

## **Fox, Amy (FHWA)**

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**From:** Harkins, Michael (FHWA)  
**Sent:** Thursday, August 26, 2010 5:55 PM  
**To:** Fox, Amy (FHWA); Holian, Thomas (FHWA)  
**Cc:** Vaughn-Fair, Sharon (FHWA); Cough, David (FHWA); Mantione, Ross (FHWA); Nanov, Peter (FHWA); Wolf, Greg (FHWA); Kleskovic, Peter (FHWA)  
**Subject:** RE: RE: DRJTBC Compact for certain Delaware River Bridges

Amy,

I have reviewed the Delaware River Joint Toll Bridge Commission (DRJTBC) Compact, the relevant Federal laws authorizing the DRJTBC Compact, relevant case law concerning the authority of the DRJTBC to toll bridges under its control and jurisdiction, and the legal opinions from New Jersey and Pennsylvania, and it is my opinion that the FHWA may enter into a 129 agreement with New Jersey, Pennsylvania, and DRJTBA to authorize the imposition of tolls on the I-95 Scudder Falls Bridge so long as the bridge is replaced, and the impacts of tolling are considered under NEPA.

### 23 USC 129

Under 23 USC 301, all highways constructed under the provisions of title 23, USC, shall be free from tolls of all kinds except as provided in 23 USC 129. With respect to bridges, 23 USC 129(a)(1)(C) provides that the Secretary shall permit Federal participation in the reconstruction or replacement of a toll-free bridge or tunnel conversion of the bridge or tunnel to a toll facility. Upon conversion of such bridge or tunnel into a toll facility, the Secretary and the public authority having jurisdiction of the bridge (including the State DOT) must enter into a toll agreement providing that the revenues collected from the operation of the toll facility will be used first for debt service, for a reasonable return on investment of any private party financing the project, and for the costs necessary for the proper operation and maintenance of the facility. If the State certifies annually that the tolled facility is being adequately maintained, then the State may use any excess toll revenues for other title 23 eligible purposes.

Since the Scudder Falls Bridge was constructed with Federal-aid funds, 23 USC 301 applies. If the States wish to toll this bridge, then they may do so under 23 USC 129(a)(1)(C) in conjunction with a reconstruction or replacement project (note that 23 USC 129(a)(1)(C) applies to both Interstate and non-Interstate bridges and tunnels).

### DRJTBC Compact

Pursuant to the existing DRJTBC Compact, the following powers are granted to the DRJTBC:

- Article V – DRJTBC may collect tolls on any bridge which it constructs and operates;
- Article X(a) – DRJTBC may acquire, construct, improve and operate bridges north of the boundary between Philadelphia and Bucks County, PA;
- Article X(b) – DRJTBC may replace one or more bridges north of the boundary line between Philadelphia and Bucks County, PA; and
- Article X(i) – DRJTBC may toll any bridge constituting a single project, but may not toll any bridge currently operated as a free bridge, but only for bridges constructed and acquired by the Commission under the compact.

In 1912 and 1913, the States of New Jersey and Pennsylvania, respectively, enacted laws creating a commission for the purpose of acquiring toll bridges over the Delaware River between New Jersey and Pennsylvania north of the Stone Arch Bridge at Trenton (according to the Compact, the southern boundary of the Commission's jurisdiction is the boundary between Philadelphia and Bucks County, PA). These acts provided that immediate

upon the acquisition of the toll bridges, the commission must cease the collection of tolls and maintain the bridges as free facilities. Subsequently, in 1934, the DRJTBC compact was signed and, pursuant to a 1931 PA statute and 1934 NJ statute, the DRJTBC was given the authority to finance the construction of new bridges with the collection of tolls. The compact was approved by Congress on Aug. 30, 1935 (49 Stat. 1058). The compact was amended in 1947 with the enactment of reciprocal statutes by PA and NJ providing that the DRJTBC may also impose tolls to replace any of its existing bridges with new bridges. Congress approved the 1947 amendments on August 30, 1935, (61 Stat. 752), with the condition that any such bridges become free after the costs have been paid. In *Barton v. Delaware River Joint Toll Bridge Commission*, the court held that the DRJTBC clearly has the authority under Compact to toll newly constructed bridges and to demolish and replace free bridges with toll bridges. 120 F. Supp. 337, 351 (D.N.J. 1954), *aff'd* 216 F.2d 717 (3<sup>rd</sup> Cir. 1954).

In 1986, the Compact was further amended to permit the Commission to use the tolls collected on its toll facilities for the expenses of any of the bridges under the DRJTBC's jurisdiction. The Supplemental Agreement was approved by Congress in section 151 of the STAA of 1987. In approving the compact, a number of specific provisions under which Congress intended to guide the interpretation of the Supplemental Agreement. These provisions concerned the repayment of Fed funds of the I-80 Delaware Water Gap Bridge in order to relieve the bridge from title 23 restrictions and authorize the DRJTBC to toll such bridge; to permit the DRJTBC to toll the I-78 bridge between Easton, PA, and Phillipsburg, NJ, pursuant to the conditions in 23 USC 129; establish that the Commission's toll rates were subject to review by the Secretary of DOT pursuant to authority requiring the Secretary to determine whether toll rates on bridges were "just and reasonable" (which has since been repealed); to establish that Congress is not authorizing the DRJTBC to toll any of the existing free bridges on which tolls were not imposed on January 1, 1986; and to establish that Congress is not approving the construction of a toll bridge in the previously designated I-895 corridor (at the time, Fed law required an assurance that a toll facility would not be constructed when a State withdraws a segment from the Interstate). In considering the bill to approve the Supplemental Compact, USDOT General Counsel Jim Marquez transmitted a letter to Congress to explain the DOT's views on how the provisions of the bill and the Compact would impact 23 USC 129. In the House, Senate and Conference Reports, Congress stated its intent that the provisions of the act approving the Compact were to be construed consistently to Mr. Marquez's letter. In the letter, among other things, Mr. Marquez stated his interpretation that the bill would not authorize the imposition of tolls on any of the existing free bridges under the jurisdiction of the DRJTBC, although the Compact itself could be construed as allowed such tolling.

Accordingly, under the DRJTBC Compact, Supplemental Agreement, and Congressional provisions relating to Congress' approval of the Compact and Supplemental Agreement, the DRJTBC may toll any newly constructed bridge, including a bridge that replaces an existing free bridge that has been demolished.

### PA and NJ Legal Opinions

The legal opinions we received from NJ Counsel to the DRJTBC, dated 7/26/2010, and PA Counsel to the DRJTBC, dated 7/26/2010, both conclude that under the Compact, Supplemental Agreement, and NJ and PA law, the DRJTBC may toll the Scudder Falls replacement bridge. While both reach the same conclusions, the letters do have a few differences in their assumptions and analysis. Specifically, the opinions have the following differences:

- In assumption #3 for the NJ opinion, NJ counsel assumes that a valid 129 agreement will be executed for the replacement projects. However, in assumption #3 for the PA opinion, PA counsel assume that the project can move forward without the execution of a 129 agreement.
- In the bottom of the 4<sup>th</sup> page and top of the 5<sup>th</sup> page of the PA opinion, PA counsel states that the Supplemental Agreement required that any post-1986 replacement bridge not be funded exclusively with Federal funds. There is no such reference in the NJ opinion to the Supplemental Agreement prohibiting any post-1986 replacement bridge from being funded with Federal funds. Instead, the NJ

opinion on page 4, merely states that the Supplemental Agreement extended the ban on tolling free bridges to bridge that were not tolled as of January 1, 1986.

I agree with the conclusion of both opinions that the DRJTBC may toll the Scudder Falls replacement bridge. However, I agree with NJ counsel, and not PA counsel, that a 129 agreement is necessary in order for the project to move forward. The PA counsel should be informed of our view with regards to the necessity of a 129 agreement.

Also, I am not sure that I agree with PA counsel that any significance was made with respect to the use of Federal funds has any bearing in a bridge replacement project under the Supplemental Agreement. I do not read anything in either the Federal legislation approving the Supplemental Agreement or the Supplemental Agreement itself regarding the authority to toll being dependent on the source of funding for a bridge replacement project. Rather, my read is in line with the NJ opinion that the authority of the DRJTBC to toll under the Supplemental Agreement depends on whether the bridge is being replaced. However, since no Fed funds are being contemplated for the replacement project, and since Federal law (other than ARRA, which has already been fully obligated) does not authorize project to be 100% federally funded, I do not think that this factor in the PA opinion has much, if any, significance.

#### Environmental Assessment

If DRJTBC is going to toll this project, then the EA will need to be revised to consider the impacts of tolling prior to the FONSI because that may impact whether you do an EIS prior to the execution of a 129 agreement. If a FONSI gets issued without considering the impact of tolling, then a reevaluation will be necessary prior to the execution of a 129 agreement.

Michael

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**From:** Fox, Amy (FHWA)  
**Sent:** Thursday, August 19, 2010 4:44 PM  
**To:** Holian, Thomas (FHWA); Harkins, Michael (FHWA)  
**Cc:** Vaughn-Fair, Sharon (FHWA); Cough, David (FHWA); Mantione, Ross (FHWA); Nanov, Peter (FHWA)  
**Subject:** RE: DRJTBC Compact for certain Delaware River Bridges

#### Background:

The Scudder Falls bridge will be constructed without Federal funding, however there is a Point of Access Study which must be approved by FHWA. Because of this Federal action, FHWA is the lead agency on the environmental document. The EA was approved for circulation in December of 2010. Shortly thereafter, the DRJTBA announced plans to toll the bridge. Prior to approving a FONSI, we would like to ascertain whether there is any reason that tolling cannot be installed. Following this determination we would most likely need to develop a toll agreement. Additional public involvement and NEPA documentation would likely be necessary.

Please find attached for your review the DRJTBC legal opinion (opinion from a NJ law firm and an opinion from a PA law firm) on tolling the I-95, Scudder Falls Bridge. You should also know that the Bridge Commission is now pursuing a Public Private Partnership which was announced by the Governor of Pennsylvania recently.

Please let me know if you need a copy of the Compact. I had originally sent it to Sharon Vaughn-Fair and Karen Hedlund for review.

Thanks,

Amy Fox

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