

Chapter 25: Permits and Clearances

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25.1 Introduction

This chapter discusses the permits, reviews, clearances, and approvals that would be required to construct any of the West Davis Corridor (WDC) action alternatives. Throughout the WDC Environmental Impact Statement (EIS) process, the Federal Highway Administration (FHWA) and the Utah Department of Transportation (UDOT) have coordinated extensively with the resource Agencies responsible for the permits and approvals discussed in this chapter. See Chapter 30, Coordination, for more information about the agency coordination process.

25.2 Federal Permits, Reviews, and Approvals

25.2.1 Individual Permit under Section 404 of the Clean Water Act (USACE)

Project applicants are required to obtain a Clean Water Act Section 404 permit if a proposed action would discharge dredged or fill materials in waters of the U.S., including wetlands. All of the WDC action alternatives would place fill material in waters of the U.S. and would require an individual permit. The agency responsible for issuing a Section 404 permit is the U.S. Army Corps of Engineers (USACE). Before a Section 404 permit can be issued, the applicant must first obtain a Section 401 water quality certification, which is a finding by the state water quality agency that the project complies with the state's water quality standards [see Section 25.3.1, Water Quality Certification under Section 401 of the Clean Water Act (Utah Division of Water Quality)].

UDOT has been coordinating extensively throughout the EIS process with USACE regarding the Section 404 process and alternatives that meet the requirements of that process. Based on this coordination, USACE has commented that there is no other alternative to the alternatives being carried forward for detailed analysis in this EIS that would be a least damaging practicable alternative to the aquatic environment.

UDOT anticipates that USACE would issue a Section 404 permit or permits for the selected alternative at some point after the Record of Decision is issued for the WDC Project. UDOT could implement the project in phases based on available funds. Section 404 permitting also could be phased. UDOT would be responsible for any required changes or additions to the Section 404 permit due to design changes or construction activities.

25.2.2 Approval of Addition or Modification of Access Points (FHWA)

Changing access points to the interstate highway system requires approval from FHWA. All of the WDC action alternatives would require access to Interstate 15 (I-15). An interchange design/justification report would need to be prepared and approved by FHWA. UDOT anticipates that the required interstate access point approval would be issued after FHWA's Record of Decision for the WDC Project.

25.2.3 Endangered Species Act Compliance (USFWS)

Under Section 7 of the Endangered Species Act (ESA), federal agencies are required to consult with the U.S. Fish and Wildlife Service (USFWS) if their proposed actions or approvals could affect ESA-listed species or designated critical habitat. Under Sections 9 and 10 of the ESA, incidental take permits must be obtained from USFWS if the proposed action would result in the take of listed species.

What is a take of a listed species?

The term *take* means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect an individual of a species listed as threatened or endangered (16 United States Code [USC] 1532).

Based on surveys by a qualified biologist that no critical habitat is adjacent to the WDC alternatives (see Chapter 14, Ecosystem Resources), FHWA has determined that federally listed threatened and endangered species and designated critical habitat would not be affected by any of the WDC action alternatives. This “no-effect” finding fulfills FHWA’s obligation under Section 7 of the ESA. See Appendix 14B, Ecosystems Correspondence, for the USFWS concurrence with the “no effect” determination.

25.2.4 Bald and Golden Eagle Protection Act (USFWS and Utah Division of Wildlife Resources)

The Bald and Golden Eagle Protection Act prohibits the take, sale, purchase, possession, barter, or transport, or offer to do any of the above, to either the bald eagle (*Haliaeetus leucocephalus*) or golden eagle (*Aquila chrysaetos*) at any time or in any manner (16 USC 668a–d). The Bald and Golden Eagle Protection Act could apply to the WDC Project if any individual bird or occupied nest of these two eagle species could be affected. Golden eagles are not known nest in the ecosystem impact analysis area but may migrate through the area.

There are reports of some daytime bald eagle use along Farmington Creek in the vicinity of Glovers Lane and south and west of Glovers Lane (Kramer and others 2013). Bald eagles that use this area could be disturbed during construction activity and highway operations. Winter roosting surveys would need to be conducted for the selected alternative before construction in areas where taller trees or snags (upright, dead trees) are present along the Great Salt Lake shore. If any of the action alternatives is selected, the area around Glovers Lane would also need winter roosting surveys. If winter roosting is observed within 0.5 mile of potential construction areas, coordination with USFWS and/or the Utah Division of Wildlife Resources would be conducted to determine what mitigation measures, if any, would be necessary.

25.2.5 Migratory Bird Treaty Act of 1918 (USFWS and Utah Division of Wildlife Resources)

The WDC could affect migratory bird nests during construction. If protected species are found nesting within the construction zone or buffer zone during construction, UDOT would coordinate with USFWS and the Utah Division of Wildlife Resources to ensure compliance with the Migratory Bird Treaty Act.

25.2.6 Consultation under Section 106 of the National Historic Preservation Act (Utah SHPO and Advisory Council on Historic Preservation)

For the WDC EIS, FHWA is the lead agency under the Section 106 process. Section 106 of the National Historic Preservation Act requires federal agencies to take into account the effects of their actions on historic properties and to give the Advisory Council on Historic Preservation a reasonable opportunity to comment. Any property that is listed on or is eligible for listing on the National Register of Historic Places is considered a historic property. For projects that could affect a historic property, the federal agency must consult with the relevant State Historic Preservation Officer (SHPO).

For the WDC Project, FHWA and UDOT have consulted with the Utah SHPO, who has concurred with UDOT's Determination of Eligibility and Finding of Effect for historic properties. FHWA and UDOT have also consulted with the Advisory Council and Native American tribes. FHWA, UDOT, and the Utah SHPO have entered into a Section 106 Programmatic Agreement regarding the identification and treatment of cultural resources affected by the preferred alternative (see Appendix 16B, Correspondence Pertaining to Historic, Archaeological, and Paleontological Resources).

25.2.7 Section 4(f) of the Department of Transportation Act (FHWA)

The Section 4(f) regulation (23 Code of Federal Regulations [CFR] 774.3) states that FHWA may not approve the use of a Section 4(f) property unless:

- (a) FHWA determines that (1) there is no feasible and prudent avoidance alternative to the use of the property and (2) the action includes all possible planning to minimize harm to the property resulting from such use; or
- (b) FHWA determines that the use of the property, including any measure(s) to minimize harm (such as any avoidance, minimization, mitigation, or enhancement measures) committed to by the applicant, would have a *de minimis* impact on the property. For historic sites, a *de minimis* impact means FHWA has determined that no historic property would be affected by the project or that the project would have no adverse effect on the historic property in question.

What is Section 4(f)?

Section 4(f) of the Department of Transportation Act prohibits the approval of federal transportation projects that use publicly owned parks, recreation areas, wildlife and waterfowl refuges, or historic sites [Section 4(f) properties] unless there is no feasible and prudent alternative and the project includes all possible planning to minimize harm.

Chapter 27, Section 4(f)/6(f) Evaluation, provides a detailed analysis of the Section 4(f) requirements related to the WDC Project. This evaluation found that all of the WDC action alternatives would require a use of Section 4(f) properties.

25.2.8 Section 6(f) of the Land and Water Conservation Funds Act (FHWA)

No Section 6(f) properties would be affected by any of the WDC action alternatives.

25.2.9 Air Conformity Requirements under the Clean Air Act (FHWA)

Chapter 11, Air Quality, provides a detailed analysis of air conformity requirements related to the WDC Project. In summary, the Clean Air Act requires that all regionally significant highway and transit projects in air quality non-attainment areas be included in a “conforming” transportation plan and transportation improvement program.

A “conforming” plan is one that has been analyzed regionally for emissions of controlled air pollutants and is found to be within the emission limits established in the State Implementation Plan. Transportation projects are said to conform if, both alone and in combination with other planned projects included in that transportation improvement program, the project would not result in any of the following:

- New violations of the National Ambient Air Quality Standards (NAAQS)
- Increases in the frequency or severity of existing violations of the NAAQS
- Delays in attainment of the NAAQS

For the WDC Project, the Wasatch Front Regional Council, which is the metropolitan planning organization for the WDC study area, conducted the regional conformity analyses and submitted them to FHWA for a conformity determination. Based on the most recent regional conformity analyses, the WDC Project conforms to the State Implementation Plan for all pollutants in applicable non-attainment or maintenance areas.

What are attainment, non-attainment, and maintenance areas?

An attainment area is an area that meets (or “attains”) the NAAQS for a given air pollutant.

A non-attainment area is an area that does not meet the NAAQS for a given air pollutant.

A maintenance area is an area previously designated as a non-attainment area that has been redesignated as an attainment area and is required to have a maintenance plan.

What is the WDC study area?

The WDC study area is the area described in Section 1.2, Description of the Needs Assessment Study Area.

25.2.10 Federal Land Right-of-Way Transfer

All of the WDC action alternatives would cross federal land managed by the Utah Reclamation, Mitigation, and Conservation Commission (URMCC). Prior to highway construction, URMCC would need to transfer property to UDOT for the WDC. Transfer of federal property out of federal ownership or issuing a right-of-way across federal property is an action requiring compliance with the National Environmental Policy Act (NEPA). In accordance with URMCC’s NEPA Rule (43 CFR 10010), the WDC EIS would be adopted by URMCC to fulfill its NEPA compliance requirements pertaining to the fee title transfer or

right-of-way grant across federal lands for the WDC Project. URMCC would need to approve its own NEPA decision document based on the findings of this EIS. To ensure that this EIS meets URMCC's NEPA requirements, URMCC is a cooperating agency in the WDC NEPA process.

25.3 State Permits, Reviews, and Clearances

25.3.1 Water Quality Certification under Section 401 of the Clean Water Act (Utah Division of Water Quality)

Section 401 of the Clean Water Act requires that, before a federal agency issues a permit authorizing a discharge into waters of the U.S., it must obtain certification from the State that the discharge will not violate water quality standards. For the WDC Project, UDOT must obtain a certification from the Utah Division of Water Quality before USACE issues a Clean Water Act Section 404 permit for the project. All of the WDC action alternatives would require a Section 404 permit [as discussed in Section 25.2.1, Individual Permit under Section 404 of the Clean Water Act (USACE)] due to placing fill material in waters of the U.S. and therefore would require a water quality certification in accordance with Section 401 of the Clean Water Act from the Division of Water Quality.

25.3.2 Utah Pollutant Discharge Elimination System Permit under Section 402 of the Clean Water Act (Utah Division of Water Quality)

Section 402 of the Clean Water Act regulates discharges of pollutants to surface waters. Construction projects that disturb 1 or more acres of land must be covered under the statewide Utah Pollutant Discharge Elimination System (UPDES) stormwater permit. All of the WDC action alternatives would disturb 1 or more acres of land and would require coverage under the UPDES stormwater permit.

To obtain a UPDES permit, a notice of intent and fee must be submitted to the Utah Division of Water Quality with operator information, facility location, type of construction, total acres to be disturbed, identification of applicable best management practices, and the certification of the responsible party. In addition, the general permit requires the development and implementation of a Stormwater Pollution Prevention Plan that includes identification of erosion-control, sediment-control, and good housekeeping best management practices as well as site-specific measures to protect slopes and natural features, minimize erosion, and prevent eroded sediment from leaving the construction zone.

Additionally, UDOT might be required to obtain a UPDES General Permit for Construction Dewatering (Permit Number UTG070000). UDOT will coordinate with the Utah Division of Water Quality to obtain this permit if it is required.

As described in Section 13.2.2, Surface Water Discharges, UDOT will address post-construction stormwater runoff from the WDC in accordance with its statewide municipal separate storm sewer system (MS4) permit. UDOT will also coordinate with the Utah

Division of Water Quality to ensure that all MS4 permit conditions are met. Additionally, UDOT will coordinate with local municipalities, as appropriate, to ensure that any stormwater runoff or stormwater facilities from the WDC will not affect any municipal MS4 permits.

25.3.3 Utah State Stream Alteration Permit (Utah Division of Water Rights)

The Utah Division of Water Rights requires project applicants to obtain a stream alteration permit if a stream crossing would result in a major stream alteration or modification. Constructing any new drainage structures at a stream crossing would constitute a major stream alteration or modification. UDOT and FHWA anticipate that stream alteration permits would be required for the action alternatives.

25.3.4 Air Quality Approval Order (Utah Division of Air Quality)

An air quality approval order is required to build, own, or operate a facility that pollutes the air, including any of the WDC action alternatives. To obtain an air quality approval order, a notice of intent must be submitted to the Utah Division of Air Quality describing the construction activities and emissions that would be associated with operating construction equipment. The permit applicant must include provisions for controlling dust and emission sources, and the permit might require other construction approvals depending on the source and location of aggregate, asphalt, combustion, and/or fuel storage facilities. This permit would be obtained by the contractor before construction.

25.3.5 Certificate of Registration (Utah Division of Wildlife Resources)

A certificate of registration is required by the Utah Division of Wildlife Resources if a proposed action could affect raptor nests. Although UDOT does not anticipate that any raptor nests would be affected by the WDC Project, nests could be established before construction. UDOT will obtain a certificate of registration if needed based on consultation with the Division of Wildlife Resources.

25.3.6 Approval of Remediation Work Plan (UDEQ or EPA)

No hazardous waste sites were identified within or adjacent to the right-of-way required for the WDC action alternatives. However, if a site is found during construction, a remediation work plan would be submitted and approved by the regulatory agency (either the Utah Department of Environmental Quality [UDEQ] or the U.S. Environmental Protection Agency [EPA]) if construction activities would occur on existing hazardous waste sites. The remediation work plan would define clean-up levels and protective measures for construction workers.

25.4 Local Permits and Clearances

25.4.1 Floodplain Development Permit (Local Jurisdictions)

Floodplain development permits would be required from local jurisdictions if construction, including placement of highway fill and drainage structures at stream crossings, is required within the Federal Emergency Management Agency (FEMA) 100-year floodplain boundary.

The Cities and Counties in the WDC study area have adopted FEMA's National Flood Insurance Program. This program includes the preparation of flood insurance rate maps that show the 100-year floodplain boundaries within a community.

The WDC would cross several floodplains, washes, rivers, and creeks as described in Chapter 15, Floodplains. All of the WDC action alternatives would overlap several 100-year floodplains. In accordance with Executive Order 11988, Floodplain Management, coordination with FEMA would be required during the construction phase to ensure that local jurisdictions' flood design standards are met and to obtain floodplain development permits from the local jurisdictions.

What is a 100-year floodplain?

A 100-year floodplain is the area around a water body that would be inundated by a 100-year flood.

A 100-year flood is a flood with a 1% chance of occurring each year, or one that occurs on average every 100 years.

25.4.2 Construction-Related Permits and Clearances (Various Agencies)

The construction contractor would be responsible for obtaining all construction-related permits and other environmental clearances for activities occurring outside the right-of-way, such as activities in construction staging areas, borrow areas, and batch plant sites.

Table 25-1 below lists the permits and clearances that would be required for the WDC. These permits and clearances would apply to all action alternatives. To make sure the contractor adheres to environmental commitments, UDOT will include commitments in contract documents.

Table 25-1. Permits and Clearances Required for the WDC Project

Permit	Granting Agency(ies)	Applicant	Application Time	Granting Time	Applicable Portion of Project
<i>Federal Permits, Reviews, and Approvals</i>					
Individual permit under Section 404 of the Clean Water Act	USACE	UDOT	After the Final EIS	Before construction	Portions of roadway in wetlands
Approval of addition or modification of access points	FHWA	UDOT	EIS phase	Concurrent with Record of Decision	Interstate access changes
Compliance with Section 106 of the National Historic Preservation Act	Utah SHPO and Advisory Council on Historic Preservation	FHWA	Concurrent with EIS	Final EIS	Considerations of impacts to historic properties; includes consultation between agencies and interested parties
Federal land right-of-way transfer	URMCC	UDOT	After the Final EIS	Before construction	Portions of the roadway that cross URMCC land
<i>State Permits, Reviews, and Clearances</i>					
Water quality certification under Section 401 of the Clean Water Act	Utah Division of Water Quality	UDOT	Concurrent with Section 404 individual permit	Concurrent with Section 404 individual permit	Required if the project could discharge fill into navigable waters
UPDES permit under Section 402 of the Clean Water Act	Utah Division of Water Quality	Contractor	Construction phase	Before construction	Stormwater quality during construction phase
Utah state stream alteration permit	Utah Division of Water Rights	UDOT	Final design phase	Before construction	Required for new or modified stream crossings proposed as part of the preferred alternative
Air quality approval order	Utah Division of Air Quality	Contractor	Construction phase	Before construction	Air quality during construction phase (emissions from equipment)
Certificate of registration	Utah Division of Wildlife Resources	Contractor	Construction phase	Before construction	Impacts to raptor nests from construction

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Table 25-1. Permits and Clearances Required for the WDC Project

Permit	Granting Agency(ies)	Applicant	Application Time	Granting Time	Applicable Portion of Project
<i>Local Permits and Clearances</i>					
Floodplain development permit	Local jurisdictions	UDOT	Final design phase	Final design phase	Portions of roadway or structure in FEMA floodplain
Construction-related permits	Various agencies	Contractor	Contractor	Before construction	Impacts associated with offsite activities such as activities in construction staging areas, borrow areas, batch plant sites, and so on

25.5 Limitation on Claims

This section explains how citizens can file claims seeking judicial review of final agency actions involving permits, licenses, or approvals for a transportation project.

An agency of the U.S. Department of Transportation can publish a notice in the Federal Register, in accordance with 23 USC 139(l), stating that one or more federal agencies have taken final actions on permits, licenses, or approvals for a transportation project. If such a notice is published, citizens can file claims to ask a court to review those federal agency actions. These claims must be filed within 150 days after the date of publication of the notice, or within a shorter period of time if one is specified in the federal laws that apply to the specific judicial review that is allowed for the federal agency action.

After 150 days from the publication of a statute of limitations notice, any claims for review of a permit, license, or approval listed in the statute of limitations are time-barred. If no notice is published, then the periods of time that are provided by the federal laws governing such claims apply.

25.6 References

Kramer, P., R. Hansen, and A. Brewerton

- 2013 E-mail from Kramer, Hansen, and Brewerton of the Utah Division of Wildlife Resources to Trent Toler of HDR Engineering regarding undocumented sightings of bald eagles and yellow-billed cuckoos in the ecosystem impact analysis area. January 30.



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