



# USDOT Signs First Tolling Agreements Under Express Lanes Demonstration Program

04.15.2009 | By **Brandon J. Davis**, **Brian G. Papernik**

The United States Department of Transportation (USDOT) and the Texas Department of Transportation (TxDOT) recently signed two agreements under USDOT's Express Lanes Demonstration Program (ELDP) to establish federal authorization for TxDOT to toll the managed lanes it plans to build on the IH-635 and IH-820/SH 183 corridors in the Dallas/Fort Worth metropolitan area.[1]

The ELDP, created in August 2005 by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU),[2] provides an exception to the general rule prohibiting tolling on federal aid highways.[3] Under the ELDP, states, public authorities or public or private entities designated by a state, may implement and collect tolls on up to 15 facilities (demonstration projects), including interstate highways, that would otherwise be toll-free. The imposition of tolls must (a) manage high levels of congestion, (b) reduce emissions or (c) finance the expansion of a highway for the purpose of reducing traffic congestion.[4]

As part of the ELDP tolling approval process, the USDOT and the applicant must develop performance goals for each express lanes project. Once the USDOT and applicant agree upon these goals, the USDOT publishes the goals in the Federal Register for public comment.[5] The USDOT published the goals for these first two projects, also known as the IH 635 Managed Lanes Project and the North Tarrant Express, on January 22, 2009.[6] Included in the Federal Register notice are reporting requirements that will help track the progress of the projects with respect to the performance goals.

Even though 13 of the 15 ELDP demonstration project slots are still available, USDOT's authority to enter into tolling agreements under ELDP will expire on September 30, 2009, unless this deadline is extended by Congress.[7] In order to screen applicants and process tolling agreements before the September 30th deadline, USDOT has stated that it must receive all applications for ELDP tolling approval by May 31, 2009.[8]

## North Tarrant Express and IH 635 Managed Lanes Project Background

In the last few months, TxDOT has conditionally awarded comprehensive development agreements to private entities for the North Tarrant Express project and the IH 635 Managed Lanes Project. These projects will add roughly 53 miles of managed lanes and will help relieve traffic on the heavily congested IH-635 and IH-820/SH 183 corridors. The agreements require the private entities to finance, design, build, operate and maintain these lanes, in addition to reconstructing existing facilities in these corridors.[9]

In accordance with the North Central Texas Council of Governments' regional managed lanes policy, the comprehensive development agreements for the North Tarrant Express and IH 635 Managed Lanes Project will manage congestion and reduce emissions by establishing an obligation to maintain an average speed of 50 mph in the managed lanes.[10] During the first six months of tolling operations, toll rates will be set by schedule. After the first six months, tolls will be set using dynamic pricing, under which tolls may change every five minutes. During peak periods, registered users who self-declare as HOVs will receive a discount. Transit agency buses, trolleys and vans used for mass transportation, as well as certain other categories of users, will be exempt from tolls.

Governmental agencies will need to act quickly to obtain tolling authority for their projects under ELDP before the authority for the program expires on September 30, 2009. For further information about the ELDP or other federal tolling programs please contact Brian Papernik or Brandon Davis.

*Brian G. Papernik is an infrastructure attorney focusing on procuring and developing projects through public-private partnerships and design-build contracts. He can be reached at [bpapernik@nossaman.com](mailto:bpapernik@nossaman.com) or 213.612.7858.*

*Brandon J. Davis is an infrastructure attorney who has played a key role in the procurement and contract drafting processes for several large design-build and public-private partnership projects. He can be reached at [bdavis@nossaman.com](mailto:bdavis@nossaman.com) or 213.612.7894*

[1] The USDOT issued a press release announcing these two toll agreements on March 23, 2009. See <http://www.fhwa.dot.gov/pressroom/fhwa0909.htm> for a copy of the press release.

[2] Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, §1604(b), 119 Stat. 1144, 1250 (2005).

[3] 23 U.S.C. § 301 (2008). Five other USDOT tolling programs exist: (1) 23 U.S.C. § 129 provides statutory authority to toll certain federal aid facilities (excluding Interstate Highways); (2) 23 U.S.C. § 166 provides statutory authority to toll certain vehicles on HOV facilities; (3) the Value Pricing Pilot Program creates broad tolling authority and is limited to 15 member states; (4) the Interstate System Construction Toll Pilot Program creates authority to toll up to three greenfield projects; and (5) the Interstate System Reconstruction and Rehabilitation Pilot Program authorizes tolling for up to three Interstate Highway facilities that cannot be

maintained / improved without tolling.

[4] Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 1604(b)(2)(A)-(C), 119 Stat. 1144, 1250 (2005).

[5] Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 1604(b)(7)(A), 119 Stat. 1144, 1252 (2005).

[6] Express Lanes Demonstration Program-Performance Goals for the Texas Department of Transportation Express Lanes IH-635/IH35E and North Tarrant Express Lanes Projects, 74 Fed. Reg. 4069 (Jan. 22, 2009).

[7] Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 1604(b)(2), 119 Stat. 1144, 1250 (2005).

[8] Express Lanes Demonstration Program, 73 Fed. Reg. 6549 (Feb. 4, 2008).

[9] TxDOT conditionally awarded the North Tarrant Express project to NTE Mobility Partners on January 29, 2009 and conditionally awarded the IH 635 Managed Lanes Project to LBJ Infrastructure Group on February 26, 2009. Nossaman LLP represented TxDOT on both projects.

[10] See [http://www.nctcog.org/trans/committees/rtc/ManagedLanePolicies\\_091307.pdf](http://www.nctcog.org/trans/committees/rtc/ManagedLanePolicies_091307.pdf) for a copy of the North Central Texas Council of Governments' managed lanes policy.