



## FRIENDS OF THE EEL RIVER

*Working for the recovery of our Wild & Scenic River, its fisheries and communities.*

[eelriver.org](http://eelriver.org)

April 9, 2013

Mitch Stogner, Executive Director  
Chair Kelly and Members of the Board of Directors  
North Coast Railroad Authority  
419 Talmage Road, Suite M  
Ukiah CA 95482

TRANSMITTED VIA EMAIL to [mitch.stogner@northcoastrailroad.org](mailto:mitch.stogner@northcoastrailroad.org)

**RE: Resolution 2011-02 and Its Project Approval**

Dear Mr. Stogner, Chair Kelly and Members of the Board:

Friends of the Eel River (FOER) and Californians for Alternatives to Toxics (CATs) submit comments on Resolution No. 2013-04, proposed for action by your Board on its April 10, 2013 agenda.

CATs and FOER object to any attempt by the NCRA Board or its Directors to repeal any portion of Resolution 2011-02 or to otherwise reconsider, modify, rescind, or alter that Resolution. We believe that any such attempt is contrary to NCRA's existing obligations, is without authority, and itself would constitute an action requiring compliance with the California Environmental Quality Act (CEQA).

The recitals prepared for your approval are in many instances inappropriate, not factually accurate, and are not supported by evidence in the record of approval for the resumption of operations. Some are nothing more than unsubstantiated legal opinion. The NCRA proceeds at its peril to rely on such unsubstantiated statements and theories after California courts have repeatedly held that the agency has assumed a duty to comply with CEQA.

For years, CATs and FOER have relied on NCRA's many public statements and assurances to the Transportation Commission and the courts that NCRA would comply with the California Environmental Quality Act (CEQA), both procedurally and substantively, to disclose, analyze and mitigate significant impacts likely to occur as a result of the extensive work necessary to resurrect and reopen the railroad.

Those impacts threaten natural resources and home, business and family assets valuable to our members and the general public, particularly residents of the five northern California counties – Napa, Marin, Sonoma, Mendocino and Humboldt – through which the railroad traverses. CATs and FOER, each having members in the most affected counties, are known throughout the region as concerned about the actions of NCRA.

We are offended that NWP Co. would demand that NCRA rescind approvals necessary for CEQA compliance, given the clear obligation to undertake CEQA review, and for which extensive public resources as well as much energy, hard work and resources of the NCRA and

the interested public have been expended. Such an action would betray the trust of those who have worked with the NCRA throughout the CEQA process. Rescinding portions of the Resolution now would place NCRA at risk of having to start all over, expending unnecessary resources and time because of CEQA noncompliance.

We ask the Board of Directors to reject this proposal and move forward in compliance with CEQA.

## **I. Background**

The Board approved Resolution 2011-02 on June 20, 2011—more than twenty months ago—and four years after NCRA had issued its Notice of Preparation in June 2007. As you know, CATs and FOER timely filed lawsuits on July 20, 2011 challenging the validity of your actions. See *Californians for Alternatives to Toxics v. NCRA*, Marin County Superior Court Case No. CIV 11-03597; *Friends of the Eel River v. NCRA*, Marin County Superior Court Case No. CIV 11-03605. Despite repeated and unsuccessful maneuvering by NCRA and NWP Co. to have these cases dismissed, they are now scheduled to be heard for decision on May 8, 2013. On February 20, 2013 CATs and FOER filed their opening briefs on the merits, and NCRA and NWP Co. filed their opposition briefing on Wednesday, March 27, 2013.

Resolution 2011-02 encompasses NCRA’s decisions to certify the Final EIR and approve a project permitting NCRA and its operator to “resume freight service” between Lombard and Willits. The project to resume freight service includes more than just operations, as the Final EIR illustrates. The project includes repair and rehabilitation construction, work and railroad maintenance. The project also includes work required under the City of Novato Consent Decree. And, for this project to resume freight service, the NCRA Board took two additional actions dependent upon approval of Resolution 2011-02: it executed (1) an updated SMART Operating Agreement, and (2) a June 20, 2011 Amendment to the 2006 Agreement for the Resurrection of Operations Upon the Northwestern Pacific Railroad Line and Operations Agreement (“Resurrection Agreement”).

We have reviewed the March 13, 2013 letter from Douglas Bosco of NWP Co., requesting that NCRA “rescind Resolution 2011-02,” claiming NCRA had approved the operations through its 2006 Resurrection Agreement, and thus Resolution 2011-02 was not required by law or otherwise, and is a “legal nullity.” Contrary to the express condition in the Resurrection Agreement, NWP Co. now claims it did not agree to any CEQA compliance, and that to the extent NCRA has inserted the need to comply with CEQA to resume service, it has imposed new terms not agreed to in the Resurrection Agreement. This characterization of the Resurrection Agreement and Resolution 2011-02 is false and misleading.

## **II. The Resurrection Agreement Did Not Prevent NCRA from Approving Resolution 2011-02.**

NWP Co.’s major premise is that NCRA had no authority to adopt Resolution 2011-02, because it inserts CEQA compliance as a term that was not agreed to in the 2006 Resurrection Agreement. NWP Co. contends that the Resurrection Agreement did not contemplate or require further permitting or approvals by NCRA other than those contained within it. This is simply not true. The Resurrection Agreement provided NWP Co. a lease to operate, subject to certain conditions, including CEQA compliance. Actual operations and resumption of service could not

occur until certain conditions were satisfied. A key condition was CEQA compliance, as set forth in Section IV.C of the Agreement.

“IV. Conditions

“This Agreement is conditioned upon

...

...

C. NCRA having complied with the California Environmental Quality Act ("CEQA") as it may apply to this transaction.”

It is pure fiction to now contend that no further action was needed. NCRA’s Executive Director testified under penalty of perjury in the City of Novato case that “[u]ntil the Environmental Impact Report is certified and the condition of compliance with the [CEQA] is satisfied, the agreement entered into between NCRA and NWPCo does not authorize NWPCo to take possession of the property or to commence operations.” Declaration of Mitch Stogner in Opposition to Preliminary Injunction, ¶¶ 42, 50, at 13 & 15.<sup>1</sup>

The terms of the Resurrection Agreement authorized NCRA’s action of approval. NCRA’s preparation of an EIR and approval to resume service therefore does not interfere with NWP Co.’s rights under the Resurrection Agreement. If anything, it advances those rights by attempting to provide the agreed-upon CEQA compliance.

In addition, NCRA as a public agency had full authority to adopt Resolution 2011-02. NCRA has a policy in its Administration and Contracting Policy Manual requiring that it comply with CEQA, which it purported to do with this Resolution. NCRA is contractually bound through funding agreements with the State of California to comply with CEQA. NCRA is obligated under the City of Novato Consent Decree to conduct CEQA review for certain work, which it purported to do with its approval of Resolution 2011-02. NCRA is obligated to provide environmental compliance plans under the terms of its 1999 State Consent Decree, which it purported to do with its approval of Resolution 2011-02. NWP Co. has not provided any basis upon which it can assert that NCRA had no authority to take the action encompassed by Resolution 2011-02. The only question is whether that action complied with CEQA, as presented in the cases filed by CATs and FOER.

### **III. Any Partial Rescission, Rescission, or Reconsideration of Resolution 2011-02 Is Contrary to Public Policy and Existing Agreements.**

An attempt to alter the decision on CEQA implementation violates existing contractual obligations of NCRA and NWP Co. As Resolution 2011-02 documents, NCRA has received and spent upwards of \$3 million in public money developing the EIR for the project. Indeed, NCRA received several million dollars through the State of California Traffic Congestion Relief Program to fund the reopening and resumption of service on the rail line. According to NCRA’s initial 2006 Strategic Plan, this funding “is the cornerstone to the public contribution of restoring

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<sup>1</sup> Counsel for FOER have provided a copy of this Declaration to your office on March 26, 2013, along with the administrative record for the above-referenced Marin County cases as evidence in support of these comments.

the NWP right-of-way.” A condition of this funding is CEQA compliance. In fact, under the TCRP, California funded the development of the EIR for the project. To now rescind Resolution 2011-02 based on a theory that NCRA had no obligation to comply with CEQA violates the very terms of the Master Agreement and Project Applications/Supplements which NCRA has entered into with the State of California.

In addition, the Consent Decree in the City of Novato litigation also requires NCRA to comply with CEQA for the work required by that Consent Decree. The EIR approved by Resolution 2011-02 includes that work as part of its project. And the EIR purports to provide the necessary compliance plans for the 1999 Environmental Consent Decree entered into with the State of California. Although the requested action does not de-certify the EIR, it repeals some necessary statements and findings in violation of CEQA, thereby rendering the agency in non-compliance with its contractual obligations.

NWP Co. is fully aware of these contractual obligations, and it agreed to CEQA compliance for the project approved by Resolution 2011-02. It supported NCRA’s funding applications for the TCRP money. In October 2006 NWP Co. submitted to the California Transportation Commission a Business Plan in support of NCRA’s funding applications. In 2007 it entered into a Bridge Loan Agreement with NCRA, in which both NCRA and NWP Co. agreed that NCRA would “perform all obligations and requirements necessary to seek reimbursement from the Funding Agencies for [ ] expenditures.” NWP Co.’s insistence that NCRA has no authority to require CEQA compliance is directly contrary to this agreement. NWP Co. is a party to the Novato Consent Decree, in which it too agreed to require NCRA to comply with CEQA for the work covered by that Decree — work that is part of the project encompassed by Resolution 2011-02. And NWP Co. agreed in the Resurrection Agreement to be bound by the 1999 Environmental Consent Decree. Thus, it appears that NWP Co. is consciously asking NCRA to violate numerous agreements, thereby interfering with NCRA’s contractual obligations with the State of California and others.

NCRA cannot escape that it secured public funding based on representations that it would comply with CEQA. If NCRA rescinds all or a portion of its Resolution 2011-02, NCRA could be liable for the misuse and illegal expenditure of several million dollars in taxpayer money.

CATs and FOER do wonder why NCRA seems intent upon doing NWP Co.’s bidding. NWP Co. plainly agreed in the Resurrection Agreement that its lease right was conditioned upon CEQA compliance. NWP Co. signed a June 20, 2011 Amendment to that 2006 Resurrection Agreement in an attempt to resolve that CEQA compliance condition. While we dispute that CEQA “compliance” has occurred, it is clear that NCRA and NWP Co. intended the approval of the project and its EIR, as set forth in Resolution 2011-02, to satisfy the CEQA condition established in the Resurrection Agreement, by certifying the EIR, making CEQA findings, adopting a statement of overriding considerations, and directing preparation of CEQA notices. Further, in the Amendment, NWP Co. agreed to be bound by the mitigation adopted in Resolution 2011-02 pursuant to the EIR.

CATs and FOER believe that it is in the interest of all parties, and particularly NCRA as lead agency, to have the validity of the EIR and CEQA compliance determined by the court. Attempting to abort that process now will be costly and likely result in even further delay preventing the resumption of environmentally sound railroad operations.

#### **IV. NCRA Has No Legal Authority or Right to Rescind or Modify Resolution 2011-02.**

“Once a project has been approved, the lead agency’s role in project approval is completed, unless further discretionary approval on that project is required.” CEQA Guidelines § 15162(c). As a result, NCRA’s role as a lead agency has ended.

Further, once an EIR has been prepared (as here), CEQA prohibits an agency from carrying out a Project unless specific findings are made. Guidelines § 15092(b). CEQA is unequivocal: an “*agency shall not . . . carry out a project for which an EIR was prepared unless*” the agency finds that the project will have no significant unmitigated impacts, or the agency issues a statement of overriding considerations. Guidelines § 15092(b) (emphasis added); *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1221. NCRA cannot change that it has already prepared an EIR for operating and rehabilitating the rail line. And it cannot dispute that it has commenced implementation of the project presented in the EIR. If NCRA rescinds portions of Resolution 2011-02, it will lack some of the required findings and statement of overriding considerations. In short, without the required findings and supporting substantial evidence, CEQA prohibits NCRA from carrying out the project. All operation and rehabilitation of the rail line would have to cease immediately.

Moreover, NCRA lost jurisdiction over its decision when CATs and FOER filed suit. Jurisdiction over a final administrative decision is transferred to the court once that agency action has been judicially challenged. NWP Co.’s attempt now to force rescission also directly conflicts with the court’s jurisdiction. Essentially, NWP Co. is again trying to claim preemption of NCRA’s CEQA action even though the courts have repeatedly rejected this argument.

#### **V. Even if NCRA Had Authority to Rescind or Modify Resolution 2011-02, Such Action Is Subject to and Violates CEQA.**

CEQA defines “approval” as any “decision by a public agency which commits the agency to a definite course of action in regard to a project.” Guidelines § 15352; *Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal. 4th 481, 505. Here, Resolution 2011-02 committed NCRA to rail operations, construction, and maintenance and was a discretionary approval requiring CEQA compliance, with or without the portions submitted for repeal.<sup>2</sup> As FOER, CATs, other commenters, and the EIR itself noted, these activities directly impact the environment.<sup>3</sup> These disclosed impacts include, but are not limited to, increased vehicle emissions, introducing toxic chemicals into the environment, degrading ground and surface water, harm to aquatic life and other biologic resources, inducing growth, and cumulative impacts. Consequently, CEQA required a valid EIR when NCRA decided to move forward with these activities.

Even if NCRA were able to repeal or partially repeal Resolution 2011-02, this decision would also constitute an approval if it permitted rail operation and maintenance activities to continue. Guidelines § 15352(a). The environmental impacts from these activities would remain and, as a result, NCRA would be obligated to comply with CEQA. Further, the EIR for any such

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<sup>2</sup> Based on NCRA’s representations, we understand that the project is proceeding.

<sup>3</sup> FOER’s, CATs’, and other commenter’s letters, which are all contained within the administrative record submitted to you by Shute, Mihaly & Weinberger via Federal Express are incorporated by reference as if fully set forth herein.

approval, as with the EIR for Resolution 2011-02, must analyze the entire project, which is the ultimate reopening of the entire rail line. As noted below, the NCRA and NWP Co. have continued since the approval of Resolution 2011-02 to take actions consistent with an ongoing, collective intent on the part of both entities to reopen the entire rail line as soon as practicable, and inconsistent with suggestions that any such actions are too remote and speculative to merit or require review of potentially significant environmental effects, including cumulative effects.

In approving rehabilitation, maintenance, and operation of the railroad, Resolution 2011-02 adopted numerous mitigation measures to reduce the Project's environmental impacts. The measures were designed to reduce impacts to air quality, biological resources, cultural resources, and water resources, as well as impacts from noise, hazardous materials, and other aspects of carrying out the Project. It is not clear from the proposed action whether NCRA intends to comply or force NWP Co. to comply with adopted mitigation measures.

However, rescinding or modifying Resolution 2011-02 to remove or render unenforceable environmentally protective mitigation measures, or to remove the public's ability to enforce such mitigation measures, would also require CEQA review. The Board cannot discard or determine whether to adhere to these measures at its whim. If the agency renders these measures legally unenforceable, it must first find, based on substantial evidence, that they are infeasible. *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 359. If the Board eliminates, modifies, or renders legally unenforceable these mitigations through its reconsideration of Resolution 2011-02, this action will negatively impact the environment and must also undergo CEQA review. *Id.*; *Lincoln Place Tenants Ass'n v. City of Los Angeles* (2005)130 Cal. App. 4th 1491, 1510.

As a result of these numerous impacts, the NCRA is required to comply with CEQA. If NCRA repeals necessary CEQA findings and determinations, it will violate CEQA and subject itself to further litigation.

## **VI. Rescission of the Resolution Will Result in Detrimental Impacts to the Eel River and Canyon.**

### **A. The Eel River Canyon Holds Extraordinary Values and Challenges**

The Wild and Scenic Eel River and its major tributary, Outlet Creek, embody a host of public trust resources, including ecological, recreational, and cultural values. These values are expressed perhaps most movingly in the three species of wild salmon and trout native to the Eel River, which, though they show signs of recovery, are listed under both state and federal Endangered Species Acts because they are at real risk of extinction. These fish depend on clean, cold water. They are vulnerable to the impacts the railroad has created in the past and is likely to create again if its reconstruction and operations are not effectively mitigated.

The Eel River Canyon particularly reflects a combination of extremely unstable geology – the Franciscan complex, said to be the most erosive terrain in North America, is being thrust upward as fast as the Himalaya, while the region is as seismically active on the continent – and an intense hydrologic regime, including both high average annual and extremely high peak flow events.

These conditions give rise to unstable slopes. When the railroad was constructed along the mainstem Eel River, it cut across the toes of many unstable slopes. This led to a persistent

history of landslides blocking or moving the rail line. If the rail line is reconstructed using the same techniques as were used to construct it a century ago, it seems more than likely that further impacts would be entailed, indefinitely and with no meaningful pretense to effective mitigation.

Due to the location of the rail corridor on the landscape and its proximity to the Eel River, reconstruction of the rail line without additional technology and investment will inevitably result in significant sediment inputs to the river, first from the reconstruction activities, then from additional landslides and slumps, and then from track-clearing actions which can be expected to continue, if history is any guide, as long as the investors' money holds out. Reconstruction with inadequate, inappropriate, or ineffective mitigations will ensure that significant impacts continue well beyond freight operations.

### **B. Rescinding Resolution 2011-02 Means Renouncing Meaningful Environmental Review and Mitigation on a Publicly Owned Rail Line.**

From the outset, the NCRA has assumed and insisted that the public will pay to rebuild the rail line. If the Board acts to rescind this EIR, it is making it clear that the public cannot expect to get the benefit of any bargain it might make with the NCRA. Above all, the proposed Resolution would make it clear that the NCRA will not, despite its many representations to the contrary, conduct meaningful environmental review before rebuilding the line through the Eel River Canyon. At the behest of NWP Co., the NCRA will have embraced a crabbed, legalistic position that it need not, and will never, conduct meaningful review before embarking on a project likely to entail significant unmitigated effects.

Your Executive Director made this position clear in speaking to the *Pacific Sun* for an article published this March 15:

*Stogner says CEQA is unnecessary to ensure environmental protection. He reiterates that the railroad authority and NWP have no immediate intentions to push freight farther north into the Eel River Canyon. But in discussing the issue, Stogner says, "As soon as funds are available and we can make the requisite repairs, we will do so."*<sup>4</sup> (emphasis added.)

This is a position sharply at odds to the NCRA's own representations to the public, the legislature, and state and federal funding agencies. It is in tension with the NCRA's existence as a public agency, created by the state of California and run by representatives of the counties and cities along the rail line. Public agencies have multiple responsibilities to the public – not only to provide for public safety and the public welfare, but also to insure that your actions don't needlessly trample the interests of property owners, the rights of our children to a healthy environment, or the needs of imperiled species to habitat sufficient to recover and survive.

For the NCRA to take the position that it need not, and will not, conduct meaningful environmental review is to insist that restoring freight rail service, and only restoring freight rail, is and will be the NCRA's single focus to the exclusion of all other public values. It is a position which threatens to undermine not only any remaining public will to subsidize reconstruction of the rail line, but confidence in the NCRA as a legitimate public institution.

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<sup>4</sup> *PacificSun.com* "Unproven 'Track' Record," March 15, 2013.  
[http://www.pacificsun.com/news/environment/article\\_6e5ca51c-8c44-11e2-acf0-001a4bcf6878.html](http://www.pacificsun.com/news/environment/article_6e5ca51c-8c44-11e2-acf0-001a4bcf6878.html)

This is not just breaking a promise to California's taxpayers. It is depriving the public of the chance to participate in making an informed decision about the actions taken in their name, with their tax dollars. If the guiding principle of CEQA is to look before we leap, this is not just to leap without looking, but to blindfold the public and push us in first.

Failing to assess the costs of properly managing the Eel River and its values, including its fisheries, makes it impossible for the public to weigh the value to the public of investing in freight restoration. Even if the NCRA were a going concern capable of meeting its obligations under the two previous environmental consent decrees, refusing to consider the potential costs of its proposed action means the agency cannot evaluate the adequacy of its resources or the viability of its plans.

If taken, the decision to rescind also leads to the inescapable conclusion that the NCRA and NWP intend to rebuild and operate the rail line through the Eel River Canyon and up to and around Humboldt Bay with only those few concessions to environmental considerations the NCRA can be forced to make, and only those mitigations the cost of which someone else can be persuaded to pay. Given the unequal relationship reflected in the NCRA's rush to accede to the NWP Co.'s demand to abandon CEQA compliance; given the structural insolvency of the NCRA and relative economic power of the NWP Co. under the one-sided lease agreement; and given the utility to the NWP Co.'s owners of an impoverished NCRA as a weak enforcement agency, this decision would make it clear that future concessions to environmental concerns will be limited.

Extraordinary, sensitive public trust values; a fragile landscape; institutional aversion to considering and mitigating potential harms; and substantial financial incentives to forgo investment in mitigations add up to a recipe for significant cumulative impacts on the Eel River Canyon and watershed.

### **C. The Railroad Entities' Actions Reflect Intent to Rebuild the Entire Line.**

The NCRA and NWP Co. have continued since the approval of Resolution 2011-02 to take actions consistent with an ongoing, collective intent on the part of both entities to reopen the entire rail line as soon as possible, and inconsistent with suggestions that any such actions are too remote and speculative to merit or require review of potentially significant environmental effects, including cumulative effects. Mr. Stogner's statement to the Pacific Sun, cited above, is just one recent, unabashed example.

Over the last several years, the NCRA has considered a series of proposals for uses of the publicly owned rail right of way in various portions of the line. Most involve proposals to develop pedestrian and bicycle trails, including examples in Ukiah, Arcata, around Humboldt Bay, and through the Eel River Canyon. Some, including a request from the Humboldt County Supervisors, have suggested railbanking as a mechanism to allow trail uses while maintaining an intact right of way against the day when rail reconstruction becomes economically feasible.

Responding to an assertive NWP Co., the NCRA has chosen actions that require any trail project involving its right of way to include a full footprint for an operating freight train from the outset. This is true for Eureka<sup>5</sup> and Arcata as much as for Ukiah.<sup>6</sup> The NCRA has adopted a

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<sup>5</sup> For Humboldt Bay, see the Agenda ([http://www.northcoastrailroad.org/Agendas/2012/20120711\\_Draft\\_Agenda.pdf](http://www.northcoastrailroad.org/Agendas/2012/20120711_Draft_Agenda.pdf)), Packet (esp. Item E.1, [http://www.northcoastrailroad.org/Agendas/2012/20120711\\_Item\\_E1.pdf](http://www.northcoastrailroad.org/Agendas/2012/20120711_Item_E1.pdf)),



Rail-with-Trail policy that requires such configurations, though such configurations can drive the cost of trail uses much higher than simple Rail-to-Trail conversions.<sup>7</sup> NWP Co. has flatly opposed all railbanking proposals<sup>8</sup> and the NCRA has carefully avoided any contrary actions.<sup>9</sup>

In the course of discussions of trails around Humboldt Bay, the NWP Co. president told your board that funding was available to rebuild rail lines around Humboldt Bay.<sup>10</sup> Although the 2006 lease agreement granted by the NCRA to NWP Co. provides options to NWP Co. to operate on the “Eel River Division” and “Humboldt Bay Division” of the NCRA right of way, it appears that the NWP exercises control over decisions taken regarding the rail line without having exercised those options.

In similar discussions, the NCRA has taken decisions regarding proposals to restore fish passage to creeks blocked by initial construction of the rail line, and has insisted on maintaining the potential for immediate reconstruction of the rail lines. In the most recent, the NCRA board voted in February of this year not to provide the requested support for a proposal to restore passage at Woodman Creek, some five miles into the Eel River Canyon downstream from Dos

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Minutes ([http://www.northcoastrailroad.org/Minutes/2012/201207amended\\_approved\\_minutes.pdf](http://www.northcoastrailroad.org/Minutes/2012/201207amended_approved_minutes.pdf)), and Audio (<http://www.northcoastrailroad.org/Minutes/2012/audio/>), for the July 11, 2012 NCRA Board meeting.

<sup>6</sup> For discussion of the Ukiah Trail, see the March 13, 2013 Agenda ([http://www.northcoastrailroad.org/Agendas/2013/20130313\\_NCRA\\_Agenda.pdf](http://www.northcoastrailroad.org/Agendas/2013/20130313_NCRA_Agenda.pdf)), and Audio (<http://www.northcoastrailroad.org/Minutes/2013/audio/>).

<sup>7</sup> Marcella Clem of HCAOG (Humboldt County Association of Governments) is recorded in the minutes of the July 11, 2012 meeting as stating, “HCAOG funded a Bay Trails Study. She said that a Rails to Trails project between Eureka and Arcata had an estimated cost of \$4.1 million and that a Rails With trails project had an estimated cost of \$31.2 mil in 2007. She said that it would be very difficult to find \$31.2 million dollars to move forward with a rail with trail project in the corridor.” ([http://www.northcoastrailroad.org/Minutes/2012/201207amended\\_approved\\_minutes.pdf](http://www.northcoastrailroad.org/Minutes/2012/201207amended_approved_minutes.pdf))

<sup>8</sup> Item E.1 on the July 11, 2012 NCRA Board meeting agenda (see note 4 above) includes a June 25, 2012 letter to the Humboldt County Board of Supervisors from NWP Co. President John Williams stating, in pertinent part, “NWP Co. also holds options to operate the Eel River Block between Willits and South Fork and, separately, the Humboldt Bay Block from South Fork to the Samoa/Arcata area. Railbanking of any portion of the NWP Line that is subject to the NWP Co.’s options would constitute interference with NWP Co.’s contractual rights. NWP Co., is, therefore, opposed to railbanking any portion of the NWP Line between Eureka, Arcata, and Samoa.” Item E.1 also contains a copy of the NCRA’s Rail-with-Trail Project Guidelines, dated August 12, 2009.

<sup>9</sup> For discussion of a proposal to railbank the Eel River Canyon, see the March 09, 2011 meeting Agenda ([http://www.northcoastrailroad.org/Agendas/2011/March\\_2011\\_Draft\\_Agenda\\_Regular\\_Meeting.pdf](http://www.northcoastrailroad.org/Agendas/2011/March_2011_Draft_Agenda_Regular_Meeting.pdf)), Minutes ([http://www.northcoastrailroad.org/Minutes/2011/March\\_2011\\_Draft\\_Minutes\\_Regular\\_Meeting.pdf](http://www.northcoastrailroad.org/Minutes/2011/March_2011_Draft_Minutes_Regular_Meeting.pdf)), Packet (Item F.2 [http://www.northcoastrailroad.org/Agendas/2011/20110309\\_Item\\_F.1.pdf](http://www.northcoastrailroad.org/Agendas/2011/20110309_Item_F.1.pdf)), and Audio (<http://www.northcoastrailroad.org/Minutes/2011/audio/>).

For discussion of the complex Humboldt Bay Trail Committee proposals, see discussion of the committee’s report prepared for the December 12, 2012 meeting. Agenda ([http://www.northcoastrailroad.org/Agendas/2012/December\\_2012\\_Agenda.pdf](http://www.northcoastrailroad.org/Agendas/2012/December_2012_Agenda.pdf)), Packet ([http://www.northcoastrailroad.org/Agendas/2012/20121212\\_NCRA\\_HumbBayRailCorrCmte\\_final\\_rpt\\_redline\\_final.pdf](http://www.northcoastrailroad.org/Agendas/2012/20121212_NCRA_HumbBayRailCorrCmte_final_rpt_redline_final.pdf)), Audio (<http://www.northcoastrailroad.org/Minutes/2012/audio/>), Minutes ([http://www.northcoastrailroad.org/Minutes/2012/December\\_2012\\_Approved\\_Minutes.pdf](http://www.northcoastrailroad.org/Minutes/2012/December_2012_Approved_Minutes.pdf)).

<sup>10</sup> NWP Co.’s Mr. Williams is recorded in the minutes from the July 11, 2012 NCRA meeting as responding to the proposal to consider railbanking of the line around Humboldt Bay, in part, “He said that he believes that there are funds available for repair of the rail line around Humboldt Bay. He said that railbanking or abandonment needs to be the last thing that should be considered after all rail options are pursued.” ([http://www.northcoastrailroad.org/Minutes/2012/201207amended\\_approved\\_minutes.pdf](http://www.northcoastrailroad.org/Minutes/2012/201207amended_approved_minutes.pdf))

Rios.<sup>11</sup> NWP Co.'s president demanded as a condition of his approval that the project proponent not only restore fish passage but also provide \$7-10 million, ostensibly to replace a century-old bridge that's north of a partially collapsed tunnel.<sup>12</sup>

These decisions are inconsistent with NCRA representations that the rail entities have no plans to rebuild the entire line, including through the Eel River Canyon, in the foreseeable future.

## **VII. Any Action to Rescind or Modify Resolution 2011-02 Will Not Moot Existing CATs and FOER Litigation.**

In its letter of March 13, NWP Co. through its general counsel claims that rescission of Resolution 2011-02 will end the CEQA litigation favorably for NCRA and NWP Co. Far from ending these suits, however, rescinding or modifying Resolution 2011-02, including NCRA's statement of overriding considerations and approvals for the Project, without a simultaneous commitment to cease project operations, only further deepens NCRA's violation of its duties under CEQA.

In its March 20, 2013 *Ex Parte* application for a temporary stay of the briefing schedule, which was summarily rejected by the court, NCRA argued that NCRA's rescission of Resolution 2011-02 on the theory that Project approval was unnecessary, and thus would moot the CEQA challenge. This is far from the truth. Courts will only dismiss a CEQA suit as moot where a ruling in the case could have no practical impact or could not provide petitioners effective relief. Here, FOER and CATS have clearly alleged that NCRA must comply with CEQA for its approval of the Project. Our petitions ask that the court restrain NCRA and NWP Co. from implementing the Project pending full compliance with CEQA. Accordingly, even if NCRA repeals portions of the Resolution, the court may still provide petitioners effective relief by enjoining NWP Co. and NCRA from operating or implementing the Project until NCRA has prepared and certified a legally adequate EIR for the Project.

## **VII. Conclusion**

To rescind Resolution 2011-02 is to concede the EIR cannot withstand careful scrutiny and is inadequate as compliance with CEQA. It is an admission to the courts and to the people of California that NCRA will waste public and judicial resources to avoid accountability and judicial review.

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<sup>11</sup> For discussions of Woodman Creek project, see Nov 14, 2012 meeting Agenda ([http://www.northcoastrailroad.org/Agendas/2012/NCRA\\_November\\_2012\\_Agenda.pdf](http://www.northcoastrailroad.org/Agendas/2012/NCRA_November_2012_Agenda.pdf)), Audio (<http://www.northcoastrailroad.org/Minutes/2012/audio/>), Packet ([http://www.northcoastrailroad.org/Agendas/2012/20121114\\_Item\\_E2\\_111412\\_fv.pdf](http://www.northcoastrailroad.org/Agendas/2012/20121114_Item_E2_111412_fv.pdf)) Minutes not available. See also February 13, 2013 meeting Agenda ([http://www.northcoastrailroad.org/Agendas/2013/Agenda\\_February\\_2013.pdf](http://www.northcoastrailroad.org/Agendas/2013/Agenda_February_2013.pdf)), Audio (<http://www.northcoastrailroad.org/Minutes/2013/audio/>),

Minutes ([http://www.northcoastrailroad.org/Minutes/2012/December\\_2012\\_Approved\\_Minutes.pdf](http://www.northcoastrailroad.org/Minutes/2012/December_2012_Approved_Minutes.pdf)) and Packet ([http://www.northcoastrailroad.org/Agendas/2013/20130213\\_Item\\_G7.pdf](http://www.northcoastrailroad.org/Agendas/2013/20130213_Item_G7.pdf)). See also May 9, 2012 Meeting Agenda ([http://www.northcoastrailroad.org/Agendas/2012/May\\_2012\\_NCRA\\_Agenda.pdf](http://www.northcoastrailroad.org/Agendas/2012/May_2012_NCRA_Agenda.pdf)), Minutes ([http://www.northcoastrailroad.org/Minutes/2012/2012\\_February\\_Minutes.pdf](http://www.northcoastrailroad.org/Minutes/2012/2012_February_Minutes.pdf)), and Audio (<http://www.northcoastrailroad.org/Minutes/2012/audio/>).

<sup>12</sup> Mr. Williams' email of 1/17/13 is included in Packet Item G.7 for the February 13, 2013 meeting. [http://www.northcoastrailroad.org/Agendas/2013/20130213\\_Item\\_G7.pdf](http://www.northcoastrailroad.org/Agendas/2013/20130213_Item_G7.pdf)

FOER and CATs respectfully request that the NCRA Board deny NWP Co.'s request to partially repeal, rescind, modify, reconsider, or in any way alter Resolution 2011-02. To take NWP Co.'s requested action will likely expose NCRA to claims of breach of contract and further litigation challenging the action.

We thank you for your careful and conscientious consideration of these comments.

Sincerely,

/s/

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Scott Greacen  
Executive Director  
Friends of the Eel River

/s/

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Patricia M. Clary  
Executive Director  
Californians for Alternatives to Toxics

cc:

SMART Board of Directors  
Marin County Board of Supervisors  
Sonoma County Board of Supervisors  
Mendocino County Board of Supervisors  
Humboldt County Board of Supervisors  
Assemblymember Wes Chesbro  
Senator Noreen Evans  
California Transportation Commission  
California Department of Justice  
City of Novato  
California Department of Fish and Wildlife  
National Marine Fisheries Service  
US Fish and Wildlife Service  
California Trout  
EPIC  
Humboldt Baykeeper  
Russian Riverkeeper  
Sierra Club  
Willits Environmental Center  
Northcoast Environmental Center  
Sonoma County Water Coalition  
Eel River Trails Association  
Humboldt Trails Council

Enclosures.

FOER v. NCRA and CATs v. NCRA Administrative Record, volumes 1-21  
NCRA EIR – Scoping Session  
Novato v. NCRA Administrative Record

NCRA Updated CAR November 2005 – Structures Disk 1 of 2  
 NCRA Updated CAR November 2005 – Structures Disk 2 of 2  
 NCRA Updated CAR November 2005 – Roadway  
 NCRA Updated CAR November 2005 – Signals  
 NCRA Updated CAR November 2005 – Geotechnical  
 NCRA Updated CAR November 2005 – Tunnels  
 NCRA Updated CAR November 2005 – Environmental  
 NCRA 2002 CAR and Updated CAR November 2005  
 NCRA RRD Freight Rail Project DEIR – CD 1 of 5  
 NCRA RRD Freight Rail Project DEIR – CD 2 of 5  
 NCRA RRD Freight Rail Project DEIR – CD 3 of 5  
 NCRA RRD Freight Rail Project DEIR – CD 4 of 5  
 NCRA RRD Freight Rail Project DEIR – CD 5 of 5  
 Audio of NCRA Special Board Meeting 6/20/11  
 NCRA Public DEIR Russian River Division Appendix C 3/9/09  
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 NCRA Public DEIR Russian River Division Volume II of II Report 3/9/09  
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 Declaration of Mitch Stogner 11/26/07  
 North Coast Railroad Authority. June 20, 2011. Resolution 2011-02 to Adopt and/or certify the Final Environmental Impact Statement Russian River Division Freight Rail Project, Statement of Overriding Considerations, Mitigation Monitoring and Reporting Plan; Findings; Approve the Russian River Project and Agreement with Sonoma Marin Area Transit Commission.  
 California Transportation Commission. November 9, 2009. State Funded Transit Projects. North Coast Railroad Authority Traffic Congestion Relief Program Funding Agreement with Attachments.  
 Agreement for the Resurrection of Operations Upon the Northwestern Pacific Railroad Line and Lease. September 2006. North Coast Railroad Authority and Northwestern Pacific Railroad Company.  
 Amendment to Agreement for the Resurrection of Operations Upon the Northwestern Pacific Railroad Line and Lease. June 2011.  
 Northwestern Pacific Railroad Letter to North Coast Railroad Authority. March 13, 2013. Re: CEQA Litigation.

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