Memorandum

U.S. Department of Transportation
Federal Highway Administration

Subject: State DOTs Leveraging Alternative Uses of the Highway Right-of-Way Guidance

From:
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Acting Administrator

Date: April 27, 2021

Reply to: HEPR-40

To:
Directors of Field Services
Division Administrators
Division Directors

PURPOSE

The purpose of this guidance document is to provide clarification to FHWA Division Offices who work with State departments of transportation (State DOTs) on certain uses of the highway right-of-way (ROW) that can be leveraged by State DOTs for pressing public needs relating to climate change, equitable communications access, and energy reliability. This guidance document supports the consistent utilization of the ROW for renewable energy generation, electrical transmission and distribution projects, broadband projects, vegetation management, inductive charging in travel lanes, alternative fueling facilities, and other appropriate uses as identified herein. FHWA Division Offices should share this memo with their State DOTs for their consideration for these alternate uses of highway ROW.

These uses of the highway ROW, including the development of renewable energy projects, enable breakthrough transportation technology related to electrification and connected and autonomous vehicles. These uses of the highway ROW also better utilize the full value and productivity of the existing asset while also reducing or eliminating the ongoing maintenance expenses for State DOTs. For example, State DOTs may create new revenue opportunities through participation in public-private-partnerships to develop renewable energy projects and negotiating agreements that include land lease or land license payments and power purchase agreements that reduce the States' energy costs, both actual and over the life cycle of the renewable energy project.

This guidance document first addresses renewable energy generation facilities, such as solar arrays and wind turbines, and alternative fueling facilities (e.g., electric vehicle (EV) charging within the highway ROW). The lands State DOTs manage can be suitable locations for renewable energy and alternative fueling applications. Such projects can:

- Better leverage the full value and productivity of existing highway ROW assets;
- Reduce greenhouse gas and other pollutant emissions;
- Promote energy security by diversifying energy generation and delivery methods;
- Foster the creation of a local green job market that enhances the viability of the Nation's renewable energy industry;
- Create a potential revenue source for State DOTs to develop projects and negotiate agreements that include land lease or land license payments and power purchase agreements; and
- Reduce or eliminate ongoing maintenance expenses for State DOTs.

Additionally, this guidance document provides relevant information on the use of certain vegetation management practices within the highway ROW to address climate change.

In considering requests pertaining to these ROW uses, FHWA Division Offices are encouraged to develop programmatic approaches, where appropriate, to processing such requests under the National Environmental Policy Act (NEPA) and Section 106 of the National Historic Preservation Act.

Coordination with State Departments

Division offices of the Federal Highway Administration should collaborate as frequently as practicable with State departments of transportation in reviewing utility accommodation policies under section 645.205 of title 23, Code of Federal Regulations. Division offices should foster an enhanced consideration of right-of-way and utility accommodation interests as part of the transportation planning process.

Additionally, FHWA Division Offices should encourage State DOTs to consider practices that can further broadband deployment initiatives, such as resource sharing. Best practices include minimizing repeated excavation of the roadway, coordinating with broadband utilities during highway construction, and integrating trenchless technologies into construction practices, as appropriate.

RENEWABLE ENERGY, ALTERNATIVE FUELING FACILITIES, ELECTRICAL TRANSMISSION AND DISTRIBUTION, AND BROADBAND PROJECTS

There are two methods for addressing renewable energy, alternative fueling, electrical transmission and distribution, and broadband projects (hereinafter known as "Clean Energy and Connectivity" (CEC) projects) in the ROW of a Federal-aid highway:

1. Accommodation as a utility under 23 CFR Part 645; or
2. Approval as an alternative use of the highway ROW under 23 CFR Part 710.

The FHWA Division Offices should encourage State DOTs to consider addressing these facilities through accommodation as a utility to the extent practicable and consistent with State law.

Accommodation as a Utility

As stated in 23 CFR 645.205, it is in the public interest to accommodate utility facilities on the highway ROW of a Federal-aid or direct Federal highway project when such use and occupancy of the highway ROW does not adversely affect highway or traffic safety, or otherwise impair the highway or its aesthetic quality**,** and does not conflict with the provisions of Federal, State or local laws or regulations.

The Federal definition of a utility facility in 23 CFR 645.207 is broad and intended to cover the extensive array of uses that are defined by the States. State laws/regulations can be narrower in scope than the Federal definition. As such, States may broaden their applicable State laws/regulations to cover the full scope of the Federal definition should they wish these facilities to be accommodated in the highway ROW as a utility. In determining whether a proposed installation is a utility or not, the most important consideration is how the State DOT views it under its own State laws and/or regulations (23 CFR 645.209(m)).

Accommodation of these CEC projects as a utility should be reflected in the State DOT Utility Accommodation Policy (UAP). For example, for renewable energy generation, the State DOT UAP should be updated to include language: (1) acknowledging renewable energy generation as a utility facility when consistent with State law, establish the proper form of written agreement or permit, (2) discussing the means by which utility accommodation can be better integrated into the transportation planning process at the State, regional, and corridor levels, and (3) addressing applicable terms and conditions, pursuant to 23 CFR 645 Subpart B. Federal regulations provide each State DOT with flexibility regarding utility accommodation and FHWA must give programmatic approval of the UAP. For broadband projects, similar updates to the State DOT UAP can help accommodate utilities within the Federal-aid ROW.

However, a State DOT UAP that does not specifically mention CEC projects, such as renewable energy generation or broadband, but uses the FHWA definition of a utility, or is in a State where State law allows for renewable energy generation or broadband to be considered as a utility facility, can proceed with a permit for a facility so long as the permit addresses the applicable terms and conditions, including but not limited to the rights and interests being permitted, the terms of the agreement, and the roles and responsibilities of the parties.

State DOTs are not required to charge fair market rent or other fees for use of the ROW if accommodating the facility as a utility, and fees may be set at the discretion of the State. State DOTs are encouraged but not required to allocate collected fees for transportation uses, purposes, and services.

The State DOT's UAP outlines the procedures, criteria and standards to evaluate and approve applications for utility facilities within the highway ROW. Each State DOT must submit a UAP in accordance with 23 CFR 645.211 and 645.215, addressing

how the State DOT will consider applications for utility accommodation within the access control lines of a freeway. State DOTs may accommodate utility facilities in the Interstate or non-Interstate highway ROW in accordance with 23 CFR 645.209.

If a State does not view renewable energy, electric vehicle charging stations, other alternative fueling facilities, or broadband as utilities under State laws and/or regulations, these facilities may also be approved in the highway ROW as an alternative use of ROW under Federal regulations, 23 CFR Part 710.

No Secondary Access Requirements for Renewable Energy Projects

There is no Federal requirement for secondary access to renewable energy generation facilities located adjacent to ramps, interchanges, corridor parking facilities, or within rest areas.

*No Commercial Activity Restrictions for **CEC** Projects*

A CEC project in the Interstate or non-Interstate ROW that is being accommodated as a utility facility serving the public is not a prohibited commercial activity under 23 U.S.C. 111 unless such project also qualifies as an automotive service station or other commercial establishment pursuant to 23 U.S.C. 111.

Alternative Use of the ROW

As a separate path from accommodation as "utilities", the FHWA may approve alternative uses of the highway ROW if it is determined that such occupancy, use, or reservation is in the public interest and will not impair the highway or interfere with the free and safe flow of traffic thereon (23 CFR 1.23(c)).

The FHWA has determined that CEC projects provide an opportunity to reduce carbon emissions and are an important tool to address climate change. The FHWA has also determined that broadband installation can assist with equitable communications access. These non-highway alternative uses of highway ROW are in the public interest.

The FHWA will consider the installation of solar panels, electric vehicle charging stations, broadband deployment, and other CEC projects as acceptable alternative uses of the Interstate or non-Interstate highway ROW if they comply with Federal property management regulations at 23 CFR 1.23, 23 CFR Part 710, and 23 U.S.C 111.

Certain provisions must be incorporated in ROW Use Agreements for a time-limited alternative use of a Federal-aid highway (23 CFR 710.405), including planning and design details about the project and provisions for maintenance access, terms of use, maps, plans, and sketches.

Fair Market Value (FMV) Exceptions for Renewable Energy and Alternative Fuel Facilities

Alternative uses of the highway ROW, meaning any non-transportation uses, are subject to 23 U.S.C. 156 requirements to charge FMV for the lease or disposal of highway ROW if the property was acquired with Federal-aid highway funding. The FHWA can approve an exception for a social, environmental, or economic purpose (23 U.S.C. 156(b)) and 23 CFR 710.403(e)).

Based on the environmental benefits that would result from these installations, FHWA has determined that CEC projects located on Interstate or non-Interstate highway ROW qualify for an exception to the FMV requirement under 23 U.S.C. 156(b).

Location of Alternative Fuel Facilities

States are encouraged to consider an alternative fuel facility's proximity to off-highway travel centers and fuel retailers when siting these facilities along the highway ROW.

BIOLOGIC CARBON SEQUESTRATION PRACTICES

Environmental Benefits

Vegetation management practices along the highway ROW can affect the amount of carbon that is biologically sequestered, or removed from the atmosphere. Treatments, such as increased mowing heights and planting native grasses, can increase the amount of carbon that is absorbed from the atmosphere and stored in the soil. These practices are consistent with ROW maintenance and safety considerations, but also may be carried out by others under agreements for an alternate use of the ROW. These practices may provide other environmental benefits such as reducing erosion from stormwater runoff, reducing peak flow and runoff velocity, enhancing stormwater infiltration, and reducing dust. Additionally, the FHWA encourages State DOTs to use highway ROW to develop habitat and forage for Monarch butterflies, other native pollinators, and honey bees through plantings of native forbs (e.g., flowering plants) and grasses, including noninvasive, native milkweed species that can serve as migratory way stations for butterflies and facilitate migrations of other pollinators.

Vegetation management, as well as habitat and forage for Monarch butterflies, other native pollinators, and honey bees, can improve the affected environment and foster opportunities that support native habitat. It can provide: stream bank stabilization, wetland mitigation, water quality improvement, air pollution mitigation, noise abatement, and wildlife habitat. Further, vegetation management provides habitat for pollinators such as bees and butterflies. Pollinators are essential to agricultural production and ecosystem health.

The contents of this memorandum do not have the force and effect of law and are not meant to bind States or the public in anyway way, however, all cited statutes and regulations must be complied with. This memorandum is intended only to provide clarity to FHWA Division Offices regarding existing requirements under the law or agency policies. Questions may be directed to Nicholas Thornton at (202) 366-1352, Nicholas.thornton@dot.gov, or Lindsey Svendsen at (202) 366-2035, Lindsey.S.Svendsen@dot.gov .