

FHWA National Electric Vehicle Infrastructure Formula Program

Manifest

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1. Introduction and Statement of Purpose

This is a comment by [Public.Resource.Org](#) (“Public Resource”), [iFixit](#), and [Make Community](#) on the Notice of Proposed Rulemaking (NPRM) entitled *National Electric Vehicle Infrastructure Formula Program* ([87 FR 37262](#)).

Public Resource is a 501(c)(3) nonprofit organization based in California. Its mission is to make the law more readily available. iFixit is a collaborative effort spanning thousands of fixers, repair-seekers, and translators dedicated to assisting people in repairing their equipment. Make Community is an organization that has been elevating makers, nurturing a global cultural movement, and celebrating creativity, innovation and curiosity since 2005.

In this comment, we focus on a single issue: the public availability and accessibility of documents that are proposed to be incorporated by reference into law. In a final rule, the documents become part and parcel of the Code of Federal Regulations. These codes, if incorporated, will be the law, and there is no dispute about the binding nature of the Code of Federal Regulations on our citizens.

As the Federal Highway Administration states in the Federal Register Notice of Proposed Rulemaking:

Currently, there are no national standards for the installation, operation, or maintenance of EV charging stations, and wide disparities exist among EV charging stations in key components, such as operational practices, payment methods, site organization, display of price to charge, speed and power of chargers, and information communicated about the availability and functioning of each charging station. This regulation would enable States to implement federally-funded charging station projects in a standardized fashion across a national EV charging network that can be utilized by all EVs regardless of vehicle brand. Such standards would provide consumers with reliable expectations for travel in an electric vehicle across and throughout the United States and support a national workforce skilled and trained in EVSE installation and maintenance.

We would like to state one important and overriding fact at the outset: America is a better place because of the dedicated efforts of the Federal Highway Administration

and the Department of Transportation. The technical regulations promulgated by the FHWA will help lead America into a new era by encouraging the use of electronic vehicles on a nationwide basis. We greatly appreciate your efforts.

It is precisely because this work is so important that the FHWA must address this one glaring defect in this rulemaking: The text of the proposed law is hidden from public view, with access deliberately limited and available only by expensive entry fees. Special permission is required just to read the law. In most cases, copying the law—or even repeating a brief extract—is purportedly prohibited without a special license that is only awarded by a private organization at its discretion.

The bottom line is this. The proposed rule occupies 5 pages in the Federal Register. It incorporates two standards that are openly available into the rule: OCPI is 192 pages long and the core OCPP specification is 459 pages long. However, the proposed rule also incorporates by reference 2,596 pages that cost \$786 to purchase and are not available for inspection during the NPRM in any location. Standards incorporated by reference are part and parcel of the rule; they are binding law. The length of the proposed rule is 3,279 pages, of which 79% cannot be read except at great cost and with onerous terms of use and inadequate formats.

This defect is especially problematic during the notice and comment period. How can we comment on a proposed rule when the important details of that rule is hidden behind a cash register, technical limitations, and terms of use?

This is not how the rule of law is supposed to work. This is not how federal rulemaking is supposed to work.

This proposed rule is an important update to our national telecommunications regulations, one that aims to enact into federal law standards that are integral to the testing of equipment and accreditation of laboratories that test RF devices.

What is not clear is why the FHWA believes that it is appropriate or in the public interest to issue a proposed or final rule that includes major components that many people, including many interested parties, will not be able to fully access, because obtaining these components of the law requires payment of exorbitant fees and because of improper assertion of copyright claims that deter people from communicating the text of these provisions to others. Indeed, these restrictions are intended to prevent interested people from speaking about or even quoting their own laws.

Accordingly, Public Resource, iFixit, and Make Community 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 the details of these standards—which are integral parts of the rule—available to us and other members of the public on a free and unrestricted basis. This unwarranted action by the FHWA places an impossible to surmount barrier 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 the FHWA proposes to exclude the texts of these standards from the text of the published regulation. Nor does the FHWA propose to link the online version of the regulation to websites offering free and unrestricted access to the standards. Instead, the FHWA apparently expects people to purchase the standards from private organizations at substantial cost, subject to a series of elaborate requirements and restrictions for online use, with the organizations claiming the right to prohibit purchasers from sharing these provisions of the law with others.

This failure to make standards that are proposed to be part of the rule freely available denies people basic access to their own laws, the laws they are both bound to obey and dependent upon for protection. In so doing, the proposed rule violates the Administrative Procedure Act (“APA”) ([5 U.S.C. § 553](#)) 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, the FHWA should re-publish the proposed rule with the incorporated public safety standards available online on a free, unrestricted basis and re-open the comment period. As to any final rule, the FHWA may not lawfully incorporate these standards into its regulation until and unless they are written directly into the rule, or else permanently available to the public online without charge and without any restriction whatsoever on use.

2. The Proposed Rulemaking

The FHWA proposes to incorporate by reference four sets of technical standards that are an integral and vital part of the proposed rulemaking and are detailed in the text of [§680.120](#) of the proposed rule. Two of the standards to are readily available for the public not only to read, but to speak, quote, and transmit to their fellow citizens:

- [Open Charge Point Protocol \(OCPP\) 2.0.1](#), March 31, 2020, which was created by the [Open Charge Alliance](#). To obtain the standard, the user must furnish their name, email address, a phone number, and the name of their organization, then solve a simple math problem, and finally solve a captcha. After that process is completed, the user receives an email message with a download link. While the document does state on page 3 that the specification is “Copyright © 2010 – 2020 Open Charge Alliance. All rights reserved” it also states clearly that “This document is made available under the ‘[Creative Commons Attribution-NoDerivatives 4.0 International Public License](#).”
- [Open Charge Point Interface \(OCPI\) 2.2.1](#), October 6, 2021, which was created by the [EVRoaming Foundation](#). The document is readily available for download and the reader does not to furnish email address or complete formalities such as solving math problems or captchas. Page 9 of the standard states “Copyright © 2014 – 2021 EVRoaming Foundation. All rights reserved” and is the case with the OCPP, it also states clearly that “This document is made available under the ‘[Creative Commons Attribution-NoDerivatives 4.0 International Public License](#).”

We applaud the efforts of the EVRoaming Foundation and the Open Charge Alliance for making these important standards more readily available, and thus far more relevant to industry, users, and government. This is not the case on the other two sets of standards that are proposed to be incorporated by reference and for which this Notice of Proposed Rulemaking specifically asks for feedback:

- ISO Standard 15118, “Electric Road Vehicles: Road vehicles—Vehicle to grid communication interface,” 43.120.15118, [Section 1](#) (published 2019), [Section 2](#) (published 2014), [Section 3](#) (published 2015), [Section 4](#) (published 2018), [Section 5](#) (published 2018), and [Section 8](#) (published 2020) from the [International Organization for Standardization \(ISO\)](#). If purchased directly from ISO, which is what the NPRM provides as the relevant link, the costs are [CHF 198](#) for Part 1, [CHF 198](#) for Part 2, [CHF 178](#) for Part 3, [CHF 198](#) for Part 4, [CHF 198](#) for Part 5, and [CHF 138](#) for Part 8 for a grand total of CHF 1,108 (\$1,153 on June 23, 2022).
- [SAE Standard J1772](#), “Electric Vehicle and Plug in Hybrid Electric Vehicle Conductive Charge Coupler,” Version 201710, October 13, 2017 from the

[Society of Automotive Engineers International \(SAE\)](#). The cost of the standard if purchased from SAE is \$87. Purchase of the document requires the user to register as a user and furnish [detailed personal information](#) and accept strict [terms of use](#) which greatly limit what a user can do with this document.

An alternative to purchase from ISO and the SAE is to use the American National Standards Institute Webstore, which sells all 6 ISO standards as the [ISO 15118 - Road Vehicles Grid Communication Package](#) for \$699 and [SAE J1772](#) for \$87.00 for a total of purchase price of \$776.00. Purchases from ANSI are subject to stringent terms of use and all documents are watermarked on every page with the name of the purchases, the ANSI store order number, the download date, and the phrase "Single user license only." Copying and networking prohibited. ANSI and ISO also both take the position that any excerpts from the standards are also prohibited without prior written permission.

3. Why We Care

Knowledge of the technical and safety requirements for our national electric vehicle infrastructure is a core competency for the thousands of volunteers and professionals that fix their own equipment, evaluate commercial equipment, and make new things. We are particularly interested in being able to validate commercial products to understand how our vehicles interact with the charging infrastructure. Knowledge of these technical standards enforced by the FHWA is vital to understand how these devices operate and whether they are operating properly.

As the Federal Highway Administration says clearly in the NPRM, the electric vehicle infrastructure will have a dramatic impact throughout our nation:

The NEVI Formula Program presents an opportunity to advance both equity and environmental justice for communities that have been underserved by transportation infrastructure and overburdened by costs and environmental harms. When determining where EV charging stations should be located, there should be engagement with rural, underserved, and disadvantaged communities to ensure that diverse views are heard and considered and to ensure that the deployment, installation, operation, and use of EV charging infrastructure achieves equitable and fair distribution of benefits and services.

We also care about these proposed requirements because they will form the basis for certification through a newly formed industry group, the [Electric Vehicle Infrastructure Training Program](#) (EVITP). The certification will be required for any licensed electrician who wishes to participate in the National Electric Vehicle Infrastructure program. How can a working electrician decide whether or not to enroll in such a certification program if the underlying technical knowledge is not available?

In addition to Public Resource, iFixit, and Make Community, a wide range of entities have an interest in shaping, understanding, evaluating, and monitoring compliance with these FHWA rules, including government officials at the state and municipal level, officials at other agencies in the federal government, small businesses wishing to make or use relevant devices, engineering professionals, and engineering students. 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 all of the 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 the capacity to advise them.

Yet even though the technical and safety requirements for our national electronic vehicle infrastructure are very much a matter of public concern, the 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 relevant standards incorporated into law, or can easily afford to purchase such standards.

4. The Process for the Proposed Rulemaking Is Not Lawful

In order to comment on this Notice of Proposed Rulemaking, we would have to each expend \$776. Furthermore, the standards, once obtained, are subject to onerous terms of use. Among other provisions, the terms of use specify:

THE COPYRIGHTED STANDARD(S) AND OTHER INFORMATION PROVIDED HEREWITH ARE LICENSED (NOT SOLD). BY DOWNLOADING ANY FILE PROVIDED HEREWITH TO YOUR COMPUTER, YOU ARE ACCEPTING AND AGREEING TO THE TERMS OF THIS AGREEMENT. IF YOU ARE NOT WILLING TO BE BOUND BY THE TERMS OF THIS AGREEMENT, PRIOR TO DOWNLOADING OR COPYING TO YOUR COMPUTER ANY FILES(S), YOU MUST DECLINE ACCESS TO SUCH MATERIALS.

(a) This Agreement does not convey to you an interest in or to the Product, but only a limited right of use, revocable in accordance with the terms of this Agreement.

(b) You may install one (1) copy of the Product on, and permit access to it by, a single computer owned, leased or otherwise controlled by you. In the event that computer becomes dysfunctional, such that you are unable to access the Product, you may transfer the Product to another computer, provided that the Product is removed from the computer from which it is transferred and the use of the Product on the replacement computer otherwise complies with the terms of this Agreement. You may print one (1) copy of the Product for personal use only. Neither concurrent use on two or more computers nor use in a local area network or other network is permitted. You shall not merge, adapt, translate, modify, rent, lease, sell, sublicense, assign or otherwise transfer the Product, or remove any proprietary notice or label appearing on any of the Product. You may make one (1) copy of the Product for backup purposes only.

(c) You acknowledge and agree that the Product is proprietary to the Copyright holder (the "Owner") identified on the front page of the Product, and is protected under U.S. copyright law and international copyright treaties. You acknowledge and agree that all provisions regarding the usage and copying of the Product in this Agreement replace all otherwise applicable limitations and privileges under the U.S. Copyright law, including, without limitation, the fair use doctrine. You further acknowledge and agree that all right, title and interest in and to the Product, including all intellectual property rights, are and shall remain with the Owner.

Think about those limitations on use. You are required to give up all fair use rights under U.S. copyright law. You may not share this document with your colleagues, even a paragraph's worth.

We believe it is inherently unfair for our government to contemplate binding regulations that we are not allowed to see. The Administrative Procedures Act, under which federal rulemaking is governed, requires that all citizens may participate in the process that results in regulations which we will have to live by. They cannot do that in a meaningful way unless they have access to the text of the standards on which they may comment and must obey.

5. Availability of the Law After Incorporation by Reference Is Inadequate

We also believe that if these standards are indeed incorporated by reference, the final documents will not be adequately available to the public. There are three ways to examine these standards.

First, the Code of Federal Regulations requires that one copy of each standard must be available at the FHWA's office in Washington, and a second at the Office of the Federal Register. Viewing these standards requires a trip to Washington, D.C., several days advance notice, but even then, we would be forbidden from photocopying the relevant pages.

Second, a few standards bodies make a subset of these standards available in so-called "Read-Only Reading Rooms." ANSI hosts these facilities for a few [ISO standards](#) but none of the standards that are subject to this rulemaking are available through ANSI (or ISO) and SAE does not have a reading room.

The government seems to depend on the ANSI service to meet public access needs once documents are incorporated by reference into a final rule. But, the ANSI service is provided at their own volition and the terms and selection of which standards to be made available can be changed or withdrawn at any time.

But for those that are available, in order to use these reading rooms, the user must accept all cookies on the web site and must provide extensive [registration information](#), including address, telephone number, and name of employer. Once registered, the user must accept the end user license agreement which warns the user:

By clicking on the link(s) to view the "read only" standards (the "Licensed Materials"), I agree to be bound by the terms and conditions of this End User License Agreement as a permitted "Recipient" of the Licensed Materials. I further agree to abide by all security measures imposed by the American National Standards Institute (ANSI) and/or any licensor with respect to accessing all materials during this session.

Access to the Licensed Materials is strictly for the purpose of review. I understand that I may not copy, use or further distribute the Licensed Materials except as set forth in this agreement and that the Licensed Materials are owned and copyright protected under U.S. copyright law and

international copyright treaties. I further understand that I am not permitted to republish, modify, condense, or abbreviate the Licensed Materials.

I agree to be bound by any additional agreements as may be requested by ANSI from time to time as a result of updated or additional materials being made available as a condition of continued access to the licensed materials.

I agree that ANSI may terminate my access to the Licensed Materials at any time and for any reason, including my failure to comply with the terms of this license or any license agreement incorporated herein.

After completing that process and attempting to access a standard on the Firefox or Chrome browsers, interested persons were confronted with the following message:

*Error
Failed to load PDF document.*

This is because the user is required to install the ["FileOpen plug-in,"](#) which only works with Adobe's Acrobat PDF viewer before being able to view the standards. Many of us do not have the Adobe Acrobat PDF viewer, so that requires a second installation. And, because the standards are locked down so totally (no cut and paste or printing is allowed), the documents become inaccessible to the visually impaired, a gross violation of the Americans with Disabilities Act.

Having private parties regulate the conditions under which citizens may read the law and proposals to amend the law does not comply with the APA. Telling organizations such as ours that we may not communicate the provisions of the law to our fellow citizens without permission from a private party (which will not grant that permission) defeats the very purpose of being able to comment on proposed changes in the law, an essential requirement of the rule of law.

The entire web site that ANSI has made for access by the public is in violation of the legal mandates of the Americans with Disabilities Act ([42 USC § 12101](#), et seq.). For example, the [registration page](#) has 14 significant accessibility errors and 23 contrast errors listed on the [WebAIM Accessibility Evaluation](#), including lack of labels for the registration form fields, making it impossible for the print disabled to fill out.

6. 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 must be 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 APA Compels the FHWA to Make These Incorporated Standards Freely Available

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.

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 standards development organizations (SDOs). Greater public access to standards incorporated by reference into federal regulations might alert

policy and industry communities to the fact that federal rules all too often continue to rely on outdated private standards and are in need of updating to improve public safety.

The NPRM's assertion that the incorporated standards are available for inspection at the FHWA offices does not fix the problem: People should not be expected to travel from their homes to Washington DC in order to read (but not copy) the laws they are bound to obey. This solution is also inadequate because the agencies do not 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, let alone be expected to comment to the FHWA on their specifics, is tantamount to denying them access entirely.

Given all these factors, the FHWA should determine that the mandates of APA and the public interest require that the standards proposes to incorporate 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 the FHWA making clear that its obligations would not be satisfied by the SDOs continuing to make its standards available only for a fee, and only with the kind of restrictions on access and use described above, limiting the capacity of all persons to read, speak, and use standards that have become binding law.

For all of these reasons, the NPRM's failure to provide access to the text of the incorporated standard violates the provisions of the APA that require agencies to give people an opportunity to comment on 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 standards to be incorporated by reference into the instant rule do not meet this requirement.

B. The Constitution and Judicial Decisions of the United States Compel the FHWA to Make All Final Standards Freely Available

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." *Veeck 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*, *Veeck* all concerned comparable fact patterns: A private party was trying to stop another private party from publishing material that was part of the law. In none of those 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, everyone has the right to read the law and to speak and copy it, without limitation—a proposition clearly applies to standards incorporated by reference into federal law, notwithstanding assertions of copyright by SDOs.

In *Georgia v. Public Resource* (2020), the U.S. Supreme Court rejected an effort by the state of Georgia to use copyright claims to prevent Public Resource from posting online the Official Code of Georgia, and Chief Justice Roberts, writing for the Court, reaffirmed the almost 200-year-old principle that “no one can own the law.” *Georgia v. Public.Resource.Org, Inc.*, [140 S. Ct. 1498, 1507](#) (2020).

In *American Society for Testing v. Public.Resource.Org*, faced with a copyright complaint filed by SDOs, because Public Resource posted hundreds of standards incorporated by reference into federal and state statutes and regulations, noted “a serious constitutional concern with permitting private ownership of standards essential to understanding legal obligations.” [896 F.3d 437, 447](#) (D.C. Cir. 2018). Concurring, Judge Katsas stated, “As a matter of common-sense ... access to the law cannot be conditioned on the consent of a private party.” [Id. at 458](#).

On remand from that decision, the United States District Court for the District of Columbia ruled on March 31, 2022, that it was protected fair use for Public Resource to post online a series of standards incorporated by reference. *American Society for Testing et. al. v. Public.Resource.Org*, [2022 WL 971735](#) (D.D.C. 2022).

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.*, [512 Fed. Appx. 635](#) (7th Cir., 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 with some of these laws), 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 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 the FHWA to propose making these standards part of binding United States law without providing a means for citizens to access them without cost or restriction.

7. What the FHWA Should Do Instead

It is essential that the rules of the road that govern our national electronic vehicle infrastructure be available for all to know and that we be allowed to copy, speak, and otherwise communicate the laws by which citizens are expected to know their rights and responsibilities. That requires that the FHWA restart this rulemaking proceeding with everyone having free access and the right to copy these proposed standards, which is what 5 U.S.C. § 553 mandates. The FHWA should restart the NPRM process with the standards readily available and, if a final rule is adopted, should make those documents available for use without restrictions, the same as any other edicts of government. Edicts of government form the rulebook by which we the people choose to govern ourselves in this democracy, and the law cannot be subject to the terms, formats, and prices that private organizations wish to impose upon our laws. In the United States, the law belongs to the people.