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Agency of Natural Resources

December 30, 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:

On December 15, 2009, the Legislative Committee on Administrative Rules ("LCAR" or "Committee") objected to the Final Proposed Rule Governing the Designation and Establishment of All-Terrain Vehicle Use Trails on State Land ("ATV Rule") pursuant to authority set forth in 3 V.S.A. §842 and Section 4 of the rules of procedure for LCAR. The formal notification to the Agency of the objection was dated December 18, 2009 and received by the Agency on December 22, 2009. This letter constitutes the Agency of Natural Resources' response to the objections of LCAR pursuant to 3 V.S.A. §842 (a). This letter also serves as the Agency's notification that it respectfully disagrees with the Committee's objections and intends to file the ATV Rule for adoption with the Secretary of State's Office.

The December 1, 2009 letter provided to the Committee is attached hereto and incorporated herein to this response. The Committee's objections and additional Agency responses are as follows:

Objection # 1: The Committee objects to the final proposed rule in its totality based on the criterion set forth in 3 V.S.A. §842(b)(1) because the proposed rule is beyond the authority of the Agency.

ANR Response: LCAR contends that the Secretary of ANR has no authority to promulgate the ATV Rule under 23 V.S.A. §3506(b)(4) because: a "solitary clause in the motor vehicle law referring to a general prohibition of ATVs on public lands does not of itself constitute a statement of legislative authorization for proceeding with such a rule;" because it contains no statement of legislative intent regarding specific limitations or purposes of such a rule; because "the potential rule-making would be highly controversial, involve a potentially significant shift in longstanding state policy, and its impact on public lands is outside the scope of motor vehicle provisions focused on limiting ATV use;" because "[o]perative rule-making delegations normally are found in statutes directly or primarily relating to the subject which would be substantially impacted by the potential rule, in this case Vermont's public lands."; and because "[t]he three legislative committees with jurisdiction over our state natural resources thus would be expected to authorize any rule-making in this arena and to indicate legislative intent."

The reasons set forth by the Committee constitutes a novel standard for rulemaking authority and are unsupported by state or federal case-law interpreting agency administrative rulemaking authority and longstanding case-law regarding canons of legislative interpretation. As set forth in the Agency's December 1, 2009 letter to LCAR, when construing a statute, a court's overall objective is to give effect to the intent of the legislature, and in doing so, a court will first look 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. In re Vermont Verde Antique International, Inc., 174 Vt. 208, 211 (2002). In this case, the statute is unambiguous on its face and thus, both the plain meaning of the statute and the legislative history (see December 1, 2009 letter) must guide statutory interpretation. 23 V.S.A. §3506(b)(4) plainly and unambiguously 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."

The plain meaning of this provision is that the legislature authorized the only manner in which the secretary could designate public lands or bodies of public water for ATV use is by rulemaking. The fact that this is a solitary provision is of no import – the legislative intent clearly authorizes the secretary of ANR to designate public lands and bodies of public water for ATV use by rulemaking, and thus delegates rulemaking authority to the secretary for such purpose. The fact that this provision is located in Title 23, Motor Vehicles, is entirely appropriate as this Title is the only Title that primarily relates to, and has the purpose of, regulating the use and operation of ATVs. Moreover, there are other recent examples of ANR rulemaking authority existing in statutory provisions other than Title 10. For example, the ANR rules applicable to the Vermont CO2 Budget Trading Program regulations were promulgated pursuant to authority in 30 V.S.A. §255(b), which relates to the Public Service Department. Additionally, particularly relevant here, the ANR regulations related to snowmobiles were promulgated pursuant to authority resting in the sister provision to ATVs at 23 V.S.A. §3206(b)(6) in which the legislature authorized the secretary to designate snowmobile trails on public lands "in manners chosen by the secretary or other public land manager."

A longstanding history of state and federal case law related to administrative rulemaking dating back to Chevron, U.S.A., Inc. v. NRDC, 104 S.Ct. 2778, establishes the legal principal that the legislature "must give effect to the unambiguously expressed intent of Congress [or the legislature]" such that a " court does not simply impose its own construction on the statute" and that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations" is accorded great weight by courts. Chevron, U.S.A., Inc. v. NRDC, 104 S.Ct. 2778. Additionally, "[a]gency actions, including the promulgation of rules, enjoy a presumption of validity," American Council of life Insurers v. Vermont Department of Banking, 2004 WL 578737 (Vt.Super.), citing Vermont Assoc. of Realtors, Inc. v. State, 156 Vt. 525, 530 (1991). Where the rulemaking authority is broad, "'there must...be some nexus between the regulation and a specifically granted power of the agency." Id. Citing In re Club 107, 152 Vt. 320, 323 (1989). See, also In re Rusty Nail Acquisition, Inc., 2009

WL 2401163 (Vt. 2009) and Vermont Assn. Of Realtors, Inc. v. State, 156 Vt. 525, 530 (1991) and the December 1, 2009 letter to LCAR. ANR asserts that the ATV Rule not only has a direct nexus to the legislative authority of 23 V.S.A. §3206(b)(6) but it is also a direct implementation of clear legislative rulemaking delegation and intent.

Rulemaking authority of the secretary of ANR related to use of public lands exists in 3 V.S.A. §2803(a) and provides broad and underlying authority to the secretary to promulgate the ATV Rule. If the legislature did not intend to delegate rulemaking authority to the secretary of ANR related to use of ATVs on public lands and bodies of water, and to prescribe the policy for the state as prohibiting ATV use on public lands and bodies of water, it would have clearly and unambiguously stated so, by, for example, leaving this provision as a absolute prohibition on the use of ATVs on public lands and bodies of waters and leaving out the clause "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." In fact, the legislature specifically amended the original bill to include the rulemaking delegation. See, H.713 of 1983 and the December 1, 2009 letter, page 2. It is inconceivable how this legislative history and clear statutory language could be interpreted in any other way than as a clear statement to provide rulemaking authority to the secretary of ANR to designate ATV use on public lands and bodies of waters. In fact, in 1986 the Department of Forests, Parks and Recreation, under the authority of the secretary of ANR promulgated regulations designating the frozen bodies of public waters for which ATV use is authorized and those for which ATV use is prohibited. Notably, this rule was promulgated with no objection from LCAR. [1]

Furthermore, the contention that the three legislative committees of jurisdiction over natural resources "would be expected to authorize any rule-making in this arena" is potentially violative of state and federal constitutional law. Chapter II. Section 5 of the Constitution of the State of Vermont states that the Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others." The fact that the legislature has spoken on this issue and granted rule making authority to the secretary of ANR to promulgate rules authorizing the use of ATVs on public lands and bodies of public waters is determinative. The legislature does not have the authority to oversee the executive branch administration of such legislative authority unless it determines it is prudent to amend Legislative Committee on Administrative Rules

[1] It is noteworthy that Representative Deen (Chair, House Fish, Wildlife and Water Resources Committee) has proposed a bill for consideration in the 2010 legislative session that would remove the authority of the secretary of ANR to designate frozen bodies of public waters for ATV use by deleting the words " body of public water" from 23 V.S.A. §3206(b)(6), but leaving the words "[O]n any public land..." If there is no rulemaking authority delegated to the secretary of ANR this bill would not be necessary. Likewise, if a statutory amendment is required to remove rulemaking authority of the secretary to designate frozen bodies of public waters for ATV use, then the corollary is true: the secretary of ANR has rulemaking authority to designate public lands for ATV use. This certainly does not comport with the statements that the chairs of the legislative committees of jurisdiction over state natural resources agree with LCAR that §3206(b)(6) is not a statutory delegation of rulemaking authority to the secretary of ANR.

the existing legislation to provide further direction and authority for the executive branch. LCAR's statement that the legislative committees of jurisdiction "would be expected to authorize any rule-making in this arena" is violative of the separation of powers clause of the state and United States constitution absent state legislative action to amend the existing statutory rulemaking authority.

For the reasons discussed above, and as outlined in the December 1, 2009 letter to LCAR, the Agency respectfully disagrees with LCAR's objections and contends that the secretary has the authority to promulgate the ATV Rule and will file the Rule for adoption with the Secretary of State.

Objection #2 and #3: #2: The Committee objects to the final proposed rule in its totality based on the criterion set forth in 3 V.S.A. §842(b)(3) because the final proposed rule is arbitrary. #3: The Committee objects to Section 4.8 of the final proposed rule based on the criterion set forth in 3 V.S.A. §842(c) because the final propose rule is not written in a satisfactory style according to 3 V.S.A. §833 in that the final proposed rule is not written in a clear and coherent manner. LCAR also objects to Section 4.8 of the proposed rule based on the criterion set forth in Section 842(b)(2) of the APA because it does not satisfy the APA's requirement that a rule be clearly written, and also based on the criterion set forth in Section 842(b)(3) of the APA because it is arbitrary, both for the reasons stated in LCAR's findings.

ANR Response: The definition of "arbitrary" is "not fixed by rules but left to one's judgment or choice, discretionary; based on one's preference, notion, whim, etc.; capricious." The definition of "capricious" is "subject to caprices; tending to change abruptly and without apparent reason; erratic; flighty, showing wit or fancifulness." Webster's New World Dictionary of American English, Third College Edition, 1988. Yet the Rule provides specific and detailed criteria by which potential connector trails would be reviewed in Section 4.1 of the Rule. These criteria provide transparency and consistency for the review and approval of connector trails on state lands and prohibit the whim or caprice of a decision maker.

Further, LCAR contends that the proposed ATV Rule is arbitrary in its totality but notes only section 4.8 of the rule stating that the use of the term "'persons in the town or city' has no definition and is susceptible to a wide variety of possible meanings" and because "it creates an impossible burden for requesting such a hearing in some Vermont towns." LCAR also states that "the section's provision limiting the right to petition for a hearing arbitrarily restricts that right to persons in the town or city where the trail would be located...[I]gnores the fact that the land in question is held in common for all the people of Vermont, not just those of any single municipality."

The Vermont Statutes Annotated defines the term "person" as including "any natural person, corporation, municipality, the state of Vermont or any department, agency or subdivision of the state, or any partnership, unincorporated association or other legal entity." The use of the term "person" is ubiquitous throughout state and federal legislation. The fact that the Vermont statutes define the term "person" removes the contention that the use of such term could be arbitrary or capricious in any way. In addition, the fact that the term "person" includes any corporation, municipality, partnership, unincorporated association or other legal entity, as well as any individual

residing in the town, encompasses not only the town where the proposed ATV trail is located, but any legal entity with some interest in the town in which the proposed ATV trail is located. Thus, LCAR's objection is unfounded.

Objection #4: The Committee objects to the final proposed rule in its totality based on the criterion set forth in 3 V.S.A. §842(d) and returns it to the submitting agency because the economic impact statement fails to recognize substantial economic impacts.

ANR Response: First, there is no statutory provision authorizing LCAR to object on the grounds of the scientific impact statement. However, the December 1, 2009 letter addresses witness objections to the scientific impact statement and is incorporated herein. Regarding enumerated objections of LCAR to the economic impact statement itself, ANR responds that the economic impact statement contained in the proposed final rule is sufficient. However, ANR has revised the economic impact statement to more specifically address the no action alternative to the proposed ATV Rule. [2]

For the reasons outlined herein and in the December 1, 2009 letter to LCAR, ANR respectfully disagrees with LCAR's objections to the economic impact statement and will file the ATV Rule for adoption with the Secretary of State.

Sincerely,

Jonathan L. Wood
Secretary

[2] LCAR states that there has been no consultation with the legislature requesting approval to use a 500 foot by 18-inch strip of land under the jurisdiction of the Department of Fish and Wildlife which is the only known location for a proposed VASA connector trail to date. There is no legislative requirement for ANR to request authorization from the legislature to use the Fish and Wildlife land. In fact, the clear and unambiguous language of 23 V.S.A. §3206(b)(6) leaves it within the appropriate discretion of the secretary of ANR. Additionally, LCAR raises as a possible alternative to the ATV Rule the conveyance of the Fish and Wildlife land to VASA that should have been addressed in the economic impact statement. However, the funding restrictions associated with such Fish and Wildlife lands renders the LCAR proposal to consider transferring such lands to VASA a non-sequitor. Moreover, conveying public lands to recreational groups wishing to establish a trail is contrary to long-established Agency practice and would create a very problematic precedent.