



**THE STATE OF NEW HAMPSHIRE**  
**DEPARTMENT OF TRANSPORTATION**



*Victoria F. Sheehan*  
*Commissioner*

*William Cass, P.E.*  
*Assistant Commissioner*

March 4, 2016

Mr. Patrick Bauer  
Division Administrator  
New Hampshire Division  
Federal Highway Administration  
James C. Cleveland Federal Building  
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The City of Claremont is requesting a waiver to the requirements of 23 USC 217, which prohibits motorized vehicle use on bicycle and pedestrian walkways built with Transportation Enhancement funds. The purpose of this letter is for NH Department of Transportation to provide FHWA NH Division Office a recommendation in accordance with FHWA's "Framework for Considering Motorized Use on Non-motorized Trails and Pedestrian Walkways under 23 U.S.C. 217". Under this framework, NHDOT is expected to provide the FHWA Division Office a recommendation of whether a waiver should be approved for the motorized vehicle use of trails and pedestrian walkways in accordance with 23 USC 217.

In 1993 Transportation Enhancement project 11911, FHWA project number STP-TE-X-000S(081) was approved for the purchase and preservation of an abandoned rail corridor in the City of Claremont. Once purchased by the Department, ownership of the abandoned rail corridor was conveyed to the City of Claremont. Although the original application called for the building of a bicycle and pedestrian trail on the corridor, funds were only available for the purchase of the corridor.

Between the time the corridor was purchased and spring 2014, the corridor was used by pedestrians, bicyclists, ATV users, snowmobilers and others. Maintenance of the corridor was handled by ATV and snowmobile groups, without any local financial investment. Funding for maintenance of the corridor came through many sources, including the NH Department of Resources and Economic Development (DRED). DRED funding sources included both state grants and FHWA grants through the Recreational Trails Program.

Based on an inquiry made to the FHWA NH Division Office in late 2013, and followed up by NHDOT with the City of Claremont, in the spring of 2014 the City banned the ATV (motorized) use of the trail. This was based on the FHWA assertion that 23 USC 217 prevents ATV (motorized) use on bicycle and pedestrian walkways. The City of Claremont does not believe that 23 USC 217 should apply to this situation. Transportation Enhancement funds were not used to build a bicycle/pedestrian walkway, only to acquire the existing abandoned rail corridor for the purpose of preserving it for future use. Nevertheless, the City has also gone through the detailed process of reviewing and addressing all of the factors outlined in the FHWA "Framework for Considering Motorized Use on Non-motorized Trails and Pedestrian Walkways under 23 U.S.C. 217". This detailed review is contained in the attached "Request for Exception from 23 U.S.C. Section 217 to Allow Motorized Vehicles on 1.84 Mile Segment of the City's Rail Trail" document, which is dated June 3, 2015. This shows the City thoroughly addressed each of the framework criteria that FHWA outlines must be addressed for an exception to be considered under 23 USC 217.

### NHDOT Review of this Request

First, NHDOT reviewed the background of the federal regulations as they were applied by FHWA, and Claremont's legal interpretation and opinion of the regulations. At the time this project was approved and funded, there were 12 eligible Transportation Enhancement Activities in accordance with 23 USC 101(a)(35). Two eligible activities that impact this request are:

1. **Provision of facilities for pedestrians and bicycles**. Examples include new or reconstructed sidewalks, walkways, or curb ramps; wide paved shoulders for non-motorized use, bike lane striping, bike parking, and bus racks; construction or major rehabilitation of off-road shared use paths (non-motorized transportation trails); trailside and trailhead facilities for shared use paths; bridges and underpasses for pedestrians and bicyclists and for trails.
2. **Preservation of abandoned railway corridors (including the conversion and use of the corridors for pedestrian or bicycle trails)**. Examples include acquiring railroad rights-of-way; planning, designing, and constructing multiuse trails; developing rail-with-trail projects.

Source: [http://www.fhwa.dot.gov/environment/transportation\\_enhancements/teas.cfm](http://www.fhwa.dot.gov/environment/transportation_enhancements/teas.cfm).

Then, NHDOT reviewed information provided by the City of Claremont, which includes Department records, and a review of FHWA FMIS records as well to research if it could be determined that this project fell under the category of Preservation of abandoned railway corridor, and not specifically the Provision of Pedestrian and Bicycle Facilities.

1. Funds spent were for purchase of the Corridor as demonstrated in Exhibits E, F, H, I, J of the City's waiver request. No TE funds were spent for the construction of any trails or walkways.
  - a. Exhibit E is a bill from NHDOT to the City of Claremont noting Engineering and Right-of-Way expenses in total, with Claremont's share broken out. No construction spending is identified. It is also noted in this billing that the federal share of these costs are \$258,011.64.
  - b. A review of FHWA FMIS records for the project reflect the same \$258,011.64 federal expenditures.
  - c. The other exhibits are various NHDOT, FHWA TE Clearinghouse and LPA Agreement documents that reference that an abandoned corridor was purchased, and no funds were spent for the construction of a trail or walkway.
2. It is also noted from the FHWA website that "Although TE projects must relate to surface transportation, nothing in Federal law prohibits TE funded trails from allowing recreational use. The restriction in 23 U.S.C. 217(i) only applies to bicycle projects, not to other uses."

Source: [http://www.fhwa.dot.gov/environment/transportation\\_alternatives/resources/hist\\_pres/](http://www.fhwa.dot.gov/environment/transportation_alternatives/resources/hist_pres/)



In addition, the Department reviewed other factors and issues that the City of Claremont researched and considered in the preparation of their waiver and offers the following observations:

1. Based on Sullivan County ATV club records (Exhibit M), Recreational Trail Program funds were approved and administered through FHWA by NH DRED were granted to the ATV group and used for the maintenance of this trail. If motorized use of this abandoned rail corridor was not permitted, FHWA could have denied the use of Recreational Trail Program funds. It is reasonable to expect the City believed the approval and use of these federal funds confirmed motorized use of the corridor.
2. Motorized use of the trail is consistent with local plans and the Statewide Trails Plan for NH. The section in question abuts and connects to other sections of the same abandoned corridor where motorized use continues to be permissible. This section provides an important link and connectivity to adjacent local, regional and statewide facilities.
3. Within Exhibit N of the waiver request, a memo from FHWA dated April 7, 2014 notes the option of offering a trail or other non-motorized transportation network that provides functionally equivalent transportation options in the general corridor. A review by the Department of the roadway corridor that parallels most of the abandoned rail corridor notes the majority presence of sidewalks for pedestrian travel and sufficient shoulders for bicycle travel.
4. The Department also noted that the City of Claremont is amenable to a trial period prior to a final waiver determination being made, and that monitoring of the corridor would continue through a trial period. The City also understands that any exception granted may be revoked by City or FHWA if circumstances should change.
5. Historically, there has been motorized and non-motorized use of the rail for 20 years since the corridor was acquired and preserved without operational and safety concerns, and with ongoing maintenance and upkeep by motorized user groups.

#### **Results of this Review and Department Recommendation**

Financial records maintained by NHDOT and FHWA support Claremont's position that the purpose of the project is for the acquisition and preservation of a rail corridor, and not explicitly for the construction of a bicycle and pedestrian facility. Therefore Claremont's opinion that 23 USC 217 does not apply seems reasonable. There is no question that the use of Transportation Enhancement funds was eligible and appropriate. In addition, the City has thoroughly addressed all of the factors outlined in the FHWA "Framework for Considering Motorized Use on Non-motorized Trails and Pedestrian Walkways under 23 U.S.C. 217".

FHWA approved the use of Recreational Trail Program funds for the maintenance of the same rail corridor for motorized vehicle usage. If motorized usage of the corridor was not permitted, then FHWA should not have approved the use of RTP funds.

As noted in FHWA guidance posted on their website, there is nothing in Federal law that prohibits Transportation Enhancement funded trails from allowing motorized and recreational use unless there is construction of bicycle and pedestrian facilities, which was not the case with this project.

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In accordance with options provided by FHWA to the City of Claremont, the Department has noted that there are alternative transportation network options within the same general area that provide for bicycle and pedestrian travel.

Based on the review of the waiver request submitted to NHDOT by the City of Claremont, it is our recommendation that FHWA conditionally approve the waiver request as submitted by the City. NHDOT feels that a 2-3 year trial period, with monitoring and documentation of use and concerns is appropriate. At the conclusion of this trial period, if FHWA determines that the waiver should be revoked due to documented operational, safety or other safety concerns unable to be satisfactorily addressed at the local level, then the City should accept that decision.

Sincerely,



Victoria F. Sheehan  
Commissioner

cc: William Watson Jr, NHDOT Administrator – Bureau of Planning and Community Assistance  
Guy Santagate, City Manager, Claremont NH  
Jane Taylor, City Solicitor, Claremont NH