

USDA Forest Service  
Objection Reviewing Officer  
Kristin Bail  
Forest Supervisor  
National Forests in North Carolina  
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Asheville, NC 28801-1082  
[objections-southern-north-carolina@fs.fed.us](mailto:objections-southern-north-carolina@fs.fed.us).

July 10, 2014

Re: Chattooga River Boating Access Project

Dear Forest Supervisor Bail,

American Whitewater is fully supportive of the trail construction that is the primary, if not sole purpose of the EA and Decisions. We continue our efforts to be a good and supportive partner to the Forest Service in river and land management. This objection narrowly challenges two discrete judgments made in the EA and Decisions, which are in fact peripheral or immaterial to the Decisions themselves. We brought these exact issues up in our otherwise supportive comments, however the EA and Decisions did not address our concerns.

The Decisions objected to herein are the first since paddling was banned 39 years ago to be based on actual visitor data associated with paddling. This marks a pivotal moment where the Forest Service can and should for the first time make science-based decisions regarding the management of paddling.

American Whitewater hereby regrettably objects to Draft Decision Notices (Decisions) and finding of no significant impact (FONSI) for the *Chattooga River Boating Access Environmental Assessment* (EA), issued by the Chattahoochee-Oconee National Forest, Chattooga River Ranger District, Georgia; Nantahala National Forest, Nantahala Ranger District, North Carolina and Sumter National Forest, Andrew Pickens Ranger District, South Carolina are issuing We do so following the regulations in 36 CFR § 218 Subparts A and B. The Draft Decisions were signed on May 26, 2015. Subsequently, the legal notice of the objection period appeared in the newspapers of record on May 27, 2015. The 45-day objection period thus began on May 27, 2015, and ends July 6, 2015.

Objector

Kevin R. Colburn



National Stewardship Director  
American Whitewater  
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**1) Statement of the issues and/or the parts of the plan revision to which this objection applies.**

We hereby object to the following issues:

- a) The Decisions fail to explicitly state that paddling will be neither permitted nor prohibited on the Chattooga River upstream of Green Creek, which the agency confirmed is the present management in Federal Court filings. The agency response to our comments on this issue in the EA was vague. This lack of clarity could wrongly lead to revisions of permit language or 36 CFR 261.77 prohibiting paddling on this reach which are inconsistent with claims made in Federal Court, as well as without basis. This reach was explicitly determined to be out of scope of the 2012 decisions from which the Decisions at issue in this Objection tier. *See Draft Decision Notice and FONSI at 2 (first decision bullet point) and 6. See also EA at 120-122.*
- b) The Decisions unnecessarily, dangerously, and unfairly require paddlers to launch in specific zones while allowing all other visitors to access the river wherever they choose. *See Draft Decision Notice and FONSI at 2. See also EA at 122-123.*

**2) Concise statement explaining the objection and suggestion of how the proposed plan decision may be improved.**

The Decisions err in two ways. First, they fail to explicitly state that paddling below Green Creek is limited by a mandatory permit, while paddling upstream of Green Creek is not actively managed or prohibited by the Forest Service. Second, they dangerously and unfairly require paddlers to enter the river at specific locations while allowing other visitors to enter anywhere they wish.

- a) Request for Explicit Geographical Scope Limitation Consistent with USFS Position

Last year the Forest Service stated in a brief to the Fourth Circuit Court of Appeals that “In fact, the USFS neither permits nor prohibits floating on this part of the river,” referring to “the roughly 1.7-mile reach of river above Green Creek.”<sup>1</sup>

The Decisions however fail to explicitly state that paddling will be neither permitted nor prohibited on the Chattooga River upstream of Green Creek, which the agency confirmed is the present management in Federal Court filings.

The agency response to our comments on this issue in the EA was similarly vague: “Please refer to section 2.2 of the 2012 EA, Greens Creek. Once the decision becomes

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<sup>1</sup> See Answering Brief Federal Defendants-Appellees, American Whitewater v. Tidwell, Fourth Circuit Court of Appeals. 2/20/14. Footnote 9, Page 15.

final, the permit conditions will be changed to “permitted from the Green Creek trail and the Chattooga River intersection to Lick Log Creek.” *See EA at 121.*

It is unclear if in this sentence the word “permitted” means that the activity is allowed or rather that a permit is required. More to the point it is unclear if it means that by omission paddling is not permitted (e.g. not allowed) upstream of the Green Creek trail. This lack of clarity could wrongly lead to revisions of permit language, 36 CFR 261.77, or closure orders prohibiting paddling on this reach that is inconsistent with agency claims made in Federal Court.

The 2012 decisions state: “Require boaters to start or complete their trip only at specific boater put-ins and takeouts, which will be designated after site-specific NEPA analysis and will be a condition of the self-registration boating permit.” *See EA at 121.* The scope of this statement (and the 2012 EA) is specific to the Upper Chattooga River downstream of the private lands in the Green Creek vicinity. This requirement does not affect access upstream of the Green Creek area. From the permitting and management perspective, paddlers floating to this point from upstream would “begin” their trip on the USFS-managed Chattooga Wild and Scenic River at the Green Creek put-in. We view this language in the 2012 EA as fully compatible with a Forest Service decision to not prohibit paddling upstream of the permitted reach.

We herein reiterate our request that the ROD, the resulting permit, any changes to 36 CFR 261.77, and an updated closure order explicitly require a permit for floating the Chattooga River from a point 200 feet upstream of the junction of the Green Creek Trail and the Chattooga River, downstream to Lake Tugaloo, and clearly state that no permit is required for floating above the point 200 feet upstream of Green Creek. We see this as the only legal decision given the Agency position.

This is a very small change to the EA that will have no practical effect on the rationale or structure of the document. The EA must simply clearly state that its scope is, like the 2012 Amendments from which the Decisions tier, limited to the river downstream of Greens Creek, and confirm that the agency does not manage or prohibit river access upstream of that point. The permit language must follow suit.

Practically speaking what this request means is that if a paddler wishes to put in upstream of the Green Creek Trail junction with the river they would need to first secure a permit at the Green Creek trailhead or at their chosen take-out. They would enter the managed section of river at the same point as if they had hiked in on the Green Creek Trail, so there is no difference in use of the managed section of river. The river upstream of Green Creek would simply be governed like any other river in North Carolina.

The Forest Service can achieve legal consistency and more importantly greater regulatory clarity among visitors by explicitly stating in the Decisions that paddling is not prohibited upstream of the Green Creek Trail by the Forest Service, and that a permit is required for paddling below the Green Creek Trail.

b) Request for Changes to Proposed Designated Launch Areas

River safety and enjoyment can be improved by *recommending* that paddlers enter and exit the Chattooga River at specific locations, rather than *requiring* they do so, or by expanding the designated launch sites to the entire reaches.

Designating kayak launch areas while prohibiting launching in undesignated areas, as the Decisions do, is to our knowledge without precedent. Even on front-country rivers like the Nantahala that sees hundreds of thousands of paddlers each year, and remote strictly regulated rivers like the Selway, paddlers can hike or paddle into the river where they choose. This practice of allowing visitors to choose their access and egress points encourages safe and good decision-making, and is consistent with the Forest Service practice of avoiding unneeded management constraints.

By designating high quality trails to the Upper Chattooga River with good launch points, the Forest Service will ensure that virtually all paddlers will use them. Additional limits on launching are unnecessary, especially given that only 29 paddlers launched on the river last year. We understand that the use and creation of user-created trails is a concern, and we share that concern, and we see no environmental objective or standard that limits on paddler river access could possibly meet unless the same river access limits are applied to all visitors.

**3) Identification of how American Whitewater believes that the plan revision is inconsistent with law, regulation, or policy**

**a. To the extent the Decisions prohibit paddling upstream of Green Creek the USFS has either committed perjury or violated the APA, and other laws.**

The Forest Service stated in a brief to the Fourth Circuit Court of Appeals that “In fact, the USFS neither permits nor prohibits floating on this part of the river,” referring to “the roughly 1.7-mile reach of river above Green Creek.”<sup>2</sup>

The Decisions however at least infer that they maintain an existing prohibition, or institute a new prohibition of paddling upstream of Green Creek. To the extent the Decisions rest on maintaining an existing a paddling prohibition upstream of Green Creek, the USFS has committed perjury. Perjury is defined clearly in statute:

Whoever—

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section [1746](#) of title [28](#), United States Code,

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<sup>2</sup> See Answering Brief Federal Defendants-Appellees, American Whitewater v. Tidwell, Fourth Circuit Court of Appeals. 2/20/14. Footnote 9, Page 15.

willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States. *See U.S. Code Title 18, part I, Chapter 79, § 1621*

Perjury in Federal Court is a serious illegal act.

If however the Decisions aim to create a new paddling ban on the Chattooga River upstream of Green Creek, they do so with no basis, in violation of the APA and NEPA. The 2014 court claim cited above followed the 2012 decisions, so the 2012 EA cannot form any basis for a new prohibition. As of 2/20/2014 the reach was not prohibited. Also, the 2012 decisions specifically excluded this reach from the scope of the analysis and decisions. This leaves only the EA and Decisions challenged herein as a potential basis for a new paddling prohibition on the Chattooga River upstream of Green Creek.

The Decisions and EA collected no data on this reach, predicted no impacts, offered no legal basis, nor made any attempt to justify such a new prohibition. It was in fact out of scope. A new prohibition on paddling on this reach in this context would be in direct violation of the Administrative Procedures Act (APA).

The standard by which courts review decisions under the APA's "arbitrary and capricious" standard, 5 U.S.C. § 706(2), is "to determine whether the [agency] has considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 105, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983); see also *Southwest Center for Biological Diversity v. USFS*, 100 F.3d 1443, 1448 (9th Cir.1996); *Pub. Citizen v. DOT*, 316 F.3d 1002, 1020 (9th Cir.2003).

In the Decisions and EA, the Forest Service articulated no rational connection between any set of facts (of which none were presented) and the possible prohibition of paddling the Chattooga River upstream of Green Creek. Instead, in response to our comments, the EA cites only the 2012 decisions, which by court testimony do not prohibit paddling on this reach.

We believe this matter may be as simple as needing clarification. The Decisions may not prohibit paddling upstream of Green Creek, but due to the lack of clarity in the response to our comments we felt we must object to gain a definitive, and legal answer.

**b. In requiring paddlers, and only paddlers, to launch in specific locations the USFS is inconsistent with the Forest Service Manual.**

The Decisions require paddlers to launch in specific zones, while prohibiting paddlers from entering the river in other locations. At the same time other visitors may enter the river wherever they choose to fish, swim, hike, take photographs, or for any other purpose. The river entry limit is imposed only on paddlers.

The People At One Time (PAOT) capacities in the 2012 decisions, when multiplied by the number of days (to get a gross underestimate of total capacity), result in a capacity of more than 259,000 visitors per year for the upper Chattooga. Last year 29 people paddled the upper Chattooga. The Forest Service is imposing severe restrictions on 29 visitors that are not imposed on other visitors filling an unknown portion of a capacity of 259,000. *See EA, Table 3.2.1-3 for 2013-2014 use.*

The USFS Manual states: “When it becomes necessary to limit use [of a Wild and Scenic River], ensure that all potential users have a fair and equitable chance to obtain access to the river.” *See FSM 2354.41a.* Requiring (~30) people carrying a kayak to enter the river at specific locations while allowing (up to 259,000) people carrying packs or fishing rods or cameras to enter the river anywhere they choose is not fair or equitable. When only 30 people are paddling this river, the limit is also not necessary, so the FSM section above indicates no limits on launch sites are needed.

The Forest Service Manual, regarding Wild and Scenic River management states: “Manage the use of rivers with as few regulations as possible.” *See FSM 2354.03.3* Here the Forest Service imposes dangerous and unprecedented limits on such a small group of visitors that the effects of those regulations are negligible. It is entirely possible to eliminate these restrictions without having any measurable impact.

The Forest Service Manual recommends that managers of Wild and Scenic Rivers “apply indirect techniques for regulation of use before taking more direct action.” In this case simply building the trails to the river would more than suffice as an indirect technique in encouraging paddlers to launch at specific locations. Likewise signage could encourage launching at specific sites.

The access zones were envisioned in the 2012 decisions when there was no data on what was then presumed to be significant paddling demand, and no caps on use. The zones were envisioned to deal with thousands of paddlers, yet only 29 showed up. The Decisions objected to herein must now rely on the best available science and adapt in real-time to bring the management back into alignment with reality and agency policy. The access zones are not needed.

Our objection to this policy decision by the Forest Service is not about what the Agency can do, it is about what the Agency should do. It is not fair and has no social or biophysical value to restrict where 30 paddlers (or 100 or 300) can enter the river while allowing up to 259,000 other visitors to enter anywhere they choose. Worse, it is not safe. Paddlers need the freedom to launch in locations that are consistent with their risk assessments. Paddlers may want to put in below a dangerous log, or to shorten their trip based on energy levels, and those decisions might make the difference between a great Wild and Scenic River experience and tragedy. The vast majority of paddlers will put in at the easiest and recommended sites (kayaks are heavy and awkward after all), but freedom on the river to make smart, safe, personal decisions is vital.

- 4) Statement that demonstrates the link between prior substantive formal comments submitted by the objector and the content of the objections, unless the objection concerns an issue that arose after the opportunity for formal comment.**

American Whitewater has consistently participated in this NEPA process and raised the issues that we object to herein.

On August 23, 2013 we submitted scoping comments. In these comments we offer our support for the proposed trails and request that specific designated launch areas not be required because they are unnecessary, unfair, and without precedent.

On October 28, 2014 we submitted comments on the Draft EA and Draft Forest Plan Amendments. In these comments we:

- Supported the proposed trails
- Requested that the documents not designate specific launch sites for paddlers, or in the alternate require them for all visitors.
- Requested that the documents clearly require a permit for paddling downstream of a point 200 feet upstream of Green Creek, but not require a permit for, or prohibit, floating upstream of that point. Note that we had no reason to bring this up during scoping because we had no way of predicting the Draft EA would at best be vague and at worst run counter to claims made in Federal Court.

Each of these points was listed in the “Responses to Questions Received...” section of the Final EA, with inadequate and often unclear responses. *See Final EA, pages 118-124.*

In short, our comments on the Draft EA mirror this objection point-by-point.

## **5) Conclusion**

American Whitewater strives to be a good partner with the Forest Service, and we value that partnership. We fully support the ability of the Forest Service to construct and designate the multi-use trails proposed in the Decisions. We object only to judgments on two issues that are unrelated to the proposed trail construction. We ask that you clearly state that the Forest Service does not prohibit paddling upstream of Green Creek, and that you allow paddlers to access the Upper Chattooga where they choose just like other visitors.

Thank you for considering this relief and our interests.

Sincerely,

Kevin R. Colburn



National Stewardship Director  
American Whitewater