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Southern Regional Office

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12-08-12-0012  
Date: June 28, 2012

### **CERTIFIED MAIL R.R.R.**

American Whitewater  
ATTN: Mr. Kevin Colburn  
2725 Highland Drive  
Missoula, MT 59802

Re: Appeal of Forest Supervisor George M. Bain's, Acting Forest Supervisor Diane Rubiaco's and Forest Supervisor Paul L. Bradley's January 31, 2012, Decision for Amendments 1, 22 and 1, Respectively, for Management of Boating Activities in the Upper Chattooga River Land and Resource Management Plan

Dear Mr. Colburn:

Pursuant to the authority granted to me by Title 36 Code of Federal Regulations (CFR) Part 219 Interim Appeal Regulations, this is my Decision on your Notice of Appeal (NOA) for the subject Decision. Your appeal is to the Decision to amend the Land and Resource Management Plan (LRMP) to regulate boating in the Upper Chattooga River Corridor. I have consolidated your Appeals 12-08-03-0010 (Chattahoochee-Oconee Amendment 1); 12-08-11-0011 (Nantahala Plan Amendment 22); and 12-08-12-0012 (Sumter Plan Amendment 1) into a single response.

### **BACKGROUND**

On January 31, 2012, Chattahoochee-Oconee National Forests (NFs) Forest Supervisor George M. Bain, NFs in North Carolina Acting Forest Supervisor Diane Rubiaco, and Francis Marion-Sumter NFs Forest Supervisor Paul L. Bradley, signed the respective Decisions for this Project, amending the existing LRMP. On March 19, 2012, I received your electronically-filed NOA, which was accepted by acknowledgement on March 23, 2012.

### **RELIEF REQUESTED**

In addition to denying any stay requests, you requested that the Decisions be immediately revised to support year-round unlimited noncommercial paddling.



## DECISION

I based my Decision upon a thorough review of your NOA, the Decision Notice (DN), Finding of No Significant Impact (FONSI), Environmental Assessment (EA) and other project record documents for these Part 219 LRMP Amendments. In addition, I also considered intervenor comments filed on your appeals by Whiteside Cove Association, Jenkins at Law and Greenfire Law.

I find that the Forest Supervisors complied with the relevant legal authorities, such as the National Environmental Policy Act (NEPA), National Forest Management Act (NFMA) and Wild and Scenic River Act (WSRA). Therefore, I am affirming the Forest Supervisors' January 31, 2012, Decision. I have enclosed a detailed discussion of the issues raised in your appeals and the rationale which supports my findings for each issue.

This constitutes the final administrative determination of the Department of Agriculture unless the Chief, on his own volition, elects discretionary review of the Decision (36 CFR 219).

Sincerely,

*/s/ Ken S. Arney*

KEN S. ARNEY  
Reviewing Officer  
Deputy Regional Forester

Enclosure

## DISCUSSION OF ISSUES

### **Issue 1      Whether the decisions are in compliance with the Wild and Scenic Rivers Act (WSRA).**

#### **A. The appellant contends “1. Banning and severely restricting floating fails to protect and enhance the recreational value of floating that supported WSR designation.” (p. 27)**

The EA states (p. 62) that the 1996 ORV Report (Project Record #011) concludes that the outstanding recreation values that contributed to the designation of the river are still in place. There are fewer road-accessible access points and roads than in the 1970s, even as other facilities and trail access have increased; these closures have increased the river’s sense of naturalness and made it feel more remote (EA, p. 62). The EA also states (p. 62) that use by commercial outfitters on the lower river segment has dramatically increased since designation. The EA notes (p. 63) that “in part due to its national reputation for whitewater boating, 40,000-70,000 boaters per year run sections of the lower segment of the Chattooga WSR.” The agency has established capacities (boaters per day) for both commercial and private boaters on the lower segment (EA, p. 63); commercial guides use their full quotas on many days of the year and are carefully regulated to reduce impacts; private boaters have not approached their allocations so capacities have not been exceeded.

The EA (pp. 11-12) notes in response to the issue of boating access and equitable treatment of boating that Alternatives 8, 11, 12, 13, 13A, and 14 were developed to respond to this issue. Alternative 8 includes year-round boating, while Alternatives 11, 12, 13, 13A, and 14 vary the amount of boating on different reaches of the upper segment, during different seasons or at different flows to address this issue. The EA describes (p. 73) how the analysis team used logic-based calculations to estimate encounter levels in the upper segment of the Chattooga and during different times, relate them to different use levels, and compare encounter levels to user tolerances for encounters; these analyses allowed the team to develop estimates of use levels that would keep encounters from impacting the desired condition, thus protecting the Recreation ORV.

The Interagency Wild and Scenic River Coordinating Council (*Compendium*, p. 70; Project Record #413) interprets Section 10(a) of the WSRA (the “protect and enhance” mandate) as a “non-degradation and enhancement policy for all designated river areas, regardless of classification...” Non-degradation within the Act’s context is not synonymous with *no impact*. Non-degradation in the context of a wild and scenic river is assurance that there is no downward trend in conditions that affect ORVs. As mentioned previously (EA, p. 62), the 1996 ORV Report concluded that the outstanding recreation values of the river are still in place.

**B. The appellant contends “Banning and severely restricting floating fails to protect and enhance the scenic values that supported WSR designation.” (p. 28)**

The EA states (p. 230) that the 1996 ORV Report (Project Record #011) found scenery continued to be an important part of the experience of the Chattooga River and that outstanding scenery values are still present in the corridor. The EA states (p. 231) that scenery remains largely unchanged since the time of designation, although it notes that changes to vegetation have been occurring -- eastern hemlock trees (found primarily along the main part of the river and tributaries within the corridor) are dying from Hemlock Woolly Adelgid (HWA), an insect native to East Asia; eventually all of the hemlocks will succumb to this pest. The EA discloses (pp. 232-250) the direct, indirect and cumulative effects of the alternatives on the Scenery ORV, further noting on page 250 that all alternatives would continue to protect the Scenery ORV in the Chattooga River. The agency noted this effects analysis in its *Summary of Public Comments Received on the EA* (pp. 127-130 (Public Concern #50) and pp. 132-133 (Public Concern #53;., Project Record #411).

The EA states (p. 16) that in many cases, ORVs are defined when the river is designated. However, for some rivers, including the Chattooga, rivers were designated without explicit discussion of their ORVs, so this became a post-designation administrative task to be conducted in accordance with the Interagency Guidelines for Wild and Scenic Rivers (EA, p. 16). The EA states (p. 16) that the Chattooga ORVs are largely based on information in the original WSR study report in 1971 and from a formal analysis of the river’s ORVs conducted in the mid-1990s (referred to as the 1996 ORV Report). In the *Summary of Public Comments Received on the EA* (p. 128; Project Record #411) the agency notes the Scenery ORV is described in the 2004 Sumter Revised FLRMP in Management Area 2.A.

The Sumter Revised FLRMP (Sumter FLRMP, pp. 2-26, 3-5, 3-7, 3-14, 3-16, and 3-17) uses scenic integrity objectives (SIO) to determine if management activities meet forest plan standards and the classification of wild, scenic, or recreational (EA, p. 231). The Sumter FLRMP Goals and Standards address protecting scenic values:

Forestwide Goals, Objectives, Standards:

- Goal 28 The Chattooga Wild and Scenic River would be managed to protect and enhance free-flow, water quality and the outstandingly remarkable values of geology, biology, scenery, recreation and history (p. 2-26).
- Forestwide Standard FW-88 Protect the outstandingly remarkable values and maintain the identified wild, scenic or recreational classification (p. 2-26).

Management Area Standards

- Designated Wild River Segments (Management Area 2.A.1)  
Management Area Standard 2.A.1.-1 The scenic integrity objective is very high for all inventoried scenic classes (p. 3-14).
- Designated Scenic River Segments (Management Area 2.A.2)

Management Area Standard 2.A.2.-1 The scenic integrity objective is very high for all inventoried scenic classes (p. 3-16).

- Designated Recreational River Segments (Management Area 2.A.3)  
Management Area Standard 2.A.3-1 The scenic integrity objective is high for inventoried scenic classes 1 and 2 and moderate for scenic classes 3 – 5 (p. 3-17).

The Chattahoochee-Oconee FLRMP uses Scenic Integrity Objectives (FLRMP, pp. 2-28 to 2-30) to protect and enhance the scenic values of the forest. Specifically, it recognizes scenery as an ORV for the Chattooga WSR (P. 3-20) and includes the following standards:

- Designated Wild River Segments (Management Area 2.A.1)  
Management Area Standard 2.A.1-0001 The scenic integrity objective is Very High for all inventoried scenic classes.
- Designated Scenic River Segments (Management Area 2.A.2)  
Management Area Standard 2.A.2-001 The scenic integrity objective is High for inventoried scenic classes.
- Designated Recreational River Segments (Management Area 2.A.3)  
Management Area Standard 2.A.3-001 The scenic integrity objective is High for inventoried scenic classes 1 and 2, and Moderate for scenic classes 3 through 5.

The Nantahala FLRMP contains a Forestwide Goal (Goal #7, p. III-2) to “Protect the beauty of the Forests through special attention to visually sensitive areas and the careful application of resource management activities”. In addition, it contains the following standards:

General Forestwide Direction:

- Wild and Scenic River Management: 10.a - Maintain the natural appearance and essentially primitive character of the river areas. Provide special emphasis to visual quality within the visual corridor (p. III-16).
- Wild and Scenic River Management: 11.a - Maintain the river and its immediate environment in a near natural appearance. Provide special emphasis to visual quality within visual corridors outside the river area (p. III-17).
- Wild and Scenic River Management: 12.a - Provide special emphasis to visual quality in the immediate river environment and to protect the outstandingly remarkable scenic values in Cheoah and Snowbird Creek, Nantahala River (below Nantahala Lake) and Wilson Creek (p. III-18).

Management Area 15 Visual Resource Management - 1(a) for the Chattooga:

- 1(a) Meet a VQO of Retention. Meet a VQO of Preservation where the Ellicott Rock Wilderness overlaps the wild and scenic river corridor (p. III-167).

### **C. The appellant contends “Agency fisheries management fails to protect and enhance fisheries values.” (p. 29)**

The Response to Comments (Tab 411, pp. 64-65) states: “Public Concern 18 The Forest Service should reconsider eliminating and/or reducing the stocking of non-native species to reduce the impacts from fishing, to improve conditions for native fish and other aquatic species, and to indirectly limit use prior to instituting direct measures”.

Response to PC 18 Stocking of trout is outside the scope of this decision. Stocking of trout was occurring in 1971 and in the 1971 Wild and Scenic River Study Report, Chattooga River notes that stocking of catchable size trout was occurring in some of the Chattooga River in all three states. The 1971 Designation Study report includes an action plan for fisheries (pp. 87-89), which notes that Game and Fish State organizations recommend managing Chattooga as a “Wild River fishery”; stocking sub-adults and fingerlings in the wild and scenic sections, stocking any size fish in the recreation sections; and vehicular access for stocking is provided in the recreation sections. The Federal Register, Volume 41, Number 56 – Monday, March 22, 1976 (also known as 1976 Federal Register) not only includes formal descriptions of the wild and scenic river boundaries and classifications but also includes information on the fisheries:

A native fishery will be encouraged. Fish stocking will be permitted at the Highway 28 Bridge, Burrells Ford, Bullpen Bridge, Long Bottom Ford on the river, and Warwoman and Overflow Bridges on the West Ford [sic].

The effects of the different alternatives to the different resources are discussed in EA, Chapter 3. Specifically, impacts from the different alternatives to the aquatic community are discussed in Section 3.2.2A Aquatics. The fish species diversity of the Management Indicator Community in the Chattooga River watershed has not changed in more than 20 years of sampling the main stem of the river (SCDNR unpublished data).”

**D. The appellant contends “Banning and severely restricting floating limits a use that does not substantially interfere with public use and enjoyment of identified WSR values.” (p. 30)**

The 2007 Integrated Report (p. 7; Project Record #171) notes “Section 10(a) of the WSR Act directs management to protect and enhance free-flowing conditions, water quality, and OR values, but allows other uses as long as they do not “substantially interfere with public use and enjoyment of the river’s values.” The Integrated Report (p. 7) cites the draft Interagency Guidelines that “Only after the river’s free flow conditions, water quality and OR values are protected and enhanced can other uses (e.g., grazing, new recreation development) even be considered under the “substantially interferes” clause. Congress left the judgment of when a use “substantially interferes” to the discretion of the river managing agency.”

In the 2012 Response to Comments (p. 156; Project Record #411), the agency notes “Focusing on recreation as an ORV, the administering agency has broad discretion to manage recreation activities and use so as to achieve the desired recreation experience and protect and enhance the ORVs. This discretion may include restricting or prohibiting a recreational activity, a number of recreational activities or, perhaps in rare circumstances, all recreation use within a section (subsection) of the designated component. Through the institution of restrictions or prohibitions in certain sections of the river, the administering agency may balance recreation uses of the river corridor to protect and enhance all ORVs, free-flow and water quality for the entire designated component.” The Decision Notices (Sumter DN, p. 5; Chattahoochee-Oconee DN, p. 6; Nantahala DN, p. 4) note that the Visitor Capacity Analysis in the EA indicates that historical use during the winter and early spring is traditionally low. Therefore, setting capacities allows for the addition of a new user group – boaters - without affecting the overall capacities.

The EA addresses (pp. 83-84) potential conflict between recreational users in terms of social values conflicts and face-to-face conflicts. Social values conflict refers to a situation where a sensitive group opposes an activity that they believe is inappropriate; face-to-face conflict refers to a situation where a sensitive group wants to avoid an offending use or minimize impacts from that use. Alternatives that allow boating on the upper segment presume different levels of face-to-face conflict that may need to be addressed, with different alternatives trading-off increased boating access with greater protection of opportunities for boat-free or low boating use experiences. The agency (EA, p. 85) employs separation strategies to mitigate potential conflict; separating users by space is a common way to address face-to-face conflict; zoning by segment or reach is an effective, often-used tool. The alternatives analyze a range of separation techniques using seasonal, reach, and flow restrictions to minimize conflicts between users.

**E. The appellant contends “5.Failing to analyze or manage the uppermost two miles of the Chattooga WSR fails to protect and enhance any values that supported WSR designation.” (p. 30)**

The 2007 Integrated Report (p. 7, Project Record #171) notes “Section 10(a) of the WSR Act directs management to protect and enhance free-flowing conditions, water quality, and OR values, but allows other uses as long as they do not “substantially interfere with public use and enjoyment of the river’s values.” The Integrated Report (p. 7) cites the draft Interagency Guidelines that “Only after the river’s free flow conditions, water quality and OR values are protected and enhanced can other uses (e.g., grazing, new recreation development) even be considered under the “substantially interferes” clause. Congress left the judgment of when a use “substantially interferes” to the discretion of the river managing agency.”

In the 2012 Response to Comments (p. 156; Project Record #411), the agency notes: “Focusing on recreation as an ORV, the administering agency has broad discretion to manage recreation activities and use so as to achieve the desired recreation experience and protect and enhance the ORVs. This discretion may include restricting or prohibiting a recreational activity, a number of recreational activities or, perhaps in rare circumstances, all recreation use within a section (subsection) of the designated component. Through the institution of restrictions or prohibitions in certain sections of the river, the administering agency may balance recreation uses of the river corridor to protect and enhance all ORVs, free-flow and water quality for the entire designated component.” The Decision Notices (Sumter DN, p. 5; Chattahoochee-Oconee DN, p. 6; Nantahala DN, p. 4) note that the Visitor Capacity Analysis in the EA indicates that historical use during the winter and early spring is traditionally low. Therefore, setting capacities allows for the addition of a new user group – boaters - without affecting the overall capacities.

The EA addresses (pp. 83-84) potential conflict between recreational users in terms of social values conflicts and face-to-face conflicts. Social values conflict refers to a situation where a sensitive group opposes an activity that they believe is inappropriate; face-to-face conflict refers to a situation where a sensitive group wants to avoid an offending use or minimize impacts from that use. Alternatives that allow boating on the upper segment presume different levels of face-to-face conflict that may need to be addressed, with different alternatives trading-off increased boating access with greater protection of opportunities for boat-free or low boating use

experiences. The agency (EA, p. 85) employs separation strategies to mitigate potential conflict; separating users by space is a common way to address face-to-face conflict; zoning by segment or reach is an effective, often-used tool. The alternatives analyze a range of separation techniques using seasonal, reach, and flow restrictions to minimize conflicts between users.

**F. The appellant contends “The USFS has failed to produce a valid user capacity analysis.” (p. 35)**

The Wild and Scenic River Act (WSRA, §1274 (d)(1)) states a CRMP “*shall address resource protection, development of lands and facilities, user capacities, and other management practices necessary or desirable to achieve the purposes...*”. The EA states (p. 67) that agencies have broad discretion interpreting this mandate (e.g., which visitor impact framework to use, or whether capacities must be expressed as a number or linked to indicators or standards for ORVs). The report *Capacity Reconsidered: Finding Consensus and Clarifying Differences* (Project Record #342; Abstract, *Capacity Reconsidered*) points out that work on capacity issues “has evolved considerably since the late 1960s as a result of environmental planning, court proceedings, recreation management practice, and recreation research.” The EA recognizes (EA, p. 67) that consensus about visitor capacity related concepts, principles and approaches appears to be emerging among researchers and resource professionals. In considering visitor capacity levels, agency planners drew from several sources (EA, p. 68):

- Use estimation workshop (Berger and CRC 2007)
- Vehicle counts at access areas (Berger Group 2007a)
- General relationships between use levels and impacts (2007 Integrated Report)
- Tolerances for impacts from Chattooga studies or those from other rivers
- Logic-based calculations or other analyses that associate vehicle counts at access sites with current peak-use levels

The EA (p. 68) defines capacity as the amount and type of use that protects and enhances river values. The EA recognizes (p. 69) that social impacts, especially encounters, are probably the most limiting factor for use levels in backcountry areas of the Chattooga. The EA notes (EA, p. 73) that the 2007 Integrated Report describes several potential relevant indicators, including different types of encounters; and further notes that encounters are the best single indicator for backcountry opportunities and was chosen as the focus of analysis. The EA also notes (EA, p. 73) that encounters are the only indicator of backcountry experiences that have been measured in the Chattooga corridor (by Rutlin, 1995). In addition, the social impact analysis in the EA (p. 453) states that information from the LAC process indicates opportunity for solitude is one of the most valued, if not *the* most valued quality of the recreation experience in the upper segment of the Chattooga WSR Corridor. The EA describes (p. 73) how the analysis team used logic-based calculations to estimate encounter levels in the upper segment of the Chattooga and during different times, relate them to different use levels, and compare encounter levels to user tolerances for encounters. These analyses allowed estimates of use levels that would keep encounters from impacting the desired condition, thus protecting the Recreation ORV (EA, p. 73).

The EA states (p. 69) that in general, capacities were developed with recognition that social impacts, such as encounters, are probably the most limiting factor for use levels in backcountry



areas of the Chattooga WSR corridor. The EA analyzed varying capacity levels in the alternatives (from no capacity levels set in Alternative 1 to a range of groups per day and group sizes in other alternatives). The selected alternative (EA, p. 132) defines a capacity level designed to prevent backcountry encounters from exceeding between two and eight per day on weekdays and between four and fifteen per day on weekends. As the EA notes (p. 126) these capacities are consistent with encounter tolerances in wildernesses with higher use (Dawson and Alberga, 2003) as well as findings from a study done in the Ellicott Rock Wilderness itself (Rutlin, 1995).

The EA describes (p. 70; see also Encounter Calculations, EA Appendix D, pp. 419-423) how the interdisciplinary team arrived at the existing use estimates presented in Table 3.2.1-5 by using vehicle-based capacities (parking lot spaces), applying a regional multiplier of 2.5 people per vehicle, and assuming one vehicle equals one group. These estimates were used to develop a range of capacity levels for frontcountry and backcountry areas. Parking lot capacities are described in Chapter 3, Existing Conditions (EA, pp. 69-70). The analysis notes (EA, p. 86) parking lots have *de facto* capacities that may limit use once they are filled; with increased use, visitors may experience higher levels of congestion, crowding, or a reduced sense of naturalness. The EA states (p. 103) in alternatives that set capacity limits, there would be days when use exceeds capacity; on these days, all users would compete for limited parking availability, and some would be displaced.

Monitoring of capacity levels (Appendix G - Monitoring Plan and Adaptive Management Strategy, EA, p. 482) will determine if boating contributes to higher use while still meeting current levels of opportunities for solitude without degrading the ORVs of the river. Furthermore, the Decision Notices (Sumter DN, p. 5; Chattahoochee-Oconee DN, p. 8; Nantahala DN, p. 5) state that components of the decision relating to capacity, parking, group size limits, and actions to designate trails, campsites, put-ins and take-outs will maintain or increase opportunities for solitude.

### **Finding**

I find the decisions preserve the river's free-flowing condition, water quality, and outstandingly remarkable values, and comply with the Wild and Scenic River Act.

### **Issue 2      Whether the decisions are in compliance with the Wilderness Act.**

#### **A. The appellant contends "1. Banning and severely limiting paddling fails to protect and enhance the *unconfined* aspect of recreation in a designated Wilderness area." (p. 41)**

The Decision Notices (Sumter DN, p. 1; Chattahoochee-Oconee DN, p. 3; Nantahala DN, p. 1) state that this decision preserves the wilderness character of the Ellicott Rock Wilderness as required by the Wilderness Act; in the Rationale for the Decision each Decision Notice (Sumter DN, p. 5; Chattahoochee-Oconee DN, p. 8; Nantahala DN, p. 5) states that several components of the decision will maintain or increase opportunities for solitude; and the Finding of No Significant Impact for each Decision Notice (Sumter DN, p. 14; Chattahoochee-Oconee DN, p.

17; Nantahala DN, p. 14) states that the decision does not violate any federal, state, or local laws or requirements for the protection of the environment.

The EA notes (pp. 393-396) that in alternatives that allow boating there would likely be a slight negative effect in the primitive and unconfined component from the management restrictions placed on visitors. Regarding this, in the 2012 Response to Comments (p. 269; Project Record #411) the agency notes “a central mandate in the 1964 Wilderness Act is that the managing agencies preserve the wilderness character in designated areas. FSM 2320.2(4) directs the agency to: “Protect and perpetuate wilderness character...” Recent technical publications recommend using the qualities of Untrammeled, Natural, Undeveloped, and Opportunities for Solitude or Primitive and Unconfined Recreation in analyzing the affects a decision may have on wilderness character. The analysis presented in this document does this and recognizes that by making certain decisions the agency may be improving one quality of wilderness character (opportunities for solitude) over another (unconfined recreation) with the ultimate goal being to preserve wilderness character.”

The 2007 Integrated Report (p. 9) notes that the Wilderness Act also “directs wilderness to be managed for “unconfined recreation.” One interpretation suggests indirect management actions should be used to limit recreation impacts unless those prove insufficient, in which case direct actions are acceptable [*FSM 2323.12, dated 1990*].” FSM 2323.12(1) (WO Amendment 2300-2007-1, p. 18 of 55) notes: “Apply controls only when they are essential for protection of the wilderness resource and after indirect measures have failed.”

In the 2012 Response to Comments (p. 156; Public Concern #64), the agency notes: “Focusing on recreation as an ORV, the administering agency has broad discretion to manage recreation activities and use so as to achieve the desired recreation experience and protect and enhance the ORVs. This discretion may include restricting or prohibiting a recreational activity, a number of recreational activities or, perhaps in rare circumstances, all recreation use within a section (subsection) of the designated component. Through the institution of restrictions or prohibitions in certain sections of the river, the administering agency may balance recreation uses of the river corridor to protect and enhance all ORVs, free-flow and water quality for the entire designated component.”

**B. The appellant contends “2. Banning and severely limiting paddling fails to protect and enhance Wilderness character and primitive and unconfined recreation.” (p. 42)**

The Decision Notices (Sumter DN, p. 1; Chattahoochee-Oconee DN, p. 3; Nantahala DN, p. 1) state that this decision preserves the wilderness character of the Ellicott Rock Wilderness as required by the Wilderness Act; in the Rationale for the Decision in each Decision Notice (Sumter DN, p. 5; Chattahoochee-Oconee DN, p. 8; Nantahala DN, p. 5) states that several components of the decision will maintain or increase opportunities for solitude; and the Finding of No Significant Impact for each Decision Notice (Sumter DN, p. 14; Chattahoochee-Oconee DN, p. 17; Nantahala DN, p. 14) states that the decision does not violate any federal, state, or local laws or requirements for the protection of the environment.

The 2007 Integrated Report (p. 9) notes: “Wildernesses are designed to protect public purposes of “recreational, scenic, scientific, educational, conservation, and historical use,” but designation does not identify individual or more specific values (or priorities) for any given wilderness (a major difference from WSRs, where specific values are defined for each river). The overarching concept is to preserve natural conditions and wilderness character.”

The EA notes (pp. 389-396) that in alternatives that allow boating, the direct and indirect effects would likely be slightly negative for opportunities for solitude and primitive and unconfined recreation components from the management restrictions placed on visitors, but that the use of capacity limits, boating restrictions, parking limits, group size limits and camping restrictions would help mitigate the slight negative effects on opportunities for solitude. The EA (p. 390) states that for all alternatives, the effects of no other past, present or foreseeable activities when combined with the effects of these alternatives would result in any cumulative impacts on the four qualities of wilderness character within the Ellicott Rock Wilderness.

In the 2012 Response to Comments (p. 267; Project Record #411) the agency notes “... a central mandate in the 1964 Wilderness Act is that the managing agencies preserve the wilderness character in designated areas. FSM 2320.2(4) directs the agency to: “Protect and perpetuate wilderness character...” Recent technical publications recommend using the qualities of Untrammeled, Natural, Undeveloped, and Opportunities for Solitude or Primitive and Unconfined Recreation in analyzing the affects a decision may have on wilderness character. The analysis presented in this document does this and recognizes that by making certain decisions the agency may be improving one quality of wilderness character (opportunities for solitude) over another (unconfined recreation) with the ultimate goal being to preserve wilderness character.”... Paddling is a recreation activity that is compatible with wilderness. It is not a wilderness dependent activity and it may not be compatible with every wilderness.” The FSM 2320.6 states that “Because uses and values on each area vary, management and administration must be tailored to each area.”

**C. The appellant contends “3. Banning and severely limiting paddling fails to protect and enhance opportunities for solitude in a designated Wilderness area.” (p.43)**

The Decision Notices (Sumter DN, p. 1; Chattahoochee-Oconee DN, p. 3; Nantahala DN, p. 1) state that this decision preserves the wilderness character of the Ellicott Rock Wilderness as required by the Wilderness Act; in the Rationale for the Decision each Decision Notice (Sumter DN, p. 5; Chattahoochee-Oconee DN, p. 8; Nantahala DN, p. 5) states that several components of the decision will maintain or increase opportunities for solitude; and the Finding of No Significant Impact for each Decision Notice (Sumter DN, p. 14; Chattahoochee-Oconee DN, p. 17; Nantahala DN, p. 14) states that the decision does not violate any federal, state, or local laws or requirements for the protection of the environment.

The EA notes (pp. 389-396) that in alternatives that allow boating, the direct and indirect effects would likely be slightly negative effects on opportunities for solitude, but that the use of capacity limits, boating restrictions, parking limits, group size limits and camping restrictions would help mitigate the slight negative effects on opportunities for solitude. The EA (p. 390) states that for

all alternatives, the effects of no other past, present or foreseeable activities when combined with the effects of these alternatives would result in any cumulative impacts on the four qualities of wilderness character within the Ellicott Rock Wilderness.

The EA (p. 12) notes the general loss of solitude and related social impacts from potential use increases as a Key Issue. All action alternatives provide a range of responses to this concern by establishing capacities for frontcountry and backcountry areas as well as group size limits; they also describe a monitoring process and the resulting adaptive management strategy that together would ensure that use would not exceed capacities. The Decision Notices (Sumter DN, p. 5; Chattahoochee-Oconee DN, p. 6; Nantahala DN, p. 4) note that the Visitor Capacity Analysis in the EA indicates that historical use during the winter and early spring is traditionally low. Therefore, setting capacities allows for the addition of a new user group – boaters - without affecting the overall capacities. Furthermore, the Rationale for the Decision in each Decision Notice (Sumter DN, p. 5; Chattahoochee-Oconee DN, p. 8; Nantahala DN, p. 5) states that several components of the decision will maintain or increase opportunities for solitude.

The 2012 Response to Comments (pp. 267-268; Project Record #411) states “Through the analysis conducted, all of the alternatives “address the importance placed on solitude and the wilderness experience.” It goes on to cite recent Technical Publications regarding solitude: “Many different factors contribute in known and unknown ways to the experience of solitude or primitive and unconfined recreation (Borrie and Birzell 2001; Hendee and Dawson 2002; Manning and Lime 2000). For example, experiences may be influenced by factors largely beyond the control and influence of managers. Such factors include the attributes of the physical landscape, presence of certain animals (for example, mosquitoes and grizzly bears), local weather, intra- and inter-group dynamics, and skills and knowledge an individual brings to the experience. In contrast, managers may exert some control over use levels, types and patterns of use, level of development (both inside and adjacent to wilderness), amount and type of information available about the wilderness, and types of regulations imposed, all of which influence the opportunity to experience solitude or a primitive and unconfined type of recreation (Cole and others 1987; Lucas 1973; McDonald and others 1989; Watson 1995).”

**D. The appellant contends “4. Banning and severely limiting paddling on upper Chattooga WSR tributaries has no basis.” (p. 44)**

The EA (p. 45) states, per the Wild and Scenic Rivers Act, both the main stem of the river and the corridor (one-quarter mile on each side of the main stem) are designated as “wild and scenic.” As a result, because boating is not currently permitted on the main stem, it is also not permitted on the tributaries inside the wild and scenic river corridor. While developing alternatives that permit boating above Highway 28, the agency considered extending boating opportunities to the tributaries. However, because of concerns regarding large woody debris, native brook trout restoration, vegetation removal, increased encounter levels, user-created trails, and enforcement and management issues, this alternative was considered but not developed.

The 2005 Decision for Appeal (Decision for Appeal, p. 6) notes that the Regional Forester has the authority to limit or restrict use within a Wild and Scenic River or Wilderness area, including disallowing or restricting the number of on-river or in-corridor recreation users.

The Decision Notices (Sumter DN, p. 2; Chattahoochee-Oconee DN, p. 4; Nantahala DN, p. 2) notes that the decision is limited to the upper segment of the Chattooga WSR but that the decision is made within the context of the entire river. The Decision is to allow non-commercial boating by issuance of a boating permit on approximately 17 miles of the 21-mile main stem of the upper segment of the Chattooga WSR. This decision addresses public concerns about boating in the tributaries (Sumter DN, p. 6; Chattahoochee-Oconee DN, p. 8; Nantahala DN, p. 6) by continuing current management to not allow boating in the tributaries on the upper segment of the Chattooga WSR, which will provide important habitat needed for native brook trout restoration.

**E. The appellant contends “5. Stocking non-native trout adjacent to, and in a waterway connected to a designated Wilderness area fails to protect natural conditions (native trout).” (p. 45)**

**F. The appellant contends “6. Stocking non-native trout adjacent to, and in a waterway connected to a designated Wilderness area fails to protect natural conditions (native species other than trout).” (p. 47)**

**G. The appellant contends “7. Raising non-native trout adjacent to, and in a waterway connected to a designated Wilderness area fails to protect natural conditions (water quality).” (p. 49)**

**H. The appellant contends “8. Stocking non-native trout adjacent to, and in a waterway connected to a designated Wilderness area, and managing for angling of those fish, fails to protect primeval, primitive, natural recreation opportunities.” (p. 50)**

Combined Response for points , E, F, G, and H:

The Response to Comments (pp. 64-65; Project Record # 411) states: “Public Concern 18 The Forest Service should reconsider eliminating and/or reducing the stocking of non-native species to reduce the impacts from fishing, to improve conditions for native fish and other aquatic species, and to indirectly limit use prior to instituting direct measures.

Response to PC 18 Stocking of trout is outside the scope of this decision. Stocking of trout was occurring in 1971 and in the 1971 Wild and Scenic River Study Report, Chattooga River notes that stocking of catchable size trout was occurring in some of the Chattooga River in all three states. The 1971 Designation Study report includes an action plan for fisheries on pages 87-89, which notes that Game and Fish State organization recommend managing Chattooga as a “Wild River fishery”; stocking sub-adults and fingerlings in the wild and scenic sections, stocking any size fish in the recreation sections; and vehicular access for stocking is provided in the recreation sections. The Federal Register, Volume 41, Number 56 – Monday, March 22, 1976 (also known as 1976 Federal Register) not only includes formal descriptions of the wild and scenic river boundaries and classifications but also includes information on the fisheries:

A native fishery will be encouraged. Fish stocking will be permitted at the Highway 28 Bridge, Burrells Ford, Bullpen Bridge, Long Bottom Ford on the river, and Warwoman and Overflow Bridges on the West Ford [sic].

The effects of the different alternatives to the different resources are discussed in EA, Chapter 3. Specifically, impacts from the different alternatives to the aquatic community are discussed in Section 3.2.2A Aquatics. The fish species diversity of the Management Indicator Community in the Chattooga River watershed has not changed in more than 20 years of sampling the main stem of the river (SCDNR unpublished data)."

### **Finding**

I find the decisions preserve the wilderness character of the Ellicott Rock Wilderness and maintains outstanding opportunities for solitude and a primitive and unconfined type of recreation, and complies with the Wilderness Act.

### **Issue 3      Whether the Amendment complies with the Multiple Use Sustained Yield Act (MUSYA).**

**The appellant contends the following:**

**Section 1 of MUSYA provides that "the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, wildlife and fish purposes." 16 U.S.C. § 528 (1988) (emphasis added). The MUSYA further mandates "due consideration" of the "relative values" must be given when balancing uses. Balancing values must also be consistent with other laws. (Appeal, p. 50)**

**The Forest Service failed to attribute the appropriate "value" to boating the upper Chattooga and therefore could not possibly have properly balanced the mix of uses adequately. (Appeal, p. 50)**

**Accordingly, the USFS has failed to comply with the MUSYA's requirement to give 'due consideration' to the "relative values of various resources in particular areas.' (Appeal, p. 51)**

**USFS has attributed little or no value to floating on the Headwaters, even though Congress included the Headwaters in their identification of floating as an outstandingly remarkable value. This is a violation of the MUSYA. (Appeal, p. 51)**

The 2005 Decision for Appeal states the following:

Section 10(a) of the WSRA requires the river-administering agency to protect and enhance the values which caused a river to be added to the National System. These values are expressed in Section 1 (b) as the river's free-flowing condition, water

quality, and outstanding remarkable values (ORVs). The Interagency Guidelines (1982) interpret the direction in Section 10(a) as a "nondegradation and enhancement policy for all designated rivers, regardless of classification." (p. 4)

Specific to recreation as an ORV, the Interagency Guidelines direct public use "be regulated and distributed where necessary to protect and enhance...the resource values of the river area." Agency policy (FSM 2354.41) identifies factors to consider in developing direction for recreation visitor use in a wild and scenic river (WSR) corridor including the capability of the physical environment, desires of present and potential users, diversity of recreation opportunities within the geographic area, and budgetary, personnel and technical considerations. If it becomes necessary to limit use, "ensure that all potential users have a fair and equitable chance to obtain access to the river." (p. 5)

The Wilderness Act directs that areas designated as wilderness "be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness"(Section 2(a) of the Wilderness Act). Section 2(c) of the Wilderness Act defines wilderness, in part, as an area with "outstanding opportunities for solitude or a primitive or unconfined type of recreation." Additionally, Section 4(b) states that: "Except as otherwise provided in this Act, wilderness areas shall be devoted to the public purposes of recreation, scenic, scientific, educational, conservation, and historical use." Regulations developed for administration of National Forest wilderness establish that "wilderness will be made available for human use to the optimum extent consistent with the maintenance of primitive conditions" (36 CFR 293.2(b)). (p. 5)

After careful review of the record, particularly Appendix H, I am reversing the Regional Forester's decision to continue to exclude boating on the Chattooga WSR above Highway 28. I find the Regional Forester does not provide an adequate basis for continuing the ban on boating above Highway 28. Because the record provided to me does not contain the evidence to continue the boating ban, his decision is not consistent with the direction in Section 10(a) of the WSRA or Sections 2(a) and 4(b) of the Wilderness Act or agency regulations implementing these Acts. (p.6)

I am directing the Regional Forester to conduct the appropriate visitor use capacity analysis, including non-commercial boat use; and to adjust or amend, as appropriate, the RLRMP to reflect a new decision based on the findings. (p.6)

The EA states the following:

Specific need for action statements and relevant laws are summarized below:

- A. Action is needed to respond to an appeal decision on the Sumter Land and Resource Management Plan (2004). (p. 1)

- B. Action is needed to provide consistent management of the upper segment of the Chattooga WSR on all three national forests. (p. 3)
- C. Action is needed to preserve the upper segment of the Chattooga WSR's free-flowing condition, protect its water quality and protect and enhance its ORVs, as well as preserve the wilderness character of the Ellicott Rock Wilderness. (p. 3)
  - 1. Wild and Scenic Rivers Act (p. 3)
  - 2. Wilderness Act (p. 4)
  - 3. Potential conflict between WSRA and Wilderness Act (p. 5)

#### 1.4 Decisions to be Made

Decisions to be made are specific to the upper segment of the Chattooga WSR. Management of the river below Highway 28 was not challenged in the 2004 Sumter RLRMP and is not subject to further review. Management activities are considered within the context of the entire Chattooga WSR and are analyzed in the cumulative effects sections in Chapter 3. (p. 6)

The DN/FONSI (p. 1) states that the Purpose and Need for the Decision is the following:

- 1. Responds to an appeal decision on the 2004 Sumter Revised LRMP;
- 2. Provides consistent management of the upper segment of the Chattooga WSR on all three national forest; and
- 3. Preserves the upper segment of the Chattooga WSR's free-flowing condition, protects its water quality and protects its outstandingly remarkable values (as required by the Wild and Scenic Rivers Act [WSRA]), as well as preserves the wilderness character of the Ellicott Rock Wilderness (as required by the Wilderness Act)."

DN/FOSNI (p. 3) states under Section 3.0 Decision that "I have decided to implement Alternative 13A. The scope of my decision is limited to the upper segment of the Chattooga WSR. However, I made the decision within the context of the entire river..."

Project Record tab 183 is a document signed by Jerome Thomas dated September 26, 2007 regarding direction on the range of alternatives for Management of the Upper Chattooga River. The document specifically states:

The analysis teams are directed to follow the recommendations provided in the enclosed document, "Recommendations Regarding the Range of Alternatives for Management of the Upper Chattooga River."

"In light of the factors discussed above, the Responsible Officials for the plan amendments addressing management of the upper Chattooga River are advised to defer any management decisions that would alter the current status of boating opportunity from Grimshawes Bridge to the southern end of the Rust property. Any preliminary alternatives which contain this river segment should be eliminated from detailed consideration in the environmental assessment currently underway. Any new alternatives developed during the NEPA process that include management for general public use purposes should not include this segment of the river."

The responsible Forest Supervisors support this direction, which goes into effect immediately, in considering alternatives included in the August scoping letter, any new alternatives, and in communicating our analysis process to stakeholders.

#### **Finding**



**Issue 4      Whether the decisions comply with the National Forest Management Act (NFMA).**

**A. The appellant contends “1. The 2012 Amendments did not appropriately provide for multiple uses...The USFS failure to consider the outstandingly remarkable value of river recreation violates MUSYA. Therefore it also violates RPA and NFMA, which require the USFS to comply with MUSYA when managing the National Forests. (Appeal, p. 52)**

The 2005 Decision for Appeal states the following:

Section 10(a) of the WSRA requires the river-administering agency to protect and enhance the values which caused a river to be added to the National System. These values are expressed in Section 1 (b) as the river's free-flowing condition, water quality, and outstanding remarkable values (ORVs). The Interagency Guidelines (1982) interpret the direction in Section 10(a) as a "nondegradation and enhancement policy for all designated rivers, regardless of classification." (p. 4)

Specific to recreation as an ORV, the Interagency Guidelines direct public use "be regulated and distributed where necessary to protect and enhance...the resource values of the river area." Agency policy (FSM 2354.41) identifies factors to consider in developing direction for recreation visitor use in a wild and scenic river (WSR) corridor including the capability of the physical environment, desires of present and potential users, diversity of recreation opportunities within the geographic area, and budgetary, personnel and technical considerations. If it becomes necessary to limit use, "ensure that all potential users have a fair and equitable chance to obtain access to the river." (p.5)

The Wilderness Act directs that areas designated as wilderness "be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness"(Section 2(a) of the Wilderness Act). Section 2(c) of the Wilderness Act defines wilderness, in part, as an area with "outstanding opportunities for solitude or a primitive or unconfined type of recreation." Additionally, Section 4(b) states that: "Except as otherwise provided in this Act, wilderness areas shall be devoted to the public purposes of recreation, scenic, scientific, educational, conservation, and historical use." Regulations developed for administration of National Forest wilderness establish that "wilderness will be made available for human use to the optimum extent consistent with the maintenance of primitive conditions" (36 CFR 293.2(b)). (p. 5)

After careful review of the record, particularly Appendix H, I am reversing the Regional Forester's decision to continue to exclude boating on the Chattooga WSR above Highway 28. I find the Regional Forester does not provide an adequate basis for continuing the ban on boating above Highway 28. Because the record provided to me

does not contain the evidence to continue the boating ban, his decision is not consistent with the direction in Section 10(a) of the WSRA or Sections 2(a) and 4(b) of the Wilderness Act or agency regulations implementing these Acts. (p. 6)

I am directing the Regional Forester to conduct the appropriate visitor use capacity analysis, including non-commercial boat use; and to adjust or amend, as appropriate, the RLRMP to reflect a new decision based on the findings. (p. 6)

The EA states the following:

Specific need for action statements and relevant laws are summarized below:

- A. Action is needed to respond to an appeal decision on the Sumter Land and Resource Management Plan (2004). (p. 1)
- B. Action is needed to provide consistent management of the upper segment of the Chattooga WSR on all three national forests. (p. 3)
- C. Action is needed to preserve the upper segment of the Chattooga WSR's free-flowing condition, protect its water quality and protect and enhance its ORVs, as well as preserve the wilderness character of the Ellicott Rock Wilderness. (p. 3)
  1. Wild and Scenic Rivers Act (p. 3)
  2. Wilderness Act (p. 4)
  3. Potential conflict between WSRA and Wilderness Act (p. 5)

#### 1.4 Decisions to be Made

Decisions to be made are specific to the upper segment of the Chattooga WSR. Management of the river below Highway 28 was not challenged in the 2004 Sumter RLRMP and is not subject to further review. Management activities are considered within the context of the entire Chattooga WSR and are analyzed in the cumulative effects sections in Chapter 3. (p. 6)

The DN/FONSI (p. 1) states that the Purpose and Need for the Decision is the following:

1. Responds to an appeal decision on the 2004 Sumter Revised LRMP;
2. Provides consistent management of the upper segment of the Chattooga WSR on all three national forest; and
3. Preserves the upper segment of the Chattooga WSR's free-flowing condition, protects its water quality and protects its outstandingly remarkable values (as required by the Wild and Scenic Rivers Act [WSRA]), as well as preserves the wilderness character of the Ellicott Rock Wilderness (as required by the Wilderness Act)."

The DN/FOSNI (p. 3) states under Section 3.0 Decision that "I have decided to implement Alternative 13A. The scope of my decision is limited to the upper segment of the Chattooga WSR. However, I made the decision within the context of the entire river..."

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"The responsible Forest Supervisors support this direction, which goes into effect immediately, in considering alternatives included in the August scoping letter, any new alternatives, and in communicating our analysis process to stakeholders."

**B. The appellant contends "2. The 2012 Amendments failed to appropriately involve the public." (Appeal, p. 52). Specifically, The RPA/NFMA requires public involvement in the planning process. The USFS in this instance went through the motions of a public process but did so in a manner that manipulated and only selectively addressed public concerns. (Appeal, p. 52)**

**"The USFS made no changes in response to comments on the flawed reports that culminated in, and including, the 2007 Shelby and Whittaker Report. All of these reports were published only in their final form – no drafts were released for comment. The purportedly factual record developed by the agency was developed in a vacuum that excluded public involvement and criticism." (Appeal, p. 52)**

The EA states the following:

#### 1.5 Public Involvement

The public has shown considerable interest in management of the upper segment of the Chattooga WSR since American Whitewater et al. appealed the 2004 Sumter RLRMP. During the last seven years, the U.S. Forest Service has encouraged and documented public involvement throughout the process. All documents related to public involvement can be found in the project record and on the Francis Marion and Sumter National Forests' website at <http://fs.usda.gov/goto/scnfs/upperchattooga...>(p. 6).

The EA contains a "Values, Beliefs and Attitudes Assessment" (pp. 446—447 and pp. 460-463) as well as a Social Impact Analysis (Appendix F, p. 446) that describes an extensive public involvement process (pp. 454-459) including the Limits of Acceptable Change workshops, public meetings and hearings, websites, and formal comment periods. The Capacity and Conflict Analysis (EA, pp. 454-457) drew on many sources including literature reviews, use and impact observations, expert panels of boaters and anglers, biophysical baseline inventory/ assessment, user surveys, trial public boating, case studies of capacities on other Wild and Scenic Rivers, use

estimation workshops, proxy river information, hydrology reports, historical documents, an assessment by the Natural Resources Leadership Institute in 2007 (Chattooga Wild & Scenic River: A Situation Assessment; Project Record #168), and the agency's annual monitoring reports from the three National Forests (DN, p. 12).

The Decision Notice (p. 11-12) states "The project record demonstrates a thorough review of relevant scientific information, consideration of responsible opposing views and, where appropriate, the acknowledgment of incomplete or unavailable information, scientific uncertainty and risk."

The 2010 report *Capacity Reconsidered: Finding Consensus and Clarifying Differences* (Project Record #342; Abstract, *Capacity Reconsidered*) points out that work on capacity issues "has evolved considerably since the late 1960s as a result of environmental planning, court proceedings, recreation management practice, and recreation research." The EA recognizes (p. 67) that consensus about visitor capacity related concepts, principles and approaches appears to be emerging among researchers and resource professionals. In considering visitor capacity levels, agency planners drew from several sources (EA, p. 68):

- Use estimation workshop (Berger and CRC 2007)
- Vehicle counts at access areas (Berger Group 2007a)
- General relationships between use levels and impacts (2007 Integrated Report)
- Tolerances for impacts from Chattooga studies or those from other rivers
- Logic-based calculations or other analyses that associate vehicle counts at access sites with current peak-use levels
- Monitoring of capacity levels (Appendix G-Monitoring Plan and Adaptive Management Strategy, EA, p. 482) will determine if boating contributes to higher use while still meeting current levels of opportunities for solitude without degrading the ORVs of the river.

**C. The appellant contends "3. The 2012 Amendments select improper signatories, compromising public rights of appeal." (p. 53)**

The 2005 Decision for Appeal states the following:

Section 10(a) of the WSRA requires the river-administering agency to protect and enhance the values which caused a river to be added to the National System. These values are expressed in Section 1 (b) as the river's free-flowing condition, water quality, and outstanding remarkable values (ORVs). The Interagency Guidelines (1982) interpret the direction in Section 10(a) as a "nondegradation and enhancement policy for all designated rivers, regardless of classification." (p.4)

Specific to recreation as an ORV, the Interagency Guidelines direct public use "be regulated and distributed where necessary to protect and enhance...the resource values of the river area." Agency policy (FSM 2354.41) identifies factors to consider in developing direction for recreation visitor use in a wild and scenic river (WSR) corridor including the capability of the physical environment, desires of present and potential users, diversity of recreation opportunities within the geographic area, and budgetary, personnel and technical considerations. If it becomes necessary to limit

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After careful review of the record, particularly Appendix H, I am reversing the Regional Forester's decision to continue to exclude boating on the Chattooga WSR above Highway 28. I find the Regional Forester does not provide an adequate basis for continuing the ban on boating above Highway 28. Because the record provided to me does not contain the evidence to continue the boating ban, his decision is not consistent with the direction in Section 10(a) of the WSRA or Sections 2(a) and 4(b) of the Wilderness Act or agency regulations implementing these Acts. (p. 6)

I am directing the Regional Forester to conduct the appropriate visitor use capacity analysis, including non-commercial boat use; and to adjust or amend, as appropriate, the RLRMP to reflect a new decision based on the findings. (p. 6)

The EA states the following:

Specific need for action statements and relevant laws are summarized below:

- A. Action is needed to respond to an appeal decision on the Sumter Land and Resource Management Plan (2004). (p. 1)
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- C. Action is needed to preserve the upper segment of the Chattooga WSR's free-flowing condition, protect its water quality and protect and enhance its ORVs, as well as preserve the wilderness character of the Ellicott Rock Wilderness. (p. 3)
  1. Wild and Scenic Rivers Act (p. 3)
  2. Wilderness Act (p. 4)
  3. Potential conflict between WSRA and Wilderness Act (p. 5)

#### 1.4 Decisions to be Made

Decisions to be made are specific to the upper segment of the Chattooga WSR. Management of the river below Highway 28 was not challenged in the 2004 Sumter RLRMP and is not subject to further review. Management activities are considered within the context of the entire Chattooga WSR and are analyzed in the cumulative effects sections in Chapter 3. (p.6)

**D. The appellant contends “4. The 2012 Amendments did not consider the best available science.” (p. 54)**

The Decision Notices (Sumter DN, pp. 11-12; Chattahoochee-Oconee DN, pp. 14-15; Nantahala DN, pp. 11-12) state “The project record demonstrates a thorough review of relevant scientific information, consideration of responsible opposing views and, where appropriate, the acknowledgment of incomplete or unavailable information, scientific uncertainty and risk.”

The 2010 report *Capacity Reconsidered: Finding Consensus and Clarifying Differences* (Project Record #342; Abstract, *Capacity Reconsidered*) points out that work on capacity issues “has evolved considerably since the late 1960s as a result of environmental planning, court proceedings, recreation management practice, and recreation research.” The EA recognizes (p. 67) that consensus about visitor capacity related concepts, principles and approaches appears to be emerging among researchers and resource professionals. In considering visitor capacity levels, agency planners drew from several sources (EA, p. 68):

- Use estimation workshop (Berger and CRC 2007)
- Vehicle counts at access areas (Berger Group 2007a)
- General relationships between use levels and impacts (2007 Integrated Report)
- Tolerances for impacts from Chattooga studies or those from other rivers
- Logic-based calculations or other analyses that associate vehicle counts at access sites with current peak-use levels
- Monitoring of capacity levels (Appendix G-Monitoring Plan and Adaptive Management Strategy, EA, p. 482) will determine if boating contributes to higher use while still meeting current levels of opportunities for solitude without degrading the ORVs of the river.

The EA contains a “Values, Beliefs and Attitudes Assessment” (EA, pp. 446-447 and pp. 460-463) as well as a Social Impact Analysis (EA, Appendix F, p. 446) that describes an extensive public involvement process (EA, pp. 454-459) including the Limits of Acceptable Change workshops, public meetings and hearings, websites, and formal comment periods. The Capacity and Conflict Analysis (EA, pp. 454-457) drew on many sources including literature reviews, use and impact observations, expert panels of boaters and anglers, biophysical baseline inventory/assessment, user surveys, trial public boating, case studies of capacities on other Wild and Scenic Rivers, use estimation workshops, proxy river information, hydrology reports, historical documents, an assessment by the Natural Resources Leadership Institute in 2007 (Chattooga Wild & Scenic River: A Situation Assessment; Project Record #168), and the agency’s annual monitoring reports from the three National Forests (Sumter DN, p. 12; Chattahoochee-Oconee DN, p. 14; Nantahala DN, p. 12).

The Sumter National Forest DN/FONSI (Section 8.0, pp. 11-12) states: “In consultation with the two other responsible officials, I have considered the best available science in making this decision. The project record demonstrates a thorough review of relevant scientific information, consideration of responsible opposing views and, where appropriate, the acknowledgment of incomplete or unavailable information, scientific uncertainty and risk.”

The Chattahoochee-Oconee National Forest DN/FONSI (Section 8.0, p. 14) states: “In consultation with the two other responsible officials, I have considered the best available science in making this decision. The project record demonstrates a thorough review of relevant scientific information, consideration of responsible opposing views and, where appropriate, the acknowledgment of incomplete or unavailable information, scientific uncertainty and risk.”

The Nantahala National Forest DN/FONSI (Section 8.0, pp.11-12) states: “In consultation with the two other responsible officials, I have considered the best available science in making this decision. The project record demonstrates a thorough review of relevant scientific information, consideration of responsible opposing views and, where appropriate, the acknowledgment of incomplete or unavailable information, scientific uncertainty and risk.”

The Response to Comments (p. 146; Project Record # 424) addresses concerns by the public that “best available science” was effectively used during the decision making process by stating: “All reports are based on ‘best available science’ in planning and project level environmental analyses. As a general matter, we show consideration of the best available science when we insure the scientific integrity of the discussions and analyses in the project NEPA document. Specifically, the NEPA document should identify methods used, reference scientific sources relied on, discuss responsible opposing views, and disclose incomplete or unavailable information, See 40 CFR, 1502.9 (b), 1502.22, 1502.24. The project record should reference all scientific information considered: papers, reports, literature reviews, review citations, peer reviews, science consistency reviews, results of ground-based observations, and so on. The specialists report in the record should include a discussion substantiating that consideration of the aforementioned material was a consideration of the best available science. [June 21, 2007 Washington office letter, Clarification of May 2nd, 2007, Advice on documenting ‘Best Available Science’].”

The BA (p. 7) states: “A geographic information system was used to examine the distribution of EOs on the three forest and general vicinity. Those records and distribution maps were reviewed to determine areas of known populations of rare species within the proposed project area... The final filtered list of federally listed species... included... the rock gnome lichen...”

The BE (p.5) states “The initial list included 138 plants, 32 terrestrial wildlife species, and five aquatic wildlife species (Appendices A, B, and C)...The final filtered list of species that occurs within the Chattooga River corridor... includes thirteen plant species, one terrestrial wildlife species and five aquatic wildlife species (Table 3).”

The USFWS concurred with BA’s effects determination in their Letter of Concurrence dated December 6, 2011.

## **Finding**

I find the decisions comply with the National Forest Management Act and adequately considered best available science.

**Issue 5      Whether the decisions violate the Fifth Amendment to the Constitution.**

**The appellant contends the following:**

**The floating bans and severe limits violate the Due Process Clause of the Fifth Amendment to the United States Constitution. (Appeal, p. 55)**

**The USFS deprived Appellants of the liberty to do as Congress intended, violating the Appellants' rights under the Fifth Amendment of the United States Constitution. (Appeal, p. 55)**

**The bans and severe limits violate the equal protection clause of the Fifth Amendment by unconstitutionally singling out primitive boaters for adverse treatment without a rational basis. The upper Chattooga is a section of public river that is required by Congress to be protected and enhanced for the benefit of all Americans who wish to engage in primitive recreational activities, yet members of the public who would engage in floating are the only class to be singled out and denied access to this section of public river. (Appeal, p. 55)**

**The 2012 Amendment process is a one sided analysis, conducted with a predetermined outcome. Whitewater boaters are denied equal protection under the laws because they are discriminatorily singled out and totally banned from access with no rational basis while other primitive recreationists are allowed to use the upper Chattooga without significant restriction or limitation thus violating the Due Process Clause of the Fifth Amendment to the United States Constitution. (Appeal, pp. 55-56)**

The Fifth Amendment of the United States Constitution states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; no shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation.

Clarification of "Due Process Clause" ([http://www.law.cornell.edu/wes/fifth\\_amendment](http://www.law.cornell.edu/wes/fifth_amendment)):

The guarantee of due process for all citizens requires the government to respect all rights, guarantees, and protections afforded by the U.S. Constitution and all applicable statutes before the government can deprive a person of life, liberty, or property. Due process essentially guarantees that a party will receive a fundamentally fair, orderly, and just judicial proceeding. While the Fifth Amendment only applies to the federal government, the identical text in the Fourteenth Amendment explicitly applies this due process requirement to the states as well.



Courts have come to recognize that two aspects of due process exist: procedural due process and substantive due process. Procedural due process aims to ensure fundamental fairness by guaranteeing a party the right to be heard, ensuring that the parties receive proper notification throughout the litigation, and ensures that the adjudicating court has the appropriate jurisdiction to render a judgment. Meanwhile, a substantive due process has developed during the 20<sup>th</sup> century as protecting those right so fundamental as to be 'implicit in the concept of ordered liberty.'

The 2005 Decision for Appeal states the following:

Section 10(a) of the WSRA requires the river-administering agency to protect and enhance the values which caused a river to be added to the National System. These values are expressed in Section 1 (b) as the river's free-flowing condition, water quality, and outstanding remarkable values (ORVs). The Interagency Guidelines (1982) interpret the direction in Section 10(a) as a "nondegradation and enhancement policy for all designated rivers, regardless of classification." (p. 4)

Specific to recreation as an ORV, the Interagency Guidelines direct public use "be regulated and distributed where necessary to protect and enhance...the resource values of the river area." Agency policy (FSM 2354.41) identifies factors to consider in developing direction for recreation visitor use in a wild and scenic river (WSR) corridor including the capability of the physical environment, desires of present and potential users, diversity of recreation opportunities within the geographic area, and budgetary, personnel and technical considerations. If it becomes necessary to limit use, "ensure that all potential users have a fair and equitable chance to obtain access to the river." (p. 5)

The Wilderness Act directs that areas designated as wilderness "be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness"(Section 2(a) of the Wilderness Act). Section 2(c) of the Wilderness Act defines wilderness, in part, as an area with "outstanding opportunities for solitude or a primitive or unconfined type of recreation." Additionally, Section 4(b) states that: "Except as otherwise provided in this Act, wilderness areas shall be devoted to the public purposes of recreation, scenic, scientific, educational, conservation, and historical use." Regulations developed for administration of National Forest wilderness establish that "wilderness will be made available for human use to the optimum extent consistent with the maintenance of primitive conditions" (36 CFR 293.2(b)). (p. 5)

After careful review of the record, particularly Appendix H, I am reversing the Regional Forester's decision to continue to exclude boating on the Chattooga WSR above Highway 28. I find the Regional Forester does not provide an adequate basis for continuing the ban on boating above Highway 28. Because the record provided to me does not contain the evidence to continue the boating ban, his decision is not consistent with the direction in Section 10(a) of the WSRA or Sections 2(a) and 4(b) of the Wilderness Act or agency regulations implementing these Acts. (p. 6)

I am directing the Regional Forester to conduct the appropriate visitor use capacity analysis, including non-commercial boat use; and to adjust or amend, as appropriate, the RLRMP to reflect a new decision based on the findings. (p. 6)

The EA states the following:

Specific need for action statements and relevant laws are summarized below:

- A. Action is needed to respond to an appeal decision on the Sumter Land and Resource Management Plan (2004). (p. 1)
- B. Action is needed to provide consistent management of the upper segment of the Chattooga WSR on all three national forests. (p. 3)
- C. Action is needed to preserve the upper segment of the Chattooga WSR's free-flowing condition, protect its water quality and protect and enhance its ORVs, as well as preserve the wilderness character of the Ellicott Rock Wilderness. (p. 3)
  1. Wild and Scenic Rivers Act (p. 3)
  2. Wilderness Act (p. 4)
  3. Potential conflict between WSRA and Wilderness Act (p. 5)

#### 1.4 Decisions to be Made

Decisions to be made are specific to the upper segment of the Chattooga WSR. Management of the river below Highway 28 was not challenged in the 2004 Sumter RLRMP and is not subject to further review. Management activities are considered within the context of the entire Chattooga WSR and are analyzed in the cumulative effects sections in Chapter 3. (p. 6)

The EA (pp. 11-12) notes in response to the issue of boating access and equitable treatment of boating that Alternatives 8, 11, 12, 13, 13A, and 14 were developed to respond to this issue. Alternative 8 includes year-round boating, while Alternatives 11, 12, 13, 13A, and 14 vary the amount of boating on different reaches of the upper segment, during different seasons or at different flows to address this issue. The EA describes (p. 73) how the analysis team used logic-based calculations to estimate encounter levels in the upper segment of the Chattooga and during different times, relate them to different use levels, and compare encounter levels to user tolerances for encounters; these analyses allowed the team to develop estimates of use levels that would keep encounters from impacting the desired condition, thus protecting the Recreation ORV.

The EA describes Key Issue "C" (p. 11) as a public concern about capacity limits rather than access: "that if limits are imposed to reduce encounters, they [*the public*] believe any limits should be applied equitably to all user groups, not just boaters." The agency's response (EA, p. 12) addresses adding boating use to the total capacity; i.e., on days when boating opportunities occur, the number of boating groups anticipated are treated equitably as part of the total capacity for each reach. As the EA notes (p. 126) these capacities are consistent with encounter tolerances in wildernesses with higher use (Dawson and Alberga, 2003) as well as findings from a study done in the Ellicott Rock Wilderness itself (Rutlin, 1995). The EA recognizes (p. 369) that there may be some opportunities for use to grow in low-use seasons, but substantial increases are not expected. In the document "*Summary of Public Comments Received on the EA*" (p. 19, project

record #411) the agency's response notes that in the alternatives which allow boating, boaters "...are not singled out or treated any differently than existing user groups." Furthermore, the Social Impact Analysis (EA, pp. 372-384 and Appendix F, pp. 446-476) examines the social and economic dynamics that led to the 1976 prohibition on boating above Highway 28 and to the appeal in 2004 of the boating prohibition.

The EA addresses (pp. 83-84) potential conflict between recreational users in terms of social values conflicts and face-to-face conflicts. Social values conflict refers to a situation where a sensitive group opposes an activity that they believe is inappropriate; face-to-face conflict refers to a situation where a sensitive group wants to avoid an offending use or minimize impacts from that use. Alternatives that allow boating on the upper segment presume different levels of face-to-face conflict that may need to be addressed, with different alternatives trading-off increased boating access with greater protection of opportunities for boat-free or low boating use experiences. The agency (EA, p. 85) employs separation strategies to mitigate potential conflict; separating users by space is a common way to address face-to-face conflict; zoning by segment or reach is an effective, often-used tool. The alternatives analyze a range of separation techniques using seasonal, reach, and flow restrictions to minimize conflicts between users.

The 2007 Integrated Report (p. 7; Project Record #171) notes "Section 10(a) of the WSR Act directs management to protect and enhance free-flowing conditions, water quality, and OR values, but allows other uses as long as they do not "substantially interfere with public use and enjoyment of the river's values." The Integrated Report (p. 7) cites the draft Interagency Guidelines that "Only after the river's free flow conditions, water quality and OR values are protected and enhanced can other uses (e.g., grazing, new recreation development) even be considered under the "substantially interferes" clause. Congress left the judgment of when a use "substantially interferes" to the discretion of the river managing agency."

In the 2012 Response to Comments (p. 156; Project Record #411), the agency notes: "Focusing on recreation as an ORV, the administering agency has broad discretion to manage recreation activities and use so as to achieve the desired recreation experience and protect and enhance the ORVs. This discretion may include restricting or prohibiting a recreational activity, a number of recreational activities or, perhaps in rare circumstances, all recreation use within a section (subsection) of the designated component. Through the institution of restrictions or prohibitions in certain sections of the river, the administering agency may balance recreation uses of the river corridor to protect and enhance all ORVs, free-flow and water quality for the entire designated component." The Visitor Capacity Analysis (DN, p. 6) indicates that historical use during the winter and early spring is traditionally low. Therefore, setting capacities allows for the addition of a new user group – boaters - without affecting the overall capacities.

The DN/FONSI (Sumter, p. 1) states that the Purpose and Need for the Decision is the following:

1. Responds to an appeal decision on the 2004 Sumter Revised LRMP;
2. Provides consistent management of the upper segment of the Chattooga WSR on all three national forest; and
3. Preserves the upper segment of the Chattooga WSR's free-flowing condition, protects its water quality and protects its outstandingly remarkable values (as required by the Wild

and Scenic Rivers Act [WSRA]), as well as preserves the wilderness character of the Ellicott Rock Wilderness (as required by the Wilderness Act).”

DN/FOSNI (p.3) states under Section 3.0 Decision that “I have decided to implement Alternative 13A. The scope of my decision is limited to the upper segment of the Chattooga WSR. However, I made the decision within the context of the entire river...”

The Decision Notice (p. 5) states that although data shows that traditional uses begin to increase in March and April, use is still lower than in late spring (May), summer and fall, so the impacts of allowing boating on some days during these two months are expected to be low. The DN also states (p. 4) that continuing the current management in the Nicholson Fields Reach year-round will help eliminate potential for conflict associated with boating. The DN notes (p. 4) that this section also includes the Delayed Harvest, a fishing designation that requires catch and release fishing from November to May, which attracts the highest angling use on the upper segment of the Chattooga WSR.

Finally, the DN/FONSI states in Section 4.0 Rationale for the Decision the following:

After reviewing the alternatives in the EA, I have determined that this decision best addresses the following:

1. Provides access and equitable treatment of all users
2. Reduces potential conflict between users
3. Maintains opportunities for solitude in the backcountry
4. Protects the Recreation ORV
5. Ensures the physical environment can accommodate use
6. Recognizes the value of and ensures the continued presence of large woody debris
7. Addresses public concerns about protecting the ‘highly diverse biological conditions’ in the Chattooga Cliffs Reach
8. Addresses public concerns about boating in the tributaries
9. Addresses public concerns about commercial boating

In addition, Project Record Tabs (12, 13, 89, 91, 94, 94.1, 97, 158, 160, 161, 162, 164, 165, 166, 167, 168, 171, 173, 176, 201, 201.1, 225, 230, 231, 237, 238, 336, 336.1, 342, 345, 347, 348, 349, 350, 352, 353, 354, 413, 415, 416, 417, 419, and 420) documents an extensive range of information used for the analysis and decision making process.

## **Finding**

I find the decisions comply with the Fifth Amendment to the Constitution.

## **Issue 6 Whether the decisions comply with the Administrative Procedures Act.**

- A. The appellant contends “1. The Floating Ban Violates the Forest Service Manual.” (p. 56)**

1) **“a. The limits imposed on paddlers by the 2012 Amendments do not protect and perpetuate primitive recreation experiences.” (p. 56)**

The EA (pp. 11-12) notes in response to the issue of boating access and equitable treatment of boating that Alternatives 8, 11, 12, 13, 13A, and 14 were developed to respond to this issue. Alternative 8 includes year-round boating, while Alternatives 11, 12, 13, 13A, and 14 vary the amount of boating on different reaches of the upper segment, during different seasons or at different flows to address this issue. The EA describes (p. 73) how the analysis team used logic-based calculations to estimate encounter levels in the upper segment of the Chattooga and during different times, relate them to different use levels, and compare encounter levels to user tolerances for encounters; these analyses allowed the team to develop estimates of use levels that would keep encounters from impacting the desired condition, thus protecting the Recreation ORV.

The EA states (p. 62) that the 1996 ORV Report (Project Record #011) concludes that the outstanding recreation values that contributed to the designation of the river are still in place. There are fewer road-accessible access points and roads than in the 1970s, even as other facilities and trail access have increased; these closures have increased the river’s sense of naturalness and made it feel more remote (EA, p. 62). The EA also states (p. 62) that use by commercial outfitters on the lower river segment has dramatically increased since designation. The EA notes (p. 63) that “in part due to its national reputation for whitewater boating, 40,000-70,000 boaters per year run sections of the lower segment of the Chattooga WSR.” The agency has established capacities (boaters per day) for both commercial and private boaters on the lower segment (EA, p. 63); commercial guides use their full quotas on many days of the year and are carefully regulated to reduce impacts; private boaters have not approached their allocations so capacities have not been exceeded.

The EA addresses (pp. 83-84) potential conflict between recreational users in terms of social values conflicts and face-to-face conflicts. Social values conflict refers to a situation where a sensitive group opposes an activity that they believe is inappropriate; face-to-face conflict refers to a situation where a sensitive group wants to avoid an offending use or minimize impacts from that use. Alternatives that allow boating on the upper segment presume different levels of face-to-face conflict that may need to be addressed, with different alternatives trading-off increased boating access with greater protection of opportunities for boat-free or low boating use experiences. The agency (EA, p. 85) employs separation strategies to mitigate potential conflict; separating users by space is a common way to address face-to-face conflict; zoning by segment or reach is an effective, often-used tool. The alternatives analyze a range of separation techniques using seasonal, reach, and flow restrictions to minimize conflicts between users.

The Interagency Wild and Scenic River Coordinating Council (*Compendium*, p. 70; Project Record #413) interprets Section 10(a) of the WSRRA (the “protect and enhance” mandate) as a “non-degradation and enhancement policy for all designated river areas, regardless of classification...” Non-degradation within the Act’s context is not synonymous with *no impact*. Non-degradation in the context of a wild and scenic river is assurance that there is no downward

trend in conditions that affect ORVs. As mentioned previously (EA, p. 62), the 1996 ORV Report concluded that the outstanding recreation values of the river are still in place.

The 2007 Integrated Report (p. 7; Project Record #171) notes “Section 10(a) of the WSR Act directs management to protect and enhance free-flowing conditions, water quality, and OR values, but allows other uses as long as they do not “substantially interfere with public use and enjoyment of the river’s values.” The Integrated Report (p. 7) cites the draft Interagency Guidelines that “Only after the river’s free flow conditions, water quality and OR values are protected and enhanced can other uses (e.g., grazing, new recreation development) even be considered under the “substantially interferes” clause. Congress left the judgment of when a use “substantially interferes” to the discretion of the river managing agency.”

In the 2012 Response to Comments (p. 156; Project Record #411), the agency notes: “Focusing on recreation as an ORV, the administering agency has broad discretion to manage recreation activities and use so as to achieve the desired recreation experience and protect and enhance the ORVs. This discretion may include restricting or prohibiting a recreational activity, a number of recreational activities or, perhaps in rare circumstances, all recreation use within a section (subsection) of the designated component. Through the institution of restrictions or prohibitions in certain sections of the river, the administering agency may balance recreation uses of the river corridor to protect and enhance all ORVs, free-flow and water quality for the entire designated component.” The Visitor Capacity Analysis (DN, p. 6) indicates that historical use during the winter and early spring is traditionally low. Therefore, setting capacities allows for the addition of a new user group – boaters - without affecting the overall capacities.

**2) “b. The limits imposed on paddlers by the 2012 Amendments do not protect and perpetuate primitive river recreation experiences that offer challenge.” (p. 57)**

The EA states ( p. 62) that the 1996 ORV Report (Project Record #011) concludes that the outstanding recreation values that contributed to the designation of the river are still in place. There are fewer road-accessible access points and roads than in the 1970s, even as other facilities and trail access have increased; these closures have increased the river’s sense of naturalness and made it feel more remote (EA, p. 62). The EA also states (p. 62) that use by commercial outfitters on the lower river segment has dramatically increased since designation. The EA notes (p. 63) that “in part due to its national reputation for whitewater boating, 40,000-70,000 boaters per year run sections of the lower segment of the Chattooga WSR.” The agency has established capacities (boaters per day) for both commercial and private boaters on the lower segment (EA, p. 63); commercial guides use their full quotas on many days of the year and are carefully regulated to reduce impacts; private boaters have not approached their allocations so capacities have not been exceeded.

The EA (pp. 11-12) notes in response to the issue of boating access and equitable treatment of boating that Alternatives 8, 11, 12, 13, 13A, and 14 were developed to respond to this issue. Alternative 8 includes year-round boating, while Alternatives 11, 12, 13, 13A, and 14 vary the amount of boating on different reaches of the upper segment, during different seasons or at different flows to address this issue. The EA describes (p. 73) how the analysis team used logic-based calculations to estimate encounter levels in the upper segment of the Chattooga and during

different times, relate them to different use levels, and compare encounter levels to user tolerances for encounters; these analyses allowed the team to develop estimates of use levels that would keep encounters from impacting the desired condition, thus protecting the Recreation ORV.

The Interagency Wild and Scenic River Coordinating Council (*Compendium*, p. 70; Project Record #413) interprets Section 10(a) of the WSRA (the “protect and enhance” mandate) as a “non-degradation and enhancement policy for all designated river areas, regardless of classification...” Non-degradation within the Act’s context is not synonymous with *no impact*. Non-degradation in the context of a wild and scenic river is assurance that there is no downward trend in conditions that affect ORVs. As mentioned previously (EA, p. 62), the 1996 ORV Report concluded that the outstanding recreation values of the river are still in place.

**3) “c. The limits imposed on paddlers by the 2012 Amendments do not maximize visitor freedom.” (p. 57)**

The Decision Notice (p. 1) states that this decision preserves the wilderness character of the Ellicott Rock Wilderness as required by the Wilderness Act; in the Rationale for the Decision (p. 5) it states that several components of the decision will maintain or increase opportunities for solitude; and the FONSI notes (p. 14) that the decision does not violate any federal, state, or local laws or requirements for the protection of the environment.

The EA notes (pp. 393-396) that in alternatives that allow boating there would likely be a slight negative effect in the primitive and unconfined component from the management restrictions placed on visitors. Regarding this, in the 2012 Response to Comments (p. 269; Project Record #411) the agency notes “a central mandate in the 1964 Wilderness Act is that the managing agencies preserve the wilderness character in designated areas. FSM 2320.2(4) directs the agency to: “Protect and perpetuate wilderness character...” Recent technical publications recommend using the qualities of Untrammeled, Natural, Undeveloped, and Opportunities for Solitude or Primitive and Unconfined Recreation in analyzing the affects a decision may have on wilderness character. The analysis presented in this document does this and recognizes that by making certain decisions the agency may be improving one quality of wilderness character (opportunities for solitude) over another (unconfined recreation) with the ultimate goal being to preserve wilderness character.”

The 2007 Integrated Report (p. 9) notes that the Wilderness Act also “directs wilderness to be managed for “unconfined recreation.” One interpretation suggests indirect management actions should be used to limit recreation impacts unless those prove insufficient, in which case direct actions are acceptable [*FSM 2323.12, dated 1990*].” FSM 2323.12(1) (WO Amendment 2300-2007-1, p. 18 of 55) notes: “Apply controls only when they are essential for protection of the wilderness resource and after indirect measures have failed.” Also, the 2007 Integrated Report (p. 9) notes: “Wildernesses are designed to protect public purposes of “recreational, scenic, scientific, educational, conservation, and historical use,” but designation does not identify individual or more specific values (or priorities) for any given wilderness (a major difference from WSRs, where specific values are defined for each river). The overarching concept is to preserve natural conditions and wilderness character.”

In the 2012 Response to Comments (p. 156; Project Record #411), the agency notes: “Focusing on recreation as an ORV, the administering agency has broad discretion to manage recreation activities and use so as to achieve the desired recreation experience and protect and enhance the ORVs. This discretion may include restricting or prohibiting a recreational activity, a number of recreational activities or, perhaps in rare circumstances, all recreation use within a section (subsection) of the designated component. Through the institution of restrictions or prohibitions in certain sections of the river, the administering agency may balance recreation uses of the river corridor to protect and enhance all ORVs, free-flow and water quality for the entire designated component.”

In the 2012 Response to Comments (p. 267; Project Record #411) the agency notes “... a central mandate in the 1964 Wilderness Act is that the managing agencies preserve the wilderness character in designated areas. FSM 2320.2(4) directs the agency to: “Protect and perpetuate wilderness character...” Recent technical publications recommend using the qualities of Untrammelled, Natural, Undeveloped, and Opportunities for Solitude or Primitive and Unconfined Recreation in analyzing the affects a decision may have on wilderness character. The analysis presented in this document does this and recognizes that by making certain decisions the agency may be improving one quality of wilderness character (opportunities for solitude) over another (unconfined recreation) with the ultimate goal being to preserve wilderness character.”... Paddling is a recreation activity that is compatible with wilderness. It is not a wilderness dependent activity and it may not be compatible with every wilderness.” The FSM 2320.6 states that “Because uses and values on each area vary, management and administration must be tailored to each area.”

**4) “d. The limits imposed on paddlers by the 2012 Amendments are not essential for protection of the wilderness resource.” (p. 58)**

The 2007 Integrated Report (p. 9) notes that the Wilderness Act “directs wilderness to be managed for “unconfined recreation.” One interpretation suggests indirect management actions should be used to limit recreation impacts unless those prove insufficient, in which case direct actions are acceptable.” FMS 2323.12(1) notes: “Apply controls only when they are essential for protection of the wilderness resource and after indirect measures have failed.”

The EA addresses (pp. 83-84) potential conflict between recreational users in terms of social values conflicts and face-to-face conflicts. Social values conflict refers to a situation where a sensitive group opposes an activity that they believe is inappropriate; face-to-face conflict refers to a situation where a sensitive group wants to avoid an offending use or minimize impacts from that use. Alternatives that allow boating on the upper segment presume different levels of face-to-face conflict that may need to be addressed, with different alternatives trading-off increased boating access with greater protection of opportunities for boat-free or low boating use experiences. The agency (EA, p. 85) employs separation strategies to mitigate potential conflict; separating users by space is a common way to address face-to-face conflict; zoning by segment or reach is an effective, often-used tool. The alternatives analyze a range of separation techniques using seasonal, reach, and flow restrictions to minimize conflicts between users. The Decision Notice (p. 1) states that this decision preserves the wilderness character of the Ellicott Rock



Wilderness as required by the Wilderness Act; in the Rationale for the Decision (DN, p. 5) it states that several components of the decision will maintain or increase opportunities for solitude; and the FONSI notes (p. 14) that the decision does not violate any federal, state, or local laws or requirements for the protection of the environment.

FSM 2320.6 states that “Because uses and values on each area vary, management and administration must be tailored to each area.”

- 5) **“e. The limits imposed on paddlers by the 2012 Amendments do not minimize direct controls, restrictions, and regulations.” (p. 59)**
- 6) **“f. The EA fails to exhaust indirect use limits before imposing direct limits.” (p. 59)**
- 7) **“g. Banning and severely limiting one use while not limiting - and while artificially attracting – other uses is not a fair and equitable use limit.” (p. 60)**
- 8) **“h. 17. The bans and severe limits on paddling use are not necessary.” (p. 62)**
- 9) **“i. Banning and severely limiting paddling does not protect and enhance paddling.” (p. 63)**
- 10) **“j. Managing the Wild and Scenic upper Chattooga as an artificial angling sanctuary to the exclusion of paddlers is not an appropriate role for the river or the USFS.” (p. 63)**
- 11) **“k. Limiting paddling to reduce search and rescue activities violates the Forest Service Manual.” (p. 64)**
- 12) **“l. Deciding not to manage a two-mile section of the Chattooga River *at all* is not consistent with any of the Forest Service Manual.” (p. 66)**

The following response is a combined response to contentions 5 thru 12 above.

The EA notes (p. 13) that boating on the upper segment of the Chattooga from Grimshawes Bridge down to Green Creek is outside the scope of the EA. The EA (p. 45) notes that the reach between Grimshawes Bridge and Green Creek has private land on both sides of the river and the landowners claim that public use would constitute trespass. Navigability and public access rights on this reach have not been formally analyzed by any federal or state agency or authority, nor has its navigability been adjudicated by a court of law. FSM 2354.14 – Navigability of Rivers provides agency direction: “most rivers in the country have not been adjudicated as navigable or non-navigable. Consider them non-navigable until adjudicated otherwise.” The EA further notes (p. 45) that until decisions about boating are made for the sections of the river with public land along them, or public access rights on this reach are determined, the agency considers this decision to be beyond the current scope of analysis.

The 2007 Integrated Report (p. 10, Project Record #171) states: "...these segments have not had their navigability or boat passage status legally determined by any court or governmental agency. Local U.S. Corps of Engineers (COE) personnel have communicated informally that they do not consider the Upper Chattooga River navigable. However, the US COE Division Engineer has not published a final determination of navigability for this stretch of the river under 33 CFR Part 329.14 - Determination of Navigability. Similarly, we are not aware of any formal NC Attorney General opinion or State Court ruling as to whether or not the Upper Chattooga River in North Carolina is considered to be "navigable in fact" and therefore subject to public trust rights under state law."

In an agency memo (Project Record #183) dated September 26, 2007 from the Forest Supervisor to the Chattooga River Analysis Core Team Leader, the interdisciplinary team was advised to "...defer any management decisions that would alter the current status of boating opportunity from Grimshawes Bridge to the southern end of the Rust property. Any preliminary alternatives which would contain this river segment should be eliminated from detailed consideration in the environmental assessment currently underway." Further recommendations regarding the range of alternatives are contained in a planning document dated September 25, 2007 (Project Record #186) regarding this section: "...information regarding the ability to float and recreate on this stretch of the river and the environmental impacts of such uses is incomplete and inconclusive. To date, the Forest Service has been unable to secure the access needed from private land interests in this segment to assess conditions in the area. Therefore, the agency is limited in its ability to conduct an environmental assessment of alternatives which would permit boating and other recreational uses of the general public along this stretch of the river."

The Response to Comments (Tab 411, pp. 64-65) states: "Public Concern 18 The Forest Service should reconsider eliminating and/or reducing the stocking of non-native species to reduce the impacts from fishing, to improve conditions for native fish and other aquatic species, and to indirectly limit use prior to instituting direct measures."

Response to PC 18 Stocking of trout is outside the scope of this decision. Stocking of trout was occurring in 1971 and in the 1971 Wild and Scenic River Study Report, Chattooga River notes that stocking of catchable size trout was occurring in some of the Chattooga River in all three states. The 1971 Designation Study report includes an action plan for fisheries on pages 87-89, which notes that Game and Fish State organization recommend managing Chattooga as a "Wild River fishery"; stocking sub-adults and fingerlings in the wild and scenic sections, stocking any size fish in the recreation sections; and vehicular access for stocking is provided in the recreation sections. The Federal Register, Volume 41, Number 56 – Monday, March 22, 1976 (also known as 1976 Federal Register) not only includes formal descriptions of the wild and scenic river boundaries and classifications but also includes information on the fisheries:

A native fishery will be encouraged. Fish stocking will be permitted at the Highway 28 Bridge, Burrells Ford, Bullpen Bridge, Long Bottom Ford on the river, and Warwoman and Overflow Bridges on the West Ford [sic].

The effects of the different alternatives to the different resources are discussed in Chapter 3. Specifically, impacts from the different alternatives to the aquatic community are discussed in

Section 3.2.2A Aquatics. The fish species diversity of the Management Indicator Community in the Chattooga River watershed has not changed in more than 20 years of sampling the main stem of the river (SCDNR unpublished data)."

**B. The appellant contends "2. The Forest Supervisors and Regional Forester failed to follow the directives of the USFS Washington Office to comply with American Whitewater's successful appeal of the 2004 Revised LRMP." (p. 67)**

**1) "a. The 2012 Amendments violate the Washington Office order defining the Regional Forester as the "Responsible Official". (p. 67)**

The 2005 Decision for Appeal states the following:

Section 10(a) of the WSRA requires the river-administering agency to protect and enhance the values which caused a river to be added to the National System. These values are expressed in Section 1 (b) as the river's free-flowing condition, water quality, and outstanding remarkable values (ORVs). The Interagency Guidelines (1982) interpret the direction in Section 10(a) as a "nondegradation and enhancement policy for all designated rivers, regardless of classification." (p. 4)

Specific to recreation as an ORV, the Interagency Guidelines direct public use "be regulated and distributed where necessary to protect and enhance...the resource values of the river area." Agency policy (FSM 2354.41) identifies factors to consider in developing direction for recreation visitor use in a wild and scenic river (WSR) corridor including the capability of the physical environment, desires of present and potential users, diversity of recreation opportunities within the geographic area, and budgetary, personnel and technical considerations. If it becomes necessary to limit use, "ensure that all potential users have a fair and equitable chance to obtain access to the river." (p. 5)

The Wilderness Act directs that areas designated as wilderness "be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness"(Section 2(a) of the Wilderness Act). Section 2(c) of the Wilderness Act defines wilderness, in part, as an area with "outstanding opportunities for solitude or a primitive or unconfined type of recreation." Additionally, Section 4(b) states that: "Except as otherwise provided in this Act, wilderness areas shall be devoted to the public purposes of recreation, scenic, scientific, educational, conservation, and historical use." Regulations developed for administration of National Forest wilderness establish that "wilderness will be made available for human use to the optimum extent consistent with the maintenance of primitive conditions" (36 CFR 293.2(b)). (p. 5)

After careful review of the record, particularly Appendix H, I am reversing the Regional Forester's decision to continue to exclude boating on the Chattooga WSR above Highway 28. I find the Regional Forester does not provide an adequate basis for continuing the ban on boating above Highway 28. Because the record provided to me does not contain the evidence to continue the boating ban, his decision is not consistent

with the direction in Section 10(a) of the WSRA or Sections 2(a) and 4(b) of the Wilderness Act or agency regulations implementing these Acts. (p. 6)

I am directing the Regional Forester to conduct the appropriate visitor use capacity analysis, including non-commercial boat use; and to adjust or amend, as appropriate, the RLRMP to reflect a new decision based on the findings. (p. 6)

The EA states the following:

Specific need for action statements and relevant laws are summarized below:

- D. Action is needed to respond to an appeal decision on the Sumter Land and Resource Management Plan (2004). (p. 1)
- E. Action is needed to provide consistent management of the upper segment of the Chattooga WSR on all three national forests. (p. 3)
- F. Action is needed to preserve the upper segment of the Chattooga WSR's free-flowing condition, protect its water quality and protect and enhance its ORVs, as well as preserve the wilderness character of the Ellicott Rock Wilderness. (p.3)
  - 1. Wild and Scenic Rivers Act (p. 3)
  - 2. Wilderness Act (p. 4)
  - 3. Potential conflict between WSRA and Wilderness Act (p. 5)

#### 1.4 Decisions to be Made

Decisions to be made are specific to the upper segment of the Chattooga WSR. Management of the river below Highway 28 was not challenged in the 2004 Sumter RLRMP and is not subject to further review. Management activities are considered within the context of the entire Chattooga WSR and are analyzed in the cumulative effects sections in Chapter 3. (p. 6)

#### **2) "b. The 2012 Amendments violate the Washington Office order defining the geographical scope of analysis." (p. 68)**

The 2005 Decision for Appeal states the following:

Section 10(a) of the WSRA requires the river-administering agency to protect and enhance the values which caused a river to be added to the National System. These values are expressed in Section 1 (b) as the river's free-flowing condition, water quality, and outstanding remarkable values (ORVs). The Interagency Guidelines (1982) interpret the direction in Section 10(a) as a "nondegradation and enhancement policy for all designated rivers, regardless of classification." (p. 4)

Specific to recreation as an ORV, the Interagency Guidelines direct public use "be regulated and distributed where necessary to protect and enhance...the resource values of the river area." Agency policy (FSM 2354.41) identifies factors to consider in developing direction for recreation visitor use in a wild and scenic river (WSR) corridor including the capability of the physical environment, desires of present and potential users, diversity of recreation opportunities within the geographic area, and budgetary, personnel and technical considerations. If it becomes necessary to limit use, "ensure that all potential users have a fair and equitable chance to obtain access

The Wilderness Act directs that areas designated as wilderness "be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness"(Section 2(a) of the Wilderness Act). Section 2(c) of the Wilderness Act defines wilderness, in part, as an area with "outstanding opportunities for solitude or a primitive or unconfined type of recreation." Additionally, Section 4(b) states that: "Except as otherwise provided in this Act, wilderness areas shall be devoted to the public purposes of recreation, scenic, scientific, educational, conservation, and historical use." Regulations developed for administration of National Forest wilderness establish that "wilderness will be made available for human use to the optimum extent consistent with the maintenance of primitive conditions" (36 CFR 293.2(b)). (p. 5)

After careful review of the record, particularly Appendix H, I am reversing the Regional Forester's decision to continue to exclude boating on the Chattooga WSR above Highway 28. I find the Regional Forester does not provide an adequate basis for continuing the ban on boating above Highway 28. Because the record provided to me does not contain the evidence to continue the boating ban, his decision is not consistent with the direction in Section 10(a) of the WSRA or Sections 2(a) and 4(b) of the Wilderness Act or agency regulations implementing these Acts. (p. 6)

I am directing the Regional Forester to conduct the appropriate visitor use capacity analysis, including non-commercial boat use; and to adjust or amend, as appropriate, the RLRMP to reflect a new decision based on the findings. (p. 6)

The EA states the following:

Specific need for action statements and relevant laws are summarized below:

- G. Action is needed to respond to an appeal decision on the Sumter Land and Resource Management Plan (2004). (p. 1)
- H. Action is needed to provide consistent management of the upper segment of the Chattooga WSR on all three national forests. (p. 3)
- I. Action is needed to preserve the upper segment of the Chattooga WSR's free-flowing condition, protect its water quality and protect and enhance its ORVs, as well as preserve the wilderness character of the Ellicott Rock Wilderness. (p.3)
  - 1. Wild and Scenic Rivers Act (p. 3)
  - 2. Wilderness Act (p. 4)
  - 3. Potential conflict between WSRA and Wilderness Act (p. 5)

#### 1.4 Decisions to be Made

Decisions to be made are specific to the upper segment of the Chattooga WSR. Management of the river below Highway 28 was not challenged in the 2004 Sumter RLRMP and is not subject to further review. Management activities are considered within the context of the entire Chattooga WSR and are analyzed in the cumulative effects sections in Chapter 3. (p. 6)

The DN/FONSI (Sumter, p. 1) states that the Purpose and Need for the Decision is the following:

1. Responds to an appeal decision on the 2004 Sumter Revised LRMP;
2. Provides consistent management of the upper segment of the Chattooga WSR on all three national forest; and
3. Preserves the upper segment of the Chattooga WSR's free-flowing condition, protects its water quality and protects its outstandingly remarkable values (as required by the Wild and Scenic Rivers Act [WSRA]), as well as preserves the wilderness character of the Ellicott Rock Wilderness (as required by the Wilderness Act)."

DN/FOSNI states on page 3 under Section 3.0 Decision that "I have decided to implement Alternative 13A. The scope of my decision is limited to the upper segment of the Chattooga WSR. However, I made the decision within the context of the entire river..."

Project Record 183 is a document signed by Jerome Thomas dated September 26, 2007 regarding direction on the range of alternatives for Management of the Upper Chattooga River. The document specifically states:

The analysis teams are directed to follow the recommendations provided in the enclosed document, "Recommendations Regarding the Range of Alternatives for Management of the Upper Chattooga River."

"In light of the factors discussed above, the Responsible Officials for the plan amendments addressing management of the upper Chattooga River are advised to defer any management decisions that would alter the current status of boating opportunity from Grimshawes Bridge to the southern end of the Rust property. Any preliminary alternatives which contain this river segment should be eliminated from detailed consideration in the environmental assessment currently underway. Any new alternatives developed during the NEPA process that include management for general public use purposes should not include this segment of the river."

The responsible Forest Supervisors support this direction, which goes into effect immediately, in considering alternatives included in the August scoping letter, any new alternatives, and in communicating our analysis process to stakeholders.

**3) "c. The 2012 Amendments violate the Washington Office order requiring only fair and equitable use limits." (p. 68)**

The EA describes Key Issue "C" (p. 11) as a public concern about capacity limits rather than access: "that if limits are imposed to reduce encounters, they [*the public*] believe any limits should be applied equitably to all user groups, not just boaters." The agency's response (EA, p. 12) addresses adding boating use to the total capacity; i.e., on days when boating opportunities occur, the number of boating groups anticipated are treated equitably as part of the total capacity for each reach. As the EA notes (EA, p. 126) these capacities are consistent with encounter tolerances in wildernesses with higher use (Dawson and Alberga, 2003) as well as findings from a study done in the Ellicott Rock Wilderness itself (Rutlin, 1995). The EA recognizes (EA, p. 369) that there may be some opportunities for use to grow in low-use seasons, but substantial increases are not expected. In the document "*Summary of Public Comments Received on the EA*" (p. 19, project record #411) the agency's response notes that in the alternatives which allow

boating, boaters "...are not singled out or treated any differently than existing user groups." Furthermore, the Social Impact Analysis (EA, pp. 372-384 and Appendix F, pp. 446-476) examines the social and economic dynamics that led to the 1976 prohibition on boating above Highway 28 and to the appeal in 2004 of the boating prohibition.

The Decision Notice (p. 5) states that although data shows that traditional uses begin to increase in March and April, use is still lower than in late spring (May), summer and fall, so the impacts of allowing boating on some days during these two months are expected to be low. The DN also states (p. 4) that continuing the current management in the Nicholson Fields Reach year-round will help eliminate potential for conflict associated with boating. The DN notes (p. 4) that this section also includes the Delayed Harvest, a fishing designation that requires catch and release fishing from November to May, which attracts the highest angling use on the upper segment of the Chattooga WSR.

**4) "d. The 2012 Amendments violate the Washington Office order to protect Wilderness preservation and enjoyment." (p. 69); and**

**5) "e. The 2012 Amendments violate the Washington Office order to optimize Wilderness enjoyment." (p. 69)**

The 2005 Decision for Appeal states the following:

Section 10(a) of the WSRA requires the river-administering agency to protect and enhance the values which caused a river to be added to the National System. These values are expressed in Section 1 (b) as the river's free-flowing condition, water quality, and outstanding remarkable values (ORVs). The Interagency Guidelines (1982) interpret the direction in Section 10(a) as a "nondegradation and enhancement policy for all designated rivers, regardless of classification." (p. 4)

Specific to recreation as an ORV, the Interagency Guidelines direct public use "be regulated and distributed where necessary to protect and enhance...the resource values of the river area." Agency policy (FSM 2354.41) identifies factors to consider in developing direction for recreation visitor use in a wild and scenic river (WSR) corridor including the capability of the physical environment, desires of present and potential users, diversity of recreation opportunities within the geographic area, and budgetary, personnel and technical considerations. If it becomes necessary to limit use, "ensure that all potential users have a fair and equitable chance to obtain access to the river." (p. 5)

The Wilderness Act directs that areas designated as wilderness "be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness"(Section 2(a) of the Wilderness Act). Section 2(c) of the Wilderness Act defines wilderness, in part, as an area with "outstanding opportunities for solitude or a primitive or unconfined type of recreation." Additionally, Section 4(b) states that: "Except as otherwise provided in this Act, wilderness areas shall be devoted to the public purposes of recreation, scenic, scientific, educational, conservation, and historical use." Regulations developed for

administration of National Forest wilderness establish that "wilderness will be made available for human use to the optimum extent consistent with the maintenance of primitive conditions" (36 CFR 293.2(b)). (p.5)

After careful review of the record, particularly Appendix H, I am reversing the Regional Forester's decision to continue to exclude boating on the Chattooga WSR above Highway 28. I find the Regional Forester does not provide an adequate basis for continuing the ban on boating above Highway 28. Because the record provided to me does not contain the evidence to continue the boating ban, his decision is not consistent with the direction in Section 10(a) of the WSRA or Sections 2(a) and 4(b) of the Wilderness Act or agency regulations implementing these Acts. (p. 6)

I am directing the Regional Forester to conduct the appropriate visitor use capacity analysis, including non-commercial boat use; and to adjust or amend, as appropriate, the RLRMP to reflect a new decision based on the findings. (p. 6)

The EA states the following:

Specific need for action statements and relevant laws are summarized below:

- A. Action is needed to respond to an appeal decision on the Sumter Land and Resource Management Plan (2004). (p.1)
- B. Action is needed to provide consistent management of the upper segment of the Chattooga WSR on all three national forests. (p. 3)
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  1. Wild and Scenic Rivers Act (p. 3)
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DN/FOSNI (p. 3) states under Section 3.0 Decision that “I have decided to implement Alternative 13A. The scope of my decision is limited to the upper segment of the Chattooga WSR. However, I made the decision within the context of the entire river...”

Project Record item 183 is a document signed by Jerome Thomas dated September 26, 2007 regarding direction on the range of alternatives for Management of the Upper Chattooga River. The document specifically states:

The analysis teams are directed to follow the recommendations provided in the enclosed document, “Recommendations Regarding the Range of Alternatives for Management of the Upper Chattooga River.”

“In light of the factors discussed above, the Responsible Officials for the plan amendments addressing management of the upper Chattooga River are advised to defer any management decisions that would alter the current status of boating opportunity from Grimshawes Bridge to the southern end of the Rust property. Any preliminary alternatives which contain this river segment should be eliminated from detailed consideration in the environmental assessment currently underway. Any new alternatives developed during the NEPA process that include management for general public use purposes should not include this segment of the river.”

The responsible Forest Supervisors support this direction, which goes into effect immediately, in considering alternatives included in the August scoping letter, any new alternatives, and in communicating our analysis process to stakeholders.

**6) “f. The 2012 Amendments violate the Washington Office order to minimize controls in Wilderness.” (p. 70)**

FSM 2323.12 (WO Amendment 2300-2007-1, p. 18 of 55) indicates a preference for using indirect use limits and management actions to address impact problems before employing direct ones; the Monitoring Plan in the Decision Notice notes (p. A-5) if direct measures are needed, monitoring will help identify the specific type of use and encounters that are at issue, and develop appropriate regulations or a permit system that will address the use or impact problem. The Decision Notice (p. A-5) addresses Adaptive Monitoring by using indirect measures first: “Indirect measures generally attempt to redistribute recreational use by encouraging users to visit lower use segments or times, or by changing infrastructure (e.g., reducing the size of some parking lots) to match capacity goals and cue users to use other areas. Direct measures regulate behavior through restrictions or formal use limit systems (e.g., permits); they can ensure a capacity is met, but also may create a more “heavy-handed” management footprint that restricts individual choice. If direct measures are needed, monitoring will help identify the specific type of use and encounters that are at issue, and develop appropriate regulations or a permit system that will address the use or impact problem.”

The EA states (p. 69) that in general, capacities were developed with recognition that social impacts, such as encounters, are probably the most limiting factor for use levels in backcountry areas of the Chattooga WSR corridor. The EA analyzed varying capacity levels in the alternatives (from no capacity levels set in Alternative 1 to a range of groups per day and group sizes in other alternatives). The selected alternative (EA, p. 132) defines a capacity level

designed to prevent backcountry encounters from exceeding between two and eight per day on weekdays and between four and fifteen per day on weekends. As the EA notes (p. 126) these capacities are consistent with encounter tolerances in wildernesses with higher use (Dawson and Alberga, 2003) as well as findings from a study done in the Ellicott Rock Wilderness itself (Rutlin, 1995).

**7) “g. The 2012 Amendments violate the Washington Office order to include paddlers in a visitor capacity analysis.” (p. 70)**

The US Forest Service contracted a study (EA, p. 76) to assess flow needs for angling and boating on the upper segment of the Chattooga. The study used expert panels to assess conditions for their activities at different flows; the experts were chosen from a review of qualifications to maximize years of experience, skill level, previous experience participating in flow studies, level of availability, and knowledge of the area and/or river; the creation of small panels to assess flow needs is a commonly used methodology in flow-need studies and has been used in several relicensing studies (EA, p. 76).

Many boaters submitted comments on the EA (Summary of Public Comments Received on the EA, project record #411). Information on visitor use considered in the EA (p. 419) includes: estimates collected by researchers from users contacted at major trailheads (the Rutlin, 1995 study (EA, p. 420); the Use Estimation Workshop (Berger and CRC, 2007); expert panels of boaters and anglers; a study on group size limits in wilderness (Monz et al, 2000 (EA, p. 133)); research on median tolerances for encounters within high-use wilderness (Dawson and Alberga, 2003 (EA, p. 132); an assessment of Values, Beliefs and Attitudes (VBAs) drawn from public comments received from 2005 to 2009 (EA, p. 446); a 1995 study of diverse public opinions (1995 DFC Report (EA p. 449)); a 1996 analysis of ORVs on the Chattooga (EA, p. 449); the Public Involvement and Limits of Acceptable Change process public meetings from 2004-2005 (EA, p. 454, Table F-1); numerous reports concerning capacity and conflict analysis (EA, p. 456); data from the National Survey on Recreation and the Environment (Cordell 2010a, b and c (EA, p. 466)); a Situation Assessment of the Chattooga River prepared by the National Resources Leadership Institute in 2007 to assess the perceptions of a broadly represented subset of river users (Situation Assessment, p. iii; Project Record #168); and information from *Capacity & Conflict on the Upper Chattooga River: An integrated analysis of the 2006-2007 reports*” prepared for the Forest Service by Confluence Research and Consulting in June 2007 which highlights and integrates key findings from a number of reports, field panels, fieldwork, informal discussions with public stakeholders and review of public comments, and peer-reviewed academic and professional journals (*Capacity & Conflict on the Upper Chattooga River*, p. 5).

**8) “h. The 2012 Amendments violate the Washington Office order by contradicting the mandated definition of solitude.” (p. 70)**

The Decision Notice (p. 1) states that this decision preserves the wilderness character of the Ellicott Rock Wilderness as required by the Wilderness Act; in the Rationale for the Decision DN, p. 5) it states that several components of the decision will maintain or increase opportunities for solitude; and the FONSI notes (p. 14) that the decision does not violate any federal, state, or local laws or requirements for the protection of the environment.

The EA notes (pp. 389-396) that in alternatives that allow boating, the direct and indirect effects would likely be slightly negative effects on opportunities for solitude, but that the use of capacity limits, boating restrictions, parking limits, group size limits and camping restrictions would help mitigate the slight negative effects on opportunities for solitude. The EA (p. 390) states that for all alternatives, the effects of no other past, present or foreseeable activities when combined with the effects of these alternatives would result in any cumulative impacts on the four qualities of wilderness character within the Ellicott Rock Wilderness.

The EA (p. 12) notes the general loss of solitude and related social impacts from potential use increases as a Key Issue. All action alternatives provide a range of responses to this concern by establishing capacities for frontcountry and backcountry areas as well as group size limits; they also describe a monitoring process and the resulting adaptive management strategy that together would ensure that use would not exceed capacities. The Decision Notice (p. 4) notes that the Visitor Capacity Analysis in the EA indicates that historical use during the winter and early spring is traditionally low; therefore, setting capacities allows for the addition of a new user group – boaters - without affecting the overall capacities. Furthermore, the DN notes (p. 5) that components of the decision relating to capacity, parking, group size limits, and actions to designate trails, campsites, put-ins and take-outs will maintain or increase opportunities for solitude.

The 2012 Response to Comments (pp. 267-268; Project Record #411) states “Through the analysis conducted, all of the alternatives “address the importance placed on solitude and the wilderness experience.” It goes on to cite recent Technical Publications regarding solitude: “Many different factors contribute in known and unknown ways to the experience of solitude or primitive and unconfined recreation (Borrie and Birzell 2001; Hendee and Dawson 2002; Manning and Lime 2000). For example, experiences may be influenced by factors largely beyond the control and influence of managers. Such factors include the attributes of the physical landscape, presence of certain animals (for example, mosquitoes and grizzly bears), local weather, intra- and inter-group dynamics, and skills and knowledge an individual brings to the experience. In contrast, managers may exert some control over use levels, types and patterns of use, level of development (both inside and adjacent to wilderness), amount and type of information available about the wilderness, and types of regulations imposed, all of which influence the opportunity to experience solitude or a primitive and unconfined type of recreation (Cole and others 1987; Lucas 1973; McDonald and others 1989; Watson 1995).”

**9) “i. The 2012 Amendments violate the Washington Office order by basing decisions on Search and Rescue concerns.” (p. 71)**

The EA (p. 368) examined fatalities and SAR rates on other rivers with similar issues as the Chattooga: Russell Fork, KY; New River Gorge, WV; Upper Youghigheny, PA; Big South Fork, TN; Cheoah, NC; Nantahala, TN; and the lower segment of the Chattooga itself. The river does not appear to be more or less hazardous when compared to similar rivers (EA, p. 367). Based on estimates from Sumter National Forest district staff (EA, p. 369), roughly 5 to 10 SAR operations are conducted each year associated with boaters on the lower segment. The EA

discloses (pp. 367-371) potential direct, indirect, and cumulative effects of various alternatives to human health and safety, including estimates of SAR responses, noting that under all action alternatives increased fatalities are unlikely and the potential for a substantial increase in SAR response is still considered low. In fact, the eight-mile gorge segment of the Big South Fork in Tennessee, a segment most like the upper segment of the Chattooga (EA, p. 368), has experienced 1 fatality in about 25 years of regular boating (a 150-day season) and conducts SAR responses about two times a year; impacts from these responses have not been a substantial issue for management.

The Forest Service promotes safety on the river (EA, p. 367) by requiring recreationists to use protective equipment in certain river sections; prohibiting certain craft types in some sections; restricting paddling alone in some sections; and posting pertinent safety information on maps, brochures, websites, permits and signs. The EA notes (p. 63) that boater's skill levels and equipment have progressed since the 1970s and greater numbers of kayakers have the skill to navigate the Upper Chattooga segments safely. The Implementation Strategy (EA, pp. 406-408) focuses on actions that will implement the selected Alternative. Monitoring (Appendix G-Monitoring Plan and Adaptive Management Strategy, EA, pp. 481-485) will indicate whether capacities or other management actions need to be adjusted.

**10) "j. The 2012 Amendments violate the Washington Office order requiring justification for the boating ban." (AW p. 71)**

The 2005 Decision for Appeal states the following:

Section 10(a) of the WSRA requires the river-administering agency to protect and enhance the values which caused a river to be added to the National System. These values are expressed in Section 1 (b) as the river's free-flowing condition, water quality, and outstanding remarkable values (ORVs). The Interagency Guidelines (1982) interpret the direction in Section 10(a) as a "nondegradation and enhancement policy for all designated rivers, regardless of classification." (p. 4)

Specific to recreation as an ORV, the Interagency Guidelines direct public use "be regulated and distributed where necessary to protect and enhance...the resource values of the river area." Agency policy (FSM 2354.41) identifies factors to consider in developing direction for recreation visitor use in a wild and scenic river (WSR) corridor including the capability of the physical environment, desires of present and potential users, diversity of recreation opportunities within the geographic area, and budgetary, personnel and technical considerations. If it becomes necessary to limit use, "ensure that all potential users have a fair and equitable chance to obtain access to the river." (p. 5)

The Wilderness Act directs that areas designated as wilderness "be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness"(Section 2(a) of the Wilderness Act). Section 2(c) of the Wilderness Act defines wilderness, in part, as an area with "outstanding opportunities for solitude or a primitive or unconfined type of recreation." Additionally, Section 4(b) states that: "Except as otherwise provided in

this Act, wilderness areas shall be devoted to the public purposes of recreation, scenic, scientific, educational, conservation, and historical use." Regulations developed for administration of National Forest wilderness establish that "wilderness will be made available for human use to the optimum extent consistent with the maintenance of primitive conditions" (36 CFR 293.2(b)). (p.5)

After careful review of the record, particularly Appendix H, I am reversing the Regional Forester's decision to continue to exclude boating on the Chattooga WSR above Highway 28. I find the Regional Forester does not provide an adequate basis for continuing the ban on boating above Highway 28. Because the record provided to me does not contain the evidence to continue the boating ban, his decision is not consistent with the direction in Section 10(a) of the WSRA or Sections 2(a) and 4(b) of the Wilderness Act or agency regulations implementing these Acts. (p. 6)

I am directing the Regional Forester to conduct the appropriate visitor use capacity analysis, including non-commercial boat use; and to adjust or amend, as appropriate, the RLRMP to reflect a new decision based on the findings. (p. 6)

The EA states the following:

Specific need for action statements and relevant laws are summarized below:

- A. Action is needed to respond to an appeal decision on the Sumter Land and Resource Management Plan (2004). (p.1)
- B. Action is needed to provide consistent management of the upper segment of the Chattooga WSR on all three national forests. (p. 3)
- C. Action is needed to preserve the upper segment of the Chattooga WSR's free-flowing condition, protect its water quality and protect and enhance its ORVs, as well as preserve the wilderness character of the Ellicott Rock Wilderness. (p. 3)
  1. Wild and Scenic Rivers Act (p. 3)
  2. Wilderness Act (p. 4)
  3. Potential conflict between WSRA and Wilderness Act (p. 5)

#### 1.4 Decisions to be Made

Decisions to be made are specific to the upper segment of the Chattooga WSR. Management of the river below Highway 28 was not challenged in the 2004 Sumter RLRMP and is not subject to further review. Management activities are considered within the context of the entire Chattooga WSR and are analyzed in the cumulative effects sections in Chapter 3. (p. 6)

#### Chapter 3 (pp. 51-52) A. Spatial Bound for All Effects

The spatial bound for direct and indirect effects is one-quarter mile on either side of the upper segment of the Chattooga WSR and the spatial bound for cumulative effects is the Chattooga River watershed measured at two scales; the portion above Hwy. 28 and the drainage as measured above Tugaloo Lake. The temporal bound of analysis for cumulative effects analyzes projects and land usage within the watershed that have taken place within the last five years and the foreseeable projects in the next five years (2007-2016).

The upper segment of the Chattooga WSR Corridor is divided into four reaches for analysis and reporting purposes. References to these reaches are made throughout this EA. Table 3.1-1 identifies the segments.

Table 3.1-1 Chattooga River Reaches (Source: Whittaker and Shelby 2007)

Reach Name	Location
Chattooga Cliffs	Grimshawes Bridge to Bullpen Road Bridge
Ellicott Rock	Bullpen Road Bridge to Burrells Ford Bridge
Rock Gorge	Burrells Ford Bridge to Lick Log Creek
Nicholson Fields	Lick Log Creek to Hwy. 28 bridge

The DN/FONSI states the following:

This decision (p. 1):

1. Responds to an appeal decision on the 2004 Sumter Revised LRMP;
2. Provides consistent management of the upper segment of the Chattooga WSR on all three national forests; and
3. Preserves the upper segment of the Chattooga WSR's free-flowing condition, protects its water quality and protects its outstandingly remarkable values (as required by the Wild and Scenic Rivers Act [WSRA]), as well as preserves the wilderness character of the Ellicott Rock Wilderness (as required by the Wilderness Act).

### 3.0 DECISION (p. 21)

I have decided to implement Alternative 13A. The scope of my decision is limited to the upper segment of the Chattooga WSR. However, I made the decision within the context of the entire river.

Finally, the DN/FONSI states in Section 4.0 Rationale for the Decision the following:

After reviewing the alternatives in the EA, I have determined that this decision best addresses the following:

10. Provides access and equitable treatment of all users
11. Reduces potential conflict between users
12. Maintains opportunities for solitude in the backcountry
13. Protects the Recreation ORV
14. Ensures the physical environment can accommodate use
15. Recognizes the value of and ensures the continued presence of large woody debris
16. Addresses public concerns about protecting the 'highly diverse biological conditions' in the Chattooga Cliffs Reach
17. Addresses public concerns about boating in the tributaries

**C. The appellant contends “3. Manipulations of the factual record, upon which the 2012 Amendments are based, are arbitrary, capricious, an abuse of discretion and otherwise not in accordance with the law.” (p. 72)**

The 2005 Decision for Appeal states the following:

Section 10(a) of the WSRA requires the river-administering agency to protect and enhance the values which caused a river to be added to the National System. These values are expressed in Section 1 (b) as the river's free-flowing condition, water quality, and outstanding remarkable values (ORVs). The Interagency Guidelines (1982) interpret the direction in Section 10(a) as a "nondegradation and enhancement policy for all designated rivers, regardless of classification." (p. 4)

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The EA states the following:

Specific need for action statements and relevant laws are summarized below:

- D. Action is needed to respond to an appeal decision on the Sumter Land and Resource Management Plan (2004). (p.1)
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Table 3.1-1 Chattooga River Reaches (Source: Whittaker and Shelby 2007)

Reach Name	Location
Chattooga Cliffs	Grimshawes Bridge to Bullpen Road Bridge
Ellicott Rock	Bullpen Road Bridge to Burrells Ford Bridge
Rock Gorge	Burrells Ford Bridge to Lick Log Creek
Nicholson Fields	Lick Log Creek to Hwy. 28 bridge



This decision (p. 1):

1. Responds to an appeal decision on the 2004 Sumter Revised LRMP;
2. Provides consistent management of the upper segment of the Chattooga WSR on all three national forests; and
3. Preserves the upper segment of the Chattooga WSR's free-flowing condition, protects its water quality and protects its outstandingly remarkable values (as required by the Wild and Scenic Rivers Act [WSRA]), as well as preserves the wilderness character of the Ellicott Rock Wilderness (as required by the Wilderness Act).

3.0 DECISION (p. 21)

I have decided to implement Alternative 13A. The scope of my decision is limited to the upper segment of the Chattooga WSR. However, I made the decision within the context of the entire river.

Finally, the DN/FONSI states in Section 4.0 Rationale for the Decision the following:

After reviewing the alternatives in the EA, I have determined that this decision best addresses the following:

18. Provides access and equitable treatment of all users
19. Reduces potential conflict between users
20. Maintains opportunities for solitude in the backcountry
21. Protects the Recreation ORV
22. Ensures the physical environment can accommodate use
23. Recognizes the value of and ensures the continued presence of large woody debris
24. Addresses public concerns about protecting the 'highly diverse biological conditions' in the Chattooga Cliffs Reach
25. Addresses public concerns about boating in the tributaries
26. Addresses public concerns about commercial boating

## Finding

I find the decisions comply with the Administrative Procedures Act.

## **Issue 7      Whether the decisions comply with the National Environmental Policy Act.**

### **A. The appellant contends "1. Rationale Flaws in Violation of NEPA"**

#### **1) "a. The rationale proves *inequitable* treatment of all users – not equitable treatment." (p. 73)**

The EA describes Key Issue "C" (EA, p. 11) as a public concern about capacity limits rather than access: "that if limits are imposed to reduce encounters, they [*the public*] believe any limits should be applied equitably to all user groups, not just boaters." The agency's response (EA, p.

12) addresses adding boating use to the total capacity; i.e., on days when boating opportunities occur, the number of boating groups anticipated are treated equitably as part of the total capacity for each reach. As the EA notes (p. 126) these capacities are consistent with encounter tolerances in wildernesses with higher use (Dawson and Alberga, 2003) as well as findings from a study done in the Ellicott Rock Wilderness itself (Rutlin, 1995). The EA recognizes (EA, p. 369) that there may be some opportunities for use to grow in low-use seasons, but substantial increases are not expected. In the document “*Summary of Public Comments Received on the EA*” (p. 19, project record #411) the agency’s response notes that in the alternatives which allow boating, boaters “...are not singled out or treated any differently than existing user groups.” Furthermore, the Social Impact Analysis (EA, pp. 372-384 and Appendix F, pp. 446-476) examines the social and economic dynamics that led to the 1976 prohibition on boating above Highway 28 and to the appeal in 2004 of the boating prohibition.

The Decision Notice (p. 5) states that although data shows that traditional uses begin to increase in March and April, use is still lower than in late spring (May), summer and fall, so the impacts of allowing boating on some days during these two months are expected to be low. The DN also states (DN, p. 4) that continuing the current management in the Nicholson Fields Reach year-round will eliminate potential for conflict associated with boating. The DN notes (DN, p. 4) that this section also includes the Delayed Harvest, a fishing designation that requires catch and release fishing from November to May, which attracts the highest angling use on the upper segment of the Chattooga WSR.

**2) “b. The rationale offers no basis for reducing potential conflict between users.” (p. 74)**

The EA states (p. 2) that US Forest Service agreed to reassess the ban on boating in the upper segments as part of a broader examination of visitor capacity issues in those upper segments. The purpose and need (EA, pp. 1-3) for the proposed action was to respond to the 2005 Appeal Decision on the Sumter’s FLRMP, to provide consistent management of the upper segment of the Chattooga WSR on all three National Forests, and to preserve the upper segment’s free-flowing condition, protect its water quality and protect and enhance its ORVs, and preserve the wilderness character of Ellicott Rock Wilderness.

The report *Capacity Reconsidered: Finding Consensus and Clarifying Differences* (project record #342; Abstract, *Capacity Reconsidered*) points out that work on capacity issues “has evolved considerably since the late 1960s as a result of environmental planning, court proceedings, recreation management practice, and recreation research.” The EA recognizes (p. 67) that consensus about visitor capacity related concepts, principles and approaches appears to be emerging among researchers and resource professionals. In considering visitor capacity levels, agency planners drew from several sources (EA, p. 68):

- Use estimation workshop (Berger and CRC 2007)
- Vehicle counts at access areas (Berger Group 2007a)
- General relationships between use levels and impacts (2007 Integrated Report)
- Tolerances for impacts from Chattooga studies or those from other rivers
- Logic-based calculations or other analyses that associate vehicle counts at access sites with current peak-use levels

The EA states (p. 69) that in general, capacities were developed with recognition that social impacts, such as encounters, are probably the most limiting factor for use levels in backcountry areas of the Chattooga WSR corridor. The EA analyzed varying capacity levels in the alternatives (from no capacity levels set in Alternative 1 to a range of groups per day and group sizes in other alternatives). The selected alternative (EA, p. 132) defines a capacity level designed to prevent backcountry encounters from exceeding between two and eight per day on weekdays and between four and fifteen per day on weekends. As the EA notes (p. 126) these capacities are consistent with encounter tolerances in wildernesses with higher use (Dawson and Alberga, 2003) as well as findings from a study done in the Ellicott Rock Wilderness itself (Rutlin, 1995). The EA describes (EA, p. 73; see also Encounter Calculations, EA Appendix D, pp. 419-423) how the interdisciplinary team arrived at the use estimates presented in Table 3.2.1-5 by using vehicle-based capacities (parking lot spaces), applying a regional multiplier of 2.5 people per vehicle, and assuming one vehicle equals one group. These estimates were used to develop a range of capacity levels for frontcountry and backcountry areas in the alternatives. Parking lot capacities are described in Chapter 3, Existing Conditions (EA, pp. 69-70). The analysis notes (EA, p. 86) parking lots have *de facto* capacities that may limit use once they are filled; with increased use, visitors may experience higher levels of congestion, crowding, or a reduced sense of naturalness. The EA states (EA, p. 103) in alternatives that set capacity limits, there would be days when use exceeds capacity; on these days, all users would compete for limited parking availability, and some would be displaced.

The EA (p. 68; p. 452) defines capacity as the amount and type of use that protects and enhances river values. Monitoring of capacity levels (Appendix G-Monitoring Plan and Adaptive Management Strategy, EA, p. 482) will determine if boating contributes to higher use while still meeting current levels of opportunities for solitude without degrading the ORVs of the river. Furthermore, the DN notes (p. 5) that components of the decision relating to capacity, parking, group size limits, and actions to designate trails, campsites, put-ins and take-outs will maintain or increase opportunities for solitude.

**3) “c. The rationale misinterprets the Recreation ORV it claims to protect.” (p. 76)**

The Decision Notices (Sumter DN, p. 2; Chattahoochee-Oconee DN, p. 4; Nantahala DN, p. 2) state the decision on the upper segment of the Chattooga is made within the context of the entire river. The Rationale for the Decision (Sumter DN, p. 3; Chattahoochee-Oconee DN, p. 5; Nantahala DN, p. 3) states that the decision will provide challenging, whitewater boating opportunities in a solitude setting in the section of the Chattooga WSR that boaters rated highest for creek boating; allowing this boating from December 1 to April 30 will provide the most opportunities for optimal standard and big water boating because these months historically offer the best flows for these types of boating opportunities. The Decision offers further rationale (DN, p. 4) that maintaining the current prohibition on boating in the Nicholson Fields Reach will provide opportunities for year- round, boat-free, coldwater angling in the Delayed Harvest area which attracts the highest angline use on the upper segment of the Chattooga WSR. The Decision expands opportunities for boating (Sumter DN, p. 5; Chattahoochee-Oconee DN, p. 8; Nantahala DN, p. 6) by allowing boating on the upper segment of the Chattooga WSR while maintaining

opportunities for existing users. The Decision (Sumter DN, p. 4; Chattahoochee DN, p. 7; Nantahala DN, p. 4) will reduce potential conflicts between users by separating them through reach, flow, and seasonal restrictions; and the Decision maintains opportunities for solitude through capacity, parking, and group size limits (Sumter DN, p. 5; Chattahoochee-Oconee DN, p. 8; Nantahala DN, p. 5).

The Interagency Wild and Scenic River Coordinating Council (*Compendium*, p. 70) interprets Section 10(a) of the WSRA (the “protect and enhance” mandate) as a “non-degradation and enhancement policy for all designated river areas, regardless of classification...” Non-degradation within the Act’s context is not synonymous with *no impact*. Non-degradation in the context of a wild and scenic river is assurance that there is no downward trend in conditions that affect ORVs. The EA (p. 62) states that the 1996 ORV Report concluded that the outstanding recreation values of the river are still in place. There are fewer road-accessible access points and roads than in the 1970s, even as other facilities and trail access have increased; these closures have increased the river’s sense of naturalness and made it feel more remote (EA, p. 62). The EA states (p. 73) that the analyses allow estimates of the use levels that would keep encounters from impacting the desired conditions, thus protecting the Recreation ORV.

**4) “d. The rationale admits some boating limits are based on unfounded ‘Public concerns’ regarding biological values of the Chattooga Cliffs reach.” (p. 77)**

The Sumter National Forest DN/FONSI (Section 4.0, p. 6) states: “...my decision will protect the river’s biology...ORVs... and other biological values...”

The Chattahoochee-Oconee National Forest DN/FONSI (Section 4.0, p. 8) states: “...my decision will protect the river’s biology...ORVs... and other biological values...”

The Nantahala National Forest DN/FONSI (Section 4.0, p.6) states: “...my decision will protect the river’s biology...ORVs... and other biological values...”

The EA (p. 156) addresses potential impacts from boating by stating: “When considering impacts to the fisheries component of the Biology ORV and the aquatic community, three important areas must be analyzed: 1) Trampling, crushing or scraping of aquatic species; 2) Sediment; and 3) Loss of large woody debris (LWD)... Recreational use of the river may result in the physical trampling and equipment scraping of aquatic species, particularly those with slow mobility...Fine sediments can alter and reduce the quality of aquatic habitats and eliminate benthic macroinvertebrates or reduce their density and diversity...LWD is removed from river sections downstream Highway 28 for boating and from Overflow Creek by boaters...”

The Biological Assessment and the Biological Evaluation analyzed the area known as the Chattooga Cliffs Reach in addition to the other upper Chattooga tributaries within the Chattooga River Corridor. Effects determinations were made based on the Forest Plan Amendments proposed in Alternative 13A of the EA (pp. 38-39).

The USFWS (p. 3) concurred with our “may affect, but not likely to adversely affect” determination for the federally-listed rock gnome lichen in their Letter of Concurrence dated December 6, 2011.

**5) “e. The rationale admits boating bans are based on unfounded ‘concerns’ regarding tributaries.” (p. 77)**

The EA (p. 45) states that the tributaries provide more fisheries restoration opportunities for the native brook trout than the main stem of the Chattooga. The EA (p. 45) cites data from the South Carolina Department of Natural Resources (SCNDR) documenting the complete loss of some native brook trout populations and a significant loss of range in recent years, noting brook trout range has declined 70 percent. To improve habitat conditions favorable for the preservation and perpetuation of native brook trout the agency and SCDNR are actively restoring stream habitat in the Chattooga River watershed through the addition of LWD, an important component of the aquatic ecosystem.

The Sumter National Forest DN/FONSI (Section 4.0, p. 6) states: “...my decision will protect the river’s biology...ORVs... and other biological values...”

The Chattahoochee-Oconee National Forest DN/FONSI (Section 4.0, p. 8) states: “...my decision will protect the river’s biology...ORVs... and other biological values...”

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The Biological Assessment and the Biological Evaluation analyzed the area known as the Chattooga Cliffs Reach in addition to the other upper Chattooga tributaries within the Chattooga River Corridor. Effects determinations were made based on the Forest Plan Amendments proposed in Alternative 13A of the EA (pp. 38-39). The USFWS (p. 3) concurred with our “may affect, but not likely to adversely affect” determination for the federally-listed rock gnome lichen in their Letter of Concurrence dated December 6, 2011.

**B. The appellant contends “Alternative Development Flaws in Violation of NEPA” (p. 78)**

The 2005 Decision for Appeal states the following:

Section 10(a) of the WSRA requires the river-administering agency to protect and enhance the values which caused a river to be added to the National System. These values are expressed in Section 1 (b) as the river's free-flowing condition, water quality, and outstanding remarkable values (ORVs). The Interagency Guidelines (1982) interpret the direction in Section 10(a) as a "nondegradation and enhancement policy for all designated rivers, regardless of classification." (p. 4)

Specific to recreation as an ORV, the Interagency Guidelines direct public use "be regulated and distributed where necessary to protect and enhance...the resource values of the river area." Agency policy (FSM 2354.41) identifies factors to consider in developing direction for recreation visitor use in a wild and scenic river (WSR) corridor including the capability of the physical environment, desires of present and potential users, diversity of recreation opportunities within the geographic area, and budgetary, personnel and technical considerations. If it becomes necessary to limit use, "ensure that all potential users have a fair and equitable chance to obtain access to the river." (p. 5)

The Wilderness Act directs that areas designated as wilderness "be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness"(Section 2(a) of the Wilderness Act). Section 2(c) of the Wilderness Act defines wilderness, in part, as an area with "outstanding opportunities for solitude or a primitive or unconfined type of recreation." Additionally, Section 4(b) states that: "Except as otherwise provided in this Act, wilderness areas shall be devoted to the public purposes of recreation, scenic, scientific, educational, conservation, and historical use." Regulations developed for administration of National Forest wilderness establish that "wilderness will be made available for human use to the optimum extent consistent with the maintenance of primitive conditions" (36 CFR 293.2(b)). (p. 5)

After careful review of the record, particularly Appendix H, I am reversing the Regional Forester's decision to continue to exclude boating on the Chattooga WSR above Highway 28. I find the Regional Forester does not provide an adequate basis for continuing the ban on boating above Highway 28. Because the record provided to me does not contain the evidence to continue the boating ban, his decision is not consistent with the direction in Section 10(a) of the WSRA or Sections 2(a) and 4(b) of the Wilderness Act or agency regulations implementing these Acts. (p. 6)

I am directing the Regional Forester to conduct the appropriate visitor use capacity analysis, including non-commercial boat use; and to adjust or amend, as appropriate, the RLRMP to reflect a new decision based on the findings. (p. 6)

The EA states the following:

Specific need for action statements and relevant laws are summarized below:

- A. Action is needed to respond to an appeal decision on the Sumter Land and Resource Management Plan (2004). (p.1)

- B. Action is needed to provide consistent management of the upper segment of the Chattooga WSR on all three national forests. (p. 3)
  - C. Action is needed to preserve the upper segment of the Chattooga WSR's free-flowing condition, protect its water quality and protect and enhance its ORVs, as well as preserve the wilderness character of the Ellicott Rock Wilderness. (p. 3)
- 1. Wild and Scenic Rivers Act (p. 3)
  - 2. Wilderness Act (p. 4)
  - 3. Potential conflict between WSRA and Wilderness Act (p. 5)

#### 1.4 Decisions to be Made

Decisions to be made are specific to the upper segment of the Chattooga WSR. Management of the river below Highway 28 was not challenged in the 2004 Sumter RLRMP and is not subject to further review. Management activities are considered within the context of the entire Chattooga WSR and are analyzed in the cumulative effects sections in Chapter 3. (p. 6)

#### 1.5 Public Involvement

The public has shown considerable interest in management of the upper segment of the Chattooga WSR since American Whitewater et al. appealed the 2004 Sumter RLRMP. During the last seven years, the U.S. Forest Service has encouraged and documented public involvement throughout the process. All documents related to public involvement can be found in the project record and on the Francis Marion and Sumter National Forests' website at <http://fs.usda.gov/goto/scnfs/upperchattooga...> (p. 6)

### Chapter 2 Alternatives

#### 2.1 Summary

The U.S. Forest Service has developed several alternatives that would meet the purpose and need described in Chapter 1. All alternatives preserve the Chattooga WSR's free-flowing condition, protect its water quality and protect its ORVs as required by the WSRA. All alternatives also preserve the wilderness character of Ellicott Rock Wilderness as required by the Wilderness Act. However, the alternatives vary the type and amount of recreation use, as well as other management actions, on different reaches of the upper river segment to assess the trade-offs of providing different mixes of high-quality recreation opportunities. The scope of the alternatives is limited to providing management direction for the upper segment of the Chattooga WSR, consistent with the appeal decision described in the purpose and need. (p. 22)

Within in the EA, documentation occurs specifically: Section 2.2 Alternatives Considered in Detail (pp. 23-41) describe in detail the alternatives; Section 2.3 Monitoring and Adaptive Management(p. 42), Section 2.4 Alternatives Considered But Not Evaluated In Detail (pp. 45-47), Section 2.5 Comparison of the Alternatives Considered in Detail (pp 48-50), Chapter 3 Affected Environment and Environmental Consequences (p. 51-399), and Appendixes (pp. 400-485) for compliance of NEPA.

The DN/FONSI (p. 1) states that the Purpose and Need for the Decision is the following:

- 1. Responds to an appeal decision on the 2004 Sumter Revised LRMP;
- 2. Provides consistent management of the upper segment of the Chattooga WSR on all three national forest; and

3. Preserves the upper segment of the Chattooga WSR's free-flowing condition, protects its water quality and protects its outstandingly remarkable values (as required by the Wild and Scenic Rivers Act [WSRA]), as well as preserves the wilderness character of the Ellicott Rock Wilderness (as required by the Wilderness Act)."

DN/FOSNI states in Section 3.0 Decision that "I have decided to implement Alternative 13A. The scope of my decision is limited to the upper segment of the Chattooga WSR. However, I made the decision within the context of the entire river..."

In addition, Section 5.0 Alternatives Considered in the EA (Chapter 2) states the following:

#### 5.1 Alternatives Considered in Detail

##### *Alternative 1*

This is the no-action alternative and would maintain current management on all three national forests.

##### *Alternative 2*

This alternative would increase opportunities for solitude through a permit system and by reducing user-created features such as trails and campsites. Boating would not be permitted on the upper segment of the Chattooga WSR.

##### *Alternative 3*

This alternative would provide year-round trout fishing, establish capacities at current use levels, and reduce user-created features. Boating would not be permitted on the upper segment of the Chattooga WSR.

##### *Alternative 8*

This alternative would provide year-round trout fishing, establish capacities at current use levels and reduce user-created features. Boating would be permitted on the upper segment of the Chattooga WSR from the Green Creek confluence downstream to the Highway 28 Boat Launch without zone, season or flow restrictions.

##### *Alternative 11*

This alternative would provide year-round trout fishing, establish capacities at current use levels and reduce user-created features. Boating would be permitted on the upper segment of the Chattooga WSR from the Green Creek confluence downstream to the Highway 28 Boat Launch with flow restrictions (450 cfs and higher).

##### *Alternative 12*

This alternative would provide year-round trout fishing, establish capacities at current use levels and reduce user-created features. Boating would be permitted on the upper segment of the Chattooga WSR from the Green Creek confluence downstream to the Lick Log Creek

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### *Alternative 13*

This alternative would provide year-round trout fishing, establish capacities at current use levels and reduce user-created features. Boating would be permitted on the upper segment of the Chattooga WSR from the Greek Creek confluence downstream to Lick Log Creek with season and flow restrictions (350 cfs and higher).

### *Alternative 13A*

This alternative is a slight modification of Alternative 13. All management actions would be the same as Alternative 13 with three exceptions:

1. It would extend the boating season by two months (March and April);
2. It would allow an additional boater put in at the Norton Mill Creek confluence; and
3. It is more specific about when boating would be allowed. Boating would be allowed from the time that flows reach 350 cfs or greater at the USGS Burrells Ford gauge during daylight hours. Daylight hours will be 30 minutes before official sunrise to 30 minutes after official sunset. Once boating is allowed, it may continue until 30 minutes after official sunset on that same day.

### *Alternative 14*

This alternative would provide year-round, trout fishing, establish capacities at current use levels and reduce user-created features. Boating would be permitted year round on the upper segment of the Chattooga WSR from the Green Creek confluence downstream to the Highway 28 Boat Launch with flow restrictions (350 cfs and higher).

## 5.2 Alternatives Considered but not Evaluated in Detail

### *Boating through private land on the upper segment of the Chattooga WSR*

The upper portion of the Chattooga Cliffs Reach has private land on both sides of the upper segment of the Chattooga WSR. The landowners claim that public use would constitute trespass. Until decisions about navigability are made for the sections of the river with private land along them, or public access rights on this reach are determined, the U.S. Forest Service considers this section of the upper segment of the Chattooga WSR beyond the scope of this decision.

### *Boating in the Tributaries above Highway 28*

While developing alternatives that would permit boating above Highway 28, the agency considered extending boating opportunities to the tributaries. However, because of concerns regarding large woody debris, native brook trout restoration, vegetation removal, increased encounter levels, user-created trails, as well as enforcement and management issues, this alternative was considered but not developed.

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*Preliminary Alternative 6*

This alternative was eliminated from detailed consideration because Alternative 8 replaced it.

*Preliminary Alternative 7*

Some components of this alternative were rolled into alternatives 11, 12, 13, 13A and 14. Therefore Alternative 7 became redundant and unnecessary.

*Alternative 4*

Bait angling is illegal above Bullpen Bridge. Therefore, flows set in Alternative 4 would protect a type of angling that is currently illegal. In addition, elements of Alternative 4 are analyzed in Alternative 11 (the effects are analyzed by reach, season and flows). Using the confluence of Norton Mill Creek as the uppermost put in was considered but not developed because it was determined that boaters could start floating the river as far north as the Green Creek confluence.

*Alternatives 5, 9 and 10*

Elements in these three alternatives are analyzed in Alternative 14 (the effects are analyzed by reach, season and flow level). Using the confluence of Norton Mill Creek as the uppermost put in was considered but not developed because it was determined that boaters could start floating the river as far north as the Green Creek confluence.

*Alternative 15*

This alternative would allow increased recreation use levels by increasing parking lot sizes and encouraging additional primitive camping. It was not developed because of public input gathered during the Limits Acceptable Change (LAC) process, where there was a general opposition to increased recreation use in the upper segment of the Chattooga WSR Corridor.

Project Record item 183 is a document signed by Jerome Thomas dated September 26, 2007 regarding direction on the range of alternatives for Management of the Upper Chattooga River. The document specifically states:

The analysis teams are directed to follow the recommendations provided in the enclosed document, "Recommendations Regarding the Range of Alternatives for Management of the Upper Chattooga River."

"In light of the factors discussed above, the Responsible Officials for the plan amendments addressing management of the upper Chattooga River are advised to defer any management decisions that would alter the current status of boating opportunity from Grimshawes Bridge to the southern end of the Rust property. Any preliminary alternatives which contain this river segment should be eliminated from detailed consideration in the environmental assessment currently underway. Any new alternatives developed during the NEPA process that include management for general public use purposes should not include this segment of the river."

The responsible Forest Supervisors support this direction, which goes into effect immediately, in considering alternatives included in the August scoping letter, any new alternatives, and in communicating our analysis process to stakeholders.

In addition, Project Record Tabs (12, 13, 89, 91, 94, 94.1, 97, 158, 160, 161, 162, 164, 165, 166, 167, 168, 171, 173, 176, 201, 201.1, 225, 230, 231, 237, 238, 336, 336.1, 342, 345, 347, 348, 349, 350, 352, 353, 354, 413, 415, 416, 417, 419, and 420) documents an extensive range of information used for the analysis and decision making process.

## **Finding**

I find that alternative development and decisions are in compliance with NEPA.

### **Issue 8      Whether the decisions are consistent with USFS policy and precedent.**

**The appellant specifically contends that “The discriminatory boating ban on the Chattooga is an unsupported, arbitrary and capricious management anomaly.” (Appeal, p. 80)**

The 2005 Decision for Appeal states the following:

Section 10(a) of the WSRA requires the river-administering agency to protect and enhance the values which caused a river to be added to the National System. These values are expressed in Section 1 (b) as the river's free-flowing condition, water quality, and outstanding remarkable values (ORVs). The Interagency Guidelines (1982) interpret the direction in Section 10(a) as a "nondegradation and enhancement policy for all designated rivers, regardless of classification." (p.4)

Specific to recreation as an ORV, the Interagency Guidelines direct public use "be regulated and distributed where necessary to protect and enhance...the resource values of the river area." Agency policy (FSM 2354.41) identifies factors to consider in developing direction for recreation visitor use in a wild and scenic river (WSR) corridor including the capability of the physical environment, desires of present and potential users, diversity of recreation opportunities within the geographic area, and budgetary, personnel and technical considerations. If it becomes necessary to limit use, "ensure that all potential users have a fair and equitable chance to obtain access to the river." (p. 5)

The Wilderness Act directs that areas designated as wilderness "be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness"(Section 2(a) of the Wilderness Act). Section 2(c) of the Wilderness Act defines wilderness, in part, as an area with "outstanding opportunities for solitude or a primitive or unconfined type of recreation." Additionally, Section 4(b) states that: "Except as otherwise provided in this Act, wilderness areas shall be devoted to the public purposes of recreation, scenic, scientific, educational, conservation, and historical use." Regulations developed for administration of National Forest wilderness establish that "wilderness will be made available for human use to the optimum extent consistent with the maintenance of

After careful review of the record, particularly Appendix H, I am reversing the Regional Forester's decision to continue to exclude boating on the Chattooga WSR above Highway 28. I find the Regional Forester does not provide an adequate basis for continuing the ban on boating above Highway 28. Because the record provided to me does not contain the evidence to continue the boating ban, his decision is not consistent with the direction in Section 10(a) of the WSRA or Sections 2(a) and 4(b) of the Wilderness Act or agency regulations implementing these Acts. (p.6)

I am directing the Regional Forester to conduct the appropriate visitor use capacity analysis, including non-commercial boat use; and to adjust or amend, as appropriate, the RLRMP to reflect a new decision based on the findings. (p. 6)

Project Record 183 is a document signed by Jerome Thomas dated September 26, 2007 regarding direction on the range of alternatives for Management of the Upper Chattooga River. The document specifically states:

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"In light of the factors discussed above, the Responsible Officials for the plan amendments addressing management of the upper Chattooga River are advised to defer any management decisions that would alter the current status of boating opportunity from Grimshawes Bridge to the southern end of the Rust property. Any preliminary alternatives which contain this river segment should be eliminated from detailed consideration in the environmental assessment currently underway. Any new alternatives developed during the NEPA process that include management for general public use purposes should not include this segment of the river."

The responsible Forest Supervisors support this direction, which goes into effect immediately, in considering alternatives included in the August scoping letter, any new alternatives, and in communicating our analysis process to stakeholders.

The EA states the following:

Specific need for action statements and relevant laws are summarized below:

- A. Action is needed to respond to an appeal decision on the Sumter Land and Resource Management Plan (2004). (p. 1)
- B. Action is needed to provide consistent management of the upper segment of the Chattooga WSR on all three national forests. (p. 3)
- C. Action is needed to preserve the upper segment of the Chattooga WSR's free-flowing condition, protect its water quality and protect and enhance its ORVs, as well as preserve the wilderness character of the Ellicott Rock Wilderness. (p. 3)
  1. Wild and Scenic Rivers Act (p. 3)
  2. Wilderness Act (p. 4)

### 3. Potential conflict between WSRA and Wilderness Act (p. 5)

#### 1.4 Decisions to be Made

Decisions to be made are specific to the upper segment of the Chattooga WSR. Management of the river below Highway 28 was not challenged in the 2004 Sumter RLRMP and is not subject to further review. Management activities are considered within the context of the entire Chattooga WSR and are analyzed in the cumulative effects sections in Chapter 3. (p. 6)

#### 1.5 Public Involvement

The public has shown considerable interest in management of the upper segment of the Chattooga WSR since American Whitewater et al. appealed the 2004 Sumter RLRMP. During the last seven years, the U.S. Forest Service has encouraged and documented public involvement throughout the process. All documents related to public involvement can be found in the project record and on the Francis Marion and Sumter National Forests' website at <http://fs.usda.gov/goto/scnfs/upperchattooga...>(p. 6)

## Chapter 2 Alternatives

### 2.1 Summary

The U.S. Forest Service has developed several alternatives that would meet the purpose and need described in Chapter 1. All alternatives preserve the Chattooga WSR's free-flowing condition, protect its water quality and protect its ORVs as required by the WSRA. All alternatives also preserve the wilderness character of Ellicott Rock Wilderness as required by the Wilderness Act. However, the alternatives vary the type and amount of recreation use, as well as other management actions, on different reaches of the upper river segment to assess the trade-offs of providing different mixes of high-quality recreation opportunities. The scope of the alternatives is limited to providing management direction for the upper segment of the Chattooga WSR, consistent with the appeal decision described in the purpose and need. (p. 22)

Within in the EA, documentation occurs specifically: Section 2.2 Alternatives Considered in Detail (pp. 23-41) describe in detail the alternatives; Section 2.3 Monitoring and Adaptive Management (p. 42), Section 2.4 Alternatives Considered But Not Evaluated In Detail (pp. 45-47), Section 2.5 Comparison of the Alternatives Considered in Detail (pp 48-50), Chapter 3 Affected Environment and Environmental Consequences (p. 51-399), and Appendixes (pp. 400-485) for compliance of NEPA.

The US Forest Service contracted a study (EA, p. 76) to assess flow needs for angling and boating on the upper segment of the Chattooga. The study used expert panels to assess conditions for their activities at different flows; the experts were chosen from a review of qualifications to maximize years of experience, skill level, previous experience participating in flow studies, level of availability, and knowledge of the area and/or river; the creation of small panels to assess flow needs is a commonly used methodology in flow-need studies and has been used in several relicensing studies.

Many boaters submitted comments on the EA (Summary of Public Comments Received on the EA, Project Record #411). Information on visitor use considered in the EA (p. 419) includes: estimates collected by researchers from users contacted at major trailheads (the Rutlin, 1995 study (EA, p. 420); the Use Estimation Workshop (Berger and CRC, 2007); expert panels of boaters and anglers; a study on group size limits in wilderness (Monz et al, 2000 (EA, p. 133)); research on median tolerances for encounters within high-use wilderness (Dawson and Alberga, 2003 (EA, p. 132); an assessment of Values, Beliefs and Attitudes (VBAs) drawn from public comments received from 2005 to 2009 (EA, p. 446); a 1995 study of diverse public opinions (1995 DFC Report (EA p. 449)); a 1996 analysis of ORVs on the Chattooga (EA, p. 449); the Public Involvement and Limits of Acceptable Change process public meetings from 2004-2005 (EA, p. 454, Table F-1); numerous reports concerning capacity and conflict analysis (EA, p. 456); data from the National Survey on Recreation and the Environment (Cordell 2010a, b and c (EA, p. 466)); a Situation Assessment of the Chattooga River prepared by the National Resources Leadership Institute in 2007 to assess the perceptions of a broadly represented subset of river users (Situation Assessment, p. iii; Project Record #168); and information from *Capacity & Conflict on the Upper Chattooga River: An integrated analysis of the 2006-2007 reports* prepared for the Forest Service by Confluence Research and Consulting in June 2007 which highlights and integrates key findings from a number of reports, field panels, fieldwork, informal discussions with public stakeholders and review of public comments, and peer-reviewed academic and professional journals (*Capacity & Conflict on the Upper Chattooga River*, p. 5).

In addition, Project Record Tabs (12, 13, 89, 91, 94, 94.1, 97, 158, 160, 161, 162, 164, 165, 166, 167, 168, 171, 173, 176, 201, 201.1, 225, 230, 231, 237, 238, 336, 336.1, 342, 345, 347, 348, 349, 350, 352, 353, 354, 413, 415, 416, 417, 419, and 420) documents an extensive range of information used for the analysis and decision making process.

The DN/FONSI (Sumter, p. 1) states that the Purpose and Need for the Decision is the following:

1. Responds to an appeal decision on the 2004 Sumter Revised LRMP;
2. Provides consistent management of the upper segment of the Chattooga WSR on all three national forest; and
3. Preserves the upper segment of the Chattooga WSR's free-flowing condition, protects its water quality and protects its outstandingly remarkable values (as required by the Wild and Scenic Rivers Act [WSRA]), as well as preserves the wilderness character of the Ellicott Rock Wilderness (as required by the Wilderness Act)."

DN/FOSNI (p. 3) states under Section 3.0 Decision that "I have decided to implement Alternative 13A. The scope of my decision is limited to the upper segment of the Chattooga WSR. However, I made the decision within the context of the entire river..."

## **Finding**

I find the decisions are consistent with USFS policy and precedent.