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August 9, 2023

**Via U.S. Mail and Email**

Renee Stineman, Esq.  
Chief Counsel  
General Counsel Division  
Oregon Department of Justice  
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Salem, Oregon 97301  
Renee.Stineman@state.or.us

Dear Ms. Stineman:

I represent Clackamas County in connection with its review of and public comment on the Oregon Department of Transportation's (ODOT) February 2023 *I-205 Toll Project Environmental Assessment* (Environmental Assessment). I write to you today to convey the Board of County Commissioner's continuing frustration with ODOT's handling of this matter, and to request that ODOT honor its obligations under the National Environmental Protection Act (NEPA). Clackamas County also requests that ODOT supply critical financial information regarding the I-205 Toll Project to the County.

As you may know, Clackamas County is a participating agency in the NEPA review of the I-205 Toll Project and submitted extensive comments on the Environmental Assessment in April. The County devoted significant resources to developing these comments, including hundreds of hours of staff time. Clackamas County also procured the services of an environmental consultant to assist their efforts, as well as my firm to provide legal advice regarding the NEPA process.<sup>1</sup> The County was forced to incur these costs because the Environmental Assessment was fundamentally flawed and ignored many of the numerous comments that County technical staff presented to ODOT during meetings and other communications preceding the Environmental Assessment. Most significantly, the Environmental Assessment did not properly disclose or assess the unmitigated impacts of diverted traffic from I-205 onto County roadways and local streets that would result from tolling I-205 at the Abernethy Bridge and Tualatin River Bridges crossings.

Given these efforts, it was of great surprise to the County that ODOT announced in June that it was reducing the scope of the planned improvements to I-205, including indefinitely postponing

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<sup>1</sup> Clackamas County was not alone in this effort; several of the County's municipal partners, including the City of West Linn and Oregon City, also devoted substantial time and effort to submit their own comments on the Environmental Assessment.

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the second phase of construction (e.g., Phase 2), and that it would be issuing a Supplemental Environmental Assessment (Supplemental EA) to address the change in the scope of project. The new project includes only tolling on the Abernethy Bridge and eliminates the third through lane in each direction of I-205 between the Stafford Road interchange and the OR 43 interchange, the northbound auxiliary lane between OR 99E and OR 213, and the toll gantry at the Tualatin River Bridge. The revised project also violates the intent of the Oregon Legislature in passing H.B. 2017, which identified *all* the planned improvements to I-205 as a priority project, not just tolling at the Abernethy Bridge.

Clackamas County is particularly concerned that the revised I-205 Toll Project contemplated by ODOT will have even more environmental impacts than the original project. The new project comes with all the downsides of the original – diversion of drivers on to County roads – and none of its upsides, *i.e.*, road widening and improvements to interchanges that would partially address congestion, as well as the seismic improvements to nine other bridges in the corridor. Moreover, it is unclear what mitigation, if any, ODOT is proposing to offset the environmental impacts that will result from tolling and subsequent diversion in the revamped project. In the past, ODOT has largely ignored the input of Clackamas County’s technical staff relating to the mitigation of impacts. We therefore implore ODOT to include a more robust mitigation plan in the Supplemental EA that considers the concerns of the County’s experts. *See* 40 C.F.R. § 1502.14(e).<sup>2</sup>

While Clackamas County agrees with ODOT that a Supplemental EA with public comment is legally required under NEPA, ODOT is still required to respond to the comments submitted in April because, as ODOT has noted, the Phase 2 projects are merely delayed, not eliminated. NEPA regulations require that ODOT and the Federal Highway Administration (FHWA) analyze the “effects or impacts” of the project, *see* 40 C.F.R. § 1501.3(b), which are defined to include “[c]umulative effects, which are effects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and *reasonably foreseeable actions.*” 40 C.F.R. § 1508.1(g) (emphasis added). The Phase 2 projects are clearly “reasonably foreseeable” projects under NEPA: ODOT could reinstate them at any time, as ODOT acknowledged in its June 2023 *Urban Mobility Strategy Finance Plan*. *See* 40 C.F.R. § 1508.1(aa) (“‘Reasonably foreseeable’ means sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision.”). Therefore, it is vital that ODOT respond to comments addressing the impacts from those projects and the mitigation (or lack thereof) of those impacts. *See* 40 C.F.R. § 1503.4. These aspects of the project must be reviewed now so that cumulative impacts of the entire project can be evaluated under NEPA. *See* 40 C.F.R. § 1508.1(g). Accordingly, ODOT should evaluate the revised project as a new “alternative” to the previously reviewed alternatives in the Environmental Assessment, receive

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<sup>2</sup> *See also* CEQ’s *Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact*, 76 F.R. 3843, 3848 (“Mitigation measures included in the project design are integral components of the proposed action, are implemented with the proposed action, and therefore should be clearly described as part of the proposed action that the agency will perform or require to be performed.”).

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public comment on the new alternative, and respond to all the comments received in a Final Environmental Assessment.

Alternatively, FHWA and ODOT should formally combine the NEPA review of the I-205 Toll Project with the required environmental review of the Regional Mobility Pricing Project (RMPP). In its comments to the Environmental Assessment, Clackamas County urged ODOT to combine the environmental review for the I-205 Toll Project with the RMPP to analyze the cumulative impacts of the two projects. This approach would be consistent with FHWA's preference for "tiering" of major transportation actions, whereby a "first tier" environmental review focuses on broad issues, such as areawide air quality, and "second tier" reviews focus on "project impacts, costs, and mitigation measures." 23 C.F.R. § 771.111(g); *see also* 40 C.F.R. § 1501.11(c). Without this cumulative assessment, FHWA will be unable to make a determination about the potential significance of the environmental impact, as required by NEPA. *See* 40 C.F.R. §§ 1501.3(b) and 1508.1(g). Moreover, the public and County will be deprived of the big picture view in terms of real impacts, environmental consequences, viable alternatives, and mitigation solutions if ODOT reviews these projects in an improperly segmented fashion. We noted in our prior comments that the environmental review processes for the I-205 Toll Project and RMPP were close enough in time that a combined environmental review would be efficient and result in a more thorough review. Combining the two reviews makes even more sense now that the I-205 Toll Project environmental review period has been extended and will overlap with the RMPP's review.

Finally, Clackamas County formally requests that ODOT provide all the financial information, financial modeling, or other data that it used to develop the June 2023 Urban Mobility Strategy Finance Plan. The County has repeatedly asked ODOT for financial information related to the I-205 Toll Project, and ODOT has not been forthcoming. It is crucial that the County be able to review information related to ODOT's forecast of tolling income, as well as ODOT's projected allocation of these funds, so that it can properly analyze the proposed project(s) and the impacts on the County.

The Board of County Commissioners looks forward to ODOT's response and hopes to continue the dialogue between ODOT and the County on this important issue. I am also available to discuss these issues with you at your convenience. Thank you for your consideration of the County's comments and requests.

Very truly yours,



Daniel Mulvihill

cc: Kris Strickler, Director, ODOT (via email)

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Julie Brown, Chair, Oregon Transportation Committee (via email)  
Keith Lynch, Division Administrator, FHWA (via email)  
Rep. Lori DeRemer, U.S. House Representatives (via U.S. Mail)  
Rep. Andrea Salinas, U.S. House of Representatives (via U.S. Mail)  
Sen. Jeff Merkley, U.S. Senate (via U.S. Mail)  
Sen. Ron Wyden, U.S. Senate (via U.S. Mail)  
Gov. Tina Kotek (via U.S. Mail)  
Rep. Dan Rayfield, Speaker of the House (via email)  
Sen. Rob Wagner, Senate Majority Leader (via email)  
Clackamas Caucus (via email)  
Co-Chairs of the Joint Committee on Ways and Means (via email)  
Tootie Smith, Chair, Board of County Commissioners (via email)