March 22, 2012 ADA Workshop for Trail Developers
Question and Answer Session

Q: We currently have an asphalt bike path that says "no motorized vehicles." We put motorized vehicles on it for maintenance only. Are we out of compliance?

A: (Janet Zeller) Remember, this rule has nothing to do with the accessibility of the trail. This rule applies everywhere, and it says in the rule that a person may use an OPDMD due to the fact that they have a mobility disability; all they have to say is that they are using this trail because of a mobility disability, and they get to use it. Now, you have already posted a "no motor vehicle" sign-- the [DOJ] rule requires that you modify those practices, policies, and procedures to allow that person with a mobility disability to use [their OPDMD].

Have you done an assessment there to determine whether there is one of the five assessment factors listed in the DOJ rule present that precludes that class of motor vehicles?

Remember, the rule itself doesn't work by class, it says an OPDMD can go unless you say a particular class of OPDMD can't go because a previous assessment of that area has determined there is a substantial risk under one of the five assessment factors. The question goes back to what did you do to determine that no motor vehicles were allowed there?

There is another wrinkle that may apply to many of you that are using Recreational Trail Program money for your trails. There is language within that program that states that [a portion of this] money is only to be used for foot travel trails--pedestrian use trails--and not for motorized trails. DOJ is not going to say DOJ's rule trumps FHWA's rule—it is for the [federal] entities to work out between them or it will be settled in court.
I would not hang on that FHWA direction of foot travel only that accompanies those funds as an assessment factor. Federal law or Reg ulations is in there as a consideration under factor 5, but don't depend on that, or you are just asking to be sued into compliance. Instead look at the reasons that a particular class of OPDMD is or is not appropriate under one of those other five reasons. Is there a substantial risk of eminent damage to the resource because of the width? Is it the number of people using the trail? Are there other reasons? Look at those as your back up. Don't hang on the source of funding for policy and say "no motor vehicles."

Q: How do you differentiate—how do you allow folks to have access that are impaired—but you just don't want everyone doing it?

A: (Janet) That is going to be the big implementation question. If you are allowing a particular device (such as golf cars, as was asked) to be used by a person with a mobility disability but you aren't allowing it for anyone else—I imagine that is what you are going to have to put out there in your allowed usages. Now remember, the person only has to state that they are using it because they have a mobility disability if they are challenged—and for 85% of people who have mobility disabilities—their disability won't appear obvious—that means the fact that person has a disability won't appear obvious to others using the trail, either. So implementation is going to be a big factor. There are no

requirements for particular permits, in fact—you are not supposed to be separately permitting. You may want some kind of identification on the device, however I don't knowhow can you give a placard to someone because then you start to single out people because they have a mobility disability. It's a very complicated piece on implementation and I would urge you to take that up with the DOJ on there technical assistance line at 1-800-514-0301.

Q: What if it is privately-owned land that has an easement, and within the language of the easement there is a restriction on motor vehicles?

A: (Janet) The Forest Service is dealing with this issue on a very large scale with the Forest Legacy projects, which includes millions of acres under easement—not necessarily to the Forest Service but to various conservation organizations that we help facilitate. I'm working with those folks right now. You need to look back at what the assessment factors are—there may well be reasons why, under one of those five assessment factors, you cannot allow that particular type of use.

What we don't want to see is people not granting easements, or stop conserving land, because they are afraid of motorized vehicles coming on their land. So it is very important that you work with those partners to help them understand what those five factors mean and how to work with them.

Q: What if an area is closed to that particular type of use for everyone—why would that be a problem?

A: (Janet) I would go back to that one allowance, the DOJ rule states that if an area is closed to everyone based on one or more of those five assessment factors, then it is indeed closed to everyone under all circumstances. So an area might well be that, your gray area becomes your administrative use there. But you have to go through the process, you have to identify. You can't just say--our rule is nobody and operate a particular class of motorized device there, and then you take those same devices there under as "administrative use. Youwould be impinging on the rule if you so there [with your OPDMD]. This rule doesn't creates that exception for administrative use.

Q: [Expanded] Can you close your entire trail system or perhaps your entire state to certain class of devices?

A: (Janet) The DOJ rule is clear--it is about which classes of device may be operated in <u>specific</u> locations. You cannot do blanket rule across large areas simply because situations vary within that large footprint--sometimes within a trail system. Some is wetland, boggy—some is almost like sidewalk. So you cannot use the same assessment designationfor an entire system. The DOJ requires that specification be broken down.

Q: There is administrative use on areas where ATV use is not allowed, but this area is patrolled by ATVs for safety once a week. Would a person who has a mobility disability be able to challenge that?

A: (Janet) You bet that is very likely. You have to remember the exception is unless there is **no** use by anyone "under **any** circumstances" with the exception of an emergency or you had a sudden wash out, and you had to get a big load of gravel out there or something. If you are using it yourself instead of walking, then what is the emergency use other than time? Be prepared to document that reason. We don't know where admin use will come down. So you have to have completed the assessment process.

Q: Did this DOJ rule go through the cost-benefit process to see if the cost was greater than the benefit to society?

A: (Janet) It absolutely did, any federal regulation has to go through the Office of Management and Budget (OMB) and submit a regulatory impact analysis as to how the regulation would impact those effected. The proposed rule was out for comment in 2008, received thousands of comments, and then DOJ had to take it back, go through everything, respond to comments, make decisions, and edit the rule in accordance with comments, then go back through OMB again.OMB has a 100-million-dollar threshold, anything over that has to go through a detailed the cost-benefit analysis. That [amount ofexpenditure as the impact of a regulation] is more likely going to come into play when you are talking about something like construction or alteration.

This is DOJ rule is program modification, there was nothing that is required to be built to comply with this rule. How much it would cost for the assessment. That is really the only cost factor within this rule implementation. That is an administrative issue and you so don't get to complain about that under the rule. I will tell you within my sample page [see handout], there's one policy where an entity says they won't allow those devices there because it would be an administrative burden for them to determine whether they are appropriate for that use. Do you want to guess how far that is going in a court case? The administrative burden is not considered to not bear on the cost-benefit impact. Cost benefit analysis is not required until your cost factor exceeds 100 million dollars. Agencies and OMB look very closely at what the impact will be before a rule goes out the door.

A: (Bill Botten) Rules are modified based on what the cost is.

Q: Would a shared-use path viewed as a trail within state right of way, would this rule apply? Does it apply to state DOTs?

A: (Janet) The DOJ rule applies everywhere except on sidewalks--if it is a public right of way, recreation trail, recreation facilities, shared-use paths, inside buildings, open areas, trails, EVERYWHERE.

Q: So a sidewalk that is an asphalt path—the rule would not apply?

A: (Janet) It is not required there—it doesn't mean it would not make sense. I don't know why DOJ's reason for setting aside sidewalks. I didn't write the rule. I don't know

why, and quite frankly, I think that a Segway would be very at home on a lot of sidewalks. They certainly are in DC-- I've almost been run over by more than one. The rule applies on shared use paths—it applies everywhere except sidewalks.

Q: Do existing rules like ATV etiquette, fees and helmet use apply?

A: (Janet) If you have existing rules (for example, ATV proper use, helmets, speed, etc.) those apply to a person who has a mobility disability just as they would apply to anyone else. This rule doesn't make an exception for those sorts of things. This is about where the device can be used, and that's it.

Q: Do fees that are applicable to recreation devices apply to mobility devices?

A: (Janet) Understand if you are talking about an area where that particular class of device is allowed for everyone, this isn't an issue. This is only about making an exception to where this type of device would not otherwise be allowed to be used. That you would modify your policies, practices, procedures—to allow the person because they have a mobility device, to use this device there. This is not about changing the rules that apply to everyone, as far as the fee, the helmet. You've got a place where folks bring their RV to go camping—this is not about letting the person who says this is my mobility device say so I don't have to pay the entrance fee for my "mobility device" RV.

Q: What about shared ATVs? Like the driver does not have a disability, but the passenger does?

A: (Janet) That is a great question for the DOJ technical assistance line at 1-800-514-0301. I would love to know the answer. I haven't heard that one come up. So I would encourage you to call. And if you do call, could you let me know the answer? And also let Jennifer know, so we can let everyone else know. It's a learning opportunity, folks.

Q: If a particular class of OPDMD device has been determined to cause damage to the trail, would that meet the criteria within assessment factor 5 about posing substantial risk of damage? Would wear and tear on the trail be a reason not to allow the OPDMD?

A: (Janet) If you can document it. I would say there is a category among the five DOJ assessment factor that would fit into. I'm not saying it is going to hold up, remember I can't judge that. But you've always got to find the appropriate category and keep in mind, if it is just your guess that the use of a certain number of devices at such frequency that could be allowed before such damage, but then how does that equate to the certain number of uses that would be happening by if only allowed to be used by individuals who havea mobility disability. I don't know how you would document that.

The other question is, when you talk about actual risks under safety, does that mean you've got to let somebody get hurt before we have documentable reason for why we would allow it? Call the DOJ technical assistance line at 1-800-514-0301. We don't have a track record on these things yet. I think you can be pretty clear in what does

occur, for example, when a Segway meets a horse, coming around a blind corner. I don't think it takes an actual instance to figure out that the Segway is not going to come out well on that. There are some things that are going to be fairly obvious, there are others that are just not as obvious.

Q: If you can't ask about the mobility disability, how do you control abuse?

A: How do you control abuse in this situation? I don't think you can. That is the problem. Remember, 85% of people who have legitimate disabilities--a mobility limitation—it is not obvious. So the fact that you are not allowed to ask: how does that preclude anyone who wants to use an ATV from responding "I'm using this device because of a mobility disability?" It doesn't. And the abuse issue is one that was laid out pretty clearly in the comments to DOJ and DOJ felt that it was not enough of an issue—that there was no proof that people would subvert a rule for self gain. [laughter]

Q: Is there a requirement that your facility be 100% ADA accessible, or can portions of it be accessible?

A: (Bill Botten) In new construction or when altering an existing facility, you have specific requirements. In the trail guidelines I presented to you, remember there was a series of conditions that gave you the opportunity to opt out for a certain distance. Or if there is a specific provision you can't comply with, you do the best you can and then you go on and try to make it accessible. Ultimately, the goal is that it is accessible—especially in new construction and if you are altering something. So I would say that no, not everything has to be accessible.

Obviously in new construction, the gold standard is to have everything accessible—we are trying to do that. If you are altering something, we are evaluating on what you can make accessible. Everyone knows that a pocket of accessible trail someplace where it has taken four people to take the disabled person to is not a whole lot of help. But I do think that over time, the devices that we are talking about have greater access, have greater opportunity for getting people out to those places. But the trail guidelines opt out based on certain conditions, even in new construction or an alteration. And, in an alteration, you are only required to meet the guidelines if the trail connects to a trailhead or connects to a trail that is already meeting the guidelines or substantially meeting the guidelines. So there are going to be portions that were built in the past that aren't accessible because there were no best practice guidelines. I would think the expectation now, since you have best practice guidelines, is that you follow them as much as possible. Funding sources may require a certain level of access or that you follow the gold standard. So I would say that not everything has to be accessible, just like you see in the bathrooms that not all stalls are accessible, but there is an expectation that new construction will be accessible. And the trail guidelines give you an opportunity to opt out if one of the conditions is present.