

October 29, 2009

John D. Austin, Jr.  
202-457-6167  
JAustin@pattonboggs.com

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

Re: Request for Stay of Implementation of Floating Prohibitions on the Upper Chattooga River

Dear Appeal Reviewing Officer:

In accordance with Section 10 of the *Optional Appeal Procedures Available during the Planning Rule Transition Period*, American Whitewater, American Canoe Association, Atlanta Whitewater Club, Georgia Canoeing Association, and Western Carolina Paddlers (the Boating Parties<sup>1</sup>), on behalf of their members, hereby file this written request to stay certain provisions of the three National Forest (Nantahala, Sumter, and Chattahoochee-Oconee) Decision Notices implementing Alternative 4 of the USDA Forest Service's ("USFS") August, 2009 *Environmental Assessment: Managing Recreation Uses on the Upper Chattooga River* (the "2009 Decision Notices").

The Boating Parties, along with three individuals, recently filed a federal lawsuit challenging the legality of the bans and severe limitations the USFS placed on the upper twenty-two miles of the Chattooga River (the "Headwaters") and its tributaries along with an administrative appeal of the 2009 Decision Notices.<sup>1</sup> Both the lawsuit and the administrative appeal contain the same reasoning as to why the USFS's boating bans are illegal. We hereby incorporate the above-referenced Appeal and its supporting documentation as justification for granting this stay.<sup>2</sup>

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<sup>1</sup> The Boating Parties are participating in the administrative process under the protection of a federal court order from the United States District Court for the District of South Carolina.

<sup>2</sup> <http://www.fs.fed.us/r8/fms/sumter/resources/documents/2009.10.19AWFinalPaddlersAppeal.pdf>.

USDA Forest Service  
October 29, 2009  
Page 2

For the reasons set forth below, the Boating Parties request that the USFS stay its implementation of boating bans and restrictions, thereby returning to the last legal status of the Headwaters—unlimited access for floaters.<sup>3</sup>

1. Actions to Be Stopped

a. The 2009 Boating Bans

The Boating Parties request that the USFS:

- (1) stay its implementation of a total floating ban on two of the three Headwaters sections;<sup>4</sup>
- (2) stay its decision to ban boating on the middle third of the Headwaters<sup>5</sup> during Spring, Summer and Fall;<sup>6</sup>
- (3) stay its decision to severely restrict floating on the middle third of the Headwaters during the Winter;
- (4) stay its decision to impose arbitrary and capricious flow, group size and other limitations on restrictions on floating the middle third of the Headwaters, specifically staying the following restrictions:

Above the Highway 28 bridge, boating on the main stem of the Chattooga Wild and Scenic River is allowed by issuance of a permit consistent with 36 C.F.R. § 261.77, from the confluence of Norton Mill Creek in North Carolina to Burrells Ford Bridge in South Carolina from December 1 – March 1 with the following conditions:

[...]

B. When the U.S. Forest Service declares a boatable day.<sup>7</sup>

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<sup>3</sup> Though floating access would be unlimited by the USFS, it would not be unlimited by nature. Much like the other recreational uses that take place on the Headwaters, natural environmental factors will dictate when floaters will access the Headwaters—the reality of which is that floaters will be absent from the Headwaters far more frequently than they would be present.

<sup>4</sup> These sections run from the Grimshawes Bridge to Norton Mill Creek, and from Burrells Ford Bridge to the Highway 28 Bridge. This ban is imposed in the negative, and therefore lacks 2009 Decision Notice citations.

<sup>5</sup> This section runs from Norton Mill Creek to Burrells Ford Bridge.

<sup>6</sup> This ban is imposed in the negative, and therefore lacks 2009 Decision Notice citations.

USDA Forest Service  
October 29, 2009  
Page 3

C. Only “Put-in” at the designated locations of: Confluence of County Line Road with Norton Mill Creek (NC), Bull Pen Bridge (NC);

D. Only “Take-out” at the designated locations of: Bull Pen Bridge (NC), Burrells Ford Bridge (SC);

[...]

F. Maximum group size of six per group, minimum two craft per group;

G. No floating/boating in the tributaries.<sup>8</sup>

b. All Prior Boating Bans

The Boating Parties also request that the USFS stay its decision to renew Headwaters boating bans, specifically the bans instituted in 1976, 1985, and 2004. Since boating on the Headwaters was first banned in 1976, the USFS has been reviewing, renewing and enforcing this illegal prohibition, and the 2009 Decision Notices are merely a renewal and continuation of this illegal prohibition. Moreover, the USFS has reopened, reexamined and reaffirmed the 1976, 1985 and 2004 boating bans. As such, those bans are substantively reviewable.

With respect to the portion of the Headwaters in Nantahala National Forest, the only prior boating ban was in effect from February 7, 2006 through April 30, 2008.<sup>9</sup> Because this order expired prior to the promulgation of the 2009 Decision Notices, the status quo to be maintained by this requested stay is unlimited boating access within Nantahala National Forest.

Likewise, prior to the 2009 Decision Notices, boating was never banned in the tributaries of the Chattooga Wild and Scenic River. Therefore, the status quo to be maintained by this requested stay is unlimited boating access in all of the river’s tributaries.

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<sup>7</sup> A “boatable day” is one in which “flow levels at the Burrells Ford gauge are predicted to or actually do reach at least 450 cfs at least once during a 24-hour day (or approximately 2.5 feet at the Highway 76 gauge).” Sumter National Forest Decision Notice, Appendix B, p. B-7; *See also* Nantahala National Forest Decision Notice, General Direction 1a; Chattahoochee-Oconee National Forest, Appendix B, p. B-13.

<sup>8</sup> This common language may be found at Nantahala National Forest Standard a1, pp. III-168, Dispersed Recreation Management; Sumter National Forest Standard 2.A.-1, pp. 3-9; Chattahoochee-Oconee National Forest Standard 2.A.-001, pp. 3-21.

<sup>9</sup> *See* Nantahala National Forest Order Number 02-01-2006.

USDA Forest Service  
October 29, 2009  
Page 4

With respect to the remainder of the river passing through Sumter National Forest and Chattahoochee-Oconee National Forest, the status quo to be maintained by this requested stay is also unlimited boating access because all prior purported bans violated the WSRA, as well as other federal laws and regulations.

The USFS's management of the Chattooga is governed, *inter alia*, by the WSRA, which Congress enacted in 1968 so that rivers with "outstandingly remarkable scenic, recreational . . . or other similar values . . . [would] be preserved in a free-flowing condition, and . . . be protected for the benefit and enjoyment of future generations."<sup>10</sup> Through the WSRA, Congress instructed the USFS to manage Wild and Scenic Rivers such as the Chattooga according to the following guiding principle:

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.<sup>11</sup>

Importantly, floating is one of the specific values for which the Chattooga was designated Wild and Scenic,<sup>12</sup> therefore the WSRA requires the USFS to protect and enhance this use, and the Headwaters floating ban directly violates Congress's mandate under the WSRA. In 2005, the Chief of the USFS acknowledged this: "*Whitewater boating (canoeing and rafting) is specifically recognized as one of the recreational opportunities available in this generally remote river setting.*"<sup>13</sup>

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<sup>10</sup> 16 U.S.C. § 1271.

<sup>11</sup> 16 U.S.C. § 1281(a) (emphasis added).

<sup>12</sup> See, e.g., USFS, *Chattooga River: Wild and Scenic River Study Report* (1971), 66-67 ("These activities like . . . *whitewater canoeing* . . . will enhance the recreation opportunities for many people in an area where river-oriented recreation is scarce; [and] a river capable of supplying many intangible values. These values are difficult to assess *but certainly exist for the canoeist* as he meets the challenge of the river . . .") (emphasis added); 150 ("*floating activities which include rafting, canoeing, and kayaking are very compatible uses* for the river because these activities can capitalize on whitewater and scenic qualities that it possesses.") (emphasis added); 74 ("*Rafting or some method of floating is the best way to see this rugged portion of the river [the Headwaters].*") (emphasis added).

<sup>13</sup> USFS, *Decision for Appeal of the Sumter Nat'l Forest Land and Res. Mgmt. Plan Revision*, 5 (April 28, 2005) [Hereinafter 2005 Appeal Decision].

USDA Forest Service

October 29, 2009

Page 5

Further, under the WSRA, the USFS is tasked with limiting only those river-oriented activities that “substantially interfere” with a Wild and Scenic River’s remarkable values.<sup>14</sup> The Headwaters floating ban violates this requirement for two reasons: First, a value cannot substantially interfere with itself—because floating is one of the Chattooga’s Outstandingly Remarkable Values (“ORV”), floating cannot logically interfere with the Chattooga’s ORVs; second, the USFS has never found or cited any evidence whatsoever that floating “substantially interferes” with any other ORVs.<sup>15</sup>

An agency regulation that does not “carry into effect the will of Congress as expressed by the statute . . . but operates to create a rule out of harmony with the statute, is a mere nullity.”<sup>16</sup> As discussed above, none of the USFS’s boating bans carry Congress’s will into effect as expressed by the WSRA, but are rules “out of harmony with the statute,” meaning that each of the USFS’s boating bans since 1976 was a “mere nullity.” Because all prior boating bans were mere nullities, the actual status quo on the Chattooga Headwaters is one of open and unrestricted access—the same kind of access enjoyed by all other recreational users of the Headwaters corridor. Consequently, staying the 2009 Decision Notices’ boating prohibitions means staying all boating prohibitions, thereby permitting unrestricted boating access to the Headwaters.<sup>17</sup>

Further, “where an agency’s actions show that it has not merely republished an existing rule in order to propose minor changes to it, but has reconsidered the rule and decided to keep it in effect, challenges to that rule are in order.”<sup>18</sup> Indeed, “if an agency has opened the issue up

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<sup>14</sup> See 16 U.S.C. § 1281(a).

<sup>15</sup> See *Riverhawks v. Zepeda*, 228 F. Supp. 2d 1173 (D. Or. 2002) (refusing to ban high levels of motorized boat use on a Wild and Scenic River where there was insufficient evidence that the motorized boats “in fact substantially interfere with the river’s outstandingly remarkable values.”). The USFS Chief admitted as much in the 2005 Decision: “The [USFS] record, however, is deficient in substantiating the need to continue the ban on boating to protect recreation as an ORV or to protect the wilderness resource . . . . While there are multiple references in the record to resource impacts and decreasing solitude, these concerns apply to all users and do not provide the basis for excluding boaters without any limits on other users.” 2005 Appeal Decision 5. Likewise, nothing in the 2009 Amendment or its supporting documents provides such evidence.

<sup>16</sup> *Dixon v. United States*, 381 U.S. 68, 74, 85 S.Ct. 1301, 1305, 14 L.Ed.2d 223 (1965).

<sup>17</sup> It is inconsequential that the illegal, and null, boating bans have existed since 1976. Because the bans were null, there are no limitations on when they may be challenged. See, e.g., *Legal Envtl. Assistance Found., Inc. v. U.S. E.P.A.*, 118 F.3d 1467, 1473 (11th Cir. 1997) (“we also have jurisdiction to entertain LEAF’s contention that the regulations upon which EPA relies are contrary to statute and therefore invalid, regardless of the fact that LEAF’s challenge is brought outside the statutory period for a direct challenge to the regulations.”).

<sup>18</sup> *Public Citizen v. Nuclear Reg. Comm’n*, 901 F.2d 147, 150 (D.C. Cir. 1990) (relying on *Ass’n of Am. R.R.s v. ICC*, 846 F.2d 1465, 1473 (D.C. Cir. 1988)).

USDA Forest Service

October 29, 2009

Page 6

anew, even though not explicitly, its renewed adherence is substantively reviewable,” even if the review would otherwise be time barred.<sup>19</sup> Here, it is quite obvious that the USFS reopened, reexamined and reaffirmed its 1976, 1985, and 2004 bans on boating the Headwaters. As such, these bans, which violate the WSRA and other federal laws and regulations, are substantively reviewable.

2. Reasons Why the Stay Should Be Granted

a. Adverse Effects upon the Boating Parties

If the USFS implements its complete floating ban on two of the three Headwaters sections, and its floating ban for nine months of the year on the other Headwaters section, the Boating Parties and their members will continue to suffer an unlawful ban on their statutorily-protected right to float the entire Chattooga Wild and Scenic River. Members of the Boating Parties are irreparably harmed by their exclusion from a spectacular natural resource that was protected by Congress expressly for the type of use they wish to enjoy. Once these individuals have lost time floating the Headwaters and tributaries that Congress intended them to enjoy, that lost time on the water can never be returned. This is true despite the fact that they could enjoy floating other rivers. Staying the USFS’s continuation and institution of unlawful boating bans is necessary to end this arbitrarily unequal, and unlawful, treatment of one class of recreational would-be users.

b. Harmful Site-Specific Impacts or Effects on Resources in the Area Affected by the Actions to Be Stopped

In addition to the harm caused to the Boating Parties, moving forward with the planned implementation of the 2009 Decision Notices will preclude the possibility of conducting a valid User Capacity Analysis (“UCA”), as required by the WSRA and the USFS Chief’s 2005 decision. Unless boaters are allowed to access the Headwaters, limited only by natural constraints, the USFS will never be able to determine the true nature of user-group coexistence or the true capacity of the Headwaters to support the diverse user groups. Without such floating access and a UCA, the effects on the resource remain unknown, and harmful site-specific impacts such as fish-hatchery pollution and natural ecosystem destruction caused by stocking non-native trout species to the river, will continue. Conversely, staying the USFS’s unlawful boating prohibitions will cause no harmful site-specific impacts or effects on area resources. In fact, the requested stay would result in the protection and enhancement of the Chattooga’s ORVs, specifically the whitewater floating value identified by Congress, by allowing boaters to once again float the Headwaters. On the

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<sup>19</sup> *Id.* (quoting *Ass’n of Am. R.R.s*, 846 F.2d at 1473).

USDA Forest Service  
October 29, 2009  
Page 7

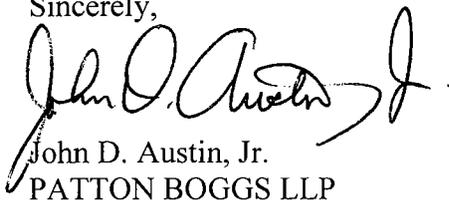
other hand, if the USFS proceeds under the 2009 Decision Notices, it will degenerate and lessen the Chattooga's ORVs by completely eliminating one form of recreation on a substantial portion of the river.

c. How the Effects and Impacts Would Prevent a Meaningful Decision on the Merits

For the same reasons, not staying the implementation of the 2009 Decision Notices so that a UCA can be properly conducted would prevent a meaningful decision on the merits of the appeal because the lack of impact caused by floaters is central to the appeal, and such impact cannot be analyzed without conducting a proper UCA. It is simply impossible to analyze the impact of boating on the Headwaters if boating is not allowed on the headwaters. Likewise, allowing boaters access only during times when the USFS predicts no other users will be present will not result in an appropriate or accurate analysis of how user groups will coexist. If the implementation of the 2009 Decision Notices is not stayed, the proper UCA cannot be conducted and a meaningful decision on the merits cannot be reached.

Only by staying its implementation of the Headwaters floating ban and restrictions contained in the 2009 Decision Notices can the USFS comply with federal law and align the management of the Chattooga River with that of the other rivers that the USFS manages nationwide. For this reason and the reasons stated above, the Boating Parties request the stay of all boating prohibitions contained in the 2009 Decision Notices, both explicitly and negatively, the result of which would be a reversion to the last legal boating status on the Headwaters—unlimited boating access.

Sincerely,



John D. Austin, Jr.  
PATTON BOGGS LLP

*Counsel for Appellants  
American Whitewater, American Canoe Association,  
Atlanta Whitewater Club, Georgia Canoeing Association,  
and Western Carolina Paddlers*

USDA Forest Service  
October 29, 2009  
Page 8

cc:

<u>Other Appellants:</u>	<u>Deciding Officers:</u>
Friends of the Upper Chattooga Attn: Butch Clay 10320 Highlands Hwy. Mountain Rest, SC 29664	USDA Forest Service Attn: Forest Supervisor Monica J. Schwalbach 4931 Broad River Road Columbia, SC 29212
Friends of the Upper Chattooga Attn: Michael Bamford P.O. Box 2725 Cashier, NC 28717	USDA Forest Service Attn: Forest Supervisor Marisue Hilliard 160 A Zillicoa Street Asheville, NC 28801
Chattooga Conservancy Attn: Buzz Williams 8 Sequoia Hills Lane Clayton, GA 30525	USDA Forest Service Attn: Forest Supervisor George M. Bain 1755 Cleveland Highway Gainesville, GA 30501
Georgia ForestWatch c/o Rachel S. Doughty Paul, Hastings, Janofsky & Walker LLP 55 Second Street, FL 24 San Francisco, CA 94105	