

Access Board Draft Final Rule on Accessibility Guidelines for Outdoor Areas

On October 19, 2009 the Access Board published in the Federal Register a notice of a Public Review on their Draft Final Outdoor guidelines, open for 60 days of review and comment, until December 18, 2009 before they publish the guidelines as their final rule. To see the Draft Final and to submit your comments go to the website at

<http://www.regulations.gov/search/Regs/home.html#docketDetail?R=ATBCB-2009-0006>

Clarification:

The Forest Service Trail Accessibility Guidelines (FSTAG) and Forest Service Outdoor Recreation Accessibility Guidelines (FSORAG) are and will remain the legally enforceable guidelines on National Forest System lands, even after the Access Board publishes their final rule. The Access Board guidelines will apply to all the Federal agencies, including the U.S. Forest Service. However, any agency may use their own guidelines that integrate their definitions, terminology, processes and policies, as long they are an equal or higher standard. The Forest Service will update the FSORAG and the FSTAG, as well as the Forest Service 2006 Accessibility Guidebook, to ensure they continue to be both user-friendly and in full compliance with the Access Board's guidelines.

Background:

A number of changes have been made in the Access Board Draft Final guidelines since the June 2007 Notice of Proposed Rulemaking (NPRM) version. The Draft Final mentions most of those changes in the narrative. Overall the Access Board has simplified the guidelines' content. However some of the specifics have been lost through the simplification process with the result that it may be more of a challenge applying the guidelines to trails.

Key Changes that may be of concern for Trails:

Definitions:

- **Trail alteration and maintenance** are not defined. Because the Access Board will be integrating the outdoor guidelines into various areas of the existing Americans with Disabilities Act (ADA) and Architectural Barriers Act (ABA) Accessibility Guidelines (ADAABAAG), the Draft Final of the outdoor guidelines relies on the definitions for buildings currently in the ADAABAAG. The definition of alteration in the ADAABAAG (section 106 -Definitions) is not applicable to trails. While trail alteration and maintenance are mentioned in the unnumbered preamble to the Draft Final, they are not defined within the guidelines. One must look carefully to find mention of trail alteration and maintenance in F247.3 and its advisory note. The crucial definitions of Trail Alteration and Trail Maintenance need to be clearly defined and easy to locate in the Final guidelines.
- **Feasible** The Draft Final relies heavily on the direction that if there is a Condition that allows for an Exception from a technical provision, that provision is to be applied "to the maximum extent feasible". However the term "feasible" is not defined.

The term to the maximum extent feasible has been long used in the federal accessibility guidelines in relation to buildings, including for historic structures also where platform lifts are allowed rather than elevators, on highly modified accessible routes and on golf course's where

one is teeing off. “Technically infeasible” applying to those types of facilities and sites, is defined in the ADA/ABAAG as referring to actions such as the removal of load-bearing walls. While that works for buildings, the Access Board guidelines need to recognize trails in the often undeveloped outdoor environment are very different than buildings, or golf courses. Therefore using the same definition for buildings of “technically infeasible” as the opposite of “feasible” just doesn’t work on hiking trails.

In the outdoor environment the program based “fundamentally alter” is a far better measure of how much change is too much before the experience, the reason a person goes to that place, is fundamentally altered. Using “technically infeasible” as the end point measure of what is “to the maximum extent feasible”, crisscrossing a mountainside with switch-backed ramping would be “technically” feasible in that it would be possible to construct. However, it would definitely result in a fundamental alteration to the setting and therefore to that program.

The only explanation of the term feasible is within a preamble comment, on page 5, (not in the guidelines themselves) stating in an example “to the maximum extent feasible means that the portion of the trail can depart from the technical provision for running slope to the extent necessary to address the condition”. What does that mean? That is definitely not in “plain language”.

At what point is it appropriate to not pursue a technical provision because it will produce a fundamental change. In the previous outdoor drafts since 1999 (Reg.Neg. and NPRM) and in the Forest Service guidelines, there was no measure based on technical feasibility / possibilities because with enough money, anything is possible. Those previous guidelines worked well on the ground and used only the Conditions and the measure of fundamental alteration to define when the change should and when it should not be made. IF that is what is meant by this Access Board language, then that needs to be stated clearly within the guidelines.

By not clearly defining “feasible” in the context of trails, these guidelines pit technical feasibility against fundamental alteration as laid out in the Conditions. The result will be confusion and the downside will be felt in the outdoor environment. A clear definition of the term “feasible” within the Final guidelines themselves is essential. The opposite of feasible must not be “technically infeasible”. “Feasible” should be defined as “able to be completed within the limits of the applicable Conditions”.

Other Provisions:

- **Notification of Trails and Beach Access Routes** will be required to be sent to the Access Board when the guidelines will not be applied to the entire length of a new or altered trail or beach access route. The Board states the purpose is so they “can monitor situations where the exceptions for trails and beach access routes result in exempting an entire trail or beach access route” (F201.4.1). The Forest Service supports the Access Board’s gathering of information about trails that are 1) new or altered, 2) have a designed use of hiker/pedestrian, and 3) are connected either directly to a trailhead or to a currently accessible trail, where the guidelines can’t be applied, in order to, as the Access Board has stated, use the information provided by the Federal agencies to develop additional guidance on exempting entire trails and beach access routes.

However, the Forest Service is concerned because the guidelines do not explain how this Notification process differs from the also required “Documentation” process (1017.1 Exception 1) for such trails and routes. It is unclear why it not sufficient to simply require that same Documentation also be sent to the Access Board without creating a second separate Access Board Notification form and process. The documentation process as described in the FSTAG (section 7.1.3) would be sufficient for both purposes. Clear direction regarding a simplified single process to serve both as Documentation for the trail entities’ files and to also be sent to the Access Board for their Notification needs to be added to the Final Access Board guidelines. While preamble states the federal agency accessibility program managers will be invited to provide assistance “with the development of the Notification form”, comments concerning the redundancy of two separate reporting processes and the content of the final reporting form will be helpful.

Trails: Two General Exceptions in the all the previous Access Board drafts since 1999 (the Reg. Neg. and in the 2007 NPRM) were designed to provide guidance in the decision making process, if there were Conditions in the trail environment that prevented substantial compliance with the technical provisions. The 1st general exception was based on extreme barriers beyond which requiring compliance with the trail provisions points was not reasonable. The 2nd general exception defined the point at which so many departures from the technical provisions were necessary that, due to terrain or other natural features, the resulting accessibility would be so piecemealed as to be of no value as an accessible trail experience. Those two exceptions have provided clear “go” or “no go” criteria that has proved to be helpful for the past ten years. The Forest Service developed an Overview that allows all of those considerations to be evaluated when the flag line was being laid out for the new or altered trail. That overview is in both the FSTAG and in the 2006 Accessibility Guidebook.

In the 2007 NPRM comments, no one requested a change in those two General Exceptions for trails. The only comments regarding those trail exceptions were that in the NPRM the 2nd General Exception had been rewritten and it be returned to the original language in the Reg.Neg. to continue to provide decision guideposts for the trail designer/manager. The Access Board has instead determined that 2nd exception, which had been designed to measure the cumulative affect of piecemealing, “does not distinguish between minor and significant departures from the technical provisions” and so the Board deleted both of the General Exceptions entirely.

As currently written, if there is a Condition present, the trail is to comply with the guidelines “to the maximum extent feasible”. Again, the term “feasible” is not defined, so there is no guidance provided as to how much change to the trail environment is the maximum “feasible”. If the trail designer/manager determines that due to a Condition, it is not “feasible” to apply the guidelines to the entire trail, the trail designer/manager is required to document, sign, and file their rationale in the project file and also to file a Notification with the Access Board.

While that sounds like an easy solution, the Forest Service is concerned that because all the guidance previously provided within the two General Exceptions has been deleted, a decision that none of the trail accessibility provisions would apply to the entire trail would have to be based not on specific criteria but only on an individual’s non specific judgment. Therefore that decision maker will be legally accountable for that judgment. This situation places undue legal pressure on the trail entity.

The Forest Service contends it is far better to return to the clear process, with the specific data based guideposts / sideboards as to how much change is too much change that is currently contained in the two General Exceptions, per the 1999 Reg.Neg. Final Report. Working through the FSTAG Overview process that is based those guideposts / sideboards, allows the trail designer/manager to gather the data as to what is reasonable within those specific guideposts, during the layout of the trail, reach the final decision based on his/her evaluation of those specific findings and clearly cite, in the documentation, those specifications on the ground that lead to the decision. The final decision is then based not simply a challengeable sense on the part of the trail designer/manager that too much change would occur on the ground if the technical provisions were to be applied to the entire trail, but rather on data that has been determined within the guidelines to be outside the bounds of reasonability.

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