

## 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 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 the ROW that was purchased with Federal-aid highway funds. What Federal regulations do I need to follow and what FHWA approvals are required?**

The answer depends on if 1) the State Utility Accommodation Policy (UAP) includes renewable energy generation as a utility facility and 2) the project serves the public. The Federal definition of a utility facility includes facilities that produce or distribute power and electricity.<sup>1</sup> State definitions may be more restrictive. 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).<sup>2</sup> 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 to be serving the public.

|                                      | <b>UAP includes renewable energy as a utility facility <u>and</u> the project serves the public</b>   | <b>UAP does <u>not</u> include renewable energy as a utility facility</b>  |
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| <b>Applicable Federal Regulation</b> | <a href="#">23 CFR part 645</a> Accommodation of Utilities  | <a href="#">23 CFR part 710</a> Right-of-Way Use Agreements  |
| <b>Process</b>                       | A State DOT's 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 written arrangements setting forth the terms for a particular project. The State DOT can approve a utility project installation in | State DOTs may execute a ROW use agreement for a renewable energy project. This requires approval by FHWA, including 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. An application for a ROW use agreement approval must include planning and |

<sup>1</sup> 23 CFR 645.207.

<sup>2</sup> FHWA Office of Realty, "Guidance on Utilization of Highway Right-of-Way" (March 2009), available at [https://www.fhwa.dot.gov/real\\_estate/right-of-way/policy\\_and\\_guidance/guidutil\\_a.cfm](https://www.fhwa.dot.gov/real_estate/right-of-way/policy_and_guidance/guidutil_a.cfm).

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|   | accordance with the process outlined in the UAP without referral to FHWA. <sup>3</sup>   | design details about the project, including provisions for maintenance access, terms of use, maps, plans, and sketches. <sup>4</sup>  |
| <b>FHWA Approvals Required for Renewable Energy Project</b>   | The FHWA must give programmatic approval of the UAP; project by project approval from FHWA is not required. <sup>5</sup>   | Approval from FHWA is required for each project within the Interstate ROW. For non-Interstate projects, FHWA may delegate approval authority to the State through their Stewardship and Oversight Agreement. <sup>6</sup>                             |
| <b>FHWA Approvals Required for Access to Interstate</b>   | The State DOT must obtain written approval from FHWA prior to any temporary or permanent modification of access to the Interstate System. <sup>7</sup>   | The State DOT must obtain written approval from FHWA prior to any temporary or permanent modification of access to the Interstate System. <sup>8</sup>  |
| <b>Does FHWA require the State DOT to charge a fee?</b>   | No. Fees charged for utility use are at a State's discretion and may be used as the State sees fit. <sup>9</sup> The FHWA does, however, encourage States to use generated revenues for transportation purposes. <sup>10</sup> | Yes. Fair market rent is required for use of the ROW, unless there is justification that the project is in the public interest based on social, environmental, and economic considerations, in which case an exception may be approved. <sup>11</sup> |
| <b>How does FHWA ensure the renewable energy project does not cause safety, aesthetic, or other problems?</b> | Through FHWA review and approval of the UAP. <sup>12</sup>   | Through FHWA review and approval of the ROW use agreement. <sup>13</sup>  |

<sup>3</sup> 23 CFR 645.211.

<sup>4</sup> 23 CFR 710.405.

<sup>5</sup> 23 CFR 645.215.

<sup>6</sup> 23 CFR 710.405.

<sup>7</sup> 23 CFR 620.203(h).

<sup>8</sup> 23 CFR 620.203(h).

<sup>9</sup> FHWA Office of Realty, "Guidance on Utilization of Highway Right-of-Way" (March 2009), available at [https://www.fhwa.dot.gov/real\\_estate/right-of-way/policy\\_and\\_guidance/guidutil.cfm](https://www.fhwa.dot.gov/real_estate/right-of-way/policy_and_guidance/guidutil.cfm).

<sup>10</sup> FHWA Office of Realty, "Guidance on Utilization of Highway Right-of-Way" (March 2009), available at [https://www.fhwa.dot.gov/real\\_estate/right-of-way/policy\\_and\\_guidance/guidutil.cfm](https://www.fhwa.dot.gov/real_estate/right-of-way/policy_and_guidance/guidutil.cfm).

<sup>11</sup> 23 U.S.C. 156; 23 CFR 710.403(d); 23 CFR Part 771; FHWA Office of Realty, "Guidance on Utilization of Highway Right-of-Way" (March 2009), available at [https://www.fhwa.dot.gov/real\\_estate/right-of-way/policy\\_and\\_guidance/guidutil.cfm](https://www.fhwa.dot.gov/real_estate/right-of-way/policy_and_guidance/guidutil.cfm).

<sup>12</sup> 23 U.S.C. 215(c) and 23 CFR 645.211.

<sup>13</sup> 23 CFR 710.405.

### **What about the provision that ROW be devoted exclusively to public highway purposes?<sup>14</sup>**

Highway use is the primary, but not sole, use of the ROW. 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.<sup>15</sup> 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.<sup>16</sup> The Federal definition of utility facility includes facilities that produce or distribute power and electricity.<sup>17</sup>

### **What type of environmental review is required?**

The National Environmental Policy Act (NEPA) applies to any project that involves Federal funds or approvals.<sup>18</sup> 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.<sup>19</sup>

### **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:<sup>20</sup>

[https://www.fhwa.dot.gov/real\\_estate/right-of-way/corridor\\_management/alternative\\_uses.cfm](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/](https://www.fhwa.dot.gov/real_estate/right-of-way/utility_rights-of-way/).

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<sup>14</sup> 23 CFR 1.23.

<sup>15</sup> 23 CFR 1.23(c).

<sup>16</sup> 23 CFR 645.205(a).

<sup>17</sup> 23 CFR 645.207.

<sup>18</sup> The FHWA's NEPA regulations are available at 23 CFR part 771.

<sup>19</sup> Per FHWA interviews with Massachusetts DOT and Oregon DOT.

<sup>20</sup> Some project examples are located on non-Federally-funded ROW, and accordingly don't require Federal approval.