

## Comments on the Proposed Modification and Expansion of 36 CFR § 261.77

To the Chattooga Planning and Rules Analysis Team.

The proposed modification and expansion of 36 CFR § 261.77 does not comport with the operative Forest Plans, nor with the associated 2012 Planning Documents with which the proposed rules purport to be consistent. Importantly, the proposed revisions do not match the Federal Courts Orders and Rulings based upon the courts' understanding of these exact same 2012 Planning Documents and Plan Decisions. Finally, there exists a chasm between the regulatory conditions that existed prior to the 2012 Plan Decisions, and the regulatory scheme purported by the proposed CFR. This chasm cannot be explained by the 2012 Planning Documents. The proposed expansion of the rules is unsupported by the underlying record.

Our primary concern with the "rule change" is its' undefined expansion to now include the North Carolina segment of the Chattooga River in 36 CFR § 261.77. Unlike the Chattooga River through South Carolina and Georgia (which is 100% National Forest property), the North Carolina Chattooga River includes our property, (the "Private Segment"). The proposed action fails to consider this important distinction. Although presented here as an innocuous rule "change", expanding the scope of CFR§ 261.77 into North Carolina requires inspection of the indirect and cumulative effects such an action may cause. This CFR expansion must be assessed against property laws, and the Forest Service regulations in place under the current operative River Management Plans, Forest Plans and Closure Orders. Unlike SC and GA, adding North Carolina into CFR§ 261.77 would not be an increment "change" from the immediately previous rule. In North Carolina, the "rule change" is an expansion of the CFR into an area with distinctive qualities that cannot be force-fit into a previous regulation written for the South Carolina or Georgia segments which contain no private property. At a minimum, the physical boundaries of the National Forest System must be clearly defined before the action under review could be clearly defined, understood and reviewed by the public.

The proposed expansion of the § 261.77 would grant Forest Officials new discretion to "authorize" floating anywhere on the North Carolina Chattooga "by a permit or through a special use authorization". It argues that "the Agency must be able to issue permits in a flexible and efficient manner". The proposed rule includes an impermissible assumption there are no legal limits to agency authority or discretion. However limits to discretionally authority are defined by the associated statutes (the WSR Act, NFMA and NEPA), property rights/boundaries and the limits within the current Operative Plans. As presented here -without limits or assessment of this expansion- the proposed expansion of § 261.77 circumvents the required review process needed to rationalize the assertion of expanded discretionary authority, especially in North Carolina where no such previous authority had been asserted in any CFR. The proposed limitless

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expansion of discretion goes far beyond that which could be supported by the underlying record, or even the limits of delegated authority.

The proposed expansion of authority is inconsistent with the 2012 Plan Decisions which continued to prohibit all floating outside of the Winter months; at flows under 350cfs; and above Greens Creek or through the Private Segment. Importantly, the continuation of the floater prohibitions defined geographically as “upstream of Greens Creek” applies to both the National Forest property and our Private Segment. Further, the 2012 Decision only allows floaters access to the Chattooga River at discrete sites; the uppermost being “well-downstream” of the Private Segment. The 4<sup>th</sup> circuit Court verified these limits to the 2012 Plan Decisions based on the USFS position taken in court; these included property and geographic limits in its’ ruling.

*“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 continued ban on floating above Green's Creek, and the Rusts' property.” *Whitewater v Tidwell* 770 F. 3d 1108,1120-1121 4<sup>th</sup> Circuit (2014).*

Therefore, for proposed expansion of the § 261.77 to presumptuously assert authority to permit floating without first defining these clear geographic limitations would not comport with the current status of regulations and Plans on the Chattooga River in North Carolina; nor with the Courts Rulings and case law. Any new discretion to authorize a floater permit, or special use authorization, must remain limited by the scope of the 2012 Plan Decisions which: a) continued the floater prohibitions above Greens Creek, and b) only allowed the floater's river access “well downstream from the Rusts' property line”.

Therefore, the proposal to modify and expand 36 CFR § 261.77 without clear geographic limits is unsupported by the underlying record. The proposal cannot include the segment of the Chattooga River through, or the National Forest immediately adjacent to, the Private Segment

Even if the record may support minor revisions to in South Carolina and Georgia, the proposed expansion of 36 CFR § 261.77 into North Carolina (near, across, or upstream of the Private Segment) is not, and cannot be presumed to be, supported by the 2012 Planning Documents as witnessed by the unchallenged Court Orders.

The proposed modification and expansion of 36 CFR § 261.77 would alter the management direction for the upper Chattooga River beyond the scope of any assessment, analysis or consideration as is required under the governing NEPA and NFMA statutory regime designed to protect the due process rights of citizens against potentially harmful federal agency actions. Without clearly defining the action, and then conducting the mandated assessments and

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analysis, any attempt to promulgate the expansion of the rule would circumvent our due process rights to challenge not only the rule but the rationale purportedly supporting the rule's expansion. The Action presented here would circumvent our right to be heard at a meaningful time and in a meaningful forum to defend our property rights and interests which are threatened here.

The absence of the analysis and assessment to support the proposed rule reaches its pinnacle of irrationality by claiming to have conducted the required taking analysis. How could the proposed actions (unconstrained discretionary authority for Forest Officials) have possibly been analyzed for a potential taking (interference with property rights and interests) when both objects of the analysis are undefined in the CFR. Only if clear geographic limits are placed on the proposed expansion of discretionary authority -that definitively do not interfere with our rights and interests in the Private Segment- could an analysis definitively rule out a taking. A conclusionary statement of an analysis to an undefined action against undefined property interests can not be anything other than pure speculation. It can not be relied upon as support to the proposed CFR.

Finally, the redefined management schemes for managing recreational use of the upper Chattooga WSR has exceeded the court-defined ripeness criteria. Accordingly, these recent actions raise the issues of our property rights and the scope of USFS authority and discretion across any privately-owned segment of a Wild and Scenic River. Thank You.

For the reasons mentioned above we believe these rules should either not be promulgated at all; or alternatively, and as a compromise to avoid litigation, limiting the scope of any floater use-authorization, or Floater Permit, to the portion of the Chattooga downstream of Norton Mill Creek, and to make floating prohibited above that point within the text of the published § 261.77. Only by publishing in the Federal register the clear geographic limits on where floating could be authorized, permitted or allowed, would the modification and expansion to 36 CFR§ 261.77 remain consistent with the 2012 Decisions, current operative Management Plans, multiple Federal Court rulings, associated statutory obligations, and property laws. Including a map defining where floating remains prohibited would remove the obscurity and ambiguity clouding the proposed rules.

Due to recent comments made by the Nantahala District Ranger and acting Forest Supervisors during the Fall of 2015 public objection meetings, and other recent actions like the modification of the conditions of the floater permit outside of public purview, greater clarity in scope of the "new direction for managing recreation uses on the upper Chattooga WSR" is necessary now.

Sincerely  
Michael Bamford on behalf of the Rust Family  
As Manager for Goodenow LLC