



U.S. Department  
of Transportation  
Federal Highway  
Administration

# Memorandum

Subject: ROW's Request for Legal Opinion on  
Rotating Panel Signs - Alabama

Date: MAR 20 1991

From: Chief, Program Services Division

Reply to  
Attn. of:

HCC-30

To: Mr. Marlin E. Meese  
Chief, Special Programs and Evaluation Branch (HRW-12)

Reference is made to your request for a legal opinion concerning rotating panel signs or tri-vision signs in Alabama in relation to the flashing lights prohibition contained in Alabama's Federal/State agreement and State law.

Alabama Code Section 23-1-274(2) Lighting, provides as follows:

Signs shall not be erected or maintained which contain, include or are illuminated by any flashing, intermittent or moving lights, except those giving public service information such as, but not limited to time, date, temperature, weather, or news.

You have described the offending sign as follows:

The sign is a standard size two-sided billboard designed with triple rotating panels. Each side is lighted by 4 flood lights. A complete change of message occurs every 10 seconds with the slats rotating every 8 seconds, requiring 2 seconds to complete each change. At the time of the State's inspection, the sign was displaying off-premise messages.

In its Complaint seeking the removal of this sign, Alabama's Highway Department, in Count IV, charged:

The defendant has erected and maintained a sign on Alabama Highway 142 near Milepost 150.87 on the right side. The two-sided sign is designed with triple flashing panels. (See Exhibit IV.)

Handwritten initials and date: HRW-12 3/20

Note: We do not have Exhibit IV.

In the memorandum from the Division dated December 17, 1990, we are told that the court ruled that the rotating panel sign does not violate State law, and that the judge apparently did not see this type of sign as one containing or illuminated by flashing intermittent or moving lights. We assume that the Division has correctly stated the court's decision, although without at least a copy of the defendant signowner's Motion for Summary Judgment we have no legal documentation to confirm what the ruling was based upon. The court order only says that it grants defendant's motion for summary judgment.

It is within the authority of the Federal Highway Administration to decide whether the subject signs are prohibited under the flashing lights prohibition of the Federal/State Agreements, and it is initially up to the Office of Right-of-Way to make the determination. If the determination has a rational basis, the Office of Chief Counsel would be obliged to concur in such determination.

Your office should determine as a matter of policy what factors or components, including the rate of change of the message or visual field, contribute to the achievement of a flashing light effect. For example, in the case of a rotary slat sign, if it displays a message or field that, regardless of other components, does not change quickly enough to create a flashing effect, it should not be prohibited under the flashing lights prohibition.

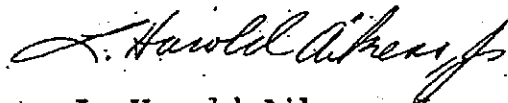
No doubt there is a great deal of scientific data that could assist your efforts in resolving the policy question after appropriate study. Your determination should be rationally based on scientific considerations. As an example of the type of data I have in mind, I would direct your attention to the following recommendation contained in "Safety and Environmental Design Considerations in the Use of Commercial Electronic Variable-Message Signage", Report No. FHWA/RD-80/051, June 1980:

In summary, signs which are capable of displaying motion or animation, and signs which display information cycles without changing the texts of their messages, should be prohibited under the Highway Beautification Act amendments (i.e. the 1978 on premise sign amendments). Those signs on which many independent messages are displayed sequentially should maintain a minimum "on-time" for each message calculated to be such that a

motorist traveling the affected road at the 85th percentile speed would be able to read not more than one complete nor two partial messages in the time required to approach and pass the sign. In no case, however, should this on-time be less than four seconds. Since the average glance duration is generally accepted to be 0.3 second, a display time per message of four seconds would require less than 10 percent of the driver's available visual search time. A shorter display time could be too demanding when there are competing needs for the motorists attention.

There remains the problem of the capability of the sign to achieve a flashing light effect by reducing the on-time display to less than an acceptable rate of change. Would having such capability alone be sufficient reason for continuing to ban these signs off premise? Any attempt to ban CEVMS that do not have the effect of flashing lights would have no legal foundation unless it is reasonable to assume that, regardless of the actual rate of change, signs having merely the capacity to create a flashing light effect would have to be banned as a practical matter because policing every sign's rate of change would be too onerous. It is unlikely, however, that such a ban would succeed because practical measures are no doubt available to enforce the rate of change of sign messages. Such measures may even be in place enforcing on premise CEVM compliance with the 1978 Highway Beautification Act Amendments. This too, sounds like a policy question for the program office.

Please let me know how you propose to deal with the question. Ideally, down the road, the process of interpretation would probably best be served by issuance of criteria for implementing the flashing light prohibition in State/Federal agreements via notice or regulations published in the Federal Register rather continuing with determinations on an ad hoc basis.



L. Harold Aikens, Jr.

# ILLEGAL Signs, Removal by State

## ILLEGAL SIGNS

Illegal signs are generally defined as those signs which are erected and/or maintained in violation of State law or regulations. The State must have a control program which results in the early discovery and expeditious removal of illegal signs. If a sign is illegal because of a failure to comply with a reasonable police power regulation, or some volitional act of the sign owner, then a sign may be considered noncompensable. However, if the reason that the sign is illegal is tied to some nonvolitional act of the sign owner, such as the expiration of an amortization period, then the sign is compensable.

There are several ways in which a sign may be classified as illegal. Following is a discussion of three categories of signs and the ways in which such signs may become illegal.

I. **Existing Conforming Signs** - Conforming signs are signs that are lawfully erected and maintained and comply entirely with all provisions of the law. Conforming signs can remain or be erected adjacent to controlled highway systems after the effective date of the State law. One example of an illegal sign within this category is the nonrenewal of an outdoor advertising permit required by State law. Another example would be a sign which is modified so as to violate the size, lighting or spacing provisions of the State law passed to carry out the State/Federal agreement.

II. **New Signs** - A new sign would be classified as illegal if:

- A. Is erected in a controlled area where signs are not allowed; or
- B. Violates size, lighting or spacing requirements in commercial or industrial areas; or
- C. Fails to have a proper permit or license if such is required by State law.

III. **Nonconforming Signs** - A sign is considered to be nonconforming if it was lawfully erected prior to the effective date of the State law but does not conform to the law's requirements. A nonconforming sign must be lawfully maintained in accordance with applicable state law or regulations. Failure to do so may result in loss of the right to operate the sign and require removal of the nonconforming sign without compensation.

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There are several ways in which a nonconforming sign may become illegal.

A. **Abandonment or discontinuance** - A sign may lose its nonconforming rights if the sign owner fails to operate the sign for a certain period of time. This may be manifested by a voluntary abandonment, by nonuse, or by actual discontinuance. Examples of abandonment or discontinuance are:

- 1. Obsolete message content on the sign for a designated period of time