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ADA Information



United States Access Board
William R. Botten
Accessibility Specialist
U.S. Access Board
1331 F. Street, NW
Suite 1000
800.872.2253, Ext. 0014
202.272.0014
www.access-board.gov



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Final Guidelines for Outdoor Developed Areas



OUTDOOR DEVELOPED AREAS

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Published in the *Federal Register* September 26, 2013.

36 CFR Part 1191
RIN 3014-AA22

Architectural Barriers Act Accessibility Guidelines; Outdoor Developed Areas

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Final Rule.

SUMMARY: We, the Architectural and Transportation Barriers Compliance Board (Access Board), are issuing a final rule that amends the Architectural Barriers Act Accessibility Guidelines by adding scoping and technical requirements for camping facilities, picnic facilities, viewing areas, trails, and beach access routes constructed or altered by or on behalf of federal agencies. The final rule ensures that these facilities are readily accessible to and usable by individuals with disabilities. The final rule applies to the following federal agencies and their components that administer outdoor areas developed for recreational purposes: Department of Agriculture (Forest Service); Department of Defense (Army Corps of Engineers); and Department of the Interior (Bureau of Land Management, Bureau of Reclamation, Fish and Wildlife Service, National Park Service). The final rule also applies to non-federal entities that construct or alter recreation facilities on federal land on behalf of the federal agencies pursuant to a concession contract, partnership agreement, or similar arrangement.

DATES: The final rule is effective November 25, 2013. The incorporation of certain publications listed in the guidelines is approved by the Director of the Federal Register as of September 21, 2004.

FOR FURTHER INFORMATION CONTACT: William Botten, Access Board, 1331 F Street, NW., Suite 1000, Washington, DC 20004-1111. Telephone: (202) 272-0014 (voice) or (202) 272-0082 (TTY). E-mail address: botten@access-board.gov.

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In this preamble, "we," "our" and "us" refer to the Architectural and Transportation Barriers Compliance Board (Access Board).

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Outdoor Developed Areas:

CONTACT INFORMATION:

Bill Botten
(202) 272-0014
TTY: (202) 272-0073
Fax: (202) 272-0081
outdoor@access-board.gov

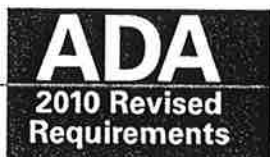
Contact Information

U.S. Access Board
1331 F Street NW, Suite 1000
Washington, DC 20004-1111

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Accessible Pools Means of Entry and Exit

The Department of Justice published revised final regulations implementing the Americans with Disabilities Act (ADA) for title II (State and local government services) and title III (public accommodations and commercial facilities) on September 15, 2010, in the Federal Register. These requirements, or rules, clarify and refine issues that have arisen over the past 20 years and contain new, and updated, requirements, including the 2010 Standards for Accessible Design ("2010 Standards").

Overview

Providing equal opportunity to people with disabilities is the fundamental principle of the Americans with Disabilities Act. This publication is designed to help title II and title III entities understand how new requirements for swimming pools, especially existing pools, apply to them.

People with disabilities were, for too long, excluded from participating in many recreational activities, including swimming. The revised 2010 Standards change that. For the first time, the 2010 Standards set minimum requirements for making swimming pools, wading pools, and spas (pools) accessible. Newly constructed and altered pools must meet these requirements. Public entities and public accommodations also have obligations with respect to existing pools. State and local governments must make recreational programs and services, including swimming pool programs, accessible to people with disabilities. Public accommodations must bring existing pools into compliance with the 2010 Standards to the extent that it is readily achievable to do so.

The requirements for newly constructed and existing pools will ensure that, going forward, people with disabilities can enjoy the same activities—a community swim meet; private swim lessons; a hotel pool—at the same locations and with the same independence, ease, and convenience as everyone else.

comply with the 2010 Standards. If a public entity chooses to acquire equipment (e.g., a portable lift) to provide program accessibility, the entity should select equipment that includes features required by the 2010 Standards, including independent operation by individuals with disabilities. Sharing accessible equipment between pools is not permitted, unless it would result in undue burdens to provide equipment at each one. Accessible pool features must be available whenever the facility is open to the public. When choosing to purchase equipment or to make structural changes, the public entity should factor in staff and financial resources required to maintain program accessibility.

Over time, a public entity will need to reassess its compliance with program accessibility, and it may become necessary to acquire new accessible equipment or make structural modifications. For more information about program accessibility, see the title II regulations at Section 35.150.

Title III Readily Achievable Barrier Removal

Title III of the ADA requires that places of public accommodation (e.g., hotels, resorts, swim clubs, and sites of events open to the public) remove physical barriers in existing pools to the extent that it is readily achievable to do so (i.e., easily accomplishable and able to be carried out without much difficulty or expense).

Determining what is readily achievable will vary from business to business and sometimes from one year to the next. Changing economic conditions can be taken into consideration in determining what is readily achievable.

For an existing pool, removing barriers may involve installation of a fixed pool lift with independent operation by the user or other accessible means of entry that complies with the 2010 Standards to the extent that it is readily achievable to do so. If installation of a fixed lift is not readily achievable, the public accommodation may then consider alternatives such as use of a portable pool lift that complies with the 2010 Standards. It is important to note that the barrier removal obligation is a continuing one, and it is expected that a business will take steps to improve accessibility over time. When selecting equipment, the public accommodation should factor in the staff and financial resources needed to keep the pool equipment available and in working condition at poolside. For more information about barrier removal, see the title III regulations at Section 36.304.

To determine which pools must be made accessible, public accommodations should consider the following factors:

- The nature and cost of the action;
- Overall resources of the site or sites involved;
- The geographic separateness and relationship of the site(s) to any parent corporation or entity;
- The overall resources of any parent corporation or entity, if applicable; and
- The type of operation or operations of any parent corporation or entity, if applicable.

Maintenance of Accessible Features

Accessible pool features must be maintained in operable, working condition so that persons with disabilities have access to the pool whenever the pool is open to others. For example, a portable pool lift may be stored when the pool is closed but it must be at poolside and fully operational during all open pool hours.

An entity should recognize that certain types of equipment may require more staff support and maintenance than others (e.g. ensuring there are enough batteries for a pool lift to maintain a continued charge during pool hours). Entities should plan for these issues and modify operational policies as needed to provide accessible means of entry while the pool is open.

Staff Training

Ongoing staff training is essential to ensure that accessible equipment (particularly pool lifts) and pool facilities are available whenever a pool is open. Staff training should include instruction on what accessible features are available, how to operate and maintain them, and any necessary safety considerations.

Tax Credits and Deductions

Title III entities may be able to take advantage of federal tax credits for small businesses (Internal Revenue Code section 44) or deductions (Internal Revenue Code section 190) for barrier removal costs or alterations to improve accessibility regardless of the size of the business. See the IRS website www.irs.gov for more information.

**For more information
about the ADA,
please visit our website
or call our toll-free number.**

ADA Website: www.ADA.gov

ADA Information Line
800-514-0301 (Voice) and
800-514-0383 (TTY)
24 hours a day to order
publications by mail.

M-W, F 9:30 a.m. – 5:30 p.m.,
Th 12:30 p.m. – 5:30 p.m. (Eastern Time)
to speak with an ADA Specialist.
All calls are confidential.

For persons with disabilities,
this publication
is available in alternate formats.

**Duplication of this document
is encouraged.**

January 2012

Guidance for arVC Members Regarding the New ADA Requirements for Pools and Spas

As you may know, the Department of Justice created new guidelines for public accommodations under the Americans with Disabilities Act (ADA) in September 2010. These new regulations may affect your business in various ways. In particular, you will be required to comply with new regulations governing access to pools and spas within your parks and campgrounds. The regulations went into effect on March 15, 2011. But you will have until January 31, 2013, to make sure that your pools and spas are in compliance with the 2010 regulations when it is readily achievable to do so.

We have received many questions about the new regulations from our members on this matter. Our counsel at McDermott Will & Emery in Washington, D.C., prepared this guidance after analyzing the 2010 ADA regulations and standards, and confirmed their interpretation and conclusion with the U.S. Department of Justice.

We hope the following Frequently Asked Questions (FAQs) provide you with some answers and clarity on this important issue. We also recommend that you review the U.S. Department of Justice booklet "ADA Update: A Primer for Small Business," which is available at:

<http://www.ada.gov/regs2010/smallbusiness/smallbusprimer2010.pdf>

Key Takeaways for arVC Members

- **The "safe harbor" is not available for swimming pools.** The revised ADA rules and 2010 Standards contain new requirements for elements (e.g., swimming pools, play areas) in existing facilities that were not addressed in the 1991 Standards. Because these elements were not included in the 1991 standards, they are *not* subject to the safe harbor (see FAQs). To be clear, the safe harbor does not apply to elements that were not included in the 1991 Standards. Thus, on or after January 31, 2013, public accommodations must remove architectural barriers to elements subject to the new requirements in the 2010 Standards when it is readily achievable to do so.
- **Just because the safe harbor does not apply to your swimming pool does not mean that you must immediately and automatically renovate your pool to bring it into compliance or close it altogether.** The ADA requires that you remove architectural barriers in existing facilities when it is "readily achievable" to do so. Readily achievable means "easily

28 C.F.R. §36.304(d)(2)(iii) provides that,

The safe harbor provided in §36.304(d)(2)(i) does not apply to those elements in existing facilities that are subject to supplemental requirements (i.e. elements for which there are neither technical nor scoping specifications in the 1991 Standards), and therefore those elements must be modified to the extent readily achievable to comply with the 2010 Standards...Elements in the 2010 Standards not eligible for the element-by-element safe harbor are identified as follows...

- (E) fishing piers and platforms
- (F) Golf facilities
- (G) Miniature golf facilities
- (H) Play areas
- (I) Saunas and steam rooms
- (J) *Swimming pools, wading pools, and spas***

...
28 C.F.R. §36.304(d)(2)(iii)(emphasis added).

Furthermore, as the U.S. Department of Justice guidance notes: *"The revised ADA rules and the 2010 Standards contain new requirements for elements in existing facilities that were not addressed in the original 1991 Standards. These include recreation facilities such as swimming pools, play areas, exercise machines, miniature golf facilities, and bowling alleys. Because these elements were not included in the 1991 Standards, they are not subject to the safe harbor. Therefore, on or after March 15, 2012, public accommodations must remove architectural barriers to elements subject to the new requirements in the 2010 Standards when it is readily achievable to do so."* (Italics added.) U.S. Department of Justice, ADA Update: A Primer for Small Business (2011).

Q: What if I cannot afford to make the required changes to my pool/spa?

A: The regulations require only that barriers to entry are removed so that your pool conforms with the requirements for disabled access "to the extent readily achievable." The DOJ has stated that "readily achievable" means that it is "easily accomplishable without much difficulty or expense."

Specifically, the definitions section of the regulation at 28 C.F.R. § 36.104 provides the following factors to be considered when evaluating whether a barrier removal is readily achievable:

- (1) The nature and cost of the action needed under this part;
- (2) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources;

begin evaluating your specific situation utilizing the arVC Self-Evaluation for Readily Achievable Barrier Removal.

Section 242 of 36 C.F.R. Part 1191, the scoping requirements, govern the requirements for swimming pools, wading pools, and spas. It provides:

Swimming pools. At least two accessible means of entry shall be provided for swimming pools. Accessible means of entry shall be swimming pool lifts complying with 1009.2; sloped entries complying with 1009.3; transfer walls complying with 1009.4; transfer systems complying with 1009.5; **and** pool stairs complying with 1009.6. At least one accessible means of entry provided shall comply with 1009.2 or 1009.3.

Exceptions:

1. Where a swimming pool has less than 300 linear feet (91m) of swimming pool wall, no more than one accessible means of entry shall be required provided that the accessible means of entry is a swimming pool lift complying with 1009.2 **or** sloped entry complying with 1009.3.
2. Wave action pools, leisure rivers, sand bottom pools, and other pools where user access is limited to one area shall not be required to provide more than one accessible means of entry provided that the accessible means of entry is a swimming pool lift complying with 1009.2, a sloped entry complying with 1009.3, **or** a transfer system complying with 1009.5.
3. Catch pools shall not be required to provide an accessible means of entry provided that the catch pool edge is on an accessible route.

Advisory 242.2 Swimming Pools: Where more than one means of access is provided into the water, it is recommended that the means be different. Providing different means of access will better serve the varying needs of people with disabilities in getting into and out of a swimming pool. It is also recommended that where two or more means of access are provided, they not be provided in the same location in the pool. Different locations will provide increased options for entry and exit, especially in larger pools.

Advisory 242.2 Swimming Pools Exception 1. Pool walls at diving area and along pool walls where there is no pool entry because of landscaping or adjacent structures are to be counted when determining the number of accessible means of entry required.

Billing Code: 4410-13

DEPARTMENT OF JUSTICE

28 CFR Parts 35 and 36

CRT Docket No. 123; A.G. Order No. 3332-2012

RIN 1190-AA69

**Amendment of Americans with Disabilities Act Title II and Title III Regulations to Extend
Compliance Date for Certain Requirements Related to Existing Pools and Spas Provided
by State and Local Governments and by Public Accommodations**

AGENCY: Department of Justice, Civil Rights Division.

ACTION: Final rule.

SUMMARY: This final rule revises the Department of Justice regulations implementing the Americans with Disabilities Act to extend until January 31, 2013, the compliance date for the application of sections 242 and 1009 of the 2010 Americans with Disabilities Act (ADA) Standards for Accessible Design for existing pools and spas.

EFFECTIVE DATE: This rule will take effect on May 21, 2012.

FOR FURTHER INFORMATION CONTACT: Allison Nichol, Chief, Disability Rights Section, Civil Rights Division, U.S. Department of Justice, at (202) 307-0663 (voice or TTY). This is not a toll-free number. Information may also be obtained from the Department's toll-free ADA Information Line at (800) 514-0301 (voice) or (800) 514-0383 (TTY).

SUPPLEMENTARY INFORMATION:

Background

The Department of Justice published its revised final regulations implementing the Americans with Disabilities Act (ADA) for title II (State and local government services) and title

Attorney General has sole responsibility for promulgating accessibility standards that fall within the Department's jurisdiction and enforcing the Department's regulations, which include the accessibility standards.

The 2010 Standards set minimum scoping and technical requirements for accessible means of entry (and exit) for newly constructed and altered swimming pools, wading pools, and spas (collectively, "pools"). The 2010 Standards include requirements for accessible means of entry for large and small pools. These requirements are found at sections 242 and 1009 of the 2010 Standards. Specifically, section 242 provides that large pools (pools with 300 linear feet of pool wall or more) must have two accessible means of entry, one of which must be a pool lift or sloped entry; the other accessible means of entry include a transfer wall, transfer system, or pool stairs. Small pools (pools with less than 300 linear feet of pool wall) must provide at least one accessible means of entry, which must be either a pool lift or a sloped entry.

The 2010 Standards also provide details about what features an accessible means of entry should include. Specifically, section 1009 addresses pool lift requirements such as the location, size of the seat, lifting capacity, and clear floor space, as well as the requirements for sloped entry, transfer wall, transfer system, or pool stairs.

Sections 35.151(d) and 36.406(b) of the respective title II and title III regulations specify that the 2010 Standards only apply to fixed or built-in elements. Sections 35.151(c) and 36.406(a) provide that the 2010 Standards apply to new construction and alterations of covered buildings and facilities.

With regard to existing facilities, the title II rule published in 2010 provided that, as of March 15, 2012, the 2010 Standards apply whenever public entities choose to meet their title II ADA program accessibility obligations by making structural alterations to their existing

Inquiries received by the Department both prior to the TA Document's publication and in response to the TA Document revealed that there were significant concerns and misunderstandings among a substantial number of pool owners and operators with respect to what was required for title III entities in order to engage in readily achievable barrier removal, or for title II entities to provide program accessibility with respect to their existing pools now that the ADA regulations included minimum scoping and technical requirements for accessible means of entry for pools. Some pool owners and operators believed that taking certain steps would always satisfy their obligations when in fact those steps would not necessarily result in compliance with the ADA regulations. For example, some pool owners and operators believed, incorrectly, that providing non-fixed lifts (lifts that are not attached to the pool deck and often referred to as portable lifts) would in all circumstances achieve compliance with the ADA regulations, even in circumstances where providing a fully compliant lift is readily achievable. Others expressed the view that they would have to close pools due to an inability to provide access, even though the regulations allow pool owners and operators to use non-fixed lifts or no lifts at all in circumstances where the provision of access is not readily achievable. The vast majority of pool owners and operators expressing these concerns were title III entities.

Recognizing the extent of the misunderstandings in determining appropriate compliance when faced with an immediate compliance date, and consistent with Executive Order 13563, "Improving Regulation and Regulatory Review" (with its emphasis on promoting predictability and public participation), the Department determined that it would be impracticable and contrary to the public interest to retain the March 15, 2012, compliance date for application of these requirements to existing pools. 77 FR 16163, 16164 (March 20, 2012). Thus, the Department issued a Final Rule extending the date for compliance with sections 242 and 1009 of the 2010

the application of the requirements to existing pools, the NPRM was not proposing to change those requirements or modify the ADA regulations in any other way and, thus, the Department was not soliciting comments on the merits of the requirements. 77 FR at 16197.

Discussion of Public Comments

In response to its proposal, the Department received approximately 1,915 public comments from individuals with disabilities, organizations representing individuals with disabilities, pool owners and operators, and other entities covered by the regulations. Approximately 1,420 commenters supported the proposal and approximately 495 commenters opposed it. While the vast majority of commenters were concerned about the impact of the requirements on title III public accommodations, there were some comments from title II entities.

Organizations representing the hotel industry and individual owners and operators of hotels and campgrounds provided the largest number of comments in support of postponing the compliance date. Of these comments, approximately 520 were form comments submitted anonymously. Other commenters who supported the proposal included homeowners associations, pool lift manufacturers, individual owners and operators of pools and spas, and some title II entities. Commenters opposed to the proposed extension included many organizations representing persons with disabilities, including veterans with disabilities, numerous individuals with disabilities, and some title II entities. Many comments illustrated the kinds of misunderstandings and concerns that led to the Department's decision to propose the extension. This final rule will not address specific comments about the merits of the requirements for accessible means of entry for pools, except to the extent that they illustrate these misunderstandings or provide support or opposition for the proposed compliance date

Some of the most moving comments came from families with individuals with disabilities. Parents of children with disabilities shared their stories of how their children were getting too big for them to carry in and out of the pool safely or with dignity. Several recounted how their older children loved to swim and wanted to partake in family outings to the pool, but then explained that it was difficult to safely transfer a wet and slippery child across a slick pool deck. Parents with disabilities also lamented their inability to join their children in the pool. For these families, an extension of the compliance date for the pool requirements would mean another year of summer vacations without access.

The Department also heard from organizations representing veterans with disabilities who indicated that, after a decade of war, a significant number of service members have returned with injuries and are reintegrating into their communities by participating in adaptive sports and that these individuals should have access to pools and spas in their communities without further delay. One veteran with a disability stated that he had very few methods of exercise that he could use to stay in shape and expressed frustration about having to travel long distances to a pool with a compliant lift for his weekly swim. Many other commenters also stated that swimming was one of the few exercises available to many individuals with disabilities and that the extension would further delay pool access that has been long sought.

Several state-level advisory organizations on disability issues provided comments opposing the extension. These organizations stated that they believed that there had been ample time for title II and title III entities to comply and that delaying implementation further would constitute a roll-back of the ADA. These organizations were especially concerned about the resistance of public accommodations in their states to implement the new requirements and the impact this would have on residents and visitors with disabilities.

stated that the ADA Standards did not apply to freestanding (e.g., non-fixed, moveable, or portable) equipment. For example, the 2004 ANPRM included a section entitled, “Application of ADA Standards and ADA to Free-Standing Equipment,” in which the Department stated that the ADA Standards do not apply to portable equipment. See 69 FR 58768, 58775 (Sept. 30, 2004) (providing that “the revised ADA Standards will apply directly only to fixed equipment—as described above, equipment that becomes built into the structure of a facility—and not to free-standing equipment”). The 2008 title III NPRM and the 2010 Final Rules reiterated this point. See 73 FR 34508, 34543 (June 17, 2008) (“The Department is proposing a new § 36.406(b) that would clarify that the requirements established by this section, including those contained in the proposed standards (and the 2004 [ADA Accessibility Guidelines]) prescribe the requirements necessary to ensure that fixed or built-in elements in new or altered facilities are accessible to people with disabilities.”); 75 FR 56236, 56303 (Sept. 15, 2010) (“The final [title III] rule contains a new § 36.406(b) that clarifies that the requirements established by this section, including those contained in the 2004 [ADA Accessibility Guidelines], prescribe the requirements necessary to ensure that fixed or built-in elements in new or altered facilities are accessible to individuals with disabilities.”).⁴

Section 36.304(d) of the title III regulation specifies that measures taken to comply with the readily achievable barrier removal requirement must comply with the applicable requirements for alterations as set forth in § 36.402 and §§ 36.404 through 36.406, which

⁴ Moreover, the Regulatory Impact Analysis (RIA) for the final rule looked at the costs with respect to fixed and built-in elements when analyzing the provisions of the 2010 Standards. With respect to pools, the RIA included both the cost of purchasing a lift as well as the cost of installing the lift for barrier removal in existing pools. See Final RIA at pp. 59-60, 283 (July 23, 2010), available at http://www.ada.gov/regs2010/RIA_2010regs/DOJ%20ADA%20Final%20RIA.pdf.

Congress passed in 1990, and the Department's ADA title III regulation, which was originally published in 1991, set out a case-by-case analysis to be used in determining whether removing certain barriers is readily achievable. Specifically, the regulations provide at § 36.104 that in determining whether an action is readily achievable, the factors to be considered include:

- (1) The nature and cost of the action;
- (2) The overall financial resources of the site or sites involved, the number of persons employed at the site, the effect on expenses and resources, legitimate safety requirements necessary for safe operation, including crime prevention measures, and any other impact of the action on the operation of the site;
- (3) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;
- (4) If applicable, the overall financial resources of any parent corporation or entity, the overall size of the parent corporation or entity with respect to the number of its employees, and the number, type, and location of its facilities; and
- (5) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.⁵

Under this standard, which has applied to places of public accommodation since 1991,

⁵ Since the title III regulation first took effect, the Department has provided extensive technical assistance regarding the readily achievable barrier requirement for existing facilities. The technical assistance material provided by the Department contains examples of the application of this requirement. Pool owners and operators can access information on barrier removal on the Department's ADA website, www.ada.gov. Publications that address barrier removal include, but are not limited to, the 1993 ADA Title III Technical Assistance Manual (Section III-4.4200), available at <http://www.ada.gov/taman3.html>, the 1996 ADA Guide for Small Businesses (revised and reissued in 1999), which was published in conjunction with the Small Business Administration ("SBA"), available at <http://www.ada.gov/smbusgd.pdf>, and a 2005 online course entitled "Reaching Out to Customers With Disabilities," which is available at <http://www.ada.gov/reachingout/intro1.htm>.

Some title II entities stated that they would have to close down community pools rather than incur the expense of complying with the regulation. To the contrary the title II program accessibility regulation does not require title II entities to make changes to their programs, services, or activities if the changes would constitute a fundamental alteration or would impose an undue financial and administrative burden. Title II does not require a facility to close when compliance with the program accessibility requirements poses an undue financial and administrative burden. This is the case whether the title II facility in question is a public office, a school, or a swimming pool.

Some of the comments the Department received reflected misconceptions about the abilities of persons with disabilities to participate in the same activities that are afforded persons without disabilities. The ADA was intended, in part, to address these misconceptions.

Without the pool access requirement of the regulations, it is clear that many individuals with disabilities would not be able to avail themselves of pool amenities offered by covered entities. As noted by many commenters opposed to the proposed extension, individuals with disabilities have long awaited the ADA Accessibility Standards that address access to recreational facilities, such as pools. These comments illustrate the significant impact that a further extension would have on many individuals with disabilities and their families during yet another summer pool season. On the other hand, as stated above and in the Department's NPRM, it is clear to the Department that a significant number of pool owners and operators may continue to have misunderstandings and concerns about their obligations with regard to providing access to existing pools. These misunderstandings have affected pool operators and owners in at least three ways that are relevant to the Department's proposal. First, it appears that some places of public accommodation initially proceeded on the misunderstanding that a

breadth of the concerns and the misunderstandings about the requirements expressed in the comments the Department received, the Department has decided to extend the compliance date for sections 242 and 1009 of the 2010 Standards for existing pools subject to title III barrier removal and to title II program access until January 31, 2013. That date is one year from the date that the Department issued its initial guidance clarifying that the ADA regulations required fixed pool lifts, and is still well in advance of next year's swim season. The Department emphasizes that this extension is consistent with Executive Order 13563, which emphasizes the importance of promoting predictability and reducing uncertainty, and which also stresses the value of public participation and an "open exchange of information and perspectives."

This longer extension will provide additional time for the Department to continue to educate covered entities about their obligations under the 2010 Standards with regard to providing access into their existing pools, to respond to relevant concerns, and to address misunderstandings that could lead covered entities to take unnecessary and counterproductive steps, thereby allowing all stakeholders to have the same understanding of what is required by the ADA and promoting broader compliance with the rule. The Department also believes that the additional time will allow covered entities to complete the fact-specific evaluation required by the "readily achievable" standard, and to implement their compliance plans, including by taking the steps necessary to comply with the pool accessibility requirements of the 2010 Standards.

Section-By-Section Analysis

Section 35.150(b)(1)

Regulatory Certifications

Administrative Procedure Act

The Department finds good cause to make this regulation effective without a 30-day delay in the effective date, pursuant to 5 U.S.C. 553(d), as it relieves a restriction by extending the compliance dates for the title II program accessibility requirements pursuant to 28 CFR 35.150 and the title III barrier removal obligations pursuant to 28 CFR 36.304 as they relate to accessible means of entry into existing swimming pools, wading pools, and spas, from May 21, 2012, until January 31, 2013.

Executive Order 13563 and Executive Order 12866—Regulatory Planning and Review

This regulation has been drafted and reviewed in accordance with Executive Order 13563, “Improving Regulation and Regulatory Review,” and Executive Order 12866, “Regulatory Planning and Review” section 1(b), The Principles of Regulation. The Department of Justice has determined that this rule is a “significant regulatory action” under Executive Order 12866, section 3(f), and accordingly this rule has been reviewed by the Office of Management and Budget (OMB).

Executive Order 12988—Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Executive Order 13132—Federalism

This rule will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is

national origin, age, handicap, or disability.” Accordingly, this rulemaking is not subject to the provisions of the Unfunded Mandates Reform Act.

Paperwork Reduction Act of 1995

This rule does not contain any information collection requirements that require approval by OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq.

List of Subjects for 28 CFR Parts 35 and 36

Administrative practice and procedure, Buildings and facilities, Civil rights, Communications, Individuals with disabilities, Reporting and recordkeeping requirements, State and local governments, Business and industry.

By the authority vested in me as Attorney General by law, including 28 U.S.C. 509 and 510, 5 U.S.C. 301, and sections 204 and 306 of the Americans with Disabilities Act of 1990, Public Law 101-336 (42 U.S.C. 12134 and 12186), chapter I of title 28 of the Code of Federal Regulations is amended as follows:

PART 35—NONDISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL GOVERNMENT SERVICES

1. The authority citation for Part 35 continues to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 12134.

2. In § 35.150, paragraph (b)(4) is added to read as follows:

§ 35.150 Existing facilities.

* * * * *

(b) * * *

(4) Swimming pools, wading pools, and spas. The requirements set forth in sections 242 and 1009 of the 2010 Standards shall not apply until January 31, 2013, if a public entity

	pools, and spas built before March 15, 2012 [See § 36.304(g)(5)]. Note: Noncomplying newly constructed and altered elements may also be subject to the requirements of § 36.406(a)(5).	
On or after January 31, 2013	For existing pools, wading pools, and spas built before March 15, 2012, elements that do not comply with the supplemental requirements for entry to pools, wading pools, and spas must be modified to the extent readily achievable [See § 36.304(g)(5)].	Sections 242 and 1009 of the 2010 Standards
Elements not altered after March 15, 2012	Elements that comply with the requirements for those elements in the 1991 Standards do not need to be modified.	Safe Harbor

* * * * *

(g) * * *

(5) With respect to facilities built before March 15, 2012, the requirements in this section for accessible means of entry for swimming pools, wading pools, and spas, as set forth in sections 242 and 1009 of the 2010 Standards, shall not apply until January 31, 2013.

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May 17, 2012
Date

James M. Cole
Acting Attorney General

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Guidance for ARVC Members Regarding the New ADA Requirements for Pools and Spas

As you may know, the Department of Justice created new guidelines for public accommodations under the Americans with Disabilities Act (ADA) in September 2010. These new regulations may affect your business in various ways. In particular, you will be required to comply with new regulations governing access to pools and spas within your parks and campgrounds. The regulations went into effect on March 15, 2011. But you will have until March 15, 2012, to make sure that your pools and spas are in compliance with the 2010 regulations.

We have received many questions about the new regulations from our members on this matter. Our counsel at McDermott Will & Emery in Washington, D.C., prepared this guidance after analyzing the 2010 ADA regulations and standards, and confirmed their interpretation and conclusion with the U.S. Department of Justice.

We hope the following Frequently Asked Questions (FAQs) provide you with some answers and clarity on this important issue. We also recommend that you review the U.S. Department of Justice booklet "ADA Update: A Primer for Small Business," which is available at:

<http://www.ada.gov/regs2010/smallbusiness/smallbusprimer2010.pdf>

Key Takeaways for ARVC Members

- **The "safe harbor" is not available for swimming pools.** The revised ADA rules and 2010 Standards contain new requirements for elements (e.g., swimming pools, play areas) in existing facilities that were not addressed in the 1991 Standards. Because these elements were not included in the 1991 standards, they are *not* subject to the safe harbor. To be clear, the safe harbor does not apply to elements that were not included in the 1991 Standards. Thus, on or after March 15, 2012, public accommodations must remove architectural barriers to elements subject to the new requirements in the 2010 Standards when it is readily achievable to do so.
- **Just because the safe harbor does not apply to your swimming pool does not mean that you must immediately and automatically renovate your pool to bring it into compliance or close it altogether.** The ADA requires that you remove architectural barriers in existing facilities when it is "readily achievable" to do so. Readily achievable means "easily accomplished without much difficulty or expense," and will vary from business to business and sometimes year to year.
- **If you do remove barriers or improve accessibility to your pool, you may qualify for a tax credit or be able to deduct eligible expenses from your taxes.** Please consult your tax attorney, accountant or business adviser on this issue.

the 2010 Standards...Elements in the 2010 Standards not eligible for the element-by-element safe harbor are identified as follows...

- (E) fishing piers and platforms
- (F) Golf facilities
- (G) Miniature golf facilities
- (H) Play areas
- (I) Saunas and steam rooms
- (J) *Swimming pools, wading pools, and spas*

...

28 C.F.R. §36.304(d)(2)(iii)(emphasis added).

Furthermore, as the U.S. Department of Justice guidance notes: *"The revised ADA rules and the 2010 Standards contain new requirements for elements in existing facilities that were not addressed in the original 1991 Standards. These include recreation facilities such as swimming pools, play areas, exercise machines, miniature golf facilities, and bowling alleys. Because these elements were not included in the 1991 Standards, they are not subject to the safe harbor. Therefore, on or after March 15, 2012, public accommodations must remove architectural barriers to elements subject to the new requirements in the 2010 Standards when it is readily achievable to do so."* (Italics added.) U.S. Department of Justice, ADA Update: A Primer for Small Business (2011).

Q: What if I cannot afford to make the required changes to my pool/spa?

A: The regulations require only that barriers to entry are removed so that your pool conforms with the requirements for disabled access "to the extent readily achievable." The DOJ has stated that "readily achievable" means that it is "easily accomplishable without much difficulty or expense."

Specifically, the definitions section of the regulation at 28 C.F.R. § 36.104 provides the following factors to be considered when evaluating whether a barrier removal is readily achievable:

- (1) The nature and cost of the action needed under this part;
- (2) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site;
- (3) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;
- (4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to

systems complying with 1009.5; **and** pool stairs complying with 1009.6. At least one accessible means of entry provided shall comply with 1009.2 or 1009.3.

Exceptions:

1. Where a swimming pool has less than 300 linear feet (91m) of swimming pool wall, no more than one accessible means of entry shall be required provided that the accessible means of entry is a swimming pool lift complying with 1009.2 **or** sloped entry complying with 1009.3.
2. Wave action pools, leisure rivers, sand bottom pools, and other pools where user access is limited to one area shall not be required to provide more than one accessible means of entry provided that the accessible means of entry is a swimming pool lift complying with 1009.2, a sloped entry complying with 1009.3, **or** a transfer system complying with 1009.5.
3. Catch pools shall not be required to provide an accessible means of entry provided that the catch pool edge is on an accessible route.

Advisory 242.2 Swimming Pools: Where more than one means of access is provided into the water, it is recommended that the means be different. Providing different means of access will better serve the varying needs of people with disabilities in getting into and out of a swimming pool. It is also recommended that where two or more means of access are provided, they not be provided in the same location in the pool. Different locations will provide increased options for entry and exit, especially in larger pools.

Advisory 242.2 Swimming Pools Exception 1. Pool walls at diving area and along pool walls where there is no pool entry because of landscaping or adjacent structures are to be counted when determining the number of accessible means of entry required.

242.3 Wading Pools. At least one accessible means of entry shall be provided for wading pools. Accessible means of entry shall comply with sloped entries complying with 1009.3.

242.4 Spas. At least one accessible means of entry shall be provided for spas. Accessible means of entry shall comply with swimming pool lifts complying with 1009.2; transfer wall complying with 1009.4; **or** transfer systems complying with 1009.5.

Exception: Where spas are provided in a cluster, no more than 5 percent, but no fewer than one, spa in each cluster shall be required to comply with 242.4.

(Emphasis added.)

Q: Is it true that there are tax credits and deductions available if I have to make changes to my pool and the change is readily achievable?

A. Yes, there are. While you should consult a tax attorney, accountant or business adviser, the Internal Revenue Service includes a Disabled Access Credit (Section 44) for



ADA Resources

arvc ADA Self-Evaluation Form www.arvc.org

This is a fillable form arvc members may use to develop an ADA compliance plan for ADA Accessibility Priorities 1 through 4 and the Recreational Checklist which includes swimming pools.

A Guide to Planning Accessible Meetings

<http://www.adahospitality.org/accessible-meetings-events-conferences-guide/book>

The Mid-Atlantic ADA Center and TransCen Inc. sponsored this update and publication in recognition of the 25th anniversary of the transformational Americans with Disabilities Act (ADA) of 1990.

ADA Service Animals

http://www.ada.gov/service_animals_2010.htm

When it is not obvious what service an animal provides, only limited inquiries are allowed. Staff may ask 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. Staff cannot ask about the person's disability, require medical documentation, require a special identification card or training documentation for the dog, or ask that the dog demonstrate its ability to perform the work or task.

Reaching Out to Customers with Disabilities (for You and your Staff)

<http://www.ada.gov/reachingout/intro1.htm>

As a business owner or operator, or someone thinking about opening a business, you may have wondered what you have to do to comply with the Americans with Disabilities Act (ADA). This course explains how the ADA applies to businesses in ten short lessons. Putting these lessons into practice will allow you to comply with the ADA and welcome a whole new group of customers to purchase your goods, products, and services. And you may find that making your business more accessible and welcoming to people with disabilities is not as difficult as you thought.

Surfacing the Accessible Playground

<http://www.access-board.gov/guidelines-and-standards/recreation-facilities/guides/surfacing-the-accessible-playground>

7 Things Every Playground Owner Should Know About the Accessibility of Their Playground Surfaces

Accessible Pools Means of Entry and Exit

http://www.ada.gov/pools_2010.htm

Title III Readily Achievable Barrier Removal. Title III of the ADA requires that places of public accommodation (e.g., hotels, resorts, swim clubs, and sites of events open to the public) remove physical barriers in existing pools to the extent that it is readily achievable to do so (i.e., easily accomplishable and able to be carried out without much difficulty or expense).

Determining what is readily achievable will vary from business to business and sometimes from one year to the next. Changing economic conditions can be taken into consideration in determining what is readily achievable.

Common ADA Errors and Omissions in New Construction and Alterations

<http://www.ada.gov/error.htm>

The ADA requires that new construction and alterations to existing facilities comply with the ADA Standards for Accessible Design¹ (Standards). ADA requirements for new construction and alterations include detailed provisions for elements, spaces, and facilities.

This document lists a sampling of common accessibility errors or omissions that have been identified through the Department of Justice's ongoing enforcement efforts.

Common ADA Problems at Newly Constructed Lodging Facilities

<http://www.ada.gov/comhotel.htm>

Hotels, motels, inns, and other places of lodging designed and constructed after January 26, 1993, must comply with the Americans with Disabilities Act (ADA). To comply with the ADA and to make it possible for persons with disabilities to use lodging facilities like everyone else, lodging facilities must meet specific requirements set out in Justice Department regulations, 28 C.F.R. pt. 36. These regulations include detailed architectural requirements known as the ADA Standards for Accessible Design (ADA Standards), 28 C.F.R. pt. 36, Appendix A. The ADA Standards are designed to make lodging facilities usable by persons with a wide variety of disabilities, including persons who are blind or who have low vision, persons who are deaf or hard of hearing, persons with mobility impairments who use wheelchairs, canes, crutches, or walkers, and persons with other disabilities or with combinations of disabilities.

Ten Small Business Mistakes

<http://www.ada.gov/videogallery.htm#anchor10mistakes990>

This thirteen-minute video identifies common mistakes that small businesses make when trying to comply with the ADA and addresses the importance and value of doing business with 50 million people with disabilities. The video features statements by store owners expressing their doubts or misunderstandings about the ADA followed by responses from the Assistant Attorney for Civil Rights and other Department of Justice employees explaining the law in common sense terms.



Frequently Asked Questions about Service Animals and the ADA

Many people with disabilities use a service animal in order to fully participate in everyday life. Dogs can be trained to perform many important tasks to assist people with disabilities, such as providing stability for a person who has difficulty walking, picking up items for a person who uses a wheelchair, preventing a child with autism from wandering away, or alerting a person who has hearing loss when someone is approaching from behind.

The Department of Justice continues to receive many questions about how the Americans with Disabilities Act (ADA) applies to service animals. The ADA requires State and local government agencies, businesses, and non-profit organizations (covered entities) that provide goods or services to the public to make "reasonable modifications" in their policies, practices, or procedures when necessary to accommodate people with disabilities. The service animal rules fall under this general principle. Accordingly, entities that have a "no pets" policy generally must modify the policy to allow service animals into their facilities. This publication provides guidance on the ADA's service animal provisions and should be read in conjunction with the publication [ADA Revised Requirements: Service Animals](#).

DEFINITION OF SERVICE ANIMAL

Q1: What is a service animal?

A: Under the ADA, a service animal is defined as a dog that has been individually trained to do work or perform tasks for an individual with a disability. The task(s) performed by the dog must be directly related to the person's disability.

Q2: What does "do work or perform tasks" mean?

A: The dog must be trained to take a specific action when needed to assist the person with a disability. For example, a person with diabetes may have a dog that is trained to alert him when his blood sugar reaches high or low levels. A person with depression may have a dog that is trained to remind her to take her medication. Or, a person who has epilepsy may have a dog that is trained to detect the onset of a seizure and then help the person remain safe during the seizure.

Q10: Can a person bring a service animal with them as they go through a salad bar or other self-service food lines?

A: Yes. Service animals must be allowed to accompany their handlers to and through self-service food lines. Similarly, service animals may not be prohibited from communal food preparation areas, such as are commonly found in shelters or dormitories.

Q11: Can hotels assign designated rooms for guests with service animals, out of consideration for other guests?

A: No. A guest with a disability who uses a service animal must be provided the same opportunity to reserve any available room at the hotel as other guests without disabilities. They may not be restricted to "pet-friendly" rooms.

Q12: Can hotels charge a cleaning fee for guests who have service animals?

A: No. Hotels are not permitted to charge guests for cleaning the hair or dander shed by a service animal. However, if a guest's service animal causes damages to a guest room, a hotel is permitted to charge the same fee for damages as charged to other guests.

Q13: Can people bring more than one service animal into a public place?

A: Generally, yes. Some people with disabilities may use more than one service animal to perform different tasks. For example, a person who has a visual disability and a seizure disorder may use one service animal to assist with way-finding and another that is trained as a seizure alert dog. Other people may need two service animals for the same task, such as a person who needs two dogs to assist him or her with stability when walking. Staff may ask the two permissible questions (See Question 7) about each of the dogs. If both dogs can be accommodated, both should be allowed in. In some circumstances, however, it may not be possible to accommodate more than one service animal. For example, in a crowded small restaurant, only one dog may be able to fit under the table. The only other place for the second dog would be in the aisle, which would block the space between tables. In this case, staff may request that one of the dogs be left outside.

Q14: Does a hospital have to allow an in-patient with a disability to keep a service animal in his or her room?

A: Generally, yes. Service animals must be allowed in patient rooms and anywhere else in the hospital the public and patients are allowed to go. They cannot be excluded on the grounds that staff can provide the same services.

Q15: What happens if a patient who uses a service animal is admitted to the hospital and is unable to care for or supervise their animal?

A: If the patient is not able to care for the service animal, the patient can make arrangements for a family member or friend to come to the hospital to provide these services, as it is always preferable that the service animal and its handler not be separated, or to keep the dog during the hospitalization. If the patient is unable to care for the dog and is unable to arrange for someone else to care for the dog, the hospital may place the dog in a boarding facility until the patient is released, or make other appropriate arrangements. However, the hospital must give the patient opportunity to make arrangements for the dog's care before taking such steps.

BREEDS

Q22: Can service animals be any breed of dog?

A: Yes. The ADA does not restrict the type of dog breeds that can be service animals.

Q23: Can individuals with disabilities be refused access to a facility based solely on the breed of their service animal?

A: No. A service animal may not be excluded based on assumptions or stereotypes about the animal's breed or how the animal might behave. However, if a particular service animal behaves in a way that poses a direct threat to the health or safety of others, has a history of such behavior, or is not under the control of the handler, that animal may be excluded. If an animal is excluded for such reasons, staff must still offer their goods or services to the person without the animal present.

Q24: If a municipality has an ordinance that bans certain dog breeds, does the ban apply to service animals?

A: No. Municipalities that prohibit specific breeds of dogs must make an exception for a service animal of a prohibited breed, unless the dog poses a direct threat to the health or safety of others. Under the "direct threat" provisions of the ADA, local jurisdictions need to determine, on a case-by-case basis, whether a particular service animal can be excluded based on that particular animal's actual behavior or history, but they may not exclude a service animal because of fears or generalizations about how an animal or breed might behave. It is important to note that breed restrictions differ significantly from jurisdiction to jurisdiction. In fact, some jurisdictions have no breed restrictions.

EXCLUSION OF SERVICE ANIMALS

Q25: When can service animals be excluded?

A: The ADA does not require covered entities to modify policies, practices, or procedures if it would "fundamentally alter" the nature of the goods, services, programs, or activities provided to the public. Nor does it overrule legitimate safety requirements. If admitting service animals would fundamentally alter the nature of a service or program, service animals may be prohibited. In addition, if a particular service animal is out of control and the handler does not take effective action to control it, or if it is not housebroken, that animal may be excluded.

Q26: When might a service dog's presence fundamentally alter the nature of a service or program provided to the public?

A: In most settings, the presence of a service animal will not result in a fundamental alteration. However, there are some exceptions. For example, at a boarding school, service animals could be restricted from a specific area of a dormitory reserved specifically for students with allergies to dog dander. At a zoo, service animals can be restricted from areas where the animals on display are the natural prey or natural predators of dogs, where the presence of a dog would be disruptive, causing the displayed animals to behave aggressively or become agitated. They cannot be restricted from other areas of the zoo.

Q32: Are restaurants, bars, and other places that serve food or drink required to allow service animals to be seated on chairs or allow the animal to be fed at the table?

A: No. Seating, food, and drink are provided for customer use only. The ADA gives a person with a disability the right to be accompanied by his or her service animal, but covered entities are not required to allow an animal to sit or be fed at the table.

Q33: Are gyms, fitness centers, hotels, or municipalities that have swimming pools required to allow a service animal in the pool with its handler?

A: No. The ADA does not override public health rules that prohibit dogs in swimming pools. However, service animals must be allowed on the pool deck and in other areas where the public is allowed to go.

Q34: Are churches, temples, synagogues, mosques, and other places of worship required to allow individuals to bring their service animals into the facility?

A: No. Religious institutions and organizations are specifically exempt from the ADA. However, there may be State laws that apply to religious organizations.

Q35: Do apartments, mobile home parks, and other residential properties have to comply with the ADA?

A: The ADA applies to housing programs administered by state and local governments, such as public housing authorities, and by places of public accommodation, such as public and private universities. In addition, the Fair Housing Act applies to virtually all types of housing, both public and privately-owned, including housing covered by the ADA. Under the Fair Housing Act, housing providers are obligated to permit, as a reasonable accommodation, the use of animals that work, provide assistance, or perform tasks that benefit persons with a disabilities, or provide emotional support to alleviate a symptom or effect of a disability. For information about these Fair Housing Act requirements see HUD's Notice on Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-funded Programs.

Q36: Do Federal agencies, such as the U. S. Department of Veterans Affairs, have to comply with the ADA?

A: No. Section 504 of the Rehabilitation Act of 1973 is the Federal law that protects the rights of people with disabilities to participate in Federal programs and services. For information or to file a complaint, contact the agency's equal opportunity office.

Q37: Do commercial airlines have to comply with the ADA?

A: No. The Air Carrier Access Act is the Federal law that protects the rights of people with disabilities in air travel. For information or to file a complaint, contact the U.S. Department of Transportation, Aviation Consumer Protection Division, at 202-366-2220.