



To: Members of House Fish, Wildlife & Water Resources, House Transportation, Senate Natural Resources & Energy, and Senate Transportation Committees

From: Jamey Fidel,
General Counsel and Forest and Wildlife Program Director
Vermont Natural Resources Council

Date: January 8, 2015

Re: 15-P45 - Agency of Natural Resources/Rule Governing the Designation and Establishment of All-Terrain Vehicle Use Trails on State Land

Please accept the following comments from Vermont Natural Resources Council (VNRC) regarding the Rule Governing the Designation and Establishment of All-Terrain Vehicle Use Trails on State Land and the approval of the Les Newell Connector trail.

In 2009, LCAR unanimously objected to an ATV rule to open up state lands to ATV use. LCAR objected to the rule on multiple grounds, including finding that the rule was beyond the authority of the agency, and that the rule was arbitrary.

The authority that the ANR cited for the previous rule is the same authority that the ANR now cites for the proposed rule. In particular, the ANR cites 23 V.S.A. § 3506(b)(4), which states that an ATV may not be operated on “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.”

That is the extent of the authority cited in the proposed rule, which presents two major concerns.

The first concern is the ANR is proposing a rule to govern the use of ATVs on state land while at the same time proposing the designation of a trail. We fail to see how a trail can be proposed before the rules required under 23 V.S.A. § 3506(b)(4) governing the designation of trails has been promulgated.

The second concern is the ANR is moving forward with opening state lands to ATVs without the requisite legislative standards or policy guidance dictating how to open state lands to ATV use.

The Supreme Court of Vermont has instructed that any delegation of law making to the executive branch must be in accordance with appropriate standards. See *Hunter v State*, 177 Vt. 339, 353-354 (2004). Valid legislative delegation cannot be made without limiting standards outlining the proper exercise of discretion. According to the Vermont Supreme Court, there will be an impermissible delegation of lawmaking when no standards exist. *Id.* citing *Village of Waterbury v. Melendy*, 109 Vt. 441, 352 (1938).

The authority the ANR cites for the proposed rule does not include any standards dictating how or where ATV use should be allowed on state lands. The only authority cited states it should be done through rulemaking. LCAR wrote in its findings when it objected to the 2009 rule, "...it is inconceivable that the legislature ever intended to create operative rulemaking 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."

In its repeal of the previous Rule Governing the Establishment of ATV Use Trails on State Land, ANR's General Counsel Jon Groveman articulated in a filing with LCAR and the Secretary of State's Office that members of the public concerned about the impacts of ATV riding are "correct that illegal ATV riding has been an issue in the past, and the state's ability to enforce against illegal ATV use depends upon having adequate resources." ANR's General Counsel also instructed, "Given the significant questions regarding ANR's authority to adopt the ATV rule, ANR believes that right course of action at this time is to repeal the existing ATV rule while working to address the unresolved policy issues related to the use of ATV's on state land." Our biggest concern is the same policy issues remain unresolved, including addressing illegal riding, illegal trespass, landowner resource damage and adequate enforcement, yet the ANR is moving ahead with the process of opening state lands and designating trails on public lands.

Please see our attached comments to ANR addressing our concerns that the outstanding policy issues have not been addressed. For example, when VNRC participated on the ATV Collaborative in 2004, there was not consensus on the issue of opening public lands; however there was widespread support for increasing registration fees to \$55 to help pay for enforcement, creating an illegal trespass fund, addressing safety education, and other issues. The Collaborative also addressed the need to develop effective penalties for illegal use, and for trails to comply with Act 250 jurisdiction where appropriate. Additionally, the Collaborative submitted a proposed budget to the Governor, which highlighted that with annual ATV registration of \$55, VASA could raise \$935,000 based on an 85% return of registrations from 20,000 annual registrations (see attached ATV Collaborative proposed budget). According to the Collaborative's budget, ATV registration fees were to pay for the following:

Administration	\$136,500
Law Enforcement	\$470,000
Trail Liability Insurance	\$130,000
Illegal Trespass Fund	\$130,000
Use Training/Safety Education	\$ 50,000
Office Supplies and Equipment	\$ 4,500
Trail Maintenance	\$ 42,000

While we understand that VASA has made efforts to work on some of the Collaborative recommendations, other important recommendations have been ignored. The ATV Collaborative budget has not been implemented, and important improvements such as adequate enforcement, an illegal trespass fund, adequate penalties, and other needed policies have fallen by the wayside.

The best course of action is for the Legislature to craft the requisite standards that are required to delegate proper authority to the ANR to open state lands to ATV use, if that is, in fact, the Legislature's intent. Through such an exercise, the Legislature could examine the ATV Collaborative Report, and decide whether public lands should be opened to ATVs, and if so, whether they should be opened first through a pilot project as anticipated in the report. In addition, the Legislature could implement the proper guidance that is needed to address outstanding policy issues that caused the ANR to withdraw the previous rule, including funding adequate enforcement, addressing illegal trespass and resource damage on public and private land, and implementing effective penalties before public lands are opened to ATV trails.

Thank you for your consideration of our comments.