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October 16, 2009

32078.00112

VIA E-MAIL AND UPS

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USDA Forest Service
Attn: Appeal Reviewing Officer
1720 Peachtree Road, NW
Suite 811N
Atlanta, GA 30309-9102

Re: NOTICE OF APPEAL

Dear Chattooga Planning Team:

This is a notice of appeal filed pursuant to 36 CFR 219.14(b)(2) on behalf of appellant Georgia ForestWatch (c/o Wayne Jenkins, Executive Director, 15 Tower Road, Ellijay, Georgia, 30540, Tel: 706-635-8733). Georgia Forest Watch appeals the joint decision to adopt the management direction of "Alternative 4" presented in the *Environmental Assessment: Managing Recreation Uses on the Upper Chattooga River* in the Sumter, Chattahoochee, and Nantahala National Forests (August 2009) (hereinafter "EA"), and the three separate decisions by the three responsible officers to amend the Forest Plans of each of these National Forests. These decisions are established in the following documents (hereinafter collectively referred to as "decision notices"):

- (1) Decision Notice and Finding of No Significant Impact for Amendment #1 to the Chattahoochee-Oconee National Forests Revised Land and Resource Management Plan Managing Recreation Uses on the Upper Chattooga River (Published in the Times on September 3, 2009); deciding officer: Forest Supervisor George Bain (Decision Notice signed on August 25, 2009) (hereinafter "Chattahoochee DN");
- (2) Decision Notice and Finding of No Significant Impact for Amendment #1 to the Sumter National Forest Revised Land and Resource Management Plan Managing Recreation Uses on the Upper Chattooga River (Published in The State on September 4, 2009); deciding officer: Forest Supervisor Monica J. Schwalbach (Decision Notice signed on August 25, 2009) (hereinafter "Sumter DN"); and
- (3) Decision Notice and Finding of No Significant Impact for Amendment #22 to the Nantahala and Pisgah National Forests Revised Land and Resource Management Plan

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Managing Recreation Uses on the Upper Chattooga River (Published in the Asheville Citizen-Times on September 4, 2009); deciding officer: Forest Supervisor Marisue Hilliard (Decision Notice signed on August 25, 2009) (hereinafter "Nantahala DN").

Summary of Appeal

Georgia ForestWatch appeals the three decisions as arbitrary, capricious, an abuse of discretion and otherwise not in accordance with the law in violation of the Administrative Procedure Act (5 U.S.C. §§ 701-706). The three decisions would permit boating on the Upper Chattooga River accessed by unauthorized roads and features. They would grant implementing officers unfettered discretion to adapt management of large woody debris outside of the consideration required by the National Environmental Policy Act (NEPA) and the bounds of the direction of a Land and Resource Management Plan (LRMP). The EA supporting the decisions and the decisions themselves disregard the policy of managing for recreation at a regional level and repudiate the concept of zoning, possibly establishing a precedent for similar actions across the lands managed by the U.S. Forest Service. The decision fails to consider inextricably intertwined and connected actions and their impacts, including construction of a parking lot for floaters wishing to access the Upper Chattooga. Instead, the decision conceals significant impact by arbitrarily segmenting this action from the larger review and categorically excluding it from the public NEPA process altogether. Implementation of Alternative 4 would negatively impact the wild character of the Upper Chattooga in violation of the Wilderness Act and the Wild and Scenic Rivers Act, and the impact will be much greater if enforcement is not funded or proves ineffective—an eventuality not addressed in the unlawful adaptive management plan that is proposed or otherwise. Despite thirty years of controversy and millions of dollars spent to consider the impacts of reversing management policy for one of the most extraordinary pieces of public land in the Southeast, the U.S. Forest Service has arbitrarily and capriciously determined that its decisions are not significant enough to merit an Environmental Impact Statement, a position it has unlawfully failed to support.

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I. Access

Access as proposed in the three decisions and the EA is not legal because it has not been properly considered in the process prescribed by the Forest Service’s own extensive transportation guidance. As a result, the number of trails that boaters will create is underestimated. The cost of properly providing access to allow for boating by adding unauthorized trails to the system cannot be justified.

A. Dependence on user created trails and other unofficial trails is not lawful

The EA states that:

Access for boaters would utilize exiting trails, old roadbeds, existing bridge crossings or other user-created features for put-in and take-out. . . . Additional user-crated trails from boating activities would be discouraged, but difficult to control. Portage trail needs would be addressed while trying to minimize potential resource impacts. There is no new road or trail construction proposed for any alternative.
(EA, 45)

Selection of Alternative 4 will increase the use of “County Line Road Trail by boaters to reach the confluence of Norton Mill Creek” (EA, 40). County Line Road Trail is not a Forest Service designated road or a trail, as it does not appear on the roads atlas for the Nantahala National Forest (See FONSI and EA for the White Bull Timber Sale, Attachment 1).¹

¹ Personal communication with L. Hicks, Engineering, Heritage, and Recreation (July 22, 2008); http://www.cs.unca.edu/nfsnc/roads/nantahala_roads.pdf; FSM 2353.12. County Line Road was described in the EA for the White Bull timber project as an “administrative access road.” That plan called for the road to be “closed and seeded after timber harvest activities are completed.” White Bull Timber Project EA, p. 25. This is consistent with the way that a temporary road is supposed to

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County Line Road and other “user-created features” must be designated National Forest System Trails and Facilities because the Forest Service has determined they are necessary for the use of resources (here, accessing the Chattooga by kayakers). 36 C.F.R. § 212.1. They must be included in the forest transportation atlas. *Id.*, FSM 2353.22-1. If they are not, they are “unauthorized trails,” and it is inappropriate to rely on them to provide access to the River. 36 C.F.R. § 212.1, FSM 2353.05 (definition of “unauthorized trail”). The process for designation and administration of National Forest System Trails is described in detail in the Forest Service Manual and Handbook. Neither the Decision Notices nor the EA reflect compliance with Forest Service designation policy.

Use of unauthorized trails and roads is not in compliance with the Trails Management Handbook. The Trails Management Handbook has specific and detailed guidelines for considering where and what kinds of trails should be added to the transportation system (FSH 2309.18 Ch. 3). Among other things, those guidelines direct:

- The stability, steepness of slopes, and amount of annual maintenance that the surrounding vegetation will demand must be considered (FSH 2309.18 Ch. 3.11);
- An EA should be prepared that includes consideration of “alternative trail locations and expected impacts on wet-area soils, slope soil stability, stream crossings, visual resources, cultural sites, and planned recreational opportunities, as well as other natural resources such as wildlife” (FSH 2309.18 Ch. 3.11-16);
- The long-term maintenance costs of the route are to be considered thoroughly (FSH 2309.18 Ch. 3.11-16);
- Trail planning is supposed to be based on decisions documented in a land management plan (FSH 2309.18 Ch. 10.11);
- For each trail or trail segment, the Trail Fundamentals found in FSM 2353.13 and section 14.1 through 14.5 of the Trails Management Handbook are supposed to be identified and applied (FSH 2309.18-14.3); and
- The Design Parameters, management needs, and management cost of each trail are supposed to be determined (FSH 2309.18 Ch. 10-14.1-1).

It is abundantly clear that trails are not supposed to be added to the system just because they already exist or because boaters create them for portage, access or scouting convenience without thought to all other management concerns. The EA does not contain a discussion of the costs of adding put ins or take outs or the costs of adding County Line Road Trail to the system, or whether the existing location of that “trail” or

be treated. *See* 16 U.S.C. § 1608(b). Incidentally, the “road” or “trail” has apparently continued to be used by the Forest Service and others. If it is in fact part of the transportation system, then it needs to be officially included or obliterated and an alternative provided. This murky ghost road status is not consistent with Forest Service policy, regulation or guidance.

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the location of that access route is most appropriate. It is entirely inappropriate and arbitrary and capricious to rely on these.

B. Scouting trails are not considered

The EA does not appear to include scouting trails, and so underestimates significantly the number of user-created trails likely to be created if the Upper Chattooga is open to boating. American Whitewater trip reports, submitted by Don Kinser to Michael Crane of the USFS, note the need for “intensive scouting” and “a lot of scouting” when paddling the Upper Chattooga (Attachment 2).

C. The expense of adding County Line Road and other access facilities has not been and cannot be justified

The Forest Service Manual requires that the trail system be “environmentally, socially, and financially sustainable” and that “long term cost effectiveness and need” be emphasized when developing or rehabilitating trails.” FSM 2353.03-7, 4.

The cost of maintaining the unauthorized County Line Road Trail and multiple portage and scouting trails (that are moving all the time with the river) cannot be justified. Pisgah/Nantahala is unable to adequately fund the management needs of its existing transportation system (See Attachment 3).²

D. Requested Actions

- (1) County Line Road Trail and other unauthorized transportation features (including put ins/take outs) cannot be used to support a decision to allow boating in the Upper Chattooga. The EA must be modified, either to include a full analysis of the social, economic, and ecological impacts of adding these trails and features to the system, or to consider the impacts of the use of existing authorized system trails and features.

² “The overall condition of the forest’s classified road system continues to deteriorate because the forest is not adequately funded to operate and maintain these roads to the level they were designed for. The forest receives only 25% of what is needed for annual road maintenance and approximately \$48 million is required to correct existing deferred maintenance needs.” Pisgah and Nantahala National Forest, Roads Analysis Process Report, p. 16 (Jan. 2003) (available at http://www.cs.unca.edu/nfsnc/roads/np_roads_report.pdf). “A continuous decrease in the amount of funds available for reconstruction of the collector and arterial roads, the backbone of the Forest Service system, has occurred as purchaser credit [from timber sales] has decreased.” *Id.* at p. 13.

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- (2) As appropriate access has not been identified, prohibit all boating on the Upper Chattooga.
- (3) Revise the EA to consider the extent and impact of scouting trails associated with any alternatives permitting boating.
- (4) Modify the EA to reflect the cost of providing authorized access to the Chattooga for boaters and reevaluate the choice of Alternative 4 accordingly.

II. Adaptive Management

The EA and the Decision Notices purport to adopt an adaptive management strategy for the management issues of large woody debris and user encounter levels,³ but do not include the analysis necessary to support this strategy or the elements necessary to implement it. As drafted, the three decisions would unlawfully grant the responsible officials implementing the management decisions unfettered discretion on a number of management issues.

Where an adaptive management strategy is adopted, it

[m]ust clearly identify the adjustment(s) that can be made when monitoring during project implementation indicates that the action is not having its intended effect, or is causing unintended and undesirable effects. The EIS or EA must disclose not only the effects of the proposed action or alternative but also the effect of the adjustment. Such proposal or alternative must also describe the monitoring that would take place to inform the responsible official during implementation whether the action is having its intended effect. [. . .]

When using adaptive management, display the proposed action as an initial management action and a collection of possible adjustments or acceptable tools to be used to modify the initial action to achieve the intended effects. Disclose the site-specific effects of all of these actions, adjustments, or use of acceptable tools in the analysis along

³ See, e.g. Nantahala DN, p. 2 (citing EA Appendix B) (“Applies a management approach which identifies adjustments that may be needed when monitoring indicates an action is not having its intended effect. . .”); EA, Appendix B, p. 169 (discussing adaptive management principles).

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with the monitoring methods to be used to determine the effectiveness of each. [. . .]

The ability to accomplish necessary monitoring and to fully analyze the effects of the range of additional adaptive management actions needs to be carefully considered before using an adaptive management approach (FSH 1909.15 Ch. 10-14.1) (emphasis added).

Future NEPA obligations are only avoided if management adjustments and their effect are within the bounds of those anticipated in the original decision (FSH 1909.15-14.1). Adjustments not contemplated and included within the bounds established in Land Resources Management Plan are unlawful (See 16 U.S.C. § 1604(i)). Because the EA so seriously underestimates the commitment required for an adaptive management plan, the EA estimate of \$227,000 in staffing expense to perform monitoring and enforcement is probably low (EA, Appendix B, p. 169).

A. No desired conditions are described for large woody debris (LWD) management

Adaptive management is absolutely dependent on the identification of desired conditions. In adaptive management, monitoring is used to determine whether management actions are having their desired effect. The desired effect is measured by comparing the actual impact of management decisions against a desired condition. If it is found that they are not being achieved through the initial management action, then the action can be adjusted to one or more already identified management actions disclosed in an environmental document (FSH 1909.15 Ch. 50-54.1). If desired conditions are not identified, adaptive management is impossible.

Large woody debris, a necessary and stabilizing component of a healthy trout stream, but a barrier to boaters, is expected to be impacted by both boating and hemlock mortality to some degree.⁴ (see *Inventory of Large Wood in the Upper Chattooga River Watershed*, "Inventory," p. 8-9 (Jan. 2008), Attachment 4). The EA identifies monitoring of LWD as a goal and its management as appropriate for an adaptive approach (EA, Appendix B, pp. 169-171), but includes no desired conditions for this critical aquatic resource on the Upper Chattooga (e.g., is more or less desired than at present?). With no desired condition stated, the responsible official implementing adaptive management would have completely unfettered discretion, which is not lawful.

⁴ The Forest Service found clear evidence of removal of large wood from areas popular with whitewater boating (*Inventory*, p. 8)

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B. The EA does not identify adjustments

The EA does not propose an adequate adaptive management strategy for large woody debris because no specific adjustments are proposed.

Large woody debris removal can have a negative effect on the aquatic environment. The EA acknowledges this (see monitoring question 1, Appendix B, p. 169), but proposes no adjustments, not even vague ones, in the instance that large woody debris is removed by boaters or other users.

If large woody debris is found to block boat passage, then the plan proposes portage. However, in the case that rare species are present in the portage route, there is no proposed adjusted management strategy. The EA merely states that the management decision “would ensure that boaters traversing that stretch of the river would avoid impacts” (EA, Appendix B, p. 170). That is a given as it is required by the Endangered Species Act and the Wild and Scenic Rivers Act. Adaptive management allows greater flexibility to managers to comply with these laws, but only if potential adjustments have been pre-considered in the NEPA document that selects an adaptive management approach (see next section). One could imagine that impacts could be avoided by removing the large woody debris necessitating the portage, banning boating, or educating boaters to identify the threatened plants. Each of these options would vary in cost, effectiveness, and impact to the environment. Failing to evaluate the impacts of any adjustments is a critical error in establishing the basis for an adaptive management strategy. Instead, the EA vaguely proposes that “a site-specific decision under the appropriate NEPA process will be made”⁵ (EA, Appendix B, p. 170). That is not adaptive management.

C. The EA does not disclose effects of adjustments

In order to implement an adaptive management strategy, impacts of alternative management direction must have been considered in the EA. That did not occur here--the adjustments are not even identified for the most part. Where they were identified (e.g., “indirect measures will be employed” to lower encounters, and then “direct measures”), the impacts of taking these measures is not discussed.⁶

⁵ Presumably, boaters hope that this would be a categorical exclusion permitting removal of large woody debris. We assume that the EA does not include specific adjustment alternatives because of mere oversight.

⁶ One might argue that *some* of the impacts were discussed as part of other alternatives, but that is not really the case. After boaters become accustomed to using an area, it might cost more to enforce a future ban, should their use prove too problematic to continue. Also, if too much large woody debris is removed from a stream or if rare plants are trampled, there may be restoration costs associated with adjusting management

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D. The Decision Notices do not include the necessary elements of an adaptive management strategy

The Decision Notices do not provide adequate guidance to implement an adaptive management strategy. Like the EA, they lack specific monitoring parameters, desired conditions (for large woody debris), and direction for when adjustments should be made and precisely what adjustments may be made.

E. Requested Actions

- (1) Provide desired conditions for each adaptive management element.⁷
- (2) Include in each of the Decision Notices specific directions for implementing an adaptive management strategy for each element (desired conditions, monitoring guidelines, available adjustments).
- (3) Provide an accurate estimate of what adaptive management will cost.
- (4) Perform a NEPA analysis for each of the proposed/possible adjustments.
- (5) Any new or continued boating access should be made contingent upon the receipt annually of the budgetary resources necessary to implement adaptive management (including funding for monitoring).
- (6) A “sunset” provision should be included for any more intensive uses that are added (including boating in the Upper Chattooga, if retained) so that they expire unless it is shown on an annual basis that they are sustainable and that funding is available to enforce the implementing rules.

III. Segmentation of NEPA Analysis

The October 1, 2009 Schedule of Proposed Action (SOPA) for the National Forests in North Carolina includes a project to “construct a parking area at County Line Trail/Road between Whiteside Cove Road and the Wild and Scenic River boundary, for access to floating in the Upper Chattooga River” (SOPA, Attachment 5) (emphasis added). This action is not considered in the EA nor is there any discussion of the impacts of constructing and maintaining this parking lot.

strategies. For reasons such as these, impacts from potential management adjustments need to be represented and discussed in the context of the adaptive management strategy.

⁷ This is particularly critical for large woody debris.

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“Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.” 40 CFR 1502.4(a). Actions that the CEQ NEPA regulations require agencies to consider include:

Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

- (i) Automatically trigger other actions which may require environmental impact statements.
- (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
- (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

40 CFR 1508.25(a)(1). In other words, some actions are so “inextricably intertwined” that they must be considered in a single document. In the case of *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985), the court found that a road built to facilitate timber harvests and the timber harvests themselves had to be considered in a single NEPA document. The same is true of a parking lot built solely for the stated purpose of facilitating floating and a simultaneous proposal to allow floating. These two meet the regulatory definition of “connected actions.”

It appears that the Forest Service has deliberately omitted discussion of the parking lot from the EA to minimize the anticipated impacts of its chosen alternative. For example:

- The EA states that “There is no change in parking from current forest plan direction” associated with Alternative 4 (Table 2.1.4, p. 12). At best, this is misleading given that Georgia ForestWatch identified the issue of this parking lot in its August 18, 2008 comments on the pre-decisional Environmental Assessment (which had mentioned a parking lot).⁸
- The response to public comments on the draft EA, included the following statement: “There are no plans to build any additional parking lots for any of the proposed alternatives that will allow boating in the upper corridor and it is not part of the decision to be made” (Managing Recreation Uses on the Upper

⁸ These comments, which already are part of the administrative record, are incorporated by reference into this appeal.

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Chattooga River – Responses to Public Comments, p. 30 (August 25, 2009)
Excerpt, Attachment 6). This is simply wrong.

- The SOPA indicates that the parking lot project is to be accomplished by categorical exclusion from NEPA—so largely or entirely outside of the public arena.⁹
- The SOPA was published on October 1—in the midst of the highly publicized planning for the Upper Chattooga Recreation Management, yet the proposed parking lot was mentioned nowhere in the EA. A decision and implementation of parking lot construction is expected by April 2010—after the deadline to file this appeal.¹⁰

A. Requested Actions

- (1) Revise the EA to correct misleading statements that suggest that no new parking areas will be constructed.
- (2) Revise the EA to consider the impacts of the new parking area proposed for the identified purpose of providing access for floaters (e.g., sedimentation, increased user access to remote areas of the river, anticipated users of the parking lot during times of year when boating is not permitted).
- (3) Revise the cost estimate for the various alternatives taking into consideration the cost of providing parking.
- (4) Do not proceed with the proposal in the SOPA to categorically exclude the construction of a parking lot at County Line Trail/Road from the NEPA process.

IV. Scope of Analysis of Recreational Opportunity

The Recreation Opportunity Spectrum policy was ignored, resulting in an artificially narrow review of boating and other recreational opportunities in the region and a false justification for flattening recreational opportunity.

⁹ The particular categorical exclusion that this action is proposed to proceed under is not identified in the SOPA, but generally speaking, “[p]rojects and activities which are categorically excluded from documentation in an [EA] pursuant to FSH 1909.15, Chapter 30, section 31” are not subject to legal notice and opportunity to comment (36 C.F.R. § 215.4(a)). We note that construction of a new parking lot would not appear to fall within any of the Forest Service’s identified categorical exclusions.

¹⁰ The SOPA is a technical planning document that typically is not widely read by the public and is not automatically part of the planning record for administrative decisions which are the subject of this appeal.

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It is Forest Service Policy to use the Recreation Opportunity Spectrum (ROS) to guide recreational management of the National Forests (FSM 2310.3-2).¹¹

The basic assumption underlying the ROS is that quality in outdoor recreation is best assured through provision of a diverse set of opportunities. A wide range of tastes and preferences for recreational opportunities exists among the public and . . . quality seems to be a highly personalized matter. Providing a wide range of setting varying in level of development, access, and so forth insures that the broadest segment of the public will find quality recreational experiences, both now and in the future (ROS, p. 4, internal citation omitted, Attachment 7).

Recognizing the great diversity of quality opportunities that the National Forests can offer, if managed according to the ROS, it is Forest Service policy that "individual National Forests need not provide recreation opportunities for each ROS class" (FSM 2310.3-4). Inventories of Recreational opportunities "should encompass at least regional levels and transcend administrative boundaries" (ROS p. 23).

The ROS policy, including consideration of regional diversity, is explicitly included in the Forest Service's management direction for Wild and Scenic Rivers:

Management plans for designated rivers must:

1. Establish management objectives for each segment of the river. As a minimum, state the Recreation Opportunity Spectrum class featured (ROS, FSM 2310) and procedures for maintaining the ROS for each segment over time. To the extent possible, the management objectives should reflect the river's recreational relationship to nearby rivers.
2. Describe historical trends in use, demands, and needs of the river resources and likely future trends. (FSM 2354.32, emphasis added).

Zoning is endorsed as a method to protect character and prevent overuse:

¹¹ Roger N. Clark and George H. Stankey, *The Recreation Opportunity Spectrum: A Framework for Planning, Management, and Research*, General Technical Report PNW-98 (1979).

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When necessary, develop prescriptions to manage the character and intensity of recreational use on the river.

Use specific management objectives for each segment. Consider the following factors in developing direction:

1. Capabilities of the physical environment to accommodate and sustain visitor use.
2. Desires of the present and potential recreation users and trends over time in the amounts, types, and distribution of recreational use and the characteristics of recreation users. These help identify what kinds of recreation opportunities to provide and how and where to manage and maintain such opportunities.
3. The diversity of river recreation opportunities available within the geographic region.
4. History of nonrecreation uses that are compatible or conflict with recreation use of the river.
5. Budgetary, personnel, and technical considerations (FSM 2354.41).

A. The definition of existing recreational opportunities is too narrow

Back when it was designated a Wild and Scenic River, the “zone of influence” for the Chattooga was defined as “the 27-county area delineated by the three affected States as the Southern Highlands,” but the WSR stated that it would draw visitors from “allover the Southeast and the Nation” (WSR, p. 7). Nevertheless, the EA frames the existing condition of recreation opportunities focusing only on the Upper Chattooga:

Currently, existing users are able to experience their desired recreation opportunity on the upper Chattooga whether they seek solitude, campsites near the water, a variety of hiking trails, fishing opportunities, or just an opportunity to enjoy the river environment, all without the possible interference from boats. However, boaters are unable to experience their desired recreation opportunity on the upper Chattooga because they currently are not allowed to legally float the river (EA, p. 127).

By framing the existing conditions in this way, the EA artificially suggests that boaters are not provided for in the Forest Services recreation system or otherwise in the Southeastern

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region. This is misleading.¹² In fact, the EA in its (very brief) discussion of cumulative impacts (p. 138) acknowledging that “no other rivers in the region” have boating restrictions by flow, season or zone, and that there are “several similarly-sized river segments in the region that permit some boating use at higher flow levels.”¹³ There is no discussion about regional opportunities for the type of recreational opportunity and experience that the zoning ban has preserved for the last thirty years.

B. The basis for choosing Alternative 4 is contrary to the ROS policy

The Decision Notices state that one basis for the choice of alternative 4 was that this alternative “[p]rovides all potential users with a fair and equitable chance to obtain access to the river” (Nantahala DN, p. 4).¹⁴ This basis ignores the ROS policy and pretends that opportunities for boaters regionally and on other segments of the Chattooga are not relevant to evaluating diversity of experience. It results in flattened, less diversified regional recreational opportunity that is precisely contrary to the intent and direction of the ROS policy. But, the real error is that it equates “users” with “uses.”

The source of this basis may be the direction of Forest Service Manual section 2354.41a, which directs that “[w]hen it becomes necessary to limit use, ensure that all potential users have a fair and equitable chance to obtain access to the river. Also ensure that the use-limiting system is within the administrative capabilities of the managing unit.” This appears to be a reference to individual users, not user groups. Meaning that if use is limited, a fair system must be derived so that some individuals do not have greater access than others desiring to use the area in the same way. A non-boating alternative is not inconsistent with this directive; most expert kayakers are, after all, capable of walking into the Ellicott Rock Wilderness and the Upper Chattooga corridor—they don’t have to boat it to access it or to use it.

¹² Existing boating opportunities are sufficient both regionally and on the Chattooga. (See Attachment 8, *Alternative Local Streams Offer Sufficient Whitewater*, Appendix). On the Chattooga alone, boating dominates more than 60% of the corridor. There are creek boating opportunities on the nearby tributaries of the Chattooga’s West Fork, Overflow and Holcomb Creeks. In 1987, 62,200 recreation visitor days dedicated to canoeing or kayaking in the Sumter National Forest were logged. (Sumter National Forest, Recreation Supply and Demand: The Sumter National Forest’s Place in Outdoor Recreation in South Carolina, p. 15.)

¹³ In only two other places can the type of solitude protected for the last thirty years on the Upper Chattooga be found: private boating is prohibited only on three sections of the Wild and Scenic River Rogue and rivers in Yellowstone National Park. See U.S. Forest Service’s Opposition to Motion for Preliminary Injunction, 2:06-CV-0074-WCO (11th Cir. filed July 7, 2006).

¹⁴ Of course, even this is not true, because mountain bikers and ORV users are still excluded, for example.

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The Forest Service's argument that fairness dictates opening the Upper Corridor to boating is strange for another reason. In response to American Whitewater's attempts to open up the Chattooga to boating prior to completion of the impacts of a study on the effects of increasing the intensity of recreational effects, the Forest Service successfully argued to the 11th Circuit Court of Appeals that there was no urgent need to permit boating in the Upper Chattooga corridor because:

plaintiffs have the same ability as others to engage in a multitude of other recreational pursuits allowed throughout the Chattooga corridor. They are not prohibited from accessing the Headwaters of the Chattooga for recreational pursuits such as swimming, fishing, hiking, camping, and photographing, to name just a few. Nor is it true, as plaintiff claim, that they are being treated unfairly as the only individuals prohibited from engaging in their desired recreational pursuit on the Chattooga. As an initial matter, it is not the individual that is prohibited from accessing and recreating in the Chattooga corridor. Instead it is the recreational use or pursuit that is limited in order to strike a balance that protects and enhances the Recreation ORV. Many uses, not just floating, are prohibited or limited in the Chattooga corridor. For instance, although floating is only prohibited in a small section of the Chattooga, off-highway vehicle use and mountain bike use is prohibited throughout the Chattooga corridor and only allowed in specific areas on the forest. Likewise, there are numerous restrictions on fishing, camping, and horseback riding, among others. (*American Whitewater v. Bosworth*, 2:06-CV-0074-WCO, Document 11, p. 22 (filed July 7, 2006) (Attachment 9)).

C. Requested Actions

- (1) Revise EA so that the analysis complies with the ROS policy.
- (2) Each of the three decisions should be modified such that no boating is allowed in the Upper Chattooga River Corridor (prohibition on boating in the tributaries should be maintained) so that regional recreational diversity is maintained.
- (3) Include in a revised EA consideration of the appropriate geographical scope, including all regional recreational opportunities similar to those for which management decisions are being made.

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- (4) To the extent any boating is permitted in the upper corridor of the River (which it should not), boating should be limited to the period between December 15 and February 15 to limit user conflict, and boater groups should be limited to one trip per day. Any alternative that expands boating into March would risk damage to sensitive vegetation and would drive herons, kingfishers, warblers, and flycatchers from their nests, leaving them vulnerable to predators.
- (5) Limiting boating on the basis of flow is unworkable and inadequate unless the flow level is above 750 cfs. Fishing occurs at water levels in excess of 450 cfs.
- (6) Limit boating on the lower 36 miles of the Chattooga Wild and Scenic River Corridor as necessary to enhance other uses and to allow for restoration of the resource.

V. Maintenance of Area's Character

The Chattooga Corridor is degraded along its length and proposed management changes will increase degradation in violation of Wilderness and Wild and Scenic River management policy and law. Any trails accessing the wilderness must meet wilderness standards; the unauthorized user-created trails identified for access to the river, portage, and scouting in the EA do not and cannot meet these standards. As drafted, the decision notices would permit degradation of the aquatic ecosystem to enhance boater safety in violation of law.

Both the Wild and Scenic Rivers and the Wilderness Act require careful management to protect their recognized special characteristics. The portion of the Chattooga now proposed to be open to boating is subject to the provisions of both the Wilderness Act and the Wild and Scenic Rivers Act with respect to both the river and to its immediate environment. In case of conflict between the provisions of these Acts the more restrictive provisions shall apply (16 U.S.C. § 1281(b); FSM Ch. 2354.42e).

Section 10(a) of the Wild and Scenic Rivers act imposes a "nondegradation and enhancement policy for all designated river areas, regardless of classification."¹⁵ The

¹⁵ See U.S. Forest Service, Wild & Scenic River Management Responsibilities (A Technical Report of the Interagency Wild and Scenic Rivers Coordinating Council), p. 22 (March 2002).

Public use and enjoyment of components; protection of features; management plans. Each component of the national wild and scenic rivers system shall be administered in such manner as to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values. In

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Forest Service must document baseline resource conditions and monitor changes to these conditions.¹⁶ The Forest Service must “[e]stablish appropriate levels of recreation use and developments to protect the values for which the river was designated.” (FSM 2354.32-6, see also FSM 2354.41).

In a wilderness, “[w]here a choice must be made between wilderness values and visitor or any other activity, preserving the wilderness resource is the overriding value. Economy, convenience, commercial value, and comfort are not standards of management or use of wilderness. The overarching concept is to preserve natural conditions and wilderness character” (FSM Ch. 2320.6). The Forest Service’s Wilderness Management policy is to always work toward closing the gap between the attainable level of wilderness purity and the less pure, human-influenced reality that exists on each wilderness (FSM Ch. 2320.6).

In order to protect the character of the Chattooga Wild and Scenic River, the original *Wild and Scenic River Study Report* (June 15, 1971) for the river directed that “[r]ecreation use will be regulated on the basis of carrying capacity of the land and water rather than on demand” (p. 86). It recognized that the major management challenge for the Chattooga would be to maintain the river in the condition that made it worthy of inclusion in the National Wild and Scenic Rivers System while providing for “a safe and satisfying recreation experience” (WSR Report, p. 86).

Forest Service directives require that regulations for river management be enforceable (FSM 2354.03.3). Any efforts to distribute visitor use must be supported by adequate administrative capabilities of the managing unit (FSM 2354.41a).

A. Baseline conditions are unacceptable

Conditions in the Chattooga Corridor need to be improved from the present baseline. Canoeing, rafting and kayaking use on the Chattooga River has already been identified as an example of where the “facilities and resources are being stretched to capacity.”¹⁷ Litter, sediment, and lack of solitude plague all parts of the River Corridor, but are less of a problem on the Upper Chattooga where access is more restricted. The Chattooga, which should be pristine, is ranked below average in comparison to other watersheds on the Forest because of sediment problems.

such administration primary emphasis shall be given to protecting its esthetic, scenic, historic, archeologic, and scientific features (16 USCS § 1281(a))

¹⁶ *Id.*

¹⁷ Sumter National Forest, *Recreation Supply and Demand: The Sumter National Forest’s Place in Outdoor Recreation in South Carolina*, p. 15.

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B. Boating will increase sedimentation

“A substantial amount of erosion occurs at river access points due to slope and soil types.” EA, p. 48. Boating will increase sedimentation more than is indicated in the EA:

- Many boaters drag boats when portaging or for long distances when approaching waterways, and slide down riverbanks to enter the water, making boaters a significant source of sediment compared to other users.
- The EA has neglected to address the potential of many scouting trails very close to the water.
- Boaters tend to use Rivers at higher flow (and would be required to do so under the preferred alternative), requiring different near-stream trails than users during normal or low flow.
- Boaters will be active in the watershed during or just after precipitation events, when erosion and sedimentation are most problematic.
- The Forest Service proposes to build a new parking lot for boaters (SOPA, p. 17). Parking lots are identified in the EA as a source of sediment and erosion (EA, p. 48).

All of these factors will degrade the quality of the Upper Chattooga Corridor in violation of the Wild and Scenic Rivers Act’s nondegradation policy and the Wilderness Act’s mandatory prioritization of resource protection over recreation.

C. Trail Character

The trail system accessing the Ellicott Rock Wilderness area must be planned and managed in accordance with the wilderness objectives in the three land management plans (See FSM 2323, FSH 2309.18 Ch. 20.6-1). User-created trails that the proposed alternative relies on cannot meet the criteria for locating, constructing, and maintaining trails in a wilderness area, including the most easily measureable goal that trail treads not exceed 24 inches in width (See FSH 2309.18 Ch. 20.6-2.h, see also FSH 2309.18 Ch. 23.11-Exhibit 01 (design tread width for wilderness), Nantahala LRMP, III-104). The Nantahala LRMP directs that trails within or accessing wilderness areas offer a “more difficult” to “most difficult” experience” (III-104). Trails within the Wild and Scenic Rivers Corridor must be managed for hiking use only (Nantahala LRMP, III-169). A trail (or trails) over which a kayak can be carried, rolled, or dragged will almost certainly not meet these criteria. Deviations from the design parameters for wilderness trails (see FSH 2309.18 Ch. 23.11) cannot be justified for user-created trails which are not even individually identified, and in any event, no effort has been made in the EA to do so.

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D. Large Woody Debris

As drafted, the Decision Notices allow large woody debris to be removed with agency approval and nothing bars that approval from being forthcoming if presented as a safety instead of recreation concern (See, e.g., Sumter DN, p. 3). Over time, protection of the aquatic resource could be degraded in order to make the river safer for a very few skilled boaters. Georgia ForestWatch argues that if any boating is permitted on the Upper Chattooga, and if safety becomes a concern due to large woody debris, a ban on boating instead of large woody debris removal, should be the solution. This needs to be made explicit in the desired conditions and adjustments presented in the adaptive management plan.

Large Woody Debris (LWD) will increase as a result of hemlock die-off. Insufficient attention was given to this significant anticipated change which will alter and stress the entire ecology of the Upper Chattooga,¹⁸ cause additional slope erosion and tree mortality, and change water temperature. Allowing boating on the Upper Chattooga where hemlocks are more common will increase the number and distance of portages, and the temptation to remove LWD.

It is the confirmed habit of some boaters to remove LWD from streams.¹⁹ Removal with chainsaws—also a common practice—is not allowed in wilderness areas. The Forest Service fails to explain how LWD removal will be prevented if boating is allowed in additional sections of the River (see discussion of adaptive management).

E. Requested Actions

- (1) Boating should not be allowed anywhere in the Chattooga Corridor during or within 24 hours of high precipitation events.
- (2) All trails (including put ins/take outs) providing access to the Ellicott Rock Wilderness must be designed and maintained consistent with wilderness character and guidelines.
- (3) Trails in the Wilderness area of Nantahala National Forest must offer a “more difficult” or “most difficult” experience.
- (4) Add an adaptive management element (including identified desired conditions) for measuring approach, portage, and scouting impacts on aquatic

¹⁸ Some stretches of riverbank have as many as ten dead or dying hemlocks in a 100-yard stretch.

¹⁹ Draft EA, p. 84, *et seq.*

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ecosystems/sedimentation (put ins/take outs, and dragging boats down trails, for example). Present the proposed element for public comment.

- (5) Make large woody debris maintenance a priority over both recreation and safety. Achieve safety goals through management options other than large woody debris removal (such as banning boating in areas where large woody debris recruitment creates an unacceptable hazard).

VI. Environmental Impact Statement

The Forest Service should have prepared an EIS for this decision.

The National Environmental Policy Act requires federal agencies to prepare a detailed Environmental Impact Statement prior to taking an action that could “significantly” affect the quality of the human environment (42 U.S.C. § 4332(2)(C)). The Forest Service’s Handbook defines “significantly” to include both context and intensity (FSH 1909.15-05). In evaluating intensity, the Forest Service is directed to consider the unique characteristics of the geographic area, such as proximity to wild and scenic rivers or ecologically critical areas, the controversy surrounding the decision, and the precedential quality of the decision. “An agency cannot avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have insignificant effect on the environment. Instead an agency must provide a reasoned explanation for its decision.” *California ex. rel. Cal. Coastal Comm’n v. Norton*, 150 F.Supp.2d 1046, 1057 (N.D. Cal. 2001) (citation omitted).

In determining whether an effect is significant, the Forest Service must consider groups of actions that collectively are significant.

Consideration must be given to the incremental effects of the action when added to the past, present, and reasonably foreseeable related future actions of the Forest Service, as well as those of other agencies and individuals, that may have a measureable and meaningful impact on particular resources (FSH 1909.15, Ch. 10-15.1).

“Past actions and events also need to be analyzed to determine how the present situation has been affected by history, and to identify trends or patterns that may exist” (FSH 1909.15, Ch. 10-15.2b). “It is important to explain why cumulative effects are not expected beyond the special and temporal boundaries of the affected area” (*Id.*).

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A. Unique Characteristics of the Area

The Chattooga was the very first river designated a Wild and Scenic River in the Southeast (*Capacity & Conflict on the Upper Chattooga River*, p. 7). “The beauty of the rapids and scenery of the Chattooga drainage is unsurpassed in the Southeastern United States” (WSR p. 5). The Upper Chattooga travels for five miles through the Ellicott Rock Wilderness, so designated for its wild, untrammeled character.

The ecology of the river and the surrounding Wilderness and recreation land is in peril. Hemlock die-off, declining Chattooga water quality, and increasing demand for recreational opportunity are all taking their toll on the Chattooga Corridor (*Capacity & Conflict on the Upper Chattooga River; Inventory*, p. 8).

B. Controversy

There can be no doubt that management of the Upper Chattooga is controversial and has been for more than thirty years (See *Capacity & Conflict on the Upper Chattooga River*, pp. 14-16). The fishing-boating conflict was of sufficient stature to be noted in the Chattooga Development Plan in 1976 (41 Fed. Reg. 11847, 11849 (Mar. 22, 1976), Attachment 10). In the last half decade, the Forest Service has spent well over \$1 million to complete a visitor use capacity analysis for just the Upper Chattooga. From May 2005 to April 2006, the Forest Service spent approximately \$425,000 in staff costs (not including travel) and consultant costs analyzing this issue. From May 2006 to December 2007 it expected to spend an additional \$920,000 (Declaration of Chris Liggett, 06-cv-00074-WCO, filed July 7, 2006, Attachment 11). It has been sued by American Whitewater. Heated public debate has taken place at multiple meetings, and hundreds, if not thousands of comments have been submitted to the agency over the years on this issue alone.

C. Precedential Quality

The Decision Notices state that one basis for the choice of alternative 4 was that this alternative “[p]rovides all potential users with a fair and equitable chance to obtain access to the river” (See, e.g., Nantahala DN, p. 4). This is an apparent repudiation of the concept of zoning (see FSM 2354.41) and the ROS policy which could significantly impact the management of other areas of the National Forest System where boating, fishing, mountain biking, hunting, horseback riding and off road vehicle use are restricted.

D. Cumulative Impacts

In considering the cumulative impact on recreation, the EA concluded that there would be “no cumulative adverse effects on boaters from restricting boating by flows, season or zone since there are no other rivers in the region where boating is limited in this manner”

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and that there would be only small cumulative impacts on other users “because, while there are several similarly-sized river segments in the region that permit some boating use at higher flow levels, this option would reduce the number of rivers in the region that do not permit boating at any flow level” (EA, p. 138). This cursory discussion of cumulative impacts neglects to mention that this is the only white water river in the East and one of only three areas in the entire country where one can enjoy a remote river where boating is prohibited (see footnote 13). It also fails to discuss and consider the erosion over time in the area in the Chattooga Corridor dedicated to fishing, hiking and other traditional, more solitary wild area pursuits.

As already mentioned, the Forest Service has failed to sufficiently consider access impacts and has failed to consider at all the impacts of a new parking lot it proposes at the unauthorized County Line Trail/Road (e.g., sedimentation, increased impervious surface, encouragement of foot traffic and other uses of an unauthorized road).

E. Requested Actions

- (1) Prepare an EIS.
- (2) Include within the EIS a cumulative effects analysis that considers the temporal and Forest Service recreation opportunity spectrum impacts of removal of the boating ban on the Upper Chattooga.
- (3) Include within the EIS consideration of all connected actions, but particularly impacts (direct and indirect) of the construction of a new parking lot at the top of an unauthorized County Line Trail/Road.
- (4) If no EIS is prepared, explain in detail why a reversal of a 30 year policy, repudiation of zoning and managing for recreation regionally, and intensifying use of a Wild and Scenic River in a Wilderness area already under stress is not significant.

VII. Enforcement and Resources

The Forest Service identifies no source of resources to implement Alternative 4, and has failed to sufficiently analyze the excessive cost of permitting boating on the Upper Chattooga.

In managing river recreation, the Forest Service must “[u]se specific management objectives for each segment” and consider, among other factors, “[b]udgetary, personnel, and technical considerations” (FSM 2354.41). In managing trails, financial sustainability in the long term is supposed to be emphasized (FSM 2353.03-4, 7). The method of

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regulation of use of rivers is supposed to be enforceable (FSM 2354.03-3), which means that it must be funded. Adaptive management is only appropriate where there is the “ability to accomplish necessary monitoring and to fully analyze the effects of the range of additional adaptive management actions” (FSH 1909.15-14.1).

A. The EA does not thoroughly examine the issue of cost and budgetary sustainability of the proposed boating policy

The EA discusses the costs to implement Alternative 4 only in an appendix, and offers no explanation for the basis for different cost estimates among alternatives. A detailed discussion is avoided by stating that the “number, location and the rates in which projects are implemented are driven by available funding and additional decisions” (EA, Appendix B, p. 168). In 2006, the Forest Service filed with the 11th Circuit Court of Appeals the declaration of Chris Liggett, the Director of Planning for the Southern Region of the Forest Service and a member of the Steering Team for the Chattooga River visitor capacity analysis process (2:06-cv-00074-WCO, filed July 7, 2006). Mr. Liggett had some idea of the expenses that permitting boating might impose on the Forests, and the lack of resources to do so:

[t]he Forest Service is not administratively prepared to immediately accommodate floaters on the uppermost section of the Chattooga Wild and Scenic River. It currently does not have sufficient staff to monitor the floating and to enforce existing applicable regulations on a new influx of users. The Forest Service also currently lacks the means necessary to search for and rescue stranded and injured floaters in that uppermost section of the river.

The EA does not indicate from what sources these resources that were not available in 2006 will now be drawn or whether any diversion from other priorities will be required. As for sustainability, the EA does not discuss how projects will be selected if funding is insufficient to cover the entire cost of implementing an alternative, and it does not say whether boating will be permitted if there is insufficient funding to provide monitoring of the effects of boating and enforcement of the proposed restrictions on boating.

B. The cost to the public to allow boating on the Upper Chattooga has been underestimated

Appendix B states that Alternative 4 will require two to four additional full staff positions and between \$133,000 and \$227,000 to implement. Because of the issues discussed in this appeal (e.g., the cost of providing lawful access, the failure to include the addition of a parking lot specifically for floaters, and the increased monitoring of legitimate adaptive

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management), we believe the cost is actually higher, although without knowing how these numbers were derived, it is very difficult to say how much they underestimate the implementation and enforcement costs of Alternative 4.

C. Requested Actions

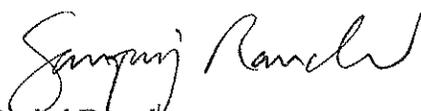
- (1) Describe in the EA how the estimated cost of each alternative was calculated.
- ~~(2) Update the cost of each alternative to reflect the cost of providing lawful access and appropriate monitoring to support adaptive management.~~
- (3) Discuss and evaluate the impact of the cost of adding the parking lot proposed at page 17 of the SOPA. Change the implementation cost estimate accordingly.
- (4) Explain in the EA where the resources to accommodate boating on each segment of the Chattooga will be drawn from. If resources are to be diverted from other priorities, then the impact of that reallocation must be discussed.
- (5) Include in the three decisions an adaptive management element that makes any boating contingent on adequate funding, measured annually.
- (6) Add an adaptive management element that eliminates boating (if allowed at all) if enforcement of boating restrictions is unsuccessful.

VIII. Conclusion

As explained above, the Forest Service has violated the Administrative Procedure Act in evaluating alternatives for the management of the Upper Chattooga and has issued decision notices selecting Alternative 4 that cannot be supported. Georgia ForestWatch urges the three deciding officers to withdraw their decisions (Optional Appeal Procedures § 12(b)). If the decisions are not withdrawn, Georgia ForestWatch respectfully requests the opportunity to discuss resolutions of this appeal in an informal disposition, as is permitted by the Optional Appeal Procedures, § 12(a).

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Submitted this 16th day of October, 2009.

for 
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cc: Georgia ForestWatch
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