

U.S. Department of Transportation
Dockets Management Facility 1
200 New Jersey Avenue, SE
Washington, DC 20590

July 22, 2008

Ref: FHWA Docket No. FHWA-2007-28977

Dear Sir or Madam:

The National Committee on Uniform Traffic Control Devices (NCUTCD) is an organization that exists solely to contribute to the improvement of the *Manual on Uniform Traffic Control Devices* (MUTCD). The NCUTCD meets twice a year. At each meeting, over 250 professionals representing a wide cross-section of MUTCD users develop suggested MUTCD language, review proposed MUTCD language published by the Federal Highway Administration (FHWA), and/or offer recommendations to FHWA staff related to important MUTCD issues. There are 20 individual organizations that sponsor the NCUTCD and the total annual contribution of NCUTCD participants exceeds 10,000 labor-hours, all of it devoted to improving the MUTCD. The NCUTCD believes that the MUTCD benefits greatly from the input that it provides to the FHWA.

On January 2, 2008, the FHWA published a Notice of Proposed Amendments (NPA) to the 2003 MUTCD (FHWA Docket No. FHWA-2007-28977). This NPA was expected, as the NCUTCD has provided input and recommended language to the FHWA on a continuing basis since the publication of the 2000 MUTCD. However, the NPA as published contains an extensive number of proposed changes, perhaps more than have been proposed in any previous edition of the MUTCD. The NCUTCD technical committee members worked diligently during the docket comment period to review the proposed changes and the NCUTCD Council has approved an extensive set of docket comments in response to the NPA (nearly 700 total pages of comments).

The NCUTCD recognizes the need to revise the MUTCD on a timely basis to keep it up-to-date with current practices and technologies. However, the NCUTCD also believes that it is vital that the FHWA produce an MUTCD that is fully vetted by practitioners, even if more time is needed to revise and republish a proposed rule. After a careful review of the NPA and an assessment of its own docket comments, the NCUTCD believes that the changes to the NPA will be significant and justify further review before finalizing. In the interest of producing the best possible next edition of the MUTCD, **the NCUTCD is recommending that the FHWA publish a Supplemental Notice of Proposed Amendments (SNPA) on the MUTCD prior to publication of a Final Rule.** The SNPA should incorporate the FHWA responses to the docket comments received in

response to the NPA and provide an opportunity for the public to assess how all of the changes to the NPA relate to each other prior to the Final Rule. The NCUTCD offers the following reasons that support the publication of a SNPA:

- **Economic Assessment:** The current NPA does not include a quantified assessment of the economic impacts of the proposed changes on public agencies and the private sector. It is the opinion of the NCUTCD that the economic impacts of the proposed changes are extensive and that an assessment will determine that the NPA is an unfunded mandate according to the Unfunded Mandate Reform Act of 1995. The NCUTCD recommends that the FHWA perform an assessment of the economic impacts of the proposed changes (after incorporating changes due to docket comments) and publish the assessment as part of the SNPA. The assessment should consider all economic factors associated with the proposed changes, including the following examples:
 - ♦ *Non-Federal-Aid Costs:* The costs of complying with the changes on roads that are not part of the federal-aid system and that are not eligible for federal reimbursement.
 - ♦ *Local Agency Costs:* The costs to local agencies for complying with the changes. Although local agencies are eligible for federal reimbursement on federal-aid projects, local agencies indicate that this type of reimbursement flows through state agencies and may not be readily available to local agencies.
 - ♦ *Private Sector Costs:* The costs to the private sector for bringing private roads, parking lots, and other private facilities open to public travel in compliance with the MUTCD. This includes privately owned toll roads, shopping center roads, parking lots, airports, and sports arenas. As the MUTCD has not previously required compliance for these facilities, this is a new impact on private property owners and may result in extensive costs to achieve compliance.
 - ♦ *Liability Impacts:* The potential liability impacts of an MUTCD which is more specific than previous editions and provides less flexibility in adapting to the unique circumstances that may exist at a specific location may be significant. In assessing these costs, the FHWA must include the cost of meeting both standard (shall) and guidance (should) statements as most states treat a guidance statement as equal, or nearly so, to a standard statement.
 - ♦ *Sign and Sign Infrastructure Costs:* The costs of replacing signs and sign support structures to accommodate the proposed change in minimum legibility distance (30 ft/in).
 - ♦ *Signal Hardware Costs:* The costs of traffic signal hardware and the installation/maintenance aspects of signal hardware. In particular, the costs of implementing pedestrian countdown signals, 12-inch signal heads, installing additional signal heads as recommended/required, and relocating traffic signal heads to meet proposed guidelines.
 - ♦ *Life-Cycle Costs:* The Unfunded Mandate Reform Act of 1995 requires that costs be assessed only for the first seven years following a Final Rule. For

many of the proposed MUTCD changes, the FHWA has established extended compliance dates (often longer than seven years). As a result, the costs of complying with a Final Rule are incurred beyond the time frame of the Act. The NCUTCD believes that the practice of extended compliance dates dilutes an assessment of the true costs of a Final Rule to state and local agencies. Accordingly, the NCUTCD requests that the FHWA consider the costs of implementing the proposed changes over the life of the devices, not just in the seven year period following the Final Rule.

- **Additional Review Needed:** Several of the NCUTCD docket comments request that the FHWA provide more detail about a proposed change or that proposed changes be reorganized or reformatted. Although the FHWA may consider reorganizing changes as editorial, the NCUTCD believes that the creation of new parts or chapters in the MUTCD is something that should be reviewed by practitioners prior to a Final Rule. Likewise, the need for more information also requires additional review. Examples of changes that should receive SNPA review include:
 - ♦ *New Part on Toll Roads:* The NCUTCD recommends that all of the toll road related material be moved to a new part in the MUTCD. This need addresses toll road issues that cut across several parts of the MUTCD. The combination of a new MUTCD part with changes in the proposed material justifies further review in a public forum.
 - ♦ *Reorganized Part 3:* The proposed changes to Part 3 of the MUTCD will make it more difficult to use because of the large amount of information that is contained in individual sections and the difficulty in identifying related applications within Part 3. To address this, the NCUTCD approved a reorganization of Part 3. As with the toll road material, the NCUTCD believes that a reorganized Part 3 should be reviewed by practitioners and the public prior to becoming a Final Rule.
 - ♦ *Revised Legibility Index:* The NPA includes a provision that the legibility index be changed to 30 ft/in. While such a change is desirable at the conceptual level, the FHWA has not addressed the application of this change on individual signs. The FHWA needs to provide information in a SNPA that indicates the impacts of this change on each sign in the MUTCD.
 - ♦ *Lack of Research Findings:* Many of the proposed signing and marking changes are based on findings from the FHWA sign synthesis and the NCHRP marking synthesis. It is the position of the NCUTCD that the findings from a synthesis alone are not sufficient grounds for establishing a standard or guidance in the MUTCD. Specifying specific practices based on a synthesis study is different from basing the changes on research findings. A synthesis merely indicates what agencies are doing – it does not indicate what is the best way or proper way. The FHWA should conduct or sponsor research to provide justification for the proposed changes that are based on the signing or marking synthesis. Such findings should be included in the SNPA or the recommended changes should not be included in the SNPA if there are docket comments that oppose the changes.

- ♦ *Typical Application Figures for Incident Management:* The FHWA chose not to include typical application figures for incident management in the NPA despite a recommendation from the NCUTCD that it be included. Other legally affected organizations also support including incident management typical applications in the next MUTCD. The FHWA should include incident management typical application figures in a SNPA so that they can be reviewed for incorporation into the next edition of the MUTCD.
- ♦ *Aerial Lift Bucket Vehicle Operations:* The FHWA chose not to include language related to Aerial Lift Bucket Vehicle Operations in the NPA. This activity legally affects the work of other agencies beyond the NCUTCD, justifying additional review. As with incident management typical applications, such guidelines should be included in a SNPA rather than waiting for a separate MUTCD rulemaking activity.
- ♦ *Traffic Signal Issues:* The NCUTCD made numerous recommendations for changes to the NPA regarding traffic signal issues, particularly with respect to: pedestrian clearance time/pedestrian change interval and their relation to pedestrian signal head and countdown displays, legal definitions associated with pedestrian signal symbols, traffic signal indications for permissive left turns, and a reorganization of Chapter 4D. NCUTCD recommendations for changes to the NPA related to these and other signal issues should be reviewed by practitioners before being published as a Final Rule.
- **Extent of Proposed Changes and Expected Docket Comments:** As a result the NPA contains a large number of proposed changes and is expected to generate significant docket comments. The NCUTCD believes that the FHWA will need to make significant changes to the NPA prior to publication of a Final Rule. Because of the size of the NPA and the number of comments, the changes made to the NPA are expected to produce an MUTCD so different from the NPA version that it constitutes a new document. This new MUTCD should be reviewed in a SNPA prior to becoming a final rule. The following reasons support this position:
 - ♦ *Number of Proposed Changes:* The NPA Federal Register notice identifies 513 individual changes that are proposed for the MUTCD. These 513 changes do not include many additional changes which seem minor, but which can have far-reaching impacts on public agencies. The number of identified changes is 62 percent higher than those identified in the NPA that resulted in the 2003 MUTCD.
 - ♦ *Number of Expected Docket Comments:* The current NPA has generated 1,279 comment letters through the end of June 2008, a full month before the close of the comment period. The NCUTCD recognizes that a large number of these comments relate to the RV friendly symbol or to high visibility garments for fire fighters. However, the large number of comments makes it difficult for the public to gain a sense of the content of the overall docket comments and indicates a high level of interest in the MUTCD changes. The large volume of comments also suggests a greater potential for changes to the NPA in response to the comments.

- ♦ *Comparison to Previous MUTCD Rulemaking Efforts:* In comparison to the current NPA, there were 771 letters commenting on the multiple NPA's that led to the 2000 MUTCD and there were 293 letters responding to the NPA that led to the 2003 MUTCD. The comments generated by the current NPA are far above those of previous rulemaking efforts, with a month remaining in the docket comment period.
- ♦ *Timing of Docket Comments:* Of the comment letters for the 2003 MUTCD that were submitted before the deadline, 77 percent were submitted in the final month of the docket period. If a similar trend is exhibited for the current docket, then there will be over 5,500 individual letters submitted to the docket. In many cases, a letter may contain multiple individual comments. This trend indicates that there is significant interest in the proposed MUTCD revision and that FHWA may have to make a large number of changes to the NPA in response to the comments.
- ♦ *Potential for Follow-Up Rulemaking:* Implementing changes without additional public review could lead to inconsistencies in MUTCD language and unintended consequences. It would be detrimental to both the FHWA and to MUTCD users to have a new edition of the MUTCD with inconsistencies and potentially conflicting information. Such problems could lead to the need to produce another MUTCD NPA shortly after the Final Rule to address the shortcomings, similar to how the NPA for the 2003 MUTCD was published 17 months after the Final Rule for the 2000 MUTCD. The NCUTCD believes that a SNPA would provide an opportunity for MUTCD users to review the changes that FHWA wishes to make in response to the multitude of comments, many of which may conflict with one another, and in so doing, avoid the need for a follow-up rulemaking immediately after the publication of a new MUTCD.
- ♦ *Potential for Amended Final Rule:* Publishing a Final Rule with errors or inconsistencies could lead to a challenge on the Final Rule and the potential need for an amended Final Rule. A similar situation occurred with the Final Rule for color specifications for signs and markings (Docket No. FHWA–99–6190). In that rulemaking effort, the FHWA published a change in the Final Rule that was significant and which had not been publicly reviewed. As a result, the FHWA had to make changes and publish an amended Final Rule. An amended Final Rule on the MUTCD would be confusing to users. Publishing an SNPA would help to minimize the potential for an amended Final Rule.
- **Interconnectivity of Proposed Changes:** The MUTCD is akin to a spider web in that there is significant interconnectivity between the language in various sections, chapters, and parts. A change in one section may have impacts on multiple other sections throughout the Manual. With the expected number of changes and the potential differences in the comments, it is essential that an SNPA provide the opportunity to examine the additional proposed changes to assess whether they are consistent with each other.
- **Precedent for a SNPA:** There is a precedent for issuing multiple proposed rules for changes to the MUTCD. The most recent example is the SNPA issued in

response to docket comments related to minimum levels of sign retroreflectivity. Additionally, the FHWA published updated proposed rules for Parts 1, 3, 4, and 8 prior to the Final Rule for the 2000 MUTCD. Publishing a SNPA for the current rulemaking effort would not be inconsistent with previous MUTCD rulemaking efforts.

- **Legal and Practical Implementation Challenges:** The MUTCD has always been an important document, from both a legal and practical perspective. However, recent changes in the Code of Federal Regulations (Docket No. FHWA–2005–23182) have increased the legal significance of the document and its application to public and private roads. Furthermore, the changes defining “substantial conformance” justifies a detailed review of the changes as state agencies have less discretion in adopting MUTCD changes in state manuals and supplements than they have had in the past. While the NCUTCD has performed such a review over the last six months, there is uncertainty over the final product. It is essential that the FHWA provide an opportunity for Manual users to review FHWA responses to the docket so that implementation and liability challenges can be identified, assessed, and discussed before a Final Rule is published.
- **Prescriptive Nature of the NPA:** The NPA is much more prescriptive than previous MUTCD editions with respect to the specificity of the standards and guidance in the Manual. The changes contained in the NPA will have the effect of reducing flexibility to address selection, installation, operation, and maintenance issues and increasing the liability and risk exposure of public agencies. With the expectation that many docket comments will address this issue in general or on specific changes, the NCUTCD believes that a SNPA is needed to assess the FHWA response to the comments and evaluate the level of engineering flexibility that will be provided in the next edition of the MUTCD.

In summary, the NCUTCD recommends that the FHWA publish a Supplemental Notice of Proposed Amendments for the current MUTCD rulemaking effort for the reasons listed above. Doing so will help to produce a Manual that best meets the needs of road users and the practitioners that are responsible for implementing the principles contained in the document.

Robert M. Garrett
NCUTCD Executive Secretary