



Kevin Colburn
National Stewardship Director
P.O. Box 1540
Cullowhee, NC 28723
828-712-4825
kevin@americanwhitewater.org

www.americanwhitewater.org

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Proposed Rule Amendment

c/o USDA Forest Service, R8 Planning

1720 Peachtree Street NW. Suite 811N

Atlanta, GA 30309

Submitted electronically to: *commentssouthern-regional-office@fs.fed.us*

Dear USDA Forest Service.

American Whitewater is a national non-profit organization dedicated to river restoration, conservation, access, and safety. We are active steering committee members of the Outdoor Alliance, a coalition of groups representing citizens who treasure human powered outdoor recreational opportunities and the public lands and waters that support those experiences. We are active participants in regional forest planning efforts, and advocates for sustainable recreation as envisioned in the 2012 Forest Planning Rule. We have sought protective and sustainable river management on the Upper Chattooga since at least 1995.

Paddling is now, and always has been, a non-issue on the Upper Chattooga River. All evidence, including the small amount of paddling demand documented since 2012, continues to show there is no need whatsoever for the severe paddling bans and limits on the Upper Chattooga. We understand that the Proposed Rule Amendment (Proposed Rule) is simply meant to codify the 2012 Decisions, and may not revisit those Decisions. We thus focus these comments on portions of the Proposed Rule that stray well outside of the scope of the 2012 analysis. We must however point out that this Proposed Rule is based on use and impact predictions on the entire Upper Chattooga that have since been proven wrong, and it should not be implemented. The discredited geographical, flow, and seasonal paddling bans should be lifted – not codified. There is no reason to make paddling a crime on this Wild and Scenic River.

The Proposed Rule relating to the management of the Chattooga River errs by applying the Proposed Rule outside of the geographical scope of the analysis it tiers from. In doing so it violates law and policy, and transgresses on state river management authority. In these comments we offer remedies for these errors and others, as well as offering support for easing geographical bounds on permit stations.

1. The proposed regulations should not, and may not, cover the Chattooga River upstream of Green Creek.

The Forest Service wrongly proposes to amend 36 CFR 261.77 to include all sections of the Chattooga River that lie within the Nantahala National Forest, some of which were explicitly excluded and/or omitted entirely from analysis in the 2012 EA.

The Proposed Rule aims to be consistent with the “Forest Service decision on the management of the Chattooga Wild and Scenic River, which lies within the Chattahoochee, Nantahala and Sumter National Forests. The Decision Notices (one for each National Forest) were signed on January 31, 2012, and were based upon an Environmental Assessment (EA) titled “Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor.” The social and environmental effects of this decision are documented in this EA.” This statement is only true downstream of Green Creek. *See Proposed Rule at 2790 - Regulatory Impacts.*

The Proposed Rule thus tiers from the 2012 EA. The EA did not address the Chattooga River upstream of Green Creek, and nor may the Proposed Rule.

The 2012 EA states that boating upstream of Green Creek is “outside the scope of this EA.” All alternatives that allowed any paddling “focus on use downstream of Green Creek...” It further states: “this EA does not analyze potential visitor use issues upstream of Green Creek.” *See EA Page 13.*

The EA references no data, studies, or analyses from the river upstream of Green Creek nor do any alternatives address the need for prohibitions or permits relating to paddling on that reach. The EA in fact explicitly excludes the section of river between Grimshawes Bridge and Green Creek from the scope of analysis.

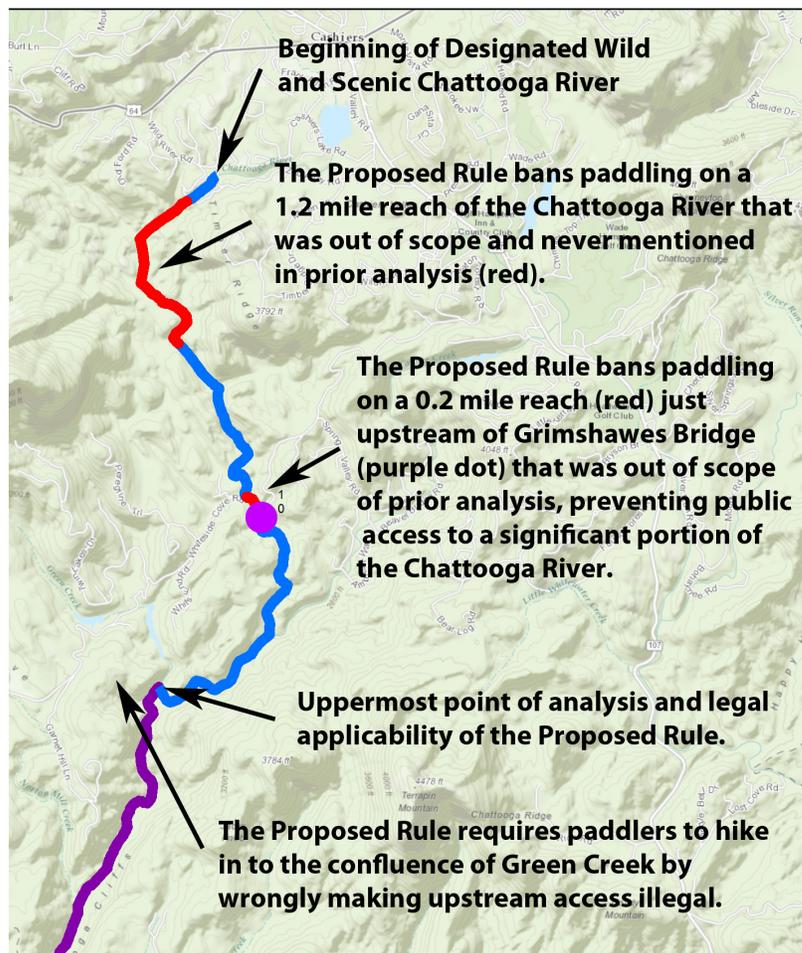


Figure 1. The Upper Chattooga River in NC. Reaches flowing through private land and unaffected by the Proposed Rule are blue, reaches wrongly banned in the Proposed Rule are red, reaches within legal scope of the Proposed Rule are purple, and the purple dot is at Grimshawes Bridge.

The EA is *completely silent* on the Wild and Scenic Chattooga River upstream of Grimshawes Bridge. There is literally no mention in the EA of these reaches totaling 1.4 miles.

All statements in the 2012 EA that speak to the Chattooga River upstream of Highway 28 do so only to the confluence of Green Creek where the scope of the paddling analysis ends. While wording in the related Decisions is unclear as to their intended scope, decisions that tier from the EA may only do so within the clearly defined geographical scope of the EA.

Legal challenges to the 2012 EA and related decisions were likewise limited to the portion of the Chattooga River below Green Creek. The case was limited to “the Headwaters,” which the Court delineated as follows: “The Headwaters is the section of the Chattooga WSR above Highway 28 and is defined as the portion between Grimshawes Bridge in North Carolina and the Highway 28 Bridge in South Carolina and covers approximately 21 river miles.” *American Whitewater v. Tidwell*, 959 F. Supp. 2d 839, 860 (D.S.C. 2013) (“*Tidwell*”). Page 2.

In Plaintiff’s amended complaint the geographical scope was further narrowed to the reach between Green Creek and Highway 28, a change in scope adopted by the Court. Thus, the court decisions neither considered nor reached decisions on the effect of the plan amendment on the Chattooga River upstream of Green Creek. *American Whitewater v. Tidwell*, 959 F. Supp. 2d 839, 860 (D.S.C. 2013) (“*Tidwell*”). Page 8.

The Proposed Rule is legally limited to the portion of the river where the Forest Service has studied the need for issuing permits and what the content of those permits should be. That portion of river unequivocally begins at Green Creek. The Proposed Rule may not ban paddling on the Wild and Scenic Chattooga River upstream of Green Creek based on an EA that did not consider the impacts of, or need for such a ban.

The Land and Resource Management Plan (LRMP) for the Nantahala National Forest contains the Comprehensive River Management Plan (CRMP) for the Wild and Scenic Chattooga River. These plans replace all prior plans in their entirety. The new EA and plan excluded or omitted any consideration of regulating recreational paddling upstream of Green Creek. Thus, no evidence of need for paddling permits or prohibitions exist on this reach, and other forest-wide plan components regulate paddling use on these reaches. These components support and fully allow dispersed non-motorized recreation like paddling.

Thus we request the following additions be made to the proposed rule, in bold:

§ 261.77 (a) Using or occupying any area of National Forest System land abutting the Chattooga River **downstream of the confluence of Green Creek with 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.)

§ 261.77 (d) Entering, going, riding, or floating upon any portion or segment of the Chattooga River within National Forest System land **downstream of the confluence of Green Creek with the Chattooga River** 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.

2. Infringement on State Authority

The proposed rule wrongly claims: “this proposed rule... will not have substantial direct effects on... the relationship between the Federal government and the States, or the distribution of power and responsibilities among the various levels of government.” *See proposed rule at 2790.*

Recreational paddling rights are protected under the public trust doctrine and are a matter of state law. The Supreme Court of the United States confirms: “Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders...” *See PPL Montana, LLC v. Montana.*

Under North Carolina law, citizens have the right to paddle rivers in canoes and kayaks. The North Carolina Attorney General was asked: “Do all citizens have the right to travel by boat down the course of North Carolina streams that are navigable in fact by canoe or kayak, without the consent of riparian property owners?” The formal 1998 opinion answered:

“The answer to your question may be summarized as follows: Yes. Citizens have the right to travel by "useful vessels" such as canoes and kayaks, "in the usual and ordinary mode" on waters which are in their natural condition capable of such use, without the consent of the owners of the shore.”

Citizens thus have the right to float the Chattooga River as it flows through North Carolina, regardless of land ownership. The proposed regulations would foreclose that right on two reaches under USFS ownership totaling 1.4 miles of the Chattooga River upstream of Grimshawes Bridge.

The Forest Service bans the state-held public trust right of paddling on no other boatable river in the entire National Forest System or Wild and Scenic River System. The Chattooga is also the only river banned to boating by any entity in all of North Carolina. This is a nationally unique infringement on the State of North Carolina’s rights.

The Forest Service has argued elsewhere that they have the authority to regulate recreational navigation on rivers flowing through Forest Service lands. Setting aside legal arguments and rulings to the contrary, we support the Agency’s river management authority, though not without

sideboards. There simply must be an analysis supporting the need to prohibit or limit public trust navigation if the Agency seeks to do so. If there is any standard for the federal government foreclosing state public trust authority it has not been met for these river reaches of the Chattooga River, upstream of Grimshaws Bridge, on which paddling was never mentioned or considered in the Federal environmental review.

In fact, there are standards for preempting state authority. Section 3(b) of Executive Order 13132 states that “National action limiting the policymaking discretion of the States shall be taken only where... the national activity is appropriate in light of the presence of a problem of national significance.” There is no problem of national significance with paddling on the Upper Chattooga, and no analysis documenting or even predicting any problems whatsoever upstream of Green Creek.

Section 4(c) of the same Executive Order states: “Any regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated.” There are no objectives of this statute relating to the Chattooga River upstream of Green Creek, and no evidence of need of any regulation. The minimum level of preemption needed is none at all.

3. We support the proposed elimination of specific codified permit stations.

Citizens wishing to paddle the Chattooga must navigate a complex and unique barrage of Agency deterrents including seasonal bans, water level bans, geographical bans that force hike-ins and hike-outs rather than allowing existing bridge access, as well as mandatory permit acquisition. These nationally unique limits and bans make descending the river artificially time-consuming, energy intensive, and complicated, while forcing people to only paddle during short and often cold winter days. Expansion of where people can acquire permits, especially if an online option were to become available, would lower one hoop the public is made to jump through to float the Chattooga River.

4. The Proposed Rule should define “the River.”

The Proposed Rule at § 261.77(a) and elsewhere refers to “the River” without defining “the River.” This lack of clarity has caused confusion in the past, and we ask that the proposed rule consistently use the term “Chattooga River.”

5. The Proposed Rule unsafely prohibits swimmers from wearing life jackets.

The Proposed Rule at § 261.77(d) prohibits “Entering ... any portion or segment of the Chattooga River within National Forest System land in ... any floatable object...” This language prohibits people (including children) from swimming or wade-fishing with life jackets on. We ask

for the sake of public safety that the rule clearly state that the public is welcome to wear a life jacket or similar swimming aid in the Chattooga River.

6. The Proposed Rule should not include false historical information.

The Proposed Rule wrongly states: "In the initial 1976 river management plan for the Chattooga River, the U.S. Forest Service used zoning to manage the upper and lower segments of the river for different recreational opportunities." *See proposed rule at 2788*. There is no basis for this claim. The 1976 development plan noted the rocky low-water nature of the river as a basis for recommending against paddling these reaches, and the 1976 land and resource management plan officially banned paddling for "public safety." There is no evidence of zoning for different recreational opportunities: it was, at least on paper, a public safety closure. We request the Proposed Rule not contain any revisionist history of this bad decision, and recommend simply stating that paddling the river was banned in 1976.

Thank you for considering these comments.

Sincerely,

Kevin Colburn
National Stewardship Director
American Whitewater
PO Box 1540
Cullowhee, NC 28723