

Other Power-Driven Mobility Devices on Trails and Areas Open to Pedestrians



Creating and Implementing Policies for Accessibility and Compliance with the Americans with Disabilities Act

Trails and other areas open to the public for pedestrian use must also be open to motorized vehicles used by persons with mobility disabilities. Any type of motorized vehicle must be allowed unless the trail owner or operator creates specific written policies justifying restrictions.

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Introduction

Any trail or other area open to the public for pedestrian use and owned or operated by a public or private entity covered by the Americans with Disabilities Act (ADA) is subject to ADA regulations regarding **Other Power-Driven Mobility Devices** (OPDMDs). These rules mandate—in the absence of properly established policies to the contrary—that motorized vehicles of any type used by persons with mobility disabilities be allowed on trails and other areas open to the public for pedestrian use.

Unless private nonprofit organizations and local, county, and state government agencies create specific written policies governing the use of motorized vehicles on

their lands open to the public for pedestrian use, ALL such vehicles must be allowed without restriction.

To prohibit certain or all types of OPDMDs on a trail or other area, an entity needs to:

- Create a written policy on OPDMD use that establishes adequate reasons for banning or limiting the vehicles based on the U.S. Department of Justice’s five assessment factors; and
- Inform the public in advance about its OPDMD policy.

The U.S. Department of Justice issued the OPDMD regulations in March 2011. (As of October 2020, there appears to be no on-point case law or subsequent government guidance to aid in interpreting these rules.)

This guide helps trail and park managers and land trust staff understand the demands placed on them by the regulations. It also provides guidance on policies and procedures to address the rules so managers can optimally manage public access to and environmental stewardship of their trails, parks, preserves, and other green spaces.

Applicability of the OPDMD Regulations

The OPDMD regulations apply to non-federal¹ government entities (under Title II) and to private entities operating “places of public accommodation” (under Title III).² **It covers trails open to the public even on *private land***, whether or not the landowner has agreed to such vehicles; the critical factor is not consent of the landowner or land manager but the appropriateness of OPDMD usage on such lands, evaluated in accordance with the U.S. Department of Justice’s assessment factors discussed below.



¹ Federal agencies generally are covered by the ABA and Section 504 of the Rehabilitation Act.

² See 28 CFR § 35.137 (for Title II entities) and § 36.311 (for Title III entities).

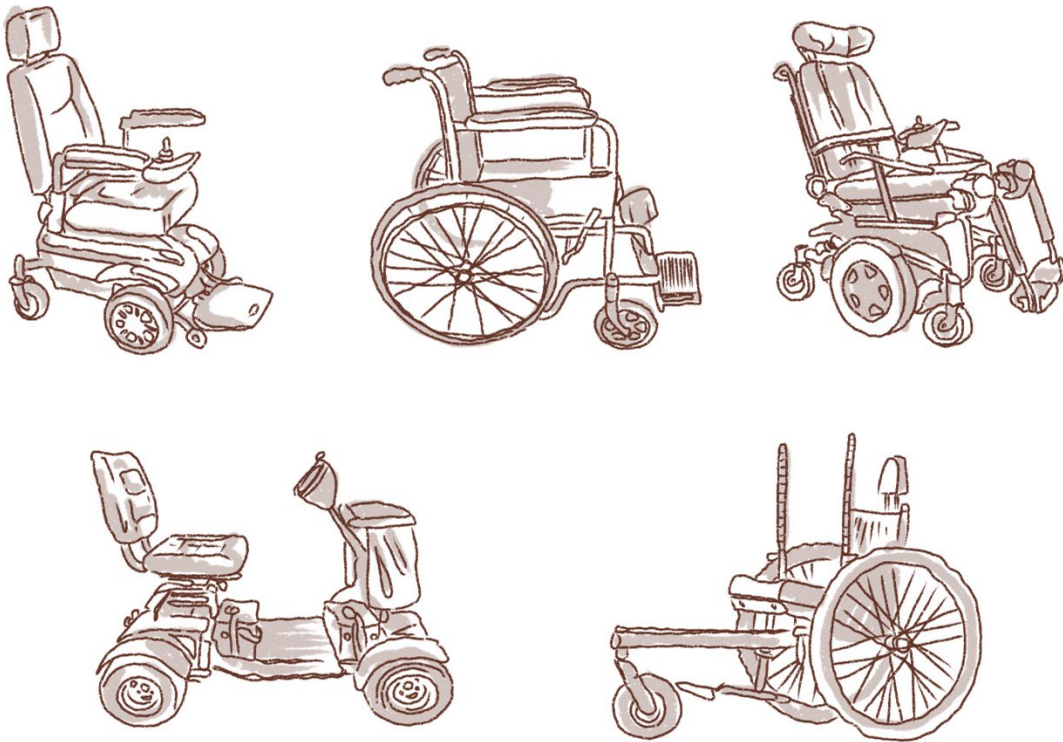
Wheelchairs vs. OPDMDs

The U.S. Department of Justice regulations categorize mobility devices for individuals with mobility related disabilities as either wheelchairs or OPDMDs. **Wheelchairs**—devices specifically designed for use by people with mobility impairments—must be permitted in all areas open to pedestrian use. **OPDMDs**—devices not designed for disabled individuals but which *can be used* by mobility-impaired people for mobility purposes—also must be permitted in all areas open to pedestrians **unless the trail provider establishes that their use would change the provider’s programs or activities or create a safety hazard or threat.**

Wheelchair

A wheelchair generally is reimbursable by insurance and is defined as:

[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.³



Wheelchairs must be permitted to be used anywhere on a property that is open to pedestrians.

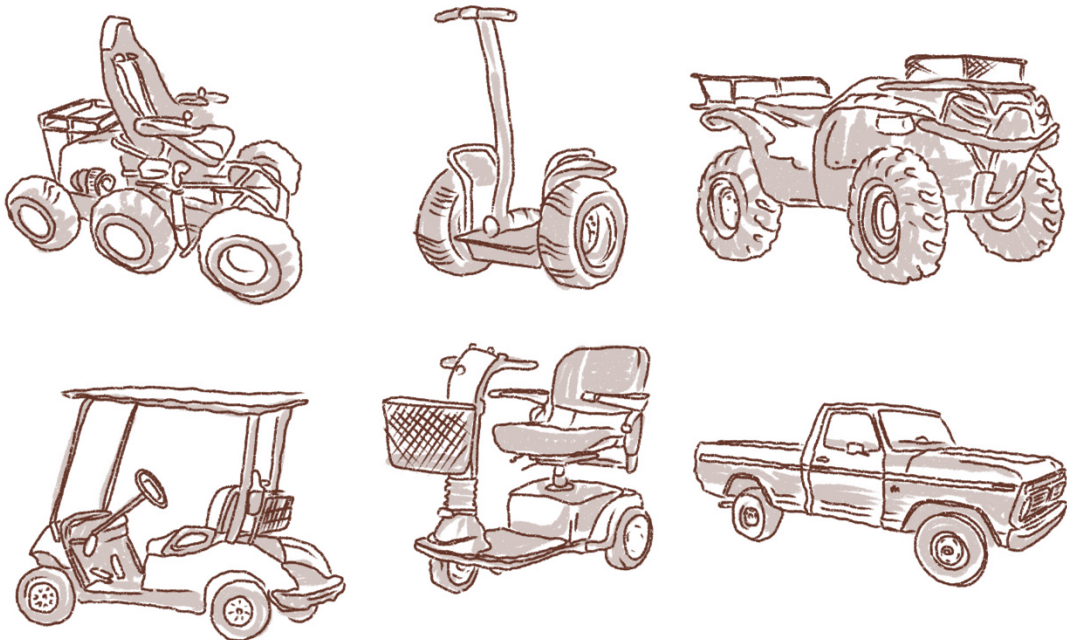
³ See generally U.S. Dept. of Justice regulations 28 CFR § 35.104, § 35.137, § 36.104, and § 36.311.

Other Power-Driven Mobility Device

In contrast, almost any vehicle can be used as an OPDMD. Anything with a motor, from golf carts to large trucks falls within the definition of “OPDMD,” which is defined in the rules as:

[A]ny 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....⁴

In sum, an OPDMD is any motorized device that may be driven, regardless of size, width, weight, or horsepower, if it is driven by someone who has a mobility-related disability.



Unlike wheelchairs, the use of OPDMDs on publicly accessible property owned or operated by entities covered by ADA’s Title II or Title III **may be restricted—but only if the restriction is based on one of the assessment factors discussed below.**

The Assessment Factors

The U.S. Department of Justice regulations require that public entities and private entities offering “places of public accommodations” (e.g., trails) make “reasonable modifications” in

⁴ 28 CFR § 35.104.

their “policies, practices, or procedures” to permit the use of OPDMDs by persons with mobility disabilities UNLESS those entities can show that a particular class of OPDMD “cannot be operated in accordance with legitimate safety requirements” the entity has adopted. The factors that organizations may use to evaluate whether a certain type of OPDMD can be accommodated on a particular trail or other area is spelled out in the regulations. The five assessment factors are:

1. The **type, size, weight, dimensions, and speed** of the device;
2. The facility’s **volume of pedestrian traffic** (which may vary at different times of the day, week, month, or year);
3. The facility’s design and operational characteristics (e.g., whether its business is conducted indoors or outdoors, its square footage, the density and placement of furniture and other stationary devices, and the availability of storage for the OPDMD if needed and requested by the user);
4. Whether **legitimate safety requirements** (such as limiting speed to the pace of pedestrian traffic or prohibiting use on escalators) can be established to permit the safe operation of the OPDMD in the specific facility; and
5. Whether 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.⁵

The regulatory guidance issued by the U.S. Department of Justice goes on to state that:

It is important to understand that these assessment factors relate to an entire class of device type, *not* to how a person with a disability might operate the device... All types of devices powered by fuel or combustion engines, for example, may be excluded from indoor settings for health or environmental reasons, but may be deemed acceptable in some outdoor settings. Also, for safety reasons, larger electric devices such as golf cars may be excluded from narrow or crowded settings where there is no valid reason to exclude smaller electric devices like Segway.[®]

Based on these assessment factors, the Department of Justice expects that devices such as Segways[®] can be accommodated in most circumstances. The Department also expects that, in most circumstances, people with disabilities using ATVs and other combustion engine-driven devices may be prohibited indoors and in outdoor areas with heavy pedestrian traffic.⁶

⁵ 28 CFR § 36.311; 28 CFR § 35.137

⁶ Federal Register, Vol. 75, No. 178, September 15, 2010, Rules and Regulations. More information on the U.S. Dept. of Justice assessment factors can be found at <http://www.ada.gov/opdmd.htm>.

The regulations do not *require* that Title II and Title III organizations conduct such an assessment, but if they do not do so, by default ALL OPDMDs will be permitted on ALL their publicly accessible trails, and other lands open to pedestrians!

Creating an OPDMD Policy

An organization may wish to retain an expert to help it assess its lands as well to prepare a written policy, although this is not required. Several sample OPDMD policies are included in WeConservePA's [online library](#). These policies show a variety of restrictions that different organizations have imposed on OPDMD use on their lands, together with how each limitation has been substantiated vis-à-vis the assessment factors. These policies should not be adopted or excerpted without an organization first evaluating and documenting how the assessment factors apply to each of *its own trails*. The U.S. Department of Justice has not yet given a stamp of approval on any particular OPDMD policy, so there is no guarantee that any of these policies would be deemed legally compliant. Moreover, a written policy alone—without supporting assessments tailored to each trail (or perhaps to each *specific trail type*)—will NOT meet the U.S. Department of Justice's legal requirements.

A typical OPDMD policy includes the following content:

- A **purpose statement** explaining why the policy is being implemented and providing that OPDMD usage (to the extent permitted at all) is limited only to individuals with mobility disabilities.
- **Definitions** defining “OPDMDs”; “wheelchairs” or other manual-powered mobility devices; “electric-powered” vs. “gas-powered” mobility devices (to the extent the two categories are treated differently under the policy); and other terms used in the policy.
- A description of the **process** used to assess an organization or agency's trails (such as whether a committee was formed, who staffed the committee, the time period over which the author/committee drafted the policy).
- A summary of the **evaluation for each assessment**.
- **Prohibitions/limitations** that might restrict:
 - a specific class or type of OPDMD (e.g., “internal combustion engines are prohibited”);
 - OPDMDs over a certain, size, weight, and/or dimension (e.g., “only electric vehicles weighing less than 150 pounds and no more than 5 feet in length and 32 inches in width are permitted”); and
 - OPDMD use on particular areas of the property (e.g., “use of OPDMD off-trail is not permitted”).

In each case, an explanation of the limitation or prohibition should be provided together with a reference to the assessment factor upon which the decision is based.

- **Trails (or trail types)** to which the limitations apply.
- **Safety rules** may be imposed. For instance, the policy might:
 - set a maximum speed limit and require that all users yield to pedestrians;
 - state that users of OPDMDs and wheelchairs must exercise reasonable caution and operate the devices in a safe way based on trail conditions, user volume, other uses, weather conditions, etc.;
 - recommend that OPDMD users wear protective gear and require minors to wear helmets;
 - require OPDMDs to remain on marked trails.
- **Other time, place and manner restrictions.** If the policy restricts the time periods during which OPDMDs may be used (for instance, prohibiting them during certain high-traffic times of the day or during certain weather conditions), it needs to justify this by referencing one or more of the assessment factors.
- **Legal disclaimer** noting that adoption of the policy does not constitute an endorsement that the trails or other lands are safe for wheelchair or OPDMD use. It may note that any outdoor activity, such as hiking, carries inherent risks and that persons who use the organization's trails do so at their own risk.
- **How the mobility disability will be validated.** The policy should explain how the organization will validate an OPDMD user's claim that they need to use the mobility device due to a mobility disability (discussed below).

Assessment by Trail Type vs. Specific Trail

Some entities with multiple facilities open to pedestrians have chosen to evaluate **categories** of trails (i.e., unpaved single-tracks; unpaved service roads; paved trails), because the sheer task of assessing each trail individually is not deemed feasible. For instance, unpaved service roads may be able to accommodate wheelchairs and electric-powered mobility devices that do not exceed a 36" maximum width and 6' in length, whereas nature trails may be able to accommodate only devices that do not exceed 32" in width and 5 feet in length.

However, given that conditions vary from trail to trail, it remains to be seen whether the U.S. Department of Justice will ultimately view this form of group assessment as sufficient to comply with the OPDMD rules. Until the Department issues further guidance, the safest approach would be to evaluate each trail individually to substantiate the application of the assessment factors.

Vehicle Use by Organization vs. Disabled Users

It is unclear how the fact that **the administrative entity itself occasionally uses motorized vehicles on its trails** (e.g., construction trucks on service roads or ATVs to maintain wilderness trails) would affect the U.S. Department of Justice’s view of that entity’s OPDMD policy banning use of these same vehicles by disabled users. Until the Department issues further guidance, organizations that use vehicles that are prohibited as OPDMDs may want to limit this use as much as possible and carefully document why such use may be necessary.

Wheelchairs Must Be Permitted

Note that even if an entity assesses its trails and determines that *all* OPDMDs will be prohibited, wheelchairs still must be permitted in all locations where pedestrians are allowed.

Notifying the Public About the OPDMD Policy

The regulations require that information as to which classes of OPDMDs are allowed in specific locations must be available before the user arrives at the trail, park, or preserve. Typically, this would involve posting the guidelines on the organization’s website and offering to make the policy available in printed form upon request. The rule does not *require* information about OPDMD use restrictions to be posted on signs, but where feasible, managers may want to do so. (For instance, information about tread width would help OPDMD users make informed decisions regarding use of their device on a particular trail.) Signage could also inform the public that wheelchairs are permitted in all locations.

It is not clear that a policy requiring individuals to check in at the park office first, to obtain a key or a permit or speak with staff, would comply with the regulations.

“Verifying” Mobility Disabilities

The U.S. Department of Justice regulations state that anyone who has a mobility disability may use an OPDMD. To validate that a person who is using an OPDMD has a disability, trail managers:

- May ask the OPDMD user for “credible assurance” of a disability.
- **May NOT ask** about the nature and extent of disability.⁷

The regulations require that a state-issued disabled parking placard, card, or other state-issued proof of disability, be accepted as “credible assurance” of the disability. However, the regulations also require that if the person does not offer proof and the manager does not observe the person performing physical activities that generally would contraindicate the

⁷ 28 CFR § 35.137(c)(1) and § 36.311(c)(2).

existence of a mobility disability, the manager **must accept the person's word** that the OPDMD is being used for a mobility disability.⁸

Note that many disabilities are not obvious. 13.7 percent of U.S. adults⁹ have serious difficulty walking or climbing stairs. However, only a fraction of these individuals actually use canes, wheelchairs, canes, or crutches.

Determining Vehicle Conformance

Regarding verification of whether the vehicle itself meets an organization's restrictions on a particular type of OPDMD (e.g., on size or weight), managers generally can determine this by using common sense. Detailed measuring is not necessary to determine whether the device has a combustible engine; appears to be significantly larger or heavier than allowed; or is going faster than the speed limit allowed. A ranger or police officer should be contacted if there is any doubt about how to handle a possible conflict situation.

Consequences of Non-Compliance

If a disabled OPDMD user were to bring a lawsuit under the ADA claiming that a trail provider did not properly apply or document the assessment factors—and thus possibly violated her civil rights—what would be the consequence to the trail provider?

As of October 2020, there appears to be no case law interpreting the regulations. But it is likely that infractions of OPDMD regulations would be handled in the same manner as violations of other ADA provisions. Aggrieved citizens who feel that a facility is non-compliant may file complaints with the U.S. Attorney General or with other federal administrative agencies identified in the ADA. That law does not provide for money damages for plaintiffs who win an ADA violation suit (under either Title II or Title III). The ADA does, however, permit prevailing parties to recover their attorneys fees, consultant costs, and other litigation-related expenses. No proof of wrongful intent on the part of the defendant is needed for the plaintiff to win her case.¹⁰

In addition to lawsuits brought by private parties, the U.S. Department of Justice can initiate compliance reviews on its own under the Project Civil Access initiative. It is unclear at this point whether this authority will be brought to bear on compliance with OPDMD regulations. As part of this initiative, Department of Justice investigators, attorneys, and architects survey state and local government facilities, services, and programs in communities across the country to identify modifications needed to comply with ADA requirements. The

⁸ 28 CFR § 35.137(c)(2) and § 36.311(c)(2).

⁹ Centers for Disease Control and Prevention at <https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html> on 10/21/2020.

¹⁰ See, e.g., *Helen L. v. DiDario* (3d Cir. 1995) 46 F.3d 325.

settlement agreements address the specific steps needed to improve access for the disabled. Under general rules governing lawsuits brought by the federal government, the U.S. Department of Justice may not file a suit unless it first has tried to settle it via negotiation. Courts may award money damages and impose civil penalties of up to \$50,000 for a first violation in lawsuits filed by the Department.

Other OPDMD Considerations in Trail Design and Management

The U.S. Department of Justice OPDMD regulations **do not require that new trails accommodate OPDMDs or that existing trails be retrofitted** so OPDMDs can be used. The OPDMD rules only relate to the *use* of publicly accessible lands, *not to the construction* of trails.

It is important, however, to factor in OPDMD use when designing and managing trails. An entity with an OPDMD policy that allows specific types of vehicles on trails should utilize that policy as part of its criteria in determining that trail's design, construction, and maintenance. And if an entity allows the use of OPDMDs upon (certain) existing trails, then the existing barriers and related devices (e.g., bollards, gates, latches, handles) will need to be modified or removed so as not to inhibit or block the permitted OPDMD use.

See WeConservePA's guide [Trails for People](#) for more information on the design and management of trails for people with mobility disabilities.



The latest version of this guide and related resources are posted at [WeConservePA.org](https://www.weconservepa.org).

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Substantial portions of this guide appeared in similar form in the 2014 WeConservePA publication [Universal Access Trails and Shared Use Paths](#).

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