

Memorandum

Subject: NEPA Analysis of Toll Roads

Date: October 15, 2004

From: D.J. Gribbin
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In Reply Refer To:
HCC-30

Thru: David Nicol
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To: Peggy Catlin, Deputy Executive Director
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Issue and Background:

This is in response to your question regarding whether the Colorado Department of Transportation (CDOT) can include tolling or funding availability as part of its purpose and need statement, and whether funding availability can be used to eliminate alternatives as “unreasonable.”

CDOT has raised this issue as a result of a recent announcement by the Colorado Tolling Enterprise Board regarding the results of its statewide tolling system traffic and revenue feasibility analysis. The study evaluated twelve corridors and various scenarios within each corridor to determine which seemed to be viable toll projects. The study identified eight corridors where tolling would cover the costs to build the new toll facilities. It also identified other corridors where toll revenues could cover additional transportation upgrades and corridors that would need funding in addition to tolls to cover costs. None of these toll projects are yet included in the area’s long-range transportation plan. By using toll revenues, Colorado would be able to build additional highway capacity and transportation infrastructure and address transportation needs of these corridors in the next few years. The study was the first phase in exploring the viability of these projects; additional environmental studies and financial analysis would be necessary before any final decisions could be made.

In a larger context, this issue also arises as a result of changing approaches to financing transportation projects that increasingly rely on funding sources beyond traditional federal-aid and state highway funds. This memorandum correspondingly modifies previous guidance given to FHWA field offices to reflect the new realities of highway financing. Because no specific projects are ripe for consideration, this response provides only general guidance and not specific approval of a particular approach for any specific project. Using this guidance, FHWA will continue to work with CDOT on this issue as its plans for these projects proceed.

Answer:

If the need for a toll road comes out of the transportation planning process, then tolling could be included as part of the purpose and need statement for an environmental analysis under NEPA. Absent these circumstances, specific goals and objectives of a project, such as the urgency of the project or the need to relieve congestion, could narrow the range of reasonable alternatives to only toll road alternatives. Finally, the economic feasibility of a particular alternative, especially when considered in conjunction with other factors, might provide the basis for eliminating that alternative as unreasonable.

Analysis:*1. When a Toll Road Can Be Part of the Project's "Purpose and Need"*

The requirement for "purpose and need" under the regulations implementing the National Environmental Policy Act of 1969 (NEPA) is to "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives, including the proposed action." 40 C.F.R. 1502.13. "Purpose and need" for a transportation project is a statement of the transportation problem to be solved. Examples of "transportation problems" include the need to connect highways, need for expanded capacity, need to service new development, or the need to correct unsafe highways. See FHWA Technical Advisory T 6640.8A, pp. 13-14 (October 30, 1987).

A toll road is usually perceived as a solution to a transportation problem, not a statement of the problem itself. However, in some circumstances, tolling might be part of the purpose and need for the project. If the need for a toll road came out of the transportation planning process (or another similar process), it could represent an element of the community's "vision" for its future transportation system. Conducted properly, the planning process identifies and balances the competing needs of an area, and reflects a judgment about how to maximize limited resources to obtain the most transportation improvements possible. If the long-range transportation plan identifies a toll road or other public-private partnership as a goal, this may mean the community has determined that other non-toll sources of funds are needed for projects on which tolls would not be a viable option. In this circumstance, a toll road becomes necessary to fulfill the community's vision of its optimal transportation system, and thus could appropriately be included in the purpose and need statement.

Under this approach, the planning process would dovetail with the NEPA process, as envisioned by Congress and affirmed in the CEQ and FHWA NEPA regulations.¹ The metropolitan planning provision of Title 23 requires that long-range transportation plans must include "a financial plan that demonstrates how the long-range transportation plan can be implemented, indicates resources from public and private sources that are reasonably expected to be made available to carry out the plan, and recommends any additional financing strategies for needed

¹ For example, Section 102(2)(A) of NEPA direct all Federal agencies to "utilize a systemic, interdisciplinary approach which will insure the integrated use of natural and social sciences and the environmental design arts in *planning* and decisionmaking." [Emphasis added] The CEQ regulations implementing NEPA require decisionmakers to "integrate[e] the NEPA process *into early planning* to ensure appropriate consideration of NEPA's policies and to eliminate delay." 40 CFR 1501.1(a). FHWA NEPA regulations provide that "To the fullest extent possible, all environmental investigations, reviews and consultations be coordinated as a single process..."; 23 CFR 771.105(a).

projects and programs.” 23 U.S.C. 134(g)(2)(B). This requirement is spelled out in more detail in FHWA’s planning regulations: the transportation plan must “[i]nclude a financial plan that demonstrates the consistency of proposed transportation investments with already available and projected sources of revenue. The financial plan shall compare the estimated revenue from existing and proposed funding sources that can reasonably be expected to be available for transportation uses, and the estimated costs of constructing, maintaining and operating the total (existing plus planned) transportation system over the period of the plan.” 23 C.F.R. 450.324(b)(11). Under these provisions, the metropolitan planning organization (MPO) must identify reasonably available funds for the projects on the long-range transportation plan and the transportation improvement program. The transportation conformity regulations issued under the Clean Air Act have a similar requirement that applies in air quality non-attainment and maintenance areas: “Transportation plans and TIPS must be fiscally constrained consistent with DOT’s metropolitan planning regulations at 23 CFR part 450 in order to be found in conformity.” 40 C.F.R. 93.108.

During the transportation planning process, costs are roughly estimated using project-type historical cost trends for the concept and scope of each proposed project, and a fiscal constraint determination is made to ensure that adequate funds will be available to implement the transportation plan as a whole. An MPO might identify toll revenues as a funding source for a highway in its transportation plan because all other public funds are committed for other projects and not available. In this circumstance, the need for a project can include a need for a particular revenue source, such as tolls, to pay for the project. To interpret the law otherwise creates a “circle of indecision” by first requiring MPOs in the planning process to identify “reasonably available” funding sources for each project, but then, in the next breath, requiring the NEPA document to consider alternative funding arrangements that had just been rejected as unavailable in the planning process. Even if such alternative funding arrangements could be pursued, it would be at the cost of removing another state or federally funded project from the plan, or at the cost of having a plan that was no longer fiscally constrained. Congress cannot have intended to require such specific fiscal planning for transportation projects only to then allow it to be unraveled in the NEPA process.²

There does not appear to be case law directly on point with respect to this issue. However, in at least one case, a Court has upheld a purpose and need statement in an EIS that was based on the goals and objectives in the transportation plan. In *North Buckhead Civic Association v. Skinner*, 903 F. 2d 1533 (11th Cir. 1990), the purpose and need statement for an environmental impact statement for a segment of highway in Atlanta was based on specific goals and objectives derived during the transportation planning process. Plaintiffs challenged the purpose and need statement, arguing that it was crafted in a way that the proposed highway was “conclusively presumed to be required” and a rail alternative perfunctorily dismissed for its failure to fully satisfy the objectives of the project. The Court of Appeals disagreed with the Plaintiffs, stating that their objections reflected “a fundamental misapprehension of the role of federal and state agencies in the community planning process established by the Federal-Aid Highway Act.” The Court went on to explain that the Federal-Aid Highway Act contemplated “a relationship of cooperation between federal and local authorities; each governmental entity plays a specific role in the development and execution of a local transportation project.” The Court emphasized that

² When it enacts a provision of law, Congress is presumed to have in mind previous laws relating to the same subject matter. To the greatest extent possible, new statutes should be read in accord with prior statutes, and should be construed together in harmony. N. Singer, *Statutes and Statutory Construction*, 6th Ed., Vol. 2B, Sec. 51.02.

federal agencies did not have responsibility for long range local planning, and found that the “federal, state and local officials complied with federally mandated regional planning procedures in developing the need and purpose section of the EIS.” 903 F.3d at 1541-42. The Court ultimately held that the purpose and need statement could rely on goals and objectives from the transportation planning process.³

Were a purpose and need statement to be drafted to include a toll road, the following factors would be important in determining its validity under NEPA. First, the transportation planning process should have taken into account the availability of public and private resources and analyzed its transportation priorities based on these. Second, using toll revenues to enhance funding for transportation projects would have to be specifically included as one of the goals and objectives of a transportation plan. Finally, documentation of this analysis would be important in demonstrating the validity of the purpose and need statement.⁴

2. When a “Purpose and Need” Statement Can Be Satisfied Only by Toll Alternatives

The Purpose and Need Statement establishes the framework in which “reasonable alternatives” will be identified. It should be sufficiently specific to hone in on the problem to be solved so the alternatives considered offer real solutions to the problem. Although courts have cautioned agencies not to write purpose and need statements so narrowly as to “define competing ‘reasonable alternatives’ out of consideration (and even out of existence)”, *Simmons v. U.S. Army Corps of Engineers*, 120 F.3rd 664 (7th Cir. 1997), they have generally deferred to agencies when reviewing the adequacy of purpose and need statements.

If a specific need for a toll road does not arise out of the planning process, it is still possible that the only alternatives that would satisfy the purpose and need statement might be toll alternatives. Even if CDOT is operating under circumstances in which the purpose and need statement does not include a toll road, it could be that the purpose and need is defined in a way that the range of alternatives is consequently limited. Under some circumstances, the purpose and need statement might be so narrow that it can only be met by toll road options. In *Sierra Club v. USDOT*, 962 F.Supp. 1037 (N.D. Ill. 1997), the District Court for the Northern District of Illinois found that FHWA’s inclusion of some specific objectives in its purpose and need statement that could be solved best by a toll road was allowable under NEPA, so long as other broader objectives were not artificially excluded. These specific objectives included providing a link between two highways and accommodating increasing freight demand. In this case, the Court upheld as “reasonable” a range of alternatives that only included toll roads. In some cases, EISs examining only toll alternatives have been approved by a court without specifically addressing whether consideration of non-toll options were required. For example, in *Laguna Greenbelt v. DOT*, 42 F.3d 517 (1994), FHWA approved an environmental document for a toll road in California. Even though no federal funds were involved, DOT’s approval was needed to connect the toll road to a federally-funded interstate. The EIS studied only two toll road options (in addition to the no build alternative). Plaintiffs alleged that this was not an adequate range of alternatives, alleging that the EIS should have considered a smaller, flexibly-priced toll alternative as well as

³ Other cases also support reliance on work done during the planning process in the NEPA process. See, e.g., *Utahns for Better Transportation v. DOT*, 305 F.3d 1152 (10th Cir. 2002); *Sierra Club v. DOT*, 350 F. Supp.2d 1168 (9th Cir. 2004). However, none of these focus on the purpose and need statement of the EIS.

⁴ This memorandum assumes that DOT will have some significant role in the project that precipitates the need for an EIS. However, if the federal role is very small, the NEPA analysis for the project might be limited only to the action to be undertaken by DOT, allowing CDOT to analyze alternatives for the major components of the project free from NEPA requirements.

a toll road that would have included tunneling and bridges to minimize environmental impacts. The Court disagreed, observing that several other alternatives were eliminated from further consideration early on because they did not meet the purpose and need of reducing traffic congestion and air emissions. 42 F.3d at 524.

Several transportation objectives could narrow the range of reasonable alternatives to be considered. If the project's objective is to reduce congestion on a particular route, this could justify eliminating alternatives that did not involve a new route (such as expanding the existing network) if these alternatives would not provide adequate capacity to meet this objective. If a primary component of the transportation problem to be solved is moving freight carried by trucks, then transit alternatives are unlikely to be "reasonable" alternatives.⁵ Importantly, the need to complete a project urgently could indirectly eliminate alternatives for which public funding is not immediately available. In such urgent circumstances, public-private partnerships such as toll roads might be the only alternatives that would adequately meet the purpose and need.

3. *When Alternatives Can be Screened out as Economically Infeasible*

If the purpose and need statement is not so narrow as to yield only toll road alternatives, CDOT might in some circumstances be able to eliminate alternatives early on based on the economic feasibility of the alternatives. "Reasonable alternatives" warranting detailed study are described in the President's Council on Environmental Quality (CEQ) guidance as "those that are practical or feasible from the technical and economic standpoint and using common sense." *Forty Most Asked Questions Concerning CEQ's NEPA Regulations*, Question #2a (March 23, 1981). Although there are not any such cases relating to toll roads, there are cases in other contexts holding that cost or economic feasibility are appropriate factors to use to screen alternatives to eliminate those that are unreasonable. In *Valley Citizen for a Safe Environment v. Aldridge*, 886 F.2d 458 (1st Cir. 1989), plaintiff challenged the alternatives analysis in an EIS relating to the Air Force's decision regarding where to locate some planes. Plaintiffs argued that the Air Force should have studied in more detail alternatives that would have sent the planes to bases in other cities. The Air Force had eliminated these alternatives early on primarily because of the cost of additional construction that would be required. The Air Force said that, due to these additional costs, it would not under any circumstances decide to locate its airplanes in bases in these cities. The First Circuit upheld the Air Force's alternatives analysis. The Court found that the lack of discussion on these alternatives was "perfectly reasonable" given that the Air Force had acknowledged it would never use them:

"The EIS makes clear that the Air Force will not send the C-5As to the other bases because of significant added construction costs or recruitment problems [on one of the alternatives]. It will not send them irrespective of environmental effects at those bases; it will not send them even if there are no harmful environmental effects, even if no one in those areas thinks the planes are too noisy. What purpose, then could a discussion of environmental effects at those other bases serve, at least as long as the Air Force makes clear it is prepared to evaluate those alternatives on the assumption that their 'adverse environmental effects are zero?'" 886 F.2d at 462.

⁵ FHWA Technical Advisory T 6640.8A states that Mass Transit and Transportation System Management alternatives should be considered when identifying reasonable alternatives. However, if these alternatives do not fit the "purpose and need" of the project, then they can be properly screened out of the list of reasonable alternatives requiring detailed study.

Similarly, in *Sierra Club v. Lynn*, 502 F.2d 43 (C.A. Tex. 1974) the plaintiffs challenged the failure of the Department of Housing and Urban Development (HUD) to consider an alternative site for the development of a housing community. The Court disagreed with plaintiffs, finding that the new site would have involved the purchase of new property at a “prohibitive” cost, and therefore HUD was justified in eliminating this alternative as unreasonable.

More typically, costs and economic viability are considered along with other factors in determining the reasonableness of alternatives. For example, in *Jackson County v. Jones*, 571 F.2d 1004 (C.A. Mo. 1978), the Air Force eliminated a number of alternatives for relocating a facility based on prohibitive costs plus other factors, such as mission incompatibility or lack of other necessary resources at the alternative site. In *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051 (9th Cir. 1985), the Court upheld the elimination of an alternative route for a road based on the fact it would be “significantly more costly and more environmentally destructive.” 768 F.2d at 1057. In *Swinomish Tribal Community v. Federal Energy Regulatory Commission*, 627 F.2d 499 (C.A.D.C. 1980), the Court upheld the elimination of more expensive alternatives to the construction of a proposed dam because the EIS demonstrated the alternatives would have adverse effects in quantity and quality at least as significant as the proposed project.

To eliminate non-toll alternatives based on economic feasibility, CDOT should be able to demonstrate that using non-toll financing is infeasible. Merely a preference for constructing toll roads instead of public roads will not be adequate to meet NEPA’s standards. If available, CDOT should be sure to explain any other reasons, in addition to economic feasibility, that might also justify eliminating an alternative. For example, if CDOT can demonstrate that an economically infeasible alternative has greater environmental impacts than other alternatives considered in detail in the EIS, it will have a stronger case for eliminating the alternative.

Although CDOT’s question is whether alternatives can be screened out based on economic feasibility, it is important to note that the range of alternatives can be refined in other ways as well. Reasonable alternatives must be presented in a “comparative form” that sharply defines the issues and provides a clear basis for a choice by the decisionmaker and the public. 40 CFR 1502.14. If a preliminary analysis identifies an alternative with adverse impacts that are significantly higher than those of other alternatives, such an alternative might not need to be carried forward for more detailed analysis in the Draft EIS. In this case, the preliminary analysis would probably be sufficient to provide the decisionmaker and the public with adequate information upon which to base a decision.

Conclusion:

In the circumstances described in this memorandum, a NEPA document can examine in detail only toll road alternatives and still meet the requirements of current law. With appropriate justification, non-toll alternatives can be eliminated during the transportation planning process or through the alternatives analysis under NEPA. However, nothing in this memorandum should be interpreted as *requiring* that an alternative be eliminated. In circumstance where a public controversy exists regarding the use of tolls on a road, it may be advisable, even though not required, to examine non-toll alternatives in the NEPA document so as to help avoid future litigation.

Finally, once reasonable alternatives are identified and their comparative merits presented, the agency can select any alternative regardless of the impacts, as long as they comply with other environmental laws. At this point, the availability of funding can be a key factor – or even the determining factor – in making a decision about which alternative to select.

Federal Highway Administration

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