



Keeping Northwest California wild since 1977

June 3, 2011

*Transmitted via facsimile and U.S. Post*

North Coast Railroad Authority  
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**RE: Notice of Intent to Sue**

Dear Directors and Decision-makers for the NCRA:

This letter provides written notice that the Environmental Protection Information Center (“EPIC”) intends to file a lawsuit should the North Coast Railroad Authority (“NCRA”) certify the Final Environmental Impact Report (“FEIR”) for the North Coast Railroad Authority Russian River Division Freight Rail Project (“Project”), and approve the Project. We understand that the NCRA may take these actions as soon as June 8, 2011 at its next regularly scheduled meeting. We write this letter in a final effort to stop the NCRA from taking these actions, as EPIC believes they are ill-advised and fail to comply with the law.

We request that to avoid litigation 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”). This request to not take action includes a request that the NCRA not approve any and all related agreements or contracts, including but not limited to the Novato Agreement or the SMART Agreement.

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. EPIC 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. EPIC alleges that the FEIR is illegal for several reasons, including but not limited to the following:

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### **Segmentation**

The NCRA is illegally segmenting environmental review of rail line developments by separating the Eel River Division from the Russian River Division. As we noted in our previous comments, the NCRA fails to disclose, analyze, and propose appropriate mitigation for the potential impacts, including but not limited to, reasonably foreseeable future impacts and cumulative impacts, of rebuilding the entire rail line. The FEIR only analyzes rebuilding part of rail line and purposefully leaves out any analysis of impacts to the Eel River Canyon and other areas.

### **Failure to Adequately Analyze Cumulative Impacts & Mitigation**

Even within the constrained analysis, the FEIR fails to disclose, analyze, and mitigate the cumulative impacts of the project. The NCRA fails to specifically disclose and analyze mitigation actions to be undertaken in the course of various aspects of the project. The FEIR lists a number of authorizations that the NCRA will be required to secure, from federal and state authorities, under a number of different laws and regulations. These include, but are not limited to, permits for discharges into wetlands, water quality certifications, and consultations that must be undertaken with the National Marine Fisheries Service and U.S. Fish and Wildlife Service. The potential impacts that must be addressed in such permits and consultations are not adequately addressed in the FEIR and the mitigation is not even outlined in many instances. Such a cursory discussion fails to inform the public and decision-makers about the potential cumulative impacts of the Project, and thus fails to meet the requirements of CEQA.

### **Uncertainty of Funding**

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.

### **Salmonids**

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 and 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

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which the appropriate wildlife agencies agree will be sufficient to prevent those impacts.

### **Wildlife Corridors**

The NCRA fails to adequately analyze the impacts of the Project on wildlife corridors. Construction and operations pursuant to the Project would have a significant impact on the ability of wildlife to move freely across the landscape or may become a barrier to movement.

### **California Tiger Salamander**

The FEIR fails to adequately disclose and analyze the impacts of the Project on the Sonoma County Distinct Population Segment of the California tiger salamander. Salamanders will be negatively impacted by the Project, including but not limited to railroad reconstruction, construction and operations, growth-inducing impacts and other cumulative impacts. Like ESA-listed salmonids, a Biological Opinion and Incidental Take Statement from the U.S. Fish and Wildlife Service will be required for the Project. Without knowing the outcome of the consultation with the Service, the FEIR is lacking in critical details on the impacts and needed mitigation for this species.

### **Bats**

Two bat species of concern that will be impacted by the Project are pallid bat and Townsend's big-eared bat as they occur in tunnels throughout the rail line. The lack of disclosure and analysis of the impacts and needed mitigation for these species is yet another fatal flaw in the FEIR.

### **Fire**

The FEIR fails to adequately disclose and analyze the increased likelihood of fires as a result of Project actions and operations on the rail line. The significant impacts of a new source of fire throughout the rail line threaten human habitations and communities as well as sensitive wildlife areas.

### **Conclusion**

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 in the absence of correcting these errors.

We also believe the Project should not be approved because, among other things, the impacts of the Project violate the federal Endangered Species Act and the California Endangered Species Act.

Although EPIC has previously provided the NCRA with a list of valid concerns and legal issues, EPIC is willing to immediately begin discussing terms to settle this dispute that could

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either obviate the need to file this lawsuit before the possible expiration of any applicable statute of limitations. EPIC 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).
2. The NCRA agrees that if it intends to pursue adoption of the Project, it will: (1) revise the Draft EIR for the Project to adequately account for the above mentioned deficiencies; (2) recirculate this revised Draft EIR for public comment; and (3) prepare a new Final EIR for the Project before considering whether to re-approve the Project.

Should the NCRA reject this offer of negotiation and settlement and proceed with certification of the FEIR, and approval of the Project without change, EPIC will proceed with litigation, and should EPIC prevail, will seek attorney 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 avoiding 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. Please contact me directly in response to this letter.

Sincerely,



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