Local Programs Right of Way

Temporary Easements
Questions & Answers

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Joining Us Today & Purpose of Today's Q&A

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On November 20, 2024, FHWA Washington Division released Temporary Easement (TE) guidance to clarify policy regarding the identification, valuation, and acquisition of TEs.

The guidance letter was provided by a Gov Delivery email on November 22, 2024. This letter is also available on our ROW Training Webpage.

Today's Q&A is to answer questions you still have concerning TEs.

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Questions & Answers

QUESTION:

What is the definition of PERMIT, RIGHT OF ENTRY, and TEMPORARY EASEMENT?
When can each be used to maintain federal eligibility?

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ANSWER:

Permit: Grants temporary rights with an expiration date. Typically, used for minor work that is beneficial to the property owner (contouring, slope flattening, driveway reconnection-in some cases). Permits are non-transferable.

Right of Entry: A personal right NOT a property right. It grants an entity the right to perform a service with the permission of the property owner. Typically used for soil testing, wetland delineation, or septic and well testing. The ROE can be revoked by the property owner and is non-transferable.

Temporary Easement: Grants the rights to utilize property with specific circumstances and conditions, for a defined timeframe. These rights are shown on the project ROW Plans and are necessary for the construction of the project. The rights are transferrable.

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ANSWER (continued):

Some helpful tools available for making the correct determination between permit, right of entry, and temporary easement are:

- Property Right vs. Permit (Right of Entry) table in Chapter 25 of the LAG (page 25-10)
- Charts located in the Appendix of Chapter 25 of LAG
  - Appendix 25.171 Determining Whether Land or Property Rights or Interests are Needed
  - Appendix 25.172 Determining the Type of Property Rights Necessary

The appropriate method should be used, as outlined in the above tools, to maintain eligibility and keep the project in compliance with federal regulations.

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QUESTION:

How do you determine when a permit or a TE should be utilized for a driveway reconnection?

ANSWER:

A permit is acceptable if the work is minor and solely for the benefit of the property owner. If the work is caused by the project or causes damages to the remainder (driveway) then a TE is required. Property owners must be treated equitably throughout the project.

Again, utilize Appendix 24.171 and 24.172 to guide you through the process to make the correct determination.

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QUESTION:

Why do driveway reconnections need to be a TE acquisition? Aren't they a mutual benefit for the owner as they get a driveway reconnection?

ANSWER:

The term mutual benefits is not found or defined in federal regulations. If the agency cannot complete the project without walking away from the driveway reconnect then the agency will need to acquire a TE. Walking away means the project can be constructed without doing the work on private property and the work being done in the ROW does not cause damage to the remainder (such as a change in grade).

Again, utilize Appendix 24.171 and 24.172 to guide you through the process to make the correct determination.

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FOLLOW-UP QUESTION:

A change in grade for a driveway may still be within design standards w/in the existing ROW. Is ANY change in grade considered a damage requiring a TE?

ANSWER:

Please utilize Appendix 24.171 and 24.172 to guide you through the process to make the correct determination.

However, if the grade is still within design standards within the existing ROW, no other rights are needed from the property owner, and there is no “damage”, a TE wouldn’t be required. The determination of “damages” would be made by the appraiser/waiver valuation preparer.

Temporary Easements Questions & Answers

FOLLOW-UP QUESTION:

Would it be appropriate to condemn for a TE that is solely for driveway reconstruction? If the owner refuses to grant it, how is there any public use or necessity?

ANSWER:

If a TE is being acquired for a driveway reconstruction, then the appraiser/waiver valuation preparer has determined there is a damage and the rights are necessary to construct the project. If the property owner refuses to settle, condemnation should be filed since the project can't be constructed within design standards without the acquisition.

The agency can't walk away in this type of situation. Otherwise, the property owner being damaged could file an inverse condemnation since the necessary rights were not acquired and just compensation was not paid.

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QUESTION:

If the Construction Phase (CN) of a project is designed (or nearly designed) but construction will not be starting for a year, when is it appropriate to execute the TEs? Is there federal guidance on this?

ANSWER:

Federal guidance - if the dates of use of the TE are not known, acquisition of such TE will be deferred until those dates are determined and the valuation can reflect market value and state a specific date of termination.

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QUESTION:

What resources are agencies using when valuing TEs using a Waiver Valuation? Especially concerning the rate of return for land leases in their local markets.

ANSWER (from a local agency):

We look at leases in the area. Our port is a big landlord, so we obtain a lot of lease information from them. Price Waterhouse is a good online resource for lease information. We also track (spreadsheet) any leases that we come across when doing research for possible future use.

Agencies: If you would like to share other resources, please use the chat or feel free to unmute and share.

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QUESTION:

Hypothetical Situation-

The appraisal Scope of Work is to value a TE from March 1, 2025 to March 1, 2029 (4-year term). Negotiations begin (offer made) on February 1, 2025, but settlement is not reached until September 1, 2025. Is the agency still required to pay the full term (4 years) or can it be reduced to 3 ½ years to remove negotiation time?

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ANSWER:

The TE will be effective on the date of mutual acceptance and will extend until the explicit termination date as determined by project needs and valued in the appraisal or waiver valuation. In this case, you would not reduce the compensation, just pay the amount for the TE. The agency would need to go back and revise the offer if it was determined the TE was needed for a shorter period of time.

It is about planning for your project – timing is everything. The Project Manager should be looking at the timeline to know when it is appropriate to value the TE.

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QUESTION:

Is it acceptable for the appraisal scope of work to allow for a few weeks before the start date of the TE to allow the preparation of the offer and negotiations to start?

ANSWER:

Yes, this is acceptable as long as the scope of work states it is okay. As a rule of thumb, it would be best not to go beyond four weeks.

REMINDER: Be sure to include a draft of the TE document with the scope of work!

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FOLLOW-UP QUESTION:

How can an agency reconcile the time between the valuation of the TE and the termination date? If it takes 3 months to negotiate and settle the agency is being shorted 3 months that they paid for. How is it not a gift of public funds if no use/encumbrance is occurring?

ANSWER:

As stated on the previous slide, the scope of work can allow for a delay of a few weeks for the start of the TE. The agency can also request within the scope of work for an inactive and active period (floating easement) during the term of the TE. There is FHWA-approved language in the TE template related to floating easements. The URA focuses on the property owner receiving just compensation for the rights being acquired. The URA doesn't address reduction in compensation for negotiation time. It could be viewed as coercion if the agency reduces compensation for the negotiation time giving the appearance that "the longer you wait to sign, the less money you will receive". There may be local requirements related to the gifting of public funds, and this is why agencies must know the timing and needs of their project.

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QUESTION:

Should all TEs include the 1-year extension option in the document?

ANSWER:

This is up to the agency. Including this paragraph can streamline the process if an extension becomes necessary; however, the extension must be exercised before the termination date. If the language is not included, or the TE has expired, the agency will have to start a new acquisition and draft a new TE.

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FOLLOW-UP QUESTION:

Is the max extension term 1-year? How would the agency exercise the extension?

ANSWER:

The maximum term allowed within the FHWA-approved extension paragraph is 1-year.

Before the termination of the TE, the agency would verify, using the same method as the original valuation, to determine if there has been a change in value. Just compensation for the extension would be at whichever rate is higher (original rate or newly established rate). The agency would provide in writing to the owner that they are exercising their right to the 1-year extension and render payment.

If the TE has terminated, or the extension language wasn't included, then the agency must start the acquisition process over including spot check and re-certification of the project.

Temporary Easements Questions & Answers

FOLLOW-UP QUESTION:

Is an agency/contractor required to stop construction work if TEs on the project have expired? Or can the work continue while new TEs are being acquired?

ANSWER:

If the TEs have expired, and construction within those areas has not been completed, the agency/contractor must stop work with those areas. The agency/contractor must ensure that the property owner is not unnecessarily inconvenienced by any continued construction activities. The agency will need to start the acquisition process over including spot check and re-certification of the project.

The takeaway on this- track your TE termination dates, exercise your extension before termination, and start acquiring new TEs, when necessary, early enough to avoid them terminating before the new TEs can be acquired.

Temporary Easements Questions & Answers

FOLLOW-UP QUESTION:

If the scope of work was to value a TE for 2 years, but it takes 1 ½ years to negotiate and settle, the extension language still wouldn't cover the time lost. What would you do in this situation?

ANSWER:

Condemnation should more than likely have been filed instead of negotiating for 1 ½ years. If your agency makes the business decision to allow for lengthy negotiations instead of filing condemnation so that the original termination date is no longer sufficient for the project, the agency will need to have the TE valuation updated with a new termination date and present a revised offer letter to the property owner.

The TE extension language isn't for covering extended negotiation, it is a tool to assist agencies in being successful when there are construction delays or other unforeseen circumstances.

Temporary Easements Questions & Answers

FOLLOW-UP QUESTION:

The cut-off for federal ROW expenses is the contract award date for Construction. Does this mean if TEs expire and must be re-acquired it must be done using state/local funds only (no federal participation)?

ANSWER:

It depends. The agency would need to submit adequate justification requesting FHWA participation in an activity previously reimbursed. FHWA does not participate in the same activity twice without the necessary justification. The agency would submit their request/justification through the Region LPE to HQ LP for approval. If the request is approved, the cost of the re-acquisitions of TEs would be eligible as a construction cost.

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QUESTION:

Is there a way to more precisely define the beginning of just compensation (JC) calculations and what is currently practiced? Current practice is to calculate just compensation from the date of valuation, which leads to paying for the time during which there isn't any actual encumbrance on the property. This is in effect consistent with overpayment.

ANSWER:

The BEGINNING of JC is the date on which the agency sets the amount of the offer. The property is encumbered from the date the TE is executed until the specific date of termination.

This is consistent with doing an appraisal and offering JC and it takes the property owner 4 months to settle, the agency still pays the same amount regardless of the date the deed is executed.

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QUESTION:

Continuous of JC and encumbrance timeframe:

Is it acceptable to value a TE with a payment rate defined by just compensation that factors in the TE execution date?

An example of this would be to produce a base calculation that leaves time as the variable but defines the percentage of the price per sq. ft as the base rate for compensation.

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ANSWER:

We are not going in this direction. This is too complicated, and we need to keep the process simple. The guidance for TEs is consistent with doing an appraisal and offering JC and if it takes the property owner 4 months to settle, the agency still pays the same amount regardless of the date the deed is executed.

A property owner should not be penalized for time spent in active negotiations as it can be viewed as coercive. This is especially true in situations where the property owner has expressed concerns or has additional questions that need to be addressed by the agency, which can take weeks.

Temporary Easements Questions & Answers

QUESTION:

<u>TEs and Relocation</u>

Scenario:

An agency project requires a two-year TE. Construction crews will be working (active) within a specific parcel for two weeks. Personal Property (PPO) only needs to be moved out of the ROW during this two-weeks. However, doesn't the PPO need to be moved (ROW free & clear) for the project to be certified?

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ANSWER:

No, the PPO can remain within the ROW until it is needed (PPO moved at a future date).

For this to happen the agency must follow WSDOT procedures (under development at this time) or have its own procedures/process for creating a plan/agreement with the occupant to make sure they vacate when necessary.

The plan/agreement will need to be in the parcel file to meet the requirements to be certified under a Certification #1.

Temporary Easements
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QUESTION:

<u>TEs and Relocation</u>

Scenario:

Can PPO items be moved in and out of the TE during the few days of construction on the parcel if the items are something vital (like a business sign or a business delivery vehicle) instead of relocating them for the entire term of the TE?

ANSWER:

Yes, the PPO can remain within the ROW until it is needed (PPO moved at a future date). See the answer to the question on the previous slide.

Temporary Easements Questions & Answers

QUESTION:

TEs and Relocation

Scenario:

Why does a business have to move its entire operation when the TE is for two years, but the construction period is only for a few days to pour a sidewalk? Can an agency receive a waiver from FHWA/WSDOT and determine a fair procedure to pay the owner for a loss of business for a few days?

ANSWER:

You do not have to do this. If you only need to be on the parcel for a few days within the overall TE term, the occupant is considered only temporarily displaced since the time they would be required to move is less than 1 year. In this situation they would be required to move temporarily from the property only for the time the work is being done. You do not need to displace the business for the full 2-year TE unless the business will not be able to access the property for a duration longer than 1 year. In addition, loss of business is not compensable in WA state, so it is not an option to request a waiver from FHWA.

Note: Be sure to follow the Final Rule changes related to notices on temporary relocations.

Temporary Easements Questions & Answers

QUESTION:

<u>TEs and Relocation</u>

Scenario:

The agency has a project where the construction window can't be determined before ad. How does the agency know how long the construction upon each of the parcels will take? Sometimes this isn't known until the contractor is on board.

ANSWER:

If the construction period is unknown, then the acquisition of the TE should be deferred until such time the construction period is identified, and the specific termination date is provided so it can be included in the Appraisal scope of work.

Temporary Easements Questions & Answers

QUESTION:

TEs and Relocation

Scenario:

What if a construction period is non-continuous and takes place for a few days in the first year and a few days in the fifth year. Is an agency supposed to come back in five years to move the PPO out and back again?

ANSWERS:

Yes, however, if the amount of time the property needs to be moved is longer than 12 months then it would be a permanent relocation. The plan/agreement with the occupant would need to be very clear on expectations and timelines and the temporary displacement would need to be less than 12 months.

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FOLLOW-UP QUESTION:

If a project is state/locally funded (not federalized) should these TE requirements still be followed?

ANSWER:

Due to possible project funding changes, Local Programs ROW recommends that agencies have one acquisition process that follows the URA for all projects. Otherwise, if a project becomes federalized in construction and the URA has not been followed the acquisitions will be out of compliance, and accepting federal funding may not be an option.

Temporary Easements Questions & Answers

FOLLOW-UP QUESTION:

What about work that is agreed upon by the private property owner & agency during negotiations? An example would be rebuilding a fence elsewhere on the parcel. Could a permit be used or would a TE be necessary?

ANSWER:

It depends. Permits are revokable and non-transferable. If the fence rebuild is necessary or caused by the project, then a TE with just compensation would be the correct document. If the fence rebuild is at the request of the property owner, then a permit would be acceptable (no federal participation).

Again, utilize Appendix 24.171 and 24.172 to guide you through the process to make the correct determination.

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FOLLOW-UP QUESTION:

What is FHWA's definition of "mutual acceptance"? Is it verbal approval, date of execution, or recording of the document?

What about "effective date" when multiple people need to sign for the agency?

ANSWER:

Mutual acceptance is when two or more parties agree on the terms of the TE. The date of mutual acceptance is the date the last party signs the document.

Effective date is also the date the last party signs the document.

Note: There should not be a delay between signatures and payment should be made expeditiously.


Thank
you!!