

Original

FINDINGS

The Legislative Committee on Administrative Rules (LCAR) has reviewed the Final Proposed Rule 09-P29 entitled Rule Governing the Establishment of All-Terrain Vehicle Use Trails on State Land as provided for in the Vermont Administrative Procedure Act (the APA). LCAR makes the following findings regarding the Final Proposed Rule:

1) Absence of Rule Making Authority -

The statutory authority cited by the submitting agency in its filing for promulgating the Final Proposed Rule is Chapter 31, Section 3506 (b) (4) of Vermont Motor Vehicle Title 23. That section of Vermont's motor vehicle law prohibits use of ATVs in a number of locations. The cited provision categorically bars all use of ATVs on state public lands "unless the secretary has designated the area for use by all terrain vehicles pursuant to rules promulgated under provisions of [the APA]."

Section 800 of the APA - the Purpose Section setting forth the General Assembly's intent in creating the APA - specifically provides that "the general assembly should articulate, as clearly as possible, the intent of any legislation which delegates rule-making authority;" Delegation of rule-making authority under the APA thus is not to be casually inferred; it is intended to be delegated only when accompanied with clearly articulated guidance as to the ends to be served.

Consistent with that standard, Section 801 (9) of the APA goes on to define a rule as "each agency statement of general applicability which implements, interprets, or prescribes law or policy and which has been adopted in the manner provided by [the APA]"

A solitary clause in the motor vehicle law referring to a possible exception by rule 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. The cited clause contains no statement whatsoever of legislative intent regarding any specific purposes to be served by a rule or any limits on it. That clear articulation of intent is called for under the APA in any rule-making delegation. The total omission of this expected guidance is particularly relevant where, as here, 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.

Operative 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. The 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. However, the chairs of all three of the committees of jurisdiction are unaware of any such intended legislative grant of rule-making authority. None of them believes that the provision cited by the agency constituted such a delegation. And, finally, each of them has filed a statement with LCAR indicating that the Final Proposed Rule itself is contrary to legislative intent on its merits.

In sum, it is inconceivable that the legislature ever intended to create operative rule-making authority for a significant change in permissible uses of state lands by using a single clause in a motor vehicle law, with no further policy guidance whatsoever. Had it actually intended to delegate rule-making power on a controversial topic, the legislature would have complied with the APA by using clear statutory language after consideration by its three committees of jurisdiction.

The submitting agency has failed to furnish convincing evidence supporting any clear legislative intent to delegate current rule-making authority to it for use of ATVs on state land. Its citation in a letter to LCAR pointing to the secretary's general authority to establish rules does not alleviate that absence of authority. That statute defines the role of the secretary, including empowerment to issue rules for the agency. However, this does not supplant the APA's provisions governing what is required before a secretary actually may do so. It does not of itself create independent rule-making power in the absence of prior legislative authorization for a rule.

LCAR thus concludes that rule-making authority does not exist within the submitting agency for the Final Proposed Rule. LCAR also does not believe that any amendment of the Final Proposed Rule can alleviate this problem.

2) Unacceptability for Filing Because of an Inadequate Economic Impact Statement -

Section 838 of the APA establishes the requirements for filing a proposed rule. Among those requirements are "an economic impact statement" and "a brief summary of the scientific information upon which the proposed rule is based to the extent the proposed rule depends on scientific information for its validity".

Section 838 then states that the economic impact statement "shall analyze the anticipated costs and benefits to be expected from adoption of the rule". Specifically, the economic impact statement must:

- " (1) list categories of people, enterprises and governmental entities potentially affected and estimate for each the costs and benefits anticipated ;

- (2) compare the economic impact of the rule with the economic impact of other alternatives to the rule, including no rule on the subject... ."

The Final Proposed Rule would create a process for allowing the use of ATVs on Vermont state lands for the first time. Those lands are held in common for all the citizens of the state and presently are open to them for a variety of permissible uses. Despite this fact, the submitted Economic Impact Statement fails to make any mention of the current users and uses, to contain any analysis of the economic value of those uses, or have any analysis of the impact on existing uses which allowing ATVs would entail.

The Economic Impact Statement also fails to analyze possible costs from the Final Proposed Rule's

direct impacts on state lands and natural resources. It only states that “additional impact on the trail system could increase maintenance costs”, but has no discussion of possible collateral impacts. In this regard, just as for the issue discussed in the previous paragraph, the absence of a Scientific Information Statement both is inconsistent with the APA’s requirements and renders the Economic Impact Statement inadequate.

The agency has told LCAR that it will address any scientific issues in considering each ATV trail application. It seems clear, though, that although some ATV impacts are site specific, many of them apply to any ATV use on state lands. The agency’s proposed review of each trail application does not obviate the APA’s requirement for a Scientific Information Statement covering issues which are common to ATV use. Testimony before LCAR as well as information provided to it indicate that there are numerous scientific studies on those impacts readily available for use in compiling a Scientific Information Statement.

Reading the APA’s provision as the agency suggests would essentially negate the APA’s Scientific Information requirement since almost any rule can argue that its scientific issues will be dealt with on a case by case basis. The APA requires these Statements in order to permit assessment of whether a rule is consistent with statute regarding scientific issues and their impacts as well as whether the rule’s economic impact analysis adequately addresses them. A Scientific Information Statement thus is a prerequisite for this Final Proposed Rule.

Finally, the submitted Economic Impact Statement completely ignores the APA’s requirement to address the economic impact of alternatives to the Final Proposed Rule, including possibly having no rule at all. This omission is especially material in light of testimony given to LCAR by both the agency and VASA that the only known location for which a trail application is expected to be submitted is a single 500 foot by 18 inch strip of land which would connect two existing VASA trails.

There apparently has been no consultation or request made to the legislature for either authorization to use that land or to possibly transfer ownership of it to VASA. In light of this and the limited problem presented, there clearly are potential alternatives to the Final Proposed Rule for addressing VASA’s concern. These include a much narrower rule or legislative elimination of any current need for a rule. The Economic Impact Statement addresses none of these possible alternatives.

LCAR concludes that the Final Proposed Rule’s Economic Impact Statement does not comply with the APA because it fails to consider significant categories of potentially affected people, fails to consider all relevant potential costs, fails to compare its economic impact with alternatives including that of having no rule at all, and because a Scientific Information Statement is both required and is essential here to create an adequate Economic Impact Statement.

3) Lack of Clarity and Arbitrariness -

Section 4.8 of the Final Proposed Rule provides for the possibility of a public hearing concerning creation of any proposed ATV trail on state lands. That hearing is to be scheduled only “if so requested by 25 or more persons in the town or city where the trail is located”.

This provision does not satisfy the APA’s requirements because it is unclear on its face. The term “persons in the town or city” has no definition and is susceptible to a wide variety of possible meanings including “any persons regardless of age”; “adults”; “voters”; “residents”; “adult residents”; or “property owners”. This ambiguity makes it impossible for potential petitioners to determine who actually is qualified to request a hearing.

The section also is arbitrary for two reasons. First, it creates an impossible or unreasonable burden for requesting such a hearing in some Vermont towns. Assuming “persons” is intended to refer to either adult residents or voters, there are Vermont towns whose population may be inadequate to even meet the 25 person threshold. In others it would require an unreasonably large super-majority of a small population to do so. In either case the proposed current wording effectively would deny any real possibility of a hearing in some towns.

Second and even more fundamentally, 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. This ignores the fact that the land in question is held in common for all the people of Vermont, not just those of any single municipality. Denying any right to petition for a hearing to all other Vermonters - who may well have different questions or concerns about a proposed use - arbitrarily ignores their interests in state lands.

OBJECTIONS TO THE FINAL PROPOSED RULE

- (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 final proposed rule is beyond the authority of the agency.
- (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 proposed 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.
- (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.

For these reasons, pursuant to 3 V.S.A. § 842 (a), the committee recommends that the final proposed rule be withdrawn.

Approval Date: December 15, 2009
Legislative Committee on Administrative Rules