

Chattooga River Public Comments

Jan. 30, 2005 - March 10, 2006

Posted on Tuesday, January 31, 2006 at 10:49 Hours (Server time).

From: harrison metzger
Email: harrison.metzger@hendersonvillenews.com

Telephone Number: 828-694-7875

Street Address:

Message Subject: Visitor Capacity Analysis, Upper Chattooga River

Message Contents:

According to your web site:

Forest Service officials will make a decision on what data collection methods will be used in this analysis by the end of January 2006.

It is Jan.31. What is the decision?

Thank you

Posted on Wednesday, February 1, 2006 at 12:44 Hours (Server time).

From: Harrison Metzger
Email: jahmetz1@bellsouth.net

Telephone Number: (enter your phone)

Street Address:
(enter your mailing address)

Message Subject: Visitor Capacity Analysis, Upper Chattooga River

Message Contents:

It is really an outrage that the Forest Service continues to drag its feet and keep in place this illegal and unfair ban on one user group's enjoyment of a public resource, despite a clear decision by the USFS chief that this ban must be lifted. Isn't this just a good old boy network posing as bureaucratic inertia? The simple fact is whitewater boating is a compatible use allowed on every other section of river that flows across the public's USFS lands in the United States, except these upper miles of the Chattooga. The USFS had no authority under the Wild and Scenic Rivers Act to ban boating in the first place. What is your justification for continuing to unfairly favor one user

group, fishermen, over another user group, private whitewater paddlers? Where in NEPA is the Forest Service authorized to falsely pit one user group against another based on the fiction that we somehow can't coexist? This ban should have never been allowed in the first place. To allow it to cont!

inue is outrageous, offensive and just plain wrong to any sense of fairness. You said you would issue a decision about study methods by the end of January. That has now come and gone. How in the world do you propose to study the impact of whitewater boating without allowing whitewater boating? I recently took a hiking trip into the headwaters and saw the condition of the river and the trails, and there is absolutely no justification for excluding a form of recreation that will have no permanent impact on the resource. Where in the Forest Service's mandate is it charged with keeping a select portion of the public from using a public resource? You should be ashamed.

During public meetings and in other communication about the visitor use capacity analysis on the Chattooga Wild and Scenic River, we've said we would release information by the end of January about what data collection methods we plan to use during this process.

A decision about the methods has been recommended but is currently under internal review. We hope to get feedback from that review soon, and we'll make a public announcement then.

This is not a decision about whether or not boating will be allowed on the river above Highway 28 - this is a decision only about what study methods will be used on the upper reaches of the river. Forest Service decision-makers will consider the data collected from these studies before making that final decision about boating. That decision is expected in 2007.

Posted on Thursday, February 2, 2006 at 0:14 Hours (Server time).

From: Chuck Neese
Email: chuckneese@netzero.com

Telephone Number: 6784170029

Street Address:
5845 The Twelfth Fairway, Suwanee, GA 30024

Message Subject: Visitor Capacity Analysis, Upper Chattooga River

Message Contents:

As an avid boater and someone who enjoys fishing, I can not comprehend why the boating ban on the headwaters of the Chattooga is NOT lifted!!! Boaters have far less impact than fisherman. If you take a look at any of the access points you will see a tremendous amount of damage to the surrounding caused by people fishing, not boatin

Posted on Monday, February 6, 2006 at 9:42 Hours (Server time).

From: Michael Waddell
Email: mwaddel@attglobal.net

Telephone Number: (803)777-5905

Street Address:
240 Frostwood Dr.
Columbia, SC 29212

Message Subject: Visitor Capacity Analysis, Upper Chattooga River

Message Contents:

I find it very disturbing that America Whitewater would file such a motion. Up to this point the way the Forest service is operating the Chattanooga River i.e no boating above the Highway 28 bridge appears to me very good management. As a trout fisherman the boaters have entired river below the Highway 28 bridge for their used. I believe allowing boaters above the 28 bridge will destroy a viable fisheries. The reason for this belief is the section of the river above the bridge is so shallow that the boaters would have to pull their boats along rives because of the shallow depth therefore destroying trout habitat. Therefore I am opposed to allowing boaters above the Highway 28 bridge.

Posted on Thursday, February 9, 2006 at 19:19 Hours (Server time).

From: Paul Young
Email: pscy3@mail.newnanutilities.org

Telephone Number: 770-254-9665

Street Address:
28 West Washington
Newnan, GA 30263

Message Subject: Visitor Capacity Analysis, Upper Chattooga River

Message Contents:

I respectfully request you not change the existing prohibition on boating on the Upper Chattooga. This exisiting rules have worked for years - I don't understand the need to change it. Boaters have plenty of opportunities on the lower section. Let's keep fishing only in the upper section.

Posted on Tuesday, February 14, 2006 at 10:08 Hours (Server time).

From: Josh Mecca
Email: jmecca@mcnair.net

Telephone Number: 803-798-5231

Street Address:
104 Chippenham Circle
Columbia, SC 29210

Message Subject: Visitor Capacity Analysis, Upper Chattooga River

Message Contents:

Thank you for recommending to uphold the boating ban above highway 28. I believe this section of river should be reserved for foot traffic only, because from what I understand, this is the only river in the entire southeast with a boating restriction. I believe the only reason American Whitewater is against the ban is simply because they cannot use 1/3 of a river where there are no whitewater rapids to begin with. This section of river should be held to its current status in order to give anglers the continued opportunity to fish without being consistently run over by boaters. This has happened to me on the Saluda on several occasions, and I like to enjoy the outdoors and the scenic qualities the upstate of South Carolina has to offer.

Posted on Monday, February 20, 2006 at 18:57 Hours (Server time).

From: Jason Tarpley
Email: riverbound01@bellsouth.net

Telephone Number: 4043727774

Street Address:
13181 Hwy 142 Newborn Ga. 30056

Message Subject: Visitor Capacity Analysis, Upper Chattooga River

Message Contents:

On behalf of American Whitewater, I would like to support their concern for boating the upper Chattooga River...Its only fair to allow paddling to be done with the same amount of time and effort allocated for all other recreation that is to be studied...

Forest Supervisor Thomas,

American Whitewater has reviewed the recent USFS press release in which the Sumter National Forest proposed a data collection framework for the Chattooga River user capacity analysis. We have drafted a response to the press release which includes recommendations on the specific methodologies we feel will be essential to successfully completing the user capacity analysis. Our response is attached to this email. Please feel free to contact me if you have any questions.

Kevin Colburn

National Stewardship Director
American Whitewater
328 N Washington St.
Moscow, ID 83843
Office: 208-882-2711
Cell: 828-712-4825

xxxxxxxxxxxxxxxxxx



Kevin Colburn
National Stewardship Director
American Whitewater
328 N Washington St
Moscow, ID 83843
208-882-2711
Kevin@amwhitewater.org

Jerome Thomas
Forest Supervisor
Sumter National Forest
4931 Broad River Rd.
Columbia, SC 29210

February 7, 2006

Dear Forest Supervisor Thomas:

American Whitewater received your press release dated February 3, 2006 regarding data collection techniques. In addition, several members of our team received courtesy calls from Sumter personnel alerting us to the release.

American Whitewater's primary goal in working on the Chattooga issue is to bring fair and legal river management to the entire Wild and Scenic Chattooga River. We feel strongly that this will only be accomplished when the Sumter National Forest (SNF) allows all wilderness compliant uses to occur on the entire Chattooga River, and equitably limits *all* users *if* resource impacts occur and cannot be controlled using indirect measures first. We have outlined these concepts in detail in our appeal.

We have reviewed and discussed the SNF proposed data collection techniques and are cautiously optimistic that the outlined techniques could in fact result in development of data that could lead to appropriate river management *if implemented correctly*. Alternately, if the collection techniques are implemented incorrectly the analysis will be flawed and biased from the beginning. During conversations with planning team members we asked for further detail regarding the collection techniques and were told that the SNF has yet to develop specific data collection methodologies. Because we feel there are very few right ways to carry out this data collection, and many wrong ways, we would like to offer specific recommendations for how data should be collected in order to ensure a fair user capacity analysis that yields relevant and accurate data.

One aspect of the proposed data collection techniques that we support is the use of expert panels as we understand they will be constituted. We view this methodology as a means of gathering basic information regarding the paddling resources available on the Chattooga River such as access areas, portages, hazards, significant rapids, etc. Through photo and written documentation, the SNF and the public will for the first time in 30

years obtain real information on paddling the upper Chattooga River. This type of reconnaissance is fairly simple to implement, and will yield valuable but basic information. Using expert panels in conjunction with open public use during the study will require more management but will yield critical, comprehensive and detailed information. We support allowing both types of paddling use.

Within the analysis framework the SNF has created and the data collection techniques the SNF have proposed, we feel the following considerations are absolutely essential to a successful user capacity analysis.

1. Count All Users:

Throughout the proposed one year study period, every person entering the Wild and Scenic River Corridor upstream of Highway 28 for any purpose must be counted, and their use characterized (i.e. (i.e., purpose, length of stay, number in group, etc). We recommend that this be accomplished through requiring a free self-issued permit for all users (front country and backcountry), administered at every major trailhead and river access area.

Through collecting and analyzing these data, the SNF will for the first time have reasonable visitor use information including seasonal use trends of each user group, relative use by each user group, relative use of various access points, total user days per month per activity, amount of overnight use, use by each user group of access points, temporal and spatial overlap of various user groups, average group size, etc. Only through acquiring and analyzing this information can the SNF manage the Chattooga Wild and Scenic River in a manner that is known to comply with the law, maximizing visitor enjoyment and use, while minimizing impacts associated with that use. This information will also allow the SNF to relate visitor use with specific impacts, and plan targeted management activities to mitigate, minimize, and manage those impacts.

Conversely, if the SNF chooses to count only whitewater boaters, none of these critical analyses will be possible. We will be left with no way to address relative use or impacts and will have no basis for any river management actions. The user capacity analysis cannot focus on boating, but instead must paint a complete picture of recreational use.

2. Allow Maximum Visitor Freedom:

Throughout the proposed one year study period, every person entering the Wild and Scenic River Corridor upstream of Highway 28 for any purpose must have the same degree of visitor freedom. Specifically, paddling use (and other uses) must be allowed to occur unannounced and unscheduled throughout the study period whenever permitted users choose. We recommend that this be accomplished through not imposing any temporal, spatial, or water level controls when permitted users chose to engage in their chosen activity.

Only through allowing maximum visitor freedom will the SNF be able to accurately (and fairly) determine likely post-study visitor behavior. Specifically, through allowing this level of freedom, coupled with the mandatory self-issued permit and surveys of recreational users, the SNF will be able to determine true seasonal, water level, time of day, day of week, group size, and length of stay preferences, as well as other key variables. Allowing maximum visitor freedom, dispersed across time and space, will also reduce opportunities for study bias, and intentional manipulation of results by participants.

Conversely, if visitor freedom is limited by water level, season, day, reach, or other factors, data collected will be of little value for predicting future use patterns and will be highly susceptible to manipulation by study participants. If the SNF limits the “appropriate timing and number of days for the boater trials,” a critical and unacceptable flaw will be introduced into the study methodology. Additionally, limiting paddlers to a specific set of days creates a high likelihood that permitted paddlers will paddle on those days regardless of factors that would otherwise discourage them, such as availability of their normal paddling group, physical fitness, recent paddling experience, etc. This effect will reduce overall paddling safety during the study if use is limited inappropriately.

3. Ensure Adequate Sample Sizes for Statistical Validity:

There are two ways to study a population – either through a complete census of that population, or through studying a large enough sample of that population to extrapolate information about the population. While the SNF does not explicitly state that any use will be limited in number during the study, they do use the term “restricted” when referring to boating use. SNF staff mentioned limiting numbers of boaters to very small groups on specific days. Counter to those statements, the press release states the goal of a “comprehensive and statistically valid user survey.”

If the SNF limits the number of paddlers while allowing all other uses to occur in unlimited numbers, the user capacity analysis will be of no value. Many of the analyses described in sections 1 and 2 of these comments will be rendered impossible, and the ability to predict future use patterns will be hamstrung. Comparing a census of all other users to a sample of paddlers has virtually insurmountable statistical challenges. For fairness and to collect the best possible data we strongly recommend that the SNF not limit use of any user group during the analysis, except by requiring them to fill out a self-issued permit at the access areas they use.

Any system to limit use numbers will have significant problems. Group size preferences (and effects on other users) will be impossible to analyze because they will be artificial. Specifically no limits on group size but limited permits will encourage large group sizes, whereas maximum group sizes will almost always be filled and will be artificial. Limitations on one user group only, will reduce the validity of statistical comparisons between that group and others. Limitations on numbers of users may limit potential ranges of management alternatives without basis, resulting in future faulty decisions, appeals, and study.

If the SNF insists on limiting the numbers of users able to use the river during the study window, we ask that they consult with AW on the best manner in which to do so.

4. Biophysical Impacts Must Be Assessed for All User Groups:

SNF staff noted in conversation that current biophysical impact will be characterized and monitored during the data collection period. We fully agree with this portion of the study, however staff also suggested that current conditions may be considered baseline, and that the SNF would be monitoring only any additional impacts of boating. Contrary to this, the SNF must analyze the current impacts along with any that may occur as a result of unlimited boating (so that all users are equal as the baseline), and then propose management measures to minimize, mitigate, or manage the impacts of all users, with emphasis on the most impacted areas and impactful uses. To focus only on boating is both inequitable in that it assumes boaters are a new use with less value, and perhaps more importantly it is irresponsible in that will not lead to sound river management that protects the river and the experiences of those who visit the river.

If the SNF intends to study and manage any biophysical impacts associated with boating, than they must do the same for all other uses, and propose similar management to address similar impacts. To not do so would be grossly biased and would leave many potential impacts to the river corridor unmanaged.

5. Address Solitude Equally For All Users:

You are quoted in the press release as stating “...we feel it is important to collect site-specific information about flow levels *and the solitude experience many recreation users have told us is important to them.*” We caution the SNF to adhere to the Washington Office’s ROD that stated “[w]hile 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.” If a total user census is carried out and all users report inadequate opportunities to experience solitude, then equitable limits of total use by all users may be justified after indirect measures have been exhausted. However the study must not assume some backcountry users (i.e., existing) have a greater right to solitude than others (i.e., banned), or that some wilderness backcountry users have a greater impact on the solitude of others. The literature, the Wilderness Act, the Wild and Scenic Rivers Act, USFS regulations, and the Chief of the USFS are very clear that solitude is something that each individual backcountry recreationist enjoys on equal footing.

6. North Carolina Reach Should Be Studied, or Excluded From SNF Management

The data collection techniques described in the press release indicate that boating use by the public will only be allowed during the study on Sections 0 and 1, and will not be allowed on Section 00. We see no reason for this distinction, except that Section 00 is entirely in North Carolina. We request that Section 00 be studied by the SNF using the same methods as the other sections, or that management authority of the North Carolina

portions of the Chattooga River be restored to the National Forests of North Carolina. We also question whether there is a valid existing ban on floating in the North Carolina portion of the River, and have made inquiries of the National Forests of North Carolina and the Regional Counsel concerning this question.

We are aware that a portion of the lands surrounding and underlying Section 00 is under private ownership, but there is nothing unusual about this situation whatsoever. The North Carolina navigability laws fully and clearly support the public's right to float Section 00 and doing so does not violate any laws. The USFS has no obligation to keep the public from enjoying the Wild and Scenic Chattooga River as it flows through public – or private – lands.

Conclusion

Throughout the study process we have requested that boating be equitably allowed and studied throughout the user capacity analysis. While this is theoretically the framework laid out by the SNF in the press release, the SNF will have to select specific methodologies within that framework to ensure that it actually occurs. More important though, is that the data collection, analysis and ultimate decision represent fair and legal river management. We have offered specific methodologies that we feel will provide that level of quality throughout the user capacity analysis. We encourage the SNF to ask any questions they should have regarding these recommendations, and to adopt them in full. We look forward to collaboratively designing and implementing a study that will work for all of us.

Please feel free to contact me if you have any questions regarding this correspondence.

Sincerely,

/s/ Kevin Colburn

Kevin Colburn
National Stewardship Director

cc via email to:

Gloria Manning
Chuck Myers
Marisue Hillard
Kathleen Atkinson
John Cleeves
Stephanie Johnson
Joe Robles
John Austin
Nathan Galbreath
Don Kinser
Charlene Coleman



Kevin R. Colburn
National Stewardship Director
American Whitewater
328 N. Washington St.
Moscow, ID 83843
208-882-2711
Kevin@amwhitewater.org

Mr. Chuck Meyers
Southern Regional Forester
USDA Forest Service, Southern Region
1720 Peachtree Street
Atlanta, GA 30309

Ms. Kathleen Atkinson
Forest Supervisor
Chattahoochee-Oconee National Forests
1755 Cleveland Highway
Gainesville, GA 30501

Ms. Marisue Hilliard
Forest Supervisor
National Forests in North Carolina
160A Zillicoa St.
Asheville, NC 28805

Mr. Jerome Thomas
Forest Supervisor
Francis Marion and Sumter National Forest
4931 Broad River Road
Columbia, SC 29212

Mr. John Cleaves
Project Manager
Francis Marion and Sumter National Forest
4931 Broad River Road
Columbia, SC 29212

RE: Recreational floating access to the Chattooga Wild and Scenic River as it flows through private lands in North Carolina.

February 16, 2006

Dear Gentlemen, Ms. Atkinson, and Ms. Hilliard,

I am writing concerning a letter sent to each of you (except Forest Supervisor Atkinson) on November 9th, 2005, by Mr. Wyatt Stevens. This letter (enclosed) was related to public access to, and analysis of, the Wild and Scenic Chattooga River. A copy of the letter was given to American Whitewater by the National Forests in North Carolina upon request earlier this

month. The letter is presumably responsible for limiting the scope of the analysis on the uppermost section of the Chattooga River, known as Section Double Zero. Regardless of its profound effect, the Sumter National Forest (SNF) did not enter the letter into their website specifically set up to share information regarding the Chattooga user capacity analysis, and thus the letter is not part of the public record. By withholding this information, the SNF denied American Whitewater the opportunity to formally respond to the misinformation included in it, and the value of the user capacity analysis has been compromised.

Mr. Stevens at best manipulated the facts in his letter, but he has also manipulated you – the recipients of his letter. While obviously effective at meeting his objectives, the letter has little or no basis in fact or law. We are writing this letter in response to Mr. Stevens's to clear up his misrepresentation of the facts involved with public access to the Chattooga River, and the public's right to float the Chattooga River through Whiteside Cove Association's (WCA) land. Counter to Mr. Stevens's opinions, the American public absolutely has the right to paddle the Wild and Scenic Chattooga River through private lands in North Carolina. Please consider the following points relative to Mr. Stevens's letter.

Mr. Stevens has misrepresented the location of rapids and portages on the Chattooga River relative to WCA property boundaries.

Mr. Stevens erroneously references a guidebook article which I authored based on anonymous trip reports as stating "a nasty sieve (corkscrew falls) which can be walked." (*erroneous information in parentheses is his - not mine*). In fact, the sieve and the falls are two totally different rapids separated by miles of river, and the sieve is far below WCA property on USFS lands. In the guidebook I stated:

“This very small creek transports paddlers over 5 to 8 foot tall sliding ledges while forcing them to duck through laurel thickets and under bogus no trespassing signs. Paddlers soon arrive at the lip of a 20 foot sketchy drop, followed by a unique series of rapids and falls. One rapid courses through a narrow gorge with smooth vertical walls. This memorable rapid opens up just in time for paddlers to catch a small eddy above a nasty sieve, which can then be walked.”

The trip report on the American Whitewater website that Mr. Stevens referenced confirms this layout of the river. What is *very* clear from all accounts is that the sieve that is typically portaged is actually several miles downstream of the 15-20 foot drop he is calling "corkscrew falls," and is on USFS land. This is significant because Mr. Stevens is claiming multiple portages on WCA land which according to him ends at the 15-20 foot drop. In fact, all accounts reference no portages until that 15-20 foot drop which itself has been run multiple times. The take home message is that there is one optional portage of a 15-20 foot drop that may or may not be on WCA land - but the portages Mr. Stevens references as being on WCA land are in fact far downstream on USFS land. You can view a photo of the sieve on our website at <http://www.americanwhitewater.org/photos/?photoid=10890>; it is clearly not the 15-20 foot drop.

Mr. Stevens has totally misrepresented the layout of the river, in order to make the erroneous point that paddlers must portage on WCA property. It is in fact possible to paddle Section Double Zero through WCA lands without portaging.

Mr. Stevens has misrepresented actions of the USFS as applying to his lands.

Mr. Stevens claims that *in his opinion* the USFS has "no authority to authorize boating" through their land. That may be true, but the USFS also has no authority to prevent paddling through their land, since the public trust uses of the river are under the jurisdiction of the state of NC, which absolutely supports the public's right to float over private lands on all rivers capable of supporting such use." In other words, it is a moot point: WCA land is not USFS land – and therefore the USFS has no jurisdiction to either allow or disallow public recreational boating through those lands. This jurisdiction lies with the state of North Carolina

Mr. Stevens offered an erroneous explanation of historical use and navigability.

Mr. Stevens claimed that he or his clients have never witnessed boating use on the river "for one simple reason ... This 1.7 mile section of the Chattooga is not, under any reasonable definition, navigable at any water level." In fact the painfully obvious reason he has not seen paddlers utilizing this section of the river is that the USFS has enforced a ban on floating this section for over 30 years! Prior to the ban however, the river was paddled multiple times, and reports exist of a very small number of runs during the ban. No one disputes that Section Double Zero has been navigated by members of the public in kayaks and canoes.

Even more important is that **Section Double Zero is absolutely navigable** under the state of North Carolina's navigability laws. A NC Attorney General Opinion (enclosed) supports this conclusion beyond a shadow of a doubt. The opinion quotes Chief Justice Mitchell in *Gwathmey v. State of North Carolina*, 342 N.C. 287, 464 S.E.2d 674, 679 (1995) as follows:

"The controlling law of navigability as it relates to the public trust doctrine in North Carolina is as follows: " If water is navigable for pleasure boating it must be regarded as navigable water, though no craft has ever been put upon it for the purpose of trade or agriculture. The purpose of navigation is not the subject of inquiry, but the fact of the capacity of the water for use in navigation.' " *Id.* at 608-09, 48 S.E. at 588 (quoting *Attorney General v. Woods*, 108 Mass. 436, 440 (1871)). In other words, if a body of water in its natural condition can be navigated by watercraft, it is navigable in fact and, therefore, navigable in law, even if it has not been used for such purpose. Lands lying beneath such waters that are navigable in law are the subject of the public trust doctrine. 342 N.C. at 301, 464 S.E.2d at 682."

The Attorney General further clarified that

"...citizens have the right to travel by "useful vessels" such as canoes and kayaks, "in the usual and ordinary mode" on waters which are in their

natural condition capable of such use. The owner of land adjoining a watercourse has no right to control or interfere with public travel by boat down streams which are navigable in fact. State v. Twiford, 136 N.C. 603, 606-7, 48 S.E. 586-7 (1904).”

Mr. Stevens’s misrepresentation of NC navigability law was an attempt to meet his own interests, and has no basis in law or fact. Furthermore, it was an intentional effort to convince both US Forest Service and congressional representatives of false information. Mr. Stevens was well aware of the erroneous nature of the legal opinion he was sharing in his letter. I personally told Mr. Stevens about the Attorney General’s Opinion and its content at an October 13th USFS meeting, and followed up by sending a copy of the opinion via email (enclosed) to his colleague/client (also at the meeting) Mike Bamford on October 26th, 2005.

Mr. Stevens wrongly stated that the paddlers who wrote a trip report for Section Double Zero on our website were AW Members.

Mr. Stevens stated that the paddlers who described their run on our website were American Whitewater members. In fact, we do not know who these people are and are thus unaware of their membership status in our organization. Content for the river pages on our website is collected and displayed by volunteers, rather than staff. Incidentally, at the time of the “poached” run featured in the trip report, paddling Section Double Zero was not actually illegal, however a boating ban was being enforced by the USFS regardless. Paddling this section only formally became illegal with the issuance of closure order which went into effect on February 7th, 2006.

Mr. Stevens’s rescue concerns are moot.

Mr. Stevens indicated his desire to forbid boating in order to eliminate any incident of rescue. Once again, the state navigability laws allow paddling through private lands regardless of permission or rescue access. Also his point is moot because it has nothing to do with the USFS or their authority.

Conclusion:

Mr. Stevens tried in his letter to make an argument for his clients and his interests, but his arguments have no basis in fact or law, and are based on a misrepresentation of the river's layout and his incorrect "opinion" regarding the navigability laws. The American public absolutely has the right to paddle the Wild and Scenic Chattooga River through private lands in North Carolina (as well as South Carolina and Georgia). We ask that the intentionally erroneous arguments

made by Mr. Stevens be disregarded, and that public floating access be restored to *all* of the Wild and Scenic Chattooga River during the user capacity analysis and forever thereafter.

Thank you for considering these points, and feel free to contact me with any questions you may have.

Sincerely,

Kevin Colburn
National Stewardship Director
American Whitewater

Attachments:

1. 1998 North Carolina Attorney General Opinion
2. Email correspondence with Mike Bamford, colleague/client of Mr. Stevens.
3. Original letter from Wyatt Stevens

cc:

Representative Charles H Taylor
339 Cannon House Office Building
Washington D.C. 20515

Representative Charles H Taylor
22 South Pack Square
Suite 330
Asheville, NC 28801

Mr. Matthew A. Tilden
Attorney
USDA - Office of the General Counsel
Eastern Region
1718 Peachtree Road, Suite 576
Atlanta, Georgia 30309-2409

Mark Singleton
Executive Director, American Whitewater

Nathan Galbreath
Patton Boggs

Attachment 1: 1998 North Carolina Attorney General Opinion

[346] January 20, 1998

Richard B. Whisnant General Counsel N. C. Department of Environment and Natural Resources 512 North Salisbury Street Raleigh, North Carolina 27604

RE: Advisory Opinion: Use of navigable-in-fact streams without consent of riparian owners.

Dear Mr. Whisnant:

On August 27, 1997 you requested a formal Attorney General's Opinion on the following question:

Do all citizens have the right to travel by boat down the course of North Carolina streams that are navigable in fact by canoe or kayak, without the consent of riparian property owners?

We agreed that the answer to your question should be delayed, pending final resolution of litigation involving the Department of Environment and Natural Resources ("Department" or "DENR"), in which the issue was raised. As you are aware, those five consolidated cases (Wainwright, et al v. State of North Carolina, et al, New Hanover Co., 91 CVS 640, 816, 1117, 1790) involved whether certain inter-tidal salt marshes in New Hanover County were navigable-in-fact, so as to be subject to public trust rights. Following the State prevailing in that matter, we discussed whether a formal opinion or an advisory opinion would be the more appropriate response. We advised you that the issuance of an advisory opinion would be preferred, as it was more consistent with the opinion policy of this Office. Having heard nothing further from you, and being aware that you will soon be leaving State service, we provide you with the following advisory opinion.

The answer to your question may be summarized as follows:

Yes. Citizens have the right to travel by "useful vessels" such as canoes and kayaks, "in the usual and ordinary mode" on waters which are in their natural condition capable of such use, without the consent of the owners of the shore.

Under the public trust doctrine, as applied in North Carolina, citizens have the right to use the state's navigable waters for the exercise of public trust rights, without the consent of riparian owners, i.e., the owners of the land adjacent to those waters. Public trust rights are defined by common law, and "include, but are not limited to, the right to navigate, swim, hunt, fish, and enjoy all recreational activities in the watercourses of the State and the right to freely use and enjoy the State's ocean and estuarine beaches and public access to the beaches." N.C.G.S. § 1-45.1.

North Carolina follows the modern "pleasure craft test" in determining whether waters are navigable-in-fact, and therefore subject to public trust rights. In *Gwathmey v. State of North Carolina*, 342 N.C. 287, 464 S.E.2d 674, 679 (1995), the North Carolina Supreme Court set forth the law of this State governing application of the public trust doctrine to navigable waters. Chief Justice Mitchell, writing for the unanimous Court, explained:

The controlling law of navigability as it relates to the public trust doctrine in North Carolina is as follows: " 'If water is navigable for pleasure boating it must be regarded as navigable water, though no craft has ever been put upon it for the purpose of trade or agriculture. The purpose of navigation is not the subject of inquiry, but the fact of the capacity of the water for use in navigation.' " *Id.* at 608-09, 48 S.E. at 588 (quoting *Attorney General v. Woods*, 108 Mass. 436, 440 (1871)). In other words, if a body of water in its natural condition can be navigated by watercraft, it is navigable in fact and, therefore, navigable in law, even if it has not been used for such purpose. Lands lying beneath such waters that are navigable in law are the subject of the public trust doctrine. 342 N.C. at 301, 464 S.E.2d at 682.

The Court concluded that "navigability in fact by useful vessels, including small craft used for pleasure, constitutes navigability in law." (Emphasis supplied.) *Gwathmey*, 342

N.C. at 300, 464 S.E.2d at 681, citing *State v. Narrows Island Club*, 100 N.C. 477, 5 S.E. 411 (1888). "The capability of being used for purposes of trade and travel in the usual and ordinary modes is the test, and not the extent and manner of such use." *Gwathmey*, 342 N.C. at 300, 464 S.E.2d at 681, quoting *State v. Twiford*, 136 N.C. 603, 606, 48 S.E. 586, 587 (1904). Further, "the public have the right to the unobstructed navigation as a public highway for all purposes of pleasure or profit, of all watercourses, whether tidal or inland, that are in their natural condition capable of such use." *Gwathmey*, 342 N.C. at 300, 464 S.E.2d at 681, quoting *State v. Baum*, 128 N.C. 600, 604, 38 S.E. 900, 901 (1901).

Over a century ago, in *State v. Narrows Island Club*, a case cited with approval in *Gwathmey*, the Supreme Court found "battery boats, flat-boats and skiffs, drawing from eight to eighteen inches of water" to be "useful vessels." 100 N.C. at 479. Although the *Gwathmey* Court did not specify what types of vessels it meant by the phrase "useful vessels, including small craft used for pleasure," in our opinion canoes, kayaks, and similar small recreational craft are clearly included within the meaning of those terms. This is the modern trend followed in other jurisdictions which, like North Carolina, apply the "pleasure craft test" for determining navigability. In *Swan Island Hunt Club v. White*, 114 F. Supp. 95, 97 (E.D.N.C. 1953), *aff'd sub nom.*, *Swan Island Club v. Yarborough*, 209 F.2d 698 (4th Cir. 1954), the federal District Court found waters "over shoal lands, even though not useable for navigation by sea vessels or any crafts other than those with flat bottoms, and even though at low tide some of the land thereunder may not be entirely covered by water. . .are navigable waters under the prevailing modern view."

A separate line of cases known as the "floatability" cases supports this conclusion. See Monica Kivel Kalo and Joseph J. Kalo, *Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust*, 64 N.C. L. Rev. 565, at 581, n. 108. (1986). Those cases were not disturbed by *Gwathmey*, and are consistent with its holding. That line of cases found that streams, which become navigable for the floating of logs only during the spring freshets or on a seasonal basis, are subject to an easement in the public for that

purpose. *Commissioners of Burke Co. v. Catawba Lumber Co.*, 116 N.C. 731, 733-34, 21 S.E. 941, 942 (1895); *Gwaltney v. Scottish Carolina Timber & Land Co.*, 111 N.C. 547, 553-60, 16 S.E. 692, 693-94 (1892); *McLaughlin v. Hope Mills Mfg. Co.*, 103 N.C. 100, 9 S.E. 307 (1889). The Supreme Court applied the same principle to the upper White Oak River, which was navigable for floating logs, except in the summer, when the waters fell. *State v. White Oak River Corp.*, 111 N.C. 661, 16 S.E.2d 331 (1892).

Thus, citizens have the right to travel by "useful vessels" such as canoes and kayaks, "in the usual and ordinary mode" on waters which are in their natural condition capable of such use. The owner of land adjoining a watercourse has no right to control or interfere with public travel by boat down streams which are navigable in fact. *State v. Twiford*, 136 N.C. 603, 606-7, 48 S.E. 586-7 (1904). Even so, this does not afford the right to trespass on the shore. The Supreme Court has stated the rule as follows:

However, the right of navigation gives no license to go and come through and over the riparian owner's land without "let or hindrance." Similarly, those navigating a river have no right, as incident to the right of navigation, to land upon and use the bank at a place other than a public landing without the consent of the owner, for the banks of a navigable stream are private property.

Gaither v. Albemarle Hospital, 235 N.C. 431, 444, 70 S.E.2d 680 (1952) (Citation omitted.)

It is not possible to say with confidence how far up a watercourse public rights may extend. At some point, navigability "in the usual and ordinary course" ceases, and public trust rights give way to those of private property. As the Supreme Court noted in *State v. Baum*, "[w]e are not prepared to say that a land owner would be liable to criminal prosecution because he happened to put a watergate across a creek up which otherwise an idle hunter might be able to pole a canoe. . ." 128 N.C. at 604. Finally, it should be noted that the State may properly exercise its police power to regulate the use of navigable-in-fact waters, to protect the public health, safety, or welfare.

Thank you for your inquiry. Please advise if we may be of further assistance.

signed by:

Daniel C. Oakley

Senior Deputy Attorney General

J. Allen Jernigan

Special Deputy Attorney General

Attachment 2: Email correspondence with Mike Bamford, colleague/client of Mr. Stevens.

From: Kevin Colburn
Sent: Wed 10/26/2005 7:08 PM
To: mike.bamford@verizon.net
Cc: jcleeves@fs.fed.us; Nathan Galbreath
Subject: NC Navigability

Mike,

I am writing to follow up on our conversation at the Chattooga meeting. I have attached the NC AG's opinion that we discussed at the meeting. The Chattooga River, from the top of section 00 to the reservoir has a history of boating extending back well over 30 years and was recognized by the US Congress for its value to the American Public as a paddling resource. Based on the AG's opinion, case law, federal regulation, and long history of use I am quite confident that the public has the right to float the Chattooga River above highway 28 through private lands.

That being said, I would be happy to work with you and the USFS to meet whatever interests you may have in protecting your private property rights. We could collaborate to develop educational materials for the put-in that clearly show on a map which lands are private and which are public, and alert the public to what rights they have and don't have as they paddle through private lands - and recommended behavior. In addition we could develop signage for the river corridor itself that could show property boundaries in a manner that is as aesthetic as possible. As the USFS develops a river management plan I am sure they will include this type of information/education and I am also sure they would be willing to work with you and I in its development.

While your position of no boating is unlikely to be met, I hope that we can work together to meet some of the underlying interests beneath your position. If you would like to outline your underlying concerns I will certainly consider how we could meet them.

Thanks for the good conversation at the meeting,

Kevin Colburn

National Stewardship Director
American Whitewater
328 N Washington St.
Moscow, ID 83843
Office: 208-882-2711
Cell: 828-712-4825

Attachment 3: Original letter from Wyatt Stevens (Attached to email, enclosed with Hard Copies)