

**From:** Director Meyers  
**To:** NCRA Board of Directors  
**Subject:** Farewell Report – 10/9/13 Board Meeting

Directors:

My term as a Director of the NCRA will soon end. After serving three consecutive terms I am not seeking reappointment. Having served for six years, I give you the benefit of my observations, especially as only two of you were here when I joined. I apologize for a lengthy report. But the Authority is near ruin. I am concerned about the health of an organization that should benefit the people of California if managed properly.

I. NCRA Lacks Transparency, Accountability and Precludes Full Public Participation. Its Procedures Should Be Changed.

A. Background

An in-law of one of my children counsels her children: "Choose wisely." Regretfully, this Board has all-too-often disregarded that good counsel. Our procedures almost guarantee poor results. All too consistently we operate in a setting in which staff (I refer to senior staff herein) presents - at the last moment - but one choice and instructs the Board that it must be adopted or the consequences will be somewhere between dire and catastrophic. Recall that our agenda is, at best, posted on our website on a Friday, and the packet on a Monday. I expect you can remember occasions that were worse - the packet didn't arrive until Tuesday and/or there were revisions handed out as the meeting commenced. Thus, too often the public has no idea of what we will be considering at the Wednesday Board meeting. Since we preside over a 310-mile line, running through four Counties, imagine how difficult it must be for the public to keep track of our activities under such circumstances. In addition, our website does not include any of the materials handed out by the public, by Caltrans, by our staff and by our Directors, except as they might make it into our packet. Then, after a matter is adopted but with changes, the website does not contain the final matter "as approved." True, these materials could be sought of staff well after the event, but this is a poor substitute to having the material timely available on the website. The meeting Minutes are generally brief encapsulations of the activity, not because the recorder is unable to present a more robust review, but because we choose to have it as such. We excuse this by relying on the

taped Minutes which, if we are lucky, are eventually placed on our website, despite the fact that the recordings are difficult to understand. (Note – I do not advocate doing away with the recordings.) All-too-often, agenda items are either not accompanied by a staff memo, or the memo is so short as to be virtually not worth producing. The absence of accompanying memos is not limited to open session matters, and these are items that are presented to us at the open meeting's end, often when we are as interested in leaving the jurisdiction for home as we are in the careful consideration and deliberation that closed session items demand. I know of no excuse why memoranda regarding these items are not furnished confidentially to the Board well in advance.

I suggest to you that in most of the matters brought before us, the matter is not so urgent so as to require our approval of the staff's suggestion at *that* particular meeting. Invariably, the public and others, such as Caltrans, are hampered from giving us valuable input and we ourselves do not have sufficient time to carefully consider the issues upon which we are forced to vote. Instead, in my opinion, staff reveals only what it wants to, when and as it wants to. I believe that the staff has not fulfilled its duties to the Board, thus limiting the Board from fulfilling its responsibilities. The results are, charitably described, disastrous.

NCRA not only lacks transparency vis-à-vis the public, it does so with respect to the Board. The Board and public do not regularly see non-confidential correspondence (whether from federal or state agencies, from NWP, or others) and staff does not provide to each Board member material provided to *some* Board members. Staff provides little, if any, follow-up to matters considered at Board meetings. On one occasion (an A & M trail Resolution), staff undid in the final document what the Board had expressly agreed to. On another occasion (Balfour Beatty) the follow-up gave rise to a hundreds of thousands of dollars of additional liability without seeking Board authority for such a non-routine, substantial expenditure, or even informing the Board of the events as they unfolded. In NCRA's reports over the years to the California State Comptroller NCRA is shown as being financially healthy, when the truth is completely the opposite. Yet over the years, staff refused my inquiries and those of a member of the public to explain the matter - and to take steps to correct the ongoing errors. NCRA's financial reports are *years* behind, yet when I asked for information about them, Counsel instructed the Executive Director to not respond unless my

request went through my lawyer! No reason for this position was given; in fact Counsel refused to respond to my e-mails asking for an explanation. Attached are the e-mails of August 21 – 25, 2013.

## B. Possible Changes That Might Solve Some of NCRA's Problems

1. We should promptly have an independent study done of the line's future prospects for hauling freight and carrying excursion and commute passengers. I include by reference my Memos of the Tiger V Grant Application and Agenda Item L.1 from the September 11, 2013 Agenda.
2. The Authority has, for too long, hidden its finances from the light of day. The most recent audited financials cover up to June 30, 2011. [Not a typo.] This should be promptly rectified. In addition, why not send to each of the Counties we represent a yearly report with financial and economic information, such as revenues, expenses, freight cars handled, tonnage miles, maintenance expenditures, proposed capital expenditures, fulfillment of prior year's estimates, benefits provided in our haul area, trucks removed from area roads, etc? We could also provide information about other matters, like assistance provided to others (a prime candidate would be our agreements over the past year to bring back fish in the Eel River Canyon). Post this on the website and send copies to the Legislature, Caltrans and SMART.
3. Before public funds (like the Ukiah Depot proceeds) are spent, try to get a buy-in from the four counties or even cities. Consider having them put some of their own funds in if they are to benefit in an uneven manner.
4. Insure that contracts are subject to public bidding. There can hardly be an exception from my experience. The instances in which we maneuvered to have NWP do the work without public bidding was an embarrassment and a disaster. I incorporate my November 14, 2012 Memo here, as part 3 thereof details how NWP's "Punch List" work came in 3 times over budget, a year late, and covered work NCRA was not responsible for doing and should not have paid for. I also incorporate my Memo of April 25, 2013 to the Marin County Board of Supervisors here, as it shows that the excuses raised in support of the Punch List payment were specious and that there was no quarrel with my assertions as to the burden of being designated a High Risk Agency and that we were nearly bankrupt. NCRA's latest efforts to evade public bidding in the Ukiah Depot clean up are of a similar nature. First there

was the failed April 2013 effort to hire a developer without public bidding and give it rights of first refusal. Then on June 12 we amended the requirement that competitive bids be secured. We created an exception that swallows the rule. We decreed that if "exigent circumstances" were present, or if "additional or continued delay" threatens NCRA's conducting railroad operations, no bids are required. Exigent means "requiring immediate aid or action". Yet under our new standard, we were able to give a no-bid contract to NPW to have NWP hire another company to clean up a site that has been contaminated for decades. Decades! There are no rail operations anywhere *near* Ukiah - not even in the same County! None are planned. So, instead of having NWP provide the funds needed to have the work done subject to public bidding, we turned it into a cost-plus contract under which NWP is to make an overhead fee.<sup>1</sup> The Resolution states that it is authorized by 49 CFR 18.36. Really? That procurement policy provides:

1. Awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. (b (8))
2. If the contract includes a ceiling price that the contractor exceeds at his own risk. (b (10)(ii))
3. All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of Section 1836. Some of the situations considered to be restrictive of competition include but are not limited to:
  - ...(iv) Noncompetitive awards to consultants that are on retainer contracts (c)
4. Procurement by sealed bids (formal advertising). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest price. The sealed bid method is the preferred method for procuring construction... (d (2))
5. The cost plus a percentage of cost and a percentage of construction methods of contracting shall not be used. (f (4))
6. Bonding requirements (h)

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<sup>1</sup> The accompanying Resolution bemoaned NCRA's "very challenging position financially". Psst: NCRA has not received one cent of trackage fees from NWP since September 2011. With over one third of its income gone, what else can be expected?

So much for the need to seek public bids for our contracts.

5. Try to settle lawsuits earlier rather than later. When discussing litigation, take into account that the advice you get to settle - or not - comes from someone who may benefit monetarily if you accept the advice. When you sue over the billboards along the Eureka-Arcata highway and discover well after suit is filed that the signs are not on your property, consider whether you should be paying fees to your attorney. Routinely have copies of briefs NCRA files in court provided to Board members. You might just find, as did I, that the alleged “facts” were not correct! Audit legal billings.

6. Require that the Board hold at least two meetings before acting on resolutions and other matters, thus giving the Board and the public the opportunity to fully and properly consider all the matters. The only exceptions should involve true emergencies and require a super-majority vote to shorten the time. Even then, there should be added a week or two instead of the usual one-month hiatus, unless a super-super-majority votes otherwise. Some items relate to a particular area (for example, THA requests, Ukiah repairs by the right-of-way, and Eel River fish spawning). For these, try a first reading in any jurisdiction and the second in the area primarily affected. If staff opposes this, ask for concrete examples of what votes in the last 5 years would have been precluded by this procedure and then carefully examine the reasons offered in support of staff's position. If there are any that survive scrutiny, then include only those as matters that can be heard without a two-meeting routine.

7. Require posting the agenda and packet at least five (5) (or more) business days before the hearing date. Thus, for the usual Wednesday meeting, the material should be available on the website by the close of business on the preceding Wednesday, unless there is an intervening holiday, in which case the posting should take place earlier. If staff opposes this ask for concrete examples of what matters in the last 5 years would have been precluded by this procedure and then carefully examine the reasons offered in support of staff's position. If there are any that survive scrutiny, then include only those as matters that can be heard on shorter notice.

8. Require there be a comprehensive staff memo accompanying each item on the agenda - both for open session and closed session items.

9. As soon as is reasonably convenient, post on the website a full version of whatever action was taken by the Board or Committee in any instance where

the resolution, contract, etc. was changed in any manner from that posted on the site when the agenda was posted. Include this in the draft minutes so that the Board sees it at the succeeding meeting, or the Committee sees it at the next meeting of the Committee or Board, whichever first occurs.

10. Include on the site a copy of all but very routine agreements and contracts. As things now stand, Board members will have a difficult, if not impossible time trying to learn the fate of an agreement, the exact wording of a contract, the structure of the arrangement between NCRA and NWP, etc. except by asking staff for the information. However, staff may not want to furnish the information, either from the press of business or more sinister motives. Now imagine that you are a member of the public and want the same information.

11. In a recent article ("North Coast Railroad Authority Committee Floats the Possibility of Impending Bankruptcy") Director Hemphill was noted as raising the possibility of the NCRA filing a Chapter 9 bankruptcy. His concern is not inappropriate, and the Board should raise the issue for discussion as soon as possible, both in its public sessions and in its closed sessions. This is particularly so as the matter will raise a number of procedural aspects that will take some time to resolve and because we should hear from the public in the counties we serve. Note that NCRA Counsel bears some responsibility for the situation and has a conflict of interest – he is a potential creditor. Outside counsel should be sought. Note also that while some of NCRA's contracts might be voided or subject to renegotiation, that NCRA's major asset might have but one bidder - NWP. Consider also any dealings with the STB. As then-Director MacDonald suggested there should be a clear policy on how debts were to be prioritized for payoff. The items should be listed together with dollar amounts or estimated dollar amounts. These will be needed for the bankruptcy as well, should that route be chosen. Determine the value of all assets, including those in the Eel River Canyon.

12. Strive for transparency in all you do. Video record meetings and promptly post them on the website. Promptly honor all California Public Record Act Requests. Do not avoid meeting in any of the four Counties for an extended period (ex. Marin, during 2013).

13. The Board's ethics policy requiring all Board members to uphold all Board decisions is an embarrassment. Adopted in December 2012, it violates the US Constitution's First Amendment. If followed it would inhibit, if not prohibit, full, fair discussion of Board activity, including reports to the Boards of

Supervisors and any State agencies. Precluding the “city representative” from being from Marin (Feb. 2013) is also embarrassing, if not illegal.

14. NCRA should post on its website an accounting of all of the public funds and non-public funds it has received, including the funds used to purchase the right-of-way from the Bankruptcy Trustee, the amount of TCRP funding, the FEMA grant, the Fish and Game funding, etc. Show how the funds were spent. The accounting should be in a form so as to allow the public to understand the source of all public funds and the use made thereof. Update annually. Show how much money was made running the line when the NCRA ran it and how much was made after private operators ran it. Also, post an accounting of all of the funds received from NWP. Update quarterly.

15. Have periodic public meetings with the SMART Board (whether as a whole or committees).

## II. Substantive Changes Are Needed.

### A. Background

An impartial outside observer coming afresh to the NCRA's books and the NWP lease could conclude that this organization is primarily run for the benefit of its lessee, NWP Co., that the public is not currently getting – and may not ever get - the benefit of the tens of millions of tax-payer dollars used in the line's rehabilitation, and that public benefit was not a primarily intended consequence. We practice financial imprudence.

When the NCRA was formed in 1989 it seemed a wise undertaking. Preserve the 300+ mile right-of-way from Lombard to Samoa and restore trains to the area. But within a decade the difficulties of maintaining the line and service were apparent. Nature did not cooperate and revenues were meager. Traditional traffic declined. New traffic was slow in joining. In 1998 NCRA was ordered by the Federal Railroad Administration to shut the line until basic repairs were made. In 2002 a study of the line for the Humboldt Harbor District determined that only under the most optimistic conditions could it hope to make money, and that under normal conditions it would continue to lose money. By then NCRA had been promised \$60,000,000 by the State and would receive \$7,900,000 from FEMA. By 2005 NCRA was planning with individuals who would eventually form NWP to rehabilitate the line and in 2006 it entered a lease – described below – to do so. State funds were sought

based on the 2002 study and on estimates of the aggregate that could be hauled from Island Mountain. In mid-2006 NWP complained to NCRA staff of an estimate that it would take three years to get the line to Island Mountain (“one year is long enough and [staff] should organize your consultant to do so, getting a new one if necessary”). By August 2006 it was clear that rehabilitation costs had increased substantially and that the entire line could not be done with the available funds. Nonetheless, NWP chose to enter the lease and to pursue the state funds, if only to operate to Windsor. The final lease was not shown to the public for years and was “in NO way subject to review comments from the CTC and Caltrans.” NCRA’s Progress Report of September 15, 2006 sets out the lease plan for NWP to provide funding to NCRA. It states (page 3) that NWP will pay \$20,000/month, “contingent upon the CTC’s allocation of the requested allocation for the rehabilitation and reopening of the line between Lombard and Windsor”. The CTC made the allocation, but the agreement was altered.

The keystone agreement between NCRA and NWP is the lease of September 2006. Can it be described as anything other than a lop-sided, sweetheart deal? It allows NWP to unilaterally extend the lease term for a century, without any additional approval by NCRA. Similar leases between a state entity and private operators amply demonstrate how to proceed. Generally, they are for terms of between 5 and 20 years, with possible renewals if conditions are met. For example, a 2007 Ohio lease provides for 5-year renewals if various conditions are met, including a review of shipper satisfaction, safety, car loadings, track maintenance and financials. Isn't that what NWP should also expect and NCRA demand? (Staff refused to provide me with leases between a state entity and a private operator. I found them on my own. After I did, I doubt that staff provided copies to all other Directors. I incorporate by reference my memos of Aug. 29, 2010, Feb. 9, 2011, and June 8, 2011)

No trackage payments are to be made by NWP until the year after NWP has a net profit of \$5 million. Thereafter, NWP is to make payments from its yearly net income into a fund, until the fund maxes out at \$20 million. While the fund may be used for NCRA expenses, NWP must agree to any withdrawals. When the lease expires, the money in the fund goes to NWP, not NCRA. If NWP never makes more than a \$5 million net annual profit, NCRA will not receive any payments through 2100.

The lease requires NCRA to acquire and spend public funds without limitation. \$68 million (per staff) have been expended to get 62 miles to

Windsor; tens of millions will be needed to extend the line to Willits. Then hundreds of millions of dollars are estimated to rehabilitate the Eel River segment, after which further tens of millions are estimated for work in the Eureka area. When, over the lease term there are major storms, fires and earthquakes, NCRA bears the responsibility of getting funds to cover the damage - all without regard to fiscal prudence.

There is an absence of conflict-of-interest provisions.

Then there is the manner in which the lease arose. I wrote a memo voicing my opinion on how from 2005 through 2007 the Authority extensively violated the Brown Act and the lease lacked “fairness”. I include it by reference (Memo of May 24, 2011). I also wrote a Memo to the Marin County Board of Supervisors dated December 10, 2010 and incorporate it by reference. I stated then, and could still state:

... if the Lease is left as is, for the next century there could be a major drain on the public fisc and mainly private gain. Perhaps this is the inevitable outcome when an obscure public agency is given the opportunity to draw public funds without proper checks and balances. Unlike public agencies that must directly tax or charge constituents to obtain the funds they spend, NCRA can draw on the public weal, supposedly for public benefit. Its insular status, with circumscribed outside oversight has, in this case, yielded an aberrant result.

Hundreds of millions of taxpayer dollars stand to be paid apparently for private gain and limited public benefit. The role of fiscal prudence has been swept aside in an effort to bring freight rail to the 4-county area. While the restoration of freight service may be desirable, it should not be carried out in a fiscally imprudent manner.

## B. Possible Changes That Might Solve Some of NCRA's Substantive Issues

1. NCRA is badly in need of a review of its actions and its mandate. This should be your overarching goal. There is not a unique entity that might accomplish the task. Some unbiased, knowledgeable entity with audit capabilities and an oversight function should be employed. California has a State Auditor and a Joint Legislative Audit Committee which seem well suited

to the task, assuming that a proper reference, whether by the Authority or by a legislator such as Assemblymember Levine, can be made. Items to be covered should include:

- Whether NCRA is maximizing its value for the people of the State;
- What economic development benefits have been provided by NCRA and for what cost, and what economic benefits it might provide, and at what cost;
- The effectiveness of State law to provide effective oversight of the NCRA; and
- Whether the State should consider repealing or amending NCRA's authorizing legislation.

2. The Board needs to understand the reasonable needs of both NWP Co. and NCRA and see where, if at all, the two overlap and accommodations can be made. Simply saying that NCRA has a mandate to get passenger and freight train service up and running over the 300-plus miles from Lombard to Humboldt Bay, because that is what our governing statutes (Gov't Code Sections 93000 et seq.) say, is insufficient and incorrect. The enabling legislation states (emphasis supplied):

It is the intent of the Legislature to provide a means to consider and, if justified, to pursue economic development opportunities and projects related to rail service along these railroad lines. (93001)

The [NCRA] may prepare a plan for the acquisition and operation of any railroad line specified in Section 93001, at no expense to the state, to achieve the purposes set forth in Section 93003. (93022)

After preparation of a plan pursuant to Section 93022, the [NCRA] may do any of the following:

(b) Evaluate alternate plans from the private sector to acquire, finance, and operate a railroad system in a manner which achieves the purposes specified in Section 93003.

(c) Establish criteria for the award of a franchise.

(d) Select a franchisee to acquire, finance, and operate the railroad system. (93023)

We should not exclude from the enabling legislation a need to determine whether actions we might take are fiscally prudent. The Legislature surely did not expect or mandate that we not exercise common sense in our governance of the line.

3. The lease badly needs to be changed. Staff's closeness to NWP's Messrs Bosco and Williams, has resulted (whether by inadvertence or otherwise) in at least the appearance of impropriety and a loss of confidence as to negotiating with them. An outside, knowledgeable person should be brought in to assist. It is no excuse that NCRA lacks funds for its basic needs and thus cannot hire such a person. Have NWP (including its officers) disclose potential conflicts.

4. The argument has been made that as NWP is paying \$180,000 on the RRIF loan, it need not pay any trackage fee. I respectfully disagree. If the loan covered hundreds of thousands of dollars of expenses to which NWP was not entitled or which NWP would have had to incur in any event, or which NCRA did not have to incur, then the yearly payments are seen in another light. And if, after the sale of the Ukiah Depot, NWP is to be fully reimbursed for the RRIF payments, then NWP not only suffers no monetary loss, it comes out ahead. Even if the expenses were appropriate, since NWP is to be fully reimbursed on the sale of NCRA assets, NWP comes out even.

5. Insure that any funds NCRA expends are not tainted by a conflict of interest (or worse), putting staff and NWP in front of other creditors. Also insure that all staff and NWP debts have been properly incurred. That means, *inter alia*, having an auditor look into the "Punch List" contract and billings, instead of having the Board simply acquiesce to NWP's demands.

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You have a fiduciary duty. Have you fully and properly exercised it? You have a reputation. Do you want to be remembered as someone who went along with recommendations that have resulted in what the NCRA has become? Or not.

Thank you.