

AASHTO PRACTITIONER'S GUIDES

03

January 2006

MANAGING THE NEPA PROCESS FOR TOLL LANES AND TOLL ROADS

IN THIS GUIDE:

Conducting National Environmental Policy Act (NEPA) studies for projects involving toll lanes and toll roads involves many sensitive issues and complex considerations. This guidance covers issues associated with the NEPA process and related issues.

Key issues to consider when conducting studies:

- Transportation plans and policies
- Proposed tolling concept
- Scope of NEPA analysis
- Relationship of NEPA process to project financing and procurement
- Legal issues

Practical tips for responders:

- Laying the policy foundation
- Building the project team
- Developing toll alternatives
- Framing the issues for decision in the NEPA process
- Modeling the performance of tolled alternatives
- Evaluating impacts of tolled alternatives
- Synchronizing NEPA reviews with procurement process
- Considering tolling after NEPA is under way or completed

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

The Guides 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 Guide includes:

- key issues to consider;
- a background briefing;
- practical tips for achieving compliance.

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

This Guide was prepared by Akin Gump Strauss Hauer & Feld LLP with the assistance of Parsons Brinckerhoff and with input from several state departments of transportation (DOTs) and the Federal Highway Administration (FHWA). The views expressed in this Guide are solely those of the authors and do not constitute official guidance or policy of any agency. This Guide should not be used as a substitute for reviewing applicable Federal, State, or local laws, regulations, guidance documents, or agreements, nor should it be used as a substitute for obtaining the advice of legal counsel where needed. The Guide does not constitute legal advice and should not be used as such.

AASHTO Center for Environmental Excellence



American Association of State Highway and Transportation Officials

Overview



This Guide 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 NEPA studies with a competitive procurement for a public-private partnership.

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—the Safe, Accountable, Flexible, and Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU)—seems likely to accelerate the trend toward tolling, by creating new programs that allow for the development of toll lanes and toll roads.

For NEPA practitioners, the consideration of tolled alternatives presents a range of new issues to consider. This Guide provides an overview of the key issues and offers suggestions for consideration in preparing a NEPA study for a project that includes tolled alternatives. It is important to bear in mind that approaches to these issues are rapidly evolving; decisions for each study must be made on a case-by-case basis by the agencies involved, and may be different from the approaches suggested in this Guide.

Key Issues to Consider

Transportation Plans and Policies

- Does the statewide and/or metropolitan long-range plan address tolling? In particular, does the plan include a policy specifically regarding tolling?
- Is this project part of a larger network of toll roads or toll lanes? How does the project's role in the larger network affect the purpose and need, termini, and alternatives to be considered for this project?
- Have tolls on this project been assumed by a State DOT or metropolitan planning organization (MPO) for purposes of revenue forecasts used in transportation plans or programs? If so, what specific assumptions about tolls were made?

Proposed Tolling Concept

- What type of tolling is being proposed? For example, does the project involve all lanes tolled, express toll lanes, high occupancy/toll (HOT) lanes, or some other concept?
- Does the proposed project involve the conversion of existing free lanes to toll lanes? Or will tolls be established only on new lanes?
- What toll collection technology is proposed? Is it all electronic toll collection (ETC)? Or will a cash payment option be provided? Or has no decision been made?
- What additional work is needed to develop or refine the basic tolling concept in order to complete the NEPA analysis? Who is responsible for this work?

Scope of NEPA Analysis

- Will both toll and non-toll alternatives be considered? Or toll alternatives only? If toll alternatives only, why?
- Are there any tolling concepts that are considered “out of bounds” for purposes of the NEPA study (for legal or policy reasons)? If so, how will this be documented?

- What toll rates will be assumed in the traffic modeling in the NEPA study?
- Does the traffic model have the capability to evaluate tolled alternatives? If not, what will be required to develop that capability, who will do it, and how long will it take?
- How will tolling affect the analysis of environmental justice, noise, and air quality impacts? Are there any other impact categories that might be affected by tolling?
- If NEPA has already been completed at the time tolling is first considered, what additional work (re-evaluation or supplemental EIS) is needed to satisfy NEPA?

Relationship of NEPA Process to Project Financing and Procurement

- How is the NEPA process being coordinated with other aspects of project development, such as project financing? Who is the “quarterback” for the overall effort within the State DOT?
- Will the project be developed solely by a public authority? Or will a public–private partnership be used?
- Is a traffic and revenue study being prepared for purposes of a bond financing or a potential private investment in the project? How does that study relate (in timing, assumptions, etc.) to the traffic forecasts that are being prepared in the NEPA process?
- If a public–private partnership is contemplated:
 - 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?
 - Will the alternatives selection criteria in the NEPA process take into account the objectives of potential private investors?
 - What ground rules will be established regarding communications between the NEPA team and any potential private investors?
 - Who will be responsible for obtaining environmental permits? Will this responsibility be placed on a private developer or on the State DOT?

Legal Issues

- What is the legal basis for tolling? Are there any conditions that must be met in order to obtain authorization to establish tolls on this facility?
- Are there any applicable state laws or policies regarding tolling? To what extent do they affect the type of tolling alternatives that can be considered?
- Is additional state legislation required for the project? If so, what specific laws need to be enacted or changed? When will this be done in relation to the NEPA process?
- What is the likelihood of litigation challenging the project? How do litigation risks affect the strategy for involving private-sector partners? How do those risks affect the approach to NEPA compliance?

Background Briefing

The fundamental NEPA requirements for a toll road project are no different from those applicable to any other project. But the introduction of tolling concepts into a NEPA study creates a series of new issues that give rise to new challenges for project teams. Many of these issues relate to the interplay between the NEPA process and other decision-making arenas, such as the transportation planning process, which precedes NEPA, and the financing and procurement process, which may overlap with or follow NEPA.

Applicability of NEPA to Toll Projects. The need for NEPA review is triggered when a project requires the approval of a federal agency. For toll road or toll lane projects, FHWA approval may be needed for (1) the use of federal funding for the project, (2) new and modified Interstate access points, or (3) authorization to establish tolling on a federally funded highway.¹ (See “Legal Authorization to Toll” below.) Even if FHWA approval is not needed for a project, other federal agency approvals may be needed and thus could trigger NEPA. For example, NEPA review could be triggered by the need to obtain permits for wetland impacts from the U.S. Army Corps of Engineers. It also could be triggered by the need for a bridge permit by the U.S. Coast Guard.

Federal Responsibility for NEPA Compliance. The responsibility for NEPA compliance rests on federal agencies. For highway projects that require FHWA approval, the lead federal agency typically is FHWA, which carries out its NEPA responsibilities in partnership with the State DOT. These NEPA responsibilities cannot be privatized; they cannot be “handed off” to a private developer. Therefore, even if a state seeks to shift many responsibilities for project development to a private developer, the state and FHWA must retain ownership of the NEPA process. Specific guidelines regarding the extent of a private developer’s involvement were provided by FHWA to Virginia DOT in a memorandum dated May 6, 2003.²

Policy Decisions as Foundation for NEPA Review. The scope of the NEPA review required for a toll road project will depend to a great extent on policy decisions made outside the NEPA process. For example, these policy decisions may include a commitment to rely upon toll revenues as part of the state’s or MPO’s overall financial plan for funding needed transportation improvements. Similarly, a state or MPO could decide as part of its planning process to develop a network of express toll lanes or to designate certain regional corridors for the development of toll roads. These policy decisions, if properly developed and documented, can be relied upon in the NEPA process when defining the purpose and need and range of alternatives. Thus, decisions made before the NEPA process begins can play an important role in determining the scope of the NEPA review. For further information, see the FHWA memorandum to the FHWA Colorado Division Office, dated October 15, 2004, and the FHWA/FTA program guidance on linking planning and NEPA, dated February 23, 2005.³

Coordination of NEPA with Procurement Decisions. The NEPA process for a toll project may be undertaken in parallel with a procurement process in which the State DOT seeks private-sector partners to participate in the development of the project. The FHWA design-build regulations, issued in 1999, prohibited states from issuing a request for proposals (RFP) to developers before NEPA was completed. In 2004, FHWA initiated Special Experimental Program 15 (SEP-15), which allowed this requirement to be waived, so that an RFP could be issued prior to NEPA completion. Section 1503 of SAFETEA-LU directs FHWA to revise its design–build regulations, so that an RFP can be issued before completion of NEPA. With this change in the regulations, it will be possible to select a private-sector developer, enter into a contract, and give a notice to proceed (with preliminary engineering only) before concluding NEPA. Thus, states will have broader flexibility in determining the timing of the procurement process.⁴

Legal Authorization to Toll. Federal law restricts tolling on highways constructed with federal-aid highway funds. The most severe restrictions apply to Interstate highways. Therefore, to establish a toll road or toll lane, it often is necessary to obtain federal authorization for tolling. There are several federal laws under which this authorization can be granted.⁵ For some projects, tolling can be approved under Section 129 of Title 23. Others require approval under one of the tolling pilot programs: the Value Pricing Pilot; the Interstate Reconstruction and Rehabilitation Pilot; the Express Toll Lanes Pilot; and the Interstate Construction Pilot. For projects involving high-occupancy toll (HOT) lanes, tolling may be allowed under a new law, Section 166 of Title 23. All of these laws contain specific conditions that must be met in order for tolling to be authorized; those conditions should be considered when defining tolled alternatives for a project.⁶

¹ It also is important to remember that innovative finance techniques that rely upon federal funds to pay bonds, or that use federal loans or loan guarantees to support a project financing, are considered a form of federal funding, and thus require FHWA approval, which triggers the need for NEPA review.

² This memorandum is available on the Center’s website, <http://environment.transportation.org/center/>.

³ Both of these documents are available on the Center’s website, <http://environment.transportation.org/center/>.

⁴ Applicable regulations, guidance, and other materials related to the issuance of an RFP during the NEPA process are available on the Center’s website, at <http://environment.transportation.org/center/>.

⁵ This legislation is available on the Center’s website, at <http://environment.transportation.org/center/>.

⁶ Many HOV lanes were constructed with funds that were provided under the Congestion Mitigation and Air Quality Improvement (CMAQ) program or with transit funding provided by the Federal Transit Administration. For those types of facilities, it is important to coordinate with FHWA and FTA, respectively, in order to determine any conditions that need to be met before converting HOV lanes to HOT lanes.

Practical Tips

1 | Laying the Policy Foundation

The statewide planning process provides the state with an opportunity to set forth its vision for the transportation system. The goals and priorities established in the statewide planning process can lay the groundwork for NEPA studies for individual toll projects. The same is true for an MPO with regard to metropolitan planning. Using the planning process to define the role of tolling in the statewide or metropolitan long-range plan can be helpful in establishing the scope, purpose and need, and range of alternatives of the NEPA studies for specific toll projects.

Specific issues to consider in the statewide or metropolitan planning process may include:

Assuming Tolls in Revenue Forecasts. Toll revenues can be incorporated into the revenue forecasts that are used as the basis for fiscal constraint findings. If toll revenues from a project are “built in” to the revenue forecasts, FHWA may have a basis for focusing its alternatives analysis in the NEPA process entirely on tolled alternatives.

Designating Toll Corridors. Tolling feasibility studies can be conducted by a State DOT prior to initiating the NEPA process for a specific project. These studies can assist in identifying corridors where toll projects should be considered. These studies also can provide the basis for a policy decision to establish specific corridors within the state as toll routes.

Designating Toll Networks. A comprehensive plan calling for the creation of a network of toll lanes can be adopted by a state or MPO as part of the transportation planning process. A policy decision to implement a network of tolled lanes can be considered in developing the purpose and need for individual toll projects.

2 | Building the Project Team

For a tolled project, the project development effort often involves multiple teams working together. This type of project often requires increased coordination with the State DOT as well as an expanded range of consultant expertise.

Specific issues to consider include:

Coordination within State DOT. The development of a toll project may require a broader project team within a State DOT than would be required for a typical non-tolled project. Particularly if the toll project is fast-tracked and/or involves private-sector partners, the project may require heightened involvement from State DOT offices responsible for (1) long-range planning; (2) innovative finance; (3) right-of-way acquisition; (4) policy and legislation; (5) public affairs; and (6) legal issues. State DOT leadership also will likely play a more direct role than in a typical non-tolled project. The organization of the State DOT’s internal team must allow for the coordination of these offices with the NEPA process.

Consultant Expertise. The development of a toll project may require additional consultant expertise. Regardless of the financing approach, it is essential to include consultants with expertise in traffic forecasting for tolled projects. In addition, if a public–private partnership will be used, it will be important to include consultants and attorneys with expertise in conducting a procurement process. The team responsible for the procurement may be separate from the NEPA team, but the two teams should be closely coordinated.

Coordination with Private Investors. If a public–private partnership is being used for a toll project, the private investors may have their own team of consultants, financial planners, and attorneys, who may develop information for consideration in the NEPA process. It is useful to establish ground rules for communication with the private investors’ teams in order to ensure that information can be submitted, while at the same time maintaining the objectivity of the NEPA process.

3 | Developing Toll Alternatives

The initial proposal to consider tolling often assumes a particular design concept, such as HOT lanes, express toll lanes, or a toll road in which all lanes are tolled. This initial proposal may be refined many times, through an iterative process that takes into account engineering factors, economic factors, public opinion, and other issues. As a result, “pinning down” the basic tolling concept for purposes of NEPA analysis may be difficult and time-consuming. Rather than being a purely engineering exercise, this task often involves consideration of factors such as public acceptance, revenue potential, construction cost, and

environmental impacts. If a public–private partnership is being pursued, this step also may include an assessment of the specific tolling concepts proposed by private developers.

Specific factors to address when developing toll alternatives include:

Toll Lanes vs. Toll Road. A tolled alternative may involve the development of toll lanes (as part of a facility that also includes free lanes) or a toll road (in which all lanes are tolled). Typically, toll lanes are proposed when tolling is being added to an existing facility; a toll road is more commonly proposed when an entirely new highway is being constructed. Generally, the tolled alternatives considered in the NEPA process will focus on one or the other (toll lanes or a toll road). However, as in other aspects of the NEPA process, the types of tolled alternatives to be considered must be determined on a case-by-case basis.

Type of Toll Facility. A toll road or a toll lane can be operated with fixed toll rates or with a toll rate that varies in order to manage traffic volumes. There are several approaches to using tolls to manage traffic volumes. A high-occupancy toll (HOT) lane allows single-occupant vehicles to use a high-occupancy vehicle lane by paying a toll. An express toll lane (ETL) is similar to an HOV lane, except that all vehicles pay a toll regardless of the number of occupants. In addition, some facilities are established as toll roads with all lanes tolled, and toll rates on the entire facility are set to manage traffic volumes. The type of toll facility is an important issue to determine when developing tolled alternatives in NEPA.

Toll Payment Options. A toll project may rely solely on electronic toll collection (ETC), which avoids the need for toll plazas, or may provide a cash payment option. If all-ETC is assumed in the NEPA analysis, the engineering features of the project would not need to include traditional toll plazas. One important factor to bear in mind is that toll pilot programs under Section 1604 of SAFETEA-LU require exclusively electronic toll collection as a condition for participation in the pilot programs; this legal limitation should be considered when defining the tolled alternatives to be considered in the NEPA process.

Toll Rates. Toll rates generally are not decided as part of the NEPA process, but instead are left to State and local discretion. However, for purposes of NEPA analysis, it is necessary to make assumptions about the toll rates that will be charged because toll rates will affect the traffic volumes projected in the NEPA document for tolled alternatives. As with any other assumption underlying the NEPA analysis, assumptions about toll rates should be disclosed and explained.⁷ Where there is uncertainty about the actual toll rates, it may be appropriate to consider a range of toll rates in order to assess the sensitivity of traffic volumes to toll rates.

Toll Plazas and Other Features. Toll alternatives may include toll plazas or other toll-related facilities. These types of facilities should be described when presenting tolled alternatives. The level of detail regarding facility size and location should be determined on a case-by-case basis.

4 | Framing the Issues for Decision in the NEPA Process

The alternatives chapter in an EIS frames the issues for decision in the NEPA process. For example, an alternatives chapter that compares both tolled and non-tolled alternatives would place the issue of whether to toll squarely on the table for decision; by contrast, a chapter that focuses solely on tolled alternatives would treat the decision to toll as a given. Both of these approaches, in principle, can be consistent with NEPA. The appropriate approach for each project must be determined on a case-by-case basis.

Specific issues to consider when deciding the range of alternatives include:

Ability to Include Tolling in Purpose and Need. The concept of tolling can be incorporated directly into the purpose and need for a project. For example, if a state has established a plan for completing a network of HOT lanes, a project that is intended to complete a link in that network could include tolling as an element of its purpose and need. The decision to incorporate tolling into the purpose and need would have to be based on a solid underlying foundation in the planning process, and could be done only with the approval of FHWA. If this approach is followed, the alternatives considered in the study would consist entirely of tolled alternatives that meet the defined purpose and need for the project. Of course, it is also appropriate to adopt a “tolling-neutral” purpose-and-need statement, which allows for consideration of both tolled and non-tolled alternatives. The appropriate purpose and need must be defined on a case-by-case basis.

⁷ On HOT lanes and express toll lanes, toll rates are managed in order to maintain free-flowing traffic in those lanes. For this type of facility, the key assumption that should be disclosed is typically the operating condition that will be maintained in the toll lane—e.g., a certain average speed or level of service (LOS). For disclosure purposes, it may be appropriate to report the toll rates that would need to be charged in order to maintain the desired operating condition.

Ability to Focus Solely on Tolled Alternatives. The range of alternatives considered can include both tolled and non-tolled alternatives or, in some cases, can be limited to tolled alternatives. FHWA has identified three scenarios in which it may be appropriate for a NEPA study to focus solely on tolled alternatives: (1) when tolling is assumed as part of the financial forecasts in the planning process, as the basis for meeting fiscal constraint; (2) when tolling is an element of the purpose and need; and (3) when non-tolled alternatives are eliminated from consideration during the alternatives screening process. While it is possible to focus solely on tolled alternatives, there are situations in which it will be more appropriate to consider both tolled and non-tolled alternatives. This decision must be made on a case-by-case basis.

Ability to Focus on a Single Tolling Concept. The NEPA analysis could consider several different tolling concepts, and compare their pros and cons, or it could define a single tolling concept and use that concept consistently for all tolled alternatives. For example, some toll projects rely entirely on electronic toll collection, while others provide a cash payment option; some involve flat-rate tolls, while others involve tolls that vary by time of day or that are adjusted automatically based on traffic conditions. It may be justifiable to focus the consideration of toll alternatives solely on a single tolling concept—for example, alternatives that rely solely on electronic toll collection. If the alternatives analysis focuses on a single tolling concept, the reasons for using that concept should be explained, in the same manner as other decisions about the range of alternatives considered in the NEPA process.

Reasons to Consider Non-Tolled Alternatives. Even in situations where it is legally acceptable to focus solely on tolled alternatives, a decision still could be made to consider both tolled and non-tolled alternatives. Reasons to consider both non-tolled and tolled alternatives could include: (1) it preserves the option of selecting a non-tolled alternative at the end of the NEPA process, if tolling is found to be unacceptable or infeasible; (2) it provides the public with a greater opportunity to consider the pros and cons of tolling, and to offer their perspectives, before a decision is made on tolling; and (3) it avoids disputes over the adequacy of the legal justification for focusing solely on tolled alternatives.

Criteria for Evaluating Alternatives. The evaluation of alternatives in the NEPA process typically focuses on conditions in a single year about 20–25 years in the future (often called the “design year”). This type of analysis gives little attention, if any, to the timing of construction. Yet for toll projects, the timing of construction may be the central issue: the basic reason for considering tolling, in some cases, is the potential for toll revenues to accelerate construction of the project. Therefore, when considering tolled alternatives in the NEPA process, it may be appropriate to develop evaluation criteria that specifically incorporate the timing of construction and the potential for acceleration of project benefits.

5 | Modeling the Performance of Tolled Alternatives

The evaluation of tolled alternatives in the NEPA process requires a travel demand model with the capability to take into account the effects of tolling on traffic volumes and patterns. In areas that have no existing toll facilities, these capabilities may not exist when the NEPA process begins for a toll project. Developing these capabilities can be time-consuming and expensive. In metropolitan areas, the improvements to the travel demand model will have to be made in close coordination with the MPO.

Specific issues to consider with regard to traffic modeling include:

Capability of the Model to Consider Tolls. An important first step is to assess the existing capabilities of the applicable traffic model. For example, even if the traffic model has the ability to model the effects of HOT lanes, it may not be as well-suited for modeling a facility in which all lanes are tolled—or vice-versa. In addition, a model developed for broad regional planning purposes may not be well-suited to conducting a project-specific analysis of alternatives as part of a NEPA study. A careful review of the model’s capabilities is therefore essential to ensure that the model can satisfy NEPA requirements for a toll project.

Assumptions in the Model. The modeling results for tolled alternatives—and thus the larger choice between tolled and non-tolled alternatives—may be sensitive to certain assumptions that are made in the traffic model. Examples include assumptions about toll rates, about the sensitivity of travel choices to toll rates, about the availability of alternative routes that are not tolled, and about the timing and allocation of population and employment growth within the study area. These assumptions should be identified and explained in the traffic modeling technical report or other appropriate documentation.

Sensitivity Analyses. Sensitivity analysis may be appropriate as a means of showing how changes in key assumptions (for example, toll rates) would affect the results of the traffic modeling. One possible approach is to assess several different toll rate scenarios, which would represent a range of potential future tolling options.

Relationship of NEPA Forecasts to “Investment-Grade” Traffic Study. The NEPA traffic forecasts are intended to provide the basis for an informed federal decision about the project. For projects involving private investment or bonding, it also will be necessary to conduct an “investment grade” traffic and revenue study. This study serves a different purpose: it provides assurances to investors that traffic levels will be sufficient to support the toll revenues anticipated for the project. These two sets

of traffic forecasts generally are conducted separately and involve different methodologies. If the results of the investment-grade study are released during the NEPA process, it may be useful to include an explanation in the NEPA documentation of any discrepancies between the two different sets of traffic forecasts.

6 | Evaluating Impacts of Tolled Alternatives

Tolled alternatives may differ from non-tolled alternatives in terms of both impacts and benefits. It is important for a NEPA study to identify the specific aspects of the analysis that may be affected by tolling.

Environmental Justice and Tolls. The evaluation of tolled alternatives requires consideration of the effect of tolling on low-income users of the transportation network. This analysis is needed in order to satisfy the requirements of the Environmental Justice executive order (E.O. 12898), which requires consideration of a federal action's potential for "disproportionately high and adverse" effects on minority and low-income populations. Methodologies for considering a project's potential effects on low-income users are continuing to evolve, and should be considered on a project-by-project basis. Depending on the results of the impacts analysis, it may also be appropriate to consider potential measures for mitigating the effects of tolling on low-income users.

Impacts Related to Traffic Volumes. Tolling has the potential to affect traffic volumes, and thus has the potential to affect impacts that are directly dependent on traffic volumes. These types of impacts generally include air quality, noise, and traffic congestion on existing roads. For example, an important issue when considering a tolled alternative is the potential for the toll to divert traffic to alternative routes. One possible approach is to present data (level of service, traffic volumes, etc.) at selected points on the local road network, in addition to presenting traffic data showing operations on the toll road itself. If toll-related diversions would necessitate improvements to other roads, those issues also should be considered.

Impacts Related to Footprint. Tolling has the potential to affect the footprint of a roadway, and thus has the potential to affect the direct physical impacts of the roadway on the environment—for example, on wetlands, farmland, floodplains, and other landscape features. Tolling may affect the footprint in a number of ways, including (1) the impacts of a toll plaza, if cash payment options are provided; (2) the impacts of a wider facility, if toll lanes are separated by a barrier from free general purpose lanes; and (3) the reduction in the number of lanes needed, if tolling reduces traffic volumes to the point that a smaller facility can accommodate projected demand.

7 | Synchronizing the NEPA Review with Procurement Process

For many toll projects, the NEPA process must be coordinated with a separate process in which the State DOT reviews competing proposals from potential private-sector developers. Under Special Experimental Program 15 (SEP-15) and the recent SAFETEA-LU legislation, it is possible to complete the entire procurement process—including issuing the request for proposals (RFP) and selecting a private-sector partner—before completion of the NEPA process. This new flexibility makes it possible to accelerate project development, but also raises issues that will need to be carefully considered in order to protect the integrity of the NEPA review.

Specific issues to consider when coordinating the NEPA and procurement processes include:

Inter-Dependence of NEPA and Procurement Decisions. The NEPA process and the procurement process are inter-dependent. On one hand, the procurement process requires some definition of the basic project location, design concept, and mitigation requirements—and these basic project features are defined through the decision-making process in NEPA. But on the other hand, the NEPA process for a toll project must be informed by some understanding of the project features that potential private investors consider to be essential; otherwise, the NEPA process may result in approval of a project that meets environmental requirements but is unworkable economically as a toll road. Thus, if a state anticipates using some form of public-private partnership, it is useful for the NEPA team to begin thinking about the RFP—and considering the perspectives of potential private investors—as early as possible.

Factors to Consider in Determining Timing of RFP. As noted above, it is possible to issue the RFP for a private-sector partner—and even select that partner—before the NEPA process is completed. Given this flexibility, it is important to consider the appropriate timing of the RFP in relation to major milestones in the NEPA process. For example, will the RFP be issued before or after the announcement of a preferred alternative? In deciding the timing of the RFP, some factors to consider include: (1) the schedule for beginning project construction; (2) the potential for the RFP process to generate new ideas that may require modification of alternatives being considered in the NEPA process; (3) the potential for the NEPA process to resolve certain

issues and thus provide greater certainty for potential proposers in the RFP process; (4) the potential for the RFP process to affect public confidence in the NEPA process; and (5) the potential to negotiate more favorable prices for design and construction services by commencing the RFP process earlier.

Role of Private Sponsor in NEPA Process. The responsibility for NEPA compliance rests with federal agencies, such as FHWA. For a highway project, a State DOT may play a substantial role in helping FHWA carry out these NEPA responsibilities. Private developers cannot take over these NEPA responsibilities, but can contribute technical information, including proposed engineering plans, environmental data, and other materials. It may be helpful to establish a communications protocol regarding interactions between the NEPA team and potential private-sector partners. This protocol could identify the types of information that can be provided to the potential developers by the NEPA team, as well as the type of information that can be submitted by the potential developers to the NEPA team.

8 | Considering Tolling After NEPA Is Under Way or Completed

For many toll projects, the consideration of tolling first arises after the NEPA process is under way or even after it has been completed. In these situations, the NEPA team is not working with a blank slate. Instead, they are faced with a decision about how to adapt an existing or completed NEPA process to incorporate consideration of tolled alternatives.

Specific issues to consider may include:

Re-Evaluation vs. Supplement. The consideration of tolled alternatives after completion of the NEPA process will require, at a minimum, a re-evaluation of the completed study. In some cases, the re-evaluation may be a relatively robust document; in others, it may be more limited. The level of detail depends on the circumstances of each project. The key is to provide enough information to determine the “significance” of the new information (i.e., tolling). If the information is considered to be significant, then a Supplemental Environmental Impact Statement (SEIS) must be prepared.

Range of Issues for Analysis. The issues considered in the re-evaluation or SEIS will closely parallel the issues that would be considered in any NEPA process for a tolled project. For example, the re-evaluation or SEIS would assess the effect of tolls on traffic volumes and flow and, in turn, on any environmental impacts that are correlated with traffic volumes and flow (air, noise, congestion on other routes, etc.) The re-evaluation or SEIS would also consider any potential environmental justice impacts of tolling, as well as any impacts resulting from changes in the project footprint (e.g., for toll plazas). In terms of benefits, the re-evaluation or SEIS would assess the potential for tolling to reduce the traffic and economic benefits of the project—but it also would consider the potential acceleration of those benefits, if tolling allows the project to be built sooner. The re-evaluation or SEIS also could involve a more fundamental re-assessment of the project, including the purpose and need and the range of alternatives considered.

Reference Materials

Statutes, regulations, and guidance documents cited in this Guide, along with additional materials and sample documents, are available on the AASHTO Center for Environmental Excellence website, <http://environment.transportation.org/center/>.

ADDITIONAL RESOURCES

PRACTITIONER'S GUIDES AVAILABLE FROM AASHTO CENTER FOR ENVIRONMENTAL EXCELLENCE:

- 01 Maintaining a Project File and Preparing an Administrative Record for a NEPA Study
- 02 Responding to Comments on an Environmental Impact Statement
- 03 Managing the NEPA Process for Toll Lanes and Toll Roads
- 04 Consulting Under Section 106 of the National Historic Preservation Act
- 05 Utilizing Community Advisory Committees for NEPA Studies
- 06 Tracking Compliance with Environmental Commitments/Use of Environmental Monitors

For additional Practitioner's Guides, please visit the AASHTO Center for Environmental Excellence website at: <http://environment.transportation.org>

Comments on the Practitioner's Guides may be submitted to:
AASHTO Center for Environmental Excellence
444 North Capitol Street, N.W., Suite 249
Washington, DC 20001
Telephone: 202-624-5800
E-mail: environment@aaashto.org
Website: <http://enviroment.transportation.org>

