ATV Rule, 15-P45: Legislative Council Questions/Comments

I. General Questions/Comments

1) Does 23 V.S.A. § 3506(b)(4) give the Agency sufficient guidance to avoid constitutional nondelegation concerns?

Yes. Title 23 V.S.A. Chapter 31 provides sufficient guidance for the agency to administer and designate trails for ATV use on public land. One of the core principles of statutory interpretation is that the courts will look to the plain language of a statute to ascertain legislative intent. Section 3506(b)(4) states as follows:

> ***(b) An all-terrain vehicle may not be operated:***
> ***(4) On any public land, body of public water, or natural area established under the provisions of 10 V.S.A. § 2607 unless the Secretary has designated the area for use by all-terrain vehicles pursuant to rules promulgated under provisions of 3 V.S.A. chapter 25.***

This language clearly indicates that the legislature intended to allow ATV use on public lands in accordance with rules promulgated by the Secretary of the Agency pursuant to 3 V.S.A. Chapter 25.

Generally, the courts are reluctant to strike down a statute based on the non-delegation doctrine. The Agency could find no instance in which the Vermont Supreme Court held that a statute was unconstitutional for this reason. The United States Supreme Court ruled that federal statutes were unconstitutional based on the non-delegation doctrine under the separation of powers, only twice, both times in 1935. See, U.S. v. Cooper, 750 F.3d 263, 266-270 (2014). All that is required is an intelligible principle. As such, a statute is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." Id at 270 (citing Mistretta v. United States, 488 U.S. 361, 372–73 (1989) quoting American Power & Light Co., 329 U.S. at 105, 67 S.Ct. 133); Touby v. U.S., 500 U.S. 160 (1991).

Here the statute clearly provides the Secretary with authority to designate ATV trails but only on public land, public waters, or natural areas. The Secretary is also required to print the list of public lands and waters designated for ATV use and make it available to the public. In addition, the Secretary is subject to a number of policies and requirements relating to public lands managed by the Secretary. These statutory provisions provide guidance for the management of agency lands which are certainly applicable to the designation of ATV trails on Agency lands. See for example, 3 V.S.A. § 2825 (e); 3 V.S.A § 2807; 10 V.S.A. § 2603 (b) and 10 V.S.A. §4144.

2) Did the Agency consider adopting separate rules regarding (a) the process for designating connector trails; and (b) designation of the Les Newell Connector trail? Why did the Agency elect not to handle these distinct subjects in separate rules?

Yes, the Agency considered adopting the standards and the designation separately. The Agency decided to adopt the standards and designate one trail in order to provide context for the application of the rule. This allows the public to review and evaluate the application of the designation criteria and rule to a specific trail designation. In addition, the adoption of the standards and the rule in one rule is more efficient and has saved considerable staff time and state resources.

3) 23 V.S.A. § 3506(b)(4) refers to a general prohibition on ATV operation on "any public land." Does the Agency view itself as constrained under 23 V.S.A. § 3506(b)(4) to only designate property held by ANR (or departments thereof) as open to ATV operation?

No, the Agency does not view itself as constrained to designation trails only on public land that is owned by the Agency.

→ If so, why does ANR view itself as so constrained?
→ If not, why does the rule only contemplate designations on ANR-held property? For example, if a municipality or VTrans would like to authorize an ATV trail in a town forest or on VTrans land, why should the rule exclude the possibility of ANR authorizing such a trail?

This rule is intended to be applicable to limited circumstances. The application of the rule to Agency lands narrows the scope of the rule and allows the Agency to determine the impacts of the proposed rule and designation. The Agency will evaluate the impact of the proposed rule on lands that the Agency owns and manages. The Agency considers this to be a prudent approach to the allowing ATV use on public lands. As noted, municipalities have the authority to allow ATV use on public trails and town roads in accordance with 23 V.S.A. § 3506(b)(1). To date, no municipality or other state agency has expressed any interest in having the Agency designate trails on public lands owned by those entities. If a municipality or other state agency were to express interest in expanding the rule, the Agency would consider the request and likely amend the rule accordingly.

4) Why does this rule allow only for designation of connector trails? What is the rationale for categorically excluding the possibility of designating trails other than connector trails?

Again, this proposed rule is intended to be narrowly applicable and to balance the competing interests of a broad range of uses on public lands.

II. Substantive Questions/Comments Related to Particular Provisions

1) 2.1 states, "The purpose of this rule is to ensure that any designation of public land for use by ATVs is in the public good." What is intended by this statement, and in particular the phrase "public good"? What is the statutory authority for this statement? "Public good" is also referenced in 5.1(h).

   This term is intended to encompass the principal that Agency lands are acquired and managed for the benefit of all citizens, rather than the benefit of a select few. Here, the Agency is seeking to balance the interests of citizens in Agency lands; specifically, the natural, cultural and historic resources associated with the land and the various recreational and other public uses of Agency lands.

   The Agency has authority to acquire lands for a variety of purposes including, hunting and fishing, forestry and recreational purposes. See for example, 3 V.S.A. § 2825 (e); 3 V.S.A § 2807; 10 V.S.A. § 2603 (b) and 10 V.S.A. §4144. The statutory authorities specifically recognize the importance of managing Agency lands for the benefit of this and future generations. For example, Title 10 V.S.A. § 2603 (b) requires the Commissioner of Forests Parks and Recreation to manage publicly owned forests and park lands in a manner that implements "the public interest."

   To ensure that the language is consistent with other statutory provisions regarding land management, the agency is proposing to change the references in the rule from "public good" to "public interest."

2) "State Lands" is a defined phrase. 2.2 refers to "areas of state land" in the first sentence and then to "ANR lands" in the second sentence. (Similarly, 4.4 refers twice to "ANR lands"; 5.2(a) and (b) refer to "non-state lands," which is consistent with the defined phrase, whereas 5.2(c) refers to "non-ANR" land; 5.2 uses "Agency lands"). Is there any reason for the apparent inconsistent use in terminology?

   The Agency proposes to delete all references to ANR lands and Agency lands and replace them with the defined term "state lands."

3) 2.3 states, "The lands of the state are held in common by the people." This statement may engender confusion that it creates substantive legal rights. Does ANR object to deletion of this statement? If not, is ANR aware of the potential substantive legal effects of this statement?

   The Agency does not object to the deletion of this statement.

4) § 3.2: this definition of ATV is inconsistent with the statutory definition in 23 V.S.A. § 3501(5), which refers to use of ATVs "for cross-country travel on trails or on any one of the following or a combination thereof: land, water, snow, ice, marsh, swampland, and natural terrain." In the rule, the latter has been changed to "when used for cross-country travel on trails or on any one of the following or a combination thereof: land and natural

terrain". The Agency has already adopted a rule regarding the use of ATVs on frozen water; however, why has the reference to "water, snow, ice, marsh, and swampland" been omitted from the definition used in the rule? Was this change intended to limit the rule?

This change was made in response to a public comment and is intended to narrow the application of the rule. The use of ATVs in state waterways, marshes and swamplands (wetlands) is very likely to be impermissible under the designation standards articulated in the proposed rule. The Agency does not want to give the impression that such uses will be permissible on public lands.

5) 3.3 defines "connector trail" as a "narrow section of developed linear travel way which connects two or more established VASA trails." The phrase "established VASA trail" is defined in 3.6 as follows: "an existing VASA trail on publically [sic] or privately owned lands, is designated as a VASA trail and depicted on the VASA trail map and is open for ATV use pursuant to a legally binding agreement between VASA and the landowner."

→ If the legislative body of a municipality votes to open a town highway to ATV travel under 23 V.S.A. § 3506(b)(1)[1], then the concept of a "legally binding agreement between VASA and the landowner" is not operative. Helena spoke with the executive director of VASA, who said that VASA and towns don't enter into agreements when town highways or public trails are designated as open for ATV use by the municipality.

The Agency proposes amending this definition to the following:

"Established VASA trail" is an existing VASA trail on publically or privately owned lands, is designated as a VASA trail and depicted on the VASA Trail map and is legally open for ATV use.

6) 3.5: why is the term "disability" defined if it's not used anywhere in the rule? Any objection to striking this definition?

No objection to deleting this section.

7) 4.1 references ANR acting on receiving a petition. Does ANR intend not to reserve for itself the right to designate trails on its own initiative?

The Agency intends to reserve the right designate trails on its own initiative. As such, the Agency proposes the following amendments to 1.4 and 4.1.

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[1]"(b) An all-terrain vehicle may not be operated:
(1) Along a public highway unless it is not being maintained during the snow season or **unless the highway has been opened to all-terrain vehicle travel by the selectboard or trustees or local governing body and is so posted by the municipality** except an all-terrain vehicle being used for agricultural purposes may be operated not closer than three feet from the traveled portion of any highway for the purpose of traveling within the confines of the farm."
(emphasis added).

1.4 The Secretary shall consider the designation and establishment of ATV connector trails on state lands upon <u>its own initiative</u> or receipt of a petition as described in 3 V.S.A. § 806.

4.1 The Secretary may commence rulemaking to designate an ATV connector trail <u>on its own initiative or</u> after receiving a petition for designation, if the ATV connector trail designation meets the criteria set forth in this rule.

8) An essential criterion under 5.2(c) is that the adjacent trail segments to be connected are either an "approved class 4 road or are permitted by the adjoining land owners." Is this language intended to exclude class 2 and 3 town highways and public trails that the legislative body of a municipality has opened up to ATV travel under 23 V.S.A. § 3506(b)(1)?[2] If so, what is the rationale for excluding the possibility of a connector trail to or from a class 2 or 3 town highway or public trail that has been opened to ATV travel?

The Agency proposes to amend this paragraph to:

The established connecting VASA trail segments proposed to connect to state lands are permitted by the adjoining landowners or have been opened for ATV use by a municipality in accordance with 23 V.S.A. § 3506(b)(1). The applicant shall secure legally enforceable written approval from adjoining landowners, such as, an easement, license, or long term lease. The Secretary may determine, in his or her sole discretion, whether the permission is adequate;

9) Under 5.2(c), would a written license be insufficient? If a license is sufficient, would ANR object to including a "license" in the list of acceptable forms of approval? The executive director noted that VASA has few (if any) easements; it uses a "Landowner Permission Form," i.e. it obtains a license from private landowners.

No see proposed amended language in 8) above.

10) 5.2(c): What is intended with the reference to "right of way"? Is this term unnecessary in light of use of the term easement?

See proposed amended language deleting reference to right of way in 8) above.

11) 5.2(d) requires that the proposed connector trail not conflict with the "established land use classification or emphasis zones for the parcel(s) as provided within the Agency's current long range management plan for the parcel." Should this be "does not conflict with uses allowed under the Agency's current …."?

No, these terms are specific to the Agency long term management planning. There are four land use classifications that are used in the planning process to

[2] The executive director of VASA has confirmed that municipalities do open class 2 and 3 town highways and public trails to ATVs.

determine management approaches and strategies. The land use classifications are Highly Sensitive, Special, General, and Intensive Management. The classifications are based on resource surveys and the particular features of the property in question. For example, the Highly Sensitive classification would occur on land with exceptional natural resource values such as, rare and irreplaceable natural areas or threatened and endangered species. In contrast, the Intensive management classification is characterized by a high level of human activity such as, a ski resort or a popular camp ground. Emphasis zone is another term for the land use classification. Note that depending on the features and size of a parcel, all of the classifications may apply to different areas within the parcel. A document that sets forth a more detailed explanation of the classifications is attached.

12) 5.2(l) requires that the proposed connector trail meet or exceed "Vermont Water Quality Standards and other relevant water quality standards". What "other water quality standards"? What does it mean that the trail meets or exceeds the VWQS? Is it the construction and maintenance of the trail shall meet or exceed the requirements of the VWQS?

The Agency proposes to delete references to the VWQS and other water quality standards and require that "the maintenance and use of the connector trail shall meet or exceed the Vermont Water Quality Standards" 9.1(d).

13) 5.2(m) requires that the proposed connector trail not adversely impact historic or cultural resources. Which person will make this determination?

The Secretary will ultimately make this determination based on the input of the Agency Lands and Stewardship Teams in consultation with SHPO and any other persons who have been identified as having expertise regarding these resources.

14) 7.3, why can only VASA provide supplemental information to confirm or rebut the Department's findings for each criterion? Does this raise issues under the Common Benefits Clause? Does ANR object to replacing "VASA" with "A person"?

No, the Agency does not object to replacing the word "VASA" with the words "A person."

15) 8.4, does ANR object to inserting the language in bold: "Closure **under §§ 8.1 or 8.3**"?

No, ANR does not object.

16) 9.1(d) What are "best available BMPs"? What BMPs is intended to be referenced here?

This section refers to Best Management Practices associated with ATV trail construction, maintenance, and use that focus on issues such as erosion control.

17) 9.1(h) states: "There shall be no manipulation or alteration of natural watercourses, lakeshores, wetlands, water levels and/or flow or other waterbodies" No rule or statute defines "natural watercourses" or "lakeshores." How does ANR define these terms? What do "water levels and/or flow" or "other waterbodies" mean?

These are terms that are commonly used in conservation easements to ensure that state waters and shorelines remain in a natural state and that water is not diverted from a waterbody such as, a pond or stream. The Department of Environmental Conservation has jurisdiction over water levels and the Vermont Water Quality standards include a Flow Procedure. For clarity, the Agency proposes to amend the language to the following.

h) There shall be no manipulation or alteration of natural state waters, lakeshores, shorelines, wetlands, water levels and/or flow.

III. Comments re: typos, inaccurate quotes, and confusing or ungrammatical language

1) 1.1, quote of 23 V.S.A. § 3506 is not technically correct. It is missing a comma and the citation of 10 V.S.A. § 2607 is not how the section is cited in statute.
2) 1.2, "establishing the criteria by which connector trails may be designated." Do criteria designate? Should it be the process by which connector trails may be designated? Or criteria "under which connector trails may be designated"?
3) 1.2, "as defined in chapter 31 of Title 23." What is defined in chapter 31, the term ATV? ATV is already defined in § 3.2 of the rule, and as noted above, the definition in § 3.2 does not match up with the definition in 23 V.S.A. chapter 31.
4) 2.2, first sentence is confusing/ungrammatical because of missing "and" before "that have been thoroughly evaluated…."
5) 2.3, second sentence, missing word ("or" should be inserted before "permissions").
6) 3.6, misspelling, "publically".
7) 5.1(c), awkward, "What impact the proposed designation would have on the primary uses intended by the acquisition of the parcel." Primary uses of what—the parcel?
8) 5.1(d), comma needed after "not limited to".
9) 5.2 generally, punctuation issues in list: (k) and (n) have a period whereas other subsections have semicolons; (m) ends with an "and" but the "and" should be at the end of (n).
10) 5.2(c), confusing language that fails to use defined phrase "established VASA trail": "The established connecting VASA trail segments on non-ANR land…." Perhaps reword as follows: "The established VASA trail segments proposed to be connected…."
11) 5.2(e), confusing language, punctuation, and use of semi-colon after "pre-approved uses" make for difficult reading. Does the following capture ANR"s intent?

    "The proposed connecting ATV trail will not unreasonably impact other public uses of the connector trail, and will be open to other intended or permitted uses of the ANR parcel as well as to pre-existing and pre-approved uses including established recreation, educational, or research uses associated with the ANR parcel(s);"
12) 5.2(j), should "connector trail proposal" be "proposed connector trail"?

13) 5.2(m), should “connector trail proposal” be “proposed connector trail”?
14) 5.2(n), should remove semicolon before “as necessary” in the second sentence.
15) 6.1, em-dash typo, “In addition, the Petitioner shall — generate:”
16) 7.5, typo: “and; and the”
17) 9.1(d), typo: “VASA shall be maintain”
18) 9.1(m), misspelling: “connecter”

All of the above corrections have been accepted and incorporated into the attached draft rule.