

Assessment of Options to Streamline the Toll Rate Setting Process

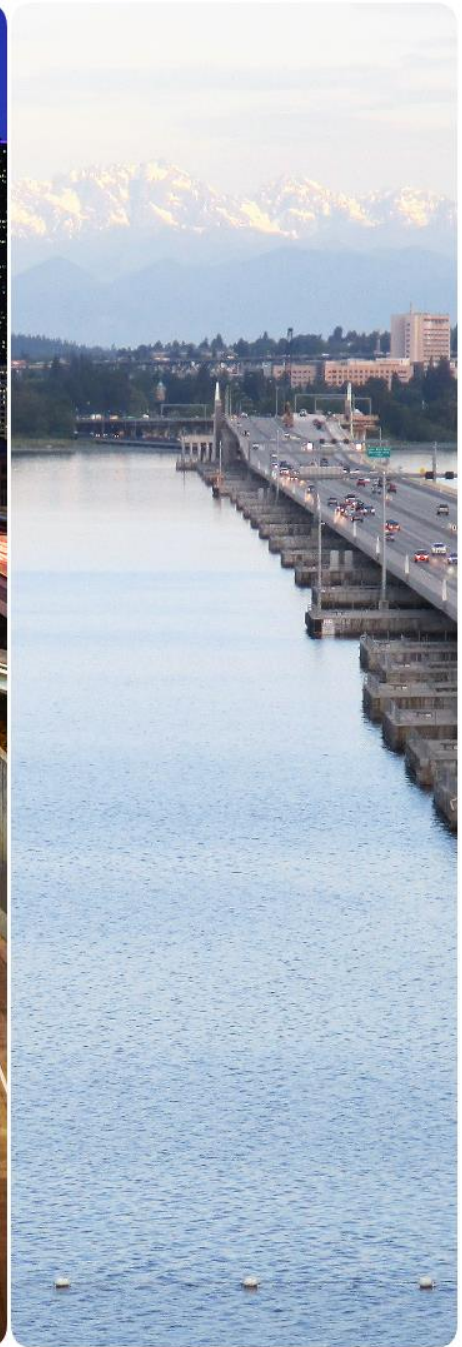


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State of Washington

TRANSPORTATION COMMISSION

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July 30, 2024

Dear Members of the Senate & House Transportation Committees:

On behalf of the Washington State Transportation (WSTC), I am pleased to submit the final report of findings and recommendations on options to streamline the current toll rate setting process. This study was directed in the 2023-25 Transportation Budget (ESHB 1125, Sec. 205).

The Legislature directed the WSTC to conduct this assessment with intent to identify approaches to streamlining the current process for setting toll rates and policies for eligible tolling facilities, while maintaining public access and providing opportunities to provide input on proposals. The Legislature further directed that the assessment includes a review of rate-setting processes used by toll authorities in other states. The recommendations contained herein represents the culmination of research, learning, and findings of the WSTC.

We hope you find this information helpful and supportive of your deliberations.

Sincerely,

Deborah C. Young, Chair
Washington State Transportation Commission

Executive Summary

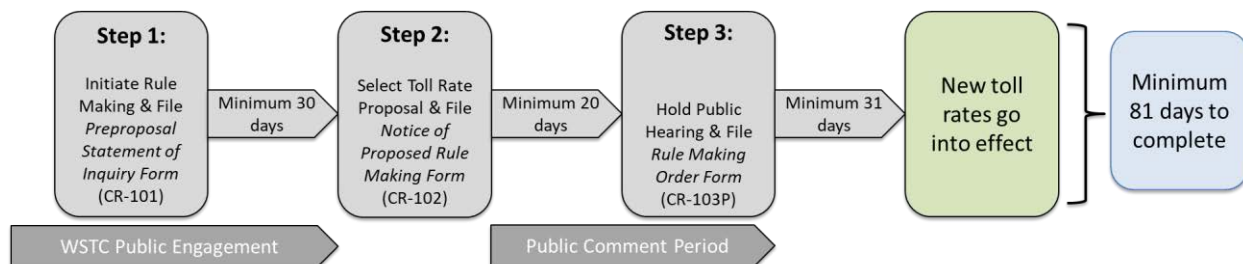
In the 2023 Transportation Budget (ESSB 1125, Sec. 205), the Legislature directed the Washington State Transportation Commission (WSTC) to conduct a study to identify approaches to streamlining the current toll rate setting process.

Current Process and Challenges

The current process for setting toll rates and policies is governed by the Administrative Procedure Act (APA)¹ which requires a standardized framework for developing regulations that is applicable to all state agencies regardless of circumstance, impact, or need. This process – commonly referred to as rule making – is exceedingly lengthy and inflexible. Barring any schedule or process challenges, rule making takes a minimum of 81 days (under three months) to complete. However, in practice **this process takes the WSTC an average of 160 days (over five months) to complete when setting toll rates.**

Meanwhile, financial requirements for Washington’s tolled facilities are largely dictated by strict, legally binding bond covenants, with failure to meet them carrying serious outcomes. Due to the APA’s rigidity and length of time that it takes to complete, when unforeseen financial needs arise on a tolled facility arise, the state’s financial standing is placed at risk due to the inability to respond to demands in a timely manner. Additionally, this limits the WSTC’s ability to expand its public engagement efforts as doing so would delay implementation and cause greater revenue needs.

The chart below depicts the major steps that must be followed under the APA’s current standard rule making requirements.



The current APA process also impacts transparency and public trust. This is largely due to the fact that public input received after the official toll rate proposal has been issued under step 2 above, cannot practically be addressed without causing significant delays (at least 50 days). This is due to APA requirements that if a proposal is substantively modified, the rule making process must essentially restart. To avoid this further delay, the WSTC does not typically modify its proposals, resulting in a commonly observed public perception that the WSTC has already made its decision, ie: it’s a “done deal.”

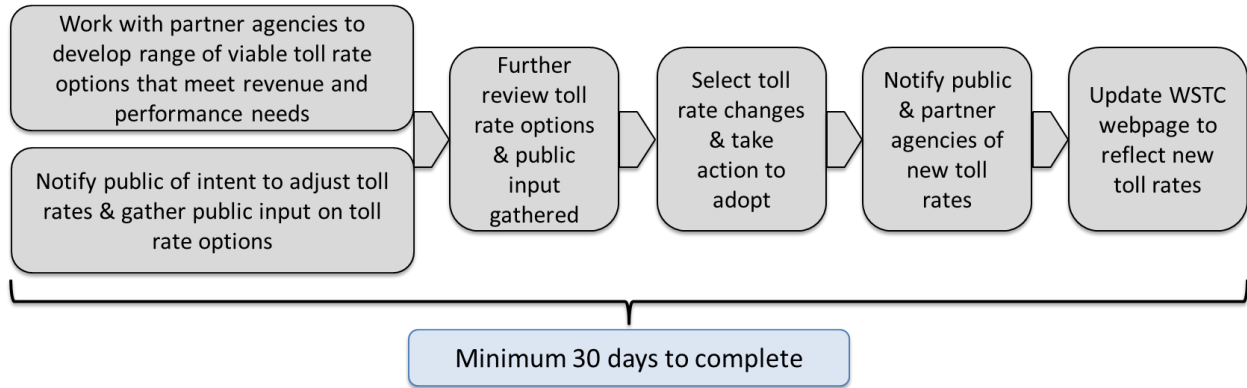
Further details on the current process for setting toll rates and the associated challenges can be found on page 5 of this report.

¹ RCW 34.05 – Administrative Procedure Act: <https://app.leg.wa.gov/rcw/default.aspx?cite=34.05>

Recommended Approach

In order to fully address the challenges outlined above, **the WSTC recommends the Legislature exempt toll setting from the APA and establish new, separate, requirements in law for setting toll rates.**

The chart below shows the major steps a new, more efficient process could look like.



This approach would allow the WSTC to expand its public engagement efforts without causing significant delays and ensure that public input genuinely influences final decisions. It would also importantly provide great efficiency gains in the process, allowing the WSTC to implement toll rate adjustments in as little as 30 days when necessary to meet financial or performance needs.

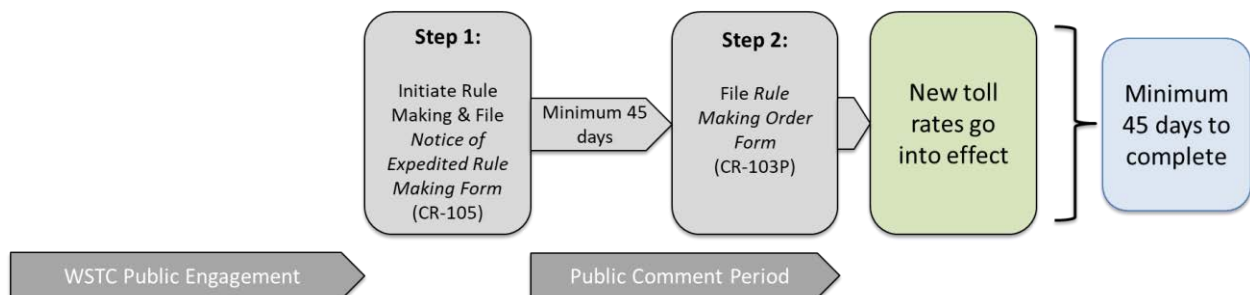
Further details on this recommended approach can be found on page 8 of this report.

Alternative Approach

As a secondary option, changes could potentially be made within the existing APA structure that would provide some improvement to the toll setting process. Possible changes to the APA under this approach could include:

- Expanding the allowable use of Expedited Rule Making to explicitly include toll setting; and
- Allowing toll rate changes to take effect immediately upon filing the final rule making paperwork, as opposed to having to wait an additional minimum of 31 days.

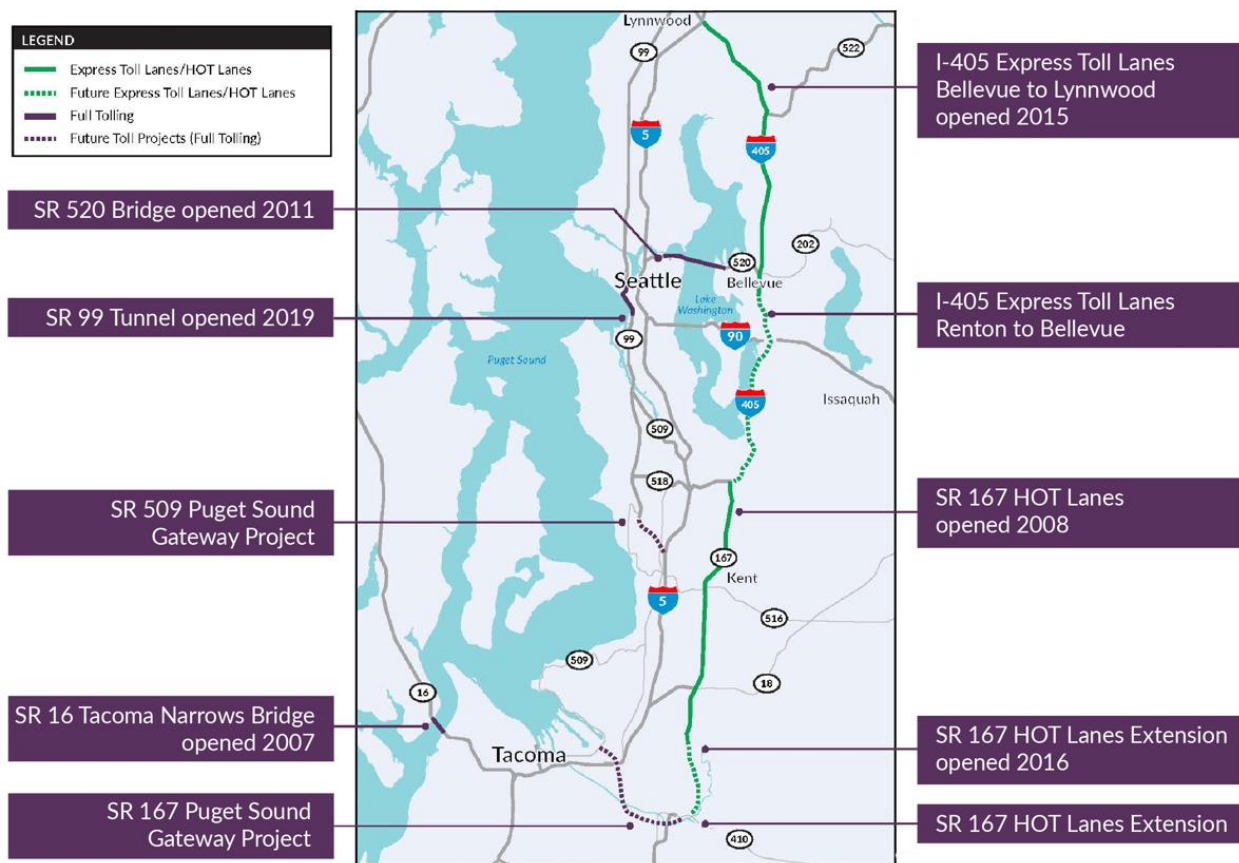
If both of these changes were made, the following chart shows what this process could look like.



While these changes would provide some improvement over the current process, this alternative approach would not fully address all of the challenges associated with the current process. This is because a public comment period would still be required after the WSTC has issued its official toll rate proposal. As with the current process, any significant changes to the proposal would require the WSTC to restart the process. Further details on this alternative approach can be found on page 9 of this report.

Introduction

As the State Tolling Authority, the Washington State Transportation Commission (WSTC) is responsible for setting toll rates, toll rate policies, and related fees for all of Washington state's tolling facilities². Currently this includes: the SR 520 Bridge, the SR 16 Tacoma Narrows Bridge, the I-405 express toll lanes, the SR 167 high occupancy toll lanes, and the SR 99 tunnel. In the near future, this will also include the SR 509 and SR 167 Expressways (Puget Sound Gateway Program), as well as the I-5 Bridge over the Columbia River, with tolls on these facilities expected to go into effect in the mid-to late 2020s.



Map of Current and Future Washington State Tolling Facilities Located in the Puget Sound Area

In Washington state, tolling is used to help fund public improvement projects, manage congestion, improve mobility, and generate sufficient revenues for ongoing operation and maintenance costs. Most tolling facilities carry their own stringent bond covenants and financial requirements, requiring swift action in times of financial duress. However, the process for setting toll rates is cumbersome, inefficient, and lacks the flexibility that is necessary for the WSTC to quickly adjust tolls to meet revenue and performance requirements when unanticipated needs arise. As tolling continues to advance and expand in the state, it is imperative that toll setting be carried out in a more nimble and efficient manner to ensure critical financing and performance requirements can be met.

² RCW 47.56.850 – Transportation commission as state tolling authorities:
<https://apps.leg.wa.gov/rcw/default.aspx?cite=47.56.850>

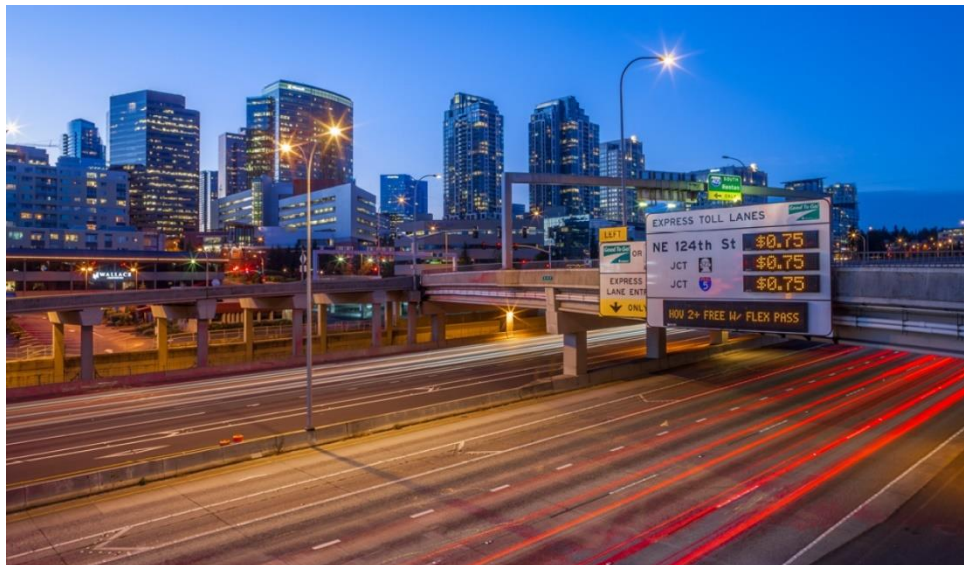
The 2023-25 Transportation Budget directed the WSTC (Sec. 205) to carry out an assessment aimed at identifying approaches to streamlining the current toll rate setting process:

“(6) The transportation commission shall conduct an assessment aimed at identifying approaches to streamlining the current rule making process for setting toll rates and policies for eligible toll facilities, while maintaining public access and providing opportunities to provide input on proposals. The intent of the assessment is to identify rule-making approaches that support the state’s ability to set toll rates and policies in a timely and efficient manner, so that the state can meet anticipated funding obligations. This assessment should include a review of rate-setting processes used by toll authorities in other states. The transportation commission shall provide recommendations to the transportation committees of the legislature by July 31, 2024.”

To accomplish this, the WSTC conducted the following tasks:

- Assessed existing state laws to document and establish the current legal requirements and process for rule making when it comes to toll setting.
- Researched potential rate setting alternatives used by tolling authorities in other states.
- Gathered input from stakeholders and subject matter experts to inform the development and selection of potential rate setting alternatives.

This assessment includes an overview of the WSTC’s current process for setting toll rates, research of toll setting processes that are used in other states, and two alternative approaches to the current toll setting process in Washington state.

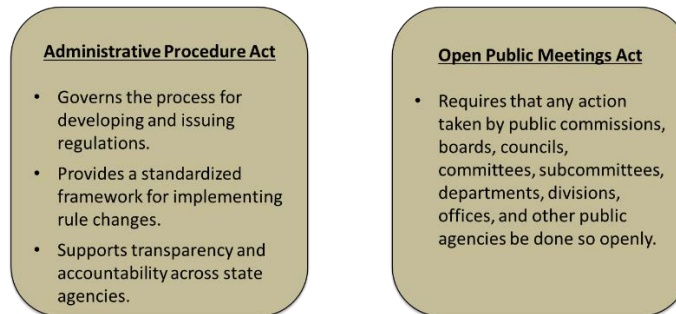


I-405 Express Toll Lanes in Bellevue

Current Process for Setting Toll Rates in Washington State

Guiding Statutes

All current toll rates and toll rate policies for Washington’s tolling facilities reside in Chapter 468-270 of the Washington Administrative Code (WAC)³. The process for making changes to the WAC is guided by two primary statutes: RCW 34.05 – the Administrative Procedure Act (APA)⁴; and RCW 42.30 – the Open Public Meetings Act⁵.



The APA includes three distinct processes for making changes to the WAC: *Full Rule Making*; *Expedited Rule Making*; and *Emergency Rule Making*:

- **Full Rule Making** is the standard process for implementing rule changes and ensures thorough review and public participation.
- **Expedited Rule Making** is a more streamlined process that skips some of the steps of Full Rule Making.
- **Emergency Rule Making** allows rule changes to go into effect immediately on a temporary basis for up to 120 days.

Both Expedited and Emergency Rule Making are only allowable when certain criteria are met, as outlined in RCW 34.05.353⁶ and RCW 34.05.350⁷. However, WSTC’s rate settings rarely meet these requirements, and so therefore, Full Rule Making is the WSTC’s standard process for setting or adjusting toll rates or toll rate policies.

Current Full Rule Making Process

Step 1: Initiate Rule Making and File Preproposal Statement of Inquiry Form (CR-101):

Once the need for a toll rate adjustment has been identified, the WSTC will file a *Preproposal Statement of Inquiry Form* (CR-101) with the Office of the Code Reviser. The purpose of the CR-101 is to notify the public of an agency’s intent to adopt or adjust a rule, and must be filed in the state registry a minimum of 30 days before moving onto the next step in the process. In addition to this, the WSTC provides the public notification through various outlets including WSTC public meetings, press releases, the WSTC website, and social media posts.

³ Chapter 468-270 WAC – Setting Toll Amounts for Toll Facilities in Washington State:

<https://app.leg.wa.gov/wac/default.aspx?cite=468-270>

⁴ Chapter 34.05 RCW – Administrative Procedure Act: <https://apps.leg.wa.gov/rcw/default.aspx?cite=34.05>

⁵ Chapter 42.30 RCW – Open Public Meetings Act: <https://apps.leg.wa.gov/rcw/default.aspx?cite=42.30>

⁶ RCW 34.05.353 – Expedited Rule Making: <https://apps.leg.wa.gov/rcw/default.aspx?cite=34.05.353>

⁷ RCW 34.05.350 – Emergency Rule Making: <https://apps.leg.wa.gov/rcw/default.aspx?cite=34.05.350>

During this time, the WSTC will work with the Washington State Department of Transportation (WSDOT) and the Office of the State Treasurer (OST) to assess the facility’s revenue and performance needs and develop a range of viable toll rate options that meet those needs. This work includes conducting detailed analysis such as traffic and revenue studies to analyze future travel demand and revenue projections.

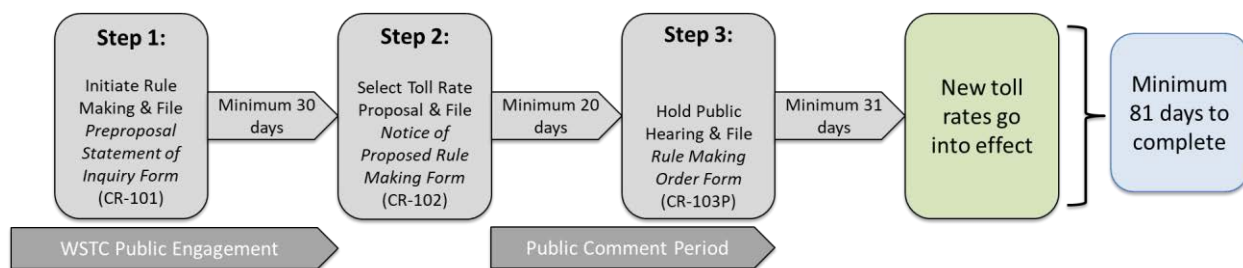
In addition, the WSTC will engage with the public to gather input on the toll rate options under consideration. The WSTC often begins these efforts prior to the CR-101 filing, and they typically include holding a public survey, gathering input at public meetings, and engagements with impacted and underrepresented communities.

Step 2: Select Toll Rate Proposal and File Notice of Proposed Rule Making Form (CR-102):

Based on the data and input gathered, the WSTC will select its toll rate proposal at a public meeting and file a *Notice of Proposed Rule Making Form* (CR-102) with the Office of the Code Reviser, along with a copy of the proposed rule text. This provides the public with an opportunity to review and comment on the toll rate proposal, and must be filed in the state registry a minimum of 20 days before moving onto the next step in the process.

Step 3: Hold Public Hearing and File Rule Making Order Form (CR-103P):

The WSTC will then hold a public hearing and take action to adopt the new toll rates by filing a *Rule Making Order Form* (CR-103P) with the Office of the Code Reviser. At least 31 days following the CR-103P filing is required before the new toll rates can take effect. This allows time for the public to challenge the rule in the event that it exceeds the agency’s statutory authority, is unconstitutional, or is arbitrary or capricious. However, WSTC’s rate settings have never been challenged.



Visualization of the Full Rule Making Process

Challenges with the Current Toll Setting Process

The current rate setting process presents a number of challenges due to its inflexibility and lengthy timeline. Assuming the quickest possible transitions between steps, the minimum amount of time necessary for rate changes to take effect under Full Rule Making is 81 days. However, in practice it takes the WSTC an average of over five months (160 days) to complete, limiting the state’s ability to use tolls to address immediate and unexpected needs and thereby threatening the state’s financial health.

Additionally, the current process is ambiguous, undermines public trust, and limits the WSTC’s capacity to expand its public engagement efforts without delayed implementation and greater revenue needs. Once the WSTC has selected its toll rate proposal and filed the CR-102, any significant changes to the proposed rule would require the entire process restart. Given the urgent nature of toll setting and the need to meet financial and performance requirements, any input received during the public comment period rarely influences the toll rates that are ultimately enacted. This causes a perception of pre-determined decisions and wasting both public and state time.

Review of Toll Setting Processes Used in Other States

There are currently over 350 tolling facilities and over 120 tolling authorities throughout the United States. Recognizing the unique toll setting needs and structure in Washington, to help inform the development of an alternative approach to the toll setting process, the WSTC conducted a review of 17 tolling authorities throughout 10 states:



Most tolling authorities can be grouped into three categories: public toll authorities, independent toll setting authorities, and private toll operators. Rate setting processes tend to vary among these organizations; public and independent toll authorities typically have stricter requirements and lengthier timelines for setting toll rates compared to private operators. However, most tolling authorities have implemented automatic rate increases of either defined amounts or indexed to inflation to help provide revenue stability and limit the number of rate settings they must undergo. The SR 99 tunnel is the only tolling facility in Washington with framework in place for automatic toll rate increases, subject to review and approval by the WSTC. So, while within the WSTC's current authority and thus outside of the scope of this assessment, automatic rate increases should be something the WSTC considers extending to other tolling facilities in Washington.

Public toll authorities include governmental agencies that typically hold no budget-setting authority. They are subject to political oversight and public accountability in their actions, and toll rates are typically codified in law with established procedures similar to those that the WSTC is held to. Examples of public toll authorities include the WSTC, the Central Florida Expressway Authority, Florida's Turnpike Enterprise, and the New Jersey Turnpike Authority.

Independent toll setting authorities are quasi-governmental agencies with some level of independent operation. They are typically established in law and hold independent budget and rate setting authority. They typically have a formal process for setting toll rates, but tend to have greater flexibility and efficiency compared to public toll authorities due to their semi-autonomous nature. An example of an independent

toll setting authority includes such as the Toll Roads of Orange County, which has a board approved toll policy that is incorporated into its annual budget process.

Private toll operators are private companies under concession agreements or public private partnerships (PPPs). These entities tend to have the most flexible and efficient process for setting toll rates, with internal toll and budget setting procedures subject to the terms and conditions of their concession agreements. An example of a private toll operator is the Toll Roads Investors Partnership II, which owns and operates the Dulles Greenway in Virginia.



Tolling Gantry

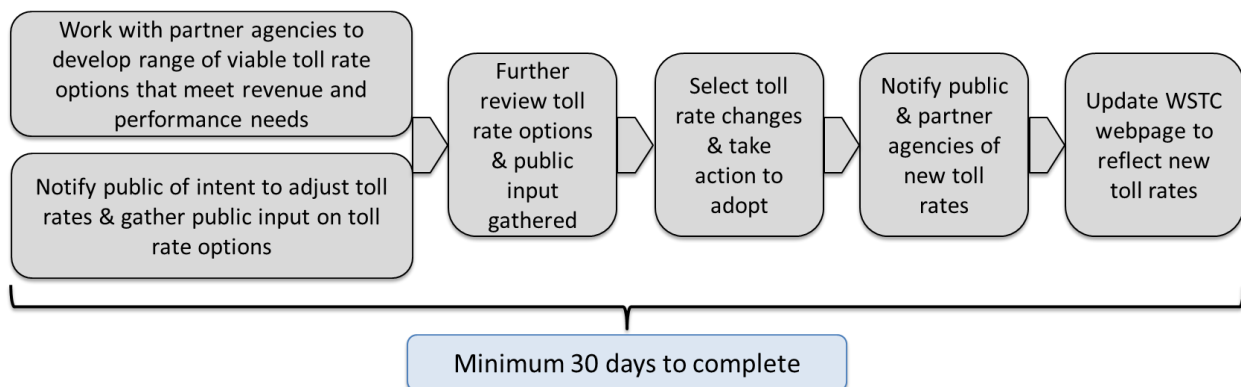
Approaches to Streamlining the Toll Rate Setting Process

Recommended Approach: Create a New Toll Rate Setting Process Outside of the APA Structure

There currently exists several exemptions from all or part of the APA, as outlined in RCW 34.05.030⁸. To fully address the challenges that are associated with the current toll setting process, **the WSTC recommends that the Legislature extend these exemptions from the APA to include toll setting and establish new, separate, requirements in law for setting toll rates.**

This new process should include requirements around public engagement and key milestones for advancing the rate setting process, while still providing the ability to swiftly adjust tolls to meet revenue and performance requirements when unexpected needs arise. All decision making and discussions would continue to be carried out in the WSTC’s public meetings, in compliance with the Open Public Meetings Act⁹.

The chart below shows the major steps that could be included in this new process.



⁸ RCW 34.05.030 – Exclusions from chapter or part of chapter:

<https://app.leg.wa.gov/RCW/default.aspx?cite=34.05.030>

⁹ Chapter 42.30 RCW – Open Public Meetings Act: <https://apps.leg.wa.gov/rcw/default.aspx?cite=42.30>

All of the background work that currently goes into toll setting would remain unchanged. This includes working with partner agencies to develop a range of viable toll rate options that meet the facility’s revenue and performance needs, and providing ample opportunities for the public to weigh in on those options. However, once the WSTC has selected which toll rate option to advance, the process should allow the WSTC to implement the rates as soon as necessary to meet financial or performance requirements.

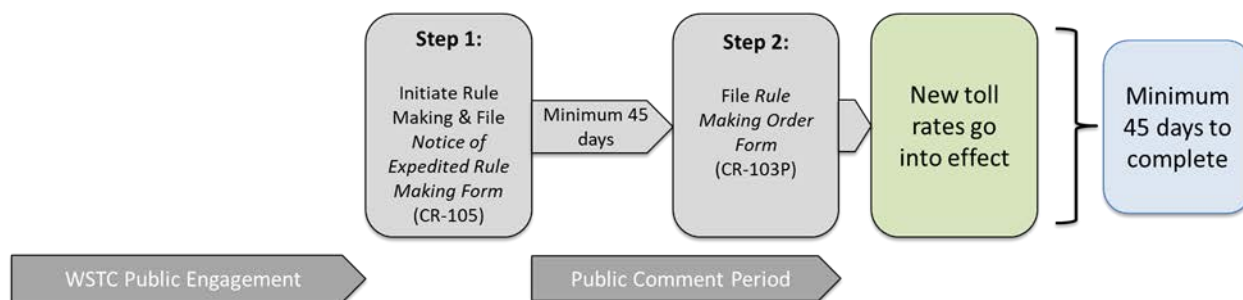
This approach would provide significant time savings compared to the current process, allowing the WSTC to transparently and efficiently implement toll rate adjustments in **as little as 30 days**. This approach would also support enhanced public engagement efforts. Because the WSTC is currently unable to alter its toll rate proposal after issuing an official toll rate proposal without causing significant delays, this new structure would ensure that public input genuinely influences final decisions, thereby improving public trust and engagement through a more transparent process.

Alternative Approach: Implement Changes to the Toll Rate Setting Process Within the Existing APA Structure

As a secondary option, **an alternative approach could be to implement changes within the existing APA structure for Expedited Rule Making, to provide a more streamlined process for setting toll rates.** To increase the efficiency of Expedited Rule Making, possible changes to the APA could include:

- Expanding the allowable use of Expedited Rule Making to explicitly include toll setting; and
- Allowing toll rate changes to take effect immediately upon filing the final rule making paperwork, as opposed to a minimum of 31 days.

If both of the above changes were made, **toll rate adjustments could be made in as little as 45 days under this approach.** The following chart shows what this process could look like.



Expedited Rule Making is currently only allowable when certain criteria are met, such as when specifically and explicitly dictated statute. However, the WSTC does not normally meet the criteria as outlined in RCW 34.05.353¹⁰. Furthermore, Expedited Rule Making poses many of the same challenges that are associated with Full Rule Making due to a similarly rigid and inflexible process.

Under the expedited rule making process, rather than filing a CR-101 and CR-102 under the Full Rule Making process, a *Notice of Expedited Rule Making Form* (CR-105) is filed to begin the expedited process. Like the CR-102, the CR-105 includes a copy of the proposed rule text. A minimum of 45 days is then required to allow time for the public time to review and comment on the toll rate proposal before the final CR-103P paperwork can be filed. However, as with Full Rule Making, any substantive changes cannot be made after this point without restarting the entire process.

¹⁰ RCW 34.05.353 – Expedited Rule Making: <https://apps.leg.wa.gov/rcw/default.aspx?cite=34.05.353>

While this alternative approach would provide time savings compared to the current process, the WSTC would still be limited in its ability to expand its public engagement efforts due to the rigidity of Expedited Rule Making. Because the public would still be asked to weigh in on the WSTC's toll rate proposal when input cannot practically be addressed, there would still exist the perception that the WSTC has already made its decision. As such, many of the same challenges associated with the current process would exist under this approach.



SR 520 Bridge