

April 9, 2010

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CERTIFIED MAIL RETURN RECEIPT REQUESTED

Dear Sir/Ms.:

I am writing on behalf of Ms. Gwen Jones, the Coopers Rock Foundation, and Friends of Blackwater (collectively, "the Notifiers.") Any response to this letter should be directed to me.

The West Virginia Division of Forestry ("WVDOP") and West Virginia Division of Natural Resources ("WVDNR") have expressed the intent to and upon belief are advancing plans to harvest timber from a tract of land within Coopers Rock State Forest, in Preston County, West Virginia. Such planned timbering activity, known as the Scott Run II Timber Project, would be in violation of section 9 of the Endangered Species Act ("ESA"), 16 USC § 1538(a)(1)IB). It would "take" the endangered species Three-toothed Flat-spined Land Snail (*Triodopsis platysayoides*), or Cheat Threetooth Snail ("CTS"); and the Indiana bat (*Myotis sodalists*). It would also upon belief violate the public trust duties of the WVDOP and WVDNR, and other applicable environmental laws and regulations.

The Notifiers hereby provide notice, pursuant to section 11(g) of the ESA, 16 U.S.C. § 1540(g), and all other applicable statutes and regulations, of this illegality; and of the Notifiers' intent to exercise all of

their legal rights, including but not limited to litigation asserting *inter alia* the claims made herein, and seeking appropriate court relief, fees, and costs, in the event that this proposed activity and/or planning therefore continues to threaten to occur or occurs, in order to prevent irreparable harm and to prevent the violation of applicable laws and regulations.

The Notifiers believe that there is a real possibility of mutually acceptable resolution of their concerns, and they welcome discussions to that end, without waiving any of their legal rights. Please feel free to contact me to discuss the matters raised herein.

Endangered Species Act

Section 9 of the ESA prohibits any person from “taking” an endangered species. 16 U.S.C. § 1538(a). The term “take” is defined broadly to include “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect.” *Id.* § 1532(19). The U.S. Fish & Wildlife Service (FWS) has further defined “harass” to include “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. § 17.3.

In order for species to survive and persist, their habitat must also persist. Under the ESA, Congress defined “take” to include activities that “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” listed species in the absence of a permit, and U.S. Fish and Wildlife Service (USFWS), which has regulatory authority under the ESA, further defined “harm” to include “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering” (50 C.F.R. §17.3.).

Provisions for the application of Habitat Conservation Plans (“HCPs”) in cases where the protection of habitats for endangered species is an issue is made possible by Section 10 of the Endangered Species Act which authorizes states, local governments, and private landowners to apply for an Incidental Take Permit for otherwise lawful activities that may harm listed species or their habitats. To obtain a permit, an applicant must submit a Habitat Conservation Plan outlining what he or she will do to “minimize and mitigate” the impact of the permitted take on the listed species. The principle underlying the Section 10 exemption from the ESA is that some individuals of a species or portions of their habitat may be expendable over the short term, as long as enough protection is provided to ensure the long term recovery of the species. We believe the HCP

process is necessary to protect the endangered species in Coopers Rock State Forest.

Flat-spired Three-toothed Land Snail (Cheat Threetooth Snail)

The Flat-spired Three-toothed Land Snail, or Cheat Threetooth Snail ("CTS"), *triadopsis platysayoides*, is a land snail whose entire global range is along only 10 miles of the 16 mile long Cheat River Canyon in West Virginia. Brooks, 1933. Within its range, *T. platysayoides* habitat is widespread and extensive, covering hundreds of hectares (Hotopp, 2004 [citing White & Precht, 2004]) including Coopers Rock State Forest, the largest in the state. *T. platysayoides* is typically found in wooded areas associated with sandstone boulders or cliffs and occasionally at the entrances of limestone caves (Stihler, 1994), and is often hidden in crevices or cave-like structures. The Cheat Threetooth (CTS) was listed as "threatened" under the Endangered Species Act on July 3, 1978 (USFWS 1978). The US Fish and Wildlife Service ("USFWS") completed a recovery plan for the CTS on May 9, 1983.

It is estimated that perhaps one third or more of all known CTS snails may reside at Coopers Rock. Since snails do not migrate, their habitat must sustain them throughout the year and throughout their entire life cycle, including essential activities such as breeding, feeding, and sheltering. According to snail expert Ken Hotopp, "We don't know how large these snail populations were before European settlement, or how well they have recovered after past logging and fire. In many places, land snail species that were formerly widespread, but that are now rare, have collapsed to talus site refuges. This suggests that Cheat Threetooth populations are fragmented and vulnerable."

The WVDOF and WVDNR have refused to share specific snail location data from the 2008 endangered snail survey of the Scott Run timber project area that was completed by Copperhead Consulting in June and July of that year. The CRF did obtain a copy of the Copperhead Consulting report and confirmed locations of the snail as well as several potential habitat areas within the timber project boundaries. Several problems were identified by CRF regarding the timber project and protections for the snail. First, this area within the timber project has not been regularly studied for presence of the CTS. In fact, the 2008 study was the first in ten years. Another problem with the work completed by Copperhead to locate snails was that the field work was conducted in late June and early July. This is not a reliable time to search for this snail because the conditions later in the summer are not ideal and do not provide a good likelihood of finding the snail. Despite the lack extensive and reliable data regarding CTS populations and locations, the WVDOF

and WVDNR are moving ahead with proposals to timber in close proximity to both known snail habitat and potential habitat.

Indiana Bat

A mammalian species, the Indiana bat is a medium-sized bat, with small and delicate feet, short hair, and dull-colored fur that is pinkish-black on the back and lighter on the chest and belly. It weighs approximately three-tenths of an ounce and has an in-flight wingspan of 9 to 11 inches. The Indiana bat is migratory, with a range extending throughout the eastern half of the United States. See U.S. Fish and Wildlife Service, Draft Indiana Bat (*Myotis sodalists*) Revised Recovery Plan (1999), at http://ecos.fws.gov/docs/recovery_plans/1999/990301.pdf (“Recovery Plan”). The Indiana bat is today in added peril due to White Nose Syndrome (WNS) which is spreading at alarming rates to all bat species in the east. Some experts estimate that perhaps fifty to sixty percent of all bats in this range may perish before the cause of this disease is found.

The Indiana bat spend summers roosting and foraging in flood plains, riparian forests, and upland forests, and uses both live and dead trees and snags as roost sites. The female Indiana bats form “maternity colonies” in hollow trees or under the exfoliation bark of dead or dying trees to birth and raise their young. In 1976 the US Fish and Wildlife Service designated critical habitat for this bat including 11 caves and mines in Illinois, Kentucky, Missouri, Tennessee, and West Virginia (Recovery Plan, at 1). Despite these efforts the Indiana bat populations continue to decline. At this time all of West Virginia is considered potential summer habitat for the Indiana bat because of the high number of hibernating bats here during the winter.

Cornwell Cave in the Cheat Canyon, just nine miles from Coopers Rock State Forest, has a substantial Indiana bat population. Additional caves nearby have not been surveyed for endangered bats and may contain Indiana bats as well. Indiana bats are likely to the use caves and trees within the boundaries of the Scott Run Timber Project at Coopers Rock State Forest.

The proposed Scott Run timber project comprises 241 acres and the plans are to timber many of the tree types known to be used by Indiana bats including many species of oak, maple, and also to clear dead and decaying trees which are used by bats. The Indiana bat is at high risk of population decline due to WNS. The timbering of Coopers Rock State Forest puts a greater stress on surviving bats due to additional loss and degradation of potential habitat within their known range.

The Proposed Scott Run II Timber Project and the West Virginia Division of Forestry and Division of Natural Resources

The WV Division of Forestry Scott Run II timber project in Coopers Rock State Forest would cause a "take" of the Cheat Threetoothed Snail. Coopers Rock State Forest may be the last refuge for this tiny, slow moving creature, due to widespread habitat degradation from timber harvests in a majority of its range which is largely comprised of privately owned land in the Cheat Canyon.

Furthermore, the requests made herein are supported by the state's duties under the public trust doctrine and the following statutory language: "It is declared to be the public policy of the state of West Virginia that the wildlife resources of this state shall be protected for the use and enjoyment of all the citizens of this state. All species of wildlife shall be maintained for values which may be either intrinsic or ecological or of benefit to man. Such benefits shall include (1) hunting, fishing and other diversified recreational uses; (2) economic contributions in the best interests of the people of this state; and (3) scientific and educational uses" (§20-2-1).

In the Guidelines for Managing West Virginia's Nine State Forests, the WVDOP states that "the mission of the W.Va. Division of Forestry is to protect and manage all West Virginia forest land resources through partnerships emphasizing a stewardship ethic." See WVDOP-TR-96-2 (March 1996). The timber project proposed by WVDOP does not comply with this standard. WV Division of Forestry has consistently demonstrated a lack of cooperation by refusing to provide information in the form of research data and snail habitat delineation maps that would serve to inform the Coopers Rock Foundation (CRF) and WV Sierra Club of the integrity of the plans to protect the Cheat Threetooth within the proposed timber project which is on public land at Coopers Rock State Forest.

In addition to the lack of communication on the part of the WVDOP and WVDNR about the specifics of the timber project, the use of snail "buffers" to protect the CTS is not appropriate because it is not supported by research. The practice of "buffering" to protect the CTS habitat was implemented during timber operations in the Cheat Canyon by Allegheny Wood Products (AWP) among others. There is disagreement among the experts over both the effectiveness of the use of buffer zones to protect animals as fragile as snails, as well as variations on the suggested size of buffer zones or areas with. Some field researchers believe a 150ft buffer "should suffice," while more cautious experts urge that in the

absence of real research, larger 300ft buffers or “preserves” should be used. The practice of buffering snail habitat is not supported by actual research data. All parties agree on this point. In fact, Charles Dye, Director of the DOF pointed out that “data has not yet been collected to study the effectiveness of buffer zones in maintaining snail populations during timber harvest”. See letter from Randy Dye to Roger Dotson (October, 2009). No snail population data have been collected from the two recent timbering projects that were conducted using “buffer zones” around CTS habitats (Snake Hill WMA and the Allegheny Wood Products Property). Thus, we have no way of knowing yet whether the practice of creating snail buffer zones is a successful practice.

What is known, however, is that timbering affects the interior forest next to the cut area, raising temperature, increasing sunlight, reducing moisture and over time changing the composition of plants in the neighboring forested area. These changes in micro-climate have a negative impact on the snail. Despite this uncertainty, the absence of research, and lack of agreement among snail experts, the WV Division of Forestry and Division of Natural Resources have thus far stated an intention to use minimal 150 ft. buffers, suggested by a private consultant, rather than the much safer 300 ft. buffers recommended by snail scientists and Ph.D. researchers. Dr. Tim Pearce, a snail researcher with the Carnegie Museums Mollusks Collection, is concerned that the planned buffers are not adequate, and asserts that before more snail habitat areas are timbered at Coopers Rock State Forest, research should be conducted in the recently timbered snail habitat areas of the Cheat Canyon and Snake Hill WMA, to determine how effective this strategy is in protecting the snail. See email from Dr. Pearce to Jones (January, 2010). Ken Hotopp, the preeminent CTS expert, also urges caution in assuming that buffers will protect the endangered snail -- when there is no research underway to study the effectiveness of this approach.

Further, Hotopp and Pearce have serious concerns over the disruptions timbering creates for forest microclimates by altering moisture, temperature, and humidity which are essential for the survival of the snail. Despite the urging of snail scientists, microclimate research to monitor impact on snail habitat is not a part of the plan for this timber project

In fact, no formal document to protect the CTS or Indiana bat is in place in the form of a Habitat Conservation Plan (HCP) despite WVDOF desire to extensively timber Coopers Rock State Forest over the next several years. The absence of a formal plan to protect and conserve habitat for both the Indiana bat and the Cheat Threetooth is a violation of the public trust, and not good stewardship of public lands, and does not

adhere to state policy which requires that the WVDOR and WVDNR “maintain all species of wildlife for values which may be either intrinsic or ecological or of benefit to man”. (§20-2-1).

Conclusion

The proposed Scott Run II timber project in Coopers Rock State Forest, as currently planned, would result in the illegal taking of the endangered Cheat Threetooth Snail and the Indiana bat, and upon belief would violate other applicable laws and regulations.

To avoid such illegal occurrences, the Notifiers believe that certain measures must be adopted and implemented. Among these measures is a commitment on the part of the WVDOF and WVDNR to delay any timbering in Coopers Rock State Forest until (1) a Habitat Conservation Plan is in place, and (2) a commitment is made to conduct annual population studies for each of the endangered species within Coopers Rock State Forest. Furthermore, 300ft.-buffered snail habitat “preserves” must be used to protect both actual and potential snail habitat, as well as maintaining the integrity of the nearby forest microclimate until such time when definitive research can be acquired with respect to best methods for protecting snail habitat. The Indiana bat is facing a struggle for survival due to White-Nose Syndrome. Its winter cave in Cheat Canyon and surrounding forest are all on privately owned timber company land, much of which has already been extensively timbered. This species must be afforded every opportunity for survival within its known summer roosting area. Coopers Rock State Forest must not be timbered without first giving rigorous consideration and study of the role the forest plays in the life cycle of this imperiled species. That consideration and the necessary planning and protection have not been done.

In summary, current proposals and plans for timbering must be placed on hold, and there must be an immediate meeting of all concerned parties to discuss this issue together and attempt to resolve these concerns.

Very truly yours,

Thomas W. Rodd
State Bar No. 3143

cc: Ms. Gwen Jones
Friends of Blackwater
Coopers Rock Foundation