



Working to Protect Native Species and Their Habitats

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January 26, 2003

South Dakota Department of Environment and Natural Resources
523 E. Capitol
Joe Foss Building
Pierre, SD 57501

Re: Water Quality Violation in Black Hills

Dear Sir or Madam:

Pursuant to State of South Dakota Water Quality Law at Chapter 34A, Biodiversity Conservation Alliance, Native Ecosystems Council, and Jeremy Nichols hereby file this petition/complaint to the South Dakota Department of Environment and Natural Resources (“SDDENR”) seeking enforcement South Dakota Surface Water Quality Rule 74:51:01:34 (hereafter “South Dakota antidegradation rule”) and South Dakota Surface Water Quality Rules 74:52:01:05 and 74:52:02:36 (hereafter “stormwater permitting rule”) as they relate to management of the Black Hills National Forest (“BHNF”) in western South Dakota. Petitioners/complainants request SDDENR to declare the United States Forest Service (“USFS”), an agency of the federal government, in violation of South Dakota’s antidegradation rule and stormwater permitting rule for authorizing implementation of the Mercedes timber sale on the Mystic Ranger District in the central BHNF. Petitioners/complainants further request SDDENR order the USFS to comply with State of South Dakota water quality laws before authorizing, implementing, and otherwise undertaking the Mercedes timber sale on the BHNF. Petitioners/complainants understand this petition and complaint set in motion specific procedures according to South Dakota Water Quality Law at Chapter 34A.

Petitioners/Complainants

Biodiversity Conservation Alliance is a Laramie, WY-based nonprofit conservation organization with over 300 supporters that are dedicated to protecting and restoring native species and their habitats throughout the Rocky Mountain Region, including the Black Hills of western South Dakota and northeastern Wyoming. Formerly called Biodiversity Associates, Biodiversity Conservation Alliance has been intimately involved in issues affecting the native species of the Black Hills for over a decade. Biodiversity Conservation Alliance has expressed many concerns to the USFS and other state and federal agencies over degraded water quality on the Black Hills of South Dakota. The impacts of degraded water quality are profound and have the potential to irreversibly impair not only the health and function of the Black Hills ecosystem, but also the health of communities dependent upon the Black Hills for drinking water, recreation, and fishing opportunities. As an organization dedicated to protecting and restoring the health of native habitats on the Black Hills, Biodiversity Conservation Alliance is entirely dependent upon the SDDENR to enforce and uphold South Dakota water quality laws to ensure the health of stream ecosystems on the Black Hills.

Native Ecosystems Council is a nonprofit conservation organization that is dedicated to protecting and restoring native ecosystems in the Black Hills of South Dakota. With a regional office in Rapid City, Native Ecosystems Council long been involved in forest management issues on the Black Hills and has expressed numerous concerns over water quality to various agencies, including the USFS and South

Dakota Department of Environment and Natural Resources. Native Ecosystems Council and its supporters rely upon healthy streams in the Black Hills for recreational and aesthetic values, as well as for drinking water. Accordingly, Native Ecosystems Council and its supports rely upon the SDDENR to enforce and uphold South Dakota water quality laws to ensure drinking water is clean, to ensure recreational opportunities are not irreversibly foreclosed, and to ensure the opportunity to enjoy the aesthetics of the Black Hills can continue to be experienced for years to come.

Jeremy Nichols is an individual residing in Laramie, WY. As a supporter and staff member of Biodiversity Conservation Alliance, Mr. Nichols has been involved in forest management decisions on the Black Hills and has expressed numerous concerns over water quality to agencies like the USFS, South Dakota Department of Game, Fish and Parks, and the U.S. Environmental Protection Agency. Mr. Nichols and his family visit the Black Hills regularly to seek out and enjoy its natural values, including its streams and stream dependent organisms. Mr. Nichols and his family are dependent upon the recreational value of healthy streams in the Black Hills. Healthy streams on the Black Hills offer swimming opportunities, invaluable wildlife viewing opportunities, rare plant viewing opportunities, and bird watching opportunities. As such, Mr. Nichols depends upon the SDDENR to enforce and uphold South Dakota water quality laws to ensure his present and continued recreational opportunities and experiences are not irreversibly foreclosed by irresponsible forest management activities or other negligent actions that unnecessarily degrade water quality.

Background

On September 30, 2002, BHNF Supervisor John C. Twiss, an agent of the USFS, authorized implementation of the Mercedes timber through a decision notice (“DN”) and finding of no significant impact (“FONSI”) based on a final environmental assessment (“EA”) prepared pursuant to the National Environmental Policy Act (“NEPA”) and the Act’s implementing regulations. In doing so, he allowed for the harvest of 10.25 million board feet of timber from 5,498 acres of the BHNF. Additionally, his decision authorized 3.1 miles of new road construction, 13.2 miles of road reconstruction, and 19.4 miles of temporary road construction. The timber sale would affect lands on the Mystic Ranger District of the BHNF in the State of South Dakota.

The Mercedes timber sale poses various adverse environmental impacts to the environment of the BHNF. Most abhorrent however, are the adverse impacts the timber sale and its related activities pose to stream health in the project area, particularly along Castle Creek and Rapid Creek, of which both streams and many of their tributaries flow within or through the Mercedes timber sale project area. As SDDENR is aware, Castle Creek and Rapid Creek have suffered numerous water quality problems in recent years. In citing SDDENR’s 1998 Report to Congress: 305(b) Water Quality Assessment (hereafter “1998 305(b) report”), the FS states in the EA prepared for the Mercedes timber sale:

“The SDDENR 1998 Report to Congress: 305(b) Water Quality Assessment reported both Castle Creek and Rapid Creek as partially supporting of designated beneficial uses. Rapid Creek above Pactola reservoir supported its designated beneficial uses with minor impairments due to elevated pH, TSS, and Fecal coliform. Rapid Creek near Rochford had moderate impairments in the previous two reporting periods due to high Total Suspended Sediment (TSS) and occasional high pH. Castle Creek near Mystic was moderately impaired in the previous two reporting periods due to high TSS and pH. The siltation noted in lower Castle Creek may be attributable to the effects of in place contaminants from past mining activities. Pactola Reservoir is threatened by eutrophication and sedimentation. Sources of nutrients and sediments identified by the SDDENR include natural soil erosion, recreational activities and silviculture activities.”

Mercedes EA, p. 112. The SDDENR 2000 305(b) report echoes similar findings, noting that the upper reaches of Rapid Creek suffered impairments from elevated pH, TSS, and fecal coliform and that Castle Creek below Deerfield Reservoir suffered impairments from elevated TSS. The 2000 report identified silviculture activities as a source of sediment. The SDDENR 2002 305(b) report also echoes similar findings, again noting that the upper reaches of Rapid Creek suffered impairments from elevated pH, TSS, and fecal coliform and that Castle Creek below Deerfield Reservoir suffered impairments from elevated TSS. The 2002 report also identified silviculture activities as sources of impairment. Furthermore, Rapid Creek is listed on SDDENR's 2002 303(d) report, indicating that existing water quality rules are failing to protect the health of this vital stream.

While the fact that water quality in the timber sale area is seriously degraded and obviously inhibiting the ability of streams to meet their designated beneficial uses, the USFS ignored the implications of these circumstances. In assessing the impacts of the Mercedes timber sale and its associated road construction activities, the USFS claimed, "Long-term sediment yields are expected to decrease due to elimination of existing CDAs [connected disturbed areas] and careful BMP [best management practice] implementation on newly disturbed areas. Short-term yields may increased (sic) slightly due to road maintenance activities." Mercedes EA, p. 113. However, this statement is flawed for the following reasons:

1. Nowhere in the EA did the USFS make any direct comparison between short-term and long-term sediment yields. For instance, the USFS concludes that a one-time reduction in CDAs, which are proxies for assessing sediment yield potential, would result in long-term sediment decreases. However, this methodology fails to consider the cumulative sediment yield resulting from other activities such as domestic livestock grazing, county road construction and use, recreational activities, and past, present, and future silviculture activities. As an example, the FS is proposing many miles of road construction and reconstruction, an activity that has been documented to be a source of sediment delivery to streams. Furthermore, continued use of unsurfaced roads is also a documented source of sediment. Additionally, simply concluding that a reduction in CDAs will decrease long-term sediment yields is facetious reasoning to say the least. The USFS provides no data to show the proposed CDA reductions will actually lead to decreases in sediment yields or that if they do reduce sediment yields, the short-term increases in sediment yield will be offset. Finally, the USFS provides no context whatsoever for the terms "short-term" or "long-term." For all we know, "long-term" could mean 100, 200, even 500 years from now.
2. The ability of State of South Dakota silviculture BMPs to protect water quality on impaired streams is not proven to be effective. The USFS's reliance upon silviculture BMPs to protect water quality on streams that have already been degraded is highly questionable. It is difficult to believe that BMPs, which may be appropriate in areas where streams are currently meeting or exceeding their beneficial uses, can adequately protect water quality on streams that are failing to meet their beneficial uses (e.g., Castle Creek and Rapid Creek). It is further difficult to believe that BMPs can protect water quality on Rapid Creek given its designation as a Total Maximum Daily Load waterbody. Furthermore, BMPs only minimize the adverse impacts of silviculture activities to water quality, therefore BMP implementation does not mean that sediment delivery will be reduced in the timber sale area.
3. The USFS has further concluded that silviculture BMPs are only 80% effective in protecting water quality on the BHNF. Therefore, BMPs fail to protect water quality 20% of the time. Given this level of uncertainty, it is difficult to trust the USFS's conclusion that BMP implementation will lead to any sediment yield decreases.

4. Finally, if BMPs actually protect water quality, then why are water quality problems in the Mercedes timber sale area attributed to silviculture activities? The long-term effectiveness of silviculture BMPs is highly questionable.

Overall, these flaws indicate the USFS's analysis is, at the least, lacking key information that is necessary to show compliance with State of South Dakota water quality laws, the Clean Water Act, and Clean Water Act implementing regulations. At the most, these flaws indicate the USFS is condoning the continued degradation of streams on the BHNF, streams that provide invaluable fish and wildlife habitat, drinking water, and recreational opportunities. In either case, the USFS is shirking its responsibility to protect water quality on the BHNF.

In authorizing the Mercedes timber sale, Supervisor Twiss also authorized the construction and reconstruction of numerous miles of roads. In total, this proposed construction would disturb more than five acres of land. While some of the proposed road construction and reconstruction is being undertaken solely to facilitate silviculture activities, much of the proposed road construction and reconstruction is being undertaken for purposes other than silviculture activities. For instance, the Mercedes EA discloses that road construction is being undertaken to address access needs and recreation needs, in addition to addressing silviculture needs. Additionally, all roads constructed through the Mercedes timber sale will remain open for future public use. However, the USFS did not attempt to obtain a general stormwater discharge permit in accordance with State of South Dakota water quality laws. The impacts of stormwater runoff in the Mercedes timber sale area therefore pose serious impacts to water quality. As the SDDENR states in the 2002 305(b) report, "...higher than average annual precipitation can produce considerable suspended sediment problems over large areas of the state particularly in the west and southeast" (emphasis added).

In light of these potentially serious and degrading impacts and the USFS's flawed and egregious conclusions, petitioners filed an administrative appeal of the Mercedes timber sale on November 22, 2002, asking the Rocky Mountain Regional Office of the USFS in Denver, Colorado to review the decision of Supervisor Twiss. Petitioners specifically asked the Regional Office to review the impacts of the Mercedes timber sale to water quality in the timber sale area and requested the Regional Office order Supervisor Twiss to withdraw his decision and comply with all applicable water quality rules, regulations, and laws. On January 13, 2003, the Regional Office denied petitioners' requests, thereby allowing the Mercedes timber sale to proceed. The Regional Office therefore further condoned the USFS's egregious conclusions and gave the green light for continued stream degradation.

USFS Violation of South Dakota Water Quality Law

In authorizing the Mercedes timber sale, the USFS and BHNF Supervisor Twiss allowed water quality on streams that are already failing to fully meet their beneficial uses to be degraded further, thus violating State of South Dakota Water Quality Rule 74:51:01:34(5). This rule states as follows:

"Antidegradation of waters of the state. The antidegradation policy for this state is as follows:

(5) No further reduction of water quality may be allowed for surface waters of the state that do not meet the water quality levels assigned to their beneficial uses as a result of natural causes or conditions, and all new discharges must meet applicable water quality standards[.]"

This authority of this rule is further strengthened by the requirements of the Clean Water Act implementing regulations. The antidegradation policy found at 40 CFR § 131.12(a)(1) states:

“The State shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such a policy pursuant to this subpart. The antidegradation policy and implementation method shall, at a minimum, be consistent with the following:

- (1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.”

As documented in the Mercedes EA prepared by the USFS, the Mercedes timber sale would lead to short-term increases in sediment yield. This indicates that water quality on Castle Creek and Rapid Creek, which are both impaired waterbodies, will be reduced (i.e., degraded). There is no indication that these short-term increases will be offset by any long-term decrease. The USFS’s prediction of long-term decreases in sediment yield appear to be nothing more than an empty assumption. Given the USFS’s flawed methodology and conclusions, the cumulative effects of past, present, and future silviculture activities (including road construction), the inability of BMPs to protect impaired waterbodies, and the admitted uncertainty in overall BMP effectiveness, water quality on the Mercedes timber sale area will not be protected. Instead, the Mercedes timber sale will lead to further water degradation and reduced water quality, further adverse impacts to aquatic communities and fisheries, and further adverse impacts to drinking water supplies. This is ecologically, economically, socially, and physically unhealthy, impractical, and irresponsible.

Additionally, in authorizing the Mercedes timber sale before acquiring a storm water discharge permit, the USFS is in violation of State of South Dakota Water Quality Rules 74:52:01:05 and 74:52:02:36. While both State of South Dakota Water Quality Rules and the Clean Water Act implementing regulations exempt “silviculture activities” that are nonpoint sources of pollution from stormwater discharge permitting requirements, much of the road construction and reconstruction authorized as part of the Mercedes timber sale will not be undertaken solely for silviculture activities. Both the regulation and rule are explicit that only silviculture activities are exempt from storm water discharge permitting requirements. In authorizing the construction and reconstruction of roads for reasons other than to facilitate silviculture activities, the USFS is thereby obligated to follow State of South Dakota permitting procedures and requirements to mitigate the impacts of the nonpoint source pollution, including developing and implementing an adequate pollution prevention plan that fully minimizes the adverse impacts of storm water runoff as required by State of South Dakota Water Quality Law and Clean Water Act regulations.

The USFS is required by the Clean Water Act to comply with all State and Federal water quality laws. 33 USC § 1323(a)(2). Furthermore, SDDENR is required to enforce State of South Dakota water quality laws and hold entities, including the USFS, in violation of such laws in light of noncompliance and issue such penalties as are necessary to properly enforce state law. The SDDENR is thereby required to respond to the aforementioned water quality violations perpetrated by the USFS, issue and enforce such orders and/or penalties as are necessary to halt and prevent USFS violation of State of South Dakota Water Quality Law, and use its authority to ensure the USFS fully complies with all applicable water quality laws before proceeding with the Mercedes timber sale should the agency choose to proceed with the sale.

Petitioners/complainants expect to receive acknowledgement of this petition from SDDENR and to be apprised of any and all activities undertaken by SDDENR to investigate, assess, enforce, and resolve the water quality violations documented herein.

Signed this _____ day of _____, _____ in Rapid City, South Dakota.

for
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