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June 28, 2007

Via Certified Mail – Return Receipt Requested

Mike Johanns, Secretary  
U.S. Department of Agriculture  
1400 Independence Ave., S.W.  
Washington, DC 20250

Gail Kimbell, Chief  
USDA Forest Service  
1400 Independence Ave., SW  
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USDA Forest Service, Region 8  
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Marisue Hilliard, Forest Supervisor  
USDA Forest Service, National Forests in North Carolina  
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Joe Bonnette, District Ranger  
USDA Forest Service, Tusquitee Ranger District  
123 Woodland Drive  
Murphy, NC 28906

Re: Notice of Intent to Commence Civil Action Under Sections 301, 401, 402,  
313 and 505 of the Clean Water Act

To Whom It May Concern:

On behalf of the North Carolina Council of Trout Unlimited, the Tennessee Council of Trout Unlimited, Public Employees for Environmental Responsibility, and the Southern Appalachian Biodiversity Project, you are hereby notified that we intend to file

suit against the United States Forest Service for serious and ongoing violations of the Federal Water Pollution Control Act (“Clean Water Act” or “CWA”, 33 U.S.C. § 1251 et seq.), the National Environmental Policy Act (“NEPA”, 42 U.S.C. § 4321 et seq.), the National Forest Management Act (“NFMA”, 16. U.S.C. § 1600 et seq), and the Forest Service’s own regulations arising from the operation and management of the Tellico Off-road Vehicle (“ORV”) area in the Tusquitee Ranger District of the Nantahala National Forest, NC. The Forest Service’s mismanagement of the Tellico ORV area is devastating water quality and fish populations in designated trout streams in violation of federal and state law. Therefore, we provide this notice pursuant to the citizens suit provision of the Clean Water Act, 33 U.S.C. § 1365(a)(1) and (b)(1)(A), that unless you correct the legal violations arising out of your mismanagement of the Tellico ORV area within the next sixty (60) days, we will file suit in United States District Court for the Western District of North Carolina to correct these violations.

### Parties

The mission of the North Carolina and Tennessee Councils of Trout Unlimited is to conserve, protect and restore coldwater fisheries and their watersheds. The North Carolina Council of Trout Unlimited (NCTU) represents 3,757 anglers and conservationists in North Carolina. The Tennessee State Council of Trout Unlimited (TNTU) represents 2,488 anglers and conservationists in Tennessee. Members and volunteers with the NCTU and TNTU are active users of the National Forests and frequently fish in streams adversely affected by sediment runoff from the Tellico ORV area. NCTU is party to a Memorandum of Understanding with the Forest Service and the North Carolina Wildlife Resources Commission pursuant to which the Forest Service committed to “[f]ollow management practices that will protect the water quality and riparian areas within the National Forests,” and to “[r]estore and enhance fisheries habitat on a watershed basis by reducing sources of sedimentation . . . .” See Memorandum of Understanding (May 5, 2000).

For seven years, Trout Unlimited has engaged with the Forest Service in a cooperative effort to improve management of the Tellico ORV area. Annual clean-up days and collaborative meetings of stakeholders have been well attended by NCTU and TNTU volunteers. NCTU and TNTU repeatedly have raised concerns about the impact of the Tellico ORV area on trout populations in affected streams. On multiple occasions, NCTU and TNTU have asked the Forest Service to change its management practices in order to improve water quality and trout habitat in streams affected by the Tellico ORV system.

Public Employees for Environmental Responsibility (PEER) is a national alliance of local state and federal resource professionals. PEER’s environmental work is directed by the needs of its members. PEER works nation-wide with government scientists, land managers, environmental law enforcement agents, field specialists and other resource professionals committed to responsible management of America’s public resources. From its Nashville, TN office, PEER has been monitoring the water quality impacts of the Tellico ORV area for four years.

The Southern Appalachian Biodiversity Project (“SABP”) is a citizen based conservation organization committed to the protection and restoration of the native biodiversity of the Southern Appalachians. SABP represents over 900 hundred members across the southeast. SABP focuses its efforts on protecting public lands as a refuge for ancient forests, native wildlife, and natural beauty. SABP has a long history of interest in the Nantahala National Forest. For many years, SABP and its members have monitored the Tellico ORV area, commented on changes to the trail system, and raised concerns about the impacts of ORV use on water quality in the National Forests.

PEER, NCTU, SABP and their members are very familiar with the Tellico ORV area and the surrounding National Forest. PEER, NCTU and SABP’s members use and appreciate these lands for their scenic beauty and for fishing, hiking, camping, wildlife viewing, spiritual renewal, and other recreational and educational activities. The Forest Service’s mismanagement of the Tellico ORV area directly and significantly affects PEER, NCTU and SABP and their members in their use of these National Forest lands.

The Southern Environmental Law Center is legal counsel for the North Carolina Council of Trout Unlimited, Public Employees for Environmental Responsibility, and the Southern Appalachian Biodiversity Project for this matter. Any response or correspondence related to this matter should be directed to the Southern Environmental Law Center at the letterhead address.

### Background

The headwaters of the Tellico River originate in the Nantahala National Forest in the mountains of western North Carolina. The Tellico River then flows across the state line into Tennessee and the Cherokee National Forest. In North Carolina, the Tellico River and its tributaries are designated by the Department of Environment and Natural Resources as trout waters, which are protected for natural trout propagation. Over the state line in Tennessee, the Tennessee Department of Environment and Conservation classifies the Tellico River as a Naturally Reproducing Trout Stream. The Eastern Brook Trout Joint Venture, a cooperative effort between the Forest Service and other agencies, groups and individuals, has identified the headwaters of the Tellico River as the last intact population of brook trout in western North Carolina. See [http://saindev.seris.info/gis\\_apps/proj/brooktrout/index.php](http://saindev.seris.info/gis_apps/proj/brooktrout/index.php).

Brook trout are highly sensitive to water quality and are especially vulnerable to excess sedimentation and turbidity. Brook trout spawn among the loose gravel in mountain streams. Excessive sedimentation can cause this loose gravel to become embedded in silt and sand, interfering with brook trout breeding success and disrupting habitat for the aquatic macroinvertebrates upon which brook trout feed. See, e.g., Andrew J. Nuhfer, Long-term effects of sedimentation and other factors on the brook trout population in Hunt Creek, Michigan Department of Natural Resources, *Fisheries Research Report 2074*. Turbidity, in turn, reduces the ability of brook trout to detect drifting prey. See e.g., John A. Sweka and Kyle J. Hartman, Influence of Turbidity on Brook Trout Reactive Distance and Foraging Success, *Transactions of the American Fisheries Society*, Volume 130, Issue 1, 138–146 (January 2001). As a result, sediment

pollution and turbidity can significantly degrade brook trout habitat and reduce brook trout populations.

The Tellico ORV area, with 40 miles of designated ORV trails and an estimated average usage of 2,400 off-road vehicles per month, is one of the largest and most intensively-used ORV destinations in the Southeast. The ORV area is located in the headwaters of the Tellico River and includes at least 19 stream crossings. Many designated trails run parallel and in close proximity to mountain trout streams. The trail system is operated to an extent and intensity not permitted by the governing Forest Plan and Forest Service regulations and guidelines. The 40 miles of designated trails in the system exceed the maximum density of trails allowed by the Forest Plan by 200%. Although the Forest Plan does not contemplate provision of high difficulty trails, which attract the largest ground-disturbing ORVs, the Tellico ORV system includes substantial stretches of trails rated as high difficulty by the Forest Service and by OHV user groups.

The Forest Service has not adequately maintained the Tellico ORV trail system to accommodate the intensity of its usage. Required best management practices, including water bars, sediment basins, culverts and other measures designed to minimize impacts to water quality, are not maintained and regularly fail throughout the system. Eroded channels extend from failed sediment traps to nearby streams, conveying sediment laden water directly to mountain trout streams. Culverts that have been compromised collect sediment laden water from the trail system and convey it directly to nearby streams. As a result, sediment from the trail system is devastating trout populations in neighboring streams. Even when trails are maintained to standard, water quality in some streams suffers because of poor placement of trails parallel and in close proximity to sensitive trout waters. Eroded depressions, gullies, tills and channels on these trails collect runoff from the trail system and direct it the nearby trout streams. In addition, because of inadequate resources for policing and enforcement, the area is criss-crossed by illegal side trails created by users which have no sediment control structures and often channel sediment-laden runoff directly to streams.

The Forest Service's monitoring data confirms that trout streams in this area receive sediment loads from the trail system orders of magnitude greater than sediment loads received by nearby reference streams unaffected by the trail system. See Upper Tellico River Watershed Assessment at 14-15. The result is that the Tellico ORV area in the Nantahala National Forest is devastating water quality and trout populations in nearby streams. Densities of trout in affected streams are far below the densities found in comparable streams unaffected by the trail system. Upper Tellico River Watershed Assessment, September 2005. In addition, benthic macroinvertebrate surveys confirm that sediment from the trail system is degrading aquatic habitat in affected streams. See Jason Farmer, Aquatic Insect Community Monitoring within the Upper Tellico ORV Area, 2006.

Recently the Forest Service initiated an administrative process to consider changes to the trail system. A series of collaborative meetings were held with stakeholders (including Trout Unlimited and ORV user groups). As part of this process, the Forest Service prepared the Upper Tellico Assessment and Strategy, dated August 26, 2005, and

identified options for addressing water quality issues in the trail system. In that Assessment and Strategy document, the Forest Service acknowledged that the options for addressing problematic trails in the trail system included trail closure. The Forest Service also identified seasonal closure of the entire system as an option for addressing water quality impacts.

In response to the Forest Service's request for comments on the Assessment and Strategy, NCTU and PEER submitted comments to the Forest Service on January 16, 2005, identifying legal violations in the management of the Tellico ORV area and stating that, at a minimum, remedial measures for the Tellico ORV trail system must include year-round closure of trails known to be degrading water quality and seasonal closure of the entire system during the wettest months of the year.

At the close of that administrative process, the Forest Supervisor declined permanently to close any trails and declined to order seasonal closure of the trail system. Instead, the Forest Supervisor issued an order on December 8, 2005, ordering seasonal closure of Trails 7, 9, 10, and the lowest part of 2. The order was issued pursuant to a Categorical Exclusion under section 31.1b category 1, of Forest Service Handbook 1909.15, and no analysis was conducted under NEPA.

The Forest Supervisor's December 8<sup>th</sup>, 2005 decision to keep open all trails within the Tellico ORV area was arbitrary and capricious and contrary to law. The decision was contrary to the requirements of the Forest Plan and the Forest Service's own regulations. In addition, the decision resulted in continued infringement of state water quality standards in violation of the Clean Water Act.

### Clean Water Act Violations

#### *Unpermitted discharge of Pollutants*

The Clean Water Act prohibits the discharge of pollutants to waters of the United States, except in compliance with a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to § 402 of the Act. See 33 U.S.C. §§ 1311(a), 1342(a). The streams degraded by discharges from the Tellico ORV system, including the Tellico River, Round Mountain Branch, Mistletoe Creek, Bob Creek, Peckerwood Creek, Tipton Creek, and Bearpen Branch, are jurisdictional waters of the United States under the Clean Water Act. Sand and dirt, which are the primary components of sediment, are specifically listed as pollutants under the CWA. See 33 U.S.C. § 1362(6). Although the Forest Service is discharging sediment from the Tellico ORV system into waters of the United States, the Forest Service has not obtained an NPDES permit for the Tellico ORV system or for any component of that system.

The Tellico ORV area is replete with point sources discharging sediment to nearby streams. Sediment traps, ditches, culverts, and water bars throughout the Tellico ORV trail system have been and continue to be compromised on a regular basis by heavy trail use and inadequate maintenance. Sediment traps, to which the Forest Service intentionally channels sediment-laden water, are undersized and routinely overflow with

sediment, which causes polluted water to erode a channel from the sediment trap to a nearby stream or to areas from which sediment migrates to nearby streams. Culverts in the Tellico system are regularly compromised by heavy usage and wear on the trail system, causing them to collect sediment-laden water and discharge directly to a stream or to a ditch leading to a stream. Furthermore, ditches and the trails themselves collect and channel sediment-laden water. Depressions, rills, and gullies that have formed and that continue to form on a regular basis along ditches and along designated and illegal trails in the trail system channel sediment-laden water collected by the trails into nearby streams or into areas from which sediment migrates to nearby streams. Approximately six miles of designated trail are located within 100 feet of stream channels, impacting 64% (16 miles) of perennial stream aquatic habitat. See Upper Tellico River Watershed Analysis at 16, 39. The Forest Service has noted that “[s]ome roads have downcut several feet and have lost their cushioning material (gravel and native surfacing) and large rock and bedrock is exposed. In these areas, diverting water off the road is no longer possible and the road becomes the conduit for flow, often directly to stream channels.” *Id.* at 17. Silt, sand, and sediment plumes and deltas are observable in nearby streams as the result of sediment-laden discharges from point sources throughout the trail system.

Each of these discrete conveyances of sediment to waters of the United States is a point source subject to regulation under the Clean Water Act. The regulatory definition of discharge of a pollutant from a point source expressly includes “additions of pollutants into waters of the United States from . . . surface runoff which is collected or channeled by man.” 40 CFR 122.2. See e.g., North Carolina Shellfish Growers Ass’n v. Holly Ridges Associates, 278 F. Supp. 2d 654, 679-80 (E.D.N.C. 2003) (finding failed sediment traps, ditches, gullies and rills to be point sources); United States v. Law, 979 F.2d 977, 980 (4th Cir. 1992) (finding section 402 applicable to system collecting polluted runoff and channeling it to water of the United States); Concerned Area Residents for the Env’t v. Southview Farm, 34 F.3d 114, 119 (2d Cir. 1994) (finding 402 permit required for polluted runoff that was channeled by natural depression into nearby ditch which discharged to stream).

Operation of the Tellico ORV trail system is not a forestry or silvicultural activity for purposes of sections 401 and 402 of the Clean Water Act. The operation and maintenance of a recreational trail system for users is unrelated to forestry practices and serves no legitimate forestry purpose. The activities violate North Carolina best management practices for forestry activities and forest practice guidelines. Furthermore, point source discharges from silvicultural lands are not exempted from the requirements of section 402 of the Clean Water Act.

#### *Unpermitted discharge of dredged and fill material*

Sections 301 and 404 of the Clean Water Act require a permit from the Corps of Engineers prior to the discharge of dredged or fill materials into waters of the United States. See 33 U.S.C. §§ 1311, 1344. Operation of the Tellico OHV system, pursuant to which the Forest Service authorizes large off-road vehicles customized with oversize tires and heavy treads to traverse the streambeds of waters of the United States, is causing the

discharge of dredged or fill material into waters of the United States. These discharges exceed incidental fallback. See United States v. Deaton, 209 F.3d 331 (4th Cir. 2000); see also, 65 Fed. Reg. at 50109-50111 (August 16, 2000).

Discharges of fill material occurs when ORVs carry sediment and dirt from the trail system into streams at legal and illegal stream crossings. Discharge of fill includes the addition of any material to a water of the United States which has the effect of “[r]eplacing any portion of a water of the United States with dry land” or “[c]hanging the bottom elevation of any portion of a water of the United States.” See 33 C.F.R. § 323.2(e) and (f). Examples of fill material include “rock, sand, soil, clay.” See 33 C.F.R. § 323.2(e). The deposition of dirt and sediment by as many as 2,400 ORVs/ month is a discharge of fill regulated by the Clean Water Act

Discharges of dredged material occurs when off-road vehicles disturb, displace, and excavate material from stream beds as they cross or otherwise travel in waters of the United States. Eyewitness accounts confirm that the Tellico River runs brown with mud on days of heavy trail usage, even in dry weather. This results from the excavation of streambed material by OHVs as they travel through and spin their tires in these streams. The excavated material is sidecast by the vehicles and carried downstream where it is redeposited in the stream bed. This redeposit of dredged material is the discharge of dredged material under the Clean Water Act.

These discharges of dredged and fill material occurred without permits or authorization in violation of sections 301 and 404 of the Clean Water Act. As a landowner, the Forest Service is responsible for obtaining the appropriate permits for the discharges of dredge or fill material in waters of the United States that result from activities it specifically authorized.

#### *Violation of state water quality laws and standards*

Violations of North Carolina water quality law and standards. The Clean Water Act requires federal agencies “engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants” to comply with North Carolina water quality standards and procedures. See 33 U.S.C. § 1323. Operation of the Tellico ORV area is degrading water quality and is depleting trout populations in affected streams, in violation of North Carolina water quality standards. In addition, the Forest Service has failed to implement and maintain best management practices as required by North Carolina law. These violations are actionable under the Clean Water Act. In addition, the Forest Service’s administrative decision to continue operation of the full trail system in light of these ongoing violations of state water quality standards is arbitrary, capricious, and contrary to law.

All of the streams affected by the ORV trail system are designated as Class C Trout waters by the North Carolina Department of Environment and Natural Resources. North Carolina law prohibits sediment-caused turbidity in designated trout streams in excess of 10 Nephelometric Turbidity Units (NTU). 15A NCAC 02B .0211 (3)(k). Furthermore, “if the turbidity exceeds these levels due to natural background conditions, the existing

turbidity level cannot be increased. Id. Turbidity in streams affected by trails in the Tellico ORV area routinely exceeds this standard and continues to exceed this standard on a regular and ongoing basis. Water quality monitoring conducted by the Forest Service confirms that streams affected by the trail system have sedimentation levels, as indicated by total suspended solids, an order of magnitude greater than those of nearby streams not affected by the trail system. See Upper Tellico River Watershed Assessment at 14-15.

Although, compliance with this turbidity standard can be met when land management activities employ Best Management Practices (BMPs), “BMPs must be in full compliance with all specifications governing the proper design, installation, operation and maintenance of such BMPs.” 15A NCAC 02B .0211 (3)(k). Best management practices throughout the Tellico ORV trail system are improperly designed: trails are routed in close proximity to streams and sediment traps and culverts are undersized. In addition, best management practices are not maintained: sediment traps are overflowing, culverts are compromised, trails are worn down to bedrock, and water bars and other erosion control structures are eroded away. The Forest Service’s own watershed assessment for the Upper Tellico River concludes:

The effectiveness of these drainage control features is compromised in places where use is high and illegal use occurs. Poor design and location, in combination with excessive use, has resulted in deteriorated travelways to the point that regular road/trail BMPs are no longer adequate to protect trails from erosion and stream channels from sedimentation.

\* \* \*

Often sediment traps are under designed and therefore are not 100 percent effective in removing trail-derived sediments. As in this case, when trails are close to streams there is often inadequate distance between them to install effective BMP’s.

Upper Tellico River Watershed Analysis at 17.

In addition, sediment loading and turbidity are degrading aquatic habitat in violation of North Carolina water quality standards. North Carolina water quality standards provide that Class C waters “shall be suitable for aquatic life propagation and maintenance of biological integrity, wildlife, secondary recreation, and agriculture; sources of water pollution which preclude any of these uses on either a short-term or long-term basis shall be considered to be violating a water quality standard.” See 15A NCAC 02B .0211(2). Furthermore, the streams affected by the Tellico ORV area are designated as Trout waters “which have conditions which shall sustain and allow for trout propagation and survival of stocked trout on a year-round basis.” 15A NCAC 02B .0202(65).

From 1996 through 2004, annual fish counts conducted by the North Carolina Wildlife Resources Commission documented a declining trend in trout populations affected by the Tellico ORV trail system, including at least one year in which no young of

the year were documented. Trout densities in streams affected by the Tellico ORV area are approximately 50% of densities found in streams of similar size, topography, and geology across the Forest. Upper Tellico River Watershed Assessment at 34, 39. The Forest Service's Watershed Assessment concluded that "it is likely that aquatic habitat quality has been degraded by high turbidity during storm runoff events, and due to excessive sedimentation in stream channels." *Id.* at 32. Similarly, recent Forest Service surveys of benthic macroinvertebrate communities found that reduced species diversity in streams affected by the Tellico system "suggests that sedimentation in within the Tellico River watershed is negatively affecting the aquatic insect community." See Jason Farmer, Aquatic Insect Community Monitoring within the Upper Tellico ORV Area, 2006.

This degradation of water quality and aquatic habitat violates state law. Under North Carolina law, a permit is required to "cause or permit any waste, directly or indirectly, to be discharged to or in any manner intermixed with waters of the State in violation of the water quality standards applicable to the assigned classifications . . . ." N.C. Gen. Stat. § 143-215.1(a)(6). Furthermore, North Carolina's antidegradation policy provides that "[e]xisting uses . . . and the water quality to protect such uses shall be protected." 15A NCAC 02B .0201(b).

Finally, the North Carolina Sedimentation Pollution Control Act places an affirmative requirement on landowners to implement and maintain sediment control measures sufficient to meet performance-based sedimentation standards. Because the purpose of the Act is to control erosion and sedimentation, the Act and implementing regulations regulate sedimentation, not just land-disturbing activity. State ex rel. Lee v. Penland-Bailey Co., 274 S.E.2d 348, 351 (N.C. Ct. App. 1981). State law provides that after development of a site, such as the Tellico ORV trail system, "the land owner or person in possession or control of the land shall install and/or maintain all necessary permanent erosion and sediment control measures." 15A NCAC 04B .0113.

This requirement applies even if the land-disturbing activity that created the site occurred before passage of the Act. North Carolina law provides that all uncovered areas resulting from land-disturbing activity before the effective date of the Act that exceed an acre in size, are experiencing continued accelerated erosion, and are causing off site damage from sedimentation "shall be provided with ground cover or other protective measures, structures, or devices sufficient to restrain accelerated erosion and control off site sedimentation." 15A NCAC 04B .0116. North Carolina courts have construed these requirements to create liability under the Act for failure to maintain permanent sediment control measures on an exposed road system created by land-disturbing activity prior to the passage of the Act. See e.g., Cox v. State, 344 S.E.2d 808, 809 (N.C. Ct. App. 1986). Internal Forest Service correspondence written before the Forest Supervisor's December 8, 2005 decision, which declined to implement trail closures or seasonal closure of the trail system, acknowledged that the Forest Service likely is in violation of the North Carolina Sedimentation Pollution Control Act.

In addition, the Tellico ORV trail system violates North Carolina's prohibition against land-disturbing activities within 25 feet of a designated trout stream. N.S. Gen. Stat. §

113A-57(1). The Forest Service further violates the requirements of the Act by failing to comply with procedural requirements and best management practices when conducting trail maintenance and other land-disturbing activities within the Tellico system.

Although activities “undertaken on forestland for the production and harvesting of timber products” are generally exempted from the Sedimentation Pollution Control Act, the Forest Service’s operation and maintenance of the Tellico ORV trail system is unrelated to any silvicultural purpose or program. Even if the Forest Service operated these trails incident to a silvicultural program, the exemption for silvicultural activities is contingent upon compliance with Best Management Practices and NC Forest Practice Guidelines. Applicable Best Management Practices include a requirement to establish a Streamside Management Zone (SMZ) of sufficient width to confine within the zone visible sediment resulting from accelerated erosion. Construction of roads is generally prohibited within the SMZ. When a road is constructed within an SMZ, however, the road “shall have effective erosion control and sediment control structures or measures installed to restrain accelerated erosion and prevent visible sediment from entering intermittent or perennial streams or perennial waterbodies.” 15A NCAC 01I .0201. At the close of silvicultural operations, NC Forest Practice Guidelines require “[t]reatment and maintenance” of disturbed areas “sufficient to restrain accelerated erosion and prevent visible sediment from entering intermittent and perennial streams and perennial waterbodies until the site is permanently stabilized.” 15A NCAC 01I .0209. The Forest Service has fallen far short of these performance-based standards.

Violations of Tennessee water quality law and standards. The Tellico ORV trail system is in the headwaters of the Tellico River on the North Carolina-Tennessee state line. The sediment pollution and turbidity generated by the trail system flows downstream in the Tellico River to Tennessee, over the state line. The downstream effects of the ORV trail system are causing violations of Tennessee water quality standards.

The Tennessee Department of Environment and Conservation (TDEC) classifies water bodies according to the uses they support and mandates minimum water quality standards necessary to sustain those uses. The Department of Environment and Conservation classifies the Tellico River in Tennessee, between river miles 41 and 50 (mile 50 marks the border with North Carolina), as supporting the following uses: Domestic Water Supply, Fish and Aquatic Life, Naturally Reproducing Trout Stream, Recreation, Industrial Water Supply, Livestock Watering and Wildlife, and Irrigation. See Tenn. Comp. R. and Regs. 1200-4-4-.08 (Upper Tennessee River Basin). In addition, TDEC has identified the Tellico River from the Tellico Reservoir to the North Carolina State line as a high quality water (Tier 2 or Tier 3) because it provides habitat for the federally endangered Duskytail Darter and Smoky Madtom, the federally threatened Spotfin Chub, and the state endangered Yellowfin Madtom, and because it is a naturally reproducing trout stream in the Cherokee National Forest. See TDEC, The Known High Quality (Tier 2 and Tier 3) Waters in Tennessee.

For each use classification, Tennessee has established minimum water quality standards. Because the Tellico River is subject to multiple use classifications, the most

stringent standards apply. See See Tenn. Comp. R. and Regs. 1200-4-4-.02. For waters supporting fish and aquatic life, like the Tellico River, the regulations provide that “[t]here shall be no turbidity or color in such amounts or of such character that will materially affect fish and aquatic life.” See Tenn. Comp. R. and Regs. 1200-4-4-.03(3)(d). Similarly, for recreation waters, the regulations provide that “[t]here shall be no turbidity or color in such amounts or character that will result in any objectionable appearance to the water, considering the nature and location of the water.” See Tenn. Comp. R. and Regs. 1200-4-4-.03(4)(d).

Operation of the Tellico ORV area is causing the Tellico River in Tennessee to violate each of these standards. Turbidity measurements collected by the Forest Service in the Tellico River on the North Carolina-Tennessee state line demonstrates that turbidity routinely exceeds acceptable standards. See Forest Service Spreadsheet entitled TSS Data \_1998-2006. This excessive turbidity is materially affecting fish and aquatic life. Fish monitoring data in the vicinity of the state line demonstrate that trout populations are significantly reduced as compared to reference streams of similar character and hydrology, in violation of Tennessee water quality standards for aquatic and fish life. In addition, photographic and eyewitness accounts report that the Tellico River in Tennessee runs brown with mud and sediment after rain events, causing an objectionable appearance in the water, in light of the significant recreation usage of the area by anglers and other users and the area’s proximity to the Bald River Gorge Wilderness.

The continued degradation of water quality and aquatic habitat in the Tellico River attributable to the operation of the Tellico ORV area also is degrading a recognized high quality water in violation of the Tennessee antidegradation policy. See See Tenn. Comp. R. and Regs. 1200-4-3-.06. Finally, the continued sedimentation of the Tellico River violates a requirement under Tennessee that “[n]o pollution, including . . . any deleterious . . . substance or activity, shall be . . . allowed to run into, wash into or take place in any waters, either private or public, in a manner injurious to fish life or other aquatic organisms, or that could be injurious to the propagation of fish, or that results in the destruction of habitat for fish and aquatic life.” See T.C.A. § 70-4-206.

#### Other Violations of Law

In addition to these Clean Water Act violations, the Forest Supervisor’s December 8, 2005 order and the Forest Service’s continued mismanagement of the Tellico ORV Area violate the National Environmental Policy Act, the National Forest Management Act and Forest Service regulations.

The Forest Plan for the Pisgah and Nantahala National Forests does not allow the Forest Service to operate the Tellico ORV trail system at the current density or intensity of usage. In the management areas that include the Tellico ORV area, the Forest Plan directs the Forest Service to operate ORV trails that “provide easy to moderate levels of challenge,” Plan Amendment 5 II-11, up to a maximum density of “2 miles per square mile in any management area unit.” See Plan Amendment 5 at III-59, III-67. The Tellico ORV area provides numerous “high difficulty” trails, which attract the largest earth-moving ORVs to the system, and currently exceeds the maximum trail density provided

by the Forest Plan by 200%. The National Forest Management Act requires that all “[r]esource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans.” 16 U.S.C. § 1604(i). The Forest Service’s operation of the Tellico ORV area violates this standard as does the Forest Supervisor’s December 8, 2005 order.

Furthermore, the Forest Plan and Forest Service regulations require the Forest Service to locate ORV trails so as to avoid degradation of water quality and aquatic habitat and to close trails that fall short of that standard. See 36 C.F.R. § 212.52(b)(2); Plan Amendment 5 at III-11, III-11. In addition, approximately 6 miles of the Tellico ORV Areas 40 miles of trail are within 100 feet of perennial stream channels, an area classified as Management Area 18 by the Forest Plan. In Management Area 18, the Forest Service is required to “permanently close and rehabilitate sites that cannot accommodate use without unacceptable impacts to riparian area resources.” Plan Amendment 5 at III-184.

Finally, the Forest Service has never analyzed the significant environmental impacts attributable to the Tellico ORV Area, as required by the National Environmental Policy Act. The EIS accompanying the Forest Plan for the Nantahala National Forest deferred consideration of the water quality impacts attributable to the Tellico ORV area until the completion of a site-specific analysis of trail condition and maintenance needs for the area. See Forest Plan at N-9. The Forest Service never has conducted such a site specific analysis in conjunction with a NEPA process and never has considered the cumulative impacts of operating the Tellico ORV Area in the headwaters of the Tellico River. The Forest Supervisor’s order of December 8, 2005, which considered and rejected the prospect of trail closures was issued pursuant to a Categorical Exclusion and did not consider the cumulative impacts of continued operation of the trail system at its current density. Because the Forest Service has never considered those impacts, pursuant to the Forest Plan or a site-specific management plan, the Forest Supervisor’s order was not tiered to another environmental review. The Forest Supervisor’s December 8, 2005 order violated the requirements of the National Environmental Policy Act. In addition, the Forest Service’s continued operation of the Tellico ORV area without conducting an adequate review under NEPA, violates the requirements of that statute.

We request that you take immediate action to remedy the significant and ongoing violations of law identified in this letter. If you fail to do so, we will file suit, sixty days after the date of this letter, to remedy these violations.

Sincerely,

/s/

Austin DJ Gerken  
Southern Environmental Law Center  
*Counsel for*

North Carolina Council of Trout Unlimited  
c/o Michael “Squeak” Smith

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cc:

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