

Comments of the Transportation Departments of
Idaho, Montana, North Dakota, South Dakota, and Wyoming
to the
United States Department of Transportation, Office of the Secretary
Docket No. DOT-OST-2019-0165
Request for Comments on
Non-Traditional and Emerging Transportation Technology (NETT) Council
December 13, 2019

The transportation departments of Idaho, Montana, North Dakota, South Dakota, and Wyoming (“we” or “our”) submit these joint comments in response to the notice in this docket published at 84 Federal Register 65214 *et seq.* (November 26, 2019).

In this docket the Office of the Secretary of Transportation broadly requests comments on matters relevant to the work of the Non-Traditional and Emerging Transportation Technology (NETT) Council, an internal body at the U.S. Department of Transportation (USDOT) that focuses on issues concerning new transportation technologies.

In these comments we address a single issue regarding new transportation technology.

Two provisions in the Manual on Uniform Traffic Control Devices (MUTCD), which is administered by the Federal Highway Administration with the force of regulation,¹ discourage research and the development of new and improved technologies that could improve highway safety. Those provisions, an item in the Introduction and another in Section 1A.10, prohibit the use of patented, copyrighted and proprietary materials as traffic control devices.²

These restrictions have the effect of discouraging efforts to improve safety, as the companies and individuals who would develop new highway safety technologies would like to benefit from the intellectual property they create (*i.e.*, patent the product). The prohibition on the use of patented materials embedded in the MUTCD is, therefore, a significant barrier to the development and deployment of emerging technologies that can improve highway safety.

For several reasons, we are hopeful that the opportunity will come soon to eliminate those outdated provisions in the MUTCD.

More specifically, USDOT’s report on significant rulemakings indicates that FHWA plans to issue, soon, a notice of proposed rulemaking (NPRM) to update the MUTCD.

¹ See 23 CFR 655 subpart F.

² See the Introduction to the MUTCD, latest version (2009), where on the first page a Standard provides that: “Traffic control devices contained in this Manual shall not be protected by a patent, trademark, or copyright, except for ... items owned by FHWA.” This restriction is reinforced later in the MUTCD in that, even for purposes of experimentation, it is stated that the concept of a traffic control device cannot be protected by a patent or copyright. MUTCD Section 1A.10, Guidance paragraph E. While it is arguable that a part of a traffic control device, but not the concept of a device, can be patent protected, in practice, Section 1A.10 has not changed the overall effect of the MUTCD’s discouragement of technological innovation to advance safety by precluding patent protection for traffic control devices.

Further, FHWA very recently decided to end its regulatory ban on the use of patented and proprietary products in construction and maintenance activities. See 84 Federal Register 51023 et seq. (September 27, 2019), amending 23 CFR 635. In that notice of final rule, FHWA stated that the ban on patented and proprietary products (in construction and maintenance) was “outdated” and that the change was made “to encourage innovation in the development of highway transportation technology and methods.” *Id.* This is an encouraging, very recent, and very relevant precedent for amending the MUTCD to eliminate restrictions on patented and proprietary products.

But that recent decision did not address the restrictions on patented and proprietary products contained in the MUTCD. The scope of that recent rulemaking was construction and maintenance and did not address the MUTCD.

As a procedural matter, it is important that the forthcoming NPRM on the MUTCD clearly address the issue of eliminating MUTCD restrictions on the use of patented and proprietary products. We recommended that the proposed rule itself delete from the MUTCD those restrictions. However, at a minimum, in the discussion portion of that NPRM, FHWA should expressly state that it is considering eliminating those restrictions and expressly seek comment on such a change. Put another way, at a minimum the ban on proprietary products in the MUTCD should not be allowed to continue without at least being subjected to comment through a clearly worded Federal Register notice inviting comment in a way that makes clear to the public that the final rule could eliminate the MUTCD’s ban on patented, copyrighted, trademarked and proprietary products.³

However, notwithstanding the FHWA’s clear decision to eliminate the restriction on the use of patented and proprietary products as to construction and maintenance, we are concerned that inertia could somehow result in no mention of the patented and proprietary products issue in the forthcoming NPRM regarding the MUTCD.

If the proposed revision to the MUTCD does not include changes to remove the restrictions on patented and proprietary products, or at least clearly seek comment on whether FHWA should make those changes in the final rule, some may argue that any comment to the docket asking for such changes would be outside the scope of the docket and that eliminating the restrictions on use of patented or proprietary products would be outside the scope of the docket. Since the MUTCD comes up for comment rarely, it is important to ensure that in the NPRM either the restrictions are proposed to be removed, which is the preferred course, or comment is otherwise expressly invited on whether FHWA should make those changes in the final rule. Either way, the NPRM should keep the “door open” for action at the final rulemaking stage to eliminate the MUTCD’s ban on patented and proprietary products.

³ By deleting, with any needed conforming changes, the provisions described at note 2, *infra*.

Conclusion

We are hopeful that when FHWA develops its proposed revisions to the MUTCD and sends them to the Office of the Secretary for review, the proposal will call for ending the MUTCD’s ban on patented and proprietary products.

However, if, notwithstanding FHWA’s excellent recent decision to end its ban on patented and proprietary products in highway construction and maintenance, that draft NPRM were to continue the MUTCD’s ban on patented traffic control devices (and not even invite comment in a way that would allow ending the ban in the final rule), then the Office of the Secretary should, before its issuance, take action so that the MUTCD NPRM would be in accord with our recommendations, described above

That way, the forthcoming MUTCD NPRM would be consistent with FHWA’s excellent recent decision to end the ban on patented and proprietary products in highway construction and maintenance and would help ensure that new, high-technology traffic control devices are more likely to be developed, making our highways safer.

The transportation departments of Idaho, Montana, North Dakota, South Dakota, and Wyoming recommend that further departmental action on matters addressed in this docket be in accord with these comments. We thank USDOT for its consideration.
