

USDA Forest Service, R8 Planning,
1720 Peachtree Street NW., Suite 811N,
Atlanta, GA 30309

March 15, 2016

RE: Proposed Rule Amendments to CFR § 261.77(c) [Fed Reg Jan 19, 2016]

To Paul Arndt as the Region 8 Planner, legal review team and Agency Decision Makers,

As written, the proposed revisions to CFR § 261.77 are inconsistent with the 2012 Planning Decisions to which they are purportedly based. The CFR seeks to retroactively redefine the management direction established by the 2012 Planning Documents. The imaginative reinterpretation of the current operative Plans sets a management direction that is inconsistent with, and not supported by, the 2012 Planning Documents and Decisions. This contradictory direction adversely affects the Whiteside Cove Associations use and enjoyment of the resource. The revision would invalidate the court's rationale for upholding of the 2012 Decisions, and finally the revision would circumvent the obligatory statutory schemes that require an assessment, opportunity for public review, and judicial oversight under the APA. The proposed rule attempts to alter management course of the resource by *ipse dixit*. These seeming innocuous changes proposed for CFR § 261.77 -in conjunction with other recent management actions on the upper Chattooga- significantly alter management direction defined by the 2012 Forest Plan Amendments and are unsupported by the underlying record.

The Whiteside Cove Association has participated in the Forest Service Administrative proceedings since 2005, when the agency included the Private Segment¹ of the Chattooga Wild and Scenic River in their analysis. The Association has filed substantive comments to each proposed action and has appealed the 2009 and 2012 Planning Decisions, the associated 2015 Decisions, and now comment on the proposed revisions to CFR § 261.77(c). The Association has also Petitioned the agency to reverse the alterations made to the Chattooga Floater Permit outside of the NEPA process. The Association considers all these Actions and Decisions associated with the upper Chattooga as connected actions that should have been considered collectively in a single review process. The Association retains its' right to challenge each action, or the collective, under the Administrative Procedures Act and the US constitution.

Our detailed comments are provided below. Many of our concerns could be corrected by including a statement that would confirm the proposed revisions remain limited by the 2012 Decisions as stated and a correction to the interconnected floater permit.

Sincerely
Michael Bamford
Whiteside Cove Association
Cashiers, NC 28717
mbamford123@gmail.com

¹ The Private segment refers to a Chattooga Wild and Scenic River-segment located above Greens Creek that is owned by the Rust family and which a portion of is leased to the Whiteside Cove association. The USFS has documented private ownership of this segment in Planning documents and conceded ownership in Federal Court.

Background:

The Rust Family have resided on the Chattooga River since 1946. The Family own a segment of stream which has been designated the Chattooga Wild and Scenic River upstream of Greens Creek and below Grimshawes Bridge, (the "Private Segment"). Since 1958, the Whiteside Cove Association have leased a portion of the Private Segment for their recreational use and relaxation. In 1974 the Chattooga watershed -including the Private Segment- was added into the National Wild and Scenic River (WSR) system. Under the WSR Act, administrative obligations are mandated, but these obligations can not abrogate existing property rights. The Act defining the contours of agency obligation and jurisdiction at the contours of existing rights.²

Since the original River Management Plan in 1976, floating was permitted downstream of highway 28 and prohibited above. In 1978, 36CFR 216.77 was published with the corresponding and original floating permit. Floating was prohibited without a floater permit, and floaters had to comply with the conditions of the Floater Permit. One condition of the Floater permit stated that floating upstream of highway 28 is prohibited. The combination of the CFR and Floater Permit became the mechanism to enforce the provisions in the 1976 River Management Plan, which limited floating to the lower 35 miles in order to accommodate other uses upstream.

The Permit and River Plan were renewed in 1980, 1985 and again in 2004. The kayak lobby appealed the 2004 Decision to continue the prohibition on floating. In 2006, the legality of the prohibition was challenged in North Georgia Federal Court. It was challenge was from Grimshawes bridge downstream to highway 28; this included the Private Segment. The ultimate court ruling explained in detail the history of the prohibition from 2004 up until 2006 as is paraphrased here. see *Whitewater v USFS (2006) N.GA p.1-3*. Ultimately the court upheld the prohibition on boating above highway 28 as it existed in 2006, and found unripe any challenge to the future 2012 Decisions. The Courts ruling established the base-line regulatory status on the Chattooga River above highway 28. Floating was 100% prohibited.

In 2012, the USFS published a new management direction for floating on the upper Chattooga. The 2012 Plan Decisions³ continued to prohibit boating above highway 28, but added some explicitly defined exceptions to the rule. See 2012 Sumter Decision Notice page A-1.

The kayak lobby again litigated this time adding a claimed "*constitutionally protected liberty interest*" to travel by boat down the Chattooga; this litigation again included the Private Segment. The court ruled that the liberty interest was not a constitutionally protected right or an individual entitlement. The court also ruled that *floating is not an outstanding and remarkable value for which the Forest Service has an obligation to "protect and enhance"*. These ruling were upheld by the 4th circuit.

² The Wild and Scenic Rivers Act (WSR Act) P.L. 90-542, 16 U.S.C. §§1271 et seq.

³ The 2012 Planning Decisions comprise all Planning documents associated with the new management direction for the Chattooga Wild and Scenic River as published in the January 31, 2012, Chattahoochee, Nantahala and Sumter National Forests' Decision Notices that amended their Forest Plans. And The 2012 EA titled "Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor".

Further, the Court found the property and jurisdictional issues raised by the Rust Family in cross and counter-claims were *not ripe for judicial review and dismissed them without prejudice*, because the agency policy prohibited floating upstream of Greens Creek which includes the Private Segment. These CFR Revisions, and post 2012 Actions, make these issues ripe for review now! Similarly, the Court dismissed the Rusts claims that the 2012 Assessment lacked analysis of potential indirect impacts from the 2012 agency Actions, because floating remained prohibited upstream of, at and through, the Private Segment. Here the CFR Revisions contradict these courts findings by retroactively describing the 2012 Planning Documents in contradiction to the actual text, and in contradiction of the Court rulings.

In order to justify the proposed CFR revisions, the agency has disregarded the court findings, imaginatively redefined their own 2012 Plan Decisions, and expanded the scope of the narrow 2012 Environmental Assessment to include broadly expanding individual forest official discretion to authorize use wherever and whenever an individual officer “considers” acceptable. The CFR reaches the untenable by delegating discretionary authority to local Forest officials to interpret complex administrative statutes, Planning documents, property law, public rights and case law based that official opinion; this proposition is an absurdity! The basis supplied to justify the proposed revisions to CFR § 261.77(c) are simply not accurate, and as listed in our comments here, well beyond the scope of congressional delegated authority.

The Whiteside Cove Association as lessees to the Private Segment possess – in conjunction with the property owner- inalienable property rights to the Private Segment above Greens Creek. The Whiteside Cove Association and Rust Family are adversely affected by the CFR Revisions alone and when combined with the collective set of Agency Actions, Decisions and Statements all presumably related to the 2012 Planning Documents and Decisions.

WHITESIDE COVE ASSOCIATION DETAILED COMMENTS

I. The Proposed Revisions to CFR § 261.77 contradict the 2012 Plan Documents:

A: “Allow” is diametrically opposed to “Not Allow”.

- a) The 2004 Chattooga River Management Plan states: “Floating on the Chattooga River is not allowed upstream of the Highway 28”
- b) The 2012 Decisions reiterates that floating is “Not Allowed above highway 28”, but adds some limited exceptions. The Plan Amendment instructions are listed here:

After “2.A.-1 Floating on the Chattooga River is not allowed upstream of the Highway 28 bridge” replace the period with a comma and add, “except non-commercial boating is allowed on approximately 17 miles of the 21-mile main stem only from December 1 to April 30 from the confluence of Green Creek downstream to the designated take out within one-quarter mile downstream of the Lick Log confluence by issuance of a self registration boating permit”

2012 Decision Notice p. A-1

- c) Conversely, the Proposed CFR Revisions assert the 2012 Decision “Allows floating”.
- d) A clear contradiction exists between the current Plans (River Management and Forests), and the proposed revisions to CFR § 261.77.

- e) As written the operative River Management & Forest Plans require explicit authorization before floating the upper Chattooga. This, while the CFR proposes allowing use, unless explicitly restricted.
- f) The administrative proposition within the proposed rules contradicts the operative Plans.
- g) The Federal Court rulings defined the 2012 Plan Decisions as the “continuation of the floating prohibitions” where and when explicit exceptions to the full prohibition were not provided. see *Whitewater v. USFS* 770 F.3d 1108, 1120-1121, 4th (2014).
- h) The Federal Court relied upon “the continued floating prohibition” where not explicitly allowed (specifically above Greens Creek) in its’ ultimate rulings. *id*, see also *Whitewater v. USFS* 8:09-2665-MGL (2012)
- i) Therefore, the proposed rules also contradict the Courts understanding of the 2012 Plans.
- j) The proposed rules invert the approved management proposition under the 2012 Decisions. This perverted management proposition is unsupported by the record.
- k) The new rules create a ripple effect of management actions which if approved would contradict the operative Plans, the governing WSR statutes, and the associated case law.

B: The 2012 Decision did not expand Agency Discretion, nor was this Assessed.

- a) The 2012 Forest Plan explicitly defines the limited exceptions to the complete prohibition on floating the upper Chattooga. Conversely, the proposed CFR Revision claim that floating is generally “allowed” and expands Forest Official discretion to issue *Special Use Authorizations* without limitations.
- b) *Special Use Authorizations* provide new and undefined forest officials discretion that was never assessed in the 2012 (EA), nor was it part of the 2012 Amended Forest Plans.
- c) Under the current Plans, floating is prohibited with explicitly defined exceptions. The effects from removing the prohibition were never assessed upstream of Greens Creek on either the National Forest or the Private Segments.
- d) The “proposed rule change” has no basis for expanding agency authority in excess of that assessed in the 2012 Planning Documents
- e) Forest Officials cannot “allow” “permit” or “authorize” floating anywhere or at anytime on the upper Chattooga Wild and Scenic River as is suggested in the CFR Revisions.
 - i. Granting infinite discretion for a Forest official was not assessed as part of the 2012 EA, nor was it incorporated into the 2012 Plan Decisions. Rather the 2012 Decisions, established places and times when boating would remain prohibited.
 - ii. Further, some segments of the Chattooga River are beyond the scope of Forest Officials statutory authority and discretion; these include the Private Segment and any State-owned River segments.
 - iii. The 2012 EA found that “allowing floating” outside of Winter months would cause significant harm to other users, like hikers, birders, anglers and of course swimmers.
 - iv. The EA found “allowing floating” at flows lower than 350cfs would cause significant interference with anglers. Upheld, *Whitewater v. USFS* 770 F. 3d 1108, (2014)
 - v. Allowing, authorizing or permitting floating downstream of Licklog Creek was found to interfere with other river visitors. This continued prohibition was also upheld. *id*

- vi. Allowing, authorizing or permitting floating upstream of Greens Creek was considered but rejected by the USFS due to likely interference with private.⁴
- vii. The “continued floating prohibition” above Greens Creek was relied upon in the Federal Court’s ultimate rulings. *Whitewater v Tidwell* 770 F. 3d 1108,11214th (2014)
- viii. Finally, Egress points for floaters was limited to 5 (five) discrete sites along the upper Chattooga River that are listed explicitly in the 2012 Forest Plan. The discretion to permit or authorize access at other sites, especially at or above Greens Creek, has not been assessed and the court noted that allowing such access may have resulted in a different ruling. see *Whitewater v. USFS 4th circuit* (2014)
- f) The limitless expansion of Forest Officials discretionary authority to permit floating anywhere was never assessed in the 2012 EA.
- g) The proposed rule change is unsupported by the facts in the cited Planning Documents.

C: Inconsistent Geographic Scope between 2012 Decisions and proposed CFR.

(the Wild and Scenic River Boundary is not the same as the National Forest System)

- a) The scope of the 1978 CFR is based on the *National Forest*. The scope of the 2012 Decisions and Assessment are based on the *Wild and Scenic River designated boundaries*. The proposed revision would change the scope to the *National Forest System*.
- b) The Three (3) different geographic scope each alter the meaning of the action under review.
- c) The Designated Boundary of a Wild and Scenic River (WSR) includes non-Federal property. WSR boundaries encompassed state-owned waterways and our Private Segment of stream.
- d) The geographic scope of the existing CFR is defined by the boundary of the “National Forest” which includes privately owned land within the Boundary. i.e. the Private Segment. .
- e) The National Forest System is limited to “federally owned” land and resources, and any “interest in non-federal property” under which congress explicitly granted agency authority.
- f) Therefore, the scope of the Revised CFR is inconsistent with the 2012 Plan Decisions and the previous CFR. Altering the geographic scope of the CFR alters its’ meaning.
- g) The proposed Rule acknowledges that current regulations are based on the WSR boundaries, not the National Forest System boundaries. Noting current regulations “prohibits floating activities on the Chattooga Wild and Scenic River (WSR) unless authorized by permit” “floating was allowed...downstream of GA/SC Highway 28, and prohibited upstream.”
- h) Two separate Federal courts ruling confirm this pre-revision meaning of the regulations⁵.
- i) Altering the geographic scope in the CFR alters the meaning of the regulations promulgated by the River Management Plan and Forest Plans. The altered scope voids the continued prohibition over the Private Segment, and any regulation over state-owned segments of the

⁴*Whitewater v Tidwell* 770 F. 3d 1108,1120 4th Circuit (2014) “As the Forest Service points out, the uppermost portion of the Headwaters opened to floating [] is downstream from the Rusts’ property line. The uppermost put-in location is another quarter-mile further downstream....The situation might be different if the Forest Service had allowed floating upstream of the Rusts’ land — but the agency rejected that option, precisely because it might present an increased risk of trespass.”

⁵ *Whitewater v. Tidwell* 8:09-2665-MGL (2010) note 4 “promulgated in 1978 and officially prohibited all floating on the Chattooga except where allowed by permit issued by the USFS.” See also *See Whitewater v. Bosworth*, 2:06-cv-00074-WCO 4 (N.D. Ga. Oct. 6, 2006) pg 2, 3.

Chattooga River in South Carolina. As worded the proposed CFR Revision voids much of regulations and direction within 2012 Plan Decisions.

- j) Multiple Federal court rulings relied upon the existence of the floater prohibition extending on the WSR boundaries upstream of Greens Creek and across the Private Segment. see *Whitewater v. USFS 2006 N.GA, 2010-2013 SC, 2014 4th circuit.*
- k) These same court rulings relied upon the agency jurisdiction being valid over the Chattooga River segments throughout South Carolina, regardless of the State's claimed ownership.
- l) The geographic scope change eliminates the protection of property rights and invalidates the CFRs with respect to preventing floating below Licklog Creek to protect anglers.
- m) As written the proposed revisions to CFR § 261.77 are a significant departure from the current status or the 2012 Plan Decisions and Documents. This adversely effects the Association's and the Rust Family property rights and their angling interests in SC.

II. The Narrow Scope of 2012 Assessment does not support an ambiguously broad revision to the CFR.

The proposed revisions to CFR § 261.77 purport to be "*based upon a 2012 Environmental Assessment (EA)... The social and environmental effects of this decision are documented in this EA. [making the CFR Revision] consistent with this new management decision.*"

However, as explained above, the CFR Revision are in juxtaposition with the 2012 Plan Decisions. Additionally, the scope of effects analysis conducted based on the 2012 Decisions is woefully deficient as basis for the proposed revision CFR § 261.77(c). The 2012 Decision and narrow Assessment fails to support or justify the broad scope of actions being proposed by the revision to CFR § 261.77. A deficient assessment results in an arbitrary and capricious set of Decisions on the upper Chattooga that must be set aside by the courts under the Administrative Procedures Act.

- a) As explained above the 2012 EA did not assess "allowing" boating anytime and anywhere within the WSR Boundaries or within the National Forest boundaries.
- b) Over eighteen "alternative management strategies" were proposed and assessed during the 2008-2012 Planning documents. None of these alternatives match in scope the proposed revision to CFR § 261.77.
- c) It would have been impossible for the agency to have conducted the necessary "comparative analysis" required under NEPA without having first included the alternative proposed by the proposed rule change in CFR § 261.77 before the 2012 Assessment.
- d) In fact, the final EA acknowledges that it never assessed the impact of lifting the prohibitions on the four miles of the Chattooga WSR above Greens Creek, or on the ¼ mile of National Forest below Greens Creek, The Court noted:
"As the Forest Service points out, the uppermost portion of the Headwaters opened to floating [] is downstream from the Rusts' property line. The uppermost put-in location is another quarter-mile further downstream. *Whitewater v Tidwell 770 F. 3d 1108,1120 4th Circuit (2014)*
- e) The proposed rule change is premised upon a reversal of the position the agency took in court to justify their 2012 Decisions.
- f) The 2012 Assessment also found that floating should remain prohibited below Licklog Creek, during the Spring, Fall and Summer months, and when flows were under 350cfs.

The court relied on, and cited to, the 2012 EA when upholding these very prohibitions that were challenged by the kayak lobby. see *Whitewater v USFS SC 2013, upheld 2014*.

- g) The underlying record does not support allowing unlimited floating, or the absence of any floating prohibition, above Highway 28.
- h) The Court labeled the 2012 Decision “intermittent”, because floater egress sites and their associated impacts were only “temporary”. The agency argued the lack of assessment was forthcoming in a future NEPA process. Therefore, the 2012 EA never conducted assessment on egress sites other than the five discrete locations labeled in the 2012 and later in the 2015 EA. see *GA Forest Watch v USFS (2015) SC*.
- i) Therefore, the 2012 EA and underlying record only supports a few limited locations for floater egress sites. The record does not support the broadly proposed rules change.
- j) The District and 4th circuit Court also relied on the *continued floater prohibition above Greens Creek* to support the agencies claim that such an assessment was not necessary. The court cited to the 2012 EA’s explanation that no assessment was ever conducted on the four uppermost miles. see *Whitewater v. USFS 4th (2014), SC(2013)*.
- k) The 4th circuit Court cited to, and relied upon, the 2012 EA’s justification for not assessing the four miles of the Chattooga WSR above Greens Creek, before finding against the Family NEPA claims. *Whitewater v. USFS 770 F.3d 1108, 1120-1121, 4th (2014)*.
- l) The effects analysis and 2012 EA did not consider allowing floating above Greens Creek.
- m) The proposed revisions to CFR § 261.77 is not supported by the record.
- n) The scope of the 2012 EA creates a ceiling, not the floor, for any agency actions.
- o) The proposed CFR Revisions would circumvent the necessary procedures for revising Plans as outlined under the National Forest Management Act 36 CFR §§ 219.1 - 219.62) and under the National Environmental Policy Act (NEPA) (36 CFR §§ 220.1 - 220.7).
- p) These statutory schemes were established to protect the Constitution’s due process rights of citizens that require an opportunity to be heard at meaningful time and in a meaningful place to challenge a Federal Agency Decision before a regulation is promulgated. The proposed action violates the Association’s and Family’s constitutionally protected rights.
- q) The erroneous interpretation of past Planning Document would circumvent the protective statutory construction which provides adversely affected parties the right to challenge an agency action, rule or statement in a court of law. (5 USC §§ 701-706)
- r) As Judge O’Kelly ruled with regards to this very issue on the Chattooga WSR:
Opening the Chattooga for floating without the necessary assessments “would violate a host of environmental laws.” *Whitewater v. USFS*, 2:06-cv-00074-WCO 4 (N.D. Ga. Oct. 6 2006)
- a) The 2012 EA that forms the underlying record, does not support the sweeping changes being proposed in the revision to CFR § 261.77, nor does the law.

III. The 1978-2013 Chattooga Floater Permit compared with a Special Use Authorization.

- a) A violation of current CFR § 261.77 includes “failing to comply with any of the terms or conditions of any permit...”
- b) The proposed CFR § 261.77 would prohibit “failing to comply with any of the terms or conditions of any special use authorization or permit authorizing the occupancy and use”

- c) While the original/current CFR 261.77 included a copy of a Chattooga-specific floater permit that listed the “conditions of the permit”, the proposed CFR Revision provides no permit conditions whatsoever. This leaves the proposed Rule undefined and limitless.
- d) Without listing “Conditions” of the Floater Permit, it impossible to know if the CFR revisions are consistent with the 2012 Forest Plan Amendments. However, we know :
 - i. The Floater Permit in place from 1978 to 2013, included a condition that **“floating is prohibited above Highway 28.”**
 - ii. Without any public review process, the Forest Service has altered the conditions of the floater permit to exclude any condition that would limits or prohibits floating at all.
 - iii. The Whiteside Cove association filed a Petition in 2015 requesting the Forest Service either alter the conditions of the illegally revised Floater permit, or to revert back to the original floater permit until such time as a new permit could be properly promulgated. See Appendix E
 - iv. Without including the prohibitions from the 2012 Decisions as a condition of the permit, floaters comply with the 36 CFR 261.77 by ignoring any limitations whatsoever. The CFR itself by becomes toothless, a meaningless regulation without the backing of law.
 - v. Because the conditions of the permit are interconnected with the CFR they are connected actions that must be considered in tandem with the CFR. They can not be separated else the proposal being asked becomes infinitely broad and unsupported.
 - vi. Segmentation of review of these changes is an illegal partitioning of the Decisions under the NEPA connected actions clause.
 - vii. Without the prohibitions listed as a condition on the floater permit, alters the meaning of the CFR and makes the proposed CFR inconsistent with the 2012 Decisions.
- e) The CRF revisions expand Forest Officials authority and discretion to include “*special use authorizations*” without defining any limitations to this new authority.
- f) “*Special-use authorization* means a permit, term permit, lease or easement which allows occupancy, or use rights or privileges of National Forest System land.” 36 CFR §261.1a
- g) Under 36 §261.1a, any Forest Officers would be granted broad discretion to issue a *special use authorization* with whatever conditions “that officer considers necessary”
- h) The 2012 Environmental Assessment does not support allowing boating upstream of Greens Creek, over the Private Segment, below LickLog Creek, outside of the Winter season and at lower flows. Therefore, providing such broad discretion to authorize such uses within this CFR would “violate a host of environmental laws”⁶
- i) Because some conditions for any *special use authorizations* are illegal, and outside the scope of agency authority, granting such unrestricted authority in the proposed revision to CFR § 261.77 is in excess of statutory authority must be set aside. 5 U.S.C. §706(2)
- j) Recent actions by Forest Officials show a willingness to ignore the Forest Plans and regulatory statutes by authorizing use to their “chums” with kayaks. see d) above.
- k) Therefore, the evidence in this record does not support granting expansive discretion to these same officials that have shown a willingness to ignore Plans and property rights.
- l) The original intention of the CFR and Floater Permit in 1978 was to regulate floater use and to effectively communicate these regulations to the floating public. The proposed CFR Revisions -in conjunction with the illegally revised Permit- obscures this regulation, and grants discretionary authority to forest officials that are shuffled around to different

⁶ Upper Chattooga litigation Whitewater v, Bosswell 2006 N GA Final Order.

positions like cards in Vegas. (Since 2004, these agency actions have been overseen by four different Regional Foresters, with 10 (ten) different Forest Supervisor.)

- m) The lack of consistency in Forest personnel requires that Forest Plans and CFRs concisely define the limits of agency discretion within the Plans and CFRs, else. Planning documents and CFRs become as worthless as the paper they are written upon.
- n) The CFR Revisions -coupled with the change in conditions of the floater permit- do not comply with the 2012 Plan Amendments, the Chattooga River Management Plan, statutes or case law. Coupled with the requested expansion of agency discretion in this proposed CFR Revisions, results in a rule change in excess of statutory authority.
- o) The undefined expansion of agency discretion in the proposed revision is not supported by the operative Plans, the 2012(EA), the underlying record or the law.

IV: North Carolina's inclusion into CFR § 261.77

- a) We applaud the inclusion of North Carolina into the proposed CFR to streamline regulations, however the CFR revisions inaccurately portray the prohibition on floating in NC as a “new” regulation. This contradicts the underlying record.
- b) The scope of the 1976-2004 River Management Plans, and the 2012 Amendments have always been based on the Boundaries of the Chattooga Wild and Scenic River. And, the River Plan is imbedded into the current Forest Plans. See I. c. above
- c) Even the proposed CFR Revisions acknowledges that WSR boundaries, not the National Forest's, establish the scope of the current regulations: ((*“prohibits floating activities on the Chattooga Wild and Scenic River (WSR) unless authorized by permit”* *“floating was allowed...downstream of GA/SC Highway 28, and prohibited upstream.”*))
- d) In 2006, then supervisor Marisue Hilliard issued a Closure Order that prohibited floating in North Carolina. The Order has been renewed twice due to delays with this CFR. Mrs. Hilliard documented the legal basis for the Closure Order as an “oversite” and necessary to comport with the 1976-2004 River Management Plans.
- e) Therefore, the Closure Order is not an independent rule, but rather clarity of an existing regulation. The same regulations on which the 1978 CFR was based.
- f) The inclusion of North Carolina into the CFR is the promulgation of a rule that has been in place since 1976, and based on the WSR boundaries and not the National Forest's.
- g) The Rule change distorts the current regulation and rationale for including North Carolina into the CFR. It ignores, or attempts to reverse, the continued floater prohibition above Greens Creek and across the Private Segment. see *Whitewater v. USFS* 4th @1121

V: A Taking Analysis was not conducted as claimed and required

- a) A “regulatory Takings” occurs when a government regulation, rule or policy statement causes a meaningful interference with an individual's possessory interests in that property.” *Presley v. City of Charlottesville*, 464 F. 3d 480, 487, 4th (2006).
- b) By the removal of the court-recognized *continued ban on floating upstream of Greens Creek*, the CFR revisions redefine the 2012 Decisions as already having caused a meaningful interference with our property interests. i.e. effected a taking.
- c) The proposed revision to CFR § 261.77 states that the proposal has been “analyzed in accordance with Executive Order 12630 and found to have no takings implications”.

- d) The proposed CFR Revision does not include such an analysis, nor was the supporting documentation made available upon request.
- e) The 2012, from which this CFR revision is supposedly based, did not include the obligatory takings analysis. We note that deficiency again here.
- f) Section II of Executive Order 12630 states: "Policies that have takings implications refers to Federal [actions], proposed Federal regulations, or other Federal policy statements that, if implemented or enacted, could effect a taking of property." {emphasis added}
- g) The Forest Service admitted that they never considered the effects Forest Service actions may cause to the Private Segment in the 2012 EA, i.e. the underlying record.
- h) The 4th circuit defines a taking as any meaningful interference with property rights, caused by an agency action either directly or indirectly. see *Presley v. Charlottesville*
- i) Under the Wild and Scenic River's Act, condemnation (reverse or otherwise) is prohibited by statute. 16 USC § 1277
- j) Therefore, by altering the meaning of the 2012 Plan Decisions in the proposed action is also prohibited under the WSR Act and in excess of statutory authority.
- k) Previous objections, petitions and appeals by the Association challenged the adequacy of the upper Chattooga Planning Decisions and Documents where they cloud our property right⁷ to exclude the public and Government from the Private Segments of the Chattooga and illegally obscure the Forest Service Action being proposed⁸. The reversal of the previously acknowledged continued floating prohibition on the four miles of the Chattooga above Greens Creek, including the USFS land upstream of the Private property, invalidates each Forest Plan Decision since 2012 and the underlying case law.
- l) Due to the ambiguity in recent Forest Plans and Decisions for the upper Chattooga, the Private Segment has experienced property damage and harassment. **One deranged visitor to the Chattooga-River threatened an Association member at gunpoint under the mistaken belief that the Private Segment was available for public use.**
- m) Since the scope of the proposed CFR revisions extends well beyond the limits placed on floating by the 2012 Plan Document, and because segments of the Chattooga River are private property, the broadly-defined CFR revisions could effect a taking if promulgated.
- n) Because it is a mathematical impossibility to conduct an infinitely broad takings analysis that assessed the undefined expansion of regulations in the proposed revision to CFR § 261.77, it would be impossible for this takings analysis to have ever been conducted as is claimed in the Federal Register.
- o) Because a mandated step of conducting the analysis was not complete, this propose revision to CFR § 261.77 cannot be promulgated.**
 - i. Because the Chattooga below Greens Creek is completely within the National Forest System, a taking is only possible above Greens Creek.

⁷ "In the bundle of rights we call property, one of the most valued is the right to sole and exclusive possession — the right to exclude strangers, [and especially the Government." *Presley v. Charlottesville*, 464 F. 480, 492 4th(2006).

⁸:Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, ..and make it an authority for invasion of private right under the pretext of the public good." *US v. Lynah*, 188 US 445, 470.

- ii. Only by limiting the authority of the Forest Service to permit, authorize or allow floating above, through or to start at the confluence of Greens Creek could the Forest Service conclude that no taking has been effected.
- iii. Adding to the CFR that each floater permit or authorization must include the condition that *“Floating the Chattooga Wild and Scenic River above the confluence of Greens Creek remains prohibited”* would not effect a taking.

F: The Floating Prohibitions that continued under 2012 Plan Decisions: :

a) Seasonal Prohibitions on Floating

- The 2012 Decision allowed as a limited exception to the prohibition, floating during the Winter season (Dec-April). See p. A-1
- The 2012 EA justified the continuation of seasonal limitations based on potential and likely interfere with the desired conditions of non-floating Chattooga visitors.
- Changes to these continued prohibitions require a NEPA assessment to prove why the regulation designed to protect the interests of hikers, birders, anglers and swimmers are no longer necessary, and how such a change would “protect and enhance” the physical resource values under 16 USC 1281.
- Therefore, the CFR Revision, which claims that the 2012 Plan “allows” floating without any caveat is misleading and factually inaccurate.
- The retroactively re-interpretation of the 2012 Decisions in the proposed CFR Revision, is not only procedural deficient, it denies potentially aggrieved parties their right to challenge the removal of these continued prohibitions in a public forum.

b) Flow Prohibitions on Floating

- The 2012 Decision only allowed, as a limited exception to the prohibition, floating while flows were above 350cfs (about 20% of all flows). see p A-1
- The 2012 EA justified the continuation of flow level restrictions on the documented interference between anglers and paddlers. Anglers were found to be less likely present when flows exceed 450cfs. see 2004 Sumter RRLM Plan Appendix H.
- Changes to these continued prohibitions require a NEPA assessment to prove why the regulation designed to protect the interests of anglers are no longer necessary, and how allowing floating a insufficient water levels would continue to “protect and enhance” the physical resource values as required under 16 USC 1281.
- Therefore, the Proposed rule, which claims the 2012 Plan “allows” floating without the caveat only at flows above 350cfs is misleading and factually inaccurate.
- The retroactively re-interpretation of the 2012 Decisions in the proposed CFR Revision, is not only procedural deficient, it denies potentially aggrieved parties their right to challenge the removal of continued prohibitions.

c). Geographic limits on Floating

- The 2012 Decision only allowed, as a limited exception to the prohibition, floating between Greens Creek and LickLog Creek. The Decision continued the prohibition on the four uppermost and four lowermost miles of the upper Chattooga. see p A-1
- The 2012 EA justified the continued prohibition below LickLog creek based on the documented interference between anglers and paddlers.
- Changes to these continued prohibitions would require a NEPA assessment to prove why the regulation designed to protect the interests of anglers are no longer necessary, and how expanding floating would continue to “protect and enhance” the esthetic biological and physical resource values as required under 16 USC 1281.
- The 2012 EA justified the continued prohibition above Greens Creek based on likely interference with the Private landowners and their associated property rights.

- The District and 4th circuit Court relied on this continued prohibition in their final rulings before declaring the property issues raised by the property owners were not ripe for judicial review. see *Whitewater v. USFS 2011-2013 (SC)*, held 4th (2014).
- The 4th circuit Court relied on this continued prohibition above Greens Creek to protect the Private Segment from potential interference, when finding against the Family's NEPA cross-claims. see *Whitewater v. USFS 4th (2014) @ 1119-1121*
- Changes to these continued prohibitions above Greens Creek would require multiple assessments and analysis as required under NFMA, NEPA and executive orders to prove why the regulation designed to protect the interests of property rights are no longer necessary, or must provide proof of the transfer of title of the Private Segment from the riparian owners (the Rust Family) into the public domain.
- Therefore, the Proposed CFR, which claims the 2012 Plan "allows" floating without the caveat above Licklog Creek and below Greens Creek is factually inaccurate.
- The retroactively re-interpretation of the 2012 Decisions in the proposed CFR Revision, is not only procedural deficient, it denies potentially aggrieved parties their right to challenge the removal of continued prohibitions.
- Further, the Forest Service are blocked under the rules of estoppel by taking a position contrary to that which it has previously taken in Federal Court.

d) Predefined Floater Egress points:

- Floaters must enter the Chattooga at one of the Five (5) Discretely defined egress points according to the 2012 Decision Notices.
- The USFS plead, and the court relied upon, their being only five discretely defined access points -all existing and downstream of Greens Creek- before approving the 2012 Plan Decision. *GA Forest Watch v. USFS, CV# 8:12-cv-03455-BHH, USFS Motion for Judgment EN#54 p11,12 03/27/15*), see also *Whitewater v. USFS 4th (2014) @1120-21*
- Therefore, for the CFR Revision to purport the 2012 Decisions "allows boating upstream of highway 28" must preclude the segment upstream of the uppermost egress point which is located well downstream of the confluence of Greens Creek.
- Forest discretion cannot be expanded to authorize egress sites or to authorize use that would require new egress sites. Specifically, the agency does not have the discretion to create new river upstream of the Private Segment, or even at the confluence of Greens Creek. These egress points were never assessed in the 2012 EA nor were they assessed in the 2015 Boater Trails EA.
- Since there are no limits placed on authorizing use, the CFR is not supported by the underlying record.
- Further, the proposed CFR seeks to remove any reference to the locations for "obtaining a floater permit" which direct floaters to the approved river egress points. Although defining the locations to "obtain" a permit may become unnecessary in the future, the removal of these locations has serve an additional purpose not considered. The locations correspond to the egress locations allowed prior to 2012 and direct floaters to discrete locations for egress. Because only discrete locations for access were ever approved, locations within the CFR should not simply be discarded. Instead the CFR should replace the locations of where to "obtain" a permit, with the discrete locations for where floater are approved initiate a float trip.
- Only by including the approved egress sites would the proposed CFR revisions remain consistent with the 2012 Planning decisions

G. Proposed alterations to the CFR based on our comments above.

Our Proposed Changes to proposed revisions to CFR§ 261.77

[Changes are highlighted; TEXT Added are in *Italics*, TEXT Removed are ~~striked through~~]

Prohibitions in Region 8, Southern Region.

(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.

Floater egress is limited to Highway 28, Low-Water Bridge, Earl's Ford, Sandy Ford, Highway 76, Woodall Shoals, or Overflow Bridge, Licklog Creek, Burrells Ford, Bull Pen Bridge, and Norton Mill Creek.

(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.)

[REINSERTS FLOATER EGRESS POINT TO REMAIN CONSISTENT WITH 2012 DECISIONS]

(b) Using or occupying within the scope of any commercial operation or business any area ~~of National Forest System land abutting the~~ *within the Chattooga Wild and Scenic River* for the purpose of entering or ~~going, riding or floating~~ upon the River in, on, or upon any floatable object or craft of every kind or description, unless permitted under a special use authorization. *All Commercial floating use above highway 28 will remain prohibited.*

[SCOPE CHANGED TO WSR BOUNDARY AND PROHIBITS COMMERCIAL USE ABOVE HIGHWAY 28 TO REMAIN CONSISTENT WITH THE 2012 PLAN DECISIONS]

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

[MADE REDUNDANT BY PREVIOUS (f), NOW (D BELOW.)]

~~(d-c)~~ Entering, going, riding, or floating upon any portion or segment of the *designated Chattooga Wild and Scenic River within National Forest System land* in, on, or upon any floatable object or craft of every kind or description, ~~or at any egress location unless explicitly authorized by the current floater permit or through a special use authorization.~~

[SCOPE CHANGED TO WSR BOUNDARY. REMOVE EXPANDED SCOPE OF AGENCY DISCRETION TO REMAIN CONSISTENT WITH 2012 DECISION]

~~(e) Entering, going, riding, or floating within the scope of any commercial operation or business upon any portion or segment of the designated Chattooga Wild and Scenic 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.~~

[THIS STATEMENT IS NOW REDUNDANT SEE (b).

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

[CONSOLIDATED WITH PREVIOUS CONDITION (C)]

(e) Nothing herein shall be deemed to constitute any change to the continued prohibitions on the Chattooga Wild and Scenic River above Greens Creek, or to authorize any expansion of floating beyond what is specifically listed in the 2012 Decisions Notices (p.A-1), or otherwise to alter the scope of the January 312012 Decision Notices issued by the Forest Supervisors of the Chattahoochee, Nantahala and Sumter National Forests in any way.

[ADDS ASSURANCE THAT THESE CFR REVISIONS ARE CONSISTENT WITH THE 2012 DECISIONS, AS EXPLAINED IN THE PROPOSED ACTIONS]

2. **Our Proposed Changes to proposed revisions to CFR§ 261.77**

A. Because the *conditions of the Floater Permit* are cited in the CFR, and these conditions can alter significantly the meaning of the CFR, these permit conditions should be included as supporting documentation in the review of this proposed CFR revisions. The language in the CFR and conditions of the Floater Permit are linked within the CFR, an isolated review of either one without the other results in the review of an undefined agency action, which is a violation⁹.

B. To remain consistent with the 2012 Plan Decisions we suggest the Permit Conditions remain consistent with the 2012 Plan Amendment. We suggest:

#1) Reinsert the original permit Condition whereby “floating is prohibited above highway 28”, then list where floating is “permitted” as an exception to this rule.

This text would match the language in the 2012 Plan Decisions. p. A-1.

Alternatively:

#2) Add the word “only” in front of the conditions describing where floating is permitted.

For example: Change “Floating is permitted from ...”

To: “Floating is only permitted from...”

By reinserting (as a condition of the floater permit) that the prohibitions on floating remain active, except where floaters are explicitly allowed, comports with the 2012 Decisions, the operative Forest and River Plans, and the Federal Court Rulings. By setting the prohibition across the private segment as a condition of any and all floater permits, allows the regulation to avoid taking direct action (removing the prohibition) over Private Property, therefore NOT exceeding statutory authority. Without prohibiting boating upstream of Greens Creek, as a condition of the Floater-Permit, the collective agency actions raise the issue as to the scope of Federal Agency statutory authority and discretion over private property within a designated Wild and Scenic River.

Conclusion:

Recent Agency Actions appear to be combative with the Association, property owners and their associated rights. Our repeated appeals, objection and petitions have been unanswered. Suggestions on how to avoid litigation have been disregarded and dismissed by the local forest officials with close ties to the kayak lobby. All our efforts to prevent litigation through the administrative process have been blocked repeatedly by the agency.

---end---

⁹ NEPA requires the USFS “State what the Decision was” 40 C.F.R. § 1505.2(a). BY LAW, a Forest Plan must be “understandable”. 36 CFR §219.30.

Appendix A: proposed revisions to CFR

Action

Proposed rule.

Summary

The Chattooga Wild and Scenic 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. Forest Service regulations generally prohibit floating activities on the Chattooga Wild and Scenic River unless authorized by a permit. 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.

Dates

Comments on this proposed rule must be received in writing by March 21, 2016.

Addresses

Send written comments to Proposed Rule Amendment, c/o USDA Forest Service, R8 Planning, 1720 Peachtree Street NW., Suite 811N, Atlanta, GA 30309. Electronic comments may be sent to *comments-southern-regional-office@fs.fed.us*; or by facsimile to 404-347-5401. If comments are sent electronically, do not duplicate via regular mail. Comments should only address issues relevant to this proposed regulation.

All comments, including names and addresses when provided, will be placed in the rulemaking record and will be available for public inspection and copying. The public may inspect comments received on this proposed rule in the USDA, Forest Service Regional Office, 1720 Peachtree Street, Suite 811N, Atlanta, GA, on business days between the hours of 8:30 a.m. and 4:30 p.m. Those wishing to inspect comments should call ahead at 404-347-4984 to schedule a time and to facilitate entry into the office.

For Further Information Contact

Paul Arndt, Regional Planner, Planning Unit, Southern Region, 404-347-4984. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800-877-8339 FREE between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

Supplementary Information

Background and Purpose for the Amendment

In 1974, Congress designated the 57-mile Chattooga River (and its 15,432-acre corridor) as a component of the National Wild and Scenic River System. The uppermost portion of the Chattooga Wild and Scenic River is located in the Nantahala National Forest (NF) in North Carolina. The river then flows in a southerly, south-westerly direction to form the boundary between Georgia and South Carolina, and also the boundary between the Chattahoochee NF (in Georgia) and the Sumter NF (in South Carolina). 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. As part of the initial zoning effort, management direction prohibited floating on the upper segment above GA/SC Highway 28 (which includes a section of the river in the Sumter NF in South Carolina, a section of the river in the Chattahoochee NF in Georgia, and all of the sections of the river in the Nantahala NF in North Carolina).

Under the authority of 36 CFR 261.70(a)(7), these prohibitions were codified at 36 CFR 261.77 (Federal Register, 43 FR 3706, January 27, 1978). In general terms, 36 CFR 261.77 prohibits floating activities on the Chattooga Wild and Scenic River unless authorized by a permit. Consistent with the river management plan that is incorporated into the forest plans, the original terms and conditions of the permits issued pursuant to 36 CFR 261.77 allowed floating on the Chattooga Wild and Scenic River but only on that portion of the river located downstream of GA/SC Highway 28. Therefore, due to the combination of 36 CFR 261.77 and the terms of the self-registration permit issued pursuant to that regulation, floating was allowed on that section of the river downstream of GA/SC Highway 28 and prohibited upstream from that location. However, that management direction has changed, allowing for an increase in boating opportunities upstream of GA/SC Highway 28. To be consistent with this new management direction, the agency proposes to amend 36 CFR 261.77.

On January 31, 2012, the Chattahoochee, Nantahala and Sumter National Forests issued Decision Notices that amended their Forest Plans to incorporate new management direction for the Chattooga Wild and Scenic River. These changes are based upon an Environmental Assessment titled "Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor". Generally, these new decisions allow floating above GA/SC Highway 28 with certain restrictions.

In the existing regulations at 36 CFR 261.77, the sections of the river that lie within the Nantahala NF in North Carolina are not addressed. This area is instead regulated by Forest Supervisor's closure order pursuant to subpart B of 36 CFR part 261. In the interest of efficiency and clarity, and to be consistent with the new management direction, the Forest Service proposes to amend 36 CFR 261.77 to include sections of the river that lie within the Nantahala NF. Consistent with the new management direction, the Forest Service also proposes to amend 36 CFR 261.77 to include the Sumter and Nantahala NFs in certain provisions that currently only include the Chattahoochee NF. In the interest of further consistency and clarity, and to better serve the public, the Forest Service also proposes to amend 36 CFR 261.77 by eliminating reference to specific locations where self-registration permits are made available to the public. Instead, the Agency will use other means to inform the public of the variety of places where it can go to obtain permits to float the Chattooga Wild and Scenic River. 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."

Section-by-Section Analysis of the Proposed Rule

Part 261, Subpart C—Prohibitions in Regions

§ 261.77 Prohibitions in Region 8, Southern Region.

Revisions to § 261.77(a)

Currently, § 261.77(a) applies to the Sumter National Forest and the Chattahoochee National Forest abutting the Chattooga River. However, this regulation is silent about that section of the Chattooga Wild and Scenic River Corridor that is located upstream of the Sumter and Chattahoochee NFs which lies within the Nantahala NF in North Carolina. The January 31, 2012, decision by the Forest Service allows for additional boating to occur under permit in the upper section of the Chattooga River which in-part is located in North Carolina on the Nantahala NF. Therefore, the regulation needs to be revised to include the Nantahala NF. The Agency proposes that § 261.77(a) now be applicable to "any area of National Forest land abutting the Chattooga River." A parenthetical sentence will then be added to clarify that "(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.)"

Due to the allowance of additional floating on the Chattooga River, 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 , 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 the use will need to be "authorized by permit or through a special use authorization".

Revisions to § 261.77(b)

Similar to § 261.77(a), § 261.77(b) currently applies to “. . . the Sumter National Forest and the Chattahoochee National Forest abutting the Chattooga River.” However, this regulation is also silent about that section of the Chattooga Wild and Scenic River Corridor that lies within the Nantahala NF in North Carolina. Again, since the January 31, 2012, decision by the US Forest Service allows for additional boating to occur under permit in the upper section of the Chattooga River, the regulation needs to be revised to include the Nantahala NF. The agency proposes that § 261.77(b) now is applicable to “any area of National Forest System land abutting the Chattooga River.” As noted above, a parenthetical sentence will then be added to clarify that “(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.)” Finally, the term “unless authorized by special use permit” is also being replaced with the term “unless permitted under a special use authorization”.

Revisions to § 261.77(c)

Section 261.77(c) currently only applies to “. . . the terms or conditions of any permit authorizing the occupancy and use . . .” However, 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 . . .”

Revisions to § 261.77(d)

Section 261.77(d) applies to “. . . any portion or segment of the Chattooga River within the boundaries of the Chattahoochee National Forest . . .” However, as stated above, the Chattooga Wild and Scenic River flows through all three forests; the Chattahoochee NF, the Sumter NF and the Nantahala NF. In addition, the new management direction applies to all three forests. Therefore, this provision needs to be revised to include all three forests. So, proposed § 261.77(d) is revised to apply to “. . . any portion or segment of the Chattooga River within National Forest System land . . .”

In addition, as discussed above, in the interest of consistency, efficiency and clarity, to best serve the public, specific locations to obtain self-registration permits will no longer be codified. Rather, these locations will be identified by the local Forest Service officials administering the different sections of the Chattooga River. The locations of the registration stations may need to be changed from time to time to better serve the public. It should also be recognized that the Forest Service may, in the future, develop an option where permits could be obtained online or in some other efficient manner that better serves the public. In order to address this, the specific locations of the “Forest Service Registration Stations” are being removed and the proposed regulation will simply state that the use will need to be “authorized by permit or through a special use authorization.”

Revisions to § 261.77(e)

Similar to § 261.77(d), the scope of the commercial or business operation prohibitions currently in § 261.77(e) only applies to “. . . any portion or segment of the Chattooga River within the boundaries of the Chattahoochee National Forest . . .” As described above, the regulation needs to be revised to also include all three national forests. Therefore, § 261.77(e) is revised to read, “Entering, going, riding, or floating . . . upon any portion or segment of the Chattooga River within National Forest System land . . .” Finally, the term “unless authorized by special use permit” is also being replaced with the term “unless permitted under a special use authorization.”

Revisions to § 261.77(f)

Section 261.77(f) currently only applies to “. . . the terms or conditions of any permit authorizing the occupancy and use . . .” However, in § 261.77(d) and (e), a distinction is now being made between a “permit” and a “special use authorization”. So proposed § 261.77(f) is revised to apply to “. . .the terms or conditions of any special use authorization or permit authorizing the occupancy and use . . .”

Regulatory Certifications

Environmental Impact

This proposed rule is to amend an existing regulation to make it consistent with a USDA, 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, which 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 proposed rule amendment is to update the Forest Service regulations to now be consistent with this new management decision.

Regulatory Impact

This proposed rule has been reviewed under USDA procedures and Executive Order 12866 on regulatory planning and review. It has been determined that this is not a significant proposed rule. This rulemaking will not have an annual effect of \$100 million or more on the economy, nor will it adversely affect productivity, competition, jobs, the environment, public health and safety, or State or local governments. This rulemaking will not interfere with an action taken or planned by another agency, nor will it raise new legal or policy issues. Finally, this proposed rule will not alter the budgetary impact of entitlement, grant, user fee, or loan programs or the rights and obligations of beneficiaries of such programs. Accordingly, this rulemaking is not subject to Office of Management and Budget (OMB) review under Executive Order 12866.

Regulatory Flexibility Act

This proposed rule has been considered in light of the Regulatory Flexibility Act (5 U.S.C. 602 *et seq.*). The proposed rule makes minor, technical changes to the Forest Service's regulations. This rulemaking will not have a significant economic impact on a substantial number of small entities as defined by the act because the rulemaking will not impose recordkeeping requirements on them; it will not affect their competitive position in relation to large entities; and it will not affect their cash flow, liquidity, or ability to remain in the market.

No Takings Implications

This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12630. It has been determined that the rulemaking will not pose the risk of a taking of private property.

Civil Justice Reform

This proposed rule has been reviewed under Executive Order 12988 on civil justice reform. After adoption of this proposed rule, (1) all State and local laws and regulations that conflict with this rulemaking or that impede its full implementation will be preempted; (2) no retroactive effect will be given to this rule; and (3) it will not require administrative proceedings before parties may file suit in court challenging its provisions.

Federalism and Consultation and Coordination With Indian Tribal Governments

The Department has considered this proposed rule under the requirements of Executive Order 13132 on federalism, and has determined that the rulemaking conforms with the federalism principles set out in this Executive Order; will not impose any compliance costs on the States; and will not have substantial direct effects on the States, the relationship between the Federal government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, the Department has determined that no further assessment of federalism implications is necessary.

Moreover, this proposed rule is not expected to have Tribal implications as defined by Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. The Department does recognize that one or more Indian Tribes may have direct interest in the management of Chattooga Wild & Scenic River. Therefore, the Department will request consultation with all potentially affected Indian Tribes on this proposed rule. The tribal consultation will be held concurrently with the public comment period.

Energy Effects

This proposed rule has been reviewed under Executive Order 13211 of May 18, 2001, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. It has

been determined that this proposed rule does not constitute a significant energy action as defined in the Executive Order.

Unfunded Mandates

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538), which the President signed into law on March 22, 1995, the Department has assessed the effects of this proposed rule on State, local, and Tribal governments and the private sector. This rulemaking will not compel the expenditure of \$100 million or more by any State, local, or Tribal government or anyone in the private sector. Therefore, a statement under section 202 of the act is not required.

Controlling Paperwork Burdens on the Public

This proposed rule does not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 that are not already required by law or not already approved for use. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320 do not apply.

List of Subjects in 36 CFR Part 261

Prohibitions, Law enforcement, National forests.

Therefore, for the reasons set out in the preamble, we propose to amend part 261 of title 36 of the Code of Federal Regulations as follows:

Part 261 Prohibitions

1. The authority citation for part 261 continues to read as follows:

Authority

7 U.S.C. 1011(f); 16 U.S.C. 4601-6d, 472, 551, 620(f), 1133(c)-(d)(1), 1246(i).

Subpart C Prohibitions in Regions

2. Revise § 261.77 to read as follows:

§ 261.77

Prohibitions in Region 8, Southern Region.

(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.

Dated: December 21, 2015.

Thomas L. Tidwell,
Chief, Forest Service.

[FR Doc. 2016-00888 Filed 1-15-16; 8:45 am]

BILLING CODE 3411-15-P

-

Appendix B Current Promulgated CFR

36CFR § 261.77c

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]

Appendix C

Association's Petition for relief: the Floater Permit:

Before the United States Forest Service

PETITION BY THE WHITESIDE COVE ASSOCIATION:

PETITION TO THE US FOREST SERVICE TO HALT THE USE OF THE ILLEGALLY REVISED FLOATING PERMIT AND ALL FLOATING ON THE CHATTOOGA ABOVE BULL PEN BRIDGE, UNTIL A NEW PERMITS ARE PROMULGATED THAT COMPLY WITH THE CURRENT FOREST PLAN AND FEDERAL COURTS.

SUBMITTED NOVEMBER 27, 2015

I. Rationale for the Petition:

Forest Officials have published a revised permit for floating on the Chattooga Wild and Scenic River that repudiates the current Forest Plans and multiple Federal Court rulings. The revisions were made without public notice or review. Because regulations on boating within the Chattooga Wild and Scenic River are violated when a floater fails to comply with the conditions on the Floater Permit,¹⁰ altering these “conditions” effectively modifies the regulations. Under the current Plan, boating is unlawful during the Summer, during less-than high flows, on all the tributaries, below Lick Lock Creek and above Greens Creek. However, the conditions of the revised Floater Permit contain no restrictions at all. Contradicting the Forest Plan as upheld by the court, a 2015 Forest planning document declared a previous Decision had “lifted” the prohibitions¹¹. The declared action of lifting all restrictions was not an isolated mistake. Forest officials confirm this action was deliberate and have also removed all restrictions on boating from the forest website and signage at access trail. These changes were done despite multiple Federal Court rulings which recognize the continuation of the prohibition on boating, with only limited exceptions, and never above Greens Creek.

Regardless of what the Forest Service may wish to do with its own property, removing the prohibition over the privately owned segment (the “Private Segment”¹²) is in excess of the agencies statutory authority. The agency has no discretion to deny a property owner’s right to exclude others, nor to disavows a court-recognized prohibition on boating across the Private

¹⁰ 7 CFR 261.77 (c)&(f): “failing to comply with any of the terms or conditions of any permit

¹¹ 2015 *Chattooga River Boating Access Environmental Assessment*. page 2

¹² The Private Segment refers to the segment of the Chattooga WSR flowing across and through the Rust property immediately above Greens Creek as outlined by the Rust Family’s Deed.

Segment. These recent actions are particularly egregious after multiple Federal Courts used the existence of a prohibition on boating across the Private Segment to dismiss, and deny as unripe, the Rust Family's multiple requests for a Declaratory Judgment seeking to confirm their property rights¹³, and that those existing rights supersede any administrative requirement under the Wild and Scenic Rivers Act¹⁴. The Court found these issues unripe as a result of a prohibition on boating already protecting and acknowledging the Rust Family's property right to exclusive use.

Despite how often the agency may wish to reinterpret their own ambiguously worded Plan on their own property to avoid judicial scrutiny, or to make needful adjustments, the Forest Service has no discretion to declare restrictions on use over the Private Segment "lifted". The agency cannot deny what is settled law; multiple courts upheld a prohibition on recreational use across the Rust property and above Greens Creek. The 4th circuit court upheld the Forest Plan based in part upon the continuation of restricting all boating "above Greens Creek and the Rust property"¹⁵. The Court found the continued prohibition is a result of the segment through the Rust's property currently being "non-navigable and private"¹⁶; therefore until property title is transferred, or a court declares the Chattooga navigable, a continued prohibition remains. It cannot be declared to not exist or presumed otherwise.

We request the agency halt use of the revised Floating Permit and revert to the previous permit, which clearly identifies the prohibition on boating above highway 28 as a condition of the floater permit. We also request the USFS issue a closure order on all floating upstream of Bull Pen Bridge to avoid conflict between and landowners and misinformed paddlers until such time as a new permit is promulgated that complies with the court-recognized prohibition on boating upstream of Greens Creek.

Background:

¹³ *Whitewater v. USFS* 8:09-2665-MGL 2010, 2012, 2013, The USFS had argued forcefully that they do not allow boating above or across Greens Creek as rationale for why their 2012 Actions would not interfere with Rust Family's use and enjoyment of their property. The 4th Circuit Court ultimately upheld a continued prohibition on boating above Greens Creek and the Rust's property, ending any ambiguity as to what the Forest Service meant by its assertion that "boating is not allowed". 770 F.3d 1108, 1120-1121, 4th (2014).

¹⁴ 16 USC 1283(b)

¹⁵ *Whitewater v. USFS* 770 F.3d 1108, 1120-1121, 4th (2014).

¹⁶ *Whitewater v. USFS* 770 F.3d 1108, 1120-1121, 4th (2014).

A segment of the Chattooga River has been owned, and resided upon, by the Rust Family¹⁷ since 1946. (the “Private Segment”). A portion of this Private Segment has been leased by the Whiteside Cove Association (“Association”) since 1958. As a fundamental element of their property right¹⁸, the Rust Family and Association exclude general public use of the Private Segment. The Associations’ leasehold would be loose all its’ value without this well recognized property right.

The Chattooga River and its surrounding lands -including the Private Segment- were incorporated into the National Wild and Scenic River System in 1974. Up until 2015, the US Forest Service acknowledged and protected these property rights by prohibiting boating through, and immediately adjacent to, the Private Segment¹⁹ as a condition of the Floater Permit. In contradiction to Federal Court findings, and without public notice, the Floater Permit has been modified by rouge elements within the agency.

The preceding River Management Plan stated “floating North of the Highway 28 Bridge is prohibited through a condition of the floater permit.”²⁰ The 2004 Revised River Management Plan continued these longstanding policy²¹. A 2012 Amendment to the Plan added some limited exceptions to the complete prohibition. Amendment Language:

After “2.A.-1 Floating on the Chattooga River is not allowed upstream of the Highway 28 bridge” replace the period with a comma and add, “except non-commercial boating is allowed on approximately 17 miles of the 21-mile main stem only from December 1 to April 30 from the confluence of Green Creek downstream to the designated take out within one-quarter mile downstream of the Lick Log confluence by issuance of a self registration boating permit” p. A-1

Prior to this 2012 Amendment, multiple District Court judges found the Forest Plan “prohibited all floating on the Chattooga except where allowed by permit issued by the USFS”²². The court had even denied the Association’s request to dismiss the Private Segment from the Paddler

¹⁷ Richard Rust, Henry Rust and Goodenow LLC (‘Family’ or ‘Rust Family’)

¹⁸ Public use “eviscerates the owner's right to exclude others from entering and using [their] property — perhaps the most fundamental of all property interests.” {emphasis added} *Lingle v. Chevron*, 544 U.S. 528, 539 S.Ct (2005). Citing *Dolan v. City of Tigard*, 512 U. S. 374, 384 (1994); *Nollan v. California Coastal Comm'n*, 483 U. S. 825, 831-832 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982); *Kaiser Aetna v. United States*, 444 U. S. 164, 176 (1979) (which includes the right to exclude boats on a non-navigable body of water.)

¹⁹ *Whitewater v. USFS* 770 F.3d 1108, 1120-1121, 4th (2014).

²⁰ 1985 Sumter Forest Plan containing the Chattooga River management Plan . page M-14.

²¹ “Floating on the Chattooga River is not allowed upstream of the Highway 28 bridge”. 2004 Sumter National Forest RRLMP, Sec 2.A.1

²² *Whitewater v. Tidwell* 8:09-2665-MGL (2010) note 4 “promulgated in 1978 and officially prohibited all floating on the Chattooga except where allowed by permit issued by the USFS.” See also *See Whitewater v. Bosworth*, 2:06-cv-00074-WCO 4 (N.D. Ga. Oct. 6, 2006) pg 2, 3.

lawsuit which challenged any prohibition on boating.²³ Two Court Orders upheld the prohibition; the existence of a prohibition is undeniable .

After the 2012 Amendment was published, the court found this prohibition on boating protected the rights of the Rust Family so much so, that adjudication of property rights, or property boundaries, was not ripe for judicial review, (the court found adjudication of property issues would “not arise unless and until [the Forest Service] remove the ban on floating this portion of the river or this court determines that any such ban is contrary to the law.”²⁴). Therefore, even after the 2012 Plan was published, the court recognized a prohibition remained in effect across the Private Segment and that this prohibition protects the private interests and associated rights. The 4th Circuit Court ultimately upheld the continued prohibition on floating the Chattooga headwaters outside of the Winter, at lower flows and below Lick Lock Creek, by agreeing that interference with anglers and hikers would be significant without these prohibitions. The Court upheld the continued prohibition on the tributaries, based on the likelihood of resource damage. And, upheld the continued prohibition upstream of Greens Creek and over the Private Segment based upon property rights.

“Prior to 2012, longstanding Forest Service policy allowed non-motorized rafting or "floating" on the lower portions of the Chattooga, but prohibited the practice on the 21-mile northernmost section of the River (the "Headwaters"). In 2012, after a lengthy review, the Forest Service revised its management plan for the Chattooga to allow floating on most of the Headwaters during the winter months, when flows are highest and conditions are best” @ 1112. The court Acknowledged a prohibition remained in place “above Greens Creek and the Rust’s property” @ 1118. And, on all tributaries. @ note 4

Whitewater v. Tidwell, 770 F. 3d 1108 4thCir.(2014)

Therefore, the 2012 Forest Plan did not “lift” all the prohibitions on boating above highway 28 as claimed by Forest Officials in a 2015 Forest Planning Document²⁵. It continued the prohibition on floating, during low or moderate flows, outside of the winter-time, above Greens Creek, and across the Rust Family’s property.

With respect to the Private Segment, disavowing the existence of a prohibition amounts to a denial of the Rust family’s constitutionally protected property rights, and a denial of their rights

²³ Whitewater v. Tidwell 8:09-2665-MGL (2010) see section II. III B.

²⁴ Whitewater v. Tidwell 8:09-2665-MGL (2012)

²⁵ *Chattooga River Boating Access Environmental Assessment*. (2015) Sumter USFS p. 2

to due process protected under the Constitution Article V. Whether these rights were violated by a misapprehension by six unique judges in four separate court orders, or by some misguided agency actions while implementing a contradictory version of the Forest Plan remains unknown. What is certain is that the Judiciary's and Forest Service' interpretation of the Forest Plan are inconsistent. Regardless of which group is in error, recent Forest Actions have re-inserted "uncertainty" as to where boating is lawful, or remains unlawful within the Chattooga Wild and Scenic River corridor, including across the Private Segment. While the court found a prohibition on boating does exist, Planning documents have declared the prohibition "uncertain"; this resulted in requests for clarification from the Rust Family, the Association and the kayak lobby²⁶.

Based entirely upon uncertainty, (cloaked by purported obliviousness) the agency has revised the Floater Permit, updated their website, and posted new signs at the trailhead which are incongruent with Federal Court rulings and harm the Association. The illegally revised Floater Permit excludes the actual Planning rule which states :**"Floating on the Chattooga River is not allowed upstream of the Highway 28 bridge"**²⁷. The Permit list only the exceptions to the Planning rule (where and when boating is "allowed"), which without the rule become meaningless and trite. Had the Floater Permit and website included the word "only" in front of the word "allowed", the prohibition would still remain intact. (see revised permit, kiosk and Website Exhibit B)

In contradiction to the current plan, the agency has revised documents to avoid informing the public where and when it remains unlawful to boat within the Chattooga Wild and Scenic River corridor. Because violations under 7 CFR 261.77 are based upon the floater's failure to comply with the conditions of the Floater Permit, altering the Permit language amounts to a legal change in river policy; this has been implemented outside of the planning process, without due process for those potentially aggrieved, and incongruent with the current Forest Plan as upheld in multiple court orders.

The Association has made multiple requests to the agency to correct public misconception and be in compliance with these court rulings. We have requested that forest policy recognize that there is a prohibition which prevents public recreation across the Private Segment.²⁸ The agency has

²⁶ Objections to the March 2015 Environmental Assessment and draft decision from the Association, American Whitewater and Rust family are included as Exhibits here.

²⁷ 2004 Sumter National Forest RRLMP, Sec 2.A.1

²⁸ Whiteside Cove and Rust Family Objection to the 2015 EA <http://www.fs.usda.gov/detailfull/scnfs/home/?cid=stelprdb5253595&width=full>

ignored these requests, and even denied a requested meeting between the Chief office and the Association and property owner. On September 25 2015, the Association meet with District Ranger Wilkins and Forest Supervisor Melonas to discuss the Associations objection to a newly proposed actions. Both Forest Officials confirmed they had deliberately set forest policy which disavows any prohibition on boating “above Greens Creek or over the Rust’s property”; thus confirming that their actions were deliberate and not simply blunders. After review of the case law with the District Ranger, he was under the misapprehension that Court findings are not law. These Forest Officials had offered to review the discrepancies between agency actions and the court rulings on September 25th. As of November 27th, the agency had not made corrections to the Permit or to the Forest Service Website, nor had any explanation for the discrepancies between the multiple Court rulings, even though the start of Boating season is on December 1st.

Agency Actions and inactions undermine our property rights; they cloud our property title; they have created interference with our use and enjoyment of our property; they appear by design to destroy the value of our leasehold; increase security costs; finally, the actions contradict case law and the current Forest Plan. Agency actions deliberately were designed to nullify the court-recognized prohibition on boating over the Private Segment. Such actions cannot be allowed to stand, nor can review be further delayed. Agency Actions –like altering a floater permit- must comply with the Forest Plans under which it is tiered, here that includes both the Nantahala Plan and the Chattooga Comprehensive River Plan within the 2004 Sumter Plan²⁹. A Federal Court has concluded these Plans prevent boats from interfering with our lawful use and enjoyment of the Private Segment. Without basis, rouge statements and actions by forest officials have “declared” otherwise.

These rouge actions appear to be in direct response to the 2014 and 2015 request by the paddler lobby (AW)³⁰ to the have the agency “confirm” the removal of any prohibitions on boating above Greens Creek, and across the Private Segment; i.e. contract the court’s finding to which AW were the moving party. Some uninformed Forest Officials appear to have been deceived by AW’s explanation which cites a legal pleading, rather than the Court Order, as being the outcome of their litigation with the agency. At least one Forest Official -District Ranger Wilkins- has publically denied that there is, or ever was, any prohibition; and, has been actively involved in removing any mention of all boating restrictions from the Floater Permit, from the

²⁹ The Sumter Plan contains the Chattooga WSR Plan which sets policy across all three forests including the North Carolina Nantahala forest where the Private Segment is located. AW v Tidwell 2015

³⁰ AW 2015 objection comments <http://www.fs.usda.gov/detailfull/scnfs/home/?cid=stelprdb5253595&width=full>

Nantahala FS website, and from trailhead signage. These rouge actions contradict the Forest Plan, as it was defined through multiple court Orders. These action will continue to cause harm to the Association.

That a prohibition exists on floating upstream of highway 28 -especially upstream of Greens Creek and the Rust's property- is now a mater of settled law. Nullification of these restrictions by Ipse-dixit, would circumvent the statutory Planning process outlined under the National Forest Management Act, the review process under the National Environmental Procedures Act, and executive Order12630 which protects property rights. These requirements are not meaningless "tasks" for federal agencies, they force agencies to clearly define their action, assess the direct and indirect effects of any proposed action, and provide the rationale behind those actions so that potentially aggrieved parties can object to these action at a meaningful time and before existing rights are extinguished by those actions. Actions based upon ipse-dixit also interferes with the judicial oversight role under the Administrative Procedures Act to protect citizen's rights from monolithic Federal Agencies. Circumventing these statutory requirements amounts to more than just an inconsequential "process" violation, it becomes a denial of the due process rights awarded to citizens under the fifth amendment of the constitution. Simply put, actions declared valid by ipse-dixit circumvents the entire statutory scheme to which the Forest Service must adhere. Especially here where such actions conflict with case law. It remains unclear whether these rouge actions resulted from an abuse of power by a few misguided Forest Officials, or contempt exists forest-wide for property rights and the judicial oversight role. The response, or lack thereof, to this petition will be illuminating.

At issue is the origin of the court-recognized prohibition on boating upstream of Greens Creek. It could be based on the agency's lack of authority to permit public use over this segment; the agency's recognition of the Family's desire to exclude any public use of the Private Segment; or that the prohibition is based upon constitutionally protected property rights. Regardless, the agency would have no discretion to remove this prohibition without providing the rationale and an opportunity to object.

For the reasons outlined above, we request the agency halt use of the revised Floater permit and revert to the previous version that clearly identifies the prohibitions on boating above highway 28 as a condition of the permit. We also request the USFS to issue a closure order on all floating upstream of Bull Pen Bridge in order to avoid conflict between and landowners and misinformed paddlers until such time as a permit is promulgated with adequate public notice that

does comply with the court-recognized prohibition on boating upstream of Greens Creek and the Private Segment.

Respectfully Submitted,
/s/ Michael Bamford
Michael Bamford
River Director Whiteside Cove Association

Sent electronically on 11/27/2015 ,Chief of the Forest Service, Mr. Tidwell. Regional Forest Supervisor. Mr. Tooke, Nantahala Forest Supervisor: Mr Melonas, Sumter Forest Supervisor. Mr. Lint; Honorable Judge Mary Lewis, Jerome Thomas, and Mary Wagner

Hard copy to The Regional Forester USDA Forest Service, Southern Region (R8), 1720 Peachtree Road, NW, Atlanta, GA 30309.

cc Richard Rust, Henry Rust , Senators Burr, Tillis, Isakson, Perdue

Enclosures/Exhibits:

- A) Court Orders in Whitewater v. Tidwell 2010, 2012, 2013, 2014, GA Forest Watch v Tidwell 2015, Whitewater v Bosworth 2006
- B) 2015 Boater Access EA, 2015 Objection notices from the Association, Rust Family and American Whitewater.
- C) Forest Documents related to previous Plans: 2015 Sumter Forest Ammendment # 1. Assessment *Managing Recreational uses on the upper Chattooga River* (2012)
- D) Current and Previous Floater Permit language, Previous and current FS website posts, Previous and Current signage at river access trail heads for boaters.

Before the United States Forest Service
PETITION BY THE WHITESIDE COVE ASSOCIATION:
PETITION TO THE US FOREST SERVICE TO ISSUE A CLOSURE ORDER
TO A SEGMENT OF THE CHATTOOGA RIVER IN ORDER TO AVOID
FURTHER CONFLICT AND TO ASSURE COMPLIANCE WITH THE
FEDERAL COURT RULINGS.

SUBMITTED NOVEMBER 18, 2015

I. Rationale for the Petition:

Forest Officials have implemented a revised Forest policy which contradicts the Forest Plan as written, and more importantly as defined by the 4th circuit court of appeals and two lower court rulings. The court's definition of the Plan formed the basis for its ultimate findings in each of those cases -which denied as unripe recognition of the Rust family property rights and dismissed the Rust Families cross-claims that the 2012 Assessment was deficient. The recent rouge and retroactive interpretation of the court-upheld Forest Policy results in more than just a contempt of the court. The denial of any prohibition by retroactively altering previous policy ignores statutory procedures under the National Forest Management Act and the Administrative Procedures Act designed to protect constitutionally recognized rights of due process of potentially aggrieved parties. Here, Forest Service recent actions amount to the violation of the Associations and Family's due process rights protected by the Constitution of the United States.

To prevent further constitutional violations and to adhere to their own statutory requirements under the National Forest Management Act, NEPA and the Wild and Scenic River's Act, we ask that the USFS immediately issue a Closure Order for all boating above Bull Pen Bridge until the legally inaccurate statements disseminated by the local Forest Officials about the Private Segment are publically corrected and Forest Policy is aligned with the multiple judicial rulings in the Whitewater v. Tidwell lawsuit. The conflict created by rouge implementation of policy and the public misrepresentation of property laws has already escalated into conflicts involving firearms between misinformed WSR visitors and those rightfully on the Private Segment³¹. The agency's

³¹ On August 27, 2013 the Nantahala Forest Supervisor was first notified of misinformed WSR "Visitor" threatening a member of the Whiteside Cove Association with a firearm on the private property. files as exhibit

obfuscation in defining its' own Actions and confusion over what is lawful and unlawful behavior for public visitors to the Chattooga Wild and Scenic River Corridor has incited this conflict, and the extensive 2006-2014 legal actions. This absence of clarity and at times obfuscation, is especially egregious because Forest Officials are implementing policy that contradicts multiple Federal Court ruling to which the agency was a named party.

For these reasons and those explained below a Closure Order for the Chattooga Wild and Scenic River above Bull Pen Bridge is necessary until Forest Policy is implemented that matches the Federal Court rulings and the misstatements by Forest Officials are publically corrected. The Association requested the agency issue a Closure to all boating the upper segment on June 27, 2015³²; the agency has not responded to this request and their revised policy for boating will go into effect on December 1st. A Closure Order at this juncture would be a prudent course of action.

II. Background and Explanation:

A segment of the Chattooga River has been owned, and resided upon, by the Rust Family³³ since 1946. (the "Private Segment"). A portion of this Private Segment has been leased by the Whiteside Cove Association ("Association") since 1958. The Chattooga River and its surrounding lands -including the Private Segment- were incorporated into the National Wild and Scenic River System in 1974. However, designation as a Wild and Scenic River (WSR) does not nullify existing property rights.³⁴ And the Act prevents any presumption of federal jurisdiction or management authority over both lands or Water³⁵. The Act consolidates federal authority and establishes administrative obligations for that which is under Federal management; therefore the contours of Federal authority define both the contours of statutory obligation under the WSR Act, as well as the limits of any statutory authority or discretion. Because the agency fails to define their action or the rationale behind it, whether agency actions are short of statutory obligation or in excess of statutory right is not clear at this time;

³² See Association's objection Section V page 13.http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprd3846832.pdf

³³ Richard Rust, Henry Rust and Goodenow LLC ('Family' or 'Rust Family')

³⁴ 16 USC 1283 (b)

³⁵ Lands : 16 USC 1283 (a) Water 12 USC 1284(b)

however, this ambiguity is itself a violation under NEPA, NFMA and according to the US Supreme court³⁶ which has created the current situation of confusion that exists today.

The Rust family has informed the agency that their property –the Private Segment of the designated WSR- is not available for public recreational use, or as a thoroughfare. The 4th circuit agreed by ruling that boating remains prohibited “above Greens Creek and the Rust property”³⁷, due to the Private Segment being considered Private property. The District Court confirmed that the floater lobby’s purported “right” or “liberty interest” to travel by boat down the Chattooga “has no merit.”³⁸ Therefore, the Agency’s 2015 legal opinion that the “public’s right” to access the Private Segment is “uncertain” is both inaccurate and in contempt of the court’s findings. That a prohibition on boating above Greens Creek exists, regardless of ownership, is now a matter of settled law.

Recent agency actions deny that the Rust family property rights include the right to exclude the public from the Private Segment. The agency now disavows that there is, or ever was, a prohibition on boating above Greens Creek. Forest Officials have revised floater permits and policy that reversed a court-recognized prohibition. The Forest Service Website has removed any mention of the prohibition or limits on floating at all. Forest Officials have declared the Private Segment free from any boating prohibition during publicly attended meetings. Although there remains legal questions as to the origin of this prohibition on recreational use across the Private Segment, what is undisputable is that a prohibition exist, and that the prohibition has been recognized by the Federal Court at least four separate occasions.

The Court found a prohibition on recreational use “above Greens Creek and the Rust property”³⁹ exists in recognition of the Private Segment being “private”. A federal Court found unripe the need to adjudicate the Rust family property rights due to the

³⁶ The USFS must “State what the Decision was” 40 C.F.R. § 1505.2(a). A Forest Plan must be “understandable”. 36 CFR §219.30, “Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.” *United States v. Florida East Coast R. Co.*, 410 US 224,242-3 Supra (1973)

³⁷ *Whitewater v. USFS* 770 F.3d 1108, 1120-1121, 4th (2014).

³⁸ *Whitewater v. Tidwell*, 959 F. Supp. 2d 839,865 SC 2013 American Whitewater's purported a “constitutionally protected liberty interest in the right to interstate travel and personal movement” was being violated by the “prohibitions on whitewater floating.” The court disagreed and found the argument has no merit.

³⁹ The court documented a “continued ban on floating above Green's Creek, and the Rusts' property.” *Whitewater v. USFS* 770 F.3d 1108, 1120-1121, 4th (2014).

existence of this prohibition,⁴⁰ already protecting those rights. Finally, the Court found the agency did not need to consider the indirect affects to the adjacent Private Segment because the agency prevents boating on, or within ¼ mile of, the Private Segment.⁴¹ Agency actions that now disavow the existence of these court-recognized prohibitions or even prevention of boating, expose the agencies contempt for the Federal Court.

The local Forest Officials appear to believe that recreational use above Greens Creek is lawful and that the Rust Family property rights were mysteriously nullified by WSR designation. The issue has become significant because the local Forest officials publically declare there is no prohibition on recreational use –specifically relating to boating- through the Private Segment. This continued misinformation is in excess of statutory authority, and has caused harm to the Association and to the Rust Family. Since the agency has recently published a legal interpretation that questioned our property right, and now denies the existence of a court-recognized prohibition, the agency has raised the issue of property rights, the scope of agency authority and obligation within a Wild and Scenic River corridor and the scope of Public trust rights across the Private Segment. Due to the dissemination of this misinformation, Forest Officials have created conflict by opining what is lawful, or not unlawful, behavior within the Chattooga Wild and Scenic River Corridor. We do not see how the WSR Act or the Case law declared private property available for public use, such an interpretation violates rights protected by the constitution.

The Agency were made aware of the conflict within the Chattooga caused by their ambiguity in August of 2013 and again in June of 2015. Requests to meet with the Regional Forester and/or the Forest Chief to resolve these issues were ignored. In September of 2015, the District Ranger meet with the Association, but continues to deny any prohibition on boating and even asserts that neither him nor his Agency consider the 4th Circuit ruling “law” that binds the Agency, we disagree. Even the Forest Supervisor

⁴⁰ Whitewater v. Tidwell F. D. SC 2012 “the necessity for any adjudication of the issues raised by [Rust Family] would not arise unless and until Defendants remove the ban on floating this portion of the river or this court determines that any such ban is contrary to the law.”

⁴¹ Whitewater v Tidwell 770 F. 3d 1108,1120 4th Circuit (2014) (“Any possible increase in the risk of trespass on the Rusts' land does not meet this standard. As the Forest Service points out, the uppermost portion of the Headwaters opened to floating [] is downstream from the Rusts' property line. The uppermost put-in location is another quarter-mile further downstream. ... The situation might be different if the Forest Service had allowed floating upstream of the Rusts' land — but the agency rejected that option, precisely because it might present an increased risk of trespass.”

has avoided our requests to correct any public misconception before the start of the boating season on December 1st .

The last published information by the Forrester Service is that there is no prohibition on boating above Greens Creek or the Private Segment, this in contradiction to multiple Federal Court ruling. This issue requires immediate action by the agency, or by the judiciary if necessary.

Until the necessary clarity is provided to the public, we request the **agency close the uppermost segment to boating, specifically the portion of the Wild and Scenic River Corridor above Bull Pen Bridge known as the Chattooga Cliffs reach**. In 2014-2015, zero floaters used this segment, therefore few boaters would be effected. The Floater Lobby have complained about having to hike to the designated put-ins, and about the potential safety risk these designated put-ins may have on boaters⁴². Therefore, impacts to recreational users by closing the segment above Bull Pen Bridge would be minimal, and, according to American Whitewater, potentially life-saving. Only those boaters interested in unlawfully traversing the Private Segment above Greens Creek would be affected by a Closure Order preventing boating on the Chattooga Cliffs segment. A Closure Order would appear the prudent and rational alternative to ignoring the judiciary, protected constitutional rights, and the safety of the precious floaters.

Additionally, the Forest Service 2015 EA acknowledges that current interim policy that allows use of the Greens Creek Trail is causing sedimentation into the Chattooga, and requires remediation⁴³. Degrading the WSR resource conditions alone is cause for the agency to terminate recreational use of this area. Issuing a Closure Order on boating this uppermost reach until such time as a Decision to designate such a trail is promulgated and trail remediation are completed would prevent further degradation of the resource.

Finally there are four other outstanding Objections pending to the 2015 Assessment and the associated Proposed Action that would finalize the 2012 interim decision. Some parties object to the designation of certain trails and the impact to the resource. Some seek clarity regarding the lawful capacity of boating the upper Chattooga, specifically throughout the Chattooga Cliffs in North Carolina. A Closure

⁴² See Whitewater June 2015 Objection. http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprd3846810.pdf

⁴³ May 15th 2015 Environmental Assessment p.71 & 76 http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprd3838217.pdf

Order that prohibits boating above Bull Pen Bridge under the interim management plan, or a complete Stay that continues any and all boating above highway 28 under the previous Forest Plan would prevent infringement of any property rights and prevent continued degradation of the resource the agency are obligated to protect and enhance.

A more detailed outline regarding our request to close the uppermost segment are provided in the WC Associations appeal attached here as an exhibit. Thank you for your time and quick response to our request.

Respectfully Submitted,
/s/ Michael Bamford
Michael Bamford
River Director Whiteside Cove Association
and on behalf of the Rust Family.

Sent by email on 11/18/2015 ,Chief of the Forest Service, Mr. Tidwell. Regional Forest Supervisor. Mr. Tooke, Nantahala Forest Supervisor: Mr Melonas, Sumter Forest Supervisor. Mr. Lint; Honorable Judge Mary Lewis, Jerome Thomas, and Mary Wagner

Hard copy to

The Regional Forester
USDA Forest Service
Southern Region (R8)
1720 Peachtree Road, NW
Atlanta, GA 30309