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April 27, 2009

Via Certified Mail - Return Receipt Requested

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Gail Kimball, Chief
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USDA Forest Service, Tusquitee Ranger District
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RE: Upper Tellico OHV Area - Notice of Intent to Sue under Clean Water Act

Dear Agency Officials:

We write on behalf of our clients the Southern Four Wheel Drive Association, United Four Wheel Drive Associations, and the BlueRibbon Coalition, and hereby provide notice pursuant to 33 U.S.C. § 1365(a)(1) and (b)(1)(A) of our intent to file suit against applicable units

and officials in the Department of Agriculture and United States Forest Service for violation of the Clean Water Act. Specifically, on March 31, 2009, Nantahala Forest Supervisor Marisue Hilliard issued the Temporary Emergency Closure of Trails in the Upper Tellico OHV Trail and Road System (Order No. 02-19-2009) (the "Order"), which effectively closes all meaningful routes previously authorized for recreational motorized travel in the Upper Tellico OHV Area (the "Area") from April 1, 2009 until March 31, 2011, or until the order is terminated by the Forest Supervisor. The Order was accompanied by a Decision Memo alleging several bases for the immediate closure of the Area. This notice is filed in order to satisfy the jurisdictional notice requirement of the Clean Water Act and addresses only the contention in the Order/Decision Memo that "North Carolina standards for turbidity are being exceeded." DM at 3. We will not attempt here to discuss the flaws with the other alleged bases for the Order, and expressly reserve the right to assert such challenges beyond Clean Water Act claims within and beyond the ongoing administrative process.

Parties

Southern Four Wheel Drive Association ("Southern") is a nonprofit organization formed in 1987 and dedicated to promoting four-wheel drive recreation, responsible land usage, conservation and education. Southern is an association of member clubs located in the southeastern U.S. including Alabama, Georgia, Kentucky, North Carolina, South Carolina and Tennessee. Southern members have long visited the Forest and the Area, have assisted to the extent allowed by the Forest Service in active management of vehicle travel, and have definite and concrete plans to access the Forest and the Area via motorized vehicles in the future, to the extent authorized by the Forest Service.

United Four Wheel Drive Associations ("UFWDA") consists of more than 10,000 individuals, clubs, and associations who share a common interest in recreational off-road activities, including the use of four-wheel-drive vehicles. UFWDA has members in each of the 50 states and in several foreign countries. UFWDA members access federal public lands throughout the United States, including lands within the Nantahala National Forest and the Upper Tellico OHV Area, to the extent authorized by the Forest Service.

The Blue Ribbon Coalition, Inc. ("BlueRibbon") is an Idaho nonprofit corporation representing over 1,100 businesses and organizations with approximately 600,000 members nationwide. BlueRibbon members use motorized and nonmotorized means, including off-highway vehicles, horses, mountain bikes, and hiking, to access Forest Service and other public lands throughout the United States, including such lands in North Carolina. BlueRibbon has a long-standing interest in the protection of our Nation's public land values and natural resources, and regularly works with land managers to provide recreation opportunities, preserve resources, and promote cooperation between public land visitors. BlueRibbon members have visited the Area in various types of off-highway vehicles ("OHV") and intend to do so in the future to the extent authorized by the Forest.

Collectively, we refer to these organizations and their members as “the Recreational Groups.”

Background

The Nantahala Forest includes the Area within its Tusquitee Ranger District. The Area, like much of the Forest, contains a variety of vegetation types punctuated by streams and relatively deep gorges. Much of this terrain was heavily logged during or before the 1960's and later purchased by the Forest Service. The Area consists of approximately 8,000 acres and now includes twelve (12) formally designated trails that encompass a total of about 38 miles. These trails involve a variety of terrain and challenges ranging from relatively easy routes to extremely challenging routes requiring advanced equipment and operator skill/experience. As a result of these unique opportunities, the Area is a destination for “jeep” and “four wheel drive” OHV enthusiasts from throughout the country and is an unparalleled site in the eastern United States for the four-wheel drive community.

OHVs are a traditional and increasingly-popular means of visiting National Forest System lands. This access occurs as a means to other activities, such as sightseeing, picnicking, camping, photography, hunting, fishing, wildlife study and similar outdoor pursuits. In addition, some enthusiasts derive enjoyment and satisfaction from the act of traveling through the Forest in their vehicle and the associated navigational, operational and mechanical challenges associated with such travel.

In addition to its supporters and enthusiasts, OHV travel has its detractors. Opponents to OHV access on the Forest have more closely targeted riding in the Upper Tellico OHV Area in recent years, applying their energies and resources to a campaign including political, administrative, legal and public relations strategies ultimately designed to eliminate meaningful OHV access to the Area.

Mindful of the potential issues and controversy surrounding OHV use in general and on the Forest, the Recreational Groups have long attempted to educate their members, forge effective and collaborative relationships with land managers and other interest groups, and proactively address resource concerns potentially associated with vehicle use. Plaintiff organizations and their members conduct trail maintenance work in the area several times each year in conjunction with Forest Service oversight. Typical trail maintenance activities have included movement of rock for trail stabilization, adding signage, planting seed and fertilizing new plantings. During the months of May, June, and July, 2007 trail work included hauling over 250 tons of surge stone for trail stabilization; repairing, cleaning, and installing over 150 water bars and silt traps; repair of Fain's Ford Crossing; repairing and replacing 2 culverts; closing 6 illegal trails/bypasses; donating 698.5 volunteer hours and donating 1,003.5 hours of heavy machine time. At the “Tellico Cleanup Day” on March 10, 2007, Defendant's reported volunteer pickup and removal of 213 bags of trash and 2,400 pounds of trash removed in North Carolina by

212 participants. The Recreational Groups' members constituted 116 of the 212 participants, while Trout Unlimited members constituted 23 of the 212 participants.

Following these efforts the Southern Environmental Law Center sent a letter to the Forest dated June 28, 2007 on behalf of several organizations styled as a "notice of intent to sue" under the Clean Water Act for alleged violations of that and related statutes arising from continuing OHV use of the Area (the "NOI"). The NOI specifically requested "at a minimum, remedial measures for the Tellico ORV trail system must include year-round closure of the trails known to be degrading water quality and seasonal closure of the entire system during the wettest months of the year". NOI at 5. The NOI further requested immediate action to address alleged Clean Water Act violations including unpermitted discharge of pollutants (NOI at 5), unpermitted discharge of dredged and fill material (NOI at 6); violations of state water quality laws and standards in both North Carolina (NOI at 7) and Tennessee (NOI at 10); violations of National Environmental Policy Act, the National Forest Management Act and Forest Service regulations (NOI at 11).

In apparent response to the NOI, the Forest leapt to action, at least by comparison to its prior passive management of the Area. The Forest held a number of meetings. At least one meeting was open to the public and included representatives from numerous interest-group perspectives. Other meetings were not open to the public and involved only the Forest and hand-picked representatives of the preservationist special interests opposed to ongoing vehicle access in the Area.

The Forest sent out a "scoping notice" dated September 17, 2007 soliciting public comment on two proposed "Forest Supervisor's Orders" in the Area. One proposed order would prohibit motorized vehicles on Lower Trail 2, Trail 7, and Trail 9, duration of order not to exceed one year or until a reasonable plan is in place to prevent adverse impacts to the aquatic resource. The other proposed order would prohibit winter-time motorized vehicle use on the Upper Tellico OHV Trail System from January 1 to March 31 each year. This would include all trails in the system except Trail 1 and the upper section of Trail 2 which would remain open as system roads used by vehicles types normally found on public roads. During this same time in September, 2007 the Forest initiated an "engineering survey and assessment" to evaluate a variety of issues articulated or implicated by the NOI.

On November 19, 2007 Forest representatives held a meeting with Plaintiff organizations' representatives which the Forest indicated was to be an "informational" meeting in which to report on the progress of the "survey and assessment" and to discuss various short- and long-term strategies to manage OHV travel in the Area and to appropriately avoid or mitigate any adverse effects associated with such travel.

Approximately one month after this meeting the Forest issued a decision on December 20, 2007 which "put into effect two Forest Supervisor's Orders" restricting OHV use in the Area. The first action consists of "a one-year closure" of Lower Trail 2, Trail 7, a portion of Trail 8 and Trail 9 which prohibits operation of motor vehicles during the closure period. The second action

is an Area-wide “seasonal closure” which prohibits operation of motor vehicles between January 1 and March 31 each year. The decision indicated its actions “are categorically excluded from documentation in an environmental impact statement or an environmental assessment.” The Decision further states that its actions “are not subject to legal notice and opportunity to comment” and that the Decision “is not subject to [administrative] appeal.”

On May 22, 2008, the Recreational Groups filed suit in the U.S. Western District of North Carolina, asserting a variety of challenges to the December 20, 2007, closure orders. In June, 2008, the Forest released a proposal “for long-term management of the System” and received about 1,500 comments on the proposal. The suit was voluntarily dismissed on October 30, 2008, pursuant to a stipulation which was entered, at least in part, “in light of the Forest Service’s stated intention to complete a public planning process and announce a new decision in the near future which will likely substantially impact or change the interim orders referenced in the complaint....” Stipulation of Dismissal (Doc. No. 40) at 1-2.

Before, during and after the lawsuit the Recreational Groups’ contacts have endeavored to maintain a constructive with both the Forest and USDA-USFS leadership. Consistent with those discussions and at meaningful expense, the Recreational Groups obtained a Recommended Trail System Repair & Maintenance Plan from Caliber Engineering Consultants, LLC, of Greenville, South Carolina. That 56-page report concludes:

Streams are healthy and have excellent water quality per North Carolina standards and are capable of sustaining viable, reproducing native trout populations. Degradation of water quality and aquatic habitat in Upper Tellico is non-existent.....Historic clear-cutting of land in Upper Tellico has contributed more to the off-site sediment transport than the trail system.

The current deteriorated trail conditions are largely the result of too many years of neglected maintenance by the USFS due to budget constraints. However, the trails and site obstacles are repairable and very much maintainable/sustainable after repair.

Caliber Report, Executive Summary at 6. The report is dated January 23, 2009, and the complete report was provided to the Forest in February, 2009.

On February 27, 2009, the Forest released an Environmental Assessment (“EA”) analyzing six alternatives for management of the Area. Alternative B represented the “proposed action” that was outlined in the June, 2008, proposal. On the same day, Forest Supervisor Marisue Hilliard issued a letter. The letter generally announced release of the EA, provided background and information about submitting comments. In addition, the letter took the unusual step of announcing that “my preferred alternative is Alternative C, which closes the OHV System.” The letter thus proposes another “temporary closure” of the OHV System “for resource protection, effective April 1, 2009.” The letter clarifies that “the impacts to water quality are so

significant that I cannot recommend keeping the System open at this time.” The letter further states “[t]he Agency is in violation of North Carolina state water quality standards because of the conditions on the Upper Tellico OHV System.” Following these staggering, untrue, and unwise announcements, the letter offers the hollow assurance “that a final decision has not yet been made.”

Consistent with the letter, and the day following close of 30-day comment period on the EA, the Forest Supervisor issued the Order/DM on March 31, 2009.

Clean Water Act Violation(s)

The Order/DM are largely, and incorrectly, premised upon the Forest’s determination that streams in the Area are in violation of the Clean Water Act as a result of peak turbidity readings following storm events. The Forest’s determinations contradict applicable law and the findings of the North Carolina Division of Water Quality.

The Clean Water Act was enacted “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The CWA makes the states primarily responsible for achieving the Act’s goals. *Id.* at (b). Section 303 directs states such as North Carolina to adopt water quality standards, which are then reviewed by the EPA. *Id.* at §1313(a)-(c); 40 C.F.R. § 131.4(a). State water quality standards are developed for each water body and generally contain three elements: (1) designated uses (33 U.S.C. § 1313(c)(2)(A)); (2) criteria for allowable limits of specified pollutants (*id.*); and (3) an antidegradation policy to protect existing uses (*Id.* at § 1313(d)(4)(B)).

In North Carolina, such standards are partly contained in the North Carolina Administrative Code (the “NCAC”). As noted above, and contrary to the EA, applicable state standards are being met for those waters arising in the Area. The applicable waters are within the Little Tennessee River and Hiwassee River Basins. The only pollutant standard meaningfully discussed in the EA and other documents is turbidity, and the EA asserts that sediment load readings within the Area at peak storm runoff exceed the applicable 10 Nephelometric Turbidity Unit standard. EA at 36-37. However, these statements fail to recognize that the standards do not attempt to regulate, are not deemed violated by, “natural conditions.” 15A NCAC 02B .0205. It is both technically and intuitively obvious that a “normal range” for turbidity must be determined for each stream or stream segment. When deviations outside the “natural range” occur, the next inquiry is whether the cause is “the discharge or sewage, industrial wastes, or other wastes including those from nonpoint sources....” or whether elevated pollutant levels are “caused by natural conditions.” *Id.* If the latter, “water quality standards will not be considered violated.” *Id.* Additionally, the standard for turbidity is not deemed violated if “background levels” are above the standard or if BMPs are in place. 15A NCAC 02B .0211(3)(k).

The SELC/Forest analysis is based on a fundamentally flawed preoccupation with “peak” event turbidity levels. Nowhere does the Forest identify “natural conditions” including NTU

levels on the relevant streams or stream segments. The fact that the SELC/Forest can identify a handful of alleged violations based on peak levels after storm runoff is irrelevant. Such levels are contemplated by the above-cited regulations - the presence of high readings is not sufficient cause, standing alone, to determine a violation has occurred.

Nor does the SELC/Forest make any effort to causally connect vehicle travel to sediment discharge, regardless of the level of that discharge. It is the existence of the route that is the primary factor in sediment transport rather than whether vehicles are authorized to travel, or have traveled, the route.

The NOI, Order and DM present the flawed conclusion that existing conditions do not comply with state requirements or the Act. Instead, as noted above, “[t]he Little Tennessee River basin has one of the most outstanding and diverse aquatic communities within the entire state.” *Id.* at ii. Tellico Creek is located within subbasin 04-04-01 and is listed as “supporting” by the State DWQ. Subbasin report (March 2007) at 1.1, Table 3 (subbasin report is located at http://h2o.ehnr.state.nc.us/basinwide/documents/Chapter1_008.pdf). Overall, of the 139 stream miles in this subbasin, all but 2.1 miles have been rated, with only 3.7 determined to be impaired, none of which are in the Area. To the extent it is singled out in the subbasin report, Tellico Creek is noted among those “[s]treams that have consistently been rated Excellent...” *Id.* at 16. Similarly, Hanging Dog Creek, which is in the Hiwassee River Basin and is hydrologically connected to sections of Area Trails 1 and 2, is rated as “supporting” by the State DWQ. Hiwassee River Subbasin 04-05-02 Report (March 2007) at 2.1, Table 5 (located at http://h2o.ehnr.state.nc.us/basinwide/documents/Chapter2Subbasin02_001.pdf).

Under even the most deferential standard, the Forest’s conclusions, which closely mirror the SELC NOI, cannot withstand review. We urge you to reconsider the Forest’s analysis and take appropriate steps to correct the identified flaws and present a defensible interpretation of water quality issue at the Area, consistent with the findings of the North Carolina DWQ.

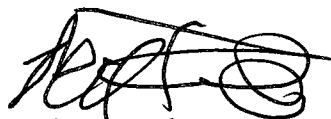
Conclusion

The Forest has engaged itself and the public in a nearly two-year process of swallowing the SELC NOI conclusions hook, line and sinker. The central conclusions of the February 27th letter and the Order/DM closely follow the allegations, if not specific wording, of the NOI. The NOI allegations and Forest’s acceptance of them cannot be squared with the facts or applicable law. Notwithstanding their concerted effort to pursue collaborative and creative solutions at transitioning to a meaningful, active management system at the Area, the Recreational Groups find themselves backed into a corner by the Forest’s actions. Such actions reflect erring on the side of eliminating use that has been continuing for decades. Sadly, the Forest apparently perceives an unsolvable dilemma, despite the fact that alternative, more successful management strategies have been proposed to the Forest from internal and external sources. Absent a meaningful response to the concerns raised here the Recreational Groups will find themselves with no resort but the courts.

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Sincerely,

MOORE SMITH BUXTON & TURCKE CHARTERED

A handwritten signature in black ink, appearing to read 'Paul A. Turcke', with a large circular flourish at the end.

Paul A. Turcke

/PAT

cc: Jay Bird, SFWDA
Carla Boucher, UFWDA
Greg Mumm, BRC