

RHODE ISLAND GOVERNMENT REGISTER
PUBLIC NOTICE OF PROPOSED RULEMAKING

AGENCY: Department of Transportation

DIVISION: Legal

RULE IDENTIFIER: Repeal of ERLID 1305 (will be consolidated into 290-RICR-20-00-5)

REGULATION TITLE: ACCOMMODATING UTILITY FACILITIES WITHIN PUBLIC PUBLIC RAILROAD RIGHTS-OF-WAY

RULEMAKING ACTION: Direct Final

Direct Final: If no formal objection is received on or before 7/7/2018 the Department of Transportation will file the repeal without opportunity for public comment.

TYPE OF FILING: Repeal

TIMETABLE FOR ACTION ON THE PROPOSED RULE:

Public notice date: 6/7/2018

End of comment period date: 7/7/2018

SUMMARY OF PROPOSED RULE:

The regulation is being repealed as part of a consolidation with regulation 1302 in order to reduce redundant language. This action will have all have the requirements located in the same place to make it easier for an interested party to apply for a utility permit.

COMMENTS INVITED:

All interested parties are invited to submit written or oral comments concerning the proposed regulations by 7/7/2018 to the addresses listed below.

FOR FURTHER INFORMATION CONTACT:

ATTN: Kathleen Corbishley, Senior Legal Counsel

Office of Legal Counsel, Department of Transportation

2 Capitol Hill, Providence, RI, 02903

Phone: 222-6510 ext. 4585

Email: kathleen.corbishley@dot.ri.gov

SUPPLEMENTARY INFORMATION:

Regulatory Analysis Summary and Supporting Documentation:

Any economic impact is *de minimis*.

Authority for This Rulemaking: R.I. Gen. Laws § 3-7-8 and Chapter 42-35

Regulatory Findings:

In the development of the proposed repeal consideration was given to: (1) alternative approaches; (2) overlap or duplication with other statutory and regulatory provisions; and (3) significant economic impact on small business. No alternative approach, duplication, or overlap was identified based upon available information.

The Proposed Repeal:

The Department of Transportation proposes to repeal as follows:

290-RICR-20-00-5

290 - DEPARTMENT OF TRANSPORTATION

CHAPTER 20 - GOVERNMENT AND UTILITIES

SUBCHAPTER 00 N/A

PART 5 - ACCOMMODATING UTILITY FACILITIES WITHIN PUBLIC RAILROAD RIGHTS-OF-WAY

5.1 - Authority

- A. The following regulations are promulgated to administer the Department's policy for accommodating utility facilities within Railroad rights-of-way pursuant to RIGL Sections 37-7-8 and Chapter 42-35.
- B. The purpose of these regulations is to prescribe conditions for the granting of easements and rights-of-way within Railroad rights-of-way. No easement or right-of-way will be granted that will or may adversely impact the future transportation needs of the citizens of Rhode Island.

5.2 - Definitions

1. "APPLICANT" means any individual, firm, corporation, partnership or agency, public or private, that has requested the granting of an easement or right-of-way within a Railroad right-of-way.
2. "APPLICANT" means any individual, firm, corporation, partnership or agency, public or private, that has requested the granting of an easement or right-of-way within a Railroad right-of-way.
3. "DEPARTMENT" means The Rhode Island Department of Transportation.
4. "DIRECTOR" means The Director of the Rhode Island Department of Transportation, whose address is Two Capitol Hill, Room 210, Providence, Rhode Island 02903.
5. "EASEMENT" means a non-possessing interest held by one person in land of another whereby the first person is accorded partial use of such land for a specific purpose. An easement restricts but does not abridge the rights of the fee owner to the use and enjoyment of his land.
6. "LEASE" means a contract, written or oral, by which possession of land and/or building is given by the owner to another person for a specified period of time and for the rent specified.
7. "LICENSE" means a personal privilege to do some act on the land of another.

~~8. "MAINTAINER" means any individual, firm corporation, partnership or agency, public or private, that enters into an agreement with the Department to maintain a utility facility permitted under these regulations~~

~~9. OWNER means any individual, firm, corporation, partnership or agency, public or private, that owns a utility facility permitted under these regulations.~~

~~10. "PERMIT" means Railroad Utility Permit. All permits shall include temporary or permanent easements, or both, for use of State property.~~

~~11. "RAILROAD RIGHT-OF-WAY" means Railroad right-of-way acquired by the State for future transportation needs.~~

~~12. "UTILITY FACILITY" means The term "Utility Facility", as used herein, is defined in 23 CFR 645.207. In general, it applies to any privately, publicly, or cooperatively owned line, facility, or system for producing, transmitting, or distributing communications, cable television, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, storm water not connected with highway drainage, or any other similar commodity, including any fire or police signal system or street lighting system, which directly or indirectly serves the public. The term utility shall also mean the utility company inclusive of any substantially owned or controlled subsidiary. For the purposes of this part, the term includes those utility-type facilities which are owned or leased by a government agency for its own use, or otherwise dedicated solely to governmental use. The term utility includes those facilities used solely by the utility which are a part of its operating plant.~~

5.3 General Restrictions

~~1. "PERMIT" means utility permit is required for the installation of any Utility Facility within a Railroad right-of-way, the process for which is specified in Section 4.~~

~~2. "TRANSVERSE INSTALLATIONS" means Transverse installation of utility facilities will be permitted only where there is no prudent alternative to the installation of said facility within a Railroad right-of-way. Said installation shall be as close to perpendicular as possible to the Railroad alignment, and in all cases shall be limited to longitudinal distances of less than 1,000 feet. Said installation shall not endanger the safety of the motoring public and shall not adversely effect the public use. Any above ground structure shall be placed at a safe distance from the transportation portion of the right-of-way as determined by the Department. Access to said installation will only be permitted as specified in Section 3.4.~~

~~3. " LONGITUDINAL INSTALLATIONS" Longitudinal installation of utility facilities within a Railroad right-of-way are permitted only when there is no feasible or prudent alternative to the installation of said facility. Installations are to be permitted only in close proximity to the edge of the right-of-way. Access to said installations will be permitted as specified in Section 3.4.~~

~~Service connections to adjacent properties shall not be permitted from within the utility strip. Where such longitudinal installations are requested, the utility owner must in each case show to the RIDOT's satisfaction~~

~~a. That the accommodation will not adversely affect the right-of-way and public safety.~~

~~b. That alternate locations are not available or cannot be implemented at reasonable cost, from the standpoint of providing efficient utility services in a manner conducive to safety, durability, and economy of maintenance and operations; that the accommodation will not adversely affect the design, construction, operation, maintenance or stability of the Railroad right-of-way; and that it will not interfere with or impair the present use or future expansion of the right-of-way.~~

~~c. That disapproval of the use of the State right-of-way would result in the loss of productive agricultural land, or loss of productivity of agricultural land, if any. In this case, the utility must provide information on the direct and indirect environmental and economic effects of such loss, which effects will be evaluated and considered by the RIDOT.~~

~~——— d. That the accommodation satisfies the conditions of "Access for Constructing and/or Servicing Utilities." (Policy Section 3.4)~~

5.4 Access

~~Access for construction and/or servicing a Utility Facility within a Railroad right-of-way shall minimize disruption and be in conformance with the guidance found in the MUTCD.~~

5.5 Protection from suits

~~——— As a condition of receipt of a permit, the Permittee shall defend, indemnify, protect and save harmless the State and its agents, servants and employees from and against any and all suits, claims, losses, demands or damages of whatever kind or nature arising out of the issuance of said permit or claimed to arise out of any act, error or omission of the Permittee, its agents, servants and employees in the performance of work covered by the permit. A performance bond and certificates of insurance shall be required. The performance bond shall be obtained by the Permittee and submitted to the RIDOT prior to the Permittee initiating utility work.~~

5.6 Relocation

~~——— It will be the responsibility of the Maintainer to accomplish any relocation of the Utility Facility at its expense. Any such relocation shall be subject to review and approval by the Department. If a relocation is required by the Department, the Maintainer will receive due notice and must comply with the relocation with all deliberate speed.~~

5.7 Maintenance

~~The Maintainer shall maintain the Utility Facility in a condition satisfactory to the Department which does not endanger the safety of the motoring public and does not adversely affect the Railroad right-of-way. The Department may perform emergency maintenance on the Utility Facility for which it shall be reimbursed by the Maintainer. In the event the Maintainer needs to perform routine emergency maintenance on the facility, the Department will be notified as soon as reasonably possible. Full coverage will be in place to cover liability claims against the Department and a new permit will be required. Should the Maintainer need to replace all or a portion of an existing utility, a new easement will be required only in the event that the work should extend beyond the limits of the original easement. Otherwise the Maintainer will be vested with the right to complete all work under the original grant of easement.~~

6.0 Permit Process

- ~~1. "Filing" means Any person, firm, corporation or governmental agency seeking to install a Utility Facility within a Railroad right-of-way shall do so by filing a utility permit Application with the Department's Division of Maintenance. At the time of such Application, the Applicant shall pay to the Department any fee required by statute. All Applications must be signed by a governmental agency or public utility agreeing to be responsible for all future maintenance of the facility.~~
- ~~2. "Copies" means Completed Applications must be accompanied by four copies of a preliminary plan showing the plan and profile view of the proposed facility as well a traffic control plan, both stamped by a registered professional engineer, and two (2) copies of a detailed discussion of all possible alternatives to the Freeway installation proposal. The profile plan shall be developed in accordance with the RIDOT Design Policy Memo 2.1.~~
- ~~3. "Review" means After the Applicant has submitted the required documentation, the Application will be reviewed by the Department's staff personnel.~~
- ~~4. "EASEMENT/LEASE/LICENSE AGREEMENTS" During the review process, the Applicant must, at its own expense, provide any additional information relevant to the Application requested by the Department. In addition, the Owner must enter into either temporary and permanent~~

~~easement agreements or a lease or license with the Department, prepared by its Property and Right-of-Way Division, in reference to its use of State property, unless such use is in reference to maintenance, repair, testing, operation, replacement, recon structuring, or upgrading that does not have an adverse impact on the State right-of-way, or a relocation required by the Department of existing Utility Facilities. In no case shall this exception allow the use of an easement, lease or license by any entity other than the Owner without the prior written agreement of the State.~~

- ~~5. NEPA means any application within the jurisdiction of the National Environmental Policy Act, as amended, shall be reviewed by the Federal Highway Administration. The approval of utility installations along or across Railroad right-of-way meets the criteria for a categorical exclusion under 23 CFR 771.117; however, any action which normally would be classified as a categorical exclusion but may involve unusual circumstances will be evaluated on a case-by-case basis per 23 CFR 771.117(b).~~

~~7.0 Transverse Railroad Crossing~~

~~a. In the case of an Application for a transverse Railroad crossing the Chief Engineer of the Department may grant or deny the Application after considering the recommendations of the Departmental staff personnel.~~

~~b. Longitudinal Utility Installation In the case of any application for a longitudinal utility installation, the proposal shall be forwarded to the installation will be required in order for the committee to recommend approval. Upon written recommendation from the Utility Advisory Committee, the Chief Engineer may authorize approval or denial of the requested utility permit~~

~~7.1 Decision~~

~~A decision by the Chief Engineer will be rendered within forty five (45) days of receipt of a completed Application by the Maintenance Division, and any additional information requested by the Department.~~

~~7.2 Conditions and Bond~~

~~As a result of the Departmental staff review and the action of the Chief Engineer, the Application will be either approved as submitted with standard conditions, approved with additional conditions or denied as submitted. The Applicant will be notified, by mail, of the decision. A performance bond issued by a company licensed to conduct business in the State of Rhode Island and in an amount sufficient to assure that all the terms and conditions of the permit granted by the Department of Transportation shall be obtained by the Applicant.~~

7.2 Appeal

~~A. An Applicant dissatisfied with the decision of the Chief Engineer, may appeal to the Director within ten (10) days of the receipt of the decision. The appeal must include a copy of the decision. The Director's decision may be appealed to the Superior Court in accordance with the Administrative Procedures Act, RIGL Section 42-35-24.~~

7.3 State Properties Committee

~~A. All easements, leases or licenses are subject to the approval of the State Properties Committee pursuant to RIGL Sections 37-7-8 and 37-7-9.~~

7.4 Compensation

~~A. Compensation for the installation of a utility facility will be determined by the Department of Transportation based upon the fair market value of the property utilized. In reference to municipalities and non-profit, Public Utilities Commission regulated utilities, it shall be the Department's recommendation to the State Properties Committee that fair market value be waived and no compensation be due.~~

~~B. Payment must be in the form of a certified check or money order made payable to the Rhode Island Department of Transportation. Cash will not be accepted.~~

7.5 Severability

~~A. If any provisions of these rules and regulations or the Application thereof to any person or circumstances shall be held invalid, such invalidity shall not affect the provisions or application of the rules and regulations which can be given effect, and to this end the provisions of these rules and regulations are declared to be severable.~~

7.6 Effective Date

~~A. These rules and regulations shall become effective twenty days (20) days after filing with the Office of the Secretary of State.~~

~~RHODE ISLAND DEPARTMENT OF TRANSPORTATION~~

~~I hereby certify the above is a true copy,~~

~~William D. Ankner, Ph.D. DIRECTOR~~
