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May 14, 2018

Via E-Mail and Federal Express

Members of the Commission  
% Matthew Trujillo  
San Francisco Bay Conservation and Development Commission  
455 Golden Gate Ave., Suite 10600  
San Francisco, Ca. 94102

Re: Proposed Civil Penalty Order- North Coast Railroad Authority

Dear Members of the Commission:

The Board of Directors of North Coast Railroad Authority has requested us to advise the Commission that the North Coast Railroad Authority is perplexed by the enforcement proceedings in this matter. Your staff has not pointed to any action by NCRA at any time. Instead your staff points to the actions of an employee of Northwestern Pacific Railroad Company Inc, a private entity.

In short, NCRA will not enter into a stipulated order for the reasons set forth below.

Because your notice is inconsistent with itself and inconsistent with representations understood to have been made at the Enforcement Committee on April 20, 2018.

The actions complained of relate to the emergency application of about four cubic yards of gravel to a road servicing a railroad facility. Those actions were taken on an emergency basis by the private entity, without the knowledge of or participation of North Coast Railroad Authority which would have in any event had no contractual basis for interference. Those actions were taken on land which is not owned by the North Coast Railroad Authority.

In preliminary discussions with BCDC we understand that you are aware that the actions by the private entity are preempted pursuant to Oregon Coast Railroad, LLC v. Oregon Department of State Lands, (2016) 841 F.3d 1069. Apparently your staff has determined that Friends of the Eel River v. NCRA (2017) 3 Cal. 5<sup>th</sup> 677 authorizes the imposition of vicarious liability upon a contracting public entity for the acts of its independent contractor, a questionable proposition.

NCRA is perplexed in that complained of washout by a force majeure event outside the control of anyone was *de minimus* in any event and there has been no explanation as to why a public entity would be vicariously liable for the actions of its independent contractor.

However, NCRA attempted to resolve this matter by having its engineer meet with your staff to propose a remedial program rather than stand upon legal defenses. From anecdotal reports from our engineer the NCRA came to believe that the proposed remedial program was acceptable to BCDC staff. We were advised that due to the resolution of the matter that it was not necessary to attend the April 20, 2018 meeting of your enforcement committee.

In addition we advised that the proposed penalty assessment represented approximately half of the cash available to NCRA for the remainder of the fiscal year. We understood that if we established this to the satisfaction of your staff that the penalty would be abated and that we would proceed with the remedial program. It was not clear from the document received by NCRA on May 4 that the BCDC staff approved of the remedial program.

At one point we understood that your staff agreed to abate half of the penalty subject to discretionary approval of the remedial program. Before NCRA could react to that proposal it was rescinded after the General Counsel left two unreturned phone calls for our Executive Director at our office which due to funding restraints is not staffed full time. The inability to reach the Executive Director was interpreted as non-cooperation and the abatement of the penalties was withdrawn as punishment.

On May 4, 2018 NCRA received notice of the meeting on May 17, 2018 with a proposal that the penalty would be abated, apparently subject to discretionary approval of the remedial program, and discretionary approval of the remedial project. However, inconsistently, also transmitted to NCRA was a proposed Cease and Desist Order calling for the payment of a \$30,000 penalty within thirty days by cashier's check.

This letter is to advise that neither option is acceptable to the North Coast Railroad. We cannot accept a penalty of \$30,000 subject to abatement only upon the whimsical approval of BCDC staff, especially where our lack of staff has been interpreted as lack of cooperation, and NCRA was under the impression that the remedial program had already been approved. Certainly imposition of a penalty in the amount of \$30,000 due and payable immediately is also unacceptable. NCRA will not enter into a stipulated order as proposed.

NCRA will cause implementation of the remedial program which has been long described to your staff, with or without the issuance of the Cease and Desist Order unless instructed otherwise. Perhaps that is the appropriate disposition of this matter. However, NCRA will not enter into a stipulated order calling for the payment of any penalty, whether conditional or otherwise. If you want to continue the matter to clarify the inconsistencies in the message to NCRA that may be appropriate as well.

Yours very truly

A handwritten signature in blue ink, appearing to read "Chris Neary", with a long horizontal flourish extending to the right.

Christopher J. Neary

cc Board of Directors  
Mitch Stogner  
Northwestern Pacific Railroad Co.  
David Anderson  
Marc Zeppetello, Esq.