

TO: The Directors of the North Coast Railroad Authority

FROM: Director Meyers

DATE: May 24, 2011

This memo is in response to the Op-Ed by the Chairman, Dir. Wagenet, in the Marin Independent Journal on April 7

(http://www.marinij.com/opinion/ci_17787403?IADID=Search-www.marinij.com-www.marinij.com). That was in response to mine of March 24

(http://www.marinij.com/opinion/ci_17685513?IADID=Search-www.marinij.com-www.marinij.com) ([http://novato.patch.com/articles/op-ed-freight-rail-](http://novato.patch.com/articles/op-ed-freight-rail-agreement-unfair-to-taxpayers)

[agreement-unfair-to-taxpayers](http://novato.patch.com/articles/op-ed-freight-rail-agreement-unfair-to-taxpayers) - Novato Patch 3/20/11) which followed my Memo to the Marin County Board of Supervisors submitted at its December 14, 2010 Board meeting

(<http://marinsearch1.co.marin.ca.us/smb/egovfiles.co.marin.ca.us/WebShare/EgovShare/BS/AgMn/agdocs/101214/cybagnda.htm> - Item 9), a copy of which I

furnished to this Board on December 10. My material set out what I considered the lopsided terms of the NCRA-NWP Co. lease of September 2006, as well as a general overview of the background of the lease. The Chair's response did not take issue with my analysis of the lease terms. Instead, it sought to provide a basis for those terms by listing six supposed circumstances extant when the lease was negotiated. The "fairness" of the contract, he argued, has to be viewed at the time of its making, not subsequent events. Additionally, he sought to dispel any perception that the lease was the product of back room dealing between NCRA and NWP Co. The argument was straightforward: The lease was the product of a publically advertised request for proposals (RFP), a public selection of the winner, and the subsequent public announcement of the lease terms.

The Chair's response fails for two separate reasons. First, it fails to take into account that the lease is between a taxpayer funded institution and a private entity. When the public perceives that the institution is giving scarce public funds to overwhelmingly benefit a private concern, the public will do everything in its power to rein in the give-away of its funds. That includes spending additional funds to rehabilitate the right-of-way -- unless and until it is definitively shown that the expenditure is fiscally prudent. That showing was not even considered before the lease was executed. A prior study and the experiences of the SP and NCRA strongly suggest that the lease will not result in a fiscally prudent operation from the taxpayers' perspective.

The second reason is that the factual arguments regarding the closed-door dealings and the supposed six conditions in existence through the time the lease was accepted were not as described by the Chair. As shown below, the lease is a creature of back room machinations, involving Brown Act violations. The process seems designed to keep the public in the dark about the RFP, the choice of the winner and the lease terms agreed to after NWP Co. "won". The six facts are either irrelevant or incorrect.

The Chair's Op-Ed points:

(A) Bernie may disagree with the terms of the Lease, but it is wrong to suggest that the process took place behind closed doors. NCRA went through a RFP process, which was publically advertised, and the selection of the operator was accomplished at a public meeting in May 2006. The selection was subject to negotiation of a contract which came back before the Board in an open meeting in September 2006.

(B) The "fairness" of the contract has to be viewed at the time of its making, not subsequent events. At the time the contract was signed:

- (1) The railroad had been closed down for eight years.
- (2) The last word from the California Transportation Commission (CTC) had been that it would not allocate any Transportation Congestion Relief Program (TCRP) funds to the NCRA.
- (3) NCRA had a \$10 million claim from its previous operator, which had to be resolved before any third party such as NWP Co. could operate.
- (4) The Union Pacific said they would never do business with the NWP (the former operator) railroad again.
- (5) NCRA did not even have enough resources to pay its staff.
- (6) Most of the other short-lines solicited did not even respond. Rail America said that they were not interested under any circumstance.

My Response:

Almost all of the current Directors either joined the Board after the so-called facts occurred, or served during only part of the time the events unfolded. With so little personal knowledge among us, it is imperative that we carefully examine these claims. To do so I have drawn on the public record – mainly the records of the NCRA, as I have no personal knowledge of the events. If I am incorrect in my statements, I apologize and ask that those with knowledge provide material in support of their position so that I can make any necessary changes. Through my term on the Board I have requested certain materials from the NCRA staff. All too often my requests have received limited or no response.

In summary:

- The major dealings involving the January 17, 2006 (RFP), from its formulation, through the interviews of the bidders, the award of the bid to NWP Co., the negotiations for the lease, and through the September 2006 signing of the lease were undertaken by the Operator Committee, whose



meetings were held without any public notice and without any public participation;

- The Operator Committee did not report in any meaningful way to the public; when it reported to the Board, it did so in secret in Board closed sessions;
- There is not one single meeting of the Operator Committee listed on the NCRA web site for 2002, 2003, 2004, 2005, 2006, and 2007 through September; no notice, no agenda, no minutes;
- The selection criteria utilized by the Operator Committee was never revealed to the public and there is no way to determine how or why NWP Co. was chosen;
- The May 2006 “public meeting” the Chair refers to was in violation of the Brown Act; its notice failed to identify the locations of the places from which members called in and failed to give the real intent of the meeting, and, of course, no members of the public were present;
- The lease negotiations commenced with the Operator Committee plus Mr. Neary and Mr. Stogner on one side and Mr. Williams and Mr. Bosco on the other; thereafter, Mr. Neary apparently did the bulk of the negotiating for NCRA, conferring with Mr. Stogner and others on occasion, and conferring with Messrs Williams and Bosco on occasion;
- The notice for the September 13, 2006 Board meeting does not adequately indicate that the lease was to come before the Board for final approval; the lease is effective as of September 13, 2006, but was apparently executed at a later date. The end result is that the public did not see the lease in its final form prior to its execution;
- In June 2005 the Operator Committee met at Mr. Bosco’s office; that December, it apparently interviewed an owner of the Island Mountain Quarry; between the time the RFP was issued in January 2006 and the choosing of NWP Co. as the winner in late May, NCRA utilized the services of the Quarry owner in a pitch to the CTC for funding, and NWP Co. listed both that owner and Mr. Bosco as principals;
- At no time in 2006, including the nine months from the time the RFP was considered by the Board through the time the lease was signed, did one single member of the public comment on the substance of the dealings;
- None of the six items support acceptance of the NCRA-NWP Co. lease whose terms are highly unusual when compared to similar leases and are so favorably disposed to NWP Co.

A. The Back Room Dealings Matter

The Chair’s first claim is that there were no “closed doors” -- the RFP was publically advertised; selection of the operator was at a public meeting in May 2006; and, the contract came before the Board in an open meeting in September 2006. This allegation, even if true, would not support a bad contract, but it would indicate to taxpayers that NCRA’s actions were all above board, completely transparent,

showing no favoritism, based on publically known and accepted criteria and reached only after copious public input was eagerly sought and duly considered. Sadly, that is not the case. The RFP was publicly issued, but it is a stretch to say that the winning bidder was announced at a “public meeting “on May 30, 2006, and the Board considered but did not enter into the lease at its September 13 meeting. A close review of the events surrounding the RFP through the date the lease was executed (probably September 21, 2006) shows anything but transparency, and plenty – plenty - of back room dealing.

A bit of background is necessary to appreciate the events.

We first consider NCRA’s stealth Operator Committee. Its origins date back to before Feb. 20, 2002, when there is mention of a “Permanent Operator Committee” in the Minutes. It met frequently through the years until October 2007 (after being challenged in a law suit) but always in secret. Its meeting locations varied. No advance notice of any meeting – or even its meeting location - was provided to the public. At least most of the public. The June 20, 2005 Operator Committee meeting was apparently held at the office of Mr. Bosco. The Committee’s members were three Board members whose identities changed slowly through the years as old Members left the Board and new Members joined. No minutes of the meetings were made or kept – or, if they were, they were never provided to the public. On rare occasions, a brief oral “report” was publically made at a Board meeting about the fact that the Operator Committee had met. The report was typically a very short statement, and might include some subject matter covered by the Committee. More often, the Committee gave a report of its activities to the Board – but in secret closed session. No public members were at the closed sessions. No minutes of the closed session reports were made public. Precious little, if any, of the Operator Committee’s reports to the Board were described in the announcements after the Board’s closed sessions. As 2006 dawned, if there was ever a pigeonhole for the NCRA to have “closed door” meetings for the selection of its new operator, and to craft the new operator lease without public interference, the Operator Committee was *the* place.

The secret Operator Committee meetings violated the spirit of the NCRA By-laws, if not their letter. The By-laws, adopted in 1999, state at page 3:

“All meetings of the Board of Directors are open to the public in accordance with the State Codes governing the conduct of public meetings. ... The Secretary shall keep full and complete minutes of all meetings... Closed sessions shall only be held when specifically authorized by the Ralph M Brown Act...”

NCRA meeting dates, agendas, and minutes are posted on the NCRA web site. There is no mention of any Operator Committee meeting – no agenda – no minutes – nothing - for the years 2002, 2003, 2004, 2005, 2006, and, 2007, through September, when the practice was the subject of a lawsuit, and promptly abandoned.

The Operator Committee apparently met on or around at least the following dates



through 2006 (these dates have been pieced together from various references, there being no readily available list of its meetings, meeting topics, attendees, meeting locations, and meeting minutes publically available):

2/20/02, 10/30/03, 12/5/03, 1/21/04, 1/30/04, 3/5/04, 3/15/04, 5/19/04, 7/30/04, 9/8/04, 11/16/04, 3/15/05, 6/20/05, 10/27/05, 12/14/05, 1/3/06, 1/17/06, 4/12/06, 4/18/06, 5/19/06, 5/26/06, and 12/13/06.

Perhaps there will be an argument in support of the Operator Committee along the lines of “it was an *ad hoc* committee (Gov’t Code Sec. 54952 (b)) so it did not need to provide public notice of its meetings, nor provide an opportunity for public input, nor let the public know what it was doing.” But the public’s right to review and comment upon public business is broadly applied and exceptions are narrowly construed. An *ad hoc* committee is charged with a specific task and the committee does not survive completion of the task. It is advisory – that is, it should not be delegated any decision making power and is to return to the full board with its recommendation, which the public will then be able to hear and comment upon. It serves only a limited or single purpose, is not perpetual, but of limited duration and is dissolved when the specific task is complete. A committee which is given a title, a general ill-defined area of responsibility and no windup date, which either has no immediate assignment or keeps reshaping and extending its assignment is not an *ad hoc* committee. Calling a committee an *ad hoc* committee does not make it such.

Even if there is some way to legally justify the secret manner in which the Operator Committee acted for most of the decade, and the apparent violations of the meeting notices, the fact remains that NCRA’s actions regarding the RFP for its new operator, the choice of the “winner”, and the negotiations that concluded in the NWP Co. lease all took place outside of the public arena. In those nine months not one member of the public was able to comment upon this vital matter.

Now, lets look at the events that preceded the selection of NWP Co. as the “winner” of the bid and the negotiation of the NCRA-NWP Co. lease. I place winner in quotes, as a winning bidder of a public bid ordinarily is a bidder whose bid is publically matched against publically available criteria so that it can readily be seen to be superior to the bids of others.

Early in the decade, Nature and the FRA shut down the line. The operator then running trains, for whatever reason, did not repair the line. Its agreement with NCRA terminated on June 30, 2005. Even before that date, NCRA was looking for a new operator, and potential new operators were knocking on the door. (Board meeting of Feb. 27, 2004 – Dir. Hemphill reported that there are two offers with two potential operators, both willing to do repairs with their own money if NCRA provides them with materials at a favorable rate; March 26, 2004 – Sierra Northern is very interested in operating between Lombard and Willits, both freight and excursion; May 19, 2004 Board meeting – Operator Committee continues to meet with the operator and potential operators; July 30, 2004 – Operator Committee meets with Sierra Northern to explore whether an assignment of the South End

should be pursued, or whether we should move to an RFP to secure an operator for the Russian River Division).

Meanwhile, former state legislator and Congressman Doug Bosco had been providing much appreciated assistance to NCRA. For example, in September 2003 he met with NCRA staff regarding several funding possibilities. In February 2004 he appeared with NCRA staff at a meeting with the Deputy AG handling the Environmental Consent Decree. In June 2004, Dir. Hemphill thanked him for his assistance with federal funding. In October 2004, he appeared at a CTC meeting regarding the use of the Port of Humboldt Bay, noting that private investors had taken an interest in such a project. In November 2004, Dir. Woolley thanked him for working on private investment in the railroad. In May 2005 he appeared on behalf of NCRA along with NCRA staff at a Coast Guard meeting. Early in June 2005 he met with his long time former assistant, Executive Director Stogner, regarding NCRA provisions in pending federal legislation. Later in June he hosted a meeting of the Operator Committee. In early December 2005 he was copied on a memo from Mr. Stogner to the Board, which included, inter alia, the upcoming staff recommendation to the Board regarding an operator RFP. It appears he was trying to help the NCRA.

In October 2005 NCRA received a copy of a permit request by Evergreen Natural Resources to mine Island Mountain, a quarry along the NCRA right-of-way in the Eel River Canyon. On December 14, 2005 the Operator Committee's report to the Board by Chair Hemphill indicated that the Committee had met "with a potential aggregate shipper and discussed their plans as well as NCRA's timeframe for restoration of service." The Directors then chosen to be the 2006 Operator Committee included Dirs. Hemphill and Wagenet. At the January 11, 2006 Board meeting the Directors approved the release of an RFP to obtain an operator. Chairman Hemphill stated: "there is a renewed interest in goods movement, rock extraction and the movement of municipal solid waste by rail". Selection criteria were discussed, and staff was directed to have the Operator Committee finalize the RFP and the selection criteria. Apparently they did so, for the RFP was publically released on January 17. The RFP stated that NCRA would offer a contract to the highest-ranked responder and then negotiate final terms (III, Page 11). If an agreement could not be reached, NCRA could terminate negotiations and commence negotiations with the next-highest ranked, etc. Some of the contract terms were set out, including the length of the contract. It "shall be for an initial period of five (5) years ...with two consecutive five (5) year options to extend... Longer terms may be negotiated pursuant to compliance with State Bond requirements". (p. 13)

The response to the RFP was encouraging. In a January 31 letter to the Press Democrat, Chairman Hemphill stated that this was understandable. "The line could handle containers from Humboldt Bay, high-quality aggregate from a large quarry development in the Eel River Canyon, and move solid waste to Nevada." The reference to "a large quarry development in the Eel River Canyon" appears to be to Island Mountain Quarry.

NCRA appeared before the CTC on March 16, 2006 to solicit repair funding. The presentation included Dir. Wagenet to talk about the aggregate at Island Mountain and Evergreen Natural Resources representative Roger Green. "Mr. Green will discuss the status of his work in Trinity County to get approval for the mine and reclamation plan at Island Mountain." (Memo to Board dated March 14, 2006) The responses to the RFP were due on March 31. Mr. Stogner wrote on March 24: "We will have to schedule an Operator Committee meeting in the near future to review the proposals and set in motion the process that will result in the selection of an operator for the line." (Memo of March 24, 2006). On March 29 he wrote regarding the RFP Process:

An Operator Committee meeting will be scheduled immediately following the April 12 Eureka Board meeting to discuss and evaluate the proposals; Interviews will be scheduled for the week of April 17 in Healdsburg based on the recommendation of the Operator Committee....Non-Operator Committee members should feel free to suggest questions to the Operator Committee to pose during the interview process.

On March 31, 2006, NCRA found itself with five bids. One was for the far north end only. Another was from a yet-to-be-formed company, the predecessor of NWP Co. It stated it would be comprised of

H. Skip Berg (owner of Berg Holdings), R. Allen Ennis, Jr. (CEO of Evergreen Natural Resources, developer of the Island Mountain Rock Quarry), and John H. Williams (Executive Dir. of NCRA, 1993-1995 and acted as NCRA consultant 1997 and 2002 (pp. 13, 33 - 34). Doug Bosco was to be General Counsel and a Board member. J. T. Wick would serve as an advisor and a Board member (pp. 3, 7; Mr. Wick was "responsible for converting the Port Sonoma marina into a premier multi-modal transit center linking ferry, rail, and bus service to the Bay Area" (p. 17)). NWP, Inc "brings exclusive ownership, by owners of NWP, Inc. [sic], of the mineral rights to Island Mountain". Another "strategic freight advantage that is exclusive to NWP, Inc. is Port Sonoma, whose Property Manager and Developer is Berg Holdings (pp. 2 - 5). Roger R. Green, of Evergreen Natural Resources, will be on the Board. (p.8)

The current owners of NWP Co. may be different than these, but as we are cautioned by the Chair to focus on the onset of the Lease, I do.

NWP Co.'s bid envisions that it will obtain all NCRA real property assets including the Island Mountain Yard, NCRA's portion of the Island Mountain Quarry, and the 20 miles of rock deposits located north of Dos Rios. (p. 6) NWP Co.'s bid proposes that since NCRA needed \$500,000 annually, NWP Co. and NCRA would split NWP Co.'s annual net income, subject to a maximum annual payment of \$500,000. NCRA boxcar lease revenues were to be retained by NWP Co. in all years after annual payments of \$500,000 had been made to NCRA by NWP Co. NWP Co. estimated that in its third year of operations its payments to NCRA would reach \$500,000 (p. 30).

Remember this when we look at the payment provisions in the lease below, at C.

The other two bids proposed payment terms of the sort that most other leases between private operators and state line owners include. Sierra Railroad proposed to pay “5% of the gross revenue generated from NWP freight and passenger operations” plus other payments. North Bay & Pacific Railroad Co., Inc was to pay a monthly lease fee of \$27,500, plus 3% of the gross operating revenue in each month its net income was positive, minus possible offsets.

The Operator Committee met following the April 12 Board meeting and selected the NWP Co., Sierra Railroad and NB&PRR proposals for follow-up interviews on April 18. At the May 10 Board meeting Dir. Wagenet said the Operator Committee reviewed the three proposals and that the Committee would report to the Board in closed session. The report out of the closed session was that the Operator Committee met with its “Short List” bidders and that the Board narrowed the list to two finalists. The Committee was directed to begin negotiations with the two. An NCRA Press Release of the same date said the Operator Committee was to commence negotiation immediately and report to the full Board at the regularly scheduled June 14 Board meeting, where the Board would make the final selection. Both proposals outlined solid plans. “We will spend the next 30 days assessing the relative merits of each proposal”.

The Operator Committee met with Sierra Railroad on May 19, and with NWP Co. on Thursday, May 26. Then the Operator Committee did a peculiar thing. It not only selected the “winner”, it decided that it could not wait until the regular June 14 meeting to inform the Board – and the public - of its decision. Instead, a Special telephonic Board meeting was called for Tuesday, May 30, the day after Memorial Day. A Special Board meeting requires only 24-hour notice, not the 72 hours required of a regular meeting. The intervening days included Saturday, Sunday, and Memorial Day. The Draft Agenda (probably posted Friday in the Ukiah office of NCRA which would be sufficient to comply with California law as to public notice but hardly any real notice to the public) showed the meeting to be one by Conference Call. The conferees were to call in to the Ukiah office. There was no indication of where any of the participants would be calling from – a violation of the Brown Act. The remote locations must be posted and accessible to the public. No items were listed under Conduct of Business. The only item shown was a Closed Session matter - it was silent as to the real intent of the meeting. It stated (emphasis added):

Conference with Real Estate Negotiators; Government Code 54956.8

Property: NWP line

Agency negotiators: NCRA Operator Committee comprised of Allan Hemphill, Hal Wagenet, and Robert Simonson

Negotiating Parties: NCRA and respondents to the NCRA Request for Proposals For Operator chosen by the Operator Committee on April 10, 2006 for the “Short List”: NWP, INC.; Sierra Railroad Company; and North Bay & Pacific Railroad Co.



Inc. Under negotiation: Terms of Operating Agreement transferring leasehold in portions of the NWP line to a potential operator, including price, terms.

Do you see a statement about the announcement of the “winning” bid? Would you expect that you might hear something about the “price and terms” of some agreement? Not so fast.

The minutes of the Special Meeting do not state from where any of the Board Members called, reminding us of the violation of the Brown Act. Not surprisingly, “There were no members of the public present.” (E.) The Closed Session is the same as its corresponding Agenda item. The two-minute Announcement out of Closed Session (H.) was that “The Board of Directors directed its staff to commence negotiations with NWP Inc. for a lease and operating agreement...”

So much for the assertion that the “public the selection of the operator was accomplished at a public meeting in May 2006”. Although the May 30 2006 meeting ran afoul of the law, the statute of limitations has long since served to shield any such claim. But that is not the point. The point is that at every step along the way in the RFP process the public was kept in the dark as to how the NCRA was evaluating the bids, when the NCRA was doing so, what the responses of the bidders were, and why the eventual “winner” was chosen. Even the “public” meeting announcing the “winner” was not conducted as the Board said it would be – on June 14 at a regularly scheduled meeting – but rather in a contrived fashion with no lawful or reasonable public notice and with absolutely no public input. The result was that the public never had an opportunity to address the Operator Committee, never had an opportunity to learn what the Operator Committee had decided nor what its decision was based upon, nor what the Operator Committee said to the Board. Additionally, the Board meeting announcing the bid winner was in violation of the Brown Act as it clearly failed to give proper public the notice and the opportunity to be heard. Finally, the public never had an opportunity to address the Board, never had an opportunity to learn what the Board decided nor what its decision was based upon. Is this the type of conduct you want your reputation to bear?

At the June 14 Board meeting Chair Hemphill announced that NWP had been selected. (D) Doug Bosco thanked the Board and staff. “He said that he along with his NWP, Inc. will be working diligently to effectuate a contract, and that he is looking forward to working with everyone involved.” (G.) The Board and staff were thanked for their hard work. (G) The closed session included a conference with Real Estate Negotiators regarding all terms of the NWP, Inc. Lease and Operating Agreement. Representing NCRA: the Operator Committee, Messrs Stogner, and Neary. (K.2.) Thus the Minutes indicate that on one side of the negotiating table sat the fellow who had worked as the chief assistant for 14 years for the former legislator who was now a negotiator on the other side of the table. That, in itself, is not unlawful.

The negotiations continued through the summer of 2006. At the July 14 Board meeting the Closed Session stated that the Board continued discussion with Real

Estate Negotiators (the Operator Committee members plus Messrs Stogner and Neary) regarding all terms of the NWP Inc. Lease and Operating Agreement. (K.2)

Mr. Neary apparently did the bulk of the negotiating for NCRA, conferring with Mr. Stogner and others on occasion, and conferring with Messrs Williams and Bosco on occasion. At the August 16 Board meeting the Closed Session again stated Conference with Real Estate Negotiators Operator Committee, Stogner and Neary re all terms of Lease and Operating Agreement. (K.1.)

The September 13, 2006 Board meeting agenda did not clearly state that the Board would consider the lease and, if acceptable, approve it. Instead, it stated as to Conduct of Business:

1. Consideration and Authorization to enter into agreement with NorthWestern Pacific Railroad, Inc.
Recommendation: Approve authorization to enter into agreement with NorthWestern Pacific Railroad, Inc.

The Draft Agenda also listed a closed session conference with Real Estate Negotiators and the Agency Negotiators were the Operator Committee, and Messrs Stogner and Neary.

The Minutes of the September 13, 2006 meeting show that it started at 11:00 AM. There were no committee reports (and thus no Operator Committee report to the public)(E.). Two items were added to the closed session – CBS Outdoor Advertising and NCRA vs. NWPY (C.). In Matters from the Board (D.) Dirs. Hemphill and Kelly spoke about meeting with SMART Chair Boro and having a sub-committee meet regularly with SMART. The Board passed the Consent Calendar (F.) with Dir Woolley absent (he arrived at 11:15 AM (See, J.). The Board took Public Comment – two speakers - neither addressed the lease. They then met in closed session at 11:10 and the first item was: Conference with Real Estate Negotiators re NWP Co., Operator Committee, Stogner and Neary re all terms of Lease and Operating Agreement. The session ended at 12:50 p.m. (J.) and included the CBS and NWPY matters (G.) The announcement out of the closed session was that the “Board met with its real property negotiators—no decision was made.” (K.)

The next item was

“H. Conduct of Business

1. Consideration and Authorization to enter into agreement with Northwestern Pacific Railroad, Co.

Recommendation: Approve authorization to enter into agreement with Northwestern Pacific Railroad, Co.

Director Kelley moved to approve resolution to enter into agreement with Northwestern Pacific Railroad Company, seconded by Director Wagenet approved unanimously.”

The remaining agenda items consumed over 1 and ½ pages and involved the CBS Outdoor agreements, public discussion, and staff reports. The meeting ended at 1:45 p.m., 55 minutes after the end of the closed session. Realistically the NWP item could not have taken more than between 2 and 6 minutes, at the most. There was no public comment given regarding the lease. The end result was that someone was authorized to enter into an “agreement” with NWP Co. – not that the Board approved the lease.

The September 14, 2006 Press Release said “NCRA approved a 5 year [sic] contract with the Northwestern Pacific Railroad Company to operate trains on the 316 mile line extending from Eureka to Novato”. NWP Co. “is comprised of Woodside Consulting Group of Palo Alto, Evergreen Natural Resources of Oroville, and Berg Holdings of Novato.” Chair Hemphill was quoted as saying “we now have a credible operator and the potential to ship three new commodities on this line: in-bound containers from Humboldt Bay, rock from the Island Mountain Quarry... and solid waste (garbage) from Sonoma, Mendocino and Humboldt Counties.”

Note that the resolution is “to enter into agreement with NWP Co.” It was not the “acceptance” of the lease agreement supposedly before the Board. In fact, it appears that the final lease agreement executed by the parties was not one presented to the Board on September 13, 2006. This may be discerned by looking at the bottom left-hand corner of each of the pages 1 – 60 of the lease. Each says “Final 9-21-06”. Compare that to the notation on the upper right hand corner of all the pages of “09/06/06”.

That typographical clue as to the real date the lease was finalized is supported by what transpired at the subsequent Board meeting of October 11, 2006. Item F. 6 was the Consideration of Approval of the MOU between NCRA and NWP Co. John Williams signed the MOU after it was unanimously approved. This was not a “resolution to enter into an agreement” ala the September 13 meeting. It was the real thing – the approval of the contract in front of the Board, and its prompt execution.

Furthermore, the terms of the MOU tell a compelling story as to why the lease could not be entered into when it was placed before the Board on September 13. The MOU “is made this 11th day of October 2006”... and is made effective as of September 20, 2006.” (1st para.) The MOU states that NWP Co. “is obligated to make lease payments only upon satisfaction of the conditions set forth in Section X.B.1 of the [lease]” (Recital F., p. 1). Those conditions require NWP to make an annual net profit exceeding \$5,000,000 one year before NWP would pay any funds to NCRA. The parties clearly understood that it would be many years before such a net profit was reached. Without those payments, NCRA would be broke. To cover that, the MOU provides that NWP is to make “in Lieu Fee” payments of \$20,000/month, commencing on 9/20/06 (Section 2) until NWP Co. either meets the requirements of having to make payments after it has achieved the \$5 million in Net Profits, or in NWP Co.’s sole discretion it determines that there has been a failure of TCRP

funding in sufficient amount or time to permit reopening to Windsor and commencement during 2007 of environmental review as is necessary to reopen the Eel River Division. (Section 5, a. and b., page 2). The MOU also requires NWP Co. to provide bridge financing of \$500,000 to allow NCRA to pay TCRP and ISTEA vendor invoices. (Section 3). Once the terms of the MOU were agreed to and the first payment received by NCRA, the lease could be made "Final" and executed. The lease can relate back to the September 13, 2006 hearing date, but it was placed in final after September 13.

The argument that there was insufficient notice as to the approval of the lease was also made by SMART. Its Jan. 31, 2007 letter to Mr. Stogner set out a number of concerns it had with the NCRA-NWP Co. lease, the first being:

1. The Lease is not specifically called out on the 9/13/06 Agenda. Instead the Agenda "merely indicates an agreement is to be considered" and that staff recommends approval. Opponents may argue that NCRA did not properly notify the public and provide the public with a fair opportunity to comment prior to NCRA's approval.

On February 12, 2007 NCRA responded that

1. The public notice was "more than adequate", and in any event, the statute of limitations has run. (Gov. Code 54960(C)(1)). (p. 1, 1.)

What would NCRA do without the statute of limitations?

We now see that not one single member of the public commented on the selection of the "winner" or on the lease terms. These negotiations and terms were among the most important actions taken by NCRA in its history, and can have a profound effect on the NCRA and taxpayers for the next century. Yet the public did not know when the Operator Committee was meeting, what it was discussing, could not give public input, did not know what it decided, nor why, and did not know what the Committee said to the Board. The public also was not properly informed of the Board meeting at which the RFP "winner" was chosen, or of the Board's subsequent approval of the NWP Co. lease. To the extent there was any public notice of what was ensuing, it was, at best, in-artfully presented, and at worst, misleading and unlawful.

B. Circumstances Required NCRA Accept the Lease – The Tale of the Six "Facts"

Next, we view the fairness of the contract through the lens existing at the time of its negotiation and execution – September 2006 - and not later events. We carefully examine the six "facts" to see if they are true, and, if so, whether they provide substantial – or even any - support to justify our continued refusal to even attempt to renegotiate the lease.

1. When the contract was negotiated, the line had been shut down for eight years.



This is correct, but irrelevant. It might be relevant if there were no other bidders. But there were five. At least two, if not three, other entities submitted bids that looked promising to NCRA, if not superior to the bid by the yet-to-be-formed NWP Co. Even the secretive Operator Committee said that the two finalists were comparable. So did an NCRA Press Release. Furthermore, after NCRA declared NWP Co. the “winner”, NCRA did not have to agree to a lopsided deal. The terms of the RFP allowed NCRA to negotiate with the next best bidder if NCRA failed to get good contractual terms with the “winner”. [RFP III, page 11, NCRA will offer a contract to the highest-ranked Proposing Party and negotiate final terms. If an agreement could not be reached, NCRA may terminate negotiations and commence negotiations with the next-highest ranked, etc.]

Of course, if none of the responders agreed to a reasonable, fiscally prudent contract, there was no reason why NCRA had to agree to a contract that could amount to a gift of public funds for the next century.

2. The CTC said it would not allocate any TCRP funds to NCRA.

The facts are to the contrary. The 1/17/06 RFP states, as to funding available:

\$60 million of TCRP funds (Project #'s 32.1 - 32.9) of which \$41,204,000 was available

In the Activities Report for the Week Ending January 20, 2006, Mr. Stogner states that Senator Chesboro's office has requested that NCRA meet with the new Ex. Dir. of the CTC, John Barna, and that they hope to do so on Jan. 25th. Part of the meeting will be to see if he supports NCRA's request for TCRP funding at the March CTC meeting to address public safety issues made worse by the recent storms.

A March 14, 2006 memo from Mr. Stogner to the Board reviews the proposed presentation to the CTC for March 16. It will include “Evergreen Natural Resources representative, Roger Green”. Supervisor Wagenet is to talk about the aggregate at Island Mountain, and “Mr. Green will discuss the status of his work in Trinity County to get approval for the mine and reclamation plan at Island Mountain.” Recall that this is the Mr. Green of the future-winning bidder, NWP Co.

NCRA's Quarterly Report and TCRP Application Presentation dated March 16, 2006 sets out various freight available, including Evergreen Resources' Island Mountain aggregate and requests \$4.9 million reprogramming for urgent repairs.

The minutes of the March 16, 2006 CTC meeting show that the requests were deferred until the June meeting (pp 19 – 21).

At the April 12, 2006 Board meeting Mr. “Stogner said that NCRA will meet with the CTC on April 27 ... to request funding. He said that he has every reason to believe

that they will approve funding for NCRA on April 27.” (Item J. 1.)

At the April 26-27 CTC meeting, the CTC approved allocation of funds to NCRA under TCRP # 32.4 (upgrade rail line to class II or III) and 32.5 (the Environ. Consent Decree), but “that instead of a cash advance, as requested by NCRA, that a progress payment process be utilized instead”. (p. 17) Recall - NCRA was then, and remains today, a “High Risk” Grantee.

The April 27, 2006 NCRA Press Release stated: “CTC approved \$7.8 million in funding for NCRA”. It quoted an April 21 letter from Ex. Dir. Barna: “It is in the best interest of NCRA and CTC and the State to see that the railroad asset... be maintained and that a viable rail operation be established as soon as possible.” Allan Hemphill said “The State is now clearly an active partner in the effort to bring trains back to the NWP line”.

In the weekly report for week ending June 2, 2006 Mr. Stogner thanked the Operator Committee for the hard work leading to the recommendation of NWP, Inc. He said that on April 27 the CTC approved \$4.9 million for emergency repairs and additional funds for other things. Also, Caltrans is waiting for the “high-risk” designation to be addressed.

At the October 11, 2006 Board meeting Mr. Stogner (at I. 2.) said that the CTC allocated funding for repairs caused by the 2006-2007 storms and that on Oct. 12 NCRA would request CTC funds for the actual repairs. Mr. Williams was optimistic the CTC would provide funding on November 9. The October 11-12, 2006 CTC Minutes, pp 16 – 17 state only guidance at this meeting; no action needed.

At the Nov. 8, 2006 NCRA Board meeting Mr. Williams said that on Nov. 2 Mr. Bosco hosted a private reception for Gov. Schwarzenegger. Mr. Stogner said that on Nov. 9 the CTC will consider NCRA’s repair project and he is hopeful it will approve and allocate funding. (I.3.a.)

In the Updated 2006 – End Year Report, Mr. Stogner states that in April, NCRA “had a major break-through that produced the following CTC actions” – approval of NCRA’s repair plans and allocation of approximately \$5 million for repairs. (P. 2) Thus, contrary to the allegation, the CTC had approved funding for NCRA well before the lease was negotiated.

3. There was a \$10 million claim from our prior operator, which had to be resolved before any third party such as NWP Co. could operate.

There may have been a claim by the prior operator against NCRA, but there is no indication that the claim had to be resolved before any third party operator could operate. To the contrary, the prior operator agreed on June 30, 2005 to the termination of its contract with NCRA. As to the question whether the new operator would be able to assume the common carrier status help by NCRA’s prior operator

(NWPY), the RFP (at F., page 7) answered in the affirmative:

“The Responding party should assume for purposes of response that the NCRA Operating Agreement with NWPY is terminated and that the successful responder would assume common carrier status by petition and notice to the STB.”

Thereafter, NWP Co. filed with the STB its Change of Operators, which included verification by the prior operator of the change.

4. The Union Pacific said it would not do business with the former operator.

Even if corroborated, this is irrelevant. The former operator’s lease was terminated in June 2005. It is also probably against STB rules which deal with whether and when a Class I carrier can decide to not do business with another common carrier. NCRA and UP did have an agreement, and in a February 23, 2006 NCRA Strategic Plan Presentation, NCRA said it would enforce its agreement:

NCRA’s intention is to “aggressively seek to enforce the contractual arrangement with Union Pacific” to remediate the Willits yard (page 3).

As to the UP car hire issue, that matter was apparently well on its way to a settlement in June, 2006, months before the NWP Co. Lease was negotiated:

Mr. Neary said that he and Mr. Stogner met with UP in June to present an offer to solve the car hire issue. He said the proposal was well received. He said he hopes to meet with UP within 30 days and hopes to have a resolution by year’s end. (Board Minutes of Nov. 8, 2006, I.4.)

5. NCRA did not have enough resources to pay its staff.

No support is offered for this statement. It is contrary to Mr. Stogner’s “2006-End Year Report” which recounts how NCRA in late 2005 took \$7.9 million of FEMA funds intended to rehab storm damage to the line and instead bought 35 boxcars, which were then leased-out to generate a quarter million dollars of new yearly revenues. While NCRA’s deficit was not solved, it had a substantial source of new funds. By using the \$7.9 million FEMA grant to purchase (for \$3.4 million) and lease 35 boxcars, NCRA “generated about \$20,000 per month... Although we still had a \$500,000 deficit, we were able to put outstanding invoices on hold, while we embarked on the RFP process to secure an operator.” (p. 1)

Furthermore, NWP Co. was not the only bidder to offer to pay funds to NCRA. Two of the other bidders did, along with a percentage of their gross revenues. Finally, even if times were financially tough for NCRA, that can hardly justify its entering into a potential 104 year lease in which hundreds of millions, if not billions, of taxpayer dollars are to be spent primarily for the benefit of a private company formed just before the lease signing by a former NCRA Executive Director and a former

legislator who had employed the current NCRA Executive Director as his chief legislative assistant for 14 years.

6. Other short lines were solicited but did not respond. One company said it was not interested under any circumstances.

This assertion is incorrect, and irrelevant as to the company which purportedly disdained bidding. The fact is that there were five (5) bidders, four (4) of whom proposed to carry freight over the entire line. Three were good enough to make it on to the initial "Short List". On May 10, 2006 the Board (without disclosing its criteria nor its reasoning) met with the Operator Committee and narrowed the list to two finalists. The secret way NWP Co. was chosen is covered above. But before sending the bidders into the closed-door, unnoticed meetings of the Operator Committee, the May 10, 2006 Board minutes as well as the May 10, 2006 NCRA Press Release note that both proposals outlined solid plans. "We will spend the next 30 days assessing the relative merits of each proposal." (Ibid.) By now the reader may not be surprised that the "winner" was chosen well before the "next 30 days" were up, or that NWP Co. won. But it is a re-write of history to suggest that NWP Co. was the only white knight to appear on the scene.

The Chair discusses events that transpired after the lease was executed. I do not here burden the reader with whether some, or even any, of the subsequent events are correct. For, under his argument, they are all irrelevant as to the lease terms. He argues, "the 'fairness' of the contract has to be viewed at the time of its making, not subsequent events." Thus the argument either hangs or falls on the "backdrop" in place by September 2006. He has given us his view of that backdrop, and, as shown above, it is not supported by the facts and does not support the lopsided NCRA-NWP Co. lease.

B. A Reminder About the Problematic Provisions of the Lease.

The 99-year extension option, without NCRA oversight, is indefensible. Providing all NCRA property to NWP Co. is questionable, especially as NCRA may not benefit from the property's use. The utilization of the public purse to pay for major repairs, including "force majeure" events, without providing an appreciable reserve to cover such events, and not requiring fiscal analyses, is poorly crafted. And the provision for NWP Co.'s payments are far different than those set out in its March 31, 2006 response. The lease payments provision (Section X, pp 21 - 24) essentially says:

1. No payments will be made by NWP Co. until the 1st year *after* NWP has a net profit of \$5 million.
2. At that point, NWP Co. is to pay 20% of its yearly net income into a kitty, but -
3. NWP Co. stops making payments when the kitty reaches \$20 million, except to top off the kitty if and when needed.
4. The kitty is to be jointly administered by NWP Co. and NCRA. NWP Co.'s agreement must be obtained for withdrawals.

5. There can be withdrawn up to \$1 million/yr for NCRA expenses, including salaries. Any money NCRA gets from its property and rail car leases diminishes NCRA's withdrawals. If NWP Co. takes over all NCRA's leases and properties and gets the funds NCRA would otherwise have gotten, the withdrawal can be up to \$1 million/yr from the kitty – irrespective of how much NWP Co. gets from the leases and properties.
6. Kitty money is to be used for repairs, litigation and the like.
7. At end of the Lease, any money remaining in the kitty is given to NWP Co. If NCRA terminates the Lease, kitty funds are to be used to cover NWP Co.'s expenses. Section XII (D).
8. In case of any major problems (Force Majeure Section VIII (B)(2)), NCRA and SMART are to seek public funds for repairs. In NWP Co.'s view, the Treasury, via FEMA and California's OES, will "insure" the public's line against catastrophic damage, and thus "minimize" NWP Co.'s business risk.
9. If NCRA decides to sell any of its property, NWP Co. has a right of first refusal (Section XVIII).
10. NWP can take any of NCRA's rock deposits (Island Mountain, river gravel) for use on the line, without any payments to NCRA (Section V(E)(3)).

Keep in mind the absence of

- any meaningful oversight, such as a periodic review of shipper satisfaction, safety, car loadings, financials, payments to NCRA and track maintenance;
- conflict of interest requirements; and,
- provisions dealing with energy efficiency, and appropriate environmental practices.

D. Conclusion – and where do we go from here?

So, where are we, and where might we go? You have my prior reviews of the NWP Co. lease showing it overwhelmingly and unusually favors the private company to the detriment of the taxpayers - potentially for the next century. We have now seen that the Chair's response erred – that the negotiations took place behind closed doors and violated the Brown Act, and that the six supposed circumstances giving rise to these lopsided terms did not support his argument. Thus there is no logical reason why we should not turn our attention to renegotiating the lease. We cannot undo the past, nor can we re-do it. But we have an opportunity to correct its result.

Negotiating – or amending - does not mean we should pay short shrift to the needs of NWP Co., or NWP Co. to ours. In some respects the parties are in a better position to negotiate now than they were five years ago. The first 62 miles of the line are in relatively good shape and the FRA has removed its ban on traveling those tracks. Plus, we know the cost associated with that work, and can better estimate the cost of further rehabilitation efforts in the southern end of the line. NWP Co. has a better understanding of customers and potential customers – and of its revenues and potential revenues. SMART's position has changed as well, and we have a better working relationship with SMART. All parties should have come to the understanding that the line needs substantial taxpayer assistance and that unless

some appropriate taxpayer return can be achieved, it will be a long time before taxpayer funds are forthcoming. The NCRA has a better understanding of its own needs and the cost thereof, including NWP Co. funding. I have separately provided to you leases between a state right-of-way owner and private operators and we can make use of the terms in such leases to properly structure our lease with NWP Co. NCRA should also take the opportunity to do an analysis of how fiscally responsible any new lease might be, which is a key ingredient needed before further taxpayer funding is sought. Other matters, like the EIR, the Novato Consent Decree, and the Environmental Consent Decree are at a stage where they might soon be put to rest. So, while we should have renegotiated the lease long ago, it is not too late to do so now. In January I provided a suggested interim agreement. Either using that, or other ideas, we should get started.

Thank you,
Bernie Meyers