



## THE CASE AGAINST PROGRESSIVE RAIL

Progressive Rail is not the type of company our environmentally conscious local leaders should endorse. Yet they are about to sign a 10-year contract with them. Learn how our Regional Transportation Commission (RTC) arrived at this ironic juncture and why they must pivot while they still can.

### [PROGRESSIVE RAIL EXECS SUED FOR FRAUD](#)

Three Progressive Rail executives are named in an ongoing July 2017 class action lawsuit related to a U.S. Securities lawsuit alleging widespread fraud. [READ >](#)

### [STORIES FROM PROGRESSIVE'S MIDWEST TOWNS](#)

Some benefit from Progressive's operations, others raise safety, health, traffic, and environmental concerns. [READ >](#)

### [A SECRETIVE, BIASED PROCESS](#)

RTC staff strongly favored hiring Progressive Rail well before Iowa Pacific had even announced it would like to get out of its contract. [READ >](#)

## **WE DON'T NEED TO HIRE A NEW OPERATOR**

The rationale for signing a new operator agreement is based on a manufactured sense of urgency that does not match the facts. [READ >](#)

## **FLAWED RAIL CONTRACT**

An analysis of the proposed contract with Progressive Rail which mirrors most of the 2010 Iowa Pacific contract with additions and deletions that create unacceptable risks. [READ >](#)

## **FAILURE LIKELY BUT SUCCESS COULD BE WORSE**

The RTC is gambling on either another money-losing freight operation or new use of the tracks that will hinder real transit solutions for the community. [READ >](#)

## PROGRESSIVE RAIL EXECES SUED FOR FRAUD

Progressive Rail, a Minnesota firm, has been recommended by the Santa Cruz County Regional Transportation Commission staff to become the rail operator for the Santa Cruz Branch Line.

Three members of Progressive Rail's management team served together as officers and/or board members of Dakota Plains Holdings, a now bankrupt oil services company in the Midwest.

**Craig McKenzie** — CEO and Chairman of the Board at Dakota Plains Holdings. CEO and Chairman at Progressive Rail.

**Dave Fellon** — Director and Board Member at Dakota Plains Holdings. Owner and President at Progressive Rail.

**Jim Thornton** — Interim CFO and principal financial officer; and Executive VP for Strategy, General Counsel and Secretary at Dakota Plains Holdings. Managing Director - Legal at Progressive Rail.

In October, 2016 Co-Founders of Dakota Plains Holdings and associates of the Progressive Rail management team were charged with securities fraud by the U.S. Attorney, Minnesota District[1], and the U.S. Securities and Exchange Commission[2].

Although not directly named in the U.S. government's lawsuits, all three Progressive Rail executives are named *individually* in another class action lawsuit[3] filed on July 10, 2017 regarding the same matter as detailed below.

To quote from the complaint filed:

*“This securities fraud class action concerns a scheme hatched and orchestrated by defendants Gilbertson and Reger to enrich themselves and their accomplices by hiding their involvement in, and control of, Dakota Plains, since its inception, and then secretly and nefariously siphoning off millions of dollars from the public shareholders of the Company in various ways, including an elaborate price manipulation scheme involving its stock. This scheme was unknown to the investing public, but was known to or recklessly disregarded by each of the individually named defendants [including Dave Fellon, Craig McKenzie and Jim Thornton] who signed the Company's Class Period SEC filings, all of which*

*omitted to disclose this fraud until it was too late for any public shareholder to recoup any value from their investment in the Company.”*

Dakota Plains Holdings declared bankruptcy in December 2016, three months after Craig McKenzie resigned as CEO in September 2016.

## REFERENCES

[1] UNITED STATES OF AMERICA, Plaintiff, v. RYAN RANDALL GILBERTSON, DOUGLAS VAUGHN HOSKINS, and NICHOLAS HARRIS SHERMETA, Defendants., U.S. Attorney, Minnesota District

[2] UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. RYAN GILBERTSON, THOMAS HOWELLS, and DOUGLAS HOSKINS, Defendants., U.S. Securities and Exchange Commission

[3] JON D. GRUBER, Individually And On Behalf Of All Others Similarly Situated, Plaintiff, v. RYAN R. GILBERTSON, MICHAEL L. REGER, GABRIEL G. CLAYPOOL, CRAIG M. MCKENZIE, TIMOTHY R. BRADY, TERRY H. RUST, PAUL M. COWNIE, DAVID J. FELLON, GARY L. ALVORD, and JAMES L. THORNTON, Defendants., SECOND AMENDED CLASS ACTION COMPLAINT FOR VIOLATION OF THE FEDERAL SECURITIES LAWS

## STORIES FROM PROGRESSIVE'S MIDWEST TOWNS

There are two sides to every story. When it comes to the freight rail industry, the two sides tend to be voices of those who stand to profit and voices of those who will be affected by the industry behind the profits. As the Santa Cruz County Regional Transportation Commission prepares to approve a new 10-year freight rail operating agreement with Progressive Rail (PGR) of Lakeville, MN, it's helpful to consider stories from both of these sides in communities where Progressive Rail currently operates.

### **Cannon Falls, MN—Proposed Liquid Asphalt Facility**

Emotions ran high at an [October 2015 City Council meeting in Cannon Falls, MN](#). Mayor Robbie Robinson was enthusiastic about Progressive Rail's plans to partner with Bituminous Roadways to build a storage facility designed to house 6.7 million gallons of 300-degree liquid asphalt along the rail line. The Planning Commission had endorsed the plan after two sparsely attended public hearings. After 80 minutes of debate, the city council unanimously rejected the rezoning request that would have allowed the expansion.

Robinson referred to Progressive as a good neighbor and said that the community's concerns expressed at the meeting represented “small mindedness.”

An unidentified woman prompted cheers from the crowd of community members when she responded to Robinson:

*“You talk about small mindedness; here's small mindedness — until Progressive Rail or this asphalt plant is in your backyard, you could give a crap about how it affects the rest of us because you aren't living directly there. And you're going to call us small minded? This affects our health, our property values, our whole quality of life. It doesn't belong where people live.”*

During an interview a week later Progressive Rail President Dave Fellon said, “Nobody won last week,” pointing out that the Bituminous facility represented a “significant” financial investment in the town that would have had a positive impact on the city's tax rolls while creating jobs.

## **Bridgewater Township, MN—Proposed Ethanol Facility**

Eight years earlier in May of 2007, a similar community debate had waged over a proposed ethanol plant that Progressive Rail and partner Advanced BioEnergy hoped to construct in Bridgewater Township, MN. Although some community members were enticed by a potential new source of local income, others were concerned that the proposed ethanol plant would use between 350 and 600 million gallons of water per year.

According to Locally Grown (LoGro) Northfield, “Progressive Rail President Dave Fellon told the town board (that) spring that if the ethanol plant isn’t built, a rail company could pursue industrial use of the land without local approval.”

## **Eagle Point, WI—Frac Sand Industry/Proposed Road Closure**

Eagle Point, WI is still waiting for a final ruling to a lengthy debate over Progressive Rail’s petition to close 95th Avenue to assemble mile-long trains. Recently, Judge David Albino wrote the Office of Commissioner of Railroads (OCR) for the State of Wisconsin stating that the petition had been denied. However, the Commission is not required to side with the judge.

Dennis Ferstenou, Chairman of the Town of Eagle Point, said “The town was opposed to closing that road because it serves an important route for emergency services. It would also impact traffic and other roads.”

Progressive Rail officials delivered this statement about Eagle Point road blockages resulting from their trains:

*“Closing the 95th Avenue crossing allows the railroad to substantially reduce blockages of Highway S and virtually eliminate those on 105th Avenue. We believe the improved traffic flow across two east-west traffic corridors is preferable to the current situation in which the motoring public is uncertain if one, two or all three corridors in the area could be blocked due to rail operations. Keeping the 95th Avenue crossing open is less safe for all parties because the number and length of blockages of Highway S, 95th Avenue, and 105th Avenue will continue.”*

The current OCR ruling allows Progressive Rail to run a second track across 95th Avenue which will likely increase blockages. While additional blockages aren’t a good thing, the

community members who fought the road closure petition say it's better than losing the road to closure.

## **Chippewa Falls, WI—Frac Sand Industry**

In a July 2014 [Wisconsin Center for Investigative Journalism](#) story, Chippewa Falls resident Patricia Popple described the dramatic increase in freight rail traffic as a result of growing frac sand industry, “Train traffic in the area was once much less frequent, and that the trains were shorter. Now,” she said, “They go through here any hour of the night and day...and have to sound whistles every time they go through an intersection.”

Jeff Plale, Wisconsin's railroad commissioner estimates, “Progressive Rail, has increased from one train a week to two or three a day — which would be about 15 to 20 times more traffic.”

According to Progressive President Dave Fellon, the frac sand business has been a “huge win for northwest Wisconsin (since) the volume has justified a lot of upgrades.”

Popple described health, safety, and traffic concerns related to Progressive Rail's frac sand operations in [an April 2018 letter to Santa Cruz County](#) and predicted:

*“At the moment, some people are grateful for jobs and a few are profiting along with Progressive. However, I'll bet we will all miss our beautiful landscape when the oil and gas fracking industries decline and the jobs disappear.”*

## **Lakeville, MN (Progressive Rail's Hometown)—Environmental Violations and Long Term Railcar Storage**

Community members in Lakeville, MN have been speaking out for nearly a decade about [railcars that have divided their neighborhoods](#) for months at a time collecting stagnant water and graffiti and raising safety, health, and general blight concerns.

Speaking about the railcars, local preschool owner and community advocate [Pam Steinhagen wrote in a 2018 Letter to Santa Cruz County](#):

*“Progressive Rail moves them without warning, sometimes right when the nearby middle school lets out, knowing full well that kids climb under the trains to get home. When moving trains, they have blocked the entrance to our neighborhood repeatedly, sometimes for more than 45 minutes... When we directly address owner Dave Fellon and others at Progressive Rail they are not friendly and tell us*

*to watch our children more carefully, that they have a right to park these cars despite the safety risk and general blight on this community.”*

Lakeville [Mayor Doug Anderson says](#):

*“The city has no control over this line which is under federal authority and is operated by Progressive Rail. The company is storing cars for its clients until business picks up.”*

Railcar storage is not the only concern in the rail operator’s hometown. According to a [2011 Thisweek Farmington and Lakeville article \(page 3\)](#), when Progressive Rail was handling about one million gallons of oil and hazardous materials a month at its Lakeville facility, the Minnesota Pollution Control Agency (MPCA) fined them \$75,000 for alleged violations including:

1. Failure to notify the MPCA immediately of a number of spills including the release of about 30,000 gallons of animal tallow and a spill of ferric chloride solution within ten feet of a stormwater drain
2. Failure to take reasonable steps to prevent spills of oil and other hazardous substances that might pollute land, water, and air and threaten the public’s safety and health. Substances such as ethanol, sulfuric acid solution, and ferric chloride solution were being transferred over the railbed and cracked asphalt within ten feet of stormwater inlets instead of in a secondary containment area
3. Failure to have an industrial stormwater permit and a stormwater pollution-prevention plan
4. Allowing spilled materials to enter the stormwater conveyance system and be discharged directly into the soil

When the reporter covering the 2011 story asked Progressive Rail President/Owner Dave Fellon to comment in regard to the MPCA fines and alleged violations, he declined.

### **Things to Consider Before Signing a Progressive Rail Contract**

In a [presentation delivered to the RTC in October](#), on page 9 PGR Director of Marketing Brandon Bauer states “Our marketing strategy is to, quite simply, connect our customers to larger markets, further away via PGR lines.” At the April 19 RTC meeting, Fellon made it clear that PGR is not interested in confining freight to Watsonville. They want to

establish and grow a freight business that spans the entire 32-mile branch line. According to PGR President/Owner Dave Fellon they have “customers who have already provided their interest in expanding their operations to include Santa Cruz.”

Other than Lansing Trade whose interest in constructing a Propane Distribution Terminal in Watsonville was mentioned in PGR’s January 2018 proposal, Progressive rail has not stated who these potential customers are. Whoever they are, if the RTC signs a contract with Progressive Rail and their customers want to bring their business to our county, federal preemption and interstate commerce laws might allow them to do so even if Santa Cruz County community members would rather they didn’t.

# A SECRETIVE, BIASED PROCESS

## The Outcome Was Preordained

The process used to replace Iowa Pacific with a new rail operator has happened outside of the public's purview. Using the [California Public Records Act](#), Greenway obtained communications between the RTC and Progressive Rail (PGR). In this document, we describe a process that strongly favors hiring Progressive Rail well before Iowa Pacific had even announced it would like to get out of its contract.

Progressive Rail first expressed an interest in operating the Santa Cruz Branch line in an [email to George Dondero, Executive Director of the RTC](#)[1], on 7/25/17. Regular communications about a potential proposal began at least 83 days before the official Request For Proposal (RFP). These emails show a plan to use Progressive Rail as the rail operator well before even the Commissioners knew, much less other potential rail operators.

An employee of Iowa Pacific (IP), Mark Westerfield, was a Managing Director for IP and in charge of the Santa Cruz Branch line.

On 9/15/17, an [email from George Dondero to Craig McKenzie, CEO of PGR](#)[2], mentions a meeting organized by Mark Westerfield and implies that Mark should not be “officially” involved due to his employment status with IP. On the same day, [Westerfield sends an email to Dondero and Luis Mendez](#)[3], Deputy Director of the RTC, indicating that he was now with Progressive Rail.

On 9/26/2017, an [email from McKenzie confirms Westerfield's new position](#)[4].

On 10/24/17, [Craig McKenzie sent an email](#)[5] with a link to a [presentation](#)[6] pitching Progressive to the RTC. The email described an upcoming trip to present to George Dondero and Luis Mendez.

On 11/21/17, [Craig McKenzie sent an email to George Dondero and Luiz Mendez](#)[7] stating that his team had surveyed the tracks:

*“We are respectful of the fact that the portion below the washout is technically in Service. That said the guys did go a little bit further only to come upon a group of*

*Mexicans living on the tracks at MP 4.9. Reportedly they waived guns and so my guys turned around.”*

By December, the relationship between Progressive Rail and the RTC was well established. On 12/4/17, [Iowa Pacific sent a letter to the RTC](#)[8] requesting that the RTC find another operator. The letter mentions a letter sent by Dondero on 12/2/17, wherein Dondero suggests abandonment. Just 3 days later, on 12/7/17, the [RTC Commissioners met](#)[9] and there was no announcement that Iowa Pacific wanted out or that the next day, on 12/8/17, the RTC would [release the RFP](#)[10] for a new rail operator. It is inconceivable that the RFP did not exist before 12/4/17 when the RTC was first formally told of Iowa Pacific’s intentions to withdraw, or even earlier on 12/2/17, when Dondero mentioned abandonment to Iowa Pacific. There are serious questions regarding violations of the Brown Act in these closed door meetings regarding an issue so central to the RTC and the public.

The RFP process was extraordinarily well timed to be both quick and inconvenient for other rail operators to bid or for the public to weigh in. The RFP was released 12/8/17, less than 30 days before the Proposals were due on 1/4/18—and needless to say over the holidays. It is no surprise that the [RFP from Progressive Rail](#)[11] is the most extensive and polished compared to the other four submitted. It should also be noted that this proposal has a very different tone than the one sent in October.

On 1/18/18, **just fourteen days after proposals were submitted**, the [RTC staff announced](#)[12] that they had analyzed all proposals and were recommending Progressive Rail. This occurred at the first meeting of the RTC since the RFP was released.

A [PGR letter to Watsonville City Council](#)[13], reviewed twice by George Dondero and Luis Mendez, despite the fact that no contract had been signed with PGR, is particularly troublesome. Rather than sending to **county counsel** a legitimate question about a city’s ability to regulate a federally supervised rail operator once an agreement is signed, the RTC chose to have the unsigned rail operator itself respond to the city’s question. Thankfully, [Alan Smith, Watsonville City Attorney, wrote a letter](#)[14] on 3/2/18 confirming that such activity could be preempted by federal law and listing a series of examples where state and local governments were not able to enforce regulations against railroads due to federal preemption.

Each step of the RFP process with Progressive Rail appears to have been carefully coordinated behind the scenes toward a preordained outcome and is a violation of the public trust and makes a mockery of the so-called “public process.”

## REFERENCES

- [1] [Email to George Dondero, 7/25/17](#)
- [2] [Email from George Dondero to Craig McKenzie, 9/15/17](#)
- [3] [Email to Dondero and Luis Mendez, 9/15/17](#)
- [4] [Email from McKenzie confirms Westerfield’s new position, 9/26/2017](#)
- [5] [Email from Craig McKenzie, 10/24/17](#)
- [6] [Presentation pitching Progressive to the RTC, 10/24/17](#)
- [7] [Craig McKenzie sent an email to George Dondero and Luis Mendez, 11/21/17](#)
- [8] [Iowa Pacific letter requesting that the RTC find another operator, 12/4/17](#)
- [9] [RTC Commissioners met without discussing rail operator, 12/7/17](#)
- [10] [RTC RFP for a new rail operator, 12/8/17](#)
- [11] [RFP from Progressive Rail 1/4/18](#)
- [12] [RTC staff announced recommending Progressive Rail, 1/18/18](#)
- [13] [PGR letter to Watsonville City Council](#), reviewed by Dondero and Mendez
- [14] [Alan Smith, Watsonville City Attorney, letter, 3/2/18](#)

Note: This is only a partial list of communications between the RTC and PGR.

## **WE DON'T NEED TO HIRE A NEW OPERATOR**

The [Santa Cruz County Regional Transportation Commission](#) (RTC) is proposing a [10-year agreement with Progressive Rail](#) to operate freight and excursion trains on the 32-mile Santa Cruz rail line. The rationale for signing the agreement is based on a manufactured sense of urgency that does not match the facts.

1. The RTC is not required to continue freight service.
2. The threat of a lawsuit from existing freight customers has little merit.
3. Adjacent owners are unlikely to seek compensation for railbanking.

The following three sections address each of the above points.

### **Does the RTC Need a Freight Operator?**

A handful of customers in Watsonville currently use Iowa Pacific, the existing operator, for freight service. The freight travels on about 2.5 miles of the Santa Cruz Branch Line. In December 2017, [Iowa Pacific informed RTC](#) that it could no longer carry out its obligations under the operating agreement.



Santa Cruz Branch Line connects to Union Pacific Main Line

The RTC says they must sign an agreement with a new operator as they are compelled to provide service to these existing businesses. **This is not true.**

Pursuant to [RTC's existing operator agreement](#), Iowa Pacific is instructed to pursue formal abandonment of the line after default or expiration of the agreement. Nothing in the agreement with Iowa Pacific or the original purchase agreement with Union Pacific compels the RTC to find a new operator.

Moreover, the RTC's position implies that a rail operator has an obligation to continue freight service into perpetuity even if there was only one customer shipping or receiving one railcar a year. But federal law does not require a railroad to continue operating for the benefit of a single or small handful of customers. For this very reason, the [Surface Transportation Board](#) (STB) considers certain economic standards as part of its decision making prior to abandonment of freight service. These standards establish a threshold

weighing a railroad's losses against the public's need for continuing operations and that of the rail customers located along the line.

RTC's current position also contradicts information provided by its own experts. Prior to the purchase of the corridor, the RTC hired a railroad expert to [opine on the potential abandonment of the Santa Cruz Branch Line](#).<sup>[1]</sup> Mr. John Williams of the [Woodside Consulting Group](#) informed RTC that:

*"...there is no chance the STB would deny an application by SCCRTC and its short line operator for abandonment of the Santa Cruz Subdivision."*

Existing customers along the corridor or others **may** contest abandonment but must show that they would suffer more harm by losing the rail service than the RTC would suffer by continuing to provide the service. In light of the small number of existing customers and the high cost of service, STB **approval for any application for abandonment is almost certain.**

### **Would the RTC be Sued If Freight Service Was Abandoned?**

The RTC has raised the concern that it might be sued by existing customers if freight service were abandoned. This concern is unfounded as **the only entity legally obligated to provide freight service is the designated common carrier.** In this case, the common carrier is the Santa Cruz and Monterey Bay Railway (SCMB); a subsidiary of Iowa Pacific Holdings.

Prior to purchasing the corridor, the RTC went out of their way to make certain they did not acquire the legal obligation to provide freight service. This is specifically referenced in a [petition filed September 7, 2012 with the STB](#).<sup>[2]</sup>

From the STB decision:

*"Although Santa Cruz [RTC] is acquiring the physical assets of the line, it will not acquire the right and legal obligation to provide freight service, which will be retained by the seller and then transferred to [Iowa Pacific]."*

Nothing is certain in the world of railroading, but a lawsuit against the RTC if the current operator (Iowa Pacific) broke its contract and stopped delivering freight to Watsonville is very unlikely. Even if the RTC was sued, they would almost certainly win such a suit.

## Would Abandonment/Railbanking Result in Lawsuits?

Abandonment is not a question of “all or nothing” and can be applied to portions of the corridor. Moreover, abandonment does not mandate removal of railroad track or equipment. The track north of Watsonville has been inaccessible due to a washout for over a year. Given the circumstances, the RTC and existing operator should file for an expedited abandonment procedure for all trackage north of Watsonville (milepost 2.50).

Once the abandonment process has been initiated by a rail operator, a public agency can request railbanking to preserve the right-of-way rather than completing the abandonment process. Nearly 6,000 miles of rail corridor in the United States have already been successfully railbanked. That said, a significant amount of misinformation is being reported as it relates to railbanking here in Santa Cruz County. Specifically, opponents claim railbanking will result in a “takings” lawsuit from adjacent land owners.

This is a complex issue, but the underlying premise of a “takings” suit (also known as inverse condemnation) is the land was never owned by the railroad. Rather, the railroad use was based on an agreement called an easement. Once the railroad use ends and is replaced with a different use, the easement for railroad purposes terminates. Adjacent landowners could then file “takings” suits claiming they are owed compensation for the new use (i.e., the trail or other use facilitated by railbanking).

Here’s the problem. The likelihood of such suits along the Santa Cruz Branch Line is extremely remote. Why? Because the majority of land in the corridor is not an easement, but is owned outright by the RTC. Meaning the RTC holds fee simple title. As such, the adjacent landowners have no legal right to any land in the corridor and no basis for a takings case.

How are we certain about this? As part of the purchase transaction, the RTC hired an attorney to review title for the corridor. According to [the findings of Mr. Kirk Trost](#), an attorney hired by the RTC, the majority of the corridor is owned in fee by RTC. There are few easements to worry about.[4]

The liability associated with potential takings claims may equally apply to railbanking or the rail-with-trail plan being pursued by the RTC. Both plans constitute a change in use that could exceed the scope of the original easement. But, in the unlikely event that a

takings case was filed and won, any settlement would be paid by the Federal government not the county.

## Conclusion

The RTC completed a tremendous amount of due diligence prior to its purchase of the rail corridor. In fact, the situation we find ourselves in today has already been addressed in multiple documents. Yet, the RTC chooses to ignore this information from within their own documents.

At best, the selection and draft agreement with Progressive Rail has been founded on a manufactured sense of urgency. A more cynical viewpoint would be certain pro-train individuals in the RTC are attempting to circumvent the Unified Corridor Investment Study. In either case, **the RTC must provide documentation** as to the rationale for contradicting the statements and expert advice on which it previously relied.

## REFERENCES

1. [Appraisal Review Report and Appraisal Review Certificate of Appraisals and Related Valuation Analyses for the Santa Cruz Branch Line of the Santa Cruz Subdivision of the Union Pacific Railroad Company](#), Tim Landes, SR/WA, 2010-03-16
2. [Surface Transportation Board \(STB\) Decision, Santa Cruz County Regional Transportation Commission—Petition For Declaratory Order](#), “Digest: Santa Cruz County Regional Transportation Commission does not need Board authorization to acquire the physical assets of the Santa Cruz Branch line in Santa Cruz County, Cal. Although Santa Cruz is acquiring the physical assets of the line, it will not acquire the right and legal obligation to provide freight rail service, which will be retained by the seller and then transferred to a third-party easement owner/operator. Nor will Santa Cruz be in a position to interfere unduly with freight rail operations.”, 2012-09-07
3. [Santa Cruz Branch Line Business Plan](#), Systra Consulting, 2008-08-04
4. [Santa Cruz Branch: Preliminary Title Report](#), Kirk Trost, 2005-05-11

## FLAWED RAIL CONTRACT

The proposed contract with Progressive Rail, being promoted by the Regional Transportation Commission's staff, **follows the failed contract with Iowa Pacific containing similar terms**. We provide an analysis of the poor financial terms for taxpayers, but other terms are also important for the public to understand, since most are not familiar with the current failed contract with Iowa Pacific. Numbers at the beginning of each contract point relate to the specific paragraph number in the proposed contract [[PDF](#)].

### Railcar Storage On the North Coast

§2.5.1 Railway has the right to **store 100 railcars on the North Coast** between Davenport and Laguna Rd within the Coast Dairies State Park and Wilder Ranch State Park. Although there is a 2-month time limit for specific cars, there is no overall limit, meaning that railcars could be present at all times, as they are now present in Harkins Slough.

### Prioritizes Freight Service Over Passenger Rail and the Trail

§2.1, §2.4.1b **Prioritizes freight service**. The clause “the Transportation Service will not materially conflict with, and will be subject and subordinate to Freight Service” makes clear that Transportation Service is at risk since it will have to be designed to have no impact on freight service.

§3.1 Other projects like the **trail must not materially interfere with Railway's rights and operations or freight service rights and obligations**.

§6.1.1 Implies that the RTC can adjust the railroad as needed for a project such as the Trail. But the phrase “subject to Railway's rights under this agreement” and §6.1.2 appears to remove that flexibility.

### Significant Impacts On Neighborhoods

§5.2.2 **Absolves the railway of any obligation to correct graffiti**. Graffiti is an almost certain problem that will blight our coastline and natural areas.

§6.3 Indicates that **facilities will be built on the west side of Santa Cruz for train maintenance** (just west of Swift St. by Kelly's Bakery). It removes any ambiguity that

the Railway intends to run freight through the west side of Santa Cruz, and intends to add significant industrial facilities for maintenance operations there (that would not likely be subject to city planning laws). This could have significant noise, visual, odor and other impacts.

§7.1.2 Gives the Railway the option to create “lay down” areas which they can use to temporarily store shipped materials that are being transferred to/from a train. The **storage areas would be adjacent to the tracks and could be located in neighborhoods**, or anywhere else convenient for the shipper and Railway.

### **Severely Limits Local Control of the Corridor For At Least a Decade**

§2.3 This clause, which is referenced throughout the contract, significantly limits the SCCRTC's rights.

§2.4.1 Contract language for “**failure to act**” **within 120 days means approval** (problematic for slow-moving government body), and RTC Commission may make requests, but has no actual authority over transportation service.

§2.4.1.1 Railway can make changes that must be acted on within 60 days or they’re deemed approved.

§2.4.1.2 **All other uses of rail are subordinate to Railway and can’t “materially conflict with” Railway operations.**

### **Bypasses the Outcome of the Unified Corridor Investment Study (UCIS)**

§5.1 How can the RTC agree to make **multi-million dollar investments in track upgrades** for freight service before the UCIS has determined that this is our community’s priority, which is part of legal language of Measure D? This giveaway to Progressive Rail makes no financial sense. It is like a building owner spending millions to upgrade a space which will never return the investment.

§8.2.3 Require the RTC to pay \$300,000 if the result of the UCIS determines freight service should not be implemented between mile marker 0 and 7. The RTC is proposing we sign a contract for six months before the completion of the UCIS. Essentially, **we are giving away \$300,000 of the public’s money if the UCIS determines that rail is not the best use of the corridor.**

§1.16 Says the UCIS is complete when presented to the RTC, **not when the Commissioners approve it**. Aside from the fact that the study should be considered complete only after the Commissioners accept it, this starts the clock for §8.2.4, which creates unrealistic pressure on the RTC.

### **Restricts Current Access to Rail Corridor by Community**

§17 This section (and others) limit community access to the rail corridor in general. **Current ad hoc trails on the west side and elsewhere would likely become off-limits until the proposed trail in each section is completed**. Since the agreement restricts how the RTC can develop the corridor, this could lead to long-term loss of access, since freight operations could limit the Commission's ability to construct a trail due to section §3.1. In particular, **the heavily used recreational sections of coastal trail north of Wilder Ranch would lose access**.

### **Insufficiently Protects the RTC (And Our Community)**

§27.2 **Presumes the RTC and Railway are on equal footing with regard to legal expertise in drafting a rail service operation contract—this is not the case**. The previous failed contract with Iowa Pacific, upon which this proposed contract is based, should be enough learning for the RTC to know that it has little expertise in contracting with or managing a rail operator.

### **Our Community Will Continue To Be Directed by Proposition 116**

§8.5 Shows the ongoing concern the RTC has re Prop 116 funds and its determination to be bound by rail requirements, despite the California Transportation Commission's (CTC) stated desire to provide our community with flexibility in determining the best use of the corridor. To increase our options, the RTC should petition the CTC to permit a transportation-focused trail as an alternative to a rail operation.

## FAILURE LIKELY BUT SUCCESS COULD BE WORSE

The [five-year financial plan](#) provided by [Progressive Rail](#) is inconsistent with historical operations along the Santa Cruz Branch Line. Based on this history, the RTC is unlikely to make money on this contract. In fact, if one includes the millions of dollars of investment to get the tracks ready for Progressive Rail's use, it's a huge money loser.

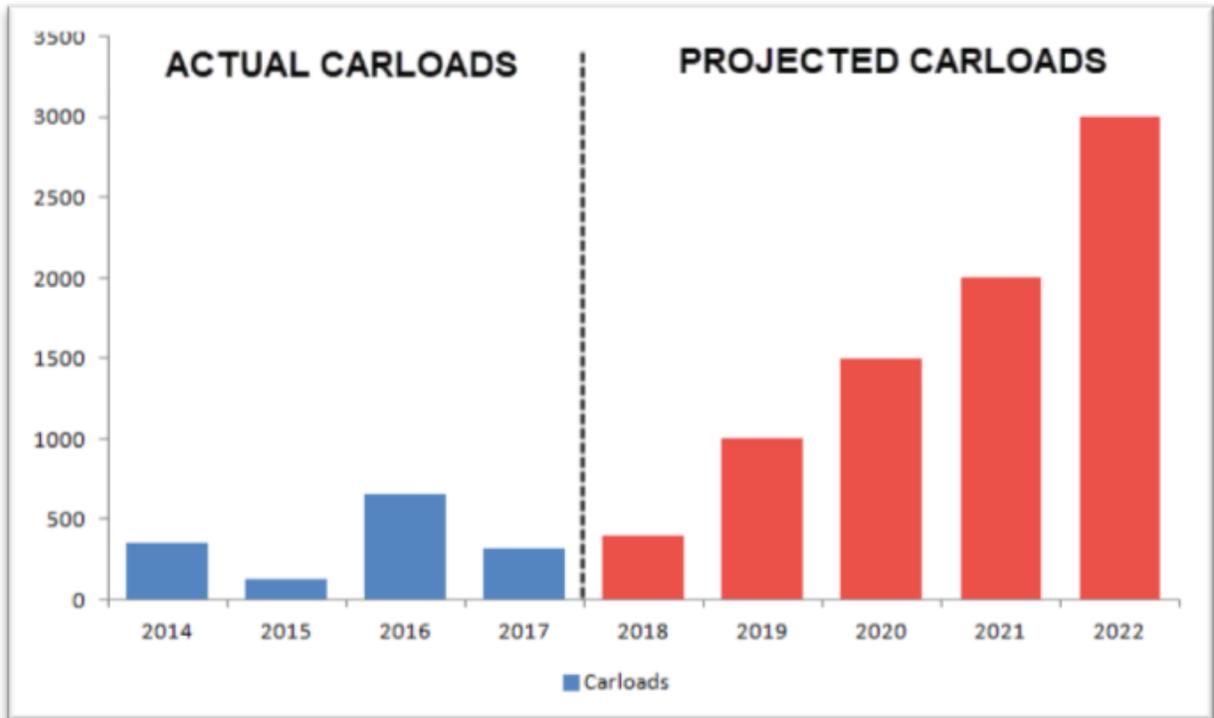
However, at the April 19 RTC meeting, Progressive Rail President/Owner Dave Fellon stated that they will succeed where Iowa Pacific failed by bringing new "[customers who have already provided their interest in expanding their operations to include Santa Cruz.](#)" Given that many, if not most, of Progressive Rail's current locations [transload hazardous commodities](#) one wonders who these customers might be.

Other than [Lansing Trade](#) whose interest in constructing a Propane Distribution Terminal in Watsonville was mentioned in [PGR's January 2018 proposal](#), Progressive rail has not stated who these potential customers are. Whoever they are, if the RTC signs a contract with Progressive Rail and their customers want to bring their business to our county, [federal preemption and interstate commerce laws](#) might allow them to do so even if Santa Cruz County community members would rather they didn't.

Why is the RTC gambling on either another money-losing freight operation or new use of the tracks that could open the corridor to unwanted activity and hinder real transit solutions for the community?

### Branch Line Financial History Compared to Progressive's Goals

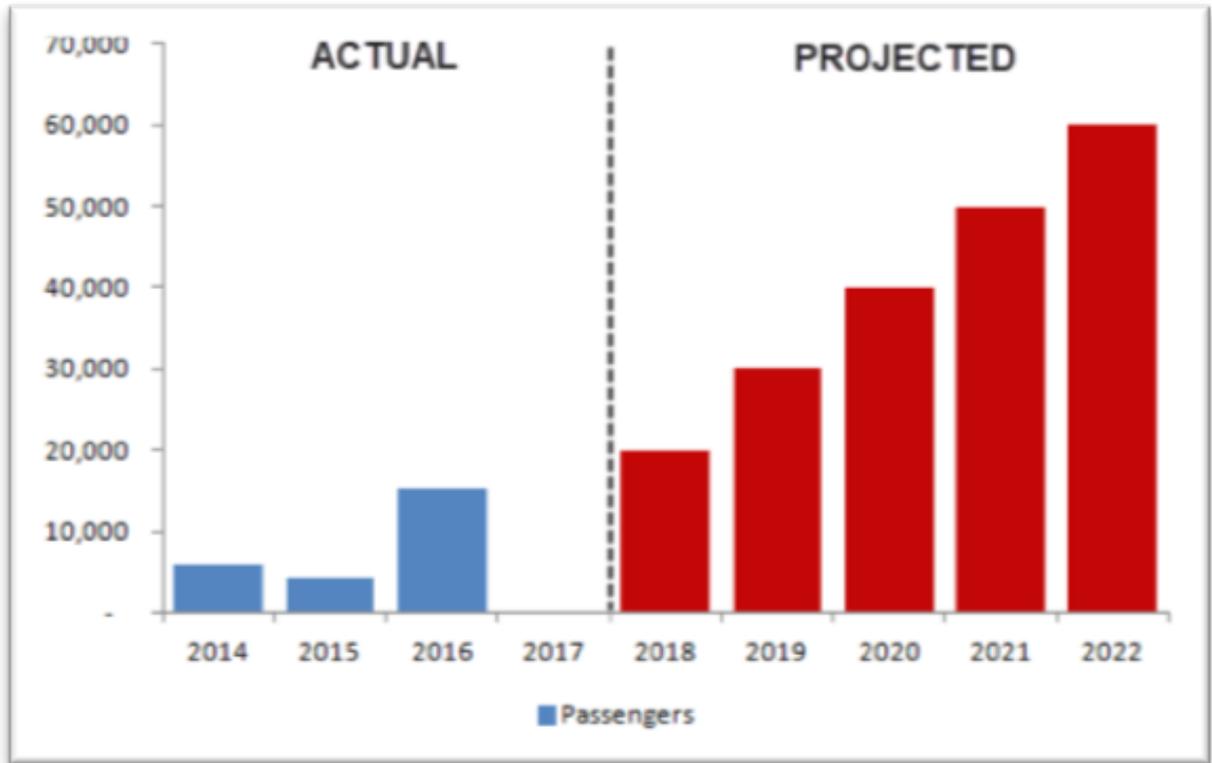
With regards to freight, the prior operator averaged approximately 365 carloads a year. Progressive Rail has projected 400 carloads in year one growing to 3,000 carloads in year five; an astounding 650% increase. **Prior to the RTC purchasing the branch line, 90% of the freight on the corridor was from the Cemex plant, which closed in 2010.**



*Actual vs. projected freight*

Based on the proposed revenue share model,[1] coupled with the historical carload figures, the RTC stands to make \$2,792 per year from freight operations.[2] Yes, you read that number correctly!

For excursion trains, Progressive Rail has projected year one ridership at 20,000, which increases to 60,000 in year five, representing a 200% increase. **This is a farcical estimate inconsistent with historical operations.**



*Actual vs. projected passengers for tourist trains*

The prior operator averaged 5,040 passengers from 2014 to 2015 with an average revenue of \$114,234. Revenues increased in 2016 with 15,285 passengers and \$764,268 in gross revenue. That said, the increase is attributed to licensing the Polar Express brand, and **it’s assumed that the operator made little to no money as the RTC and local vendors remain unpaid.**

Santa Cruz Big Trees & Pacific Railway (SCBT) is a local rail operator providing excursion train services in Santa Cruz County for over 50 years. Year one excursion train revenue estimates provided by SCBT in their response to the RFP are \$395,000. This is a more realistic estimate given SCBT’s history running excursion trains and local market insight. Using SCBT’s revenue estimate, coupled with the proposed revenue share model, **the RTC stands to make \$11,850 per year from excursion train service.**

Lastly, Progressive Rail has suggested reinstating the Suntan Special providing passenger service from San Jose to Santa Cruz by way of the Watsonville Junction. **This should be dismissed upfront as a nonstarter. Travel time is estimated at two hours and**

**thirty-six minutes. Moreover, tickets are estimated at \$45 per person; meaning a family of four would pay \$180.[3]**

[1] Revenue sharing for freight service is equal to 3% of handling revenues for the first 750 carloads per quarter and 5% thereafter.

[2] Assumes \$255 per carload with 365 carloads a year.

[3] Per Progressive Rail proposal document.