

BEFORE THE OBJECTION REVIEWING OFFICER, USFS FOREST SUPERVISOR FOR NATIONAL  
FORESTS IN NORTH CAROLINA

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In Re: Objection to Draft Decision Notice  
and FONSI for the Chattooga River Boater  
Access Project

CHATTOOGA CONSERVANCY  
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**NOTICE OF OBJECTION, STATEMENT OF REASONS & REQUEST FOR RELIEF**

Submitted via email to: [objections-southern-north-carolina@fs.fed.us](mailto:objections-southern-north-carolina@fs.fed.us)  
July 13, 2015

## INTRODUCTION

Pursuant to 36 CFR § 218, the Chattooga Conservancy (“CC”) objects to the proposed decision to construct an access trail beneath the Bull Pen Bridge at the Bull Pen Bridge area (“lower Bull Pen trail”),<sup>1</sup> which is made in conjunction with the Chattooga River Boating Access Project (“the Project”) on the Nantahala, Chattahoochee-Oconee and Sumter National Forests. In accordance with 36 CFR § 218.8(a), this objection is made to Reviewing Officer Kristen Bail, Forest Supervisor of National Forests in North Carolina, having an address at 160 Zillicoa Street, Suite A, Asheville, NC 28801-1082. For purposes of this objection, the Responsible Official is Mike Wilkins of the Nantahala Ranger District, Nantahala National Forest. Legal notice of this objection period was published by the Nantahala Ranger District on May 27th, 2015 in the Franklin Press, the stated Newspaper of Record.<sup>2</sup> It states that the aforementioned draft NCDN and FONSI is subject to the pre-decisional objection procedures and 36 CFR § 218 subparts A and B.

### I. STANDING

CC is a non-profit grassroots conservation organization working to protect, promote, and restore the natural ecological integrity of native Chattooga River watershed ecosystems; to ensure the viability of native species in harmony with the need for a healthy human environment; and, to educate and empower communities to practice good stewardship on public and private lands. CC has an organizational interest in the proper and lawful management of public lands within the Chattooga River watershed, including the Sumter, Nantahala and Chattahoochee-Oconee National Forests. Members, staff, and board members participate in a wide range of recreational activities on these national forest lands, including those areas proposed for boater access trail maintenance and/or designation within the Nantahala National Forest. CC represents approximately 600 total members that support our work.

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<sup>1</sup> The proposed decision to construct the lower Bull Pen trail is memorialized in the *Nantahala National Forest Boater Access EA Draft Decision Notice and Finding of No Significant Impact (FONSI)* (Signed by Forest Supervisor Mike Wilkins on May 19, 2015) (“DNCDN”).

The DNCDN is supported by the *Environmental Assessment: Chattooga River Boating Access* (September 26, 2014) (“Boater Access EA”).

The DNCDN and Boater Access EA are tiered to an earlier decision to amend the current Land and Resource Management Plan (“LRMP”) of the Nantahala and Pisgah National Forests, as memorialized in the *Decision Notice and Finding of No Significant Impact: Amendment #22 to the Nantahala and Pisgah National Forests Land and Resource Management Plan, Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor* (signed by Acting Forest Supervisor Diane Rubiaco on January 31, 2012) (“2012 NCDN”).

The FONSI for this amendment was supported by the *Environmental Assessment: Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor* (January 2012) (“2012 EA”).

<sup>2</sup> DNCDN, at 6.

CC claims standing to participate in the public land decision-making process on the grounds that it has been involved in National Forest land management issues concerning the Chattooga River watershed since its formation, including the current Project. Our members have sought and continue to seek solitude, forested scenery, and hiking, fishing, hunting, paddling, rafting and photographing experiences within the Nantahala National Forest, including the portion of the Project area that would be affected by construction of the lower Bull Pen trail. Our collective membership includes professional photographers and recreational guides whose livelihoods depend, in part, on the remote and beautiful nature of the Chattooga Wild and Scenic River, including the Bull Pen Bridge area, remaining intact. Other members also rely on the opportunities for solitude and seclusion provided in the headwaters region of the Chattooga River.

The procedural harms and direct physical impacts associated with this project detract from the ability of our members to be involved in the decision-making process of our public lands, and impact the outstanding remote and natural beauty and tremendous biological diversity that makes the headwaters of the Chattooga River so appealing and desirable to our members. We claim partial ownership of the public lands covered by the Project and have participated in its previous comment process. Consequently, we have legal standing to participate in the process and object to those aspects of the Project that are unacceptable and inconsistent with applicable laws and regulations.

CC filed comments on the preceding the Boater Access EA on October 22nd, 2014,<sup>3</sup> and have fully participated in the U.S. Forest Service's ("USFS") review of the Project. Pursuant to 36 CFR § 218.8, the parties state that the following content of this Objection demonstrates the connections between the October 22nd comments ("previous comments") for all issues raised herein. Pursuant to 36 § CFR 218.8(b), the previous comments submitted by CC, dated October 22nd, 2014 are hereby incorporated by reference. CC reserves the right to supplement these objections based on agency records unlawfully withheld by the Forest Service in pending FOIA requests.

## **II. REQUEST FOR RELIEF**

Objectors request that the Reviewing Officer invalidate the DNCDN & FONSI and remand the Boater Access EA with instruction to reconsider the environmental impacts of the lower Bull Pen trail in accordance with applicable legal and regulatory standards. If the Project is to carry on, Objectors also request that the Reviewing Officer require the Nantahala Ranger District to re-engage the NEPA process for the lower Bull Pen Bridge trail with the alternative trail design set forth herein.

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<sup>3</sup> *Chattooga Conservancy's Comments: Chattooga River Boating Access Environmental Assessment* (October 22, 2014) (Attached hereto as "Exhibit A").

## OBJECTION

### **THE ENVIRONMENTAL IMPACTS OF THE LOWER BULL PEN TRAIL HAVE NOT ADEQUATELY BEEN CONSIDERED DUE TO A PROCEDURAL TIERING DEFECT IN THE BOATER ACCESS EA**

*Relationship to Prior, Written Comment:* The 2012 EA concludes that at the program-level, whereby boating is managed as a use through the designation of access sites, Alternative 13A's environmental impacts will not be significant. The subsequent Boater Access EA similarly concludes that at the project-level, whereby boating is managed as a matter of access through the designation of access trails, the environmental impacts of access trails will not be significant. In reaching this conclusion, however, the Boater Access EA fails to offer an adequate degree of supporting "site specific" analysis. As stated in our previous comments, this analytical gap—a "tiering" defect—has prevented due consideration of the environmental impacts associated with the lower Bull Pen trail.

*Statement of Objection:* We object to the proposed decision to construct the lower Bull Pen trail, as memorialized in the DNCDN & FONSI and Boater Access EA, because its direct, indirect and cumulative impacts have not received adequate consideration. Specifically, we assert that a procedural tiering defect in the Boater Access EA has prevented adequate consideration of the trail's impacts on the Chattooga WSR's Recreation, Scenery and Biology ORVs. We also assert that the trail's impacts on the wilderness character of the Ellicott Rock wilderness have not received adequate consideration.

*Suggested Remedy:* Our concerns are easily resolved by utilizing an existing, user-created access trail beneath the Bull Pen Bridge. Preferably, one of these trails would be designated for boater access and appropriately mitigated by installing steps and other strategies to address erosion and sedimentation. This would decrease impacts, while also providing visitors with the access they desire. Alternatively, a switch-back trail in the immediate vicinity of the road and bridge, leading visitors to an existing access point below the bridge could be designed and similarly designated and mitigated.

*Legal Implications:* The agency has not adequately analyzed the direct, indirect and cumulative impacts of the lower Bull Pen Bridge trail. Where an issue has not been analyzed in an earlier environmental document to which a site-specific document is tiered, the scope of the required analysis in the project-specific environmental document is correspondingly increased.<sup>4</sup> The 2012 EA stated that "[s]pecific put-ins and take-outs will be designated after site-specific NEPA

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<sup>4</sup> *Kern v. United States BLM*, 284 F. 3d 1062, 1078 (9th Cir. Or. 2002), *Sierra Club Northstar Chapter v. Bosworth*, 428 F. Supp. 2d 942, 949 (D. Minn. 2006), *Heartwood, Inc. v. U.S. Forest Serv.*, 380 F. 3d 428, 430 (8th Cir. 2004).

analysis.”<sup>5</sup> Alternative 13A, selected by the 2012 NCDN, did not analyze the impacts of the lower Bull Pen Bridge trail.

Now the agency purports to analyze the site-specific impacts of the lower Bull Pen Bridge trail but has offered an analysis that is incomplete and fails to consider the practical consequences of the trail. “It is hardly fair to ward off objections to a proposed project by assuring future consideration, and then decline to revisit the issue later on the grounds that it has already been decided.”<sup>6</sup> We believe that this failure to consider the impacts of the trail violates the National Environmental Policy Act (“NEPA”), the Wilderness Act, the Wild and Scenic Rivers Act (“WSRA”), the National Forest Management Act (“NFMA”), the LRMP for the Nantahala National Forest, and Forest Service Manuals and Handbooks.<sup>7</sup>

*Discussion:* Opportunities for solitude and remoteness in a spectacular scenic setting, naturalness and scenic and aesthetic qualities are defining features of recreation in front-country areas within the upper Chattooga WSR corridor.<sup>8</sup> The greatest threats to these qualities is congestion, crowding, and poor trails.<sup>9</sup> The Boater Access EA concludes that the proposed lower Bull Pen Trail would protect the Chattooga WSR corridor’s Recreation, Scenery and Biology ORVs and the wilderness character of the Ellicott Rock Wilderness. In reaching this conclusion, however, it fails to offer adequate analysis in support and ignores some of the practical consequences of constructing the trail as proposed.

This analytical gap constitutes a “tiering” defect in the Boater Access EA. Use of earlier analyses as a substitute for more complete environmental evaluation of subsequent projects or project phases is known as “tiering.” Tiering is intended to avoid duplicative analysis. If an agency has prepared an EIS on a broad program, there may be no need to repeat the analysis when it later considers individual projects that are components of the broader program. *Tiering is justified, however, only when the potential effects of individual implementing actions have been fully considered at the programmatic stage.*<sup>10</sup> Where an issue has not been analyzed in an earlier environmental document to which a site-specific document may tier, the scope of the required analysis in the project-specific EA is correspondingly increased.<sup>11</sup> The Boater Access EA fails to reach this increased analytical threshold.

The lower Bull Pen trail would increase the environmental impacts beyond those considered in the Boater Access EA. There are several attributes directly below the bridge that provide

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<sup>5</sup> 2012 NCDN, pp. 2 & 13-14.

<sup>6</sup> *Washington Trails Ass’n v. United States Forest Serv.*, 935 F. Supp. 1117, 1124 (W.D. Wash. 1996).

<sup>7</sup> Legal contentions are discussed in greater detail in the Discussion section below.

<sup>8</sup> 2012 EA, p. 2, fn. # 2; p. 65, Table 3.2.1-1; p. 66-69.

<sup>9</sup> *Id.* at 68.

<sup>10</sup> *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 997 (9th Cir. 2004) (finding tiered analyses flawed due to failure to include specific information on cumulative effects).

<sup>11</sup> *Kern v. United States BLM*, 284 F. 3d 1062, 1078 (9th Cir. Or. 2002), *Sierra Club Northstar Chapter v. Bosworth*, 428 F. Supp. 2d 942, 949 (D. Minn. 2006), *Heartwood, Inc. v. U.S. Forest Serv.*, 380 F. 3d 428, 430 (8th Cir. 2004).

desirable swimming, fishing, sunbathing, picnicking and general riverside recreation opportunities.<sup>12</sup> The existence of three user-created trails to these features should be evidence that visitors are determined to reach this stretch of the river. The proposed trail would funnel users further downstream from the bridge, deeper into the Ellicott Rock Wilderness. This is problematic because existing biological and recreational conditions would be degraded.

Assuming that visitors would be discouraged from using the aforementioned user-created trails through “naturalization” techniques, the creation of new user-created trails leading upstream from the terminus of the proposed lower Bull Pen trail is, quite frankly, a foregone conclusion. Then, there is also the risk that visitors would simply continue to utilize existing user-created trails in addition to the proposed lower trail. In either scenario, the results are the same: the Bull Pen Bridge area, the Ellicott Rock Wilderness and possibly the sensitive and biologically unique Ammons Branch and Scotsman Creek spray zone areas (both of which are near the proposed lower Bull Pen access trail as documented in the Pittillo-Zartman study) would be forced to endure environmental impacts well beyond those addressed in the Boater Access EA.

## **A. Impacts Inadequately Considered**

In light of the aforementioned practical impacts, which were not discussed in the Boater Access EA, the following focuses on the specific aspects of the Bull Pen Bridge area that were inadequately considered.

### **1. Recreation ORV**

Capacity was defined as the “amount and type of use that protects *and* enhances all river values.”<sup>13</sup> With respect to the Chattooga WSR’s Recreation ORV, the Boater Access EA states that existing recreational opportunities would continue to be available at the Bull Pen Bridge area and that use levels would remain low enough to protect all recreation.<sup>14</sup> In reaching this conclusion, the EA relies on capacity. Any impediment to the Recreation ORVs within this area, stated differently, would be naturally limited by the number of available parking spaces.

In the 2012 EA, recreation at the Bull Pen Bridge area—a front-country recreation area within the Chattooga WSR corridor—was described as follows: “The river and its dramatic backdrop offer ... [recreational users] outstanding opportunities for river recreation where they can immerse themselves in their surroundings; take in the sights, sounds and feel of the river; relieve stress; and connect with the natural world.”<sup>15</sup> The 2012 EA then analyzes impacts on Recreational ORVs, by programmatically assessing capacity at the Bull Pen Bridge area. The specifics of the lower Bull Pen Bridge trail, however, were not incorporated into that analysis. The 2012 EA thus renders a programmatic conclusion and defers to the Boater Access EA to

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<sup>12</sup> See Exhibit B.

<sup>13</sup> 2012 EA, 68.

<sup>14</sup> 2012 EA, 29.

<sup>15</sup> 2012 EA, p. 66.

ensure that access trails at the Bull Pen Bridge area will be in accordance with this conclusion. The Boater Access EA fails to make these assurances.

The Boater Access EA merely asserts that the ROS Classification imposed upon the Bull Pen Bridge area would not be disrupted and that the capacities established in the 2012 EA would continue to protect the river's Recreation ORV.<sup>16</sup> The Boater Access EA also asserts that while a new trail would be developed downstream from the Bull Pen Bridge into the Ellicott Rock Wilderness, "it would replace existing user-created trails in the area that have the potential for greater resource impacts that would detract from a sense of naturalness."<sup>17</sup> Concerns regarding additional user-created trails as described above in the Introduction, however, were never considered.

Construction of the lower Bull Pen trail, as proposed in the Boater Access EA, is contrary to the Wild and Scenic River Act's (WSRA) mandate that the Chattooga's Outstandingly Remarkable Values (ORVs) be "protect[ed] and enhance[d]," and that uses which would "substantially interfere" with these values be limited.<sup>18</sup> While recreation is considered to be one of the Chattooga's ORVs, it is not the only one. Moreover, the WSRA makes it mandatory for the Forest Service to place "primary emphasis" on a river's "esthetic, scenic, historic, archaeological, and scientific features," in its administration of the river. Promotion of the river's recreational values alone, stated differently, cannot detract from the WSRA's overall directive that Wild and Scenic River segments be managed so that each ORV is protected and enhanced.<sup>19</sup> Because the Forest Service's proposal would pose direct and substantial interferences with the Chattooga's ORVs and because the lower Bull Pen trail would not enhance these ORVs, the proposal is inconsistent with the WSRA, thereby in violation of the APA.

## 2. Scenery ORV

Existing impediments to the river's Scenery ORVs come from "soil compaction, erosion and vegetation damage associated with dispersed camping and user-created trails."<sup>20</sup> The 2012 EA concludes that Alternative 13A would "reduce impacts to scenery more than current management through ... trail management, new capacity levels and monitoring."<sup>21</sup> It then programmatically concludes that boater connector trails would protect the Scenery ORV because they would be designed to "minimize adverse impacts to resources, especially scenery and aesthetic values."<sup>22</sup> New trails are to be supported by site-specific analysis and NEPA documentation.<sup>23</sup>

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<sup>16</sup> Boater Access EA, p. 25.

<sup>17</sup> Boater Access EA, p. 29.

<sup>18</sup> 16 U.S.C. 1271

<sup>19</sup> *Wilderness Watch v. U.S.F.S.*, 143 F.Supp.2d 1186, 1205 (D. Mont. 2000).

<sup>20</sup> 2012 EA, p. 231.

<sup>21</sup> 2012 EA, p. 232.

<sup>22</sup> 2012 EA, p. 233.

<sup>23</sup> 2012 EA, p. 231.

The Boater Access EA states that the “action alternative,” Alternative 2, states that management activities concerning boater access trails would improve scenic quality and that long-term visual impacts would be positive on scenery. In support of these assertions, it states that the impediments resulting from user-created trails would be minimized because users would be discouraged from using user-created trails through naturalization techniques.<sup>24</sup> It fails to consider, however, the concerns relating to the creation of new user-created trails at the Bull Pen Bridge area, as described above, and/or the concerns relating to the continued use of user-created trails at the Bull Pen Bridge area due to the recreational opportunities directly below the bridge.

Construction of the lower Bull Pen trail, as proposed in the Boater Access EA, is contrary to the Wild and Scenic River Act’s (WSRA) mandate that the Chattooga’s Outstandingly Remarkable Values (ORVs) be “protect[ed] and enhance[d],” and that uses which would “substantially interfere” with these values be limited. 16 U.S.C. 1271. While recreation is considered to be one of the Chattooga’s ORVs, it is not the only one. Moreover, the WSRA makes it mandatory for the Forest Service to place “primary emphasis” on a river’s “esthetic, scenic, historic, archaeological, and scientific features,” in its administration of the river. Promotion of the river’s recreational values alone, stated differently, cannot detract from the WSRA’s overall directive that Wild and Scenic River segments be managed so that each ORV is protected and enhanced.<sup>25</sup> Because the Forest Service’s Proposal would pose direct and substantial interferences with the Chattooga’s ORVs and because the proposed lower Bull Pen trail would not enhance these ORVs, the proposal is inconsistent with the WSRA, thereby in violation of the APA.

### 3. Biology ORV

The Boater Access EA relies on the 2012 EA, its Biological Evaluation<sup>26</sup> and Biological Assessment<sup>27</sup> to address the potential impacts of the proposed lower Bull Pen trail on the Chattooga’s biology ORVs. The BE purports to “address potential project-related impacts to species listed as sensitive by USFS Region 8.”<sup>28</sup> Specific to the river segment identified as “Bull Pen Bridge South – Ellicott Rock, the BE lists 1 federally listed plant, 10 regional sensitive plants, and 4 locally rare plants,<sup>29</sup> and further cites that the “primary suitable habitat for the majority

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<sup>24</sup> Boater Access EA, p. 66.

<sup>25</sup> *Wilderness Watch v. U.S.F.S.*, 143 F.Supp.2d 1186, 1205 (D. Mont. 2000)

<sup>26</sup> *Biological Evaluation: Managing Recreational Uses on the Upper Chattooga River* (January 2012) (“BE”).

<sup>27</sup> *Biological Assessment: Managing Recreational Uses on the Upper Chattooga River* (January 2012) (“BA”).

<sup>28</sup> BE, p. 1

<sup>29</sup> Id. at 9.



of the rare species included boulders in the middle and/or edge of the river and alluvial sand bars.”<sup>30</sup>

The BE and BA were both completed in the winter of 2011-2012, during the dormant season when meaningful site-specific surveys to address potential project-related impacts to sensitive plant species would either be impossible or significantly compromised. As such, the BE and BA are not site-specific surveys, but are recitations of research. In fact, the BA references only one, old 2007 survey (during the growing season) for just 2 federally listed species that “might be affected by the proposed project,” and the BA’s analysis of direct and indirect effects is based in part on the parameter that “There is no hiking trail within the vicinity of this site nor is there any trail proposed for this area.”<sup>31</sup> The CC asserts that the BE, the BA, and the 2007 survey fail to satisfy the mandate to “address potential project-related impacts” of the lower Bull Pen trail as proposed in the Boater Access EA, because these documents fail to address the site-specific, direct and indirect effects of the proposed lower Bull Pen trail, which was not conceived and released to the public through the scoping process until July 2013.

In addition, the Boater Access EA, the 2012 BE and 2011 BA are completely devoid of any consideration of the impacts of the proliferation of user-created trails that would inevitably occur from the terminus of the proposed lower Bull Pen trail, back upstream to the historical recreation attributes located directly below the Bull Pen Bridge. Such user-created trails would surely proliferate in the very habitat favored by the majority of the rare and sensitive species as cited above. Absent as well from due consideration in the Boater Access EA, the BE, and BA are the potential impacts of the proposed lower Bull Pen trail on the Ammons Branch spray zone area that contrary to statements in the Boater Access EA is located within the Wild & Scenic River Corridor immediately below the Bull Pen Bridge, and the Scotsman Creek spray zone, that is located in the vicinity of the proposed lower Bull Pen trail terminus.

#### **4. Wilderness Character of the Ellicott Rock Wilderness**

Of the four qualities of wilderness character, “outstanding opportunities for solitude or a primitive and unconfined type of recreation,” is the most threatened by the current proposal. Indicators of this quality include “*remoteness* from sights and sounds of people inside the wilderness and management restrictions on visitor behavior.”<sup>32</sup> The 2012 EA assesses the impacts of Alternative 13A by evaluating opportunities for solitude from within the context of the Wilderness Act of 1964, as well as the wilderness experience that may be expected by visitors.<sup>33</sup> It then concludes that there would be a “slight negative” impact on this quality but that parking limits would help mitigate these impacts.<sup>34</sup>

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<sup>30</sup> Id.

<sup>31</sup> Id.

<sup>32</sup> 2012 EA, at p. 387.

<sup>33</sup> Id.

<sup>34</sup> 2012 EA, at 395.

The Boater Access EA repeats that there would be slight negative impacts on this quality of the Ellicott Rock Wilderness due to the construction of the lower Bull Pen trail but fails to provide meaningful analysis in support of this conclusion. It continues with the faulty logic that visitors would be discouraged by way of “naturalization” strategies from using existing user-created trails and neglects to consider the inevitable scenario of new user-created trails being established, as described above.

The proposed decision to construct the lower Bull Pen trail, as memorialized in the Boater Access EA and DNCDN and FONSI, violates Section 2(c) of the 1964 Wilderness Act which defines Wilderness as, “an area where the earth and its community of life are untrammelled by man...retaining its primeval character and influence... and which generally appears to have been affected primarily by the forces of nature with the imprint of man’s work substantially unnoticeable.”<sup>35</sup>

There are alternative trail designs that would have less resource impacts and that would be more in line with current use patterns at the Bull Pen Bridge area than the lower Bull Pen trail, as proposed in the Boater Access EA. The proposed lower put-in would be constructed deeper into the Ellicott Rock Wilderness. Although trails are allowed in wilderness areas, they must not significantly diminish the qualities as defined in Sec. 2 (c) of the Wilderness Act. The construction of the lower Bull Pen trail would attract more users into an already heavily used eastern wilderness, and would inevitably result in additional user-created trails being established. This is concerning, given the many sensitive and rare species of plant life in the Project area and in the Ammons Branch and Scotsman Creek spray zones immediately located in this area. Constructing a new trail into a wilderness area at a place where adequate access already exists upstream, for the purpose of getting boaters off the road and for the “convenience” of providing a put-in for boaters to avoid putting in where “highly technical water” exists at the upper Bull Pen put-in is not a sufficient reason to risk degrading the wilderness area immediately below.

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<sup>35</sup> Public Law 88-577

## II. A “TIERING” DEFECT IN THE BOATER ACCESS EA CONCERNING THE LOWER BULL PEN BRIDGE TRAIL RENDERS THE ALTERNATIVES COMPREHENSIVELY UNTENABLE

*Relationship to Prior, Written Comment:* This Objection is related to the primary argument raised in prior comments concerning the question of whether a viable range of alternatives was duly provided in the Boater Access EA.<sup>36</sup>

*Statement of Objection:* We object to the proposed decision to construct the lower Bull Pen trail, as memorialized in the DNCDN & FONSI and Boater Access EA, because it is based upon consideration of an inadequate array of alternatives, and provides no justification for the selected alternative.

*Suggested Remedy:* Our concerns could be remedied by re-initiating the NEPA process for the Boater Access EA, with respect to the lower Bull Pen trail, and providing the public with more than a “yes and no” dichotomy of alternatives. Specifically, alternatives should include the 100 ft. access trail as proposed in the Boater Access EA, in addition to alternative trail designs specific to mitigating and utilizing an existing user-created trail for the lower Bull Pen access .

*Legal Implications:* We believe the “all or nothing” approach, with respect to the proposed construction of the lower Bull Pen trail—that is, either it will be constructed as proposed, or not at all—violates NEPA. An action is “arbitrary and capricious,” within the purview of the APA, when the agency fails to consider the “relevant factors and articulate a rational connection between the facts and the choices made.”<sup>37</sup> In light of the “all or nothing” approach presented in the Boater Access EA, the agency has failed to consider “relevant factors” and, moreover, has failed to establish a “rational connection” between the demonstrable needs to designate the lower Bull Pen trail in such a way that reduces impacts on the Bull Pen Bridge area and the Ellicott Rock Wilderness.

*Discussion:* With respect to the proposed decision to construct the lower Bull Pen trail, the “all or nothing” approach set forth in the Boater Access EA effectively reduces discussion of other environmentally sound alternatives to a false “yes,” or “no,” dichotomy. This oversight is in breach of the regulatory requirement that an environmental assessment contain a “brief discussion ... of alternatives ... [and] the environmental impacts of [those] ... alternatives.”<sup>38</sup> While we do not necessarily disagree with the expressed need for a trail beneath the Bull Pen Bridge, the inference that the construction of this trail as proposed in the Boater Access EA alone is sufficient to satisfy NEPA’s procedural requirements is the precise kind of agency solipsism that has been met by a skeptical glare from the judiciary.

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<sup>36</sup> See Exhibit A, p. 3-4.

<sup>37</sup> *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 105 (1983).

<sup>38</sup> 40 C.F.R. §1508.9

The Sixth Circuit Court of Appeals, for example, has explicitly stated that an environmental assessment may not discuss the “yes and no” alternatives of an action and no action without at least exploring other alternatives.<sup>39</sup> As was stated by the Seventh Circuit, moreover, while discussing an EA’s required alternatives analysis: “if an even less harmful alternative is feasible, it ought to be considered.”<sup>40</sup> The question is whether the agency has taken a “hard look” at a reasonable range of alternatives and further explained its reasons for rejecting them.<sup>41</sup> Because the Forest Service has failed to consider an obviously feasible and less harmful alternative—namely, designing the lower Bull Pen trail in such a way that reduces impacts and that is more in alignment with existing use of the Bull Pen Bridge area—it cannot be said that they have adhered to this requirement.

The “all or nothing” alternatives dichotomy is not appropriate given the current use of the Bull Pen Bridge area. As stated in previously, the desirable recreation opportunities beneath the Bull Pen Bridge, as well as the current existence of user-created trails to these features, is evidence that visitors are determined to utilize this setting. The proposed trail would funnel users further downstream from the bridge, deeper into the Ellicott Rock Wilderness. This is problematic because existing biological and recreational conditions would be degraded.

Assuming that visitors would be discouraged from using the aforementioned user-created trails through “naturalization” techniques, the creation of new user-created trails leading upstream from the terminus of the proposed lower Bull Pen trail is, quite frankly, a foregoing conclusion. Then, there is also the risk that visitors would simply continue to utilize existing user-created trails in addition to the proposed lower trail. In either scenario, the results are the same: the Bull Pen Bridge area, the Ellicott Rock Wilderness and possibly the sensitive and biologically unique Ammons Branch and Scotsman Creek spray zone area (both of which are near the proposed lower Bull Pen access trail as documented in the Pittillo-Zartman study) would be forced to endure environmental impacts well beyond those addressed in the Boater Access EA.

An action is “arbitrary and capricious,” within the purview of the APA, when the agency fails to consider the “relevant factors and articulate a rational connection between the facts and the choices made.”<sup>42</sup> In consideration of the above information, it is apparent that the agency has failed to so consider each of the “relevant factors.” With respect to the “all or nothing” logic advanced by the agency, moreover, they have failed to establish a “rational connection” between the demonstrable needs to designate the lower Bull Pen trail as proposed in the Boater Access EA, and have also refrained from designing alternative access trails with less resource impacts and in accordance with existing use patterns at the Bull Pen Bridge area.

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<sup>39</sup> *Save Our Cumberland Mountains v. Kempthorne*, 453 F.3d 334, at 345-46 (6th Cir. 2006).

<sup>40</sup> *River Road Alliance, Inc. v. Corps of Engineers*, 764 F.2d 445, at 452 (7th Cir. 1985).

<sup>41</sup> See *Baltimore Gas & Electric Co.*, 462 U.S. 87, at 97-98 (1983).

<sup>42</sup> *Id.* at 105.