

VERMONT SUPERIOR COURT
CIVIL DIVISION, WASHINGTON COUNTY

CONSERVATION LAW FOUNDATION)	
)	
Plaintiff)	
v.)	
)	Civil Action No.
VERMONT)	
AGENCY OF NATURAL RESOURCES)	COMPLAINT FOR
)	<u>DECLARATORY AND</u>
Defendant)	<u>INJUNCTIVE RELIEF</u>
)	

INTRODUCTION

1. This civil action arises under 3 V.S.A. § 807, and challenges the Vermont Agency of Natural Resources’ (“ANR” or “Agency”) unlawful promulgation and implementation of the Rule Governing the Designation and Establishment of All-Terrain Vehicle Use Trails on State Land (“ATV Rule”). Plaintiff seeks declaratory and injunctive relief to prevent implementation of the unlawful ATV Rule from interfering with, impairing, or threatening to interfere with or impair its members’ safe use and enjoyment of public lands.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action pursuant to 3 V.S.A. § 807 and Vermont Rule of Civil Procedure 75.
3. Venue is appropriate in the Superior Court of Washington County pursuant to 3 V.S.A. § 807.

PARTIES

4. Plaintiff Conservation Law Foundation (“CLF”) is a member-supported, non-profit public-interest environmental organization with members throughout Vermont. CLF works on behalf of its members to protect natural resources, including water and forest ecosystems, from degradation.
5. Defendant ANR is the administrative agency in charge of overseeing the protection and improvement of the health of Vermont’s people and ecosystems, as well as promoting sustainable use of Vermont’s natural resources. ANR is also the Agency that proposed and adopted the ATV Rule.

6. CLF advances its organizational mission by, among other activities, advocating for sound management of lands owned and managed by state and federal governments. These lands include the State of Vermont's wildlife management areas, fragile areas, state parks, and state forests that are subject to the ATV Rule (hereinafter collectively referred to as "state lands").
7. CLF members use and enjoy state lands and the public trust waters that run through such lands for fishing, hunting, recreation and aesthetic enjoyment, and scientific study.
8. ANR's implementation of the unlawful ATV Rule will interfere with, impair, or threatens to interfere with or impair, safe use and enjoyment of the state lands by CLF members. Such interference and impairment will result from, among other causes, increased accidents, user conflicts, air, water, and noise pollution, trail damage, and unnatural death and injury rates among wildlife in the proximity of designated trails.
9. Safe use and enjoyment of the state lands subject to the unlawful ATV rule will also be threatened by the diversion of scarce agency funds from mandatory agency land-management functions to cover the cost of increased management and enforcement activities that will be necessitated by implementation of the ATV rule.
10. Implementation of the unlawful ATV rule will also interfere with and impair the ability of CLF's members to participate fully in the public process to designate ATV trails under the rule. The opportunity to request a public hearing on proposed trail designations is arbitrarily limited, under Section 4.8 of the ATV Rule, to persons who reside in the town or city where the proposed trail is located even though the state lands are owned in common for use of all citizens of Vermont regardless of the municipalities in which they reside.

**PROCEDURAL BACKGROUND AND LEGISLATIVE COMMITTEE ON
ADMINISTRATIVE RULES OBJECTION**

11. On May 15, 2009, the secretary of ANR, Jonathan Wood, filed the proposed ATV Rule with the secretary of state.
12. ANR held a public hearing on June 15, 2009 during which approximately seventy-eight members of the public offered oral comments. In addition, ANR received more than two thousand written comments during the public comment period, which ended on July 6, 2009.

13. By ANR's own account, the public comments opposed the ATV Rule by a four to one ratio.
14. After weighing public comments and amending the proposed ATV Rule, the ANR filed the final ATV Rule proposal on October 20, 2009.
15. The Legislative Committee on Administrative Rules ("LCAR") reviewed the final proposed ATV Rule on December 15, 2009 and by a unanimous vote of 7-0 formally objected pursuant to its authority under 3 V.S.A. § 842(b). A true and accurate copy of that certified objections and supporting findings are attached hereto as Exhibit A.
16. LCAR set forth four objections to the rule. (Exh. A at p. 3).
17. Pursuant to 3 V.S.A. § 842(b)(1), LCAR objected to the rule in its entirety because the proposed rule is beyond the authority of the agency.
18. Pursuant to 3 V.S.A. § 842(b)(3), LCAR objected to the rule in its entirety because it is arbitrary.
19. Pursuant to 3 V.S.A. § 842(c), LCAR objected to Section 4.8 of the rule because it is not written in a clear and coherent manner and thus violates 3 V.S.A. § 833.
20. Pursuant to 3 V.S.A. § 842(d), LCAR objected to the rule in its entirety because the economic impact statement, including the scientific assessment, failed to address significant negative potential economic impacts that the rule's implementation could create and thus did not comply with the requirements of 3 V.S.A. § 838.
21. LCAR transmitted its objections to ANR by letter date December 18, 2009 and recommended that ANR withdraw the ATV rule. (Exh. A at p.3)
22. After receiving a response to LCAR's objections from the ANR Secretary Jonathan Wood, LCAR voted by a unanimous 7-0 majority to file its objections in certified form with the Secretary of State, notwithstanding Secretary Wood's response to those objections. (Exh. A at p. 2)
23. At its meeting on January 14, 2010, the LCAR considered ANR's response to its objections and voted to file its objections in certified form with the Secretary of State. (Exh. A at p. 2).

24. Despite LCAR's multiple objections, ANR adopted the ATV Rule on January 4, 2010. A true and accurate copy of the final adopted ATV rule is attached hereto as Exhibit B.
25. Pursuant to 3 V.S.A. § 842(b), because the LCAR filed such certified objections with the Secretary of State "the burden of proof thereafter shall be on the agency...to establish that the part objected to is within the authority delegated to the agency, is consistent with the intent of the legislature, [and] is not arbitrary."

COUNT I

ANR LACKS RULE-MAKING AUTHORITY TO SUPPORT PROMULGATION OF THE RULE

26. Plaintiff re-alleges and incorporates all of the prior paragraphs, as if fully set forth herein.
27. CLF hereby adopts and incorporates by reference LCAR's certified Objection #1. (Exh. A at pp. 3-8)
28. Based on the allegations in the preceding paragraph, CLF alleges further that the proposed rule in its totality is beyond the authority of the Agency.
29. ANR cannot meet its burden of proof to establish that it has the authority under existing law to adopt the ATV Rule.

COUNT II

THE ATV RULE IS ARBITRARY

30. Plaintiff re-alleges and incorporates all of the prior paragraphs, as if fully set forth herein.
31. CLF hereby adopts and incorporates by reference LCAR's certified Objections #2 and #3. (Exh. B at pp. 3-8)
32. Based on the allegations in the preceding paragraph, CLF alleges further that the ATV Rule is, in its totality, arbitrary and unclear in violation of the Vermont Administrative Procedures Act.
33. ANR cannot meet its burden of proof to establish that the ATV Rule is not unlawfully arbitrary and unclear.

COUNT III

ANR FAILED TO ADEQUATELY COMPLETE THE REQUIRED ECONOMIC IMPACT STATEMENT AND SCIENTIFIC ASSESSMENT

34. Plaintiff re-alleges and incorporates all of the prior paragraphs, as if fully set forth herein.

35. CLF hereby adopts and incorporates by reference LCAR's certified Objections #4. (Exh. B at pp. 3-8)
36. Based on the allegations in the preceding paragraph, CLF alleges further that the ATV Rule is, in its totality, not supported by an adequate economic impact statement or scientific assessment as is required by 3 V.S.A. § 838(a).
37. The changes ANR made to the Economic Impact Statement in response to LCAR's comments have failed to cure the defects in the statement.
38. ANR cannot meet its burden of proof to establish that the economic impact statement and scientific assessment required to support the rule's validity are adequate.

PRAYER FOR RELIEF

Plaintiff respectfully requests that this Court grant the following relief:

- A. Issue a declaratory judgment pursuant to 3 V.S.A. §§ 807, 846(c), that the Defendant did not have the authority to create and implement the ATV Rule, that it is unlawfully arbitrary, and is not supported by an adequate economic impact statement and scientific assessment as required by 3. V.S.A. 838(a).
- B. Declare that the rule invalid and repealed by operation of law pursuant to 3 V.S.A. § 848(a)(2).
- C. Enjoin Defendant from taking any actions to implement the rule.
- D. Award Plaintiff any other just relief including but not limited to its fees and costs.

Respectfully submitted this 18th day of January 2011 by

CONSERVATION LAW FOUNDATION



Anthony L. Iarrapino, Esq.
License # 4075
15 E. State St. #4
Montpelier, VT 05602
aiarrapino@clf.org
802.223.5992 x 14

Redstone Building
26 Terrace Street
Montpelier, VT 05609-1101

Tel: (802) 828-2363
Fax: (802) 828-1135

www.sec.state.vt.us



Deborah L. Markowitz
Secretary of State

William A. Dalton
Deputy Secretary

State of Vermont
Office of the Secretary of State

TO: Jonathan Wood, Agency of Natural Resources
FROM: Deborah L. Markowitz, Secretary of State
Louise Corliss, APA Clerk

DATE: January 14, 2010

SUBJECT: Certified Objection from Legislative Committee on
Administrative Rules of 10-001

This will acknowledge receipt of the certified objection of the Legislative Committee on Administrative Rules for 10-001 relating to a Rule Governing the Establishment of All-Terrain Vehicle Use Trails on State Lands.

.Cc: Katie Pickens, Committee Assistant
Legislative Committee on Administrative Rules
Meghan Purvee, Department of Forests, Parks & Recreation.

c/o LEGISLATIVE COUNCIL
115 STATE STREET
DRAWER 33
MONTPELIER, VT 05633-5301



PHONE: (802) 828-2231
FAX: (802) 828-2424

Sen. Mark A. MacDonald, Chair
Sen. Ann E. Cummings
Sen. Claire D. Ayer
Sen. Diane B. Snelling

Rep. Richard J. Marek, Vice-Chair
Rep. Patsy French
Rep. Virginia Milkey
Rep. Linda K. Myers

STATE OF VERMONT

Legislative Committee on Administrative Rules

January 14, 2010

The Honorable Deborah L. Markowitz
Secretary of State
State of Vermont
26 Terrace Street, Drawer 9
Montpelier, VT 05609-1101

Dear Secretary Markowitz:

On December 18, 2009 the Joint Legislative Committee on Administrative Rules voted to object to the Agency of Natural Resources' final proposal 09-P29 relating to Rule Governing the Establishment of All-Terrain Vehicle Use Trails on State Lands. At its meeting on January 14, 2010, the committee considered the agency's response to the objections and voted to file its objections in certified form with the Secretary of State.

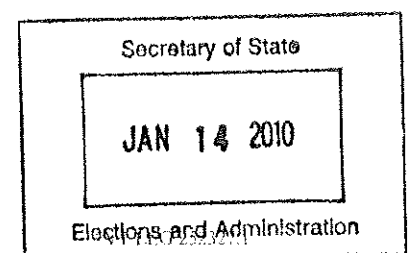
The committee respectfully requests that your office inform any interested party that its objection has legal effect under 3 V.S.A § 842(b) of the Administrative Procedure Act. That section provides in part: "to the extent that the objection covers a rule or a portion of a rule, the burden of proof shall thereafter be on the agency in any action for judicial review or for enforcement of the rule to establish that the part objected to is within the authority delegated to the agency, is consistent with the intent of the legislature and is not arbitrary."

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark MacDonald', written over the word 'Sincerely'.

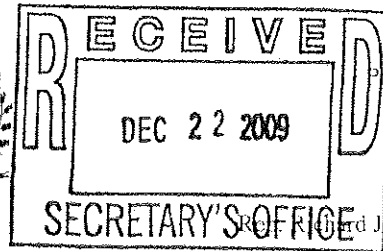
Sen. Mark MacDonald., Chair
Legislative Committee on Administrative Rules

cc: Member, Legislative Committee on Administrative Rules
Meghan Purvec, General Counsel for Forests, Parks & Recreation Department
Agency of Natural Resources
104 So. Main Street, Center Building
Waterbury, VT 05671-0301
Louise Corliss, APA Clerk, Office of the Secretary of State



c/o LEGISLATIVE COUNCIL
115 STATE STREET
DRAWER 33
MONTPELIER, VT 05633-5301

Sen. Mark A. MacDonald, Chair
Sen. Ann E. Cummings
Sen. Claire D. Ayer
Sen. Diane B. Snelling



PHONE: (802) 828-2231
FAX: (802) 828-2424

Marek, Vice-Chair
Rep. Patsy French
Rep. Virginia Milkey
Rep. Linda K. Myers

STATE OF VERMONT

Legislative Committee on Administrative Rules

December 18, 2009

Jonathan Wood, Secretary
Agency of Natural Resources
103 So. Main Street, 10 South
Waterbury, VT 05671-0601

Dear Secretary Wood:

This letter is to formally notify you that the Joint Legislative Committee on Administrative Rules has voted to object to the Agency of Natural Resources' final proposal 09-P29 relating to Rule Governing the Establishment of All-Terrain Vehicle Use Trails on State Land. The committee's objections were made at its meeting on December 15, 2009 and, for the reasons set forth in the attached findings, are as follows:

- (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.
- (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.

Under 3 V.S.A § 842(a), the agency is obliged to respond within 14 days of receipt of this notice of the committee's objection. After receipt of a response, the committee may reschedule the rule

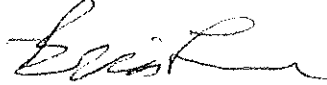
Jonathan Wood, Secretary

December 18, 2009

Page 2

and determine whether to withdraw or modify its objection. You should also note that the agency may not adopt the rule until it has responded to this objection.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian Leven". The signature is fluid and cursive, with a long horizontal stroke at the end.

Brian Leven
Counsel for the Legislative
Committee on Administrative Rules

cc: Members, Legislative Committee on Administrative Rules
Louise Corliss, APA Clerk, Office of the Secretary of State

DRAFT FINDINGS

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

1) Absence of Rule Making Authority -

The statutory authority cited by the submitting agency in its filing for promulgating the 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 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 Proposed Rule. LCAR also does not believe that any amendment of the 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 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 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 Proposed Rule.

Finally, the submitted Economic Impact Statement completely ignores the APA's requirement to address the economic impact of alternatives to the 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 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 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 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 PROPOSED RULE

1) LCAR objects to the proposed rule in its totality based on the criterion set forth in Section 842 (b) (1) of the Vermont Administrative Procedure Act (the APA) because the proposed rule is beyond the authority of the submitting agency for the reasons stated in LCAR's Findings. Because of that objection, pursuant to Section 842 (a) of the APA, LCAR also requests that the proposed rule be withdrawn.

2) LCAR objects to the proposed rule in its totality based on the criterion set forth in Section 842 (d) of the APA and returns it to the submitting agency because the Economic Impact Statement is inadequate under the APA's requirements for the reasons stated in LCAR's Findings.

3) LCAR 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.