



---

**File Code:** 1950  
**Date:** December 30, 2015

Richard Rust  
Suite 101 Weldin Building  
3411 Silverside Road  
Wilmington, DE 19801

Dear Mr. Rust:

This letter is in response to your objection, dated June 26, 2015 to the Chattooga River Boating Access Environmental Assessment (EA) and Draft Decision Notice on the Nantahala Ranger District of the Nantahala National Forest, the Andrew Pickens District of the Sumter National Forest, and the Chattooga River Ranger District of the Chattahoochee-Oconee National Forests. I have read your objection, reviewed the Environmental Assessment (EA), and the analysis in the project file, and I understand the disclosed environmental effects. I have also considered the comments submitted during the public scoping for this project. My review was conducted in accordance with 36 CFR 218 Subparts A and B.

#### **NON-HFRA PROJECT BACKGROUND**

The administrative review of the Project has been conducted under 36 CFR 218 Subparts A and B in which the objector provides sufficient narrative description of the project, specific issues related to the project, and suggested remedies that would resolve the objection.

These regulations also allow the parties to meet in order to resolve the issues (36 CFR 218.11(a)). On September 25, 2015 District Ranger Mike Wilkins, Administrative Review Coordinator Heather Luczak, Francis Marion and Sumter National Forests Environmental Coordinator, Jim Knibbs and I met with you at the Nantahala Ranger District office in Franklin, North Carolina to discuss your concerns with Mike Bamford (your representative) about the project and analysis.

I have reviewed and considered the project in light of the issues presented in your objection letter. I appreciate that you have taken an interest in the proposal, and that you have taken the time to discuss your objections and concerns with me. This letter summarizes your issues, as presented in your objection letter and provides the Forest Service response to these concerns.

#### **ISSUE REVIEW<sup>1</sup>**

**Issue 1:** The EA redefines the previous Forest Plan as the removal of the prohibition of boating upstream of highway 28, without recognition that boating remains prohibited above Green Creek. The EA presents the previous Forest Plan as the removal of the boating prohibitions, including above Greens Creek, and that boaters could access the River anywhere.

---

<sup>1</sup> For purpose of clarity, *Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor Environmental Assessment* is referred to in this document as the 2012 EA. The associated Decision Notices from the three Forest Supervisors are referred to as the 2012 Decision Notices. *Chattooga River Boating Access Environmental Assessment* is referred to in this document as the Boating Access EA or the 2015 EA.



**Suggested Remedy:** The Rust family requests the USFS: “Clarify the scope of their discretionary authority over the Private Segment (the agency has no discretion to allow public use of private property, the agency can prohibit boating because of property rights, and it cannot remove a court-recognized prohibition without an assessment as to the effects such a removal would have on the property owners).”

**FS Response:** The key driving need for the 2015 EA was to designate specific river put-ins and take-outs. The 2012 Decisions allowed boating on National Forest Lands only between the Green Creek confluence and the Lick Log confluence. Boaters are required to start or end trips at specific put-in and take-out locations (Decision Notice and Finding of No significant Impact, Amendment #22 to the Nantahala and Pisgah National Forests Land and Resource Management Plan, page 2) which are to be designated with site-specific NEPA. The 2012 decision applies only to National Forest lands. Boating on private land above Green Creek is beyond the scope of this decision (Boater Access EA, comment # 107, page 163). Pursuant to the current closure order in effect on the Nantahala National Forest (attached), boating remains prohibited on all National Forest Lands above the Green Creek and Chattooga River confluence.

The Boating Access EA response to comments (page 163) states, “The 2012 EA disclosed that private property is located in the upper reaches of the Chattooga River.”

The following is excerpted from the 2012 EA:

Navigability and public access rights on this reach have not been formally analyzed by any federal or state agency or authority, nor has its navigability been adjudicated by a court of law. Public access rights and navigability are complex topics, and the outcome of a formal analysis or adjudication for the upper segment of the Chattooga WSR is uncertain. According to FSM 2354.14 - Navigability of Rivers, “Most rivers in the country have not been adjudicated as navigable or non-navigable. Consider them non-navigable until adjudicated otherwise.” Until decisions about boating are made for the sections of the river with public land along them, or public access rights on this reach are determined, the U.S. Forest Service considers this decision to be beyond the current scope of analysis.

The Boating Access EA therefore limits the scope of the decision to establishing boater put-in and take-out locations on National Forest System lands and is consistent with the decisions signed in 2012.

**Issue 2:** The EA defines the Proposed Actions based on property boundaries while leaving ambiguous the location of those property boundaries; therefore the Proposed Actions lack necessary clarity.

**Suggested Remedy:** “We ask the USFS to comply with the 4th Circuit Court ruling by enforcing the boating prohibition both upstream of Greens Creek and over private property, and that no river access point be designated within a quarter mile of the Private Segment.”

**FS Response:** A map indicating national forest system lands was included in the Boating Access EA. Also, see comments #117, 125, 130, 140, 154 in Appendix A of the Boating Access EA.

The Boater Access EA therefore limits the scope of the decision to establishing boater put-in and take-out locations on National Forest System lands and is consistent with the decisions signed in 2012.

The 4<sup>th</sup> Circuit Court ruling did not prohibit boating within ¼ mile of the private property. The court did not require that a buffer strip be established on National Forest lands and private property. To the

contrary, the court stated that, “Of course, the Rust Family is free to challenge any decisions on any site-specific locations of boating access points (made downstream from the Rust Family property) when those decisions are made and the issues are ripe for review.”

The Court of Appeals also addressed this in their review on page 25 by stating:

The Rusts also argue that the Forest Service violated NEPA by failing to analyze the risk that opening portions of the Headwaters to floating could lead to trespass on Rust property. They insist that floaters are likely to attempt to reach the River by crossing their property illicitly, instead of using the trails and parking lots already available to the public. The district court correctly held that this prospect is so speculative that no NEPA analysis is required.

The 2012 EA considered access on the trail that is covered in the Boating Access EA (page 169).

Property boundaries are marked on the ground and on the 2013 administrative maps which are available and sold to the public.

**Issue 3:** Neither of the two EAs has considered the indirect consequences the Proposed Actions (as defined for review within the 2015 EA) could have on the Private Segment, the property rights of the Family, or of their productive use and enjoyment of their property.

**Suggested Remedy:** “We request the USFS conduct a legally sufficient review (a complete EIS) if the Proposed Actions include the removal of boating prohibitions above Greens Creek. Alternatively, not designate the proposed Greens Creek trail and move the location from where boating is allowed downstream to Norton Mill Creek.”

**FS Response:** The Boating Access EA considered impacts to private property in Appendix A, response to comments, (comment #121, pages 169-170) stating “Due to the terrain, easy access to the Green Creek trail head and location of the put-in well downstream of private property (700 feet) and the experience from the 2013, 2014 and 2015 paddling seasons, no trespass is expected. In addition, paddlers coming to this section are much more highly skilled and research their trip to a very high degree.”

Chapter 3 of the Boating Access EA covers the affected environment and consequences of the put-in location at the Green Creek Trail in sufficient detail. In addition, a number of responses to comments in the May 2015 EA discuss trail access including but not limited to pages 160, 165, 168, 169, 170, 180, 224, 225, 226, 228, 229, 231, 233. The EA has addressed the Outstandingly Remarkable Values, river values, physical resources, biological resources and social environment accurately and in sufficient detail.

The Court of Appeals also addressed this in their review on page 25 by stating:

The Rusts also argue that the Forest Service violated NEPA by failing to analyze the risk that opening portions of the Headwaters to floating could lead to trespass on Rust property. They insist that floaters are likely to attempt to reach the River by crossing their property illicitly, instead of using the trails and parking lots already available to the public. The district court correctly held that this prospect is so speculative that no NEPA analysis is required.

**Issue 4:** The USFS failed to conduct the required suitability analysis which must remove areas from forest planning consideration if the proposed use violates the law, rights or executive order.

**Suggested Remedy:** Conduct the required suitability analysis.

**FS Response:** There is no mention of a suitability analysis in comments received during the 30 day notice and comment period detailed in Appendix A of the Boating Access EA.

The Proposed Action does not propose any actions on private property nor is the Forest Service suggesting the public use of private land to access the river. The 2012 EA page 13, item E (AR16709) and section 2.4 (AR16741) state that boating through private land is beyond the scope of the decisions that were made in 2012.

The US Court of Appeals for the Fourth Circuit states on page 24 of Appeal: 13-1960:

The Rusts acknowledge that the Forest Service would need to take additional action before it could manage this portion of the Chattooga. The Forest Service has not done so. Nor has it argued that this portion of the Chattooga is subject to Forest oversight. In fact, the Rusts agree that the Forest Service has consistently treated this segment of the Chattooga as non-navigable, private, and outside its authority.

The Boating Access EA proposes access locations and trail construction only on national forest lands. These locations are described in narrative form and on maps that are clearly on the national forest and not private land.

Civil Action No.: 8:09-2665-MGL, Amended Order and Opinion, issued on July 30, 2013 stated that the Forest Service complied with statutory directives relative to the user capacity study (refer to pages 20-23 of the Amended Order).

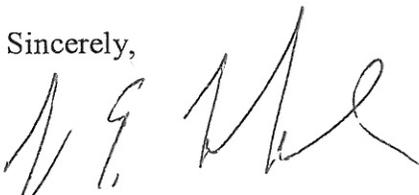
## SUMMARY

After careful review of the issues presented in your objection letter, I have concluded that there is adequate direction in place (or to be in place once the decision is signed and implemented) to ensure that the proposed actions are being authorized as stated in the Environmental Assessment and Decision Notice/Finding of No Significant Impact.

This letter meets the requirements for resolution of objections (§218.11(b)(1)) and, therefore, concludes the administrative review process for this objection (§218.11(b)(2)). Based on this response, Nantahala District Ranger Mike Wilkins, Chattooga River District Ranger Edward Hunter Jr. and Andrew Pickens District Ranger Robert Sitzlar may sign their decisions (36 CFR 218.12 (a) and (b)) and implement the project as soon as practicable. This response is not subject to further administrative review by the Forest Service or the Department of Agriculture (36 CFR 218.11 (b)(2)).

Thank you for participating in the process. I appreciate the time and thoughtfulness you have given to this project.

Sincerely,



JAMES E. MELONAS  
Acting Forest Supervisor