



MEMO

To: NCRA Board of Directors
From: Executive Director Mitch Stogner
Date: April 14, 2010
Subject: **Agenda Item E.1 - Discussion and Possible Action Regarding Agreement to Complete Reopening Project (Lombard to Windsor)**

NWP Co. and NCRA's project manager have determined that \$1.112 mil. in additional maintenance work needs to be completed prior to FRA inspection of the Lombard – Windsor segment. This work includes:

- **Vegetation Control** – NWP Co. has contracted with Allied Weed Control to perform vegetation removal from Lombard to Windsor. NCRA's project manager has reviewed the contract with Allied, reviewed the scope-of-work, and provided NWP Co. with the conditions required for weed removal.
- **Wayside Signal Repairs** – NWP Co. has contracted with Summit Signal to repair wayside signals at the movable bridges. NCRA's project manager has reviewed and approved the scope-of-work.
- **Re-anchoring of track on the Ignacio to Lombard segment, and minor track repairs from Ignacio to Windsor** – NWP Co. will use its own forces or solicit bids to make essential track repairs (re-spiking and re-anchoring) from Blackpoint Bridge to Sears Point, and to perform minor track repairs from Ignacio to Windsor. NCRA's project manager has reviewed the proposed trackwork and is in agreement that this scope-of-work needs to be completed.

These contracts fit the criteria for sole-source, under NCRA's Policies and Procedures, because of the specialized nature of the work, and the necessity to complete the work as soon as possible. (Please also see Legal Counsel's attached Memo)

As reported to the Board at the March 10, 2010 meeting in Eureka, staff seeks Board authorization to repay NWP Co. \$1.112 million for the above-described projects, which must be completed prior to FRA inspection of the Lombard – Windsor line-segment.

Accordingly, the attached agreement requires NCRA to immediately repay NWP Co. for this estimated \$1.112 in maintenance work from the proceeds provided by the RRIF loan. If the RRIF loan is not approved, NCRA would have 5 years to repay NWP Co. both the principal and NWP Co.'s interest costs for advancing funds for these projects.

Staff Recommendation:

Support the "Agreement to Complete Reopening Project Lombard to Windsor."

CHRISTOPHER J. NEARY

ATTORNEY AT LAW

**110 SOUTH MAIN STREET, SUITE C
WILLITS, CALIFORNIA 95490**

**FAX (707) 459 - 3018
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MEMORANDUM

**TO: Board of Directors
North Coast Railroad Authority**

FROM: Christopher J. Neary

DATE: April 8, 2010

RE: Agreement to Complete Reopening Project (Lombard to Windsor)

Submitted to you for consideration is an Agreement to Complete the Reopening Project from Lombard to Windsor. The Agreement contemplates the completion of certain punch-list type items at a capped cost of \$1.112 million to complete the Project to lift Emergency Order No. 21 from Lombard to Windsor. The Agreement contemplates that the Operator, NWP, will perform this work at its cost by contracting out to its subcontractors it will use in conducting routine maintenance on the rail line. The Agreement contemplates that NWP will advance the funds and be repaid either from the RRIF Loan Proceeds, or by NCRA, no later than five years from the date of execution.

As has been pointed out before, NWP will subordinate its security on certain collateral in order to facilitate the FRA Loan. This Agreement contemplates replacing NWP in a security position subordinate to the FRA.

The Project is described in the exhibits to the proposed Agreement.

To the extent this Agreement is considered a Sole Source Contract, such a result is justified by the fact that the work needs to be performed on a "total package basis" by those who will be responsible for maintaining the work. Furthermore, the contractor has an interest in seeing that this work be performed and therefore uniquely offers to finance the work. It is submitted that it is very unlikely other contractors would be capable of performing substantial work and financing it on the terms as provided in this Agreement. It is my opinion that this is probably not a sole source contract, but in an abundance of caution, I believe that the Board, in making any motion to approve the Agreement, should make specific findings as to the uniqueness of this particular arrangement and relationship of the parties.

**AGREEMENT TO COMPLETE REOPENING PROJECT
LOMBARD TO WINDSOR**

THIS AGREEMENT is entered into by and between NORTH COAST RAILROAD AUTHORITY, a public agency ("NCRA") and the NORTHWESTERN PACIFIC RAILROAD COMPANY, a California Corporation, its successors and assigns ("NWP") and is effective as of March 10, 2010.

R E C I T A L S

- A. NWP is the designated Operator of railroad facilities, including property and easements owned by NCRA under that Agreement for the Resurrection of Operation upon the Northwestern Pacific Railroad Line and Lease dated September 21, 2006 ("Lease").
- B. NCRA finds that punchlist items remain to be completed to ready the railroad for inspection by the Federal Railroad Administration, as described in Exhibit "A."
- C. NWP is uniquely capable of performing such work to complete the project on a "total package basis," while breaking out the requirements into separate competitive packages would not lead to the desired coordinated completion of the projects at a single point in time to enable FRA inspection. Furthermore, the identified financing for the project is speculative and NWP is unique in its position to assume risks associated with lack of funding.
- D. NWP has agreed to perform the work at its costs, with such cost to be capped at \$1.112 million under the supervision of the NCRA Contract Engineer, Dave Anderson, who shall approve all contracts verifying that each such project falls within the scope of an existing environmental clearance and is reasonably calculated to result in a coordinated completion of the project.
- E. The NCRA's authorization for performance of such work shall not operate as prejudice to any claims which NCRA may have against any contractors related to the Windsor-Lombard Reopening Project.
- F. NCRA anticipates it will receive funds under the Railroad Rehabilitation and Improvement Financing Program ("RRIF Loan Proceeds") as authorized and administered by the Federal Railroad Administration. Said funds will be paid to NCRA for the reimbursement of funds expended by NCRA and/or NWP for authorized projects if FRA approves such expenditures.
- G. NWP agrees to spend and/or loan NCRA "Interim RRIF Loan Financing" that will enable completion in whole or in part of any or all Projects listed in Exhibit "B," Executive Director Mitch Stogner's January 20, 2010 letter to FRA entitled "Project Description for RRIF Loan Refinancing" subject to reimbursement as set forth above, under the terms and conditions set forth herein.

IT IS THEREFORE AGREED by and between the parties as follows:

1. **Performance of Work.** NWP shall perform the work described in Exhibit "A" for a price not to exceed \$1.112 million with a completion date no later than September 1, 2010, through such contractors as under contract to NWP.
2. **Interim RRIF Loan Proceeds.** NWP shall from time to time spend and/or loan NCRA such funds ("Loan Proceeds") as are necessary to pay NWP for the sole purpose of performing work authorized for the RRIF Loan Projects listed in Attachment A in an amount not to exceed Seven Hundred Fifty Thousand Dollars (\$750,000) outstanding at any one time, or a cumulative total of One Million, One Hundred Twelve Thousand Dollars (\$1.112 million).
3. **Sole Purpose.** NCRA and/or NWP shall expend Interim RRIF Loan Proceeds solely for the purposes of completing in whole or in part the RRIF Loan Projects listed in Attachment B and NCRA shall in a timely manner perform all obligations and requirements necessary to seek reimbursement from the FRA Loan Proceeds for such expenditures.
4. **Project Accounting.** No later than the fifteenth (15th) day of each month, NWP shall account for and provide to NCRA invoices for EO-21 Projects that have been partially or wholly completed, in a form and with content reasonably specified by NCRA. When any invoice is submitted to NCRA, the invoice shall contain the date and amount of such invoice and shall include supporting invoices and such other evidence or confirmation of work performed as may be reasonably required by NCRA or FRA as part of its RRIF Loan Proceeds review. When NCRA has approved payment of an invoice and such approval has been provided to NWP, NCRA shall in a timely manner perform all obligations and requirements necessary to seek reimbursement from the RRIF Loan Proceeds from FRA for such expenditures.
5. **Repayment of Loan Funds.** Both NWP's advancement of Interim RRIF Loan Funds to NCRA and NWP for expenditures that have been jointly authorized for RRIF Loan Projects shall create an immediate and unqualified obligation on the part of NCRA to repay such Loan Funds to NWP under the terms and conditions hereof, without regard to whether or not the expenditures for which such Loan Funds were advanced are reimbursed by the RRIF Loan Proceeds from FRA. At such time as expenditures for which Interim RRIF Loan Funds were used by NCRA and/or NWP are reimbursed by the FRA RRIF Loan Proceeds, NCRA shall immediately repay such funds to NWP.
6. **Interest.** Interest on any Interim RRIF Loan Funds advanced by NWP, including funds advanced prior to this Agreement shall accrue at the rate paid by NWP for such funds. NWP shall provide NCRA with quarterly invoices of its interest amounts.
7. **Security.** NCRA hereby pledges as collateral security for performance of its obligations hereunder thirty-five (35) boxcars now under lease, further described as car marks NCXX 1000-1034, inclusive, along with the lease and proceeds therefrom, and all work equipment, listed in Exhibit "C" attached hereto. NWP may file and record appropriate liens on said security, and NCRA shall safeguard and protect said security to the reasonable satisfaction of NWP and shall not cause any of the security items to be otherwise collateralized, transferred, disposed of, or wasted, it being understood that the FRA shall have a prior lien securing the RRIF loan, and

further that NWP will subordinate its existing lien on the collateral to the FRA to facilitate the loan.

8. Term. Principal and interest then outstanding on all Interim RRIF Loan Funds extended by NWP to NCRA shall be due and payable no later than five (5) years from the date hereof, with the exception that any Interim RRIF Loan Funds expended by NCRA and/or NWP and reimbursed by the FRA RRIF Loan Proceeds shall be due and payable to NWP immediately upon receipt of such FRA RRIF Loan Proceeds.

9. Default. A default under this Agreement shall occur:

a. As to the Interim RRIF Loan Funds, if NCRA fails to perform any of the terms and conditions of this Agreement, and/or if the FRA RRIF Loan Proceeds fail to reimburse NCRA for any authorized expenditure in an amount in excess of One Hundred Thousand Dollars (\$100,000). In the event any expenditure by NCRA and/or NWP is disallowed and reimbursement is denied by FRA Loan Proceeds, NCRA shall immediately and in writing notify NWP; and

b. Upon Notice of Default being served by NWP upon NCRA, NCRA shall have a period of not more than one hundred eighty (180) days to cure the default, after which NWP without further recourse or legal process of any sort may levy against and collect so much of the collateral security as to repay any Loan Funds together with interest outstanding.

10. Status of Agreement. This Agreement supersedes any and all other agreements, either oral or in writing, between the parties hereto with respect to the subject matter hereof and contains all of the covenants and agreements between the parties with respect to said matters, and each party to this Agreement acknowledges that no representations, inducements, promises, or agreements, orally, in writing, or otherwise, have been made by either party or anyone acting on behalf of either party, which is not embodied herein and that no other agreement, statement or promise not contained in this Agreement shall be valid or binding.

11. Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of the successor(s) and assign(s) of the parties hereto.

12. Severability. In the event that any provision of this Agreement is held to be invalid, void, or unenforceable, the remainder of the Agreement shall nonetheless remain in full force and effect and shall not otherwise be affected, impaired or invalidated.

13. Notice. Any notices required herein or any other information passing between the parties shall be addressed to the following:

Northwestern Pacific Railroad Co.
John H. Williams
250 Cambridge Ave., Ste. 104
Palo Alto, CA 94306-1554

North Coast Railroad Authority

Mitch Stogner, Executive Director
419 Talmage Rd., Ste. M
Ukiah, CA 95482

14. Venue and Attorneys' Fees. In the event legal action is brought by the parties hereto, the venue shall be the Superior Court of the State of California, County of Sonoma. The prevailing party shall be entitled to reasonable attorneys' fees and costs as determined by the Court.

15. Counterparts. This Agreement may be executed in one or more counterparts each of which shall be deemed an original and all of which together shall constitute one and the same instrument.

16. Time of the Essence. Time is of the essence with regard to performance of all obligations and duties of the parties hereto.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first herein above written,

NORTH COAST RAILROAD AUTHORITY

NORTHWESTERN PACIFIC RAILROAD
CO.

ALLAN HEMPHILL
Chairman of the Board of Directors

JOHN H. WILLIAMS
President

Attest:

MITCH STOGNER
Secretary to the Board of Directors

Approved as to Form:

CHRISTOPHER J. NEARY
General Counsel

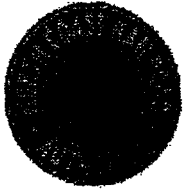
EXHIBIT A

EO-21 Projects Subject to RRIF Loan Financing

	<u>Dollars in Thousands</u>
1. Repair Pull-aparts and Reanchor approximately 7 miles of CWR from Sears Point to Black Point Bridge, MP 29-36	\$250*
2. Repair and Install Signals at movable bridge sites, MP 2.9, 22.5, 37.2	\$300
3. Track Rehabilitation, Ignacio to Windsor, MP 25.8 – 62.9	\$500*
4. Vegetation Control, MP 1-84	<u>\$62</u>
Estimated Total Cost	\$1,112

*NCRA/NWP Estimates

EXHIBIT B



North Coast Railroad Authority
419 Talmage Road, Suite M
Ukiah, CA 95482
(707) 463-3280
<http://www.northcoastrailroad.org>

January 20, 2010

Amanda McKinney
RRIF Credit Analyst
Innovative Finance Division
Federal Railroad Administration
1200 New Jersey Ave. SE
Washington DC 20590

Re: Project Description for RRIF Loan Refinancing

Dear Ms. McKinney:

The purpose of this letter is to amend the project description for NCRA and NWP Company's RRIF loan refinancing. The maximum loan amount requested is \$3.18 million. The projects attached total more than the maximum loan amount, but as discussed, other funding is being pursued for some of these projects, and it is desired that all of these projects be evaluated with any ineligible projects identified.

1. Destress, and reanchor 8 miles of CWR from Sears Point to Black Point Bridge MP 29-37 (\$250)
2. Replace State Highway 37 Crossing, fix wide gauge MP 5H-33.4 and replace ties and surface (\$250)
3. Lombard interchange track – 0.5 mile of siding MP 1-1.5 (\$500)
4. Signals at movable bridge sites, MP 2.9, 22.5, 37.2 (\$150)
5. Track rehabilitation Ignacio to Windsor (MP 25.8-62.9) (\$500)
6. Black Point bridge automation MP 22.5 (\$1,500)
7. Brazos Bridge MP 2.9 (\$400)
8. Track rehabilitation from Windsor to Cloverdale MP 62.9 – 84(\$1,250)
9. Vegetation control MP 1-84 (\$100)
10. Restore drainage MP 34-35 (\$200)

The total of all of these projects is \$5.1 million, but the RRIF loan amount is not to exceed \$3.18 million to maintain a 120% collateral coverage. Attached are Categorical Exclusion Worksheets specific to each project. Please contact me or Angel Lucero if you have any questions.

Sincerely,

Mitch Stog

EXHIBIT C

NORTH COAST RAILROAD AUTHORITY

September 12, 2007

Quantity	Equipment	Serial No./Model No.	Description
1	Air Compressor	Serial # 004149705	Sullair Portable Air Compressor 6 Air hoses 2 Flex handle hammers 2 Clay spades 4 Spike drivers 2 Concrete wedges 2 Brushing tools 2 Mail points \$15,896.49
1	Backhoe	Pin# CAT043odvbnk06955	430 D Cat Backhoe \$93,389.08
1	Hyrail Pick-up	VIN# 1GVHK39U27E115524	2006 Chevrolet 2500 4x4 Extended Cab-DMF Light duty hydraulic gear. \$48,000.00
1	Rotary Dump Truck	Vin# 4V5JC2UE1YN870173	2000 Volvo Hyrail Rotary Dump Truck \$88,000.00
1	Brush Cutter	PIN# 571525 S/N FF120CX036016	RCE BC120C on track brush cutter John Deere 120C upper structure; enclosed cab with A/C; heater and defroster; standard excavator boom and arm; hydraulic pack and 96" rotary head; hyrail gear. \$259,999.00
1	Excavator	PIN# 566487 S/N FF180CW030047	John Deere 180CW Excavator Dual traction tires, 18' boom; cab with A/C, heater and defroster, 42" bucket, cab vandal shields, and mechanical excavator bucket coupler; hyrail gear. \$266,805.00