



U.S. Department
of Transportation
**Federal Highway
Administration**

Oregon Division

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In Reply Refer To:
HDA-OR

Ms. Tammy Baney
Chairperson
Oregon Transportation Commission
355 Capitol Street NE, MS #11
Salem, OR 97301-3871

Mr. Matthew L. Garrett
Director
Oregon Department of Transportation
355 Capitol Street NE, MS #11
Salem, OR 97301-3871

Dear Ms. Baney and Mr. Garrett:

Thank you for your December 10, 2018, letter expressing your interest in pursuing tolling on segments of Interstate 5 (I-5) and Interstate 205 (I-205) in the Portland region. You asked that I address the following: 1) eligibility and other requirements under federal tolling programs; 2) required project refinement and analysis to obtain a classification determination under the National Environmental Policy Act (NEPA); and 3) the anticipated timeline and opportunities to streamline review under NEPA. Below is a response to these topics.

Question 1: Eligibility and other requirements under federal tolling programs.

The report transmitted with your December 10 letter, titled *Oregon Application to FHWA: Value Pricing Feasibility Analysis and Proposed Implementation*, presents an I-205 Project (page 1-4) and an I-5 Project (page 1-6). Additional project detail is needed for a final eligibility determination by the Federal Highway Administration (FHWA), however, the I-205 Project is likely eligible for tolling under both Section 129 of Title 23, U.S.C. (Section 129) and the Value Pricing Pilot Program (VPPP), while the I-5 Project is likely eligible for tolling under the VPPP.¹

Section 129 provides authority for tolling Federal-aid highways in conjunction with construction, reconstruction, or other capital improvements to highways, bridges and tunnels. While revenue generation is commonly the driving reason for tolling under Section 129, a state may implement a time-of-day tolling (pricing) strategy under this mainstream tolling program.² Under Section 129, public agencies may impose tolls on Federal-aid highways in the following instances:

¹ Title 23 of the United States Code (Highways) includes a general prohibition on the imposition of tolls on Federal-aid highways. However, Title 23 and other statutes contain exceptions to this policy. Two mainstream federal tolling programs and two pilot programs offer states opportunities to use tolling to generate revenue to support highway construction activities and to implement priced managed lanes on Federal-aid highways. The two mainstream tolling programs that do not require an agreement with the federal government or approval from USDOT/FHWA are presented in Section 129 and Section 166 of Title 23. The VPPP and the Interstate Reconstruction and Rehabilitation Pilot Program (ISRRPP) are pilot programs that can be used to advance a tolling project. Both pilot programs require USDOT/FHWA approval. All four federal tolling programs are discussed in detail at https://www.fhwa.dot.gov/ipd/tolling_and_pricing/tolling_pricing/federal_tolling_programs.aspx.

² Pricing involves the imposition of fees or tolls that vary based on the level of demand for travel on a highway facility. The fees may vary according to a fixed schedule or in real-time based on actual travel conditions. Also, known as congestion pricing, value pricing, variable pricing, peak-period pricing, or market-based pricing - this

- Initial construction of a new highway, bridge, or tunnel
- Initial construction of new lanes on highways, bridges, and tunnels (including Interstates), as long as the number of toll-free lanes is not reduced
- Reconstruction or replacement of a bridge or tunnel
- Reconstruction of a highway (other than an Interstate)
- Reconstruction, restoration, or rehabilitation of an Interstate highway, as long as the number of toll-free lanes is not reduced

Therefore, under Section 129, the State of Oregon is permitted to toll all lanes of the Abernathy Bridge if the bridge is replaced or reconstructed. The state would also be permitted to toll all lanes of mainline Interstate bridges that are replaced or reconstructed as part of the project. Placing tolls on all lanes of Interstate 205 beyond the immediate approaches to replaced or reconstructed bridges, is permitted under Section 129 only if the conditions above are met, particularly, that the number of toll-free lanes is not reduced. As the OTC/ODOT develops a tolling strategy for the I-205 Project, eligibility under Section 129 will be more fully understood.

Federal law does not provide FHWA authority to approve the tolls, the specific toll rates, or exemptions, as the state owns, operates and controls these facilities. Additionally, tolling agreements are no longer required by Section 129, however, under existing implementing guidance, state departments of transportation and other public agencies responsible for toll facilities are encouraged to enter into a memorandum of understanding (MOU) with FHWA.^{3 4} An MOU can be particularly meaningful in light of requirements for audits and the use of toll revenues, and the potential consequences of noncompliance (including the discontinuation of toll collection). Typically, under Section 129 a contract for physical construction must be awarded before tolls may be collected.

The State of Oregon may also pursue authority to impose tolls on Federal-aid highways under the VPPP, a program that uses pricing to control travel demand and address congestion. Authority to use tolls under this program requires approval by USDOT/FHWA. The VPPP was first authorized under the Section 1012(b) of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), as amended under other laws, most recently in Section 1604(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). While discretionary funding is no longer provided, the authority to use tolling as a tool to address congestion remains in force, and FHWA enters into or modifies existing cooperative agreements for tolling projects under the VPPP, consistent with the pilot authority.

strategy manages demand by imposing a fee that varies by time of day, direction of travel, type of vehicle, number of occupants, or other factors. While pricing generates revenue, this strategy also seeks to manage congestion, environmental impacts, and other external costs.

³ In 2012, the Moving Ahead for Progress in the 21st Century Act (MAP-21) removed the earlier requirement that State or local public agencies execute a tolling agreement with FHWA prior to imposing tolls under Section 129.

⁴ As shown in FHWA's sample MOU template, located at https://www.fhwa.dot.gov/ipd/tolling_and_pricing/tolling_pricing/sample_mou_template.aspx, suggested elements of the MOU include documenting the eligibility for tolling a Federal-aid highway facility under Section 129 and outlining how the statutory requirements regarding the use of toll revenues, audits, and other federal requirements will be met.

The VPPP is a pilot program designed to assess the potential of different value pricing approaches for reducing congestion. Under the VPPP, tolls may be imposed on existing toll-free highways, bridges, and tunnels, and variable pricing is used to manage demand. The legislation also requires a state that implements tolling under this program to report on the outcomes (impact on travel times, transit, air quality and low income/minorities). There is also a requirement that a state consider the potential impacts on low income drivers. Congress has authorized up to 15 slots under the VPPP, which are allocated to state or local agencies. Oregon currently holds a VPPP slot that was recently used to evaluate peer-to-peer car sharing in Portland. This VPPP slot is also being used to support the OTC/ODOT's current effort to explore additional congestion pricing projects in the Portland region.

Oregon would need to develop a VPPP tolling plan, conduct an environmental review under NEPA, and enter into a cooperative agreement with FHWA to implement a VPPP project. The VPPP tolling plan should address how tolling will manage congestion in the corridor, how tolling revenues will be used for construction, and the effect tolling has on traffic patterns, facility operations, and financing. A key element of the VPPP tolling plan, is a traffic and revenue study. The traffic and revenue study serves to provide understanding of the tolling, traffic, and financing aspects of a project. This work then serves to inform the project's environmental review under NEPA. The limits of the VPPP project corridor identified must include the construction project to which the toll revenues will be applied.⁵ Also, there have been circumstances under the VPPP where tolls have been collected in advance of construction.

Question 2: Required project refinement and analysis to obtain a classification determination under the National Environmental Policy Act (NEPA).

Should NEPA be required, Oregon's decision to implement a tolling project in the Portland region should be informed by an in-depth traffic and revenue study, public engagement, and environmental review under the requirements of NEPA.⁶ These in-depth studies will provide an understanding of the operational impacts to the system and the overall feasibility of the project, as well as serve to educate and inform the project owner, the FHWA, and the public on natural and human environmental impacts, and the viability of tolling in the region.

The report entitled *Oregon Application to FHWA: Value Pricing Feasibility Analysis and Proposed Implementation* presents a high-level scoping of two potential tolling projects, the I-205 Project and the I-5 Project. Prior to initiating a formal NEPA analysis, ODOT should better

⁵ For tolling under the VPPP, the toll revenue provision (section 1012(b)(3)) of Public Law 102-240) has been implemented under the cooperative agreements which provide that the revenues first be used within the defined VPPP corridor for operating and capital costs of the project. Any revenues in excess of those costs may be used on other eligible title 23 activities, without limit to the defined VPPP corridor. Similarly, for tolling under Section 129, 23 U.S.C. Section 129(a)(3) authorizes excess revenues to be expended on any Title 23 eligible activity without limit to project limits, provided the state certifies that the toll facility is adequately maintained.

⁶ Reliance on Section 129 for tolling authorization does not by itself trigger the need for FHWA to conduct NEPA review for the tolling project. The general rule is that major federal actions, including commitments of federal funds and other types of federal approval decisions require NEPA review. If the state does not seek to use Federal-aid (or other federal funds subject to Title 23 requirements, such as TIFIA credit assistance) and FHWA has no approval action to take (e.g., no Interstate access change approval or design exception approval), there is no requirement under current law to undertake a NEPA review. Other federal requirements that apply and are typically addressed in the NEPA review, like Title VI, would continue to apply whether, or not NEPA requirements are applicable.

define the proposed project and evaluate its impacts. Issues that require additional analysis include but are not limited to: establishing tolling in Metro's fiscally constrained transportation plan; defining tolled alternatives; evaluating toll methods and rates; analyzing environmental justice impacts; and analyzing transportation system impacts, including the impacts of traffic diversion.

A traffic and revenue study would inform a discussion with affected communities and provide a better sense of the significant impacts of the action and therefore the appropriate NEPA classification, i.e., Categorical Exclusion (CE), Environmental Assessment (EA) or Environmental Impact Statement (EIS).

Question 3: The anticipated timeline and opportunities to streamline review under NEPA.

A state's request for authority to toll under the VPPP is typically accompanied by confirmation that the necessary state legislative approvals are in-place, completed or nearly complete studies that support the tolling request (including traffic and revenue study), and completed or nearly complete necessary NEPA environmental review. Figure 3 of the *Oregon Application to FHWA: Value Pricing Feasibility Analysis and Proposed Implementation* report presents a timeline for advancing the tolling projects. The duration of such work is influenced by many factors and it is largely dependent on the approach and manner taken to manage the project(s). After satisfactory completion of the above items, the FHWA's approval of tolling projects under the VPPP has typically been a straight forward process, commonly taking as little as a few months.

Finally, the FHWA cannot overemphasize the value of a transparent public involvement, outreach, and marketing effort to inform the region on the realities and myths of tolling, the issues the OTC/ODOT seeks to address, and the state's vision for tolling in the region. An aggressive public involvement, outreach, and marketing effort serves to streamline the overall project delivery.

We look forward to continued close coordination with the OTC and ODOT on this very important tolling discussion. Please contact myself or Nathaniel Price at nathaniel.price@dot.gov or (503) 316-2566 with questions.

Sincerely,



Phillip A. Ditzler
Division Administrator