



Detailed Comments Made by the American Public Works Association (APWA)

FHWA Docket No. FHWA-2010-0159

Manual on Uniform Traffic Control Devices (MUTCD) Compliance Dates

January 12, 2011

INTRODUCTION

The American Public Works Association (APWA), along with other professional organizations representing public agencies and the taxpayers across the country they serve, believes that the 2009 Manual on Uniform Traffic Control Devices contains a grievous error in philosophy that is irreconcilable with the original intent of the MUTCD as a national aid to road managers, traffic engineers and other practitioners, and can only be reconciled with a follow up to the notice in this docket. APWA **urges FHWA to very promptly publish in the *Federal Register* a notice of proposed rulemaking proposing improvements in the MUTCD which would:**

- (1) Modify OR delete compliance dates; and
- (2) Restore the age-old concept that public agencies across the country can and should continue to use engineering judgment as the controlling factor with respect to MUTCD standards/guidance and other provisions, yet remain in “substantial conformance” with the MUTCD. This has been a basic precept introduced in the earliest of all MUTCDs, and a concept that was clearly in place **until the publication of the 2009 MUTCD**. The benefit of making these improvements would be to:
 - (a) Properly utilize rather than diminish the profession of Traffic Engineering by relegating it to being a “cookbook” science. Public agencies who hire professionals should be able to rely on their judgments regarding proper engineering actions, and not be forced into using standards/guidance information developed in Washington, DC by a few professionals who have no day-to-day accountability for public roadways. Nor do they have (impossible to have) a personal knowledge of the wide diversity in climate, state laws, conditions, etc. Professionals familiar with local conditions and site specific information are much better equipped to select the safest and most efficient traffic control options.
 - (b) Protect public agencies from the unnecessary burden of billions of dollars in new regulatory costs, many of which have no proven safety benefit. Such burdens are unproductive, unwise and punitive to the taxpayers of America. These new mandates could not come at a worse time when state and local governments can least afford them and at a time when state and local government safety efforts have proven that actions taken using engineering judgment have helped achieve significant reductions in traffic fatalities.

Despite appeals by professional organizations representing public agencies across America (the American Association of State Highway and Transportation Officials (AASHTO), APWA, National Association of County Engineers (NACE), Institute of Transportation Engineers (ITE) and others) since its final rulemaking action adopting the 2009 MUTCD and related rules, FHWA has been unresponsive to the concerns expressed. Initially, there seemed to be a willingness to discuss the issues, but after a series of conference calls with a wide spectrum of transportation professionals across the country, FHWA issued what they called a “clarification” to the 2009 MUTCD that neither clarified nor resolved the key issues.

Secretary of Transportation Ray LaHood, to his credit, issued a press release November 30, 2010 on just one of many new mandates (requirement to change capital letter street name signs to upper and lower case lettering) contained in the 2009 MUTCD. He said:

“I believe that this regulation makes no sense. It does not properly take into account the high costs that local governments would have to bear. States, cities, and towns should not be required to spend money that they don’t have to replace perfectly good traffic signs. To set things right, the first step is to reopen public comment and give people a chance to weigh in. There have got to be better ways to improve safety without piling costs onto the American people. Safety is our priority, but so is good government. Listening to the public helps to ensure both.”

APWA applauds Secretary LaHood’s recognition of the problem, and we assume his comments were the reason the docket has fortunately now been reopened. But opening the docket will be a meaningless exercise, **unless** FHWA listens to comments differently than before and reacts responsively to the professional input that has been provided. We agree that FHWA can create a revised rule that is consistent with safety, less costly and burdensome, and effective toward our goals. It is imperative that action be taken promptly.

The docket poses seven specific questions, all relating to compliance dates set forth in the 2009 MUTCD for several new or modified requirements. FHWA also states that it is seeking comment to “help FHWA in further examining these issues and evaluating potential future alternative courses of action.” That is good, because unless significant and expensive provisions contained in the 2009 MUTCD are modified, public agencies and states should be urged to keep the 2003 MUTCD as their applicable document to use for engineering streets and highways.

APWA has specific recommendations for improving the 2009 MUTCD and past rule-making. They include:

- (1) Abandon the new found philosophy that a few engineers in Washington, DC, who have no day to day accountability for constructing, maintaining, operating and defending traffic control on our nation’s highways, should dictate to practicing professional engineers throughout America the best traffic control for a location they have never seen.
- (2) Reinstate the premise that traffic control decisions should be made by:
 - (a) Trained professional traffic engineers, familiar with local conditions and ordinances;
 - (b) Practitioners trained by them, who are familiar with local conditions and ordinances;

- (c) Practitioners knowledgeable about the MUTCD, who follow its guidance specifically (little deviation).

The MUTCD can assist professional traffic engineers by summarizing practices found to be successful by others, but the MUTCD can be an invaluable tool for the smaller jurisdictions that do not have professional engineers. Those jurisdictions, by very closely following a “reasonable” MUTCD, can continue to maintain safe and efficient roadways. But, it is counter-productive to take away the flexibility in the MUTCD for Professional Traffic Engineers to apply their knowledge and site specific information in making traffic control decisions. Engineering judgment, as the basic precept and core principle underlying the MUTCD, has worked effectively for decades, and will continue to work without imposing huge and unnecessary expenditures up front.

- (3) FHWA needs to take a step back from its seemingly insatiable thirst to increase the amount of standards and guidance placed within the MUTCD. The number and breadth of standards and requiring agencies to follow each (no options except those listed in the MUTCD) imposes an unfair tort liability on public agencies. And, where standards are necessary, reckless and careless language that disregards the need for flexibility places public agencies at a significant (and unfair) legal disadvantage.
- (4) We believe FHWA should delete specific compliance deadlines, except in those cases where a statute requires that a particular matter be addressed through a specific compliance deadline. This will free state and local governments from such unfunded federal mandates as bearing the cost of replacing signs or other devices before the end of their useful life. The 2009 MUTCD requirement regarding street name signs got the media’s attention in late 2010, but there are many more similar mandates in the 2009 MUTCD that are not well thought out.
- (5) More specifically, Section 1A.13 of the 2009 MUTCD sets forth definitions. Corrections needed are:
 - (a) The definition of STANDARD must be returned to the definition in the 2003 MUTCD, deleting the new sentence added: “Standard statements shall not be modified or compromised based on engineering judgment or engineering study.”
 - (b) Revise the definitions of “engineering judgment” and “engineering study” by striking the use of “provisions” and substituting “provisions, including but not limited to standards, guidance, and options.”
- (6) Similarly, Section 1A.09 of the 2009 MUTCD deleted key sentences from the 2003 MUTCD that must be restored: “The decision to use a particular device at a particular location should be made on the basis of either an engineering study or the application of engineering judgment. Thus, while this Manual provides Standards, Guidance, and Options for design and application of traffic control devices, this Manual should not be considered a substitute for engineering judgment. Engineering judgment should be exercised in the selection and application of traffic control devices” This omission diminishes or completely removes state/local agency engineering judgment in decisions regarding traffic control devices covered by a “standard.” These changes too need to be reversed.
- (7) FHWA should also revise its rules and MUTCD provisions regarding substantial conformance of state versions of the MUTCD with the National MUTCD.
- (8) FHWA must give greater weight to mitigating or avoiding the cost burdens of the 2009 MUTCD. The January 2, 2008 *Federal Register* claimed that the agency’s action would NOT be a significant regulatory action. This is nowhere near an accurate statement, based on the published 2009 MUTCD.

The reality is that many state agencies and local governments will bear undue financial burdens. The costs appear to be particularly steep for counties and smaller agencies that do not have specialized engineers on staff or extensive federal funding levels to perform even the preliminary studies and research to implement these changes.

CONCLUSIONS

It has been very frustrating to public agencies that these major changes were made in the 2009 MUTCD with no notice provided to the public. It was not even known that these changes were being contemplated (i.e., Section 1A.13). Certainly these major changes to the MUTCD were made inconsistent with usual advertising requirements of proposed Federal Rules. Essentially, that means that these very significant changes were presented to the public for the first time when the final rule was published December 16, 2009. The 2008 notice of proposed amendments to the MUTCD did not even hint at these changes. These unadvertised changes were not fair, and to make matters worse the various states indicate the Divisional Offices of FHWA are holding up already approved projects until they are made consistent with language in the 2009 MUTCD.

Even the ill-advised change in the definition of “substantial conformance” was done quietly without discussion several years ago (but now needs to be corrected by leaving “substantial conformance” undefined as it was before). Essentially, that move was designed by FHWA to limit states significantly as to what they could do with State Manuals if they wished to remain in “substantial conformance” with the national manual. Again, this move would destroy public agencies’ right to exercise engineering judgment and use successful procedures. It is noteworthy that the National Committee on Uniform Traffic Control Devices (National Committee) took rare and unanimous exception to that new ruling when it was issued, and FHWA ignored the National Committee’s plea for help. Since the re-definition of “substantial conformance” is inexplicably linked with the definition of STANDARDS and GUIDANCE changes in the 2009 MUTCD, the AASHTO Board of Directors also sent a series of resolutions to FHWA requesting corrections be made and the definition of “substantial conformance” be left undefined. As an aside, the APWA representative on the National Committee indicated that the discussions among local governments, states and FHWA Divisional Offices while preparing State Manuals was perhaps the healthiest exchanges for all that he had seen held in his 40 year career. So, it is puzzling and disappointing that FHWA would thwart that communication.

FHWA’s response to AASHTO’s resolutions and a series of conference calls were disappointing to APWA, the National Committee and AASHTO delegates. Despite urging that the only solution would be a new quickly designed Federal Rulemaking, FHWA instead issued an “official interpretation,” on October 1, 2010, designed to clarify and correct the problems. Unfortunately, it did neither. Essentially, the interpretation suggested that, under limited circumstances, states that have their own MUTCD or supplement may yet be able to exercise “engineering judgment” with respect to standards, after undertaking documentation work not believed to have been required under prior versions of the MUTCD. This answer was unacceptable to all, and the key point remains that FHWA needs to promptly issue a notice of proposed rulemaking that will adopt our recommended changes to the MUTCD and any related rules.

Implementation of the recommendations contained herein is fully consistent with safety, yet would substantially reduce unnecessary expenditures.

Implementing the 2009 MUTCD, as it currently exists, would be extremely expensive for cities and counties and constitutes an unfunded mandate imposing billions of dollars in costs. The overall increase in standards (up 44 percent from the prior MUTCD and up an even more unreasonably excessive amount from prior MUTCDs written by the National Committee) is clearly a factor in these costs. We are told that Caltrans estimates a cost of between \$500 million and \$1 billion to implement the provisions of the 2009 MUTCD. Florida reportedly estimates it will cost \$5,000 per interchange statewide for pavement markings just to comply with new requirements. Other jurisdictions will no doubt have similar concerns as they determine costs related to the current version of the MUTCD. Clearly, annual costs for the nation (state and local agencies and private road owners) are well into the billions of dollars annually.

APWA agrees with AASHTO that it would be highly inappropriate and inconsistent with Secretary LaHood's public statements for the US Department of Transportation and FHWA to refuse to give serious and realistic analysis to the cost burdens of the 2009 MUTCD, and instead continue to try to make technical interpretations of what is or is not a significant rule or unfunded mandate. However, it is important to point out that public agencies need immediate relief. Because of the need for relief, we are not suggesting that time be taken now to complete a thorough cost analysis; rather we call on FHWA to provide sorely needed relief. Accordingly, we urge issuance of a very much needed notice of proposed rulemaking now.
