

Washington State Department of Transportation

Right of Way Acquisition in Advance of Completion of NEPA Policy (Early Acquisition)

Background

Prior to passage of MAP-21 in July 2012, federal participation in advance of right of way acquisition was limited to hardships, protective acquisitions and other unusual circumstances that rarely occurred on WSDOT or local agency projects. The MAP 21 Section 1302 statutory changes have been codified in 23 USC 108, and the biggest change, and the focus of this policy paper, is the ability for the Acquiring Agency to use federal funds for right of way acquisition prior to completion of NEPA for the overall project as a method to accelerate project delivery. The MAP 21 changes do not provide any new federal funds; the changes just make the early acquisition costs eligible activities.

The MAP 21 changes do not affect the previous Agency funded at-risk early acquisition policies, so the Acquiring Agency may still choose to fund any early acquisitions if they choose. If the Acquiring agency chooses to use their own funds for early acquisition activities and they are planning on requesting to use the value of the property as a match for their project, they need to remember they cannot purchase property that is a 4(f) resource.

The MAP 21 changes do not affect WSDOT's Right of Way Revolving Fund Program.

Requirements Included in MAP-21 for Federally Funded Early Acquisition

While MAP-21 allows federal participation in advance right of way acquisition, certain conditions must be met. A State Certification process/form needs to be set up to ensure the following:

- The State Certification must be in writing and it needs FHWA concurrence.
- Any right of way interest purchased in advance must be for transportation purposes,
- Any right of way interest purchased in advance cannot influence the outcome or alternatives considered during the future project's NEPA process,
- The purchase of any right of way interest must not cause any significant environmental impact (to the property),
- Acquisitions must be approached without the threat of condemnation (e.g. it is a willing-seller transaction),
- The early acquisition will not reduce or eliminate relocation benefits (e.g. the acquisition is NOT voluntary as defined in 49CFR 24.101(b)(1),
- The acquisition complies with applicable Federal laws and regulations,
- The right of way acquisition is treated as a stand-alone project with a separate (parcel specific) NEPA document,
- A stand-alone project is included in the STIP for the advance/early¹ right of way acquisition

¹ The term early and advanced are often used interchangeably.

- FHWA authorization is required prior to starting right of way acquisition
- Demolition of improvement or other irrevocable actions cannot occur until overall project's NEPA documentation for the project is complete and the need for the right of way is documented.
- Acquisition of property interest must be incorporated into a project eligible for surface transportation funds within 20 years.

Benefits of Advance Acquisition

There are several benefits to acquiring right of way or starting the process early in a project. Each project should consider if the benefits outweigh the risks. Benefits include;

- Acquisition of right of way prior to completion of overall project's NEPA documentation can be used to accelerate overall project delivery;
- Acquisition of parcels with willing sellers can proceed as the agency is ready to acquire parcels. This can help reduce the public perception of lengthy process.
- Additional time is available to negotiate with property owners without impacting the construction start
- Overall project costs may be reduced due to a shortened project delivery schedule.

Risks of Advance Acquisition/Issues

- Examples of environmental risks include: Section 106, Environmental Justice, 4(f) Properties, and hazardous materials. This list is not inclusive.
- Property Management activities and costs need to be considered, especially in light of the prohibition of demolishing or developing the property prior to the completion of the overall project's NEPA documentation.
- There may be instances where early acquisition creates additional expenditures such as additional NEPA costs.
- Acquisition is "At Risk" and may require repayment of federal funds if the right of way is not incorporated into a qualifying transportation project.
- The agency discovers that the sellers are unwilling after federal funds have been spent.

WSDOT Guidance Documents Needing Modification

There are several WSDOT guidance documents that need to be updated:

- Environmental Procedures Manual
- Right of Way Manual
- Local Agency Guidelines (LAG) Manual
- WSDOT ECS Guide
- Local Agency ECS Guide Book

The next step is for WSDOT H&LP, ESO and Real Estate to work with FHWA to prepare procedures for federally funded early acquisition.

General Guidance and Requirements

Prior to proceeding with advance acquisition the following must occur:

- A stand-alone right of way acquisition project must be included in the STIP, either through the annual approval process or by the STIP Amendment processed through the appropriate RTP/MPO.
- The appropriate acquisition NEPA document must be prepared, reviewed and approved by the designated authority.
- FHWA approval of a federal aid project agreement must occur prior to starting right of way activities
 - For Local Agency projects a “LA Agreement” must be processed through Local Programs. Requirements for submittal and approval are consistent with the process outlined in Chapter 25 of the LAG.
 - For WSDOT projects a work order authorization must be processed and approved.
- Tracking will be accomplished by FHWA’s FMIS application.

State Certification Statement to be included in Federal Aid Agreements for Requesting Federal Participation in Early Acquisition of ROW

The following statement must be included in the Federal Aid Agreement.

The State certifies that the early acquisition complies with applicable Federal laws and regulations and is only for transportation purposes. The advance purchase of right of way will not influence the outcome of alternatives considered during the future project’s NEPA process nor will it cause any significant environmental impacts (to the property). The acquisition will not be done under threat of condemnation and the early acquisition will not reduce or eliminate relocation benefits. Demolition of any improvement on the property or other irrevocable actions will not be taken until NEPA for the overall project is complete and the need for right of way is documented.