CHAPTER 28

NEPA AND RIGHT-OF-WAY

CONTENT

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This chapter provides information on the relationship of right-of-way and the National Environmental Policy Act of 1969 (NEPA) process. During the NEPA process, the establishment of project right-of-way needs, as well as staging or easement areas, provides the basis for identifying an impact footprint outside the existing right-of-way for the project. For NEPA analyses, a new right-of-way required for a project defines the conversion of an existing use to a transportation use. This conversion is what is evaluated in the NEPA document. It is for this reason that the right-of-way information is valuable for the NEPA process. The current stage of the project development process determines the level of certainty of the position of the right-of-way and, therefore, the specificity of the proposed impacts from the project. Advanced engineering design to refine right-of-way needs during the NEPA process is important to consider if the result could establish a design modification to avoid or minimize project impacts.

The potential for acquisition of new right-of-way for a project often generates interest and concern from adjacent residents and businesses during the NEPA process. These types of impacts are often among the most sensitive to affected property owners and, therefore, must be addressed with care throughout the project development process. Communication of right-of-way needs to property owners is generally not conducted during the NEPA process. Some general coordination may occur and is typically limited to NEPA-required processes. Examples of these needs could include right-of-entry coordination to facilitate resource surveys, notification of the availability of the NEPA document for review and comment, or notification of or coordination at a public information meeting (scoping) or hearing regarding the NEPA process. More specific coordination would occur if additional information about the property were needed to complete the NEPA analysis. This could include information about property access requirements if alterations were expected from the project, history about the property to support the historic property survey, or hardship assessment related to the sale or proposed development of the property.

For any project with potential right-of-way acquisition needs, the District of Columbia Department of Transportation

(DDOT) will have professional real estate staff available to consult with property owners about right-of-way needs, proposed changes in property access, and relocations. Most importantly, all right-of-way acquisition and relocations must be planned to adhere to the Uniform Relocation and Real Property Acquisition Act of 1970 (the Act), as amended by the Surface Transportation and Uniform Relocation Assistance Act of 1987 and 49 Code of Federal Regulations (CFR), part 24, effective April 1989. During the NEPA stages of project development, the need for specialized real estate professionals is typically least in the earliest stages (public meetings) and increases to a greater need when final project design decisions are being made—especially if relocations are involved and/or if funding and scheduling for real estate acquisition and project construction is near.

As the time for property acquisition approaches, those who are impacted by right-of-way needs and relocations are entitled to advisory services, appraisals, fair market value for property acquired, and the reimbursement of costs associated with relocation. These costs may include moving expenses, replacement housing costs, increased rental or mortgage payments, closing costs, and other valid relocation costs. In accordance with the Act, the replacement dwelling or business site for those who are relocated must be "decent, safe, and sanitary," meaning that it must meet all of the minimum requirements established by federal regulations and conform to all housing and occupancy codes.

Ultimately, the DDOT right-of-way process is documented in detail in the DDOT Right-of-Way Manual as well as in Chapter 9 of the Design and Engineering Manual.

28.1 Balancing Right-of-Way Detail in NEPA Documentation

The methodology used to address right-of-way needs in NEPA documentation must be structured to fit the parameters of the project and the level of decision making currently at hand. Examples of the various levels of discussion are provided in Table 28-1. This general guidance addresses three levels of impact analysis for rights-of-way, based on the specifics of the project and the status of the project in the decision-making process. Table 28-1 is structured to address three levels of NEPA analysis: (1) pre-NEPA studies; (2) NEPA Draft Environmental Impact Statement/ Environmental Assessment (EIS/EA) documents with many alternatives; and (3) Advanced NEPA Draft EIS/ EA with one preferred alternative or documentation for a Final EIS or Finding of No Significant Impact (FONSI).

Balancing the level of right-of-way detail is challenging throughout the NEPA process. A coordinated effort between engineering and NEPA planners is needed to establish an acceptable level of information. A certain amount of risk needs to be considered at each phase of project development. Directing this attention to the impact evaluation in the NEPA document is most important. Consideration of additional right-of-way detail should focus on (1) the potential risk that a significant impact would not properly be identified or evaluated in the NEPA document and (2) the potential to further evaluate a potential impact as a means to attempt to avoid or minimize the impact. The consequences of the first category could result in not identifying all permits or approvals required for the project or possibly requiring a second circulation of the environmental document. The second category could assist to reduce permitting or mitigation requirements, but careful review of advanced design work would be required to ensure additional effort was not being expended on an analysis that would not result in additional clarity of the impact. Because of the consequences of an inappropriate level of right-of-way detail in the NEPA document, the determination of an acceptable level of right-of-way detail for the project is critical for successful and timely delivery of the NEPA process.

28.2 Approaches to Right-of-Way Preservation and Advanced Acquisition

Typically, real estate acquisition must not occur until after the completion of the NEPA process, and even much later after significant detail is available to prepare a right-of-way plat during final design. However, there are techniques that can be used to preserve lands for future transportation improvements, particularly with cooperation from local units of government and property owners.

28.2.1 Corridor Preservation

Corridor preservation is an action to establish a commitment for a future transportation facility that is currently in the planning process. The level of detail about the facility could be as basic as a general location and an objective for its designation and resulting cross-section. The establishment of this information in a publicly available document or approved transportation plan triggers the requirement for the local government to address the objectives of the transportation agency during the NEPA or local permitting process for the proposed development. The main objective of a corridor preservation strategy is to facilitate the review of proposed developments prior to their approval to ensure their implementation would not preclude a future transportation project. If a reasonable solution would not be attainable, the prior disclosure of the intent of the future transportation facility would provide the grounds for advanced legal action.

Table 28-1 General Guidance and Examples for Addressing Right-of-Way in NEPA Documents

Level of NEPA Analysis	Methodologies for Assessing Property Acquisition Impacts	Methodologies for Assessing Relocation and Access Adjustment Impacts
—Feasibility studies, scoping studies, and Tier 1 NEPA documents or overviews	Address needs and impacts broadly and estimate potential impacts either qualitatively or quantitatively. Emphasize broad comparisons of alternatives. Do not show specific right-of-way acquisition limits on maps; show the potential footprint if feasible and appropriate or only show roadway limits and point out areas, in general, where right-of-way will be needed.	Address qualitatively or quantitatively, depending on the level of detail, emphasizing broad comparisons of alternatives. Describe all impacts as "possible" or "potential," not "proposed." On mapping, show either general areas where potential impacts might occur or show specific buildings with concurrence from the client. Availability of replacement sites may or may not be discussed, depending on the potential importance of that topic.
—Projects with substantially differing alternative corridor locations or project configurations	Address impacts quantitatively to compare the amount of land acquisition for each alternative. On mapping, show the potential footprint for right-of-way acquisition and roadway limits. The level of detail must be sufficient to reflect, at minimum, conceptually engineered design and to provide a reasonable comparison of the alternatives. Typically, do not differentiate between potential fee acquisition and temporary/construction easements.	Address impacts quantitatively to compare the number of residential and business relocations for each alternative. If the level of detail is sufficient to determine setbacks, typically assume that nonconforming setbacks will result in relocation impacts. If relocation can be avoided with a change to property access, label the property accordingly and illustrate major access changes (for example, new frontage roads). Analyze and discuss the market availability of replacement housing and sites for business relocation. Use generalized and reasonable real estate and relocation cost estimates, with contingencies.
—Especially for projects with a final decision, in an advanced stage of development/funding, and with one preferred design	Address impacts quantitatively at a higher level of detail to more accurately determine land acquisition requirements—considering slopes, drainage, and reasonableness in working with property owners. On mapping, show potential construction limits and the preliminary plat for proposed right-of-way acquisition at a conceptual level. The level of detail should be set to more accurately support project cost estimates and to determine impacts and mitigations, including some differentiation between potential fee acquisition and temporary/construction easements.	Address impacts quantitatively to support near-final decisions with regard to which properties will be subject to relocation impacts or changes in access. If appropriate to do so, consult with individual property owners and address the potential for special cases, such as owners who might have the opportunity and desire to rebuild on a remaining portion of the same property. On mapping, show detailed concept plans for changes in property access. Analyze and discuss the market availability of replacement housing and sites for relocated businesses. If appropriate to support the planning process, refine the cost estimates to account for site-specific parcel values and relocation costs.

Methods to preserve future transportation corridors are noted by FHWA at: *http://www.fhwa.dot.gov/realestate/cp_bib.htm*, an annotated bibliography on the topic. It provides information on publications that explore these and other tools and techniques, which fit the definition of corridor preservation herein:

- Corridor Maps/Planning and Regional Transportation Planning – These planning tools/techniques generally avoid transactions with land owners, but could impose zoning restrictions as an example of a corridor preservation. The objective with these tools is to clearly establish the project with the local agencies and to coordinate on proposed developments within and adjacent to the corridor as development applications are submitted and reviewed for approval. Developments should be reviewed in their potential to preclude the feasibility of the implementation of the transportation project.

  Additional information on this topic is included in Transportation Corridor Preservation: A Survey of State Government Current Practices: May 2000 (*http://www.fhwa.dot.gov/realestate/cp_state.htm*). That report indicates that DDOT does not currently have any particular corridor preservation programs in place (by exclusion). Therefore, the implementation of corridor preservation strategies for DDOT must be approached and developed very carefully, on a case-by-case basis, working with experienced DDOT right-of-way personnel.

- Exactions/Takings, Easements, Transferable Development Rights/Purchase of Development Rights – All of these techniques are essentially partial acquisition approaches, wherein some value in the land is recognized and even "purchased," although such transactions do not progress up to full fee acquisition of property.

NEPA practitioners should recognize that corridor preservation strategies often introduce legal precedents in addressing public agency objectives versus private property rights. Qualified right-of-way professionals are essential to aspects of this work.

28.2.2 Protective Buying and Hardship Acquisitions

Advanced purchase of right-of-way proposed for future projects, many years before construction, is a more certain and complete right-of-way preservation action. This approach would typically involve the full detailed process of corridor planning, engineering, and land acquisition based on eminent domain. The main difference between protective versus traditional purchasing is that the former is a slower pace of the land acquisition process. In the case of protective buying, the land acquisitions would typically be focused first on legitimate hardship cases, where the land owners have been disadvantaged by the planned project. Next, the priority would be on willing sellers, and so on. Incidentally, project teams should be prepared to work with hardship cases, sometimes even before a NEPA decision is finalized. A common example of a hardship case is a property owner who wishes to liquidate real estate assets in the interest of retirement or other financial need, who can legitimately claim that the transportation agency is the only reasonable buyer.