# EXHIBIT 4

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**FLOYD JULY 29, 2017 NOTIFICATION OF SUPERVISOR NICHOLAS**

4110 Quail View Road
Charlotte, NC 28247

July 29, 2017

Re: Continuing Failures: (1) Suppression of the Public Participation Mandate of the 2012 Planning Rule, With Respect to the Nantahala & Pisgah Forest Planning Process; (2) Violations of the Antidegradation Mandate That Applies to the Chattooga River

**VIA EMAIL** anicholas@fs.fed.us

Mr. Hurston A. Nicholas
Forest Supervisor and Responsible Official, Nantahala and Pisgah National Forests
160A Zillicoa Street
Asheville, NC 28801

Dear Forest Supervisor Nicholas:

The United States Forest Service ("USFS") published a Notice of Initiation for Revision of the Nantahala and Pisgah National Forest's Land Resource Management Plan ("LRMP") on September 25, 2013. Subsequent to that date the Nantahala National Forest ("NNF") has suppressed the public's due process rights, including the public participation rights mandated by the USFS 2012 Planning Rule (36 CFR 219).

I have repeatedly posed written questions focused on establishing whether or not the USFS has provided the requisite intensity of antidegradation protection owed to the Chattooga's *once outstanding* trout habitat and its *once outstanding* trout fisheries. Unfortunately, either *neglectfully or intentionally,* the USFS has repeatedly produced piecemeal and less then fully responsive answers detailing the Nantahala's management of these public trust resources. In other cases, the USFS has simply not answered my questions.

Preventing human activities from degrading the outstanding quality of this *particular river's* trout habitat and its trout fisheries constitute specific subcategories of water quality use which must be protected by all federal and state agencies. The Chattooga's trout buffer must not be disturbed by the development of recreational infrastructure required to pursue the sport of whitewater creek boating. *Unfortunately*, *the USFS has ignored this discrete and non-discretionary obligation.*Despite being obligated to do so, the USFS has not applied *adaptive management* to identify and to halt the impermissible *development and use of an unmanageable crazy quilt* of creek boat launch sites, portage trails, and evacuation points within the highly erosive trout buffer.

*The development of this creek boating infrastructure has impermissibly caused the river bank to collapse in certain locations.* Constructing this infrastructure defies effective management because the USFS lacks clairvoyance to predict where the next massive hemlock log will wedge itself into the channel to create a new life threatening obstacle. Where creek boaters must portage can change each time that a new log falls into the channel or an existing log is pushed further downstream by high water to create a new "strainer" obstacle. This unavoidable land disturbance

displaces soils and causes the creation of new point sources where sediments are being channeled into the water. If the USFS were to allow large woody debris ("LWD") to be lawfully cut out to reduce this unpredictability, such a measure would work to the detriment of the stream's trout habitat which is benefitted by LWD. In any case, removing LWD would constitute an unacceptable half measure because it would not address the infrastructure problem of paddlers wanting *to re-ride white water features where there is no existing portage trail*.

Prior to introducing creek boating, the USFS documented the baseline condition of North Carolina's trout buffer and the wider riparian corridor. In 2007 the trout buffer remained almost as pristine as what Chief McGuire described in 1976. Unfortunately, the development and use of this creek boating infrastructure has significantly degraded the previously *inventoried* condition of the trout buffer and the wider riparian corridor.

*The USFS experiment with creek boating has failed.* Instead of encouraging additional land disturbance within the trout buffer, and additional channeling of sediments into the water, the USFS should focus on abating the excessive amount of anthropogenic sediment that has degraded the Chattooga's once *outstanding* trout habitat and trout fisheries. The USFS must use the LRMP to prevent any additional contributions of sediment resulting from the pursuit of incompatible recreational uses within the fragile riparian corridor, such as mountain bicycling horseback riding, and creek boating.

The impermissible accommodation afforded to creek boating has a long and disappointing history. From 1976 to 2004, Chief McGuire's prohibition on paddling, which applied to a limited segment of the river, remained unchallenged. This changed *only* when advances in kayak/canoe technology evolved to create highly buoyant boats more suitable for pursuing creek boating on narrow and steeply entrenched bodies of water such as the Chattooga's headwaters. As American Whitewater swore: *"The boating community's interest in the upper Chattooga was sparked by improved equipment that brought the upper Chattooga within the skill-level of more paddlers… Although …boating on the Headwaters was banned in 1976…a few members of the public occasionally floated the Headwaters [*in violation of the law]*."* See American Whitewater's complaint in *American Whitewater v Tidwell,* No. 8:09-cv-02665-JMC at page 24 (Dist. of SC, 10/14/2009) [Doc. 1].

On April 15, 2004, American Whitewater quietly filed a an appeal to the Sumter National Forest's Record of Decision, Revised Land and Resource Management Plan, Issue #13 Chattooga River Watershed, which had been promulgated on January 15, 2004 ("2004 ROD"). In its appeal, *American Whitewater asserted that creek boaters have an unrestricted entitlement to float the Chattooga's narrow and steeply entrenched headwaters in North Carolina.*

Specific notice and the opportunity to be heard was never provided to North Carolina Lifetime Sportsman licensees—even though they possessed a protectable interest in preserving the outstanding quality of the trout habitat and rainbow, brook, and brown trout fisheries on North Carolina's headwaters. In fact, American Whitewater's appeal went uncontested because the USFS impermissibly failed to require specific notice and the opportunity to be heard to any specific constituency—including North Carolina Lifetime Sportsman licensees.

The only Land Resource Management Plan lawfully being modified in 2004 was the Sumter National Forest's plan. The Nantahala National Forest was not processing any form of amendment to its LRMP at that time. Stated differently, prior to September 25, 2013, paddlers lacked administrative standing for requesting that the Nantahala National Forest amend its existing LRMP to accommodate creek boating on North Carolina's headwaters. American Whitewater's allegations of denied rights were specifically raised in the context of contesting Issue #13 in the 2004 Record of Decision associated with the Revised Sumter National Forest LRMP.

Although not capable of being recognized until the USFS fully responded to my Freedom of Information Act request somewhere around February 17, 2016, it's now clear that the USFS lacks any form of "intra forest agreement, order, decision, letter ruling, etc. *evidencing how, or explaining why there was legal authority for this Decision of Appeal* (#04-13-00-0026) to be applied to the Nantahala National Forest—and not just exclusively to the Sumter National Forest." (italics in original).[1] Stated differently, neither a court order nor administrative agreement compelled the Nantahala to modify its LRMP prior to its normal plan revision date—which we all know did not start until September 25, 2013.

By issuing Amendment #22 in January 2012, the NNF provided special accommodation to a single recreational user group which lacked any standing at that time to compel such an amendment. Even more prejudicial, in 2004, the Reviewing Officer for the Chief took it upon herself to issue a seven page Decision of Appeal that summarily dismissed over two decades of precedent without ever seeking out any contesting point of view to those articulated in the one sided 94 pages of advocacy submitted by American Whitewater, et al.

To make matters worse, even though the USFS, and presumably the Reviewing Officer for the Chief, must have understood in 2004 that the *public trust resources* of North Carolinians might be adversely impacted by any changes compelled by Decision of Appeal #04-13-00-0026, the USFS failed to provide notice and the opportunity to be heard to the single constituency who held a protectable interest in the preservation of the *outstanding quality* of the Chattooga's trout habitat and its *outstanding* rainbow, brown, and brook trout fisheries—*resident North Carolina Lifetime Sportsman licensees.* Because these individuals were never provided with adequate notice and an opportunity to be heard—at that crucial point in time—their rights were irreparably violated by this uncontested appeal decision.

In addition to denying *North Carolina Lifetime Sportsman licensees* of their due process rights, the NNF also chose to use administrative segmentation to conceal the full scope of the USFS plans for accommodating the demands of whitewater creek boaters. When promulgating the January 2012 Record of Decision that set the parameters for introducing creek boating to North Carolina's headwaters (Amendment #22 to the exiting Nantahala LRMP) the USFS neglected to

[1] *Decision of Appeal* (#04-13-00-0026) was the decision made by the Chief's Office in response to a complaint filed by American Whitewater. It was this improperly promulgated Decision of Appeal that launched a thousand boats and a decade long effort to accommodate the demands of the creek boating lobby. See the Freedom of Information Act ("FOIA") request that I submitted to the Nantahala National Forest on October 20, 2015. See also the subsequent email correspondence with Ms. Hegler-Wooten (USFS) inquiring about when the Regional Office would complete its review and response to this FOIA.

provide full and complete disclosure to the public about its previously formulated intention to subsequently bring forward a second initiative to construct special trails—an initiative that would serve to benefit only the needs of creek boaters.

Pursuant to that second Record of Decision (promulgated in January 2016) the USFS approved a controversial plan to build a special trail [2] to facilitate paddlers repeatedly refloating the class V rapids under the Bull Pen bridge during high water—like a ride at Disney World. By segmenting two closely related initiatives, and by claiming de minimis impact for each one, the USFS cleverly avoided having to explain how these initiatives could not be achieved without violating the intense protective duties owed to the Chattooga's trout habitat and trout fisheries.

During this period of time when the USFS improperly segmented this second decision to build special trails for paddlers from the first decision to allow creek boating, the USFS inadvertently but candidly signaled its willingness to provide special accommodation to American Whitewater—and to discount the complaints (and rights) of other recreation constituencies.

The USFS took the unprecedented step of giving American Whitewater an inappropriate form of special accommodation by scheduling a second objection meeting that was held on Thursday, October 1, 2015. During its first objection meeting held on September 25, 2015, American Whitewater was provided ample opportunity to be heard, to argue its objections to the draft Record of Decision for the paddler trails.

The USFS stated purpose for allowing an unprecedented second objection hearing was to "correct some information that was shared during our Friday conference call."[3]

Unfortunately, when this second call was held, those who were attending by teleconference were abruptly cut off of the call by the District Ranger Wilkins who was running the second objection meeting. This changed the meeting into a private meeting between the only participant who was physically present (American Whitewater) and the USFS.

No transcript or recording of that meeting was maintained—so the public does not know what was discussed during this *private* meeting. *We do know that highly prejudicial admissions were made by the USFS during the first American Whitewater objection meeting. Were these prejudicial admissions what needed to be retracted?*

[2] If built, the 2016 approved paddler access trail will depart from the edge of a highly erosive graveled Forest Service road, will require the significant disturbance of the vegetation growing in the trout buffer, will necessitate an engineering miracle of constructing a trail that will descend straight down a steep bank characterized by highly erosive soils, all without causing sediments to be channeled off the road and the steep bank into the water. At the bottom, this trail will channel humans, presumably with boats, to a pool where trout have been known to spawn, at the same time that their eggs are subject to disturbance by humans walking on the stream bottom.

[3] See the email from Ms. Heather Luczak (USFS) dated Monday, September 28, 2015 @ 11:02 am to various members of the public, including myself.

My complaints about this improper accommodation were submitted to the acting Forest Supervisor via emails on Wednesday, September 30, 2015 and Thursday, October 1, 2015. My request to be given a similar *formal* opportunity to refine the nature of my objection and to ask additional questions of the USFS was subsequently denied.

This special accommodation of whitewater creek boaters occurred—even after the Fourth Circuit Court of Appeals had unambiguously ruled that this group had no special rights of accommodation: "We find that the Forest Service reasonably and lawfully identified "recreational value" as the relevant ORV, *and that floating is not a value of the Chattooga that must be protected and enhanced under §1281*." *American Whitewater et al, v. Tidwell,* 770 F. 3d 1108, 1118 (4th Cir. Ct. App. 2014)(italics added).

Consequently, alert citizens must remain wary that the USFS intends to continue providing special accommodation by using the current LRMP planning process to finish off what it attempted to achieve by improperly segmenting these two closely related Records of Decision.

During the trails construction objection process, American Whitewater sought to get the USFS to offer an expanded interpretation of the meaning and intent of Amendment #22. During the September 25, 2015 American Whitewater objection meeting, and in direct conflict with what Amendment #22 states, the USFS attempted to accommodate American Whitewater's demands by publicly stating that paddlers were not prohibited by Amendment #22 from paddling on the main stem upstream of the confluence with Green Creek—so long as the paddler had the specified USFS permit in their possession.

Mr. Mike Bamford, of Whiteside Cove, strongly contested this more expansive interpretation of Amendment #22—to the extent of promising to litigate if necessary to prevent this reinterpretation. *The USFS also articulated an intention to forego enforcing the rules that restrict where creek boaters are allowed to launch their boats*.[4] I submitted a written objection to this second attempt to reinterpret the rules. After being forced to back down from reinterpreting these rules, the Nantahala District Ranger candidly reveals the biased disappointment of the USFS for not having succeeded in accommodating American Whitewater's demands:

"*I think his [Colburn] only recourse in the near future is through our forest planning process*."[5]

Ranger Wilkins' statement implicitly evidences his recognition, how any attempt to use the language of this second Record of Decision to expand paddling, by reinterpreting the intentions of Amendment #22, would risk precipitating litigation by one of the non-paddling groups. *Hence, almost two years later, the trail below the Bull Pen bridge remains unbuilt—perhaps as a testimony to the USFS desire to avoid testing the resolve of non-paddlers in bringing potential future litigation against this obvious favoritism towards paddlers.*

[4] See pages 110 of this notification for a detailed discussion of the "walk around" interpretation.

[5] See the email dated Thursday, October 1, 2015 @ 1:04 PM from Mr. Mike Wilkins to Mr. James Melonas (Acting Nantahala Forest Supervisor), et al. (italics added here)(to be indexed for the USFS as document 00-M-1).

This circumstance evidences why the USFS retains a special motive for using the LRMP planning process for further accommodating the demands of creek boaters. *In fact, American Whitewater was selected to participate on the LRMP Stakeholders Committee.* I do not take issue with the concept of having a Stakeholders Committee to help the Nantahala in processing the preparation of the LRMP. Neither do I complain that American Whitewater has every right to ask to participate and advocate their position.

However, the USFS has no right to provide special accommodation to whitewater creek boating if it conflicts with the USFS discrete and non-discretionary duty to provide the highest intensity of protection against any diminishment in the once outstanding—but now degraded—quality of the Chattooga's trout habitat and trout fisheries. Similarly, a Stakeholders Committee must not be used to provide special accommodation and access to a limited number of organizations while prejudicing the flow of information to those outside this group.The Nantahala's prior behavior suggests this Stakeholders Committee might be used to offer behind the scenes access and disproportionate influence to select recreational user groups—like American Whitewater.

Going forward, the USFS might fix some of these prior indiscretions by adopting discrete and nondiscretionary *Standards* within the Aquatic Ecosystems part of the LRMP to provide the requisite intensity and *enforceable* protection needed to prevent human activities from *further* degrading the *once* outstanding quality of the Chattooga's trout habitat and its trout fisheries.

The highest intensity of antidegradation protection is owed to these two narrow subcategories of ORW water quality use and not to the less specific and broader "aquatic life use" of water quality.

In addition to having other discrete and non-discretionary duties, when preparing the LRMP the USFS has directed that the Nantahala must fix *Standards* "to maintain or restore the ecological integrity of …aquatic ecosystems and watersheds in the plan area." 36 CFR §219.8(a).

This brings us full circle to my primary complaint today: the NNF has repeatedly failed to answer my specific questions that are designed to find out if the Nantahala *will* provide the requisite intensity of protection owed to the Chattooga River's trout habitat and its trout fisheries. Providing forthright, comprehensive, and entirely accurate answers to such questions would seem compelled by the 2012 Planning Rule. Unfortunately, either *neglectfully or intentionally,* the USFS has repeatedly produced piecemeal and less then fully responsive answers to inquiries about the Nantahala's management of the Chattooga's most critical public trust resources.

This pattern and practice of refusing to provide complete and forthright answers to questions about the Chattooga's trout habitat and trout fisheries prejudices those not allowed into the tent of special accommodation set up for the Stakeholders Committee.

My objective is simple: to populate the administrative record with all the published and unpublished information that would allow the public to complain that the requisite level of protection has not been provided to the Chattooga's trout habitat and trout fisheries.

This recurring pattern of delay has thwarted my ability to participate *actively* in the LRMP planning process. This pattern and practice makes it almost impossible for a single individual to uncover, assimilate, and digest all of the published and unpublished information pertaining to this narrow but critical concern.

Instead of asking and receiving comprehensive and accurate answers to questions, I have had to resort to the uncertain and time consuming Freedom of Information Act ("FOIA") to try to identify documents from which such answers might be inferred. This hinders the public from timely discovering critical information evidencing how the USFS has neglected to provide the highest intensity of protection to the Chattooga. This prevents the administrative records from being fully and timely populated with the data and information needed to support an allegation that Federal and State agencies have not met their nondiscretionary obligations to protect and maintain the Chattooga's once outstanding trout habitat and trout fisheries from suffering measurable non-temporary degradation. The Nantahala National Forest must cease its pattern and practice of neglecting to disclose critical information on a timely basis, of providing piecemeal responses to requests for information, or in some cases refusing to answer follow up questions pertaining to the Aquatic Ecosystems component of the forthcoming Land Resource Management Plan. This pattern and practice hinders the public from demonstrating why the forthcoming NNF LRMP must adopt *Standards* which prevent any further degradation in the once outstanding quality of the Chattooga's now degraded trout habitat and trout fisheries.

**The Trout Habitat Problem: An Extended Segment of the Chattooga Suffers Impermissible Habitat Degradation Because the Stream Bed's Substrate Has Become Excessively Embedded With Fine Particle Sized Sediment**

The habitat suitable for early life cycle use by rainbow, brook, and brown trout *has been measurably degraded* because the supply of sediment has overwhelmed the sediment transport capacity of this river. Small sized sandy sediments (<2mm) have *excessively embedded* the streambed's larger substrates. This blanket of sediment is bank to bank in certain places and over a foot deep in others. This sediment has eliminated trout hiding spaces in moderately flowing waters by filling in upstream facing crevices. It has also *remarkably* decreased the depth of minor pools that the Chattooga's trout have historically used to sustain themselves during the low flows and heat of the summer. This sediment transport imbalance is most pronounced on approximately 2 miles of the Chattooga reaching from Green Creek downstream to where Cane Creek enters from the west. Sediments are impounding upstream of a massive logjam *remotely* located at 35.033897 -83.128544.

*To clarify, this logjam does not constitute the problem. Excessive embedded sediment now occurs far downstream of this logjam.* The fact is this logjam has served as a sediment catch basin to slow this excessive supply of anthropogenic sediment from fouling the downstream trout habitat. This level of embeddedness has pronouncedly increased since 2007.

*The USFS (or its agents) eye should have eye witnessed the visibly unmistakable impacts of this sediment transport imbalance as early as 2007 when they were photographed standing in front of this logjam.*

The excessiveness of this embedded sediment is *visibly unmistakable* because the sediment is being impounded bank to bank in front of this logjam.

This embedded sediment exceeds any reasonable *minimum effects threshold* for disrupting the early life cycle of salmonids.[6]

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[6] The scientific literature shows that excessive embeddedness of fine particle sized sediments (<2mm in diameter) is particularly problematic in disrupting the early life cycle of salmonids. The United States Environmental Protection Agency ("US EPA") has recognized that excessive sediment constitutes the leading cause of water quality impairment. *Environmental Protection Agency National Water Quality Inventory-2000 Report,* Agency Report #EPA-841-R-02-001, Washington DC *(USEPA 2002)(* with 31% of all miles of impaired streams being tied to excessive sedimentation)(otherwise indexed for this administrative record as Floyd document 00-J).

The US EPA has generally recognized that relying on traditional macroinvertebrate population indices might not provide an early enough warning signal of diminishing biotic integrity of salmonid populations due to reproductive habitat degradation caused by suspended and bedded sediments ("SABs"). Consequently, although not a regulation, the US EPA promulgated guidance in May 2006 entitled *Framework for Developing Suspended and Bedded Sediment Water Quality Criteria,* EPA-822-R-06-001 Office of Water, Office of Research and Development, 2006 ("*EPA SABs Framework*")(otherwise indexed for this administrative record as Floyd document "00-H"). This guidance shows how to develop water quality standards for recognizing impairment of designated uses of water quality using measurable and quantifiable criteria for suspended and bedded sediments.

The US EPA, Region 10, has supplied a roadmap for state and federal agencies to use in recognizing impairment of designated uses of water quality due to excessive sedimentation problems. Because Oregon did not have an assessment methodology for bedded sediments, Oregon had failed to recognize that the designated uses of certain streams had become impaired by excessive embedded sediment. Consequently, the US EPA compelled Oregon to place additional streams on Oregon's 2010 Section 303(d) list of impaired waterbodies. Region 10 acknowledged: "Bryce et al. (2008 and 2010) determined the optimum sediment tolerance values and medians for areal % fines (<=0.06 mm) and areal sand and fines (<=2mm). The median optima for percent sand and fines was 13% for sediment sensitive salmonids and 9.7% for sediment sensitive macroinvertebrates." 102814 EPA Region 10, G. Hayslip, Guidance re Use of Biological Data in 303d Listings at page 3(indexed for this administrative record as Floyd document "00-I").

The US EPA's Region 10 endorsed the use of a Fine Sediment Score (FSS).This methodology applies two tests. "First, fine sediment was assessed as the percentage of substrate composed of particles smaller than 2mm in diameter…Second, EPA assessed Relative Bed Stability (RBS) which evaluates the ability of a stream of a particular size, steepness, discharge and roughness to move substrate downstream. Values less than zero indicate that the stream has a higher level of fine sediment than expected. (Kaufmann, 1999)." *Enclosure 2: EPA 303(d) Listing Methodology*, EPA Region 10, at page 14 of 36 (attachment outlining methodology used by the EPA to assess water quality data and information for compliance with Oregon's water quality standards) (index for this administrative record as document 00-I-A) downloaded on 12/29/2016 from http://www.deq.state.or.us/wq/assessment/docs/2010EPAenclosure2.pdf. This EPA endorsed methodology can be used to assess a specific reach of a specific wadeable stream in Oregon. In order for a site on a wadeable stream to be considered impaired because of excessive embeddedness of fine particle sized sediments, it has to fail both tests. A suspect site has to have an actual RBS value that is less than a predicted benchmark value, and it has to exhibit a greater percentage of embeddedness compared to actual standards derived from the results of 10 years of state wide habitat field monitoring applying protocols consistent with those previously articulated by the Environment Monitoring and Assessment Program (EMAP).

Consistent with the United States Environmental Protection Agency's recommendation to utilize special criteria in addressing excessive suspended and bedded sediments ("SABs"), the United States Forest Service ("Forest Service or USFS") has *routinely measured embedded sediments* for the purpose of characterizing the impacts of sediments on in-stream habitats of streams flowing within the National Forests. By way of example, consider how the Forest Service conducted interstitial and surface sediment monitoring from 1983 to 2006 on the Payette and Boise National Forests in Idaho(See *Deposition of Fine Sediment in the Salmon River Watershed, Payette and Boise National*

**Why the Chattooga River's Trout Habitat and Trout Fisheries Must Be Provided the Highest Intensity of Antidegradation Protection.**

Just *three* streams in the Nantahala/Pisgah Forests constitute: (1) Outstanding Resource Waters ("ORW"), (2) Trout Waters (protected for natural trout propagation), (3) Class B Waters(waters protected for swimming) and (4) a National Wild and Scenic River.

The Chattooga River is unique among these three *because of why it was classified ORW*. The Rabun County Georgia Chapter of Trout Unlimited petitioned North Carolina to reclassify the Chattooga to ORW to prevent any *future* degradation of the river's *outstanding* native trout habitat and its *outstanding* brook, rainbow, and brown trout fisheries.[7] North Carolina's administrative record explicitly cited this as the purpose for ORW classification. This is why protecting and maintaining the Chattooga's *outstanding* trout habitat and *outstanding* trout fisheries constitute specific subcategories of water quality use. Consequently, the trout habitat and trout fisheries must be *fully* protected from suffering any non-temporary degradation either directly or indirectly caused by human activities.

The USFS has a discrete and nondiscretionary duty to protect and maintain this individual stream's trout habitat and trout fisheries at an *outstanding* level of quality. An ORW stream must not suffer any anthropogenic non-temporary degradation in either the quality of their waters or the specifically designated subcategories of use of their water quality.

Consequently, the forthcoming LRMP *should* adopt *Standards* that mandate the highest intensity of *antidegradation protection* for: (1) the Chattooga's ORW water quality; (2) the explicitly designated subcategories of use of this ORW water quality; and (3) the Chattooga's trout buffer.

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*Forests, Idaho,* Statistical Summary of Interstitial and Surface Sediment Monitoring, 1983-2007, Roger Nelson, Fisheries Biologist et al, Payette National Forest; last downloaded 0312017 from https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsm9_030928.pdf. See also the U.S. Forest Service, Lake Tahoe Basin Management Unit *Bedded Sediment report for Blackwood Creek* which empties into Lake Tahoe (February 18, 2015). Similarly, see *Monitoring sediment production from forest road approaches to stream crossings in the Virginia Piedmont,* USDA Forest Service, Southern Research Station, Kristopher Brown et al 2015. Finally, as part of the Forest Service Large Scale Watershed Restoration initiative in 2002, researchers from the Forest Service's Coweeta Hydrologic Laboratory previously measured the impact of sediment from forest roads on streams in the Chattooga River watershed. Nevertheless, the Nantahala National Forest has neglected to investigate the negative impacts of excessive embedded sediment on the trout habitat and trout fisheries found on the Chattooga's headwaters in North Carolina.

[7] The specific reasons why the Chattooga River's trout habitat and trout fisheries must be provided with the highest intensity of antidegradation protection is spelled out starting on page 16 of this notice.

**Why the Nantahala LRMP Planning Process Fails To Meet Its Obligations**

First, despite the intensified protection *owed* to the Chattooga's fragile trout habitat and trout fisheries, the *Standards* proposed within the most current Aquatic Systems component of the LRMP does not provide sufficient antidegradation protection to this Outstanding Resource Water. See *Aquatic Systems, Developing Forest-wide Plan Components,* February 7, 2016 (last downloaded on 04262017 from **https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd492098.pdf**) (otherwise indexed for this administrative record as document "L-5"). See also the underlying supplemental assessment report titled *Aquatic Ecosystems,* Nantahala and Pisgah NFs Assessment, February 19, 2014 (last downloaded on 04262017 from **https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprd3793006.pdf**) (otherwise indexed for this administrative record as document "L-5-A").

By adopting appropriately intense *Standards* for protecting and preventing any further degradation of the once outstanding quality of the Chattooga's in stream trout habitat and its once outstanding trout fisheries, the NNF might fix its repeated failure to apply "the best available scientific information" (36 CFR §219.3) in addressing the Chattooga's impairment from excessive embedded sediment.

The USFS must adopt appropriately intense *Standards* to regulate the Chattooga because the 2012 Planning Rule purports to claim *unilateral* authority to restrict the manner in which the public may challenge yet to be announced future site specific projects. "*Except as provided in the plan consistency requirements in §219.15, none of the requirements of this part apply to [site specific] projects or activities."* 36 CFR §219.2(c).

Stated differently, the public will only be allowed to contest future site specific management initiatives by arguing that such site specific activity is inconsistent with some specific forest plan Standard, Guideline, Desired condition—as the concept of "*inconsistency"* is implied by 36 CFR §219.15(d). Only *Standards* constitute mandatory constraints on yet to be announced site specific projects.

Consequently, the public must be fully informed during the period of time in which the applicable Desired Conditions, *Standards,* Guidelines, and Management Approaches are being considered and *prior to any Standards being adopted* within the Nantahala's LRMP. Just as important, before proposing any such *Standards*, the USFS must properly prepare the administrative record by ceasing its pattern and practice of denying the *public participation* rights guaranteed by the 2012 Planning Rule (36 CFR §219.4(a)).

Unfortunately, the USFS has repeatedly failed to provide *prompt and fully responsive answers* to questions about the Chattooga's degrading trout habitat and trout fisheries. This pattern and practice is underscored by how you responded to my questions directed to Ms. Sheryl Bryan, NNF biologist in an email chain between September 16 and October 11, 2016.

Your October 17, 2016 response states: "*Although you did not submit your request as a FOIA request, I have determined that it does fall within those parameters; thus, it is being processed as a FOIA request."* This statement unilaterally transformed an *interested individual's* request *for answers to specific questions* pursuant to the *public participation* mandate of the 2012 Planning Rule into a much more restricted Freedom of Information Act ("FOIA") *request for documents.* This unilateral recasting of the legal nature of my request for comprehensive answers to specific questions does not satisfy the Nantahala Forests' *information disclosure obligations* under the *public participation* mandate of the 2012 Planning Rule. I *do not believe that I am obliged* to engage in the *"document identification"* guessing game incumbent to the FOIA process.

I*nterested individuals* are entitled to expect prompt, detailed, and comprehensive answers regarding how the LRMP might or might not provide the Chattooga's trout habitat and trout fisheries with sufficient antidegradation protection. This right to know compels your fisheries biologists etc. to publish detailed and comprehensive answers to complaints about deficiencies in the Aquatic Ecosystems component of the forthcoming LRMP and to disclose all non-privileged but unpublished institutional knowledge pertaining to this narrow subject matter.

To amplify, the USFS must ensure that the administrative record gets fully populated with all relevant facts and data even if such facts and data might demonstrate how the USFS has neglectfully failed for decades to monitor the deteriorating condition of these specifically designated uses of the Chattooga's ORW water quality. *Public participation compels the full disclosure of non-privileged institutional knowledge.*

Before your arrival, the USFS spent nearly a decade publishing two separate environmental assessments that *erroneously* claimed that the sport of creek boating would not cause unacceptable environmental impacts to North Carolina's headwaters. *Despite making those claims, the USFS never conducted any formal antidegradation assessment of the Chattooga's trout habitat and trout fisheries.*

The USFS neglected to do so despite having admitted that "Electrofishing surveys were conducted within the upper Chattooga River from 1992 through 1996 by the NCWRC. Young-of-the-year Brown Trout densities appeared to be lower than other North Carolina trout populations during the same sampling period; however, a self-sustaining population continues to persist." [8]

The fact that a self-sustaining population "continues to persist" does not satisfy the mandated standard for assessing whether or not the Chattooga's trout habitat and trout fisheries have suffered impermissible degradation. The Chattooga's trout habitat and trout fisheries must be protected and maintained at an *outstanding* level of quality.

[8] Chattooga River Boating Access, Environmental Assessment, USFS, May 15, 2015 at page 205 (the "2015 EA")(otherwise indexed for the administrative record as document "E-1").

The USFS never assessed if the sediment blanketing the river's streambed exceeds any reasonable *minimum effects threshold* for disrupting the early life cycle of trout. Instead, ignoring the significance of its own admission about lower young-of-the-year trout, the USFS encouraged additional sediments to be channeled into the water by endorsing the informal construction and use of a crazy quilt of whitewater creekboat launch sites, evacuation points, and portage trails. All of which have impermissibly disturbed North Carolina's protected trout buffer.

Any effort to recast my *public participation questions* into a much less user friendly FOIA request raises additional misgivings about *why* the Forest Service continues to deny the existence of this excessive embedded sediment and why the USFS continues to turn a blind eye to the impermissible degradation being caused by the development and use of this creekboating infrastructure. The development and use of this creekboating infrastructure has visibly *degraded* the specifically *designated uses* of the Chattooga' ORW water quality as well as the esthetic, scenic, and scientific features of this National Wild and Scenic River.

The Forest Service has neither made any effort to collect detailed analytical information about this embedded sediment problem, nor to place such detailed information about this embedded sediment problem into the Nantahala National Forest's administrative record. This neglect *evidences* why the Aquatic Resources component of the LRMP must incorporate *Standards* using imperative verbs such as "*shall*" and "*must*" to ensure the prohibition of any future site specific activity that might *degrade* the Chattooga' trout habitat and trout fisheries.

Your October 17, 2016 letter *implies* that the Nantahala National Forest believes its *information disclosure obligations* under the *public participation* mandate of the 2012 Planning Rule *are limited* to what is required under FOIA. The USFS must stop suppressing public efforts to gain *timely* access to the *institutional knowledge* needed *to establish a full and complete administrative record* and to prevent any additional degradation of the Chattooga's trout habitat and trout fisheries.

As a starting point, I still need fully responsive answers to questions emailed to Ms. Sheryl Bryan (NNF biologist) between September 16, 2016 and October 11, 2016 (to be placed into the USFS administrative record as document L-6). *More broadly, I would demand that the Nantahala National Forest engage with me in a candid and continuous dialogue regarding the deficiencies in its approach towards the Chattooga's degraded trout habitat and trout fisheries.*

*A number of scientific data gathering studies need to be done on the Chattooga's instream trout habitat and populations prior to publishing a draft LRMP. Such studies must be conducted free of any bias to reach a predetermined conclusion.* In fact, the USFS ought to work hand in hand with *interested individuals* in designing the scope of such studies and in selecting an independent party to conduct these studies. The administrative record must be fully populated with all relevant information and data needed to guaranty that the USFS has taken the hard look at providing the Chattooga's trout habitat and trout fisheries with the requisite intensity of antidegradation protection to which they are entitled.

Reaching backwards my inquiries have focused on gaining *timely* access to facts, data sets, and the entirety of the Forest Service's *unpublished institutional knowledge* about three *very specific areas of concern* that must be addressed in the Nantahala's forthcoming LRMP: (1) the Forest Service's refusal to admit the disruptive impacts of *excessive embedded sediments on the early life cycle of the trout living in the Chattooga;* (2) the Forest Service's negligence in having introduced a new recreational use of the river that has caused additional sediments to be channeled into an ORW body of water already suffering from excessive embedded sediments; and (3) the USFS's endorsement of the unpermitted *destruction of the Chattooga's critical trout buffer which has been caused by the unfettered construction and use of paddler infrastructure consisting of informal boat launch sites, evacuation points, and portage trails.*

My information gathering efforts have been repeatedly frustrated because the United States Forest Service has engaged in a pattern and practice of delaying answers and of serving up piece meal, obtuse, and not infrequently nonresponsive answers to narrow questions about the degrading condition of the Chattooga's trout habitat and trout fisheries. This implicates a pressing need to discover why the USFS has neglectfully turned a blind eye to a visibly obvious problem. Unless there is some claim of privilege the USFS must disclose and must publish any and all *unpublished institutional knowledge relevant to this narrow concern.*

The USFS has been provided with photographs evidencing precisely where the Chattooga suffers from a chronic sediment transport imbalance that has caused fine particle sediments to embed the streambed's larger substrates. This embedded sediment exceeds any reasonable *minimum effects threshold* for disrupting the early life cycle of trout. Nevertheless, despite being aware that the river was already suffering from excessive embedded sediments, the USFS went ahead and initiated a new recreational use of the river which has impermissibly caused the destruction of the fragile trout buffer and which has channeled additional sediment into this ORW body of water. When challenged in writing about this neglect, the USFS has tried to evade its own duties for the deteriorating condition of the trout habitat by redirecting the finger of responsibility back towards the state of North Carolina for the trout fisheries.

The NNF must stop essentially turning a blind eye to a visibly obvious problem. The USFS must fully investigate the Chattooga River's sediment transport imbalance on this extended segment of North Carolina's headwaters.

*The USFS must make sure that the necessary studies are conducted to determine whether or not the level of embedded sediment exceeds any minimum effects threshold for disrupting the early life cycle of trout*.

**This Notification Makes Several Specific Demands**

To encourage cooperation this notification seeks:

(1) To demonstrate why preserving the Chattooga's outstanding trout habitat and rainbow, brook and brown trout fisheries *constitute specifically designated subcategories of use of the Chattooga's ORW water quality that are entitled to the highest intensity of protection*;

(2) To show how the USFS *has engaged in a pattern and practice of*: (a) ignoring the *public participation* mandate of the 2012 Planning Rule by providing less than full and complete answers to LRMP related questions; (b) delaying responses to questions that seek to reveal how the Aquatic Systems component of the LRMP does not provide the mandated intensity of antidegradation protection for the Chattooga's trout habitat and trout fisheries; (c) *refusing to publish reports detailing the historic baseline condition of the Chattooga's trout populations in 1992-1996 as jointly studied by the USFS and the North Carolina Wildlife Resources Commission ("NCWRC");*(d) forcing the public to resort to the less efficient Freedom of Information Act ("FOIA") to document the administrative record with facts showing how the USFS has not protected the explicitly designated uses of the Chattooga's ORW water quality; (e) conducting inadequate and incomplete FOIA searches even when told what questions I am seeking to answer using the contents of such documents; (f) forcing me to suffer the delay of filing multiple appeals to the Chief of the United States Forest Service to compel the production of additional germane documents not produced within the initial FOIA deadlines;

(3) To show how this pattern and practice of nondisclosure has repeatedly obstructed me from learning key factual information *early enough in time* to recognize the need to obtain the preparation of opposing expert opinions and to lodge such expert opinions within the administrative records associated with various federal and state agency actions;

(4) To show why the Nantahala National Forest's LRMP must incorporate compulsory and non-precatory *Standards* to provide the mandated antidegradation protection owed to the Chattooga's Outstanding trout habitat and Outstanding trout fisheries;

(5) To demand *Standards* that designate a measurable *minimum effects threshold* for when embedded sediments must be viewed as disrupting the early life cycle of trout and which require mitigation when a trout stream suffers from embedded sediments which exceed that minimum effects threshold;

(6) To demand that a comprehensive antidegradation assessment of trout populations be conducted both before and after *each USFS site specific initiative* [9] that might potentially aggravate the Chattooga's excessive embedded sediment problem;

[9] This would include conducting a comprehensive antidegradation assessment before and after any proposed timber cut within the watershed of the Chattooga's headwaters. This should apply in particular to any planned timber cut such as the Southside Project on Brushy Mountain. Neither N. Fowler Creek nor Scotsman Creek can stand any additional increase in sediments originating from timber cutting activities on Brushy Mountain. Both are critical

(7) To object to any future exclusive reliance on macroinvertebrate studies when assessing the potential negative impacts of any USFS site specific initiative on the water quality of ORW mountain trout streams suffering from embedded sediments that exceed a designated minimum effects threshold for disrupting the early life cycle of trout;[10]

(8) To identify the problem with the Nantahala Forest's stated intention to use the North Carolina Index of Biotic Integrity ("NCIBI")[11] as a proxy for declaring the satisfactory habitat health of specific mountain streams within the Nantahala/Pisgah Forest;

The Chattooga must be distinguished from other cold water trout streams flowing through the Nantahala National Forest. North Carolina has established that the Chattooga's subcategories of ORW water quality use must be preserved at an *Outstanding* level of quality.

The *Aquatic Ecosystem* component of the LRMP does not fulfill this discrete and nondiscretionary duty. To repeat, the Forest Service has repeatedly engaged in a pattern and practice of providing incomplete or overly vague responses to narrowly drawn factual inquiries pertaining to the degrading trout habitat and trout fisheries on the North Carolina part of the Chattooga.

Such a pattern and practice prejudices interested individuals from participating in the planning process with the permitted intensity of detail. Such practices prevent the public from becoming knowledgeable of critical factual information that may not have been reduced to a written document, or which may exist in a document that the public has no way to identify in order to compel disclosure under FOIA.

Set forth below is a detailed explanation why the USFS should pivot towards trying to cooperate with interested individuals to address this pressing water quality concern.

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tributaries that flow directly into the last bastion of rainbow trout habitat on the North Carolina part of the Chattooga. This habitat exists below the Bull Pen Iron Bridge. Likewise, any plan to replace the Bull Pen Iron Bridge should require such an antidegradation assessment.

[10] With respect to the nearby Tellico River, the Nantahala National Forest has already sworn to a federal district judge that: "an NCDENR study [concluded] that '*aquatic insects are generally poor indicators of ecosystem stress due to sedimentation.*' See *Southern Four Wheel Drive Association v United States Forest Service,* Case 2:10-cv-00015, Document #39, page 27, August 3, 2011(italics added for emphasis). Such minimum effects thresholds for embeddedness are already being used on salmonid streams in the Northwestern United States.

[11] The NCIBI method was developed for assessing a stream's biological integrity by examining the structure and health of its fish community. The North Carolina Administrative Code defines *Biological Integrity* as: " . . . *the ability of an aquatic ecosystem to support and maintain a balanced and indigenous community of organisms having species composition, diversity, population densities, and functional organization similar to that of reference conditions.*" (15A NCAC 02B .0200; NCAC 2004). The NCIBI is a modification of the Index of Biotic Integrity (IBI) initially proposed by Karr (1981) and Karr, *et al*. (1986).

**Why Protecting the Chattooga's Outstanding Trout Habitat and Trout Fisheries Constitute the Specifically Cited Subcategories of Use For the River's ORW Water Quality.**

Federal water quality rules do not dictate that states employ *specific subcategories of use* in classifying bodies of water. However, if "the State designated use classification system is very specific in describing subcategories of a use, then such specifically defined uses, if they exist, must be protected fully under antidegradation." *Water Quality Standards Handbook,* United States Environmental Protection Agency, Office of Water, EPA 823-B-94-005a, Chapter 4:Antidegradation, August 1994, at pages 4-5 (otherwise indexed as Floyd document "00-J-1").

The EPA recently clarified that: the ''uses specified in section 101(a)(2) of the Act'' refers to uses that provide for the protection and propagation of fish, shellfish, and wildlife, and recreation in and on the water, as well as for the protection of human health when consuming fish, shellfish, and other aquatic life. A ''subcategory of a use specified in section 101(a)(2) of the Act refers to any use that reflects the subdivision of uses specified in section 101(a)(2) of the Act into smaller, more homogenous groups *for the purposes of reducing variability* within the group." Water Quality Standards Regulatory Revisions, Final Rule, 80 Fed. Reg. 51020-51050, at 51024, Aug. 21, 2015 (footnote and internal quotation marks omitted)(to be codified at 40 C.F.R. Part 131)("2015 WQS Revisions")(italics added for emphasis)(otherwise indexed as Floyd document 00-J-2).

"Subcategories of aquatic life uses may be on the basis of attainable habitat (e.g., coldwater versus warmwater habitat); *innate differences in community structure and function (e.g., high versus low species richness or productivity*); or fundamental differences in important community components (e.g., warmwater fish communities dominated by bass versus catfish). Special uses may also be designated to protect particularly unique, sensitive, or valuable aquatic species, communities, or habitats." *EPA WQ Standards Handbook,* Chapter 2:Designation of Uses*,* at page 6 (italics added for emphasis)(otherwise indexed as Floyd document 00-J-3).

The EPA's guidance explains that a subcategory of water quality use can be differentiated by "*innate differences …in…species…productivity."* Document 00-J-3 at p. 6.

North Carolina employs just such a *subcategory of water quality use in defining what bodies of water can be designated as Outstanding Resource Waters.*

Unfortunately, this EPA mandate to provide strict antidegradation protection to such subcategories of ORW water quality use have been ignored with respect to the Chattooga River. Through an adroit lobbying campaign coordinated with the pressure of an ultimately discredited litigation campaign, a highly skilled but small group of creek boating enthusiasts distracted the attention of the Forest Service for more than a decade. During this time, the USFS took its eye off the ball with respect to its discrete and nondiscretionary obligations under the Clean Water Act, the National Wild and Scenic Rivers Act, and other federal and state statutes and regulations. The Forest Service has ignored its existing LRMP rules prohibiting visible sediment from being channeled into forest streams as a consequence of human activities.

In defining bodies of water that qualify for the *strict antidegradation* protections afforded to ORW, North Carolina's water quality classification system requires that a body of water be of exceptional state or national recreational or ecological significance and that the body of water *also* exhibit one or more of the following outstanding resource values/*subcategories of water quality use*:

(1*)* there are *outstanding* fish (or commercially important aquatic species) habitat and fisheries;

(2) there is an unusually high level of water-based recreation or the potential for such recreation;

(3) the waters have already received some special designation such as a North Carolina or National Wild and Scenic River, Native or Special Native Trout Waters or National Wildlife Refuge, which do not provide any water quality protection;

(4) the waters represent an important component of a state or national park or forest; or;

(5) the waters are of special ecological or scientific significance such as habitat for rare or endangered species or as areas for research and education. "

See 15A NCAC 02B.0225(b)(italics emphasis added).

The first of these five qualifying outstanding resource values defines a subcategory of water quality use. The shared modifier *"outstanding*" defines the superlative quality of habitat and fisheries that a stream must possess for ORW classification. This subcategory of use is based on "*innate differences …in…species…productivity"* which distinguishes certain waters "into smaller, more homogenous groups *for the purposes of reducing variability* within the group." *2015 WQS Revisions* at 51024.

Stated differently, a body of water can qualify for ORW *antidegradation protection*, if it possesses "*outstanding"* in stream fish habitat (or commercially important aquatic species habitat) *plus* an *"outstanding"* fishery. *There is a dual requirement*. To qualify for *antidegradation protection*, a stream's in stream fish habitat (whether cold or warmwater) must be sufficiently "*outstanding"* to maintain an "*outstanding"* fishery.

The context in which North Carolina's administrative code utilizes the word *"outstanding"* implicates an intention to differentiate the relative quality of "*innate differences …in…species…productivity"* that a river's in stream fish habitat must possess, in comparison to all other streams. See 15A NCAC 02B .0225(b) (Outstanding Resource Waters) and 15A NCAC 02B .0201 (Antidegradation Policy)

North Carolina's selection of the word "*outstanding"* as the shared modifier is synonymous with having chosen *exceptional, superlative, first rate, first class, or excellent*. It is conceptually distinguishable from average or sufficient or minimally adequate trout habitat.

North Carolina chose to employ "outstanding" to distinguish the numeric characteristics in "*innate differences …in…species…productivity"* that a stream's habitat must exhibit to qualify for ORW protection. North Carolina reserves special ORW antidegradation protection for those few streams possessing the requisite *"outstanding"* or *first rate* or *exceptional* fish habitat needed to sustain an *"outstanding"* fishery.

The choice of the word "*outstanding"* implicates that the habitat must be capable of supporting the highest level of abundance for the species of fish (cold-water versus warm water; largemouth bass versus brook trout) that North Carolina intends to protect by granting ORW classification. Stated differently, a stream can qualify for North Carolina's special ORW antidegradation protection if it possesses the requisite *"outstanding"* in stream fish habitat capable of *maximizing* in stream reproduction and *maximizing* recruitment of juveniles into adults of catchable size sufficient to sustain an "*outstanding"* standing crop of harvestable fish. These constitute measurable standards recognizable across all streams.

A stream habitat can't be "*outstanding"* unless it exhibits all of the physical elements and characteristics needed to yield *the greatest recruitment of early age fish to the stream's fishery and the higest numbers of catchable fish.* Such habitat is logically distinguishable from fish habitat that merely sustains *average or substandard reproduction and recruitment of fish,* or alternatively that will merely allow *some form of aquatic life to persist.*

The Chattooga was reclassified ORW based on this *"outstanding"* subcategory of ORW water quality use. The ORW petition was brought by members of the Rabun County Georgia Chapter of TU to secure stringent antidegradation protection for the river's exceptional trout habitat and trout fisheries. The significance of that administrative action must not be minimized because ORW designation *has not* been indiscriminately handed out to every trout stream in North Carolina. In fact, there are just 39 Class B, Trout, ORW streams in North Carolina.

Out of those 39 streams, only the Chattooga appears to have been petitioned for ORW reclassification based *explicitly on the* recognition of "an outstanding native trout habitat and fisheries including eastern brook, rainbow, and brown trout." *Report of Proceedings For the Proposed Reclassification of Fires Creek In The Hiawassee River Basin (Cherokee County), Cataloochee Creek In The French Broad River Basin (Haywood County), Upper South Fork Mills River In The French Broad River Basin (Henderson And Transylvania Counties), Wilson Creek In The Catawba River Basin (Avery And Caldwell Counties), Elk Creek In The Yadkin-Pee Dee River Basin (Watauga And Wilkes Counties), Upper Nantahala River In The Little Tennessee River Basin And Savannah River Drainage Area (Macon And Clay Counties), And Chattooga River In The Little Tennessee River Basin And Savannah River Drainage Area (Macon And Jackson Counties),* North Carolina Department of Natural Resources And Community Development, Division of Environmental Management, Public Hearings, August 1-4 1988 at page S-8 (the "1988 Report of Proceedings") (originally provided to me by the NC DEQ as "*Chattooga Classification history.pdf"* in November 2015 but otherwise indexed for the USFS administrative record as Floyd document "*A-2*").

North Carolina's 1988 Report of Proceedings *specifically states:*"Several reasons have been cited as the basis for this reclassification request including…an outstanding native trout habitat and fisheries including eastern brook, rainbow, and brown trout." Id.

Furthermore, at reclassification, these trout fisheries were entirely self-reproducing. This further differentiates the Outstanding Resource Waters of the Chattooga from other trout waters in terms of its commercial importance to wild trout anglers as well as the budgetary savings that it affords to the state of North Carolina's Wildlife Resources Commission.

North Carolina specifically documented the following finding: "*Based on DEM water quality data and fisheries information provided by the Wildlife Resources Commission, the Chattooga River from its source to the North Carolina-Georgia state line…[is] recommended for ORW*." Id. at page S-10 (emphasis added).

Hence, the 1988 Report of Proceedings gave "effect to the need for balancing conflicting considerations as to [best] useage [of these waters]." NCGS §143-214.1(b). Accordingly, these findings constitute a written admission by North Carolina that maintaining and protecting the *outstanding* trout habitat and *outstanding* self-sustaining rainbow, brook, and brown trout fisheries constitute the "best usage" of these waters "in the interest of the public". 15A NCAC 02B.0101(b)(8)(emphasis added). The *1988 Report of Proceedings*(otherwise indexed for the administrative record as document "A-2") confirms the *explicit* intention was to provide enhanced protection for the trout habitat and trout fisheries *in contrast to the* more general *aquatic life use.*

Accordingly, preserving the *outstanding quality* of the brook, rainbow, and brown trout fisheries constitutes a *specifically designated subcategory of water quality use* that is narrower and distinct from the broader and more general *aquatic life use*. Consequently, the fisheries for *each* of these species of trout and the quality of their habitat *must be fully protected* under the *federal antidegradation mandate* set forth by 40 C.F.R. §131.12(a)(3)—which North Carolina incorporates by reference in its regulations at 15A NCAC 02B.0201.The responsible federal and state agencies must stop ignoring how this protective mandate applies both to brown trout as well as rainbow and brook trout.

In summary, *pursuant to the Clean Water Act, the National Wild and Scenic Rivers Act and other statutes and regulations, the United States Forest Service has a discrete and nondiscretionary duty to provide the Chattooga's subcategories of ORW water quality use with the most rigorous antidegradation protections—a duty which the United States Forest Service has not faithfully discharged.*

**How Public Participation Has Been Stifled**

In September 2016 I directed questions to the Nantahala Forest Fisheries Biologist directly involved with the preparation of the Aquatic Ecosystems component of the LRMP. In response, you interceded by directing the dumping of a large number of Excel spreadsheets that you assert are responsive to a FOIA request that I never submitted.[12]

Inconsistent with my *public participation* rights under the 2012 Planning Rule, you did not provide any explanation for why these "355" pages of documents were responsive. Neither did you explain who created these documents, how the USFS came to be in possession of those documents, or the source of the data that was tabulated in the various spreadsheets that you produced.

Specifically, I had asked Ms. Bryan to provide me with *all reports and memorandum* prepared in connection with the assessment of the fish communities for each of the 19 long term NCIBI monitoring sites referenced on page 14 of the Aquatic Ecosystems assessment (document L-5-A). I asked for all reports and memorandum from 1993 to the present, to include the *original field data sheets used to record habitat conditions, fish counts, etc. that were used to compile either an NCIBI score or a Fish Community Assemblage Assessment at each of the 19 referenced monitoring sites.*

I asked for this information in order to identify the inescapable flaws incumbent in the NNF's stated intention to use the NCIBI as a litmus test for declaring the satisfactory habitat health of specific mountain trout streams within the Nantahala Pisgah National Forests.

Please see the full content of the email chain between Ms. Bryan and myself dating from September 16, 2016 at 1:55 PM to October 11, 2016 at 9:00 PM (otherwise indexed for this administrative record as document "L-6 Email Chain w Sheryl Bryan 10112016").

In response to my email of October 11, 2016, you directed that my request should be governed by the limitations of FOIA in lieu of being subject to the more expansive public participation mandate of the 2012 Planning Rule. In your letter of October 17, 2016 you state: "*Although you did not submit your request as a FOIA request, I have determined that it does fall within those parameters; thus, it is being processed as a FOIA request."*

This stated action unilaterally transformed my request *for answers to specific questions* pursuant to the *public participation* mandate of the 2012 Planning Rule into a much more restricted FOIA *request for documents.* Whether by accident or intent, this recasting of my request for answers to specific questions was improper.

Even hypothetically assuming you were correct, the dictionary definition of "*memorandum"* should have been broadly construed to include any brief written messages or reports from one person or department in an organization to another. *This would of necessity include emails and*

[12] These documents have been indexed for this administrative record as documents L-8-1, L-8-2, L-8-3, L-8-4, L-8-5, L-8-6, L-8-7, L-8-9, and L-8-10.

*text messages, etc. between USFS officials or between USFS officials and their counterparts at the relevant North Carolina agencies, or any other federal agency discussing the subject.*

Nevertheless, the USFS did not produce a single email, text message, memo, or narrative report of any kind evidencing any collaborative consultation between the various individuals working on the aquatic ecosystems component of the LRMP—even though the request was for any memo dating back to 1993. Neither was a privilege asserted to avoid disclosing such information.

You asserted that "we do not have the supporting field data sheets. You will receive a response from the Regional Office regarding that item in your request." Document L-7-A at page 1.

240 days have passed. I still do not have the data that I need to participate in the LRMP planning process, and to make sure the administrative record contains all relevant information. This failure to respond evidences the Forest Service's pattern and practice of refusing to provide timely answers to questions that are narrow and specific.

Supervisor Nicholas, I also asked for Ms. Bryan to describe or to provide the specific metrics or numeric standards that constitute the "*historical reference"* against which the USFS compared all other streams within the forests. See page 15 of document L-5-A. As you know, the Assessment makes the following claim: "Overall, stream community, health, and function has been, and remains, good across the Nantahala and Pisgah NFs. Across the Forests, only one site within the Catawba River basin during one year of this monitoring (1998) received a NCIBI score lower than the *historical reference*." Id. (italics added).

Despite your response dated October 17, 2016 (received October 21, 2016 via email) the USFS has still not identified how the specific NCIBI *historical reference* was derived for making comparison against streams within the Savannah River basin (e.g Chattooga). *This does not constitute a difficult question to answer.* Presumably, the historical reference constitutes an NCIBI score between 1 and 60 that was calculated for a particular stream in the Nantahala/Pisgah Forests. However, instead of simply identifying the benchmark stream etc., the Forest Service engages in a treasure hunt game of dumping a bunch of Excel spreadsheets with the implied message that the applicable benchmark is buried somewhere in one of the documents. Go find it for yourself. *Please disclose what NCIBI score from which monitoring site on what stream constitutes the historical reference.* More significantly, as discussed at pages 90-94 there appear to be insurmountable problems in using the NCIBI to assess the condition of our mountain trout streams—like the Chattooga River.

**The Public Policy Reasons for the Public Participation Mandate**

There are fundamental Due Process reasons why the information disclosure obligations of the *public participation* mandate must exceed those stipulated under FOIA.

First, such information disclosure obligations exceed those of FOIA because of the public policy interest in making sure that *interested individuals* and underrepresented groups of individuals can procure meaningful participation in the planning process. This public policy interest seeks to

preclude the planning process from devolving into one where only powerful and well-connected lobbyists dictate the terms and agendas of individual forest plans.

Second, the robust *public participation* mandate only applies during the *infrequent and limited time period* during which National Forest System unit planning takes place—which might only occur once every 10 to 15 years. The publics' right to participate at the National Forest System unit planning level is constrained by the specific time deadlines editorially controlled by local Forest Service officials. Once those deadlines pass, any information disclosure obligations become moot because the public loses any standing to contest or challenge any specific *Standard* adopted in the Nantahala's ten to fifteen year land resource management plan—unless there is evidence of bad faith, etc. Clearly, such circumstance impacts the publics' due process rights.

Stated differently, the publics' right to complain is limited to a short period of time chosen by the local Responsible Forest Service official. This circumstance demonstrates why the information disclosure obligations of the public participation mandate of the 2012 Planning Rule exceed those of the Freedom of Information Act. The public must be given the opportunity to become fully informed prior to the publication of the land resource management plan because the publics' due process rights are curtailed (1) by the deadlines editorially set by local Forest Service officials and (2) by the editorial omission of critical factual details included within the administrative record.

Third, the 2012 Planning Rule purports to claim *unilateral* authority to restrict the manner in which the public may challenge yet to be announced site specific projects. "*Except as provided in the plan consistency requirements in §219.15, none of the requirements of this part apply to [site specific] projects or activities."* 36 CFR §219.2(c).

Stated differently, the public will only be allowed to contest future site specific management initiatives by arguing that the site specific activity is inconsistent with some specific forest plan Standard, Guideline, Desired condition—but the meaning of "*inconsistency"* is only implied by 36 CFR §219.15.This explains why the public must be fully informed while the applicable Desired Conditions, *Standards,* Guidelines, and Management Approaches are being considered and *prior to any Standards being adopted* within the Nantahala's LRMP.

This need for a robust *public participation* mandate is also compelled because of the prospective threat of the USFS avoiding the use of prescriptive verbs (*"must" or "shall")* in defining the applicable Desired Conditions, Standards, Guidelines, and Management Approaches used in the LRMP. Likewise, there is a threat of the USFS increasing the number of applicable *Standards* that apply to a particular subject. The increased number of applicable *Standards* might be construed as diluting the *determinative importance* of any *single Standard* in measuring whether or not a specific management initiative violates a forest plan.

In doing so, the Forest Service essentially establishes indeterminate *Standards*—which undermines the publics' capacity to challenge the future actions and decision made by a frequently changing cast of local forest service officials. Stated differently, the 2012 Planning Rule attempts to vest officials with complete discretion to decide the *Standards*, to change the *Standards*, and then to referee the application of those changing *Standards.*

This accentuates why the Nantahala National Forest must employ prescriptive verbs (*"must" or "must not" or "shall")* in defining the applicable Desired Conditions, *Standards*, Guidelines, and Management Approaches to be applied in protecting and restoring the once outstanding trout habitat and once outstanding trout fisheries on the Chattooga. These *Standards* must compel the prohibition of activities which would further aggravate the excessive embedded sediment that plagues these specifically cited subcategories of ORW water quality use.

Unfortunately, the Nantahala National Forest has engaged in a pattern and practice of obstructing public participation on the narrow forest planning subject of how to protect the Chattooga River's subcategories of ORW water quality use. The Forest Service has evidenced the belief that the *public participation* mandate does not require the USFS to answer narrowly drawn factual questions.

The most current draft of the Aquatic Systems component of the LRMP has insurmountable problems. Despite being made aware of this percolating problem, the USFS has made no effort to engage in a deliberative and collaborative dialogue to try to discover an improved version for this component of the LRMP.

The manner in which the Nantahala National Forest has evaded answering my questions seeking clarification about these obvious inconsistencies leaves an unmistakable impression: Don't call us, we'll call you. That's not what I am required to suffer *either* under the *public participation* mandate spelled out in the 2012 Planning Rule or FOIA.

Repeatedly dumping hundreds of pages of documents, without providing any detailed answers to my specific questions, suggests the Forest Service practices a game of cat and mouse instead of straightforward disclosure.

By forcing me to have to use the much more cumbersome FOIA to collect bits and pieces of factual knowledge, the Nantahala National Forest hastens the clock to expire before the public can compose and interject critical countervailing expert opinions into the administrative record of the LRMP. The Forest Service needs to answer questions in order to avoid leaving an impression of an intention to force a flawed plan on an unsuspecting and uninformed public.

**What Public Participation Demands From the United States Forest Service**

*Public participation* demands the USFS "should be proactive….and should share information *in an open way* with interested [individuals]." 36 C.F.R. § 219.4(italics added). The Nantahala National Forest can only satisfy this nondiscretionary obligation by candidly sharing the entirety of facts and its institutional knowledge. Such honest sharing of information and close collaboration must occur *throughout the entirety* of the planning process—*not solely after the Forest Service announces a plan.*

Most importantly, open sharing of information precludes the USFS from editorially shaping its response to avoid revealing critical facts that threaten to contradict or entirely impeach the reasoning given for a preferred management *Standard*, as outlined in the Land Resource Management Plan. When asked, the USFS must in good faith reveal all that it knows about a particular subject—even if that knowledge constitutes the unpublished understandings lodged in the heads of the officials charged with designing the *Standards* impacting the Chattooga River.

As you must understand, any neglectful delay in providing specific answers to narrowly drawn questions prejudices the public *by preventing it* from arranging for competing expert opinions to be included in the administrative record. As you must know, in the future, any site specific actions on the Nantahala National Forest can only be challenged by the public based on the contents of this past administrative record. This makes the content of the administrative record extremely important.

The Forest Service controls the creation of the administrative record upon which a revision to a forest unit plan is based. The USFS has the real-world editorial ability, *but not the right*, to prevent critical contradictory facts from being disclosed to the public, from being published in the administrative record. Consequently, when answering narrowly drawn forest planning questions, *public participation* mandates the accurate, candid, and complete disclosure of critical facts and the entirety of Forest Service institutional knowledge. This disclosure obligation extends to critical facts and institutional knowledge retained in the heads of those officials charged with revising the Land Resource Management Plan but not otherwise published within the administrative record.

If the *public participation* mandate required anything less, the USFS could essentially eliminate the public's ability to contest any future site specific decision, no matter how controversial. The USFS could achieve this by simply making sure that the administrative record was sanitized to avoid disclosing facts and details that might impeach any future decision. Sanitizing the administrative record can be easily achieved by sticking to broad generalizations instead of specific details and by using precatory language to define the *Standards* that will be used to implement the Nantahala's 15 year plan—*or by individuals deleting emails or by never memorializing the results of planning officials' verbal consultations into written documents to avoid creating "working files"*[13] *to avoid the publics' future scrutiny*. Taking advantage of the extended time deadlines and the limited *document* disclosure obligations imposed by FOIA *constitutes a poor substitute* for *providing prompt, highly relevant, and detailed answers* to narrowly drawn questions about a specific forest planning subject matter.

*Public participation* demands more than the Freedom of Information Act ("FOIA").

**The Public Participation Mandate of the 2012 Planning Rule Requires More Precise Disclosure Than the Freedom Of Information Act**

The *public participation* mandate under the 2012 Planning Rule requires *more precise disclosure* of *unpublished* institutional knowledge because (1) the promulgation of a National Forest System unit plan constitutes an administrative event *which only occurs every 10 to 15 years*; (2) the plan *limits the publics' future rights.*

[13] "Working Files" meet the definition of records and should be maintained to ensure adequate and proper documentation in those circumstances where preliminary drafts, rough notes, and similar materials used to prepared final copies have been circulated to employees other than the creator for purposes of comments, edits, or approval, or if those "Working Files" contain unique information, such as substantive annotations or comments that add to a proper understanding of the Forest Service's formulation and execution of basic policies, decisions, actions, or responsibilities. See Forest Service Manual 6200, Chapter 6230, Records Creation, Maintenance, and Disposition, Section 6230.5 Definition.

The intensity of public participation disclosure obligations cannot be minimized by equating them to the limited obligations prescribed under FOIA. Unfortunately, the Forest Service impermissibly equates the two.

*They are entirely different in fundamental purpose*. Of necessity, because FOIA allows the public to stay informed about our government's daily activities, it provides more limited rights to information. In contrast, the overriding objective of the 2012 Planning Rule's *public participation* mandate is to provide for the *free exchange* of factual information and the *cooperative collaboration* between Forest Service officials and *interested individuals* throughout *the entirety* of the Nantahala Forest's land resource management planning process.

"The public participation requirements are expected to improve plans and increase planning efficiency in a variety of ways. Collaborative efforts during the early phases of planning are expected to result in improved analysis and decisionmaking efficiency during the latter stages of planning; lead to improved capacity to reduce uncertainty by gathering, verifying, and integrating information from a variety of sources; reduce the need for large numbers of plan alternatives and time needed for plan revisions; potentially offset or reduce monitoring costs as a result of collaboration during monitoring; improve perceptions regarding legitimacy of plans and the planning process; increase trust in the Agency, and potentially reduce the costs of litigation as a result of receiving public input before developing and finalizing decisions." *Final rule and record of decision, 36 CFR Part 219, National Forest System Land Management Planning,* 77 Fed. Reg. 21162-21276, at 21195 (April 9, 2012)(the "2012 Planning Rule").

FOIA only compels the production of reasonably identified documents—assuming such non-privileged documents are at least in the *constructive control* of the Forest Service.

*Public participation* mandates much more. *Providing precise and detailed answers to narrow questions satisfies this obligation but burdening the public with vast quantities of irrelevant and nonresponsive records does not. It is the quality of the answer that matters under the public participation mandate, not the quantity of pages of nonresponsive documents dumped onto the public to create an impression of cooperation.*

Absent some legal privilege, it would be inapposite to claim that this *public participation* mandate permits the Forest Service to delay or to stonewall answering narrow inquiries seeking specific facts and data pertaining to the protection, monitoring, or restoration of the integrity of water resources, fish habitat, and riparian areas located on the Nantahala National Forest.

The *public participation* mandate presumes an obligation to respond to narrowly drawn inquiries (1) when such answers are known or can be accessed from documents which are *constructively controlled* by Forest Service personnel, or (2) when any delay in publishing such facts or knowledge might adversely impact the public's ability to formulate alternatives for protecting, monitoring, or restoring the integrity of *water resources* and *riparian areas*.

During the creation of a land resource management plan, the Forest Service editorially controls both (1) the subject matter and the level of detail that it chooses to publish in the administrative record, and (2) the precise timing for when such information might or might not be released to the public. *Both editorial functions hold great opportunity for abuse of authority.*

Hypothetically, if this editorial power were to be negligently exercised, or purposely abused, an *interested member* of the public could be *untimely* delayed or *entirely* precluded from being able to recognize potential analytical omissions of fact within the forest plan's administrative record. Such abuse could prevent the public from recognizing the need to supplement the administrative record with additional facts, competing research, comments, criticisms, or suggestions.

When the USFS stonewalls the disclosure of key factual information under its constructive or actual control, the USFS effectively thwarts the public from having sufficient time to arrange for its own expert to offer a countervailing opinion on controversial land management planning issues. Challenging any future ill-conceived site specific initiative might prove impossible unless the public injects some countervailing expert opinion into the administrative record of the LRMP.

In fact, on January 26, 2012, the USFS implicitly acknowledged that one of the major benefits for adopting the 2012 Planning Rule was to try to vest the agency with greater discretion to thwart future public challenges to the agency's site specific initiatives.

The Washington Post reported Chief Tidwell as saying: "We expect to see much less litigation with this process." [14] Despite Chief Tidwell's statement, the 2102 Planning Rule must be exercised without intentionally excluding critical information that might otherwise refute the reasoning or justifications given for some management policy or site specific initiative.

In short, there is some point along this *public participation* continuum where this discretion to overlook information or to fail to include it in the administrative record constitutes neglect. Such neglectful action inappropriately prejudices the public's right to become informed and to participate satisfactorily in the forest planning process.

This is why the Forest Service must guarantee that timely and responsive communications occur between individual Forest Service officials and interested members of the public—why the Forest Service should contemporaneously answer specific questions seeking factual information and knowledge possessed by the Forest Service but not made public within the administrative record.

Absent some legal privilege, the Forest Service must not stonewall the public's request for facts and data—especially in those circumstances where sharing such knowledge might allow the public to recommend alternative *Standards* for protecting and restoring the integrity of degraded water resources and riparian areas encompassed by the Nantahala Forest plan.

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[14] *Administration issues major rewrite of forest rules,* The Washington Post "Democracy Dies in Darkness" on-line edition, Juliet Eilperin, January 26, 2012, last downloaded 03/15/2017 from https://www.washingtonpost.com/national/health-science/administration-issues-major-rewrite-of-forest-rules/2012/01/26/gIQAnquvTQ_story.html?utm_term=.413ab36ce466.

**The Pretext of A Need To Redirect Questions To State Agencies Must Not Be Casually Employed To Shield the Forest Service From Answering the Public's Questions**

Forest Service officials must not frustrate the publics' right to know by casually engaging in a practice of redirecting their inquiries for information to other federal or state agency sources. This is especially true if the Forest Service knows the answers or if the Forest Service constructively controls the data base or information needed to answer such questions.

*State agencies are not encumbered with the same intensity of disclosure obligations as the Forest Service.* By redirecting the publics' inquiries to other government agencies in lieu of simply answering the questions, the Forest Service thwarts the public's ability to obtain timely answers to critical but narrow factual inquiries. This prejudices the public's *time constrained* ability to raise factual issues within the administrative record—information which if otherwise developed and included in the administrative record might evidence the Forest Service's refusal to take a *hard look* at inconvenient conflicting information.

As the Interdisciplinary Team knows, one of the only ways that the public can hold the Forest Service accountable is to demonstrate how the Forest Service failed to give adequate scientific scrutiny of legitimate concerns raised by the public within the administrative record.

The *public participation* mandate of the 2012 Planning Rule intends for the Nantahala to collaborate with the public in order to improve and resolve issues during the plan development process. Such open and candid cooperation implicates the necessity of sharing the *institutional knowledge of individual officials* involved in the Nantahala's land resource management planning process (in particular its fisheries and wildlife biologists)—even if that knowledge resides in the heads of those individuals and not in some handwritten or type-printed document.

Unless otherwise subject to some claim of privilege, the Forest Service should not refuse to publish complete and specific answers to narrowly drawn questions relevant to evaluating whether or not the *Standards* adopted by the land resource management plan will provide effective protection of *water resources and riparian areas* within the Nantahala National Forest—especially Outstanding Resource Waters like the Chattooga.

While the Forest Service is free to editorialize in creating a land resource management plan, it does not have the right to refuse to provide complete and detailed answers to narrowly drawn questions seeking factual information not otherwise explicitly published within the administrative record. Similarly, the Forest Service does not have the right to refuse to explain the meaning or to refuse to provide sufficient keys to explain symbols, codes, protocols, and conventions, not otherwise clearly explained in any document or report shared with the public.

Neither does the Forest Service have the right to limit the scope of the answer it provides to the public's questions based on an editorial decision making process that seeks to conceal information that might otherwise provide a justification for a public challenge of a Forest Service initiative.

Neither should the Forest Service refuse to provide answers to inquiries because such answers might reveal a failure to use the *best available scientific information* to inform the planning process with respect to streams classified as a Class B Trout Stream, National Wild and Scenic River, and Outstanding Resource Water.

Although in the midst of developing a new land resource management plan for the Nantahala & Pisgah National Forests, the Forest Service has adopted a pattern and practice of offering delayed responses or incomplete responses to inquiries seeking information about this critical *water resource and riparian area* concern. This does not satisfy the Forest Service's information disclosure obligations under the *public participation* mandate spelled out by the 2012 Planning Rule. In certain cases, the Forest Service has simply refused to respond to informally submitted questions.

This has necessitated the repetitive use of the more formal, but more cumbersome, less focused, and more time consuming information gathering process dictated by the Freedom of Information Act.

Unfortunately, FOIA only compels the production of *documents* which the requester manages to *reasonably identify or describe* to the Forest Service—*not answers to discrete factual inquiries or discrete questions.* Furthermore, the FOIA obligation to produce *reasonably identified* documents only applies if the documents are *non-privileged* and are at least in the *constructive control* of the Forest Service. *FOIA says nothing about compelling the production of institutional knowledge not otherwise published in writing.*

Similarly, because there can be significant time delays between when a FOIA request is tendered and when the Forest Service responds, FOIA can work to suppress the *public participation* rights of those trying to make sure that the forthcoming land resource management plan: (1) acknowledges the Chattooga's existing *degradation,* and (2) mandates the Chattooga's remediation. In contrast, the *public participation* mandate requires *timely* responses to specific questions submitted by *interested individuals*.

**The History of My Prior Information Requests**

As stated before, reaching backwards my inquiries have focused on gaining *timely* access to facts, data sets, and the entirety of Forest Service *institutional knowledge* about three *very specific areas of concern* that must be addressed in the Nantahala's forthcoming LRMP: (1) the Forest Service's persistent refusal to admit the negative impacts of *excessive embedded sediments on the Chattooga's specifically recognized subcategories of ORW water quality use;* (2) the Forest Service's negligence in having introduced a new recreational use of the river that has caused additional sediments to be channeled into a body of water already suffering from excessive embedded sediments; and (3) the USFS's negligence in having promoted the unpermitted *destruction of the North Carolina's trout buffer by allowing the incompatible construction and use of a crazy quilt of boat launch sites, evacuation points, and portage trails.*

The USFS has repeatedly frustrated these inquiries by responding with unnecessary delay and by refusing to provide specific and complete answers to narrowly drawn questions. Presumably, these delays and refusals to answer augur the Forest Service's fear of providing potential evidence of its ongoing neglect in discharging its nondiscretionary duties. However, unless there is some claim of privilege that can be asserted to justify withholding such information, the USFS must end this pattern and practice of nondisclosure.

For two decades after 1996 neither the USFS nor the state of North Carolina bothered to monitor the Chattooga's trout habitat or trout fisheries for any degradation owing to excessive embedded sediments. During that period of time the USFS also reversed a longstanding recreational use policy. This policy reversal has caused additional anthropogenic sourced sediment to be channeled into a segment of the river that was already suffering from excessive embedded sediment. It has caused the impermissible destruction of the Chattooga's fragile trout buffer.

Despite any suggestions to the contrary, this excessive sediment problem does not constitute a *natural background condition* for which the USFS lacks responsibility. In any case, the Forest Service has no right to promote a new recreational use policy that causes additional unpermitted *sedimentation* to be channeled into these ORW trout waters. In fact, the Forest Service shares a nondiscretionary obligation to *remediate* this excessive sedimentation to bring it back below its *minimum effects threshold* for negative impacts on the Chattooga's trout populations.

The USFS, the North Carolina Department of Environmental Quality ("NC DEQ") and the North Carolina Wildlife Resources Commission ("NCWRC") all share a nondiscretionary duty to monitor, to recognize, and to take action when any non-temporary anthropogenic sourced activity directly or indirectly degrades the Chattooga's trout habitat or its brook, rainbow, and brown trout fisheries below their administratively mandated *Outstanding* level of quality.

However, pursuant to the National Wild and Scenic Rivers Act, the USFS has the superseding responsibility for the day to day management of this river. Consequently, the USFS must make sure that the appropriate intensity of nondiscretionary antidegradation protection is being provided to the Chattooga by all federal and state agencies.

The USFS must not ignore this independent duty in order to justify turning a blind eye to the Chattooga's plainly visible and otherwise measurably excessive embedded sediment. The USFS must not presume to be excused by a "not my job" defense. It is simply insufficient for the USFS to point the finger back at North Carolina. Neither may the USFS claim an ability to rely on water quality assessments prepared by the state of North Carolina *when the USFS has every reason to believe such assessments are procedurally and substantively flawed*. In fact, the USFS has an *independent duty* to protect and to enhance the Chattooga's special subcategories of ORW water quality use.

Unfortunately, for almost 20 years subsequent to 1996, the USFS absolutely failed to monitor the declining condition of the trout habitat or the brook, rainbow, and brown trout fisheries on the North Carolina part of the Chattooga. In 2015, the USFS admitted as much when it responded to my public comments that complained about this 20 year neglect.

The USFS responded as follows: "Electrofishing surveys were conducted within the upper Chattooga River from 1992 through 1996 by the NCWRC. Young-of-the-year Brown Trout densities appeared to be lower than other North Carolina trout populations during the same sampling period; however, a self-sustaining population continues to persist." [15]

The USFS must have known that the antidegradation standard that applies to the Chattooga is not satisfied just because a "self-sustaining population continues to persist." The USFS must have known that the Chattooga's native trout habitat and its brook, rainbow, and brown trout fisheries must be sustained at an Outstanding level of quality.

Lower young-of-the-year trout numbers often constitute an early warning sign of density independent habitat problems—*especially where in stream habitat is plagued with excessive embedded sediment.* As the USFS has recognized on other streams throughout the United States, excessive embedded sediment degrades the ability of salmonids to produce offspring and to convert juveniles into fishable adult populations.

In addition, the NNF knows how the United States Forest Service, the Chattooga Coalition, and responsible state agencies from Georgia and South Carolina have been annually monitoring trout populations in South Carolina for decades. In fact, the USFS published an article on October 10, 2010 praising this collaborative monitoring effort.[16]

Consequently, the Nantahala National Forest must have understood that these joint monitoring efforts maintained a data base that carefully recorded the ratio of young-of-the-year to all other age classes on the South Carolina segment of the river. The Nantahala National Forest must have understood the critical significance of this ratio as a long term indicator of the relative health of a trout population.The Nantahala National Forest must have understood there was a baseline to which North Carolina's trout populations could be contrasted.

Despite knowing this, the NNF never took the logical next step of investigating any cause and effect correlation between this excessive sediment and the lower young-of-the-year numbers on North Carolina's headwaters. Instead, it ignored this discrete and nondiscretionary duty.

To stress the Forest Service's culpability for turning a blind eye to the degradation of the trout habitat and trout populations on North Carolina's headwaters, beginning in 2004, the USFS consumed a decade conducting extensive environmental investigations in advance of publishing the 2012 EA and subsequently the 2015 EA. [17]

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[15] Chattooga River Boating Access, Environmental Assessment, USFS, May 15, 2015 at page 205 (the "2015 EA")(otherwise indexed for the administrative record as document "E-1").

[16] On October 10, 2010, Ms. Gwyn Ingram of USFS published an article entitled "Chattooga Coalition Tracks Success of River Species", which was last downloaded on March 8, 2017 from https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5371521.pdf, and otherwise indexed for this administrative record as Floyd document "L-9".

[17] (1) *Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor*, Environmental Assessment, United States Forest Service, January 2012 (the "2012 EA")(otherwise indexed for the administrative record as document "B-1") and (2) *Chattooga River Boating Access*, Environmental Assessment, United States Forest Service, May 15, 2015(the "2015 EA")(otherwise indexed for the administrative record as document "E-1 Trail Construction EA May 15, 2015_96811_FSPLT3_2466259").

These environmental assessments were prepared to lift the ban on creekboating on North Carolina's headwaters and to endorse disrupting the trout buffer by building special trails needed only by creekboaters. *Despite publishing over 750 pages of environmental analysis, the USFS neither conducted any field studies of this excessive embedded sediment and chronic sediment transport imbalance, nor any antidegradation assessment of the trout habitat and fisheries on North Carolina's headwaters.* The USFS never took a *hard look* at the degraded condition of the trout habitat. The USFS knew about the massive logjam and the visibly obvious sediment transport imbalance. However, the USFS never told the public about them. The USFS never tried to determine if the amount of embedded sediment exceeded any reasonable *minimum effects threshold* for disrupting the early life cycle of trout.

On November 5, 2014, I provided comments for the draft environmental assessment regarding the planned construction of special paddler trails. I complained about the absence of any contemporaneous assessment of either the condition of the river's in stream trout habitat or the degrading quality of the associated rainbow, brook, and brown trout fisheries. See document E-1 at pages 186-225. Subsequently, I submitted a formal objection on July 7, 2015.

Please consider the email chain discussing the "Floyd objection" that occurred between District Ranger Wilkins and his subordinates, Mr. Jason Farmer, Fisheries Biologist, and Ms. Heather Luczak, from September 15, 2015 to September 24, 2015.[18]

In that September 2015 email chain, Ranger Wilkins states:

> "Jason, James Melonas and I will sit down with Mr. Floyd on 9/28 to go over his objections to my Chattooga decision. Attached is his objection. It has some 88 pages a lot of which are pictures. Most of his concerns are really outside the scope of the decision. I spent over 30 min with him on the phone today and I think *I can make him feel better with your help*. He sees some sediment in Norton Mill or the Chattooga and it is a significant issue that we should deal with because it IS or MIGHT be causing significant reductions in fish and insect populations.
>
> He thinks we have never done any past surveys for fish and bugs *and we have.* Before the end of the day on Thursday 9/24 I need you to summarize when various types of surveys were done in our section of the river over the years. Just list the type of survey and date. THEN provide us a summary statement on general trends that we know or what we think we know. Not a written summary of each fish survey. *I figure you have some general info that you could say about the Chattooga Coalition's annual survey that might help even though it is usually in SC/GA.*

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[18] This email chain was contained within a document entitled "email.pdf" (otherwise indexed for this administrative record as Floyd document "C-6") which was transmitted to me by the Nantahala Forest under a cover letter dated February 2, 2016(otherwise indexed for this administrative record as Floyd document "C-5") in response to a Freedom of Information Act request originally dated January 4, 2016 (otherwise indexed for this administrative record as Floyd document "C-4").

> I do NOT need you to respond to his objections. We have a written response prepared. I just need an outline of past surveys .. etc and generally what we found."[19]

The full significance of this email chain is detailed later in the section entitled **"A Fourth Example of a Pattern and Practice of Neglecting To Disclose Critical Information and of Providing Piecemeal Responses to Requests for Information."** See page 56 of this notice.

However, to establish a placeholder for that detailed discussion, please consider the significance of the District Ranger's September 2015 reference to: (1) "He thinks we have never done any past surveys for fish and bugs *and we have";* and (2) "I figure you have some general info that you could say about the *Chattooga Coalition's annual survey* that might help even though it is usually in SC/GA."[20]

These statements suggest Ranger Wilkins was aware and Mr. Farmer also seemed to be aware that detailed trout population metrics had been carefully collected on an annual basis for many years on the river flowing through South Carolina/Georgia by a collaborative partnership consisting of federal and state agencies and concerned citizens. Presumably, based on his emphatic "*and we have*", Mr. Wilkins must have also believed that trout population monitoring had been *conducted* on North Carolina's headwaters at some point in time.

The fact is, between 1992-1996, the North Carolina Wildlife Resources Commission and the United States Forest Service conducted extensive electrofishing to assess the condition of the trout populations at two separate locations on the Chattooga in North Carolina.

On September 15, 2015, because Ranger Wilkins instructed Mr. Farmer to "summarize when various types of surveys were done in our section of the river" and to "THEN provide …a summary statement on general trends that we know or what we think we know", Ranger Wilkins implicated his understanding that the results of those 1992-1996 trout surveys had been archived in a document prepared contemporaneously in the past. [21]

In stark contrast, on May 15, 2015 the *USFS had conveyed a distinct impression that it had no involvement in conducting the 1992-1996 trout population surveys on the North Carolina part of the Chattooga*. In response to my written complaint about the lack of scientific data, the USFS made the following assertion of fact: "Electrofishing surveys were conducted within the upper Chattooga River from 1992 through 1996 *by the NCWRC."* 2015 EA at page 205 (otherwise indexed for this administrative record as document E-1)(italics added here).

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[19] Document C-6 at page 2(italics added for emphasis).

[20] Document C-6 at page 2(italics added for emphasis).

[21] According to documents produced by the state of North Carolina, "information was collected by the North Carolina Wildlife Resources Commission *and US Forest Service* in August of 1992 and 1993 at 2 sites on the Chattooga River. Site 1 is approximately 1 km below Bullpen Bridge and site 2 is approximately 2 km above the bridge." See document L-2 River Coalition R produced as an attachment to document H-11 via email 12122016 (italics added).

I now know this to have been less than a completely accurate choice of words. On May 8, 2017, after trying *unsuccessfully* for over a year to have the USFS provide me with any narrative summarizing the results of this definitive 1992-1996 Chattooga trout population study, curiously and belatedly, the North Carolina Wildlife Resources Commission provided me with a copy of a 58 page report entitled "*EVALUATION OF WILD TROUT REGULATION WITH A NATURAL BAIT ALLOWANCE,* Final Report, Mountain Fisheries Investigations, Federal Aid in Fish Restoration Project F-24, James C. Borawa, Micky M. Clemmons, NCWRC, 1998 ("Borawa and Clemmons 1998")(otherwise to be indexed for the USFS administrative record as document "00-T Borawa and Clemmons 1998").

On page 3 of this report, Borawa states: "We thank Jeanne Riley, Monte Seehorn, and others of the U.S. Forest Service (USPS) and Steve Moore and others of the National Park Service for their assistance in the collection of the fish population data. Without their help, it would not have been possible to complete the data collections, particularly on the Chattooga River."

Stated differently, the USFS was *actively* involved in the collection of the Chattooga's trout population data from 1992-1996. It bears further investigation about how and why the USFS never managed to put its hands on this report despite being asked multiple times to provide any such report.

The significance of this inconsistency will be further expanded upon later in this letter at the section titled: **"A Fourth Example of a Pattern and Practice of Neglecting To Disclose Critical Information and of Providing Piecemeal Responses to Requests for Information."**

The bottom line is the USFS should be imputed with constructive control of any and all reports summarizing the results of the 1992-1996 North Carolina trout population surveys. Analogous to how public officials must be held accountable for the content of emails dealing with the public's business that have been transmitted and archived on their private and non-government email accounts, the Nantahala National Forest must not be allowed to excuse itself from producing such critical information by claiming that such documents are in the possession of some other National Forest or some other state agency.

Such excuses are particularly pernicious in this case. The USFS denies having any obligation to produce these narrative reports from 1992-1996. Simultaneously the USFS draws upon some of the data detailed in such reports to create editorialized documents intended to dissuade the public from pressing a formal objection to the Nantahala's management initiatives.

Supervisor Nicholas, these prior trout population reports established specific trout standing crops against which the USFS could have compared the trout populations that existed on the same locations just before the publication of the 2012 Finding of No Significant Impact.

*An antidegradation assessment of the Chattooga's trout habitat and trout fisheries should have been conducted but wasn't.*

The failure to disclose this critical baseline trout population report warrants asking for permission to supplement the prior administrative records for several past decisions promulgated pursuant to the National Environmental Policy Act ("NEPA). Neither NEPA, the public participation mandate of the 2012 Planning Rule, nor FOIA endorse such neglectful non-disclosure of such critical information. The totality of circumstances surrounding my multiple unsuccessful attempts to compel the USFS to provide me with any document such as the Borawa

and Clemmons 1998 report suggests the USFS may have acted with less than good faith in addressing my inquiries.

Had the trout population standing crops documented in the 1992-1996 surveys been disclosed prior to the publication of the 2012 EA, and had the USFS told the public that no trout population studies had been conducted in North Carolina since 1996, trout anglers could have recognized the need to demand an antidegradation assessment of the trout habitat and fisheries on the North Carolina part of the river. [22]

After rejecting my objection to the 2015 EA, and immediately after the January 2016 issuance of the FONSI for the 2015 EA, I asked to be provided with *any report* summarizing the results of the critical trout population survey that had taken place in 1992-1996 on the Chattooga's headwaters in North Carolina. Unfortunately, it became necessary to file *multiple* Freedom of Information Act requests in order to try to obtain the narrative reports detailing the results of those 1992-1996 trout population surveys.

Unfortunately, the USFS never managed to put its hands on the Borawa and Clemmons 1998 report summarizing the 1992-1996 trout population surveys. This necessitated multiple FOIA appeals to the Chief of the United States Forest Service. The truth is the Forest Service should have produced the Borawa and Clemmons 1998 report pursuant to the *Public Participation* mandate of the 2012 Planning Rule. I should not have had to resort to FOIA and FOIA appeals to try to run down this *absolutely* critical information.

My FOIA appeals produced additional raw data but not the critical Borawa and Clemmons 1998 narrative report. Unfortunately, this raw data proved impossible to use to draw comparisons between current trout population conditions to prior conditions. The Forest Service must have recognized the limited usefulness of such information absent the public being told the specific locations (latitude and longitude or other identifying information) where this limited trout population data had been collected.

Moreover, the significance of this additional information proved impossible to decipher because the NNF did not provide any key explaining undefined abbreviations and acronyms.

*Most remarkably*, despite the Forest Service's *reported involvement* with the NCWRC in having collected the trout population data on the North Carolina part of the river between 1992-1996, despite undertaking multiple FOIA searches, and despite the subsequent production of previously undisclosed documents on appeal, the NNF *inconceivably* did not lay hands on the reports that detailed the results of these trout population studies on the North Carolina part of the Chattooga.

[22] One of those narrative reports has been indexed for this administrative record as document L-1 River Coalition – N. Per this report, the trout standing crop averaged 31.22 kg/hectare over the four years sampled. The high was 43.2 kg/hectare and the low was 22.23 kg/hectare. Had this report been published before the 2012 EA, anglers could have recognized how their creel experiences in 2012 no longer matched the outstanding trout standing crops documented between 1992-1996.

Had the narrative reports detailing the 1992-1996 trout population studies been properly disclosed prior to the 2012 EA, I would have acted entirely differently in exercising my due process rights. In fact, I sacrificed some of my administrative rights because of the false belief that the USFS had disclosed all that it knew about the Chattooga's trout populations in North Carolina—*when in fact we now know that the USFS did not reveal all that it knew*.

Consequently, the NNF must be imputed with knowing but not disclosing that these trout population studies had been summarized into a very informative and easy to read narrative report. More importantly, the USFS must be imputed with having constructive control of the Borawa and Clemmons 1998 report. The NNF must be held accountable for knowing that such a report must have otherwise been in the possession of either the Sumter National Forest, the Chattahoochee-Oconee National Forest, the Chattooga Coalition, the North Carolina Wildlife Resources Commission, the South Carolina Department of Natural Resources, or the Georgia Department of Natural Resources, Wildlife Division.

When preparing the 2012 EA and the 2015 EA, the NNF should have published and carefully discussed the results of the Borawa and Clemmons 1998 report but it didn't. This *peculiar and prejudicial* fact compels an explanation. *In any case, these trout population studies have now surfaced, accidentally, from other sources*.[23]

Reconsider the extensive history of the Forest Service's responses to my information inquiries on this subject of trout population studies on the North Carolina part of the Chattooga. On January 4, 2016, the USFS was presented with an initial FOIA request that asked:

> " On May 15, 2015, the Forest Service published an Environmental Assessment *Chattooga River Boating Access.*
>
> On page 205 of this May 15, 2015 Environmental Assessment, the Forest Service states 'Electrofishing surveys were conducted within the upper Chattooga River from 1992 through 1996 by the NCWRC. Young-of-the-year Brown Trout densities appeared to be lower than other North Carolina trout populations during the same sampling period; however, a self-sustaining population continues to persist.'
>
> (1) Please provide me with any document, electrofishing survey results report, memorandum, written analysis that the Forest Service relied on, used, read, or studied to make this written factual assertion, as a true and accurate statement, that electrofishing surveys were conducted on the Upper Chattooga by the North Carolina Wildlife Resources Commission from 1992 to 1996 and that young-of-

[23] These documents contain easily read summaries of trout population biomass/standing crops, young-of-the-year counts, etc. that were documented by a collaborative effort of the USFS and the North Carolina Wildlife Resources Commission at one monitoring site located 2 km above the Bull Pen Bridge and another monitoring site located 1 km below the Bull Pen Bridge from 1992 to 1996. These documents contain highly relevant information that answer many of the questions that I have been asking for a very long time about the prior baseline condition of trout populations on North Carolina's headwaters. The relevant documents have been otherwise indexed for this administrative record as documents "00-T Borawa and Clemmons 1998"; "L-1 River Coalition N"; "L-2 River Coalition H"; and "L-2 River Coalition R".

the-year Brown Trout densities appeared to be lower than other North Carolina trout populations during the same sampling period.

(2) Please provide me with any handwritten notes of conversations (by telephone or in person) that pertain, relate, reference, or discuss these electrofishing surveys: (A) between any of the individuals involved in the preparation of the Environmental Assessment as listed on pages110-111 of the Environmental Assessment or (B) between any one of these listed Preparers (on pages 110-111) and any individual outside that group of listed Preparers." [24]

The Forest Service's initial document response on February 2, 2016 [25] was found lacking and an additional follow up/clarification was submitted to the Forest Service on February 4, 2016.[26]

Despite the Forest Service's published admissions of its close collaboration with the Chattooga Coalition in collecting data on the Chattooga in South Carolina (see Document L-9), and Despite Ranger Wilkins admission *"and we have"*, the USFS never produced any of the reports summarizing the results of the 1992-1996 trout population studies that took place on the Chattooga in North Carolina.

*This nondisclosure raises many questions* that might justify a request for an opportunity to supplement the administrative record through discovery.

Presumably, the Forest Service would now explain away this highly prejudicial fact, by suggesting: (1) the documents were not in their possession when I asked for them; (2) the USFS had no obligation to advise me that narrative reports had been prepared to summarize the results of the trout population assessments conducted for 5 years between 1992-1996 by the USFS and the North Carolina Wildlife Resources Commission at one location situated 1 km below the Bull Pen Bridge and at another site situated 2 km above the bridge.

Fortunately, we have Ranger Wilkins' emphatic statement: "[Floyd] thinks we have never done any past surveys for fish and bugs and we have."[27] This statement equates to an awareness of the existence of such reports, if not an admission of the USFS constructive control over such data. Given the persistent nature of my requests to be provided with such trout population survey reports, even if the Nantahala National Forest wasn't in physical possession of either the trout population data collected in South Carolina, or the data collaboratively collected in North Carolina from 1992-1996, the NNF should have known that this information was likely held by either the Sumter National Forest, the North Carolina Wildlife Resources Commission, or the Chattooga Coalition. Nevertheless, the Forest Service never tried to find these reports.

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[24] The text of this FOIA request has been otherwise indexed for this administrative record as Floyd document "C-4".

[25] The text of the Forest Service's FOIA response on February 2, 2016 has been indexed for this administrative record as Floyd document "C-5"

[26] The text of this subsequent February 4, 2016 clarification and new FOIA has been indexed for the administrative record as Floyd document "C-7".

[27] See the document indexed for this administrative record as Floyd document C-6 at page 2.

In fact, as of January 31, 2017, both Ranger Wilkins and Mr. Jason Farmer were still on the Chattooga Coalition email distribution list maintained by Mr. Monte Seehorn of the Chattooga Coalition.[28] It remains to be determined to what extent these parties have ever communicated.

In any case, the record evidences how the USFS never attempted to determine which of these other agencies or organizations might possess copies of the reports summarizing the results of the 1992-1996 studies of trout populations on the North Carolina part of the Chattooga. After clarifying why the Forest Service's initial response to my January 4, 2016 FOIA was incomplete, and after tendering a new FOIA on February 4, 2016, District Ranger Wilkins emailed me on February 5, 2016 as follows:

> "Mr. Floyd, I may be incorrect but reading between the lines of you [sic] last Freedom of Information Action appeal *I am not sure you have a clear picture of what we have for records and what we don't.* If you would like to schedule a day when I am here I will be happy to show you our Chattooga files, pull them out and let you sit in the conference room and go through them for a couple hours."[29]

While discouraging me from trying to gather information about the Chattooga, Ranger Wilkins *never advised me* that on point documents such as 00-T Borawa and Clemmons 1998, L-1 River Coalition N, L-2 River Coalition H, or L-2 River Coalition R might exist or might be in the possession of other federal and state officials.

Supervisor Nicholas, the USFS has not cooperated fully. Had the USFS simply answered the narrow questions posed to it, the USFS could have avoided dumping large caches of largely unhelpful documents. Instead the Nantahala Forest ignored its 2012 Planning Rule responsibilities to foster collaborative efforts during the early phases of planning. The Forest Services' production of hundreds of pages of only half responsive documents neither constitutes good faith compliance with *public participation* nor technical compliance with FOIA.

This pattern and practice of piecemeal disclosure or complete refusal to disclose has effectively frustrated and delayed my information gathering efforts. This has had a prejudicial impact.

Supervisor Nicholas, the recently recovered documents "00-T Borawa and Clemmons 1998", "L-1 River Coalition N", "L-2 River Coalition H", and "L-2 River Coalition R", contain highly relevant baseline trout fisheries data that would have assisted my fashioning an objection to the incompleteness of North Carolina's 2016 Section 303(d) list. Despite having day to day responsibility for managing this National Wild and Scenic River, and for making sure that any use of the river does not run afoul of the Clean Water Act, the USFS never managed to put its hands on any of these reports. When the trout population data reported within those 1992-1996 studies is properly compared against the trout population data collected in September 2016 by NC DEQ, the negative impact of the long term neglect of the Chattooga's excessive sediment becomes obvious.

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[28] See Mr. Monte Seehorn's email dated 01/31/2017 otherwise indexed for the administrative record as document N-1.

[29] This email chain has been indexed for this administrative record as Floyd document "C-8-A"(italics added).

North Carolina's administrative record establishes that rainbow, brook, and brown trout lived in the Chattooga and its tributaries before ORW designation in 1988. However, NC DEQ did not manage to capture even a single rainbow or brook trout at any of the eight 600 foot reaches that it sampled in September 2016. *NC DEQ's September 2016 failure to capture and release even a single rainbow or brook trout constitutes dispositive evidence of degradation.*

The simple fact is the USFS has initiated activities that have caused additional sediments to be channeled into an already overstressed stream. When challenged about its neglect of the river's habitat, the USFS has simply responded by pointing the finger of responsibility back towards the state of North Carolina for the trout fishery.

Because the USFS did not timely provide me with a copy of any of those trout population monitoring reports (document 00-T Borawa and Clemmons 1998; L-1 River Coalition N; L-2 River Coalition H; and L-2 River Coalition R), I was prevented from incorporating such reports into my administrative objections.

The USFS has sufficient reason to suspect that the Chattooga suffers from embedded sediment which exceeds any reasonable minimum effects threshold for disrupting the early life cycle of trout. In fact, the USFS (or its agents) must have observed this excessive sediment as early as 2007 when they had their photographs taken in front of the massive logjam. Nevertheless, the USFS continues to ignore its independent duty to identify and address this visibly obvious and excessive embedded sediment problem. *The USFS knows that NC DEQ did not capture a single rainbow or brook trout when it electro-fished almost a mile of water in September 2016.*

The record implicates an effort to construct a wall of presumed agency expertise while ignoring the most dispositive indicator of the degraded condition of the Chattooga's trout habitat and trout fisheries: *the visibly obvious excessive embedded sediment*. These look the other way denials of the excessiveness of this sediment implicates blameworthy neglect.

Setting aside these challenges, the preferred objective is to collaborate with the USFS to develop an action plan for remediating this excessive sediment and for finding the appropriate mix of public/private funding needed to begin that abatement. Unfortunately, the USFS has rejected any overtures to cooperate by engaging in a pattern and practice of substantially delaying or entirely refusing to answer specific questions that simply must be addressed while developing the Nantahala's LRMP.

The public must be provided with prompt and accurate answers to questions regarding the LRMP's intended plan for preventing any additional degradation of the Chattooga's subcategories of ORW water quality use. The USFS must cease piecemealing responses or redirecting the public to make inquiries to state agencies. Whether by neglect or otherwise, such practices encourage the clock to run on the public's right to gather critical information and to have that information incorporated into the LRMP's administrative record. This does not square with the 2012 Planning Rule's *public participation* mandate.

Additionally, the USFS must populate the administrative record with all available data pertaining to the degrading condition of the trout habitat and brook, rainbow, and brown trout fisheries on the North Carolina part of the Chattooga.

Any unpublished institutional knowledge about the declining condition of the Chattooga's trout habitat and brook, rainbow, and brown trout fisheries should be disclosed. Such information might be found in the content of *unrecovered* emails and other unpublished handwritten notes summarizing telephone conversations between the USFS and other federal and state agencies. It remains to be determined to what extent the Forest Service made any effort to collect such handwritten notes. To the extent there is relevant unwritten institutional knowledge regarding the degrading condition of this trout habitat and trout fisheries, it should be added to the administrative record.

The Notice of Initiation for Revision of the Land Resource Management Plan was published September 25, 2013.

Consequently, after September 25, 2013, all of my inquiries and questions about the Chattooga River should have been considered against the backdrop of the *public participation* mandate of the 2012 Planning Rule.

The public must not suffer being compelled by the USFS to rely on the more cumbersome process of submitting FOIAs to obtain *mere hints of answers* to LRMP related questions. While working together is in the best interest, there are multiple examples of how the Forest Service has engaged in a pattern and practice of effectively suppressing *public participation* subsequent to the restart of the LRMP planning process. These examples augur why there might be a need to supplement the administrative record in the future.

**The First Example of a Pattern and Practice of Neglecting To Disclose Critical Information on a Timely Basis and of Providing Piecemeal Responses to Requests for Information**

On November 27, 2015, the Nantahala National Forest first responded to a FOIA request dated October 20, 2015. Among other things, item #2 of this October 20th FOIA specifically requested: "Please provide me with electronic copies of any intra forest agreement, order, decision, letter ruling, etc. *evidencing how, or explaining why there was legal authority for* [the] *Decision for Appeal (#04-13-00-0026)* to be applied to the Nantahala National Forest—and not just exclusively to the Sumter National Forest." [30]

The cited Decision for Appeal may have unnecessarily initiated a decade long process intended to justify making certain changes to the Nantahala National Forest land resource management plan at the request of a single special interest group—who lacked standing to demand this.

This Decision for Appeal was processed in response to an appeal filed by American Whitewater captioned as "Appeal of resolution of Issue #13 in the Record of Decision for the Revised Land and Resource Management Plan for the Sumter National Forest, the Record of Decision for the Revised Land and Resource Management Plan for the Chattahoochee National Forest, and to the extent that the decision is applicable to the implementation of this decision in the Nantahala National Forest*." NOTICE OF APPEAL AND STATEMENT OF REASONS,* American Whitewater, Appellant, by their counsel, Patton & Boggs, LLP, April 15, 2004.

The Forest Service's seven page Decision for Appeal swept away almost thirty years of precedent with the following *uncontested* finding:

> "[T]he Regional Forester does not provide an adequate basis for continuing the ban on boating above Highway 28. *Because the record provided to me* does not contain the evidence to continue the boating ban, his decision is not consistent with the direction in Section 10(a) of the WSRA or Sections 2(a) and 4(b) of the Wilderness Act or agency regulations implementing these Acts.
>
> 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." Document 00-B at page 6(italics added).

My October 20, 2015 FOIA specifically requested records explaining why an appeal filed with respect to *final decisions* impacting the Sumter National Forest (South Carolina) and the Chattahoochee National Forest (Georgia) land management plans had any lawful due process authority to compel any action on the Nantahala National Forest—*which at that point in time (April 2004) was not the subject of any final action or revision to its land management plan that would have created standing for the American Whitewater/appellant to complain.*

[30] The October 20, 2015 FOIA has been indexed for this administrative record as document "00-C" and the 7 page text of this Decision for Appeal, #04-13-00-0026 has been indexed for this administrative record as document "00-B".

This appeal decision was improperly applied to the Nantahala National Forest. Interested individuals with a *protectable interest* pertaining to the Chattooga's headwaters in North Carolina did not receive proper notice and an opportunity to be heard.

In compelling the Nantahala National Forest to amend its existing LRMP in accord with the Appeal Decision, such individuals' due process rights were unlawfully prejudiced. Such individuals simply had no way to know to appear and protect their rights which were de facto being prejudiced away by the April 2005 Appeal Decision.

This Appeal Decision appears to have been reached solely by considering the *uncontested allegations* spelled out in the Appellant's 95 page complaint. [31] Ignoring the rights of others, this appeal made bold but *unchallenged* assertions such as that paddling constitutes "*one of the oldest and least environmentally impactful forms of primitive recreation.*" 00-B-1 at page 6 (italics added).

The fact is creek boaters must "seal launch"[32] into narrow creeks like the Chattooga when the water is running high. Both the Appellant (and the Reviewing Officer for the Chief) should have known that seal launching a boat can cause the destruction of the river bank by tearing away the living groundcover that hold the soils in place. This can even cause damage to bryophytes when boats are launched off of rocks lying along the banks of such creeks.

The destructive act is functionally analogous to a plow blade being pushed/pulled by a tractor across the fragile trout buffer. Unfortunately, the Reviewing Officer for the Chief was not explicitly told how boats being seal launched would predictably cause the destruction of the Chattooga's protected trout buffer. Instead the Appellant pressed the *uncontested* claim that their recreational interest could not be prohibited "until a NEPA compliant analysis demonstrates that boating is environmentally harmful." Id. at page 15.

More critical to North Carolina Lifetime Sportsman licensees, neither did the Appellant's *uncontested* advocacy bring to the attention of the Reviewing Officer for the Chief that the Chattooga in North Carolina had been classified as an Outstanding Resource Water specifically to prevent any anthropogenic sourced degradation of the river's *outstanding* native trout habitat and its *outstanding* brook, rainbow, and brown trout fisheries.

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[31] *NOTICE OF APPEAL AND STATEMENT OF REASONS,* American Whitewater, Appellant, April 15, 2004, otherwise indexed for this administrative record as Floyd document 00-B-1.

[32] During high currents (>350 CFS), a paddler can experience significant difficulty, and in fact would be normally precluded from putting their boat into this narrow creek before entering its cockpit, because the ripping current would sweep them both away. Instead, the paddler must *first* climb into the cockpit of a six foot, forty pound kayak, and then launch the weight of their body and the boat into this narrow creek by propelling the bottom of the boat across the top of the bank while simultaneously using their hands or paddle to accelerate the force of that forward motion. The friction of the bottom of a boat being forcefully *seal launched* off of a river bank displaces the soils within the trout buffer and causes them to be redeposited into the river as unpermitted fill. *It is functionally analogous to a plow blade being pushed/pulled by a tractor across the landscape*. Consequently such seal launch sites produce distinct point sources of pollution where dirt is deposited into the creek and where sediment flows are channeled into the water—much as if a ditch had been dug.

Had proper notification been given to me as a North Carolina Lifetime Sportsman, an entirely different interpretation would have been provided about why the Chief of the Forest Service had decided in 1976 that creekboating had to be prohibited under the Chattooga's first river plan.[33]

The full context of Chief McGuire's comments demonstrate why boating, *as well as certain other recreational use*s, needed to be prohibited on the fragile headwaters in North Carolina—for reasons other than just safety. The Chief was clearly concerned about protecting the *"near natural"* condition of the riparian corridor, trout buffer, and water quality, from the inescapable damage which he must have understood would be caused by the development of an incalculable number of portage trails, river evacuation sites, and boater launch points on the most fragile part of the entire river. The Chief understood that the soils predominantly present in North Carolina are unsuitable for the development of paddler portage trails. Unfortunately, this reasoning was never brought to the attention of the Reviewing Officer for the Chief during the 2004 appeal—to the prejudice of myself and other similarly situated individuals.

Instead, the Appellants pressed a subsequently rejected legal fiction that some implied right to paddle the creek was being denied without any "data or studies to support the decision." Id. at p.6

This appeal took place without the government ever providing specific notice and the opportunity to be heard to the only group that arguably held a protectable interest: North Carolina Lifetime Sportsman licensees. Specifically, if properly noticed in 2004, this North Carolina Lifetime Sportsman would have appeared to inform the Reviewing Officer for the Chief why the boating ban needed to remain in place on the headwaters in North Carolina. The Reviewing Officer would have been advised of the specific reason why the Chattooga had been designated ORW in North Carolina, and why creek boating cannot be pursued on the Chattooga's headwaters in North Carolina without violating the *antidegradation protections mandated* for the special subcategories of designated use of North Carolina's water quality—namely the once *outstanding* trout habitat *and outstanding* trout fisheries.

*This seven page appeal decision neither examined creek boating's previously recognized potential for destroying North Carolina's trout buffer nor its propensity for channeling additional sedimentation into the water in violation of the antidegradation mandate that applies to the Chattooga's Outstanding Resource Waters.*

When the Appeal Decision was issued in 2004, the Forest Service should have known that additional sediment would be channeled into the water as a consequence of the unregulated construction and use of paddler created boat launch sites, takeouts and portage trails. Today the impacts of that prejudicial denial of due process is evidenced by the destruction of the trout buffer and increased sedimentation. Consequently, a FOIA request dated October 20, 2015 asked to be provided with any document that might explain why there was legal authority in 2004 to compel an amendment to the LRMP of the Nantahala National Forest at that point in time.

[33] This first river management plan was published in the Federal Register, Volume 41, No. 56, Monday, March 22, 1976 on pages 11847-11856. This plan has been otherwise indexed for this public record as Floyd document "00-A").

The Nantahala National Forest's initial FOIA response *acknowledged that relevant documents existed* but stated: "The records requested in item 2 have been referred to the Regional Office for review, determination, and final response to you."On December 17, 2015 @ 7:03 am, I emailed a request for clarification as to when I might receive a response with respect to item #2. On January 4, 2016, via email @ 11:56 am, the Southern Region suggested that it did not have "any pending referrals from the National Forests in North Carolina to the Regional Office."

I responded at 3:26 pm that day by challenging the factual accuracy of this assertion while providing a detailed explanation for why the Forest Service's statement could not be the case. On January 25, 2016, @ 12:49 pm, the Southern Region admitted this mistake via email as follows: "Thank you for the information provided. I am currently processing the referrals (2) from the National Forest in North Carolina on your behalf. We would appreciate an extension and anticipate a response to you by Wednesday, February 3."

The Forest Service's self-designated deadline passed without any further communication from the Southern Region. On February 5, 2016 @ 6:30 am, *another* request for an update was emailed to the Southern Region. Subsequent efforts to resolve this request proved fruitless and concluded with the Southern Region offering to discuss this matter via teleconference. On February 17, 2016 a teleconference was held with Ms. Danielle Hegler-Wooten, Southern Region FOIA Program Manager and Ms. Carol Milholen, FOIA coordinator for the Nantahala National Forest.

In that telephone call, without asserting any claim of privilege, and despite the Nantahala's prior admission that "records requested in item 2 have been referred to the Regional Office", Ms. Hegler-Wooten now asserted that no documents had been located that were responsive to item #2 of the original October 20, 2015 FOIA request.

Hence, either one of two conclusions follow. Presuming the truth of these representations, there is no *documented explanation for why there was a legal basis* for this April 2005 Appeal Decision to have been applied to the Nantahala National Forest. Alternatively, such documentation exists, but the Forest Service has failed to produce such documents, or to assert some privilege, despite repeated efforts to obtain this critical information.

In any case, it took over 4 months for this simple request to be resolved. *In short, this ultimate response was not provided on a timely basis.*

**The Second Example of a Pattern and Practice of Neglecting To Disclose Critical Information and of Providing Piecemeal Responses to Requests for Information**

Prior to lifting the ban on creek boating in North Carolina, the Forest Service conducted a comprehensive biophysical audit of the Chattooga's riparian corridor. The Forest Service wanted to establish the baseline physical condition of the entire riparian corridor prior to allowing boating. As part of the administrative record associated with lifting the ban, the Forest Service summarized the results of this audit in a 14 page document entitled "*Biophysical Monitoring Information on the Chattooga River*" downloaded from the Forest Service's website at: http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsbdev3_037225.pdf.[34]

This audit inventoried user created campsites, trails, and a total of 182 erosion sites where sediment was presumably being discharged into the river. Any contribution of sediment into the water from any erosion site would constitute an anthropogenic source of *degradation* for the Outstanding Resource Waters in North Carolina. Unfortunately, this summary report did not disclose the precise latitude and longitude coordinates for those 182 erosion sites. These erosion sites were overlaid onto *crude snap shots of* topo maps of different reaches of the river, but without providing any latitude and longitude coordinates for the pinpointed erosion sites. Neither did the Forest Service summarize which erosion sites were most problematic in terms of size or what kind of human activity had caused them. This prevented the public from recognizing how the greatest amount of anthropogenic physical damage was inventoried in South Carolina and Georgia—not North Carolina.

These maps suggested 5 of these 182 sources of sedimentation were located in North Carolina. But based on my familiarity with the undisturbed physical condition of North Carolina's riparian corridor, I believed the Chattooga Cliffs remained in a "near natural" condition just as the Chief of the Forest Service had described it in 1976. Doubting the existence of 4 of these 5 erosion sites, I thought to field verify whether or not the USFS had mistakenly misrepresented the existence of 4 of these 5 erosion sites in North Carolina. To field verify I needed the exact latitude and longitude locations for these alleged erosion sites.

Consequently, on October 14, 2015, pursuant to FOIA, a request was made for the *specific* latitude and longitude coordinates for each of the individual features that had been previously inventoried and plotted onto these crude topo maps.[35]

On November 5, 2015, twenty two calendar days later, the Forest Service produced an Excel spreadsheet that contained latitude and longitude coordinates for each of the 182 erosion sites, campsites, trails—*but without providing any additional detail*.[36]

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[34] This 14 page summary has been indexed for this administrative record as Floyd document "B-4".

[35] This FOIA dated October 14, 2015 has been otherwise indexed for this administrative record as Floyd document "B-4-A Floyd FOIA Request Oct 4 2015".

[36] This first Excel spreadsheet has been indexed for this administrative record as document "B-4-B ChattoogaRiverBioPhys_LatLong20151026".

The metadata for this first spreadsheet(document B-4-B) evidences it was created by the "USDA FS" on "10/26/2015" by one "ad.jlakhiani". An employee search for "lakhiani" suggests this document appears to have been created by Jayesh G. Lakhiani, MR, National Headquarters/Albuquerque Service Center, Ops-WO, Office of Deputy Chief. This spreadsheet (document B-4-B) appears to have been extracted from a larger data base that the Forest Service neither felt the need to identify nor to share with me. *FOIA should have obligated the Forest Service's production of the entire data base or at least its identification.*

After plotting these coordinates as pinpoints onto Google Earth, I could not reconcile the alleged location of 4 of these 5 erosion sites with my knowledge of the river's riparian corridor prior to 2012. I doubted that there could have been any erosion sites, of any significant size, at four of the five locations reported for North Carolina.

Consequently, on November 9, 2015, it became necessary for me to submit a second FOIA request for information pertaining to these erosion sites.[37]

Here is the text of that second FOIA request:

> "In 2007, the Forest Service prepared a 14 page document referred to as the *"Biophysical Monitoring Information on the Chattooga River."*
>
> *See:* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsbdev3_037225.pdf
>
> This 2007 *"Biophysical Monitoring Information on the Chattooga River"* inventoried all **"erosion sites"** located within the riparian corridor of the Chattooga River by latitude and longitude. Although inexplicably not provided to the public within the body of the 2007 report, the Forest Service maintains a table of latitude and longitude coordinates for each of these inventoried **"erosion sites".** The Foresst (sic)Services has provided me with a copy of that table pursuant to a prior Freedom of Information Act request.
>
> Unfortunately, the Forest Service's 2007 inventory of **"erosion sites"** neither defines nor discloses the specifically observed *scientific* criteria, common physical characteristics, measurably quantifiable standards, descriptive measurements, physical differentiating conditions, etc., used/employed by the Forest Service to qualify/identify/define a specific location within the riparian corridor as an **"erosion site."**
>
> Neither does an associated *Appendix E, Biophysical Impact Data Collection Protocols* define what specific criteria must be observed/applied in order for a specific location to be inventoried as an **"erosion site"** within the 2007 biophysical inventory.
>
> **Request #1:** For the purposes of this 2007 inventory, I am interested in understanding what specific physical criteria or specific common physical characteristics are used by the Forest Service to define an **"erosion site".**

[37] This FOIA request has been indexed for this administrative record as document "B-5 Floyd FOIA Request Nov. 9 2015".

Accordingly, please provide me with a copy of any document, memorandum, email, external scientific standard, etc., defining or explaining the specific criteria used by the Forest Service in determining which physical locations within the riparian corridor constitute **"erosion sites"** as tabulated and included in the 2007 *"Biophysical Monitoring Information on the Chattooga River"* inventory.

**Request #2:** Please provide a copy of any document, email, etc. identifying the specific Forest Service employee who led the preparation and compilation of the inventory of "**erosion sites"** visually plotted onto maps within the 2007 *"Biophysical Monitoring Information on the Chattooga River"* report.

**Request #3**: A physical site visit to each of the **"erosion sites",** plotted on the 2007 biophysical inventory maps, would suggest that certain "**erosion sites" are more problematic than others**—in terms of the quantity of sediment flowing into the river, in terms of the square footage of the bare ground present, in terms of the slope of the surface on which the **"erosion site"** is located, the types of soils involved, etc.

Unfortunately, neither the 2007 *"Biophysical Monitoring Information on the Chattooga River"* data report, nor the*"Capacity and Conflict on the Upper Chattooga River"* analysis, an integrated executive summary report prepared June 2007, describes, differentiates, or discusses which **"erosion sites"** pose the greatest relative risks of environmental harm and why.

Accordingly, please provide a copy of any document, including but not limited to, any field notes, any executive summary, any informal analysis, any emails, that evaluate, differentiate, discuss, or quantify the comparative physical differences between the 182 "**erosion sites"** which were inventoried by the 2007 "*Biophysical Monitoring Information on the Chattooga River"* data report.

**Request #4:** The Forest Service document fsbdev3_037424, ***"****Appendix E: Biophysical Impact Data Collection Protocols", 10/13/2006,* states that "[s]ignificantly-impacted areas may be digitally-photographed and recorded as a GPS point." See page E-2.

Accordingly, please provide *electronic copies* of any and all digital photographs of "significantly-impacted areas", as well as such pictures identifying latitude and longitude coordinates, GPS point information, location descriptions, etc."

This second request for information was directed to the *Nantahala National Forest Acting Supervisor Melonas,* on Monday, November 9, 2015 @ 5:29 am (indexed as document B-5).

On December 14, 2015, the USFS responded by instructing me to retrieve documents from a USFS website. This second FOIA *pried loose* a second Excel spreadsheet which contained a host of details about this biophysical audit not previously disclosed to me on November 5, 2015—including the disclosure that electronic photographs had been taken of each these reported *erosion sites*.(this second spreadsheet has been otherwise indexed for this administrative record as document "B-6").

*Alarmingly*, this second spreadsheet (document B-6) appears to have been drawn from the *exact same data base* as the first Excel spreadsheet (document B-4-B). My original October 14th FOIA request had asked: "Please provide me with any table, list, etc. *of the specific latitude and longitude coordinates* for each of the *individual features* plotted onto those maps. To clarify, I am seeking the specific latitude and longitude coordinates for each of the erosion sites, campsites, user created trails, designated trails, that have been *visually* plotted onto the maps set forth within this 14 page document." Document B-4-A at page 1.

The public policy interest of FOIA requires broad production of all relevant information contained within reasonably identified documents—as does the information disclosure obligations presumed by the *public participation* mandate of the 2012 Planning Rule. Neither permits the USFS to use editing to avoid revealing information otherwise contained within that same document—*unless some privilege exists to justify such redaction.*

Unfortunately, this is exactly what the USFS appears to have done in creating spreadsheet B-4-B. My original FOIA request (document B-4-A) *did not ask* the USFS to edit any document which was identified as being responsive. Neither did it *authorize* the Forest Service to editorialize by creating a new document which involved the undisclosed redaction (or omission) of other critically relevant information extracted from a larger source document that *should have been originally produced in entirety* in response to the original FOIA dated October 4, 2015

*The Forest Service's non-disclosure of this relevant information* prejudiced me.

Specifically, four of the five erosion sites purportedly identified in the first spreadsheet (B-4-B)as existing in North Carolina, were reported in this second Excel worksheet (B-6) as having *zero square footage*. Consequently, it is difficult to understand why the Forest Service accounted for these four locations as an *erosion site* located in North Carolina. The fifth site was proximate to Ellicott Rock and was reported as having 450 square feet.

In fact, given the fact that four of the five erosion sites associated to North Carolina are reported to have had zero square footage, the Forest Service appears to have *casually misled* the public about the condition of the riparian corridor in North Carolina compared to the condition of the riparian corridor further downstream in South Carolina/Georgia.

All of this previously undisclosed detail *irrefutably reveals* that the biophysical condition of the North Carolina part of the Chattooga remained the *most pristine, near natural, and least anthropogenic impacted* part of the entire river corridor *prior* to the introduction of creek boating in 2012. This second spreadsheet (B-6) irrefutably confirms how the *most degraded part of the river* was in South Carolina where whitewater paddling had always been permitted.

This raises concern about why this critical information was not accurately disclosed to the public prior to January 2012 when the Forest Service lifted the ban on creek boating the headwaters in North Carolina—headwaters which arguably constitute the most fragile part of the entire river.

In January 2012, the USFS told the public that lifting the boating ban was a necessary part of its planned initiative to satisfy its discrete and nondiscretionary duty to protect and enhance the river's Outstanding Remarkable Values from impermissible degradation. "The forests are seeking to take appropriate action now to reduce existing or prevent future unacceptable impacts to the [Chattooga's outstanding remarkable values] from increasing use levels, and thus preserve the river's free-flowing condition, protect water quality and protect and enhance the river's ORVs in addition to protecting its wilderness character." *Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor,* Environmental Assessment, U.S. Forest Service, January 2012, at p.2 (the "2012 EA"). As a part of the process of justifying this action, the Forest Service explained: " To achieve a non-degradation standard, the river administering agency must document baseline resource conditions and monitor changes to these conditions." 2012 EA at page 3.

The Forest Service created a narrative that degradation was widespread over the entire river corridor across all states. Throughout the 2012 EA the Forest Service attempted to catalog the evidence of physical degradation requiring it to act, including a sanitized discussion of the results of its comprehensive 2007 biophysical audit. *There's just one problem with the Forest Service's promotion of that narrative.*

*It was false with respect to the river in North Carolina—and the Forest Service must have known this truth.* Prior to the introduction of paddling, North Carolina's riparian corridor (and trout buffer) remained in the same pristine and "near natural" condition extolled by the Chief of the Forest Service in 1976.

This example of *editorial* obfuscation demonstrates how the Forest Service has adopted a pattern and practice of burying critical information. Such editorial efforts thwart an interested individual from making sure that the administrative record contains the entirety of relevant factual information as opposed to just an editorialized version of facts. Through such omissions the Forest Service effectively avoids having to admit that creekboating cannot be pursued on the Chattooga's headwaters without causing significant additional sedimentation to be channeled into an already excessively sediment stressed stream.

*This pattern and practice of non-disclosure and inaccurate disclosure rises to a sufficiently repetitive level to warrant further inquiry.* As a Boolean search of the 2012 EA and 2015 EA confirms, in terms of erosion sites, user created trails, and user created campsites, the USFS neither told the public how North Carolina's riparian corridor remained in a "near natural" physical condition, nor how North Carolina's trout buffer was in a far superior condition compared to South Carolina/Georgia's riparian corridor.

Neither did the Forest Service tell the public in the 2012 EA about the additional detail found in document B-6. Instead the critical significance of this data was never disclosed to the public until I stumbled across these spreadsheets in 2015—long after the information should have been disclosed.

This previously buried data *reveals* how the *baseline* condition of North Carolina's riparian corridor and its trout buffer remained in an almost "near natural" condition prior to the introduction of creek boating—a *critical distinction* which the USFS continues to ignore although it claims to be monitoring for any negative impacts caused by creek boating.

The truth is the North Carolina part of the river has gone from virtually zero erosion sites before boating to a significantly larger number of erosions sites after boating commenced. As my own photographic field audit confirms, the trout buffer in North Carolina has suffered significant damage as a consequence of creek boating activities. Creek boating has caused the development of new point sources where sediment is being visibly channeled into the river. In certain places the fragile river bank *has entirely collapsed* because of creekboats being *seal launched* into the river. (e.g. Boater Created Erosion Sites B-5 (@ approximately 35.047649, -83.120699) & B-5-B (@ approximately 35.047640, -83.120714)).[38] A photographic compilation of this paddler caused damage has been indexed for this administrative record as document 00-N.

The metadata for the second Excel spreadsheet(document B-6) indicates that it was created by the "USDA FS" on "12/9/2015" by a "gholden". An employee search for "gholden" suggests this document appears to have been created by Geoffrey Holden, GIS Program Manager, Region 8, Francis Marion and Sumter National Forests. Document B-6 provide a vast amount of critical information, not previously disclosed by the first spreadsheet (B-4-B), including but not limited to the *square footages* for each of the five *erosion sites* alleged to exist in North Carolina.

Clearly, before planners and *interested individuals* can develop effective *Standards* for preventing activities that cause sediments to be channeled into the Chattooga's ORW, these planners and the public would logically need to understand the comparative size of these erosion sites and the particular human activities giving rise to the most egregious locations.

Thus, given *both* the *public participation* mandate to provide for the open sharing of information, coupled with the strict requirements of FOIA, it remains alarming that this additional critical detail was not included in the Forest Service's original response on November 5th to the original October 14, 2015 FOIA. Again the LRMP process restarted on September 25, 2013.

The piecemeal and delayed nature of the USFS response is just part of the problem.

[38] This has occurred at places where paddlers are seal launching their boats off of the fragile bank, where paddlers are evacuating the river, and at locations where paddlers have cut out rhododendron, etc. to create a crazy quilt of portage trails around an indeterminate and ever changing number of fallen hemlock logs which constitute unavoidable obstacles that must be portaged. Neither the point source of pollution at B-5 nor B-5-B existed prior to 2012. Boater Created Erosion site B-5 and B-5-B constitute paddler seal launch sites that were created by paddlers within just a few feet of each other. B-5 was the first of those two conjoined seal launch sites to evidence intense damage of the trout buffer. According to the Forest Service's permit counts only a few paddlers have supposedly floated this section over the first four paddling seasons. Nevertheless, this numerically infrequent use was sufficiently intense enough to cause the bank to collapse. Not to be discouraged after causing the collapse of the bank at B-5, paddlers simply moved a few feet down the trail and excavated the second seal launch site B-5-B. The earliest photos of B-5-B evidence that it was hand dug with a shovel, etc. to facilitate the repetitive *seal launching* of boats across the top of the bank and across a rock ledge into the creek.

What is more important is that the previously redacted information was substantively critical to analyzing the candor of certain representations published by the Forest Service in its 2015 environmental assessment. In 2012 the USFS promised to monitor the impacts of allowing boating on the headwaters of the Chattooga. The USFS promised to use "adaptive management" and the USFS promised that "if monitoring reveals any undesired consequences, adaptive management would trigger actions to keep use levels from exceeding capacities." *Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor,* Environmental Assessment, U.S. Forest Service, January 2012, at page 12 (the "2012 EA").

Apparently, the USFS erroneously believes that counting cars at the Green Creek trailhead and the Bull Pen Iron Bridge constitutes an adequate method for monitoring and for determining when recreational use is "approaching capacities and correlate these to use-impact relationships in different areas and/or for different types of use." 2012 EA at page 5.

Such an approach arbitrarily overlooks how the Clean Water Act's antidegradation mandate does not ask if there are too many cars or too many creek boating permits pulled in a single season.

The Clean Water Act's antidegradation mandate compels the USFS to make sure that its site specific initiatives do not cause any non-temporary degradation of the Chattooga's trout habitat and brook, rainbow, and brown trout fisheries. The USFS should have been continuously monitoring the stream banks to document how additional stormwater and sediments are being channeled into the Chattooga's ORW waters at those points where creekboaters are constructing boat launch sites, river evacuation points and portage trails. The USFS should have been annually monitoring the trout populations on the North Carolina part of the river where this sediment transport imbalance and excessive embedded sediment condition is most pronounced.

Unfortunately, the Forest Service has adopted a pattern and practice of prejudicing the public's *administratively time constrained* ability to gather and analyze relevant facts or to determine what facts and analysis need to be added to the administrative record for the forthcoming plan. This pattern and practice, of delaying responses, providing incomplete or totally irrelevant disclosures, or entirely refusing to respond, suppresses the publics' ability to identify what factual information is missing from the administrative record.

There is more than sufficient reason to seek further inquiry as to the appropriateness or inappropriateness of this pattern and practice of nonresponsiveness.

**A Third Example of a Pattern and Practice of Neglecting To Disclose Critical Information and of Providing Piecemeal Responses to Requests for Information**

Request #3 in my FOIA dated November 9, 2015, asked for "*any document …that evaluate, differentiate, discuss, or quantify the comparative physical differences between"* the 182 erosion sites inventoried by the 2007 Biophysical report. (See document B-5 at page 2).

Request #4 *asked* for "*electronic copies* of any and all digital photographs of 'significantly-impacted areas', as well as such pictures identifying latitude and longitude coordinates, GPS point information, location descriptions, etc." Id.

Stated differently, this FOIA *implicitly* requested *any document* containing digital photographs of the 182 erosion sites as well as *any document* that might identify the location of the photographed erosion site based on precise latitude and longitude coordinates.

The implied purpose of trying to match individual photographs with individual erosion sites was (1) to corroborate that such erosion sites actually existed, (2) to consider which erosion sites posed the greatest risk of stream sedimentation based on proximity to the water, etc. and (3) to figure out what human activities were responsible for having caused these erosion sites.

On December 14, 2015, the Forest Service instructed me to download 281 digital photographs (presumed to contain photos of the five erosion sites in North Carolina) from a Forest Service website. However, the Forest Service neglected to provide any way to corroborate what individual photographs tied to which erosion site listed on the 2nd Excel spreadsheet (Document B-6). This made it impossible to determine what kinds of human activities had caused the alleged erosion sites. In fact, the lack of a cross-walk makes the photographs largely useless.

Even if one hypothetically presumes that the Forest Service *technically* met its obligations under FOIA, the fact remains that the Forest Service *has not satisfied* its *information disclosure obligations* under the *public participation* mandate of the 2012 Planning Rule. The Forest Service must have had some way to associate these 281 photographs to a specific geographic location listed on the spreadsheet.

*Otherwise, why take the pictures?* Such a crosswalk explanation, or key should have been disclosed pursuant to the *public participation* mandate—but one wasn't provided.

Instead, the Forest Service dumped a large number of photographs onto me with an indifferent attitude of go figure it out for yourself.

After trying unsuccessfully to work with your staff to identify which photographs related to the five erosion sites in North Carolina, I eventually appealed to the Chief of the Forest Service on January 7, 2016.[39] In that appeal, I narrowed the scope of my information request by asking the Chief of the Forest Service to identify which photographs tied to the five erosion sites inventoried as being in North Carolina.

[39] This FOIA appeal dated 01/07/2016 is indexed for this administrative record as Floyd document "B-15".

My appeal included the following:

> "The 2012 EA acknowledged that the USFS is obligated under Section 10(a) to effectuate a policy of non-degradation in managing wild and scenic rivers. [referencing the 2012 EA] The USFS argues: ' *Non-degradation* within the Act's context is not synonymous with no *impact*. Nondegradation in the context of a wild and scenic river is *assurance that there is no downward trend in conditions* that affect ORVs.' [quoting the Forest Service's comments in the 2012 EA at page 16 (italics in original)].
>
> The USFS further argues: 'To achieve a nondegradation standard, the river-administering agency *must document baseline resource conditions* and monitor changes to these conditions.' [quoting the 2012 EA at page 16 (italics in original)].
>
> In order to satisfy [the Forest Service's] interpretation of the relevant standard of 'no downward trend in conditions', the 2012 EA explained how it prepared various baseline condition reports to be used to assess the potential for future significant impacts. 'During this 11-month period, the agency focused on conducting analysis using several (but not all) of the elements outlined in the visitor use capacity analysis plan and producing several reports including literature reviews, *biological and physical data collection,* flow data, proxy river information, case studies on seven other wild and scenic rivers, existing use observations and expert panels. These reports were then incorporated into *Capacity and Conflict on the Upper Chattooga River: An integrated analysis of the 2006-2007 reports* often referred to as the Integrated Report (Whittaker and Shelby 2007).'[quoting the 2012 EA at page 7 (emphasis added here)].
>
> This Integrated Report incorporated the report of special concern to me: the *Biophysical Monitoring Information on the Chattooga River (USFS 2007)* report (the "2007 Biophysical inventory"). This *Biophysical Monitoring Information on the Chattooga River* document constitutes a *baseline inventory* of ecological conditions which existed prior to the introduction of creekboating in North Carolina. This *Biophysical Monitoring Information on the Chattooga River (USFS 2007)* report summarized field surveys which inventoried specific erosion sites, user created trails, campsites too close to the water, etc. The specific geographic information systems ("GIS") locations of these inventoried features were tabulated and pinpointed onto topographic maps of the various reaches of the Chattooga River: (1) Chattooga Cliffs Reach, (2) the Ellicott Rock Reach, (3) the Rock Gorge Reach, (4) the Nicholson Field Reach, (5) the SC Hwy 28 to US Highwat 76 Reach, (6) the US Highway 76 to Tugaloo Lake Reach, and (7) the West Fork of the Chattooga Reach.
>
> The 2012 EA was required to carefully evaluate the prospective cumulative adverse impacts of allowing creekboating on the Chattooga before the USFS could promulgate a Finding of No Significant Impact. The aforementioned 2007 Biophysical inventory was critical to discharging that responsibility. In fact, without the baseline inventory of existing physical conditions, it would have been impossible for the USFS to evaluate potential future impacts of allowing creekboating on the most fragile part of the river.

> Hence, this 2007 Biophysical inventory allowed the USFS to consider the cumulative impacts of introducing a new recreational use. During the physical field surveys conducted to gather information used to prepare the 2007 Biophysical inventory, photographs were taken to document the statistics summarized in the *Biophysical Monitoring Information on the Chattooga River (USFS 2007)* report. Subsequently, the specific results of the 2007 Biophysical inventory were summarized and presented to the public as a reliable, true and accurate representation of the baseline conditions on the Chattooga.
>
> Consequently, this field survey data, including the photographs, constitute the cornerstone on which the public relied in assuming the completeness and authenticity of the USFS evaluation of its alternatives in the 2012 EA as well as the 2015 EA." (See document C-15 at pages 4 & 5 of 21).

The text of my appeal also noted:

> "[T]he USFS has not produced a single photograph documenting a single one of these five North Carolina erosion sites---despite the fact that a spreadsheet provided to me by the USFS on December 14, 2015 clearly indicates that such photographs were taken. That spreadsheet identifies the following erosion sites (OBJECTID) as being associated with the corresponding "Photo ID": OBJECTID 76= Photo ID 1760, Data Collector selig keener, DATAFILE chatt.cor; OBJECTID 171= Photo ID 847.894, Data Collector none listed, DATAFILE none listed; OBJECTID 172= Photo ID 777.741, Data Collector none listed, DATAFILE none listed; OBJECTID 173= Photo ID 667.405, Data Collector none listed, DATAFILE none listed; OBJECTID 174= Photo ID 730.377, Data Collector none listed, DATAFILE none listed.
> I renew my request to be provided with all photographs of "significantly impacted areas" located in North Carolina." (see document B-15 at p.3 of 21).

See also the host of back and forth communications with the Chief's office regarding this appeal: documents B-16. B-17, B-18, B-19, B-20, B-21, B-22, & B-23. Document B-19 and B-23 summarize the issues being debated in this back and forth discussion with the Chief's office. In general, these communications pressed the Forest Service to provide a way for the public to confirm which photographs tied to the five erosion sites alleged to have existed in North Carolina prior to the commencement of boating on the upper Chattooga.

To repeat, the purpose for trying to match individual photographs with individual erosion sites was (1) to corroborate that such erosion sites actually existed, (2) to consider which erosion sites posed the greatest risk of stream sedimentation based on proximity to the water, etc. and (3) to figure out what human activities were responsible for having caused these erosion sites.

*Seven months later*, on August 5, 2016, the Chief's office finally responded.[40]

> "In your appeal, you questioned the adequacy of the search conducted by the National Forests in North Carolina. You noted that the following documents and pieces of information were not included in the records provided to you:
>
> 1. "any document that would reveal the identity of [the] individual in charge of coordinating, supervising, and leading the collection and preparation of the 2007 Biophysical inventory;"
> 2. " photographs of erosion sites in North Carolina;"
> 3. " [Records other than the] single document [that] was produced with respect to Request#1 .. . a copy of any document, memorandum, email, external scientific standard, etc.,defining or explaining the specific criteria used by the Forest Service in determining which physical locations within the riparian corridor constitute ' erosion sites' as tabulated and included in the [2007 Biophysical inventory]."
>
> In response to your appeal, we asked the National Forests in North Carolina to conduct a second search for responsive records. They found records responsive to the three questions raised in your appeal. These records are enclosed in full electronically and listed below. While some of these records may have been previously provided to you, the list below also includes notes indicating the manner in which these records satisfy the questions raised in your appeal.
>
> 1. In the spreadsheet titled ChattoogaRiverBioPhys _latlong_ 2015 1209 .xlsx, data collectors were entered as a data field . The main person who was a clearinghouse for data collection (Column G labeled "Data Collector") and interfacing with GIS at the time was Elizabeth Robinson (now NEPA Coordinator on the Daniel Boone). A number of Forest Service employees were used for data collection, and their initials are indicated in the "data collector" column. The following initials correspond with the Forest Service employees noted: VS =Vern Shumway; CS =Chris Smith; VK =Vincent Keeler; JJ =Jason Jennings.
> 2. The spreadsheet entitled ChattoogaRiverBioPhys_Erosion Points.xlsx lists all of the erosion points. We have highlighted those points that occurred in North Carolina. Column F provides a "Photo ID." We have likewise enclosed all the photographs associated with the 2007 Biophysical inventory. *By utilizing the spreadsheet to search through the photos, you may be able to identify which photos were taken in North Carolina.*
> 3. Appendix E-2 of the enclosed 159.0_06_10_13_Implementation Plan 10-13-06 Final. pdf indicates the specific criteria used by the Forest Service in determining which physical locations within the riparian corridor constitute erosion sites."[41]

[40] The Chief's response to my appeal dated August 5, 2015 has been indexed for this administrative record as document B-24. It consists of two pages of text.

[41] See Document B-24, italics added.

This instruction was entirely unhelpful [42] and implicates several possibilities:

(1) The Forest Service has no way to validate the *accuracy* of a *critically important* factual representation that it made when it published its *Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor*, Environmental Assessment, January 2012; or
(2) The Forest Service refuses to openly share information with an *interested individual* seeking to participate in the planning process—and in fact gives every impression of trying to make it as difficult as possible to gain answers to highly relevant but troubling questions.

The Notice of Initiation for Revision of the Land Resource Management Plan was published on September 25, 2013. I should not have had to file a FOIA request to try to elicit an answer to a highly relevant LRMP issue. My narrow question should have been answered pursuant to the public participation mandate of the 2012 Planning Rule.

The USFS has not identified the photographic evidence to prove that it did not overstate the number of erosion sites that existed in North Carolina prior to the introduction of boating. Given the zero square footage reported in the second spreadsheet (document B-6), this is particularly troubling.This is troubling because of the way that your staff failed to respond adequately to the FOIA request originally dated October 14, 2015. As previously detailed starting on page 38 of this notice, it took your staff two searches and until December 14, 2015 to produce a second spreadsheet (document B-6). B-6 revealed critical information that had been omitted from the first spreadsheet provided to me (document B-4-B).

As discussed before, B-6 *revealed* that four of the five erosion sites alleged to have existed in North Carolina actually had *zero square footage. Consequently,* unless the USFS identifies which photos prove the existence of all five of the alleged *erosion sites* in North Carolina, the argument might be made that the USFS gamed the system in order to support a narrative that was simply false with respect to the North Carolina part of the Chattooga. The 2012 EA clearly evidences an intention to use the existence of such 182 erosion sites, and the need to fix them, as a major justification for lifting the ban on boating.

*Whether by error or intention, the fact remains that the Forest Service appears to have overstated the number of measurable erosion sites in North Carolina by four hundred per cent.*

This repeating pattern and practice of neglectful non-disclosure augurs a potential level of bad faith and a need for potential discovery and supplementation of the prior administrative record.

[42] To be clear, I made an effort to open each of the 281 photographs and look for identifying meta data that would allow me to match an individual photo to each of the five erosion sites.

**A Fourth Example of a Pattern and Practice of Neglecting To Disclose Critical Information and of Providing Piecemeal Responses to Requests for Information**

On November 5, 2014, I reported the Chattooga's excessive embedded sediment to the USFS via 80 pages of comments and photographs submitted in response to the *Chattooga River Boating Access*, Environmental Assessment, USFS, September 26, 2014 (the draft "2014 EA")(indexed as document C-1).The stated purpose of the draft 2014 EA was to assess the ecological impacts of building special access trails for whitewater paddlers—*trails whose construction would necessitate the further disturbance and destruction of the critically fragile trout buffer.*

The aforementioned photographs show how sediment is embedded from bank to bank in certain locations. In other places, this sediment is over a foot deep. This sediment has visibly *degraded* the suitability of the streambed's substrate for trout spawning habitat. This excessive embedded sediment exists throughout an extended reach of the Chattooga's headwaters in North Carolina.

Nevertheless, despite this visibly excessive sediment, and despite spending over a decade preparing two environmental assessments, *the Forest Service never monitored the trout populations on the North Carolina part of the Chattooga after 1996*. To shield itself from its neglect in having allowed this once outstanding trout habitat to degrade, the Forest Service served up the following excuse:

> "Continued monitoring indicates that, while individual populations exhibit high annual variability in age class structure and biomass, overall trends in Salvelinus fontinalis, Oncorhynchus mykiss, Salmo trutta and Rhinichthyes atratulus populations across the Nantahala and Pisgah National Forests have remained stable during the last 13 years (National Forests in North Carolina FY 2009 Monitoring and Evaluation Report, USFS 2009)." 2015 EA at p.34 (indexed for the administrative record as E-1 Trail Construction EA).

The Clean Water Act *does not permit* the USFS to use the condition of trout populations *averaged over the entire Nantahala National Forest* to presume that the USFS has met its discrete and nondiscretionary duty to prevent any anthropogenic sourced degradation of the Chattooga River's explicitly designated subcategories of ORW water quality use: the river's outstanding native trout habitat and outstanding brook, rainbow, and brown trout fisheries.

To bring this discrete duty back into focus, I first complained in November 2014 that:

> "The administrative record is missing any official report documenting prior or current fish sampling counts by electrical shock to establish population trends. The record lacks any scientific monitoring report on the quantity of newly spawned or less than one year old wild brown trout to ascertain how well wild brown trout are reproducing on that part of the river. The failure to publish such monitoring trends, if they even exist, makes it impossible for the Forest Service to refute what a layperson, with any familiarity of the river, can see for themselves: significant ecological degradation appears to be occurring on the upper Chattooga river."

On May 15, 2015, the Forest Service dismissed my concern about the low numbers of young-of-the-year trout and excessive embedded sediment by offering the following excuse:

> "The Brown Trout is a non-native species managed by the North Carolina Wildlife Resources Commission (NCWRC) and maintained as a wild trout population within the upper Chattooga River (this reach of the river is not listed as hatchery supported waters). Electrofishing surveys were conducted within the upper Chattooga River from 1992 through 1996 by the NCWRC. Young-of-the-year Brown Trout densities appeared to be lower than other North Carolina trout populations during the same sampling period; *however, a self-sustaining population continues to persist."* 2015 EA (document E-1) at page 205 (italics added for emphasis).

The fact that a self-sustaining brown trout population *continues to persist does not satisfy the antidegradation standard* that applies to the Chattooga. Neither does the continued persistence of a brown trout population excuse any degradation of the rainbow or brook trout populations. As detailed previously, when the Chattooga was classified an Outstanding Resource Water, the associated 1988 Report of Proceedings explicitly cited the *outstanding* eastern brook, rainbow, and brown trout fisheries as the existing *designated uses* requiring *antidegradation* protection.

My July 7, 2015 objection to the 2015 EA was submitted to encourage the USFS to cease arbitrarily denying how this anthropogenic sourced embedded sediment exceeds any minimum effects threshold for disrupting the early life cycle of trout. The goal remains to prevent the USFS from causing any additional degradation of the trout habitat through the implementation of its own management initiatives. Implicit in my objection was a demand for the USFS to respond by providing the pubic with the details of any trout fisheries field work and trout habitat assessments that had been previously conducted on the North Carolina part of the Chattooga. The fact that a self-sustaining brown trout population *continues to persist* on the Chattooga does not excuse the wide spread trout habitat degradation caused by this excessive embedded sediment.

*The Nantahala LRMP planning process restarted on September 25, 2013*. Despite the *public participation* mandate of the 2012 Planning Rule, the USFS never conducted a complete and detailed physical evaluation of the river's in stream trout habitat and the health of the underlying brook, rainbow, and brown trout fisheries. Instead the Forest Service pointed the finger back towards the state of North Carolina while promulgating a Finding of No Significant Impact for the 2015 EA. The USFS did so without seriously entertaining this clean water issue. Looking back in time, the totality of fact and circumstances suggest that the USFS engaged in a pattern and practice of providing bits and pieces of information to create an impression of cooperation while simultaneously denying me the most substantively comprehensive and easily understandable *reports* detailing the results of the trout population surveys conducted on the Chattooga from 1992 through 1996.

Consequently, on January 4, 2016, to determine if the day to day manager of this river had been monitoring the degradation of the river's trout habitat, it became necessary to submit a FOIA request to the Nantahala National Forest (indexed for this record as document C-4).

This FOIA asked for "any document, electrofishing survey results report, memorandum, written analysis that the Forest Service *relied on, used, read, studied* to make [the] written assertion" [on Page 205 of its May 15, 2015 Environmental Assessment] "*that electrofishing surveys were conducted on the Upper Chattooga by the North Carolina Wildlife Resources Commission from 1992-1996 and that young-of-the-year Brown Trout densities appeared to be lower than other North Carolina trout populations during the same sampling period.*" (italics added here).

This January 4, 2016 FOIA also asked the Nantahala National Forest to

> *"provide me with any handwritten notes of conversations (by telephone or in person) that pertain, relate, reference, or discuss these electrofishing surveys: (A) between any of the individuals involved in the preparation of the Environmental Assessment as listed on pages110-111 of the Environmental Assessment or (B) between any one of these listed Preparers (on pages 110-111) and any individual outside that group of listed Preparers.*" (italics added here)(document C-4).

As you know, the Nantahala National Forest has an obligation to comply with the *broad* regulatory record keeping requirements spelled out in 36 CFR Part 1222. Handwritten notes, and working files that contain unique information or substantive annotations or comments pertaining to the formulation and execution of any agency decision, action, or discharge of any agency duty constitute records that must be maintained if the information contained in such notes were used to discuss or to communicate about agency business with anybody other than the creator of those handwritten notes and working files. See 36 CFR §1222.12 (c); See Forest Service Manual 6200, Chapter 6230, Records Creation, Maintenance, and Disposition, Section 6230.5 Definition. As you know, when there is any doubt about whether or not to classify written information as a record or nonrecord, the regulation requires that the written information should be treated as a record. 36 CFR §1222.16(b)(1).

In other words, unless otherwise identified as being exempt from disclosure, any relevant handwritten notes, emails, memos, etc. authored or received by this specific set of individuals regarding this subject matter should have been retained as records subject to being produced—even if such comments about trout populations, etc. were preliminary written comments on draft documents. Most importantly, *under the record retention rules, just because a local official might have deleted such emails from their local workstation does not exempt the Forest Service from searching for them in its archives.*

On February 2, 2016, the Nantahala National Forest responded to my January 4, 2016 FOIA by emailing five documents containing a total of thirty pages: (1) *Chattooga Aquatic Monitoring Summary.docx;*(2) *Chattooga fish summary.xlsx*;(3)*email.pdf;* (4) *FOIA Response Letter.pdf;* (5) *Population Monitoring Document.pdf.*[43]

[43] FOIA Response Letter.pdf(otherwise indexed for this administrative record as Floyd document "C-5"); Chattooga fish summary.xlsx(otherwise indexed for this administrative record as Floyd document "C-5-A"); Population Monitoring Document.pdf((otherwise indexed for this administrative record as Floyd document "C-B");email.pdf(otherwise indexed for this administrative record as document "C-6"); Chattooga Aquatic Monitoring Summary.docx(otherwise indexed for this administrative record as document "C-6-1").

Remarkably, the USFS did not produce a single handwritten note or working file of any member of its staff that pertained to the 1992-1996 trout population surveys. Because protecting the *outstanding* trout habitat and *outstanding* brook, rainbow, and brown trout fisheries constitute the Chattooga's administratively recognized subcategories of ORW water quality use, one would have logically presumed to find some documentation proving that the USFS conducted an antidegradation assessment of the river's trout habitat and fisheries when it prepared its 2012 EA and its 2015 EA.

*The failure to produce even a single handwritten note or working file suggests that such antidegradation assessment was arbitrarily and capriciously never conducted.*

Prior to publishing its 2012 EA, the USFS should have provided the public with access to *all* of the narrative reports detailing the results of the trout population surveys conducted on the North Carolina part of the Chattooga between 1992-1996. The roundabout way in which these narrative reports were ultimately surfaced in December 2016 and May 2017 raises concern that the USFS acted with less than good faith because it never disclosed these reports to the public.

The USFS was directly involved in assisting the NCWRC in collecting the field data associated with the 1992-1996 trout population studies. The USFS must have had institutional knowledge that such narrative reports had been prepared by the NCWRC to summarize the results of those 1992-1996 studies. These reports contain highly relevant information that logically should have been accessed by the USFS to conduct its antidegradation assessments of the Chattooga's trout habitat and trout fisheries when it prepared the 2012 EA and the 2015 EA.

At a minimum, the USFS must consider itself to have been in constructive control of these same narrative reports. Consequently, the USFS had an obligation to provide me with copies of those narrative reports within the time deadlines mandated by FOIA. Unfortunately, the USFS has repeatedly attempted to disavow any responsibility to provide the public with such narrative reports—reports which the USFS must have known or should have known contained highly relevant information for undertaking an antidegradation assessment of the Chattooga's trout habitat and trout fisheries.

The unsatisfactory way in which the USFS responded to my FOIA requests for these narrative reports also illustrates how the USFS has repeatedly failed meet its *public participation* information disclosure obligations subsequent to its publication of the Notice of Initiation for Revision of the Land Resource Management Plan on September 25, 2013.

Set forth below is a detailed summary of the circumstances surrounding the Forest Service's initially inadequate FOIA response on February 2, 2016.

First, the document titled *Chattooga fish summary.xlsx* (document C-5-A) constitutes an Excel workbook consisting of two worksheet tabs. The metadata suggests this spreadsheet was editorially created by the USFS on 09/17/2015 at 10:15 am.[44]

[44] Please recall the hearing on my formal objection to the 2015 EA (dated July 7, 2015) was ultimately held on September 28, 2015.

The USFS never explained the assumptions or methods used to create this spreadsheet, or what the spreadsheet was intended to show. Logically, this document appears to reference data from some other source *not disclosed* within the four walls of document C-5-A.

Because a key was not provided for the abbreviations used or assumptions employed, worksheet tab 2 appears to compare the Chattooga to nine other trout streams with respect to some kind of metric for young-of-the-year and adult trout. Worksheet tab 1 appears to calculate some kind of *averaged* trout population metric for the Chattooga River (presumably in North Carolina but without any way of confirming that for certain) over a time period presumed to be 1992-1996.

*Remarkably, worksheet tab 1 draws attention to the fact that the trout population data being reported in the spreadsheet was presumably collected at "site 1" and "site 2" on the Chattooga.* The logical presumption is that the creator of this worksheet should have known precisely where *"site 1" and "site 2"* were located—perhaps with latitude and longitude precision. However, the precise locations of *"site 1" and "site 2"* were never identified.[45]

Second, *Chattooga Aquatic Monitoring Summary.docx* (document C-6-1) also appears to draw upon *some undisclosed source* of trout population data—perhaps the same one drawn upon to create *Chattooga fish summary.xlsx* (document C-5-A). The *Chattooga Aquatic Monitoring Summary.docx* (document C-6-1) was initially created on 09/17/2015 @ 1:11 pm by the USFS. The content of "*email.pdf"(document C-6)* corroborates that *Chattooga Aquatic Monitoring Summary.docx* (document C-6-1) constitutes the work product of Mr. Jason Farmer, Fisheries Biologist, Nantahala National Forest. On September 15, 2015 @ 3:26 PM, Mr. Mike Wilkins, the Nantahala District Ranger, emailed the following instruction to Mr. Jason Farmer:

> "Jason, James Melonis and I will sit down with Mr. Floyd on 9/28 to go over his objections to my Chattooga decision. Attached is his objection. It has some 88 pages a lot of which are pictures Most of his concerns are really outside the scope of the decision. I spent 30 min with him on the phone today and I think I can make him feel better with your help. He sees some sediment in Norton Mill or the Chattooga and it is a significant issue that we should deal with because it IS or MIGHT be causing significant reductions in fish and insect populations." (indexed as Floyd document C-6).

The "pictures" referenced by Ranger Wilkins constitute photographs documenting (1) the excessive embedded sediment that plagues an extended reach of the Chattooga and (2) the damage being done to North Carolina's trout buffer by paddlers construction and use of creek boat put ins, evacuation sites, and portage trails—*evidence of ongoing violations of North Carolina's water quality standards for Outstanding Resource Waters, and other statutes and regulations.*

[45] The NNF must have logically understood the importance of disclosing the precise location of "*site 1" and "site 2"*. The precise location of "*site 1" and "site 2"* was not disclosed until December 2016 and May 2017 when documents L-1 River Coalition N; L-2 River Coalition H; and L-2 River Coalition R, were provided to me by the NC DEQ and after document 00-T Borawa and Clemmons 1998 was provided to me by the NCWRC.

District Ranger Wilkins ordered the fisheries biologist to do the following:

> [Floyd] "thinks we have never done any past surveys for fish and bugs *and we have.* Before the end of the day on Thursday 9/24 I need you to summarize when various types of surveys were done in our section of the river over the years. Just list the type of survey and date. THEN provide us a summary statement on general trends that we know or what we think we know. Not a written summary of each fish survey. I figure you have some general info that you could *say about the Chattooga Coalition's annual survey* that might help even though it is usually in SC/GA.
> I do NOT need you to respond to his objections. We have a written response prepared. I just need an outline of past surveys etc. and generally what we found…." (email contained in Document C-6) (*italics added for emphasis).*

On September 24, 2015 at 9:39 am, Mr. Farmer complied with the order given to him by Ranger Wilkins as follows:

> "Please find attached a brief summary of the available Chattooga data. The first 2 pages provide a summary of NC data while the last 2 pages are a brief summary of the SC/GA fish data." (indexed as Floyd document C-6)

At 10:42 am, after *perhaps* reviewing the content of Mr. Farmer's editorial effort for a full *three minutes,* Ranger Wilkins forwarded to me a copy of the five page report entitled "*Chattooga Aquatic Monitoring Summary.docx*"(document C-6-1). Without identifying or providing the public with a copy of the data source(s) used to support his analysis and conclusions, Mr. Farmer prepared a simple graphical presentation to try to assert that any variability observed in the Chattooga's trout population was due to large scale factors instead of degraded in stream habitat caused by the deposition of an excessive amount of embedded sediment on the stream bed.

Mr. Farmer asserts:

> "Electrofishing survey results demonstrate that the Chattooga River Brown Trout population shows variable densities of fish over time. This variability is characteristic of wild trout populations in general and is also characteristic of wild trout populations on the Nantahala-Pisgah NF. Mean Brown Trout densities within the sample period were within the range of 9 other wild Brown Trout populations across the forest (Figure 1)." (C-6-1 at p.1)

Mr. Farmer generalized:

> "When compared to a wild Brown Trout population of similar density, the Chattooga River population varied in a similar pattern which suggests that both populations are affected by similar large-scale factors (Figure 2). These factors are likely to be climatic variability (e.g. droughts or floods) rather than local site variability." (C-6-1 at p.2).

Unfortunately, the *scientific value* of this two page editorialized generalization is limited. Mr. Farmer never discloses the precise location of the field data for the Chattooga nor the reference sites. Mr. Farmer never details why the field methodologies used to collect the trout population data at these reference sites were comparable enough to allow a graphical comparison to the Chattooga. Mr. Farmer never identifies the nine other streams to which he made his comparison. He never explains why those nine streams are appropriate for comparison to the Chattooga.

Neither does Mr. Farmer disclose the specific locations (latitude and longitude) where the electrofishing took place on the Chattooga in North Carolina, or over how long a reach this sampling occurred. Based on the limited information provided, it is simply impossible to verify if this presentation constitutes a true apples to apples comparison of the Chattooga to the nine other streams in North Carolina—*or the logical integrity of Mr. Farmer's methodology.*

*To press the concern about methodology,* Ranger Wilkins did not instruct Mr. Farmer to investigate the merits of my allegations of degraded trout habitat and diminished trout fisheries. Instead, Ranger Wilkins' message implied that Mr. Farmer should prepare an editorial document to help Ranger Wilkins convince me to quit asking questions: "*I think I can make him feel better with your help.* He sees some sediment in Norton Mill or the Chattooga and it is a significant issue that we should deal with because it IS or MIGHT be causing significant reductions in fish and insect populations*." See* "email.pdf" *at page 2(italics added)(document C-6).*

The circumstances surrounding the creation of Mr. Farmer's "*Chattooga Aquatic Monitoring Summary.docx*"(document C-6-1) in September 2015 evidences why there is sufficient reason to investigate whether or not the Forest Service acted in good faith in handling my subsequent FOIA request made on January 4, 2016.

Ranger Wilkins' September 15, 2015 admission, *"and we have",* evidences his understanding that trout population sampling had taken place in the past on the Chattooga in North Carolina. Despite this admission, the Nantahala National Forest repeatedly failed to search adequately enough to provide me with the narrative reports that the public ultimately learned in December 2016 had been prepared and distributed contemporaneously when the 1992-1996 trout population surveys were conducted on the North Carolina part of the Chattooga.

Looking back to September 2015, Mr. Farmer should have also had some awareness that such narrative reports[46] had been created and could be drawn upon and edited to create the *Chattooga Aquatic Monitoring Summary.docx*"(document C-6-1) that he prepared to fulfill Ranger Wilkin's order. In fact, as Mr. Farmer self-reported on page 3 of his *Chattooga Aquatic Monitoring Summary.docx*"(document C-6-1), sometime prior to September 24, 2015, Mr. Farmer had emailed Mr. Dan Rankin, Fisheries Biologist, SC Department of Natural Resources to learn the most recent results of the 2014 trout survey at the long-term monitoring site near Spoonauger Falls in South Carolina. This evidences the Forest Service's capacity and willingness to look for

[46] Documents "L-1 River Coalition N", "L-2 River Coalition H", and "L-2 River Coalition R" contain easily read summaries of the results of the 1992 to 1996 trout population surveys that were conducted through a collaborative effort of the USFS and the North Carolina Wildlife Resources Commission at one monitoring site located 2 km above the Bull Pen Bridge and another monitoring site located 1 km below the Bull Pen Bridge.

information that it knows to exist in the possession of other agencies—*when the retrieval of such information suits the Forest Service's purposes.* [47]

To press my concern, the Nantahala National Forest never took *the logical next step* of asking either the North Carolina Wildlife Resources, the Sumter National Forest, or the Chattooga Coalition to provide copies of the narrative reports detailing the results of the 1992-1996 trout population sampling on the North Carolina part of the Chattooga. As of January 31, 2017, both Ranger Wilkins and Mr. Farmer were still on the email distribution list of Mr. Monte Seehorn, Chattooga Coalition. Mr. Seehorn coordinates the annual trout survey in South Carolina. Similarly, Mr. Farmer and Ms. Sheryl Bryant (USFS) are known to work with Doug Besler, of the North Carolina Wildlife Resources Commission. Stated differently a substantial working relationship existed between relevant employees of the Nantahala National Forest and these other agencies with respect to the Chattooga River.

Given my detailed written complaints about degraded trout habitat and trout fisheries on the Chattooga in North Carolina, and based on my January 4, 2016 FOIA, its subsequent clarification on February 4, 2016, and my ultimate February 24, 2016 appeal to the Chief of the United States Forest Service, the Nantahala National Forest must have understood the importance of this 1992-1996 trout population data. I needed to have this information provided to me on a timely basis in order to allow me to incorporate that information in comments that I intended to submit to federal and state agencies subject to administrative time certain deadlines.

Based on the Forest Service's information disclosure duties presumed by the *public participation* mandate of the 2012 Planning Rule, as well as its obligations under FOIA, the USFS must have understood its legally compelled obligation to provide full and complete disclosure of:

> "any document, electrofishing survey results report, memorandum, written analysis that the Forest Service *relied on, used, read, studied* to make [the] written assertion" [on Page 205 of its May 15, 2015 Environmental Assessment] "*that electrofishing surveys were conducted on the Upper Chattooga by the North Carolina Wildlife Resources Commission from 1992-1996 and that young-of-the-year Brown Trout densities appeared to be lower than other North Carolina trout populations during the same sampling period.*" See Document C-4 (italics added).

Nevertheless, the USFS never provided me with a copy of any of these 1992-1996 narrative reports. This prejudiced the exercise of my due process rights. The prejudicial impact is not mitigated by the fact that such documents were eventually accidentally provided to me by NC DEQ in December 2016 and the NCWRC in May 2017.

Ranger Wilkin' stated editorial objective was to make me "*feel better*" about my fundamental complaint that the Chattooga's in stream trout habitat and trout fisheries had been degraded over an extended reach because of excessive embedded sediment. Consequently, in January 2016, it is logically inapposite that the USFS never thought to ask the NCWRC or NC DEQ if they possessed copies of the 1992-1996 narrative reports.

[47] It remains to be determined what was communicated in that email exchange between Mr. Farmer and Mr. Rankin.

This raises the unanswered question of whether or not the USFS wanted to find out if copies of those reports could be located. The Nantahala National Forest had substantial reason to suspect that these 1992-1996 narrative reports were in the possession of either the Sumter National Forest, the Chattahoochee-Oconee National Forest, the Chattooga Coalition, the North Carolina Wildlife Resources Commission, the South Carolina Department of Natural Resources, or the Georgia Department of Natural Resources, Wildlife Division. But the NNF never managed to obtain a copy of document 00-T Borawa and Clemmons 1998.

By not *timely* producing copies of these narrative reports, the USFS prejudicially prevented me from incorporating the highly probative facts reported in those 1992-1996 trout population studies into the administrative record compiled in connection with Forest Service's proposed amendment to 36 CFR 261.77. My objection was submitted on March 21, 2016.

Similarly, this neglect prevented me from using this critical trout population data when I complained to the state of North Carolina that the Chattooga needed to be added to the Section 303(d) list of impaired waters. This complaint was tendered on March 30, 2016.

Finally, this nondisclosure prevented me from using that data in the spring of 2016 to press the NC DEQ to make sure that the then forthcoming September 2016 trout population survey would be conducted using methodologies and locations that were compatible to the methodologies and locations used by the USFS and the NCWRC back in 1992-1996.

To recap, prior to my January 4, 2016 FOIA request, Ranger Wilkins instructed Mr. Farmer to prepare a written report for the purpose of persuading me that the USFS had been conducting ongoing monitoring of the trout habitat and trout population trends on the Chattooga's headwaters in North Carolina. Following his superior's instruction, Mr. Farmer prepared such an editorialized report—***based on sources of information not fully itemized for the public.***

My January 4, 2016 FOIA *did not ask* the USFS *to substitute a summary* which editorially drew upon source documents not otherwise produced. I asked for the *source documents* that the Forest Service *relied on, read, studied, etc*. to make the quoted assertions of fact published on page 205 of the May 15, 2015 Environmental Assessment.

Nevertheless, in response to my January 4, 2016 FOIA, the Nantahala Forest doubled down by sending me yet another copy of Mr. Farmer's editorially created *Chattooga Aquatic Monitoring Summary.docx* (C-6-1).

The *non-responsiveness and obfuscation* of serving up that editorialized advocacy for a second time is obvious. The Forest Service could not have published statements in May 2015 that *relied on a document that was created by Jason Farmer four months later on September 24, 2015***.**

My January 4, 2016 FOIA request was broad enough to have compelled the Forest Service to produce the original narrative reports summarizing the results of the 1992-1996 trout surveys on North Carolina's part of the Chattooga.

Similarly, my request should have compelled the production of the field data sheets used during the 1992-1996 electrofishing surveys of the Chattooga in North Carolina. Such field data sheets would normally contain a host of critical scientific details, including but not limited to: *latitude and longitude of sampling locations*, the identity of the samplers, the distance of the section of river electrofished (with fixed starting and ending points identified with latitude and longitude), stream width, degree of turbidity, water level, water depth, water temperature, conductivity, pH, a total tally of each of the individual fish species present, the length and weight of individual specimens collected, comments about the health of the specimens, (including any evidence of gill lice or whirling disease), the existence of any barriers preventing fish from migrating upstream, etc.

On February 4, 2016, I pointed out the inconsistency in the NNF's February 2, 2016 document production and asked for the NNF to revisit my January 4, 2016 FOIA:

> "…the January 4, 2016 request was also broad enough in scope to have compelled the production of any other original source document, used by Mr. Jason Farmer, USFS, to create the editorialized summary document that was attached to the email sent to Mr. Mike Wilkins on September 24, 2015. This would include any report prepared by the North Carolina Wildlife Resources Commission which summarized the significance of its electrofishing sampling findings on the Chattooga for the years 1992-1996."

The Nantahala National Forest made little if any effort to locate and to provide me with copies of the reports summarizing the 1992-1996 trout population data that the USFS helped to collect. The USFS had an obligation to do so under either the *public participation* mandate of the 2012 Planning Rule or the Freedom of Information Act. I only learned the full extent of the Forest Service's dismissiveness of its information disclosure obligations on May 8, 2017.

On that date, the NCWRC provided me with a copy of a 58 page report entitled "*EVALUATION OF WILD TROUT REGULATION WITH A NATURAL BAIT ALLOWANCE,* Final Report, Mountain Fisheries Investigations, Federal Aid in Fish Restoration Project F-24, James C. Borawa, Micky M. Clemmons, NCWRC, 1998 ("Borawa and Clemmons 1998")(otherwise to be indexed for the USFS administrative record as document "00-T Borawa and Clemmons 1998")

This report states "We thank Jeanne Riley, Monte Seehorn, and others of the U.S. Forest Service (USFS) …for their assistance in the collection of the fish population data. Without their help, it would not have been possible to complete the data collections, particularly on the Chattooga River." See document 00-T Borawa and Clemmons 1998 at page 3.What explains why the USFS repeatedly failed to provide me with a copy of this report?

It is bad enough that I accidentally first learned about the involvement of the USFS in December 2016 when the NC DEQ inadvertently provided me with copies of several other narratives that implicated the previously unadmitted depth and intensity of the Forest Service's institutional knowledge about the past condition of the Chattooga's trout populations. It is even worse that I was only provided the irrefutable proof of that intense involvement on May 8, 2017—more than a year after my first inquiry seeking such information.

Because of the Forest Service's refusal to provide an adequate response to my January 4, 2016 FOIA request, it became necessary for me to try again by clarifying what I was seeking.

On February 4, 2016, I sent a letter of clarification that also contained a new FOIA request[48] as follows:

> "…I am submitting a new Freedom of Information Act request as follows.
>
> (1) Please provide me with **any emails or memorandum** that pertain, relate, reference, or discuss **any aspect of trout habitat, trout populations, trout monitoring, pertaining to the North Carolina part of the Chattooga,** for the period of time between January 1, 2012 and September 24, 2015, and **authored by any one of the individuals** involved in the preparation of the Environmental Assessment, *Chattooga River Boating Access*, published on May 15, 2015, as listed on pages 110-111 of that Environmental Assessment. ( a copy of which is attached for your convenience).
>
> For the purposes of improving efficiency, and avoiding future clarifications, **please begin by initially focusing your search efforts on the following specific individuals as well as the Region 8 planning staff in Atlanta:** Mr. Jim Knibbs, IDT team leader (FMS), Mr. Jason Farmer, Fisheries Biologist (NNF), Mike Wilkins, Nantahala District Ranger, Kristin M. Bail (former Forest Supervisor NNF), any of the unnamed Planners within the Region 8 Planning Department, and James Melonas (acting Forest Supervisor NNF). After this initial list is exhausted, depending on the responsiveness of any documents produced, it might prove possible to withdraw my request to search for additional responsive documents from the balance of the individuals listed on page 110-111. I am prepared to do what I can to assist the Forest Service in producing the documents that I need—and to restrict the amount of documents to no more than what is needed.
>
> (2) Please provide all emails pertaining to, relating to, referencing, or discussing electrofishing for trout on the North Carolina part of the Chattooga, in any way, for the period of time between November 1, 2014 and February 4, 2016, authored by any one of the following: Jason Farmer, Fisheries Biologist, Nantahala National Forest, Mike Wilkins, District Ranger, Nantahala Ranger District, James Melonas, Acting Forest Supervisor, Nantahala National Forest, Kristin Bail, former Forest Supervisor, Nantahala National Forest.
>
> (3) For the period of time December 21, 2015 to February 4, 2016, please provide all emails sent to the United States Forest Service from either Doug A. Besler, North Carolina Wildlife Resources Commission (doug.besler@ncwildlife.org); Powell Wheeler, District 9 Fisheries Biologist, North Carolina Wildlife Resources Commission (powell.wheeler@ncwildlife.org); Ms. Andrea Leslie, Aquatic Habitat Biologist (andrea.leslie@ncwildlife.org)."

[48] Indexed for this administrative record as document "C-8 Floyd FOIA Request 02042016…"

On the next day, February 5, 2016 at 9:38 am, I received an *unsolicited* email from the Nantahala District Ranger Wilkins suggesting that my FOIA requests might not produce any additional documents that were responsive because:

> "Mr. Floyd, I may be incorrect but reading between the lines of you[sic] last Freedom of Information Action appeal I am not sure you have a clear picture of what we have for records and what we don't. If you would like to schedule a day when I am here I will be happy to show you our Chattooga files, pull them out and let you sit in the conference room and go through them for a couple of hours."[49]

The following reply was emailed to Ranger Wilkins and FOIA coordinator Ms. Carol Milholen:

> "Thank you. That's just untenable with the time urgency of the circumstances.
>
> The information requested pursuant to FOIA is narrow. The request is in the public interest because it is likely to contribute significantly to a better understanding of what exactly is being done to avoid any further decline in the habitat suitable for spawning trout on the NC part of the Chattooga *and to prevent any further decrease in North Carolina's water quality.* I am all certain that we are all interested in making sure that all views on this important issue are carefully considered—as water quality is an issue about which we are all concerned.
>
> However, in any case, FOIA is designed to give the Forest Service the first opportunity to quickly locate the specific documents that I am requested, since the USFS knows best how the files are organized and archived.
> If you or Carol have any questions about the specifics of my requests, I would be happy to help clarify.
>
> Please do let me know specifically, if you intend to reject my request.
>
> Let's work together to save this river from having its water quality further destroyed!!!"

On March 7, 2016 @ 5:14 pm, the NNF emailed a response to the follow up FOIA submitted on February 4, 2016. The NNF *did not produce a single email or memorandum* responsive to request items (1) or (2)—*not a single email or memorandum authored by any of the individuals involved in the preparation of the 2015 EA, including Jason Farmer, NNF Fisheries Biologist, or Sheryl Bryan, NNF Biologist.* However, the NNF produced three pages of email communications responsive to request item (3) which asked for "all emails sent to the United States Forest Service from either Doug A. Besler…Powell Wheeler…Ms. Andrea Leslie."

[49] Indexed for this administrative record as document "C-8-A".

One of the documents produced was an email dated February 2, 2016 at 3:03 pm. This message involves Mr. Powell Wheeler, District 9 Fisheries Biologist, NCWRC, communicating with Mr. Monte Seehorn (Chattooga Coalition) with a copy to Mr. Jason Farmer, Fish Biologist, USFS:

> "Hey Monte,
>
> Thanks for forwarding the Bill Floyd info to me.
>
> The NCWRC doesn't have any concerns with the USFS's boating proposal. In addition, I don't have any desire to devote any more of my career to dealing with Mr. Floyd. So, I'm not going to attend the meeting.
>
> Thanks.
> Powell"[50]

There was a second email from December 22, 2015 @ 9:38 am, from Regional Fisheries Biologist, Mr. Doug Besler to his direct report, Mr. Powell Wheeler, and to Ms. Andrea Leslie, Mountain Habitat Conservation Coordinator, NCWRC, with copies to Mr. Jason Farmer, Fish Biologist, USFS and Ms. Sheryl Bryan, Biologist, USFS.

> "Powell and Andrea,
> FYI. This relates to my 2+ hour phone conversation yesterday with Mr. Floyd. No need to act on this or respond to Mr. Floyd aside from the note request I had yesterday. I made it very clear to Mr. Floyd that we have no plans to initiate any trout studies in this section of the Chattooga. I reiterated to Mr. Floyd that any specific water quality concerns need to be directly relayed, by him, to NCDEQ and that any specific issues with sediment inputs from USFS trails need to be directly relayed, by him, to USFS. He is currently engaged in some level of discussions, or interventions, with both agencies. He is obviously 'fishing' to have anyone within our agency intervene into the processes of both the USFS and NCDEQ to derail the lifting of the boating ban by showing that there has been both impacts to trout community and to water quality since boaters have had access to the resource. I am not biting. To save you both long phone calls, feel free to decline conversation and direct Mr. Floyd to me.
>
> Jason and Sheryl, FYI." [51]

The first name nature of Mr. Besler's carbon copy to "Jason [Farmer] and Sheryl [Bryan]" suggests a familiar working relationship existed between those USFS fisheries biologists and Mr. Besler. By copying his colleagues at the United States Forest Service, Mr. Besler implicitly signaled those counterparts that *there was no need for the Nantahala National Forest to be concerned about the water quality allegations of a North Carolina Lifetime Sportsman being investigated by the North Carolina Wildlife Resources Commission.* Similarly, the same circumstance is evidenced by how Mr. Powell Wheeler carbon copied his peer Jason Farmer in his email dated February 2, 2016 to Mr. Monte Seehorn.

[50] See document C-8-B FOIA Response_March 4 2016.pdf at page 5.

[51] See document C-8-B FOIA Response_March 4 2016.pdf at page 3.

These messages evidence a willingness to marginalize the merits *of my stated stream habitat concerns* without determining if this embedded sediment exceeded any reasonable minimum effects threshold for disrupting the early life cycle of trout. These messages encouraged the USFS to ignore my *photographed* allegations of degraded trout habitat and trout fisheries. After receiving this greenlight, the USFS never bothered to investigate the additional sediments being channeled into an already overstressed body of water as a consequence of the unregulated construction and use of multiple creek boating launch sites, evacuation points, and portage trails along the river's highly erosive banks. You should do so now.

The USFS must have understood the time constrained nature of my January 4, 2016 request to be provided with:

> "any document, electrofishing survey results report, memorandum, written analysis that the Forest Service *relied on, used, read, studied* to make [the] written assertion" [on Page 205 of its May 15, 2015 Environmental Assessment] "*that electrofishing surveys were conducted on the Upper Chattooga by the North Carolina Wildlife Resources Commission from 1992-1996 and that young-of-the-year Brown Trout densities appeared to be lower than other North Carolina trout populations during the same sampling period.*" Document C-4 p.1 (italics added).

Despite having reason to know that I wanted this information to substantiate whether or not the trout fisheries had been degraded, and despite the close working relationship between Nantahala Forest officials and fisheries biologist within the Sumter National Forest, the NCWRC, etc., the Nantahala National Forest never took the logical next step of asking those peers for copies of any narrative reports prepared in connection with the extensive trout population surveys that took place on the North Carolina part of the Chattooga in 1992-1996. Neither did the Nantahala National Forest consider its obligations to produce such information pursuant to the public participation mandate of the 2012 Planning Rule.

Similarly disappointing, based on the Nantahala's dearth of response to the FOIA request for "**any emails or memorandum** that pertain, relate, reference, or discuss **any aspect of trout habitat, trout populations, trout monitoring, pertaining to the North Carolina part of the Chattooga…"** it appears conclusive that the Forest Service never bothered to undertake any *antidegradation assessment* of either the condition of the trout habitat or eastern brook, rainbow, and brown trout fisheries subsequent to the start of creekboating in 2012. More remarkably, this neglect continued even after I complained in November 2014 that an exponentially increased amount of sediment had become embedded on an approximate 2 mile reach of the river.

The USFS simply ignored the photographic evidence provided to it. Such photos convincingly evidence how the unregulated paddler construction and use of boat put ins, evacuation sites, and portage trails inside North Carolina's trout buffer has caused additional sedimentation to be channeled into the creek.

Efforts were made to work with the FOIA coordinator at the NNF and the Region 8 FOIA coordinator to obtain additional documents relevant to my original January 4, 2016 FOIA and my February 4, 2016 clarification. After several weeks of efforts failed to produce additional documents responsive to the January 4th FOIA request, I appealed to the Chief's office for assistance on February 24, 2016.[52]

On April 21, 2016, after a second search prompted by my February 24, 2016 appeal to the Chief's office, the Nantahala National Forest managed to produce several *previously undisclosed* documents in response to my original January 4, 2016 FOIA request:

*(1) "Macon County.pdf" (*indexed for this administrative record as document C-12-C)
*(2) "Trout Distribution.pdf:* (for this administrative record document C-12-D)
*(3) "Copy of Chattoog.xls"* (for this administrative record document C-11-D)

Each of these files appear to contain raw, unexplained data, pertaining to the results of prior fish assemblage sampling that presumably took place somewhere on the Chattooga River in North Carolina. *Unfortunately, once again the USFS failed to provide any kind of narrative explaining the content of these spreadsheets or excerpts of spreadsheets.* Neither did any of these spreadsheets provide any way to identify the exact location of these monitoring sites.

The metadata for the Excel spreadsheet entitled "*Copy of Chattoog.xls*" (document C-11-D) suggests that the document was originally created 1/13/1999 @ 5:32 PM and was last modified on 3/3/2016 at 4:09 PM. The metadata indicates Ms. Sheryl Bryan, Biologist, USFS authored the document.

The file appears to contain critical fish assemblage population density data associated with some form of fish assemblage monitoring on the Chattooga in North Carolina that purports to have taken place between 1992 and 1996.

*To amplify,* on April 21, 2016, the Chief's office explicitly acknowledged that the raw data contained in the "*Copy of Chattoog.xls*"(document C-11-D) was used to create the spreadsheet entitled "*Chattooga fish summary.xls* (document C-5-A). Document C-5-A had been previously shared with me on February 2, 2016 in response to my original January 4, 2016 FOIA request.

The metadata for the spreadsheet "*Chattooga fish summary.xls"* (document C-5-A) indicates that the spreadsheet was originally created on September 17, 2015 and was last modified on February 2, 2016. The metadata identifies the USDA Forest Service as the author of the document.

For some reason, the more detailed raw data contained within the *Copy of Chattoog.xls*(document C-11-D) spreadsheet wasn't provided to me back on February 2, 2016 when the Forest Service delivered the editorialized document *Chattooga fish summary.xls (document C-5-A).* The delay in producing the raw data contained within the *"Copy of Chattoog.xls"* (C-11-D) spreadsheet raises questions whether or not the Forest Service wished to

[52] Indexed for this administrative record as document "C-10 FLOYD Appeal to USFS Chief re orig. FOIA dated Jan 4 2016".

allow the public to audit the accuracy of the assertions set forth in the much more general "*Chattooga fish summary.xls."(document C-5-A)*

The NNF *must have* known this *Copy of Chattoog.xls* (document C-11-D) contained the raw data pertaining to fish assemblage population trends collected presumably through electrofishing on the Chattooga River. What has not been disclosed is the identity of the custodian of document C-11-D and why *Copy of Chattoog.xls* was not previously produced in response to my January 4, 2016 FOIA.

This delayed response *also* prejudiced my efforts to prepare comments pertaining to the Forest Service's proposed changes for 36 C.F.R. 261.77—*comments which had to be submitted on or before March 21, 2016.* This *Copy of Chattoog.xls"* spreadsheet was not delivered until April 21, 2016—a full month after the time for comments for 36 C.F.R. 261.77.

A second document that the Forest Service produced is entitled *Trout Distribution.pdf* (Floyd document C-12-D). The metadata for C-12-D suggests it was created March 3, 2016 by converting an Excel spreadsheet into an Adobe Acrobat file using a KONICA MINOLTA bizhub C280. Unfortunately, the Forest Service did not provide me with the underlying Excel file from which this Adobe Acrobat file appears to have been created. Similarly, a notation found on page 9 of *Trout Distribution.pdf* suggests the source of the Excel data is "From Doug Trout Layer."[53]

*"Trout Distribution.pdf* appears to tabulate a very limited set of raw data presumably pertaining to the results of fish assemblage monitoring efforts conducted in 1978 and 1992 at an unspecified latitude and longitude in Jackson County, NC. However, other than the implications that can be drawn from the title of the column headings the document provides no explanation for the limited fields of data or their significance. Again, what has not been disclosed is the identity of the custodian of this document and why this document was not previously produced by the NNF in response to my January 4, 2016 FOIA.

The third document produced in response to my February 24, 2016 appeal was a document entitled *Macon County.pdf* (Floyd document C-12-C). The metadata for C-12-C suggests it was created March 3, 2016 using a KONICA MINOLTA bizhub C280 pdf producer. *"Macon County.pdf" also* appears to document some limited raw data pertaining to the results of fish assemblage monitoring that purports to have taken place on September 7, 1978 somewhere on the Chattooga River in Macon County, NC. The precise site was not identified with latitude and longitude. Document C-12-C conveys an impression that the raw data was gathered by an agency with the abbreviated title of "NCWRC." The document lacks any explanation as to the meaning of the 6 rows and 11 columns of tabular data. The document appears to have been part of a larger spreadsheet or database not otherwise identified. However, the Forest Service did not provide any explanatory keys, etc.

[53] It remains to be determined if "From Doug Trout Layer" identifies the source of this information as Mr. Doug Besler, Regional Fisheries Biologist, North Carolina Wildlife Resources Commission. We know that Mr. Doug Besler communicates regularly with his United States Forest Service fish biologist counterparts, Mr. Jason Farmer and Ms. Sheryl Bryan. Refer again to Mr. Besler's 12/22/2015 email incorporated above.

Synthesizing all of these facts and circumstances, it appears that the North Carolina Wildlife Resources Commission might constitute the original source of the raw data contained within *"Trout Distribution.pdf*", the "*Copy of Chattoog.xls"* spreadsheet, and the *"Macon County.pdf."*

*However, the metadata neither discloses the specific individual who created two of these documents nor how the raw data in these files were transmitted from the North Carolina Wildlife Resources Commission to the United States Forest Service.*

Of course, *if* this data was transmitted to the Forest Service *via email, correspondence, etc*. from the NCWRC, the transmittal email or other correspondence *should have also been identified and delivered to me in accord with the original FOIA request and the broad intent of FOIA.*

Unfortunately, these three documents raise more questions then they answer about the dearth of trout population monitoring on the Chattooga in North Carolina. Despite having a *public participation* obligation to do so under the 2012 Planning Rule, the Forest Service made no effort to share explanatory information *about any* of these spreadsheets.

The Forest Service's repeated pattern and practice of stifling public participation in the forest planning process can be summarized as follows: (1) The USFS first refuses to answer specific and narrowly drawn questions pertaining to the health and quality of the Chattooga's instream native trout habitat which constitutes one of the Chattooga's subcategories of ORW water quality use;(2) The Forest Service's repeated refusal to answer narrow and detailed questions seeking such factual information forces an interested individual to either accept that denial and quit, or alternatively, to try to force the production of some information using the slow and inefficient "hunt and peck" FOIA process; (3) The Nantahala National Forest manages its records so as to create the ability to repeatedly deny having possession of any trout population monitoring data pertaining to the Chattooga in North Carolina, even though it has drawn upon the information contained in such documents which it has every reason to know are in the possession of other National Forests or other state agencies; (4) When asked for documents under FOIA, the Forest Service happily uses the technical information disclosure limits of that statute to produce only partially responsive documents that still do not answer the specific questions of concern to the individual trying to participate in the planning process.

The 1992-1996 trout population data is essential to understanding the degraded condition of the Chattooga's fisheries today. In fact, the Forest Service has admitted in Federal court that the results of macro invertebrate sampling are insufficient for assessing the prospective adverse impacts of excessive sediment on a trout fishery. While turning a blind eye to the impacts of excessive embedded sediment on the Chattooga, *the USFS was contemporaneously swearing to a federal court that relying solely on bug studies was flawed when evaluating the impairing impacts of sediments on trout*.

Specifically, with regards to the nearby Tellico River, the Nantahala National Forest *told* a federal judge that "an NCDENR study [concluded] that '*aquatic insects are generally poor indicators of ecosystem stress due to sedimentation.*'" See *Southern Four Wheel Drive Association v United States Forest Service,* Case 2:10-cv-00015, Document #39, page 27, August 3, 2011(italics added for emphasis).

Stated differently, the Forest Service knows very well the importance of continuously gathering trout population data for assessing whether or not there has been any impermissible degradation of the Chattooga's once outstanding trout habitat owing to excessive embedded sediments. Stated differently, the Forest Service should have understood the neglect in continuing to base its management decisions about the condition of the Chattooga's eastern brook, rainbow, and brown trout fisheries solely on macro invertebrate sampling taken by the NC DEQ next to two highway bridges that are miles removed from where this excessive sediment is so visibly pronounced.

Agents of the USFS had stood in front of the massive logjam that serves as the sediment catch basin multiple times from 2007 forward. In fact, they took photographs of themselves while standing in front of this logjam. Being aware of the existence of an excessive amount of embedded sediment on this reach of river, the USFS should have understood its obligation to conduct a thorough and comprehensive *antidegradation assessment* of both the Chattooga's trout habitat and trout fisheries.

Unfortunately, the USFS never advised the public of its obligation to conduct such an antidegradation assessment. Furthermore, the Forest Service failed to provide the public with sufficient information about the existence of this excessive sediment to allow the public to recognize that the USFS had a compelling reason for conducting an antidegradation assessment of the Chattooga's trout fisheries. Had the USFS provided the public with the details contained within the Borawa and Clemmons 1998 report, I would have realized the intensity of deterioration that my own personal experience now evidenced compared to the 1992-1996 studies. Unfortunately, because the USFS de facto redacted the precise latitude and longitude where this 1992-1996 fish assemblage monitoring purportedly took place, my ability to use this information to investigate further was thwarted.[54]

[54] The lack of identifying latitude and longitude coordinates became the subject of a FOIA appeal to Chief's office on September 8, 2016, regarding the original FOIA request dated April 22, 2016 (FOIA Case No. 2016-FS-R8-05068-F. An unsatisfactory final response was received December 6, 2016. See documents indexed for this administrative record as M-1, M-2, M-3, M-4.

**A Fifth Example of a Pattern and Practice of Neglecting To Disclose Critical Information and of Providing Piecemeal Responses to Requests for Information**

As noted above, the Forest Service declined to provide the latitude and longitude, or any other way to identify the specific locations where trout population data had been collected as disclosed within "*Trout Distribution.pdf*", the "*Copy of Chattoog.xls"* spreadsheet, and the *"Macon County.pdf."*

Consequently, on April 22, 2016 at 1:13 pm, in an email transmitted to Mr. Jason Farmer, USFS Fisheries Biologist, I asked for the latitude and longitude of the locations where this trout population monitoring had purportedly taken place:

> "Mr. Farmer,
>
> I received the three attached documents yesterday from the Chief's office. They represent sources of raw data that I believe you may have used to compile your "Chattooga River Aquatic Resources Monitoring" summary… at the request of Ranger Wilkins.
>
> These three documents reference multiple locations where fish sampling was conducted, but they do not identify the specific location by latitude and longitude where this occurred.
>
> (1) The Excel spreadsheet only refers to Site "A", "1" and "2" without providing any kind of latitude or longitude coordinates.
> (2) The document titled Macon County.pdf references a Site "1" [*without providing any latitude or longitude location]*
> (3) The document titled Trout Distribution references "FID 1015" and "FIA 1017" but gives an incomplete latitude longitude
>
> Could you please consider this as a Freedom of Information Act Request to be provided with an explanation of where these specific sample sites are located by latitude and longitude *or alternatively a request for any document that might identify the specific latitude longitude coordinates for these respective sampling sites.* I'm presuming you may know where these sites are located since you prepared a summary of the results of 1992-1996 electrofishing data which is incorporated with the Excel spreadsheet attached.
>
> Hopefully, this is something that could be addressed without great burden to you." See document M-1 at page 7[*italics added].*

Mr. Farmer never responded to this email. In fact, instead of promptly responding to this simple request, the NNF waited until May 23, 2016 when it advised: "Your request has been forwarded to the Regional Office for review and final response to you." (see document M-1 at page 6).

On August 15, 2016, via certified mail, Tony Tooke, Regional Forester, Southern Region, responded as follows to the simple request made to Jason Farmer on April 22, 2016:

> "…You are requesting the specific latitude and longitude coordinates identifying the six (6) locations where salmonid population monitoring has occurred on the Chattooga in North Carolina…On March 3, the National Forests in North Carolina provided a final response to your previous request regarding salmonid population monitoring on the Chattooga River. Our staff conducted a second search and did not locate any records in addition to the Wild Trout Fish Stream Population Monitoring Report and Spreadsheet which was provided to you in our previous response.
>
> *Please be reminded that the monitoring survey and report were conducted by the North Carolina Wildlife Resources Commission which is a state government agency. All related records would be maintained by the North Carolina Wildlife Resources Commission. Therefore, any future requests should be directed to their office at 1701 Mail Service Center, Raleigh, NC 27699."*
>
> (letter indexed as Floyd document M-1 at page 1)(italics added for emphasis).

Here, after *four months of delay*, Regional Forester Tooke denies being in possession of *any document* that would prove responsive to my narrow request. The USFS then suggests that some form of responsive document might exist somewhere within the records of the North Carolina Wildlife Resources Commission—and that such document might prove the veracity of what the Forest Service published on page 205 of its May 15, 2015 Environmental Assessment.

However, the USFS directs me to ask for such documents directly from a state agency which the Forest Service knows is neither subject to the *public participation* mandate of the 2012 Planning Rule nor FOIA. In addition, the Nantahala National Forest was in possession of emails evidencing how *key officials at this agency had explicitly demonstrated their strong opposition to investigating the diminishment in the Chattooga's trout populations.*(See Besler email in document C-8-B FOIA Response_March 4 2016.pdf at page 3; See Wheeler email in document C-8-B FOIA Response_March 4 2016.pdf at page 5).

Here, instead of simply picking up the phone and asking the North Carolina Wildlife Resource Commission to provide the missing latitude and longitude coordinates, as compelled by the *public participation* mandate, the Forest Service waits almost four months before declaring it will not answer this simple question.

What will be interesting to discover is what kinds of communications, if any, were occurring between the fisheries biologists at the Nantahala National Forest and their counterparts at NC DEQ and the NC WRC pertaining to the then upcoming trout population study being planned for the upper Chattooga in September 2016. It remains to be discovered whether or not there was any discussion about the narrative reports prepared in connection with the 1992-1996 trout population study that occurred at a monitoring site located 2km upstream of the Bull Pen Iron Bridge and another monitoring site located 1km downstream of the Bull Pen Iron Bridge.

On September 8, 2016, I appealed the Regional Forester's rejection of my request to be provided with "any document that might identify the specific latitude and longitude coordinates" of the six sites where this fish assemblage sampling had been conducted on the Chattooga.[55] This 61 page appeal detailed the problems with how the USFS had responded to my FOIA. The Chief finally responded, three months later, via emailed correspondence dated December 6, 2016.[56]

The Chief's response is remarkable in how it attempts to explain away and to excuse the Nantahala National Forest's failure to put its hands on the substantively critical narrative reports summarizing the results of the 1992-1996 trout surveys on the Chattooga in North Carolina.[57]

In contrast to the Regional Forester's denials on August 15, 2016, the Chief's office subsequently advised on December 6, 2016 that "[a]lthough the records you seek may have been previously obtained and utilized by the Forest Service, they were not under the control of the Forest Service at the time you submitted your FOIA request." M-4 at page 2.

This *carefully parsed* response compels several questions. When did such potentially responsive documents become "lost"? Were relevant documents intentionally thrown away? Were electronic copies of such information deleted from the Forest Service's computers?

Even if the USFS was in technical compliance with FOIA at the time of the original request on January 4, 2016 (which I do not concede), under the *public participation* mandate of the 2012 Planning Rule, the USFS should have simply told me the precise locations where this 1992-1996 monitoring of the Chattooga's trout populations occurred.

*The Forest Service must have known how to recover that information.*

The USFS must have known that such reports were likely in the possession of either the Sumter National Forest, the Chattahoochee National Forest, the Chattooga Coalition, or one of the relevant wildlife management agencies for either South Carolina, Georgia, or North Carolina.

Disturbingly, page 3 of the Borawa and Clemmons 1998 report (document 00-T) states that the USFS was *indispensably* involved in collecting the trout population data on the Chattooga. In addition to revealing the Forest Service's direct involvement in the trout population data collection, Borawa and Clemmons 1998 also reveals the critical fact that Site 1 is approximately 1 km below Bullpen Bridge and site 2 is approximately 2 km above the bridge.

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[55] This appeal has been indexed for this administrative record as document "M-2 FLOYD 09082016 Appeal to Chief re April 22, 2016 FOIA".

[56] The Chief's response has been indexed for this administrative record as document "M-4".

[57] Documents L-1 River Coalition N; L-2 River Coalition H; and L-2 River Coalition R, were provided to me by the NC DEQ in December 2016 and document 00-T Borawa and Clemmons 1998 was provided to me by the NCWRC in May 2017.

Given all these facts and circumstances, the Forest Service must have known how to provide me with the precise locations of monitoring site 1 and site 2. However, the Forest Service declined to advise me of this critical information on a timely basis.

By *repeatedly* refusing to tell me where Site 1 and Site 2 were precisely located during the 1992-1996 Chattooga trout population studies, the USFS thwarted my efforts to exercise my rights in 2016.

First, because the USFS failed to produce document 00-T Borawa and Clemmons 1998, or documents L-1 River Coalition N, L-2 River Coalition H, or L-2 River Coalition R, the USFS prevented me from using the river's prior outstanding baseline trout population metrics that were detailed in those reports. Consequently, I could not incorporate those critical pieces of evidence into my March 30, 2016 complaint regarding the incompleteness of North Carolina's 2016 Section 303(d) list ( otherwise indexed for this administrative record as Floyd document G-1). This complaint (G-1) included two attached exhibits: (1) FLOYD PICTURES EXHIBIT A SEDIMENT v12152015 (otherwise indexed for this administrative record as document G-2); and (2) Exh B HOW CREEKBOATING DEGRADES THE WATER QUALITY OF THE CHATTOOGA IN NC (otherwise indexed for this administrative record as document G-3).

Document G-1 alleges that the accumulation of an excessive amount of embedded sediment has degraded "both the quality as well as the quantity of streambed habitat which remains suitable for the successful spawning of wild trout." G-1 at page 1. The trout population data contained in documents 00-T Borawa and Clemmons 1998,L-1 River Coalition N, L-2 River Coalition H, or L-2 River Coalition R, offer dispositive evidence of the *outstanding* baseline condition of the condition of these trout populations in 1992-1996. In particular, I now know that site 2 for the 1992-1996 Chattooga trout studies documented a standing crop of as high as 43.20 kg/ha in 1996, and 35.33 in 1993, with an average of 31.22 over the four years that were sampled. See document L-1 River Coalition N at page 3. Sampling did not occur in 1995 because the water was too high. Similarly, the report indicates that high water also resulted in a lower sample of 24.13 kg/ha in 1994. Id. These standing crop figures constitute outstanding numbers for a trout stream in North Carolina. Unfortunately, I was not able to include this key data in the administrative record associated with my March 30, 2016 objection in which I asserted that an extended segment of the Chattooga needed to be added to the Section 303(d) list due to negative impacts of excessive embedded sediments.

This high baseline standing crop might have been used to assess the Chattooga's current condition to determine if these trout populations had diminished because of in stream habitat degradation. We also now know, too late, that the prior trout population sampling that occurred at site 2 during the 1992-1996 study, took place proximate to where this excessive embedded sediment has subsequently developed.

Second, the Forest Service's failures prevented me from making sure that NC DEQ designed its September 2016 Chattooga River trout population survey so that a direct comparison might be made to the prior trout population stats recorded at Site 2 during the 1992-1996 trout population surveys.

The Forest Service's repeated failures to produce this information prevented me from knowing that Site 2 from the 1992-1996 survey was located approximately 1000 feet downstream of the massive log jam. This nondisclosure prevented me from recognizing the fact that substantial baseline data existed to make an apples to apples antidegradation assessment of the river's trout habitat and trout fisheries.

Multiple federal agencies have repeatedly concluded that the primary cause of sediment in the Chattooga River Watershed comes from the anthropogenic source of "*unpaved multipurpose roads*." See *Total Maximum Daily Load (TMDL) Development, For Sediment in the Stekoa Creek Watershed 303(d) Listed Stream Segment,* US EPA Region 4, December 28, 2000 at page 3 (referencing *Sedimentation in the Chattooga River watershed,* Department of Forest Resources Technical Paper No. 19, Clemson University, D.H. Van Lear et al)(emphasis added) ("Stekoa Creek TMDL 2000")(otherwise indexed for this administrative record as Floyd document 00-R).

The USFS has repeatedly observed: "Van Lear et al (1995) found that 80 percent of observable sediment sources in the Chattooga River watershed were associated with open graveled and unsurfaced roads." 2012 EA at page 156 (indexed for this administrative record as document B-1).

Other studies have also concluded that unsurfaced roads contribute more sediment to streams than any other land management activity: (1) *An annotated bibliography of the effects of logging on fish of the western Unites States and Canada.* Gen. Tech. Rep. PNW-10 USDA Forest Service, Pacific Northwest Forest and Range Experiment Station. Portland, OR, Gibbons, D.R. and E.O. Salo. 1973; (2) *Influences of forest and rangeland management on salmonid fishes and their habitats,* American Fisheries Society Special Publication 19, Bethesda Md., Meehan, W.R., 1991. In short, this sediment does not constitute a *natural background* condition.

The NNF implicitly defends ignoring this visibly obvious water quality problem by asserting a right to rely on the flawed water quality assessments of the state of North Carolina. In September 2016, NC DEQ studiously avoided comparing the dismal standing crop results of its trout population sampling to the prior trout population standing crops recorded during the 1992-1996 study. By doing so, NC DEQ avoided having to admit how the Chattooga's once *Outstanding* trout habitat and rainbow, brook, and brown trout fisheries had become impermissibly degraded.

In fact, NC DEQ's September 2016 survey applied methodologies that introduced a potential bias for overstating the true standing crop of these trout populations. *Individual fish were not weighed*. Instead, the standing crop weight was estimated using an Standard Weight projection model that is known to exhibit an upward bias when there are degraded habitat conditions. NC DEQ also used < 115mm as the cutoff for assigning young-of-the-year status to a captured fish in stark contrast the traditional cutoff of <101mm. Nevertheless, despite the use of a study plan that possessed an upward design bias, the study projected a less than superior standing crop of just 10.8 kg/hectare for "All Sites Combined." See p. 9 of NC DEQ's report which has been otherwise indexed for this administrative record as Floyd document H-10.

*More remarkably, NC DEQ did not capture and release a single rainbow or brook trout at any of the eight monitoring sites sampled in September 2016. This constitutes dispositive evidence that the Chattooga's ORW rainbow trout fishery has been impermissibly diminished since 1988*—with the most obvious potential cause for this degradation being the visibly obvious loss of habitat due to excessive embedded sediment.

By not providing me with a copy of document 00-T Borawa and Clemmons 1998, the USFS prevented me from quantifying how intensely the Chattooga's trout habitat and fisheries had degraded. Still to be discovered is whether or not the Regional Forester understood or should have understood how the data associated with this report had been jointly collected by the *US Forest Service* and North Carolina Wildlife Resources Commission in August of 1992 and 1993 at 2 sites on the Chattooga.

Skipping the technicalities, the 2012 Planning Rule compels USFS officials to be transparent and collaborative in answering *critical* factual inquiries from the public—especially when those inquiries are as narrow as the ones that I have submitted.

To press further, at the time that I made my initial request, the Forest Service *must have possessed* some document *or key* that would have allowed the USFS to identify for me where these 1992-1996 trout survey sites had been located—because the nonexistence of such documents would irrefutably confirm that the Nantahala National Forest published critical representations on Page 205 of its May 15, 2015 Environmental Assessment without being in possession of any documents corroborating the truth of such assertions. The nonexistence of such documents would evidence how critical claims of scientific fact made on page 205 of its May 15, 2015 Environmental Assessment were based entirely on unsubstantiated hearsay.

The fact that monitoring site 2 for the 1992-1996 study was located approximately 2 km above the Bull Pen bridge *constitutes a critical piece* of information that remained *undisclosed to the public* until it was accidentally discovered in December 2016—long after when it would have been critical to know such information.

This illustrates the negative impacts of the Forest Service's pattern and practice of neglecting to disclose critical information and of providing piecemeal responses to requests for information. In addition, the accidental revelation about where site 2 was located during the 1992-1996 trout survey holds critical importance in validating how the Chattooga's once outstanding trout habitat and trout fisheries have been subsequently degraded by excessive embedded sediments.

The USFS ought to be imputed with constructive control of *all of the reports* that summarized the 1992-1996 trout surveys on the North Carolina part of the Chattooga.

Such reports appear to have been contemporaneously prepared after this trout survey took place in 1992-1996. Despite Regional Supervisor Tooke's advocacy to the contrary, the aforementioned report points the finger of accountability toward the United States Forest Service by claiming that "[t]he following [trout population]] information was collected by the North Carolina Wildlife Resources Commission *and US Forest Service* in August of 1992 and 1993 at 2 sites on the Chattooga River [in North Carolina]."

*This constitutes a not insignificant admission of fact.* I should not be compelled to chase a state agency to obtain information that was in part collected by the USFS. State agencies such as the NCWRC are neither subject to the intense information disclosure requirements of either the 2012 Planning Rule's *public participation* mandate nor FOIA. The USFS must understand how state sunshine laws do not equate to FOIA. Presumably, the USFS also understands the public's inability to compel a state agency to answer specific questions under the *public participation* mandate of the 2012 Planning Rule.

To press further, the USFS must have known or should have known that NCWRC officials had already demonstrated a negative bias towards my efforts to have an extended part of the Chattooga River recognized as being impaired due to excessive embedded sediment. Please recall the content of the emails contained in document C-8-B. Consequently, the USFS suggested solution of looking to the NCWRC for answers offered an improper solution for its own refusal to provide a copy of the 58 page narrative report summarizing the results of the1992-1996 trout population surveys. On May 8, 2017, more than a year later, the Chief of the Inland Fisheries at NCWRC provided me with the relevant report which has been indexed for this administrative record as 00-T Borawa and Clemmons 1998.

The record does not reveal if either the NNF or the Regional Forester ever took the simple step of asking the NCWRC to provide this *critical information* to the USFS so that they might forward this information to me. This augurs great concern about the motivations for not having done so.

On May 8, 2017, after reviewing the Borawa and Clemmons 1998 report (document 00-T) provided to me by the NCWRC, I finally confirmed that the USFS had not provided me with critical information and that this had prejudiced my rights.

The USFS prevented me from using this information: (1) to make comments regarding the Forest Service's proposed amendment of 36 CFR 261.77 (which were due on March 21, 2016) ; (2) to offer comments to the state of North Carolina detailing why an extended segment of the Chattooga should be placed on the 2016 Section 303(d) list of impaired waters (which was due on March 30, 2016); and (3) to use the historical trout population data from the 1992-1996 studies to help design NC DEQ's September 2016 study plan for surveying the current condition of the Chattooga's brook, rainbow, and brown trout populations in North Carolina.

*More distantly, the January 2012 Finding of No Significant Impact promulgated in connection with the 2012 Record of Decision should never have been issued. It was arbitrary and capricious to have lifted the ban on boating without having considered the measurable impacts of this excessive embedded sediment on the trout habitat and trout fisheries that constitute the Chattooga's specific subcategories of ORW water quality use.*

*By never disclosing the details of the 1992-1996 trout population surveys, or the critical location of trout population monitoring site 2, the Forest Service prevented the public from recognizing how the Forest Service had a baseline of data against which to compare current trout population metrics. This prevented the public from demanding that the USFS conduct an antidegradation assessment of the Chattooga's trout habitat and rainbow, brook, and brown trout fisheries.*

This non-disclosure is particularly peculiar because one of the primary debates that took place in 2012 was about the damage that paddlers might cause to the trout habitat and trout fisheries. In January 2012, the USFS told the public that lifting the boating ban was a necessary part of its planned initiative to satisfy its discrete and nondiscretionary duty to protect and enhance the river's Outstanding Remarkable Values from impermissible degradation. "The forests are seeking to take appropriate action now to reduce existing or prevent future unacceptable impacts to the [Chattooga's outstanding remarkable values] from increasing use levels, and thus preserve the river's free-flowing condition, protect water quality and protect and enhance the river's ORVs in addition to protecting its wilderness character." *Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor,* Environmental Assessment, U.S. Forest Service, January 2012, at p.2 (the "2012 EA").

As a part of the process of justifying this action, the Forest Service explained: " To achieve a non-degradation standard, the river administering agency must document baseline resource conditions and monitor changes to these conditions." 2012 EA at page 3.

Nevertheless, despite making this assertion, the Forest Service neglected to undertake any assessment of the degrading condition of the trout habitat and trout fisheries on North Carolina's ORW headwaters. This is quite remarkable and deserves further investigation.

What is particularly offensive is that the USFS must have known or should have known the precise location where trout sampling took place between 1992-1996—something which the USFS did not disclose to me despite my repeated requests for that information. In fact, on September 8, 2016, I appealed to the Chief of the Forest Service seeking the latitude and longitude locations where these 1992-1996 trout population sampling had occurred. This appeal followed Regional Supervisor Tooke's August 15, 2016 rejection of my request to be provided with the latitude and longitude where these 1992-1996 trout surveys took place.

The NNF must have known that sample Site 1 for the 1992-1996 study was located 1 km below Bullpen Bridge while Site 2 was situated 2 km above the bridge. The USFS refused to disclose this critical fact. This nondisclosure prejudiced my efforts to prove why an extended segment of the Chattooga belonged on the 2016 Section 303(d) list.

Clearly, NC DEQ's planned September 2016 trout study could have been designed to make sure that an apples to apples comparison was made at site 2 for critical trout population metrics such as: standing crop kilograms/hectare, Relative Weight (Wr), ratio of young-of-the-year to other age classes.

An apples to apples comparison of these trout population metrics at legacy site 2 would have offered an opportunity to use the best science available to gauge any degradation caused to these trout population metrics over an extended period of time—to eliminate the prospective use of claims of short term natural trout population variability to explain away the visibly obvious problem of trout habitat degradation being caused by an excessive increase in embedded sediments.

*Instead, I did not have an opportunity to make this critical connection of fact until December 2016.* By that time it was too late to shape NC DEQ's September 2016 trout population survey.

Instead, NC DEQ adopted a sampling protocol and methodology that NC DEQ admits differed from the one used in 1992-1996. Instead of using the identifcal three pass electrofishing methodology employed in 1992-1996, NC DEQ elected to go with a modified 2 pass electrofishing methodology. *More importantly, NC DEQ did not weigh any of the trout captured and released.*

This conscious decision precluded NC DEQ from using Relative Weight (Wr) as a tool for isolating possible habitat degradation impacts on the river's trout populations. This also precluded the calculation of an actual population standing crop weight as opposed to a projected weight. In short, NC DEQ made no effort to try to isolate density independent causes for any diminishment in these trout populations.

*Neither the USFS, the NC DEQ, nor the NCWRC undertook to assess whether or not the amount of embedded sediment present exceeds any minimum effects threshold for disrupting the early life cycle of trout.*

Open disclosure, not secrecy, is what is required by both the *public participation* mandate of the 2012 Planning Rule as well as FOIA's dominant objective. *Dep't of Interior v. Klamath Water Users Protective Ass'n,* 532 U.S. 1, 8 (2001).

The purpose of FOIA "is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 242, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978). "[T]wo guiding principles apply. First, FOIA is to be broadly construed in favor of disclosure. Second, its exemptions are to be narrowly circumscribed." *See Trentadue v. Integrity Comm.,* 501 F.3d 1215, 1226 (10th Cir.2007).

The Forest Service, as the federal agency resisting disclosure in response to a FOIA request, bears the burden of justifying nondisclosure. *Trentadue*, 501 F.3d at 1226. It also bears the burden of demonstrating that it conducted a "reasonable search" for the requested agency records. *Patterson v. Internal Revenue Serv.,* 56 F.3d 832, 840 (7th Cir.1995).

Reasonableness does not require the Forest Service to search every record system or to demonstrate that no other potentially responsive documents might exist, but it must show "that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. United States Dep't of Army,* 920 F.2d 57, 68 (D.C.Cir.1990).

Supervisor Nicholas, I re-direct your attention back to Ranger Wilkin's instruction that he emailed to Mr. Farmer on September 15, 2015. In that email, Mr. Wilkins specifically ordered Mr. Farmer to consider the content of the "Chattooga Coalition's annual survey…even though it is usually in SC/GA." Document C-6 at p.1. Given this instruction coupled with Ranger Wilkins emphatic insistence "*and we have*", the Forest Service had considerable reason to search for relevant documents like "00-T Borawa and Clemmons 1998", "L-1 River Coalition N", "L-2 River Coalition H", and "L-2 River Coalition R". However, there is no evidence that the USFS tried to retrieve copies of such narrative reports from the NCWRC.

"If an agency has reason to know that certain places might well contain responsive documents, it is obligated under FOIA to search [those places] barring an undue burden." *Valencia-Lucena v. United States Coast Guard,* 180 F.3d 321, 327 (D.C.Cir.1999); see *Juda v. United States Customs Serv.,* 2000 WL 1093326, at **1-2 1223*1223 (D.C.Cir. June 19, 2000) (reversing grant of summary judgment where agency `fail[ed] to pursue clear leads to other existing records`).

When first asked, the NNF should have produced a copy of the Borawa and Clemmons 1998 report. The USFS must not be allowed to deny the prejudicial impact of having failed to follow the simple logic of simply asking the North Carolina Wildlife Resources Commission or Chattooga Coalition to provide it with copies of such reports. The USFS evidenced its constructive control of the Borawa and Clemmons 1998 report by citing a part of its substantive content on page 205 of its 2015 EA and by producing other excerpts of information that appear to be drawn from the results of this 1992-1996 study. The NCWRC has evidenced its intention to relinquish control of the Borawa and Clemmons 1998 report by sharing the underlying raw data with the USFS.

Consequently, the USFS should not be allowed to evade responsibility for having failed to provid me with a copy of the Borawa and Clemmons 1998 report. In any case, under the *public participation* mandate of the 2012 forest land planning rule, the Forest Service had an obligation to retrieve such documents and to provide copies of them to me—*especially since the fisheries biologists of these different organizations are known to communicate with each other about the Chattooga River in North Carolina.*[58]

A FOIA requester is required to "*reasonably describe*" the records sought, 5 U.S.C. § 552(a)(3)(A)(I), and the responding agency "may appropriately refrain from disclosing" materials that are "outside the scope of [the] request," *Trentadue,* 501 F.3d at 1233 n.6.

[58] Refer to the emails more fully described previously.

*However,* Congress enacted the "*reasonably describes*" language specifically to replace a prior statutory standard ("request for identifiable records") that agencies had been using to justify withholding records not requested with specificity. *Truitt v. Dep't of State,* 897 F.2d 540, 544 & nn.26-27 (D.C. Cir. 1990). "Reasonably describes" was therefore intended to "make explicit the liberal standard for identification that Congress intended.'" Id. at 545 (quoting relevant Senate report). In short, "an agency . . . has a duty to construe a FOIA request liberally." *Nation Magazine, Wash. Bureau v. U.S. Customs Serv.,* 71 F.3d 885, 890 (D.C. Cir. 1995).

Similarly, "when an agency learns that it has misunderstood the scope of a request, it has a duty to adjust its records search accordingly." *Truitt,* 987 F.2d at 545-546.

The Forest Service must search for documents in good faith and use methods that are reasonably expected to produce the requested information.

Here, the subject matter of the information being sought from the Forest Service is extremely narrow and was clearly and specifically defined: the latitude and longitude coordinates for the six sites that the Forest Service has cited as fish assemblage sampling sites on the Chattooga in North Carolina. To the extent that such narrow information can be ascertained by the production of a larger data base pertaining to fish assemblages on the Chattooga, the Forest Service should produce that entire data base. Likewise, the Forest Service should have produced a copy of "00-T Borawa and Clemmons 1998" by simply asking the North Carolina Wildlife Resources Commission to produce the document.

There is no doubt that the Forest Service relied on the sampling results of those six sites to justify its Finding of No Significant Impact in connection with the 2015 EA. In fact, on page 205 of its 2015 EA, the USFS published certain assertions drawing from those studies to deflect criticism about its neglect of the trout population trends on the Chattooga. The USFS was in constructive control of such reports. In order *to sustain the reasonableness of its FOIA search efforts*, the Forest Service should have asked the North Carolina Wildlife Resources Commission to provide it with a copy of the reports detailing the results of the 1992-1996 trout population surveys. The Forest Service's neglect equates at a minimum to arbitrary and capricious behavior. It also suggests a need for further investigation.

More importantly, it should not have been necessary for me to style any of my requests for answers to well explained questions as FOIA requests. Subsequent to September 25, 2013, it should have been incumbent on the USFS to consider all requests for documents as both requests for information under the public participation mandate of the 2012 Planning Rule as well as a request under the Freedom of Information Act. In any case, the USFS should have responded with complete and accurate answers when provided with explanations for why the documents were being requested under FOIA.

It should not be necessary for me to remind the USFS of its obligations under the 2012 Planning Rule. The totality of facts and circumstances suggest the USFS has not openly provided candid and complete answers to questions that seek to determine to what extend the USFS has neglectfully ignored its duty to protect and maintain the outstanding quality of the Chattooga's trout habitat and its trout fisheries.

**A Sixth Example of a Pattern and Practice of Neglecting To Disclose Critical Information and of Providing Piecemeal Responses to Requests for Information**

The continuing inadequacy of the Forest Service's response to my FOIA dated January 4, 2016, necessitated the submission of a more narrowed follow up FOIA on July 22, 2016. Set forth below is a description of one of the narrowed types of documents requested:

> "For the period commencing January 1, 2006 through the current date, with respect to the records of the Southern Region (R8) of the United States Forest Service, and the records of the Nantahala National Forest, (whether lodged on site or archived at remote offsite locations) please provide any document, memorandum, report, emails, correspondence, memorandum, etc., either prepared by or received by the personnel of the Forest Service, discussing, analyzing, evaluating, or referencing any condition of *sediment transport imbalance* or *excessive embedded sediment* on the Chattooga in North Carolina above the Iron Bridge on Bull Pen Road.
>
> Please make sure that your search is extensive enough to locate *any archived records* which are relevant to the narrow subject matter of this request. For the purposes of avoiding future clarifications, please make sure that your search efforts **are inclusive of but not limited to** the **records** (including any records archived in offsite document retention centers) associated with the following specific individuals Mr. Jason Farmer, Fisheries Biologist (NNF), Ms. Sheryl Bryan, Biologist (NNF), Brady Dodd, Hydrologist (NNF), Mike Wilkins, Nantahala District Ranger, Ms. Marisue Hilliard (Forest Supervisor NNF 2006), Ms. Diane Rubiaco (Acting Forest Supervisor NNF Jan. 2012), Kristin M. Bail (former Forest Supervisor NNF 2014), James Melonas (acting Forest Supervisor NNF Fall 2015), and Hurston A. Nicholas (Forest Supervisor NNF current).
>
> *This request has a narrow objective of determining if the Forest Service ever advised/notified the North Carolina Department of Environmental Quality ("NC DEQ") to go investigate the existence of the sediment transport imbalance or excessive embedded sediment condition that exists above the log jam located just north of the confluence of Cane Creek on this part of the Chattooga*." [59]

The paragraph above *was italicized* to emphasize the narrow specificity of documents being requested from the USFS. Ms. Milholen of the Nantahala National Forest emailed me on Wednesday, August 24, 2016 at 3:17 pm to advise that a response was being sent to me by US mail. After inquiring about the size of the files to be sent, Ms. Milholen agreed to avoid any further delay by sending me the 14 attachments totaling 330 pages in three separate emails.

[59] Italics are in the original. This FOIA request has been indexed for this administrative record as Floyd document "N-2".

At 4:30 pm, I received the first of three emails being sent to me by Ms. Milholen. This email contained a response authored by you, dated August 19, 2016, and 10 other documents. The second email received at 4:31 pm contained two attachments. The third email received at 4:34 pm contained a single attachment.Supervisor Nicholas, your FOIA response, dated August 19, 2016, (otherwise indexed for this administrative record as N-3) stated that you were producing "approximately 330 pages".

*Unfortunately, not a single one of those approximate 330 pages (in 13 documents) evidenced any effort on the part of the Forest Service to advise/notify NC DEQ to go investigate the existence of the visibly obvious embedded sediment plaguing the North Carolina part of the Chattooga*. In fact, 6 of the attachments are largely duplicative and pertain only to large wood inventories conducted in the Chattooga watershed. Such information is already available in the administrative record for either the 2012 EA or the 2015 EA.

Additionally, you *critically* altered the nature of my original request. I specifically explained: "This request has a narrow objective of determining if the Forest Service ever advised/notified the North Carolina Department of Environmental Quality ("NC DEQ") *to go investigate* the existence of the sediment transport imbalance or excessive embedded sediment condition that exists above the log jam located just north of the confluence of Cane Creek on this part of the Chattooga."[60]

The specificity of my FOIA request was re-characterized as follows: "Specific to managing recreation uses in the upper Chattooga corridor, you are requesting…[d]ocuments prepared or received by the Forest Service discussing, analyzing, evaluating, or referencing any condition of sediment transport imbalance or excessive embedded sediment on the Chattooga in North Carolina above the Iron Bridge on Bull Pen Road." [61]

My request was for documents in which the USFS advised NC DEQ *"to go investigate."*

This stated alteration of the specificity of my request raises concern that your office might not have conducted a proper search of both the records of the Nantahala National Forest as well as the records of the Southern Region in Atlanta. Subsequently, on September 9, 2016, an appeal was filed with the Chief of the United States Forest Service. (otherwise indexed for this administrative record as document N-4).

The Chief of the USFS responded by email on February 22, 2017. (otherwise indexed for this administrative record as document N-5). N-5 contained the Chief's cover letter, dated February 22, 2017 (document "N-6") plus another attachment containing 19 pages of information drawn from different sources. Without providing any explanation of their provenance, somebody within the USFS combined all of these 19 pages into a single document (for this administrative record Floyd document "N-7").

[60] See document N-2( italics added for emphasis).

[61] For this administrative record, see document N-3 at page 1.

Document N-7 offers no proof that the *USFS ever advised/notified the North Carolina Department of Environmental Quality ("NC DEQ") to go investigate the existence of the sediment transport imbalance or excessive embedded sediment condition which is most pronounced upstream the log jam.*

Stated differently, the USFS did not comply with its discrete and nondiscretionary duty to disclose this water quality concern to the state of North Carolina—*even after being provided with photographic evidence of the problem by me.*

*Remarkably, on pages 6 & 19 of document N-7, the Chief's office provided additional documentation substantiating how wild rainbow trout were present on the Chattooga River in the past.* The date, author, and specific provenance for pages 6 & 19 are still to be determined.

Unfortunately, because this key piece of evidence was not provided by the Nantahala National Forest on a timely basis, I was not able to share it with the US EPA when I tendered by comments explaining why an extended segment of the Chattooga River must be added to North Carolina's 2016 Section 303(d) list. Such comments were due on February 17, 2017. The Chief's office did not respond to my appeal until February 22, 2017. This further evidences the pattern and practice of the Forest Service's inappropriate behavior.

Unless the Forest Service asserts some valid claim of privilege, the Forest Service is not entitled to refuse to answer narrowly drawn questions relevant to understanding the forthcoming LRMP's capacity for providing the discrete and nondiscretionary *antidegradation protection owed* to the Chattooga River's trout fisheries and trout habitat—especially when such facts have not been published within the administrative record. Neither may the Forest Service *refuse to share the entirety* of the *institutional knowledge* constructively controlled by individuals involved in the preparation of the forthcoming Nantahala LRMP.

The Forest Service's continuing refusal to provide *prompt and detailed answers* to narrow questions was unfortunately underscored in your October 17, 2016 letter. In that letter you state: "*Although you did not submit your request as a FOIA request, I have determined that it does fall within those parameters; thus, it is being processed as a FOIA request."*

This stated action unilaterally transformed my request *for answers to specific questions* pursuant to the *public participation* mandate of the 2012 Planning Rule into a much more restricted FOIA *request for documents.* Whether by accident or intent, this recasting of my request for answers to specific questions evidences the indifference of the Forest Service towards its *information disclosure obligations* under the *public participation* mandate.

I am not obliged to engage in the *"document identification"* guessing game incumbent to the FOIA process. As an *interested individual,* I am entitled to prompt, detailed, and complete answers to my narrowly drawn LRMP questions. I am entitled to the *entirety* of non-privileged information pertaining to the narrow subject matter of my continuing campaign.

The effort to recast my *public participation questions* into a much less user friendly FOIA request raises additional misgivings about *why* the Forest Service continues to deny the existence of this massive amount of embedded sediment. This sediment has visibly *degraded* the esthetic, scenic, and scientific features of this river. Most critically this embedded sediment has *degraded* the specifically *designated uses* of the Chattooga's headwaters—the previously documented existence of an *outstanding* habitat for trout and *outstanding* trout fisheries. The Forest Service has neither made any effort to investigate, nor to accumulate detailed analytical information about this embedded sediment problem, nor to place such detailed information about this embedded sediment problem into the Nantahala National Forest's administrative record.

**A Seventh Example of a Pattern and Practice of Neglecting To Disclose Critical Information and of Providing Piecemeal Responses to Requests for Information**

On March 2, 2017 I was compelled to submit another FOIA request. This was necessitated because of this continuing pattern and practice of refusing to provide straightforward and comprehensive answers to specific questions pertaining to the Aquatic Ecosystems component of the LRMP.

The Nantahala National Forest was asked to provide me with documentation "evidencing what *specific* form of notification was provided to the state of North Carolina…in connection with [the] December 9, 2010 announcement that the NEPA process was being re-initiated" to assess the environmental impacts of allowing the sport of creek boating to be pursued on the Chattooga's headwaters in North Carolina.

I specifically requested to be provided with: "[a]ny…specific notice to the North Carolina Department of Environment and Natural Resources…or to the North Carolina Department of Administration, State Environmental Review Clearinghouse, advising and/or requesting comments from such departments about what water quality concerns and permitting requirements might need to be addressed by the United States Forest Service in preparing the …2012 EA." These agencies concerns about water quality impacts and permitting needs should have been solicited as a mandatory element of the 2012 EA.

On March 28, 2017, your office responded by producing 10 pages of records that did not directly address my questions.

These documents implied that the USFS may have had some back and forth communication with the North Carolina Wildlife Resources Commission, but such documents offered no evidence of any communications with the agencies responsible for water quality concerns and mandatory permitting.

On April 21, 2017, I wrote via email to explain why this response was unsatisfactory. "Unlike the NC Wildlife Resources Commission, [the North Carolina Department of Environment and Natural Resources or the North Carolina Department of Administration, State Environmental Review Clearinghouse] are the agencies that handle water quality concerns and permitting requirements that would have needed to be addressed by the…2012 EA." I clarified my belief that the public participation mandate of the 2012 Planning Rule entitled me to receive direct confirmation "whether or not the USFS believes that it ever notified these particular North Carolina agencies."

On April 24, 2017, you directed me to consider the emailed statement of Ms. Heather Luczak: "The USFS does believe that North Carolina agencies were notified about the restart of the NEPA process for the Chattooga EA."

On April 25, 2017, I explained why Ms. Luczak's carefully parsed statement did not answer my question. Stated differently, Ms. Luczak's statement does not say which North Carolina agencies were notified. The supporting documentation only evidences that some kind of back and forth communication occurred between the USFS and the North Carolina Wildlife Resources Commission. As I explained: "One might understand why the Forest Service might have been confused about the jurisdictional responsibilities of the NCWRC…However, the NCWRC neither has jurisdictional permitting authority nor the regulatory duty to protect the water quality of North Carolina from becoming impaired by site specific activities initiated by any federal agency." At that prior point in time this jurisdictional authority belonged to the North Carolina Department of Environment and Natural Resources, Division of Water (now known as the North Carolina Department of Environmental Quality).

I specifically asked you to direct your staff to answer the following discrete factual inquiries with a simple yes or no: "Did the USFS in fact notify the NCDENR, Division of Water when the USFS reinitiated the NEPA process in connection with preparing the 2012 EA? If so, please provide the documentation evidencing this formal notification."

I also asked you to direct your staff to disclose if the North Carolina Department of Environment and Natural Resources had provided any kind of comments or guidance about possible water pollution permits that might have been needed to be evaluated in connection with the initiation of creekboating on North Carolina's part of the Chattooga.

In that correspondence, I offered the following complaint: "Pursuant to the public participation mandate of the 2012 Planning Rule, the Forest Service *has a discrete obligation to answer questions* having relevance to the forthcoming Land Resource Management Plan…I am not required to resort to the cumbersome tool of the Freedom of Information Act to pry out factual information from the Forest Service in bits and pieces."

Having received no response to my April 25th request to have my public participation rights honored, I wrote again on May 5, 2017. I asked: "Does the Nantahala National Forest intend to respond to my concerns set forth in the attachment included in my inquiry of April 25th?...I would appreciate the courtesy of a response today."

On May 10, 2017, having failed to receive any answers from the Nantahala National Forest, I asked the Chief of the United States Forest Service to intervene.

On May 12, 2017, after I filed this appeal, and over 100 days after I first made my inquiry, the Nantahala National Forest finally provided a direct answer to this discrete LRMP related inquiry. I just don't understand why it took so long to reach this ultimate answer.

This pattern and practice of nondisclosure and piecemeal disclosure must cease. I continue to hope that there might be an opportunity for us to work collaboratively to improve the degraded condition of the Chattooga's once outstanding trout habitat and once outstanding wild rainbow, brook, and brown trout fisheries. However, there can't be cooperation unless the USFS acknowledges the problems that are so visibly obvious on the Chattooga's headwaters in North Carolina. Let me now turn to addressing specific problems with the LRMP.

**The LRMP Should Not Rely on North Carolina's NCIBI For Assessing the Impairment or Non-impairment of Mountain Trout Streams**

To expand on what is wrong with the Aquatic Ecosystems component of the LRMP, the USFS must explain why it believes the NCIBI might be used to assess the acceptable condition of mountain trout streams. *NC DEQ asserts that the NCIBI should not be used to assess mountain trout streams. Which agency is correct?* This takes on critical importance for the Chattooga River.

While NC DEQ has generally asserted that the NCIBI should not be used to evaluate the biological integrity of certain mountain streams, *the reasoning offered is vague and inconsistent.*

On the one hand, NC DEQ states "The NCIBI is applicable only to streams that are wadeable from one shoreline across to the other and for a distance of 600 feet. The NCIBI is …applicable to wadeable streams in the …Eastern Mountains (Broad, Catawba, Savannah, and Yadkin…River basins)."[62]

The Chattooga flows within the Savannah River basin within the Eastern Mountains. The river is also wadeable from shoreline to shoreline for a distance of 600 feet at multiple places along the extended reach about which I am concerned. Hence, this would seem to suggest that the Chattooga River ought to qualify to be assessed using the NCIBI.

Nevertheless, on the other hand, NC DEQ states: "**Nonwadeable streams…are not currently evaluated with the NCIBI. Neither are high elevation, cold water trout streams. Southern Appalachian trout streams are typically high gradient streams with plunge pools, *Rhododendron*- and Eastern hemlock-lined within a forested watershed, have cold water with low specific conductance, have a naturally low fish species diversity (usually brook trout, rainbow trout, or brown trout, blacknose dace, and mottled sculpin), have few tolerant fish, and support a reproducing population of one or more species of trout."** (otherwise indexed for this record as 00-Q at page 9 (red emphasis was in the original document).The red texted second paragraph does not offer an explanation to reconcile the obvious inconsistency with the first paragraph.

NC DEQ does not spell out what constitutes too high an elevation, or what steam gradient is too steep, or how many species of fish are too few to be able to apply the NCIBI to assess the biotic condition of a mountain stream.

Without saying why the Chattooga differs from other mountain streams for which NC DEQ has calculated an NCIBI score, Mr. Bryn Tracey, NC DEQ, has asserted in telephone conversations that an NCIBI score should not be used to assess the biotic condition of the Chattooga River (and presumably its tributaries).

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[62] *Standard Operating Procedure Biological Monitoring, Stream Fish Community Assessment Program,* NCDENR, Div. of Water Resources, Biological Assessment Branch, December 1, 2013 at pp 8-9(otherwise indexed as Floyd document 00-Q).

This unexplained discrepancy raises important questions both for the USFS and NC DEQ. Your October 17, 2016 correspondence forwarded a spreadsheet entitled "SAV(1).xlsx (9kb)" (indexed for the USFS administrative record as L-8-9).

The meta data for L-8-9 indicates this spreadsheet was authored by "Bryn H. Tracey" and that the document was created on September 9, 2010 at 7:58 AM. The meta data further indicates that L-8-9 was last modified on November 26, 2012 at 1:27 PM by "sbryan". An individual named Bryn Tracey works for NC DEQ and an individual named Sheryl Bryan works for the United States Forest Service

*As you know, Norton Mill Creek constitutes a major tributary to the Chattooga.* Document L-8-9 SAV(1) reports, that on May 2, 1995, an NCIBI score of 38(Fair) was calculated for Norton Mill Creek and an NCIBI score of 46 was calculated for the nearby Horsepasture River.

*An NCIBI score of 38 constitutes a poor score and is indicative of biotic impairment.*

L-8-9 shows the Norton Mill Creek monitoring site as being located at latitude 35.0591667, longitude -83.1327778. This site exists just upstream of a small bridge on Whiteside Cove Road that spans Norton Mill Creek at an approximate ground elevation of 2719 ft. Norton Mill Creek is approximately 30 ft. wide at that location. It becomes narrower as it flows downstream to the Chattooga. At the confluence of Norton Mill Creek and the Chattooga, the ground elevation drops to approximately 2551 ft. The distance between the monitoring site and the confluence of this creek with the Chattooga River is approximately 9521 feet.[63]

The projected average stream gradient for Norton Mill Creek equals drop of 168 feet divided by run of 9521 feet. This equates to approximately 1.8% stream gradient. In contrast, high gradient streams can be thought of as having 4-10% average gradient. Hence, too high a gradient would not seem to offer a reason to disqualify Norton Mill Creek from being evaluated with the NCIBI.

The Forest Service has advised that "in 1998 Norton Mill Creek *was impaired by sediment*. By the following [Section 303(d)] reporting cycle in 2000, Norton Mill Creek was removed. "[64]

Presumably, the 1995 NCIBI score of 38 provided one of the reasons why Norton Mill Creek was listed on the Section 303(d) list of impaired waters in 1998. *However, the Forest Service never explains why Norton Mill Creek was removed from the Section 303(d) list in 2000.* By never detailing why Norton Mill Creek was delisted, the Forest Service encourages the public to assume that the sediment problem had been resolved. However, it is just as possible that Norton Mill Creek was removed from the Section 303(d) list because of a possible change in how North Carolina scored its Section 303(d) water quality assessments—not because the sediment problem had been mitigated or resolved or that the NCIBI score had increased.

[63] These estimates are made Using Google Earth tools and NASA imagery from April 25, 2014.

[64] 2015 EA at page 70 & 2012 EA at page 265(italics added).

Document L-8-9 also references an NCIBI monitoring site located at latitude 35.0922222, and longitude -82.9761111 on the Horsepasture River. Identical to the Chattooga, the *nearby Horsepasture River* constitutes an ORW National Wild and Scenic River.

Document L-8-9 reports an NCIBI score of 46 (Good-Fair) as of May 2, 1995 for the Horsepasture River. The NCIBI monitoring site sits at approximately 2871 feet. Six hundred feet downstream the river flows at estimated elevation of 2860. The projected average stream gradient for this 600 foot reach of the Horsepasture River equals drop of 11 feet divided by run of 600 feet. This equates to approximately 1.8% average stream gradient. Similar to Norton Mill Creek, the Horsepasture River does not exhibit high gradient of 4-10% over its entire length.

Without specifically quantifying the disqualifying metrics, Mr. Tracey, of NC DEQ, has stated that the NCIBI cannot be used to evaluate the Chattooga because of too steep a gradient and an insufficient diversity in species of fish inhabiting it. NC DEQ does not define (1) what specific elevation is too high, (2) what average stream gradient is too steep to permit the use of the NCIBI model for assessment or (3) how many species of fish are too few to use the NCIBI model. *More problematic, NC DEQ has not explained why it is proper to monitor other nearby comparable mountain streams applying the NCIBI scoring system as recently as 2014(e.g. Caney Fork).*

To demonstrate the need for such explanation, NC DEQ's Biological Assessment Branch maintains a website that allows the public to view NCIBI Scores and Ratings by Basin. The following website was first downloaded on or prior to March 19, 2017: http://edocs.deq.nc.gov/WaterResources/Browse.aspx?dbid=0,0,0,0,0,0,0&startid=495426&row=1&cr=1 This website has been recently altered by NC DEQ.[65] Set forth below is a tabular excerpt of NCIBI data revealed for a cold water mountain trout stream called Caney Fork as set forth in a document entitled "Little Tennessee River" on this website.

| Waterbody | Latitude | Longitude | Date | NCIBI Score | NCIBI Rating |
|---|---|---|---|---|---|
| Caney Fork | 35.304976 | -83.137853 | 06/01/04 | 56 | Good |
| Caney Fork | 35.304976 | -83.137853 | 04/27/09 | 52 | Good |
| Caney Fork | 35.304976 | -83.137853 | 06/02/14 | 44 | Good-Fair |

The 2014 Caney Fork NCIBI monitoring site is located just upstream of a bridge on Hooper Cemetery Road at an elevation of approximately 2163 feet. Downstream at the confluence of Caney Fork and the Tuckaseegee River, the stream drops to an elevation of 2113 feet after having traveled a distance of approximately 11,420 feet. The projected average stream gradient for this reach of Caney Fork equals drop of 50 feet divided by run of 11,420 feet. *This equates to stream gradient of .004.* [66] Similar to Norton Mill Creek and the main stem of the Chattooga, this average stream gradient is far below the 4-10% which is generally considered high gradient.

[65] Apparently, effective 03/20/2017, the public can no longer download the actual Excel spreadsheets containing this NCIBI information along with its metadata—only Adobe pdf format files. In contrast, based on metadata, the NCIBI Excel spreadsheets produced by the USFS appear sourced from NC DEQ from an earlier date in time.

[66] These estimates are made Using Google Earth tools and NASA imagery from April 25, 2014.

Presumably, because it was just reassessed in 2014, Caney Fork still qualifies for assessment using the NCIBI methodology.[67]

In contrast to the Caney Fork, NC DEQ asserts that it would be inappropriate to use the NCIBI methodology to assess the condition of the sediment impaired segment of the Chattooga River reaching from the confluence of Norton Mill Creek downstream to the large logjam just upstream of Cane Creek. This reach of river spans approximately 2986 feet. At Norton Mill Creek pool, the elevation is approximately 2551 feet. Standing in front of the large logjam, the elevation is approximately 2544 feet. The projected average stream gradient for this extended segment of the Chattooga equals drop of 7 feet divided by run of 2968 feet.[68] This equates to an estimated average stream gradient of .002—*which is less than the .004 gradient for Caney Fork*.

*Why is it appropriate to use the NCIBI to assess the biotic integrity of the Caney Fork but not this extended part of the Chattooga River?* Neither has NC DEQ calculated an NCIBI score for the Horsepasture River, nor for Norton Mill Creek subsequent to 1995. Why? What distinguishes the Chattooga, the Horsepasture, and Norton Mill Creek from Caney Fork? All are cold water mountain trout streams. All have an indicated average gradient at the existing/potential NCIBI monitoring sites that are far below what would be normally considered high gradient.

As stated above, NC DEQ maintains a website for NCIBI Scores and Ratings by River Basin.

As of March 29, 2017, the Savannah River basin was linked to the following path **http://edocs.deq.nc.gov/WaterResources/0,0,0,0,0,0,0,0/doc/495440/Page1.aspx**

An NCIBI table for the Savannah River basin was downloaded from NC DEQ's website and has been indexed for this administrative record as document L-8-9-A. This table is now only available from this website in an Adobe Acrobat pdf format. When I previously accessed an earlier version of this website, the NCIBI scores for the Savannah River basin were available in Excel format.[69] Excel spreadsheets offer an ability to sort large amounts of data. The new Adobe formatted tables on the NC DEQ website do not. NC DEQ's Adobe formatted table lists Norton Mill Creek as having been surveyed for an NCIBI score on May 2, 1995. *However, this reformatted table no longer reports how Norton Mill Creek produced a failing score of 38.* We know Norton Mill Creek scored 38 in 1995 because this is what is reported in the Excel spreadsheet (document L-8-9) provided to me in your correspondence dated October 17, 2016.

[67] The NCIBI score for the Caney Fork has been trending down and not up. Between 2004 and 2014, there has been a 20% decrease in the indicated quality of the stream's biotic integrity as the score has decreased from 56 to 44. It would be interesting to determine what specific part of the NCIBI score has been most impacted to cause this adverse change to this mountain trout stream which rises from a source on the Nantahala National Forest.

[68] These estimates are made Using Google Earth tools and NASA imagery from April 25, 2014.

[69] In preparing this correspondence, while I can't find where I downloaded those Excel files, I did pay attention to the meta data associated with these Excel spreadsheets previously available on NC DEQ's website.

The USFS might not know why NC DEQ's website contains this omission of critical factual information. Consequently, an explanation for this discrepancy will require additional inquiry.[70]

This curious omission of critical historical information is remarkable for more than just the obvious discrepancy. *What this curious history underscores is that there are major problems with the USFS using NC DEQ's NCIBI scores as the primary tool for gauging its own success in managing critical trout streams on the Nantahala National Forest.*

NC DEQ has not explained why Caney Fork can be assessed with the NCIBI but the Chattooga cannot. In addition, the curious NCIBI history of Norton Mill Creek creates concern about the integrity of the USFS exclusively relying on reports prepared by a state agency over which it lacks supervising control. For too long, the USFS has avoided undertaking its own antidegradation assessment of the Chattooga's trout habitat and trout fisheries.

Since 1996, the USFS has turned a blind eye to the fact that the Chattooga's once outstanding trout habitat has been degrading because of excessive embedded sediment. The USFS defends this neglect by implicitly asserting a right to rely on water quality reports prepared by the state of North Carolina which the USFS has every reason to doubt.

*The fact is the USFS knew about the river's sediment transport imbalance but never told North Carolina to investigate.* The USFS also knew that North Carolina's favorable 303(d) reports were based on macroinvertebrate samples taken at two monitoring sites, one of which is miles upstream, and the other which is more than a mile downstream from the segment of river where this excessive sediment is most pronounced.

In addition to not looking where the problem was occurring, with respect to the nearby Tellico River, the Nantahala National Forest also told a federal judge that "an NCDENR study [concluded] that '*aquatic insects are generally poor indicators of ecosystem stress due to sedimentation.*'" See *Southern Four Wheel Drive Association v United States Forest Service,* Case 2:10-cv-00015, Document #39, page 27, August 3, 2011(italics added). This analytical inconsistency augurs a need to supplement the prior administrative record by investigating why the USFS continues to ignore the Chattooga's degradation by excessive embedded sediment.

[70] The meta data associated with the Excel spreadsheet that I previously reviewed but did not save suggests that it was "authored" by Mr. Bryn Tracey on December 8, 2016 at 2:37 PM and that the file was modified by "Windows User"on March 16, 2017 at 4:57 PM. At some point in time after I first looked at this spreadsheet, NC DEQ modified its website so that Excel formatted files are no longer available on this public website.

**The Current Draft of the LRMP Ignores (1) How The Highest Intensity of Protection Must Be Provided To These Administratively Recognized Subcategories of ORW Water Quality Use And (2) How This Intensified Protection Must Be Tailored To Apply to These Specific Uses of Water Quality As Opposed to the Broader General Aquatic Life Use**

The *citizens of North Carolina chose*, through their regulatory agency's actions, to mandate special water quality protection for the Chattooga River's outstanding native trout habitat and outstanding eastern brook, rainbow and brown trout fisheries. Federal agencies must respect the rights of North Carolinians to have the specifically designated uses of their Outstanding Resource Waters protected from any anthropogenic degradation. Unfortunately, the draft Aquatic Systems [71] component of the LRMP does not incorporate sufficient *Standards* to achieve the mandated intensity of antidegradation protection. Only a single broadly worded *Standard* has been proposed: "Management activities shall be designed to avoid, minimize, or mitigate negative impacts on aquatic habitats and species. For example, road and trail stream crossings shall not permanently isolate populations of native aquatic species."[72]

This *Standard* is insufficiently narrow in its focus. The Chattooga's in stream trout habitat must be provided with much more stringent protection than merely *avoiding or minimizing negative impacts to* the streams broader aquatic habitat and aquatic species.

The Clean Water Act's concept of antidegradation does not condone *minimal* or de minimis anthropogenic sourced damage for specifically designated ORW uses. *Any* non-temporary anthropogenic damage caused by local site specific initiatives must be prohibited. The Nantahala National Forest must adopt *Standards* that specifically prohibit site specific initiatives *that cause any degradation* of the Chattooga River's trout habitat—especially because an excessive amount of embedded sediment has already become deposited over an extended reach of the river.

Trout require a stream bed substrate consisting of coarse, clean, silt-free, well-aerated pebbles or gravel for spawning. The reproductive success of trout is impaired when the streambed substrate becomes clogged with excessive fine particle sized (<2mm) embedded sediments. Suitable spawning substrate must exist in locations where the water is neither too deep nor too shallow, and where the water flow is neither too fast nor too slow. Clearly, these physical conditions limit where trout can successfully hatch offspring.

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[71] See the DRAFT Desired Conditions, Standards, and Guidelines for Aquatic Systems, February 7, 2016, https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd492098.pdf (otherwise indexed for this administrative record as document "L-5" and the DRAFT Supplemental Assessment Report for *Aquatic Ecosystems*, February 19, 2014 downloaded from https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprd3793006.pdf (otherwise indexed as document "L-5-A").

[72] See the DRAFT Desired Conditions, Standards, and Guidelines for Aquatic Systems, February 7, 2016, https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd492098.pdf (otherwise indexed for this administrative record as document L-5) at page 2.

In fact, the Nantahala National Forest has acknowledged : "the availability of suitable spawning habitat (i.e. clean, silt free gravel, Figure 3) limits trout population density in southern Appalachian streams…Therefore, it is critical that spawning habitat and juvenile age classes be monitored in future efforts"[73] Unless promulgated in a *Standard*, such promises mean nothing. The USFS has culpably ignored how such trout spawning habitat has already been significantly reduced on the Chattooga because an excessive amount of fine particle sized sandy sediment (<2mm) has embedded the larger streambed substrate over an extended reach of the river.

Studies in Canada have shown brown trout prefer to build *redds* where the streambed's substrate consists of pebbles with a mean size of 6.9mm.[74]

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[73] See the document otherwise indexed for this administrative record as document L-5-A at pp 4-5.

[74] See "ABSTRACT: Redd-substrate composition, water velocity, depth, and other environmental variables associated with redd-site selection and spawning by brook trout Salvelinus fontinalis and brown trout Salmo trutta in southwestern Ontario streams were examined. Sympatric and allopatric populations spawned in similar ranges of specific conductance (225–810 µmhos/cm), pH (7.0–8.2), dissolved oxygen (>83% saturation), and stream gradient (0.2–2.3%). Brook trout spawned exclusively in areas of groundwater seepage, typically near headwaters where streamflow did not exceed 177 liters/second. Brown trout spawned in a wider range of flows (21–600 liters/second), and utilized locations with and without groundwater seepage. Spawning by brook trout usually began by the second week of October, by brown trout a week later. Brook trout spawning periods lasted 3–5 weeks, those of brown trout, 2–4 weeks. In sympatric populations, an overlap in spawning time occurred for up to 3 weeks. Reuse of redds was mostly intraspecific, although interspecific reuse of brook trout redds by smaller brown trout did occur, particularly below barriers to upstream movement. Mean water depth over redds selected by brook (24.0 cm) and brown trout (25.5 cm) were similar ($P > 0.05$). However, mean stream velocities were significantly ($P < 0.001$) slower at brook trout (17.6 cm/second) than at brown trout redds (46.7 cm/second). Average geometric mean sediment size of brook trout redds was significantly smaller than that of brown trout redds (5.7 mm versus 6.9 mm; $P < 0.02$), but less well sorted. Redd-site preference by brook trout for areas of groundwater seepage and by brown trout for faster water velocities and coarser substrates minimized species interactions during spawning. Larger body size of mature brown trout (18.0–54.5 cm fork length) than of mature brook trout (8.4–29.0 cm) was probably a factor in the brown trout's ability to utilize faster currents where coarser gravels were found." ***Redd-Site Selection by Brook Trout and Brown Trout in Southwestern Ontario Streams.*** Transactions of the American Fisheries Society , 112, pp. 760-771, Witzel, L.D. and Maccrimmon, H.R. (1983)(bolded text added).
https://doi.org/10.1577/1548-8659(1983)112<760:RSBBTA>2.0.CO;2

See also "ABSTRACT: Effects of three homogeneous gravels (2.7, 6.2 and 9.2 mm in diameter) and five heterogeneous gravel mixtures (with 0, 20, 40, 60 and 80% sand; geometric mean diameters = 14.2, 10.1, 7.2, 5.1, 3.7 mm, respectively) on embryo survival and subsequent emergence of brook charr (*Salvelinus fontinalis*) and brown trout (*Salmo trutta*) were examined in the laboratory using vertical flow incubators. Differences in survival to emergence, temporal components of emergence and developmental stage of emergents are significant ($P<=.05$) among gravel types within and between species. Alevin survival, time interval to first and 50% emergence and duration of emergence period vary directly with gravel size and inversely with sand concentration. Survivals of 0 to 20% occurred in unigranular gravels 6.2 mm or finer and in multitextured gravels with 60% or more sand and rates of 60 to 96% were found in 9.2-mm gravel and gravels with 20% or less sand. Emergent survival increased from 14 to 79% in gravels of 6.2 to 9.2 mm and from 2 to 96% in sand concentrations between 60 and 20% because of reduced entrapment. Period of emergence was longest in 9.2-mm gravel (mean for charr, 381 day degrees; mean for trout, 423 day degrees) and in 0% sand–gravel mixture (mean for charr, 232 day degrees; mean for trout, 179 day degrees). Premature emergence of alevins over a shortened emergence period in finer gravels is identified as a stress response. Larger gravel and lower sand concentrations produced the largest and most advanced alevins at emergence. Ecological implications of the results are examined." *Embryo survival and alevin emergence of brook charr, Salvelinus fontinalis and brown trout, Salmo trutta, relative to redd gravel composition*, Canadian Journal of Zoology, Vol. 61, No. 8 pp. 1783-1792, Larry D. Witzel, Hugh R. MacCrimmon.)(1983).

Another study indicated a preference for a mean substrate size of 14mm.[75] Here is what the Nantahala National Forest has suggested the streambed habitat should resemble: This photo is found on page 4 of the Nantahala's Aquatic Systems related document L-5-A.

Photo by Brady Dodd, U.S. Forest Service

[75] "ABSTRACT: This study's objective was to quantify the water depth, water velocity, and substrate used by adult brown trout Salmo trutta for feeding and spawning in rivers. General hypotheses were: (1) brown trout prefer specific magnitudes of environmental variables and occupy positions through choice; (2) the preferred value of any variable for a particular activity is the same in all rivers; (3) brown trout prefer different values of the same variable for different activities. Surface observation was used to locate 140 feeding and 140 spawning positions used by brown trout in both isolated and sympatric (with rainbow trout Salmo gairdneri) populations in six diverse rivers in New Zealand. Brown trout (mean fork length 42 cm) preferred a mean depth of 65.0 cm and a mean velocity of 26.7 cm second at the position occupied by the fish for feeding, but for spawning they preferred a mean depth of 31.7 cm, a mean velocity of 39.4 cm second, and a mean substrate size of 14.0 mm. Analysis of variance showed brown trout preferred the same velocity for the same activity in all rivers and years regardless of whether they were from allopatric or sympatric populations, but microhabitats used for feeding and spawning were significantly different. Velocity appeared to be the most important factor determining position choice but ranking of factors may vary with the type of activity. Brown trout chose positions with optimum combinations of depth and velocity instead of positions with more preferred values of either factor alone. Population size may be limited by the amount of the least abundant activity-specific microhabitat." *Microhabitats Chosen by Brown Trout for Feeding and Spawning in Rivers,* Transactions of the American Fisheries Society, 112 (3) C.S. Shirvell and R. Dungy, pp. 355-367 (1983)

As evidenced by my photographs, an extended reach of the Chattooga's streambed no longer resembles the Forest Service's photographic benchmark for *outstanding* spawning habitat for brown, rainbow, or brook trout. The USFS must stop ignoring the measurable in stream trout habitat degradation which is occurring on the upper Chattooga.

"Deposition of sediment in spawning areas can prevent reproduction. Trout eggs require a well-oxygenated environment during the embryonic stage. Eggs are laid in permeable gravel beds with many open spaces that allow continuous water flow to bathe the eggs with cool, oxygenated water. When sediment is deposited, the [interstitial spaces in the streambed substrate] can become clogged [causing a] lack of oxygen, [while inducing the trout embryos to become] poisoned by their own metabolic waste (McCabe et al. 1985)."[76]

"An increase in fine sediments within stream substrates generally has a negative impact on salmonids. Fine sediments prevent oxygen from reaching eggs, trap fry in the substrate, and retard the removal of toxic compounds from redds (Bjorn 1969, Lisle and Eads 1991)." *Sedimentation in the Chattooga River Watershed,* D.H. Van Lear, G.B. Taylor, W.F. Hansen, Department of Forest Resources Technical Paper No. 19, Clemson University, Clemson, South Carolina (February 1995) ("Chattooga Sedimentation 1995").

The degree to which larger substrate particles are surrounded, enclosed, or covered by sand-sized (<2mm) and smaller particles is known as the percent embeddedness. The quality of salmonid habitats can be assessed according to percent embeddedness. Shown below is a more general Rapid Bioassessment Protocol for assessing the quality of in stream fish habitat based on percent embeddedness of larger streambed substrates by <2mm in size sediments.

| Habitat Parameter | Condition Category | | | |
|---|---|---|---|---|
| | **Optimal** | **Suboptimal** | **Marginal** | **Poor** |
| **2.a Embeddedness (high gradient)** | Gravel, cobble, and boulder particles are 0-25% surrounded by fine sediment. Layering of cobble provides diversity of niche space. | Gravel, cobble, and boulder particles are 25-50% surrounded by fine sediment. | Gravel, cobble, and boulder particles are 50-75% surrounded by fine sediment. | Gravel, cobble, and boulder particles are more than 75% surrounded by fine sediment. |
| **SCORE** | 20 19 18 17 16 | 15 14 13 12 11 | 10 9 8 7 6 | 5 4 3 2 1 0 |

*Source: Rapid Bioassessment Protocols for Use in Streams and Wadeable Rivers: Periphyton, Benthic Macroinvertebrates, and Fish, Second Edition,* United States Environmental Protection Agency, Chapter 5, Habitat Assessment And Physicochemical Parameters, at page 5-13. Downloaded from archives at https://archive.epa.gov/water/archive/web/html/ch05main.html.

As the Forest Service knows, water quality managers out west are already regulating bedded sediments by applying some form of *minimum effects threshold* for impacts on salmonids such as the one articulated in *Protecting sediment-sensitive aquatic species in mountain streams through the application of biologically based streambed sediment criteria,* Journ. N.Am. Benthol. Soc., 2010, 29(2):657-672, Sandra A. Bryce, EPA; Gregg A. Lomnicky, EPA; Phillip R. Kaufmann (*"Bryce et al 2010*").

[76] *Aquatic Life Habitat Assessment,* North Carolina State University, downloaded from http://www.water.ncsu.edu/watershedss/info/aqlife.html.

The *Bryce et al 2010* study concluded "that minimum-effect bedded surficial sediment levels for aquatic vertebrates (fish and amphibians) were 5% and 13% [of the wetted width of the stream], respectively, for % fines (<= 0.06 mm) and % sand and fines (<= 2 mm) sampled as a systematic particle count and expressed as a whole-reach areal percentage estimates." Id. at page 669 Previously, "Maret et al. (1993) found an inverse correlation between the percentage of fine sediment and survival of brown trout to fry emergence. Bjorn et al. (1977)…suggested that when the percentage of fines [<2mm] exceeds 20-30% in spawning riffles, then survival and emergence of salmonid embryos begins to decline. In a meta-analysis of Pacific salmon studies (Jensen et al. 2009), egg-to-fry survival began to drop significantly when the percentage of fines <.85mm was >10%..[and] for larger sediment sizes, the percentage was 25-30%. Levasseur et al. (2006) observed sharp reductions in Salmo salar embryo survival if the percentage of silt and very fine sand (<0.125 mm) was > 0.2% of the redd gravel."[77]

Regarding the Chattooga River, "[s]tudies have shown that fish survival-to-emergence decreased 2-4% for each 1% increase in fine sediments." *Sedimentation in the Chattooga River Watershed,* D.H. Van Lear, G.B. Taylor, W.F. Hansen, Department of Forest Resources Technical Paper No. 19, Clemson University, Clemson, South Carolina (February 1995) ("Chattooga Sedimentation 1995").(referencing *The influence of silvicultural practices on fisheries management:effects and mitigation measures,* M.E. Seehorn (1987), pages 54-63 in *Managing Southern Forests for Wildlife and Fish… Proceedings,* Dickson & Maughan, editors, United States Forest Service, General Technical Report SO-65, Southern Forest Experiment Station.

Second, the scientific literature recognizes how excessive embedded sediment increases the risk of premature death of trout fry, while decreasing the odds that young-of-the-year become adults. A study published in 2016 found a correlation between the particle size of a stream bed substrate and the distance of dispersal from the *redd* by young of the year brown trout. See *Dispersal of young-of-the-year brown trout (Salmo trutta L.) from spawning beds,* Master Degree Thesis, Susanna Andersson, Swedish University of Agricultural Sciences, 2016. Ms. Andersson's thesis suggests that young-of-the-year *brown trout* do not disperse as far from the *redd* when the stream bed habitat located close to the *redd* possesses larger *unembedded and coarser substrates*.

A corollary expectation would be for fry to disperse much further from the original *redd* when the streambed's substrate is excessively embedded with small sized sediment (ceteris paribus). Distant dispersal makes trout fry highly susceptible to water velocity changes and puts them at risk of being involuntarily swept downstream to perish.

Other studies have shown that increased downstream dispersal from the *redd* results in lower weight fry compared to those fry that presumably conserve more energy by managing to find suitable habitat closer to the original redd. See generally *The downstream migration of brown trout, Salmo trutta, fry. I. Characteristics in an artificial environment,* Annales de Limnologie, 16, 233-245, M. Heland 1980.

[77] A Review of the Effects of Flow on Brown Trout, Eric Wagner, Fisheries Experiment Station, Logan, Utah (Nov. 2015) https://wildlife.utah.gov/fes/pdf/review-effects_of_flow_on_brown_trout_redds.pdf (indexed for this administrative record as document 00-K).

Similarly, the Michigan Department of Natural Resources studiously demonstrated over a nine year period (1972-1980) how the removal of "even small amounts of moving sand bedload sediments can have a major [positive] impact on… [the young-of-the-year brown] trout population." *Sand Sediments in a Michigan Trout Stream Part II. Effects of Reducing Sand Bedload on a Trout Population,* Michigan Dept. of Nat. Resources, Fisheries Research Report No. 1902, Gaylord Alexander and Edward Hansen, June 10, 1982 at page 1. This was a carefully controlled experiment that occurred over an extended period of time.

Synthesizing these studies, the quality of the instream habitat found in close proximity to a *redd* appears positively correlated with the odds of trout fry surviving to become juveniles and reproducing adults.

More broadly, the number of young-of-the-year [78] ("YOY") which hatch and survive to be recruited into the Chattooga's adult trout population determines the total number of trout/hectare or density of the fishery.

The recruitment of juveniles into the fishable stock can be impacted by a variety of density dependent and density independent variables. However, because spawning trout are particularly sensitive to excessive sediment, degraded habitat stands out as one of the most obvious density independent causes for the diminishment of a trout fishery.

The Forest Service has a duty to identify and to isolate *density independent causes* for the *observed* diminishment of the trout fisheries on an extended reach of the Chattooga in North Carolina. Regardless of the commitment of resources required, the Forest Service must not conveniently excuse its long term neglect by repeatedly alleging that the Chattooga's problems are traceable to the general propensity for trout populations to vary.

Such pretext does not excuse the Forest Service for having adopted a neglectful look the other way approach to monitoring the physical trout habitat for degradation from excessive anthropogenic sourced sediment. This embedded sediment now exceeds any minimum effects threshold for negative impacts on salmonids. *Nevertheless, for over 20 years(since 1996), the Forest Service neglected to track the precise trout population metrics needed to isolate this density independent cause of degradation.* Neither may the USFS excuse its neglect by conveniently pointing the finger back towards North Carolina.

The draft Aquatic Systems component of the LRMP speaks of the critical importance of monitoring trout spawning habitat. Where are the annual surveys detailing the past monitoring of trout *redds* on the Chattooga's headwaters in North Carolina? There aren't any. For more than twenty years the USFS has done nothing to assess the degrading impact of excessive sediment on the trout spawning habitat in North Carolina. The Forest Service spent almost a decade between 2004 and 2012 conducting an extensive environmental assessment of the Chattooga's condition prior to lifting the ban on boating in North Carolina.

[78] These YOY numbers are diminished on the section of river that has been impacted by this excessive sediment.

Unfortunately, the USFS neglected to study the only uses of this river which possess a discrete and nondiscretionary right to be protected from any anthropogenic diminishment. The USFS must have known that preventing any degradation of the once outstanding native trout habitat and once outstanding trout fisheries had been administratively recognized by North Carolina as specific subcategories of the Chattooga's ORW water quality use.

Astonishingly, the USFS has admitted knowing that young-of-the-year brown trout were observed (between 1992-1996) as being lower on the Chattooga compared to other trout streams in the Nantahala National Forest. However, it did nothing to investigate if this anomaly was due to in stream habitat problems. More remarkably, the USFS (or its agents) *stood in front of the massive logjam* (located at 35.033897, -83.128544) *and eye witnessed the plainly visible negative impacts of a sediment transport imbalance:*(1) when the creek boating trials were conducted in January 2007 by the Louis Berger Group, and (2) when the Forest Service conducted its large woody debris ("LWD") inventories in November 2007 and August 2012.

**Figure 5. Boaters portaging around log jam within Chattooga Cliffs Reach.**
(Photo provided by Todd Corey.)

Source: *Expert Panel Field Assessment Report,* Phase I Data Collection, Upper Chattooga River, Louis Berger Group for the United States Forest Service, Appendix C at page C-3.

The photograph above was taken in January 2007.

The photograph on the following page was taken in November 2007 by the Forest Service team while inventorying large woody debris ("LWD").

Figure 2. Large wood jam on the upper Chattooga River, North Carolina, November 2007 as published in the *Executive Summary: Large Wood in the Upper Chattooga River Watershed November 2007*, USFS Southern Research Station, C Andrew Dolloff, Team Leader at page 4.

Had the visibly excessive quantity of embedded sediment that impairs the river today been present in 2007, or 2012, or 2015, the USFS should have disclosed this fact somewhere within the combined 750+ pages of its 2012 EA or 2015 EA.[79] The simple truth is the Forest Service neither disclosed the existence of this massive logjam, the sediment transport imbalance, nor the developing excessive sediment problem. A Boolean search of those documents proves the point. This excessive sediment problem occurs far from any trail. This effectively conceals the problem from the public's watchful eye. You have to wade the creek to see it. This is an arduous task not likely to be attempted by many. The USFS has a duty to disclose what it must have eyewitnessed.

Even after being challenged about the presence of excessive embedded sediments, the USFS never investigated to quantify the problem. In stark contrast, *the USFS has measured excessive sediment on other rivers in other national forests.* The fact is, on more than a couple of feet of river reach, and at more than one location on the Chattooga, the sediment is bank to bank, and in certain cases over a foot deep. The USFS must end its policy of looking the other way and of denying any responsibility for fixing this plainly visible physical trout habitat problem.

[79] (1) *Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor*, Environmental Assessment, United States Forest Service, January 2012 (the "2012 EA")(otherwise indexed for the administrative record as document "B-1") and (2) *Chattooga River Boating Access*, Environmental Assessment, United States Forest Service, May 15, 2015(the "2015 EA")(otherwise indexed for the administrative record as document "E-1 Trail Construction EA May 15, 2015_96811_FSPLT3_2466259").

Here is what the USFS has neglectfully failed either to disclose or to investigate.

Floyd photo. June 29, 2015 @ 2:45:18 PM. View is downstream looking at the huge logjam @ 35 02 02.03 N 83 07 42.76 W. The sediment is bank to bank. This sediment condition continues upstream from here.


Floyd photo. May 22, 2014 @ 12:59:43 PM View is downstream. Sediment in foreground appears to be less than that present in June 29, 2015

The USFS must know the United States Environmental Protection Agency ("US EPA") has warned federal and state agencies that traditional biotic indices may not provide an early enough warning to prevent the degrading impacts of excessive sediment on salmonid populations.[80] The US EPA has encouraged the development and use of measurable *minimum effect thresholds* for excessive embedded sediment. This need applies to the Chattooga because preserving its outstanding native trout habitat and outstanding brook, rainbow, and brown trout fisheries constitute specific subcategories of ORW water quality use.

Prior to lifting the creek boating ban, North Carolina's trout buffer remained in a virtual pristine and near natural condition just as Chief McGuire had described North Carolina's headwaters in his 1976 Chattooga River Plan(indexed for this administrative record as Floyd document 00-A). Per the USFS 2007 biophysical audit[81] there were virtually zero places within North Carolina's trout buffer where human activity was causing sediment to be channeled into the water. This stood in stark contrast to the frequent and substantially degraded riparian habitat conditions inventoried on the South Carolina and Georgia part of the river.

*This is no longer the case*. The physical evidence in the field proves how creek boating cannot be pursued on these headwaters without causing additional sediments to be channeled into the water and without impermissibly stripping the trout buffer of its groundcover. Nevertheless, in January 2016, the USFS ignored this fact while announcing an arbitrary Finding of No Significant Impact intended to justify building unnecessary special boater access trails. Such trails will either duplicate access already available to all recreational users or increase access at very sensitive locations for just a handful of paddlers. *One of these proposed trails is particularly egregious.*

This trail, if built below the Bull Pen Bridge, will depart from the edge of a highly erosive graveled Forest Service road, will require the significant disturbance of the vegetation growing in the trout buffer, will necessitate an engineering miracle of constructing a trail that will descend straight down a steep bank characterized by highly erosive soils, all without causing sediments to be channeled off the road and the steep bank into the water. At the bottom, this trail will channel humans, presumably with boats, to a pool where trout have been known to spawn, at the same time that their eggs are subject to disturbance by humans walking on the stream bottom.

To press the point, paddlers already have easy access to the river just above the Bull Pen Bridge at a location that does not risk additional sediments being channeled into the river. The only reason for the construction of this new access trail below the bridge is to give this small group of individuals the ability to refloat the whitewater under the bridge multiple times during a single trip, much like being in an amusement park. This convincingly illustrates the Forest Service's impermissible preference for expanding whitewater paddling at the expense of the river's trout buffer, the in stream trout habitat and its trout fisheries.

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[80] The US EPA maintains a website containing links to documents such as *Developing Water Quality Criteria For Suspended and Bedded Sediments (SABS) DRAFT*, EPA, Office of Water, Office of Science and Technology, August 2003 ("*EPA SABS Criteria Overview")* and *The Biological Effects of Suspended and Bedded Sediment (SABS) in Aquatic Systems: A Review,* Internal Report, EPA, August 20, 2003 ("*Biological Effects of SABS*").

[81] For the record, the USFS 2007 biophysical inventory has been indexed as Floyd document "B-4".

Simultaneously, through improper segmentation, on January 19, 2016 the USFS proposed a critical change to its own regulations (regarding special use permits) which would de facto give the local District Ranger the discretion to vitiate *the strict rules* that were put in place when the creek boating[82] ban was lifted on the Chattooga's headwaters—without any additional

[82] *Creekboating* or steep creeking, constitutes a highly specialized form of whitewater kayaking, that is pursued by a subset of *experienced paddlers*, on narrow and steeply entrenched creeks, with steep descents, during either very little or very high volumes of water flow. The associated infrastructure demands of *creekboating* are *entirely* different from those required for canoeing on the Catawba, or from paddling the *highly regulated* Boundary Waters of Minnesota because creeking is often pursued immediately after large amounts of rain have fallen or while the rain is falling. Creekboats are specially designed with high buoyancy composites, and accentuated rocker, etc. to facilitate the descent down narrow and steep creeks with waterfalls and plunge pools.

Creekboaters must often portage—*unpredictably so—especially on the Chattooga in North Carolina*—because of the large number of massive fallen hemlocks that create life threatening stream-wide strainers which can develop unexpectedly and which may not have blocked the channel one day earlier. *This inescapable but unpredictable need to evacuate the river distinguishes creekboating from other recreational users of the Chattooga such as anglers, waders, hikers, swimmers.* Boaters cannot always choose where they will evacuate the Chattooga. *Nature makes that life threatening choice for them each and every day*—and nature changes conditions each and every day.

During high currents (>350 CFS), a paddler can experience significant difficulty, and in fact would be normally precluded from putting their boat into this narrow creek before entering its cockpit, because the ripping current would sweep them both away. Instead, the paddler must *first* climb into the cockpit of a six foot, forty pound kayak, and then launch the weight of their body and the boat into this narrow creek by propelling the bottom of the boat across the top of the bank while simultaneously using their hands or paddle to accelerate the force of that forward motion. The friction of the bottom of a boat being forcefully *seal launched* off of a river bank displaces the soils within the trout buffer and causes them to be redeposited into the river as unpermitted fill. *It is functionally analogous to a plow blade being pushed/pulled by a tractor across the landscape*. Consequently such seal launch sites produce distinct point sources of pollution where dirt is deposited into the creek and where sediment flows are channeled into the water—much as if a ditch had been dug.

In fact, the inescapable need to seal launch into the Chattooga has unlawfully caused the river bank to collapse at Boater Created Erosion Site B-5 and Boater Created Erosion Site B-5-B. To see photographs of these erosion sites please reference Floyd document "00-N Evidence of Creek Boating Caused Sedimentation and Destruction of the Trout Buffer." This collapsed bank (inside North Carolina's trout buffer) and other similar point sources of pollution *did not exist* before creek boating was introduced in 2012. We know this to be true because the Forest Service inventoried all erosion sites in 2007—*and none of these boater created erosion sites existed*. These chronic sources of sedimentation have been developed by boaters (1) at those locations where life threating hemlock strainers (which creates a risk of drowning) require paddlers to portage and (2) at those locations where paddlers wish to repeat running a particular whitewater feature similar to a ride in an amusement park. These facts impeach any suggestion that such damage has been caused by general recreational use—instead of just paddlers. *Other recreational users would have no reason to get into the creek or out of the creek at those specific locations but paddlers do.*

To evacuate the river, the paddler must first locate an eddy in which they can exit their boat without be swept downstream by the current. This may prove difficult on a narrow and steeply entrenched creek such as the Chattooga in North Carolina at high flows. *Even the most environmentally conscious paddler may simply have to take what the river offers in terms of finding an eddy.* Upon finding an eddy, and while avoiding the current, the paddler must exit the boat and then lift/push/pull the six foot forty pound creek boat up over the edge of the riverbank—which may be much higher than the water level upon which the boat was floating. This requires a certain amount of strength and nimbleness. The paddler then encounters the complication of trying to push the boat up and through an often impenetrable tangle of rhododendron and mountain laurel which grow right down to the water's edge in many places. This can necessitate the paddler having to break off or saw out a rhododendron limb(s) to get the boat out of the water. The paddler must then climb up onto the bank. Because of these *inescapable* constraints and physical complications the construction of such evacuation points denudes the river bank of its living ground cover, creating

opportunity for the public to complain. See the proposed rule change to 36 CFR 261.77, 81 Federal Register 2788-2791, January 19, 2016.

The USFS should not attempt to defend its construction of special trails for paddlers (like the one below the Bull Pen Iron Bridge) by asserting that this will somehow protect the river by preventing paddlers from using a changing number of locations to construct portage trails for getting around stream wide strainer logs, for evacuating from the river, and for launching boats.

There is no practical way to limit places where paddlers construct such infrastructure because the stream wide obstructions in the river are constantly changing. The wooly adelgid continues to cause the complete die off of the eastern hemlocks that once dominated the Chattooga's steep riparian corridor. As these trees die and fall into the creek, they create important overhead cover for trout. They also create potentially life threatening stream-wide strainers that paddlers must avoid during high water trips. This life threatening risk can be avoided by paddlers either unlawfully cutting out such obstructions with a saw, or by portaging through the dense copse of rhododendron and laurel that often anchor the highly erosive soils within the trout buffer. It is frequently impossible for a person, much less a person and a six foot long boat, to accomplish such a portage without pushing over or cutting out the rhododendron and laurel that guard the flanks of this body of water from erosion. Paddlers have caused significant impermissible damage which is corroborated by comparing photographs of the damage present today against the virtually pristine physical condition of North Carolina's riparian corridor as documented by the USFS 2007 pre-boating biophysical audit.

The USFS has no right to excuse this damage under some theory of de minimis impact.

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distinct paths for visible sediment to be channeled into the creek from either this point source on the river bank or from further up the ridge along an unplanned, unregulated, and unsustainable portage trail constructed by paddlers.

The locations of such strainer logs cannot be accurately predicted by the Forest Service, or by paddlers. The single designated trail running along the ridges above this creek is far removed up the ridge and often cannot provide a view of the creek. This remoteness precludes paddlers from scouting out conditions necessitating a portage before embarking onto the water on any given day. It is also makes it impossible for the Forest Service to monitor conditions.

The difficulty of this terrain, and the unpredictability of obstacles which must be avoided, makes it impossible for the Forest Service to estimate the definitive number and location of the places where paddlers might need to get out of the river, portage, and get back into the river. In addition to this life threatening aspect, boaters also frequently wish to exit a river in order to refloat the same section of water—much like repeating a ride in an amusement park.

Consequently, the number of places where point sources of pollution might be created remains infinite and indeterminate. This is one reason why the Chief of the Forest Service, in 1976, endorsed a prohibition of boating the headwaters in North Carolina. *Development Plan-Chattooga Wild and Scenic River,* Federal Register, John R. McGuire, Chief, United States Forest Service, Vol. 41, No. 56 p. 11847-11848, March 22, 1976. (the "1976 Chattooga River Plan") In 1976, the Forest Service recognized that the difficulty of the terrain and the fragility of the soils and shrubs within the riparian corridor made it almost impossible to protect the trout buffer from being damaged by paddlers' inescapble need to portage in places where "*exposed boulders and steep, slick, rock walled sides makes it difficult to climb out of the riverbed to portage around dangerous cascades or other obstacles."* 1976 Chattooga River Plan at page 11847(otherwise indexed for this administrative record as 00-A).

Most recently, the Nantahala National Forest has *quietly published* an ill-conceived Schedule of Proposed Actions ("SOPA") to replace the historic one lane Bull Pen Iron Bridge which permits a one lane gravel forest service road to span the river. In this SOPA, the Forest Service has published its erroneous belief that this new bridge might be built using *categorical exclusion* to avoid having to assess the environmental impacts of such construction on the pool lying immediately downstream of the bridge where trout have been known to spawn.

First, the Iron Bridge constitutes a historic treasure. Second, the native trout habitat lying downstream will not be protected by paper promises of an intention to apply best management practices to avoid any impacts on such critical trout habitat.

In falsely claiming a right to employ *categorical exclusion* to replace the Bull Pen Iron Bridge, the USFS seeks to avoid public accountability for not having complied with its frequently stated pledge *to use adaptive management* to monitor and *to comply* with its discrete and nondiscretionary duties to prevent any damage to the legally protected trout buffer and the legally protected in stream native trout habitat, and brook, rainbow, and brown trout fisheries. The USFS has not done what it promised. Should this ill-conceived project go forward, the USFS might attempt to claim agency expertise in an effort to shield itself from being held accountable for the damage that will predictably occur to the trout buffer, etc.

Since 2012, the Forest Service has demonstrated an inability, an unwillingness, or an intentional desire to avoid enforcing the rules that were *carefully* established to prevent creek boating from damaging the Chattooga's specially protected subcategories of ORW water quality use. The USFS cannot ignore its duty to prevent any anthropogenic damage to North Carolina's once outstanding native trout habitat and outstanding trout fisheries. *Unfortunately, the USFS has made statements in a public forum that reveal a tacit willingness to encourage the avoidance of such rules.*

**The Forest Service Has De Facto Demonstrated Its Unwillingness to Enforce the Paddling Rules**

*First, and most remarkably, the USFS has not issued a single notice of a rules violation during the first five paddling seasons. Unfortunately, many paddlers have self-demonstrated on the face of their Self-Registration Permits that they are breaking the rules established by the Decision Notice published on January 31, 2012.* Paddlers, by their own signed admission made on the face of the permit, are paddling as follows: (1) on days that do not meet the minimum flow; (2) in groups that exceed the maximum allowable size of six; (3) in a single boat instead of the minimum of two; (4) as a single paddler instead of the minimum of two; (5) using an unapproved raft instead of a boat; (6) *putting in at unlawful launch points*; (7) *taking out at unlawful evacuation points*.[83]

[83] Inexplicably, the text of the Self Registration Permit varies from the text of the rules promulgated by the January 31, 2012 Decision Notice. Copies of the actual self-registration permits were obtained through FOIA from the USFS. A compilation of those permits have been indexed for this administrative record as document "00-P Compilation Chattooga Self Registration Boating Permits".

The USFS has not dedicated sufficient law enforcement presence to catch these violations. Enforcement of the rules largely depends on voluntary compliance by paddlers. Unfortunately, as the permits evidence, paddlers have simply decided that this makes it entirely unnecessary to comply with these rules.

Without fear of being caught, or of being punished if caught, paddlers are encouraged by the Forest Service to ignore the rules and to access the Upper Chattooga wherever they desire, by putting in initially at impermissible launch sites and taking out wherever they desire.

This lack of enforcement effectively endorses the creation of chronic point sources where additional sediments are being channeled into the river at specific locations where paddlers are seal launching their boats, evacuating the river, or cutting out rhododendron and laurel to create portage trails. See paddler created erosion sites B-5 and B-5-B. [84] To press the point, boats are not allowed to be launched initially from either B-5 or B-5-B pursuant to the rules set forth in the 2012 Decision Notices.

Just as remarkable, on September 25, 2015, the USFS made statements in a public forum that casts doubt on the USFS commitment to enforcing the paddling rules and to protecting the specific uses of the Chattooga's ORW water quality from suffering impermissible degradation caused by paddling activities

On September 25, 2015, during a teleconference discussing American Whitewater's objection to the 2015 EA, Mr. Kevin Colburn reiterated his group's prior written insistence that the Forest Service "allow paddlers to access the Upper Chattooga where they choose just like other visitors." Mr. Colburn questioned whether the 2012 decision and the language of the existing paddling self-registration permit authorized creek boating on that segment of water flowing upstream of the designated Green Creek launch site.

District Ranger Wilkins first responded by asking if Mr. Colburn was referring to the sliding rock and large swimming hole pool located just above the Grimshawes Bridge on Whiteside Cove Road where everyone "paddles and plays."

Ranger Wilkins' characterization that everyone "paddles and plays" at Grimshawes pool drew a strong objection from Mr. Michael Bamford, a Whiteside Cove resident, who emphatically insisted: "Nobody paddles there."

Ranger Wilkins next offered his interpretation of the 2012 decision notice and the existing paddling permit by stating that the Forest Service did not regulate paddling above Green Creek. Ranger Wilkins opined that anyone can paddle anywhere upstream of the designated Green Creek launch site so long as they are carrying a self-registration paddling permit.

This drew an additional rebuke from Mr. Bamford who expressed a concern that the Forest Service was encouraging the violation of private property rights and trespassing by offering this interpretation to American Whitewater.

[84] A compilation of photographs evidencing the damage caused to the trout buffer by paddling activities has been indexed for this administrative record as document "00-N Evidence of Creek Boating Caused Sedimentation and Destruction of the Trout Buffer." This compilation includes photographs of B-5 and B-5-B.

Ranger Wilkins next asserted that he was not making any decision pertaining to private property rights, but that he was only clarifying that creek boaters were not technically prohibited by the Forest Service from paddling upstream of the Green Creek launch site.

At that point, Mr. Colburn, of American Whitewater, challenged what this meant. Mr. Colburn explained that paddlers wanted to challenge the navigability of the creek flowing between the Grimshawes Bridge and the Green Creek launch site. To be able to challenge the navigability of this narrow creek, Mr. Colburn reminded Ranger Wilkins that paddlers wanted the Forest Service to change the language of the paddling permit to make clear that the USFS doesn't prohibit paddling on that part of the Chattooga's headwaters flowing either above the Grimshawes Bridge or flowing below that bridge downstream to the confluence of Green Creek.

Next, Mr. Colburn asked the Forest Service to designate the parking lot at Green Creek as a lawful initial paddler put-in. American Whitewater appeared to be asking the USFS to give paddlers *complete discretion* to decide precisely where they wished *initially* to launch their craft into the water—in conflict with what the 2012 Decision Notices require. The 2012 Decision Notices were intended to limit where creek boaters may launch to several specific points—in order to prevent excessive damage to the riparian corridor and water quality. The rules eliminating intention of this request is evidenced by the *incongruity* of asking for the parking lot to be designated as the *initial* put in. It takes over a half an hour to hike from that parking lot to the water.

Amazingly, instead of focusing on the impermissible damage being *currently* done to the trout buffer and the additional sediment being *currently* channeled into the water by creek boating activities, District Ranger Wilkins responded to Mr. Colburn's request by suggesting that after putting in at the designated launch point at Green Creek, paddlers could always immediately just take the boat back out of the water, and *"walk around."*

Stated differently, the District Ranger was advising that a paddler could put in at Green Creek, immediately get out at Green Creek, and "walk around" to *where ever* they wished to launch their boat—without violating the restrictions on where boats are *initially* allowed to launch.

By recommending that paddlers *should* "walk around", the Nantahala National Forest tacitly admitted: (1) that Ranger Wilkins' nuanced recommendation to "walk around" might not constitute a violation of the 2012 rules, and (2) that the Forest Service had no intention of enforcing the 2012 paddling rules under the penalty of law.

The acting Forest Supervisor, James Melonas, was also on this teleconference. He neither challenged this "walk around" suggestion nor offered any clarification at that time. Neither did any Nantahala Forest official deny this concern when challenged about it via an email that I sent to Mr. Melonas, Ranger Wilkins, and Ms. Luczak on September 30, 2015 at 12:47 pm.[85]

[85] This September 30-October 1, 2015 email chain has been documented for this administrative record as document "00-M Email Chain…"

The recommendation to "walk around" encourages the destruction of North Carolina's fragile trout buffer. In fact, paddlers have disturbed the trout buffer in order to create portages needed to re-float certain water features like being in an amusement park. In fact, for your benefit please see the collection of photographs, otherwise indexed for this administrative record as 00-N Evidence of Creek Boating Caused Sedimentation and Destruction of the Trout Buffer.pdf. These photos show how creek boaters have hacked out rhododendron in the trout buffer to create their own trail for making multiple trips through particular whitewater features. Unfortunately, the *impact* of two boaters, making multiple trips through the same whitewater feature equates to multiple boaters instead of just two. This hidden intensity of resource degradation is not captured by the number of permits pulled by boaters. This dynamic can be foreseen to cause significant damage to the trout buffer, to North Carolina's water quality, and ultimately to an already sediment stressed wild trout habitat.

During this September 25, 2015 teleconference, District Ranger Wilkins made note that any disputed issues of paddler access (and by implication setting the stage for a potential challenge of the creek's navigability) could be reassessed within the forthcoming Nantahala LRMP.

Mr. Colburn acknowledged his understanding of that potential opportunity and Acting Forest Supervisor Melonas then thanked Mr. Colburn for "bringing up that last point." This exchange signaled the USFS willingness to use the LRMP to expand paddling without addressing the fact that paddling activities have damaged North Carolina's trout buffer and channeled additional sediments into the water.

Subsequently, in January 2016, the USFS quietly surfaced an intention to modify 36 CFR Part 261.77. Despite any excuses to the contrary, there was no substantive need to change the language used in the regulation—other than to clarify the locations where paddling permits could be obtained. Instead, if you consider the context of the "walk around" admission made during this September 25, 2015 meeting, the proposed change in this regulation evidences an attempt to eliminate the public's ability to challenge the USFS for allowing greater use of the Chattooga's headwaters by paddlers.

The new rule would go much further than just clarifying where paddling permits might be physically obtained. The new rule would arguably vest *local* USFS officials with discretion to eliminate the boating restrictions. The proposed rule sets the stage for the Forest Service to introduce *commercial guided boating* on the most fragile and *"near natural"* part of the river in North Carolina—*something which the public was promised would not occur throughout the decade long process of rulemaking leading up to the promulgation of the 2012 Decision Notice.* As written, the proposed rule implicates a possible intention to allow noncommercial recreational group use of 75 or more participants and spectators—which would also violate what the public was promised.

The fact is the USFS has impermissibly allowed paddlers to *degrade the physical condition* of the river's trout buffer and to channel additional sediment into these ORW waters through the construction and use of an indeterminate number of "seal" launch sites, river evacuation points, and portage trails inside the river's fragile trout buffer. The USFS has failed to discharge its discrete and nondiscretionary duty to protect the Chattooga's outstanding trout habitat and trout fisheries. *This must cease.*

**Regardless Whether Water Pollution is Caused by Point Source Pollutants or Nonpoint Source Pollutants, the Federal Antidegradation Standard Must Not Be Violated**

As the EPA recently clarified: "Although the CWA includes specific requirements for the control of pollution from certain discharges, state and authorized tribal WQS [water quality standards] established pursuant to CWA section 303 *apply to the water bodies themselves*, regardless of the source(s) of pollution/pollutants. Thus, the WQS express the desired condition and level of protection for a water body, regardless of whether a state or authorized tribe chooses to place controls on nonpoint source activities, in addition to point source activities required to obtain permits under the CWA." *Water Quality Standards Regulatory Revisions, Final Rule,* 80 Fed. Reg. 51020-51050, Aug. 21, 2015 (to be codified at 40 C.F.R. Part 131) at page 51021(emphasis added)("2015 WQS Revisions").

In fact, the EPA previously applied this approach in 2000 with respect to Stekoa Creek in Georgia. The TMDL budget was specifically designed to "only address the major sedimentation problems coming from the watershed *and not address the minor point source contributions*." Stekoa Creek TMDL 2000 at page 6.

See also *Pronsolino v. Nastri*, 291 F. 3d 1123, 1133 (9th Cir. Ct. App. 2002) cert denied 539 US 926 June 16, 2003. As the *Pronsolino* panel stated "The precise statutory question before us is whether the phrase '*are not stringent enough'* triggers the [Section 303(d)] identification requirement…for waters as *to which effluent limitations do not apply at all* to the pollution sources impairing the water. We answer this question in the affirmative…" Id. at 1126(emphasis added).

In other words, it doesn't matter whether water quality degradation occurs as a consequence of point source or *non-point source pollution/pollutants*. Human activities must be restricted if they degrade the specifically designated uses of Outstanding National Resource Waters.

**The USFS Lacks the Scientific Foundation Needed To Ignore the Negative Water Quality Impacts of its Recent Decision to Construct Special Access Trails For Creek Boaters.**

In 2015, the USFS admitted that creek boaters cause additional sedimentation but then summarily dismissed that water pollution concern with the following self-serving explanation: "With the potential for increased recreational use, this user-created trail network could become more unstable and result in an increasing source of sediment to the river. *At this time, the uses combined with the impacts from the projects identified in Table 3.1-1 do not exceed any required sedimentation threshold*." See the 2014 Draft EA at page 70 indexed for this administrative record as document C-1 (italics added).

Despite claiming that any *current* damage could be assimilated, the USFS neglected (1) to define the referenced *minimum effects threshold* for embedded sediments; (2) to *measure if existing sediments exceeded the threshold*. The USFS neither measured nor reported the actual amount of sedimentation flowing /per period of time/per square miles of the headwater's watershed.

The Forest Service *never studied* the hydrology of the headwaters for the purpose of understanding/predicting the critical impacts of the massive logjam on the river's sediment transport capacity and overall sediment loads—or whether the existing embedded sediment accumulation was excessive. Similarly, the Forest Service never evaluated the potential geomorphic response that might take place if this log jam were to be removed, by nature, by being sawed out by whitewater enthusiasts seeking to remove this impediment to their sport, or due to an initiative of the Forest Service. *This is a huge concern to those seeking to protect the downstream trout habitat and trout fisheries.*

Similarly, the Forest Service must have understood how the development of boater portage trails, evacuation points, and launch sites would prove highly incompatible with the highly erosive soils present within the trout buffer and wider riparian corridor. The Forest Service must have known that the NRCS Soils Survey *rates* the soils as having one or more weaknesses that cannot be overcome *without* major soil reclamation, special design, and expensive installation procedures. The Soils Survey reveals that the riparian corridor is dominated by Cleveland-Chestnut-Rock outcrop complex 30-50 percent slopes ("CpE"), Cleveland-Chestnut-Rock outcrop 50 to 95 percent slopes ("CpF"), Chandler gravelly fine sandy loam, 30 to 50 percent slope ("CdE"), Chandler gravelly fine sandy loam, 50 to 95 percent slope ("CdF"), Cashiers gravelly fine sandy loam 30 to 50 percent slopes ("CaE"), and Cashiers gravelly fine sandy loam 50 to 95 percent slopes ("CaF") soils.

In certain places *the dominant soils are rated so severe by the NRCS that trail design cannot reasonably mitigate the foreseeable erosion damage. Nevertheless,* the Forest Service redirected attention away from this incompatible soils problem by asserting that such problems could be mitigated. The Forest Service downplayed this incompatibility by summarily proclaiming that any impact from such unmanaged paddler developed infrastructure was acceptable.

*The visible destruction that has occurred now disproves that erroneous presumption.*

Finally, the Forest Service knew but ignored how Management Area 18 (Riparian Management Area) within the *existing* Nantahala forest plan called for improving "*habitat of wild trout streams as a first priority*." Land And Resource Management Plan, Amendment 5, Nantahala and Pisgah National Forests at III-185, March 1994 (the " NNF LRMP Amndt.#5")(emphasis added). All was ignored in order to accommodate the demands of paddlers.

Fortunately, the Clean Water Act does not allow summary assertions of projected compliance to excuse actual violations of the law. *A state's antidegradation policy is triggered when a human activity is proposed for a body of water that may have some effect on water quality*. See Memorandum Decision and Order, *Greater Yellowstone Coalition v. U.S. Environmental Protection Agency,* Case No. 4:12-CV-60-BLW, Dst. Ct. Idaho, April 24 2013 (re EPA's subsequent revocation of Idaho's de minimis exemption allowing consumption of a water body's assimilative capacity *without* providing important economic or social development justification). Similarly, "[t]he CWA requires federal agencies to determine that approved actions do not result in pollution in violation of state water quality standards." *Greater Yellowstone Coal. v. Lewis,* 628 F.3d 1143, 1149 (9th Cir.2010) (citing 33 U.S.C. § 1323(a)).

The *unregulated development and use* of river evacuation points, portage trails, and boat launch sites displaces soils *within the critical trout buffer* and re-deposits them into these Outstanding

Resource Waters—without appropriate permitting and in violation of various state and federal statutes and regulations. In certain places the construction and use of this whitewater paddling infrastructure *channels* sedimentation into these Outstanding Resource Waters. The construction and use of this whitewater paddler infrastructure creates chronic point sources of water pollution.

In contrast to the Chattooga, with respect to the Tellico River, the USFS took a polar opposite position: " A single location of visible sediment reaching a stream is a violation" of the NNF LRMP Amndt.#5. *Upper Tellico Decision Response to Public Comments to Transportation System and Related Recreation Management Actions for the Upper Tellico Off-Highway Vehicle System,* DRAFT Environmental Assessment, Nantahala National Forest, September 2009, response to Public Comment 1-3, at page 9. (last downloaded June 5, 2016 from **http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5194718.pdf**) (otherwise indexed for this administrative record as document I-3).This inconsistent approach to sediment is particularly pernicious because the Chattooga's ORW status mandates greater water quality protection than the Tellico River.

With respect to the construction of trails within the Riparian Area, the Nantahala National Forest LRMP Amndt.#5 specifies: "Design and maintain all types of trails so no visible sediment reaches the stream channel, except at crossings where visible sediments and surface runoff entering the channel will be minimized as directed by the NC FPGRWC [NC Forest Practices Guidelines Related to Water Quality 15A NCAC 011.0100-0209] for silviculture." NNF LRMP Amndt.#5 at page III-185. All of these concerns were entirely disregarded with respect to the creation of paddling infrastructure on the upper Chattooga.

**The Young-of-the-Year and Trout Habitat Problem**

The relative success or lack of success of trout reproduction can be best estimated after young-of-the-year have reached a sufficient size (>=4cm) to be captured and released through electrofishing. Lower absolute numbers of YOY can point to problems within a trout population due to density dependent or density independent reasons.

Biologists presume young-of-the-year (YOY) as being from the latest spawning cycle (less than a year old). The age determination is made through presuming that fish of a distinct length (e.g.usually less than 101mm) are YOY. Similarly, the number of YOY captured is typically used as a rough indicator of spawning success (or lack thereof). The reality is the length of a fish may not constitute a true indicator of the age of the fish since growth rates (annual production) varies greatly depending on the quality of the habitat and the fertility (or again, lack thereof) of that particular body of water. When habitat has become degraded some slower growing fish might be falsely presumed to be YOY instead of older fish with stunted growth. This is why identifying habitat problems is so crucial to obtaining an unbiased understanding of what is occurring with YOY numbers.[86]

[86] *Where habitat has been degraded, you can't presume that the length distribution of the fish caught constitute an accurate indicator of different age groups.* Fish could be of the same age class but the faster growing one may have stationed itself in superior habitat while the shorter fish may have been forced to try to survive in a much poorer quality habitat.

Based on electrofishing surveys that were conducted within the upper Chattooga River between 1992 through 1996, the USFS has admitted knowing that the young-of-the-year brown trout populations on the upper part of the river had become lower than other North Carolina trout populations during that period of time. Incredulously*, despite having reportedly been involved in those trout population surveys, the USFS did nothing to address this decline during the next two decades.* [87] The USFS entirely ignored this problem.

Instead, in 2015, the Forest Service offered the following excuse for this long term neglect: "Electrofishing surveys were conducted within the upper Chattooga River from 1992 through 1996 *by the NCWRC*. Young-of-the-year Brown Trout densities appeared to be lower than other North Carolina trout populations during the same sampling period; *however, a self-sustaining population continues to persist." Chattooga River Boating Access,* Environmental Assessment, United States Forest Service, May 15, 2015, at page 34(italics added)( (the "2015 EA")( otherwise indexed for this administrative record as Floyd document E-1).

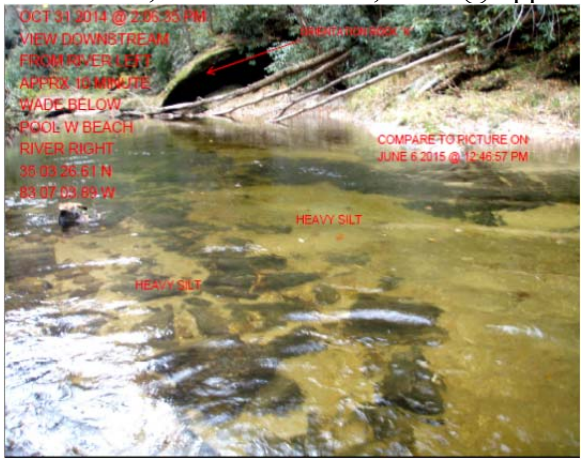
The USFS never discussed the density independent connection between lower YOY counts and decreased suitable spawning habitat due to excessive sediment. Larger fish compete with smaller fish for the best feeding, resting, and hiding locations. The USFS never discussed how this survival of the fittest pressure becomes accentuated when the quantity of total suitable habitat is decreased because of excessive embedded sediments. This creates even greater competition for survival on a limited space. Populations can't thrive in that environment although they might continue *"to persist."*

In addition, younger trout need a greater amount of *riffle without whitewater* segments of river as opposed to pools. Brown trout prefer to occupy the lower reaches of low to moderate gradient areas found on rivers with periodic steep elevation changes like the Chattooga. See *Habitat Suitability Index Models and Instream Flow Suitability Curves: Brown Trout,* US Fish and Wildlife Services, Biological Report 82(10.124), Robert Raleigh, Laurence Zuckerman, Patrick Nelson, at page 4, September 1986. This factor further concentrates fish and forces the smaller ones to have to compete for limited habitat with larger fish.

In September 2016 NC DEQ electrofished eight 600 foot reaches on this sediment impaired part of the Chattooga. Not a single rainbow trout was captured. This survey also confirmed the continuing paucity of YOY brown trout—twenty years after the 1992-1996 studies on the Chattooga. The fact is the Chattooga suffers from an amount of embedded sediment exceeds any reasonable *minimum effects threshold* for disrupting the early life cycle of trout. The USFS has an independent duty to prevent human related habitat degradation but has failed to discharge that duty.

[87] In contrast to what the Forest Service has recently repeatedly published, according to reports provided by the state of North Carolina, this trout population data was "collected by the North Carolina Wildlife Resources Commission *and US Forest Service* in August of 1992 and 1993 at 2 sites on the Chattooga River. Site 1 is approximately 1 km below Bullpen Bridge and site 2 is approximately 2 km above the bridge." See document L-2 River Coalition R produced as an attachment to document H-11 via email 12122016 (italics added).

The two photographs below show the same riffle location on the Chattooga's headwaters on October 31, 2014 and June 6, 2015 @ approximately 35 03 26.61 N 83 07 03.89 W.




The first photo shows how the cobbled streambed in this section of riffle waters are smothered with small particle sized sediment at October 31, 2014. The photo on the right shows the continuing embedded condition on June 6, 2015. Compare those conditions photographed on the Chattooga's headwaters in North Carolina to the EPA rapid assessment protocol photos below.

Optimal Range *(William Taft, MI DNR)*

Poor Range *(William Taft, MI DNR)*

**EMBEDDEDNESS: EPA RAPID BIOASSESSMENT PROTOCOL**

Applying the EPA's Rapid Bioassessment Protocol, the photographed riffle waters on the Chattooga ought to be assigned a *"Poor"* habitat condition score. Unfortunately, these two examples of "Poor" condition riffle waters are *typical* of conditions observed up and down this segment of the Chattooga.

The Nantahala's future LRMP must provide the Chattooga's specific subcategories of ORW water quality use with the highest intensity of protection compared to all other bodies of water within the Nantahala. The USFS may not excuse the impermissible degradation of the Chattooga's once outstanding trout habitat and trout fisheries by claiming that conditions measured at the broader watershed level or forest wide level are not degraded. Neither may the forthcoming LRMP devote its limited resources to protecting only brook trout habitat and brook trout populations scattered over the entire forest at the expense of allowing degradation of the once outstanding trout habitat and outstanding brown and rainbow trout fisheries which constitute specific subcategories of use of the Chattooga's ORW water quality.
Stated differently, with respect to the Chattooga River, the USFS may not prioritize the conservation of brook trout at the expense of neglecting the rainbow and brown trout fisheries.

*Also*, the Forest Service must not presume that density dependent factors instead of habitat problems explain any diminishment in the Chattooga's trout fisheries. Before any effort may be made to tinker with the composition of the Chattooga's trout species, the USFS must fix the river's in stream habitat problems.

The Forest Service may only allow site specific activities that are compatible with preserving the outstanding condition of the Chattooga's trout habitat. Any human activity that might degrade this once outstanding stream trout habitat must be prohibited by the LRMP.

The USFS understands that a high percentage of typical trout spawning sites located proximate to the tail of a pool have low percentages of fine sediment less than 2mm in size.
"Data from 189 stream reaches indicate that areas typically suited for spawning consist of approximately 20% fines less than 2mm. Raleigh *et al.* (1986) describe optimal spawning conditions for brown trout to contain less than 5% fines. As fines approach 30% of the spawning gravel, low survival of embryos and fry is expected (Raleigh *et al.* 1986). Thus, the data suggest that fine sediment is likely a limiting factor to brown trout survival and recruitment."[88]

On other National Forests, the USFS has applied a variety of habitat assessment protocols to gauge the suitability of that habitat for trout populations.

"Pool density and pool depth play an important role in the survival of all trout species, particularly during low flow periods (Meehan 1991). Pools comprise the majority of fish habitat in most small streams and pool depth appears to be one of the principal factors influencing the diversity and abundance of trout (USFS 1994)…A general rule of thumb for quality pools is 1-2m in depth (USFS 1994, Raleigh et al. 1986)…The lack of optimal pool depth (≥1m) is a limiting factor for trout survival, particularly during low flow conditions in late summer and throughout the winter."[89]

**The USFS Never Told the State of North Carolina To Go Investigate The Degrading Impacts of Excessive Embedded Sediment on the Chattooga's Once Outstanding Trout Habitat and Rainbow, Brook, and Brown Trout Fisheries**

The USFS has been repeatedly provided with physical evidence that excessive amounts of fine particle sized sediments have embedded the Chattooga's larger stream bed substrates. The USFS has also been provided with scientific literature that irrefutably establishes how excessive embedded sediments degrade trout fisheries and trout habitat.

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[88] *Brown trout (Salmo trutta) Species and Conservation Assessment,* Grand Mesa, Uncompahgre, and Gunnison National Forests, P. Adams, C. James, C Speas, at page 12 (Last Revised December 8, 2008) downloaded from https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5199817.pdf.

[89] *Brown trout (Salmo trutta) Species and Conservation Assessment,* Grand Mesa, Uncompahgre, and Gunnison National Forests, P. Adams, C. James, C Speas, at page 12 (Last Revised December 8, 2008) downloaded from https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5199817.pdf.

The USFS has been asked repeatedly if it ever advised the state of North Carolina to go investigate whether or not the Chattooga's trout habitat and trout fisheries may have suffered impermissible degradation because of this excessive embedded sediment.[90]

The record is clear that the USFS has entirely ignored discharging its duty to prevent any degradation of the Chattooga's administratively recognized outstanding trout habitat and trout fisheries.

**The Forest Service Should Pivot Towards Cooperating With Interested Individuals To Prevent Any Incremental Degradation Of the Specifically Designated Uses of the Chattooga's ORW Water Quality**

This notification *demonstrates* why the Aquatic Resources component of the LRMP must incorporate *Standards* using imperative verbs such as *"shall"* and *"must*" to ensure the prohibition of any future site specific activity that might *degrade* the Chattooga's Outstanding Resource Waters. The Forest Service should stop suppressing efforts to gain *timely* access to the *institutional knowledge* needed by the public *to establish a full and complete administrative record* and to demand the adoption of discrete and nondiscretionary *Standards.*

*As a starting point, I look forward to receiving specific answers to the inquiries submitted to Ms. Bryan months ago or an explanation why an answer cannot be provided.* It's time to roll up our sleeves to remedy the degraded trout habitat and trout fisheries by bringing together the proper planning, financial, and engineering resources. This correspondence catalogues the USFS neglect and the consequences of denying this problem by pointing the finger back towards the agencies of North Carolina.

**Why the USFS Must Adopt Sufficiently Intense LRMP Standards to Protect the Trout**

In 2012, the USFS controversially lifted a thirty year prohibition on paddling North Carolina's narrow and steeply entrenched headwaters. It did so by entirely disregarding the prohibition's original water quality preserving objective which the Chief of the Forest Service fully endorsed in 1976. In considering the full context of the Chattooga's first river plan in 1976, Chief McGuire explained why boating, as well as other recreational uses, needed to be prohibited on the fragile headwaters in North Carolina. The Chief was clearly concerned about protecting the *"near natural"* condition of the riparian corridor, trout buffer, and water quality, from the inescapable damage which he must have understood would be caused by the development of an incalculable number of portage trails, river evacuation sites, and boater launch points on the most

[90] A FOIA request was first tendered on November 12, 2015 with the "narrow objective of determining if the Forest Service passed on …specific allegations of impaired water quality, owing to excessive embedded sediment, to the North Carolina Department of Environmental Quality…" On January 28, 2016, Regional Forester Tony Tooke responded "The National Forests in North Carolina conducted a reasonable search and did not locate any records responsive to your request." A second FOIA request was submitted on July 22, 2016 that explained: "*This request has a narrow objective of determining if the Forest Service ever advised/notified the North Carolina Department of Environmental Quality ("NC DEQ") to go investigate the existence of the sediment transport imbalance or excessive embedded sediment condition that exists above the log jam located just north of the confluence of Cane Creek on this part of the Chattooga."* The USFS has not provided any evidence that it ever advised North Carolina "*to go investigate"* this degradation of the Chattooga's trout habitat and trout fisheries. This was fully detailed starting on page 85 of this notification.

fragile part of the entire river—where the soils are unsuitable for the development of paddler portage trails. Unfortunately, this reasoning has been unfortunately overlooked by more recent Forest Service officials.

From 1976 to 2004, Chief McGuire's prohibition on paddling, which applied to a limited segment of the river, remained unchallenged. This changed when advances in kayak/canoe technology evolved to create highly buoyant boats more suitable for pursuing creekboating on narrow and steeply entrenched bodies of water such as the Chattooga in North Carolina. This fact was admitted in federal court pleadings by the chief protagonist in this matter: American Whitewater. *"The boating community's interest in the upper Chattooga was sparked by improved equipment that brought the upper Chattooga within the skill-level of more paddlers… Although …boating on the Headwaters was banned in 1976…a few members of the public occasionally floated the Headwaters [*in violation of the law]*."* See Plaintiff's complaint in *American Whitewater v Tidwell,* No. 8:09-cv-02665-JMC at page 24 (Dist. of SC, 10/14/2009) [Doc. 1].

Beginning in 2004, American Whitewater began to agitate for unfettered access to the river, while asserting a legally *unrecognized* claim that it was unlawful for the Forest Service to prohibit any form of boating on the Chattooga River upstream of the Russell Bridge on Highway 28 in South Carolina. Although creekboating continued to be allowed on the comparable West Fork of the Chattooga, including the Three Forks tributaries, this group launched multiple lawsuits that necessitated the Forest Service's dedication of a disproportionate amount of resources to addressing this group's concerns.

In 2014 the Fourth Circuit Court of Appeals *unequivocally rejected the claims of any rights* by whitewater creek boaters. The Court *unambiguously* ruled: "We find that the Forest Service reasonably and lawfully identified 'recreational value' as the relevant ORV, and that *floating is not a value of the Chattooga that must be protected and enhanced under §1281." American Whitewater et al, v. Tidwell,* 770 F. 3d 1108, 1118 (4th Cir. Ct. App. 2014)(emphasis added).

Nevertheless, despite the Fourth Circuit's ruling, the USFS has recklessly pressed on to promote a recreational use of North Carolina's water quality (creekboating on the headwaters) which violates the antidegradation mandate of the Clean Water Act, the National Wild and Scenic Rivers Act, as well as other statutory and regulatory prohibitions. The USFS has employed impermissible administrative segregation of closely related site specific initiatives to avoid being held accountable for the cumulative damage done to the Chattooga's trout habitat and trout fisheries.

In January 2016, the USFS promulgated a Finding of No Significant Impact to justify building special boater access trails that will duplicate access already available to all recreational users.

This trail, if built below the Bull Pen Bridge, will serve only to tailor a new access point for the *convenience* of paddlers. If built, this new trail will depart from the edge of a highly erosive graveled USFS road. It will necessitate the disturbance of the trout buffer. It will necessitate an engineering miracle of constructing a trail that will descend straight down a steep bank, characterized by highly erosive soils, without causing sediments to be channeled off the road and the steep bank into the water. At the bottom, this trail will channel humans, presumably with

boats, to a pool where trout have been known to spawn, at the same time that their eggs are subject to disturbance by humans walking on the stream bottom.

To press the point, paddlers already have easy access to the river just above the Bull Pen Bridge at a location that does not augur future sedimentation being channeled into the river. The only reason for the construction of this new access trail below the bridge is to give this small group of individuals the ability to refloat the whitewater under the bridge multiple times during a single trip, much like being in an amusement park.

Similarly, through improper segmentation, the USFS has tried to slide through a critical change to its own regulations. If adopted, this change could vitiate the rules put in place to try to mitigate the unavoidable damage that this incompatible recreational use causes to the river's trout buffer. See the proposed rule change to 36 CFR 261.77, 81 Federal Register 2788-2791.

The USFS should pivot towards cooperating with interested individuals *to remediate and to restore the previously outstanding trout habitat and trout fisheries.* The USFS must stop ignoring the Chattooga's legally protected subcategories of ORW water quality use.

This starts with making sure the pending revision to the Nantahala National Forest Plan affords the requisite intensity of protection required by both the Clean Water Act and the National Wild and Scenic Rivers Act. The USFS must acknowledge that the Chattooga River's trout habitat and its brook, rainbow, and brown trout fisheries must be sustained at an "outstanding" level of quality. These specific uses of the Chattooga's ORW water quality must be *fully protected* from *any* non-temporary anthropogenic sourced degradation.

**Defining *Standards* for Regulating the Chattooga & The 2012 Planning Rule Problem**

The public and the Forest Service should work together to establish stringent *Standards* for regulating uses on the Chattooga under the forthcoming land management plan. The Forest Service must devote sufficient resources to restoring the river's degraded trout habitat and trout fisheries to their prior "*outstanding"* condition. The fact that "brown" trout *"continue to persist"* does not constitute the correct *antidegradation standard* for these specific subcategories of water quality use.

With respect to future site specific projects or activities, the 2012 Planning Rule provides:
" The …district ranger is the responsible official for [site specific] project and activity decisions…Requirements for project or activity planning are established in the Forest Service Directive System. *Except as provided in the plan consistency requirements in §219.15, none of the requirements of this part [36 C.F.R. 219] apply to projects or activities."* 36 C.F.R. §219.2(c)(italics added for emphasis).

This last sentence does not constitute an innocuous provision. This stipulation threatens the publics' ability to challenge future site specific activities that degrade the designated uses of the Chattooga's Outstanding Resource Waters. This provision suggests that the public *may only* challenge a future site specific activity (no matter how poorly conceived) based on a complaint that the future proposed activity is *inconsistent* with the applicable *Standards* set forth in the land resource management plan.

Unfortunately, the planning rule does not *specifically* define *inconsistency*.

Instead, the planning rule states that a future site specific activity is *consistent* with the forest plan if *it meets the four criteria* set forth at 36 C.F.R. §219.15(d)(1)-(4). It is not clear if a site specific activity must satisfy just one of these criteria or all four of them.

Of these four criteria, only *Standard*s unquestionably constitutes a "*mandatory constraint on project and activity decisionmaking."* See 36 C.F.R. §219.7(e)(1)(iii).

In contrast, some might argue the other criteria are entirely subjective and discretionary: *Desired Conditions* (broad statements of intention but without any deadline for achieving the Desired Condition)*; Guidelines(*allows departures from the terms of the Guideline), *and Suitability* (suitability is presumed if the plan is silent with respect to the suitability of a specific activity in a specific geographic area of the forest). Stated differently, these three provisions lack objective or measurable metrics against which future site specific actions can be judged. This threatens to cede an entirely arbitrary capacity to pick and choose what site specific activities will be deemed consistent with the land management plan.

The language ultimately chosen to define these *Standards* (including the use of prescriptive verbs as opposed to mere precatory verbs) constitutes the critical issue that must be addressed to protect the *specific subcategories of designated uses* of the Chattooga's ORW water quality.

To repeat, every land management plan *must* define *Standards* which restrict future site specific activities or projects undertaken. Specifically, a *Standard* constitutes "a mandatory constraint…established to help achieve or maintain the desired condition…,to avoid or mitigate undesirable effects, …*to meet applicable legal requirements*." 36 C.F.R. §219.7(e)(1)(iii)(italics added for emphasis).

Brown trout spawn optimally when a stream's substrate is comprised of < 5% fines (particles < 2mm in diameter). Between 2001-2007, a survey of 189 reaches on Colorado's national forests found trout redds are being constructed where fines are <20% of the substrate.[91] Embryos and emerging fry generally don't survive when fines exceed 30%. *Habitat Suitability Index Models and Instream Flow Suitability Curves:Brown Trout,* U.S. Fish Wildl. Serv. Biol. Rep. 82(10.124), Raleigh, R.F., et al at page 10 (1986)("Raleigh 1986").The Chattooga's embedded sediment exceeds this threshold. Unfortunately, the Nantahala National Forest neither has any knowledge about where trout have been historically spawning on the Chattooga nor whether that prior habitat has been degraded below acceptable limits.

[91] *Brown Trout (Salmo trutta) Species and Conservation Assessment,* for Grand Mesa, Uncompahgre, and Gunnison National Forests LRMP. Adams et al, last revised December 9,2008 ("Gunnison LRMP Assessment").

In order *to satisfy the antidegradation mandate* of the Clean Water Act, the National Wild and Scenic Rivers Act, and other statutory and regulatory regimes, the USFS should adopt a *Standard* that establishes a *measurable minimum effects threshold* for when bedded sediments are presumed to have negative impacts on the early life cycle of trout.

*The Forest Service can provide as high an intensity of antidegradation protection as it desires in managing the recreational and commercial uses of our Outstanding Resource Waters and the riparian corridor that buffers such trout populations*. The Forest Service can prohibit activities on the lands it manages. Measurable metrics exist for a *minimum effects threshold for* bedded sediments. The Nantahala National Forest should adopt a measurable metric such as the one articulated in *Protecting sediment-sensitive aquatic species in mountain streams through the application of biologically based streambed sediment criteria,* Journ. N.Am. Benthol. Soc., 2010, 29(2):657-672, Sandra A. Bryce, EPA; Gregg A. Lomnicky, EPA; Phillip R. Kaufmann ("Bryce et al 2010").

This *minimum effects threshold* for bedded sediments on trout populations should be incorporated into a *Standard* for allocating and prohibiting recreational uses on segments of the Chattooga's Outstanding Resource Waters in North Carolina.

Such a *Standard* might rank and define recreational uses as being *active sediment causing activities* or *passive pollutant activities*. *Active sediment causing activities* would incorporate those recreational uses *which cannot be enjoyed without the use of equipment that unavoidably denudes ground cover within the fragile riparian corridor,* which cannot be pursued without causing additional sediment to be channeled into the water. Such *active pollutant activities* would include but not be limited to, whitewater creek boating on the Chattooga's headwaters, off road bicycling, motorcycling, and the operation of alternative terrain vehicles. Each of these recreational pursuits are distinguishable because they necessitate the use of equipment that denudes vegetation as a consequence of the mechanical friction exerted on the ground cover by the bottom of the boat, the knobby bike tires, the motorcycle, and/or ATV wheels.

In contrast, *passive pollutant activities* would be defined to include hiking, swimming, and fishing. These activities are distinguishable because they do not require the use of any kind of mechanical tool that denudes the ground cover inside the Chattooga's fragile trout buffer.

Camping would constitute a middle category of pollutant activity because camp sites must be cleared of vegetation in order for a tent to be erected. However, in contrast to whitewater paddling, camping does not need to take place within the fragile trout buffer. Similarly, camping constitutes an activity that can be pursued by a much larger segment of the population irrespective of their physical condition or lack of special skills. In contrast, whitewater kayaking and mountain biking requires much greater expertise and physical fitness to be pursued.

While the *minimum effects threshold* for embedded sediment is exceeded, *active pollutant activities* must be *absolutely* prohibited under the *Standard.* Even after the Forest Service succeeds in remediating the Chattooga's excessive embedded sediment to the point that it no longer exceeds the *minimum effects threshold* on salmonids, these *Standards* should incorporate a total sediment loading budget that allocates and restricts recreational use based on the prospective amount of sedimentation that each prospective recreational use can be expected to cause (analogous to the calculation of a total maximum daily load budget under the Clean Water Act).

After remediation, if the minimum effects threshold is exceeded once again, such *Standards* should prohibit recreational uses on a last introduced first prohibited basis (similar to the accounting concept of LIFO).

A refusal to adopt a minimum effects threshold for embedded sediment as a *Standard* for managing this special body of water would impermissibly ignore the regulatory requirement to employ the best available scientific information in developing a land management plan. 36 C.F.R. §219.3.

Given the due process implications of 36 C.F.R. §219.2(c), any failure to define sufficiently discrete and nondiscretionary *Standards* will prove controversial.

Because the *outstanding* trout habitat and *outstanding* trout fisheries constitute the specifically cited subcategories of designated uses of the Chattooga's water quality, these *Standards* should also incorporate measurable metrics tied to preserving both the quality and quantity of suitable trout spawning habitat. Finally, these *Standards* must require the continuous monitoring of the trout habitat and trout population densities on the main stem of the Chattooga. These *Standards* must compel the Forest Service to take action to enhance the quality of these fisheries. While these *Standards* might appear intensive to implement, the fact is the intensity is appropriate given that only 3 of North Carolina's rivers out of 12,000 streams simultaneously carry the ORW, the National Wild and Scenic River, and Class B Trout waters classifications.

Because of the way the 2012 Planning Rule curtails the public's rights, any failure to provide for such intense protection of the Chattooga might generate constitutional controversy. It remains a basic principle of due process that rules that deprive individuals of their rights are void if the applicability of such prohibitions are vague, and indeterminately defined. "If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters…for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford,* 408 U.S. 104, 109 (1972) (quotation marks, citations, and alterations omitted). "While the implication of an agency power to clarify the statute is reasonable enough, there is surely no congressional implication that the agency can resolve ambiguities in its own regulations. For that would violate a fundamental principle of separation of powers — that the power to write a law and the power to interpret it cannot rest in the same hands." *Decker v. Northwest Environmental Defense Center,* 133 S. Ct. 1326, 1341 (2013)(concurring and dissenting opinion of Justice Scalia).

The Forest Service has an opportunity to narrow this concern. However, to define such *Standards* using merely precatory verbs ("may" or "will") in lieu of prescriptive verbs ("must" and "must not" or "shall") will increase ambiguity and encourage protracted controversy by threatening the publics' constitutional standing to compel compliance with the strict *antidegradation protections* mandated for Outstanding National Resource Waters under regulations issued pursuant to the Clean Water Act, et al.

**Precedent Exists To Use Strict Standards To Prevent Sediments From Exceeding Any Reasonable Minimum Effects Threshold For Negative Impacts on Salmonids**

Consistent with the EPA's mandate to utilize special criteria in addressing excessive suspended and bedded sediments ("SABs"), the Forest Service *routinely measures embedded sediments* for the purpose of characterizing the impacts of sediments on in-stream habitats of streams flowing within the National Forests. By way of example, consider how the Forest Service conducted interstitial and surface sediment monitoring from 1983 to 2006 on the Payette and Boise National Forests in Idaho. See also the U.S. Forest Service, Lake Tahoe Basin Management Unit *Bedded Sediment report for Blackwood Creek* which empties into Lake Tahoe (February 18, 2015). Similarly, see *Monitoring sediment production from forest road approaches to stream crossings in the Virginia Piedmont,* USDA Forest Service, Southern Research Station, Kristopher Brown et al 2015. Finally, as part of the Forest Service Large Scale Watershed Restoration initiative in 2002, researchers from the Forest Service's Coweeta Hydrologic Laboratory measured the impact of sediment from forest roads on streams in the Chattooga River watershed.

The 2012 Planning Rule threatens public accountability. Consequently, the forthcoming plan must protect the Chattooga's headwaters by using prescriptive verbs (such as *"must"* or *"must not"* or *"shall")* to define *a limited number* of discrete and nondiscretionary *Standards* for preventing *any degradation* of the explicitly stated *designated uses* of this *Outstanding Resource Water:* the Chattooga's *outstanding* trout habitat and *outstanding* trout fisheries.

Such prescriptive *Standards* must apply to *all sediment causing human activities* on *all* streams regardless of whether the stream flows through a designated remote wilderness area or alternatively through an accessible recreational area of the forest. Stated differently, sediment causing recreational activities must be prohibited on *all subsets* of geographic land classifications under the "yet to be published" Recreation Opportunity Spectrum map.

The previous forest plan, promulgated under the 1982 Planning Rule, did not deny the public the right to challenge site specific activities that might impair our Outstanding Resource Waters. Under the old plan, such waters were provided with *prescriptive protections* that (1) were applied forest wide over each and every Management Area designated in the Forest Plan, and (2) were intended to restrict *both* commercial and recreational activities around our streams. The prior land resource management plan contained the following prescriptive protections:

*"Prevent visible sediment from reaching perennial and intermittent stream channels …in accordance with NC Forest Practice Guidelines Related to Water Quality (NC I PGRWQ) (15 NCAC 11 .0101- 0209)."*

*"Permanently close and rehabilitate [recreational] sites that cannot accommodate use without unacceptable impacts to riparian area resources.*
*Rehabilitate active [recreational] sites that are contributing visible sediment to the stream channel. Use site specific analysis to determine rehabilitation needs that will prevent or minimize sediment from reaching the stream channel."*

In the past, this nondiscretionary approach to increased sedimentation *("prevent visible sediment from reaching …stream channels"* and "[*p]ermanently close…[recreational] sites that cannot accommodate use without unacceptable impacts to riparian area resources"* provided a measurable standard for challenging any neglect in the management of our Outstanding Resource Waters.

Similarly, the 2012 Planning Rule denies any right to challenge management initiatives as physical forest conditions change or as circumstances warrant (due to fire, flood, drought, disease, human population dynamics, etc.) during the extended 15 year life of the Nantahala's land resource management plan. For the next fifteen years, the public will be locked in by the constraints and rights articulated in the Nantahala's land resource management plan.

Consequently, the forthcoming land management plan *must adequately address* this stringent *antidegradation mandate.*

**What Is Being Asked of the Nantahala National Forest Land Resource Management Plan**

The USFS has an opportunity to use available technology to remove this excessive anthropogenic sourced sediment and to prevent any additional fouling of the river lying downstream of the Bull Pen Bridge. This logjam serves as a sediment catch basin where sediment removal efforts could be concentrated to restore balance to this river.

Any short cut taken to free this logjam without removing the sediment would be vigorously opposed. Fortunately, the most recent exponential increase in anthropogenic sourced sediment appears to constitute more of a one-time event. Using sediment removal technology, the USFS has the opportunity to restore a sediment transport balance without the necessity of removing this log jam. [92]

The Nantahala forest planning process provides an opportunity to *develop a plan to remove this sediment.* The Nantahala plan offers the perfect opportunity to abandon future controversy and to overcome the long history of intentional neglect of this excessive sediment.

To be clear, the record suggests that the USFS may have stage-managed the non-disclosure of critical information. In any case, had this information been otherwise disclosed, the public could have demanded that the USFS conduct an antidegradation assessment of this excessive embedded sedimentation on the quality of the river's trout habitat and its brook, rainbow, and brown trout fisheries. The USFS has tried to define away the problem or to point the finger of responsibility elsewhere.

[92] Previously, the USFS was provided with photographs documenting how the Forest Service's lack of law enforcement presence has encouraged somebody to saw off the tips of logs lying in the stream. This raises great concern about the future of this logjam.

Nevertheless, if challenged, the USFS will have a difficult time denying that it knew about the existence of this sediment transport imbalance and the interconnected logjam in January 2012, when it lifted the ban on creek boating North Carolina's headwaters. In fact, the USFS must have understood the functional connection between those physical features and the increasingly excessive embeddedness of anthropogenic sourced sediment that was most pronounced in 2012 on the segment of river reaching from Green Creek downstream to where Cane Creek enters. The Forest Service must have understood how excessive embedded sediment *degrades* the suitability of in stream habitat for use by all species of trout—in violation of the applicable water quality standards mandated for the Chattooga's Outstanding Resource Waters.

In order to assess the magnitude of direct and indirect adverse impacts of allowing creekboating on the Chattooga's headwaters in North Carolina, the Forest Service prepared two environmental assessments that contained over 750 pages of analysis.

Neither the sediment transport imbalance that existed on North Carolina's headwaters, the massive logjam at 35.033897 -83.128544, nor the excessive embedded sediment problem were *ever* disclosed anywhere within the 750+ pages of environmental assessment.

A Boolean search for the term "logjam" proves this point.

Instead, without ever acknowledging the existence of this sediment transport imbalance, the massive logjam, or the existence of an excessive amount of embedded sediment, the Forest Service promised that neither the direct or indirect effects of introducing creek boating would have any significant cumulative effects on the Chattooga's water quality and by extension the trout habitat and trout fisheries that constitute North Carolina's specific subcategories of ORW water quality use.

Instead of squarely identifying *and quantifying the baseline condition of this excessive embedded sediment problem,* the Forest Service tried to cloak the specific problem by offering broad generalizations about sedimentation. I would refer you to the 2012 EA and in particular to Section 3.2.2A *Biology ORV (Fisheries Component)* and Section 3.3.2 *Water Quality (*both of which discussed sediment impacts).

The USFS unequivocally promised it would achieve "an *overall net reduction in sediment* when watershed improvement projects are implemented in the Chattooga River watershed (refer to Section 3.3.2 for discussion on sediment impacts). Therefore, *indirect sediment impacts to aquatic species are expected to be less than existing conditions* with the implementation of watershed improvement projects." 2012 EA at page 142 (italics added for emphasis) (otherwise indexed for the administrative record as document "B-1").

It is specious for the USFS to have made this promise without ever having quantified the amount of sediment that was already present on the Chattooga. *How could the Forest Service ever hope to prove this statement without having established the baseline quantity of sediments?*

Starting in 2004, the Forest Service created an administrative record that ignored otherwise readily available but inconveniently critical scientific facts. If otherwise disclosed the public could have recognized how North Carolina's headwaters were already suffering from excessive embedded sedimentation. Had this excessive embedded sediment been disclosed the USFS could not have introduced a new recreational use that would cause additional sediment to be channeled into the water.

Generally, any review of the appropriateness of an agency action is limited to a consideration of the facts lodged within the administrative record that was before the agency when it made its decision. However, there are exceptions. Extra-record evidence may be submitted: (1) to show an agency failed to consider readily available and critically relevant evidence not otherwise lodged within the record, (2) to show the agency acted in bad faith in making its decision, (3) where the issues are so technically complex that additional facts are needed to understand the agency decision.

Here, the USFS never disclosed the existence of a sediment transport imbalance. The USFS never quantified the excessive amount of sediments plaguing the Chattooga's headwaters in North Carolina. Instead, the USFS gamed the system by presuming the satisfactory condition of a larger geographic area to dilute the magnitude of impact on a smaller segment of river. By carefully stage managing what data and information became lodged in the administrative record, the USFS bestowed upon itself an incentive as well as the practical ability to speak vaguely and broadly, so as to retain a "flexibility" that enabled subsequent "clarification" with retroactive effect. By neglecting for over two decades to monitor the trout fisheries for impacts from this excessive embedded sediment, the Forest Service must have recognized its ability to construct an administrative wall over which a future complaining public could not hope to climb**.** By intentionally not continuously monitoring the trout populations on this sediment impaired segment, the Forest Service arbitrarily prevented the administrative record from being populated with the best scientific data available. Such data could have been used to impeach the Forest Service's claims of no significant impact from introducing creekboating to North Carolina's headwaters.

The fact remains that the USFS (or its agents) *stood in front of this logjam and eye witnessed the negative impacts of this plainly visible sediment transport imbalance:*(1) when the creekboating trials were conducted in January 2007 by the Louis Berger Group, and (2) when the Forest Service conducted its large woody debris ("LWD") inventories in November 2007 and again in August 2012.

I remain prepared to work with the USFS to resolve these concerns. I look forward to receiving a detailed response to this notification as soon as possible, but certainly consistent with any applicable statutory deadlines.

With best regards,

Bill Floyd