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August 30, 2011

VIA ELECTRONIC AND FIRST CLASS MAIL

Comments on Upper Chattooga EA
c/o USDA Forest Supervisors Office
4931 Broad River Road
Columbia, SC 29212-3530

Email: comments-southern-francismarion-sumter@fs.fed.us

Re: The environmental assessment titled: "Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor"

Dear Mr. Bradley:

On July 15, 2011, the United States Forest Service ("USFS") published an environmental assessment titled "Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor." Comments were originally requested on or before August 15, 2011, and the deadline was subsequently extended to August 30, 2011. American Whitewater and the undersigned organization's and individual's comments to the USFS environmental assessment are enclosed herewith.

Thank you for considering these comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kevin Colburn', written in a cursive style.

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**COMMENTS OF AMERICAN CANOE ASSOCIATION, AMERICAN
WHITEWATER, ATLANTA WHITEWATER CLUB, FOOTHILLS PADDLING
CLUB, GEORGIA CANOEING ASSOCIATION, WESTERN CAROLINA
PADDLERS, BRUCE HARE, KEN STRICKLAND, AND JOE STUBBS
on the Environmental Assessment Titled:
“Managing Recreation Uses in the Upper Segment of the Chattooga Wild and
Scenic River Corridor.”**

Prepared by:

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August 30th, 2011

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Introduction

The undersigned organizations have reviewed the environmental assessment titled: “Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor” (hereafter referred to as the “EA”) in detail and offer comments in this document. The EA does not comply with NEPA on very basic levels. The EA does not meet the mandate of the Record of Decision (Appeal ROD) for our appeal of the 2004 Revised Land and Resources Management Plan (RLRMP). The EA is deeply biased and makes many massive and backwards leaps in logic without any actual supporting evidence. The EA and its preferred alternative violate the Wilderness Act and the Wild and Scenic Rivers Act (WSRA). The EA and its preferred alternative violate the Forest Service Manual (FSM). American Whitewater herein asserts that the EA and its recommendations are illegal and fundamentally unsound. The EA must be withdrawn as deeply flawed, biased, and illegal.

In April of 2005, the Washington Office of the USFS granted an appeal of the Region 8 Office decision to continue an unlawful ban on paddling the Wild and Scenic Upper Chattooga River. At that time the Regional Office and the relevant Forests embarked on a process designed to create animosity among the public, and to create a unilateral record in support of the boating ban. The process did indeed fuel controversy and animosity, but several attempts at producing a rational defense of the boating ban failed. They failed because there is no rational defense for the boating ban.

This most recent attempt to produce an EA succeeds only in being more clearly and exhaustively wrong, biased and unlawful. The EA proposes to significantly exceed the USFS’s discretion. The EA violates every order of the related 2005 American Whitewater Appeal Record of Decision (Appeal ROD).

At the same time, the EA considers and proposes many reasonable and responsible management components relating to non-paddlers. Paddlers are singled out for illegal, inequitable, and irrational management.

In addition to these comments, we hereby resubmit by reference all past comments made by the signatories of these comments regarding the successfully appealed 2004 Revised Land and Resource Management Plan as it related to the management of the Upper Chattooga River. These documents include all comments and correspondence sent from American Whitewater to the US Forest Service between January of 2003 and today, which include but are not limited to comments and appeal of the 2004 LRMP, comments on various USFS assessment documents including the Integrated Report, and comments¹ and appeal of the 2008-2009 Environmental Assessment titled Managing Recreational Uses on the Upper Chattooga River. In addition we hereby submit by reference the complaint and all related documents submitted in

¹ <http://www.americanwhitewater.org/content/Document/view/documentid/481/>

Civil Action File No. 8:09-cv-2665 JMC, *American Whitewater et al v. USDA Forest Service et al* regarding this issue.

These comments are intended to clearly reveal the primary elements of the 500 page Environmental Assessment (EA) that most egregiously violate federal law, federal regulations, USFS policy, and the Appeal ROD.

1. The EA lists improper “Responsible Officials.”

The EA lists three Forest Supervisors as the “Responsible Officials.” The Appeal ROD that ordered this EA was clear: “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 (emphasis added).” The EA lists no fewer than eight staff from the Regional Forester’s office as authors of the EA. The listed “Responsible Official” must be changed to the Regional Forester to comply with the Appeal ROD.

2. The EA fails to consider a reasonable range of alternatives.

The alternatives in the EA consider a range of immediate direct limits on only paddling. This is arbitrary, capricious, and unreasonable. The EA fails to consider reasonable alternatives and limits on alternatives brought forward in our scoping comments.² As we stated in multiple sets of past comments, reasonable alternatives must consider equitable limits to all similar uses, only when necessary, and proposing indirect limits first. The EA fails on all three counts. Even if the false assumption that paddling and angling conflict were assumed to be true, a reasonable range of alternatives would have considered limits to angling as well as paddling, since if anglers were absent there would be no chance of the presumed conflicts. Throughout these comments we will offer additional examples of how the EA fails to consider a reasonable range of alternatives. Singling out direct limits on paddlers as the only variable creates an unreasonable range of alternatives and thus the EA violates NEPA.³

3. The EA correctly predicts no significant impacts of all alternatives for most resource areas.

The EA offers absolutely no evidence of any biophysical or social impact of paddlers on the Upper Chattooga River or any similar regional river. The EA cites no peer reviewed

² <http://www.americanwhitewater.org/content/Document/view/documentid/217/>. See also Section II.F of the 2008 COMMENTS OF AMERICAN WHITEWATER on the Environmental Assessment Titled: “Managing Recreation Uses on the Upper Chattooga River”

³ See also Section IV.A and B of the 2008 COMMENTS OF AMERICAN WHITEWATER on the Environmental Assessment Titled: “Managing Recreation Uses on the Upper Chattooga River”

studies showing impacts of paddling on rivers. The authors of the EA opine on various potential impacts of paddling, but not for other visitors, which is inequitable. The EA generally concludes that allowing unlimited paddling with a monitoring component would not significantly impact any natural resources including aquatic species (137, 170), fisheries (158), wildlife (172, 173, 191, 208), rare wildlife (197), spraycliff communities (210), old growth (210), botanical resources (210, 222), rare plants (216-218, 222, 351), heritage resources (244), sediment (258, 286), soil (276, 283), solitude (366), Wilderness values (387), and swimmers (101).⁴

The EA authors also opine that some insignificant impacts may occur. We challenge the validity and equity of each of these assessments. They have no defensible basis.⁵

4. The EA fails to consider the portion of the river defined by the 2005 Appeal ROD decision.

The EA arbitrarily excludes the section of the Wild and Scenic Upper Chattooga River between the Grimshaws Bridge area and Green Creek from the analysis.⁶ It is unclear from the EA if paddling, angling, swimming, or wading is allowed or prohibited by the USFS in this reach. The EA envisions future criminal court challenges resolving the navigability of the reach. Navigability, as mentioned in previous comments, is a moot concept on a Wild and Scenic River. Furthermore, unless the USFS affirmatively states that paddlers are welcome to float through the USFS lands above and below the private lands, the issue of navigability in the private lands will never be resolved. Thus the EA creates a catch-22. Failing to protect and enhance any of the ORV's in this section of river is a violation of the WSR. Failing to analyze it in the EA is a violation of the Appeal ROD and NEPA.⁷ Failing to allow floating in the reach is a violation of the FSM.

At the same time paddling on the Chattooga River at and below Grimshaws is excluded from analysis, the EA does consider other uses on this reach (See pages 60, 65, 66). The EA also considers other reaches that are out of scope like the Lower Chattooga (page 139) and the West Fork (page 267).

5. The EA fails to fairly and equitably limit use.

The EA considers and proposes direct limits immediately for paddlers, but no direct limits for non-paddlers. This is not equitable. The EA considers and proposes to

⁴ See also Section III.A of the 2008 COMMENTS OF AMERICAN WHITEWATER on the Environmental Assessment Titled: "Managing Recreation Uses on the Upper Chattooga River"

⁵ See also Section II.C of the 2008 COMMENTS OF AMERICAN WHITEWATER on the Environmental Assessment Titled: "Managing Recreation Uses on the Upper Chattooga River"

⁶ See also Section II.H of the 2008 COMMENTS OF AMERICAN WHITEWATER on the Environmental Assessment Titled: "Managing Recreation Uses on the Upper Chattooga River"

⁷ The EA must address the "Chattooga WSR from and to existing access points between and including NC Road 1107 (Grimshaws Bridge) and the Highway 28 Bridge." (ROD pg. 3)

completely ban paddling from some reaches while non-paddlers are granted access to the entire reach. This is not equitable. The EA considers and proposes seasonal bans on paddling but not on non-paddling uses. This is not equitable. The EA considers flow based bans on paddling but not on non-paddler uses. This is not equitable. The EA considers and proposes future limits based on a precise permit system for paddlers but vague car-counts for non-paddlers. This is not equitable. Based on presumed conflict, the EA considers and proposes to limit one presumed conflicting use but not the other. This is not equitable. The EA considers and proposes to grant paddlers 0-5 days of use annually depending on the reach but grants non-paddlers 365 days of use. This is not equitable. The EA considers and proposes to artificially attract some visitors with stocked fish while banning others. This is not equitable. The EA proposes to ban paddling in tributaries to protect brook trout but allows unlimited anglers to catch, kill, and eat a certain number of brook trout from these same reaches each day. This is not equitable. Inequitably limiting uses violates the Appeal ROD and the FSM.⁸

6. The EA fails to exhaust indirect use limits before imposing direct limits.

On page 39 of the EA, a monitoring plan is described that would limit uses first with indirect measures and subsequently with direct measures as necessary. This statement proves that the USFS understands their mandate in the FSM. This mandated use limitation technique however is applied only to non-paddlers whose existing impacts mar the corridor, while paddlers suffer from harsh direct limits before they have ever floated the river in all alternatives. Arbitrarily, capriciously, and inequitably applying direct limits to only paddlers prior to exhausting indirect measures is a direct violation of the Appeal ROD, the FSM, and any concept of fairness or reason.⁹

7. The EA fails to include paddlers in the User Capacity Analysis.

As ordered in the Appeal ROD, the EA must ensure that “limitation and distribution of visitor use should be based on “periodic estimates of capacity in the forest plan” (FSM 2323.14).” The reviewing officer states: “I am directing the Regional Forester to conduct the appropriate visitor use capacity analysis, including non-commercial boat use.” Table 2.5 clearly depicts that paddling limits were excluded and considered separately from capacity decisions. Specifically, Alternatives 1-3 vary capacities but ban paddling, while Alternatives 8-14 have identical capacities but vary paddling limits. Thus, the EA offers no comparisons of alternatives that vary capacities that include paddling. In doing so the EA fails to ever consider the “kinds and amounts of use” in terms of a visitor capacity

⁸ The EA must ensure that “If it becomes necessary to limit use, ensure that all potential users have a fair and equitable chance to obtain access to the river.” (ROD pg. 5)

⁹ The EA must ensure that ““direct controls and restrictions” be minimized, and that controls are to be applied only as necessary to protect the wilderness resource after indirect measures have failed (FSM 2323.12).

analysis. Instead, the EA removes paddling from the actual capacity analysis, in essence first selecting a capacity, and then selecting the amount of paddling. This arbitrary and capricious decision violates the Appeal ROD, the FSM, the WSRA, Secretarial Guidelines,¹⁰ and *Friends of Yosemite v. Kempthorne*.¹¹

8. The EA fails to accurately define the mandate of the Wild and Scenic Rivers Act.

The EA states that “Managing a wild and scenic river corridor requires careful consideration of not only the natural resources, but also of people’s values and beliefs, needs and wants, and individual and community connections to the wild and scenic river corridor (page 441).” The EA authors seek to further stretch their own discretion on pages 14 and 15. The EA totally misses the point and ignores the clear statutory language of the Wild and Scenic Rivers Act. The USFS mandate is to protect and enhance the values that led to the designation of each foot of the Upper Chattooga River, which includes paddling. The EA proposes in every alternative to ban paddling and thus violate the WSRA.

9. The EA fails to protect and enhance the recreation ORV.

The EA does not accurately describe the language or intent of the Wild and Scenic Rivers Act and the designation record for the Chattooga that dictate which values must be protected and enhanced on the Upper Chattooga River. Page 14 states that development of ORV’s was a post-designation task. This has nothing to do with the direct mandate of the WSRA to protect the values that led to designation and without limiting uses that do not substantially interfere with those values. The EA wrongly claims that the USFS mandate on the Upper Chattooga is to simply protect some recreation somewhere on the river. As we have stated exhaustively in all past comments, it is undeniable that paddling on the entire upper Chattooga was a value that led to designation that must therefore under federal law be protected and enhanced by the USFS (see also next section of these comments). Banning and inequitably limiting paddling is thus in direct violation of the WSRA. In addition, Alternative 12 violates the WSRA specifically by prohibiting multi-

¹⁰ See National Wild and Scenic Rivers System; Final Revised Guidelines for Eligibility, Classification and Management of River Areas, 47 Fed. Reg. 39,454 (Sept. 7, 1982).

¹¹ FRIENDS OF YOSEMITE VALLEY; MARIPOSANS FOR ENVIRONMENTALLY RESPONSIBLE GROWTH (“MERG”), *Plaintiffs-Appellees*, v. DIRK KEMPTHORNE, in his official capacity as Secretary of the Interior; THE NATIONAL PARK SERVICE, Jonathan P. Jarvis, in his capacity as Director of the Pacific West Region, National Park Service, Department of the Interior; MICHAEL J. TOLLEFSON, in his official capacity as Superintendent, Yosemite National Park, National Park Service, Department of the Interior, *Defendants-Appellants*. No. 07-15124. DC No. CV-00-06191-AWI

day floating opportunities recognized as a value that led to designation.¹² By failing to substantiate the need to seasonally or totally ban paddling to protect the recreation ORV the EA violates the appeal ROD.¹³ See also the next section of these comments.

10. The EA fails to protect and enhance the Scenery ORV.

The EA proposes to totally or nearly totally ban paddling on the upper Chattooga River. The scenery ORV requires that recreationists be present to experience the Scenery. The specific scenery experience referenced in the EA is a boat-based experience. The EA quotes the 1971 Designation Study as describing “easy canoeing water” and states that “The river provides a constantly changing scene,” “Slow water allows the surroundings to be seen and enjoyed, provides relaxation after the last rapids, and gives time to prepare for the next rapids. (see pages 223, 224)” In addition, excluded from this quote in the EA is the following sentence: “The twisting and turning adds interest to the river by creating suspense and anticipation of what is ahead.” Thus, the Scenery ORV is defined at least in part as *the view from a boat moving downstream*. By banning and limiting paddling the EA fails to protect and enhance the scenery ORV and thus violates the WSRA and FSM.

In addition the EA asserts that boat markings on rocks could pose a scenery impact. There is no basis for this assertion – it is pure conjecture – and is arbitrary and capricious.

Lastly, the EA states that allowing an “additional means of accessing remote sections of the river, such as those designated as ‘Wild’” would conflict with the scenery ORV by causing new portage and access trails as well as human waste and trash accumulation. This entire concept is arbitrary and capricious. There is no evidence that portage or access trails are needed, in fact there is evidence to the contrary (the boating trails required no such shore access). There is no evidence that human waste and trash would increase with paddling. Paddling is *entirely* consistent with a Wild designation. Nothing in the EA even considers directly limiting other uses in these remote areas, even though non-paddling uses are anticipated to increase. The EA arbitrarily assesses impacts to paddlers without proof, while ignoring documented impacts by non-paddlers, and then bans paddling while allowing other uses unlimited use. This is arbitrary, capricious, and violates the FSM, Appeal ROD, and WSRA.

11. The EA fails to properly define, analyze or protect the fisheries ORV.

The EA misinterprets the distinction between fisheries ORV and the Recreation ORV which includes fishing. Fisheries refers to fish, and in the context of river protection

¹² See page 56, quoting the 1971 study: “River runners on extended float trips can enjoy camping under primitive conditions at sites along the river.

¹³ The appeal ROD states that the 2004 RLRMP was “deficient in substantiating the need to continue the ban on boating to protect recreation as an ORV or to protect the wilderness resource.” (ROD pg. 6).

particularly refers to native fish. Recreation refers to fishing and includes non-native sport fish. The EA blurs this distinction and thus attributes positive ecological values to the recreational impacts of stocking non-native fish. This must be fixed, as it introduces significant bias and confusion in the EA.

The impacts that this misunderstanding has can best be seen on page 143 where the EA selects non-native rainbow and brown trout as Management Indicator Species. The USFS stocks 70,000 of these fish each year and anglers partake in significant harvest. The populations of these fish therefore have little to do with natural resource management and therefore they make terrible indicator species. For example, if water quality declines but more fish are stocked then the indicator species would indicate no reduction in water quality. Worse yet, the USFS widely acknowledges that the stocking of these fish is wiping out native species like the brook trout (see past comments). If the EA were to consider these non-native fish appropriately in the recreation ORV it would be clear that they have legitimate recreational value and significant environmental impacts. Hiding these stocked non-native fish in the Biology ORV makes a fair assessment – and appropriate decisions – impossible.

On page 151 the EA states that the three important analysis components to protect and manage the Fisheries ORV are trampling, sediment, and wood. This analysis thus arbitrarily and capriciously ignores the largest impact to native biota in the Chattooga River ecosystem – trout stocking.

12. The EA fails to protect and enhance unconfined recreation in Wilderness.

The EA states on page 384: “the primitive and unconfined recreation quality of the Wilderness would be impacted under Alternative 1 because boaters would not be permitted to float there.” In fact, this is true of every alternative but Alternative 8. Every alternative but alternative 8 violates the Wilderness Act, the FSM, and the Appeal ROD as it relates to the Wilderness Act (See previous comments).¹⁴

The EA wrongly concludes on page 366 that all alternatives address the importance placed on solitude and the wilderness experience. Paddling is a core Wilderness experience eviscerated by all alternatives except Alternative 8.

Aldo Leopold put the value of Wilderness paddling this way: “The day is almost upon us when canoe travel will consist in paddling up the noisy wake of a motor launch and

¹⁴ The EA must ensure that 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). The EA must ensure 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)).

portaging through the back yard of a summer cottage. When that day comes canoe travel will be dead, and dead too will be a part of our Americanism"¹⁵

Olaus Murie put it this way: "When you go into country by pack train the streams are only for crossing, or to camp beside. To know a stream you travel on it, struggle with it, live with it hour by hour and day by day."¹⁶

The EA wrongly concludes on page 380 that encounters between paddlers and non-paddlers would negatively impact Wilderness character. In fact, such encounters are a fundamental experience of Wilderness which by definition includes both paddling and non-mechanized non-paddling forms recreation.

The EA wrongly fails to include the boating ban in the current impacts on outstanding opportunities for solitude or primitive and unconfined recreation on page 382. As admitted on page 384, the ban is a significant impact to Wilderness values.

The EA admits that boating restrictions themselves "would provide a moderate negative effect within the Ellicott Rock Wilderness." In fact, this impact is a violation of the Wilderness Act and the FSM which requires the USFS to "maximize visitor freedom." By failing to substantiate the need to seasonally or totally ban paddling to protect the Wilderness resource, and by itself damaging the Wilderness resource, the EA violates the Appeal ROD.¹⁷

13. The EA fails to protect and enhance opportunities for solitude in Wilderness.

Wilderness paddling provides spectacular and unique opportunities for solitude. Severe limits to paddling thus impact those opportunities for solitude, violating the Wilderness Act. The EA ignores the fact that solitude is a recreational experience, and paddling is a statutorily protected means of having that experience in Wilderness. Placing a higher importance on the solitude experience of one group of visitors over another is a direct violation of the Appeal ROD which correctly states that solitude is the same for every visitor.¹⁸ Results showing encounters varying with the amount of paddling permitted is purely the result of the design of the alternatives which inequitably vary only paddling from one alternative to the next. Furthermore the EA contains no estimates or documentation of encounter numbers between paddlers and non-paddlers. Thus, the EA

¹⁵ Aldo Leopold, "The Last Stand of the Wilderness," *American Forests and Forest Life*, October, 1925.

¹⁶ The Falcon, Margaret and Olaus Murie, in Wapiti Wilderness. Copyright 1985, originally published in 1966.

¹⁷ The appeal ROD states that the 2004 RLRMP was "deficient in substantiating the need to continue the ban on boating to protect recreation as an ORV or to protect the wilderness resource." (ROD pg. 6).

¹⁸ While there are multiple references in the record to resource impacts and decreasing solitude, these concerns apply to all users and do not provide the basis for excluding boaters without any limits on other users. (Appeal ROD, Page 6)

violates the Appeal ROD, the FSM, the Wilderness Act, and is arbitrary and capricious in stating that allowing paddling would decrease solitude.

14. The EA fails to produce sufficient visitor use data.

The development of visitor capacities and each alternative are premised on the opinions of a few USFS staffers and conflicting sporadic vehicle spot counts conducted by volunteers. There is no data on paddling use – none. The USFS has had over six years since the Appeal ROD to document use of the Chattooga River corridor and has totally failed to do so. The use estimations stated in Section 3.2.1 and elsewhere in the EA are complete fabrications that do not form a reasonable basis for decision making. These methods violate Forest Service standards and direction,¹⁹ and result in clear NEPA violations. By failing to provide sufficient information to conduct a visitor capacity analysis they violate the Appeal ROD,²⁰ and the Wild and Scenic Rivers Act.

15. The EA fails to calculate encounters between paddlers and other visitors.

Page 20 of the EA states that “proposed management actions for [backcountry] reaches are designed to limit encounters and separate potentially conflicting uses (boaters and others)...” Page 70 states the encounters are the best single indicator for backcountry opportunities and are the focus of the analysis in this EA.” Page 412 marks the beginning on an appendix titled Encountered Calculations. Yet, the EA fails to estimate or measure the encounters between paddlers and anglers or other corridor visitors.²¹ This failure means that there is no basis given for banning paddling. It is obvious that encounters between paddlers and anglers would be extremely rare.

For example, consider the following rough calculation. Suppose an angler fishes the Upper Chattooga 10 times each year (probability of 0.027), and paddlers use the river 63 days (0.17). Differing flow preferences indicate an overlap factor of around 10% (0.1). Differing time preferences and the short length of both paddling and angling trips justify an additional correction of 20% (0.2). Paddlers will not use each reach on each of these days resulting in a factor of 66% (0.66). Thus, an overestimate of the chance that an angler will see a paddler over the course of a year would be in the neighborhood of 0.06%.

The EA proposes a virtual total ban on paddling, and proposes a monitoring program that would yield a ban, so that a handful of intolerant anglers don't have six one-hundredths of a percent of a chance of encountering an angler. This is arbitrary and capricious,

¹⁹ Watson, Alan E.; Cole, David N.; Turner, David L.; Reynolds, Penny S. 2000. Wilderness recreation use estimation: a handbook of methods and systems. Gen. Tech. Rep. RMRS-GTR-56. Ogden, UT: U.S. Department of Agriculture, Forest Service, Rocky Mountain Research Station. 198 p.

²⁰ See also Section II.M of the 2008 COMMENTS OF AMERICAN WHITEWATER on the Environmental Assessment Titled: “Managing Recreation Uses on the Upper Chattooga River”

²¹ *Id.*

inequitable, violates the FSM which only supports limits when “necessary,” and violates national management standards.

16. The EA fails to quantify the number of zero-tolerant anglers.

The EA is clear that all alternatives except alternative 8 are designed specifically to limit or eliminate the unpleasant feelings a small elitist group of backcountry anglers that claim zero-tolerance would feel if they imagined or experienced a group of paddlers floating the upper Chattooga River. This is evident by the new prescription of “boat-free” zones which by definition are designed for people with zero tolerance of seeing boats. This zero-tolerant user group has not been managed for or documented elsewhere. If they exist, their numbers are likely extremely small, perhaps numbering only a handful of individuals. It is not reasonable for the USFS, who has a utilitarian mission, to manage exclusively for a miniscule group of users at all, but especially without even documenting the number of people that actually hold such intolerant views.²² The EA fails to estimate encounters between these zero-tolerance users and paddlers under each alternative, and thus reaching a decision based on this EA is arbitrary and capricious, violating the Appeal ROD, FSM, and the WSRA as defined by *Friends of Yosemite v. Kempthorne*.²³

17. The EA fails to limit use only when necessary.

The EA admits on page 59 that uses should only be limited “when necessary” yet fails to recognize the meaning of the word necessary, which according to Webster’s Dictionary is “inescapable, unavoidable, logically unavoidable, that cannot be denied without contradiction, determined or produced by the previous condition of things, compulsory, absolutely needed, required.” The USFS has not met this standard with this EA. Paddling is essentially or totally banned in the EA alternatives before paddlers have left a single footprint or encountered a single angler, and without any evidence that impacts will occur. Thus limits are not logically unavoidable based on previous condition of things. The USFS has no basis whatsoever to claim that paddling limits are “necessary” and thus the EA is arbitrary and capricious in its violation of the FSM.²⁴

²² *Id.*

²³ FRIENDS OF YOSEMITE VALLEY; MARIPOSANS FOR ENVIRONMENTALLY RESPONSIBLE GROWTH (“MERC”), *Plaintiffs-Appellees*, v. DIRK KEMPTHORNE, in his official capacity as Secretary of the Interior; THE NATIONAL PARK SERVICE, Jonathan P. Jarvis, in his capacity as Director of the Pacific West Region, National Park Service, Department of the Interior; MICHAEL J. TOLLEFSON, in his official capacity as Superintendent, Yosemite National Park, National Park Service, Department of the Interior, *Defendants-Appellants*. No. 07-15124. DC No. CV-00-06191-AWI

²⁴ “when it becomes necessary to limit use, ensure that all potential users have a fair and equitable chance to obtain access to the river” (FSM 2354.41a).

18. The EA fails to consider the ecological and recreational effects of stocking.

The EA fails to consider the recreational and ecological impacts of the stocking program. Likewise the EA fails to propose to limit stocking as a means of indirectly limiting use prior to instituting direct limits. The EA mentions that the upper portions of the Chattooga are better for fishing, but fails to mention the stocking that causes this condition (page 58). The EA opines on recreation use patterns, resource characteristics, and seasons but fails to mention the significant role of stocking (page 73). The EA casually acknowledges that stocking can cause congestion and crowding (page 85). The EA ponders impacts to countless aquatic species, most or all of which are eaten by stocked trout, however the EA never considers these impacts. Stocking was excluded from the analysis of existing impacts (page 151). The water quality assessment in the EA totally overlooks the impacts of the hatchery on the East Fork. The EA fails to connect the area with the “greatest length of user created trails” with the obvious cause – Delayed Harvest stocking (Page 299, etc). The USFS stocking program significantly increases use. The USFS stocking program is responsible for the near extirpation of native brook trout. The USFS stocking program causes the “potential conflicts” that the EA bans paddling to prevent. Failing to analyze stocking while banning paddling to limit use is analogous to failing to analyze a program that releases bark beetles while mandating timber harvest in response to a bark beetle infestation. The USFS is causing the impact that the EA proposes to manage. Rather than considering limiting the cause, the EA irrationally proposes to eliminate the effect by banning paddling. Doing so fails to consider and implement indirect use limits prior to direct limits and thus violates the FSM and the Appeal ROD. It fails to equitably limit use which violates the Appeal ROD and FSM. It fails to consider a reasonable range of alternatives by ignoring a primary impact, which violates NEPA.²⁵

19. The EA fails to correctly consider Search and Rescue.

Analyzing Search and Rescue (SAR) in the EA is a violation of the Appeal ROD. Assuming negative impacts based on mechanized rescue is wrong because the areas are predominantly Wilderness and Roadless areas where such transportation is prohibited. “Requests” for such access have no impacts, though the EA infers otherwise. Paddling is actively encouraged by the USFS on other Wild and Scenic rivers that are vastly more remote and deep in large Wilderness Areas. To infer that paddling is inconsistent with Wilderness because of SAR is absolutely absurd. Wilderness areas are managed for remote and high challenge recreation, not to prohibit it. This analysis represents a fundamental misunderstanding of what Wilderness is. The EA offers no evidence that SAR issues are any different on the upper Chattooga than any other river in the USFS, all

²⁵ See also Section III.D and IV.I of the 2008 COMMENTS OF AMERICAN WHITEWATER on the Environmental Assessment Titled: “Managing Recreation Uses on the Upper Chattooga River”

of which allow paddling. This analysis violates the Appeal ROD, the FSM, the Wilderness Act, and any concept of logic.²⁶

For perspective, risk is a fundamental part of Wilderness. Bob Marshall, famous Wilderness advocate, had this to say:

The benefits which accrue from the wilderness may be separated into three broad divisions: the physical, the mental and the esthetic.

Most obvious in the first category is the contribution which the wilderness makes to health. This involves something more than pure air and quiet, which are also attainable in almost any rural situation. But toting a fifty-pound pack over an abominable trail, snowshoeing across a blizzard-swept plateau or scaling some jagged pinnacle which juts far above timber all develop a body distinguished by a soundness, stamina and élan unknown amid normal surroundings.

More than mere heartiness is the character of physical independence which can be nurtured only away from the coddling of civilization. In a true wilderness if a person is not qualified to satisfy all the requirements of existence, then he is bound to perish. As long as we prize individuality and competence it is imperative to provide the opportunity for complete self-sufficiency. This is inconceivable under the effete superstructure of urbanity; it demands the harsh environment of untrammelled expanses.

Closely allied is the longing for physical exploration which bursts through all the chains with which society fetters it. Thus we find Lindbergh, Amundsen, Byrd gaily daring the unknown, partly to increase knowledge, but largely to satisfy the craving for adventure. Adventure, whether physical or mental, implies breaking into unpenetrated ground, venturing beyond the boundary of normal aptitude, extending oneself to the limit of capacity, courageously facing peril. Life without the chance for such exertions would be for many persons a dreary game, scarcely bearable in its horrible banality.

It is true that certain people of great erudition “come inevitably to feel that if life has any value at all, then that value comes in thought (Joseph Wood Krutch, The Modern Temper),” and so they regard mere physical pleasures as puerile inconsequences. But there are others, perfectly capable of comprehending relativity and the quantum theory, who find equal ecstasy in non-intellectual adventure. It is entirely irrelevant which view-point is correct; each is applicable to whoever entertains it. The

²⁶ The EA attempts to base recommendations on someone’s perceptions of safety, even though the authors were specifically told by the appeal ROD that “there is no basis in law, regulation or policy to exclude a type of wilderness-conforming recreation use due to concerns relative to safety, and search and rescue.” (ROD pg. 6)

important consideration is that both groups are entitled to indulge their penchant, and in the second instance this is scarcely possible without the freedom of the wilderness.²⁷

The EA asserts that risk and adventure is incompatible with Wilderness, which reveals a fundamental misunderstanding of what Wilderness is and how it is to be managed.

20. The EA fails to reach a logical conclusion regarding conflicts.

The EA fails to document a single recreational conflict between paddlers and non-paddlers on the Chattooga or any other similar stream, and openly admits that no studies have done so (page 82).²⁸ Thus, the decision to severely limit and/or ban paddling to prevent conflicts is arbitrary and capricious and a violation of the WSRA, the Wilderness Act, and other laws and regulations (see past comments).

In an attempt to document conflicts from over 35 years ago, the EA on page 57 unethically combines two quotes from two totally different sections of the 1976 Federal Register development plan. The first half of the quote, which is highly questionable in its validity, is from the “Fishing” section and notes that conflicts have occurred but does not note a location of the supposed conflicts. The second half of the quote is from the Development Plan section and refers to Nicholson Fields. The clear and unethical intent of the EA is to state that these supposed conflicts occurred in the Nicholson Fields Reach, which is absolutely not documented in the 1976 plan.

Lacking any documented conflicts the EA sets about inventing future potential conflicts. See pages 81-84, 96-104, 357-362. This attempt fails completely to pass any straight face test or equitability test. No such conflicts exist anywhere else so it is unreasonable to assume it would spontaneously occur here. As pointed out elsewhere in these comments actual encounters and therefore potential conflicts between paddlers and anglers are not estimated in this report, though the chance of an angler seeing a paddler in a given year is less than 0.06%, making any management of conflicts ridiculous, arbitrary, and capricious.

Even if one were to accept the EA premise that unacceptable conflicts will occur when paddling is allowed, and no reasonable person would ever accept this, the entire management response is not equitable or ethical. Specifically, these imaginary conflicts could be limited or eliminated by limiting or banning zero-tolerance angling, yet the EA fails to consider a single alternative limiting this use. A ban on zero-tolerant angling would still allow normal anglers (likely 99.9% of anglers) to enjoy the river as well as paddlers, and would likely only impact an extremely small group of people. Zero-

²⁷ “The Problem of the Wilderness” *Scientific Monthly* 30 (2), February 1930. Pp. 141 – 148, Bob Marshall

²⁸ See also Section IV.C and IV.N of the 2008 COMMENTS OF AMERICAN WHITEWATER on the Environmental Assessment Titled: “Managing Recreation Uses on the Upper Chattooga River”

tolerance anglers could also adopt a tolerant attitude and would be welcome to enjoy the river. They could likely fish the river for decades and never see a paddler, even if paddling were unlimited, as a reward for foregoing their intolerant status.

While the EA struggles to define and escape the term “equitable,” it is inescapable that banning paddling to prevent conflicts that will never occur to benefit zero-tolerant anglers is not equitable. Considering limits only on paddlers when limits to anglers would do an equally good job of eliminating conflicts is not equitable. The conflict analysis violates at least the Appeal ROD, the WSRA, the FSM, and NEPA.

It is clear that the EA confuses desires with conflicts: the presumption being that a small group of intolerant anglers desire a river without paddlers so therefore conflict will ensue if paddlers are allowed to float the river. Perhaps many Wilderness users secretly desire to have no one but themselves and their closest friends in a given Wilderness area, but that does not mean that conflict ensues when they meet another group. They likely smile, say hi, and continue their hike, paddle, or ride. Paddlers have a statutorily guaranteed place in Wilderness and on Wild and Scenic Rivers just like hikers and anglers, and in every single case share the resource. To equate base desires with conflict is just wrong and arbitrary.

21. The EA fails to design an equitable monitoring process.

Most alternatives, including the USFS preferred alternative include a monitoring and adaptive management component (See pages 38, 39, 107 and 476). This management scheme would monitor uses and when use exceeds capacity the USFS would require a “heavy-handed” permit system. This action may be targeted at whichever group the USFS feels is most responsible for the capacity violation. This process inequitably targets paddlers who in Alternative 12 may have only nine days of paddling opportunities whereas other visitors have 365 days on which to spread out their use. Also, paddlers will be precisely counted by a permit system whereas other visitors will be counted by parking lot counts, a system vastly less likely to prove a capacity violation. This whole system is set up to inequitably show that paddlers cause capacity violations while non-paddlers do not, even when this is not the case. Alternative 12 is designed to cause actual and artificial capacity violations. This scheme is inequitable, arbitrary and capricious, and inconsistent with the FSM.

22. The EA fails to document the unilateral nature of the public involvement process.

The EA mentions in several places the many research documents prepared by the USFS and their contractors over the past decade, and stresses the many public meetings and comment opportunities. The EA fails to mention the important point that all documents were published and presented in their final form, and public responses resulted in zero corrections or changes. Thus, the public comment opportunities were a farce. The record

built for this EA was built and unilaterally controlled by USFS personnel. It is largely a product of bias and misunderstanding, and has little or no scientific credibility in the manner that it is being used. While experts were hired, they were clearly not heeded. Developing such a flawed and unilateral record is in violation of NEPA, and presenting it as a robust publicly vetted record is simply untruthful.²⁹

23. The EA fails to document the role of the public involvement process in creating the controversy and intolerance now being managed for.

The EA discusses at some length the public meetings and review process over the past decade but fails to mention the only outcome of that process – heightened controversy and intolerance among forest visitors. The agency stated repeatedly in public forums that paddlers would impact other visitors and the landscape, creating fear and anger among non-paddlers. USFS proposals to ban paddlers empowered and entitled non-paddlers. The USFS listened to a few stakeholders concerns and trumpeted that these impacts would occur, growing the base of opposition to paddling. At the same time these statements made paddlers defensive and angry that their use was being blamed for impacts that would never occur, and that they were being treated as second class citizens. At every opportunity the USFS made the situation worse by taking sides, presenting false and biased information, and proposing inequitable solutions that favor some people and persecute others. If anything has been learned from this public process it is that this approach resulted in a catastrophic and utterly avoidable failure. Failure to mention this in the EA totally mischaracterizes the nature of the controversy, public sentiments, public comments, and the entire issue. Eliminating the primary driving factor behind the proposed management from the analysis is a violation of NEPA.³⁰

24. Alternative 8 fails.

Alternative 8 fails to consider paddling and other uses on the Chattooga River between Grimshawes Bridge and Green Creek and thus violates the Appeal ROD and WSRA. Alternative 8 arbitrarily bans paddling on the tributaries which violates the WSRA, NEPA, and a variety of other laws and regulations. Alternative 8 fails to require all corridor users to register. Analysis of Alternative 8 includes “scenic boaters” which do not exist, and “boat-based anglers,” an activity that can and should be managed separately. It is not clear that Alternative 8 would equitably institute direct limits only after indirect limits have been exhausted. Alternative 8 includes Licklog Creek as a put-in, which was not part of the paddlers’ requested alternative and should not have been included. It is unclear in the EA what the current status of the trail into Green Creek is,

²⁹ See also Section II.G of the 2008 COMMENTS OF AMERICAN WHITEWATER on the Environmental Assessment Titled: “Managing Recreation Uses on the Upper Chattooga River”

³⁰ See also Section IV.O of the 2008 COMMENTS OF AMERICAN WHITEWATER on the Environmental Assessment Titled: “Managing Recreation Uses on the Upper Chattooga River”

and if that trail is necessary or even desired by paddlers, and thus it may be inappropriate to propose this trail as part of the boating alternative.

25. Alternative 12 fails.

Alternative 12 bans or inequitably and severely directly limits paddling on the entire Upper Chattooga River based on imagined impacts presented in an unreasonable and biased range of alternatives. This arbitrary and capricious alternative thus violates the Appeal ROD, the WSRA, the Wilderness Act, NEPA, the FSM, and all federal laws, regulations, and policies that we references in our prior comments on current and previously proposed management. The EA offers no rationale for selecting this alternative as the preferred alternative.

26. The EA fails to provide any basis for banning paddling on tributaries.

The EA excludes the tributaries of the Upper Chattooga River from the analysis, yet bans paddling on them.³¹ This is the very definition of an arbitrary and capricious action and is a direct violation of the WSRA, FSM, and NEPA. The USFS proposes to take the most extreme management action possible against the public based on a paragraph of completely unfounded and irrational discussion. There is no basis for this action. The USFS can not both exclude the tributaries from the EA *and* ban paddling on them. To do so is arbitrary and capricious. Creating this arbitrary ban is also in violation of the scope of analysis dictated by the Appeal ROD.³²

27. The EA fails to consider the biophysical impacts of various uses equitably.

The EA discusses at length documented significant impacts of existing visitors (see pages 47, 48, 54), and proposes simple nationally consistent management actions to minimize and mitigate those impacts. While capacity limits are proposed by the EA, no direct or even indirect use limits are immediately proposed to address these significant and well documented impacts. The EA finds on page 65 that “many biophysical impacts can be reduced more effectively by other actions in the management prescription ... rather than adjusting use levels.” In fact, the EA proposes to continue to artificially attract visitors, and to continue to cause significant environmental harm through stocking 70,000 exotic trout each year in the river.

³¹ See also Section II.I of the 2008 COMMENTS OF AMERICAN WHITEWATER on the Environmental Assessment Titled: “Managing Recreation Uses on the Upper Chattooga River”

³² The EA must address the “Chattooga WSR from and to existing access points between and including NC Road 1107 (Grimshawes Bridge) and the Highway 28 Bridge.” (ROD pg. 3)

At the same time, the EA imagines and exaggerates various potential impacts associated with paddling.³³ While none of these impacts were predicted to be significant, the EA discusses at length how the impacts vary with the amount of paddling allowed under each alternative. For example see page 339. This is of course purely an artifact of how the alternatives inequitably vary only paddling, thus masking the fact that the numbers of visitors is the variable driving impacts, not the number of visitors paddling. An example of this flawed and biased logic can be found on page 343, where the EA states that “All three alternatives [8, 14, and 11] have the potential for more boaters and, therefore, the potential for more [ginseng] collection pressure than the other alternatives.” Obviously boaters have no more interest in ginseng than anyone else, and probably have less. Another example is the presumed impacts to black bears, which anglers and hikers are equally or more likely to disturb, and hunters are allowed to chase, shoot, and kill in the same area. A similar example is presumed impacts to brook trout which the USFS is wiping out through stocking non-native trout, and anglers are allowed to catch and kill.

It is unclear if any of the EA’s biased and unfounded claims regarding biophysical impacts have anything to do with the USFS decision to select Alternative 12. They should not, as they are each arbitrary and capricious, wholly unfounded, inequitably applied, and an artifact of an inequitable range of alternatives.

28. The EA references a river that does not exist.

In several locations, the EA references the “North Fork of the Chattooga River.” There is no such river. This is a factual error in the EA.

29. The EA attributes boating use to a group that does not exist, scenic boating.

The EA attributes significant use to “scenic boating” and “boat-based angling.” These uses are figments of the USFS imagination. No such boaters filed comments requesting access to these reaches. No such use has occurred historically. Including this use only in Alternative 8 arbitrarily and capriciously clouds the real effects of that alternative. Paddlers for a decade have requested an alternative that addresses use beginning and ending only at the bridges, and only in whitewater craft. By ignoring this proposal the USFS is failing to analyze a reasonable alternative put forward by the public. This violates NEPA, and is clearly arbitrary and capricious attempt to exclude Alternative 8.

³³ For example the EA on page 90 and 204 arbitrarily and capriciously asserts that paddlers will have unique impacts on black bears, which can be shot and killed legally in this area for their fur. There is no evidence for example that paddlers a) impact bears by passing them, b) will pass them, c) will have impacts distinct from hikers, d) will have impacts greater than allowed uses like bear hunting. The same is true for wood in the river, which other visitors have been documented removing.

30. The EA fails to clearly state that wood is a non-issue.

The EA once again dwells on the fact that there is wood in the Chattooga River and its tributaries as a rationale for imposing paddling limits. The EA proposes to prohibit wood removal which makes wood a moot issue. Wood has little or no ecological value in high gradient bedrock and boulder controlled reaches which makes wood a moot issue. The paddling and wood studies proved that only 1-5 out of several thousand pieces of wood in the river were a problem for paddlers which makes wood a moot issue. The EA on page 154 acknowledges that some wood removal is acceptable which makes wood a moot issue. Wood portages are temporary in high gradient streams due to wood mobility, which makes portage trails around wood a moot issue. Portages during the boating test study were conducted on bedrock which makes wood a moot issue. The EA documents that non-paddlers also remove wood but proposes no limits on non-paddlers making the EA inequitable in its treatment of the issue. The EA claims the value of wood is its benefit to brook trout, yet managers allow significant direct harvest of brook trout, and the USFS has admittedly nearly wiped the species out through the ongoing stocking of non-native trout. Limiting a use based on a miniscule and undocumented effect on brook trout while wiping the species out to benefit another use is not equitable and is arbitrary.³⁴

31. The EA fails to clearly state that portage trails are a non-issue.

The EA attempts to qualitatively predict impacts of portaging. During the on-water paddling assessment all portaging was done on bedrock, which the EA acknowledges on page 106. Thus, the only evidence that the USFS has regarding portage impacts shows that there will be none. The USFS proposes to actually create a small amount of portage trails, which would have impacts that are no different to angling and hiking trails. Wood portages are incredibly rare and transient, allowing quick recovery of any disturbed soil or vegetation. The only reasonable outcome of considering the potential impacts of portaging is that there will be no significant impacts. The EA however fails to reach such a conclusion.

32. The EA mischaracterizes the effects of low water on portages.

The EA anticipates that low water conditions may cause more portages and thus more shore use by paddlers (see 197 and 276). This is not accurate. Typically, lower flows require less shore access because more rapids can be boat-scouted and many rapids become easier to paddle. Even more importantly, low water conditions allow relatively

³⁴ See also Section III.B of the 2008 COMMENTS OF AMERICAN WHITEWATER on the Environmental Assessment Titled: "Managing Recreation Uses on the Upper Chattooga River"

easy and desirable portaging within the river channel. This is a factual error in the EA that introduces bias against paddling in certain alternatives at certain flows.

33. Excluding the errors listed above, which include the illegal and wrongful treatment of whitewater paddling, the EA contains the basic components of a river management plan.

The EA carves out whitewater paddling, management of Upper Chattooga tributaries and the uppermost section of the Wild and Scenic Chattooga River, and exotic trout stocking from the analysis and any potential action. Whitewater paddling is singled out for harsh limits and inequitable treatment based purely on agency bias. Management of tributaries and the uppermost section of the Chattooga is excluded from the analysis entirely based purely on agency bias. Any consideration of the social and environmental impacts of the exotic trout stocking program was conspicuously left out of the analysis based purely on agency bias.

Beyond these and the other fatal flaws listed above though, the EA does contain some new elements of a normal river management plan. Action alternatives propose biophysical fixes for biophysical problems like user created trails and oversized campsites. Action alternatives contain capacities for all non-paddling visitors. Though inadequate, Action alternatives propose some means of monitoring use. Action alternatives propose an adaptive management plan with valid components.

It is clear from this most recent EA that the authors finally understand what a Comprehensive River Management Plan for a Wild and Scenic River *should* contain. Unfortunately it is equally clear that the authors remain intent on violating the public trust, exceeding their discretion, and breaking federal law to pursue a biased agenda.

Unfortunately, the errors listed above and the blatant bias of the authors against paddling, render the entire EA illegal and fundamentally unsound to base future management upon.

Conclusion:

This EA is illegal, irrational, and biased. It violates every mandate of the Appeal ROD, and many elements of the Wild and Scenic Rivers Act, Wilderness Act, NEPA, the Forest Service Manual, and other federal laws, regulations, and policies. The selected range of alternatives inequitably, arbitrarily, and capriciously targets paddlers for limits. The entire design of the EA transparently aims to reach a predetermined goal of limiting paddling. We object to the selection of the preferred alternative, and consider this entire EA invalid and illegal.

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