



**"Michael Bamford "**  
**<mbamford123@comcast.net**  
**>**

01/24/2011 11:50 PM

To <comments-southern-francismarion-sumter@fs.fed.us>

cc <pbradley@fs.fed.us>, <michelleburnett@fs.fed.us>

bcc

Subject comments on the NEPA Reinitiation



Bamford comments on reinitiation of NEPA 01-24-2011.pdf

January 24, 2011

To: Chattooga Planning Team  
U.S. Forest Service  
4931 Broad River Road  
Columbia, S.C. 29212  
[comments-southern-francismarion-sumter@fs.fed.us](mailto:comments-southern-francismarion-sumter@fs.fed.us).

Subject: The re-initiated NEPA process on recreation uses analysis on the Chattooga North Fork

Thank you for the opportunity to provide 'new information' for consideration prior to the re-initiation of the NEPA process. With these comments, I incorporate all my previous comments submitted to the USFS regarding the Chattooga.

Since 2008, there has been two relevant court published opinions. The 12/02/2010 'Opinion and Order' published by Judge Childs in SC is specific to the Chattooga. While the 2008 court ruling in *Friends of Yosemite v. Kemper* involved more general direction for management of Wild and Scenic Rivers. Each court ruling provides new guidance and direction on the scope for the reinitiated NEPA process.

**A: OPINION AND ORDER:** C.A. No. 8:09-cv-02665-JMC, 12/02/2010 from Judge Childs, SC

**1. The status-quo is the absence of boating on the upper Chattooga.**

Judge Childs noted "The regulations promulgating the floating prohibitions at issue have been in place for more than thirty (30) years. Therefore, the requests by Plaintiffs do not seek to maintain the status quo" (id p.20). Judge Childs opinion on the status quo, matches that of Judge Kelly in 2006.

The importance in defining the 'status quo' influences the scope of an Environmental Assessment. Since NEPA alternatives must be compared against each other, and must include the no-action alternative [40 CFR§ 1502.14], any proposed new boating opportunities, must be compared against the status quo. See [*Friends of Yosemite v. Kempthorne* (520 F.3d 1024 (9th Cir. 2008))]

Similarly 36 CFR § 219.7 mandates: 'previous management plans provide the basis for future agency action.' The statute adds: "The evaluation shall include a comparative analysis of the aggregate effects of the management alternatives and shall compare present net value, social and economic impacts, outputs of goods and services, and overall protection and enhancement of environmental resources." [36 CFR § 219.12]

The re-initiated NEPA and revised Environmental Assessment must compare any new boating opportunities against the current conditions on the Chattooga. NEPA must compare proposed alternatives against the "present conditions" as a baseline. This significantly alters the definition of the 'Proposed Action' and 'Decision is to be made' sections published in the 2008 EA.

The hypothesis being assessed changes from: 'Should new boating opportunities be allowed/banned from the upper Chattooga?' in 2009, to: '**How will new boating opportunities effect the current environment of the upper Chattooga?** Although the 'desired conditions' of current visitor was collected in 2005, the impacts to these visitor experiences from expanding boating was never assessed.

Defining the EA's 'Proposed Action' and 'Decision to be Made' establishes the framework in which any future agency Decision will be reviewed by the courts. Outlining the framework of NEPA is not an insignificant step, because not only is an agency final Decision appealable and open to judicial review, but so is the scope of the NEPA under which the Decision is finally made<sup>1</sup> [5 U.S.C. § 706(2)(A)].

The USFS should avoid mimicking the kayak lobby's litigious rhetoric when outlining the scope of assessment. The kayak lobby has already filed their lawsuit prior to the final agency decision, placating the litigious floaters by catering the new NEPA to their gibberish is pointless.

## 2. Geographic Scope of Review,

Judge Childs acknowledged that the kayak lobby limited their claims to the 'upper Chattooga' or 'headwaters' ("Only the northernmost twenty-one miles ...are at issue in this case" id @ 2), though she did not limit her judicial review to such a myopic scope. Judge Childs acknowledged that "Plaintiffs have access to the Chattooga River to experience floating on the lower portion of the river and experience different ORVs in other areas. ... only a partial loss of opportunity to participate in one particular activity." (id p.24).

Similarly, Judge O'Kelly's 2006 Order did not allow the kayak lobby to segment the resource so narrow-mindedly. Judge O'Kelly wrote "[W]hile the Headwaters is currently closed to floating, abundant opportunities to float on the Chattooga remain; over 60% of the river, approximately 36 miles, remains open to floaters."<sup>2</sup>

Although the kayak lobby seeks to restrict review to only the Chattooga above highway 28, the USFS are required to take a 'resource-wide' and 'broad-based' when framing a NEPA (see my previous comments), which includes the geographic scope [40 CFR § 1504.2]. A NEPA scope cannot be defined so narrowly that a particular outcome is predetermined.

Even the 2005, Decision for Appeal #04-13-00-0026 acknowledged the discrepancy between the kayakers 'Request for Relief' and the order outlining the Capacity Analysis. Although the kayak lobby sought relief for "between Grimshaws Bridge and the Highway 28 Bridge", Gloria Manning incorporated all of 'The Chattooga River Management Area (Management Area 2)' into her remand decision. For added clarity, Manning referenced agency guidelines requiring consideration of the 'diversity of recreation opportunities within the geographic area', not just the upper Chattooga.

So although the kayak lobby continue to insist on a narrow geographic focus based exclusively on the zones previously established to balance conflicting types of recreation, neither the courts nor the administrative review accepted such nonsense. Isolating one portion of the Chattooga WSR from the whole, does not meet WSR management guidelines for balancing recreation throughout the designated corridor. This reinitiated NEPA should avoid letting floaters establish the scope of the geographic review and consider resource related zones; consider Wilderness v. nonwilderness areas, or the Wild or Scenic classification when assessing zones, alternatives should differ based on the landownership of the segment. Geographic scope should be resource related, rather than the most convenient spots for floaters to enter the river.

---

<sup>1</sup> "that the scope of an EIS is proper, is important to the required determination whether the agency in good faith objectivity has taken a hard look at the environmental consequences of a proposed action and at alternatives to that action"[Save Our Sycamore v. Metropolitan Transit Auth., 576 F.2d 573, 575 (5th cir 1978)]

<sup>2</sup> Pg 17-18, AW v. Bossworth, Case 2:06-cv-00074-WCO Document 23 Filed 10/06/2006

### 3. Is paddling the only recreational activity that is an Outstanding and Remarkable Values?

To date, the USFS has only acknowledged 'recreation' as a designated value that must be protected and enhanced. However, Judge Childs 'notes that floating is one of the ORVs of the Chattooga' (id p.21). Although the opinion did not make 'boating on the headwater' an ORV, it does elevate the 'protect and enhance' status of floating above all other activities under the general 'recreation' value.

Although Judge Childs added 'the WRSA contemplates that some level of regulation is necessary to balance the river's ORVs' (id p.21), she never discusses any other ORVs, nor attempts to define them. Instead Judge Childs warns that unlimited kayaking could 'potentially cede from other users... enjoyment which may rightfully belong to them.' (id p.23). She never recognizes equal status among the various activities (wildlife viewing, swimming, hiking, and angling) that the USFS has always considered part of the Chattooga 'recreational' ORVs. Therefore, a discrepancy exists between the USFS defined values and those being discussed in South Carolina Federal court.

Before debating which one is correct, or how to remedy the disparity, the USFS should include a review of how and when Outstanding and Remarkable Values are defined. The WSR guidelines are clear that the managing agency determines these 'protect and enhance' values in River Management Plan.

Counter to the kayak lobby claims, the 1971 study Report deferred recognition of any values to the river management plan; noting: '*This plan will recognize all of the resource and aesthetic values of the Chattooga River environment*'. (Pg 85 1971 Study Report). Since the 1977 River Management Plan established the current limits on boating, as recommended by the 76 Development Plan, Boating the headwaters could not possibly be a 'value' associated with the upper Chattooga. Rather, the absence of boats on the headwaters is the recognized 'value', and it is the absence of boating that the USFS must 'protect and enhance'.

Through sheer repetition, the kayak lobby has even convinced a Federal Judge that floating itself is a value that must be protect and enhance. Although the court refused to acknowledge that floating '*on the headwaters*' was a value, I am concerned that the legal tripe shoveled into the public record by the kayak lobby, might again bamboozle the unknowing into legitimizing additional bogus claims made by the kayak lobby. Allowing floating to be elevated to an ORV above all other forms of recreation, would require that floating be 'protected' above swimmers and anglers. The kayak lobby demands for eliminate stocking, or closing swim holes, to 'enhance' the floating value would be given legal clout if the court opinion goes unchallenged.

The court's recognition that floating is a value associated with the lower Chattooga is not damaging itself. However, if 'floating' is a stand-alone value, than so should be fishing, wildlife-viewing, swimming, camping, hunting and hiking. Any geographic significance to these values must be evaluated based on the 77 CRMP, not the repetitive claims made by the kayak lobby.

I urge the USFS to either challenge the court ruling regarding 'floating' being a 'stand-alone' ORV, or accept the court ruling and raise all other recreational activities to the status of Outstanding and Remarkable Value. Floaters should not receive preferential treatment over all other activity types, simply because they make a court claim that was unchallenged by the agency. All Chattooga

visitors should be treated equitably as either a stand-alone values or collectively as a component of the recreational value.

**B: *Friends of Yosemite Valley v. Kempthorne* (9th Cir. 2008) 520 F.3d 1024.**

4. **Limits of Acceptable Change (LAC):** The USFS utilized the LAC process for the visitor capacity analysis on the Chattooga River. This allows competing interests to help define the amount of change acceptable to current policy with the hope of reaching consensus on policy. More simply, this process solicits public input and visitor 'desired conditions' to determine the tolerable level of change. The NPS uses a similar tool called VERP. Both can be useful tools.

In 2008, the 9<sup>th</sup> circuit court recognized that this type of capacity process is inappropriate for managing Wild and Scenic Rivers, because of the *non-diminish* mandates protecting the 'primary emphasis values'. Although the public could 'accept' some level of impact, management agencies cannot diminish the esthetic, biological or scenic values of the river. In other words, the parameters of the LAC cannot exceed the limits imposed by WSR statutes on agencies.

So, although the kayak lobby's desired condition is unlimited floating on all sections of the River, unless floaters can prove zero impact they cannot be granted expanded access. Unless it is proven that floaters do not diminish any other values, nor impact the solitude of current visitors, nor create any new scenery impacts, than expanding floater access would violate WSR mandates. This standard for managing recreation on WSRs should be greatest through 'Wild' sections and/or Wilderness areas. The perceived 'significance' of these impacts is not relevant in assessment, nor in a FONSI under LAC review; the standard for assessing, before allowing, new recreation opportunities is a non-diminish standard.

5. **Degradation:** The 9<sup>th</sup> circuit court also requires the agency to address degradation that has already occurred (*Id.* at pp. 1035-1036.). The USFS had planned to address user-created trails in the upper Chattooga under the 2009 FEIS; I commend these agency actions. Through restricting parking, and closing camps and trails above highway 28, the USFS seeks to reduce impacts to the river environment by reducing the quantity of users allowed on the headwaters at any one time. Oddly, foot-travel access would be further reduced, while proposed policy expanded access for floaters.

Conversely, no corrective action, or any reduction of access, is being considered below highway 28. This, even though the USFS assessment of the lower Chattooga found twice as many user-created trails as discovered on the upper. In other words, the user created trails on the heavily boated section will be ignored, while trails, parking and campsites are reduced above highway 28 at the expense of hikers, campers and anglers. The policy certainly does not treat all users equitably.

As GA Forest Watch has pointed out to the USFS, the agency should concentrate on getting the lower Chattooga to look more like the upper Chattooga, not simply expand the impacts found on the lower Chattooga onto the upper segments

Oddly, instead of reducing the quantity of floating visitors to the lower Chattooga to impede degradation of the riparian areas, the USFS increased the floating quota in 2004 at the behest of American Whitewater. So, although riparian degradation is far more severe along the heavily-boated lower Chattooga, the USFS increased capacity for boaters beyond the level at which has already been proven to degrade the riverbanks. Fortunately, the 2005 Decision for Appeal did not limit the capacity analysis, nor revisions to the 2004 RLMP, to just the headwaters. The reinitiated NEPA should include the already conducted assessment of user-created trails along the lower Chattooga and the West Fork, than alter the RLMP to stop degradation of the riverbanks by limiting the number of floaters allowed to visit the River.

**6. Adoptive management:** In *Yosemite v. Kemper* the court ruled that agencies must be proactive in triggering agency action, before any degradation occurs (id pp 1034). The Adoptive Management plan outlined in the 2009 Decision establish no such proactive triggers. The variables suggested for monitoring included *encounters* and *LWD*, but baseline have not been collected for encounters which measure 'solitude, and a method for measuring encounters remains only vague. None of the proposed monitoring variables address possible impacts associated with the agency action of expanding boating upstream, These meaningless variables are those suggested by the kayak lobby's recommended consultant in the 2007 report and have little to do with the proposed agency action. More applicable variables include the effect expanding boating might have on wildlife (flora and fauna), measures of riparian impacts that 'are to be expected' from new portage trails, the number of displacement visitors, and finally the measure of the current visitor experience.

The last step of the outlined LAC process was the establishment of these variables and trigger mechanisms. This step was never completed. So long as proposed triggers remain within the WSR statutory requirements, completion of the LAC process would satisfy the Visitor Capacity Analysis order for the agency and meet WSR guidelines. Otherwise, the floaters assessment of an incomplete capacity analysis remains correct.

I submit these comments with the hope of avoiding an endless loop of litigation and analysis that is currently the fate of the NPS, and other parties, involved in the Mercedes River planning. Other than 'floating' being declared an ORV by the court, no new issues are brought to light by these comments. These comments only add 'new' information that support previous requests to alter the scope of the assessment. I welcome the reinitiation of the NEPA process in the hope that the Forest Service focuses on assessing all issues transparently, avoids methodology written by the kayak lobby and includes all interested parties in the assessment.

Sincerely, Michael Bamford.

