

**B16. Opening Nature to Everyone:  
Improving Access to Persons with  
Disabilities**

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**Room 402**

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**Opening Nature to Everyone - Improving Access to Persons with Disabilities**  
**LTA Rally 2019**  
**Raleigh, NC**

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Although the Americans with Disabilities Act (ADA) became law in 1990, its applicability to natural areas are not universally understood in the Land Trust Community. This session gives an overview of how the ADA applies to nature preserves and conservation easement properties and provides a real life example of a project undertaken at a TNC preserve. Specifically, this outline addresses the following topics:

- I. When and how does the ADA apply to nature preserves and conservation easement properties open to the public?
- II. When must wheelchairs and “Other Power Driven Mobility Devices” be permitted?
- III. What are the rules governing Service Animals?
- IV. When must sign language interpreters and other “Auxiliary Aids and Services” be provided?
- V. Legal Remedies: Who can sue land trusts? What will happen when they do?
- VI. Implementation:
  - a. What if we don’t meet accessibility guidelines? Raven Ridge example
  - b. Planning, fund raising, permitting, contracting
- VII. Beyond meeting the requirements: benefits of accessible trails
- VIII. Resources.

**I. When and how does the ADA apply to nature preserves and conservation easement properties open to the public?**

A. Disability Defined.

The definition of “disability” under the ADA is<sup>1</sup> –

- (A) a physical or mental impairment that substantially limits one or more major life activities;<sup>2</sup>
- (B) a record of such an impairment<sup>3</sup>; or
- (C) being regarded as having such an impairment.<sup>4</sup>

B. When does the ADA apply to Land Trusts?

Title III of the ADA “prohibits discrimination on the basis of disability by covered public accommodations and requires places of public accommodation and commercial facilities to be designed,

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<sup>1</sup> 42 USC 12102. Cannot consider mitigating factors such as medication, medical supplies, equipment, or appliances, low-vision devices, prosthetics, hearing aids, or mobility devices. 42 USC 12102(4)(E)(i).

<sup>2</sup> Major life activities include, but are not limited to caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. 42 USC 12102.

<sup>3</sup> E.g. a history of cancer that is now in remission.

<sup>4</sup> Applies if a person has been “subjected to an action prohibited under [the ADA] because of an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity.” 42 USC 12102. E.g. person with HIV, or with prominent facial scar. The “regarded as” category was added to the ADA in 2008. It can form the basis for action under the ADA but does not entitle those persons to modifications or accommodations in accessing programs, public accommodations and employment.

constructed, and altered in compliance with the accessibility standards established by [Title III].”<sup>5</sup> Places of Public accommodation include (among other things) “...parks or other places of recreation.”<sup>6</sup> To meet this definition, the site must (a) include human-made improvements and (b) be open to the public.<sup>7</sup> Land Trusts which own, lease (or lease to) or operates such sites would be considered a “Public Accommodation” (“PA”). The site would be the “Place of Public Accommodation” (“PPA”).

Land Trust offices, even if they are not open to the public are likely considered “commercial facilities” and would be subject to the ADA design requirements. If an office is also used as a Place of Public Accommodation, such as a visitor center at a preserve, then additional Title III requirements would apply.

Title III of the ADA also applies to conservation easements held by a land trust, to the extent the easement lands are open to the public. In particular, if the purpose of the easement includes “preservation of land areas for outdoor recreation by, or education of, the general public,” then public access must be allowed, and it would likely be a public accommodation.<sup>8</sup> This may be something to consider when drafting conservation easements.

If a land trust leases property to or from a governmental entity, additional accessibility laws may apply. Specifically, facilities owned or operated by a state or local government may be subject to Title II of the ADA.<sup>9</sup> The design standards under Titles II are nearly identical to those under Title III. Federally owned or operated facilities may be subject to Section 504 of the Rehabilitation Act<sup>10</sup> or the Architectural Barriers Act<sup>11</sup> (with similar, but not identical standards to those applicable to Title II and Title III entities).

### C. How does the ADA apply to Land Trusts?

There are two main features of Title III of the ADA. First, there are the *design standards* applicable to new construction and alterations in PPA and Commercial Facilities, discussed below. There are also the more *programmatic elements* of the law which apply only to PPAs (and not Commercial Facilities), such as the provision of “auxiliary aids and services,” and rules regarding service animals and wheelchairs, which are covered in other parts of this outline.

Updated standards for accessible design were passed effective March 15, 2011, with a required compliance date of March 15, 2012 (the “2010 Standards”).<sup>12</sup> Many of the 2010 Standards only apply if certain elements are voluntarily provided at a facility. For example, it is not required that parking be provided (although local zoning or building codes may require it), but if it is provided, certain technical elements are triggered. The following summarizes the general requirements for new construction, alterations and barrier removal.

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<sup>5</sup> 28 CFR 36.102.

<sup>6</sup> 28 CFR 36.104.

<sup>7</sup> Being open to the public is defined very broadly, such that a preserve that is open just 1-2 days a year would qualify, with respect to those areas that are opened to the public.

<sup>8</sup> For an analysis of the applicability of the ADA to conservation easements, see *Outdoor Accessibility Requirements of the Americans with Disabilities Act: Must Holders of Conservation Easements Provided ADA Access?* by Ellen Aubrey Fred, *Hastings Law Journal*, Volume 54, pp. 243-271 (2002-2003).

<sup>9</sup> 28 CFR Part 35.

<sup>10</sup> 29 USC 794. If a land trust received federal funding, it may be subject to Section 504 as well.

<sup>11</sup> 42 USC. 4151 et seq. If a land trust receives federal funding (e.g. a grant or contract) to design, build or alter a facility, this could also trigger requirements under the Architectural Barriers Act.

<sup>12</sup> The 2010 Standards consist of both revised Title III regulations, as well as the 2004 ADA Accessibility Guidelines for Buildings and Facilities (ADAAG). 36 CFR Part 1191, Appendices B and D. Prior to March 15, 2012, accessibility guidelines were governed by the 1991 accessibility guidelines (28 CFR part 36, Appendix A (1991)). The 2010 Standards can be found here: <https://www.access-board.gov/guidelines-and-standards/buildings-and-sites/about-the-ada-standards/ada-standards>.

1. **New Construction:** Buildings or facilities built after January 26, 1993 must be designed and constructed to be “readily accessible to and usable by individuals with disabilities.”<sup>13</sup> There is an exception if it is “structurally impracticable to meet the requirements,”<sup>14</sup> which is limited to “rare circumstances when the unique characteristics of the terrain prevent the incorporation of accessibility features.” This exception “should not be used in cases of merely hilly terrain.” However, it may apply in wetlands. There is no cost defense to the new construction requirements.<sup>15</sup> New construction includes additions to existing facilities, which result in increases in the gross floor area or height of the facility.<sup>16</sup>

2. **Alterations:** Any alteration<sup>17</sup> made to a building or facility after January 26, 1992 must be made in a way that ensures that “to the *maximum extent feasible*, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.”<sup>18</sup> This is a narrow exception for when the “nature of an existing facility makes it virtually impossible to comply fully” with the accessibility standards.<sup>19</sup> An example provided is when widening an entrance would require “removal of an essential part of the structural frame.” Generally, cost may not be considered.<sup>20</sup> The technical requirements only apply to the element being altered and does not trigger a requirement to make an entire room or area accessible.<sup>21</sup> There are exceptions for historic structures<sup>22</sup> if it would threaten or destroy the historic significance of the facility.<sup>23</sup>

3. **Barrier Removal:** Architectural barriers and communication barriers that are structural in nature in existing public accommodations must be removed, “where such removal is readily achievable, i.e. easily accomplishable and able to be carried out without much difficulty or expense.”<sup>24</sup> The regulations set forth the factors to consider in deciding whether removal of a barrier is “readily achievable,”<sup>25</sup> and gives examples of steps to remove barriers.<sup>26</sup> The regulations prioritize four categories of steps to achieve barrier removal: 1) provide access to the building or facility from the outside; 2) provide access to areas where goods and services are available to the public; 3) provide access to restroom facilities, and 4) provide any other means of access.<sup>27</sup>

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<sup>13</sup> 28 CFR 36.401

<sup>14</sup> 28 CFR 36.401(c)

<sup>15</sup> ADA Title III Technical Assistance Manual III-5.1000 (hereafter “Technical Manual”). (<http://www.ada.gov/taman3.html>).

<sup>16</sup> 2010 Standards 106.5 and 202.2

<sup>17</sup> An alteration is “a change to a place of public accommodation or a commercial facility that affects or could affect the usability of the building or facility or any part thereof.” It can include remodeling, renovation, and rehabilitation. Normal maintenance is not included (e.g. painting, electrical work), unless it would affect the “usability” of the facility. 28 CFR 36.402(b).

<sup>18</sup> 28 CFR 36.402(a)(1)

<sup>19</sup> 28 CFR 36.402(c)

<sup>20</sup> Technical Manual III-6.1000.

<sup>21</sup> 2010 Standards 202.3

<sup>22</sup> Eligible for listing in the National Register of Historic Places or designated as historic under State or local law. 28 CFR 36.405(a).

<sup>23</sup> 28 CFR 36.405. The Standards require consulting with the State Historic Preservation Officer to make this determination. 2010 Standards 202.5.

<sup>24</sup> 28 CFR 36.304(a). Elements in covered facilities that were built or altered in compliance with the 1991 Standards are not required to be brought into compliance with the 2010 Standards until those elements undergo an alteration. 28 CFR 36.304(d)(2)(i). However, this “safe harbor” provision does not apply to elements for which there were no specific requirements until the 2010 Standards, such as swimming pools, recreational boating facilities, and fishing piers and platforms. 28 CFR 36.304(d)(iii).

<sup>25</sup> 42 USC 12181(9)

<sup>26</sup> 28 CFR 36.304

<sup>27</sup> 28 CFR 36.304(c)

Barrier removal should comply with the 2010 Standards applicable to alterations to the extent readily achievable.<sup>28</sup> If it is not readily achievable to apply the 2010 Standards, a public accommodation can take “other readily achievable measures to remove the barrier,” such as providing a ramp with a steeper slope or widening a doorway with a narrower width than required by the Standards, provided the modifications do not pose a significant health or safety risk.<sup>29</sup> This also applies to openings in stone walls and other barriers when building or improving trails.

*D. What ADA Standards apply to Trails and other “Outdoor Developed Areas?”*

In 2013, regulations known as the Outdoor Developed Areas Accessibility Guidelines (**ODAAG**) were passed regarding accessibility requirements for “outdoor developed areas,” which include camping facilities, picnic areas, viewing areas, trails, and beach access routes. Technically these standards only apply to federal agencies that administer outdoor recreational areas.<sup>30</sup> However, in the absence of clear standards for outdoor areas under the ADA, we must use the best available standards, which at present consist of ODAAG. ODAAG will likely be incorporated into the ADA in the future with respect to state and local government and PAs. In addition, some state or federal grants may require compliance with these standards already.

ODAAG applies to *new* or *altered* Outdoor Developed Areas.<sup>31</sup> However, as discussed above, PAs have an obligation to remove existing barriers to accessibility where such removal is readily achievable. Therefore, land trusts should try to apply the ODAAG standards to existing Outdoor Developed Areas where possible. Note that some improvements found in outdoor developed areas are covered by the ADA design standards, such as *parking areas, visitor centers, signage, and bathrooms*. For those items, the ADA standards apply regardless of where they are located on a site.

The ODAAG standards allow for deviations from the ODAAG requirements if any of the following conditions for exception are met:<sup>32</sup>

- 1. Compliance is not feasible due to terrain.** For example, a trail in steeply sloped area, where compliance with slope requirements would require “extensive cuts or fills that are difficult to construct and maintain, cause drainage and erosion problems, significantly lengthen the trail, and create other adverse environmental impacts.”<sup>33</sup>
- 2. Compliance cannot be accomplished with prevailing construction practices.** For example, where hand tools would normally be used to protect environment and technical requirements would be difficult to meet using such hand tools. Note that prevailing construction practices are those used by most contractors on similar projects in the area.<sup>34</sup>
- 3. Compliance would fundamentally alter the function or purpose of the facility or setting.** This would apply where the intent is to limit interference with the natural setting or to provide users with a rugged experience.

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<sup>28</sup> 28 CFR 36.304(d).

<sup>29</sup> 28 CFR 36.304(d)(3)

<sup>30</sup> Department of Agriculture (Forest Service); Department of Defense (Army Corps of Engineers); Department of the Interior (Bureau of Land Management, Bureau of Reclamation, Fish and Wildlife Service, National Park Service); and non-federal entities that construct or alter recreation facilities on federal land on behalf of federal agencies pursuant to concession contract, partnership agreement, or similar arrangement.

<sup>31</sup> An alteration is work done to change the original design, purpose, intent, or function of the feature. It does not include routine maintenance. See Outdoor Developed Areas: A Summary of Accessibility Standards for Federal Outdoor Developed Areas by the U.S. Access Board, May 2014 (**Outdoor Developed Area Guide**), p.13.

<sup>32</sup> ODAAG 1019. See also discussion of exceptions in the Outdoor Developed Area Guide pp. 1-10. See ODAAG Advisory 1019.1 for certain limitations on the application of these exceptions.

<sup>33</sup> Outdoor Developed Area Guide page 5.

<sup>34</sup> Outdoor Developed Area Guide page 5.

**4. Compliance is precluded by the Endangered Species Act, the National Environmental Policy Act, the National Historic Preservation Act, the Wilderness Act or other federal, state or local laws, the purpose of which is to preserve threatened or endangered species, the environment; or archeological, cultural, historical, or other significant natural features.**<sup>35</sup> Examples would include Congressionally designated wilderness areas that prohibit motorized equipment, designated wetland or coastal areas with limitations on construction methods or materials, or water crossings with restrictions in place to protect aquatic features.<sup>36</sup>

If full compliance is not possible under these exceptions, compliance is still required to the extent practicable (reasonably doable under the circumstances).<sup>37</sup>

## **II. When must Wheelchairs and “Other Power Driven Mobility Devices” be permitted?**

On March 15, 2011, the ADA regulations were amended to address the use of wheelchairs and “Other Power Driven Mobility Devices” (“OPDMDs”) by disabled individuals.<sup>38</sup> The rule applies to all Places of Public Accommodation (PPA) and is different depending on whether the person wants to use a wheelchair or an OPDMD.

### **A. Wheelchairs.**

1. **The Rule:** “A public accommodation shall permit individuals with mobility disabilities to use wheelchairs and manually-powered mobility aids, such as walkers, crutches, canes, braces, or other similar devices designed for use by individuals with mobility disabilities in any areas open to pedestrian use.”<sup>39</sup>

2. **Definition:** *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. “<sup>40</sup> Mobility scooters are included in the definition of “wheelchair.”<sup>41</sup>

3. **Implementation:** Individuals may not be asked about the nature and extent of their disabilities, nor may they be asked to show proof of their disabilities.<sup>42</sup>

### **B. OPDMDs.**

1. **The Rule:** A Public Accommodation (PA) must permit individuals with mobility disabilities to use “other power driven mobility devices” on PPAs, if it can make reasonable modifications to its practices to accommodate them.<sup>43</sup>

2. **Definition:** “*Other power-driven mobility device* means 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

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<sup>35</sup> “Significant natural features include objects, such as large boulders, rocky outcrops, and bodies of water; or unique trees or vegetation, such as giant sequoia groves, that are regarded as distinctive or important locally, regionally, or nationally and are therefore placed under legal protection.” Outdoor Developed Area Guide page 8.

<sup>36</sup> Outdoor Developed Area Guide page 8.

<sup>37</sup> Outdoor Developed Area Guide page 4.

<sup>38</sup> 28 CFR Section 36.311.

<sup>39</sup> 28 CFR Section 36.311(a).

<sup>40</sup> 28 CFR Section 36.104.

<sup>41</sup> 28 CFR Section 36, Appendix A.

<sup>42</sup> 28 CFR Section 36.311(c)(1).

<sup>43</sup> 28 CFR Section 36.311(b)(1).

golf carts, electronic personal assistance mobility devices (EPAMDs), such as the Segway<sup>44</sup>; 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.”<sup>44</sup> This could include off-highway vehicles, all-terrain vehicles,<sup>45</sup> and snowmobiles.

3. Assessment: An assessment must be performed of the properties based on safety concerns and the following five factors. In the absence of such an assessment, OPDMDs cannot be prohibited.

- i) The type, size, weight, dimensions, and speed of the device;
- (ii) The volume of pedestrian traffic at the preserve (which may vary at different times of the day, week, month, or year);
- (iii) The PPA’s design and operational characteristics (*e.g.*, whether its business 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 other power-driven mobility device in the specific preserve; and
- (v) Whether the use of the other power-driven mobility device 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.<sup>46</sup>

The Assessment form prepared for and used by The Nature Conservancy is enclosed with these materials as a sample.

4. Documentation. The rule does not specify any particular format for the assessments, nor does it require that the assessments be reviewed or approved by any public entity.
5. Public Notice/Signage. Guidance to the rule states that “the public entity should endeavor to provide individuals with disabilities who use other power-driven mobility devices with advanced notice of its policy regarding the use of such devices and what rules apply to the operation of these devices.”<sup>47</sup>
6. Determining Whether a Person Requires the OPDMD. The ADA forbids direct inquiry into the “nature and extent” of an individual’s disability regardless of the device used.<sup>48</sup> However, in areas that allow OPDMDs, PA staff may ask “for credible assurance that the mobility device is required because of the person’s disability.”<sup>49</sup> The PA must accept either of the following:
  - ✓ Presentation of a “valid, State-issued disability parking placard or card, or State-issued proof of disability” OR
  - ✓ A verbal statement by the person that they are disabled. The individual’s statement is subject to the requirement that their disability is “not contradicted by observable fact.”<sup>50</sup>

### **III. What are the rules governing Service Animals?**

- A. General Rule: A Public Accommodation (PA) must allow service animals to accompany people with disabilities in all areas of its property and improvements where the public is normally allowed to go,<sup>51</sup> *even if the PA otherwise prohibits dogs in those areas.*<sup>52</sup>

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<sup>44</sup> 28 CFR Section 36.104.

<sup>45</sup> 28 CFR Section 36, Appendix A.

<sup>46</sup> 28 CFR Section 36.311(b)(2)

<sup>47</sup> 28 CFR Section 36, Appendix A.

<sup>48</sup> 28 CFR Section 36.311(c)(1).

<sup>49</sup> 28 CFR Section 36.311(c)(2).

<sup>50</sup> 28 CFR Section 36.311(c)(2)

<sup>51</sup> 28 CFR 36.302(c)(7).

<sup>52</sup> Changing the “no dog” policy could be a “reasonable modification in policy” under 28 CFR 36.302(a).

B. Exceptions:

1. If allowing service animals would “fundamentally alter the nature of” the goods or services being provided.<sup>53</sup>
2. If the service animal is either:
  - a. “out of control and the animal’s handler does not take effective action to control it;” or
  - b. “not housebroken.”<sup>54</sup>
3. If the individual with the service animal would pose a direct threat to the health or safety of others.<sup>55</sup>

C. Definition of “Service Animals”

1. Dogs: A service animal is a dog that is individually trained to do work or perform tasks for an individual with a disability.<sup>56</sup> Dogs whose sole function is to provide comfort or emotional support do not qualify as service animals.<sup>57</sup>
2. Miniature Horses: Miniature horses qualify as service animals under the same criteria described for dogs above. However, in addition to the exceptions described above, a PA can also consider the following in deciding whether miniature horses may be excluded from a PPA:<sup>58</sup>
  - a. Type, size and weight of the miniature horse and whether the facility can accommodate these features;  
Whether the miniature horse compromises legitimate safety requirements necessary for safe operation.

D. Restrictions on Service Animals: Service animals must be harnessed, leashed, or tethered, unless those devices interfere with the animal’s work or the individual’s disability prevents using these devices.<sup>59</sup> In those situations, the person must use voice, signal, or other effective methods of maintaining control of the animal.<sup>60</sup>

E. Permitted Inquires: When it is not obvious what service an animal provides, staff may ask only two questions: (1) Is the dog a service animal required because of a disability? and (2) What work or task has the dog been trained to perform? A PA *cannot*, however, require any form of documentation or proof of the person’s disability or the dog’s training.<sup>61</sup> A service animal does not have to be certified, trained, or licensed; and it need not wear a vest, ID tag, or *specific* harness.<sup>62</sup>

F. Excluded Animal: If a dog or miniature horse is properly excluded from property, the individual must be permitted to return without the animal. That person is responsible for the care and supervision of the animal – the PA would not be required to provide care or storage for the animal.

G. Impact of State or Local Regulations: Since the ADA is a federal law, it supersedes any state or local law, regulation or ordinance that conflicts with the ADA. For example, local laws that require registration of service animals, or ban particular breeds of dogs would be trumped by the service animal regulations of

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<sup>53</sup> 28 CFR 36.302(a).

<sup>54</sup> 28 CFR 36.302(c)(2). This latter exception may have limited application in outdoor settings.

<sup>55</sup> 28 CFR 36.208. The DOJ guidance provides an example of a service dog causing zoo animals to “behave aggressively or become agitated.” DOJ Service Animal FAQs Q26 ([http://www.ada.gov/regs2010/service\\_animal\\_qa.html](http://www.ada.gov/regs2010/service_animal_qa.html)).

<sup>56</sup> Examples include guiding people who are blind, alerting people who are deaf, pulling a wheelchair, or alerting a person who is having a seizure. 28 CFR 36.104.

<sup>57</sup> 28 CFR 36.104.

<sup>58</sup> 28 CFR 36.302(c)(9).

<sup>59</sup> E.g., a dog that must be loose in order to assist a person having an epileptic seizure.

<sup>60</sup> 28 CFR 36.302(c)(4).

<sup>61</sup> 28 CFR 36.302(c)(6).

<sup>62</sup> DOJ Service Animal FAQs ([http://www.ada.gov/regs2010/service\\_animal\\_qa.html](http://www.ada.gov/regs2010/service_animal_qa.html)).

the ADA.<sup>63</sup> However, federal, state or local laws or regulations that provide greater protection to individuals with disabilities would not be impacted by the ADA.<sup>64</sup>

#### **IV. When must sign language interpreters and other “Auxiliary Aids and Services” be provided?**

A. *Auxiliary aids and services.* A Public Accommodation (PA) must take steps to “ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently” because of a lack of auxiliary aids and services, unless taking those steps would *fundamentally alter* the nature of the services, facilities or accommodations being offered or would result in an *undue burden*.<sup>65</sup> A fundamental alteration “alters the essential nature of” the goods, services, or accommodations. An undue burden is defined as a significant difficulty or expense.<sup>66</sup>

Auxiliary aids and services only apply to individuals with disabilities that substantially limit their ability to communicate, such as those with vision, hearing or speech impairments.<sup>67</sup> A PA cannot require people to provide their own sign language interpreters.<sup>68</sup>

The ADA regulations suggest providing auxiliary aids such as written materials in addition to aural information, Brailed signage, qualified interpreters, and other means of providing “effective communication.”<sup>69</sup> One service that may be helpful in remote areas is “video remote interpreting” which is a fee-based service where interpreters are provided through video conferencing. The regulations encourage the PA to consult with the person with the disability to find out what they would find to be most helpful, but the ultimate decision lies with the PA, so long as the result is “effective communication.”<sup>70</sup> For example, a preserve may not need to provide Braille signs if it provides guides who can read the signs for blind visitors.<sup>71</sup>

#### **B. Websites**

Although there are currently no regulations specific to ADA and websites, there are voluntary standards available that the DOJ is requiring in their ADA settlements. These standards are currently being incorporated into standards applicable to federal agencies.<sup>72</sup> It is likely that these voluntary standards will also be adopted by the DOJ in regulations applicable to Public Accommodations in the future.<sup>73</sup> The voluntary standards are the World Wide Web Consortium’s Web Content Accessibility Guidelines 2.0 (WCAG 2.0).<sup>74</sup> These standards were updated in 2018 to WCAG 2.1. The updates were intended to improve accessibility for users with cognitive or learning disabilities, users with low vision, and users with mobile devices. These new standards will likely replace WCAG 2.0 as the new de facto standard applied by courts and the DOJ in accessibility cases. This is a hot topic. In a summary of ADA lawsuits in 2018, 1/5<sup>th</sup> of the lawsuits involved allegedly inaccessible websites.<sup>75</sup>

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<sup>63</sup> DOJ Service Animal FAQs ([http://www.ada.gov/regs2010/service\\_animal\\_qa.html](http://www.ada.gov/regs2010/service_animal_qa.html)).

<sup>64</sup> ADA Title III Technical Assistance Manual III-1.8200 (<http://www.ada.gov/taman3.html>)

<sup>65</sup> 28 CFR 36.303

<sup>66</sup> 28 CFR 36.104

<sup>67</sup> Technical Manual III-4.3100.

<sup>68</sup> 28 CFR 36.303(c)(2).

<sup>69</sup> For examples of auxiliary aids and services, see 28 CFR. § 36.303(b).

<sup>70</sup> 28 CFR 36.303(c)(1)(ii).

<sup>71</sup> See DOJ publication “ADA Requirements Effective Communication” for more information. <http://www.ada.gov/effective-comm.htm>.

<sup>72</sup> Federal Agencies are not subject to the ADA. They are subject to Section 508 of the Rehabilitation Act, which requires accessibility for persons with disabilities to electronic and information technology of the federal government.

<sup>73</sup> DOJ plans to pass regulations applicable to state and local government entities first under Title II of the ADA.

<sup>74</sup> <https://www.w3.org/WAI/intro/wcag>

<sup>75</sup> <https://www.adatitleiii.com/2019/01/number-of-ada-title-iii-lawsuits-filed-in-2018-tops-10000/>

## **V. Legal Remedies: Who can sue land trusts? What will happen when they do?**

Private parties may sue a Land Trust under Title III of the ADA if they believe they are being subjected to discrimination or believe they are about to be subjected to discrimination.

Remedies in private suits may include injunctive relief, or for structural issues, an order to bring the facility into compliance, and attorney's fees. DOJ suits include those remedies, as well as monetary damages. Additional claims and penalties may also be available under state disability laws.<sup>76</sup> Note recent proliferation of ADA Title III lawsuits filed in federal court.<sup>77</sup>

## **VI. Implementation.**

### **A. What if we don't meet accessibility guidelines? Raven Ridge example**

In 2016 TNC constructed a low boardwalk across a field that did not meet accessibility guidelines. A local accessibility advocate contacted us about this and wrote several posts in a local community online forum. After consulting with our attorneys, we determined that the boardwalk either needed to be upgraded to meet accessibility guidelines or removed. We decided to upgrade.

### **B. Planning, fund raising, permitting, contracting, management**

Constructing an accessible trail will most likely take twice as long and cost twice as much as you think.

- We have found accessibility projects to be relatively easy to raise funds for through grants, private foundations and donors. Total cost of the Raven Ridge project: \$320,000
- The first, non-accessible boardwalk cost \$24,000 and we were able to reuse about \$8,000 of the lumber.
- Recreation Trails Program grants: federal funding with lots of application and reporting requirements. We secured \$50,000. Delays from the federal government for funding the program meant we could not begin construction until mid-August and barely finished before winter
- Permitting is costly and time-consuming. We were required to secure State development permits, State wetlands permits, archeological review, curb cut permit, and Town development permits (which required an architectural drawing). Total permitting costs were: \$7,590, about half would have been required for the non-accessible boardwalk
- Staff time to manage the project (not construction): ~150 hours
- Contracting: for such a large/costly project we sent out a Request for Proposals to trail builders across the region. We did not find many companies that specialize in constructing accessible trails in ecologically sensitive areas.
- Ongoing management issues: beavers, dogs, vegetation, bees, graffiti

## **VII. Beyond meeting the requirements: Benefits of accessible trails**

Accessible trails have multiple benefits in addition to providing access to people in wheelchairs. They can better protect sensitive areas, provide a safe-feeling experience for those who are not comfortable in nature, make it easier for a wider range of visitors (e.g. people with strollers or people who are not in great shape and may not be able to handle steeper grades), be a great learning classroom, and can incorporate art/aesthetics into a natural area.

## **VII. Resources:**

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<sup>76</sup> 28 CFR 36.501-504.

<sup>77</sup> <https://www.adatitleiii.com/2019/01/number-of-ada-title-iii-lawsuits-filed-in-2018-tops-10000/>

- U.S. Access Board: [www.access-board.gov](http://www.access-board.gov)
  - ✓ Outdoor Developed Areas Accessibility Guidelines: <https://www.access-board.gov/attachments/article/1500/outdoor-rule.pdf>
  - ✓ Outdoor Developed Areas Accessibility Guidelines Summary: <https://www.access-board.gov/attachments/article/1637/outdoor-guide.pdf>
  - ✓ 2010 ADA Design Standards and Technical Guides. <https://www.access-board.gov/guidelines-and-standards/buildings-and-sites/about-the-ada-standards>
- American Trails Website (information on OPDMDs): <http://www.americantrails.org>
- Department of Justice ADA Website: [https://www.ada.gov/ada\\_title\\_III.htm](https://www.ada.gov/ada_title_III.htm)
- ADA National Network: <https://adata.org/>. Offer many free webinars and emails with current accessibility issues and news.
- ADA Checklists for Existing Facilities: <https://www.adachecklist.org/>
- Department of Agriculture
  - ✓ “Forest Service Trail Accessibility Guidelines (FSTAG)”  
[https://www.fs.fed.us/recreation/programs/accessibility/FSTAG\\_2013%20Update.pdf](https://www.fs.fed.us/recreation/programs/accessibility/FSTAG_2013%20Update.pdf)
  - ✓ “Accessibility Guidebook for Outdoor Recreation and Trails”  
[https://www.fs.fed.us/recreation/programs/accessibility/pubs/pdfpubs/pdf10072014/1223-2806P-AGORT-COL-08-20-13\\_Errata2Fixed\\_300dpi2.pdf](https://www.fs.fed.us/recreation/programs/accessibility/pubs/pdfpubs/pdf10072014/1223-2806P-AGORT-COL-08-20-13_Errata2Fixed_300dpi2.pdf)
- WebAIM (Web Accessibility In Mind). <https://webaim.org/>
- Social Media Accessibility Toolkit. <http://exploreaccess.org/social-media/?fbclid=IwAR0JS3RKWzalMD4a5rkKjbo7aILFOG2mEuvHaKiYX7RmRXEI5p8OcNDrC90>
- Other Power-Driven Mobility Device (OPDMD) Assessment Form for TNC Natural Areas (enclosed)

*This form was developed by The Nature Conservancy (TNC) for internal use only. TNC disclaims any representations or warranties as to the accuracy, completeness or applicability of this form for use by any other party.*

## Other Power-Driven Mobility Device (OPDMD) Assessment Form for TNC Natural Areas June 2012

### **BACKGROUND**<sup>1</sup>

Wheelchairs: Under the Americans with Disabilities Act Regulations (ADA), TNC must permit persons with mobility disabilities to use wheelchairs and manually-powered mobility aids on TNC property that is open to pedestrian use. “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.”

Other Power Driven Mobility Devices: Under the ADA, TNC must also allow persons with mobility disabilities to use “other power driven mobility devices” (OPDMDs) (ex. all-terrain vehicles, Segways, golf carts) on TNC property that is open to the public if TNC can make reasonable modifications to our practices to accommodate them. This applies to areas that are open on a limited basis (i.e. only during hunting season), during those open periods. OPDMDs may only be restricted or prohibited based on a site-specific assessment of the five factors listed below. Without such an assessment, the presumption under the law is that OPDMDs are permitted.

#### Five Factors:

- (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 business 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 other power-driven mobility device in the specific facility; and
- (v) Whether the use of the other power-driven mobility device 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.<sup>2</sup>

### **INSTRUCTIONS**

1. Identify the Property: This form should be completed for every natural area owned by TNC that is open to the public. This assessment need only be completed once, unless there are significant changes on the property (i.e. new trail installed, a significant new tract added). If it is a property with highly variable conditions then it may be appropriate to do a separate assessment for subparts of the property. Likewise, if you have a number of properties with very similar conditions, then it may be appropriate to address them all in a single assessment, as long as each property is clearly identified in the assessment.
2. Complete the Assessment: Complete the assessment below for the property identified. Consult with your supervisor or attorney as appropriate.
3. Obtain Review: Once complete, submit the assessment for review. Each Operating Unit will determine who will act as the reviewer for these assessments (may be more than one individual per OU).
4. Provide Public Notice: The ADA requires public notice regarding TNC policies on the use of OPDMDs at TNC properties. This is most important when OPDMDs will be prohibited or restricted. Notice should be given via signage at the property (if practical) and/or on TNC websites. See **Attachment A**

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<sup>1</sup> For more background on the applicability of the ADA to TNC natural areas, see the Accessibility Manual on Legal Connect.

<sup>2</sup> 28 CFR Section 36.311(b)(2).

attached for suggested signage and website language.

5. Records Retention. Maintain the completed assessment forms as directed by the Conservancy's Record Retention Schedule.

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Property Name (Conservation Area (Tract(s) or Preserve Name): [Click here to enter text.](#)

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Prepared By (*signature*):

Date: [Click here to enter text.](#)

Print Name: [Click here to enter text.](#)

TNC Title: [Click here to enter text.](#)

Reviewed By (*signature*):  
(or attach email approval)

Date: [Click here to enter text.](#)

Print Name: [Click here to enter text.](#)

TNC Title: [Click here to enter text.](#)

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### **Property Information**

Briefly describe the natural landscape characteristics of the Property.

[Click here to enter text.](#)

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Describe the current trails, roads and observation areas on the Property (*width, how many miles, and surface type*). *Attach map if available.*

[Click here to enter text.](#)

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Is the entire Property open to the public or only portions such as trails, roads or observation areas? Describe.

[Click here to enter text.](#)

If only certain parts of the Property are open to the public, is that made clear by signage? Describe.

[Click here to enter text.](#)

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Is there an obvious or designated point of entry to the Property (*i.e. trailhead or parking area*)? Describe.

[Click here to enter text.](#)

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Describe any physical restrictions on access to the Property (*e.g. gate, trees, bollards*).

[Click here to enter text.](#)

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Describe any binding legal agreements affecting the Property which would have the effect of restricting or prohibiting the use of motorized devices on all or part of the Property (e.g. a conservation easement held by a third party; restrictions held by a funding agency; dedication as a state natural area). Consult CLS as needed.

NOTE: If there is such an agreement, please consult your TNC Attorney.<sup>3</sup>

[Click here to enter text.](#)

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### **Current Public Use of the Property**

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<sup>3</sup> If the restrictions are based on federal land management laws and regulations; the fifth factor in the regulation would apply. However, any private, or state or local government restrictions would be subordinate to the ADA regulations.

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Describe the current public uses of the Property (*i.e. walking, biking, hunting, birding, horseback riding, motorized use*).

[Click here to enter text.](#)

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Describe where such uses occur on the Property (*e.g. on roads, trails, or off-trail*).

[Click here to enter text.](#)

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Describe existing motorized vehicle trespass issues on the Property, if any (*types of vehicles, locations of trespass, effects on conservation values, etc.*).

[Click here to enter text.](#)

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Describe the current typical volumes and timing of existing public uses.

[Click here to enter text.](#)

### **Nature Conservancy Use of Motorized Vehicles or other Mobility Devices at the Property**

Describe typical use of motorized vehicles or OPDMDs by TNC staff, contractors or volunteers on the Property (*including type of vehicles or OPDMDs, on or off-road use, and frequency of use*).

[Click here to enter text.](#)

---

Does TNC close its trails/public access areas for property management or trail maintenance?  Yes  No

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Describe any restrictions imposed on TNC use of motorized vehicles or OPDMDs on the Property (*e.g. cleaning for invasives, training requirements, seasonality*).

[Click here to enter text.](#)

### **Safety**

Are there types of OPDMDs that would pose a safety concern for non-motorized users at the Property (*size, weight, width, speed*)? Explain.

[Click here to enter text.](#)

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Will the design and characteristics of trails, roads or observation areas make certain OPDMD use unsafe?

Examples  
Steep Grades      Blind  
Sharp Curves      Intersections  
Uneven Terrain      Current Uses  
Natural              Trail Width  
Obstacles            Soil type

[Click here to enter text.](#)

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Are there any off-trail/road areas open to the public?  Yes  No

If yes, would any terrain or landscape features in the undeveloped areas make certain OPDMD use unsafe?

Examples  
Steep Grades      Blind  
Sharp Curves      Intersections  
Uneven Terrain      Current Uses  
Natural              Soil type  
Obstacles            Flood areas

[Click here to enter text.](#)

---

Are there man-made features that could make OPDMD use unsafe (e.g. utility lines, oil and gas production wells, fencing, water control structures)? Explain.

[Click here to enter text.](#)

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Overall evaluation regarding safety relating to the use of OPDMDs at this Property.

[Click here to enter text.](#)

### **Environmental Sensitivity**

Are portions of the property sensitive from a biodiversity standpoint?  Yes  No If yes, describe:

[Click here to enter text.](#)

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Are public access areas configured so that users are likely to come into contact with sensitive biological areas?  Yes  No

---

Will OPDMD use create a substantial risk of serious harm to the immediate environment, natural resources or cultural resources (*e.g. sensitive plants and ecosystems, animal habitat, spread of invasives, soil compaction*)? Explain.

[Click here to enter text.](#)

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Overall evaluation regarding impact on natural resources relating to the use of OPDMDs at this Property.

[Click here to enter text.](#)

### Results of Assessment

The ADA requires that OPDMDs be allowed if TNC can make reasonable modifications in its policies, practices, or procedures (*e.g. providing a gate lock combination to an otherwise locked gate*) to permit their use. This does not require physical modifications to trails or structures. As you select a choice below, please consider whether reasonable modifications may be possible.

Please select **one** of the following conclusions for the property being assessed and **explain how this conclusion is supported by this assessment and by one or more of the five factors listed on page one of this Form.**

**Select One:**

1.  All OPDMDs are prohibited.

Explain reasoning based on above assessment and the five factors. Confirm that there are no reasonable modifications to your policies, practices or procedures which could be made to accommodate OPDMDs.

[Click here to enter text.](#)

2.  OPDMDs shall be permitted under the following conditions (*e.g. area, vehicle types, speed, seasons. See **Appendix B** for examples*).

Identify conditions and explain reasoning for any limitations or restrictions based on above assessment and the five factors.

[Click here to enter text.](#)

3.  OPDMDs are permitted without restriction.

Explain reasoning based on above assessment and the five factors.

[Click here to enter text.](#)

## APPENDIX A

### SAMPLE SIGNAGE AND WEBSITE LANGUAGE

#### Onsite Signage Language

##### *Option 1 – for small freestanding signs.*

Other Power Driven Mobility Devices (utility vehicles, Segways, golf carts, etc) are [prohibited] [allowed subject to the following limitations: \_\_\_\_\_]. Further information is available at [insert website address or preserve building address or phone number]. Wheelchairs are permitted in areas open to pedestrian use.

*Consider adding the following if there is a locked gate or other structure that prohibits or hinders entry:*  
Contact staff at [phone number and/or email address] for [combination of lock] [to arrange entry].

##### *Option 2 – for a larger sign located on kiosk or bulletin board.*

The use of Other Power Driven Mobility Devices (OPDMDs) (utility vehicles, Segways, golf carts, etc.) on this property has been assessed in accordance with the Americans With Disabilities Act (ADA) regulations. OPDMD's are [prohibited] [allowed subject to the following limitations: \_\_\_\_\_]. Further information is available at [insert website address or preserve building address or phone number].

Wheelchairs, as defined under the ADA regulations, are permitted in areas open to pedestrian use.

*Consider adding the following if there is a locked gate or other structure that prohibits or hinders entry:*  
Contact staff at [phone number and/or email address] for [combination of lock] [to arrange entry].

#### Website Language

[The following language should be standard, other than the chart which should be filled in for your particular properties (remember to delete the examples). Please run any changes to the standard language by your TNC attorney.]

The Americans With Disabilities Act (ADA) regulations address the use of wheelchairs and “Other Power Driven Mobility Devices” (“OPDMDs) by persons with mobility disabilities. These rules apply to “public accommodations” which include TNC properties **that are open to the public**. The regulations provide that with regard to “public accommodations” persons with mobility disabilities are entitled to:

1. Use wheelchairs and manually powered mobility aids (canes, walkers, etc.) in areas that are open to pedestrian use. A “Wheelchair” includes a manually operated device or power-driven device designed primarily for use by an individual with a mobility disability for the main purpose of indoor or both indoor or outdoor locomotion.
2. Use OPDMDs if the landowner can make “reasonable modifications to its practices to accommodate them.” An assessment has been done for the following TNC properties in accordance with the ADA regulations. Based on the assessments, use of OPDMDs on these properties is subject to the following limitations:

<b>Property</b>	<b>OPDMDs permitted without limitation</b>	<b>OPDMDs permitted with following restrictions</b>	<b>OPDMDs are prohibited</b>
<i>E.g.: Happy Preserve, Happy County, Minnesota</i>	<i>N/A</i>	<i>OPDMDs are limited to paved trails; speed cannot exceed 10 mph.</i>	<i>N/A</i>
<i>E.g.: Sensitive Preserve, Sensitive County, Illinois</i>	<i>N/A</i>	<i>N/A</i>	<i>X</i>
<i>E.g.: Swamp Preserve, Mosquito County, Ohio</i>	<i>N/A</i>	<i>OPDMD are limited to ADA designated trails, except during hunting season when OPDMD's are permitted off trail with a valid TNC hunting permit.</i>	<i>N/A</i>

On those properties where OPDMDs are permitted, the following conditions shall also apply:

- A person using an OPDMD on TNC property may be asked to provide credible assurance that the OPDMD is required because of the person’s disability. TNC will accept the presentation of a valid, State-issued, disability parking placard or card, or other State-issued proof of disability as a credible assurance that the use of the OPDMD is for the person’s mobility disability. In lieu of such evidence, TNC shall accept as a credible assurance a verbal representation, not contradicted by observable fact, that the OPDMD is being used for a mobility disability. A “valid” disability placard or card is one that is presented by the person to whom it was issued and is otherwise in compliance with the State of issuance’s requirements for disability placards or cards. TNC does not accept responsibility for storage of OPDMDs.
- TNC does not accept liability for damage to OPDMDs, or injury to the operator, whether caused by the operator, another visitor to the property, or any other circumstance.
- The person operating the OPDMD cannot carry another person or object that would cause the OPDMD to tip or become unstable or cause harm to the driver, or others on trail.
- TNC does not accept liability for damage caused by the operator of the OPDMD, or injury to others caused by the operator of such device.
- TNC reserves the right to suspend the use of OPDMDs or change, modify or amend its OPDMD policies at any time.
- TNC does not represent that the TNC property is safe for use by an OPDMD. Certain risks are inherent in the use of natural areas, including rough surfaces and features such as snow, mud, vegetation, tree roots, and water crossings; all users must exercise reasonable care and judgment.
- *Consider including:* If there is a locked gate or other structure that prohibits or hinders entry, contact staff at [phone number and/or email address] for [combination of lock] [to arrange entry].

APPENDIX B  
EXAMPLES OF OPDMD RESTRICTIONS/REQUIREMENTS

Note: The following list is not exhaustive. Likewise, not every limitation would be applicable to each property. Any limitations must be guided by the above assessment and supported by the at least one of the five factors in the regulation.

A. LIMITATIONS ON TYPE OF VEHICLE

1. Width of OPDMD [Concerns re: impacts to vegetation along trail; erosion issues; safety of pedestrian traffic]:
  - a. No wider than \_\_\_ inches. [32 or 36 inches are common]
  - b. No wider than \_\_\_% of the width of the path. [e.g. 45%]
2. Length of OPDMD [Safety concerns (i.e. sharp turns in trail)]:
  - a. No longer than \_\_\_ inches [restrictions on length of OPDMD are not as common, but those that do range from 48"-72"].
3. Weight of OPDMD [E.g. for a boardwalk with a weight limitation, wetland areas, or other soil types vulnerable to rutting or compaction]:
  - a. No greater than \_\_\_ pounds. [restrictions on weight include a range from 100-550 lbs.]
4. Tires [For areas vulnerable to rutting or compaction]:
  - a. Only low-pressure tires.
5. Type of Engine [Where air or sound quality is of particular concern to local wildlife – remember the standard is “substantial risk of serious harm” to the “natural resources”]:
  - a. Electric vehicles only.
  - b. Air quality limitations:
    - i. If powered by internal combustion engine, engine shall have a four-stroke cycle, be equipped with an approved spark arrestor muffler, and meet Clean Air Act standards in effect at the time of its manufacture. Two-stroke engines are not allowed. [ILDNR]
    - ii. Zero emission OPDMDs only. [CA]
  - c. Restrictions on noise levels [range from 55 db at 25 feet to 70 db].
  - d. No internal combustion engines in buildings.

B. LIMITATIONS ON USE OF VEHICLE

1. Hours of Use [Safety concerns (visibility) or impact on nocturnal animals]:
  - a. Only during daylight hours.
  - b. May not be operated between dusk and dawn unless equipped with headlights that are visible at 300’.
2. Speed and Operation Limits [Safety and to reduce likelihood of impact to vegetation off-trail]:
  - a. May not exceed \_\_\_ mph. [5 mph is a common speed limit. Some agencies have gone up as high as 20 mph. Appropriate speed may vary depending on width of trail, volume of use, visibility (i.e. blind turns), etc.]
  - b. The OPDMD must be operated in accordance with manufacturer’s recommendations for the type of activities the device is designed for.
  - c. Must not be operated in dangerous or reckless manner. A person may be asked to leave the site if the OPDMD is being operated in an unsafe or disruptive manner.
  - d. Must stay on designated trails.
  - e. Must yield to pedestrians [and horses [if horses are allowed]].
  - f. Must stay on right side of circulation route.

