

detail below, SEA will host a public meeting to receive additional public input on this proceeding in Quarryville, Pennsylvania on November 19, 2003. Thus, SEA believes that ample opportunity has been provided to the public to participate in the section 106 process here.

Section 800.11(e) of 36 CFR outlines the documentation that must be made available to the public when an agency determines that an action will have an adverse effect on historic properties. SEA believes that all of the required documentation already has been prepared and made publicly available.<sup>15</sup>

#### 5. Other concerns.

*Comment.* Several parties commented that they are concerned about public safety at the road crossings along the right-of-way of the line, and advocated bringing the section 106 process to a close as soon as possible. Commenters also state that the PUC issued an order addressing existing safety issues, which has been stayed pending the outcome of this section 106 process.

*Response.* SEA acknowledges the public safety concerns expressed by the commenters. SEA is working to complete the section 106 process as expeditiously as possible, pursuant to the relevant regulations and procedures.

*Comment.* FAST states that NS's plans regarding the line should be made known.

*Response.* In its reply comments at 50, NS directly responded to FAST's request to detail its plans regarding the line. SEA has made all comments received to date, including NS's reply comments, available to all on the Board's Web site. NS's response is as follows:

[NS] now intends to retain that portion of the Line between Milepost 0.0 at Parkesburg, PA and Milepost 1.5 at Lenover, PA, except for

Amtrak's bridge, for use as the Parkesburg Industrial Track. Conrail sold the Line between Milepost 1.5 at Lenover, PA and Milepost 4.0 near the Lancaster County/Chester County Line to SEPTA. [NS] intends to honor the Settlement Agreements with PennDOT and the Townships pertaining to disposition of the Line between Milepost 4.0 near the county line and Milepost 27.0 near Safe Harbor, PA to the Townships and with respect to the bridges to be removed. [NS] intends to retain possession of the property between Milepost 27.0 near Safe Harbor, PA and Milepost 33.9 at Port, PA in connection with its operation of, and in order to protect, the Port Road Branch. It may retain or place excepted track on all or a portion of this Line.

*Comment.* FAST states that the PUC order approving the settlement agreement with the Townships conflicts with the section 106 process because the order does not include mitigation, does not incorporate the viewpoints of all the consulting parties, and was formulated prior to the issuance of the Keeper's determination and the court's decision. FAST states that NS should acknowledge that the order may need to be modified or vacated depending on the outcome of the section 106 process.

*Response.* The requirements of NHPA and the ACHP's regulations apply to the abandonment action pending before the Board. Post-abandonment use of the line's right-of-way is outside of the Board's jurisdiction. The settlement agreement is thus outside the Board's abandonment process, including section 106.

*Comment.* NS argues that the section 106 process does not apply to rail line abandonment proceedings, because rail abandonment proceedings and the railroad's post-abandonment activities are not Federal undertakings for the purposes of section 106 review, as specified at 16 U.S.C. 470w(7). NS argues that a project must be Federally funded in whole or in part to be considered a Federal undertaking, and notes that in notice of exemption proceedings, such as this abandonment, Federal funding is not involved. Furthermore, according to NS, in notices filed pursuant to a class exemption, the Board's responsibilities are ministerial in nature, because the exercise of the class exemption must be allowed so long as the statutory and regulatory criteria are met. NS also states that the Board's jurisdiction over a rail line ceases as soon as an abandonment is consummated, and that the Board cannot control a railroad's post-abandonment activities regarding the rail line, which is private property. Therefore, NS argues, the section 106 process causes unnecessary delay, and the Board should discontinue the section 106 process in this proceeding

and in all other rail line abandonment proceedings.<sup>16</sup>

*Response.* It is well settled that section 106 of NHPA applies to all rail line abandonment proceedings. See *Implementation of Environmental Laws*, 7 I.C.C.2d at 826; *Illinois Commerce Comm'n v. ICC*, 848 F.2d 1246, 1260–61 (D.C. Cir. 1988) *cert. denied*, 488 U.S. 1004 (1989). Indeed, in *FAST*, the court specifically found that rail abandonment proceedings, including this particular notice of exemption proceeding, were subject to section 106. See 252 F.3d at 251. An undertaking for the purposes of NHPA clearly includes actions that require Federal approval, not simply those that are federally funded. The ACHP's regulations implementing NHPA define an undertaking covered by NHPA as embracing "a project, activity, or program \* \* \* requiring a Federal permit, license or approval." See 36 CFR 800.16(y). A railroad must obtain Board authority under 49 U.S.C. 10903 or 49 U.S.C. 10502 to abandon a common carrier line of railroad such as the Enola Branch. Moreover, use of a class exemption for an abandonment can be revoked for a particular line, when the STB finds that regulation is necessary to carry out the national rail transportation policy. 49 U.S.C. 10502(d). Thus, section 106 applies to notice of exemption abandonment proceedings such as this abandonment.

*Comment.* FAST states that the comments provided by the SHPO and the ACHP on the October 2002 Notice prior to its issuance should be made public.

*Response.* The October 2002 Notice incorporated the comments that the SHPO and the ACHP provided. The written comments provided by the SHPO and the ACHP prior to the issuance of the October 2002 Notice have been placed in the public docket for this proceeding and thus are available to the public.

## II. Next Steps in the Section 106 Process

### A. Public Meeting

The Board will hold a public meeting to solicit oral comments on this case and the attached proposed draft MOA. The meeting will be held at the Hoffman Building, located at the Solanco Fair Ground in Quarryville, PA, on

<sup>15</sup> Section 800.11(e) states that documentation of a finding of adverse effect "shall include: (1) A description of the undertaking specifying the Federal involvement, and its area of potential effects, including photographs, maps, and drawings, as necessary; (2) A description of the steps taken to identify historic properties; (3) A description of the affected historic properties, including information on the characteristics that qualify them for the National Register; (4) A description of the undertaking's effects on historic properties; (5) An explanation of why the criteria of adverse effect were found applicable or inapplicable, including any conditions or future actions to avoid, minimize or mitigate adverse effects; and (6) Copies or summaries of any views provided by consulting parties and the public." Here, the October 2002 Notice described the undertaking, specified the area of potential effects, described the steps taken to identify historic properties, described the determination of eligibility of the line for inclusion on the National Register, and discussed the finding of adverse effect. As discussed above, all comments received in response to the October 2002 Notice have been made publicly available.

<sup>16</sup> NS has subsequently indicated that because this argument was raised in comments to the October 2002 Notice rather than a formal motion before the Board, it is not requesting a response from the Board on this matter at this time. SEA's response is provided here to clarify SEA's position on the section 106 process for this proceeding, and should not be construed as a formal Board response to NS's argument.