



U.S. Department
of Transportation

**Federal Highway
Administration**

Memorandum

Subject: **ACTION**: Toll Credits for Non-Federal Share (DUE
DATE: COB December 7, 2015)

Date: November 20, 2015

In Reply
Refer To: HIPA-10

From: Thomas D. Everett
Director, Office of Program Administration

To: Division Administrators

The Office of Program Administration (HIPA), with assistance from several Headquarters offices and the Program Management Improvement Team, is initiating a review of the implementation of the toll credit provisions in 23 U.S.C. 120(i). Objectives of the review are to determine: (1) how the State departments of transportation (DOTs) demonstrate maintenance of effort (MOE) and calculate toll credits; (2) if State DOTs calculate toll credits in accordance with 23 U.S.C. 120(i) and FHWA's toll credit guidance; and (3) what documentation FHWA reviews and how it verifies expenditures and revenues used in MOE and toll credit computations. The review will consist principally of this call for information from the divisions, analysis of the information provided, and selected telephone interviews and site visits. Information generated during the toll credit review will be used to make a complete update of the toll credit guidance.

In the meantime, HIPA is issuing interim guidance, Attachment 1, to replace the February 8, 2007 memorandum regarding the toll credit non-Federal matching share provisions of 23 U.S.C. 120(i).

If your State uses toll credits, please send the information requested in Attachment 2 to the HIPA Official Mailbox at HIPAOfficialMailbox.fhwa@dot.gov before COB December 7, 2015. If your State has no toll facilities or does not use toll credits, please provide a negative response. Please direct questions to Greg Wolf at 202-366-4655 or Peter Kleskovic at 202-366-4652.

Attachments

CC:

Directors of Field Services

Associate Administrator for Infrastructure

Associate Administrator for Planning, Environment and Realty

Associate Administrator for Federal Lands

Chief Financial Officer

Director, Office of Innovative Program Delivery

Team Leader, Program Management Improvement Team

Interim Guidance - Toll Credit for Non-Federal Share
November 20, 2015

This interim guidance for implementing section 120(i) of title 23, United States Code (U.S.C.) replaces guidance contained in the memorandum, "Toll Credit for Non-Federal Share, Section 1905 of SAFETEA-LU", dated February 8, 2007. Toll credit calculations based on expenditures on or after the date of this interim guidance will be determined in accordance with this interim guidance.

Overview

The following key points apply to toll credits.

1. The toll facility generating the revenue must be open to public travel. Applicable facilities include toll roads, toll bridges, and toll ferries that serve as a link on a highway.
2. To accrue toll credits, facility operators in the State must collect or plan to collect tolls from the traveling public for the use of their facilities. In the case of initial construction of toll facility, toll credits may accrue as payments are made from bond revenues that are backed by and will be repaid from future toll revenues generated by the facility.
3. The amount of credit is based on cash outlays for capital improvements to public highway facilities that serve the purpose of interstate commerce. Debt service, toll collection costs, or routine maintenance, such as snow removal or mowing, cannot be included in the computation.
4. Toll credits may be claimed only for capital expenditures supported by toll revenues. When toll revenues are combined with Federal, State, or local agency funds to finance a project, those expenditures must be pro-rated by the share of project costs borne by toll revenues when calculating the toll credit.
5. Toll revenues used in calculating toll credits may include both toll receipts and ancillary income generated from the operation of the toll facility, such as revenues from service plaza concessions; proceeds from leases of the toll facility's right-of-way by utilities or other non-highway uses; or interest income earned by the toll facility operator.
6. Toll credits cannot be used on Emergency Relief projects.
7. When choosing Maintenance of Effort (MOE) Alternates 2 and 3, State DOTs and FHWA Division Offices are to review actual expenditures at the end of the current or future year to verify that they equal or exceed the initial estimated expenditures. If a State does not meet the future expenditure level, Division Offices will seek immediate replacement of Federal funds with State funds on projects where the credit was used.

General Requirements

- Credits earned may be applied toward the non-Federal matching share of programs authorized by title 23, U.S.C. or chapter 53 of title 49, U.S.C., except the credit may not be applied to projects funded with FHWA's emergency relief funds.
- Section 1528(c) of MAP-21 provided that projects that contribute to the completion of the Appalachian Development Highway System (ADHS) as identified in the latest approved Cost to Complete Estimate and Appalachian Local Access Projects be funded with a 100 percent Federal share through FFY 2021. While the statutory 100 percent Federal share exists for these types of projects; toll credits do not apply to ADHS projects through FFY 2021. However, work to repair, extend the life of, or modify completed segments of the ADHS is not eligible for a 100 percent Federal share and toll credits can be applied to these projects.
- Use of the toll credit provision can begin with FFY 1992. As discussed above, certain MOE alternates were only available beginning with FFY 1995. Additionally, the flexibility concerning use of the two-year rule in determining the average expenditures for the MOE determination is only available beginning with the FFY 1998 credit determination.
- The MOE determination only needs to be satisfied for the FFY for which a State earns the credit amount. Once a credit amount is appropriately established, it can be applied whether or not the State satisfies the MOE determination in later years. Additionally, any established credit does not lapse after a period of time but remains available until used by the State.
- A request to use toll credits on a specific federally funded project should be submitted to the appropriate Federal agency (FHWA, FTA, or NHTSA) administering the project.
- Where the toll credit is applied on a project, whatever Federal share is established at the time of project authorization must be used throughout the life of the project. Subsequent underruns, or overruns if a balance of unused credit is available, should be processed at the initially authorized Federal share.
- The State must establish a special account to track appropriate toll credits. The State will place into the special account the amount of credit that the FHWA has approved. When the State requests authorization of a project using the toll credit, it shall request that all or a portion of the non-Federal share be credited from the special account. These projects will be processed and administered in accordance with normal procedures except that the amount of funds authorized on the project and the Federal participation will be increased. When the State submits a request to use credits from the special account, it will reduce the account by the amount applied to a project. The amount of non-Federal share credited will be deducted from the unobligated balance of Federal-aid funds available and charged to the State's obligation limitation.

- Toll credits can be applied to projects retroactively, i.e., after project authorization. In general, a State may begin use of toll credits once a credit amount has been approved by the FHWA. However, it is acceptable on a Federal-aid project to conditionally authorize use of the toll credit provisions subject to a State providing appropriate credit and MOE certifications and their subsequent acceptance by the FHWA. The project agreement or modification should indicate what the Federal share is and that toll credits are being used in lieu of all or part of the required State match, resulting in up to 100 percent Federal funds being used on the project.
- At any time, a State may request approval of a toll credit for the current FFY or any past FFY starting with FFY 1992.

Approval Authority for Toll Credits

As provided in the February 8, 2007 memorandum, each State's Toll Credit Application and Maintenance of Effort (MOE) determination are to be approved by the FHWA Division Administrator (DA). Each DA is responsible for reviewing and approving toll credit applications received from the State. The DA will reply directly to the State concerning acceptance of its toll credit application. Additional information is provided below under "Request and Approval of Credit."

Determination of Amount of Credit

The amount of credit earned is based on revenues generated by the toll authority (i.e., toll receipts, concession sales, right-of-way leases or interest), including borrowed funds (i.e., bonds or loans) supported by this revenue stream, that are used by the toll authority to build, improve or maintain highways, bridges or tunnels that serve interstate commerce. The following requirements apply:

- The toll facility generating the revenue must be open to public travel.
- To accrue toll credits, facility operators in the State must collect or plan to collect tolls from the traveling public for the use of their facilities. In the case of initial construction of toll facility, toll credits may accrue as payments are made from bond revenues that are backed by and will be repaid from future toll revenues generated by the facility.
- The toll authority may be a public, quasi-public, or private entity. Although a public or private entity other than the State Transportation Department may have statutory authority to collect tolls in a particular state, the State Transportation Department may be the designated toll authority in some cases.
- The amount of credit is based on expenditures (actual cash outlays) by a toll authority for capital improvements to build, improve, or maintain public highway facilities that carry vehicles involved in interstate commerce (the degree does not matter). It cannot include expenditures for items such as routine maintenance work (i.e., snow removal or mowing),

debt service, or costs of collecting tolls. Eligible improvement activities may be carried out on facilities that have received Federal-aid funding in the past.

The calculation of the toll credit amount is based on the total cost of specific eligible improvement activities. Toll credits should be calculated as follows:

- The toll credit amount earned from expenditures for eligible improvement activities paid for entirely without Federal funds will be equal to the amount of the eligible expenditures.
- The toll credit amount earned from expenditures for improvements paid for with Federal funds (except Federal funds or financial assistance that must be repaid to the Federal government, such as that which may be provided under the TIFIA credit program) shall be reduced by the total percentage equal to the percentage of the total cost of building, improving, or maintaining the facility that was derived from Federal funds as shown in the following examples:

Example 1: Calculation of toll credits for expenditures on a \$10 million Federal-aid project where the Federal share is 80% (\$8 million) and the non-Federal share is 20% (\$2 million). If toll revenues are used to finance all of the non-Federal portion of this project, then the actual toll credits earned will be computed by reducing the non-Federal share (i.e. toll revenue expenditure) by the percentage of Federal participation in the total project cost. In this scenario, the percentage of Federal participation in the total project cost is 80%. Therefore, the toll credit amount earned from this expenditure would be computed by reducing the \$2 million toll revenue expenditure by 80% as shown:

$\$2 \text{ million} - (0.8 \times \$2 \text{ million}) = \$400,000 \text{ toll credit amount.}$

Example 2: Using the same project in Example 1, toll revenues are only used to pay for \$1 million of the \$2 million non-Federal share of this project. The percentage of Federal participation in the total project cost is still 80%. Therefore, the toll credit amount earned from this expenditure would be computed by reducing the \$1 million toll revenue expenditure by 80% as shown:

$\$1 \text{ million} - (0.8 \times \$1 \text{ million}) = \$200,000 \text{ toll credit amount.}$

- The State must calculate all previous toll revenue, expenditures, and toll credits based on the current present value.
- Toll authority expenditures are based on when the actual expenditures are made regardless of when the toll authority revenue is generated. For example, if funds are raised through the issuing of bonds that will later be repaid from toll revenues; the actual expenditure of the funds raised from the bonds represents the amount used in the credit determination.

- Expenditures for preliminary engineering or right-of-way acquisition for upcoming construction projects can be counted when calculating the credit amount.
- Expenditures can include the initial construction of a toll authority's own facility provided these construction costs are to be repaid with toll revenues.
- Expenditures can include revenues collected from a toll ferry provided the ferry serves as a link on a public highway.
- Funding grants received by a toll authority from the State Transportation Department or State legislature are not considered to be revenues generated by the toll authority and expenditure of these grants cannot be included when calculating the credit amount.
- The amount of the toll credit earned for a given Federal fiscal year (FFY) is based on the prior year's expenditures. For example, for a toll credit to be earned in FFY 2006, a State must determine if it had qualifying toll authority expenditures during the prior year, in this case FFY 2005. In determining the 12-month period to use for the prior year's expenditures, a State can use the 12-month period represented by the FFY or either the State or toll authority's fiscal year if the financial data is more readily available. In any case, whatever 12-month period is used in the first credit determination must continue to be used in later determinations.
- For chartered multi-State toll entities, the amount of toll credit must be divided equally among all the charter States.
- A credit for any given FFY can only be earned if a State satisfies the maintenance of effort determination, as described below, for that year.

Determination of Maintenance of Effort (MOE)

To be able to earn a toll credit, a State must satisfy the MOE determination required by 23 U.S.C. § 120(i)(2). The MOE determination is an assessment of a State's non-Federal transportation capital expenditures over a four-year period. The expenditures in the last year of the four-year period must exceed the annual average of the expenditures in the preceding three years of the four-year period.

A State may select one of three alternate four-year periods for the MOE determination as follows:

- MOE Alternate 1 - This alternate uses the four years prior to the FFY for which a credit is being determined. For example, if a toll credit is to be earned for FFY 2006, a MOE Alternate 1 determination would compare FFY 2005 expenditures with the annual average expenditures for FFYs 2002, 2003 and 2004.

- MOE Alternate 2 - This alternate uses the four-year period beginning three years prior to the FFY with the fourth year being the FFY itself. For example, if a toll credit is to be earned for FFY 2006, a MOE Alternate 2 determination would compare FFY 2006 expenditures with the annual average expenditures for FFYs 2003, 2004 and 2005.
- MOE Alternate 3 - This alternate uses the four-year period beginning two years prior to the FFY and extending through the year after the FFY. For example, if a toll credit is to be earned for FFY 2006, a MOE Alternate 3 determination would compare FFY 2007 expenditures with the annual average expenditures for FFYs 2004, 2005 and 2006.

Both MOE Alternates 2 and 3 represent increased risk for a State since these alternates rely on current and future year non-Federal transportation capital expenditures that could be significantly affected by economic turndowns or political changes. Should a State not meet the future expenditure levels and, thus, fail to be able to certify that a specific MOE test has been met; any credit earned based on the MOE determination would be lost. This would require immediate replacement of Federal funds with State funds on projects where this credit has been used and could create a cash flow problem for a State.

MOE Alternates 2 and 3 can only be used beginning with credit determinations for FFY 1995 or subsequent FFYs. Once a State has selected the MOE alternate it wants to use, it must continue to use this same MOE alternate in all future MOE determinations.

Two-year rule - Beginning with the credit for FFY 1998 or subsequent years, this special rule can be applied when making calculations under any of the previous MOE alternates. Normally, the MOE determination is made by comparing the fourth year of a four-year period against the average of the three previous years. Under the special two-year rule, if any one of the three previous years exceeds the average of the other two years by 130 percent, then the higher year can be dropped from the three-year average computation and instead the average is based on only two years.

This is illustrated as follows:

Example MOE determination for FFY 2006 based on normal three-year average vs. two-year rule --

A State wishes to establish a credit for FFY 2006 and plans to use MOE Alternate 1. Its expenditures for the four-year period for MOE Alternate 1 are:

FFY 2005 - \$440 million
FFY 2004 - \$420 million
FFY 2003 - \$560 million
FFY 2002 - \$400 million

Using the normal process, 440 would be compared to the previous three-year average of $(420+560+400)/3$ or 460. In this case, 440 is less than the previous three-year average of 460 so the State fails to meet the MOE test.

Using the two-year rule, for the previous three years used in the average, one year, 560, exceeds the average of the other two, $(420+400)/2=410$, by more than 130 percent (560 is greater than 410×1.3 or 533). As a result, the high year, 560, can be dropped from the average computation. In this case, 440 is then compared to the two-year average of 410 and the State meets the MOE test.

The two-year rule provides some flexibility to account for large spikes in expenditures. The two-year rule can be applied at any time for FFY 1998 or subsequent FFY credit determinations.

The following requirements also apply to the MOE determination:

- The calculation of the non-Federal transportation capital expenditures must include expenditures to build, improve, or maintain (other than routine maintenance) public highways. As a minimum, the calculation must include such expenditures by the State for public highways. Expenditures would include projects wholly funded by the State plus the State's shares of all federally funded highway projects. At the State's option, the calculation can also include qualifying expenditures by toll authorities or local officials for public highways, or expenditures by the State or local authorities on transit systems within the State. For consistency, those types of expenditures included in the first MOE determination must be included in all subsequent MOE determinations.
- In determining the 12-month period to use for the fiscal years in the MOE determination, similar to the credit determination, a State can use the 12-month period represented by the FFY or the 12-month period for the fiscal year(s) of the entities whose expenditures are included in the MOE. Whatever 12-month period(s) are used in the first MOE determination must continue to be used in later determinations.

Request and Approval of Credit

- A State's request for approval of a credit shall identify the credit amount by FFY, indicate the MOE alternate (1, 2, or 3) being used, and provide a summary of expenditure amounts to support the MOE determination.
- A State's request shall include a certification by the State that: (1) the credit and MOE determinations have been based on expenditures for improvements that met the above criteria; and (2) the State has on file adequate documentation to support the amounts included in these determinations. This documentation should be available for audit or inspection.
- The State's request should be submitted to the FHWA State Division Office (Division Office). The Division Office should review the request for conformance with the credit

provision requirements. Each DA will be responsible for reviewing and approving toll credit applications received from the State. The DA will reply directly to the State concerning acceptance of its toll credit application.

- The State will be required to request toll credit amounts on a FFY basis and a specific MOE determination method as outlined in this memorandum. The Division Office will maintain a record of the State's requests along with a record of the cumulative use of toll credits applied toward the non-Federal share of eligible projects. The method of tracking toll credits earned and used must allow for an accurate accounting of the current balance of a State's available toll credits.
- The Division Office will also be responsible for coordinating the use of toll credits with the Federal Transit Administration (FTA) and the National Highway Traffic Safety Administration (NHTSA). The Division Office will notify both FTA and NHTSA whenever toll credits are approved.
- If a State decides to use MOE Alternate 2 or 3, expenditure data may not be available yet. In this case, the State's submission will not include a "certification" covering the MOE determination but instead will be a request to use either MOE Alternate 2 or 3. Since both of these alternates rely on determining actual expenditures at a future point in time, the MOE certification will subsequently be made by the State once the time period involved has transpired and the actual expenditures are known.

Please direct questions to Greg Wolf at 202-366-4655 or Darren Timothy at 202-366-4051.

REQUESTED DOCUMENTATION FOR TOLL CREDIT REVIEW

Please provide the following information to HIPAOfficialMailbox.fhwa@dot.gov before COB December 7, 2015. The purpose of this data collection is to obtain information to be able to determine if State DOTs demonstrate MOE and calculate toll credits in accordance with 23 U.S.C. 120(i) and the February 8, 2007 guidance. It will also be used to assess if FHWA are receiving and reviewing appropriate documentation before approving toll credits.

1. Copy of the most recent toll credit application from your State, including:
 - a. The State's Toll Credit Certification statement.
 - b. Documentation and computations used to determine the toll credit amount, including information on toll revenues and project expenditures used to accumulate toll credits.
 - c. Documentation and computations used to determine the MOE, including identification of the MOE alternate used by the State.
2. Division's approval memorandum and related correspondence with the State.
3. Methodology for tracking availability and use of toll credit balances, including coordination with the Federal Transit Administration and the National Highway Traffic Safety Administration where appropriate.