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CITY OF NOVATO

SUPERIOR COURT, STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MARIN

CITY OF NOVATO,

Petitioner,

v.

NORTH COAST RAILROAD AUTHORITY,

Respondent.

_____/

CALIFORNIA DEPARTMENT OF TRANSPORTATION, CALIFORNIA TRANSPORTATION COMMITTEE, CALIFORNIA DEPARTMENT OF FISH AND GAME, KERNEN CONSTRUCTION, MASS. ELECTRIC CONSTRUCTION CO., AND DOES 1 TO 10,

Real Parties in Interest.

_____/

CASE NO:

PETITION FOR WRIT OF MANDAMUS AND COMPLAINT FOR DECLARATORY RELIEF
[CALIFORNIA ENVIRONMENTAL QUALITY ACT-CEQA**]**

Petitioner alleges:

INTRODUCTION

1. The City of Novato ("City") brings this mandamus action in the public interest on behalf of the residents of the City and on the behalf of all persons affected by the actions

complained of herein. The City challenges the North Coast Railroad Authority's ("NCRA") approval of construction and public works projects and other agreements the purpose of which was and is to upgrade and restore to operability the railroad under NCRA's jurisdiction. NCRA's approval of these agreements and projects violated key mandates of the California Environmental Quality Act ("CEQA") and NCRA's own Administration and Contracting Policy Manual ("Manual"). Several of these agreements and projeccts are in the process of being performed. The NCRA contemplates entering additional agreements to accomplish this upgrading work. The writ and injunctive relief sought herein seeks to halt performance of these agreements, halt the upgrade work approved by the NCRA, prevent the payment of funds to NCRA from other public agencies and prevent the approval of any other related projects or agreements until NCRA has complied with CEQA.

2. In 1989 the State Legislature created the NCRA for the purpose of ensuring railroad service in Northwestern California. During the following years, the NCRA acquired ownership of railroad rights-of-way to and easements in more than 316 miles of track from Samoa in Humboldt County to Ignacio in Marin County, and then eastward to Lombard, located in Napa County (the so-called "Northwestern Pacific Railroad line"or "NWP"). See Attachment A affixed hereto which diagrammatically depicts the NWP line. The NCRA enjoys the exclusive right to operate freight trains on the NWP.

3. Due to decades of deferred maintenance and mismanagement, by 1998, the NWP was left in a serious state of disrepair. During this period, NCRA failed to comply with numerous safety directives issued by the Federal Railroad Administration ("FRA") and California Public Utilities Commission. Consequently, finding that (i) the NWP suffered from hundreds of defective track conditions, and (ii) the NWP was incapable of sustaining train

traffic at the level of the FRA's lowest safety standard (i.e., Class 1 - which allows freight trains to travel at no more than 10 mph), in 1998, the FRA issued its Emergency Order No. 21 ("EO 21") which shut down passenger and freight train operations throughout the entire NWP. EO 21 remains in effect to this day. Except for sporadic service provided for a short period in 2001 on the southern end of the NWP between Penngrove and Schellville (for which the then train operator obtained partial relief from EO 21 to run its trains at Class 1 speeds), there has not been significant, if any, freight activity along the NWP since 1997.

4. In 2001, the NCRA adopted a policy announcing that "its fundamental goal is the re-establishment" of freight railroad service throughout the entire NWP: from the Humboldt Bay Region to Lombard (Lombard is the only interchange connecting the NWP to the national rail system). In furtherance of that policy, the NCRA commissioned a study of all the capital improvements and work necessary to restore freight train service to the entire NWP and comply with EO 21. That study produced a report completed in 2002 and called the Capital Assessment Report ("2002 CAR"). In the 2002 CAR, it was expressly stated that in order to accomplish the work identified therein, an environmental impact report ("EIR") under CEQA and an environmental impact statement ("EIS") under the National Environmental Policy Act ("NEPA") would first have to be prepared and approved. No such EIR/EIS has ever been prepared or approved by the NCRA.

5. The 2002 CAR allowed that under certain circumstances the southern portion of the NWP (the portion south of Willits, the so-called Russian River Division ("RRD")), might be amenable to some other environmental analysis.[1] However, in November 2005, the NCRA commissioned an updated and more detailed study of the capital improvements required to be

[1] The NCRA calls the NWP south of Willits the RRD. The NCRA calls the NWP north of Willits the "Eel River Division" ("ERD").

effected in the RRD in order to restore freight train service on the NWP in the RRD in order to comply with EO 21. Significantly, the 2005 study's stated purpose was to identify and detail all of the capital and repair activities required to enable the NCRA to provide rail service meeting FRA Class 3 standards. Meeting the FRA Class 3 standards would allow NCRA's freight trains to travel, not 10 mph, but four times faster, at 40 mph,[2] thus, increasing the number of trains that could be operated on the NWP at any one time. Depending upon available funding, the NCRA set as its goal the upgrading of the NWP to Class 3 standards in accordance with the 2005 report (the "Updated Capital Assessment Report" or "2005 CAR"). The 2005 CAR stated that the effects of the upgrading and restoration work it identified would cause significant environmental impacts but that they could be mitigated, and as such, it was determined that a mitigated negative declaration would be the required environmental document necessary to be approved prior to the approval of the restoration projects specified therein. A proposed mitigated negative declaration was prepared. But it was never circulated or distributed for public comment. It was never approved.

6. Instead, the NCRA embarked upon a disingenuous strategy of chopping numerous components of the restoration of the NWP into bite-sized pieces, each of which the NCRA hoped could arguably be sold as having no significant environmental effect. For example, for environmental analysis purposes, it split the ERD from the RRD, asserting that in assessing the impacts of operating freight trains in the RRD, it was and is entitled to ignore the train operations

[2]The FRA has promulgated safety and construction standards, which if met, allow freight and passenger trains to travel up to specified speeds. Class 1 allows freight trains to travel up to 10 mph and passenger trains to travel 15 mph. Class 2 allows freight trains to travel up to 25 mph and passenger trains to travel 30 mph. Class 3 allows freight trains to travel up to 40 mph and passenger trains to travel 60 mph. Class 4 allows freight trains to travel up to 60 mph and passenger trains to travel 80 mph. Class 5 allows freight trains to travel up to 80 mph and passenger trains to travel 90 mph.

which will occur in the ERD. It also split the construction of the Class 3 upgrade projects in the RRD from the actual operation of the trains on those upgraded tracks, contending that the former was altogether exempt from CEQA, while conceding that the latter required an EIR to be approved before the trains could actually roll. In 2006, the NCRA spawned another "separate" project by ostensibly entering a potential 104-year lease agreement with the Northwestern Pacific Railroad Company ("NWPCo"), a California corporation, which granted NWPCo exclusive rights to operate freight trains on the entirety of the NWP. Although NCRA conceded that entering into this lease constituted a CEQA project, it undertook no environmental analysis nor approved any environmental document prior to purportedly approving the lease.

7. The NCRA violated CEQA by failing to prepare an EIR to study the proposed upgrading and restoration of the NWP to Class 3 standards. In California, each public agency must prepare an EIR whenever a proposed discretionary project may have a significant effect on the environment. Here, since the record of proceedings contains a fair argument that the upgrading of the tracks to Class 3 standards increases the allowable train speed more than four times that which presently is allowed or possible, the capacity of the tracks to handle more trains has been significantly increased (NWPCo's president calculates that the NWP, upgraded to Class 3 standards, has the capacity to accommodate 16 trains at any one time), thereby significantly increasing the noise, pollution, dust and safety problems, among others, the City and the persons on whose behalf this writ is brought will experience. Before considering any and all of the contracts and individual projects which the NCRA has been approving and which it anticipates approving in the future, the NCRA is therefore required to prepare an EIR to consider said effects and mitigations thereto and, equally importantly, feasible alternatives to the operation of the trains at the speeds and with the number of cars NCRA and NWPCo propose. The NCRA

has not yet done so, and its decisions were uninformed and violative of CEQA.

8. Not only did the NCRA fail to require the preparation of an EIR, but it also refused to timely conduct any CEQA review whatsoever, approving inapplicable categorical exemptions for the commencement of the restoration and upgrade work. First, categorical exemptions cannot be used for any project where there is a reasonable probability that the activity will have a significant effect on the environment due to unusual circumstances. Here, given that no meaningful rail service has been conducted on the NWP since 1997 (and even when such service was provided, it was sporadic, unreliable and only carried out at speeds no higher than 10 mph), increasing the ability of freight trains pulling up to 60 cars to travel at up to 40 mphs, as the NCRA is proposing to do, will patently cause significant effects on the environment. Secondly, to avoid complying with CEQA, the NCRA has invoked, among others, "Class 1" and "Class 2" categorical exemptions, which only apply if the project involves "negligible or no expansion of an existing use" and no increase in capacity. Clearly, such exemptions do not apply here, where significant increases in train speeds and concomitant capacity are two of the principal objectives of the proposed project.

9. The NCRA also violated CEQA by unlawfully segmenting the paltry and inadequate environmental review it performed. In its review, the NCRA intentionally ignored examining the environmental consequences of the "whole of its action", namely, the restoration of the entire NWP. It also impermissibly severed consideration of the effects of the restoration activities (construction, rehabilitation, repair, upgrading) from the effects of the operation of the freight trains once the restoration is completed. The NCRA has essentially conceded that the "whole of the action" will cause significant environmental effects by, in July 2007, issuing a notice of preparation of an EIR for (i) the operation of freight trains on the 142 miles of tracks in

the RRD and (ii) the construction of 4 discrete projects which are part of the restoration project.

10. Under these same facts, the NCRA also violated its own Manual by failing to secure the necessary approvals for the construction contracts it awarded in July and September 2007. Thus, not only are those contracts a nullity under NCRA's own Manual, they must be set aside and performance thereunder terminated because the requisite CEQA document has not yet been prepared, circulated for public comment and approved by the NCRA.

11. A peremptory writ must now issue requiring the NCRA to set aside its approval of the construction and other contracts which were entered and/or awarded in June, July and September for the purpose of restoring and upgrading the NWP. A peremptory writ must now issue requiring the Department of Transportation and the California Transportation Commission--state agencies that, in reliance upon the unlawful CEQA documents generated by NCRA, granted funds for the purpose of constructing the improvements required for said restoration and upgrading activities--to set aside their approval and allocation of those funds and preclude them from paying or allocating any further monies or funds to the NCRA unless and until the NCRA complies with CEQA. And injunctive relief must now be granted preventing the NCRA from approving any additional projects which have as their purpose the restoration, repair and/or upgrading of the NWP until the NCRA has completed and certified an EIR that studies and mitigates the environmental effects thereof.

JURISDICTION

12. This Court has jurisdiction under Public Resources Code Section 21168.5, and Code of Civil Procedure Section 1085. The parties are located and/or doing business in the City of Novato, and the property that is effected by the complained-of activities is located in the City of Novato, within the County of Marin.

PARTIES

13. The City of Novato is a general law city duly established and existing as such under the laws of the State of California. The City is committed to the preservation and enhancement of the City's unique character and quality of life and promotes the awareness and appreciation of the City's historic, aesthetic and natural resources. The NWP is a single track line, a portion of which cuts through the City of Novato and crosses over six separate streets located within the City's limits. The City is comprised of community residents and concerned citizens who personally enjoy and appreciate the environmental quality of the City of Novato and the safe operation of its streets and rights of way. The City brings this petition on behalf of its citizens and all others similarly situated who are too numerous to be named and brought before this Court as petitioners. Because the notices of exemption at issue in this case were filed without holding a hearing or otherwise giving members of the public an opportunity to comment on said notices, the exhaustion of remedies requirement does not apply here.

14. Respondent, the North Coast Railroad Authority, is a public agency created by California Government Code Section 93000 et seq. and approved the projects at issue in this matter. It is the lead agency under CEQA.

15. The California Department of Transportation ("CalTrans") is a state agency that manages the state's highway and transportation systems. CalTrans, along with the California Transportation Commission, have been vested with the authority to administer the Traffic Congestion Relief Act/Program of 2000 ("TCRP"), and the funds that have been made available through that program to be distributed to NCRA and other transportation agencies. CalTrans is named as a real party in interest because the NCRA has made several applications to real party in interest California Transportation Commission ("CTC") for the approval and allocation to the

NCRA of approximately $46 million in TCRP funds, which said applications are reviewed, and must be approved by CalTrans as a condition precedent to favorable action by the CTC. In this role, CalTrans is a responsible agency under CEQA. CalTrans has, in fact, recommended approval of the allocation of TCRP funds to the NCRA.

16. The California Transportation Commission is named as a real party in interest herein because it is responsible for the programming and allocating of funds for the construction of highway, passenger and freight rail, and transit improvements throughout California. The CTC is a responsible agency under CEQA in that it requires and relies upon the NCRA to comply with CEQA prior to the CTC acting upon and approving the allocation of TCRP funds to the NCRA for purposes of constructing the capital and other works of improvement that the NCRA is effecting as part of the NCRA's efforts to restore and upgrade the NWP to Class 3 standards.

17. The California Department of Fish and Game ("DF&G") is named as a real party in interest herein because it entered into an agreement with the NCRA, which was approved by the NCRA in June 2007, for the purpose of restoring and repairing improvements in and around Shellville in order to allow the NCRA to upgrade the NWP tracks in that area to Class 3 standards. No environmental document was prepared by NCRA that covers this project. Said agreement was approved by the NCRA without complying with CEQA or NCRA's Manual.

18. Mass. Electric Construction Co. ("Mass. Electric") is a company doing business in the State of California and is named as a real party in interest herein because it is a party to a construction contract with the NCRA for the repair and replacement of 28 signals on the NWP in the RRD, which said contract was approved by the NCRA Board of Directors on July 11, 2007. Said contract was approved by the NCRA without complying with CEQA or NCRA's Manual.

19. Kernen Construction ("Kernen") is a company doing business in the State of California and is named as a real party in interest herein because on or about September 12, 2007, without hearing and without following the proper procedures, the Executive Director of the NCRA awarded a public works construction project to Kernen Construction for revetment repair at mile post 279.37 to 280 located in the ERD. The award of said contract was in violation of the NCRA's Manual, as well as CEQA.

20. Northwestern Pacific Railroad Company ("NWP Co.") is named as a real party in interest herein because in September 2006 the NCRA Board of Directors acted to approve a purported agreement FOR THE RESURRECTION OF OPERATIONS UPON THE NORTHWESTERN PACIFIC RAILROAD LINE AND LEASE with NWP Co. under the terms of which NWP Co. was granted a five-year lease with the exclusive right to operate freight trains on the NWP line. Said agreement grants to NWP Co. options to extend the agreement for an additional term of 99 years. Said document expressly states that it is "conditioned upon" NCRA "having complied with the CEQA as it may apply to this transaction." The NCRA has never complied with CEQA as it applies to said agreement.

21. Does 1 to 10 are real parties in interest whose true names and capacities are currently unknown to Petitioner. If their true names and capacities become known, Petitioner will amend this petition to insert them.

22. The allegations set forth herein refer to and rely on information and documents relating to this action, all of which will be filed with this Court as part of the Record of Proceedings and which are hereby incorporated by this reference.

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GENERAL ALLEGATIONS

History of the NWP and NCRA

23. Railroad service on California's North Coast dates back into the 19th century. By 1929, the entire NWP was owned exclusively by Southern Pacific Railroad Company ("Southern Pacific"). In 1984, Southern Pacific sold that portion of the NWP north of Willits (the ERD) to Eureka Southern. Southern Pacific continued to operate the NWP south of Willits (the RRD) through an operating agreement with the California Northern Railroad. Within two years after it purchased the ERD from Southern Pacific, Eureka Southern declared bankruptcy in December 1986, and that portion of the NWP was managed by the bankruptcy trustee. In the wake of Eureka Southern's bankruptcy and because of the continuing operational and financial difficulties inherent in the running of freight trains on the NWP, in 1989, the State Legislature created the NCRA for the purpose of ensuring railroad service in northwestern California. In 1992, the NCRA acquired the NWP north of Willits out of the bankruptcy proceedings initiated by Eureka Southern. In 1996, the NCRA acquired that portion of the NWP between Willits and Healdsburg from Southern Pacific.

24. The remaining portion of the NWP south of Healdsburg was then owned by the Northwestern Pacific Railroad Authority ("NWPRA"), a joint powers agency. On January 1, 2003, the Sonoma Marin Area Rail Transit District ("SMART") was created for the purpose of providing passenger and commuter service along the NWP. SMART essentially became the successor-in-interest to NWPRA and consolidated its assets over the rail corridor south of Healdsburg into a single rail district.

25. From Healdsburg to Lombard, the NWP is currently owned by SMART. NCRA has a freight service easement over SMART's right-of-way between Healdsburg and Lombard,

and SMART has a passenger service easement over the portion of the NWP owned by NCRA between Healdsburg and Cloverdale.

26. Due to decades of deferred maintenance and mismanagement, by 1998, the NWP was left in a serious state of disrepair. Moreover, during this time, NCRA failed to comply with numerous safety directives issued by the FRA and California Public Utilities Commission. Consequently, finding, among other things, that (1) the NWP suffered from hundreds of defective track conditions, (2) the continued use of the NWP posed an imminent and unacceptable threat to public safety, (3) the NCRA had engaged in a pattern of failing to comply with federal railroad safety laws and regulations, and (4) the NWP was incapable of safely sustaining train traffic at the level of the FRA's lowest safety standard, namely Class 1, the FRA issued EO21 in 1998 which shut down passenger and freight train operations throughout the entire NWP. EO21 remains in effect to this day. Except for sporadic service provided for a short period in 2001 on the southern end of the NWP between Penngrove and Shellville (for which the then train operator obtained partial relief from EO21 to run its trains at Class 1 speeds), there has not been significant, if any, freight train activity along the NWP since 1997.

27. In July 2002, Parsons, Brinckerhoff, Quaid & Douglas, Inc., in association with Winzler & Kelly, conducted an exhaustive analysis of the long-term financial feasability of the NWP and authored a report that concluded: "The railroad has to operate the entire 300 miles in order to have a positive cash flow. . . .The fixed costs of operating a railroad are too high to support the proposed 141-mile route between Willits and Shellville." In May 1996, the NCRA and NWPRA acknowledged that the freight revenue stream "generated by traffic south of Willits has been inadequate either to fund the normalized maintenance requirements of the NWP Line south of Willits, or to maintain it for the FRA Track Classes . . . ." A former NCRA Executive

Director concluded: "Without direct access to State maintenance funding, it made little or no sense to keep running this segment of the railroad [Willits to Lombard] on freight revenues. This part of the railroad can never be maintained out of the present revenue base. Southern Pacific couldn't do it, and we can't either . . . ."

Funding and NCRA as a High Risk Grantee

28. The Traffic Congestion Relief Program ("TCRP") was established in 2000 by Cal. Gov't. Code §14556 et seq. The TCRP was established to fund transit and transportation projects and programs throughout the State of California. The TCRP requires the CTC to establish guidelines to implement the TCRP, which the CTC has adopted. Said guidelines effectuate the CTC's authority to approve applications from transit and transportation providers for funds earmarked for those providers under the TCRP.

29. Under the CTC's guidelines, CalTrans vets fund applications and makes recommendations to the CTC as to whether a given application should be approved. CalTrans conducts audits of applicants and applicants' expenditures of the funds granted by the CTC. If the CTC approves allocations of funds under the TCRP, it directs CalTrans to disburse the funds in accordance with terms and conditions specified by the CTC. Petitioner is informed and believes and thereon alleges that the CTC does not approve applications from transportation agencies for TCRP funding unless CalTrans recommends approval of the application.

30. The CTC's Guidelines for TCRP provide at Section 5.3 as follows:

> "The Commission is a responsible agency under CEQA because it makes a discretionary decision in allocating funds to a project; the Department [CalTrans] is a responsible agency because it prepares and executes the terms of cooperative agreements on behalf of the State. Therefore, implementing agencies must ensure that both the Commission and the Department receive notices of preparation, the opportunity to review draft environmental documents, and final environmental documents before allocation

> of funds and execution of the cooperative agreement for project acquisition or construction.
>
> "Sections 21100 and 21150 of the Public Resources Code require, for a project that will cause significant environmental impact, that all analysis and documentation of those impacts under CEQA, including any findings by the agency, must be completed before final decisions on project scope, design futures, and cost including mitigation can be made." [emphasis added.]

31. The NCRA has prepared several notices of exemption but has adopted no other environmental document prior to or as part of its applications for funding to the CTC under the TCRP. The NCRA has represented to CalTrans and the CTC that the projects for which the NCRA is seeking funding from CalTrans and CTC under the TCRP are exempt from CEQA, and based upon those representations and the notices of exemption provided to them, CalTrans and CTC have approved grants to the NCRA for construction and other projects otherwise governed by CEQA and/or the NEPA. Because, as alleged elsewhere in this petition, the NCRA violated CEQA and because these notices of exemption were inadequate and inapplicable, CalTrans and the CTC should not have granted the funds it has approved for the NCRA and, as such, the CTC and CalTrans should be enjoined from (1) approving or allocating further TCRP funds to the NCRA, as well (2) paying any amounts to NCRA under the TCRP by way of reimbursement or otherwise.

32. Under the TCRP, the NCRA is eligible for grants from the CTC in the total amount of $60 million. Gov't Code Section 14556.40(a)(32). The NCRA has made numerous applications to CalTrans and CTC for grants under the TCRP. Petitioner is informed and believes that the CTC has approved, but not fully allocated, approximately $46 million of the $60 million eligible to NCRA. However, not all of the $46 million has been paid to the NCRA. Furthermore, the TCRP is a reimbursement program which means that the transportation agency

to which funds under the TCRP have been allocated must first incur the costs for which those funds were allocated, pay those costs, and then seek reimbursement from the CTC and/or CalTrans. In some cases where the applicant has demonstrated a history of sound financial and operational management and accountability, CTC will authorize advance payments under the TCRP. However, because the NCRA is considered a "high-risk grantee" by CalTrans, CalTrans and the CTC have not agreed to provide any advance payments to the NCRA for its restoration or other construction work undertaken to upgrade the NWP to Class 3 standards.

33. CalTrans and the CTC have determined NCRA to be a high-risk grantee because (1) it has a history of unsatisfactory performance, (2) it is not financially stable, (3) it has had a management system which does not meet the standards governing the TCRP, (4) it has not conformed to terms and conditions of previous awards, and/or (5) it is otherwise not responsible. Because of the NCRA's past history of bad management, CalTrans and the CTC imposed a five-year ban on granting funds to the NCRA under the TCRP. That ban has only been recently lifted, but CalTrans and CTC still consider NCRA a "high risk grantee" and treat it as such.

34. That the NCRA continues to conduct its affairs consistent with the characteristics of a high risk grantee is amply evidenced in at least two relatively recent financial transactions it initiated. In order to garner sufficient funds to pay for the restoration and upgrading work which it wishes to effect on the NWP (and which the NCRA has determined to be categorically exempt under CEQA) the NCRA borrowed $170,000 from the Humboldt Bay Harbor District ("Harbor District"). The NCRA failed to timely repay the $170,000 loan to the Harbor District. The Harbor District agreed to extend the due date for an additional three years. The Harbor District's loan was subjected to a Grand Jury investigation, the results of which compelled the Grand Jury to conclude that the District's charter did not authorize the District to loan these funds to the

NCRA and act in the capacity of a "financial institution."

35. On August 15, 2007, the NCRA Board of Directors approved (with the Board members from the County of Marin and Novato dissenting) a security agreement with NWP Co. under which NWP Co. agreed to loan to NCRA up to $5 million in advance funds to pay for construction and repair costs incurred by NCRA in upgrading the NWP. The agreement, however, secured NCRA's promise to pay these advanced funds back to NWP Co. by pledging NCRA's public property, namely, "all rolling stock owned by NCRA" (34 box cars and all NCRA's work equipment). The statute creating the NCRA allows NCRA to borrow monies only from state or federal agencies, not private corporations. Gov't Code §93020(e). Similarly, said statute does not authorize the NCRA to pledge or hypothecate the public assets it owns to secure its financial obligations to a private party. *Cf.,* Gov't Code §93021. In fact, NCRA's enabling legislation makes it plain that it may only "accept grants, gifts, fees or allocations" from private entities. Gov't Code §93023(e). NCRA's security agreement with NWP Co., if breached by NCRA, could lead to the impermissible acquisition of NCRA's public property by NWP Co., a private, for-profit corporation.

Selecting an Operator for the Railroad and NCRA's Repeated Violations of the Brown Act

36. Besides violating CEQA and its own enabling legislation, the NCRA has made a mockery of the Ralph M. Brown Act. In January 2006, the NCRA prepared a Request for Proposal ("RFP") seeking proposals from persons interested in operating a railroad company on any or all of the NWP line. NCRA received five responses to its RFP, one of which was NWP Co's. NWP Co. submitted a "Proposal for Operator of Rail Service of the Northwestern Pacific Rail Line" ("NWP Co. Proposal") dated March 31, 2006.

37. To review these proposals and interview the proposers, the NCRA's Executive Director, Mitch Stogner, convened numerous meetings of the NCRA's Operator Committee. None of these meetings were noticed. No public agendas were prepared for these meetings. The public was not entitled or allowed to be present during or speak at said meetings. These meetings were held entirely in secret. During these meetings, the Operator Committee interviewed the prospective railroad operators and narrowed the selection to three and then to two finalists. The criteria utilized by the Operator Committee were never revealed to the public. The discussions held by the Operator Committee as to the rationale for accepting one proposal and rejecting another were never revealed to the public. The entire process was held in secret. Indeed, even when the full Board met to interview the finalists, these meetings too, were held in secret. The public was completely shut out of the process leading up to probably the most important decision that the NCRA has made since EO 21 was issued in 1998.

38. Allegedly, the Operator Committee was made up exclusively of members of the NCRA Board of Directors. Allegedly, the Operator was comprised of less than a majority of the Board of Directors. The Operator Committee had been established prior to 2003. Different members of the Board were selected to the Operator Committee from time to time during its long existence. The Operator Committee had continuing subject matter jurisdiction over matters that concerned the operation of the railroad and who was to operate it. Thus, under California's Sunshine Law, the Ralph M. Brown Act, NCRA's Operator Committee was considered a "standing committee." Cal. Gov't Code Section 54952(b). Standing committees are governed by the Brown Act and are required, prior to meeting, to give written notice of the meeting, a description of the items that are going to be discussed, heard or acted upon at the meetings and an opportunity for the public to speak at such meetings.

39. Beginning at some time prior to 2003 and continuing to the present, the Operator Committee has consistently met in secret in violation of the Brown Act.

40. The secrecy which has shrouded the selection of NWP Co. as NCRA's exclusive operator of the NWP has cast into doubt the propriety and lawfulness of that decision. NWP Co.'s President is John Williams, who, from 1993 to 1995 was the Executive Director of the NCRA. The Petitioner is informed and believes, and based thereon alleges that it was NCRA's lack of quality management, lack of funds, and its inability to maintain the NWP in a safe condition during the 1990's that led to the issuance of EO 21 in 1998 shutting down the NWP in its entirety. General Counsel for NWP Co. is Doug Bosco. He is also a shareholder of NWP Co. and a member of its board of directors. Even before NCRA issued its RFP in January 2006, Doug Bosco had conducted at least one, if not more, secret meetings with the Operator Committee. Petitioner is informed and believes, and thereon alleges that prior to Mr. Stogner's retention by the NCRA as its Executive Director in 2003, Mr. Stogner had no direct or significant experience in managing a transportation authority or a railroad operation. However, from 1976 to 1991, he served as Chief of Staff for Mr. Bosco while Mr. Bosco served as a Congressman and Assemblyman for the Federal and State Governments, respectively.

41. The illegalities surrounding the secrecy that led to the selection of NWP Co. by the NCRA Board of Directors as the operator of the NWP was further exacerbated by the fact that when the NWP Co.'s proposed agreement with the NCRA was acted upon by the NCRA Board of Directors on September 13, 2006, the NCRA merely agendized that action item as "Approve authorization to enter into agreement with Northwestern Pacific Railroad, Inc.". SMART has called into question whether such a description comports with the Brown Act's public disclosure requirements and has suggested that the legality of the NCRA's Board of

Directors' action in approving that document on September 13, 2006, has been called into question.

42. NCRA has violated the Brown Act in other ways also. It is not unusual for members of the NCRA Board of Directors to attend meetings through teleconferencing. However, in order for the NCRA to lawfully conduct meetings which are attended by its Board members by telephone, the notice of the meeting and its agenda must identify each teleconference location. The NCRA's notices of meetings and agendas routinely fail to include this information. Last month, the NCRA engaged in perhaps its most brazen breach of the Brown Act when, prior to convening in closed session during NCRA's regular meeting of August 15, 2007, NCRA's General Counsel, Christopher Neary, without explanation, intentionally disconnected the Board's telephone connection with Board members James Leland and Judy Arnold right before convening to closed session on a matter involving unspecified and unidentified litigation. Essentially, the NCRA forcibly ejected two of its Board members from a closed session without cause and in direct violation of the Brown Act.

NCRA's Noncompliance with CEQA

43. In 2001, the NCRA adopted a policy announcing that "its fundamental goal is the re-establishment" of freight railroad service throughout the entire NWP: from the Humboldt Bay region to Lombard. In furtherance of that policy, the NCRA commissioned a study of all the capital improvements and repair work necessary to restore freight train service to the entire NWP in compliance with EO21. In fact, the study (2002 CAR) recommended a capital improvement program to provide service at a minimum of the FRA Class 1 level but with much of the rail system capable of providing for FRA Class 2 and 3 operation levels (which would achieve an overall average track speed of nearly 30 mph). In the 2002 CAR, it expressly stated that in order

to accomplish the work identified therein, an EIR and an EIS would first have to be prepared and approved. No such EIR/EIS has ever been prepared or approved by the NCRA.

44. The 2002 CAR allowed that under certain circumstances the southern portion of the NWP (the RRD), might be amenable to some other environmental analysis. However, in 2005, the NCRA commissioned an updated and more detailed study of the capital improvements required to be effected in the RRD in order to restore freight train service on the NWP at an upgraded Class 3 level. Significantly, the 2005 CAR's stated purpose was to identify in detail all of the capital and repair activities required to enable the NCRA to provide rail service meeting FRA Class 3 standards. Meeting the FRA Class 3 standards would allow NCRA's freight trains to travel, not 10 mph, but four times faster at 40 mph, thus, increasing the number of trains that could operate on the NWP at any one time. Depending upon available funding, the NCRA has set as its goal the upgrading of the NWP to Class 3 standards in accordance with the 2005 CAR.

45. The 2005 CAR stated that the effects of the upgrading and restoration work it identified would cause significant environmental impacts, but that they could be mitigated. As such, the 2005 CAR determined that a mitigated negative declaration would be the required environmental document necessary to be approved prior to the approval of the restoration projects classified therein. Although the NCRA has embarked upon the restoration activities and construction work described in the 2005 CAR, it has never circulated or distributed for public comment a mitigated negative declaration as was determined necessary in the 2005 CAR. Ironically, NCRA's consultants prepared a mitigated negative declaration in accordance and consistent with the 2005 CAR's recommendations, but it was never circulated or approved by the NCRA.

46. Instead, the NCRA embarked upon a disingenuous strategy of chopping numerous

components of the restoration of the NWP into bite-size pieces, each of which the NCRA hoped could arguably be sold to the public and responsible agencies as having no significant environmental effect. For example, for environmental analysis purposes, the NCRA split the ERD from the RRD, asserting that in assessing the impacts of operating freight trains on the RRD, it was and is entitled to ignore the train operations which will occur in the ERD and necessarily pass through the RRD to reach the Lombard connection to the national rail system. It also split the construction of the Class 3 upgrade projects in the RRD from the actual operation of the trains on those upgraded tracks, contending that the former was altogether exempt from CEQA, while conceding that the latter required an EIR to be approved before the trains could actually roll. In September 2006, the NCRA spawned another separate CEQA project by ostensibly entering into a potential 104-year lease agreement with NWP Co. which granted NWP Co. exclusive rights to operate freight trains along the entire NWP. No environmental document was prepared and adopted by the NCRA before it ostensibly approved this lease. Inexplicably, on November 13, 2006, the Executive Director of NCRA signed a so-called "proposed negative declaration" in which he states that the signing of the lease with NWP Co. is a "project", and acknowledged that the lease was conditioned on NCRA having to comply with CEQA. By cover letter dated November 27, 2006, the Executive Directors circulated copies of this proposed negative declaration to a variety of clerks, agencies and libraries. Circulating this proposed negative declaration after the lease was approved is patently unlawful and renders the document meaningless. Eventually, the NCRA never approved the negative declaration anyway.

47. On August 22, 2006, NCRA's Executive Director signed a Notice of Exemption for alleged emergency repair work to be accomplished at specified mile posts in both the ERD

and RRD. On February 6, 2007, NCRA's Executive Director executed a categorical exemption determination form and caused a Notice of Exemption to be filed with the State Office of Planning and Research and various county clerks. The February 6, 2007, Notice of Exemption described the activities covered by it to include maintenance and repair activities from Lombard to Willits (the RRD) "to bring the rail line into conformance with FRA Class 2-3 standards", among other things. Under CEQA Guidelines Section 15062(a), when a public agency decides that a project is exempt from CEQA a notice of that exemption may be filed. However, the notice "shall be filed, if at all, after approval of the project." None of the projects described in NCRA's February 6, 2007 Notice of Exemption had been approved prior to the filing of said Notice of Exemption. Thus, the statute of limitations for challenging the exemption determination and the projects themselves commences with the date upon which the subject projects were approved. That statute of limitations has not expired with respect to the projects which are challenged herein.

48. On June 4, 2007, NCRA's Executive Director executed a categorical exemption determination form and caused a Notice of Exemption to be filed with the State Office of Planning and Research and various county clerks. The Notice of Exemption described the activities covered by it to include maintenance and repair activities from Lombard to Windsor (which NCRA calls "Phase 1" of the RRD) "to bring the rail line into conformance with FRA Class 2/3 standards", among other things. Under CEQA Guidelines Section 15062(a), when a public agency decides that a project is exempt from CEQA a notice of that exemption may be filed. However, the notice "shall be filed, if at all, after approval of the project." None of the projects described in NCRA's June 4, 2007 Notice of Exemption had been approved prior to the filing of said Notice of Exemption. Thus, the statute of limitations for challenging the exemption

determination and the projects themselves commences with the date upon which the subject projects were approved. That statute of limitations has not expired with respect to the projects which are challenged herein.

49. The utilization of categorical exemptions, the issuance of notices of exemption and the rejection of its own consultants' findings that EIRs and negative declarations were required to be prepared and certified before the upgrading work NCRA is engaged in at the present time could commence, were all part of the strategy devised by NCRA, and encouraged by NWP Co., to expedite the subject rehabilitation and upgrading work so as to permit NWP Co. to commence train operations on NWP as quickly as possible. In its March 2006 response to the RFP, its October 2006 Business Plan, and in its numerous statements and presentations to the NCRA Board of Directors, NWP Co. has made it clear that it wants to move with alacrity. Its stated objective was to restart railroad operations on the RRD beginning in July 2007, and on the ERD beginning in July 2008.

50. NCRA has admitted to implementing a strategy to avoid having to comply with CEQA. In late 2006 and early 2007, NCRA's expressed ploy was to pursue a "dual approach to CEQA clearance" by treating the repair and upgrading work in the RRD to be categorically exempt under CEQA but agreeing to prepare an EIR covering the operation of the trains on those upgraded tracks. The NCRA did not want to have to comply with NEPA either. Even though it had earlier made application to the federal government for $8.6 million in ISTEA funds to be used for upgrading the NWP in the RRD, in December 2006, the Executive Director of the NCRA reported to his Board the following:

> "Our current strategy, based on the December 13 [2006] meeting of the Operator Committee, is to seek an environmental exemption under CEQA for all of the repair work on the South End [i.e., RRD]. Also, we will remove the federal funds ($8.6 ISTEA) from the

> South End repairs which will eliminate the need for NEPA clearance. A conference call with the Operator Committee will be scheduled to reconfirm this approach, and to discuss options relative to a later EIR to address impacts of freight operations."

51. The law is clear that NCRA violated CEQA by treating the actual construction work necessary to upgrade its tracks to Class 3 as separate and distinguishable for CEQA purposes from the actual operations of the trains on those upgraded tracks. Insofar as CEQA is concerned, they are one and the same, and because NCRA has admitted the operation of the trains on those upgraded tracks requires an EIR, then the restoration and upgrading work itself should have been preceded by an approved EIR. It was not, and the contracts approved by NCRA to effect the upgrading and construction work were unlawful and must be set aside immediately.

52. The NCRA violated CEQA by failing to prepare an EIR to study the proposed upgrading and restoration of the NWP to Class 3 standards. In California, each public agency must prepare an EIR whenever a proposed discretionary project may have a significant effect on the environment. Here, since the record of proceedings contains a fair argument that the upgrading of the tracks to Class 3 standards increases the allowable train speed more than four times that which presently is allowed, the capacity of the tracks to handle more trains has been significantly increased.[3] Even though NWP Co.'s President, John Williams, testified before the City Council of the City of Novato on July 19, 2007, that the maximum capacity of the NWP (upgraded to Class 3 standards) could be determined, he stated that he did not know if that analysis had been done. In an Activities Report prepared for the week ending May 11, 2007, the

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[3] There is substantial evidence in the record that demonstrates that in some instances NCRA is upgrading its rail facilities to Class 4 standards, which would allow NWP Co.'s trains to travel up to 60 mph.

Executive Director undermines Mr. Williams' testimony, when he writes:

> "While the repair effort [from Lombard to Willits] is underway, we will initiate an EIR under CEQA to evaluate impacts of freight operations on the Russian River Division, including foreseeable cumulative impacts from Operations on the Eel River Division North of Willits to Eureka.
>
> "On May 10, we met with SMART staff in Marin County to outline NCRA's repair plans and present a draft 'Project Description', which is a necessary component of the EIR. This 'project description' has been carefully reviewed by NCRA's operator, John Williams. Highlights of the 'Project Description', include:
>
> "• Four train movements Petaluma-Lombard each day. Two 60-car trains to accommodate the garbage haul, and two 25-car trains for general merchandise;
>
> "• Two train movements (25-car merchandise trains) from Willits/Redwood Valley-Lombard;
>
> "• Potential foreseeable cumulative impacts could include another 12 trains per day from the Eel River Division, since the maximum capacity on the entire line would be 16 trains per day." [emphasis added.]

53. The evidence is overwhelming that the capacity of the NWP tracks to handle more trains is being significantly increased over present levels (0), thereby significantly increasing the noise, pollution, dust, and safety problems the Petitioner and the persons on whose behalf this writ is brought, will experience. Before considering any and all of the contracts and individual projects which the NCRA has been approving and which it anticipates approving in the future, the NCRA is therefore required to prepare an EIR to consider said effects and mitigation thereto and, equally important, feasible alternatives to the operation of the trains at the speeds and with the number of cars NCRA and NWP Co. propose. The NCRA has not yet done so, and its decisions were uninformed, and violative of CEQA.

54. Not only did the NCRA fail to require the preparation of an EIR, but it also

refused to timely conduct any CEQA review whatsoever, approving inapplicable categorical exemptions for the commencement of the restoration and upgrade work. First, categorical exemptions cannot be used for any project where there is a reasonable probability that the activity will have a significant effect on the environment due to unusual circumstances. Here, given that no meaningful rail service has been conducted on the NWP since 1997 (and even when such service was provided, it was sporadic, unreliable and only carried out at speeds no higher than 10 mph), increasing the ability of freight trains pulling up to 60 cars to travel at up to 40 mph (and perhaps 60 mph), as the NCRA is proposing to do, will patently cause significant effects on the environment. Secondly, to avoid complying with CEQA, the NCRA has invoked, among others, "Class 1" and "Class 2" categorical exemptions, which only apply if the project involves "negligible or no expansion of an existing use" and no increase in capacity. Clearly, such exemptions do not apply here, where significant increases in train speeds and concomitant capacity are two of the principal objectives of the proposed projects.

55. Petitioner has no plain, speedy and adequate remedy in the ordinary course of law. Issuance of a peremptory writ is needed to avoid immediate, severe and irreparable harm to Petitioner, Novato residents, and others who live and work near and/or are affected by the NWP and the upgrading work at issue herein. NCRA has the capacity to correct its violations of the law but refuses to do so.

FIRST CAUSE OF ACTION

VIOLATIONS OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

56. Petitioner incorporates all previous paragraphs as if fully set forth.

57. The NCRA abused its discretion and failed to act in the manner required by law in approving the contracts with Mass. Electric, Kernen, and the Department of Fish and Game, in

not conducting CEQA review because:

A. The categorical exemptions were unlawful and an initial study and EIR should have been prepared to consider project impacts and mitigation alternatives before the NCRA considered discretionary actions to approve said agreements. The Record of Proceedings contains substantial evidence to support a fair argument that the repair, rehabilitation and upgrading work described in said contracts and in the Notices of Exemption at issue herein may result in significant environmental impacts relating to but not limited to noise, dust, safety and pollution.

B. The categorical exemptions were unlawful because the NCRA has adopted and implemented mitigation.

C. The NCRA segmented environmental review of the restoration and upgrading work from the operations of the train on the upgraded tracks, as well as chopping the NWP into bite-size pieces in an effort to show that the work conducted on each piece and/or the operations on each piece will not cause significant environmental effects and, thus, violated CEQA's requirement to study "the whole of the action."

D. The NCRA's findings approving the subject contracts were inadequate and unsupported and, in fact, were nonexistent.

58. For the foregoing reasons, CalTrans' and CTC's decisions to recommend approval and to approve and/or allocate TRCP funds to the NCRA were unlawful and violative of CEQA.

SECOND CAUSE OF ACTION

VIOLATION OF THE NCRA'S MANUAL

59. Petitioner incorporates all previous paragraphs as if fully set forth.

60. In approving the construction contract with Mass. Electric, the NCRA failed to comply with NCRA's Administration and Contracting Policy Manual in that the Mass Electric agreement with NCRA has not been endorsed by NCRA's counsel. Thus, the Mass. Electric contract is not binding or enforceable.

61. The Manual requires that any public works project as defined as such in the Manual and under applicable law exceeding $50,000 in value must be awarded by the "NCRA" and not the Executive Director. See Manual at Sections 1301.1 and 1305.1. In a letter dated September 12, 2007, the NCRA's Executive Director purported to award a contract for revetment repairs to Kernen in an amount of $558,928, in violation of said Manual. As a consequence, said agreement is unenforceable and a peremptory writ should issue setting it and the Mass. Electric contract aside.

THIRD CAUSE OF ACTION

ULTRA VIRES APPROVAL OF NWP CO.'S LOAN

62. Petitioner incorporates by this reference as if fully set forth herein, all of the allegations in Paragraphs 1 through 55, inclusive, of this Petition.

63. NCRA's August 15, 2007, approval of a secured loan agreement with NWP Co. was in violation of the statute which created NCRA and outside of the authority granted to the NCRA under that statute. As such, said approval was *ultra vires*, and the agreement is void and should be set aside.

DECLARATORY RELIEF

64. Petitioner incorporates by this reference as if fully set forth herein, all of the allegations in Paragraphs 1 through 55, inclusive of this Petition.

65. An actual controversy has arisen and now exists between the City, NCRA and NWP Co. concerning their respective rights as set forth below:

A. NCRA and NWP Co. allege that on September 13, 2006, the NCRA Board approved an agreement FOR THE RESURRECTION OF OPERATIONS UPON THE NORTHWESTERN PACIFIC RAILROAD LINE AND LEASE ("Lease") with NWP Co., whereas Petitioner contends that for purposes of the applicable statutes of limitations set forth under CEQA, no such approval took place.

B. The Petitioner contends that because NCRA made no determination as to whether the Lease--which NCRA admits is a CEQA project--may have had a significant effect on the environment, the statute of limitations set forth in California Public Resources Code Section 21167(a) applies. That is, any action or proceeding challenging said Lease under CEQA must be commenced within 180 days from the date of the NCRA's decision to "carry out or approve the project . . . .". The Petitioner asserts that because the Lease was made expressly "conditioned upon" "NCRA having complied with the California Environmental Quality Act ("CEQA") as it may apply to this transaction", and because that condition has not been satisfied, the NCRA did not become legally bound to honor its obligations under the Lease. Respondent, NCRA, and real party in interest, NWP Co., contend to the contrary.

C. Petitioner contends that as a consequence of the facts and assertions stated above, the statute of limitations to challenge said Lease under CEQA has not yet begun to run. NWP Co. and NCRA contend to the contrary.

66. The Petitioner desires a judicial determination of the parties' rights and duties with respect to the statute of limitations applicable to a CEQA challenge to the Lease and whether or not that statute of limitations has begun to run.

WHEREFORE, Petitioner prays:

1. That the Court issue a Peremptory Writ of Mandamus ordering Respondent, the North Coast Railroad Authority, to set aside and void all of the contracts and agreements it purportedly approved and entered within the preceding 180 calendar days, including but not limited to, the contract with Mass. Electric, the contract with Kernen, and the contract with the Department of Fish and Game, and to refrain from further consideration or approval of any other contract or to take any other action to approve any project which has as its purposes or is related to the repair, rehabilitation, restoration and/or upgrading of the NWP Line until full compliance with CEQA and NCRA's Manual is achieved, including preparation and certification of an adequate EIR, and adoption of feasible mitigation and alternatives based on findings supported by substantial evidence in the record;

2. That the Court issue a Peremptory Writ of Mandamus ordering Real Parties in Interest, the California Department of Transportation and the California Transportation Commission, to set aside and void all approvals relative to the NCRA's applications for TCRP funds and refrain from further consideration or approval of any such applications until full compliance with CEQA is achieved, including preparation and certification of an adequate EIR, and adoption of feasible mitigation and alternatives based on findings supported by substantial evidence in the record;

3. That the Court issue an Administrative Stay Order, Temporary Restraining Order, and/or Preliminary Injunction enjoining the NCRA, Mass. Electric, Kernen, and the Department of Fish and Game, and their agents and employees, from taking any further steps or actions to perform under the agreements they entered with NCRA while this Petition is pending;

4. That the Court issue an Administrative Stay Order, Temporary Restraining Order,

and/or Preliminary Injunction enjoining CalTrans and CTC from paying to or reimbursing NCRA any TCRP funds while this Petition is pending;

5. That the Court issue a Peremptory Writ of Mandamus ordering NCRA to set aside the Bridge Financing and Security Agreement with NWP Co. and approved by NCRA on or about August 15, 2007, and declare forfeited all sums advanced by NWP Co. thereunder;

6. For appointment of a receiver or other qualified person to monitor NCRA's compliance with any and all orders issued pursuant to this Petition;

7. For judicial determination that the statute of limitations applicable to CEQA challenges of the Lease has not begun to run;

8. For Petitioner's costs and attorneys' fees pursuant to C.C.P. Section 1021.5; and

9. For such other and further relief as the Court deems proper.

Dated: September 28, 2007

WALTER & PISTOLE

By: _____
JEFFREY A. WALTER,
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