**Department of Justice Issues Final Rule**

**Including Direction on**

**Wheelchairs and Other Power Driven Mobility Devices**

On July 26, 2010, the U.S. Department of Justice (DOJ) posted a final rule under the Americans with Disabilities Act (ADA) that will go into effect 90 days after it is published in the Federal Register. This rule includes a slightly revised definition of a wheelchair and a new category, “other power-driven mobility devices” (OPDMD) for people who have mobility related disabilities. The definition for an OPDMD deals with motorized devices that do not qualify as wheelchairs

However this DOJ rule does not change the criteria for the wheelchairs or mobility devices that are allowed to be used in Federal wilderness areas or related regulations and policies of the U.S. Forest Service (Forest Service) for such use within the National Forest System. Despite the DOJ rule, those laws, regulations and policies remain in place.

The DOJ rule, which implements the ADA, applies to state and local governments and to businesses that are open to the public, therefore they are public entities. The ADA does not apply to federal agencies with the exception of wheelchair use in federally designated wilderness as detailed in ADA, Title V Section 508 (c). The Federal agencies are under the 1968 Architectural Barriers Act (ABA) and the 1973 Section 504 of the Rehabilitation Act.

The DOJ now categorizes mobility devices for individuals with mobility related disabilities as either a wheelchair or as an OPDMD. DOJ defines a wheelchair as:

Wheelchair means a manually-operated or power-driven device designed primarily for use by an individual with a mobility disability for the main purpose of indoor or of both indoor and outdoor locomotion. This definition does not apply to Federal wilderness areas; wheelchairs in such areas are defined in section 508(c)(2) of the ADA, 42 U.S.C. 12207(c)(2).

While there are slight changes in the wording of this definition from previous versions, the various types of devices that meet this revised definition remain the same. DOJ explains that “the devices that fall within the definition of a “wheelchair" are those that are used for locomotion on only indoor or on indoor and outdoor pedestrian paths or routes and not those devices that are intended exclusively for traversing undefined, unprepared, or unimproved paths or routes”. “Also devices designed primarily for use by individuals with mobility disabilities often are considered to be medical devices and are generally eligible for insurance reimbursement on this basis. Finally, devices designed primarily for use by individuals with mobility disabilities are less subject to fraud concerns because they were not designed to have a recreational component”.

The DOJ decided that the Segway® Personal Transporter (Segway® PT) is not a wheelchair because the Segway® PT is not designed primarily for use by individuals with disabilities, nor used primarily by persons with disabilities”. Currently “electronic personal assistance mobility devices (EPAMDs)”, including the Segway® PT, were designed for recreational users and not primarily for use by individuals with mobility disabilities, therefore DOJ has decided to continue its approach of excluding EPAMDs from the definition of "wheelchair" and including them in the definition of an OPDMD.

On National Forest System lands wherever foot travel is allowed, any wheelchair or other mobility device is allowed if the device was designed solely for use by a mobility-impaired person for locomotion and it is suitable for use in an indoor pedestrian area (36 CFR 212.1and FSM 2353.05). These devices are not OPDMDs, neither do they meet the 36 CFR 212.1 definition of a motor vehicle.

The DOJ defines an OPDMD as:

Other power driven mobility device: any mobility device powered by batteries, fuel, or other engines--whether or not designed primarily for use by individuals with mobility disabilities-that is used by individuals with mobility disabilities for the purpose of locomotion, including golf cars, electronic personal assistance mobility devices (EPAMDs), such as the Segway® PT, or any mobility device designed to operate in areas without defined pedestrian routes, but that is not a wheelchair within the meaning of this section. This definition does not apply to Federal wilderness areas; wheelchairs in such areas are defined in section 508(c)(2) of the ADA, 42 U.S.C. 12207(c)(2).

The DOJ rule requires a public entity to make reasonable modifications in its policies, practices, or procedures to permit the use of OPDMDs by individuals with mobility disabilities, unless the public entity can demonstrate that the class of OPDMD cannot be operated in accordance with legitimate safety requirements , based on actual risks and not mere speculation regarding the device or how it will be operated per § 35.130(h), or based on any of the other assessment factors DOJ has provided in § 35.137(c) and § 35.137(b)(2) . These are the only factors a public entity is to use in determining whether a particular OPDMD can be allowed in a specific facility as a reasonable modification its policies, practices, or procedures. The focus of the analysis must be on the appropriateness of the use of the device at a specific facility, rather than whether it is necessary for an individual to use a particular device.

These assessment factors are designed to assist public entities in determining whether allowing the use of a particular OPDMD in a specific facility is reasonable. **“§ 35.137 (2) Assessment factors**. In determining whether a particular OPDMD can be allowed in a specific facility as a reasonable modification under paragraph (b)(1) of this section, a public entity shall consider-- (i) The type, size, weight, dimensions, and speed of the device; (ii) The facility´s volume of pedestrian traffic (which may vary at different times of the day, week, month, or year); (iii) The facility´s design and operational characteristics (e.g., whether its service, program, or activity is conducted indoors, its square footage, the density and placement of stationary devices, and the availability of storage for the device, if requested by the user); (iv) Whether legitimate safety requirements can be established to permit the safe operation of the OPDMD in the specific facility; and (v) Whether the use of the OPDMD creates a substantial risk of serious harm to the immediate environment or natural or cultural resources, or poses a conflict with Federal land management laws and regulations.”

Under the DOJ rule, an OPDMD may not be operated where use of that vehicle class is prohibited due to a risk to safety, environmental, cultural or natural resources or poses a conflict with Federal land management laws and regulations. In accordance with the Forest Service’s travel management rule (36 CFR 212), after considering the criteria in the travel management rule, including effects on natural and cultural resources, public safety, and use conflicts associated with motor vehicle use, Forest Service administrative units designate on a motor vehicle use map (MVUM) where motor vehicles may be used by vehicle class and, if appropriate, by time of year. Use of motor vehicles that is inconsistent with designations on the MVUM is prohibited. Therefore, applying the OPDMD requirements of the DOJ rule to the Forest Service, use of OPDMDs would be prohibited **unless that class of motor vehicle were designated on the MVUM**.

A public entity that determines that it can make reasonable modifications to their policies, practices, or procedures to allow the use of an OPDMD by an individual with a mobility disability is to develop a written and publicly posted policy stating the following:

* The procedure by which claims that the OPDMD device is being used for a mobility disability will be assessed for legitimacy (i.e., a credible assurance that the device is being used for a mobility disability, including a verbal representation by the person with a disability that is not contradicted by observable fact, or the presentation of a disability parking space placard or card, or State-issued proof of disability);
* The type or classes of OPDMDs are permitted to be used by individuals with mobility disabilities;
* The size, weight, and dimensions of the OPDMDs that are permitted to be used by individuals with mobility disabilities;
* The speed limit for the OPDMDs that are permitted to be used by individuals with mobility disabilities;
* The places, times, or circumstances under which the use of the OPDMD is or will be restricted or prohibited;  Safety, pedestrian, and other rules concerning the use of the OPDMD; whether, and
* Under which circumstances, storage for the OPDMD will be made available; and how and where individuals with a mobility disability can obtain a copy of the OPDMD policy.

If that class of OPDMD is allowed, a person who has a disability may not be denied the opportunity to use that device. The public entity may ask a person using a power-driven mobility device if the mobility device is needed due to the person´s disability. A public entity shall not ask a person using a mobility device questions about the nature and extent of the person´s disability."

If a decision is made to construct a facility, for example a pit toilet or privy for environmental management reasons, etc., that structure is required to be in compliance with ABA and on National Forest System lands the Forest Service Outdoor Accessibility Guidelines. Those guidelines are available at <http://www.fs.fed.us/recreation/programs/accessibility>. The structure is to be of a basic design appropriate to that setting but adjusted to be accessible.

If you have any questions about this issue, please contact Janet Zeller, U.S. Forest Service National Accessibility Program Manager, (202) 205-9597.