

Steve Schneider

From: Alex Bernhard <aabernhard@comcast.net>
Sent: Friday, April 26, 2013 1:57 PM
To: Steve Schneider
Cc: Doug Smith
Subject: Update
Attachments: 4.22.13 If Gold to Sikora.pdf; ATT549859.htm

Steve:

I am attaching for your and your board's information a recent letter sent by our legal counsel to the FHWA. The essence of this letter is that even if NHDOT succeeds in their current efforts to terminate the Trail's historic status, they would still be barred from removing the bridge because of the impact such a removal would have on the Trail's status as a recreational asset.

The upshot of this is likely to be that NHDOT is going to spend the summer trying to terminate the historical status and at the end not move the project any closer to completion.

I continue to think that the best way of getting something done is to work out an agreement between our group and your board. I am available by phone and email if there is any interest.

Alex

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April 22, 2013

Mr. Jamison S. Sikora
Environmental Projects Manager
FWHA New Hampshire Division
Federal Building Suite 2200
54 Pleasant Street
Concord, NH 03301

Re: Enfield X-A001(087) 12967B; Main Street/Northern Rail-Trail Project ("Project")

Dear Mr. Sikora:

I have received your December 17, 2012 letter stating that the New Hampshire Department of Transportation ("NHDOT") has decided to "update" the Northern Railroad Historic District Area Form. Based on public records produced by the State of New Hampshire,¹ the Friends Groups are concerned that this "updating" is a pretext for stripping the Northern Rail Trail's National Register eligibility in order to circumvent the Bridge's Section 4(f) protection.²

Regardless of the Northern Rail Trail's historic status, however, the Northern Rail Trail is protected Section 4(f) property as a recreation area owned and used by the public. The proposed "updating" therefore would not provide a legal basis to destroy the Bridge. Rather, it would unnecessarily delay the Project and inappropriately divert FHWA and NHDOT funds that would be better spent maintaining and repairing New Hampshire roads.

The Northern Rail Trail is protected "Section 4(f) property," defined by 23 C.F.R. 774.17 as "publicly owned land of a public park [or] recreation area... of national, State, or local significance." The Northern Rail Trail is state-owned property, open to the public for

¹ State of New Hampshire Intra-Department Memorandum from Kevin Nyhan to Alex Vogt (Dec. 17, 2012) (attached) ("As written, there may be no legal basis for the defense of the DOT's proposed action (Alternative 2A). ... DOT could proceed with updating the District Area Form prepared in the 1990s for the Northern Railroad. If the update resulted in the railroad no longer being eligible for listing in the National Register of Historic Places, there would no longer be a Section 4(f) use of the railroad associated with Alternative 2A.")

² As discussed in my November 12, 2012 letter to you, the "Friends Groups" are the Friends of the Northern Rail Trail in Merrimack County and the Friends of the Northern Rail Trail in Grafton County, and the "Bridge" is the historic railroad bridge on the Northern Rail Trail in Enfield, New Hampshire.

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recreation.³ Officials with jurisdiction (i.e., the New Hampshire Bureau of Trails) have affirmatively determined that the Northern Rail Trail is intended to be a recreational property.⁴

The Bridge is a material part of the Northern Rail Trail recreational area, and therefore cannot be “used” because there is a “feasible and prudent avoidance alternative.”⁵ As explained in my November 12, 2012 letter to you, Alternative 3—which would preserve the Bridge—must be selected because it avoids the “use” (i.e., destruction) of the Bridge.

Alternative 2A is prohibited not only because Alternative 3 is a feasible and prudent avoidance alternative,⁶ but also because Alternative 2A would *not* have a *de minimis* impact.⁷ Contrary to the assertion in the Draft Environmental Study/Categorical Exclusion & Draft Section 4(f) Evaluation (“Draft Report”)⁸ that the Project “qualifies for a finding of *de minimis* impact on the Northern Rail Trail recreational facility,”⁹ all credible evidence shows that Alternative 2A would significantly and adversely affect recreational interests.¹⁰

³ See FWHA, Section 4(f) Policy Paper (Jul. 20, 2012), at 5, available at <http://www.environment.fhwa.dot.gov/4f/4fpolicy.pdf> (“Section 4(f) requires consideration of ... [p]arks and recreational areas of national, state, or local significance that are both publicly owned and open to the public.”).

⁴ See, e.g., NH Division of Parks and Recreation, <http://www.nhstateparks.org/explore/bureau-of-trails/northern-recreational-trail.aspx> (last visited Mar. 12, 2013) (identifying the Northern Rail Trail as a “recreational” trail and permitting uses including hiking, biking, horseback riding, Nordic/snowshoeing, mushing, and snowmobiling).

⁵ 23 C.F.R. 774.3(a)(1).

⁶ Even if Alternative 3 were construed not to be a feasible and prudent avoidance alternative, Section 4(f) “least overall harm” analysis would call for preserving the Bridge’s recreational value, for the same reasons that apply to the Bridge’s historic value, as discussed in my November 12, 2012 letter to you.

⁷ 23 C.F.R. 774.3(b).

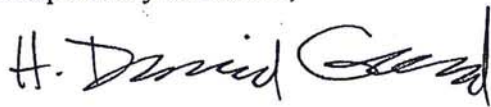
⁸ While the Draft Report title indicates that this project is a “Categorical Exclusion,” this appears to be a hold-over title from before the larger Enfield Shaker Bridge project was divided into two phases (State Project Nos. 12967 and 12967B). See, e.g., Letter from William Hauser, NHDOT, to Kathleen Laffey, FHWA (Aug. 18, 2005) at 1; Letter from William O’Donnell, FHWA, to David Brillhart, NHDOT (Sept. 29, 2005) at 1.

⁹ Draft Report at 25. The sole support offered for this assertion is a January 4, 2012 letter from Chris Gamache, Chief of the NH Bureau of Trails, to Jonathan Evans, NHDOT (Exhibit N of the Draft Report), which contains a bald statement that directly contradicts other correspondence from Mr. Gamache. Notably, including February 7, 2011 and April 19, 2011 letters from Mr. Gamache to Alex Vogt, NHDOT, state, respectively, that removal of the Bridge “could cause significant safety issues” and preservation of the Bridge would “provide a safer location for an at-grade crossing”).

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Rail trails are an important public resource, providing significant historic *and* recreational values. These values motivated the enactment of laws that protect the Northern Rail Trail and the Bridge. Rather than attempting a fatally-flawed end run around Section 4(f) compliance, FHWA and NHDOT should issue a Final Section 4(f) evaluation identifying Alternative 3 as the preferred alternative.

Respectfully submitted,



H. David Gold

Attachment

cc: Jonathan Evans, Environmental Programs Manager, NHDOT (w/ attachment)
Elizabeth Muzzey, Director, NHDHR, and NH SHPO (w/ attachment)
Andrew Raddant, Regional Environmental Officer, DOI (w/ attachment)
Charlene Dwin Vaughn, Assistant Director, ACHP (w/ attachment)

¹⁰ See, e.g., Letter from L. Keniston to A. Vogt (Dec. 24, 2009) (Alternative 2A's addition of an at-grade crossing would "increase the risk to trail users" and "materially damage the grade continuity that is a key element of this and other rail trails"); Letter from C. Martin, NH Rail Trails Coalition, to J. Evans (Sept. 29, 2012) ("removal of the railroad bridge [as described by Alternative 2A] and fill will significantly degrade the rail trail users' experience").

**STATE OF NEW HAMPSHIRE
INTRA-DEPARTMENT COMMUNICATION**

DATE December 17, 2012

FROM Kevin T. Nyhan
Administrator

AT (OFFICE)
Department of Transportation
Bureau of Environment

SUBJECT Enfield ,X-A001(087) ,12967B
FHWA Review of Draft Section 4(f) for Legal Sufficiency

TO Alex Vogt, PE
Project Manager

On Thursday, November 29, 2012, Jill Edelman, Jon Evans and I participated in a conference call with Jamie Sikora and Tracy White, FHWA. Ms. White is an attorney with FHWA headquarters and provided feedback on the Draft Categorical Exclusion/Draft Section 4(f) Evaluation. The Department (DOT) received comments on the draft document from the US Department of the Interior, Advisory Council on Historic Preservation, NH Division of Historical Resources, Friends of the Northern Rail Trail, NH Rail Trail Coalition, NHDOT Bureau of Rail and Transit, Town of Enfield, and the Upper Valley Lake Sunapee Regional Planning Commission. After much discussion, Ms. White indicated that from a legal perspective, she has the following concerns with the proposed project as presented in the draft document.

1. The administrative record includes an internal DOT memorandum identifying areas for clarification regarding the safety discussion of the proposed design (Alternative 2A), versus what is discussed as part of Alternative 3. It is difficult to make an assertion that the project meets the "Purpose and Need" by improving safety when an internal document raises these concerns. While from a design perspective we feel we could easily address the safety concerns raised, if DOT continues to move forward with Alternative 2A, a response to the internal memorandum needs to be developed and included in the administrative record.
2. As written, there may be no legal basis for the defense of the DOT's proposed action (Alternative 2A). As such, DOT would need to select one of the alternatives that would not result in a Section 4(f) use, which currently appears to be limited to Alternatives 3, 4, and 5 ("avoidance alternatives"). Conversely, DOT could proceed with updating the District Area Form prepared in the 1990s for the Northern Railroad. If the update resulted in the railroad no longer being eligible for listing in the National Register of Historic Places, there would no longer be a Section 4(f) use of the railroad associated with Alternative 2A.
3. If an argument could be made that Parcel 15 is a recreational resource, Alternative 2A becomes more viable since both Alternative 2A and 3 would then result in Section 4(f) "uses" of property. In this case, the test for selection of an alternative would be a matter of selecting the alternative that results in "least overall harm," not one that is an "avoidance alternative." The argument to identify Parcel 15 as a Section 4(f) resource would need to include some solid indication from the "officials with jurisdiction" that Parcel 15 is intended to be a recreational property (i.e. doing so is identified in the town's Master Plan or other planning document).

If you have questions, or would like to discuss further, please let me know. Thank you.

KTN:ktn

c.c. Jill Edelman (via E-mail)
Jon Evans (via E-mail)
Jamie Sikora (via E-mail)

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