29.1 General Discussion

This chapter summarizes the regulations and implementing requirements that local agencies must follow.

Section 504 of the Rehabilitation Act of 1973 states that no person with a disability shall be excluded from participation in, denied the benefits of, or be subjected to discrimination under any program or activity that receives Federal funding. This law extends to the entire operations of a recipient or subrecipient regardless of the specific funding source of a particular operation.

The Americans with Disabilities Act of 1990 is mirrored after Section 504 (nondiscrimination based on disability), but extends the reach of Federal accessibility laws to include those agencies that are not recipients or subrecipients of Federal funding. Title II (28 CFR Part 35) of the ADA specifically pertains to State and Local Governments.

Local agencies are always subject to the requirements of the ADA, and are typically subject to the requirements of Section 504 as well since they usually fall under the legal classification of being either a recipient or subrecipient of Federal funding. By legal definition, a recipient includes any public entity that receives Federal financial assistance from the United States Department of Transportation (USDOT), either directly or through another recipient (49 CFR Part 27.5). Note that recipient classification is not based on the funding source of a particular project, but rather on whether the public entity accepts any Federal funding for any purpose at any time.

29.2 Assurances

Local agencies receiving Federal funding from the USDOT or its operating administrations (i.e., Federal Highway Administration, Federal Transit Administration, Federal Aviation Administration) are required to submit a written policy statement, signed by the Agency Executive and addressed to WSDOT, documenting that all programs, activities, and services will be conducted in compliance with Section 504 and the Americans with Disabilities Act (ADA). This policy statement is required as part of the local agency’s agreement with WSDOT.
29.3 Administrative Requirements

The following is a list of requirements set forth by Section 504 and/or the ADA: [Note: When a requirement cites a number of employees as a trigger, that number is based on the total of permanent, temporary, and contract employees regardless of whether the employees are full or part time.]

- Agencies with 50 or more employees are required to designate at least one person as their ADA/504 Coordinator. This person is responsible for coordinating ADA/504 compliance throughout the agency. The name, office address, and telephone number of the ADA/504 Coordinator must be provided both internally and externally.

- All agencies, regardless of size, are required to provide public notice of the ADA provisions. This notice must contain a brief description about how the agency will address ADA accessibility in its employment, communications, policies, and resolution of complaints. This notice must be placed in locations and/or facilities that are accessible internally and externally. The notice must also be available in alternative formats. For example, you must provide alternative formats that address the needs of persons with mobility, visual, and hearing disabilities.

- Agencies with 50 or more employees are required to adopt and publish grievance/complaint procedures. These procedures must be posted internally and externally, and be made available in alternative formats.

- All agencies are required to ensure that communications with persons with disabilities are as effective as communications with others. This is applicable to all forms of communications, including information posted on an agency’s website (ref. Section 508 of the Rehabilitation Act and the ADA), emergency services communications, and pedestrian signal systems.

- All agencies are required to ensure that their emergency management programs, services, and activities are also accessible to persons with disabilities. This includes transportation and community evacuation services.

- All agencies are required to conduct a self-evaluation of its policies, services, and activities to determine whether Section 504/ADA accessibility requirements are being met. This includes all public right-of-way facilities.

- Agencies with 50 or more employees are required to develop a Transition Plan (See Section 29.4) when structural modifications, identified through the self-evaluation process, are necessary to achieve program accessibility under Section 504 and the ADA. Operation and maintenance of pedestrian facilities in the public right of way (e.g., sidewalks, crosswalks, curb ramps, pedestrian signals, transit stops, etc.) is considered a “program, service, or activity” of State and local governments covered by Section 504 and ADA requirements. Ensure there is outreach to interested parties (i.e., persons with disabilities/advocacy groups) while developing both the Transition Plan and the Self-Evaluation Plan. For an example of a Transition Plan and a Self-Evaluation Plan see the Local Programs Local Agency Guidelines Manual website www.wsdot.wa.gov/LocalPrograms/LAG

- All agencies are required to maintain accessibility of programs and facilities. This includes maintaining accessibility of pedestrian facilities that may be impacted by overgrown vegetation, snow/ice, severe heaving/cracking of surfaces, construction work zones, and so on.
29.4 Transition Plan Elements

As mentioned under Administrative Requirements, agencies with 50 or more employees (ADA) are required to develop a transition plan when structural modifications are necessary to achieve ADA compliance. Using the results of the agency’s self-evaluation, the plan shall, at a minimum:

- Identify the physical obstacles in the public entity’s facilities that limit the accessibility of its programs or activities to individuals with disabilities (including those within the public right of way);
- Describe in detail what will be done to make the facilities accessible;
- Specify the schedule for each facility and/or obstacle to be retrofitted;
- Identify the individual responsible for implementation of the plan (typically the agency’s ADA/504 Coordinator).

It is recommended by FHWA that an estimated cost of each modification is included as part of the schedule described above to assist in the budget and/or TIP preparation. FHWA considers the transition plan to be a living document. The transition plan should be used in conjunction with planning and prioritizing of projects, and for monitoring progress on completing modifications. If the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period. It is recommended by FHWA that the transition plan be updated annually until all planned modifications have been made.

Based on input from the Department of Justice, it is FHWA’s policy that States and other public agencies establish a “reasonable and consistent” policy for installing APS on all alteration and new construction projects consistent with the requirements of Section 35.151 of Title II of the ADA. FHWA will work with WSDOT and local agencies to ensure that all new and altered pedestrian signal installations are usable by persons with visual disabilities.

29.5 Requirements for New Construction and Alterations

Title II of the ADA requires that new facilities be designed and constructed such that they are readily accessible to and usable by persons with disabilities. New construction projects address the construction of a new roadway, interchange, or other transportation facility where none existed before. New construction is expected to meet the highest level of ADA accessibility unless it is structurally impracticable to achieve full compliance. Full compliance will be considered structurally impracticable only when, in rare circumstances, the unique characteristics of terrain prevent full compliance. If full ADA compliance cannot be achieved in new construction, compliance is required to the extent structurally practicable. Note that the United States Department of Justice (USDOJ), the primary enforcement agency for the ADA, has explicitly clarified in its guidance on the ADA regulations that structural impracticability is not to be applied to situations in which a facility is located in “hilly” terrain or on a plot of land upon which there are steep grades. In such circumstances, accessibility can be achieved without destroying the physical integrity of a structure, and is required in the construction of new facilities.
The vast majority of construction projects undertaken by State and Local Agencies are not classified as new construction under the ADA, but rather they are classified as alterations. An alteration is a project that occurs within an existing developed right of way. Alterations include reconstruction, major rehabilitation, widening, resurfacing (e.g., asphalt overlays and mill and fill), signal installation and upgrades, and projects of similar scale and effect. An alteration project must be planned, designed, and constructed so that the required accessibility improvements occur at the same time as the alteration.

Alterations to existing facilities are required to meet new construction standards to the maximum extent feasible. Physical terrain or site conditions that would require structural impacts, environmental impacts, impacts to a historic feature (the feature must be classified as Section 106), or unacceptable impacts to the community in order to achieve full compliance with the ADA standards are some of the factors that can be used to determine that the maximum extent feasible is achieved.

If full ADA compliance cannot be achieved in an alteration, compliance is required to the extent feasible within the scope of the project. Note that the word “scope,” when referred to in Federal accessibility guidance and requirements, has a subtly different connotation than many civil engineers are accustomed to. Examples of work that is not within the scope of a project include the need to acquire right of way when right of way is not being acquired elsewhere on the project; the need to relocate utilities when utilities are not being relocated elsewhere on the project; the need to vertically realign the roadway when the roadway is not being vertically realigned elsewhere on the project; etc. Note that cost is not to be used as a justification for not meeting ADA standards on an alteration project.

While the ADA/504 regulations do not require documentation of the application of structural impracticability nor maximum extent feasible, both FHWA and the United States Access Board recommend that these instances be documented. The documentation of these instances should reveal the standard of care that guided engineering judgments. In the event of a challenge at a future time, documentation can be retrieved from project archives in support of the agency’s decisions. While careful documentation will not protect an agency against complaint, evidence of the considerations that led to the specific project solution may be persuasive in court or in discussions with stakeholders.

As described in the Design Manual M 22-01, WSDOT has an established documentation procedure for applications of maximum extent feasible in alteration projects on state routes. If a local agency applies maximum extent feasible to a pedestrian facility located on a state route, it is WSDOT’s expectation that the agency will follow the WSDOT documentation procedure described in the Design Manual M 22-01. The completed documentation should be contained in local agency project files to document the agencies design efforts in complying with the ADA requirements.”

If a local agency finds the need to apply maximum extent feasible to a pedestrian facility that is not located on a state route, the WSDOT documentation procedure does not need to be followed. However, it is highly recommended that the agency develops its own documentation protocol for such situations that is consistent with the FHWA and United States Access Board recommendations.
29.6 Monitoring and Enforcement

Responsibility for monitoring and enforcement of Section 504 rests with the Federal funding agency. The Section 504 regulations require WSDOT, as a recipient, to monitor and enforce the compliance with both Section 504 and the ADA of any entity receiving disbursement of either state or federal funding through WSDOT. While DOJ has the ultimate enforcement authority for ADA compliance, DOJ has delegated monitoring and enforcement responsibility to several federal executive agencies including the USDOT and its operating administrations. FHWA monitors WSDOT and local agency compliance through various means such as process and program reviews, construction inspections, PS&E reviews, and complaint investigations. If noncompliance is found, and the noncompliance is not corrected to FHWA’s satisfaction, FHWA may terminate or refuse to grant federal funding.

29.7 Authorities

- 29 USC 794 - Section 504 of the Rehabilitation Act of 1973 (as amended by the Civil Rights Restoration Act of 1987)
- 42 USC 12111 - Americans with Disabilities Act (Title II)

29.8 Regulations

- 28 CFR Part 35 (Title II) “Nondiscrimination on the Basis of Disability in State and Local Government Services”
- 49 CFR Part 27 (Section 504) “Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance”
- 49 CFR Part 37 “Transportation Services for Individuals with Disabilities (ADA)"
- 49 CFR Part 38 “Americans with Disabilities Act (ADA) Accessibility Specifications for Transportation Vehicles”

29.9 Resources

- Chapters 1510 and 1515 of the Design Manual M 22-01
- Chapter 42 of the LAG Manual