

AASHTO PRACTITIONER'S HANDBOOK

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MANAGING THE NEPA PROCESS FOR TOLL LANES AND TOLL ROADS

This Handbook provides recommendations for conducting National Environmental Policy Act (NEPA) studies for projects involving toll lanes and toll roads. Issues covered in this handbook include:

- Addressing tolling in the transportation planning process
- Preparing to initiate the NEPA process for a tolled project
- Developing the purpose and need and range of alternatives
- Traffic forecasting for tolled alternatives
- Environmental justice issues related to tolling
- Addressing other direct and indirect impacts of tolling
- Coordinating NEPA reviews with a project financing and procurement
- Considering tolled alternatives in a re-evaluation or supplemental NEPA document

The Practitioner's Handbooks are produced by the Center for Environmental Excellence by AASHTO. The Handbooks provide practical advice on a range of environmental issues that arise during the planning, development, and operation of transportation projects.

The Handbooks are primarily intended for use by project managers and others who are responsible for coordinating compliance with a wide range of regulatory requirements. With their needs in mind, each Handbook includes:

- key issues to consider;
- a background briefing;
- practical tips for achieving compliance; and
- a list of reference materials.

In addition, key regulations, guidance materials, and sample documents for each Handbook are posted on the Center's web site at <http://environment.transportation.org>



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Overview



This Handbook provides recommendations for conducting National Environmental Policy Act (NEPA) studies for projects involving toll lanes and toll roads. It covers issues associated with the NEPA process itself as well as a range of related issues, such as developing tolling policies in the transportation planning process and coordinating a NEPA study with a procurement for a public-private partnership (PPP).

Tolling has received increased attention in recent years as a method for addressing transportation needs. This trend has resulted from many factors, including the expanded availability of electronic toll collection; the inadequacy of traditional funding sources for transportation projects; the removal of certain legal restrictions on tolling under Federal law; and the success of toll projects both in the United States and around the world. Recent legislation seems likely to continue the trend toward tolling by increasing States' authority to allow for the development of toll lanes and toll roads.

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Background Briefing

The basic requirements applicable to the NEPA process for a tolled project are the same as those for a typical federally funded highway project. But as described in this section, toll projects also involve some distinct legal and regulatory issues, which create additional opportunities and constraints that need to be considered when carrying out the NEPA process.

Adoption of Transportation Planning Decisions in the NEPA Process. Transportation agencies can use the transportation planning process to produce decisions or analyses that can later be adopted for use in the NEPA process, including decisions regarding the use of tolls and PPPs. For highway and transit projects, there are two main sources of authority for adopting planning decisions for use in the NEPA process:

- **23 CFR 450 Appendix A:** The statewide and metropolitan transportation planning regulations allow transportation planning products to be adopted for use in the NEPA process, based on criteria set forth in 23 CFR 450.212(b) and 450.318(b) and in Appendix A to the regulations. Appendix A states that "If the financial plan for a metropolitan transportation plan indicates that funding for a specific project will require special funding sources (e.g., tolls or public-private financing), such information may be included in the purpose and need statement."¹
- **23 USC 168:** This statute provides additional legal authority to adopt planning-level decisions for use in the NEPA process; it is distinct from the process described in Appendix A to 23 CFR Part 450.² Like Appendix A, this statute authorizes adoption of decisions regarding "whether tolling, private financial assistance, or other special financial measures are necessary to implement the project."³

¹ 23 CFR Part 450, Appendix A, Part II, Paragraph 8.

² See 23 CFR 450.212(d) and 450.318(e) (implementing 23 USC 168).

³ 23 USC 168(c)(1)(A).

Consideration of Non-Tolled Alternatives. In guidance on NEPA compliance for toll roads, FHWA has identified three circumstances in which a NEPA study can focus solely on tolled alternatives:

- when tolling is assumed in the transportation planning process as the basis for meeting fiscal constraint;
- when tolling is an element of the purpose and need; and
- when non-tolled alternatives are eliminated from consideration during the alternatives screening process.⁴

In a 2015 guidance document, FHWA reiterated that “the specific goals and objectives of a project, such as urgency, congestion relief, or financial infeasibility of non-tolled alternatives, could narrow the range of reasonable alternatives to only tolled alternatives.”⁵ The guidance also cautions, however, that even if there is a valid justification for eliminating non-tolled alternatives, it may be advisable to continue examining non-tolled alternatives if there is public opposition to tolls.

Authority to Implement Tolling on Federal-Aid Highways. Federal law allows tolling on the Interstate System and other Federal-aid highways under specific circumstances. In a NEPA context, these restrictions are relevant because they may influence the way a project is defined and the types of alternatives that can be considered. Currently, there are four main sources of authority to allow tolled facilities on new or existing Federal-aid highways:

- **23 USC 129:** Section 129 lists several types of toll projects that can be implemented on Federal-aid highways, including certain facilities on the Interstate System. It provides broad authorization for tolling on existing and new non-Interstate System highways. It also allows tolling for some types of projects on the Interstate System, including: adding new tolled lanes to an existing Interstate; converting a non-tolled bridge on an Interstate to a tolled bridge; and building new tolled Interstate highways.
- **23 USC 166:** Section 166 authorizes the conversion of existing high-occupancy vehicle (HOV) lanes to HOV/toll (HOT) lanes. This authority applies to highways on and off the Interstate System.
- **Interstate Reconstruction and Rehabilitation Pilot Program:** This program allows for tolling existing highways on the Interstate System as part of a project involving reconstruction or rehabilitation of those highways. This program is limited to three facilities, which must be in different states.
- **Value Pricing Pilot Program:** This program allows for a wide range of tolled projects to be authorized on new and existing highways, both on and off the Interstate System. The main requirement is that the project must involve some form of “value pricing” (also called congestion pricing). Participation is limited to 15 states, local governments, or other public authorities. Multiple projects can be authorized under a single agreement.

All of these laws and programs contain specific conditions that must be met in order for tolling to be authorized. For additional information on FHWA's tolling and pricing programs, see the Reference Materials section of this Handbook.

Fiscal Constraint. FHWA will not issue a NEPA decision document for a project in a metropolitan area unless that project is included in the fiscally constrained metropolitan transportation plan.⁶ Fiscal constraint, in essence, is a finding that projected revenues are sufficient to cover the projected costs of the projects in the plan. FHWA's fiscal constraint guidance recognizes that toll revenues can be considered as one source of revenue to satisfy fiscal constraint requirements.⁷ The need to make a fiscal constraint determination may require projections to be made regarding anticipated toll revenues well before any final decisions have been made regarding toll rates.

Major Project Financial Plans. All federally funded highway projects with an estimated cost of \$100 million or more are defined as “major projects” under 23 USC 106. For a major project, the sponsor is required to develop a financial plan that describes the project, the proposed construction schedule, the estimated cost, and the revenue sources and financing strategies that will be used to pay for the project.⁸ For projects with costs over \$500 million, the financial plans must be submitted to FHWA for approval. The financial plan typically is developed during the later stages of the NEPA process and submitted for FHWA approval shortly after NEPA completion.

⁴ D.J. Gribbin, Chief Counsel, FHWA, to D. Nicol, FHWA Division Administrator, Colorado, “NEPA Analysis for Toll Roads” (Oct. 15, 2004).

⁵ For additional information, see FHWA, “Public–Private Partnership Oversight: How FHWA Reviews P3s” (Jan. 2015), p. 19.

⁶ FHWA also requires at least one project phase to be included in the metropolitan transportation improvement program (TIP), which must be consistent with the statewide transportation improvement program (STIP).

⁷ FHWA, “Financial Planning and Fiscal Constraint for Transportation Plans and Programs Questions & Answers” (April 15, 2009; last updated Oct. 29, 2015), Section 11.

⁸ For additional information, see FHWA, “Major Project Financial Plan Guidance” (Dec. 2014).

Procurement of PPPs during the NEPA Process. The procurement process for a PPP may be initiated, or even completed, in parallel with the NEPA process.⁹ FHWA's regulations include safeguards to ensure that early initiation of the PPP procurement does not affect the objectivity of the NEPA process. For example, the private partner is prohibited from preparing the NEPA document or having any decision-making responsibility in the NEPA process. In addition, any PPP contract must ensure that no commitments are made to any alternative prior to completion of the NEPA process.¹⁰

Environmental Justice (EJ) and Tolling. Under an Executive Order on environmental justice (E.O. 12898), all Federal agencies are required to take action to identify and address any "disproportionately high and adverse effects" of their actions on minority and low-income populations. FHWA has implemented this mandate through its Order 6640.23A. This order directs FHWA managers and staff to "take into account mitigation and enhancement measures and potential offsetting benefits to the affected minority and/or low-income populations" when determining if effects are disproportionately high and adverse.¹¹ In addition, the order states the conditions under which FHWA may approve a project that would cause disproportionately high and adverse effects on a low-income and/or minority population:

- If the project will have disproportionately high and adverse effects on low-income populations (regardless of minority status), FHWA must ensure that the project includes all "practicable" measures to avoid or reduce the disproportionately high and adverse effects. The order states that "[i]n determining whether a mitigation measure or an alternative is 'practicable,' the social, economic (including costs), and environmental effects of avoiding or mitigating the adverse effects will be taken into account."¹²
- If the project will have disproportionately high and adverse effects on minority populations, FHWA must ensure that (1) there is a substantial need for the project, based on the overall public interest; and (2) alternatives that would have less adverse effects on protected populations have either "severe" environmental or socio-economic impacts or would involve "increased costs of an extraordinary magnitude."¹³

FHWA also has issued guidance on how to address EJ issues in the NEPA process.¹⁴ In addition, FHWA has published several reports with advice on methodologies for EJ analyses and examples of EJ analyses for toll projects. (See the FHWA publications listed in the Reference Materials section of this Handbook.)

Title VI. Title VI of the Civil Rights Act is a Federal law that prohibits a recipient of Federal funds, including state DOTs and public transit agencies, from engaging in discrimination against any person on grounds of race, color, or national origin.¹⁵ Any member of a protected class under Title VI may file a complaint with the U.S. Department of Transportation (U.S. DOT), alleging that he or she was subjected to discrimination. As part of the NEPA process, it is prudent to document that the U.S. DOT agency has specifically considered compliance with Title VI, especially if the EJ analysis has concluded that the project will have disproportionately high and adverse effects on minority populations.

Key Issues to Consider

Addressing Tolling in the Transportation Planning Process

- Does the statewide and/or metropolitan long-range plan establish any policies regarding for tolling?
- Has a toll feasibility study been conducted for this project? If so, what are the key conclusions of that study?
- Have toll revenues from this project been assumed in making a fiscal constraint determination for a transportation plan or transportation improvement program? If so, what specific assumptions were made?

Preparing to Initiate the NEPA Process for a Tolled Project

- Has the planning process produced any decisions or analyses that can be adopted in the NEPA process?
- Are improvements to the traffic model needed in order to develop forecasts for tolled alternatives?

⁹ See 23 CFR Part 636. For additional information, see FHWA, "Public-Private Partnership Oversight: How FHWA Reviews P3s" (Jan. 2015).

¹⁰ 23 CFR 636.109(b).

¹¹ FHWA Order 6640.23A (June 14, 2012), Sec. 8(e).

¹² FHWA Order 6640.23A (June 14, 2012), Sec. 8(f).

¹³ FHWA Order 6640.23A (June 14, 2012), Sec. 8(g).

¹⁴ FHWA, "Guidance on Environmental Justice and NEPA" (Dec. 16, 2011).

¹⁵ 42 USC 2000d.

- What Federal legislation provides authority to implement tolling for this project? Does that legislation include constraints that may be relevant when developing tolled alternatives?
- What expertise will be needed on the consultant team to ensure that tolled alternatives are adequately analyzed in the NEPA process?
- Is any change in state law needed to enable the project sponsor to carry out a tolled project?
- Is tolling controversial? What is the likelihood of litigation challenging the project?

Developing the Purpose and Need and the Range of Alternatives

- Has the transportation planning process provided a basis for incorporating tolling into the purpose and need?
- Even if tolling is not included in the purpose and need, are there other grounds—e.g., lack of financial feasibility—for eliminating non-tolled alternatives? If so, how will this be documented?
- Even if a basis exists for eliminating non-toll alternatives, are there other reasons to continue considering non-toll alternatives in the NEPA process?
- Are there different tolling concepts (e.g., tolling only new lanes vs. tolling all lanes) that need to be considered as alternatives to one another in the NEPA process?
- What criteria will be used for comparing alternatives? Do these criteria fully capture the relevant differences associated with tolled and non-tolled alternatives?

Traffic Forecasting for Tolled Alternatives

- Are improvements to the model needed before the NEPA forecasts are developed?
- What toll rates will be assumed in the traffic forecasts in the NEPA study? Are those assumptions consistent with the revenue projections used in fiscal constraint findings or other financial forecasts?
- Are there other important assumptions regarding tolling that need to be reflected in the traffic model—e.g., different toll rates based on time of day?
- What assumptions will be made about tolling on other facilities under the No Action alternative? For example, is there a basis for assuming that some existing non-tolled facilities will become tolled in the forecast year?
- Are separate traffic and revenue (T&R) forecasts being prepared for the same project concurrently with the NEPA process? Do those T&R forecasts differ from the NEPA traffic forecasts?

Environmental Justice Issues Related to Tolling

- What are the potential effects of tolling on minority and low-income communities?
- What are the potential benefits of tolling to minority and low-income communities?
- What mitigation measures, if any, will be considered for impacts on minority and low-income communities?
- How will compliance with FHWA Order 6640.23A be documented?
- How will compliance with Title VI of the Civil Rights Act be documented?

Coordinating the NEPA Process with Project Financing and Procurement

- How will the NEPA process be coordinated with project financing and procurement?
- Will a PPP be used? If so:
 - When will the selection of a private-sector partner occur in relation to the NEPA process? If there is overlap with the NEPA process, how are the two being coordinated?
 - What are the objectives of private sector investors (if known) and how do they relate to project assumptions and features—for example, project scope, termini, purpose and need, range of alternatives?
 - What ground rules will be established regarding communications between the NEPA team and any potential private investors?