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## FRIENDS OF THE EEL RIVER

June 7, 2011

Board of Directors  
North Coast Railroad Authority  
419 Talmage Road Suite M  
Ukiah, CA 95482

### **RE: Notice of Intent to Sue**

Dear Directors and Decision-makers for the North Coast Rail Authority:

This letter provides written notice that the Friends of the Eel River (“FOER”) intends to file a lawsuit should the North Coast Rail Authority (NCRA) certify the Final Environmental Impact Report (“FEIR”) for the NCRA Russian River Division Freight Rail Project (“Project”), and approve the Project. We understand the NCRA may take these actions as soon as June 8, 2011, at its next regularly scheduled meeting of its Board of Directors. We write in a final effort to stop the NCRA from taking these actions, as FOER believes they fail to comply with state and federal law, are ill-advised, and are likely to result in serious harms to the wild and scenic Eel river and its fisheries.

We note that the agenda for the June 8, 2011 meeting of the NCRA Board of Directors, posted to the NCRA website on Friday June 3, contains a reference at Item H, under the heading “Staff Report,” to “Certification of the Final Environmental Impact Report.” Because this item was not properly listed as the subject of a proposed Board action, if the NCRA were to vote during this meeting to certify the FEIR, it would be doing so in clear violation of the letter and spirit of the Brown Act’s requirements for timely public notice.

We request the NCRA not certify the FEIR, not approve the Project and not issue a Notice of Determination, which triggers a 30-day statute of limitations for filing a lawsuit pursuant to the California Environmental Quality Act (CEQA). We also request the NCRA not take any steps toward furtherance of the Project, including but not limited to, approval of the Novato Agreement amending the Consent Judgment entered by the County of Marin Superior Court or the Operations Agreement with the Sonoma Marin Area Rail Transit (SMART).

The grounds for our lawsuit include, *inter alia*, that the FEIR for the Project is deficient with respect to the Project’s adverse environmental impacts and does not comply with the requirements of CEQA. FOER commented on the Draft Environmental Impact Report (“DEIR”), identifying numerous errors. We have reviewed the FEIR and do not believe that the FEIR has remedied these legal defects.

The informational deficiencies of the FEIR with respect to adverse environmental impacts of the Project include but are not limited to the following:

### **Railroad Viability and Authority**

The FEIR fails to disclose NCRA's capacity to fund this Project, particularly in terms of mitigation and timing. The FEIR fails to disclose the basis of NCRA's authority as a local agency to undertake a multi-county transportation congestion relief project. The FEIR fails to disclose the potential for abuse of market power by the Northwestern Pacific Railroad (NPR) concealed by the piecemealing of the project. The FEIR fails to include required NEPA analysis. The FEIR fails to specify how the NWP Co. will be required and held accountable for full compliance with all mitigation measures suggested in the FEIR.

The NCRA has been bound by a 1999 Consent Decree for over a decade which requires it to clean up numerous contaminated sites along the rail line. The NCRA has failed to comply with the 1999 Consent Decree by not cleaning up toxic contamination. Given that track record, there is no reason to trust that the NCRA will in fact secure funding for proposed mitigation and needed clean-up work. Furthermore, the NCRA must explain how it will ensure that all necessary mitigation work is conducted, on an ongoing basis, even if the Northwest Pacific Railroad never achieves that level of profitability and never provides a revenue stream to NCRA. Especially in light of its past performance, the NCRA may not proceed on the basis of optimistic projections.

### **Segmentation.**

The FEIR fails to describe the entire Project by incorrectly dividing NCRA's rail line into geographic segments for purposes of analysis. The FEIR fails to analyze the entire project by relying on disputed Notices of Exemption for part of the NCRA rail line before project approval. The FEIR fails to disclose, analyze, and propose mitigation for the Project's reasonably foreseeable impacts in the Eel River canyon, despite the fact that the ultimate purpose of the Project is to facilitate eventual expansion into the Eel River canyon, and impacts to the Eel River canyon are reasonably foreseeable as a result of the Project. The FEIR fails to reconcile how segmentation of the project will impact its economic viability.

### **Biological Impacts**

The FEIR fails to disclose, analyze and mitigate impacts to biological resources. The FEIR's proposed mitigation measures for biological impacts are vague, unenforceable, and improperly deferred.

The NCRA fails to adequately disclose and analyze the impacts to salmonids in the Russian River and Eel River. Salmonids are vulnerable to multiple impacts from the Project and the NCRA fails to fully account for the harm or propose sufficient mitigation. Without a Biological Opinion from the National Marine Fisheries Service, including an Incidental Take Statement with binding mitigation conditions, the NCRA cannot move forward with the Project. The failure to address this critical permitting step, will require that the FEIR be revised and recirculated pending consultation. The FEIR must clearly identify all of the potential impacts to salmonids that may result from the Project actions, and specify mitigation measures in detail which the appropriate wildlife agencies agree will be sufficient to prevent those impacts

### **Project Description and Significant Impacts**

The FEIR fails to accurately and completely describe the Project. The FEIR fails to assess impacts of the release of materials including but not limited to toxic chemicals, polluted soil and wood waste into the environment as a result of the Project. The FEIR fails to include evidence on its record from the March 2009 Draft EIR of impacts of rehabilitation activities of the Project.

The FEIR fails to analyze reasonably foreseeable impacts of the Project including but not limited to clean-up, maintenance and repair. The FEIR improperly dismisses the impacts of rehabilitation and repair activities as individually insignificant. The FEIR fails to identify significant effects by avoiding description of conditions, including but not limited to the rail line's infrastructure and geographic and hydrologic features within and adjacent to the Project area.

### **Impacts of Toxic Chemicals**

The FEIR fails to assess the impacts of hazardous materials currently present within the Project area and adjacent land and water and those to be added as a result of Project disturbance in the course of rehabilitation, maintenance and other activities, including but not limited to treated wood and wood waste, creosote, pentachlorophenol, dioxin, copper chromate arsenic, various herbicides, stock maintenance chemicals such as solvents and acids, grease flanges, polychlorinated biphenyls, diesel, heavy metals, and contaminated soil and sediment.

The FEIR fails to analyze the herbicides that will be used for the Project including but not limited to reasonably foreseeable activities such as maintenance and repair. The FEIR fails to analyze the range of impacts caused by toxic chemicals that will be released by the Project including but not limited to human health, wildlife and endangered species, water and air quality. The FEIR fails to preclude hauling of toxic materials by the NCRA's operator.

### **Air Quality**

The FEIR fails to disclose, analyze, and mitigate air quality impacts. Its description of the existing air quality setting is incomplete and misleading; its assumptions regarding the Project's air quality benefits are unsupported and misleading; its analysis of truck trip displacement is erroneous and unsupported; and the FEIR fails to disclose, analyze, and provide mitigation for construction-related air quality impacts.

The FEIR fails to analyze additional impacts to air quality caused by ancillary activities such as drayage services. The FEIR fails to analyze the potential for increased supply caused by rail transport in addition to current trucking supply and associated impacts to air quality.

### **Growth-Inducing Impacts**

The FEIR fails to analyze the increase in population as people migrate to enjoy a reduction in cost of living due to reduced shipping costs.

### **Impacts of SMART plus NCRA**

The FEIR fails to include evidence on its record from the March, 2009 Draft EIR of cumulative impacts of operating on the same line with the Sonoma Marin Area Rail Transit.

### **Geology, Soils, Seismicity and Maintenance**

The FEIR fails to assess the seismic stability of structures or to describe how maintenance activities will be conducted after storms, earthquakes, floods, slides or other natural occurrences.

### **Cumulative Impacts**

The FEIR fails to consider cumulative impacts of projects already undertaken, particularly in the southern portion of the line, and the proposed Project, including but not limited to rehabilitation and operations, and reasonably foreseeable activities such as maintenance and repair. The FEIR fails to consider cumulative impacts of legacy chemicals and chemicals to be added to the Project area. The FEIR fails to consider cumulative impacts related to the addition of SMART activities to be undertaken those of the NCRA.

### **Best Management Practices, Permits and Mitigations**

The FEIR fails to provide BMPs or mitigations for many potential significant impacts. The FEIR fails by avoiding analysis in many instances by deferring to Best Management Practices (BMP) and permitting by federal and state agencies to be completed in the future. The FEIR fails to examine mitigations by deferring their description to agreements and permits to be completed in the future. The FEIR fails to analyze impacts of permits and requirements of federal and state agencies on the Project scope and its impacts. The FEIR fails to provide analysis of BMPs and mitigations by not describing them adequately, and has failed to correct contradictions between various BMPs and mitigation requirements in the description of the Project. Based on our review, we believe the FEIR is not in compliance with CEQA and it has failed to properly respond to and address comments and concerns raised. As such, the NCRA should not certify the FEIR and should not approve the Project without first correcting legal errors.

**The NCRA – NWP Co lease agreement, and the process which gave rise to it, reinforces our concerns over potential environmental impacts, inadequate oversight, and failures of transparency and accountability with respect to the Project.**

The NCRA - NWP Co lease, including the process by which it was created and adopted, is an additional and very significant source of our concern over the potentially grave environmental harms that could result from poorly-planned reconstruction of the rail line into and through the Eel River canyon, the inadequacy of the NCRA's putative controls over those impacts, and the lack of transparency and accountability that the NCRA has repeatedly demonstrated in pursuing what appear to be the goals of the NWP Co ownership group. Attached are the lease document itself and two memos by NCRA Director Meyers detailing the very significant problems with both the lease itself and the process by which it was created and adopted.

In addition to addressing the points raised elsewhere in this letter, the NCRA should decline to move forward with the Project unless and until the lease agreement has been fully revised to correct each and every one of the issues detailed in Director Meyers' analyses, through an open and transparent public process.

The NCRA's halting moves to address these issues to date strongly suggest that its leadership is determined that the fundamental imbalance of the existing document will not ever be corrected. We are left to conclude that the NCRA remains committed to a course of action that is ultimately focused on the Island Mountain mine and Eel River canyon, depending for the indefinite future on massive public subsidies, but arranged in such a way as to effectively preclude significant public oversight or even participation regarding future actions to be taken with what remains a publicly-owned asset.

**Conflicts with other laws.**

We also believe the Project should not be approved because, among other things, several other state and federal statutes may be violated upon approval of the Project and initiation of Operations, including but not limited to the California Porter-Cologne Act, Clean Water Act, Clean Air Act, California and federal Endangered Species Acts, National Environmental Quality Act and Administrative Procedures Act.

Although FOER has previously provided the NCRA with a list of valid concerns and legal issues, FOER is willing to immediately begin discussing terms to settle this dispute that could either obviate the need to file this lawsuit before the possible expiration of any applicable statute of limitations. FOER presents the following settlement demand, in the form of principles that would have to be embodied in a formal written settlement agreement.

1. The NCRA agrees to not certify the FEIR or approve the Project; if the NCRA proceeds to certify the FEIR and approve the Project, the NCRA agrees to rescind any Resolutions and statements of certification for the FEIR and approval of the Project before the expiration of any applicable statute of limitations; or, alternatively, agrees to issuance of a writ of mandate commanding that it void said certification(s) and approval(s), or a judgment voiding NCRA actions.

2. The NCRA agrees that if it intends to pursue adoption of the Project, it will: (1) revise the Project's Draft EIR for the Project to analyze the significant impacts of the Project as described above and in FOER's comment letters for both the March, 2009 DEIS and the revised November, 2009 DEIS; (2) recirculate this revised Draft EIR for public comment; (3) prepare a new Final EIR for the Project before considering whether to re-approve the Project; and (4) comply with other applicable laws, including the California Porter-Cologne Act, the Clean Air Water Act, the Clean Air Act, the Endangered Species Acts, the National Environmental Policy Act, and Administrative Procedures Act.

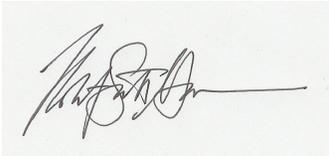
Should the NCRA reject this offer of negotiation and settlement and proceed with approval of the

Novato and SMART agreements and certification of the FEIR, and approval of the Project without change, FOER will proceed with litigation, and should FOER prevail, will seek attorneys fees and expenses from the NCRA for having to pursue this action in the public interest.

This notice is sent to you in the interest of trying to avoid litigation, and pursuant to the Public Resources Code section 21167.5 and Code of Civil Procedure section 1021.5.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Scott Greacen', with a long horizontal line extending to the right.

Scott Greacen  
North Coast Director

Attachments:

1. NCRA-NWPCo lease (“Agreement for the Resumption of Operations upon the Northern Pacific Railroad Line and Lease,” nominally dated 9/06/06, noted ‘final 9/21/06’ on signature page.)
2. Memo from NCRA Director Meyers to Marin Board of Supervisors Dec 10, 2010
3. Memo from NCRA Director Meyers to NCRA Board of Directors May 24, 2011