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Agency of Natural Resources

December 1, 2009

Legislative Committee on Administrative Rules
115 State Street
Drawer 33
Montpelier, VT 05633-5301

RE: Final Proposed Rule Governing the Designation and Establishment of
All-Terrain Vehicle Use Trails on State Land

Dear Committee Members:

This is submitted for the purpose of assisting the Legislative Committee on Administrative Rules (“LCAR” or “Committee”) with the consideration of the Final Proposed Rule Governing the Designation and Establishment of All-Terrain Vehicle Use Trails on State Land (“ATV Rule”) and the challenges to Agency of Natural Resources (“ANR” or “Agency”) authority presented to the Committee at its November 3, 2009 hearing.

As Senator MacDonald, LCAR Chair, recognized, pursuant to rules of procedure for LCAR promulgated under the authority of 3 V.S.A. §817(b), “[m]otions to object to a final proposed rule shall be in order only if made on grounds that: (1) the rule is arbitrary, (2) the rule is beyond the authority delegated to the agency, (3) the rule is contrary to the intent of the legislature, (4) the agency did not adhere to the strategy for maximizing public input prescribed by the interagency committee on administrative rules, (5) the rule is not written in a satisfactory style according to 3 V.S.A. §833, or (6) the rule is not accompanied by an adequate economic impact statement.”

This memorandum addresses challenges made by witnesses at the November 3rd LCAR hearing related to whether the proposed rule is arbitrary, beyond the scope of the authority of the agency, contrary to the intent of the legislature and that the economic impact statement is inadequate. There was no challenge to numbers 4 and 5 above; ANR implemented all requirements of ICAR and extended the public comment period by two weeks and the rule is written in a satisfactory style pursuant to 3 VSA section 833, thus these provisions are not at issue. The remaining challenges are interrelated and are addressed below.

The General Assembly expressly delegated authority to ANR to designate ATV trails on state lands through the administrative rulemaking process. 23 V.S.A. Section 3506(b)(4) states that “(b) [A]n all-terrain vehicle may not be operated:...(4) [O]n any public land, body of public water or natural area established under the provisions of section 2607 of Title 10 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.” Witnesses providing testimony to LCAR asserted that 23 V.S.A. section 3506(4) does



not delegate authority to ANR to promulgate rules allowing ATV trails on state lands, that there is no legislative intent to support such authority of ANR and that the ANR Secretary does not have independent rulemaking authority. ANR disagrees.

In construing a statute, a court's overall objective is to give effect to the intent of the legislature. In re Vermont Verde Antique International, Inc., 174 Vt. 208, 211 (2002). The court looks to the plain meaning of the statute if it is unambiguous, the legislative history and the whole statute, examining all its parts to determine the purpose. Id. A regulation promulgated by an agency pursuant to a statutory provision is a permissible exercise of statutory authority if there is a nexus between the regulation and the statutory provision. In re Rusty Nail Acquisition, Inc., 2009 WL 2401163 (Vt. 2009). "Generally, an agency's regulations must be reasonably related to its enabling legislation in order to withstand judicial scrutiny" and "[t]here must be some nexus between the agency regulation, the activity it seeks to regulate, and the scope of the agency's grant of authority." Opinion No. 2001-3 of the Vermont Attorney General, October 17, 2001, citing Vermont Assn of Realtors, Inc. v. State, 156 Vt. 525, 530 (1991).

Chapter 31 of Title 23 was enacted by the General Assembly as Act 240 of 1983 (Adj. Sess.). H.713 was introduced in the House Transportation Committee for the purpose of regulating the operation of ATVs and created a legislative scheme for such regulation patterned on the existing legislation governing the Vermont Association of Snow Travelers (23 V.S.A. §§ 3201-3218). Initially, section 3506(b)(4) of H.713 stated the following: "(b) [A]n all-terrain vehicle may not be operated:....(4) [O]n any public land, body of public water or natural area established under the provisions of section 1309 of Title 10 unless the secretary has designated the area for use by all-terrain vehicles **in a manner chosen by the secretary to give reasonable notice that the use is permitted.**" (Emphasis added). H.713 was then amended following committee review to delete the phrase "in a manner chosen by the secretary to give reasonable notice that the use is permitted" and to insert the language presently in effect "**pursuant to rules promulgated under provisions of 3 V.S.A. chapter 25.**" (Emphasis added). ANR contends that this represents clear, unambiguous legislative intent to delegate rulemaking authority to the secretary of ANR and, in fact, to require that such rulemaking occur prior to authorizing the use of ATVs on public lands rather than leave to the discretion of the secretary the manner by which ATV use would be permitted.

ANR contends that section 3506(b)(4) is not ambiguous and that the legislative history further supports the legislature's intent to provide authority to the Secretary of ANR to promulgate rules to allow ATV use on state lands. The fact that the legislation uses the language "an ATV may not be operated unless" is consistent with the structure of the entire section of 3506. This legislative authority (or enabling statute) does not require the secretary to establish a statewide policy and guidelines on ATV use on state lands, to consider whether or to what extent illegal use of ATVs on state lands exist, to implement all aspects of the 2004 ATV Collaborative Report, or to address penalties for violations of Title 23 chapter 31. It simply requires the secretary to promulgate rules to allow ATV use on state lands. The Final Proposed ATV Rule is clearly within the scope of the authority of the secretary and is clearly consistent with legislative intent.

Additionally, the secretary of ANR has independent rulemaking authority. Pursuant to 3 V.S.A. section 2803(a), “[A]ll boards, committees, councils, activities and departments which under this chapter are a part of the agency shall be advisory only...and the powers and duties of such boards, committees, councils, activities and departments, **including administrative, policy making, rule making and regulatory functions, shall vest in and be exercised by the secretary of the agency.**” (Emphasis added). 3 V.S.A. section 2825(a) provides “[T]he primary duties of the secretary are to coordinate the activities of the various departments and divisions of the agency for the proper development, management and preservation of Vermont’s natural resources, to develop policies for the proper and beneficial development, management, and preservation of resources in harmony with the state comprehensive planning program and to promote the effective application of these policies by the departments and divisions affected.”

Likewise, the proposed Final ATV Rule is not arbitrary or capricious, but represents a proper exercise of ANR’s authority. Witnesses testified that the Proposed Final ATV Rule is arbitrary and capricious because it did not address existing illegal use, it failed to provide for funding to address enforcement, it failed to address all elements of the 2004 Governor’s ATV Collaborative Report, it failed to consider existing science, it failed to consider economic costs to the resource in its economic impact statement, and it is counter to longstanding agency policies. ANR strongly disagrees. In fact, the Proposed Final ATV Rule establishes a procedure by which the Secretary must comply in order to designate a connector trail across Agency lands for use by ATVs. The Rule does not expand the legislative grant of authority, but rather, is much narrower than the legislative authority because it establishes a specific review process for any connector trail proposal, requires significant public participation through comment on a proposed connector trail, the ability to request a public hearing and requisite review through the Long Range Management Planning process, which affords further public participation. The Proposed Final ATV Rule is consistent with agency policy and provides further review requirements on the Agency than any other proposed use of state land, including establishing trails for snowmobile, hiking, mountain biking or equine use, to name a few.

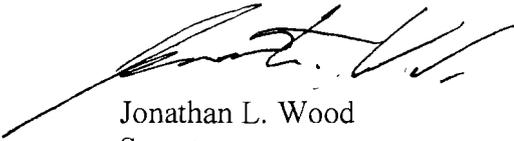
The Proposed Final ATV Rule does not ignore existing literature studies on ATV use; it establishes a procedure during which such scientific literature and on-the-ground experience of ANR staff will be considered in determining whether a proposed connector trail is appropriate. Contrary to witnesses’ testimony, the economic impact to natural resources and enforcement of illegal use is addressed in the Proposed Final Rule. VASA is required to demonstrate and dedicate grant funds to ensure proper enforcement and remediation of illegal use or restoration of a revoked trail is available. VASA is also required to establish why the proposed connector trail is appropriate and how they will address any potential natural resource impacts. All of this information is reviewed by agency expert staff and a recommendation made to the secretary. Thus, the economic and scientific impact statements are not incomplete and the rule is not arbitrary or capricious, but represents a comprehensive, valid exercise of clear, unambiguous statutory authority for the secretary to establish ATV connector trails on state lands.

In conclusion, LCAR should not object to the Proposed Final ATV Rule because the rule is not arbitrary, the rule is clearly within the scope of authority delegated to ANR as evidenced by the plain meaning of the statute and the legislative intent, the rule is consistent with legislative intent based

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on the legislative history and the entire statutory scheme regarding ATVs, the rule is written in a satisfactory style and is accompanied by an adequate economic impact statement, and the agency implemented all ICAR requirements and extended public comment to maximize public input.

Sincerely,

A handwritten signature in black ink, appearing to read "Jonathan L. Wood". The signature is fluid and cursive, with a long horizontal stroke extending to the left.

Jonathan L. Wood
Secretary
Agency of Natural Resources