

circumstances or information that would warrant the undertaking of a supplemental environmental analysis at this late date. Furthermore, the court in *FAST* only remanded this proceeding to the Board to deal with procedural matters related to the historic review process under section 106. Therefore, SEA need not reconsider the adequacy of its NEPA review here.

SEA does not believe that a title search need be undertaken as part of the section 106 process. The Board cannot compel post-abandonment use of a rail line for non-transportation purposes. See *Hayfield Northern*. Therefore, the ownership of the property after an abandonment is consummated is not affected by the Board's action and not part of the Board's section 106 review.

The Board cannot extend the assessment of adverse effects to areas in Cumberland and York Counties that are not on the line because this proceeding is necessarily limited to the rail line proposed for abandonment. See *Implementation of Environmental Laws*, 7 I.C.C.2d 807, 828–29 (1991).¹²

3. Appropriate section 106 mitigation measures. As stated in the October 2002 Notice at 6–7, the Board's ability to protect historic properties is very limited. Essentially, documentation of the historic resources (taking photographs or preparing a history) before they are altered or removed is the only form of nonconsensual mitigation that the Board can require. The Board does not have the power to force a railroad to sell (or donate) its property, or impose a restrictive covenant upon the railroad's transfer of its property, as a condition to obtaining abandonment authority. Any attempt to either preclude or force a railroad to sell (or donate) property for a non-rail purpose, as a condition to obtaining abandonment authority, would plainly constitute an unauthorized taking under the Fifth Amendment. See *Implementation of Environmental Laws*, 7 I.C.C.2d at 828–29, and cases cited therein.

The October 2002 Notice requested comment on appropriate historic preservation mitigation measures, including comments on the measures specified in a proposed draft MOA for this line developed earlier, and suggestions for additional or alternative

measures, as well as information regarding the current condition of the rail line. As stated in the October 2002 Notice at 3, the earlier proposed draft MOA would have provided for photographic documentation of certain bridges, and the development of a public, interpretative display in the form of a 6–8 minute video outlining the history of the Enola Branch.

Comment. NS commented that it has complied with the terms of the earlier proposed draft MOA. NS states that the five bridges that the PUC has ordered to be removed for safety reasons have been recorded to state standards, and that NS has paid \$15,437 to the Pennsylvania Railroad Museum to develop a video and exhibit of the rail line. NS states that the settlement agreement between Conrail and the Townships should also be considered a mitigation measure.

Comment. PennDOT states that mitigation should provide for documenting a sampling of the bridges rather than all of the bridges on the line. PennDOT also suggests that additional outreach and preservation should be conducted, such as publishing a more comprehensive history of the line and providing money to municipalities to take over the maintenance of as many bridges as possible.

Response. As discussed in more detail in Section III and the proposed draft MOA, the Board, the SHPO, and NS will work together to develop a list of appropriate representative structures to be documented. Documentation of these representative structures will serve to document the historic nature of the line as a whole. Moreover, NS will be required to conduct archival research and to consolidate all information—documentation and the results of the archival research—into one cohesive document to be archived at the SHPO's office. The mitigation in the proposed draft MOA constitutes a marked change from the first proposed draft MOA, which treated only six bridges as historic, not the line as a whole, and did not require archival research. As stated above, NS's settlement agreements with the Townships and with PennDOT provide for local maintenance of structures that would remain intact. However, because the Board's ability to impose mitigation for the protection of historic resources is limited, such agreements, if any, must be entered into voluntarily and are not within the scope of this section 106 process. As discussed in Section III below, SEA believes that the archival research discussed above and documentation of the line to

Pennsylvania state standards¹³ using representative structures on the Enola Branch is sufficient and that, given the mitigation that NS has already undertaken, a more comprehensive history of the line need not be prepared.¹⁴

4. Methods or outlets for publicizing a proposed MOA. Comment.

Commenters recommend widespread notification and public participation in the section 106 process, including press releases and public meetings.

Response. To ensure widespread notice and opportunity for public participation the Board placed all comments received in response to the October 2002 Notice on the Board's Web site, and informed all interested parties of the availability of the comments on the Web site. SEA is sending this current Notice to the Parties (October 2003 Notice) to all 211 parties on the service list for this proceeding, as well as publishing the October 2003 Notice in the **Federal Register** and posting it on the Board's Web site. The Board has also issued a press release describing the contents of the October 2003 Notice.

As discussed in more detail below, SEA will accept written comments on the attached proposed draft MOA, and will also hold a public meeting before the close of the comment period to enable interested parties to provide oral comments. As a result, there will be ample opportunity for public participation and broad notice of the continuing section 106 process here.

Comment. PennDOT states that public input is required while developing the proposed draft MOA and before deciding how to resolve adverse effects of the undertaking, rather than after the proposed draft MOA is developed. PennDOT also states that the Board should provide the documentation regarding the section 106 process to the public in the manner set forth in 36 CFR 800.11(e).

Response. The October 2002 Notice provided members of the public with the opportunity to comment on all aspects of this proceeding, including ways to mitigate adverse effects. All comments received were placed on the Board's Web site, and the proposed draft MOA is also being distributed for public comment and placed on the Board's Web site. Moreover, as discussed in

¹² The Enola Branch rail line is part of a larger rail corridor that extends into Cumberland and Dauphin Counties. Although the proceeding before the Board and this section 106 process pertains only to the right-of-way described above in Section II(B), it should be noted that the SHPO has determined that the portions of the rail corridor in Cumberland and Dauphin Counties are eligible for listing in the National Register.

¹³ Pennsylvania state standards are outlined in the guidance document titled "How To Complete the Pennsylvania Historic Resource Survey Form," available from the SHPO, and require the submission of a photo/site plan sheet, a data sheet, and a narrative sheet.

¹⁴ As indicated above, NS has already paid to the Pennsylvania Railroad Museum \$15,437 to fund an exhibit or video of the history of the Enola Branch.