

Overview of Federal and State Policy on Siting Energy and Communications Infrastructure in Highway Right-of-Way

As state policymakers plan for investments in transportation, energy, and communications infrastructure, they do so with the knowledge that the demands on all types of infrastructure are rapidly changing.

Significant federal funding has been allocated to infrastructure in both the Investment in Infrastructure and Jobs Act (IIJA) and the Inflation Reduction Act (IRA). This funding represents an opportunity to coordinate planning across agencies to maximize the benefits of these investments.

The overview of state and federal policies below provides a snapshot of new policies that aim to promote coordinated, cost-effective, and sustainable infrastructure investments.

Current federal law

Current law provides two regulatory pathways for siting energy, alternative fueling, electrical transmission and distribution, and broadband projects in a Federal-aid highway right-of-way (ROW):

1. a project can either be given a “utility accommodation” or
2. receive approval as an “alternative use” of the highway ROW.

FHWA preference is for states to use of the state Department of Transportation (DOT) utility accommodation policy.

Laws and regulations pertaining to use of the highway right-of-way

Federal laws and FHWA regulations contained in 23 U.S.C. 109, 111, 116, and 123 and 23 CFR parts 1, 635, 645, and 710 regulate the accommodation, relocation, and reimbursement of utilities located within the highway ROW.

- [23 U.S. Code § 109 - Standards](#)
- [23 U.S. Code § 111 - Occupancy or use of right-of-way for non highway purposes](#)
- [23 U.S. Code § 116 - Maintenance](#)
- [23 U.S. Code § 123 - Rights-of-way](#)
- [23 CFR § 645.211 - State transportation department accommodation policy requirements](#)
- [23 CFR § 645.215\(a\) - Approvals](#)
- [23 CFR §710.403 - Management - Subpart D-Real Property Management \(alternative uses\)](#)
- [23 CFR §710.405 - ROW Use Agreements](#)

FHWA guidance on alternative uses of the ROW

On April 27, 2021 the FHWA released a memorandum titled [State DOTs Leveraging Alternative Uses of the Highway Right-of-Way Guidance](#). The Guidance clarified that state DOTs can leverage the highway ROW for “pressing public needs relating to climate change, equitable communications, renewable energy generation, electrical transmission and distribution projects, broadband projects, vegetation management, inductive charging in travel lanes, alternative fueling facilities, and other appropriate uses...”

Renewable energy, alternative fueling, electrical transmission and distribution, and broadband projects, termed “Clean Energy and Connectivity” (CEC) projects can be accommodated in the ROW of a Federal-aid highway as a ‘utility’ or approved as ‘alternate uses of the highway ROW.’ The Federal definition of utility is broad. To accommodate a CEC project as a utility under 23 CFR 645, the project must meet the state’s definition of what constitutes a utility. If the project meets the utility definition, then the permitting process should be addressed in the state DOT Utility Accommodation Manual (UAM).

A CEC project that does not meet the state's definition of a utility, may still use highway ROW, under 23 CFR 710, if the project qualifies under the alternative use provision. The FHWA must determine 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."

In 2021 the FHWA released a memorandum titled [Policy on Using Bipartisan Infrastructure Law Resources to Build a Better America](#). Projects specifically identified that align with the Bipartisan Infrastructure Law—or IIJA—include those that, "future-proof our transportation infrastructure by accommodating new and emerging technologies like electric vehicle charging stations, renewable energy generation, and broadband deployment in transportation rights-of-way."

State laws and policies are changing

State laws and regulations regarding alternative uses of the highway ROW are also changing. Wisconsin has placed more than 800 miles of electric transmission within and along state and interstate ROW over the last 20 years. Maine and New Hampshire have also made changes to open their ROW to other uses.

- In 2003 **Wisconsin** passed [Act 89](#) establishing existing highway ROW as a priority siting corridor for new transmission lines, second only to existing transmission corridors. Wisconsin law allows utilities to locate facilities along and across highway ROW with the written consent of the DOT.
- In 2010 **Maine** passed [LD 1786 \(An Act Regarding Energy Infrastructure Development\)](#) designating energy corridors for the development of transmission and other energy infrastructure along specific highway and pipeline rights-of-way.
- In 2016 **New Hampshire** passed [HB 626](#) that simultaneously authorized energy infrastructure development, designated energy infrastructure corridors and required the department of transportation to update and revise its utility accommodation manual.

Sources

- [Policy on Using Bipartisan Infrastructure Law Resources to Build a Better America](#)
- [State DOTs Leveraging Alternative Uses of the Highway Right-of-Way Guidance](#)

- [§ 710.405 ROW use agreements](#)

About NextGen Highways

The NextGen Highways is a collaborative initiative promoting the use of highways and other existing rights-of-way as infrastructure corridors where electric and communications infrastructure are strategically and safely co-located in existing highway right-of-way. Learn more at <http://www.NextGenHighways.org>