

Quick Guide: Federal Highway Administration (FHWA) Requirements for Renewable Energy Projects in Highway Right-of-Way (ROW):

Several States have installed renewable energy generation projects such as solar arrays and wind turbines along highway ROW, and other States are considering doing so. This quick guide is intended to point FHWA Division Offices and State Departments of Transportation (DOTs) to the relevant FHWA requirements. It is guidance only and does not create any requirements other than those stipulated in statute or regulation. It provides a condensed version of information available in FHWA's [Guidance on Utilization of Highway Right-of-Way](#).

My State DOT wants to build a renewable energy project within a Federal-aid highway ROW. What Federal regulations do I need to follow and what FHWA approvals are required?

The chart below explains the requirements for permitting a project as a utility facility and those for a project requiring a right-of-way use agreement. The Federal definition of a utility facility includes facilities that produce or distribute power and electricity.¹ State definitions may be more restrictive, and the State DOT's views on whether a proposed installation is a utility under State law is considered to be the most important consideration.² To be regulated as a utility facility, the facility must also directly or indirectly serve the public (e.g., the facility cannot provide dedicated services to a corporation).³ Renewable energy projects that are connected to the public electricity grid or provide electricity used by a public agency such as the State DOT would generally be considered as serving the public.

	State definition allows for renewable energy to be considered as a utility facility <u>and</u> the project serves the public	State law excludes renewable energy as a utility facility, project is not serving the public, or utility elects not to apply for a utility permit
Applicable Federal Regulation	23 CFR part 645 Accommodation of Utilities	23 CFR part 710 Right-of-Way Use Agreements
Process	A State DOT's Utility Accommodation Policy (UAP) outlines the procedures, criteria, and standards it uses to evaluate and approve individual applications for utility facilities within the ROW. The FHWA Division Office reviews and approves new and revised UAPs for compliance with Federal requirements. The State DOT then enters into written arrangements setting forth the terms for a particular project. The State DOT can approve a utility project installation in accordance with the	State DOTs may execute a ROW use agreement for a renewable energy project. This requires a determination by FHWA that such use is in the public interest; is consistent with the continued use, operations, maintenance, and safety of the facility; and such use does not impair the highway or interfere with the free and safe flow of traffic. ⁵ An application for a ROW use agreement approval must include planning and design details about the project, including provisions for maintenance

	process outlined in the UAP without referral to FHWA. ⁴	access, terms of use, maps, plans, and sketches. ⁶
FHWA Approvals Required for Renewable Energy Use of ROW	The FHWA must give programmatic approval of the UAP; project by project approval from FHWA is not required unless the proposed installation is not in accordance with 23 CFR part 645 or the UAP. ⁷	FHWA approval is required for each use. ⁸ For non-Interstate projects, FHWA may assign approval authority to the State through their 23 U.S.C. 106(c) Stewardship and Oversight Agreement. ⁹
FHWA Approvals Required for Access Control Changes on the Interstate	The State DOT must obtain written approval from FHWA prior to any temporary or permanent modification of access control on the Interstate System. ¹⁰	The State DOT must obtain written approval from FHWA prior to any temporary or permanent modification of access control on the Interstate System. ¹¹
Approvals Required for Access Control Changes on Non-Interstate Federal-aid Highways	Approval is required prior to any temporary or permanent modification of access control on non-Interstate highways. ¹² The approving authority for NHS highways is determined by the FHWA-State DOT Stewardship and Oversight Agreement. For non-NHS highways, the State DOT is the approving authority. ¹³	Approval is required prior to any temporary or permanent modification of access control on non-Interstate highways. ¹⁴ The approving authority for NHS highways is determined by the FHWA-State DOT Stewardship and Oversight Agreement. For non-NHS highways, the State DOT is the approving authority. ¹⁵
Does FHWA require the State DOT to charge a fee?	No. Fees charged for utility use, and the disposition of such fees by the State, are at a State's discretion. ¹⁶ The FHWA does, however, encourage States to use generated revenues for transportation purposes.	Yes, if Title 23 funds were used to acquire the ROW (subject to exceptions under 23 U.S.C. 156(b) and 23 CFR 710.403). Fair market rent is required for use of the ROW, unless there is an applicable exception or justification that the project is in the public interest based on social, environmental, and economic considerations, in which case an exception may be approved. The Federal share of the net income must be used for title 23-eligible purposes in accordance with 23 U.S.C. 156(c).
How does FHWA ensure the renewable energy project does not cause safety, aesthetic, or other problems?	The FHWA uses its stewardship and oversight program to make certain the State DOT meets these responsibilities. ¹⁷	Through FHWA review and approval of the ROW use agreement. ¹⁸

What about the provision that ROW be devoted exclusively to public highway purposes?¹⁹

The FHWA Administrator may approve exceptions if he or she determines that such use is in the public interest and will not impair the highway or interfere with the free and safe flow of traffic thereon.²⁰ Federal regulation states that it is in the public interest for utility facilities to be accommodated on the ROW of a federally-funded highway project when such use does not adversely affect highway or traffic safety or otherwise impair the highway or its aesthetic quality, and does not conflict with other laws or regulations.²¹ The Federal definition of utility facility includes facilities that produce or distribute power and electricity.²² If the renewable energy facility does not meet the State definition of utility, then use of the ROW may be considered under 23 CFR 710.405.

What type of environmental review is required?

The National Environmental Policy Act (NEPA) applies to any project that involves Federal funds or approvals (including approvals handled by State DOTs under assignment or delegation of the decision from FHWA).²³ The documentation required to comply with NEPA depends greatly on the site's existing condition and the level of impacts to environmental resources. The State DOT experience so far shows that selecting sites on vacant lawns along highways, away from sensitive resources, makes it more likely that the project will be classified as a Categorical Exclusion (CE) and require only limited NEPA documentation.²⁴

Where can I find more information about renewable energy generation in the ROW and examples of projects?

Visit the FHWA Renewable Energy in the Highway ROW website:²⁵

https://www.fhwa.dot.gov/real_estate/right-of-way/corridor_management/alternative_uses.cfm.

Where can I find more guidance on utility accommodation?

Visit the FHWA Utility Program Website: <https://www.fhwa.dot.gov/utilities/>, and the FHWA Utility ROW Website: https://www.fhwa.dot.gov/real_estate/right-of-way/utility_rights-of-way/.

¹ 23 CFR 645.207.

² 23 CFR 645.209(m).

³ 23 CFR 645.207.

FHWA Office of Realty, "Guidance on Utilization of Highway Right-of-Way" (March 2009), available at https://www.fhwa.dot.gov/real_estate/policy_guidance/guidutil.cfm.

⁴ 23 CFR part 645

⁵ Except on Interstate highways, FHWA may assign its approval responsibilities to the State DOT. 23 CFR 710.405(a).

⁶ 23 CFR 710.405.

⁷ 23 CFR 645.215.

⁸ 23 CFR 710.403(b)

⁹ 23 CFR 710.405(a).

¹⁰ 23 U.S.C. 111(a), 23 CFR 710.403(a). The approval applies to segments that have received Federal-aid funds.

¹¹ 23 U.S.C. 111(a), 23 CFR 710.403(a). The approval applies to segments that have received Federal-aid funds.

¹² 23 CFR 620.202 and 620.203(a) and (h); see also 23 CFR 710.405 and 23 CFR 645.211. The approval applies to segments that have received Federal-aid funds.

¹³ See 710.403(a).

¹⁴ 23 CFR 620.202 and 620.203(a) and (h); see also 23 CFR 710.405 and 23 CFR 645.211. The approval applies to segments that have received Federal-aid funds.

¹⁵ See 710.403(a).

¹⁶ This exception to 23 U.S.C. 156(c) is based on conference report language for section 126 of the Federal-Aid Highway Act of 1987 (Title I of the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. 100-17 (Apr. 2, 1987)). With respect to 23 U.S.C. 156 provisions on income from right-of-way, added by the Act, the report stated “[t]he charges and disposition of fees for utility use and occupancy of right-of-way will continue to be governed by 23 C.F.R. 645” (H.R. Conf. Rep. 100-27). The FHWA also has broad authority to establish utility accommodation criteria under 23 U.S.C. 109(l).

¹⁷ 23 CFR 645.215(b).

¹⁸ 23 CFR 710.405.

¹⁹ 23 CFR 1.23.

²⁰ 23 CFR 1.23(c), 23 CFR 645.211, 23 CFR 710.403-405

²¹ 23 CFR 645.205(a).

²² 23 CFR 645.207.

²³ The FHWA’s NEPA regulations are available at 23 CFR part 771.

²⁴ Per FHWA interviews with Massachusetts DOT and Oregon DOT.

²⁵ Some project examples are located on non-Federally-funded ROW, and accordingly don’t require Federal approval.