4110 Quail View Rd.
Charlotte, NC 28226-7956

March 21, 2016

Re: "Proposed Amendment to 36 C.F.R. 261.77, Boating Access on the Chattooga"

VIA E-MAIL

comments-southern-regional-office@fs.fed.us

Proposed Rule Amendment
C/O USDA Forest Service, Region 8 Planning
1720 Peachtree Street, NW., Suite 811N
Atlanta, Georgia 30309

Ladies and Gentlemen:

The United States Forest Service ("USFS" or "Forest Service") claims the following purpose for changing agency policy and amending 36 C.F.R. 261.77: "On January 31, 2012, the U.S. Department of Agriculture (USDA), Forest Service issued decisions *to change some of the locations where, and conditions under which, boating would be allowed.* Consequently, the Forest Service proposes to amend the regulations *to more accurately reflect the new management direction* for the Chattooga Wild and Scenic River."[1]

Objection

Contrary to this claim, the Proposed Rule is plagued with "unexplained inconsistency." [2] The Proposed Rule neither *accurately reflects the new management direction*—nor the stated purpose of the 2012 Decision Notice, because:

(1) The text of the Proposed Rule does not explicitly detail any of the *twelve* boating restrictions, which were carefully developed and *specifically enumerated* in the Decision section of the 2012 Decision Notice. The 2012 Decision Notice enunciated the following:

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[1] Proposed Rule, 36 CFR Part 261.77, 81 Federal Register 2788, 2788, January 19, 2016 (emphasis added),(hereinafter the "Proposed Rule"). One of the "decisions" referenced by the Proposed Rule, which was specifically applicable to North Carolina, was *Amendment #22 to the Nantahala and Pisgah National Forests Land and Resource Management Plan, Managing Recreation Use in the Upper Segment of the Chattooga Wild and Scenic River Corridor*, Decision Notice and Finding of No Significant Impact, issued by Diane Rubiaco, Acting Forest Supervisor, January 2012 (hereinafter the "2012 Decision Notice"). The 2012 Decision Notice was procedurally and substantively based on the Environmental Assessment, *Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor,* United States Forest Service, January 2012 (hereinafter the "2012 EA").

[2] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

3.0 DECISION

I have decided to implement Alternative 13A. The scope of my decision is limited to the upper segment of the Chattooga WSR. However, I made the decision within the context of the entire river. My decision will:

1. Establish frontcountry and backcountry capacities as follows:

Figure 1. Capacities in four frontcountry areas in the upper segment of the Chattooga WSR.

Frontcountry Areas	Groups at One Time[1]	People at One Time
Grimshawes/Sliding Rock Bridge	25	65
Bullpen Road Bridge Area	15	40
Burrells Ford Bridge Area	80	205
Highway 28 Bridge Area	35	85

[1] The number of groups at one time equals the number of designated parking spaces in each frontcountry area.

Figure 2. Capacities in four backcountry reaches in the upper segment of the Chattooga WSR.

Backcountry Reach	Average Groups per Weekday	Average People per Weekday[2]	Average Groups per Weekend Day	Average People per Weekend Day[2]
Chattooga Cliffs	5	10	10	15
Ellicott Rock	10	35	20	110
Rock Gorge	15	40	30	95
Nicholson Fields	15	40	30	95

[2] Average number of people per group varies by reach.

2. Allow non-commercial boating by issuance of a boating permit consistent with 36 C.F.R. § 261.77 on approximately 17 miles of the 21-mile main stem of the upper segment of the Chattooga WSR December 1 to April 30 from the Green Creek confluence downstream to a designated take out within one-quarter mile downstream of the Lick Log Creek confluence.
3. Allow boating from the time that flows reach 350 cfs or greater at the USGS Burrells Ford gauge during daylight hours. Daylight hours will be 30 minutes before official sunrise to 30 minutes after official sunset. Once boating is allowed, it may continue until 30 minutes after official sunset on that same day.
4. Specify that boating opportunities (see 2 and 3 above) will be a condition of the self-registration boating permit.
5. Require boaters to use tandem/single capacity hard boats or tandem/single capacity inflatable boats.
6. Require boaters to start or complete their trip only at specific boater put-ins and takeouts, which will be designated after site-specific NEPA analysis and will be a condition of the self-registration boating permit. In the interim, require boaters to start or complete their trip only at existing trails at the following locations:
    a) Within one-quarter mile downstream of the Green Creek confluence;
    b) Within 500 feet of the Norton Mill Creek confluence;
    c) Within one-quarter mile of Bullpen Bridge;
    d) Within one-quarter mile of Burrells Ford Bridge; and
    e) Within one-quarter mile downstream of the Lick Log Creek confluence.

7. Specify that safety equipment for boaters will be determined at the district level as a condition of the self-registration boating permit.
8. Require backcountry group size limits as follows: maximum 12 people per group on trails, six people per group at designated campsites, except at designated large group campsites; six people per boating group; and four people per angling group. Require a minimum of two craft per boating group.
9. Establish a desired condition where the trail system (including portage trails) minimizes encounters and conflict while being environmentally sustainable and where redundant trails, trails where resource damage cannot be mitigated and trails that exacerbate encounters or conflict will be closed or rerouted. Trails will be designated based on future site-specific NEPA analysis.
10. Allow camping only in designated campsites. Allow campfires only in designated fire rings. Campsites and fire rings will be designated based on future site-specific NEPA analysis. Allow visitors to use existing campsites until site-specific NEPA analysis is complete.
11. Establish a desired condition where campsites accommodate no more than three tents per site, except at designated large, group campsites, are environmentally sustainable and limit encounters and conflict; where redundant campsites, campsites where resource damage cannot be mitigated and campsites that exacerbate encounters or conflict are closed or relocated.
12. Require agency approval for large woody debris (LWD) removal.
13. Adopt the monitoring plan in Appendix G of the EA to help determine whether my decision is producing the desired outcomes and avoiding unintended consequences.
14. Incorporate the use of adaptive management to address any problems revealed through monitoring.

See the 2012 Decision Notice at page 3.

The proposed text for the new regulation offers no *reasoned explanation* for not including even a single one of the 14 aforementioned restrictions which were explicitly enunciated by the 2012 Decision Notice—after over a decade of fact finding and analysis—restrictions which have not been successfully challenged in any lawsuit.

Seven of these fourteen restrictions *solely* regulate noncommercial boating on the "upper" Chattooga. [3] *Five* regulate boating plus other recreational uses. T*wo* relate solely to campsite management. Looking beyond the quantification of maximum user capacities (as set forth in restriction #1), the indispensable purpose of this rule making process was to create *these 12 boating related restrictions.*. It is not insignificant that the 2012 Decision Notice promulgated these 12 boating restrictions, after spending over a decade making *findings of fact,* and after considering no less than 15 different alternatives.

[3] Instead of respecting the differences in legal considerations regarding navigability etc., which should have required a state by state analysis, the Forest Service arbitrarily defined the "upper" Chattooga as being all of the river above the Highway 28 bridge in South Carolina. This arbitrary decision created most of the adverse consequences in North Carolina that continue to create controversy to this day.

The weight of a decade of time, three lawsuits, and large budget expenditures, foretell of a fundamental intention to create *permanently enforceable rules*—not mere precatory suggestions to be swept away at the whim of future unknown decision makers. To presume otherwise would excuse the unlawful implementation of other rule making objectives not properly disclosed to the public—in violation of due process. It would also condemn this rule making process as *an arbitrary sham* designed only to provide lip service in regards to preventing the degrading of the resource's "special attributes" and outstandingly remarkable values—in violation of Section 10(a) the Wild and Scenic Rivers Act. 16 U.S.C. §1281(a). The decision to reverse thirty years of settled precedent was highly controversial and hotly debated. This thirty year precedent of restricting boating on the Chattooga in North Carolina had quietly served the *valid* underlying purpose of protecting the *uniquely pristine* riparian corridor, trout buffer, and the outstanding resource waters of North Carolina, from being degraded by the damage which unavoidably follows the unregulated development of paddler created launch sites, river evacuation points, and portage trails.

These twelve boating restrictions constitute an uncertain effort to replace the absolute protection afforded by the ban on boating, with an absolute minimum of protection. These restrictions serve as an attempt to mitigate boating caused damage to both the esthetic of solitude, but perhaps even more importantly to prevent the physical degrading of the riparian corridor, trout buffer, and water quality of North Carolina.

Prior to 2012, the *documented baseline condition* of these "esthetic…and scientific features"[4] remained as uniquely pristine, and frozen in time, as they existed in 1976, when the Chief of the Forest Service observed how the Chattooga Cliffs and Ellicott Rock reaches of the river: "…*these sections are in a near natural condition*." See the Federal Register Volume 41, No. 56, Monday March 22, 1976 at page 11847 and within the archive of documents found on the Forest Service's website as "fsbdev3_037233.pdf" ("the 1976 Chattooga Plan").

Unfortunately, boating activities have significantly degraded these "near natural" conditions.

To press the point, restriction #9 unequivocally requires that "*trails where resource damage cannot be mitigated …will be closed or rerouted.*" This mandate specifically encompasses boater "portage trails". This particular boating restriction was so essential to the *new management direction* that the Forest Service *spent almost three additional years conducting site specific analysis,* and undertaking additional rulemaking (1) to establish the three locations in North Carolina where paddlers *are required to launch* their boats into the creek, and (2) to determine

[4] Section 10(a), The Wild and Scenic Rivers Act; 16 U.S.C. §1281(a).

where to construct new boater access trails to aid paddlers in reaching these three designated launch points.

Restriction #9 *was so critical* that the Forest Service prepared a *second* Environmental Assessment, *Chattooga River Boating Access,* Sumter National Forest, Chattahoochee-Oconee National Forest, Nantahala National Forest, published May 15, 2015 (the "2015 EA"), upon which it based a Decision Notice and Finding of No Significant Impact, *Chattooga River Boating Access,* Nantahala National Forest, Michael Wilkins, Nantahala District Ranger, January 5, 2016. (hereinafter, the "2016 Decision Notice").

In short, the promulgation of these boating restrictions, and restriction #9 in particular, constitute the *raison d'etre* for more than a decade of study and analysis. These restrictions offer an absolute minimum of protection against the point sources of pollution which are invariably created by creek boats being "seal launched" [5] into a river ripping at greater than 350 cubic feet per second.

Unfortunately, the Forest Service has demonstrated its incapacity or unwillingness to enforce these boating restrictions—in particular restriction #9.

Today, with *unexplained inconsistency,* the Forest Service proposes to ignore the significance of over a decade of study, the directives of the 2012 Decision Notice, and the physical damage being caused by boating activities to the riparian corridor, trout buffer and water quality of the state of North Carolina.

The Forest Service proposes to omit every single one of the absolute minimum protections spelled out in the 2012 Decision Notice from being incorporated into the text of 36 C.F.R. 261.77—including restriction #9. By omitting all of these absolute minimum protections, the

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[5] In stark contrast to other existing recreational uses of this part of the Chattooga, creek boating employs a piece of equipment (a creek boat) which directly destroys the trout buffer, and causes chronic sources of sediment to develop. This occurs because paddlers must "seal" launch into the Chattooga when the current is ripping with flows greater than 350 cfs. During these mandatory high flows, a paddler cannot put the boat into the water before entering its cockpit, because the ripping current would sweep them away. Instead, the paddler must climb into the cockpit of the kayak and then launch themselves into the narrow creek by scooting the bottom of the boat across the top of the bank while simultaneously using their hands or paddle to accelerate the force of that forward motion. This is called "seal" launching.

The *destructiveness of a creek boat being "seal" launched is analogous to a plow blade being pushed/dragged by a tractor across the top of the riverbank.* It is highly destructive when repeated over and over again. The visible sedimentation flowing into the river as a consequence of the interaction of the bottom of the boat being pushed like a plow blade across the ground *constitutes a point source of pollution.*

Forest Service transforms a regulatory duty of enforcement into a mere possibility of enforcement—whose actual execution becomes derivative, and dependent, on the bias of a revolving door of Forest Service decision makers.[6]

Unfortunately, because of the revolving door nature of Forest Service personnel on the Nantahala National Forest, these decision makers lack any extensive field experience with the Chattooga in North Carolina. Having prospectively spent minimal time *making field observations* about physical conditions on the Chattooga in North Carolina, such individuals must be disqualified from claiming special expertise about existing conditions or the future adverse impacts of their management decisions pertaining to the Chattooga in North Carolina. *Their decisions are not deserving of special deference by neither the public nor the judiciary.*

In fact, discovery will show that few, if any, of these Forest Service decision makers have spent any material amount of time physically walking or wading the *streambed of the* Chattooga in North Carolina to conduct field examination of the deteriorating conditions present on this isolated but *no longer* "near natural" part of the Chattooga.

More specifically, none of these decision makers are believed to have conducted any field investigation into specific allegations about water quality impairment. This charge of water quality impairment derives from the presence of an excessive and exponentially increasing amount of embedded sediment, which has become deposited throughout an extended reach of the river, *reaching from the confluence of Green Creek downstream to where Cane Creek enters the Chattooga.* This embedded sediment problem was brought to the attention of these decision makers by appropriately filed public comments—and a multitude of corroborating photographs. None of these decision makers *ever responded* to this particular charge. Consequently, discovery will show that these decision makers' knowledge of this river is based on what they have read, instead of what they have physically observed or experienced themselves.

To press the point, while delegating investigative authority to subordinate personnel would not necessarily be inappropriate, *it is in this case*. This is because the subordinates have never

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[6] Forest Supervisor Marisue Hilliard started this process but retired *before* the 2012 Decision Notice was issued. Acting Forest Supervisor Rubico, who executed the January 2012 Decision Notice, was subsequently replaced by Forest Supervisor Kristin Bail on May 21, 2012. Forest Supervisor Bail retired during the pendency of the 2015 EA in July 2015. Bail was temporarily replaced by acting Forest Supervisor James Melonas.—who oversaw the objection process to the draft FONSI for the 2015 EA as well as the 2016 Decision Notice regarding the creation of special boater access trails. Effective February 2016, Acting Forest Supervisor Melonas has now been replaced by Forest Supervisor Hurston Allen Nicholas, who conveniently assumed his post—just after the execution of the 2016 Decision Notice—as well as after the January 19, 2016 publication of the notice of Proposed Rulemaking re: 36 CFR 261.77.

conducted any credible field investigation into the specific concern about water quality impairment owing to an excessive amount of embedded sediment.

It is insufficient to claim substantial agency expertise in implementing a "new management direction" which effectuates further harm to the "near natural" conditions and the water quality of the Chattooga in North Carolina—unless you spend sufficient time being physically present on the river to remain aware of the changing environmental conditions and to recognize the adverse impacts of your decisions. To do otherwise would make a mockery of claiming such special expertise. Any associated claim of special expertise evokes that famous statement in the Wizard of Oz: "Pay no attention to the man behind the curtain." *The Wonderful Wizard of Oz,* L. Frank Baum, 1900.

Simply stated, the Forest Service has demonstrated an incapacity or unwillingness to enforce these boating restrictions, which it saw fit to create after a decade of study. This refusal to enforce these restrictions has encouraged creek boating to degrade the riparian corridor, trout buffer, and water quality of North Carolina—in violation of Section 10(a) of the Wild and Scenic Rivers Act , the Clean Water Act, and other regulations and internal directives.

Set forth below are photographs of *illegally located* boater created launch sites—one of which now constitutes a *serious point source of water pollution*. These two sites are referenced as erosion sites B-5 and B-5-B. Erosion site B-5 shows how boater's "seal launching" into the river have caused the top of the bank (and the Chattooga River Trail) to collapse into the creek.

These photographs were taken on June 29, 2015, September 7, 2015, and on September 25, 2015—each of which was subsequent in time to November 2014, when the Forest Service was first advised that a substantial amount of embedded sediment was choking the river from Green Creek downstream to Cane Creek—and eliminating riverbed habitat suitable for spawning trout.

The Forest Service was notified of the existence of these illegal created boat launch sites with latitude and longitude precision on July 7, 2015.

Erosion Site B-5 is located at approximately 35 02 51.54 N 83 07 14.52 W

This photograph of Erosion Site B-5 was taken on September 7, 2015. This view is looking down the Chattooga River Trail along the river right bank. On the left side of the photograph, a rock shelf is visible. This rock shelf implicates how boaters seeking to seal launch across that rock shelf into the creek created this illegal erosion site.

Erosion Site B-5 is located at approximately 35 02 51.54 N 83 07 14.52 W

Erosion Site B-5 did not exist prior to the introduction of boating in December 2012. Neither did it exist in 2007 when the Forest Service conducted its comprehensive biophysical inventory of the entire river. This photograph of Erosion Site B-5 was taken June 29, 2015.

Erosion Site B-5 demonstrates how the Forest Service has introduced a new recreational use—creek boating—which the Forest Service does not have the capacity to monitor and manage without allowing significant increased degradation to occur to the once "near natural" condition of this small part of the entire Chattooga River—in violation of a host of statutes, regulations, and internal manuals.

At this location, for just a few feet, the Chattooga River Trail descends from the steep ridgeline to pass immediately adjacent to the river along an unusually wide and flat section of the trout buffer.

This is the *first location* along the Chattooga River Trail, after departing from the Green Creek parking lot trailhead, where the trail passes within twenty feet of the river—*without being separated from the river by a steep slope and jungle of rhododendron and thicket of laurel.* Depending on the pace of a hiker, this location takes approximately 45 minutes to reach. After

passing this point, the Chattooga River Trail tacks away from the river for a brief while before reemerging again to pass close to the river—but not as close to the river as where Erosion Site B-5 has been created as a consequence of paddlers using this convenience to serve their needs.

There is also evidence of the possible use of a primitive campsite, maybe just the hanging of a hammock, located just uptrail of Erosion Site B-5—in a flat area beside the creek.

Erosion Site B-5 is located at approximately 35 02 51.54 N 83 07 14.52 W

This photograph, visualizes how the top of the bank is over 4 feet above the surface of the water at normal flows. The remains of the destroyed Chattooga River Trail can be seen in the top of the photograph. This view is looking downstream on river right.

Erosion Site B-5 is located at approximately 35 02 51.54 N 83 07 14.52 W

This photograph was taken on September 25, 2015 while standing in the creek looking back at the bank on river right. There is the curious presence of the remains of black plastic silt fencing in the foreground. It is unknown who made this unsuccessful attempt to address this boater created problem. Should it be *discovered* that this silt fencing was deployed by the Forest Service, this would raise serious questions about how the Forest Service processed the 2015 EA—which addressed constructing new special boater access trails through the trout buffer in duplication of the existing Chattooga River Trail—and instead of using scarce resources to fix problems such as this one for the benefit of everyone, not just paddlers.

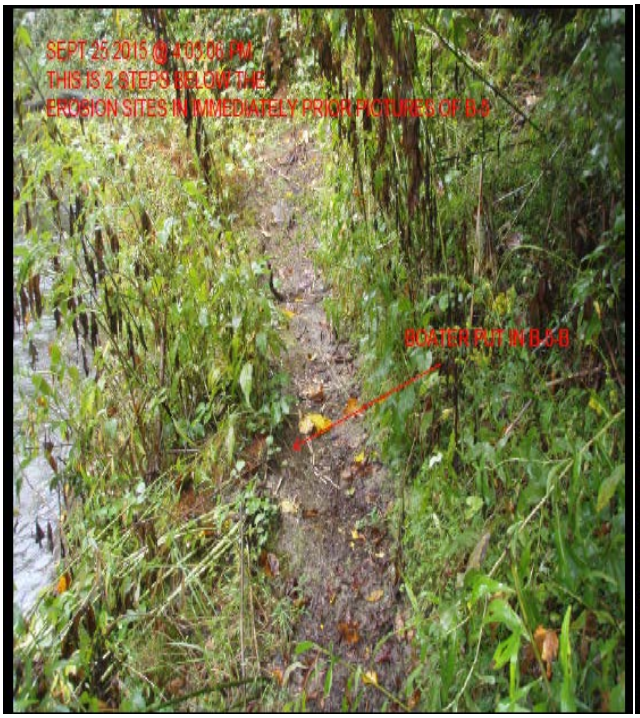
Erosion Site B-5 located at approximately 35 02 51.54 N 83 07 14.52 W

This photograph was taken on September 25, 2015 standing further out into the creek looking back at the bank on river right. It visualizes the size of this growing problem. Note the presence of a wooden hiking staff laid horizontally in the center of the picture to give reference to the size of this problem. This hiking staff is over five feet long.

Erosion Site B-5 located at approximately 35 02 51.54 N 83 07 14.52 W


This view is looking downstream at the rock shelf on river right bank over which paddlers have been launching into the creek from both Erosion Site B-5 and B-5-B.

After causing the bank to collapse from “seal launching” at B-5, paddlers simply moved several feet further down the Chattooga River trail. Using a digging tool, paddlers *excavated a narrow trench*, the width of a kayak, into the top of the riverbank, to create another creek boater launch site B-5-B. The photographs below are of B-5-B.



The photograph on the left is looking down the Chattooga River Trail. It orients to where the paddlers have excavated a launch site into the top of the riverbank. The red arrow in the photograph on the left points to the boat launch spot. The photograph on the right was taken standing on the bank an looking down through the trench that paddlers have dug out to create their illegal launch site.

Erosion Site B-5-B is located just several feet down trail from Erosion Site B-5

This photograph is a close-up of the trench that has been dug out of the top of the riverbank to facilitate paddlers launching into the creek.

The close proximity of the location of B-5-B to B-5, just several feet down the trail, and the fact that it has appeared subsequent to the collapse of the bank at Erosion Site B-5, tells the tale.

For decades prior to the introduction of boating, *this specific point* on the Chattooga River Trail, *lying in a very flat flood plain,* had been frequently used by hikers, campers, waders, swimmers, and anglers without ever having caused the riverbank to collapse *at that particular point on the trail*—or *anywhere* else along the *entire* trail between Green Creek and the Iron Bridge on Bull Pen Road.

Neither of these illegal boater created launch sites (which now constitute point sources of water pollution) existed prior to the introduction of boating in 2012. *Neither did they exist when the Forest Service conducted its comprehensive biophysical inventory of the entire river in 2007.*

The introduction of boating *has resulted in significant degradation* of the resource—including the creation of point sources of pollution. Erosion site B-5 is over 10 feet wide and 4 feet tall—

and growing each day. These boater created point sources of water pollution are neither diffuse nor insignificant. They exemplify various places on the river which have become degraded subsequent to the introduction of paddling. *These erosion sites are being entirely ignored by the USFS in violation of the law.* Still to be determined is whether or not the Forest Service knew about these *specific* point sources of pollution before July 7, 2015 when the Forest Service was informed with latitude and longitude precision, or alternatively before November 2014, when the Forest Service was informed that an excessive amount of embedded sediment was plaguing an extended segment of the river reaching from Green Creek downstream to the confluence of Cane Creek. The Forest Service was provided with a set of photographs capturing evidence of this excessive embedded sediment.[7]

The Forest Service responded in May 2015, denying any responsibility for addressing any excessive embedded sediment problem, and by pointing the finger of responsibility at the state of North Carolina. Despite the finger pointing, the Forest Service *never notified* the North Carolina Department of Environmental Quality ("NCDEQ") that it had been provided with credible photographic evidence of possible water quality impairment occurring over a large segment of the Chattooga in North Carolina—even though the Forest Service must have understood that it was compelled to address water quality problems under a multitude of statutes, regulations, as well as internal Forest Service guidelines—including the Wild and Scenic Rivers Act.

The approximate 2 miles of river where this water quality impairment occurs is far removed from any public road or the Chattooga River trail. This impairment occurs far below and far above the two roadside locations where the NCDEQ has been conducting its Section 303(d) samplings. Despite its overarching responsibility for managing this Wild and Scenic River, the Forest Service never told NCDEQ about the photographic evidence of possible water quality impairment. The Forest Service simply kept silent.

This silence creates sufficient reason to ask <u>why</u> the Forest Service has intentionally chosen to ignore this complaint about water quality impairment (owing to an excessive amount of embedded sediment and adversely impacting the quality of streambed habitat suitable for spawning wild trout).

Consequently, on January 4, 2016, a narrowly tailored and specific Freedom of Information Act ("FOIA") request was submitted to the Nantahala National Forest FOIA coordinator. This FOIA request was designed to elicit the production of documents which would substantiate to what extent the Forest Service has been actively discharging, or ignoring, its nondiscretionary duty to

[7] The specific allegation of water quality impairment was made within the public comments to the 2015 EA, found within the Forest Service's administrative record for the 2016 Decision Notice. 2015 EA at pages 186-225.

monitor the quality of the streambed habitat for its suitability in facilitating the successful spawning of wild trout populations—wild trout populations whose continuing existence formed the primary basis for this section of the river having been designated as Outstanding Resource Water ("ORW") by the state of North Carolina in 1987.

Specifically, this January 4, 2016 FOIA request asked for:

"This is a request for information pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552. Because this information is of time critical importance in serving the public purpose of protecting the water quality of the state of North Carolina, *I would appreciate your communicating with me by email, rather than by United States postal service mail, if you have questions regarding this request.*

On May 15, 2015, the Forest Service published an Environmental Assessment *Chattooga River Boating Access.*

On page 205 of this May 15, 2015 Environmental Assessment, the Forest Service states 'Electrofishing surveys were conducted within the upper Chattooga River from 1992 through 1996 by the NCWRC. Young-of-the-year Brown Trout densities appeared to be lower than other North Carolina trout populations during the same sampling period; however, a self-sustaining population continues to persist.'

(1) Please provide me with any document, electrofishing survey results report, memorandum, written analysis that the Forest Service relied on, used, read, or studied to make this written factual assertion, as a true and accurate statement, that electrofishing surveys were conducted on the Upper Chattooga by the North Carolina Wildlife Resources Commission from 1992 to 1996 and that young-of-the-year Brown Trout densities appeared to be lower than other North Carolina trout populations during the same sampling period.

(2) Please provide me with any handwritten notes of conversations (by telephone or in person) that pertain, relate, reference, or discuss these electrofishing surveys: (A) between any of the individuals involved in the preparation of the Environmental Assessment as listed on pages110-111 of the Environmental Assessment or (B) between any one of these listed Preparers (on pages 110-111) and any individual outside that group of listed Preparers."

The Forest Service responded February 2, 2016 with thirty pages of documents. However these documents *were entirely unresponsive and irrelevant to this narrowly tailored request*. However, one of the documents evidenced the District Ranger directing the creation of a summary of information not otherwise requested. A snapshot of that email is found below.

From: Wilkins, Mike -FS
Sent: Tuesday, September 15, 2015 3:26 PM
To: Farmer, Jason -FS
Cc: Bryan, Sheryl -FS; Luczak, Heather L -FS; Moffat, Steverson -FS; Melonas, James -FS
Subject: FW: Floyd objection

Jason, James Melonas and I will sit down with Mr. Floyd on 9/28 to go over his objections to my Chattooga decision. Attached is his objection. It has some 88 pages a lot of which are pictures. Most of his concerns are really outside the scope of the decision. I spent over 30 min with him on the phone today and I think I can make him feel better with your help. He sees some sediment in Norton Mill or the Chattooga and it is a significant issue that we should deal with because it IS or MIGHT be causing significant reductions in fish and insect populations.

He thinks we have never done any past surveys for fish and bugs and we have. Before the end of the day on Thursday 9/24 I need you to summarize when various types of surveys were done in our section of the river over the years. Just list the type of survey and date. THEN provide us a summary statement on general trends that we know or what we think we know. Not a written summary of each fish survey. I figure you have some general info that you could say about the Chattooga Coalition's annual survey that might help even though it is usually in SC/GA.
I do NOT need you to respond to his objections. We have a written response prepared. I just need an outline of past surveys..etc and generally what we found. Limit your time to 3-4 hrs. If you need to call me I will be in on the road Thursday and travel back from Alaska on Tuesday. Call my cell if you need to just remember 4 hrs difference. 828-421-1231

Michael Wilkins, Incident Commander, Southern Area Blue Team
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Forest Service
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Caring for the land and serving people

On February 4, 2016, I followed up by email with the Nantahala National Forest FOIA contact for the dual purpose of detailing the problems associated with creating documents not otherwise relevant to the specific request, and for clarifying the original request to assist the Forest Service in meeting its obligations under FOIA.

This February 4, 2016 email explained that the:

"request for information **did not ask** the Forest Service **to produce a document, created ex post facto,** which editorially draws upon source documents not otherwise produced. The incompleteness of the Forest Service's response is obvious because the Forest Service could not have published a document in May 2015 **that relied on a document created four months subsequent in September 2015.** The production of any document created subsequent to May 15, 2015 is irrelevant and non-responsive to the request.

Neither did the …request ask for any documents pertaining to electrofishing on the Chattooga in South Carolina. Any information about fish monitoring in South Carolina is irrelevant and does not address my often repeated concern about the **lack of any current and continuous efforts** to monitor trout habitat conditions and trout population trends **on the North Carolina part of the wild and scenic Chattooga."** Floyd FOIA request February 4, 2016.

This February 4, 2016 email also contained the specific text of an *expanded FOIA request made on that same date*. Among other things, this new FOIA asked for: "any emails or memorandum that pertain, relate, reference, or discuss any aspect of trout habitat, trout populations, trout monitoring, pertaining to the North Carolina part of the Chattooga, for the period of time between January 1, 2012 and September 24, 2015, and authored by any one of the individuals involved in the preparation of the Environmental Assessment, *Chattooga River Boating Access*, published on May 15, 2015, as listed on pages 110-111 of that Environmental Assessment."

On March 7, 2016, in response to my February 4, 2016 FOIA request, the USFS produced just 3 pages of documents—*without assertin any legal privilege or FOIA exemption for withholding any other responsive documents.*

This document production was much less than anticipated. Under the Wild and Scenic Rivers Act, the Forest Service has a nondiscretionary duty to monitor the continuing suitability of the river's streambed habitat for spawning of trout, to guard against the degrading of the streambed habitat from a baseline condition, and to enhance and remediate degraded conditions to bring the water quality back to its baseline condition. Section 10(a) Wild and Scenic Rivers Act.

More specifically, in supervising and approving activities occurring within the riparian corridor of the Chattooga, the Forest Service must do two things, (1) "manage habitat *primarily* for …trout" and (2) "*improve habitat* of wild trout streams *as a first priority.*" Nantahala and Pisgah National Forests Land Resource Management Plan, Amendment 5, March 1994 at page III-185 (emphasis added)("NNF LRMP Amendment #5").

In contrast to this specifically enumerated standard, building boater access trails is never mentioned as a *priority of any kind in the land management planning of the Nantahala National Forest*. In fact, according to the Nantahala's Forest Plan, trail construction should only be allowed "when a site specific analysis indicates that adverse effects will be avoided or effectively mitigated." NNF LRMP Amendment #5 at page III-185. Similarly, any boater access trail must be capable of being maintained "*so no visible sediment reaches the stream channel…*" Id.

When dispersed recreation, such as creek boating, *is not capable of meeting the no visible sediment standard*, then such recreational use must be subject to the following standard: "*Permanently close* and rehabilitate sites that *cannot accommodate use without unacceptable impacts* to riparian area resources." Id. at page III-184 (emphasis added).

The USFS has an obligation to evaluate the appropriateness of site specific projects, such as the construction of boater access trails through the riparian corridor and trout buffer. This analysis must specifically consider adverse impact on the principal Management Indicator Species ("MIS"): its wild brown trout, wild rainbow trout, and wild brook trout. See Nantahala and Pisgah National Forests Land Resource Management Plan, Amendment 17, June 2005 at page 3. ("NNF LRMP Amendment #17").

To press the point, in evaluating the impacts of constructing special boater access trails intruding into the Chattooga's riparian corridor and trout buffer, the Forest Service justified the disturbance of the trout buffer by *assuring the public:* "Both population and habitat data are used to monitor MIS on the national forests." The "NNF monitors particular fish species." 2015 EA at page 33.

"Continued monitoring indicates that, while individual populations exhibit high annual variability in age class structure and biomass, overall trends in *Salvelinus fontinalis*, *Oncorhynchus mykiss*, *Salmo trutta* and *Rhinichthyes atratulus* populations across the Nantahala and Pisgah National Forests have remained stable during the last 13 years (National Forests in North Carolina FY 2009 Monitoring and Evaluation Report, USFS 2009)." 2015 EA at page 34.

Despite offering these assurances about the stability of trout populations being monitored over the half of a million of acres that comprise the Nantahala National Forest, I am unaware of *any effort* made by the Forest Service to monitor the *quality of trout habitat* or the *trout population trends* on the Chattooga in North Carolina--either before or after being advised of this excessive embedded sediment problem—and certainly not on the section of river from Green Creek downstream to Cane Creek and beyond.

Instead, the Forest Service excuses its failure to monitor trout population trends and trout habitat on the North Carolina part of the Chattooga by trying to persuade the public that the overall health of wild trout populations *over the entire Nantahala and Pisgah National Forests* should

be presumed to equate to the actual conditions on this specific segment of the Chattooga. Nothing could be further from the truth.

The Forest Service buries the inconvenient fact that it has not monitored the trout habitat and populations in North Carolina by making the following broad statement:

"The Chattooga WSR and its tributaries contain cold to cool water aquatic communities from the headwaters to the downstream reaches. The cold water and cool water aquatic communities serve as management indicators that are monitored to indicate the effects of management on riparian resources. Fish, crayfish, aquatic insects and mollusks are all components of these communities.

The aquatic communities include one forest-listed locally rare fish species: Notropis leuciodus. The fish species diversity of the Management Indicator Community in the Chattooga WSR watershed has not changed in more than 20 years of sampling the main stem of the river (SCDNR unpublished data in project file). NatureServe has assigned a global rank of either G4 (apparently secure) or G5 (secure) to all of the fish species in the community." See the 2014 EA at pages 33-34(emphasis added).

Unfortunately, the referenced "*20 years of sampling the main stem*" did not occur on the North Carolina part of the river and there has not been any contemporaneous monitoring of trout habitat or population trends on the North Carolina section of the river. All of this monitoring was restricted to the river in South Carolina.

The fact is, the Forest Service does not, and has not monitored the condition of the trout habitat and trout populations on the Chattooga in North Carolina. Simply stated, the Forest Service has no factual findings or scientific basis to apply this generalization to justify its desire to build special dead ending boater access trails into the riparian corridor in North Carolina—especially given the allegation of the impairing impacts of this excessive amount of embedded sediment.

The Forest Service has no scientific basis to allow for the resulting disturbance of soils within the trout buffer nor to allow the discharge of displaced soils (fill) into North Carolina's waters. Any assessment of conditions on the Chattooga must also address the antidegradation protections afforded to this Outstanding Resource Water against downward trends in conditions based on North Carolina statutes.

As implicated by the lack of documents produced by these FOIA requests, apparently the Forest Service must not have conducted any monitoring of the trout habitat or trout populations, because otherwise the Forest Service would have produced some kind of document to memorialize the results—and that document would have been produced pursuant to the FOIA request.

It is also capricious that the Forest Service offered this *unequivocal* assurance in May 2015 after learning of the alleged excessive embedded sediment problem in November 2014. The Forest Service conveyed the distinct impression that everything was fine without addressing this *specific problem* in *any of its environmental disclosures*.

Given the Forest Service's knowledge of the allegation that excessive embedded sediment had degraded, and the streambed habitat suitability for spawning trout was continuing to degrade, it is surprising that only 3 pages of documents were produced—none of which discussed any aspect of trout habitat, trout populations, or trout monitoring.[8]

None of these 3 pages of documents were created prior to December 22, 2015. Two of the documents merely evidence the existence of collaborative conversations between North Carolina Wildlife Resources Commission employees and USFS counterparts pertaining to my efforts to request information and to advocate for the North Carolina section of the Chattooga River.

The Forest Service has not produced a single document to evidence any meaningful monitoring of trout habitat or trout populations on the Chattooga in North Carolina. Such information should have been essential to evaluating the expected impacts associated with the new management actions described in the 2012 EA and the 2015 EA. In fact, it took almost two additional years after the preparation of the 2012 EA for a group *of more than 25 individuals* to develop the 2015 EA.

It is remarkable that none of those 25 individuals, in communicating with other members of the team, created any kind of memorandum or emails which "pertain, relate, reference, or discuss any aspect of trout habitat, trout populations, trout monitoring, pertaining to the North Carolina part of the Chattooga."[9]

Despite this expanded FOIA request, so far, the Forest Service *has not produced a single document* to demonstrate how it has taken steps to monitor, to protect the trout habitat from degradation, or to show any affirmative actions taken to repair the suitability of the streambed habitat for spawning trout—despite knowing about the allegation of an excessive amount of embedded sediment corroborated with credible photographic evidence. This failure to document compliance with the Forest Service's nondiscretionary duties under Section 10(a) of the Wild and Scenic Rivers Act, occurs at the same time that the Forest Service has devoted over a decade of time and untold financial resources to tailor-make infrastructure for whitewater enthusiasts—who have no protectable interest deserving of such special accommodation.

The formerly "near natural" condition of the river, and its attendant trout habitat, have been entirely ignored, and in effect allowed to degrade, while the Forest Service simultaneously spends a disproportionate amount of time and material catering to the demands of creek boaters.

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[8] Please refer to the detailed discussion of this embedded sediment problem on pages 28-30 of this objection.

[9] Floyd FOIA request dated February 4, 2016.

The public comments which identified this embedded sediment problem, and the objection which pinpointed these boater created point sources of pollution, are lodged within the Forest Service's administrative records for the 2016 Decision Notice. Those comments, as well as my formal objection dated July 7, 2015, and *any and all administrative records* maintained by the Forest Service in connection with the 2016 Decision Notice, are hereby incorporated by reference, in full, into this objection and comment, and should be deemed to be a part of the administrative record for the proposed modification to 36 C.F.R. §261.77. Similarly, all records contained within the Forest Service's administrative record leading up to the promulgation of the 2012 Decision Notice are also incorporated by reference, in full, into this objection and comment, and should be deemed to be incorporated by reference into the administrative record for the proposed modification to 36 C.F.R. §261.77.

The Forest Service Has Verbally Acknowledged That It Does Not Intend To Enforce Restrictions Regarding Where Creek Boaters May Launch Their Boats.

In its rulemaking documents, the Forest Service promised the public that creek boating on the Chattooga in North Carolina would be limited and carefully regulated. However, during a sparsely attended but otherwise public meeting, it candidly admitted an intention which was entirely different.

This acknowledgement occurred during an objection meeting held between American Whitewater and the USFS, which convened at 10:00 am on Friday, September 25, 2015. American Whitewater had previously suggested that it intended to pressure the Forest Service to remove all restrictions on boating: "The Decisions unnecessarily, dangerously, and unfairly require paddlers to launch in specific zones while allowing all other visitors to access the river wherever they choose. See Draft Decision Notice and FONSI at 2. See also EA at 122-123." *Objection to Draft Decision Notice, FONSI, and Environmental Assessment, Chattooga Boating Access Project,* Kevin Colburn, National Stewardship Director, American Whitewater, July 10, 2014, at page 1 (downloaded http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprd3846810.pdf). During that teleconference, the American Whitewater representative repeated his written insistence that the Forest Service "allow paddlers to access the Upper Chattooga where they choose just like other visitors."

The American Whitewater representative, Kevin Colburn, insisted that "99%" of paddlers will want to put in using the Green Creek trail. Mr. Colburn then suggested that the Forest Service designate the Green Creek parking lot trailhead as the designated launch point—even *though the river is over a half mile away from the parking lot, and even though the boating restrictions carefully spelled out by the 2012 Decision Notice specifically required otherwise.*

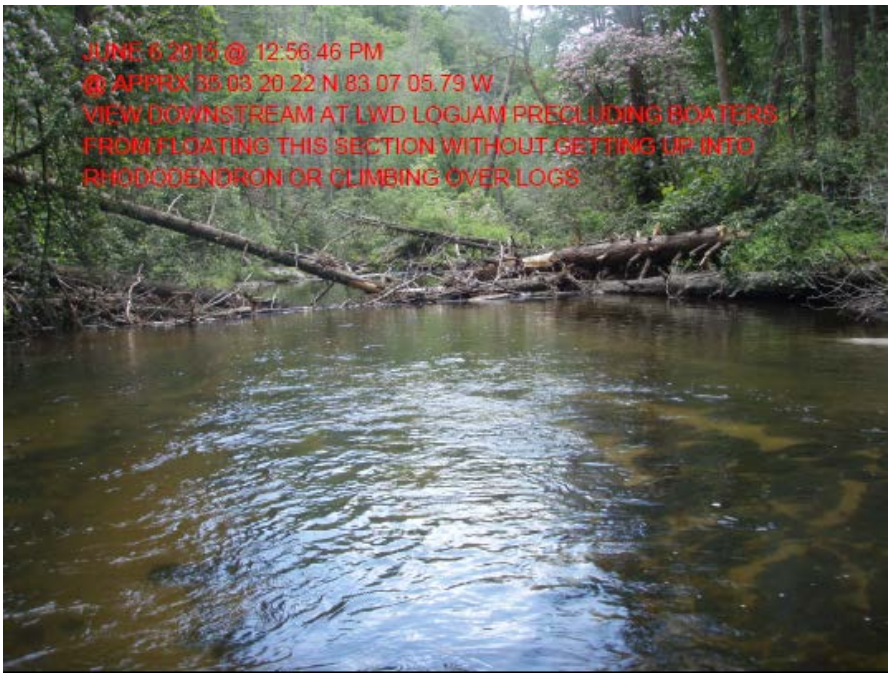
These boating restrictions, carefully established by the 2012 Decision Notice, were intended to limit where creek boaters could launch to several specific points. Such restrictions are absolutely necessary in order to mitigate damage caused to the riparian corridor, the trout buffer, and the water quality of North Carolina, from creek boats being *seal launched* into a ripping river. A kayak being seal launched scrapes loose the ground cover from the surface of the trout buffer, and causes erosion, in a way that is analogous to a plow blade being pushed/pulled across the soil by a tractor. It is a highly destructive activity that cannot be avoided by the creek boater in high water.

Mr. Colburn withdrew his suggestion before the Forest Service offered any response. However, at that precise point in the conversation, the District Ranger voluntarily suggested "You know Kevin," paddlers after hiking down the trail and putting their boat in at the designated launch

point at Green Creek, can always immediately just take their boat back out of the water, and "*walk around*."

The District Ranger *must have understood* the resource protection purposes for the boating restrictions—in particular restrictions #6 & #9. However, in response to Mr. Colburn's demand for the Forest Service to "allow paddlers to access the Upper Chattooga where they choose just like other visitors", the District Ranger detailed a way for the restriction on launch sites to be avoided: that paddlers may put in at Green Creek, immediately get out at Green Creek, and "*walk around*" to *where ever* they wish to launch their boat. Such a suggestion of how to beat the system vitiates the intent of the boating restrictions spelled out in the 2012 Decision Notice. This outrageous recommendation made clear that the Forest Service has no intention of enforcing the boater put-in restrictions—*despite what it had promised the public in the 2012 Decision Notice*.

The vexing nature of this admission is *further aggravated* because the District Ranger *must have also known* about the following unstated condition: After launching from just below Green Creek, a paddler encounters *two* log jams, less than 1300 feet downstream at approximately 35 03 20.22 N 83 07 05.79 W. Assuming an average depth of 4 feet, when the river is flowing at 350 cfs, a paddler would reach the first log jam as quick as seven minutes. There may be a way to paddle around the first logjam on river left—although this could also become jammed.



Partial Logjam #1@ Apprx. 35 03 20.22 N, 83 07 05.79 W

However, the second log jam is much larger and stream wide. It must be portaged. It is located less than 200 feet downstream from the first logjam at approximately 35 03 18.33 N 83 07 06.14

W. There is no way to avoid the second logjam in the water. In fact, the second logjam shows no chance of disappearing anytime soon—as the substantial size logs do not appear to be rotting.

#2 Logjam @ Apprx. 35 03 18.33 N 83 07 06.14 W June 6, 2015

#2 Logjam @ Apprx. 35 03 18.33 N 83 07 06.14 W October 31, 2014 @ 2:25 PM

The second logjam must be portaged. As a consequence, portaging paddlers have turned a preexisting but faintly discernible manway, on river right, into a full blown boater created trail, with denuded ground cover. This boater created trail runs straight up the steep bank to the Chattooga River trail. The environmental impacts of the Forest Service having encouraged the conversion of this infrequently used manway into a full blown unregulated paddler portage trail was neither evaluated for significance during the rule making process nor approved as an acceptable trail pursuant to restriction #9. Its current physical condition remains unmonitored and undesignated as an acceptable trail—capable of being maintained without visible sediment flows into the creek.

Both the Forest Service and paddlers *must have been aware* that establishing Green Creek as the upper most launch point *would necessitate portaging almost immediately*—because of the presence of these two logjams. The Forest Service must have understood this would continue to occur until these obstacles either disappeared by the hand of nature, or by the chain saws of humans. *However, the Forest Service never revealed this critical fact.* The Forest Service never disclosed the entirely foreseeable consequence of a previous innocuous and infrequently used manway being converted by boaters into a ground cover denuded trail—which now channels erosion down the steep bank into the creek.

By not telling the public about this *obvious* need to portage, *almost immediately after launching* from the Green Creek put in, the Forest Service concealed: (1) the Forest Service's recognition that the designation of Green Creek as the uppermost launch site would require the construction and maintenance of *two portages, not just one trail,* through the North Carolina trout buffer and fragile riparian corridor; (2) the failure to quantify the full damage caused to the trout buffer by designating the Green Creek launch site *as the uppermost launch point* (damage which could have been avoided had Norton Mill Creek been designated as the uppermost launch site); (3) the failure to quantify how much additional ground cover would be denuded, or how much volume of sediment would flow into the creek, as a consequence of increased intensity of use of this undisclosed *second* portage trail; (4) the absence of any logic in using scarce budget resources to build and maintain a trail to the Green Creek launch point(given the almost immediate need to portage after launching from there); (5) the tacit acceptance of increased damage through encouraging paddlers to launch their boats wherever they want—without regard for the destruction they cause.

This omission was egregious because the whitewater features of this stretch of water are *entirely unremarkable*—and could have been bypassed to set the uppermost launch point at Norton Mill Creek—further downstream. Using Norton Mill Creek as the upper most launch site would have eliminated the intrusive construction of a trail through the trout buffer to the Green Creek launch site. It would have eliminated the immediate need to portage with the attendant intensified use of a nondescript and infrequently used manway. Nevertheless, despite vigorous objections from others, who had specifically pointed out these physical limitations, the Forest Service went ahead

and *arbitrarily* decided to build a special boater access trail to the Green Creek launch site. It is *critically significant* that this need to portage *within seven minutes of launching from Green Creek* was *never disclosed, never discussed* by the Forest Service. This decision, *made in the face of these facts, and circumstances*, evidences the pretense of the Forest Service's justification for making this decision. *This pretense is further aggravated by the Forest Service's refusal to acknowledge the persnickety presence of an exponentially increasing amount of embedded sediment, which is impairing the water quality of this same segment of the river, reaching from Green Creek downstream to Cane Creek (approximately 2 miles)*. The Forest Service was specifically notified of this exponentially increasing amount of embedded sediment, but has nevertheless chosen to ignore it.

Set forth below are three photographs which illustrate the extent of this embedded sediment problem—*a problem which has never been mentioned a single time by the Forest Service during the decade of developing these boating restrictions.*

#1 Floyd Photograph, June 29, 2015 @ 2:45:48 PM View Upstream--70 CFS @ Burrell's Ford@ 35 02 02.04 N 83 07 42.76 W (approximately .25 miles above confluence of Cane Creek)

#2 Floyd Photograph, June 29, 2015 @ 3:50:07 PM View Downstream 70 CFS @ Burrell's Ford @ Apprx. 35 02 59.81 N 83 07 06.62 W. The embedded sediment is bank to bank. The interstitial habitat is filled in with sediment and the depth of the riverbed has been reduced. Depth of sediment is at least one foot in many places. This site is located approximately .7 miles downstream from the Green Creek boater put in.

The streambed of the creek is generally granite. However, you cannot see a single rock protruding from the riverbed at the #2 sediment location. There is no place for a trout to spawn.

#3 Floyd Photograph, June 29, 2015 @ 4:49:44 PM View Upstream--70 CFS @ Burrell's Ford @ Apprx. 35 02 26.85 N 83 07 29.53 W

This is the tail of Norton Mill Creek Pool. The exponentially increased amount of sediment has reduced the depth of the tail and the head of the pool, from bank to bank. Where are the trout spawning beds?

These three photographs constitute the canary in the coal mine. At a minimum, such bank to bank embedded sediment does not evoke the visual image of what a Wild and Scenic River should look like. Unfortunately, the Forest Service explicitly denied any responsibility for this excessive embedded sediment water quality problem, at the very moment that it was expending significant resources to promote the development of additional point sources of sediment flows into the creek, at those locations where paddlers are seal launching, evacuating the creek, and portaging through the trout buffer.[10]

[10] Environmental Assessment, *Chattooga River Boating Access*, United States Forest Service, May 15, 2015, Forest Service response #236 at pages 195-200 (the "2015 EA").

Being responsible for managing conditions on the river, the District Ranger *must have understood* that his *"walk around"* suggestion would undermine the boating restriction's capacity to protect the river from creek boater damage. The District Ranger *must have also been aware* of the alleged embedded sediment problem, when he communicated his intention to countermand a decade of proper rulemaking procedure. The District Ranger *must have known* that the Forest Service did not possess a single scientific justification for liberalizing these boating restrictions—and in fact that boating had caused the river bank to collapse in certain places from paddlers "seal launching" into the creek.

If these facts and circumstances are not sufficient to prove the pretense of the Forest Service's pattern of behavior, Ranger Wilkins next advised Mr. Colburn that the changes to the 2012 Planning Rule would *free* local Forest Service officials to reconsider these boating restrictions during the upcoming revision to the Nantahala National Forest Land Resource Management Plan—based on the *anticipated* results of *yet to be done monitoring* and adaptive management. It was clear from the context of that conversation that the District Ranger was signaling his intention to relax or even eliminate these boating restrictions in the future.

The acting Forest Supervisor, James Melonas, was also on the call. Mr. Melonas never objected to Ranger Wilkins' *"walk around"* suggestion or his prediction of what could be done in the future through the revised Land Resource Management Plan—even though there wasn't a single scientific finding of fact to justify any reduction of these boating restrictions, and even though the Forest Service had been advised with pinpoint accuracy of damage being caused by paddlers to the riparian corridor, the trout buffer, and the water quality of North Carolina.

Instead, Forest Supervisor Melonas diplomatically acknowledged that he appreciated Mr. Colburn bringing up an *important issue*. In response, Mr. Colburn acknowledged that he understood that the new planning rule would ultimately allow the Forest Service to address what American Whitewater was demanding. It was clear from the context of that conversation that the Forest Service intended to weaken the absolute minimum protections afforded by these restrictions. *This foretelling of intention has now been corroborated by the text of the Proposed Rule*.

Consistent with that revealing conversation in September 2015, today, American Whitewater constitutes one of twenty eight members of a small group, that are meeting under the oversight and guidance of the National Forest Foundation, a *non-profit partner with the Forest Service,* to fashion recommendations to be passed onto these same Nantahala National Forest officials about what the Revised Land Resource Management Plan should say—and presumably in particular, about what the plan will say about the limited use of the Chattooga River by whitewater paddlers. *There is nothing impermissible about this.* However, missing from that *informal* group are any of the players who have stood in opposition to American Whitewater with regards to the Forest Service's present management of the Chattooga River in North Carolina—in particular the

Whiteside Cove Association or Georgia Forest Watch. Missing from that group is any member *specifically representing trout anglers.* It remains indeterminate if either of these groups were asked to participate, or alternatively were notified of an opportunity to join in this informal process occurring outside of the general public's view and normal comment period. One thing is certain, the meeting before the meeting, always manages to prove more important than the comments of the public at large. In this particular case, this bias of being given greater access to decision makers, is further aggravated because, on September 25, 2015, the Forest Service candidly signaled its willingness to modify the Nantahala National Forest Land Resource Management Plan to accommodate the demands of American Whitewater—instead of indicating a resolve to protect the once "near natural" condition of the Chattooga in North Carolina.

My strong objection to the inappropriateness of Ranger Wilkins' revealing admissions were contemporaneously detailed and communicated, via email, on the following Wednesday—without either the acting Forest Supervisor James Melonas, District Ranger Wilkins, or Ms. Heather Luczak raising any objection to my summary of the facts or my complaint.[11]

Ranger Wilkins' candid recommendation to "walk around" implicates that each and every paddler is entitled to put in at Green Creek, immediately get out at Green Creek, and walk down the trail as far as they individually desire to launch their boats—wherever they want. In fact, as evidenced by the photographs of Erosion Sites B-5 and B-5-B, paddlers appear to have already adopted the Forest Service recommended approach—presumably motivated by a desire to avoid the reach of water below Green Creek which remains physically blocked in multiple places by

[11] During that Friday morning teleconference, the Forest Service made other representations and statements which seemed to validate a second demand of American Whitewater that "no permit is required for floating above the point 200 feet upstream of Green Creek." See American Whitewater's written objection to the environmental assessment. The validity of these representations and acknowledgements, were vigorously contested by the Whiteside Cove Association, later that same Friday afternoon, during their objection resolution conference meeting with the Forest Service. These Forest Service representations were so controversial and arguably inconsistent with prior statements, that the Forest Service took the unprecedented, and procedurally improper step, of notifying the public on the following Monday morning, that it intended to hold a *second objection conference* with American Whitewater on Thursday, October 1, 2016, to "*correct some information that was shared during our Friday conference call*". See the email communication from Ms. Heather Luczak, Forest Service to multiple recipients on Monday, September 28, 2016 @ 11:02 am. Providing American Whitewater with an unprecedented second objection meeting would appear to contradict the exact language of 36 C.F.R. §218.11, which was explicitly modified to make clear that multiple objection meetings with a single objector should not occur. See Federal Register Vol. 78, No. 59, March 27, 2013 at page 18489. Second, during that unprecedented second objection meeting, the Forest Service denied a request for the public to be given an opportunity to ask questions during that meeting.Third, the Forest Service abruptly closed the second objection meeting to the public. Fourth, the Forest Service failed to maintain detailed minutes of what was discussed with American Whitewater during the subsequent unprecedented private meeting held with American Whitewater.

fallen hemlocks and logjams—and which continues to grow further degraded by an excessive amount of embedded sediment.

The fact that the Forest Service would suggest that a paddler can put in, immediately take out, and "walk around", leads to many questions about its commitment to preventing the degradation of the riparian corridor, the trout buffer, and North Carolina's water quality—which was the objective intended by the 2012 Decision Notice, and which is compelled by a host of statutes and regulations.

"Unexplained inconsistency" between agency actions is "a reason for holding an interpretation to be an arbitrary and capricious change." *Nat'l Cable & Telecomms. Ass'n v Brand X Internet* Servs., 545 U.S. 967, 981, 125 S. Ct. 2688 (2005). A policy change violates the Administrative Procedures Act "if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so." *FCC v. Fox Television Stations, Inc*. 556 U.S. 502, 537, 129 S. Ct. 1800 (2009. Here, the Forest Service has de facto countermanded the boating restrictions that were first put in place, after a decade of fact finding, in order to limit the intensity of adverse impacts caused by boating—*despite the documented damage being caused by boating, and before gathering any facts that might justify such verbalized countermand*. This de facto countermand was accomplished when the Forest Service directed its "walk around" suggestion to the chief protagonist in this decade long controversy: American Whitewater.

This consistent pattern of behavior of publicly stating one thing and then doing something entirely different, exemplifies the kind of conduct surrounding a policy reversal that the Supreme Court has found *arbitrary and capricious*. The Forest Service has demonstrated its intention to abandon any enforcement of this earlier policy, which established 12 specific boating restrictions designed to prevent the degradation of the resource, through the following actions: (1) the failure to detail these boating restrictions within the text of 36 C.F.R. §261.77; (2) the admission of an unwillingness to enforce the rules; (3) the failure to take proactive steps to address the water quality issues associated with the embedded sediment problem' and (4) the failure to take any proactive steps to prevent and reverse the degradation being *exclusively caused by* boating activities.

The potential damage of the "walk around" suggestion must be enjoined, must be stopped, because it also encourages paddlers to create portages *wherever they desire,* in order to be able re-ride certain whitewater features, over and over again, like an amusement park. As such, the *intensity of the impacts* of two boaters, making multiple trips through the same whitewater feature, equates to the impacts of many more boaters than just two. This increased intensity of resource degradation is not captured by looking at the number of permits pulled by boaters or taking parking lot counts of vehicles. The simple truth is boaters are making multiple trips through particular whitewater features to the detriment of the resource. The simple truth is

boaters are using the resource in violation of season and minimum flow restrictions.[12] The simple truth is that paddlers are not always pulling permits before they float.

This degradation of the resource constitutes a critical issue being *unlawfully* sidestepped by the Forest Service. Each and every place where paddlers are allowed to launch, or to evacuate the river and portage, can become chronic point sources of pollution where sediment flows are channeled into an already sediment stressed part of the river.

Boaters *are different* from other recreational users because their boats destroy the riverbank when "seal launching" into the creek. In addition, unlike others, boaters must transport/carry an unwieldy six foot long forty pound boat wherever they go. Portaging this heavy boat up and down the steep, slippery, and highly erosive slopes, which characterize the riparian corridor in this part of North Carolina, invariably denudes the ground cover on those slopes—and within the trout buffer. Boats must sometimes be pushed or pulled up those steep banks. In fact, in certain places, there is clear evidence that boaters *have actually sawed out rhododendron* in order to ease this difficult circumstance.[13] This highly destructive act constitutes just one more example of *unlawful activity* by paddlers. Today, the physical evidence *irrefutably* demonstrates that creek boating has *significantly degraded the physical condition* of the riparian corridor and the trout buffer, while creating point sources of pollution into the river—without the USFS taking any proactive response.

Instead of addressing the problems being caused by paddlers, the Forest Service turns a blind eye to the damage, excuses the damage being done as diffuse and insignificant, and simultaneously commits additional scarce financial resources to building duplicative access trails for paddlers, which will only exacerbate the problem—not alleviate it. The absence of any effort by the USFS to remedy this documented degradation suggests the Forest Service believes these conditions are legally acceptable. *They are not.*

By omitting these boating restrictions from the text of the Proposed Rule, the Forest Service attempts to gain additional discretion to ignore enforcing these protections, to diminish them, or to eliminate them altogether. The proposed text of the regulation threatens that this might occur without the Forest Service having re-run the public gauntlet of additional administrative rule making procedures. The fact is that Forest Service officials, whose identities are constantly changing, have demonstrably failed to allocate sufficient law enforcement resources for catching and prosecuting paddlers who are floating the river outside of season and flow restrictions, who

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[12] Two brothers from Asheville have indicated their willingness to execute an affidavit that they observed three male paddlers carrying their kayaks down to the Green Creek put in in June 2014—unlawfully out of season.

[13] This illegal activity was first photographically documented in June 2015 proximate to Boater created Take out/Put in B-3 @ approximately 35 03 00.94 N, 83 07 09.47 W.

are failing to pull permits before floating, who are violating where boats may be launched, and who are illegally creating additional point sources of water pollution. *Not a single law enforcement ticket has been written to hold a single paddler accountable for any kind of violation.*

The Proposed Rule also offers too much latitude for whitewater enthusiasts to persist in pursuing their publicly stated objective of *removing all boating launching restrictions*, even though the Fourth Circuit Court of Appeals has unequivocally ruled that this group has no *protectable interest under the law*.[14] Paddlers have no legal entitlement to special treatment.

This omission of these boating restrictions constitutes an arbitrary and capricious management decision. Omitting these boating restrictions almost certainly ensures future controversy. *T*o ensure these boating restrictions will be enforced consistent with Section 10(a) of the Wild and Scenic Rivers Act, to remain consistent with the fundamental policy objective for this rulemaking process, and to protect the Due Process rights of the public, *these restrictions must be specifically en*umerated within the text of 36 CFR 261.77. It is insufficiently vague to suggest that such restrictions will be incorporated into the text of a permit—yet to be designed. Unfortunately, the intentional omission of these restrictions, and the circumstances attendant with the proposed modification of the regulation, confirm that this omission constitutes just one more step on a long and winding process whereby the Forest Service promises to protect the resource while taking actions which actually encourage the degrading of the resource.

By entirely omitting these boating restrictions, the Proposed Rule serves *an unstated and unlawful purpose* of attempting to make it much more difficult for the public to force the Forest Service to take responsibility for enforcing these restrictions. As written, the regulation attempts to vest additional discretion in the hands of local Forest Service officials to eliminate these restrictions, without the need for any additional rulemaking process.

As written, the Proposed Rule constitutes procedurally unlawful rulemaking, because the Forest Service never disclosed this significant purpose for the agency's actions. Such purposes must be clearly disclosed at the outset of the rulemaking process, and not after the fact, when the agency publishes a Decision Notice or alters an accompanying regulation. The law prohibits sub rosa purposes. The need for full and accurate disclosure of an agency's purpose in undertaking

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[14] The Fourth Circuit Court of Appeals unequivocally rejected the argument that recreational boaters could not be prohibited from paddling the Chattooga above the Highway 28 Bridge in South Carolina. The Fourth Circuit Court of Appeals explicitly ruled: *"floating is not a value of the Chattooga that must be protected and enhanced under §1281." American Whitewater, et al v Tidwell*, 770 F. 3d 1108, 1118 (4th Cir. Ct. App. 2014).

rulemaking also guards against special interests from being able to achieve a hidden agenda—which otherwise might not be in the public interest.

The Forest Service's refusal to detail these boating restrictions within the text of the regulation evidences a pattern of behavior whereby the Forest Service evades its non-discretionary duty to prevent degradation of the river resource in North Carolina, as compelled by Section 10 of the Wild and Scenic Rivers Act, as well as various Forest Service directives, the Clean Water Act, and the water quality standards of North Carolina.

(2) The Proposed Rule violates Due Process. Proper administrative rulemaking requires an agency to provide the public with a clear and true explanation of the purpose for the proposed regulatory change. The *stated purpose* for reversing a regulatory policy must not be *pretense* and the *actual purpose* must not be *sub rosa*. Otherwise, the agency would be acting in bad faith by hiding its true intentions. The effective impact of acting in bad faith, of not telling the public the true purpose for reversing a regulation, is to strip the public of its right to examine the stated justifications for the regulatory change, and to offer public comment with hope of being heard and hope of having an opportunity to shape the final form of the revised regulation. This is the essence of a participative democracy.

The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965). See also *Grannis* v. *Ordean*, 234 U. S. 385, 394 (1914). In this case, by waiting until the very last moment to reveal its regulatory intentions, the Forest Service has in fact concealed the true purpose for making certain changes in language to the text of 36 C.F.R. §261.77. By waiting until the last moment to reveal its true intentions, the Forest Service benefits from avoiding opposition that might have otherwise presented itself, but for having grown exhausted by the delay of a decade long rulemaking process.

Without disclosing its intention to do so at the start of the administrative rulemaking procedure, the Forest Service has attempted to vest itself with additional presumed discretionary authority, to diminish these boating restrictions or to increase the future intensity of boating use on the Chattooga in North Carolina. This violates due process.

Specifically, one of the proposed *changes in language* sets the stage for the Forest Service to introduce *commercial guided boating* on the most fragile and *"near natural"* part of the river in North Carolina—*something which the public was specifically promised would not occur throughout the decade long process of rulemaking leading up to the promulgation of the 2012 Decision Notice.* This *same change in language* also implicates a previously undisclosed intention to allow noncommercial recreational group use of 75 or more participants/spectators—which would also violate the specific limits set forth by restriction #1 of the 2012 Decision Notice.

This undisclosed purpose is revealed only by a careful reading of the *following seemingly innocuous admission:* "Lastly, in an effort *to use more accurate and consistent terminology*, the Forest Service proposes to replace the term '*special use permit'* with the term '*special use authorization*.'" Proposed Rule at page 2789(italics added).

Despite the casual nature of this quote, the substitution of "*special use authorization"* for "*special use permit"* d*oes not constitute an innocuous change*. In fact, this language change triggers significant legal and practical consequences.

The Forest Service never explains how or why the substitution of *"special use authorization"* for "*special use permit* achieves a *"more accurate and consistent terminology"*. The notice never explains why the term "*special use permit*" is no longer consistent terminology, *or with what terminology* "special use permit" is no longer consistent. It simply makes this assertion applying administrative fiat. Similarly, the notice never details why "*special use permit"* was employed in the past, or what specific substantive benefit will be achieved by substituting "special use authorization" for "special use permit".

In fact, if the true purpose of the modified regulation was to make the regulation "more accurately reflect the new management direction" and to address the change in "locations where, and conditions under which, boating would be allowed" , then substituting *"special use authorization"* for *"special use permit" would serve no compelling purpose*.

In fact, it would muddy the waters.

"*Special use authorization", "special use permit",* and *"permit"* are all terms currently used in the daily working lexicon of the Forest Service's directives pertaining to Special Uses. They neither presuppose uniformity of meaning nor innocuous differences—despite the muted way in which the Forest Service has attempted to portray the significance of their differences in discussing the proposed changes to 36 C.F.R. 261.77.

In general, all uses of National Forest System lands, improvements, and resources are defined as being *"special uses"*. By operation of law, before conducting any kind of *"special use"* on National Forest System lands, a user must first obtain *some form* of a *special use authorization*. See 36 C.F.R. §251.50(a). There is one huge exception to this general rule: Noncommercial recreational activities such as camping, picnicking, hiking, fishing, boating, hunting, etc. are specifically exempted from obtaining any *form* of "*special use authorization"*. See 36 C.F.R. 261.50(c).

A "*special use authorization"* encompasses the broadest legal implications of all three terms. It broadly constitutes a "written permit, term permit, lease, or easement that authorizes use or occupancy of National Forest System lands and specifies the terms and conditions under which the use or occupancy may occur." 36 C.F.R. §251.51.

As a practical example, securing a *special use authorization* (in the form of a term permit) would be required to construct and operate a ski resort on National Forest Service lands. Similarly, a

private individual might need to obtain a longer duration form of *special use authorization* (e.g. a long term easement) to allow that landowner to construct a road through National Forest lands to reach their landlocked private property. Both of these resource management problems involve a need to create for some form of protectable interest in land in order to solve the resource management problem—with the created interest in land having a need to be of longer duration—but not permanent.

In contrast, there is no need to create a protectable interest in land of longer duration, in order to solve the resource management problems associated with the introduction of limited boating to the North Carolina section of the Chattooga.

A "permit" is defined as a type of "special use authorization which provides permission, without conveying an interest in land, to occupy and use National Forest System land or facilities for specified purposes, and which is both revocable and terminable." 36 C.F.R. §251.51. The "permit" constitutes the simplest and most basic brick used to construct the regulatory structure applied to managing the use of National Forest System lands.

In contrast to *"permit"* and *"special use authorization*", the Code of Federal Regulations does not specifically define "*special use permit"*. However, the term "*special use permit*" appears within the Forest Service's directives, within its Handbook. By way of example, the Rocky Mountain Region's website, which manages 17 of the largest and most complex national forests, as well as 7 national grasslands, provides a concise and current summary of what a "*special use permit*" constitutes.

"A special use permit grants rights or privileges of occupancy and use to the holder. Examples include occupying the National Forest for a wedding party of more than 75 people, or holding a bicycle race. These permits contain specific terms and conditions that the holder must follow. Before special use permits are issued, the Forest Service must determine that the proposed use complies with all management plans and laws, that there is a demonstrated need for the activity, and that the use is appropriate on the National Forest. Special Use Permits are a temporary authority." See the Rocky Mountain Region website: http://www.fs.usda.gov/main/r2/passes-permits, See also http://www.fs.usda.gov/main/r2/passes-permits/event-commercial.

Each website last downloaded on March 11, 2016.

The Rocky Mountain Region's website makes clear that the continuing use of "*special use permit*" remains very much current and alive within the Forest Service lexicon—despite the Southern Region's unexplained insistence on a need to "*use more accurate and consistent terminology*." See the Proposed Rule at page 2789.

The truth is a *"special use permit"* constitutes a form of *"special use authorization"* which is more sophisticated in terms and conditions than a simple *"permit"*. A "*special use permit*" simply constitutes the form used to *document approval* of a special use after application, review, and approval. The typical resource management problems encountered on a river such as the Chattooga lend themselves well to the use of a *"special use permit."*

As the Rocky Mountain Region's website demonstrates, a "*special use permit"* constitutes a type of "*special use authorization*" of short and temporary time duration—in contrast to other more permanent forms of "*special use authorization*", which are issued for much longer periods of time, *such as leases or easements*. The "*special use permit*" contains specific terms and conditions that the holder must follow and is non-transferable. *"Special use permits"* continue to be used to solve the problem of temporary and short term *commercial uses* of National Forest System lands, as well as *noncommercial group uses* of National Forest System lands involving 75 or more participants or spectators (e.g. sports competitions, exhibitions, etc.)

Historically, commercial uses, *such as working as a paid outfitter*, and non-commercial group activities, such as conducting a fishing competition on a lake, have applied for and obtained a "*special use permit"* before using National Forest System lands. *In fact, this is exactly how commercial rafting and non-commercial group uses involving 75 or more participants have been managed on the Chattooga below the Highway 28 bridge for thirty years*.

In fact, the conceptual reliance on "*special use permits"* to solve recurring but conceptually different resource management challenges remains central—so much so that the Forest Service has created a set of standardized "*special use permit"* forms that can be modified to serve the intended needs of almost all special use applicants. In fact there is a form for almost every conceivable resource management challenge. Such standardized *special use permit* forms are housed electronically in the Forest Service's I-Web/SUDS electronic repository. See the itemized list of available forms found in Forest Service Handbook 2709.11, Special Uses Handbook, Chapter 50, Standard Forms and Supplemental Clauses, Paragraph 53 Special Use Authorization Forms at pages 108-123.

List and Table of Special Use Permit Forms

http://www.fs.fed.us/r2/recreation/special-use/forms/index.shtml

Feb 16 2016 accessed

FORM NUMBER	FORM DESCRIPTION	DATE REVISED	FORM SIZE	FORM FORMAT
SF-299	Application for Transportation and Utility Systems and Facilities on Federal Lands	05/2009	132 KB	
FS-2700-3a	Holder Initiated Revocation of Existing Authorization, Request for a Special Use Permit	03/2006	26 KB	
FS-2700-3b	Special Use Application & Permit (Noncommercial Group Use)	03/2006	106 KB	
FS-2700-3c	Special Use Application & Permit (Recreation Events)	03/2006	47 KB	
FS-2700-3e	Special Use Application & Permit for Government-Owned Buildings	03/2006	42 KB	
FS-2700-3f	Special Use Application & Temporary Permit for Outfitter and Guide	10/2008	85 KB	
FS-2700-4	Special Use Permit	03/2006	77 KB	
FS-2700-4(A)	Appendix A - Special Use Permit Granger-Thye Supplement	04/2006	34 KB	
FS-2700-4h	Special Use Permit for Campground and Related Granger-Thye Concessions	03/2006	220 KB	
FS-2700-4h(B)	Appendix B - Annual Granger-Thye Fee Offset Agreement	04/2006	19 KB	
FS-2700-4h(G)	Appendix G - Granger-Thye Fee Offset Claim Certification	03/2006	82 KB	
FS-2700-4h(F)	Appendix F - Special Use Permit for Campground and Related Granger-Thye Concessions	03/2006	59 KB	
FS-2700-4i	Special Use Permit for Outfitting and Guiding	10/2008	123 KB	
FS-2700-5	Term Special Use Permit	03/2006	43 KB	
FS-2700-5a	Term Special Use Permit for Recreation Residences	02/2007	88 KB	
FS-2700-5b	Ski Area Term Special Use Permit	03/2006	102 KB	
FS-2700-5c	Resort/Marina Term Special Use Permit	03/2006	152 KB	
FS-2700-5d	Special Use Permit Resort Supplement for Outfitting and Guiding	10/2008	44 KB	
FS-2700-6b	Recreation Residents Self Inspection Report	03/2006	25 KB	
FS-2700-7	Reconciliation of Sales for Fee Calculation	03/2006	74 KB	
FS-2700-8	Reconciliation of Gross Fixed Assets (GFA) To Booked Amounts	03/2006	73 KB	
FS-2700-11	Agreement Concerning a Small Business Administration Loan for a Holder of a Special Use Permit	08/2006	97 KB	
FS-2700-12	Agreement Concerning a Loan for a Holder of a Special Use Permit	08/2006	98 KB	
FS-2700-19	Fee Calculation for Concession Permits	03/2006	45 KB	
FS-2700-19a	Fee Calculation for Ski Area Permits	03/2006	30 KB	
FS-2700-23	Amendment for Special-Use Permit	03/2006	88 KB	
FS-2700-25	Temporary Special Use Permit	03/2006	28 KB	

One widely used generic *special use permit* form is Form FS-2700-4—which can be employed for authorizing use of National Forest System lands for a variety of purposes involving limited duration and development. Forest Service officers are authorized to modify the basic document

by adding the supplemental terms and conditions set forth in the Forest Service handbook *to address site-specific conditions.*

Some of these forms can also be found on the United States Forest Service Special Uses website at http://www.fs.fed.us/specialuses/special_forms.shtml.

Last downloaded March 11, 2016.

See U.S. DEPARTMENT OF AGRICULTURE Forest Service SPECIAL-USE PERMIT FOR NONCOMMERCIAL GROUP USE, FS-2700-3b (03/05) OMB No: 0596-0082 (RTF); USDA, FOREST SERVICE SPECIAL-USE APPLICATION & PERMIT FOR RECREATION EVENTS, FS-2700-3c (8/99) OMB No. 0596-0082 (RTF).

Despite the widespread continuing use of these preformatted "*special use permit"* forms, the Southern Region never explains why a *"special use permit"* could not continue to be used to facilitate *commercial guided boating* above the Highway 28 bridge, *just as it has been used to facilitate over 50,000 commercial rafting trips per year, below the Highway 28 bridge, for over thirty years.*

If the true intended purpose of the Proposed Rule were to make the regulation "*more accurately reflect the new management direction"* and to address the change in "*locations where, and conditions under which, boating would be allowed"* then the existing regulation's use of "*permits"* and "*special use permits"* could suffice with slight modifications being made to account for the specific locations where *"permits"* could be obtained, and to account for the new locations where boating is to be allowed. The fact remains: if some activity qualifies as a "special use", *then by operation of law*, some *form* of "special use authorization" must be obtained. There is no need to restate within the Proposed Rule what is already compelled by operation of law—that *some form* of "special use authorization" must be obtained.

What is not certain, by operation of law, is what *specific conditions and specific restrictions* should be applied to regulate any particular "special use" of National Forest System lands. The specific form of "special use permit" chosen provides the specific answer to that question. The specific form of "special use permit" employed provides the *specific conditions and restrictions* that govern that particular special use.

The Forest Service claims "…in §261.77(a) and (b) a distinction is now being made between a 'permit' and a 'special use authorization'. So proposed §261.77(c) is revised to apply to '…the terms or conditions of any special use authorization or permit authorizing the occupancy and use…' " (emphasis added).

This clarification for why the Forest Service wants to substitute "special us authorization" for "special use permit" is neither insightful nor honest. The Forest Service tries to emphasize how "a distinction is *now* being made between a *'permit'* and a '*special use authorization'*." Id. (italics added). However, the significance is not that *"now*" a distinction is magically being made by the Forest Service between these two defined terms. *To the contrary, there has always been a distinction between these two terms*—by operation of law. A *"permit" constitutes a form of "special use authorization".*

While the Forest Service claims to be *"now*" drawing a substantive distinction between the word "*permit*" and the phrase "*special use authorization",* the Forest Service never explain what the substance of the new distinction is. The Forest Service never clarifies why there is a need to draw a distinction between the use of the word *"permit"* and the phrase *"special use authorization."* Finally, the Forest Service never explains why *"special use authorization"* should be substituted for *"special use permit."*

In fact, the substitution of "*special use authorization"* has no foundation in the environmental assessment upon which the 2012 Decision Notice and FONSI were based. A Boolean search of the 2012 Environmental Assessment for "*special use authorization*" reveals this term was never mentioned *a single time* in that critical rulemaking document.

The fact that "special use authorization" was never used does not surprise *because the Forest Service did not evaluate the impacts of allowing boating under any and every conceivable form* of *"special use authorization"* that could have been used to permit special uses on the Chattooga. In fact, the cumulative negative impacts of boating were only evaluated/quantified while *specifically* assuming the existence and *enforcement* of these 12 *specific boating restrictions*.

Without stating so, the incorporation of these 12 boating restrictions constitutes the de facto form of special use permit which was presumed for the purposes of evaluating the cumulative negative impacts of allowing limited commercial boating on the Chattooga in North Carolina.

More specifically, the cumulative negative impacts of introducing boating *specifically* presumed that no greater than 65 persons would ever be allowed to recreate at the same time on the most fragile part of the river in North Carolina. 2012 Decision Notice at page 3. This numeric limitation was fixed after more than a decade of study. The maximum number of persons, are totaled across all types of recreational uses, which might be present in North Carolina at the same time. The Forest Service explained: "All of the alternatives allow recreational use, including group use. This effects analysis is based on *all* recreationist use and *takes into account the maximum number of individuals within groups* for each of the alternatives." 2012 EA at page 225(emphasis added).

Consistent with having fixed the maximum recreational user limit at 65 persons at one time, noncommercial group uses *involving 75 or more participants/spectators were never evaluated* for the acceptability of their cumulative negative impacts.

Given that *limited* boating activities *have already significantly degraded* the *"near natural"* conditions previously present on the North Carolina part of the river, the introduction of any non-commercial group use involving greater than 65 participants would simply be *too intense to be permitted within this fragile place*—especially without additional environmental assessment and opportunity for public review consistent with the due process requirements of lawful administrative rulemaking.

Consequently, based on the restrictions established by the procedural rulemaking process leading up to the promulgation of the 2012 Decision Notice, a "*noncommercial group use*" of 75 or more people *would never be appropriate on the Chattooga in North Carolina*—without undergoing additional rulemaking involving additional environmental assessment and public comment.

Hence, the proposed substitution of *"special use authorization*" into the text of the Proposed Rule implicates a procedural attempt by the Forest Service to award itself, *after the fact,* with additional discretion to permit a noncommercial group use of 75 or more participants/spectators in the future—without undertaking the necessary environmental impact assessment which would be required procedurally by proper rulemaking before the intensity of use could be increased. Again, a special use authorization would never be needed in North Carolina, for noncommercial group uses of 65 participants or less—which is the maximum number of recreational users allowed at one time per restriction #1 as set forth in the 2012 Decision Notice.

In South Carolina, the circumstances are entirely different. In South Carolina, the maximum number of recreational users allowed at one time can average as many as 95 on the Rock Gorge and Nicholson Fields reaches. This augurs to why the regulation cannot constitute a one size fits all proposition. This also augurs to why the proposed regulation must explicitly recite the boating restrictions promulgated by the 2012 Decision Notice within its text.

The situation is more confusing with respect to user capacities which were arbitrarily set to include parts of North Carolina and South Carolina within the Ellicott Rock Reach. On weekdays restriction #1 allows for an average of 35 people per day. On a weekend day restriction #1 would allow for a user capacity up to a maximum of an average of 110 persons per day.

The North Carolina part of the Chattooga remained the most pristine and "near natural" part of the entire river based on the Forest Service's 2007 biophysical inventory. In fact, this inventory only cataloged five erosion sites anywhere on the river stretching from Grimshawes Bridge downstream to Ellicott Rock. What wasn't disclosed was the fact that four of the five inventoried

erosion sites in North Carolina were recorded as having zero square feet of bare eroded soil. In other words, they were not troubling erosion sites in terms of creating visible sediment flows into the creek.

In stark contrast, in South Carolina, from Ellicott Rock to Burrells Ford the river was plagued with 15 erosion sites. Each of those erosion sites were characterized with bare ground. The average square feet for the 15 erosion sites was 87 square feet, and the average square feet of the six erosion sites on the riverbank was 72 square feet.

These huge differences in the relative degraded conditions found on the South Carolina part of the Ellicott Rock Reach versus the pristine conditions found on the North Carolina part of the Ellicott Rock Reach raises questions about why the Forest Service chose to lump the good with the bad.

It points to a bad faith effort to conceal an unstated purpose for lifting the prohibition on boating on the most pristine and least anthropomorphic impacted part of the river found in North Carolina. It reveals the sham of the Forest Service claiming that the introduction of boating to North Carolina would actually improve conditions in North Carolina rather than degrade conditions. The Forest Service lumped the pristine part of the river between the Bull Pen Bridge and Ellicott Rock in with the relatively degraded part of the river in South Carolina reaching from Ellicott Rock to Burrells Ford in order to manipulate the cumulative impacts analysis in order to rig the evaluation to avoid a finding of significant impact which would have been necessitated had the Forest Service conducted that cumulative impacts analysis on just the North Carolina part of the Chattooga. considered the impacts of introducing boating introduction of boating allowing boating on the North Carolina part of the river will produced a net reduction in erosion sites, user created trails, user created campsitesew management direction would reduce degradation instead of increasing degradation. To press the point further, the use of monitoring and adaptive management were specifically incorporated into the 2012 Decision Notice for the "purpose of addressing any problems revealed through monitoring" and for "avoiding unintended consequences." 2012 Decision Notice at page 3. Stated differently, the utilization of monitoring and adaptive management serves the *limited purpose* of determining when *there is a need to reduce the intensity of use*—not to increase it without going through the process of administrative rulemaking.

Hence, before any noncommercial group use could be intensified to the threshold where it would require an application and approval of a "special use authorization", the Nantahala National Forest would need to revisit the environmental impacts, through preparing another environmental assessment and perhaps a more stringent environmental impact statement.

The additional delay and expense associated with further environmental due diligence provides a powerful motivation for the Forest Service to want to claim a *categorical exemption* [15] in order to be able to increase the intensity of noncommercial group uses on the Chattooga in North Carolina without having to undertake this additional administrative rulemaking.

Consequently, the proposed substitution of "*special use authorization*" for "*special use permit*" might provide the Forest Service with an arguable basis to avoid additional environmental due diligence by trying to assert an entitlement to rely on 36 C.F.R. § 220.6(e)(15). Consequently, this substitution of terminology takes on greater significance. The Forest Service might attempt to argue that changes in user capacity limits, or changes in the number of participants/spectators involved in a noncommercial group use, might qualify for a *categorical exemption. See* 36 C.F.R. § 220.6(e)(15). Forest Service Environmental Policy and Procedures Handbook (FSH) 1909.15, Chapter 30, sections 31.12 dn 31.2.

These circumstances also reveal how the Proposed Rule threatens an unlawful attempt to vest the Forest Service with additional discretionary authority—without proper procedural foundation and in violation of the public's Due Process rights. It is arbitrary and capricious for the Forest Service to attempt to introduce a much greater potential intensity of use, on an ex post facto basis. More significantly, it is outrageous how the Forest Service attempts to downplay the true significance of this change to the public.

As such, it would be inapposite to assert that this after the fact substitution of "special use authorization" constitutes the logical consequence of lawful rulemaking.
In fact, the Forest Service's claimed justification for doing so constitutes pretext. The Forest Service never discusses the potentially broad legal ramifications of making this language change at any point in the decade long procedural rulemaking process. Even now, the Forest Service

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[15] A Categorical Exclusion is defined as "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations . . . and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. 40 C.F.R. 1508.4. The Forest Service has defined a list of categories of activities that it deems to qualify for categorical exclusion. The Forest Service's Categorical Exclusion for Special Use Authorizations ("CE-15") excludes: "Issuance of a new special authorization for a new term to replace an existing or expired special use authorization when the only changes are administrative, there are not changes to the authorized facilities or *increases in the scope of intensity of authorized activities*, and the applicant or holder is in full compliance with the terms and conditions of the special use authorization." 36 C.F.R. § 220.6(e)(15). Forest Service Environmental Policy and Procedures Handbook (FSH) 1909.15, Chapter 30, sections 31.12 dn 31.2. For actions taken pursuant to CE-15 no EIS or EA is required, but the Forest Service must create a supporting record and document its decision in a decision memo. 36 C.F.R. § 220.6(e).

fails to explore *the full set of legal implications* and *practical consequences* flowing from the insertion of "special use authorization" into the text of the regulation.

To repeat, there is no need to restate what is required by operation of law, namely that a *special use authorization* is required. The superfluous nature of that excuse evidences how the Proposed Rule has an unstated purpose (1) in substituting *"special use authorization"* for *"special use permit"*, and (2) by omitting the boating restrictions within the text of the regulation.

Unless these boating restrictions are specifically set forth in the regulation, there is no guarantee of their permanent enforcement. *Without certainty of enforcement of the rules, any prior analysis of the cumulative impacts of boating would be distorted, arbitrary, and useless*. And yet this is the after the fact result that the Forest Service seeks to produce with its Proposed Rule. These boating restrictions must be specifically detailed in the text of the regulation. Otherwise the decade of effort collapses under the weight of arbitrariness, under the unlawfulness of an agency repeatedly telling the public one thing, but doing something completely different.

The current version of 36 C.F.R. §261.77 states the following:

§261.77 Prohibitions in Region 8, Southern Region.

(a) Using or occupying any area of the Sumter National Forest or the Chattahoochee National Forest abutting the Chattooga River for the purpose of entering or going upon the River in, on, or upon any floatable object or craft of every kind or description, *unless authorized by permit* obtained through registration at Forest Service Registration Stations abutting the Chattooga River located at Highway 28, Low-Water Bridge, Earl's Ford, Sandy Ford, Highway 76, Woodall Shoals, or Overflow Bridge or *unless authorized under special use permit*.

(b) Using or occupying within the scope of any commercial operation or business any area of the Sumter National Forest or the Chattahoochee National Forest abutting the Chattooga River for the purpose of entering or going upon the River in, on, or upon any floatable object or craft of every kind or description, unless authorized by *special use permit*.

(c) Violating or failing to comply with any of the terms or conditions of any permit authorizing the occupancy and use specified in paragraph (a) or {b) of this section is prohibited.

(d) Entering, going, riding, or floating upon any portion or segment of the Chattooga River within the boundaries of the Chattahoochee National Forest in, on, or upon any floatable object or craft of every kind of description, *unless authorized by a permit* obtained through registration at Forest Service Registration Stations abutting the Chattooga River located at Highway 28, Low-Water Bridge, Earl's Ford, Sandy

Ford, Highway 76, Woodall Shoals, or Overflow Bridge or *unless authorized under special use permit.*

(e) Entering, going, riding, or floating within the scope of any commercial operation or business upon any portion or segment of the Chattooga River within the boundaries of the Chattahoochee National Forest in, on, or upon any floatable object or craft of every kind or description, unless *authorized by special use permit*.

(f) Violating or failing to comply with any of the terms or conditions of any permit authorizing the occupancy and use specified in paragraph (d) or (e) of this section is prohibited.

[43 FR 3706, Jan. 27, 1978](italics added).

In contrast to the current form of 36 C.F.R. § 261.77, and the specific boating restrictions enumerated by the 2012 Decision Notice, the Proposed Rule prohibits the following:

"(a) Using or occupying any area of National Forest System land abutting the Chattooga River for the purpose of entering or going upon the River in, on, or upon any floatable object or craft of every kind or description, *unless authorized by permit or through a special use authorization*. (The Chattooga River is located in the Nantahala National Forest in North Carolina, the Sumter National Forest in South Carolina and the Chattahoochee National Forest in Georgia.)

(b) Using or occupying within the scope of any commercial operation or business any area of National Forest System land abutting the Chattooga River for the purpose of entering or going upon the River in, on, or upon any floatable object or craft of every kind or description, *unless permitted under a special use authorization.*

(c) Violating or failing to comply with any of the terms or conditions *of any special use authorization* or permit authorizing the occupancy and use specified in paragraph (a) or (b) of this section is prohibited.

(d) Entering, going, riding, or floating upon any portion or segment of the Chattooga River within National Forest System land in, on, or upon any floatable object or craft of every kind or description, *unless authorized by a permit or through a special use authorization.*

(e) Entering, going, riding, or floating within the scope of any commercial operation or business upon any portion or segment of the Chattooga River within National Forest System land in, on, or upon any floatable object or craft of every kind or description, *unless permitted under a special use authorization.*

(f) Violating or failing to comply with any of the terms or conditions of *any special use authorization or permit* authorizing the occupancy and use specified in paragraph (d) or (e) of this section is prohibited."

Proposed Rule at 2791; 36 CFR Part 261.77, 81 Federal Register 2788, 2791, January 19, 2016. (italics emphasis added).

Irrespective of the slight differences in text, the simple truth remains: "*special use authorizations"* are never required for noncommercial recreational activities, including boating, *unless* the noncommercial boating activity constitutes a group use with greater than 75 participants or spectators. 36 CFR 251.50(c)(1) and 36 CFR 251.51.

In addition, the Proposed Rule *falsely presumes* that a proper procedural foundation exists for *allowing commercial operations or businesses,* on the lands of the Nantahala National Forest abutting the Chattooga River "for the purpose of entering or going upon the River in, on, or upon any floatable object or craft of every kind" if "*permitted under a special use authorization."* [16]

Nothing could be further from the truth.

The Forest Service has *repeatedly promised* the public that the new management direction was only intended to "*allow non-commercial boating* by issuance of a boating permit consistent with 36 C.F.R. §261.77 on approximately 17 miles of the 21-mile main stem of the upper segment of the Chattooga WSR December 1 to April 30 from the Green Creek confluence downstream to a designated take out within one-quarter mile downstream of the Lick Log Creek confluence."[17] Refer to the text of the 2012 Decision Notice, the Finding of No Significant Impact, and the associated 2012 EA.

This constitutes clear proof, of the how, when, and where restrictions under which *limited* creek boating was supposed to be allowed. To dispel any doubts about the certainty of those restrictions, just four pages later in the 2012 Decision Notice, the acting Nantahala National Forest Supervisor, Diane Rubico, *reassured* the public, *for a second time,* that: "Current management, which does not permit commercial boating on the upper segment of the Chattooga WSR, will be maintained because my decision allows only *non-commercial* boating. No boating group or outfitter has advocated for commercial boating on the upper segment of the Chattooga WSR. In addition, the appeal from American Whitewater, et al. and the subsequent appeal

[16] See Proposed Rule at page 2791.

[17] See the 2012 Decision Notice, Decision section, condition #2 of, at page 2.

decision from the Washington Office directed the three forests to 'conduct the appropriate visitor use capacity analysis, including non-commercial boating use.' " 2012 Decision Notice, Rationale For The Decision, explanation #9, at page 6(italics set forth in original).

Supervisor Rubico italicized the word *non-commercial.* This textual emphasis makes *unequivocally clear* that commercial guided boating is not to be permitted on the Chattooga in North Carolina. Supervisor Rubico's promise was not insignificant—either then or now.

Similarly, Supervisor Rubico's promise mirrored the *exact text of the promise* made to the public by the Forest Service in the 2012 EA at page 12.

Because commercial rafting constitutes the dominant recreational use in South Carolina, it is clear that the regulation of commercial rafting in South Carolina must be addressed separately from the regulation of boating in North Carolina. *The text of the regulation need not be a one size fits all proposition.* It is possible to tailor the conditions set forth in the regulation by geographic reach. To ignore this need would violate Section 10(a) of the Wild and Scenic Rivers Act.

Whether because of the revolving door of decision making officials, short institutional memory, or the persistent lobbying of those who push to eliminate all boating restrictions, the Proposed Rule clearly contradicts with what the public was repeatedly promised and what was clearly intended by over a decade of rulemaking.

In violation of proper rulemaking procedure, the Forest Service now *presumes* to award itself with *additional discretionary authority* to allow future *commercial guided boating trips*, as well as *non-commercial group uses* involving greater than 75 participants—without ever having to re-run the gauntlet of administrative rulemaking. Similarly, whether intended or not, the Proposed Rule might arguably confer the Forest Service with the discretion to diminish or eliminate all restrictions on boating in North Carolina—just as the whitewater enthusiasts continue to demand. Such a radical change would undermine *the fundamental objective for the decade long rule making process*—which was to develop the how, when, and where restrictions for regulating limited noncommercial boating on the Chattooga in North Carolina.

The Forest Service never disclosed that this rule making process would *be adapted* to amend 36 CFR 261.77 in a manner which could effectively eliminate the public's existing right, through proper rule making procedures, to contest any future effort to eliminate these restrictions. Nevertheless, the text of the Proposed Rule threatens that unrecognized consequence. This augurs a need to discover additional facts not found within the administrative record—as to why the Forest Service would do this.

In summary, the Forest Service does not possess the authority to alter 36 CFR 261.77, to accomplish the objective of awarding itself with greater discretion, without ever having undertaken the proper procedural rulemaking for doing so. The Forest Service has a nondiscretionary obligation to provide the public with a clear and true explanation for why regulatory changes are needed and justified—at the outset of the rulemaking process, and not on an after the fact basis. The Forest Service has the burden of proof for demonstrating the need for the rule change and the actual reasons for a proposed regulatory change must not be sub rosa. These constitute critical components of proper rulemaking.

As such, the ex post facto attempt to substitute this self-serving language to the text of the regulation is out of order, arbitrary and capricious. Differences in legal impacts flow from the use of different language. The Forest Service understands this but never explains.

The Forest Service leaves the public to trust what it cannot see, to rely on what it cannot know.

(3) The Proposed Rule inadvertently creates unnecessary administrative confusion about whether or not the Nantahala National Forest continues to have the authority to use a *closure order* to reestablish a prohibition of boating in order (1) to prevent further degrading of "*near natural*" condition of the resource in North Carolina; (2) to satisfy Section 10(a) of the Wild and Scenic Rivers Act, or (3) to prevent the creation of point sources of water pollution in violation of the Clean Water Act.

The Forest Service acknowledges that the "sections of the river that lie within the Nantahala NF in North Carolina are not addressed" by 36 CFR 261.77, but are "instead regulated by Forest Supervisor's closure order pursuant to subpart B of 36 CFR part 261." [18] It raises this point in discussing the need to make the regulation applicable to activities taking place on the Chattooga within the Nantahala National Forest.

However, the Forest Service never explains why the Nantahala National Forest chose to use a closure order pursuant to 36 CFR 261.50 to prohibit boating. The Forest Service never explains the specific benefits which closure orders are generally intended to achieve—or how they offer maximum flexibility to local Forest Service officials seeking to take *immediate* action to protect fragile resources from physical damage without the need for additional administrative rule making. In fact, *closure orders* maximize the flexibility of responsible Forest Service officials to react promptly to prevent further damage to resources from either natural events (fire, tornado, etc.) or overuse by humans.

Similarly, *closure orders* offer the most effective way to enforce a prohibition, because the posting of the *closure order* at the physical location of the closure, allows all members of the public to serve as the additional eyes and ears of the Forest Service in enforcing the prohibition. Each member of the public can read the posted *closure order* and recognize when illegal paddling is taking place.

Consequently, the proposed rule must be specifically clarified to state unequivocally that *closure orders* may still be used to restrict or even reestablish a total prohibition on boating on the Chattooga in North Carolina, should that become necessary, in order to satisfy the nondiscretionary duty to prevent degradation of the "esthetic, scenic, historic, archeologic, and scientific features" of the Chattooga in North Carolina.

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[18] Proposed Rule at page 2789.

(4) Similarly, the Proposed Rule asserts that "the Agency must be able to issue permits in a flexible and efficient manner that is consistent with the new management direction and in a manner that best serves the public. Rather than codifying the specific locations of self-registration permit stations in the regulations, these locations will be identified by the local Forest Service officials administering the different sections of the Chattooga River. Locations of the registration stations may need to be changed from time to time to better serve the public. In addition, the Forest Service may, in the future, develop an option where permits could be obtained online or through other more efficient and effective means. To achieve this need, the specific locations of the 'Forest Service Registration Stations' are being removed and the regulation will simply state that use will need to be 'authorized by permit or through a special use authorization." Proposed Rule at page 2789.

Incredibly, the Forest Service puts forth a plan that says, go ahead and boat, and we'll figure out how to track the intensity of *actual use* later. By not codifying where permits may be obtained, this opens the door that local permit boxes will be removed entirely. Without permit boxes being present at the trailhead, or without very large signs being posted to catch the attention of prospective visitors, an impression will invariably develop that no permit is required—because there is no permit box. This leads to concern about boaters in fact using the resource without ever having pulled a permit—thereby understating the *actual* intensity of *their consumption* of the resource. This raises concern that future efforts to increase boating—which are taking place at this very moment—will be based on these *conveniently* faulty indicators of use. Since there is no law enforcement present on the river in North Carolina, this will invariably lead to the further degrading of the resource to a point of unacceptability—before the Forest Service is able to react. Paddlers are already using the resource outside of season and flow restrictions. This has been eye-witnessed.

To make matters worse, a remotely located permit system, such as the one being recommended, especially one regulating a wilderness like place such as the Chattooga in North Carolina, does not offer the public the opportunity to recognize when a recreational use is occurring illegally outside of appropriate limits or prohibitions. *The presence of a permit box, with the rules clearly stated on the permit, or on the permit box itself, or on a sign next to the permit box, serves an important function of allowing the public to serve as the eyes and hears of Forest Service law enforcement.*

A permit system such as the one proposed, leaves too much discretion to the local Forest Service officials to simply ignore any form of local based permit—because the monitoring of such permit box requires a substantial commitment of personnel time. The proposed permit system encourages the law to be violated because of the lack of enforcement on this remote section of the river in North Carolina—as American Whitewater has so candidly admitted in Federal court that paddlers are willing to do: "Although the boating on the Headwaters was banned in 1976,

from 1976 through 1985, the USFS did not enforce the ban. Thus, between 1976 and 1985 a few members of the public occasionally floated the Headwaters…" [19]

The truth is that paddler's unlawful use of the river continues today—even after the Forest Service provided for limited use in 2012. Two brothers from Asheville have indicated their willingness to execute an affidavit that they observed three male paddlers carrying their kayaks down to the Green Creek put in in June 2014—unlawfully out of season.

At no point in the rulemaking process did the Forest Service evaluate the specific pros and cons of the existing self-registration permit system, or the benefits of using seasonal closure orders posted at entry points to the river, especially on the remotest part of the river in North Carolina.

This new form of enforcement (of eliminating the regulatory specification of where boaters may obtain a permit) was neither discussed nor evaluated in the 2012 EA, the 2012 Decision Notice, the 2015 EA or the 2016 Decision Notice. It simply appears out of thin air. The Forest Service offers a broad justification for altering the permit system under the Proposed Rule as follows: "…the "Agency must be able to issue permits in a flexible and efficient manner that is consistent with the new management direction and in a manner that best serves the public." [20]

The Forest Service never specifically details how the issuance of *permits* under the Proposed Rule will be more flexible and efficient compared to the way that self-registration *permits* have been historically issued for paddling on the Chattooga. It never details why the existing self-registration permit system *is inefficient or inconvenient for the public*—or how the self-registration process does not best serve the public. The Forest Service simply says so—and that's that.

The truth is, a locally based self-registration permit process is about the most flexible and recreational user friendly system of any permit system—because the user can pick up the permit from the location where they intend to recreate, on the day that they intend to recreate, instead of having to go to a distant ranger office etc.

Instead of explicitly explaining the specific pros and cons of doing away with the old self-registration permit system, the Forest Service simply states "Rather than codifying the specific locations of self-registration permit stations in the regulations, *these locations will be identified*

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[19] American Whitewater et al, v. Tidwell, Case 8:09-cv-02665-JMC, US District Court, District of South Carolina, Docket Entry #1, at page 24

[20] Proposed Rule at page 2789.

by the local Forest Service officials administering the different sections of the Chattooga River. Locations of the registration stations may need to be changed from time to time to better serve the public. In addition, the Forest Service may, in the future, develop an option where permits could be obtained online or through other more efficient and effective means. To achieve this need, the specific locations for the 'Forest Service Registration Stations' are being removed and the regulation will simply state that the use will need to be 'authorized by permit or through special use authorization.'"[21]

Until discussing how and where permits will be obtained, the Forest Service has repeatedly emphasized a recurring theme of the need to bring the entire river corridor under one set of consistent management rules to reflect the "new management direction"—the one size fits all management approach.

Nevertheless, in this case, with *unexplained inconsistency*, the Forest Service suggests it will be satisfactory for different District Rangers, across three different National Forests, situated in three different states, to identify different ways for self-registration to occur. This lack of consistent application of the permitting rules will inevitably produce confusion among the public and further undermine any ability of the Forest Service to monitor or to enforce the restrictions on boating—especially in North Carolina where law enforcement presence is limited to non-existent—because of the isolated nature of that stretch of water. Similar to the complaints offered earlier about the unacceptable consequences of substituting "special use authorization", this change in policy also raises due process questions because it appears to be an attempt to vest the Forest Service with additional discretion not otherwise disclosed as a purpose of the rule making process.

From a practical perspective, the permitting locations in South Carolina have existed since the advent of the boating prohibition. There is no reason to believe that these locations are not satisfactory because the Forest Service would have advised us of that fact sometime during the decade of rule making. Of greater concern is the open ended approach being taken with respect to North Carolina. The creation of intentional uncertainty about where permits may be obtained further undermines the capacity of the Forest Service to enforce the boating restrictions that it promulgated in the 2012 Decision Notice—if in fact the USFS intends to enforce those restrictions—which there is substantial reason to doubt by the Forest Service's own admission. This also suggests the Forest Service has been engaged in an elaborate deception to hide its future intention of abandoning the enforcement of these boating restrictions. Keep the local permit boxes, codify their locations, and enforce the rules. This would eliminate any controversy.

[21] See Propose Rule at page 2789(emphasis added).

(5) The geographic scope of 36 C.F.R. §261.77 cannot lawfully be expanded to regulate boating on the Chattooga in North Carolina because the stated procedural justification for doing so is derived from a constitutionally flawed 2012 Decision Notice.

The 2012 Decision Notice is constitutionally flawed because, *analogous to the fruit of the poison tree doctrine,* the stated purpose and need for issuing the 2012 Decision Notice was *administratively derived* from an *improperly noticed*, and *hence improperly decided,* Decision For Appeal, issued by the Reviewing Officer for Chief of the United States Forest Service on April 28, 2005.[22]

To demonstrate, the 2012 Decision Notice claims the purpose and need for action as follows:

> "This decision:
>
> 1. Responds to an appeal decision of the 2004 Sumter Revised LRMP…"[23]

With respect to the introduction of boating on the Chattooga in North Carolina, this constitutes a *false explanation repeatedly served up to the public both in* the 2012 EA—but also *more prejudicially* during public meetings held during the decade-long fact-finding and rule- making process that occurred subsequent to April 2005. This statement has been repeated to create an impression that the 2005 Appeal Decision compelled the introduction of limited boating to the Chattooga in North Carolina. To press the point, the 2012 EA touches upon the subject of the

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[22] See page 1 of the 2012 Decision Notice. The text of the referenced "appeal decision"(hereinafter referred to as the "2005 Appeal Decision") offered the following explanation of the procedural background for the appeal decision:

"This is my decision on American Whitewater's appeal (#04-13-00-0026) of the Record of Decision (ROD) for the Sumter National Forest Revised Land and Resource Management Plan (RLRMP) and its accompanying Final Environmental Impact Statement (FEIS). Regional Forester Robert T. Jacobs signed the ROD approving the Sumter National Forest RLRMP on January 15, 2004. His decision was subject to appeal pursuant to the Code of Federal Regulations (CFR) at 36 CFR 217 (Appeal of Regional Guides and National Forest Land and Resource Management Plans).

Appellant American Whitewater, under regulations at 36 CFR 217.8, filed a timely notice of appeal (NOA). The Regional Forester transmitted the records for the appeals to the Chief of the Forest Service in conformance with the regulations at 36 CFR 217.15(a). *There were no requests for intervention received on this appeal*. An additional four appeals were filed on the ROD for the Sumter National Forest RLRMP. These additional appeals are unrelated to the American Whitewater appeal, and will be included in a separate decision." 2005 Decision For Appeal (#04-13-00-0026, American Whitewater), Gloria Manning, Reviewing Officer for the Chief at page 3. (emphasis added).

[23] 2012 Decision Notice at page 1.

2005 Appeal Decision no less than 17 times. see (pages 1,2,6,7,9,12,22,67,372,450,451,453,454,455,460,489,494).

The 2012 EA specifically provides:

"Specific need for action statements and relevant laws are summarized below:

A. Action is needed to respond to an appeal decision on the Sumter Land and Resource Management Plan (2004).

In 2004, the Sumter National Forest issued its Revised Land and Resource Management Plan (RLRMP), which addresses several visitor impact management issues in the entire Chattooga WSR corridor, including refining previously developed boating capacities for four sections of the lower river segment, regulating several aspects of commercial boating on those sections and reaffirming the size and general capacities of recreation infrastructure (e.g., campgrounds, parking lots, miles of designated/system trails) that facilitate various recreation pursuits. The RLRMP also retained a 1976 boating prohibition (that was reaffirmed in a 1985 forest plan update) on the upper segment of the Chattooga WSR (USFS 2004c). Whitewater boaters who are interested in floating the upper segment of the river later appealed this management direction.

The U.S. Forest Service agreed to reassess the boating prohibition as part of a broader examination of visitor capacity issues on the upper segment of the river (USFS, 2005). *The appeal response specifically directed the U.S. Forest Service to "conduct the appropriate visitor use capacity analysis, including non-commercial boating use, and to adjust or amend, as appropriate, the LRMP to reflect a new decision based on the findings"* [24]

The Forest Service intended for this historical recap to explain what was compelled under the 2005 Appeal Decision. The Forest Service wanted to create an impression that the Chief of the Forest Service had already decided the matter of allowing boating on the Chattooga in North Carolina—seven years before—and that the current 2012 Decision Notice and 2012 EA were merely confirming that prior analysis. By repeatedly referencing the 2005 Appeal Decision, the 2012 EA and 2012 Decision Notice effectively deployed administrative force fields to ward off and discourage potential attacks from those disappointed with the highly controversial decision to abandon a well settled regulatory policy which prohibited boating on the Chattooga in North Carolina.

[24] 2012 EA at pages 1-2. (bold emphasis in original).

After conducting years of research into how to allow limited noncommercial boating on the Chattooga in North Carolina, the Forest Service switched to overdrive in trying to justify the introduction of boating—without regard for any discoveries that might suggest the boating prohibition should be retained.

The following optimistic justification exemplifies the kind of effort being made to justify implementing the new recreational use management plan: "The forests are seeking to take appropriate action now *to reduce existing or prevent future unacceptable impacts* to the river's values from increasing use levels, and thus preserve the river's free-flowing condition, protect water quality and protect and enhance the river's ORVs in addition to protecting its wilderness character." 2012 EA @ page 2(emphasis added).

Unfortunately, given the unique "near natural" physical condition of the river corridor in North Carolina, this parade of the wonderful simply does not square with what was *mathematically* possible based on the *irrefutable* baseline stats, photographs, etc. that the Forest Service painstakingly collected through its 2007 Biophysical Inventory.[25]

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[25] In compiling its 2007 Biophysical Inventory, the Forest Service field audited and tabulated the following conditions and data points: all erosion sites (potential human created point sources of sediment flow into the river), designated trails versus user created trails, user created campsites, and the volume of trash collected at each particular data point location(in gallons).

The Forest Service quantified 182 total erosion sites. All but 5 were located in South Carolina. Each *erosion site* was photographed and measured for total square footage. Similarly the individual points along each of the designated and user created trails were pinpointed by latitude and longitude, and additional data was recorded about each individual trail segment, such as the length of trail within 20 feet of the river (*inside the trout buffer*) as well as the amount of garbage found on that segment of the trail. User created campsites were also photographed and surveyed for the square footage of the cleared and bare soil area, while being pinpointed by latitude and longitude.

Each data point was associated with a *dominant recreational activity taking place in connection with that specific data point.* There was one exception to this general rule. The Forest Service made no effort to associate a recreational use cause for any of the 182 documented erosion sites—even though photographs and contextual circumstance, such as their physical location should have allowed the Forest Service to make such an important determination.

By measuring the square footage of bare ground, the proximity of the erosion site to the riverbank, and by evaluating what kind of human activity appeared to have created the erosion site, the Forest Service possessed the *scientific means* for comparing erosion sites, *and for ranking each one in terms of the level of threat to water quality via chronic sediment flows into the river*. However, for some unexplained reason, the Forest Service did not undertake that analysis. In this regard, the photographs offered an outstanding tool for comparing and ranking the threat to water quality by each of these erosion sites. Photographs show how steep or flat the terrain is in proximity to each erosion site, or how thick or bare the ground cover is surrounding the erosion site—in other words, a photograph demonstrates the physical conditions just as well as, if not better than, a written description. In fact, a written description can be editorialized to diminish or accentuate the true conditions found on the ground—depending on the bias of the author. Untouched photographs are independent of such bias.

In fact, the 2012 EA, and the 2012 Decision Notice entirely ignored the results of this 2007 Biophysical Inventory—results which demonstrated how it would be *mathematically impossible* for the Forest Service to introduce boating to the Chattooga in North Carolina *without causing increased degradation* of the riparian corridor, the trout buffer, and the water quality of North Carolina—in direct contradiction to the parade of the wonderful. This is because the 2007 Biophysical Inventory documented that the North Carolina segment of the river remained *literally* unspoiled in contrast to the river in South Carolina. As a consequence, the only place where *mathematical* improvement could have occurred was in South Carolina. Nevertheless, the Forest Service tries to dilute and hide this significance by sweeping North Carolina into the same *analysis* with South Carolina. [26]

Such "unexplained inconsistency" constitutes arbitrary and capricious behavior.

Despite this unflagging optimism and parade of the wonderful, what the 2005 Appeal Decision actually ruled was: "No capacity analysis is provided to support restrictions or a ban on recreation use or any type of recreational user. 2005 Appeal Decision at page 6. This appeal emphasized the obligation of the Forest Service to develop a comprehensive management plan which addressed user capacities. 16 U.S.C. §1274(d)(1). The decision further asserted: "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 limits on other users." Id. at page 6. "Because the record *does not contain the evidence to continue the boating ban*, his decision is not consistent with the direction in Section 10(a) of the WSRA ….or agency regulations…." Id. (emphasis added).

Without referencing any court opinions to validate any of her findings or rulings, Reviewing Officer Manning concluded: "I am directing the Regional Forester to conduct the appropriate *visitor use capacity analysis*, including non-commercial boat use, and to adjust or amend, as appropriate, the RLRMP to reflect a new decision based on the findings." Id. at page 6(emphasis added).

Reviewing Officer Manning *did not order the user capacity analysis to find a way to allow boating* in North Carolina. In fact, with respect to removing the prohibition of boating, she had no procedural foundation for compelling any such result because (1) the prohibition of boating in North Carolina was put in place via the issuance of a closure order pursuant to 36 C.F.R. 251.50; and (2) there was no final agency taken by the Nantahala National Forest to justify making any such ruling in connection with the appeal of American Whitewater under the Administrative

[26] See Exhibit A.

Procedures Act. To press the point, had this been the intention, there would have been no need for Reviewing Officer Manning to order: "Management of boating will revert to the direction in the 1985 Forest Plan, and the closure decision made in that plan will remain in effect." Id. at page 6. Boating could have simply commenced immediately while the Forest Service addressed Reviewing Officer Manning's instruction to "conduct appropriate user capacity analysis.." Id. In short, Reviewing Officer Manning carefully left open what the ultimate decision should be by emphasizing the Forest Service should conduct the analysis and then "to adjust or amend, as appropriate, the RLRMP to reflect a new decision based on the findings." Id. at page 6. The totality of Reviewing Officer Manning's opinion makes clear that she was most concerned that "*the record provided to me does not contain the evidence to continue the boating ban*." Id.

Despite this circumstance, somewhere along the line, the Forest Service decided to try to create the impression that the introduction of boating had already been decided by the 2005 Appeal Decision. Similarly, somewhere along the way, the Forest Service lost sight of Reviewing Officer Manning's implicit instruction to use science to discover evidence needed to set appropriate user limits—and perhaps "as appropriate" to continue to prohibit boating in certain circumstances. Instead, at some point, during the seven years subsequent to the 2005 Appeal Decision, the Forest Service morphed from being a dispassionate third party charged with protecting the river's riparian corridor, its trout buffer, and water quality, into an advocate for paddlers. In this role as advocate, the Forest Service demonstrated a willingness to ignore evidence, *even its own,* which compellingly demonstrates why boating might still need to be prohibited on the most sensitive part of the river found in North Carolina.

Just as the 2005 Appeal Decision concerned a lack of sufficient evidence to justify the prohibition on boating, the Proposed Rule lacks legal foundation for its promulgation. The administrative process employed to reach the findings and rulings of this 2005 Appeal Decision was procedurally flawed because the Forest Service failed to provide specific notice of an opportunity to be heard to a discrete group of individuals who should have been recognized as having a protectable interest requiring adequate due process.

This failure to provide adequate notice violated these individuals' constitutional due process rights. Consequently, the 2005 Appeal Decision cannot be used as the foundation for the 2012 Decision Notice. This in turn invalidates any changes to 36 C.F.R. 261.77

It is clear from American Whitewater's pleading in 2004, that the relief being sought by America Whitewater was in direct conflict with the interests of anglers who fish the North Carolina part of

the Chattooga. [27] The Forest Service *must have recognized* the significance of the injury that would be suffered by anglers should the Forest Service grant the Appellant's requested relief—because *the Forest Service had been told so by the American Whitewater's pleading which specifically targeted and attacked these anglers existing rights:*

"The ROD/FEIS suggests that paddling should be banned on the Headwaters because the angling opportunities are so uniquely outstanding that even a potential disturbance of angling use warrants a total boating ban. In other words, the Headwaters are so important for trout fishing that anglers should enjoy a monopoly on this public resource. The study relied upon by the ROD/FEIS proves this to be false.

The Bixler Study, a survey of 202 members of the "Rabun" and "Chattooga" Chapters of Trout Unlimited, revealed that of the eighteen most common substitutes for the Chattooga River, eleven were rated as offering a better trout fishing experience than the Chattooga…Furthermore, while the ROD/FEIS claims that the 'section of river upstream of Highway 28 is considered to be the best trout fishing waters in South Carolina,' respondents to the Bixler Study disagreed…Based on the only study cited in the ROD/FEIS, the Chattooga River above Highway 28 is not the best trout fishing waters in the region as rated by local anglers."[28]

Nevertheless, despite this direct attack on trout angling, the Forest Service never considered the negative impacts which might occur should the *request for relief be granted.* In fact, the entire 2004 Appeal was argued and decided as if the opinions, rights and privileges of North Carolina anglers were entirely irrelevant.

Nevertheless, the fact remains that a finite group of individuals, North Carolina Lifetime Sportsman licensees ("NC Lifetime Licensees") who fish the Chattooga in North Carolina, are vested with a legally protectable interest, derived from a set of contractually entitled rights, spelled out by statute, pertaining to their lifetime use and enjoyment of the Chattooga River game lands. Ultimately, the Forest Service has relied on the 2012 Decision Notice which relied on the 2005 Appeal Decision to justify stripping away these protectable and contractually entitled rights of NC Lifetime Licensees. However, because these individuals were denied their due process rights in 2004, the house of due process cards collapse.

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[27] American Whitewater specifically requested the following relief: "a modification of the ROD/FEIS' Preferred Alternative (Alternative I) substantially in the form of proposed Alternative E, restoring year-round access for self-guided groups of non-commercial, non-motorized canoeists and kayakers to float the Chattooga WSR from and to existing access points between and including NC Road 1107 (Grimshawes Bridge) and the Highway 28 Bridge."

[28] *Notice of Appeal and Statement of Reasons,* American Whitewater, Appellant, Appeal #04-13-00-0026 before the Chief of the Forest Service, at page 41. (emphasis added)(hereinafter the "2004 AW Appeal Notice").

Back in 2004, the Forest Service *failed to give specific notification to* these NC Lifetime Licensees of their right and standing to intervene in the American Whitewater appeal. This was procedurally fatal because, unlike the American Whitewater appellants, these NC Lifetime Licensees possessed important contractually entitled rights that were ultimately damaged as a consequence of the 2012 Decision Notice. If nothing more, the balancing of equities should have required the Forest Service to give specific notice to this small group of individuals—who certainly had a more contractually protectable interest than paddlers.

Had the Forest Service properly notified these individuals of their standing to appear and to be heard in the 2004 American Whitewater appeal, these individuals could have placed additional evidence into the record which might have proved sufficient to overcome Reviewing Officer Manning's concerns about inadequate information being lodged in the record to justify a boating ban. In particular, they would have offered a different perspective and characterization why the Chief of the Forest Service in 1976 decided that boating was not an appropriate recreational use of the river in North Carolina. This evidence might have shown:

On March 15, 1976, the Chief of the Forest Service, himself, articulated the *first* River Plan for the Chattooga River. Chattooga River Plan, 41 Fed. Reg. 11847-11856 (March 19, 1976).

In articulating the 1976 plan, Chief John McGuire confirmed how the public waters flowing through the Chattooga Cliffs and Ellicott Rock reaches of the river in North Carolina were "*in a near natural condition*" and that the Chattooga Cliffs "*has the most scenic long-range views and cascades on the river.*"[29] Equivalent *superlatives* were not employed by Chief McGuire to describe the river's esthetic and scenic condition further downstream in the Rock Gorge, Earls Ford, or Woodall Shoals sections of the river. Instead, Chief McGuire focused his descriptions of those downstream reaches in South Carolina in terms of the *increased volume of water flows* and the *sheer number of remarkable whitewater features* found there.

It was against this *difference in descriptive backdrop* that Chief McGuire made clear that a range of recreation opportunities would be provided on the Chattooga, but only to the extent that a recreational use could be pursued "*in harmony with, the nature of the individual river segments*."[30] Consistent with that objective, the Chief *carefully qualified* what kinds of water-oriented recreational uses would be permitted.

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[29] *Development Plan—Chattooga Wild and Scenic River*, Federal Register, John R. McGuire, Chief, Forest Service, Vol. 41, No. 56 p. 11847-11848, March 22, 1976. (the "1976 Chattooga Plan").

[30] 1976 Chattooga Plan at 11849

In pronouncing how the Chattooga Cliffs and Ellicott Rock reaches were in a "*near natural condition"*, Chief McGuire also stressed the unsuitability of paddling this stretch of the river owing to the fact that the river's *"exposed boulders and steep, slick, rock walled sides make it difficult to climb out of the riverbed to portage around dangerous cascades or other obstacles*." Being aware of the unsuitability of the highly erosive soils for the purposes of creating portage trails, the Chief must have recognized the damage that would be done to the riparian corridor if paddling were to occur regularly on this reach of the river—at high flows.[31] Stated differently, according to the Natural Resources Conservation Service, the development of user created

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[31] The soil types on the steep entrenched slopes and within the immediate riparian corridor are generally comprised of highly erosive soils---which are not suitable for the construction of either formally designated or unmaintained user created portage trails, paddler evacuation points, and boat launch sites.

The Natural Resource Conservation Service indicates that soils on this part of the Chattooga consist predominantly of Cleveland-Chesnut-Rock outcrop complex, windswept, 30 to 50 percent slopes ("CpE soils"), Cleveland-Chesnut-Rock outcrop complex, 50-95 percent slopes ("CpF soils"), Plott fine sandy loam, 30 to 50 percent slopes ("PwE soils"), and Chandler gravelly fine sandy loam, 50 to 95 percent slopes ("CdF soils"). See the attached soils type maps.

Each of these soil types carry either a "Severe" or "Very Severe" risk of erosion hazard for off trail uses, where human recreational activities disturb or expose the soil surfaces. A "Severe" rating means that "erosion is very likely and that erosion control measures, including revegetation of bare areas, are advised.." *A Very Severe rating* "*indicates that significant erosion is expected,…and erosion-control measures are costly and generally impractical."*

Stated differently, according to the Natural Resources Conservation Service, the development of user created (undesignated) portage trails by creek boaters can be expected to cumulatively produce significant erosion within the riparian corridor, while erosion control measures will prove generally impracticable in preventing sedimentation from getting into the river. In fact, this predicted erosion and sedimentation has already occurred on this segment of the Chattooga—as a direct consequence of creek boaters having informally created multiple portages, put ins and takeouts***--in violation of Forest Service regulations, and in violation of North Carolina's water quality and antidegradation rules***.

Under 36 CFR 212.55 (Criteria for designation of roads & trails), before constructing a new trail, the Forest Service must consider the proposed trail's future need for maintenance and the availability of resources for maintaining the trail. The existing Chattooga River Trail along the west side of the Chattooga has not been adequately maintained by the USFS. Consequently, it is difficult to accept assurances that the planned creek boater access trails and boater created launch sites will be maintained to prevent visible sediment flows into the river.

In summary, the upper Chattooga in North Carolina is characterized by severe terrain and highly erosive soils. Because rainfall in this area exceeds 80 inches per year, compared to the national average of 37 inches per year, these terrain conditions put the Chattooga corridor at significant risk of being further degraded by soil disturbance caused by human recreational activity—especially boating.

The informal user created creek boating infrastructure has already caused additional visible sediment to flow into the river from multiple erosion sites created by paddlers launching or evacuating from the river. See Erosion Site B-5.

(undesignated) portage trails by creek boaters can be expected to cumulatively produce significant erosion within the riparian corridor, *while erosion control measures will prove generally impracticable in preventing sedimentation from getting into the river.*

In short, there is no way to mitigate the damage predicted to occur. Chief McGuire must have been aware of this highly erosive soils problem.

The Chief unequivocally declared that *"[p]rotecting and maintaining the aesthetic values* of the river must remain of *paramount importance."*[32] He further advised: "*Of primary importance is the nature* and *condition of the land area seen from the river or riverbank. Protection of this primary viewed area is one of the principle management objectives.*" Id. at 11847. These are the overarching objectives to be satisfied under the Wild and Scenic Rivers Act.

Each of Chief McGuire's statements square with the specifically enumerated obligations imposed on the Forest Service by 16 U.S.C. §1281 (a). In managing a wild and scenic river, "*primary emphasis shall be given to protecting its esthetic, scenic, historic, archeologic, and scientific features."* Id. This mandate clearly evidences how the protection of these five specifically enumerated features must prevail over the promotion of any recreational use of the river. This provision has been ignored by the Forest Service today.

Consequently, in 1976 the Chief articulated a river management plan that prohibited whitewater paddling on this section of the river—***less for the protection of boaters, and much more for the protection of the riparian corridor's esthetic, scenic and scientific features from the destructive portaging demands of creek boating.*** The Chief must have understood the correlation between preserving water quality and avoiding unnecessary erosion caused by incompatible recreational uses.

At that time, this regulatory prohibition and fair allocation of recreational use did not create controversy because the state of whitewater boat technology had not advanced enough to allow anyone but the most expert to attempt to paddle the steep descent of the upper Chattooga. In fact, American Whitewater has admitted in its own pleadings that this boating controversy *did not exist* until many years later after the prohibition was put in place. The controversy only arose when boating technology began to evolve to the point where many began to believe that they might have the skill to run this reach of water .[33]

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[32] 1976 Chattooga Plan at 11850.

[33] "Also contributing to the lack of significant opposition to the 1976 and 1985 bans was the fact that available equipment prevented all but a handful of expert boaters from navigating most of the Headwaters section." 2004 AW Appeal Notice at page 4.

Chief McGuire anticipated that the day might come where "*technological advances may result in new types of equipment that could be used on the river.*" The Chief addressed this future condition by stating that "[o]*nly such new types of equipment compatible with management objectives will be permitted*." In other words, the Chief was *emphasizing* that the protection of the *esthetic and scenic features of the* riparian corridor and *the river's water quality had to remain of paramount importance*—even when the kayaking technology developed to the point of making it possible for more paddlers to attempt to float this reach of water.

This is a critical distinction. Clearly, all technology has evolved to make many different recreational uses easier for the participant—but maybe not so easy for the land and water. Does that mean that hang gliding should be allowed off the top of Big Terrapin so that this constituency could view the Chattooga Cliffs from the air? Does this mean that a landing zone should be constructed for this passion, since it would only need to be fairly small for an expert hangglider? Should mountain bikes be allowed to ride on the highly erosive soils of the Chattooga River Trail? Chief McGuire's answer has already been given.

The Chief was not singling out recreational boating for restrictions as a part of some kind of sub rosa plan—*in contrast to the suggestions of the whitewater kayaking lobby*. The Chief reemphasized this overarching resource protection objective by stating that "*Public use of the trail system, existing and proposed, will be restricted to hikers only*."[34] Implicit in this statement was the Chief's intention and belief that there was an absolute need to continue to bar horseback riders, off road vehicles, off road bicycling, etc. from using the trail system due to his concerns about damage being caused to the fragile riparian corridor—*with resulting erosion and sediment flowing into the river.*

Even more pertinent to the controversy at hand, Chief McGuire emphasized: "*Water and soil are the two basic elements which make a river and its banks. The condition of both is important in that they affect all the other uses and activities in the area.*" [35] Accordingly, the Chief further directed that special emphasis was to be placed on "*preventing and controlling soil erosion near the water's edge.*"[36]

Implicit in this imperative *to prevent erosion near the water's edge* was Chief McGuire's understanding that erosion and sedimentation could have a disastrous impact on the Forest Service's ability to maintain a healthy aquatic habitat. Without a healthy aquatic habitat it would be difficult, if not impossible, to maintain a reproducing wild brown trout fishery on the upper

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[34] 1976 Chattooga Plan at 11851

[35] 1976 Chattooga Plan at 11850

[36] 1976 Chattooga Plan at 11850

reaches of the Chattooga. Chief McGuire understood and recognized that *"[t]rout fishing on the Chattooga ranges from excellent in the upper areas to extremely marginal in the lowermost reaches."*[37] Recognizing the free stone nature of the Chattooga, the Chief acknowledged that the Chattooga "*isn't as productive as those [limestone] streams in the North or West portions of the Nation."* [38]

The Chief made the observation about the lower reproductive capacity of the Chattooga to underscore the need to adopt management initiatives which offered even greater protections to this outstanding fishery—*not less protection as being pushed forward today*.

The Chief further acknowledged how "*the recent increase in floaters using the river has had a detrimental effect on the fishing experience."*[39] The Chief did not articulate a corollary impact, because angling does not have the capacity to disturb the fundamental experience enjoyed by whitewater paddlers. However, this was not the primary reason for putting a boating prohibition in place above the Highway 28 bridge. *The primary purpose was to protect the riparian corridor, the trout buffer, and the quality of habitat in this fragile location from the damages caused by creek boating's unique and inescapable infrastructure needs.*

In short, the Chief of the Forest Service in 1976 must have been aware of the fragile connection between a sustainable wild trout fishery and the dangers of habitat impairment caused by excessive sediment and erosion in the riparian corridor and near the water's edge. The Chief recognized the unique capacity of creek boating to create chronic sources of sediment within this fragile part of the river owing to its *inescapable* need for evacuation sites, portage trails, and boat launch sites.

In summary, the totality of the Chief's statements clearly reveal the United States Forest Service's understanding that not all recreational uses should be allowed on all segments of the

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[37] 1976 Chattooga Plan at 11849

[38] 1976 Chattooga Plan at 11849

[39] 1976 Chattooga Plan at 11849. It is likely that Chief McGuire was implicitly acknowledging the marked increase of whitewater enthusiasts who gained an interest in the river as a consequence of having seen the 1972 movie Deliverance prior to the subsequent wild and scenic river designation in 1974. This led to incidents of resource user conflict between trout anglers and paddlers. However, this was not the primary reason for putting a boating prohibition in place above the Highway 28 bridge. The primary purpose was to protect the riparian corridor in this fragile location.

river—*due to some recreational uses' fundamental incompatibility with preventing erosion near the water's edge.*

The notion that some recreational uses are incompatible squares with the Chief's statement of the overarching purpose underlying the Forest Service's management of river uses: "*An objective will be to provide a range of recreation opportunities*" but only to the extent that a recreational use could be pursued "*in harmony with, the nature of the individual river segments*."[40]

In other words, certain recreational uses may be appropriate in certain spaces but inappropriate in others. Creek boating is one of those recreational uses that remains incompatible today with the "*nature of the individual river segments."*

It was against this backdrop of facts and circumstances that the prohibition on boating was established for the uppermost headwaters in North Carolina in 1976. In contrast to the assertions of those in favor of creek boating, this prohibition of boating did not arise from some local Forest Service official's to unlawfully discriminate against whitewater paddling enthusiasts. It simply represented the logical conclusion derived from a careful consideration of all the facts and circumstances pertaining to the physical limitations of the resource, including its steeply entrenched, and in certain case, gorge like slopes with highly erosive soils, the narrow 25-30 foot width of the headwaters, and the relative small volume of water flowing above the Highway 28 bridge under normal conditions.

In addition, the portion of the Chattooga in North Carolina to which this boating prohibition applied *was less than 15% of the entire river*. Chief McGuire was careful to fashion a river use plan designed to protect the resource from degradation---in particular sedimentation---while allowing dispersed recreation on those parts of the river where the resource could withstand its adverse impacts. *The original plan prohibited boating on the uppermost headwaters but also allowed boating to take place below the Highway 28 bridge without any restrictions of season or flow.* In addition the Forest Service built a controversial road far into the headwaters of Overflow Creek on the West Fork of the Chattooga, which penetrates far into brook trout habitat, in part to give paddlers access to the top of Overflow Creek. None of these counterbalancing facts were included in the record argued before Reviewing Officer Manning—because NC Lifetime Licensees were never given an opportunity to defend their rights—which were being negotiated away by folks in South Carolina and Georgia.

[40] 1976 Chattooga Plan at 11849.

As the Chief alluded, the different sections of the Chattooga River have fundamentally different and distinguishing physical features—some of which are more or less suitable to the physical demands of creek boating.

As noted previously, in North Carolina, the river is a mere creek *with the average width being no greater than 25-30 feet* and the average depth being no greater than three feet. In contrast, the river becomes much wider, much deeper, and more powerful below the Russell Highway 28 bridge in South Carolina. Beginning at the Russell Highway 28 Bridge, where boating has always been permitted, the river triples in width to 75 to 100 feet as it picks up the flow from the West Fork of the Chattooga. At Earls Ford in South Carolina, the river widens to greater than 100 feet. At Dicks Creek confluence the river exceeds 250 feet in width.

Similarly, in North Carolina, vehicular access to the public river corridor is both remote and limited to just two bridges—one on a paved road and one on a gravel road. In contrast, in South Carolina, vehicular access is provided at major bridges at Highway 28 (major paved highway), and Highway 76(major paved highway), and at a single lane bridge at Burrell's Ford(gravel road).This comparative lack of easy vehicular access at a major paved highway has served to protect the pristine and near natural condition of the resource in North Carolina, up until 2012.

This regulatory prohibition on whitewater paddling of this section of the river remained in place for almost thirty years—until 2012, when the USFS abandoned this restriction on whitewater paddling of this creek-- *without ever considering how the introduction of this new recreational use might violate North Carolina's water quality standards.*

It's almost as if the Forest Service in 2004 determined the Chief of the Forest Service in 1976 knew nothing about protecting and enhancing the physical wellbeing of the Chattooga pursuant to his obligations under the Wild and Scenic Rivers Act and Clean Water Act.

The failure of the Forest Service to have noticed the one constituency that had a powerful motive to appear is simply constitutionally wrong. As a consequence of not having been provided Due Process in 2004, NC Lifetime Licensees had no opportunity to present this argument or any other argument to counterbalance American Whitewater's single-spaced 95 page editorial effort to shape the record.

Instead, the record on which Reviewing Officer Manning made her decision was entirely the editorial product of the Appellant, American Whitewater. As an aside, it is a curious fact to remember how American Whitewater's appeal managed to go entirely uncontested by any other party. This also emphasizes the seriousness of prejudice visited on NC Lifetime Licensees from not having been given specific notice of their right and opportunity to be heard.

In fact, despite its controversial nature, the 2005 Appeal Decision reports that "*there were no requests for intervention received on this appeal"*. This lack of intervention by anybody from North Carolina, including the North Carolina Wildlife Resources Commission, or the North Carolina Department of Environmental Quality seems notable—since it was the North Carolina part of the river which was going to be disproportionately impacted by any management change.

Still unanswered is an October 20, 2015 request for information, pursuant to the Freedom of Information Act, which sought the production of any intra forest agreement, order, decision, letter ruling, etc. evidencing how, or explaining why there was legal authority for the 2005 Appeal Decision to be applied to the Nantahala National Forest. If the citizens of North Carolina had *standing to intervene* in a dispute involving a national forest in the state of South Carolina, surely the Forest Service should have *specifically explained* this standing to appeal to the citizens of North Carolina, at the precise moment when their rights were being threatened in an *uncontested* administrative appeal pertaining to an entirely different national forest than the one located in North Carolina.

To press the importance of deciding whether or not North Carolinians were given adequate notice and due process, in discussing the limits of administration and management policies affecting the wild and scenic river corridor, Section 12(b) of Public Law 90-542, October 2, 1968, specifically provides: "Nothing in this section shall be construed to abrogate *any existing rights, privileges,* or contracts affecting Federal lands *held by any private party* without the consent of said party."

Similarly, Section 13(a) explicitly evidences the priority placed by the statute on not diminishing the rights and privileges of North Carolina's lifetime licensed trout anglers: "Nothing in this act shall affect the jurisdiction or responsibilities of the States with respect to fish and wildlife….[F]ishing shall be permitted on …waters administered…under applicable State…laws and regulations…" Id.

Finally, Section 12(c) requires "[t]he head of any agency administering a component of the national wild and scenic rivers system shall cooperate…with the appropriate State water pollution control agencies for the purpose of eliminating or diminishing the pollution of waters of the river."

To emphasize the combined significance of the mandates set forth in Section 12(b) and Section 13(a), in North Carolina, any individual with established residency status, who contractually pays the licensing fee for a *lifetime hunting and fishing license,* is *entitled* to hunt and fish on *any*

and all public "Game Lands" of the state, *forever,* subject to the rules and regulations of the North Carolina Wildlife Resources Commission.[41]

The current cost for an adult *lifetime* license is $500—which is no small amount of consideration paid to protect this *entitled expectancy* from being stripped away, diminished, or effectively made prohibitively more expensive.

In the context of granting a license, the Fourth Circuit has stated that, "when the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured", a legitimate claim of entitlement exists. *Gardner v. City of Baltimore Mayor and City Council*, 969 F.2d 63, 68-69 (4th Cir. 1992); see also the negative implications of *Weinberger v. Salfi*, 422 U.S. 749, 772 (1975)(a *noncontractual claim* to receive funds from the public treasury, such as Social Security, enjoys no constitutionally protected status).

Once contractually established, the *entitled benefits* of a *North Carolina Lifetime Sportsman* licensee cannot be revoked unless the licensee subsequently violates the law at a sufficient level of severity to warrant suspension or revocation. Even under that circumstance, the licensee must *first* be given adequate due process before the *NC lifetime licensee* may have his rights revoked. North Carolina General Statutes §113-276.1 through §113-277.

In addition, the *NC lifetime licensee* is protected from being intentionally interfered with, or harassed by any third party, (including boaters) while hunting or fishing on *any* public game land. N.C.G.S. §113-295.[42] The entire public portion of wild and scenic corridor of the Chattooga constitutes such a North Carolina game land. In fact, the protections now specifically afforded to *NC lifetime licensees* against being intentionally harassed on the Chattooga or any other river, N.C.G.S. §113-295, arose from one of the public policy motivations behind the prohibition of boating above the SC/GA Highway 28 bridge that was put in place in1976, and

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[41] "Lifetime sportsman licenses ***entitle*** the licensee to take all wild animals and wild birds by all lawful methods…and to fish with hook and line for all fish in all inland …waters...including public mountain waters." N.C.G.S. §133-270.1D(b)(emphasis added).

[42] **N.C.G.S. § 113-295. Unlawful harassment of persons taking wildlife resources.**

(a) It is unlawful for a person to interfere intentionally with the lawful taking of wildlife resources or to drive, harass, or intentionally disturb any wildlife resources for the purpose of disrupting the lawful taking of wildlife resources. It is unlawful to take or abuse property, equipment, or hunting dogs that are being used for the lawful taking of wildlife resources. This subsection does not apply to a person who incidentally interferes with the taking of wildlife resources while using the land for other lawful activity such as agriculture, mining, or recreation. This subsection also does not apply to activity by a person on land he owns or leases.

Violation of this subsection is a Class 2 misdemeanor for a first conviction and a Class 1 misdemeanor for a second or subsequent conviction.

which was memorialized at 36 CFR §261.77.[43] This user separation was critical in South Carolina.

In contrast, with respect to North Carolina, the Chief explained how this prohibition was essentially important for protecting the physical condition of the riparian corridor from the inescapable damage caused by boating. He also explained the necessity of protecting anglers because the activity of floating downstream physically interferes with the success of a fly fishing anglers moving upstream on a narrow creek.[44] The Chief of the Forest Service acknowledged this inherent conflict between these two recreational uses in outlining the very first Chattooga River Development Plan in 1976.

In short, NC lifetime licensed anglers should have been specifically noticed of their standing to intervene in this 2005 Appeal Decision, because those deliberations and findings constituted the starting point for diminishing a significant component of their contractually entitled rights: their rights to fish unimpeded by paddlers on the game lands of North Carolina on a year around basis.

To press the point, during the three short seasons that creek boating has taken place on the Chattooga River in North Carolina, North Carolina anglers have suffered direct injury to the quality of their entitled fishing rights, as well as the quality of their esthetic and scenic experience. This damage is the direct result of boaters having been allowed to cause significant physical damage to the Chattooga's riverbank and riparian corridor as they unlawfully construct multiple boater put-ins, *at locations not approved by Amendment #22* to the Nantahala National Forest's Land and Resource Management Plan.

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[43] In contrast to the solitary nature of hiking, birding, nature watching, hunting , fishing, and swimming, whitewater kayaking is a gregarious but dangerous sport that is only capable of being safely enjoyed in groups. *Regulations dictate that there must be a minimum of at least two boaters in order to facilitate rescue in the event of an accident on the remote waters of places such as the Chattooga where self-rescue is inherent.* Wilderness and solitude seekers have vigorously and repeatedly stated their objection that the pursuit of their passions are incompatible with the intrusive visual pollution of brightly colored kayaks and the auditory pollution associated with half a dozen whitewater enthusiasts pursuing their passion.

[44] Creek boating disturbs trout feeding in smaller streams. The water is shallower, has lower flows, and the stream bed is narrower in width. Consequently, there is much greater opportunity to disturb a feeding fish by virtue of the fish having much greater opportunity to observe potential threats. Because kayaks float downstream and anglers fish upstream, there is an inherent incompatibility when it comes to disrupting feeding trout. The trout has a greater opportunity to observe the large horizontal shadow of the kayak approaching from upstream, compared to the vertical shadow cast by an angler who carefully monitors the sun while approaching from downstream. The fish will flee out of fear and may not return to its normal feeding pattern for some time. This is the same principle that an angler faces when fishing upstream subsequent to another angler. Once the fish has been spooked, it may not resume its feeding pattern until much later in time.

One thing is certain, without being specifically noticed, these NC Lifetime Licensees had no obligation to recognize that their rights might be adversely impacted, *because the specific subject matter of the American Whitewater appeal exclusively involved events taking place within the Sumter National Forest in South Carolina—far afield from the Chattooga in North Carolina.* Without the Forest Service specifically acknowledging their standing to appear and be heard, these North Carolina licensees had no reason to believe that they were entitled to appear and to be heard in a matter *exclusively* involving the amendment of the Land Resource Management Plan of the Sumter National Forest—since the legal situs of their contractually entitled rights involved the Nantahala National Forest in North Carolina. Hence, these NC Lifetime Licensees cannot be held accountable for not appearing during the 2005 Appeal Decision—at the very moment when their rights were being stripped from them according to the Forest Service's representations in its 2012 EA, 2012 Decision Notice, etc.

To press this point, the captioned title page of the 2004 Appeal Decision, appeared as follows:

DECISION FOR

APPEAL

#04-13-00-0026 American Whitewater

OF THE

SUMTER NATIONAL FOREST LAND AND RESOURCE MANAGEMENT PLAN REVISION

/s/ Gloria Manning 04/28/05

GLORIA MANNING
Reviewing Officer for the Chief

Date

Noticeably missing from this title page is any mention of the Nantahala National Forest, much less the Chattooga River in North Carolina. This is because the appeal was *specifically limited to addressing a complaint about modifications to the Sumter National Forest Revised Land and Resource Management Plan—not the Chattooga River within the Nantahala National Forest in North Carolina.*

Today, the Forest Service has no way to claim that it would not have objected to *such citizens' hypothetical attempt to intervene* in that 2004 Appeal Decision. The Forest Service cannot prove that it would not have attempted to argue in 2004 that such individuals lacked sufficient standing to contest an appeal *that exclusively involved modifications to the Sumter National Forest Revised Land Resource Management Plan*—based on the fact that such North Carolinians' dispute was not ripe due to the fact that the Nantahala National Forest was not amending its Land Resource Management Plan at that point in time.

The Forest Service cannot prove today that, in 2004, *it was not endeavoring to have it both ways*, by failing to provide specific notice to this finite group of North Carolina citizens. By failing to provide *specific notice*, the Sumter National Forest effectively reduced the odds of one of these adversely impacted individuals actually attempting to intervene to introduced evidence which might upset the apple cart, while also preserving the opportunity to argue a lack of standing against such potential intervention in the future.

This group's due process rights should have been protected in 2004. The only way that such rights could have been protected would have been for the Forest Service to have *specifically noticed* these individuals of their right to be heard in the American Whitewater 2004 appeal regarding the Sumter National Forest Land Resource Management Plan. Whether the administrative procedures provided in 2004 were constitutionally sufficient requires a weighing of the equities of the competing governmental and private interests that were affected by the Forest Service's failure to provide notice. In this case, any reliance on notice by publication in a remote newspaper was insufficient to satisfy the protections owed to the constitutionally protectable rights of NC Lifetime Licensees.

In fact, the weight of this substantive failure was magnified when the Forest Service ultimately rejected a request made by a NC Lifetime Licensee to intervene in the Georgia Forest Watch litigation, which was *still being heard in federal court after the promulgation of the 2012 Decision Notices—at the very moment when this same contractual right of entitlement was potentially being swept away.*[45]

[45] On August 27, 2015 I emailed the attorney representing United States Forest Service to ask that they not object to my planned intervention in the Georgia Forest Watch lawsuit. I specifically explained my status as an individual

The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965). See also *Grannis* v. *Ordean*, 234 U. S. 385, 394 (1914). This failure to provide specific notice to any qualifying NC Lifetime Licensee, *at that precise point in time,* was a constitutionally critical mistake—which must not be allowed to be swept aside. This oversight prevented this entire group from recognizing their need to intervene and to offer contradicting evidence, and argument, to what was being *editorially* advanced by the *uncontested* Appellant—American Whitewater. American Whitewater spent significant time editorializing why the Chief of the Forest Service had it all wrong in 1976—when the Chief unequivocally demonstrated why the infrastructure needs of creek boating on this part of the Chattooga were incompatible with preserving the "near natural" condition of the Chattooga in North Carolina—due to the terrain conditions found there. See the 1976 Chattooga Plan. It was the American Whitewater's editorialized and uncontested interpretation of the administrative record which formed the exclusive basis for the deciding official's findings of fact and her ultimate decision in this *appeal*—as expressed in her *abbreviated* seven page decision.

Had NC Lifetime Licensees been specifically noticed, they could have appeared to present an entirely different set of facts and argument for why the 1976 boating prohibition remained necessary to protect the fragile and unique terrain associated with the river in North Carolina.

Most significant, this right to appear at that moment in time was a critical right, because this uncontested 2005 Appeal Decision has been repeatedly cited, by the Forest Service, as the procedural foundation necessitating the development of a new management direction which *precipitated the ultimate decision that damaged the contractually entitled rights of these* NC Lifetime Licensees.

Analogous to the fruit of the poison tree, the violation of such individuals' constitutionally protected rights must not be allowed to constitute the stated purpose and basis on which the 2012 Decision Notice is processed and promulgated. *Every member of the public, including* NC Lifetime Licensees*, must trust the Forest Service to inform the public of all adverse significant impacts, direct and indirect, in publishing an Environmental Assessment—and not to gloss over or even conceal critical facts. Every member of the public must also rely on the Forest Service to change its rules on a nondiscriminatory basis.*

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holding a protectable interest, as a North Carolina Lifetime Sportsman license holder, whose interests were not being protected by the parties to the case. The Forest Service responded by asserting it would object to any intervention. Georgia Forest Watch did offer consent.

Nevertheless, even during the process leading up to the promulgation of the 2012 Decision Notice, *the Forest Service continued to conceal yet another critical fact, which if properly divulged,* would have tipped off this finite group of citizens of a legal justification for pursuing an appeal *at that precise moment in time*. In failing to disclose this *critical fact* the Forest Service *also* actively dissuaded these individuals from exercising their rights during the time for administrative appeal in 2012.

Specifically, the Forest Service never discussed the significance/insignificance of disparate impacts, which would fall on one discrete group within a larger group of similarly situated individuals, as a consequence of the Forest Service selecting and implementing Alternative 13A of the 2012 EA.

Specifically, Alternative 13A *eliminated* a year round boater free hunting and fishing zone for North Carolina lifetime hunting and fishing licensees on the less than 10% of the Chattooga River located in North Carolina. S*imultaneously,* Alternative 13A *established* a year round boater free hunting and fishing zone in South Carolina and Georgia—a sort of *special dispensation* offered by the federal government, which surely must have incentivized state officials in South Carolina and Georgia to go along, without objection, to the federal government's stripping of claims of entitlement belonging to their similarly situated neighbors standing on the northern side of Ellicott Rock.[46]

In adopting Alternative 13A, the Forest Service *must have been well aware* that South Carolina/Georgia anglers would be able to use this *specially arranged* boater-free fishing zone, by lawfully standing on, or entering the river, from either the South Carolina or Georgia riverbank, *pursuant to a mutual right of reciprocity embodied* within their lifetime resident fishing licenses. *Without* such right of reciprocity, this convenience would have been unlawful.

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[46] Ellicott Rock is the famous rock located on the Chattooga River where South Carolina, Georgia, and North Carolina were thought to join at a common boundary corner. Said point represents the farthest northeastern point of Georgia and the farthest northwestern point of South Carolina. In 1811, Andrew Ellicott made a survey for the state of Georgia to resolve the boundary dispute between Georgia and North Carolina, which in 1810 had resulted in a short armed conflict between the two called the Walton War. He engraved a large rock in the Chattooga River with "N-G", standing for North Carolina - Georgia. The location had been fixed in 1787 by the Treaty of Beaufort. This rock was listed in the National Register of Historic Places in 1973. Two years after Ellicott's survey, commissioners representing both North and South Carolina marked a large rock along the Chattooga River bank with the inscription "Lat 35 AD 1813 NC + S.C." as the juncture where the South Carolina and North Carolina state lines joined. The rock marked by the commissioners in 1813, rather than the rock marked by Ellicott in 1811, is often called Ellicott Rock or Ellicott's Rock. To clarify this misnomer, it is also called Commissioners Rock. This is now commonly accepted as the point where the boundary lines of South Carolina, North Carolina, and Georgia meet.

More importantly, because of this undiscussed *right of reciprocity,* neither of those states' licensees had to suffer *any additional economic burden* to take advantage of the *year round boater free fishing zone* established by the Forest Service.

The Forest Service *must have known* that this undisclosed *right of reciprocity* did not extend to NC Lifetime Licensees. The Forest Service *must have known* that their decision to implement Alternative 13A would require NC Lifetime Licensees to suffer an additional significant economic burden, over their lifetime, to fish for trout in a boater free zone on the Chattooga River *for almost half of the year*.[47] This undisclosed right of reciprocity *doubled* the magnitude of the adverse and disparate impacts imposed on NC Lifetime Licensees as a consequence of Alternative 13A being implemented.

Nevertheless, the Forest Service neither discussed nor explained why this disparate treatment of similarly situated individuals was warranted or justified—either in the 2012 EA or the 2012 Decision Notice.

Even more troubling, at the same time that the Forest Service repeatedly intoned a need for consistent management of the river, it was quietly promulgating this entirely inconsistent and arbitrary "new management direction." This "*unexplained inconsistency*" constitutes one more reason why the violation of these NC Lifetime Licensees' due process rights must not be allowed to simply float downstream and out of sight. Had this fundamental issue of reciprocity been disclosed in the 2012 EA, *a finding of no significant impact could not have been justified.* An environmental impact statement could not have been avoided under the National Environmental Policy Act ("NEPA"). 42 U.S.C. §4332(2)(C); 40 C.F.R. §§ 1502.1, 1508.15.

By any measure, whether by negligent omission or deliberate intention, these *critical facts* should have been carefully disclosed in the 2012 EA—but they weren't.

By omitting this critical fact, the Forest Service effectively prevented the public in general, and NC Lifetime Licensees in particular, from recognizing the full weight of the *discriminatory*

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[47] This disparate treatment is not mitigated by the season and flow restriction, because NC lifetime licensees are not physically prevented from fishing on many places on the river when flows are high enough to justify boating. As one example, there is a big deep pool in a bend of the river just above Ellicott Rock that could still be fished from the east bank at higher flows with a spinning rod and a rapala lure. There are multiple places above the Bullpen Bridge where fishing at higher flows could still be pursued by simply stepping off the Chattooga River Trail. *It is not necessary for fishermen to wade the stream to fish.* Furthermore, where sufficient rain occurred over night to trigger boating on the next day, the flow could still drop over the course of a day making it much more likely that conflicts could still occur between anglers and paddlers. In short, season and flow restrictions neither explain away nor justify the disparate treatment of NC lifetime licensees.

impact being imposed upon them, by the Forest Service's selection and implementation of Alternative 13A.[48]

In fact, the circumstances surrounding this critical omission of fact implicate a *discriminatory intention* in selecting Alternative 13A. This discriminatory intention is revealed when this undisclosed right of reciprocity is considered in context with the totality of the Forest Service's behavior pertaining to how it has introduced and continued to promote creek boating on the Chattooga in North Carolina.

The prejudice suffered by NC Lifetime Licensees in 2004 was exacerbated by the Forest Service's discriminatory behavior in 2012.

The repeated assertion of a fundamental need to respond to the 2005 Appeal Decision created an impression of legitimacy which hid the true constitutional shortcomings inseparably linked to the procedurally flawed way in which the "appeal decision on the 2004 Sumter Revised LRMP" was prosecuted against the protectable interests of this finite group of North Carolina citizens. It also masked the prejudicial nature of the ultimate alternative implemented pursuant to the 2012 Decision Notice. This false impression of fact, reinforced repeatedly in various documents published over the more than a decade of rulemaking, had the pernicious effect of giving life to the wicked principle of "If you tell a lie big enough and keep repeating it, people will eventually come to believe it."[49]

At a minimum, 36 C.F.R. 261.77 must not be changed to apply to North Carolina. At worse, it cannot be changed for any reason because the stated procedural justification for doing so is derived from a constitutionally flawed 2012 Decision Notice.

Respectfully,

/William Floyd/

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[48] Relying solely on the 2012 EA and 2012 Decision Notice, there was no reasonable way to recognize the true weight of this discriminatory impact on a small group of individuals similarly situated to those being given much more favorable treatment. This fact was never disclosed within the hundreds of pages, thousands of pages of USFS documents.

[49] This and variants of this pernicious and wicked principle has been attributed, without complete and verifiable corroboration, to having been originally used by Adolf Hitler, or alternatively by his minister of propaganda, Jospeh Goebbels. This quote constitutes the antithesis of what proper rulemaking is intended to produce.

EXHIBIT A
2007 BIOPHYSICAL INVENTORY INFORMATION

The Wild and Scenic Rivers Act requires the Forest Service "to protect the water quality of such rivers" (16 U.S.C. §1271). Consequently, understanding the baseline conditions of the riparian corridor, trout buffer, and water quality would constitute essential precondition for establishing appropriate recreational user capacity limits.

Without stating so, because of the damage done to water quality from sediment, understanding the characteristics of inventoried erosion sites would presumably be of greatest importance of all the metrics captured in the 2007 Biophysical Inventory. Understanding which erosion sites constitute the greatest threat to water quality would presumably be of great importance. Similarly, understanding what kinds of human activities had produced the greatest threats would presumably be of great interest in establishing appropriate user capacity limits.

The 2007 Biophysical Inventory established that 177 erosion sites were located in South Carolina while only 5 were cataloged in North Carolina.

Unfortunately, the Forest Service neither provided a summary of the raw data nor the raw data itself pertaining to the specifics of these erosion sites. It left the public to assume that all erosion sites are the same. However, buried within the data files not made available to the public was a spreadsheet that provided the raw data that revealed important facts not disclosed by the USFS.

Obtained through a Freedom of Information Act request, this spreadsheet reveals that 4 of the 5 identified erosion sites in North Carolina were cataloged as having an area of erosion equal to zero. Only Erosion Site #76 in North Carolina was inventoried as having erosion.

Along those same lines, to reach a non-arbitrary decision on appropriate recreational use limitations, and to satisfy the nondegradation mandate of Section 10(a) of the Wild and Scenic Rivers Act, the Forest Service should have ranked the water quality threats posed by each of these 182 erosion sites, and the specific recreational uses which had caused the creation of each erosion site. This comparative analysis should have been completed before the Forest Service allowed boating on the North Carolina part of the river and before specific recreational use limitations were set. *It might prove impossible to set non-arbitrary limits on recreational uses without first quantifying the statistical threat to water quality posed by each recreational use.* Stated differently, it does not seem possible to reach a non-arbitrary decision about the adverse impacts of boating on the riparian corridor, the trout buffer, and the water quality of the

Chattooga in North Carolina, without first quantifying the statistical threat that boating poses to water quality—based on historic data.

This failure to quantify the statistical threats to water quality posed by creek boating was arbitrary—because the Forest Service was well aware that boat launch sites, river evacuation points, and portage trails, cause erosion sites to develop, which over time can degrade and become chronic point sources of water pollution.

Unfortunately, after spending considerable effort to compile this raw data, the Forest Service never analyzed the raw data either to draw conclusions about which erosion sites posed the greatest threat to water quality, or alternatively, to determine what kind of human activity was responsible for creating the most egregious erosion sites.

This constitutes an arbitrary, and capricious failure. Such comparative evaluation of erosion sites was essential to mitigating and avoiding further degradation of water quality. Unless the greatest threats to water quality are recognized, documented, and effectively eliminated through appropriate regulation, any effort to quantify numeric recreational user capacities devolves into an arbitrary exercise, stripped of scientific foundation but infected by lobbyist's bias.

The Forest Service can't satisfy the mandate of Section 10(a) of the Wild and Scenic Rivers Act without prevent water quality from being degraded by recreational activities. This failure to undertake such comparative evaluation evidences a lack of commitment by the Forest Service in protecting the "near natural" conditions found in North Carolina—and for preventing the damages traceable to creek boating.

Section 10(a) does not allow recreational uses, such as whitewater kayaking, to be promoted at the expense of degrading the physical *features* of the river corridor—especially when those physical features constitute the "*special attributes*" of the river—as is the case on the Chattooga in North Carolina.

In establishing recreational user capacity limits, the Forest Service elected to overemphasize subjective "estimates" of social impacts and undesirable encounters between competing recreational users—in lieu of determining which specific recreational activities would exacerbate erosion sites, and in lieu of quantifying the intensity of additional sedimentation that might be expected as a consequence of introducing creek boating to the fragile riparian corridor in North Carolina.

Instead, the Forest Service adopted an arbitrary assumption that all recreational uses are equally responsible for any damage to the riparian corridor, the trout buffer, and the water quality of North Carolina.