

# CHRONOLOGY OF ATVs IN THE NASH STREAM FOREST

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## ORIGINAL INTENT OF STATE:

### MAINTAIN BAN ON ATVs IN NASH STREAM

- ATVs banned by Diamond, by State as of 1989, by 1995 Management Plan.
- 1989 Easement: Section II-C of the Easement states New Hampshire reserved the right to preserve and manage certain specific uses in the NSF. Section II-C continues: *“Uses which are not expressly reserved by the State shall be prohibited by the State....”* New Hampshire did not expressly reserve ATVs as a permitted use.<sup>1</sup>
- 1995 Vision Statement (p. 61): *“Protect the natural qualities and integrity of the land, natural communities, native species, and ecological processes.... Manage the land with as little interference as possible with natural ecological functions.”* This requires monitoring and safety and enforcement.

## 2001-2002: WESTSIDE TRAIL OPENING WAS ILLEGAL

- 1996-September 1998: Nash Stream Citizens Advisory Committee (CAC) discusses diverse topics. Beginning at the September 1998 meeting, the CAC, and its 2006 successor, NS Citizens Committee (CC), are overwhelmed with demands for more ATV trails in NS. ATV demands also commandeer “substantial” amounts of DFL and Fish and Game staff time. Since 1995, state agencies have complained that they cannot perform required monitoring on Nash Stream forestlands because of inadequate agency funding, yet these agencies can afford to divert substantial staff time to respond to the demands of ATVs. This constitutes a huge subsidy to a high-carbon activity.
- September 2001 CAC meeting, ATV promoters added to CAC membership, and the push to amend the 1995 management plan, now fully supported by leadership at DRED and DFL, intensifies.
- The New Hampshire Legislature’s ATV Study Committee issued a number of conclusions on December 19, 2001, notably:
  - “A successful enforcement program is critical to the long-term success of ATV trail expansion and development.”

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<sup>1</sup> Nash Stream Forest Conservation Easement: State of New Hampshire to US Forest Service, August 4, 1989, Section II-C

- “Environmental concerns and potential degradation of an area must always be the paramount consideration.”

The Committee released its recommendations on December 28, 2001. Recommendation no. 5 stated: “New ATV trails shall be created *only* when . . . [2] DRED/Trails Bureau has the resources to monitor and maintain trails for ATV use, and [3] Fish and Game has the resources and made the commitment to *reasonably* monitor ATV use and enforce applicable laws” (emphasis in original). Nine days earlier, this committee had acknowledged that Fish and Game was incapable of fully enforcing state laws: “NH Fish & Game, admittedly, is understaffed and under equipped to provide the necessary law enforcement component.”<sup>2</sup> New Hampshire opened the Nash Stream Forest to ATVs in full knowledge that this violated the committee’s conditions.

- Section II-C of the 1989 Nash Stream Conservation Easement states New Hampshire reserved the right to preserve and manage certain specific uses in the Nash Stream Forest. Section II-C continues: “Uses which are not expressly reserved by the State shall be prohibited by the State.” New Hampshire did not expressly reserve ATVs as a permitted use; therefore, the state lacks jurisdiction over ATVs in the Nash Stream.<sup>3</sup>

In the fall of 2001, Phil Bryce, director of the Division of Forests and Lands, asked the US Forest Service if allowing ATVs into the Nash Stream Forest would violate the terms of the easement. The White Mountain National Forest bans ATVs because the noise and environmental damage they cause are incompatible with the purposes of the national forest. Tom Wagner, superintendent of the WMNF, approved the proposal as long as the ATV trail remained an internal road and not a connecting (or through) road.<sup>4</sup> Wagner ignored the wording of Section II-C of the easement.

- On November 8, 2001, Bryce established an ATV subcommittee, dominated by ATV supporters on the Citizens Advisory Committee, to “understand what the potential impacts of ATV use would be.”<sup>5</sup>

The subcommittee met once for ninety minutes, requested no data or studies, and refused to convene a second meeting. It ignored concerns about erosion, sedimentation, siltation, and degradation of water quality; impacts on native brook trout; habitat fragmentation; the effects of noise on wildlife and nonmotorized recreationists; and conflicts between ATVs and the traditional recreational uses explicitly protected by the Nash Stream Forest management plan. The subcommittee ignored the contribution of ATV emissions to climate change and the impacts of ATVs on climate-stressed species.

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<sup>2</sup> New Hampshire Legislature, “ATV Study Committee, Attachment One: Conclusions,” December 19, 2001; ATV Study Committee, “Attachment

<sup>3</sup> Nash Stream Forest Conservation Easement: State of New Hampshire to US Forest Service, August 4, 1989, Section II-C.

<sup>4</sup> Memo from Thomas Wagner, Forest Supervisor, White Mountain National Forest, to Paul Stockinger, Director, Lands and Minerals, Eastern Region, Forest Service, September 25, 2001.

<sup>5</sup> Memo from Phil Bryce, Director of Division of Forests and Lands, to George Bald, Commissioner of DRED, November 5, 2001; Minutes of the Nash Stream Advisory Committee, November 8, 2001

Peter Benson of The Nature Conservancy and David Publicover of the Appalachian Mountain Club submitted a dissenting report: “Such a decision should not be inappropriately legitimized by reference to a Study Committee that collected little information, identified no issues or concerns, and produced no written report that could help inform the Citizens Advisory Committee, DRED, the legislature, or the public. . . . In no way did the Committee’s work represent the in-depth analysis called for by Director Bryce.”<sup>6</sup>

The ATV subcommittee ignored Wagner’s conditional approval of interior ATV trails because it “felt it was premature to consider the interior trail and concentrated on the connecting trail.” At its February 13, 2002 meeting, the CAC approved amending the management plan to permit opening the Westside Trail to ATV use.<sup>7</sup> By opening a through-trail, the state violated the Forest Service’s interpretation of the Nash Stream easement. There is no letter from the US Forest Service approving this change.

#### FLAWED STUDIES USED TO JUSTIFY OPENING WESTSIDE TRAIL

• **2002: Baseline Studies:** Fish and Game biologist John Lanier said he needed one season without ATVs to gather baseline data. However, in May 2002, the New Hampshire Legislature voted to permit ATVs in the Nash Stream. At the CAC’s May 16, 2002 meeting, Chris Gamache, of the Bureau of Trails, assured the committee, “there are currently no air quality concerns,” even though, in the United States, ATVs emit several million tons of carbon annually.<sup>8</sup> DRED commissioner Bald approved the Westside Trail pilot project in June, and it opened to ATV traffic on August 1, 2002. Any baseline studies would have to be performed with ATVs whizzing by. Subsequent studies on the potential impacts of ATVs on wildlife and water quality lack credibility.

• **2007: State permanently opens Westside Trail:** On March 21, 2007, Commissioner Bald informed the chairman of the Nash Stream Citizens Committee he had approved the Westside Trail for another three years, effectively making it a permanent fixture. Bald added: “During this pilot period several studies were conducted to assess the impact of the ATV trail on wildlife, noise levels, and surface water. The final results were presented and discussed at the Nash Stream Forest Citizens Committee on January 25, 2007.”<sup>9</sup>

The minutes of that meeting, however, contradict Commissioner Bald’s claims. Phil Bryce reported that results of the three-year mammal study had been “inconclusive,” and “there were many problems with the study.”<sup>10</sup> There is no record of any subsequent mammal study.

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<sup>6</sup> Peter Benson and David Publicover, “Minority Report,” to the Nash Stream ATV Study Committee, February 7, 2002.

<sup>7</sup> Minutes of the Nash Stream Advisory Committee, February 13, 2002.

<sup>8</sup> Minutes of the Nash Stream Advisory Committee, February 13, 2002, and May 16, 2002.

<sup>9</sup> Letter from George Bald, Commissioner of DRED, to Representative Fred King, Chairman of Nash Stream Forest Citizens Committee, March 21, 2007

<sup>10</sup> Minutes of the Nash Stream Forest Citizens Committee, January 25, 2007.

The January 2007 minutes misleadingly stated that a bird study had concluded “ATV’s seemed to have little effect on birds. This study provided good baseline information for future surveys for monitoring or if conditions change or usage change.” In fact, the report on bird studies along the Westside Trail in 2002 and 2003, had stated: “A number of questions need to be answered before it will be possible to estimate the extent of ATV noise effects on breeding birds in the Nash Stream Forest.” It warned “these questions are of increasing importance to both public and private land managers. . . .” The state has never attempted to answer the questions of increasing importance.<sup>11</sup> From 2002-2021 the state never submitted an annual monitoring report on the impacts of the Westside Trail—as required by RSA 215.

### 2012-2013: KELSEY NOTCH TRAIL OPENING WAS ILLEGAL

•The 2002 amendment to the Nash Stream management plan permitted the Westside Trail, but expressly prohibited the development of any additional ATV trails on the Nash Stream Forest: “Beginning in the summer of 2002, about 7.6 miles of trail are now available for ATV travel utilizing [the Bordeaux Trail, the West Side Road, and the Andritz Trail]. . . . *No other roads or trails are open to ATVs on the property* (emphasis added).”<sup>12</sup>

† In 2012, the ATV lobby proposed the Kelsey Notch Trail. When the issue was introduced to the Nash Stream Citizens Committee on March 7, 2012, the minutes of that meeting stated: “The Nash Stream Plan would need to be revised in order for this project to move forward.”

† There is no record that DRED amended the plan to permit the Kelsey Notch Trail. DRED claimed the Citizens Committee approved the proposal, but that approval occurred in a meeting without a quorum and with no formal minutes.

† When WMNF Superintendent Tom Wagner signed off on allowing ATVs in the Nash Stream in 2001, he noted that connector trails, such as the proposed Kelsey Notch Trail, required Forest Service consent and participation. There is no record that such consent was sought or granted.

† In December 2012 the State Lands Management Team solicited agency comments on the Kelsey Notch Trail proposal in the northern sector of the forest. Jim Oehler of Fish and Game wrote on January 28, 2013:

The continued expansion of North Country ATV trail riding opportunities has increased the demand on law enforcement substantially. . . . This demands that the NHFG [New Hampshire Fish and Game] Law

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<sup>11</sup> Carol R. Foss, “A Preliminary Investigation of Impacts of ATV Activity on Breeding Birds in the Nash Stream State Forest, Coos County, New Hampshire, August 2006, 7, 2.

<sup>12</sup> State of New Hampshire, Department of Resources and Economic Development, “Nash Stream Forest Management Plan Updates and Revisions,” 2002, 50.

Enforcement Division stretch existing funds and manpower thinner and thinner. Additional enforcement efforts on the Nash Stream SF [state forest] or other new trails in the North Country will be marginal at best. *There doesn't seem to be a clear plan for meeting law enforcement needs on the expanded Nash Stream SF ATV trail system or other proposed North Country ATV trails. . . . ATVs were not a part of the original management plan. . . . [T]he NH Fish & Game Department will concur with the proposed trail expansions at Nash Stream SF only under the condition that the planned expansions go through an amendment process that effectively gains input from a broad array of Nash Stream stakeholders. The plan amendment should adequately address potential impacts to fish, wildlife, and their habitats, especially wetland and stream connectivity issues, an assessment of law enforcement and trail maintenance needs and how those needs will be met, and an assessment of alternative routes. [Failure to perform such a plan amendment] will likely lead to intense criticism by individuals and groups who are interested in the State Forest's other uses for which the property was originally acquired.*<sup>13</sup> (Emphasis added.)

† In April 2013, Phil Bryce, acting commissioner of DRED, approved the Kelsey Notch Trail pilot project, even though the 2002 management plan amendment that he helped write, explicitly forbade any new ATV trails in the Nash Stream without an additional plan amendment.

**The state did not secure the permission of the Forest Service, and it never conducted a formal assessment of potential impacts to fish, wildlife, and their habitats. It only conducted a coarse filter-fine filter analysis after CORD required it in December 2016. It ignored Oehler's warning that Fish and Game was unable to guarantee it could meet law enforcement needs.**

#### CORD ORDERS DNCR TO MONITOR KN TRAIL:

##### MONITORING PROTOCOLS SINCE 2017 ARE SUB-STANDARD

• **2015-2017:** On August 2, 2016, Fish and Game biologist John Magee wrote to Director Glenn Normandeau:

I was disappointed to see [on a visit to the Kelsey Notch Trail in November 2015] the road erosion problems on this trail and the resulting truckloads of sediment that were obviously entering the perennial streams there. This is a direct result of a lack of suitable erosion control on this OHRV [off-highway recreational vehicle] trail. . . . The erosion issue may be even worse now because the needed work still has not been done. **Therefore, it seems that**

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<sup>13</sup> Jim Oehler, New Hampshire Department of Fish and Game, to<sup>13</sup> "State of New Hampshire Department of Resources and Economic Development Division of Forests and Lands State Lands Management Team—Request for Review," January 28, 2013; State of New Hampshire Department of Resources and Economic Development, "Nash Stream Forest Management Plan," December 2017, 286–289

**this trail should be closed until a solid, signed agreement is in place and the erosion problems are fixed.** Furthermore, the agreement should include details about how often and when assessments will be done and by when erosion issues will be fixed. Again, the sediment coming off this road and entering perennial streams is TREMENDOUS.<sup>14</sup> (emphasis added)

The Bureau of Trails (BOT) allowed the Kelsey Notch Trail to remain open and unrepaired until the fall of 2017, when it trucked in 105 loads of gravel and fill (12 cubic yards per load) to replace the eroded gravel and soil.<sup>15</sup> Where did 1,260 cubic yards of eroding materials end up? No water quality testing has ever been performed.

• **2016 Conservation Groups Appeal to CORD:** On May 5, 2016, the Appalachian Mountain Club, the Forest Society, and The Nature Conservancy wrote to CORD: “Existing [ATV] Trails in Nash Stream [are] in Clear Violation of RSA 215-A: 42.” The three groups quoted the 2002 amendment to the management plan that opened the Westside Trail: “No other roads or trails are open to ATVs on this property.”<sup>16</sup>

Jeffrey Rose, Commissioner of DRED, writing to CORD in July, repeated the false claims about ecological assessments: “Baseline information was gathered beginning in 2002, including a bird survey, baseline noise study, surface water study, mammal track study, turtle survey, and the studies continued.”<sup>17</sup>

The inconclusive studies had not continued, and there had been no monitoring of the impacts of ATVs on the Westside Road in the fourteen years since it had opened in 2002. There had been no monitoring of the Kelsey Notch Trail since it had opened in 2013. The Bureau of Trails had conducted only one noise study in 2002. The minutes of the January 2007 Nash Stream Citizens Committee meeting reported that the director of the Bureau, told the committee: “Overall, if ATV’s stay below 25 mph the sound doesn’t register on the noise meter. The greater number of ATV’s, obviously increases the noise.” The Bureau never tested the noise of ATVs traveling in packs at speeds in excess of 25 miles per hour. On December 8, 2016, CORD ruled that the Trial could continue, but Nash Stream managers must submit annual monitoring reports.<sup>18</sup>

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<sup>14</sup> Memo from John Magee, Fish Habitat Biologist, to Glenn Normandeau, Director of New Hampshire Department of Fish and Game, August 2, 2016.

<sup>15</sup> Minutes of the Nash Stream Forest Citizens Committee, November 2, 2017.

<sup>16</sup> Letter from the Appalachian Mountain Club, The Nature Conservancy, and the Society for the Protection of New Hampshire Forests to Council on Resources and Development, May 5, 2016; “Nash Stream Forest Management Plan Updates and Revisions,” 2002, 50; State of New Hampshire, “Nash Stream Forest Management Plan,” December 2017, page 309 of 340 (pages are unnumbered).

<sup>17</sup> Jeffrey Rose, Commissioner of New Hampshire Department of Resources and Economic Development to Council on Resources and Development, July 6, 2016.

<sup>18</sup> State of New Hampshire, “Nash Stream Forest Management Plan,” December 2017, 329–337; Minutes of the Nash Stream Forest Citizens Committee, January 25, 2007. CORD, “Findings Regarding ATV/UTV Use in the Nash Stream Forest Adopted by CORD on December 8, 2016,” December 14, 2016.

• **Monitoring Occurs *After* Fall Trail Maintenance:** The Bureau of Trails scheduled Kelsey Notch monitoring visits *after* annual fall maintenance work had groomed over the sources of erosion from the trail to streams and wetlands. The 2020 monitoring report stated: “water diversion devices (rubber flaps) had been cleaned out. . . . however the rubber flaps were already filled with sedimentation again.”<sup>19</sup> Maintaining the pristine water quality required by trout necessitates *preventing* erosion, not *controlling* its impacts after the fact.

The 2020 monitoring team discovered phragmites, a nonnative invasive reed that almost certainly entered the Nash Stream on ATVs and trail maintenance vehicles. The Division of Forests and Lands requires its contractors and logging operations to wash their machines before entering the Nash Stream Forest, but the BOT, as of November 2021, did not.

New Hampshire Fish and Game treated the phragmites with glyphosate, a popular herbicide that according to the World Health Organization is a probable carcinogen. In June 2020, Bayer, the maker of Roundup, the most popular commercial glyphosate herbicide, paid \$9.6 billion to settle more than one hundred thousand lawsuits brought by people exposed to Roundup before learning they suffered from non-Hodgkin’s lymphoma.<sup>20</sup> **If the state banned ATVs in the Nash Stream, there would be no need to apply herbicides.**

In the 2020 monitoring report, Fish and Game wildlife biologist Jacob DeBow expressed “continued concern” over the impacts of noise pollution on wildlife: “we have concern about potential increases in flight behavior around active trails. . . . We have concern for how this may disrupt the normal cycles of wildlife within ear shot of the trail by interfering with breeding behavior, decreasing time spent foraging, and increasing time spent on alert and on edge as machines constantly pass by.”<sup>21</sup>

In 2017, Fish and Game biologist Will Staats had warned “should traffic become heavier on the trail in the future, it might preclude some animals from crossing or denning near the trail.” The Bureau of Trails successfully installed counters on Kelsey Notch for the first time in 2021, and they recorded 12,293 ATVs during the 137-day season. In 2022, Corridor C-North counters recorded 10,167 ATVs. On Saturday, May 28, 2022 there were 427 trips and 629 the following day, for a total of 1,056 trips in a two-day period.

The Kelsey Notch Environmental Compliance report of 2022, reiterating concerns recorded in the previous year’s report, stated: “Fish and Game continues to have concern regarding wildlife impact of ATV noise during high volume trail use days. This is of

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<sup>19</sup> Kelsey Notch Trail Environmental Compliance Report to CORD, December 2020.

<sup>20</sup> Kelsey Notch Trail Environmental Compliance Report to CORD, December 2020. “Probable Carcinogenicity of Glyphosate,” *British Medical Journal*, April 8, 2019, available at <https://www.bmj.com/content/365/bmj.l1613>; Tom Hals and Tina Bellon, “Bayer Reaches \$2 Million Deal over Future Roundup Cancer Claims,” Reuters, February 3, 2021.

<sup>21</sup> Kelsey Notch Trail Environmental Compliance Report to CORD, December 2020.

particular concern during spring and early summer months (May/June) when song birds are nesting/ fledging and mammals are in the early days of raising young.”<sup>22</sup>

#### ATVs IN NASH STREAM VIOLATES 1989 EASEMENT & RSA 215

• **August-November 2020:** On August 20, 2020, AMC, TNC, and SPNHF advised CORD that Kelsey Notch is incompatible with existing, low-impact forms of recreation and the trail could cause further fragmentation of Nash Stream Forest wildlife habitat.<sup>23</sup> These are issues that the Nash Stream Forest Technical Team has raised in the past, but DRED/DNCR repeatedly ignored.

In November 2020, AMC, TNC, and SPNHF submitted to CORD a legal opinion from Attorney Ryan S. Duerring of the Boston legal firm of Ropes and Gray. It stated:

Based on my research of relevant New Hampshire law and regulations applicable to snowmobiles, all-terrain vehicles (“ATVs”) and other off-highway recreational vehicles (“OHRVs”), I conclude that the legal opinions set forth in the [2001 USFS] Opinion regarding the permitted use of ATVs on the tract of forest land known as the “Nash Stream Tract” and subject to the Easement Deed are inconsistent with applicable New Hampshire law.

#### • State and Forest Service Refuse Revisit 2001 Nash Stream Easement

**Interpretation:** In January 2022, the chairman of the Nash Stream Citizens Committee requested that DNCR Commissioner Sarah Stewart seek a legal opinion from the Forest Service regarding the meaning of Section II-C of the 1989 Nash Stream Forest easement. Stewart denied the request. A couple of days later, AMC, TNC, and SPNHF submitted a letter to the commissioner supporting the request for a legal opinion from the Forest Service, and thirty-five concerned citizens sent her a similar request. She refused. On March 8, 2022 WMNF Superintendent Derek Ibarguen refused to revisit the legality of the 2001 Forest Service decision.<sup>24</sup>

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<sup>22</sup> Department of Resources and Economic Development RSA 215:A-42 & A-43. “ATV and Trail Bike Operation on State Land Coarse and Fine Filter Worksheet: Kelsey Notch ATV/UTV Trail,” no date, but probably 2017; Kelsey Notch Trail Environmental Compliance Report to CORD, December 2021; Kelsey Notch Trail Environmental Compliance Report to CORD, December 2022.

<sup>23</sup> Letter from the Appalachian Mountain Club, The Nature Conservancy, and the Society for the Protection of New Hampshire Forests to CORD, August 20, 2020.

<sup>24</sup> Letter from the Appalachian Mountain Club, The Nature Conservancy, and the Society for the Protection of New Hampshire Forests to Sarah Stewart, Commissioner of DNCR, February 7, 2022; Letter from Derek Ibarguen, Superintendent of WMNF, to Kris Pastoriza, March 8, 2022