June 17, 2014

A.J. North
Regulations Program
National Park Service
1849 C Street, N.W., MS-2355
Washington, D.C. 20240

Re: DREDF Comments on Proposed NPS Service Animal Regulations
(RIN) 1024-AE06

Dear Mr. North:

The Disability Rights Education & Defense Fund (DREDF) appreciates the opportunity to comment on the National Park Service (NPS) Notice of Proposed Rulemaking (NPRM) to implement the National Park Service Organic Act of 1916 (16 U.S.C. § 1 et seq.), and bring its service animal provisions in line with existing federal disability rights laws. We commend NPS for its efforts to ensure it provides the broadest possible accessibility to individuals with disabilities, including its longstanding commitment to the principles of universal design.¹

Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF is a national law and policy center dedicated to advancing and protecting the civil rights of people with disabilities. For three decades, DREDF has remained board- and staff-led by members of the disability community, pursuing its mission through education, advocacy and law reform efforts.

Our concerns with the NPS proposed service animal regulations are threefold. First, we believe the proposed definition of service animal to be too restrictive, as it excludes a broad class of animals who “do work or perform tasks” for individuals with disabilities. Second, we are concerned that the procedures for determining whether the use of a service animal poses a threat to the health or safety of people or wildlife places too much discretion to park superintendents. DREDF urges NPS to not take these decisions lightly, as closures pursuant to this provision would effectively deprive individuals with disabilities who use service animals the use and enjoyment of certain areas of the park. NPS should also require that determination decisions be disseminated widely and in accessible formats.

Finally, we ask NPS to seek more input from the public regarding the prudence of aligning its service animal regulations with the Department of Justice (DOJ) 2010 ADA Title II and Title III regulations governing public accommodations and state and local government facilities. There is variability in service animal regulations among the executive agencies due to the need to craft rules for context. The areas under NPS

jurisdiction, in particular, have unique characteristics that distinguish them from the environments regulated by other agencies. While this can raise concerns unique to wilderness lands, it also means that constraints and concerns relevant to built environments do not necessarily translate well to NPS environments.

Thus, DREDF recommends NPS hold public hearings to further investigate whether the DOJ standards are appropriate in a national park setting. In finalizing the rule, we also urge NPS to pay particular attention to commenters with relevant expertise and experience in these issues.

1. Definition of Service Animal

The current NPS service animal regulations, last amended in 1983, only permit "guide dogs for the blind" and "signal dogs for persons with hearing impairments." 36 C.F.R. § 2.15(a)(1). NPS however issued interim guidance issued on September 5, 2002 that acknowledged the shortcomings of this definition and directed park superintendents to follow the standards in the existing DOJ ADA Title II and Title III regulations. Under this proposed rule, NPS would codify this guidance by formally adopting the definition of service animal contained in the more recent 2010 DOJ ADA Title II and Title III regulations. Pets and Service Animals, 79 Fed. Reg. 21878.

DREDF commends NPS for the progress reflected in its 2002 guidance, and for recognizing the need to formally update its codified regulations. However, we cannot recommend NPS codification of the DOJ definition of service animal. As explained in our 2008 Comments on the proposed ADA Title II and III regulations, we believe the DOJ definition of "service animal" to be too restrictive in some respects. As such, we revive our concerns below:

- We agree with the inclusion of the phrase "do work or perform tasks" in the definition of service animal as it is most inclusive of the various services provided by service animals on behalf of people with disabilities.

- We are also pleased that NPS has proposed language adopting the DOJ position that individuals with psychiatric, cognitive, or mental disabilities can use service animals. Confirmation of this fact will help reduce the backlash currently experienced by individuals with those types of disabilities whose service animals perform work and tasks that are oftentimes identical to those performed by service animals for individuals with other types of disabilities (e.g. picking up objects, warning of danger/alarms, assisting with balance).

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However, we oppose proposed language that specifically and categorically excludes individually trained “comfort” or “emotional support” animals from the definition of service animal. 79 Fed. Reg. 21881, to be codified at 36 C.F.R.§ 2.15(b)(1)(ii). The active provision of comfort and/or emotional support to a qualified individual with a disability whose disability results in an inability to self-soothe or de-escalate and control emotions is “work” that benefits the individual with the disability and should be recognized as such. Moreover, in practice, it will be confusing to distinguish between psychiatric service animals and comfort animals. This confusion will undoubtedly lead to increased discrimination against and/or the excessive questioning of individuals with non-visible or non-apparent disabilities. The fact that other federal laws recognize access for emotional support animals (Fair Housing Act, Air Carriers Access Act), simply adds to this confusion.

Finally, while we appreciate the proposed language authorizing the use of miniature horses (79 Fed. Reg. 21881, to be codified at 36 C.F.R.§ 2.15(d)), we would prefer miniature horses be explicitly included in the rule’s definition of service animal. Miniature horses have been used as service animals by the disability community for some time, particularly the blind community. Miniature horses are able to be trained to do work or perform tasks for people with disabilities, can be housebroken and are a viable option for those who are allergic to dogs or who would like a service animal with a longer lifespan.

2. Superintendent Discretion to Close Areas of the Park to Service Animals

Much like the proposed rule, the aforementioned 2002 NPS interim guidance explicitly granted park superintendents the authority to close an area to all service animals upon a determination that they would pose a direct threat to the health and safety of people or wildlife. NPS however spelled out the determination procedures and notice requirements in greater detail in that guidance than in the current proposed rule. Although superintendents might continue to implement the service animal rules in a manner consistent with the interim guidance, we still encourage NPS to codify relevant portion of this guidance to ensure greater protection for individuals with disabilities.

a. Park Closure Determination Procedures

DREDF’s chief concern involves the following provision granting superintendents the authority to close portions of the park to service animals:

(5) Upon determining that the use of service animals in a specific area poses a threat to the health or safety of people or wildlife, the superintendent may require proof of current vaccinations, impose additional conditions or restrictions, or close the area to service animals. Any area closed to service animals must be closed to pets. In determining whether the use of service animals poses a threat under this paragraph, the superintendent must:

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4 2002 NPS Interim Guidance, supra note 2.
(i) Make a written determination based on objective evidence evaluating the nature, probability, duration, and severity of the threat; and

(ii) Explain in the written determination why less restrictive measures will not suffice.

79 Fed. Reg. 21881 (to be codified at 36 C.F.R. § 2.15(b)(5)). Our concerns largely stem from the fact these procedures are more spelled out in the 2002 NPS Interim Guidance. For example, the guidance calls for the superintendent to perform an “individualized assessment,” whereas the current proposed language ostensibly applies to service animals broadly.5 Second, the 2002 interim guidance emphasized that “the legal burden is on the superintendent to justify closing an area of the park to service animals accompanying persons with disabilities.” That language is absent from the proposed rule, and should be added to clarify the superintendent’s obligation.

We do however acknowledge that granting the superintendent authority to close specific areas of a park upon a finding of threat to people or wildlife is consistent with the DOJ Title II framework. See 28 C.F.R. § 35.150(a)(3) (“The decision that compliance would result in such alteration or burdens must be made by the head of a public entity or his or her designee…and must be accompanied by a written statement of the reasons for reaching that conclusion”). Furthermore, the proposed rule is similar to the existing NPS regulation requiring the superintendent to produce “a written determination justifying the action” prior to implementing or terminating a restriction, condition, public use limit or closure. 36 C.F.R. § 1.5(c).

However, the DOJ requires public entities to “take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.” 28 C.F.R. § 35.150(a)(3). To this extent we agree with the proposed language requiring a written explanation of “why less restrictive measures will not suffice.” 79 Fed. Reg. 21881, to be codified at 36 C.F.R.§ 2.15(d)(5)(ii). Park closures, no matter how small the area, should be the absolute last resort since they could effectively deprive individuals with disabilities the benefit of the national park. Cf. Crowder v. Kitagawa, 81 F.3d 1480, 1484-1485 (9th Cir. 1996) (“Because of the unique dependence upon guide dogs among many of the visually-impaired, Hawaii’s quarantine effectively denies these persons...meaningful access to state services, programs, and activities while such services, programs, and activities remain open and easily accessible by others”).

5 DREDF would prefer inclusion of the term “individualized assessment.” Furthermore, we interpret such language to require a documented link between the superintendent’s determination of threat and the factual evidence, as opposed to preemptive closures based on unfounded fears or stereotypes. E.g., “This season is the nesting time for a threatened species that inhabits this area of park”; “the problem has occurred before with non-native animals brought into this region of the park”; or “dogs have been known to be susceptible to a disease carried by animals that inhabit this particular area of the park.”
Lastly, DREDF agrees with the concerns raised by commenter Psychiatric Service Dogs Partners (PSDP) regarding the amount of discretion given to park superintendents to restrict access to service animals under proposed regulation 36 C.F.R. § 2.15(b)(5). As discussed above, we agree that placing unchecked power with each area superintendent may lead to undue restrictions on access for disabled persons who rely on service dogs. We also support PSDP’s recommendation for a two-tiered system where the National Park Service would oversee the administration of restrictions to service dog access. Such an approach—with its exceptions for emergency situations—would be consistent with the current NPS regulations regarding closures and public use limits. See 36 C.F.R. § 1.5.

b. Public Notice

The proposed rule is also silent on what type of notice superintendents must provide the public when closing an area of a park to service animals. DREDF urges NPS to amend the proposed § 2.15(b)(5) to include public notice requirements sufficient to ensure individuals with disabilities are alerted to park closures. For example, the 2002 interim guidance stated that all determinations to close an area of a park to service animals must comply with the public notice requirements in 36 C.F.R. § 1.7. These requirements include:

(1) Signs posted at conspicuous locations, such as normal points of entry and reasonable intervals along the boundary of the affected park locale.
(2) Maps available in the office of the superintendent and other places convenient to the public.
(3) Publication in a newspaper of general circulation in the affected area.
(4) Other appropriate methods, such as the removal of closure signs, use of electronic media, park brochures, maps and handouts.

36. C.F.R. § 1.7(a)(1)-(4). DREDF suggests that NPS amend proposed § 2.15(b)(5) to incorporate these public notice requirements. Furthermore, NPS should include language that emphasizes the need to provide public notice in formats accessible to individuals with disabilities.6

3. Need for Further Public Input

We ask NPS to seek more input from the public regarding whether it is appropriate for NPS to align its service animal rules with the DOJ ADA Title II and III regulations. Executive agencies vary in service animal regulations, largely due to the need to craft rules with context in mind. For example, the Department of Transportation tailored its Air Carrier Access Act regulations to permit the use of emotional support animals and nontraditional service animals such as miniature horses, pigs and monkeys

6 For clarity, DREDF prefers this language be added to the new regulation itself. But regardless, NPS has an independent obligation to provide notice in an accessible format under the Department of Interior’s regulations implementing Section 504 of the Rehabilitation Act of 1973. See 43 C.F.R. Part 17.
in some instances. 14 C.F.R. § 382.117. Moreover, the Department of Housing and Urban Development’s (HUD) Fair Housing Act (FHA) regulations permit persons with disabilities to request a reasonable accommodation for any assistance animal, including an emotional support animal. 24 C.F.R. § 960.705.

The variability among these service animal regulations reflects the various settings covered by the respective authorizing statutes. DREDF is concerned that NPS’s adoption of the DOJ service animal regulations governing public accommodations and state and local government facilities may not fit in a national park setting. For example, following promulgation of the DOJ ADA Title II and III regulations, HUD issued an informational letter clarifying that the definition of “service animal” contained in ADA regulations does not limit housing providers’ obligations to grant reasonable accommodation requests for assistance animals in housing. It added that under the FHAA and Section 504, emotional support animals may be necessary to ensure equal opportunity to use and enjoy a dwelling. Because emotional support animals may similarly be necessary to ensure equal opportunity for use and enjoyment of a national park, DREDF recommends NPS solicit more public input on the topic.

A helpful illustration is the unique relationship between national parks and veterans. As NPS explains on its website, national parks are popular destinations for veterans because they often have direct connections to the military—there are dozens of battlefields, military parks, and historic sites that commemorate and honor the service of American veterans. However, under the proposed rules, veterans relying on emotional support or therapy animals for conditions such as PTSD may be prohibited from bringing their animals into certain areas of the park. Although this is just one example, it demonstrates the need for a more careful and nuanced approach to the issue of service animals in national parks.

4. Conclusion

We commend NPS for its efforts to align its service animal regulations with existing federal disability rights laws, and for its longstanding commitment to ensuring it provides the broadest possible accessibility to individuals with disabilities. Thank you for providing DREDF and other interested commenters the opportunity to offer reactions, insights and suggestions on this important rule.

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9 DREDF recognizes that the DOJ ADA Title II service animal rules apply to state parks. Thus, we suggest that NPS seek further input from both individuals with disabilities and state governments on how these rules have played out in the state park setting.
Sincerely,

Robert J. Borrelle, Jr.
Equal Justice Works Fellow