

EXHIBIT 5

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FLOYD SEPTEMBER 22, 2017 NOTIFICATION OF SUPERVISOR NICHOLAS

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4110 Quail View Road
Charlotte, NC 28247

September 22, 2017

Re: Continuing Failures: The United States Forest Service Has Intentionally Refused to Monitor and To Put a Halt to the Whitewater Creek Boating Caused Displacement of Soils Lying inside North Carolina's Trout Buffer and the Creation of Point Sources Where These Displaced Soils Are Being Channeled into Our Highest Quality Waters.

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:

A fundamental complaint about the pending Nantahala and Pisgah National Forests Land Resource Management Plan ("LRMP") is that the United States Forest Service ("USFS" or "Forest Service") refuses to apply the best available science to monitor and to recognize the need to fix the non-temporary problem of degrading trout habitat and degrading trout fisheries—due to excessive embedded sedimentation—which is being suffered over an extended segment of the Chattooga River's Outstanding Resource Waters ("ORW") in North Carolina.

A second problem springs from the first. For over 5 years the USFS has intentionally and repeatedly refused to employ appropriate monitoring methodologies using the best available science to corroborate third party provided evidence showing how its own management endorsement of creek boating¹ has impermissibly further exacerbated this existing sediment problem—which conflicts with what is required under the relevant *Standards* of the existing LRMP as well as the antidegradation mandate presumed by regulations promulgated pursuant to the Clean Water Act.

To make matters worse, the most current Aquatic Systems, Streamside Zones and Water components of the LRMP do not provide any assurance of any future effort to adopt non-precatory and sufficiently protective *Standards* prohibiting recreational activities which compel the use of equipment or tools that *systematically* displace soils lying within a stream's 25 foot

¹ Creek boating, also called creeking, or steep creeking, or treetop boating, constitutes an extreme and potentially life threatening sport pursued by a select group of the most skilled canoeing or kayaking enthusiasts. Creek boating tends to be more dangerous and extreme than other forms of kayaking and canoeing because it entails making dangerous descents of very steeply entrenched and narrow streams—during high flow events creating class V challenges—often in remote locations where portaging might prove impossible. Creek boating constitutes a relatively young sport that only became possible to pursue after plastic technologies evolved to allow the development of specialized canoes and kayaks that are designed to withstand life threatening failures—such as a boat being broken in two pieces by the forces of water and rock that characterize the whitewater environment in which this sport is pursued.

trout buffer and which create specific point sources where displaced soils and other sources of sediments subsequently get channeled into an ORW trout stream—as if a ditch had been dug.

The USFS has endorsed the destruction of the trout buffer and the impermissible degradation of the Chattooga’s ORW trout habitat and trout fisheries. This neglect must be fixed during the LRMP planning process—otherwise this neglect might have to be tested before the more stringent *Standards* set forth in the current LRMP get watered down by the new LRMP.

We ought to work together to acknowledge this problem, to search for compromise, to source an appropriate mix of private and public funding to abate this problem, and to adjust the rules which have failed to prevent additional impermissible degradation from occurring. Unfortunately, the USFS has yet to demonstrate any willingness to acknowledge the problem—much less search for consensus or compromise about how to address this excessive embedded sediment.

Instead, the USFS abandons any pretense of objectivity by summarily asserting that the “Forest Supervisor has the discretion to determine the scope and scale of the revised Forest Plan. The Nantahala...completed an environmental analysis of management of the Chattooga ...in 2012, and *there is not a need to revisit the analysis at this time...*Any updates to the management of the [Chattooga’s] will not be considered until after the plan revision, in subsequent analysis, and after several years of monitoring data is available to inform the analysis.”²

As if some magic incantation for excusing this neglect while strong arming the public, the Forest Service summarily declares: “The Forest has *publicly stated* that we will not be revisiting the management direction for the Chattooga River as part of this plan revision.”³

Consequently, in your capacity as the Responsible Official for the LRMP, please answer the following questions directly, comprehensively, and without any delay.

- 1) How does making such a *public statement* shield the USFS for ignoring the well documented and ongoing violation of the no visible sediment *Standard* articulated by the Nantahala and Pisgah National Forests’ existing Land Resource Management Plan as applied to the Chattooga River?
- 2) Who made such a *public statement* and when did they make it?
- 3) To whom did the USFS make such a public statement?
- 4) Has this public statement and the reasons for making it been memorialized in emails, correspondence, memorandums or written documents of any kind?

Similarly, could you explain the specific reasons why the USFS feels that any investigation of the Chattooga’s degraded condition can be put off until “after the plan revision...and after several years of monitoring data is available to inform that analysis[?]”⁴

² See email of September 6, 2017 @ 10:05 am from Ms. Heather Luczak, Forest NEPA Coordinator, National Forests in North Carolina to Bill Floyd, to USFS officials Mr. Allen Nicholas, Mr. Paul Arndt, and Ms. Michelle Aldridge(italics added)(email subsequently referenced as N-8 USFS Denial 09062017).

³ Id.

⁴ Id.

The USFS Does Not Have Discretion To Ignore the Chattooga's Degrading Trout Habitat and Trout Fisheries Until After the LRMP Rewrite

Claiming discretion to ignore the serious negative impacts of the current recreational use policy on the headwaters' excessive sedimentation problem, until later in time, only serves to sharpen the controversy. With respect to the problems being suffered by the Chattooga, the USFS has repeatedly refused for at least 5 years, and probably much longer, to monitor using the best available science to frame the fact gathering analysis, to debate the significance of the facts collected, to acknowledge the problem, and to fix the problem by seeking compromise.

Instead of engaging in an iterative discussion about the need to adopt non-precatory and sufficiently intense *Standards* to protect the uniquely designated subcategories of ORW water quality use on just a single small creek—the Chattooga—the USFS invites a larger *Clean Water Act* debate about unsustainability of creek boating across many streams within the Nantahala and Pisgah National Forests. **See pages 36 of this notification.**

The USFS has seen the physical evidence demonstrating how the friction of the bottom of creek boats being forcefully *seal launched*⁵ etc., *mechanically* displaces the highly erosive soils lying within the 25 foot trout buffer, while creating specific point sources where these displaced soils and other sources of sediment get channeled into an ORW cold water trout stream. *It is functionally analogous to a plow blade being pushed/pulled by a tractor across the trout buffer.*

The USFS knows that creek boating cannot be pursued without the construction and use of a crazy quilt of seal launch sites, river evacuation points, and portage trails inside the Chattooga's trout buffer—which systematically creates distinct point sources of pollution where these *mechanically* displaced soils get redeposited into the creek and where other sediment flows become channeled into the water—as if a ditch had been dug with a shovel.

The USFS knows it inventoried the condition of the trout buffer prior to allowing creek boating's commencement in December 2012. The Forest Service's knows this inventory establishes how the trout buffer on North Carolina's headwaters' remained in an almost near natural and pristine condition prior to the introduction of creek boating—just as the Chief of the Forest Service had described it in 1976. Nevertheless, for 5 years or more, the Forest Service has refused to take the common sense and scientific step of counting and measuring any changes to the trout buffer subsequent to the start of creek boating. This neglectful *look the other way* approach to monitoring the negative impacts of creek boating on the Chattooga mirrors a broader problem that is occurring on other trout streams within the Nantahala and Pisgah National Forests.

Disregarding all of the physical evidence of harm being done to other legally prioritized interests, the Forest Service has gone out of its way to provide extraordinary accommodations to

⁵ During high currents (>350 CFS), a creek boater would 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, by necessity, 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. *This constitutes seal launching.*

the demands put forth by the well-funded creek boating lobby. Some of this accommodation was spelled out in my Notification 07292017 delivered to you back on July 29, 2017.⁶

To press the look the other way accommodation being provided to creek boating enthusiasts, The USFS has also been provided with irrefutable self-proving evidence (on the face and rear of the permits used by the USFS to monitor the use of the resource by creek boaters) demonstrating how this extensive damaging of the trout buffer has been caused by just a handful of creek boaters—*unless the Forest Service knows others are unlawfully using the resource without pulling and filling out a permit*. The USFS has been shown how *too many* creek boaters admit on the face of their permits that they simply ignore adhering to the USFS rules that were put in place by Amendment #22 to protect the Chattooga’s fragile trout habitat, etc. from being damaged. **See pages 34-35 of this Notification.**

Most critically, with respect to the Clean Water Act, and its regulatory water quality *Standards*, the USFS has been advised why protecting and maintaining the “outstanding” quality and condition of the Chattooga’s in stream trout habitat and its rainbow, brown, and brook trout fisheries constitute narrower subcategories of ORW water quality use than the broader aquatic life use. The USFS has been provided with the administrative records evidencing *why* the state of North Carolina awarded strict antidegradation protection to the Chattooga’s trout habitat and rainbow, brown and brook trout fisheries—which the USFS knows followed from a petition submitted by the Rabun County, Georgia, Chapter of Trout Unlimited.

The USFS knows these specific subcategories of ORW water quality use must not be allowed to suffer any non-temporary degradation precipitated by USFS management initiatives.

Nevertheless, the USFS has refused to conduct the specific scientific studies needed to monitor and to recognize the impermissible degradation that has been allowed to occur to the Chattooga’s trout habitat and trout fisheries. Ignoring the best available science, the USFS refuses to undertake any of these scientific studies to monitor, to quantify the damages, or to justify putting a halt to the impermissible degradation that creek boating is causing to the Chattooga’s once “outstanding” trout habitat and its once “outstanding” rainbow, brown and brook trout fisheries.

Similarly, the draft components of the LRMP give no indication of any desire to adopt non-precatory and sufficiently protective *Standards* prohibiting recreational activities which require the use of equipment or tools that displace soils lying within a stream’s trout buffer and which causes the creation of specific point sources where displaced soils and other sediments subsequently get channeled into an ORW cold water mountain trout stream.

Instead, the USFS engages in a pattern and practice of behavior designed to conceal its own culpability for the neglectful management of this unique and irreplaceable resource.

⁶ Please refer to the notice entitled “Floyd Notification USFS Nicholas 07292017 FINAL.pdf, which was directed by email on July 29, 2017 to the attention of Mr. Hurston A. Nicholas, Forest Supervisor and Responsible Official, Nantahala and Pisgah National Forests (hereinafter “Notification 07292017

History of Prior Efforts To Resolve: LRMP Planning Problems and Deficiencies

On July 29, 2017, an electronic document entitled “Floyd Notification USFS Nicholas 07292017 FINAL.pdf (“Notification 07292017”) was delivered to you in your capacity as the Forest Supervisor and Responsible Official , Nantahala and Pisgah National Forests.⁷

Notification 07292017 identifies due process deficiencies in the planning process being employed by the USFS in rewriting the Nantahala and Pisgah National Forests Land Resource Management Plan.

Notification 07292017 documents seven concrete examples of how the USFS has engaged in a pattern and practice of entirely neglecting to disclose critically relevant information upon first inquiry, and of sometimes creating unnecessary delays by delivering piecemeal responses to such initial inquiries.

Notification 07292017 demonstrates how the USFS has flat out refused to answer narrow factual questions and requests for policy clarifications regarding the Aquatic Systems, Streamside Zones and Water components of the LRMP.

Notification 07292017 also points to specific examples where the USFS has provided a measurably greater form of *procedural accommodation* to a select special interest group—whitewater creek boaters.

Notification 07292017 complains about the absence of sufficiently intense *Standards* needed to protect and preserve the Aquatic Systems, Streamside Zones and Water components of the plan—and for discharging the discrete and non-discretionary obligation to honor the water quality *Standards* that apply to specific streams on specific geographic management areas governed by the plan.

Notification 07292017 warns why *Standards* should be adopted that mandate the highest intensity of antidegradation protection for the designated subcategories of water quality use that have been administratively fixed by the state of North Carolina for the Chattooga River’s Outstanding Resource Waters. Preventing any deterioration in the quality of the Chattooga’s trout habitat and trout fisheries below their original “outstanding” quality constitute the designated uses of the Chattooga’s ORW water quality.

More precisely, Notification 07292017 details why the USFS must adopt non-precatory *Standards* which would prohibit the unsustainable use of recreational equipment that necessitates the *systematic* displacement of soils lying inside the protected 25 foot trout buffer and the creation of point sources where these displaced soils and other sources of sedimentation get channeled into Outstanding Resource Waters—but in particular to prevent *any additional* non-temporary degradation of the Chattooga’s administratively protected subcategories of ORW water quality use.

Notification 07292017 demonstrates why *Standards* should be adopted and enforced to prohibit any recreational or forest use that would negatively impact the Chattooga’s in stream trout

⁷ Id. Notification 07292017.

habitat and its rainbow, brown and brook trout fisheries—below their once “outstanding” level of quality.

Notification 07292017 defends its criticisms and recommendations by referencing facts, photos, scientific studies, criticisms, opinions, etc. that are detailed within multiple other electronic documents—much of which constitutes the work product of other independent parties—and much of which *has not been published* by the USFS on the LRMP planning website, etc.

These constitute what the USFS has referenced as the “170 attachments” that it declined to publish in the electronic reading room on September 6, 2017.

As explained on August 15, August 28, and August 31 2017, all “170 attachments” illuminate why the USFS must not obstruct the LRMP planning process by refusing to provide detailed and on point answers (1) to increasingly narrowed questions seeking basic facts about the Aquatic Systems, Streamside Zones and Water components of the Nantahala and Pisgah National Forests Land Resource Management Plan; and (2) to increasingly narrowed requests for *clarifications* regarding the USFS policies being used to fix the *Standards* governing these LRMP components.

More remarkably, these “170 attachments” offer critical context needed to understand how and why the USFS has *chronically* failed to use the best science available for monitoring and establishing a base line of critically relevant data pertaining to the degraded condition of the Chattooga’s trout habitat and trout fisheries. Had the USFS otherwise employed appropriate monitoring methods for the last 5 years, the results of such monitoring would have likely compelled the adoption of sufficiently intense and non-precatory *Standards* to regulate these particular LRMP components.

Notification 07292017 and supporting attachments inform of a plainly visible need to adopt sufficiently intense and non-precatory *Standards* to prohibit the *unsustainable* use of recreational equipment that causes the *systematic* displacement of soils lying inside the protected 25 foot trout buffer and the creation of point sources where these displaced soils and other sources of sedimentation get subsequently channeled into Outstanding Resource Waters—in particular to prevent this from occurring on the Chattooga River.

These “170 attachments” are referenced in all of my prior LRMP related correspondence and emails—and will continue to be referenced going forward. For the purposes of furthering discussion with the USFS, each of these referenced documents have been assigned *shortened* indexed names. Due only to email file size transmission concerns, these substantively critical and conveniently indexed attachments to my Notification 07292017 were transmitted to the USFS as separate electronic files through a series of emails on July 28 and July 29, 2017.

The USFS was asked to publish each of these documents in the electronic public reading room found at <https://cara.ecosystem-management.org/Public/ReadingRoom?Project=43545>.

The Forest Service refused to do so on September 6, 2017.

The USFS Suppresses Public Participation By Picking and Choosing What Gets Published to the Electronic Reading Room

The USFS claims “the public comment reading room is used primarily as a way of sharing the comments that we have received during plan revision.”⁸ In the same breath, the USFS also admits how it hobbles the public’s right to participate by refusing to post all documents either received from the public or transmitted to specific members of the public by the USFS:

“The *170 attachments* that you provided with your comment letter ... will be available [*only*] on request [*by*] the public. The public comment reading room is not the comprehensive record of all information used in the plan development, *nor does it include all of the hard copy public comments that we have received over the last four years during plan revision.*”⁹

The arbitrariness of this denial is obvious. Had I simply created one massive sized electronic document by including all of these “170 attachments” within the body of Notification 07292017, how could the USFS have refused to publish this *single comment* in the electronic public reading room? Similarly, had I sent the entire document as a single hard copy comment, how could the USFS have justified a refusal to publish this comment within the public reading room?

However, in order to avoid size of file complications in transmitting my comment via email, and for the convenience of the USFS, Notification 07292017 was broken up so that the attachments were sent contemporaneously but separately from the main body of the comment.

This flat out refusal to post these documents collapses under the weight of its own arbitrariness.

Without stating so, the USFS hints that its refusal to post my attachments in the electronic reading room is based on the fact that “170 attachments” were submitted.

By quoting the total number of documents submitted for publication (e.g. the “170 attachments that you provided”) the USFS implies that *too many* documents have been submitted for publication in the electronic reading room. However, the USFS does not reference any authority that enables the USFS to define a maximum number of factual presentations, recommendations, comments, criticisms, and supporting documents that any individual or group might submit for inclusion in the electronic reading room.

It would prove logically inapposite to try to defend such a claim from either a legal or practical point of view

First, the concept of due process requires a minimum amount of participation or process. It does not seek to constrain too much participation or process.

Second, from a practical view, the number of documents submitted does not pose some complex and unsolvable technical obstacle. *What hinders or precludes the USFS from posting these “170 attachments” to the electronic reading room?* There aren’t any. Each of these “170 attachments”

⁸ See supra note 2 (email now referenced as N-8 USFS Denial 09062017)(italics added).

⁹ See supra note 2 (email now referenced as N-8 USFS Denial 09062017)(italics added).

were delivered to the USFS in a typical electronic format easily uploaded to a website. Similarly, the total amount of storage required to archive these “170 attachments” poses no insurmountable problem. Increasing electronic storage capacity is scalable and is something that is done every day by our agencies. Finally, the USFS knows how to scan hard copies of documents.

In short, the Forest Service has not provided any logically identifiable foundation for refusing to publish these “170 attachments” in the reading room—other than summarily declaring it so.

By Refusing to Post All Documents To the Public Reading Room, the USFS Conceals Critical Factual Information Not Otherwise Disclosed To the Public

The USFS adamantly refuses to conduct the specific scientific studies needed to monitor and to recognize how excessive embedded sediments have impermissibly degraded the quality of the Chattooga’s trout habitat and trout fisheries.

Even today, the Forest Service eludes doing the science by *summarily* asserting the “Nantahala...completed an environmental analysis of management of the Chattooga...in 2012, and there is not a need to revisit the analysis at this time...”¹⁰

Many of these “170 attachments” reveal facts and circumstances that impeach the Forest Service’s assertion that “there is not a need to revisit the analysis at this time.”

For example, one details the Forest Service admitting that “[y]oung-of-the-year Brown Trout densities appeared to be lower than other North Carolina trout populations during the [1992-1996]...sampling period.”¹¹ Another provides a photographic compilation of the trout buffer damage being caused by creek boating. Other attachments reveal the less than “outstanding” trout population metrics that were documented on this sediment impaired reach of the Chattooga during a September 2016 study by the North Carolina Department of Environmental Quality.

Other attachments help to explain why the USFS has arbitrarily refused to conduct any recurring monitoring of the Chattooga’s trout habitat despite having admitted that young-of-the-year trout had been observed as being measurably lower on the Chattooga compared to other streams in the Nantahala and Pisgah National Forests during the 1992-1996 time period.

Much of this embarrassing data was never voluntarily disclosed by the USFS.

Instead, these embarrassing and highly probative facts were forced to the surface very slowly through numerous Freedom of Information Act (“FOIA”) requests and subsequent FOIA appeals to the Chief of the Forest Service. Such FOIA appeals were necessitated because of the insufficiency of the initial responses provided by the Nantahala Forest. *More than once, these FOIA appeals yielded additional information and documents.*

Before being sent to the Forest Service by me, the bulk of this data or information was not otherwise readily available on the Nantahala and Pisgah National Forests Plan Revision website, whose homepage is located at <https://www.fs.usda.gov/detail/nfsnc/home/?cid=stelprdb5397660>.

¹⁰ See supra note 2 (email now referenced as N-8 USFS Denial 09062017)(italics added).

¹¹ See attachment E-1 at page 205.

The simple truth is the USFS has demonstrated a neglectful pattern and practice of catering to the persistent demands of *a single recreational user group—whitewater creek boaters*—while ignoring the water quality impairing damage that this *small clique*¹² causes by *systematically* and *mechanically* displacing the fragile soils lying within the statutorily protected trout buffer¹³ on various streams flowing through the Nantahala and Pisgah National Forests.

Notification 07292017 documented this neglect. However, the criticisms set forth in Notification 07292017 cannot be fully understood or validated without a reader having access to many of these “170 attachments.”

Refusing to publish these “170 attachments” effectively blocks individuals and organized conservation groups from studying the facts set forth in these attachments while preventing them from recognizing the corroborating evidence of serious deficiencies in the LRMP planning process.

Unfortunately, unless posted to the electronic public reading room, an interested individual would have no way to know that such documents exist or that their content might be helpful to them—a circular vortex of logic that paradoxically prevents them from recognizing a need to ask specifically for the publication of such documents.

Hence, it offers little comfort for the USFS to excuse its own improper actions by asserting the “attachments...you provided...will be available on request to the public.”¹⁴

Denying publication of these “170 attachments” prevents the public from seeing the photographs of the Chattooga’s sediment choked stream bottom, from learning about the poor condition of the Chattooga’s trout fisheries as evidenced by trout monitoring field data *painstakingly* collected through FOIA, from conducting their own inquiries into my complaints about inadequate *Standards* for Outstanding Resource Waters (“ORW”), and from forming their own opinions about the inadequacies of the current LRMP planning process with respect to our ORW streams.

Stated differently, by denying public access to otherwise unpublished information found amongst many of these “170 attachments”, the USFS prevents public attention from being drawn to a controversial issue that it has admitted it does not wish to reignite—the Clean Water Act problems of allowing creek boating to continue on the Chattooga’s ORW headwaters in North Carolina. Refusing to publish these attachments in the electronic reading room limits who sees such unpublished information.

¹² “When whitewater kayaking reaches the difficult levels of creek boating an interesting social phenomena can occur. Creek boaters will often only choose to kayak with the same group of proven paddlers and will only accept paddling with new paddlers who have proven credentials referenced by at least one of the core group members. This is primarily due to the level of safety required on a demanding river and the non-verbal communication demands. A paddler who is not prepared to handle the whitewater is both a danger to themselves and the group. It has been observed that this overall attitude is strikingly polar to the very social play boating and slalom scenes, but as with any social dynamic this is not universal. Part of this selectivity is that these individuals regularly place themselves in high risk situations for the benefit of their crew to help ensure a crew members safety.” See *Wikipedia at <https://en.wikipedia.org/wiki/Creeking>* last downloaded on September 6, 2017.

¹³ The protected trout buffer consists of the first 25 feet of riverbank measured horizontally from the water’s edge.

¹⁴ *Supra* footnote 2.

By necessity this reduces the odds of the public galvanizing around the Chattooga's excessive embedded sediment problems—a problem which the USFS flat out refuses to investigate.

The stakes are just as high for me because I wish to use Notification 07292017 and its attachments to draw public attention to this problem during the LRMP planning process.

Having these “170 attachments” exposed to the public reading room constitutes an extremely critical factor in facilitating my individual participation in the LRMP planning process and in allowing the full exercise of my legally guaranteed right to speak in the digital public square and to offer criticisms of these controversial omissions in the LRMP planning process.

Unfortunately, the USFS uses its administrative power to squash the sharing of critical information which evidences how the USFS—under the current LRMP—has not discharged its obligation to conduct *continuous monitoring using the best available science*.

In short, there is no logically identifiable basis for the USFS to refuse to publish these “170 attachments” in the reading room—other than the USFS summarily declares that it does not have an obligation to do so.

From my perspective, what this seems to augur is plain old content censorship—where the USFS has acted arbitrarily to prevent the unflattering content of this information from being made available to the public—until it becomes too late to be of any assistance in the LRMP planning process.

Although the USFS must promote multiple uses of our forests, including the creation and maintenance of small and diverse wildlife openings designed to create forage and browse for small and large game species, the USFS has gotten far off the path by trying to be all things to all people. We must not ignore how certain uses of our forest must be prioritized over others—based on the existing law.

A public reading room which has been censored prevents individuals from remaining fully informed while accentuating the discriminatory advantages of providing enhanced information access to select special interest groups—such as the Stakeholders Forum for the Nantahala and Pisgah Plan Revision.

The discriminatory impacts of providing greater LRMP access to special interest groups cannot be mitigated by asserting that disfavored individuals have access to the Freedom of Information Act (“FOIA”). Such an excuse overlooks the burden of time and effort required to compel production of documents only—*not answers to specific LRMP questions*. FOIA compels the individual to hunt and to peck for facts and details spelled out in some document archived somewhere within the byzantine records of the USFS.

Similarly, these prejudicial impacts cannot be effectively mitigated by pointing to the vast amount of information already disclosed on the website of the Nantahala and Pisgah National Forests Plan Revision which is located at <https://www.fs.usda.gov/detail/nfsnc/home/?cid=stelprdb5397660>.

This homepage states: “Welcome to the Nantahala and Pisgah National Forest Plan Revision page, where you can help us plan the Forests’ future. *This web page serves as a one-stop resource for information associated with the plan revision process.*” (italics added, last downloaded September 18, 2017, a snapshot for which is being indexed as document N-9).

Despite being billed as a “*one-stop resource*”, there is no quick link to connect to the electronic public reading room. While this webpage does contain a quick link for “*Public Participation*”, this link does not take an interested individual to the public reading room. Neither will a Boolean keyword search for “reading room” nor “Reading Room” provide any guidance about where this essential public participation resource might be accessed.¹⁵

This fails to square with the USFS assurances, relied on by the public, that this website constitutes a “*one-stop resource*” for staying fully informed about the LRMP planning process.

A “*one-stop resource*” could have been created through the simple step of providing a quick link from the Plan Revision homepage to the electronic public reading room—a public reading room where the USFS could have *centrally* archived *all documents* prepared by the USFS or received from the public during the planning process. Such standardized archiving of information at one single location—the *electronic reading room*—could have eliminated the lack of full disclosure problems that follows from archiving administrative records in multiple places not otherwise easily located by the public.

¹⁵ This is based on zero relevant hits being returned for a query using “reading room” & “Reading Room”, which was run today on this website. “Your search-reading room-did not match any documents.”

To press further, the homepage for the National Forests in North Carolina is located at <https://www.fs.usda.gov/main/nfsnc/home>. As of September 17, 2017, a Boolean keyword search for either “reading room” or “Reading Room” also fails to provide any direct guidance about an html address where this electronic public reading room resource can be accessed.

Similarly, the parent homepage for the United States Forest Service is found at <https://www.fs.fed.us/>. An identical key word query run on this national website on September 17, 2017 produced 102 documents. However, none of them directly link to the electronic reading room being maintained at <https://cara.ecosystem-management.org/Public/ReadingRoom?Project=43545>.

A second key word query for “Nantahala” yielded 37 results. However, none of those directly links to the electronic reading room.

Finally a query of the world wide web for “Nantahala public reading room” only yields an indirect path to the Nantahala’s electronic public reading room. One of these hits leads you to <https://www.fs.usda.gov/detail/nfsnc/home/?cid=STELPRD3808042>. This constitutes a page on the National Forests in North Carolina website generally discussing Hydraulic Fracturing & Plan Revision. Buried on that page is a statement “Public comments received as part of the scoping for Plan Revision include some comments on oil and gas and are posted on <https://cara.ecosystem-management.org/Public/ReadingRoom?Project=43545&SearchResultsPerPage=25>.”

A query of the web for “cara-ecosystem” leads to a variety of USFS documents. Some of these documents reveal how various electronic reading rooms are being maintained by the USFS on a database referred to as Comment and Analysis Response Application (“CARA”)—housed on the national USFS website. This database is described as the way that the USFS collects, analyzes, and archives public comments pertaining to the revision of an LRMP.

While the creation of a new LRMP constitutes a complex undertaking, this does not excuse the USFS for making it more difficult than necessary for the public to locate critical information needed by specific individuals to express their views in the LRMP public square.

By refusing to post my “170 attachments” in the reading room, adjacent to my Notification 07292017, the USFS disadvantaged my ability to speak persuasively in the public square about a controversial issue that the Forest Service has otherwise indicated it does not wish to discuss—the excessive embedded sediment being suffered on the Chattooga’s headwaters and the negative impacts on this stream’s native trout habitat and it’s naturally reproducing rainbow, brown, and brook trout fisheries.

Lacking a convenient way to access all of the supporting facts and circumstances referenced in my Notification 07292017 but housed within these “170 attachments”, a reader would be hard pressed to commit the time needed to evaluate the persuasiveness of the criticisms detailed in the Notification 07292017.

By separating the criticisms and recommendations made in my Notification 07292017 from the supporting facts and circumstance detailed in these “170 attachments”, the Forest Service chilled my ability to present my views in the electronic public square. This constitutes just one more example in a pattern and practice detailed in my Notification 07292017.

The forthcoming LRMP will severely constrain the publics’ ability to impose legal accountability on the USFS for neglectfully managing the Nantahala and Pisgah National Forests during the next 10-15 years. The specific language of the *Standards* adopted in the forthcoming LRMP will prove critically determinative to holding the USFS accountable in the future.

Consequently, the USFS must provide a way for interested individuals to remain fully informed about the dynamic influences shaping the specific language selected to create the *Standards* that will regulate the future use of the forests.

A properly maintained electronic public reading room serves this critical due process function.

Unfortunately, the electronic reading room for the Nantahala and Pisgah National Forests has not been maintained as a critical *one-stop source* of LRMP information. Consequently, individuals are left to hunt and peck for information, while other select special interest groups are provided with enhanced guidance about how to find critical information without suffering the disadvantages of having to engage in an uncertain paper chase.

By refusing to post all public documents to the electronic reading room (received or transmitted by the USFS in connection with the LRMP), the USFS gives me a reason to fear that certain factual presentations, recommendations, commentaries, notifications, and their supporting documents are being censored based on subject matter content.

The public has a due process expectation that *all public documents*, including but not limited to all emails, written objections, recommendations, and any supporting documents submitted by *all members of the public* will be published, *without censorship*, in the electronic reading room—especially when documents generated by the public raise LRMP planning issues not otherwise

studied by the USFS or when they provide factual information not otherwise disclosed by the USFS.

Maintaining a fully updated electronic reading room allows all members of the public to see who is exerting influence over the developing LRMP.

Second, through using the Boolean search function, it allows a less informed member of the public to become quickly better informed by accessing the recommendations, criticisms, opinions, and the shared knowledge of facts and circumstance independently researched and documented for the record by other interested parties.

Being able use a Boolean search query offers a special benefit because it allows individuals to retrieve and to study the work product of others who may have greater insight on a particular subject matter touching upon a discrete geographic management area. Third, maintaining a fully populated electronic reading room also provides a way for the USFS to maximize the use of its limited personnel by decreasing the amount of time consumed in answering similar Freedom of Information Act requests from multiple parties.

The USFS must publish all public documents in the electronic reading room. Nevertheless, without citing any legal authority for doing so, the USFS has declined to publish any of these “170 attachments” in the electronic public reading room.

Compelling the publication of my “170 attachments” within the electronic reading room, alongside my Notification 07292017, constitutes a critical component of being allowed to exercise my due process right to comment and complain about deficiencies in the LRMP.

A Properly Maintained Public Reading Room Maximizes Open Government By Providing A Way For Individuals To Discover How Special Interests Are Influencing the Development of the LRMP

Because an LRMP takes years to revise, the USFS must consistently use the full technological power of the electronic reading room to maximize transparency and to encourage *all members of the public* to remain fully informed about the dynamic influences shaping the LRMP—not just selectively favored national special interest groups who are paid to stay at the table and exert influence tailored to their national interests.

An arbitrary policy of selectively picking and choosing which documents get placed in the public reading room makes it impractical for local individuals to know *whose* factual presentations, criticisms, or behind the scene recommendations might be influencing the development of the LRMP.

By not promptly publishing all documents that it receives or transmits to the public, the USFS hobbles local citizens' ability to see which national special interests are influencing the LRMP—or how—because the keyword search function of the electronic public reading room cannot be used to locate or to read all factual presentations, criticisms, or recommendations received from such special interest groups.

It serves no valid purpose to assert that such unpublished documents are archived somewhere but that they might only be discovered through the time burdensome and guessing game process of having to file multiple Freedom of Information Act (“FOIA”) requests.

To refuse intentionally to maintain a contemporaneously and fully updated electronic reading room flies in the face of providing for sufficient public participation needed to reduce complaints about due process being curtailed as the byproduct of adopting the 2012 Planning Rule. ⁷⁷ Fed.Reg. 21,162 (April 9, 2012) (codified at 36 C.F.R. pt. 219).

With respect to the Nantahala's forthcoming LRMP, the public may have already been prejudiced by this pattern and practice of not consistently posting all public documents to the electronic reading room.

However, the USFS can reduce concerns about possible unseen back room trading by making sure that all communications, whether electronic or otherwise, and including any back and forth discussions between members of the public and the USFS, get immediately posted to the electronic public reading room.

The USFS should also scan and post copies of any hard copy documents including factual presentations, correspondence, recommendations, criticisms, etc.

The Forest Service Claims A Right To Refuse To Answer Increasingly Narrowed Questions Seeking Factual Information and Increasingly Narrowed Inquiries Seeking Clarification on the Forest Service Interpretations of Its Own Policies Impacting the Adoption of LRMP Standards

The USFS has recently refused to answer specific questions regarding the LRMP planning process. Instead, the USFS has elected to stonewall such inquiries by offering broad generalizations in lieu of responding with precise answers to these narrowed inquiries.

On September 6, 2017, the USFS removed any doubt about the motivations for this stonewalling.

The Forest Service offered the following interpretive denial of my rights:

Forest Wildlife and Fisheries Biologist, Sheryl Bryan has provided *some response* to your questions regarding inventory and monitoring (see below). *However, we will not be responding to individual questions and allegations raised in your comment letter as part of the plan revision process, nor do we respond individually to all of the 1000's of public comments that we receive as part of the planning process.* The information you provided about water quality, aquatic habitat, recreational uses, and wild and scenic river management will be considered as we continue to develop the draft plan and alternatives. The proposed draft plan and draft Environmental Impact Statement will be shared with the public next spring/summer, and there will be a formal 90-day public comment period to provide substantive comments on the proposed plan language and environmental analysis of the alternatives.¹⁶

The original questions submitted to Ms. Bryan, the “*some response*” referenced above, *and my additional still to be answered follow-up questions* are fully detailed in one of the “170 attachments” that the USFS *has refused to post to the public reading room.*

This document, indexed as “L-6 Email Chain w Sheryl Bryan 10112016” was sent to you on July 28, 2017 at 10:13 pm. As L-6 shows, I have longed pressed the Forest Service’s neglect in having failed to conduct the necessary monitoring using the best available science to recognize the trout habitat and trout fisheries problems that follows from fine particle sized (<2mm) sediments smothering the larger stream bed substrates in quantities that exceed any reasonable minimum effects threshold for disrupting the early life cycle of trout.

These non-temporary degrading conditions can now be corroborated by objectively comparing the significance of the poor results of the September 2016 Chattooga River trout fisheries study to the more favorable trout population metrics observed during a prior 1992-1996 study, which took place long before this excessive embedded sediment problem on the subject 2 mile segment of river had become so visibly pronounced. This degrading condition has long been recognizable by those fly fishing anglers having the benefit of years of first hand creel records and eyewitness experience with the Chattooga’s headwaters in North Carolina.

¹⁶ Supra footnote 2 (“N-8 USFS Denial 09062017”).

The North Carolina Department of Environmental Quality sent copies of the September 2016 trout population study and all data sheets to Ms. Bryan on October 6, 2011.

On October 11, 2016, subsequent to gaining possession of the results of the Chattooga River's September 2016 fisheries report and all raw data sheets, Ms. Bryan penned the following candid admission to my criticisms and questions:

As I am sure you are aware, North Carolina is blessed with an abundance of trout streams—so many that it is impossible to monitor each and every one. Therefore, both the NCWRC and NCDEQ take great care to develop statistically sound monitoring programs that can be related to the entire landscape. They use widely accepted methods and maintain strict control over data consistency and quality. DEQ's NCIBI monitoring was not designed to monitor trout population trends specifically. Nor was NCWRC's trout monitoring program data designed to assess full aquatic community health. In my opinion, to mix the two for reasons other than purely descriptive ones would invalidate the reliability of the monitoring information both agencies are striving to achieve. I am in no way suggesting that there is no monitoring data available from the Savannah Basin. I am simply cautioning about mixing data sources and types. There is limited long-term monitoring data from this basin because there is relatively little of the Savannah Basin in North Carolina (when compared to other river basins). Logically, statistically reliable sampling design would put fewer sites in basins with fewer resources. *Do I think we have enough data: no—but like I stated earlier, what we have is the best, most consistent, statistically valid sampling design our collective monitoring efforts can sustain.* The Nantahala-Pisgah Forest Plan revision process is committed to using the best available science in its processes.¹⁷

Here, we witness the responsible USFS fisheries biologist admitting not “*enough data*” has been gathered about the trout habitat and trout fisheries on the ORW Chattooga, while simultaneously excusing this neglect by claiming budget limitations and the inapposite assertion that: “*Logically, statistically reliable sampling design would put fewer sites in basins with fewer resources.*”¹⁸

The logic runs just the opposite in terms of the allocation of scarce resources. The Chattooga constitutes just 1 of 3 out of over 12,000 bodies of water in North Carolina to carry Class B, Trout, Outstanding Resource Water classifications with the supplemental designation of being a National Wild and Scenic River.

But even within this small group, the Chattooga stands apart. The fact is the Chattooga's trout habitat and trout fisheries were explicitly recognized as special subcategories of use for the Chattooga's ORW water quality. Consequently, pursuant to regulations promulgated under the Clean Water Act, the Chattooga's trout habitat and trout fisheries must be protected from suffering any non-temporary diminishment from their baseline “outstanding” level of quality.

¹⁷ See L-6 Email Chain w Sheryl Bryan 10112016 at page 7 (italics added).

¹⁸ Id.

This means the Chattooga should have been receiving the greatest amount of monitoring—especially during the lead up to the decision to introduce creek boating to its fragile headwaters in North Carolina. Nevertheless, from 1996 until September 2016 the Forest Service did not lift a finger to conduct any kind of monitoring of either the Chattooga’s in stream habitat or its trout fisheries.

Based on these objective criteria, like it or not, the Forest Service has repeatedly denied this measurable truth. When viewed within the totality of facts and circumstances that I have painstakingly tried to place into the Forest Service’s administrative record, this neglect of attention can only be viewed as intentional.

To press further, the USFS has continuously sought to excuse its utter lack of baseline monitoring data, and to defend against the specific charges of degraded conditions on the Chattooga by asserting that because conditions within some larger forest area appear to offer a statistically averaged condition that exceeds an acceptable minimum threshold (undefined by any specific measurable metric) that the Chattooga must be presumed to be ok:

“Overall stream community, health, and function has been, and remains, good across the Nantahala and Pisgah NF’s. Across the Forests, only one site within the Catawba River basin during one year of monitoring (1998) received a NCIBI score lower than the historical reference.”¹⁹

Notification 07292017 addressed the inherent double hearsay problems of giving any weight to this self-serving and highly optimistic assessment’s applicability to the visibly pronounced degraded conditions occurring on the Chattooga.²⁰ Per the state of North Carolina, the NCIBI should not be applied to gauge the condition of our mountain trout streams.

The USFS would like to summarily assert that the “Nantahala-Pisgah Forest Plan revision process is committed to using the best available science in its processes.”²¹

But as Notification 07292017 complains, the USFS cannot claim to be using the best available science by using the NCIBI as a proxy for assessing the current condition of the Chattooga River or any other mountain trout stream. This does not constitute the best available science. In fact, to rely on the use of the NCIBI to make any characterizations about the cold water trout streams would be misleading on the part of the USFS—per the guidance of NC DEQ.

By implication, Notification 07292017 asked the USFS to explain why it believes it would be appropriate to use the NCIBI score to gauge and score its own success in managing critical trout streams on the Nantahala and Pisgah National Forests. The Forest Service still hasn’t answered this question which remains outstanding since October 11, 2016—or almost a year later.

¹⁹ Id. at page 8 (quoting the February 2014 Aquatic Ecosystems Assessment at page 15).

²⁰ See Notification 07292017 at pages 91-95.

²¹ Supra footnote 17 (document L-6 at page 7).

Similarly, my prior communications asked the Forest Service to provide me with “the specific metrics or numeric *Standards* that constitute the ‘*historical reference*’ against which the USFS compared all other streams within the forests.”²² “*Please disclose what NCIBI score from which monitoring site on what stream constitutes the historical reference.*”²³

The Forest Service has still not answered this simple factual question.

In addition, the Forest Service was asked to provide copies of any communications between USFS officials and their counterparts at the relevant North Carolina agencies regarding the use of the NCIBI as a tool for judging the quality of our streams for LRMP planning purposes.

Judged by the lack of any response to this request, apparently, none of these officials communicate with each about this subject matter. Perhaps Forest Service officials ought to start talking with their peers to avoid making incorrect assertions of fact during the LRMP planning process.

16 USC §1612 compels the USFS to provide the public with adequate notice and the opportunity to comment upon the formulation of *Standards*, criteria, and guidelines applicable to USFS management initiatives, whether subject to the National Forest Management Act or “*other laws applicable to the Forest Service*” [e.g. *the Clean Water Act, National Wild and Scenic Rivers Act*].

Unfortunately, by refusing to answer my narrow questions, the USFS evidences its indifference to this mandate as it applies to these “other law applicable to the Forest Service”, regulations, etc.

By declaring it won’t answer questions, the Forest Service implies that it can do so for strategic purposes—and not because it doesn’t know the answer.

Such a view would be particularly pernicious in the hypothetical case where the USFS already knows the answer to the underlying question but nevertheless compels the individual to try to discover this answer through filing a FOIA request.

Surely, the USFS has some form of good faith obligation. But if that is the case and the USFS refuses to answer increasingly narrow LRMP questions, how would the public ever know if he Forest Service was acting out of bad faith motivations like a desire to censor public participation based on the content of the questions being asked?

Notification 07292017 provided you with seven concrete examples of how the USFS has engaged in a pattern and practice of entirely neglecting to disclose critically relevant information

²² See Notification 07292017 at page 21 (italics in original).

²³ Id. (italics in original).

upon first inquiry, and of sometimes creating unnecessary delays by providing only piecemeal response.²⁴

Such delays have compelled me to spend a greater amount of time and resources to gain access to this information. This has reduced the amount of time and resources that I have left to devote to synthesizing a better understanding of any deficiencies in the Aquatic Systems, Streamside Zones and Water components of the LRMP.

Finally, the USFS has not stated that it refuses to answer all questions posed to it by each and every individual or special interest group. Hence by implication, the Forest Service must be picking and choosing to whom it will respond based on some criteria not otherwise revealed.

Given this circumstance, the capstone question that will need to be discovered is whether or not the USFS has ever responded in any way to answer the LRMP planning questions of any special interest group—such as the members of the Stakeholders Forum For the Nantahala and Pisgah Plan Revision.—whether in writing, through emails, in person, or over the phone.

The USFS implies that it holds an unbridled right to decide how much public participation may be allowed for each and every individual—or in other words how much due process the USFS will agree to provide. This is wrong.

By claiming the discretion to pick and choose what answers to provide, the USFS summarily dismisses critical due process rights that belong to individual members of the public—while dispelling any notions about its true motivations for doing so. The flow of information must go both ways—not just in the direction of the USFS. By virtue of these admissions, the USFS now implies its own potential bad faith motivations for discouraging an open two way form of communication.

Given the due process implications of 16 U.S.C. §1612(a)²⁵ the USFS ought to cease stonewalling my increasingly focused policy inquiries and fact seeking questions regarding the Aquatic Systems, Streamside Zones and Water components of the Nantahala and Pisgah National Forests Land Resource Management Plan (“LRMP”).

²⁴ Please refer to the notification entitled “Floyd Notification USFS Nicholas 07292017 FINAL.pdf, which was directed by email on July 29, 2017 to the attention of Mr. Hurston A. Nicholas, Forest Supervisor and Responsible Official, Nantahala and Pisgah National Forests (hereinafter “Notification 07292017”).

²⁵ “In exercising...*other laws applicable to the Forest Service*, the Secretary shall establish procedures...to give...the public...an opportunity to comment upon the formulation of standards...applicable to Forest Service programs.” 16 U.S.C. §1612(a) (italics added).

The USFS Restrains Speech in the Public Square: (1) By Denying Electronic Reading Room Access For All Public Documents Received or Transmitted and (2) By Refusing To Answer An Individual’s Narrowly Drawn LRMP Questions

By denying electronic reading room access to all public documents received or transmitted during the LRMP planning process and by selectively answering some but not all of an individual’s narrowly drawn LRMP questions, the USFS attacks the due process rights of individuals interested in the LRMP planning process.

Through these not-so-subtle denials of due process, the USFS seeks to train individuals *to accept being denied access* to critical information that the USFS does not want the public to have—but which the public otherwise has a right to see.

Such proactive concealment of critical information serves to shut down a public forum designed to facilitate public discourse and expression of opinions about the “potential effect of the activity in question on the welfare...of the community.”²⁶

This keeps potentially unfavorable facts and data out of the LRMP administrative record. This also undermines an individual’s ability to point to prior inconsistent interpretations of policies as the definitive proof needed to hold the USFS accountable for violating particular *Standards* as applied to specific future actions.

In effect, the USFS works like a busy beaver to turn every scrap of potentially impeaching piece of information or evidence into just another stick of wood piled upon a logjam of discretionary guidelines incapable of being enforced by the public.

At some place on this due process continuum this simply won’t satisfy what is compelled by the law.²⁷

The Forest Service refuses to answer any additional questions—no matter how increasingly narrowed the question is. The USFS excuses itself by reminding that it “has provided some response to your questions regarding inventory and monitoring...”²⁸

Providing “*some response*” constitutes insufficient due process. The prejudicial impacts of denying contemporaneous access to key information, including fully responsive answers to specific questions, cannot be fixed by the last minute dissemination of key information and answers—as the USFS implies by reminding me about the availability of the “formal 90-day public comment period” late in the LRMP process.

²⁶ *Shuttlesworth v City of Birmingham Alabama*, 394 U.S. 147, 153 (1969).

²⁷ “Unexplained inconsistency” between agency actions is “a reason for holding an interpretation to be an arbitrary and capricious change.” *Nat’l Cable & Telecomms. Ass’n v Brand X Internet Servs.*, 545 U.S. 967, 981, 125 S. Ct. 2688 (2005). A policy change violates the Administrative Procedures Act “if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so.” *FCC v. Fox Television Stations, Inc.* 556 U.S. 502, 537, 129 S. Ct. 1800 (2009).

²⁸ *Supra* footnote 2 (“N-8 USFS Denial 09062017”).

The fact that I will have 90 days to submit formal comments has nothing to do with the refusal of the USFS to provide detailed and non-evasive answers to my increasingly narrowed questions.

There is no reason to believe that the USFS will suddenly agree to provide cogent answers at that late point in the game. In any case, even were the USFS to provide cogent answers to the public's questions during that late stage in the LRMP process, the public would still be irreparably prejudiced, because it would lack sufficient time to obtain field studies etc. to respond or to impeach the presumptions first articulated by the USFS at that late stage in the process.

In short, by delaying prompt publication, or picking and choosing what to publish in the public reading room, while simultaneously refusing to answer all narrowly drawn LRMP questions, the USFS effectively shuts down a public forum in order to achieve a prior restraint on the public's ability (1) to speak and to participate fully in the LRMP planning process, and (2) to hold the Forest Service accountable for any future neglect in managing the forest's most fragile resources.

The USFS admits to answering some but not all LRMP questions. However, the USFS articulates a *standardless explanation* for how it goes about picking and choosing which of the "1000's of public comments"²⁹ to whom it will provide answers.

Without citing any authority, the USFS implicitly claims the entitlement to *hobble* my right to participate fully and without discrimination in the LRMP planning process.

Refusing to publish all documents in the public reading room and refusing to answer all narrowly drawn LRMP questions equates to an agency asserting a right to prevent a specific individual from speaking, by taking the unusual step of shutting down a forum designed to facilitate public discourse and expression of opinions about the "potential effect of the activity in question on the welfare...of the community."³⁰

By censoring what gets published in the electronic public reading room, and by refusing to answer specific LRMP questions, the USFS effectively shackles the right to speak.

The USFS would have the public believe that it adheres to an ironclad policy of never providing detailed and precise answers to the LRMP questions of any specific individual or any particular special interest group. Nonsense.

The USFS has admitted providing answers to some, but not all, of my questions. This admission impeaches any claim that the USFS applies an ascertainable standard to pick and choose. By refusing to publish my documents in the public reading room, the USFS effectively prevents other members of the public from learning about my water quality concerns.

By hobbling the flow of information, the USFS also manages to conceal its own culpable neglect for having allowed continuing violations of existing LRMP *Standards* with respect to the Chattooga's ORW waters.

²⁹ Supra footnote 2, (N-8 USFS Denial 09062017(italics added).

³⁰ *Shuttlesworth v City of Birmingham Alabama*, 394 U.S. 147, 153 (1969).

The USFS Has Provided Special Access to the Stakeholders Forum for the Nantahala and Pisgah Plan Revision Without Sufficiently Disclosing This Special Access To the Public

The existence of the externally managed Stakeholders Forum For the Nantahala and Pisgah Plan Revision does nothing to dispel concerns that special access is being granted to a select group of Stakeholders participating in this National Forest Foundation managed group—whose membership is listed on the website <https://www.nationalforests.org/who-we-are/regional-offices/eastern-regional-program/stakeholdersforum> last downloaded on September 9, 2017:

Andrea Leslie, North Carolina Wildlife Resources Commission (“NCWRC”)(shared seat)
Ben Prater, Defenders of Wildlife (Alternate is Tracy Davids)
Bill Hodge, Southern Appalachian Wilderness Stewards
Bill Kane, North Carolina Wildlife Federation (Alternate is Richard Mode)
Bill Yarborough, North Carolina Department of Agriculture
Curtis Smalling, National Audubon of NC
David Whitmire, Fish and Wildlife Conservation Council, Headwaters Outfitters**
Deirdre Lightsey, Back Country Horseman of North Carolina & North Carolina Horse Council**
Gary Peters, National Wild Turkey Federation (Alternate is Chris Coxen)
Gordon Warburton, Quality Deer Management Association
Greg Yates, North Carolina Forest Service
Hugh Irwin, The Wilderness Society (Alternate is Jill Gottesman)
JD Diefenbach, Sierra Club, Wenoca Chapter (Alternate is David Reid)
Jim Gray, Ruffed Grouse Society** (Alternate is Don Mallicoat)
Jim Sitts, Columbia Forest Products (Alternate is Fred Hardin)
Josh Kelly, MountainTrue (Alternate is Bob Gale)**
Julie White, International Mountain Bicycling Association/Southern Off-Road Bicycling Association**
Kevin Colburn, American Whitewater
Lang Hornthal, Root Cause
Megan Sutton, The Nature Conservancy
Morgan Sommerville, Appalachian Trail Conservancy
Rob Elliot, Evergreen Paper, Canton**
Ruth Hartzler, Carolina Mountain Club** (Alternate is Bill Van Horn)
Ryan Jacobs, North Carolina Wildlife Resources Commission (shared seat)
Sam Evans, Southern Environmental Law Center** (Alternate is DJ Gerkin)
Susan Fletcher, Pisgah Hardwoods**
Zach Lesch-Huie, Access Fund

Dating back to September 25, 2013, to the best of my knowledge, neither the depth of involvement nor the intensity of influence of the National Forest Foundation (“NFF”) over the LRMP planning process has been sufficiently disclosed or explained on the Nantahala and Pisgah National Forests Plan Revision website.³¹ This assertion is based on the lack of any

³¹ The homepage for the Nantahala and Pisgah National Forests Plan Revision website is found at <https://www.fs.usda.gov/detail/nfsnc/home/?cid=stelprdb5397660> last visited on September 18, 2017.

relevant hit when this webpage’s Boolean search function was last queried for “National Forest Foundation” and “NFF” on September 10, and September 13, and September 15, 2017.

Neither have the Nantahala and Pisgah National Forests devoted a single word on their planning website to explaining how their leadership or staff interface with either NFF officials or the individual members of the Stakeholders Forum For the Nantahala and Pisgah Plan Revision (“Stakeholders Forum”). This assertion is also based on the lack of any relevant hits (out of a total of 9) when this website was last queried for “Stakeholders” on September 10, and September 13, 2017. Neither does this website provide an easily recognizable *quick link* to some outside website disclosing the involvement of the NFF or the Stakeholders Forum.

This intense involvement of the NFF, the existence of a separate planning website, and the existence of this subsidiary LRMP planning process was only discovered by reading a newspaper article that was stumbled upon long after September 25, 2013. Even today, a search query run on the *Nantahala and Pisgah National Forests Plan Revision website*, for “National Forest Foundation”, fails to yield any quick link to the NFF website.

The NFF website³² demonstrates how special presentations and special access have been provided by USFS planning personnel to this small group. For example, see the presentation delivered regarding Management Areas and Geographic Areas, Stakeholders Forum, November 1, 2016 which can be downloaded from the NFF link at <https://www.nationalforests.org/assets/files/Management-Areas-and-Geographic-Areas-Oct31.pdf>.

This USFS authored document prominently employs the tag line “Places matter” on the first page of the materials. However, even this morning, a search query run for “Places matter”, on the *Nantahala and Pisgah National Forests Plan Revision website*, yields only two hits. Neither of those two hits brings up the “Places matter” document. Neither of these two hits provides any quick link to the NFF website to where this document is archived.

Similarly, the NNF website leaves the impression that the most contemporaneous LRMP information is being funneled to the NFF and the members of the Stakeholders Forum For the Nantahala and Pisgah Plan Revision—before ever being disclosed to the rest of the public. By agreeing to answer the questions of Stakeholder Forum members about facts or policy interpretations while flat out refusing to answer my factual questions and policy inquiries, the USFS arbitrarily provides this similarly situated group with special access.³³

The Addendum to the Code of Conduct³⁴ governing membership on the Stakeholders Forum was amended on October 22, 2015 to allow individuals other than Stakeholders to attend subsequent

³² See the NFF website page found at <https://www.nationalforests.org/who-we-are/regional-offices/eastern-regional-program/stakeholdersforum> last visited on September 18, 2017.

³³ See generally *Village of Willowbrook v Olech* 528 US 562, 120 S Ct 1073, 145 L Ed 2d 1060 (2000)

³⁴ See the Stakeholders Forum for the Nantahala and Pisgah Plan Revision, Code of Conduct, Approved September 23, 2015, and updated October 22, 2015, and April, 12 2016 as archived at

Stakeholder Forum meetings as “observers” who must “refrain from speaking...unless public comment times are specifically designated on the agenda.”³⁵ *However, how are non-Stakeholders supposed to know of this right unless the USFS has conveniently and noticeably flagged that right on the Nantahala and Pisgah National Forests Plan Revision website? To the best of my knowledge such disclosure does not exist on the USFS website.*

In any case, being permitted to attend but not ask specific questions of USFS personnel stands in stark contrast to the access and special accommodation being afforded to the members of this Stakeholders Forum. Has the USFS ever provided these Stakeholders with additional follow up information or answers to questions about facts and planning policies of the USFS?

The impression is conveyed that the NFF works separate and apart from the USFS to generate consensus among different constituents in order to offer recommendations about which *Standards*, etc. should be adopted by an LRMP. However, the NFF does not stand independent of the Department of Agriculture and the United States Forest Service.

Recommendations Proposed by the Stakeholders Forum Do Not Constitute Truly Objective Consensus. The Code of Conduct Governing the Forum’s Membership Embraces a Structurally Inherent Conflict of Interest That Forces Consensus Through the Application of A Prior Restraint On Open Debate

There is nothing in the Code of Conduct to preclude members of the Stakeholders Forum from communicating directly with the USFS to articulate their concerns during the LRMP planning process. However, the Code of Conduct does impose a conditional obligation for remaining a member in good standing and for retaining the right to vote on Stakeholder proposals—a punitive condition that undermines the true independence of the consensus seeking process. The Code of Conduct stifles independent thought because it requires Stakeholders to “agree not to advocate or send comments [to the USFS] that are incompatible with agreements made by the Stakeholders Forum *or in a way that would prevent them from participating fully and in good faith in the Stakeholders Forum’s efforts to build mutual support for each other’s values and priorities.*”³⁶ Stated differently, you sustain your status as a voting member of the Stakeholders Forum *only* if you agree to forego offering factually accurate criticism to the USFS of specific concerns about *unsustainable* recreational or forestry uses when such uses constitute the special interest of another one of the members of the Stakeholders Forum.

In practice what this means is that one member of the Stakeholders Forum, such as the North Carolina Wildlife Resource Commission (“NCWRC”), would be precluded from vigorously defending the integrity of the legally protected trout buffer by vigorously advocating to the USFS about the inappropriateness of allowing the use of specific types of recreational equipment that

<https://www.nationalforests.org/assets/pdfs/April-2016-Approved-Revisions-to-Stakeholders-Forum-Code-of-Conduct.pdf> last viewed on September 10, 2017.

³⁵ Id.

³⁶ Id. at page 2.

cause the displacement of soils lying within the 25 foot wide protected trout buffer, because such honest advocacy might draw ire from another member of the Stakeholders Forum.

Stated differently the predesigned bias of this Code of Conduct compels Stakeholders to presume that all users of the forest resources should be treated the same—despite the fact that some recreational uses in some geographic management areas are simply incompatible with protecting the integrity of our stream banks and trout buffers. The not so subtle encouragement of this false planning premise distorts the true independence of the consensus supposedly engendered in the recommendations being put forth by the Stakeholders Forum.

Under this Code of Conduct, to remain a voting member of this Stakeholders Forum, the NCWRC would be precluded from vigorously opposing the use of recreational equipment which necessitates the displacement of the soils lying within the trout buffer while encouraging additional sediments to be channeled into our cold water trout streams—*which is exactly what the NCWRC is compelled to prevent under the law.*

This dissent suppressing Code of Conduct would compel the NCWRC to disregard the well documented negative physical consequences of what happens over time from allowing the use of recreational equipment that is simply incompatible with preserving the trout buffer.

This Code of Conduct also resembles a judicial gag order by specifying that “...Stakeholders will communicate with media in accordance with any communication plans determined by the group. *Until a communications plan is developed, media inquiries should be directed to the NFF.*”³⁷ This provision would seem to prohibit the NCWRC from vigorously presenting the case to the press about the inherent incompatibility of allowing the use of certain recreational equipment inside North Carolina’s fragile trout buffer.

*While this Code of Conduct encourages consensus, it does so for the wrong reasons. It subtly encourages “group think”.*³⁸

What this Code of Conduct also encourages is back room horse trading, whereby one voting member of the Stakeholders Forum gains an implicit incentive to avoid complaining about the physical damage that will occur to the forests by accommodating the recreational or forestry uses of a second Stakeholders Forum group—even if those uses are incompatible with preserving the integrity of particular resources within a geographic management area—such as North Carolinians’ legally protected trout buffer.

Each voting member is encouraged to recognize the implied incentive to accept tradeoffs in order to avoid having their own wish list from being vigorously opposed by a second Stakeholders Forum group. In addition, the members of this Stakeholders Forum must know that the National

³⁷ Id. at pages 4-5 (italics added).

³⁸ “The process in which bad decisions are made by a group because its members do not want to express opinions, suggest new ideas, etc. that others may disagree with: *Most of us thought the product wouldn’t sell, but nobody told the boss—that’s the danger of group think.*” Definition of group think from the Cambridge Business English Dictionary.

Forest Foundation raises donations from private sources of funding while also making grants to qualifying non-profit organizations for a host of purposes.

Have any of the members of the Stakeholders Forum donated funds to the NFF or received any grant funding from the NFF, before or after the initiation of the LRMP planning process commenced on September 25, 2013? To the extent they have, this introduces yet another conflict of interest that undermines the presumed independence of any recommendations being submitted by the Stakeholders Forum under the editorial guidance of the NFF.

The NFF admits its purpose and goals include “...supporting a collaborative process focused on addressing several issues of conflict as part of the Nantahala & Pisgah National Forests plan revision...and to identify zones of agreement to form recommendations...The key issues are forestry and restoration, special designations, and sustainable recreation.”³⁹

The ultimate goal of the NFF is to editorially summarize the voted upon consensus of the Stakeholders in order to “develop consensus recommendations on key issues to provide to the Forest Service.”⁴⁰ However, the NFF is inextricably tied to the wishes of the USFS because the NFF derives a large amount of its annual funding from a common parent: the US Department of Agriculture.

For fiscal years 2016 through 2018, the Congress has authorized the Secretary of Agriculture to provide matching funds, totaling up to \$3,000,000, matched dollar for dollar with private contributions, to pay for the overhead and operation of the NFF. 16 U.S.C. §583j-8(b). Form 990 for FY 2016 evidences how total revenues from contributions and grants declined by approximately 21% from the prior year to a total of just \$13,228,967. This implicates that Department of Agriculture federal matching funds accounted for approximately 22% of the funding requirements of the NFF in FY 2016. Part VIII of the Form 990 suggests that government grants from all federal and state sources accounted for \$4,669,122 of the total revenues of \$13,228,967 reported by the NFF for FY2016—or 35% of total funding.

Similarly, the Secretary of Agriculture may further subsidize the NFF by permitting the use of Department of Agriculture personnel, office space, and equipment with partial or no reimbursement being required. 16 U.S.C. §583j-3(c).

In summary, the involvement of the National Forest Foundation in the LRMP planning process should not be viewed as being an at-arms-length source of independent recommendations. The NFF should be viewed as a de facto subsidiary of the USFS when it comes to following orders.

This subsidiary planning process fabricates the means and opportunity for the Nantahala & Pisgah National Forests LRMP planning team to stand behind a thin organizational curtain to tout its solicitation of independent thought and recommendations. More remarkably, this less

³⁹ Quoting the NFF website page found at <https://www.nationalforests.org/who-we-are/regional-offices/eastern-regional-program/stakeholdersforum> last visited on September 10, 2017.

⁴⁰ Id.

than fully disclosed subsidiary planning system affords a way for the USFS to justify assigning the greatest weight and influence to the voted upon recommendations made by this Stakeholders Forum, and for claiming such recommendations should be viewed “as the gospel truth” for how to manage the most controversial decisions impacting the Nantahala and Pisgah National Forests over the next 15 years.

In summary, the USFS lays claim to having solicited independent consensus regarding the most controversial LRMP decisions. Unfortunately, the true independence of these recommendations are hobbled by the inherent structural conflict of interest created by a Code of Conduct that encourages parties to act out of motivation for avoiding opposition to their own special interests—all beyond the purview of non-Stakeholders who are led to believe such recommendations constitute independent consensus. The reality is that the USFS is actively participating in a not fully-disclosed subsidiary planning process that epitomizes the opportunity for backroom dealing and tradeoffs.

By admitting a policy of picking and choosing to whom it will respond regarding specific LRMP questions and USFS policy inquiries, the USFS reinforces the criticisms detailed in my Notification of July 29, 2017, and prior correspondence. This mirrors the evidence of special procedural accommodation that the administrative record demonstrates was afforded to American Whitewater.⁴¹ American Whitewater constitutes an active member of the Stakeholders Forum. The Stakeholders Forum is being afforded special influence in shaping the LRMP.

In stark contrast, and inconsistent with open government principles as well as the public participation mandate of the National Forest Management Act, the USFS refuses to answer *my* specific written questions seeking factual information and explanations of USFS policies required to offer recommendations about the *Standards* that the USFS ought to adopt.

Ignoring these factual questions and policy inquiries prevents me from compelling a re-visitation of the insufficient antidegradation protections being provided to the Chattooga’s designated subcategories of ORW water quality use—one of the state of North Carolina’s most unique coldwater trout streams flowing through the Nantahala and Pisgah National Forests.

Nevertheless, despite revealing facts and data not otherwise disclosed to the public, the USFS refuses to post my “170 attachments” to the electronic public reading room. This works to conceal highly probative evidence of the insufficiently intense antidegradation protection being provided to the Chattooga’s designated subcategories of ORW water quality use and the need for adopting non-precatory *Standards* in the new LRMP.

⁴¹ For example, the USFS took the unprecedented step of giving American Whitewater an inappropriate form of special procedural accommodation by scheduling a second objection meeting that was held on Thursday, October 1, 2015 in connection with the plan to build a special creek boater access trail below the Bull Pen Iron Bridge. The USFS has refused to post numerous documents in the public reading room that substantiate this fact, including documents previously submitted as attachments to my Notification of July 29, 2017 and indexed for your convenience as documents 00-M, 00-M-1, 00-M-2, 00-M-3, 00-M-4, 00-M-5 and 00-M-6.

The USFS Uses One Hand To Conceal Information and Disregard Requests For Interpretive Clarifications, and a Second Hand To Dispense Unfair Favoritism

Having rejected my questions, and having limited the effectiveness of the public reading room as a source of disclosure, the USFS insists “there is no need to revisit” the environmental consequences of the well documented physical damage being caused by creek boating and that “the Forest Supervisor has the discretion to determine the scope and scale of the revised Forest plan.”⁴² Summarily refusing “to revisit” arbitrarily flies in the face of the fundamental purpose for preparing an LRMP pursuant to the National Forest Management Act.

By summarily rejecting any need to undertake a comprehensive antidegradation assessment of the impacts of creek boating on the Chattooga’s trout buffer, in stream habitat, and trout fisheries, the USFS reveals an arbitrary willingness to dispense special favoritism to the whitewater creek boating lobby. This flat out refusal “to revisit” strips the public of due process by ignoring what Amendment # 22 to the current LRMP promised. By refusing “to revisit” now, the USFS avoids being held culpable for having arbitrarily refused to use the best available science to monitor the Chattooga’s degrading condition for at least the last 5 years.

Requests For Policy Clarifications and Disclosure of Otherwise Unpublished Facts Should Not Be Stonewalled. Nevertheless, the USFS Refuses To Engage in a Back and Forth Discussion About How To Apply the Best Available Science In Monitoring the Impacts of Creek Boating on the Chattooga’s Headwater.

This correspondence, Notification 07292017, and other prior communications strive to show how (<2mm) sandy sediments and silt have been allowed to embed and smother the Chattooga’s larger streambed substrates in amounts that exceed any reasonable minimum effects threshold for causing the disruption of the early life cycle of trout. Because of this excessive sedimentation, there is *no lawful discretion* to endorse USFS management initiatives that precipitate any further non-temporary degradation of the Chattooga’s trout buffer and in stream trout habitat.

Scientific methodologies exist for assessing and recognizing how this excessive anthropogenic sourced sedimentation has caused the physical degradation of the Chattooga’s once outstanding native trout habitat—but the USFS refuses to discharge its discrete and non-discretionary duty *to use them to monitor on a continuous basis using the best available scientific methodologies.*

Specifically, the National Forest Management Act (“NFMA”) requires “...*continuous monitoring and assessment in the field*” for the purpose of providing a science based “*evaluation of the effects of each management system to the end that it will not produce substantial and permanent impairment of the productivity of the land.*” 16 U.S.C. §1604(g)(3)(C).

More narrowly, the NFMA also directs that an LRMP must “specify guidelines which...provide for methods *to identify special conditions or situations involving hazards to the various resources and their relationship to alternative activities.*” 16 U.S.C. §1604(g)(2)(C)(italics added).

⁴² See the email previously referenced as document “N-8 USFS Denial 09062017”.

Where well documented hazards of excessive sedimentation on the health of a trout stream is visibly obvious—as is the case on the Chattooga—the USFS must employ an appropriate monitoring methodology using the best available science capable of determining the combined impacts of additional sediments being channeled by creek boaters into a body of water already suffering from an excessive level of embedded sediments. Such methodologies exist.

Nevertheless, the USFS has refused—for over 20 years—to apply appropriate monitoring of the Chattooga’s trout habitat and trout fisheries. This does not comport with the USFS directive which commands that the USFS must: “Conduct habitat examinations when proposed resource activities or uses would affect fish ...habitat objectives.”⁴³ For the last 5 years the USFS has refused to develop and to apply appropriate monitoring needed to comply with the directive to “[c]oordinate fish...habitat requirements with other resource needs in all Forest Service planning activities.”⁴⁴

When it approved creek boating on the Chattooga’s headwaters over 5 years ago, the USFS promised to employ “adaptive management to address any problems revealed through monitoring.”⁴⁵ 5 years later, the USFS now asserts that “any updates to the management of the Chattooga will not be considered until after the plan revision, in subsequent analysis, and *after several years of monitoring data is available to inform that analysis.*”⁴⁶

This statement falsely implies that the USFS had no reason to monitor the Chattooga’s degrading condition for the most recent 5 years (or anytime after 1996) to determine if the sedimentation being suffered by the Chattooga exceeds any reasonable minimum effects threshold for disrupting the early life cycle of trout—despite being advised multiple times about how an extended reach of the Chattooga was suffering from embedded sedimentation that was bank to bank in certain places and over a foot deep in other places.

On November 5, 2014, this specific concern about excessive sedimentation was brought again to the attention of the USFS—when I complained about the inappropriate emphasis being placed on building *unnecessary* trails for creek boaters—when I complained that the USFS had neglected to conduct any monitoring of the trout populations in North Carolina for the last 20 years.

⁴³ See Forest Service Manual 2600, Wildlife, Fish, and Sensitive Plant Habitat Management, Chapter 2634.03 last downloaded from <https://www.fs.fed.us/im/directives/fsm/2600/2630.txt> on September 10, 2017. See generally *Rocky Mountain Wild v Vilsack* 843 F. Supp 2d 1188 Dst. Col Feb.2012(when nonbinding guidance can become binding on the USFS); *Ecology Center v Castenada*, 574 F. 3d 652, 660 (9th Cir. Ct. App 2009).

⁴⁴ *Id.*

⁴⁵ “Adaptive management refers to additional management actions the agency would use to address problems revealed through monitoring. The system uses an “implement-monitor-adapt” strategy that provides the U.S. Forest Service with the management flexibility it needs to account for inaccurate initial assumptions, to adapt to changes in environmental conditions or to respond to subsequent monitoring information (FSH 1909.15, Chapter 10, 14.1).” *Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor*, Environmental Assessment, United States Forest Service, January 2012 at page 32; (the “2012 EA”)(otherwise indexed for the electronic public reading room and LRMP administrative record as document “B-1”)

⁴⁶ See the email dated September 6, 2017 @ 10:05 am from Ms. Heather Luczak, Forest NEPA Coordinator, National Forests in North Carolina, with carbon copies to Mr. Paul Arndt, Mr. Allen Nicholas, and Ms. Michelle Aldridge (*italics added*).

The USFS confessed: “Electrofishing surveys were conducted within the upper Chattooga River from 1992 through 1996 by the NCWRC [and USFS field personnel]. *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.*”⁴⁷

The USFS understands how 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*. Nevertheless, despite confessing that something different was occurring on the Chattooga compared to other trout streams, the USFS never made any effort to investigate by undertaking appropriate monitoring of the trout habitat, etc.

This neglect further defies understanding because the antidegradation standard that applies to the Chattooga is not satisfied just because a “self-sustaining population continues to persist.” The USFS must know satisfying this antidegradation standard compels that the Chattooga’s native trout habitat and its brook, rainbow, and brown trout fisheries must be sustained at an “outstanding” level of quality.

The Forest Service’s neglectful behavior is also incongruent because (1) These trout populations constitute a special management indicator species (“MIS”) that are supposed to be monitored closely under the current LRMP, and (2) For decades, the USFS has worked with the Chattooga Coalition and state agencies from Georgia and South Carolina, to conduct detailed annual trout population monitoring of the Chattooga’s trout populations in South Carolina. In fact, the USFS published an article on October 10, 2010 praising this collaborative monitoring effort.⁴⁸

Inexplicably, after decades of neglecting to monitor the degrading trout habitat and trout fisheries in North Carolina being brought on by visibly obvious sedimentation, the USFS now excuses this lack of baseline data by claiming it needs more time to develop an adaptive management plan—which can only happen after the new LRMP gets promulgated. Nonsense.

This pattern and practice of neglect implicates bad faith. The Nantahala National Forest understands the monitoring directive—to identify the unique hazards of excessive sedimentation on trout streams—yet the USFS now insists that 5 years isn’t enough time to figure out how to use the best available science to recognize how excessive embedded sediments are degrading the Chattooga’s once “outstanding” trout habitat and once “outstanding” rainbow, brown, and brook trout fisheries.

Unexplained Inconsistencies: Visible Sediments & the Tellico River

In September 2009, the USFS recognized *the special hazard of unsustainable recreational uses causing sediments to be visibly channeled* into the Tellico River—whose main stem and

⁴⁷ Chattooga River Boating Access, Environmental Assessment, USFS, May 15, 2015 at page 205 (the “2015 EA”) (italics added) (otherwise indexed for the public reading room and LRMP administrative record as document “E-1”).

⁴⁸ 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”.

headwater tributaries constitute Class C Trout waters. Despite not being owed the highest intensity of antidegradation protection, otherwise owed to Outstanding Resource Waters like the Chattooga, the USFS put a complete halt to the use of recreational equipment which was incompatible with preventing visible sediments from being channeled into the Tellico.

Most remarkably, an off road vehicle enthusiast asked for the following interpretive ruling: “Does a single location of visible sediment from a road or trail reaching a stream mean that the road or trail is in violation of the Forest Plan and therefore should be closed?”⁴⁹

The USFS ruled: “A *single location of visible sediment* reaching a stream is a violation and fixing the problem would prevent any need for closure. In the case of the Upper Tellico OHV System, 673 locations were identified where visible sediment from a system trail was reaching the stream network, *making it difficult to fix all the problems and keep them fixed.*”⁵⁰

In stark contrast, the USFS has refused to enforce the same interpretation of its own *Standards* with respect to creek boater caused displacement of soils lying within the ORW Chattooga’s 25 foot protected trout buffer and the creation of point sources where these displaced soils are being channeled into the water.

In contrast to the definitive approach taken on the Tellico River, the USFS has refused to acknowledge any damage or to do anything to put in place a permanent fix for the non-temporary creek boater caused damage to the Chattooga’s fragile trout buffer. Creek boaters have been allowed to do as they please in constructing a crazy quilt of boat launch sites, evacuation points, and portage trails inside the Chattooga’s 25 foot protected trout stream buffer.

As the USFS explained, closing the Tellico’s off road vehicle trails was necessitated because it would be too “*difficult to fix all the problems and keep them fixed.*”

Similar to conditions documented on the non-ORW Tellico River, there is more than one location on the ORW Chattooga where the development of this creek boater infrastructure has caused the displacement of soils lying within the 25 foot protected trout buffer and the creation of point sources where these displaced soils are being channeled into the ORW Chattooga. The USFS has been provided with an inventoried compilation of some, but not all, of the multiple locations where creek boaters have damaged the trout buffer. Unfortunately, this photographic inventory constitutes one of the “170 attachments” that the USFS refuses to post to the electronic public reading room.⁵¹ These point sources did not exist before creek boating was introduced.

⁴⁹ *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 as Floyd document I-3). See generally *Rocky Mountain Wild v Vilsack* 843 F. Supp 2d 1188 (Dst. Colorado 2012); *Ecology Center v Castaneda*, 574 F 3d 652, 660 (9th Cir. Ct App 2009).

⁵⁰ *Id.* (italics added).

⁵¹ This photographic compilation was provided to the USFS by email on July 28, 2017 @ 3:37 pm. This photographic compilation has otherwise been indexed for this administrative record as document “00-N Evidence of Creek Boating Caused Sedimentation and Destruction of the Trout Buffer.pdf.”

Some creek boater created point sources will soon be 5 years old. Nevertheless, the USFS has not provided a permanent fix of the degraded trout buffer. Based on the justification given for shutting down the Tellico's off road vehicle trails, the USFS acts arbitrarily by refusing to prevent the ORW Chattooga's trout buffer from being further displaced and damaged by creek boating activities. *Creek boating should be halted on the ORW Chattooga because it requires the use of equipment that systematically displaces soils within the 25 foot trout buffer.*

Similar to the Tellico, *permanently fixing the damage being done to the Chattooga's trout buffer 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 that compels portaging. Creating portages disturbs the trout buffer.* Where creek boaters must portage can change each time that a new log falls into the channel or an existing log is pushed downstream by high water to create a new "strainer" obstacle. With the complete die off of the hemlocks, more wood can be expected to fall into the stream—increasing this unpredictability.

Also, there is no way to prevent creek boaters from creating new portages wherever they decide that they want to create access in order to be able to refloat certain whitewater features. Such new access often requires creek boaters to clear out a new portage trail through the dense jungles of mountain laurel and rhododendron that frequently grow right down to the water's edge and inside the steeply entrenched 25 foot trout buffer.

Wherever paddlers create new portages, the unavoidable disturbance of the trout buffer follows. The creation of these new boat launch sites, evacuation points, and portage trails, displaces soils and causes the creation of new point sources where sediments are being channeled into this Outstanding Resource Water—just as if a tractor were used by an individual to push or pull a plow blade across the fragile trout buffer.

In addition to disturbing the trout buffer, when creek boats are seal launched off of rocks lying along the banks of such creeks, this activity can scrape off the bryophytes growing on the surface of those rocks.

Nevertheless, the USFS disregards how the incremental damage of the Chattooga's previously near pristine trout buffer *defies any permanent fix.* In fact, if a permanent fix were capable, the USFS would have already fixed the problem because the Chattooga does not yet suffer the same fate of the Tellico where the USFS asserted the difficulty of repairing over 600 sites.

The Chattooga is an ORW stream. Consequently, the USFS must not ignore any incremental increases in sedimentation being caused by creek boating—no matter how few or numerous the locations where soils lying within the trout buffer have been displaced while creating point sources where these displaced sediments are being channeled into the water.

Also, when constructing portage trails (whether formally designated or user created) 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.

To press the point, unless properly excused by an appropriately issued permit to discharge soils displaced from the trout buffer of an ORW stream, state and federal agencies might be expected to try to halt an individual from pulling a plow blade behind a piece of equipment inside the Chattooga's protected trout buffer. Nevertheless, these same agencies, including the USFS have turned a blind eye to the functionally equivalent type of damage being caused by creek boaters' pushing and pulling their boats across the fragile and highly erosive trout stream buffer.

The repetitive act of boats being seal launched *from the exact same spot in the trout buffer* causes the creation of distinct point sources of pollution where displaced dirt is deposited into the creek and where sediment flows are being subsequently channeled into the water—*much as if a ditch had been dug*. High performance creek boats often have slight edges along the bottom of the boat. These “chines” offer carving control for tighter turns into eddies, but these sharp edged chines also exacerbate the displacement of soils within the trout buffer when a creek boater *seal launches*⁵² off the edge of the river bank during high water.

The USFS Refuses To Explain Why It Has Not Used the Best Available Scientific Methodologies in Monitoring the Negative Impacts of Creek Boating On the Trout Buffer and the Designated Uses of the Water Quality of One of Our Most Valuable Outstanding Resource Waters—the Chattooga's Headwaters in North Carolina

5 years have passed since the Nantahala adopted the highly controversial Amendment #22 to the existing LRMP. The Record of Decision promised that “*Direct and indirect limits will be applied to all recreation users based on monitoring.*”⁵³

Nevertheless, despite being implicitly directed to develop and apply monitoring techniques sufficient “*to identify special conditions or situations involving hazards to the various resources and their relationship to alternative activities*”⁵⁴, the USFS has entirely ignored devising or applying any kind of monitoring process intended to determine if the Chattooga's visibly obvious embedded sediments exceed any reasonable minimum effects threshold for disrupting the early life cycle of the trout living in this section of the river. 16 U.S.C. §1604(g)(2)(C)(italics added)—or to recognize the hazard of promoting activities that exacerbate the problem.

Protecting and maintaining the once outstanding condition of the trout habitat and the once outstanding quality of the rainbow, brown and brook trout fisheries constitute the administratively recognized and specifically designated uses of the Chattooga's ORW water quality.

⁵² The friction of the bottom of a boat being forcefully *seal launched* off of a river bank digs loose the soils within the trout buffer and causes them to be analogously redeposited into the river as unpermitted fill. *It is functionally analogous to a plow blade being pushed/pulled by a tractor across the landscape.*

⁵³ See *Amendment #22, Nantahala and Pisgah National Forests Land and Resource Management Plan, January 31, 2012 at p. A-22* (italics added) (otherwise submitted for publication to the public reading room and LRMP administrative record via email on July 28, 2017 @ 4:07 pm as Floyd indexed document “B-3”)

⁵⁴ 16 U.S.C. §1604(g)(2)(C)(italics added).

Amendment #22 promised that “*monitoring ... will assess whether existing or new uses are causing resource impacts.* Monitoring also will indicate whether capacities or other management actions need to be adjusted.”⁵⁵

Nevertheless for almost 5 years, counting cars at trailheads appears to be the only form of monitoring being conducted. This isn’t good enough. Counting cars at trailheads does not comport with the promise made that “*monitoring ... will assess whether existing or new uses are causing resource impacts.*”⁵⁶

Neither does it comport with the NFMA implicit direction to develop and apply monitoring techniques that “*identify special conditions or situations involving hazards to the various resources and their relationship to alternative activities.*” 16 U.S.C. §1604(g)(2)(C)(italics added).

The USFS has been repeatedly provided with credible photographic evidence that the Chattooga suffers from an excessive level of embedded sediments over an extended reach of the river. The USFS has also been repeatedly advised that scientific methodologies exist for determining whether the amount of embedded sediment exceeds any reasonable minimum effects threshold for disrupting the early life cycle of trout. Nevertheless, for the last 5 years, the USFS has intentionally neglected to monitor and inventory the degrading condition of the trout buffer being caused by creek boating—electing instead to count cars at the trailhead and call it a day.

You can’t determine whether the Chattooga has any remaining assimilative capacity to absorb additional contributions of sediment caused by creek boating activities without applying the best available science to document the critically determinative baseline conditions—which the USFS has chronically refused to do.

Too Many Creek Boaters Have Disregarded the Rules Put In Place To Protect the Chattooga’s Trout Buffer. The USFS Endorses This Disregarding of the Rule.

The United States Forest Service has enthusiastically endorsed and promoted creek boaters’ construction and use of a crazy quilt of boat launch sites, evacuation points, and portage trails inside North Carolina’s protected trout stream buffer.

However, *too many* creek boaters have simply disregarded the rules put in place to protect the Chattooga’s fragile trout buffer and its designated uses of ORW water quality.

With respect to the Chattooga’s headwaters in North Carolina, the USFS has been supplied with photographic evidence, pinpointed with latitude and longitude, demonstrating how the construction and use of this whitewater creek boating infrastructure *systematically* displaces soils lying within the statutorily protected trout buffer (NCGS 113A-57(1) et al) while also creating point sources of pollution where these displaced soils are being impermissibly channeled into one of our most valuable cold water trout streams carrying an Outstanding Resource Waters (“ORW”) classification.

⁵⁵ See Amendment #22, *Nantahala and Pisgah National Forests Land and Resource Management Plan, January 31, 2012 at p. A-19* (italics added) (otherwise submitted for publication to the public reading room and LRMP administrative record via email on July 28, 2017 @ 4:07 pm as Floyd indexed document “B-3”)

⁵⁶ Id.

The Chattooga's self-registration paddling permits unmistakably prove *too many* creek boaters have admitted, in their own handwriting, *of knowingly ignoring the rules put in place to protect the designated uses of ORW water quality of particular streams like the Chattooga.*

Remarkably, one of my "170 attachments", which the USFS has categorically stated it will not publish in the electronic public reading room, consists of a chronologically organized compilation of the actual images of the front and back of the permits signed by creek boaters.⁵⁷

The rules are printed on the permit. Creek boaters are required to fill out the permit and to sign it in order to be allowed to paddle the river. A brief review of the contents of these imaged permits show that *too many* paddlers are knowingly violating the rules. 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.*

This compilation of permits also demonstrates how just a hand full of creek boaters (if the number of permits pulled are presumed to constitute an accurate count) have caused disproportionate damage to the trout buffer and the river bank. Nevertheless, the USFS has not issued a single notice of a rules violation during the first 5 paddling seasons on the Chattooga.

Where is the continuous monitoring of the damage being done to the trout buffer? Where is the law enforcement? Unfortunately, despite having had 5 years to discover all of these facts through continuous monitoring, the USFS has declined to use adequate forms of monitoring capable of documenting the degrading condition of the trout buffer and the new point sources created by creek boaters' construction and use of a crazy quilt of boat launch sites, evacuation points, and portage trails inside North Carolina's protected trout stream buffer.

In stark contrast to the favoritism shown to creek boaters, if a hunter violates a game law, like harvesting a black bear out of season, or by accidentally taking a bear from a designated bear sanctuary, the hunter would be fined heavily, would lose their license to hunt, and might be jailed. *Too many* of these experienced creek boaters—armed with a level of impunity derived from their understanding that the USFS has no intention of holding them accountable—are allowed to free ride the system without regard for the *disproportionate* damage they cause to some of our most fragile resources.

⁵⁷ The Chattooga's Self-Registration Permits demonstrate that *too many* creek boaters are breaking the rules established by the Decision Notice published on January 31, 2012. All of this is substantiated by simply reviewing the compilation of permits that I have asked to be published in the electronic reading room and indexed for the administrative record of the Nantahala's Land Resource Management Plan as document "00-P Compilation Chattooga Self Registration Boating Permits".

The USFS Ignores How Creek Boating Activities Have Caused the Displacement of Soils Lying Within the Trout Buffer On Multiple Other Streams Flowing Through the Nantahala and Pisgah Forests.

Instead of engaging in an iterative discussion about the compelling obligation to adopt non-precipatory and sufficiently intense *Standards* to protect the uniquely designated subcategories of ORW water quality use on just a single small creek—the Chattooga—the USFS invites a larger Clean Water Act debate about unsustainability of creek boating across many streams. The Chattooga isn't just any trout stream. *The Chattooga River is unique as a wild trout fishery because of why it was reclassified an Outstanding Resource Water.*

The Rabun County Georgia Chapter of Trout Unlimited specifically 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.⁵⁸ North Carolina's administrative record explicitly cited this as the purpose for ORW classification—but the USFS refuses to publish this documentation to the electronic public reading room.

This is why protecting and maintaining an *outstanding* trout habitat and *outstanding* trout fisheries constitute specific subcategories of ORW water quality use that the United States Environmental Protection Agency compels to be *fully* protected from suffering any non-temporary degradation either directly or indirectly caused by USFS promoted activities.

The USFS refuses to apply appropriate monitoring to document this baseline degraded condition, to provide for a permanent fix for the incremental damage being caused by creek boating activities, or to undertake any attempt to abate the Chattooga's embedded sediment problem that now exceeds any reasonable minimum effects threshold for disrupting the early life cycle of trout.

In addition to ignoring the incremental damage that creek boaters are causing by displacing soils lying within the Chattooga's ORW trout buffer, neither has the USFS implemented a system of permitting and penalties designed to protect the trout buffer on other streams in the Nantahala and Pisgah forests. Unlike campers, hunters and anglers, or day trip hikers, individual creek boaters do not pay compensatory fees (each time they consume the resource) that are sufficient *to fund permanent law enforcement patrols to prevent them from destroying the resource*, or to fund recovery efforts to repair what they destroy.

The discriminatory favoritism being shown to creek boaters is self-evident.

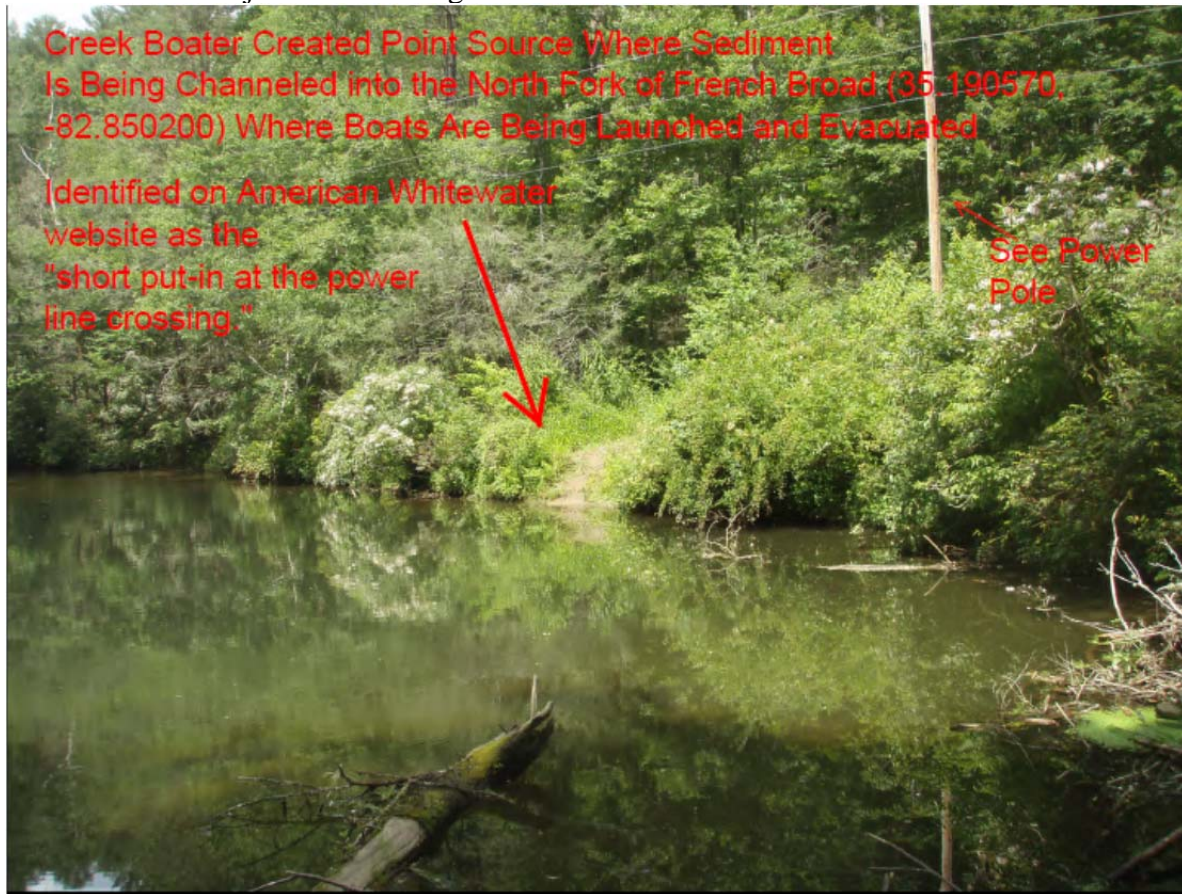
Adopting an appropriate LRMP Standard might eliminate the need to expand this controversy to debating the Clean Water Act issues implicated by the USFS refusal to consider the sustainability of creek boating on other ORW mountain trout streams.

Disappointingly, the USFS refuses to consider the evidence of a need to adjust how certain recreational uses of the Chattooga are being endorsed without regard for the physical damage that such recreational uses have singularly caused.

⁵⁸ Several documents from the administrative record of North Carolina validates this but the USFS has refused to publish Floyd indexed documents (A-1, A-2, A-3) in the public reading room. See p. S-8 of Floyd indexed document A-2 emailed to the USFS on July 28, 2017 at 3:58 pm.

The USFS encourages the unnecessary opening of a bigger can of worms by stating “we will not be responding to [your] individual questions...as part of the plan revision process...”⁵⁹ while summarily declaring there is no need to revisit the damages being done by creek boating.

On July 2, 2017, I took a brief series of photos *on the North Fork of the French Broad @ 35.190570, -82.850200*. These photos demonstrate how the damage being done by creek boaters is not restricted to just the Chattooga.



There is no question that creek boating activities created this specific point source where sediments are being channeled into the North Fork of the French Broad. To corroborate, this specific point on the river has been identified on the American Whitewater website as the “short put-in at the power line crossing.” As the website suggests this “short put-in” constitutes one of multiple creek boater developed access and evacuation points used by them to “run multiple laps down the river.” See the content of American Whitewater’s description of the North Fork of the French Broad described at <https://www.americanwhitewater.org/content/River/detail/id/1077> last downloaded on September 3, 2017.

This constitutes the “short put-in at the power line crossing” referenced on the American Whitewater website.

⁵⁹ Email dated September 6, 2017 @ 10:05 am from Ms. Heather Luczak, Forest NEPA Coordinator, to Bill Floyd.



Creek Boater Created Point Source Where Sediment Is Being Channeled into the North Fork of French Broad (35.190570, -82.850200) Where Boats Are Being Launched and Evacuated

This paddler created point source of pollution, chronically channels an unknown amount of sediment into the water—where it appears to accumulate on the stream bed in great quantities.



See how large this paddler created erosion site is today.



The photo below illustrates the turbidity that results from the disturbance of this erosion site during rain events—or when paddlers launch their boats at this “short put-in”.



All of these photos were taken in the middle of the summer when green grass was alive to decrease some of the trout buffer’s destruction associated with boats being launched. Unfortunately, during the winter months, this greenery does not exist. This makes the bank subject to even greater erosion from boats being launched across the eroded surface.

These photos of this paddler launch site on the North Fork of the French Broad typifies the degraded conditions that occur wherever whitewater creek boating is being pursued without any fear of punishment. To press the destructive impacts of whitewater creek boating, paddlers use saws to cut out large woody debris when it blocks a stream. In fact, the USFS has documented how this has occurred on the West Fork of the Chattooga. Only paddlers need to chain saw out large woody debris that would otherwise serve to enhance the quality of the trout stream habitat.

Unfortunately, the physical evidence demonstrates how too many creek boaters consider the resource as something that they are allowed to modify with impunity and without any regard for the point sources of pollution that they create. The damage caused by a boat scraping loose the soils within the fragile trout buffer is no different from the impacts that would be caused were the relevant federal and state agencies to endorse a plow blade being dragged or pushed across the top of the trout buffer’s soils.

Nevertheless, the USFS ignores the damage being done by creek boaters. This must stop.

By Refusing To Post All Documents In the Electronic Public Reading Room, the USFS Has De Facto Concealed the Intensity of Creek Boater Caused Damage To the Trout Buffer.

On August 28th, I complained because the USFS had failed to publish my Notification of July 29, 2017 and its supporting documents in the LRMP electronic public reading room at <https://cara.ecosystem-management.org/Public//ReadingRoom?Project=43545>.

I asked for these documents to be posted so that other interested members of the public might benefit from learning about facts and circumstances not otherwise disclosed by the USFS. Subsequently, the Nantahala and Pisgah Forests posted my Notification but not the documents supporting the points raised in the Notification. Unfortunately, based on the results of a keyword query for “Floyd”, run on the morning of September 8, and September 22, 2017, the supporting documents referenced in my Notification have *still not been posted* to this public website—consistent with the definitive stated refusal of September 6, 2017.

The pursuit of creek boating is a creative adaption of boating equipment advances in plastic technologies. However, this does not mean that creek boating must be allowed on each and every stream in the United States—especially not in North Carolina where there is a protected trout buffer. Nevertheless, creek boaters are basically left to use the resource as they please—with limited rules having only been set, but not enforced, on the Chattooga’s headwaters. The revision of the Nantahala and Pisgah National Forests LRMP offers an opportunity to reestablish the proper priorities and to halt the inappropriate favoritism being shown to whitewater creek boating.

Instead of recalibrating priorities, the USFS stonewalls. By refusing to engage in increasingly narrowed dialogue, the USFS works to discourage unsupportive facts and circumstances from surfacing and make their way into the electronic public reading room—presumably because the disclosure of such facts might galvanize the public in recognizing the *cumulative damage* being caused to our trout buffer by creek boating activities.

Where is the inventory of creek boater constructed boat launch sites, evacuation points, and portage trails within the highly protected trout buffer on our streams within the Nantahala and Pisgah Forests? Where are the monitoring studies inventorying the quantity of soils within the protected trout buffer that have been cumulatively displaced by creek boating activities or the comprehensive tally of point sources where displaced soils are being chronically channeled into our streams?

Without such inventories, it is arbitrary to presume that the promotion of creek boating presents no actionable problems—when the evidence along the banks of our streams suggest otherwise.

The USFS experiment with creek boating has miserably failed on the Chattooga and perhaps on other streams in the forests. Instead of blindly encouraging incompatible recreational uses which impermissibly cause the destruction of our trout buffers, and the channeling of sediments into our trout streams, the USFS should focus on restoring the Chattooga’s trout habitat and trout fisheries from their current degraded condition to their previously administratively recognized *outstanding* quality. The USFS should use the LRMP to articulate non-precatory *Standards* that prohibit any additional degradation caused by incompatible recreational uses within the fragile riparian corridor, such as mountain bicycling, horseback riding, and creek boating.

The favoritism being shown to creek boaters stands in stark conflict with the fact that the state of North Carolina has administratively specified that preventing any non-temporary degradation of the “outstanding” quality of the Chattooga’s trout habitat and the “*outstanding*” quality of its trout fisheries constitute the designated uses of this stream’s ORW water quality. By brazenly catering to the demands of creek boaters, and by repeatedly ignoring the visibly pronounced evidence of non-temporary degradation of the Chattooga’s trout habitat and its trout fisheries, the USFS prospectively flags its own *bad faith*.

The USFS should neither endorse nor promote recreational uses which require the use of equipment, which triggers or exacerbates *any incremental* non-temporary degradation of the explicitly designated uses of the water quality of North Carolina’s Outstanding Resource Waters. This is particularly true where the designated uses of ORW water quality *have been more narrowly defined* to provide intense protection for the trout habitat and trout fisheries—as was the case when the Chattooga was designated ORW in 1988/1989.

In addition, the USFS must cease the practice of selectively protecting the trout buffer on some streams but not others. The USFS must provide uniform protection against all incompatible recreational uses of North Carolina’s trout buffer—but especially so on ORW streams.

To repeat, with respect to the non-ORW waters of the Tellico River, the USFS demonstrated its understanding of its discrete duty to prohibit recreational activities which require the use of equipment or tools that displace soils lying within a stream’s riparian corridor and which causes the subsequent channeling of such displaced soils into the water. The USFS made the difficult decision to prohibit the recreational use of off road all-terrain vehicles (“ATVs”) on an unmanageable obstacle course located within the upper watershed and riparian corridor of the non-ORW Tellico River—It did so because the knobby tires of these ATVs displaces the ground cover—especially during periods of rain.

In stark contrast, the USFS has refused to put a halt to the *analogous* physical damage being done by whitewater creek boats being pushed or pulled across the legally protected 25 foot trout buffer on one of our most valuable Outstanding Resource Waters—the Chattooga’s ORW headwaters in Macon and Jackson counties. *This is logically inapposite*.

Stated differently, the USFS has inexplicably protected a non-ORW stream against the displacement of soils and the subsequent channeling of those displaced soils into the water, but has refused to provide any analogous protection to an ORW stream whose trout habitat and trout fisheries are mandated under the law to be maintained at an “*outstanding*” level of quality.

This discrepancy in protection demonstrates how the USFS indulges whitewater creek boaters at the expense of neglecting other priorities. There are only 39 Class B ORW trout streams in North Carolina. See document K-1, previously submitted to your office for inclusion in the administrative record for the Nantahala’s Land Resource Management Plan. Nevertheless, the USFS indiscriminately appears to want to endorse and to accept the damage that creek boating does to the trout buffer, etc. on each and every one of our trout streams—irrespective of an individual trout stream’s ORW water quality classification by the state of North Carolina.

Is creek boating entirely prohibited on even a single one of these 39 Class B ORW Trout streams? To the best of my knowledge, the answer is no.

Despite its multiple use mandate and its desire to avoid conflict, the USFS must neither endorse nor promote the use of recreational equipment, whether whitewater kayaks, mountain bicycles, horses, or off road vehicles, where the use of such equipment physically causes the displacement of soils inside the trout buffer and the creation of point sources where such displaced soils are being channeled into North Carolina's Outstanding Resource Waters—unless otherwise excused by a properly vetted and properly issued permit. *The issuance of a permit to allow for this pollution would require an antidegradation assessment specific to the specifically designated uses of the water quality of the ORW stream.*

The USFS Refuses To Apply the Best Available Scientific Methodologies For Recognizing When Embedded Sediments Exceed Any Reasonable Minimum Effects Threshold For Disrupting the Early Life Cycle of Trout

The USFS knows there are a multitude of scientific methodologies for recognizing when the level of embedded sediment exceeds any reasonable minimum effects threshold for disrupting the early life cycle of trout.⁶⁰ Unfortunately, the Nantahala and Pisgah National Forests have refused to use such studies to recognize the excessive embedded sediments on the Chattooga.

⁶⁰ 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. *Such guidance constitutes the best available scientific methodology for recognizing the damage caused by excessive embedded 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 embedded 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

The truth is the USFS refuses to conduct appropriate monitoring studies using the *best available scientific methodologies* because such studies would reveal to non-conflicted scientists (and the public at large) that the level of embedded sedimentation being suffered on the Chattooga exceeds any reasonable minimum effects threshold for disrupting the early life cycle of trout. Using *best available scientific methodologies* would *prove* that the level of fine particle sized sandy sediments have embedded the larger stream bed substrates over an extended segment of the Chattooga's headwaters (approximately 2 miles). Such a finding would compel the Forest Service to halt its arbitrary endorsement of recreational uses that are simply incompatible with preventing any increased displacement of soils lying within the trout buffer and the subsequent depositing of such displaced soils into an ORW classified stream already suffering from excessive sedimentation—like the Chattooga.

The National Forest Management Act, the Multiple Use and Sustained Yield Act, et al, generally compel the USFS to apply the *best available scientific skills from a variety of disciplines* when preparing an LRMP. The USFS must apply the best available science when assessing the current physical condition of the various natural resources found on specifically defined geographic management areas, when prioritizing the comparative importance of each individual resource present on the geographic management area, and when setting the *Standards* needed to provide the requisite intensity of protection for the most valuable resources on the geographic management area. Specifically, the LRMP “must include plan components, including *Standards* or guidelines, *to maintain or restore the ecological integrity of terrestrial and aquatic ecosystems and watersheds in the plan area.*” 36 CFR §219.8(a) (italics added).

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 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.

The Highland Domes Geographic Management Area Has Been Inaccurately Described With Respect To the Current Degraded Physical Conditions of the Chattooga River's Trout Habitat and its Wild Rainbow and Brown Trout Fisheries

This does not constitute a minor concern. Inaccurate descriptions of the current conditions found on this geographic management area serve to soften the 5 year culpability of the USFS for having ignoring the damage being done by creek boaters to the Chattooga's ORW trout buffer. Offering such characterizations also paves the way to attempt to claim a false discretionary need to provide for creek boaters continuing disturbance of the Chattooga's trout buffer.

On June 1, 2017, the USFS published a 5 page draft describing the current condition, goals, desired conditions, and objectives of the LRMP for the Highland Domes geographic management area. The Chattooga River arguably constitutes one of the *historically* most *outstanding* and yet most fragile wild brown, rainbow, and brook trout fisheries lying within the Highland Domes geographic area—if not the entire forest. Unfortunately, the metrics collected during a September 2016 trout population study evidences these once outstanding fisheries have degraded since a prior population study was conducted between 1992-1996.

Nevertheless the USFS makes the following unsubstantiated claim: “The region’s rivers provide visitors with access to fishing, *with anglers seeking brook trout especially attracted to the headwaters of the Cullasaja, Chattooga, Tuckasegee, and Whitewater Rivers.*”⁶¹

I have fished parts of the Chattooga and Cullasaja rivers for thirty years and I am not “especially attracted” to them because of their small populations of brook trout. Please have someone provide the trout population studies etc. and statistically competent angler surveys that permits the USFS to tell the public that “anglers seeking brook trout [*are*] *especially attracted* to the headwaters of the Cullasaja, [*and*] Chattooga...and Whitewater Rivers.”⁶²

The truth is there are no brook trout of any fishable quantities remaining in the main stem of the Chattooga's headwaters in North Carolina—especially not on the sediment impaired segment (upstream of the Bull Pen Iron Bridge).

The Highland Domes summary further neglects to tell the public how an extended reach of the Chattooga's stream bed has been documented as being choked by embedded sediments that are bank to bank in some places and over a foot deep in other places. The Highland Domes summary neglects to disclose how the USFS has not applied the best available science to determine if this visibly pronounced amount of embeddedness exceeds any reasonable minimum effects threshold for disrupting the early life cycle of its rainbow, brook and brown trout—or how the September 2016 North Carolina sponsored study of the river's trout populations failed to yield even a single rainbow or brook trout despite electrofishing almost a mile of this sediment choked section of stream existing upstream of the Bull Pen Iron Bridge. Neither does the Highland Domes description provide a reconciling explanation why there are still a few rainbow trout being caught further downstream of Bull Pen Iron Bridge—where this embedded sediment has not yet reached the same level of excessiveness as above the Bull Pen Iron Bridge.

⁶¹ See page 2 of the Highland Domes June 1, 2017 draft of descriptions and goals (italics added) last downloaded on September 7, 2017 from https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd544464.pdf

⁶² Id. (italics added).

While lower Fowler Creek still harbors brook trout, this tributary to the Chattooga is inaccessible to the average trout angler—so how can it be characterized as a special attractor for any significant number of anglers seeking native brook trout?

To press this incongruity, various state and federal agencies offer conflicting statements about which precise species of trout have historically reproduced in this river and which ones are still thriving today in the main stem. To deflect my complaints about the negative impacts of the Chattooga’s visibly pronounced embedded sediment problem on the early life cycle of all three species of trout, one of the responsible agencies has inaccurately declared that this river has historically only harbored brown trout—an explanation which conveniently helps to avoid having to recognize the correlation between the presence of excessive embedded sediments and the fact that sediment intolerant rainbow and brook trout no longer seem present in any significant quantities on the main stem of the Chattooga north of the Bull Pen Iron bridge—but which fails to reconcile why downstream of Bull Pen Bridge, where this excessive embedded sediment has not yet become as extensive, there are a few sediment intolerant wild rainbow trout still being caught in the main stem. Neither does such a claim explain why the now missing brook trout were inventoried as being present in the main stem near the mouth of Scotsman Creek during an earlier 1992-1996 trout population study in which the USFS field participated with the NCWRC.

The non-existence of fishable quantities of rainbow trout and brook trout in the sediment impaired main stem of the Chattooga upstream of the Bull Pen Iron Bridge was scientifically confirmed in September 2016 when the North Carolina Department of Environmental Quality (“NC DEQ”) failed to capture even a single rainbow or brook trout after electrofishing 8 different 600 foot segments totaling almost a mile of water—upstream of the Bull Pen Iron Bridge.

Despite the distressing results of this September 2016 trout population study, various statements made in the Highland Domes geographic management area overview seem to reflect a willingness to substitute wishful thinking for facts regarding the condition of the river’s trout fisheries. Such statements offer a subtle underpinning for a not so subtle effort being pushed forward by the USFS to abandon a longstanding previous policy of treating our non-native wild rainbow trout fisheries and our wild brown trout fisheries as equals with brook trout.

This version of the Highland Domes overview also reflects subtle but questionable representations by stating that the Chattooga “offers *unique backcountry* whitewater opportunities.”⁶³ In stark contrast to its administratively recognized importance as a specially designated “*outstanding*” trout stream, there is *nothing unique* about creek boating on the Chattooga except for the impermissible damage being done to the trout buffer of this ORW stream. Just a hand full of creek boaters have created multiple point sources of pollution (previously non-existent) where soils displaced in the trout buffer from boats being seal launched are being channeled into this Outstanding Resource Water.

⁶³ Id. at page 2 (italics added).

In terms of being a “unique backcountry whitewater” opportunity, how does the Chattooga differ from the creek boating opportunities otherwise available on any of the non-ORW Three Forks tributaries of the West Fork of the Chattooga, or upper Wilson Creek? They don’t differ. They are all remote and characterized by Class IV whitewater.

Similarly, the upper Whitewater River from Highway 107 to Highway 281 offers the same Class IV-V+ whitewater experience in a backcountry environment lacking roads—but without the problem of massive amounts of large woody debris and excessive embedded sediments.

The USFS Has A Nondiscretionary Obligation To Apply the Best Available Scientific Methodologies When Preparing a LRMP and When Discharging An Obligation To Monitor Under a LRMP

In preparing the LRMP, the USFS has a discrete obligation to apply the *best available scientific methodologies* for evaluating and identifying the non-temporary damage being caused or that might be caused by allowing specific recreational uses on specific ORW streams flowing through the Nantahala and Pisgah National Forests. The best available scientific methodologies should also be used for recognizing the need to establish non-precatory *Standards* for preventing any further non-temporary degradation of the explicitly designated uses of North Carolina’s Outstanding Resource Waters.

Unfortunately, the USFS has signaled its intention to hobble any efforts to compel a recognition of the unsustainability of continuing to allow creek boating on the Chattooga or to allow these Forest Service ignored degrading impacts from being brought straight to the public’s attention. The USFS does so by refusing to publish all of my documents in the electronic reading room—documentation that supports these concerns. Simultaneously, the USFS states:

“...*The Forest has publically stated that we will not be revisiting the management direction for the Chattooga River as part of this plan revision.* The revised forest plan for the Nantahala and Pisgah NFs will include management direction for the Chattooga River consistent with Amendment 22 (**Chattooga Wild and Scenic River**) and will include forestwide direction to protect and maintain water quality as well as provide protection for the outstandingly remarkable values of all designated Wild and Scenic Rivers on the Nantahala and Pisgah NFs. *Any updates to the management of the Chattooga River will not be considered until after the plan revision, in subsequent analysis, and after several years of monitoring data is available to inform that analysis.*”⁶⁴

After 5 years, what kinds of subsequent analysis and what kinds of monitoring are we waiting on and why do we need to wait until after the LRMP is promulgated? Nonsense. The USFS has been provided with the basic facts and data needed to demonstrate the incongruity of such flat out refusals to consider the damage that creek boating has caused to the Chattooga’s trout buffer, etc. The USFS has not complied with its discrete and non-discretionary obligation to use the *best available scientific methodologies* in conducting *continuous monitoring* of the negative impacts of creek boating on the designated uses of the ORW water quality of the Chattooga River.

⁶⁴ See the email dated September 6, 2017 @ 10:05 am from Ms. Heather Luczak, Forest NEPA Coordinator, National Forests in North Carolina, with carbon copies to Mr. Paul Arndt, Mr. Allen Nicholas, and Ms. Michelle Aldridge (italics added).

Counting cars at parking lots avoids the issue. If the permits offer an accurate count of creek boaters consuming the resource, a relatively small number of creek boaters have caused a material change in the condition of the stream's trout buffer and its river bank. Had the USFS applied the *best available scientific methodologies* for the last 5 years, it would have established the baseline facts for recognizing how the Chattooga suffers from a level of embedded sedimentation that exceeds any reasonable minimum effects threshold for disrupting the early life cycle of trout.

Consequently, it seems jaw dropping that the USFS wants to continue to claim : “*Any updates to the management of the Chattooga River will not be considered until after the plan revision, in subsequent analysis, and after several years of monitoring data is available to inform that analysis.*”⁶⁵

This is not what the 2012 Record of Decision promised. For 5 years the USFS has had the opportunity, but has intentionally declined, to conduct any kind of *continuous monitoring* designed to recognize the negative consequences and impacts of creek boating on an ORW body of water that was already suffering from an excessive level of embedded sediments—by any reasonable measure.

For 5 years, the USFS has avoided using the *best available scientific methodologies* for monitoring the degrading condition of the trout habitat. For 5 years the USFS has effectively gamed the system to avoid creating a baseline of data that would measurably establish the intensity and severity of the degrading condition of these trout fisheries. The USFS has not complied with what was promised by the 2012 Record of Decision: “*Direct and indirect limits will be applied to all recreation users based on monitoring.*”⁶⁶

Had the USFS used appropriate monitoring measured the amount of embedded sediment already present on the stream bottom, and to inventory the destructive impacts of creek boating on the trout buffer, the USFS would have been compelled during the LRMP planning process to reconsider the sustainability of allowing creek boating on the Chattooga as well as the need for adopting non-precatory LRMP *Standards* to prevent (1) any further systematic destruction of the trout buffer by recreational equipment and (2) any further creation of point sources where these systematically displaced soils and other sources of sedimentation get channeled into the water.

Instead, having purposefully neglected, for an extended period of time, to establish this baseline documentation through appropriate monitoring, the USFS summarily declares that there is no need to revisit the impacts of the 2012 Record of Decision. This assertion flies in the face of recent trout population field data that evidences a possible correlation between the excessive embedded sedimentation that is so visibly pronounced and the paucity of trout population metrics observed during this study conducted in September 2016.

⁶⁵ Id.

⁶⁶ See *Amendment #22, Nantahala and Pisgah National Forests Land and Resource Management Plan, January 31, 2012 at p. A-22* (italics added) (otherwise submitted for publication to the public reading room and LRMP administrative record via email on July 28, 2017 @ 4:07 pm as Floyd indexed document “B-3”)

Metrics collected during the September 2016 study evidence decline since the 1992-1996 studies. According to the actual field data sheets, only 26 young-of-the-year trout (using an expanded cutoff of <115mm in length instead of <101mm) were captured despite sampling almost a mile of this sediment choked reach of water spread out over 8 different 600 foot reaches. A total of 155 other age classes were captured. As a measure of reproductive success the ratio of young of the year to other age classes *was a less than outstanding* 16.8% (26/155). This is just one of the critical data points documented in the “170 attachments” that the USFS refuses to post to the electronic public reading room.⁶⁷

Instead of acknowledging the problem and conducting another trout study during September 2017, the USFS summarily states in the September 6th email “...we will not be responding to individual questions and allegations raised in your comment letter as part of the plan revision process.”⁶⁸ As evidenced by correspondence retrieved through a FOIA request, this willingness to ignore concerns about degraded trout habitat and degraded trout fisheries extends to some form of quiet collaboration whereby key personnel within the North Carolina Wildlife Resources Commission have previously openly signaled their biologist counterparts at the USFS that they were also ignoring my concerns—with the clear implication being don’t worry about the state of North Carolina holding you accountable for having encouraged additional degradation of the trout habitat and trout fisheries resource. These documents are also a part of the “170 attachments” that the USFS refuses to publish in the electronic reading room.

By refusing to answer my criticisms about having intentionally ignored monitoring the Chattooga’s degrading trout habitat and trout fisheries over the last 5 years, the USFS continues its pattern and practice of looking the other way and of inconsistently applying its own interpretation of its LRMP *Standards* pertaining to sedimentation.

Is there some statutory or regulatory provision that allows the USFS to address the questions of members of the Stakeholders Forum For the Nantahala and Pisgah Plan Revision while refusing to answer my narrow and written questions asking the USFS to explain specifically how it plans to provide the requisite intensity of protection to our ORW trout streams under the future LRMP?

The Chattooga differs from all other ORW trout streams in the Nantahala because of why it was reclassified ORW to protect the once outstanding condition of the in stream trout habitat and the once outstanding quality of the rainbow, brook, and brown trout fisheries. Consequently, it seems counterproductive for the USFS to continue to answer my narrow water quality concerns by making non-specific generalizations like: “the ...[LRMP] ...will include forest wide direction to protect and maintain water quality as well as provide protection ...for all designated Wild and Scenic Rivers on the Nantahala and Pisgah NFs.”⁶⁹

⁶⁷ See documents H-1, H-2, H-3, H-4, H-5, H-6, H-7, H-8, H-9, H-10, H-10-A, H-10-B, H-10-C, H-11, H-12, H-13, H-14 which the USFS has refused to publish within the public reading room and which were transmitted on July 28, 2017 to the USFS by email.

⁶⁸ See the email dated September 6, 2017 @ 10:05 am from Ms. Heather Luczak, Forest NEPA Coordinator, National Forests in North Carolina to Bill Floyd with carbon copies to Mr. Paul Arndt, Mr. Allen Nicholas, and Ms. Michelle Aldridge (italics added).

⁶⁹ Id.

The USFS appears to take the position that I must wait until the proverbial last minute for the USFS to reveal what these forest wide protections of water quality will be—instead of welcoming feedback and public participation through a dynamically iterative process of sharing new facts and circumstance to develop the best plan possible for reaching consensus and avoiding future controversy. This precludes me from recommending specific non-precatory *Standards* for adoption by the LRMP. Such *Standards* are needed to compel the prevention of any future damage caused by any recreational use that requires the employment of equipment that systematically displaces soils lying within the trout buffer and causes point sources where these displaced soils are subsequently discharged into the waters of our most fragile ORW trout streams—like the Chattooga.

The USFS Has Signaled An Intention To Attempt To Use the LRMP Planning Process To Define Away This Excessive Sedimentation As A Natural Background Condition For Which It Has No Responsibility

Unfortunately, the June 1, 2017 draft of the description and goals, desired conditions, and objectives of the LRMP for the Highland Domes geographic management area offers additional evidence that the USFS has no intention of establishing non-precatory *Standards* that compel the prevention of such recreational user caused damage on the Chattooga.

Regarding the description of the rivers flowing through the Highland Domes geographic management area, the USFS offers yet another half-truth that appears to lay some non-scientific groundwork for justifying its continuing neglect of the excessive embedded sediment problem that is visibly obvious on the Chattooga's headwaters upstream of the Bull Pen Iron Bridge.

The USFS states “Some of these stream and river miles *are characterized by tannic water and sandy substrates that are unique to western North Carolina.*”⁷⁰

While it is true that weathered granite deteriorates into sand over very long periods of time, and that such sandy sediments are present in these rivers, *the USFS fails to provide the rest of the story regarding both the Chattooga, and more remarkably, the Cullasaja River.*

In fact, the headwaters of the Cullasaja River have been recognized as a Section 303(d) impaired body of water due to excessive sedimentation. This part of the stream exists inside the city limits of the town of Highlands. The sediments embedded upstream of Mirror Lake are sourced from unregulated development in the past and unpaved gravel roads—not natural background conditions. I can attest to this because I have walked the roads around Mirror Lake for almost 60 years and seen how conditions have changed.

The fact is that both the Chattooga and the Cullasaja suffer from excessive levels of embedded sediments that cannot be blamed on natural background conditions—but this fact is being ignored with respect to the Chattooga. The USFS overlooks the impacts of over thirty years of development that has occurred on both sides of Highway 64 that runs along the Highlands to Cashiers Plateau (as well as the construction of multiple new golf courses within the watershed). All of this development has contributed significant sources of sediment.

⁷⁰ See page 3 of the Highland Domes June 1, 2017 draft of descriptions and goals (italics added) last downloaded on September 7, 2017 from https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd544464.pdf

In fact, the development of one of these golf course on the north side of this plateau infamously caused excessive sediments to be impermissibly swept downstream through Grassy Camp Creek into the previously pristine Young Lake on Norton Mill Creek Road. This pollution resulted in a precedent setting level of damages being awarded to Whiteside Estates by the North Carolina Court of Appeals decision in *Whiteside Estates, Inc. v Highlands Cove*, 609 SE 2d 804 (NC Ct. App. 2005). Despite this fact, the responsible federal and state agencies have worked overtime to deny the visibly obvious impairment that has been allowed to occur on the Chattooga without any response by either the USFS or any of the relevant North Carolina agencies.

To press the point, 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 (which the USFS has refused to post to the public reading room and which has been indexed as document B-1).

The Chattooga River watershed includes the area around the Three Forks which constitutes the confluence of the three tributaries Holcomb Creek, Overflow and Big Creek. Overflow rises in Blue Valley, North Carolina just southwest of the town of Highlands. Big Creek rises south of the town of Highlands out of Horse Cove, where it tumbles south and west to where it dumps into the headwaters of the West Fork of the Chattooga. *Portions of Big Creek in North Carolina now suffers from excessive levels of sediment that did not exist in 1987 when I last fished parts of that stream*. The increased amount of sediment seen in Big Creek over these last 30 years did not occur because of weathering of granite. This sediment came from unpaved gravel roads, etc.

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 USFS Has A Duty To Identify Special Conditions That Pose Hazards To Critical Resources and the Impacts of These Hazards On Other Uses of the Resource

The USFS ignores the NFMA which compels that an LRMP must ““specify guidelines which...provide for methods to *identify special conditions or situations involving hazards to the various resources and their relationship to alternative activities*.” 16 U.S.C. §1604(g)(2)(C)(italics added). Unfortunately, the USFS has ignored this discrete duty to apply appropriate monitoring methodologies for identifying the special conditions or hazards being

caused by the combined impacts of additional sediments being channeled by creek boaters into a body of water already suffering from an excessive level of embedded sediments.

The USFS has repeatedly refused to apply the *best available science* to investigate the sediment transport imbalance that has developed on an extended segment of the main stem of the Chattooga River. The USFS has refused to apply the best available scientific methodologies for recognizing and quantifying how this imbalance in bedded sediment supply has degraded the once “*outstanding*” quality and health of this stream’s trout habitat and its once “*outstanding*” rainbow, brown, and brook trout fisheries.

Preventing any non-temporary degradation of the *once “outstanding”* quality of the Chattooga’s trout habitat and the *once “outstanding”* quality of its rainbow, brown, and brook trout fisheries constitute the specifically designated uses of this stream’s ORW water quality. These specific uses of the Chattooga’s ORW water quality should have been receiving the highest intensity of antidegradation protection by the USFS and the state of North Carolina—but they haven’t been provided with the highest intensity of protection.

The USFS has declined to apply the *best available scientific studies* needed to recognize the special hazard of the Chattooga’s excessive embedded sediment problem. The USFS has refused to put a halt to its own management initiative which has impermissibly precipitated the displacement of soils lying within the trout buffer, and which have further exacerbated the Chattooga’s sediment transport imbalance while causing additional biologically relevant streamside and in stream trout habitat degradation.

By refusing to honor its own monitoring obligation, the USFS compels the public to use its own financial resources to have appropriate sediment transport imbalance and fine sediment embeddedness studies conducted and submitted to the public record. By ignoring its own monitoring obligations, the USFS effectively marginalizes the public’s capacity to participate to attending large audience meetings where only broad and meaningless generalizations are presented in a highly controlled forum—a forum which serves effectively to protect the USFS from having to provide answers to detailed written questions, from having to reveal inconvenient facts and information that might otherwise impeach what the USFS claims within the LRMP. Such forums serve more of a the check the box function of providing for the appearance of public participation—when the reality is entirely different—when the reality is the USFS has worked to suppress public participation with respect to the Chattooga River.

In contrast to how the USFS has explicitly refused to provide detailed and on point answers to my specific factual inquiries and questions(criticisms) about USFS policy interpretations, the members of the Stakeholders Forum for the Nantahala and Pisgah Plan Revision are being afforded with special access and influence over the LRMP planning process.

By refusing to conduct its own independent trout habitat and trout population monitoring studies, fine sediment embeddedness, and sediment transport studies, the USFS self-servingly establishes an excuse for claiming the need to rely on a flawed assessment of the significance of the September 2016 trout population study issued by NC DEQ. Such independent studies might compel the USFS to adopt sufficiently intense and non-precatory *Standards* for preventing the use of recreational equipment that displaces the soils lying within the trout buffer and for

preventing the creation of point sources where additional sedimentation gets channeled into our Outstanding Resource Waters.

The Consequences of the Chattooga's Insufficient Normal Sediment Transport Capacity

The *normal hydraulic sediment transport capacity* of the Chattooga has been overwhelmed by an excessive sediments (<2mm in size), originating primarily from unpaved roads and improperly regulated land development activities in the upstream watershed.

Despite any claims to the contrary, this bedded sediment imbalance does not constitute the primary result of some natural background condition—like the weathering of granite. We know this because the USFS (and the United States Environmental Protection Agency (“US EPA”)) have acknowledged, in their own written reports, that the primary source of sediments within the Chattooga watershed are sourced from human related activities—primarily erosion from unpaved gravel roads and development in the upstream watershed. See also *The dynamic nature of sediment and organic constituents in TSS*, Mark Riedel, James Vose, USDA Forest Service, Southern Research Station, Coweeta Hydrologic Laboratory, 2002.

To press my continuing complaint, the diminishment of the hydraulic capacity of this creek has been impermissibly overlooked and intentionally left uninvestigated by the USFS—as well as by the responsible agencies of the state of North Carolina. It matters not that the USFS had nothing to do with the creation of the original source of this anthropogenic supply of sediment. Because of the Chattooga's ORW status, the USFS has zero entitlement to implement management initiatives that exacerbate this excessive embedded sediment problem. Both the USFS and the state of North Carolina have ignored this reality.

Since 2007, an *increasing* amount of fine particle sized sediment (<2mm) has embedded the larger stream bottom substrates of the Chattooga in a measurable quantity that exceeds any reasonable minimum effects threshold for disrupting the early life cycle of trout. Small sized sandy sediments (<2mm) have *excessively embedded* the streambed's larger substrates. In various places along an approximate 2 mile segment of this river, this blanket of sediment is bank to bank in some places, while in other places the sediment is over a foot deep. This sediment has eliminated suitable spawning habitat in moderate riffle waters, and destroyed trout hiding spaces in moderately flowing waters by filling in upstream facing crevices. The accumulation of this bedded sediment 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 reaching from Green Creek downstream to where Cane Creek enters from the west.

This Excessive Embedded Sediment Could Be Effectively Remediated Were a Combination of Public/Private Abatement Efforts To Be Focused on Taking Advantage Of Removing the Sediments Being Trapped Upstream of A Massive Logjam Which Functionally Has Been Serving For Decades As An Unattended Sediment Catch Basin

The negative impacts of these sediments are most visibly pronounced upstream of a massive logjam *remotely* located at 35.033897 -83.128544. *However, to clarify, this logjam constitutes a blessing in disguise rather than the primary source of this sediment transport imbalance.*

The reality is the normal hydraulic sediment transport capacity of the upper Chattooga is simply insufficient to cleanse this stream of this excessive embedded sediment over an acceptable short enough period of time. Taking a holistic view, this logjam serves functionally as a form of sediment catch basin which has slowed this excessive anthropogenic supply of sediment from fouling the downstream trout habitat—although downstream impacts have pronouncedly increased since 2007. This is why the USFS must take action now.

There are third party reports that this logjam was impounding sediments as far back as 1993. However, neither the USFS nor any of the relevant state agencies ever advised the public that the excessive quantities of sediment that are now present were already present at any prior point in time—demonstrating how this must constitute a phenomena that has occurred since 2007.

The insufficiency of the normal hydraulic sediment transport capacity of the Chattooga's headwaters is evidenced by the fact that this *excessive embedded sediment condition now occurs far downstream of this logjam*. Stated differently, sediments managing to make their way through this logjam are nevertheless accumulating, *in visibly obvious increased quantities*, in the tails of critical pools needed by trout found much further downstream. *In fact, this degradation is becoming much more pronounced downstream of the Bull Pen Bridge—where until recently the trout habitat and rainbow and brown trout fisheries had remained somewhat protected from the impairing impacts of the excessive embeddedness being pronouncedly impounded upstream of the logjam.*

Even were this logjam to be removed today, (which would prove disastrous for the downstream trout fisheries unless the sediment impounded upstream was first removed), the river does not have sufficient natural hydraulic capacity to flush this sediment downstream. This is why we should be working together to abate this problem and to restore this degraded trout habitat to its once outstanding condition. Allowing the removal of this logjam without first removing the impounded sediment would merely cause non-temporary damage to the downstream trout fisheries. It would also precipitate controversy.

The USFS (and its agents) have known about this logjam for a long time. In fact, the USFS should have eye witnessed the visibly unmistakable impacts of this sediment transport imbalance as early as 2007 when its agents were photographed standing in front of this logjam.

Today, this sediment is visibly impounded bank to bank in front of this logjam. Had this been the condition of the stream bed back in 2007 or 2012, the USFS would have been compelled to specifically remark about the excessiveness of this embedded sediment in the environmental assessment used to justify the promulgation of the 2012 Record of Decision that lifted the ban on creek boating. I am unaware of anywhere in the administrative record (from 2007 forward) where the USFS specifically identified the visibly obvious problem of embedded sediments stretching from bank to bank, etc. upstream of this logjam.

Preventing human activities from degrading the once “*outstanding*” quality of the Chattooga's trout habitat as well as its once “*outstanding*” trout fisheries constitute specific subcategories of ORW water quality use which must be protected by all federal and state agencies.

The USFS must not allow the Chattooga's trout buffer to be disturbed by the use of recreational equipment and the development of recreational infrastructure required only by the sport of whitewater creek boating. *Unfortunately, the USFS has ignored this discrete and non-discretionary obligation.* Despite having a duty to do so, since 2012, the USFS has neglected to apply any form of appropriate monitoring or *adaptive management* to identify and to put a halt to the impermissible damage being done by the *development and use of an unmanageable crazy quilt* of creek boat launch sites, portage trails, and evacuation points within the Chattooga's highly erosive trout buffer.

Unfortunately, more recently, the Nantahala and Pisgah planning staff has inadvertently confirmed the favoritism being shown to creek boating, as well as the dissent stifling purpose of the 2012 Planning Rule ⁷¹, by flat out telling me that "*we will not be reviewing the 2012 Chattooga Decision as part of the Nantahala and Pisgah Forest Plan Revision.*" ⁷²

The USFS also unintentionally reveals its unfounded indifference to developing an LRMP *monitoring plan* that appropriately complies with the regulatory requirement to employ the best available scientific information while providing for *continuous* monitoring of the eight designated subject matters set forth in 36 CFR 219.12:

- 1) The status of select watershed conditions.
- 2) The status of select ecological conditions, including key characteristics of terrestrial and aquatic ecosystems.
- 3) The status of *focal species* to assess the ecological conditions required under §219.9.
- 4) The status of a select set of the ecological conditions required under §219.9 to contribute to the recovery of federally listed threatened and endangered species, conserve proposed and candidate species, and maintain a viable population of each species of conservation concern.
- 5) The status of visitor use, visitor satisfaction, and progress toward meeting recreation objectives.
- 6) Measureable changes on the plan area related to climate change and other stressors that may be affecting the plan area.
- 7) Progress toward meeting the desired conditions and objectives in the plan, including for providing multiple use opportunities.
- 8) The effects of each management system to determine that they do not substantially and permanently impair the productivity of the land (16 U.S.C. 1604(g)(3)(C)).

Quantifying the ongoing damage being done by whitewater creek boating activities to the Chattooga's designated uses of its ORW water quality must fall under one of these eight broad categories of concerns that must be continuously monitored.

Similarly, the USFS refuses to investigate using appropriate monitoring methods because to do so would reveal how the current LRMP is being violated.

⁷¹ See National Forest System Land Management Planning, 77 Fed.Reg. 21,162 (April 9, 2012) (codified at 36 C.F.R. pt. 219).

⁷² Email dated Friday, July 28, 2017 @ 3:26 pm from Ms. Heather Luczak to Bill Floyd (italics added).

To repeat, with respect to recreational uses causing sediments to be channeled into the non-ORW Tellico River, the USFS took the unequivocal 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).

Today, the USFS refuses to honor that interpretation with respect to the Chattooga.

How the USFS Has Been Violating the Existing LRMP

In January 2012, the United States Forest Service pushed through a controversial Record of Decision that lifted the longstanding prohibition of creek boating on the Chattooga’s headwaters in North Carolina—instead of delaying that decision until the Fourth Circuit ruled on American Whitewater’s asserted claim of a special entitlement to paddle on the Chattooga.

Eventually, the Fourth Circuit Court of Appeals unambiguously confirmed, what we all knew, that whitewater creek boaters have no special rights of accommodation. The Fourth Circuit 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)(italics added).

Unfortunately, the USFS chose to act before the Fourth Circuit ruled. Had it waited on ruling, the USFS might have been compelled to vet the consequences of lifting the prohibition on creek boating these headwaters through the prism of the more burdensome conditions associated with reaching a finding of no significant impact under an Environmental Impact Statement in lieu of reaching such a decision under the less restrictive requirements of an Environmental Assessment.

In any case the USFS should have been compelled to conduct a comprehensive antidegradation assessment requiring a determination that the quality of the Chattooga’s in stream trout habitat and its rainbow, brown, and brook trout fisheries remained “outstanding.” This would have compelled the USFS to apply the best available scientific methodologies for assessing the degrading condition of the trout habitat and the trout fisheries.

The Nantahala and Pisgah National Forests were not compelled to act to amend their LRMP in January 2012—other than to accommodate the demands of creek boaters. The modification of the existing LRMP was directed to occur by senior officials in Atlanta and Washington, DC. The issue of paddling the South Carolina and Georgia part of the river could have been addressed entirely separately.

The USFS could have waited to evaluate and address the demands of creek boaters with respect to the headwaters in North Carolina when it started the process of revising the Nantahala and Pisgah National Forests Land Resource Management Plan in 2013.

Furthermore, when promulgating the January 2012 Record of Decision that set the parameters for lifting the prohibition of creek boating on North Carolina's headwaters (Amendment #22 to the existing Nantahala LRMP), the USFS neglected to provide full and complete disclosure to the public about its previously understood intention to subsequently bring forward a second initiative to construct special trails within the trout buffer—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 trail⁷³ 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 two initiatives could not be achieved without violating the antidegradation mandate that applies to the Chattooga's trout habitat and trout fisheries under Clean Water Act regulations.

In lieu of using the best available scientific methodologies for conducting a comprehensive antidegradation assessment of the current condition of the Chattooga's in stream trout habitat and its rainbow, brown, and brook trout fisheries, (as compelled by the law), the USFS elected to ignore this mandatory obligation. Instead, the 2012 USFS Record of Decision skipped undertaking any such assessment. By approving this controversial reversal of a decades old policy, the USFS endorsed creek boaters' unlawful damaging and destruction of the highly protected trout buffer on the Chattooga River and the creation of previously non-existent point sources where sediment is being channeled into this Outstanding Resource Water.

Based on the repeated refusals of the USFS to use the best available science to investigate the merits of concerns, the USFS appears to believe that it has a right to ignore this legal reality. Similarly, the USFS also appears prepared to ignore the *next logical legal question* that the USFS should have raised when defending against the American Whitewater lawsuit.

The USFS ignores how the Fourth Circuit was never asked to review the permissibility of creek boaters being allowed to displace soils within the Chattooga's fragile trout buffer or the legality of creek boaters being allowed to create point sources of pollution where these displaced soils get channeled into the Chattooga's Outstanding Resource Waters.

⁷³ 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.

In preparing this new LRMP, the USFS must not ignore the Fourth Circuit's unequivocal rejection of creek boaters' claims of entitlement to special protection of their recreational passion.

The USFS should place a halt on creek boating the Chattooga's headwaters until the Chattooga's excessive embedded sediment problem is permanently abated and the quality of the rainbow, brown, and brook trout fisheries can be reestablished to their once outstanding quality. The Fourth Circuit has made clear that this sport has no entitlement to the favoritism being repeatedly shown to it by the Forest Service.

It matters not whether whitewater creek boating displaces a single ton of the soils in the trout buffer or millions of tons of soils. Under the Clean Water Act, there is no de minimus exemption for causing any non-temporary degradation of the specifically designated uses of the Chattooga's ORW water quality. The USFS has intentionally refused to undertake the necessary scientific studies to allow for a comprehensive antidegradation assessment.

Despite having implicitly promised that any future creek boater created destruction of the trout buffer would be monitored and "*treated appropriately*"⁷⁴, the USFS has elected to forego applying the *best available scientific methods* for monitoring the impacts of creek boating activities on the explicitly designated and specially protected uses of the Chattooga's ORW water quality.

Despite the Fourth Circuit's outright rejection of creek boaters' claims of special entitlement, despite being entitled to special antidegradation protection, and despite being a *management indicator species under the current LRMP*, the Forest Service has refused to conduct the *continuous monitoring* that is required to secure the highest intensity of antidegradation protection for the Chattooga's trout fisheries. When convenient, the USFS points to managerial overlap with the state of North Carolina—in particular the North Carolina Wildlife Resources Commission ("NCWRC")—to deflect any and all responsibility for having failed to provide for continuous monitoring of the Chattooga's trout habitat and trout fisheries. Unfortunately, the NCWRC has demonstrated its willingness to dismiss my concerns before ever investigating them using the best available science.

In fact, even as I was asking the NCWRC to investigate, the NCWRC *was collaboratively signaling/emailing* the USFS of its unwillingness to conduct any real antidegradation assessment of the Chattooga's degraded in stream trout habitat and trout fisheries. See the document previously submitted for the LRMP administrative record as C-8-B which the USFS has refused to post to the electronic public reading room. Today, the Forest Service tries to sweep its own neglect under the rug by pointing out that it has been counting cars at trailheads and studying creek boater permit usage—as if that has anything to do with the physical damage occurring in the trout buffer.

⁷⁴ *Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor*, Environmental Assessment, United States Forest Service, January 2012 at page 313; (the "2012 EA")(otherwise indexed for the USFS administrative record as document "B-1")

The capstone of this hypocrisy is the recent suggestion that the Forest Service needs to wait until after the promulgation of the new LRMP before taking any steps to investigate this ongoing degradation.

The Forest Service won't explain why it hasn't simply *fixed the offending creek boating infrastructure*, the various evacuation points, portage trails, and boat launch sites where soils are being displaced from the *fragile trout buffer* and where chronic new point sources of pollution are being created. In the absence of providing a permanent fix for these point sources of pollution, the USFS has refused to explain why this would not *not constitute a violation of the current LRMP regarding visible sedimentation and trails*.

To press this point, the development and use of this creek boating infrastructure has impermissibly caused the Chattooga's river bank to collapse in certain locations—as evidenced by document 00-N which the USFS has refused to post to the electronic public reading room. The latitude and longitude locations where this has occurred have been repeatedly documented and provided to the USFS in connection with the preparation of the Nantahala's LRMP.

Like the circumstances of the Tellico River, the creek boating caused damage to the Chattooga's trout buffer is not capable of being readily mitigated and fixed. Allowing any construction and use of whitewater creek boating infrastructure on the Chattooga 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 that compels portaging.

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. Unavoidable land disturbance occurs wherever paddlers create new portages. The creation of these new boat launch sites, evacuation points, and portage trails, displaces soils and causes the creation of new point sources where sediments are being channeled into this Outstanding Resource Water—just as if a tractor were used by an individual to push or pull a plow blade across the fragile trout buffer.

Similarly, this problem cannot be avoided by granting paddlers the authority to cut out the stream wide obstructions posed by this large woody debris ("LWD").

If the USFS were to allow LWD to be cut out by paddlers to reduce the prospective need to *create new portages*, such a measure would work to the detriment of the stream's trout habitat which is benefitted by the presence of this LWD.

Protecting the trout habitat must be prioritized because this constitutes one of the explicitly designated uses of the Chattooga's ORW water quality. In any case, permitting the cutting out of LWD strainers would only constitute an unacceptable half measure.

This would not address the problem where paddlers *desire* to construct a new portage to provide a means to *re-ride certain white water features but where there is no need to construct a portage to avoid a life threatening LWD strainer*.

North Carolina's Trout Buffer Was in Near Pristine Condition Prior To the Introduction of Creek Boating in 2012

Prior to introducing creek boating, the USFS documented the baseline condition of North Carolina's trout buffer and its wider riparian corridor. This 2007 inventory documented how the trout buffer in North Carolina remained almost as pristine as what Chief McGuire described in 1976. Unfortunately, since the introduction of creek boating commenced in 2012, the development and use of creek boating infrastructure has significantly degraded the condition of the Chattooga's trout buffer and the wider riparian corridor. It has caused the creation of previously non-existent point sources where sediments are being displaced and channeled into the water when boats are launched or evacuated from the creek.

Nevertheless, the USFS claims "there is not a need to revisit the analysis at this time."⁷⁵

Previously, the USFS took the unequivocal 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).

While the Chattooga's ORW headwaters are entitled the highest intensity of physical protection afforded under the law, the protection of the trout buffer should in no way be restricted to just this stream in the Nantahala and Pisgah National Forests.

As demonstrated by my photos of the North Fork of the French Broad, there are other locations within the forest where creek boating activities are creating point sources where sediments are being channeled into our trout streams—in violation of the current LRMP's mandates.

The USFS ignores the merits of my complaints as well as my overtures to try to find a better solution for the Chattooga in particular. In contrast to the indifference shown to my concerns, the favoritism shown to whitewater creek boating reeks of conflict of interest.

The fact is the USFS collects significant dollars from allowing commercial outfitters to run thousands of raft trips on both the Nantahala River in North Carolina and the Chattooga River in South Carolina, and Georgia.

However, the destruction of North Carolina's trout buffer and the creation of distinct point sources of pollution is not justified by the fact that the USFS has a significant source of revenues that flows from favoring whitewater paddling enthusiasts.

⁷⁵ See the email dated September 6, 2017 @ 10:05 am from Ms. Heather Luczak, Forest NEPA Coordinator, National Forests in North Carolina, with carbon copies to Mr. Paul Arndt, Mr. Allen Nicholas, and Ms. Michelle Aldridge (*italics added*).

Because the USFS refuses to discuss my narrower concerns about the Chattooga, perhaps it is time to open the larger can of worms.

What factual information, professional opinion, internal memos, or other documentation of any kind, *including orders or instructions delivered from a superior official to a junior official* did the USFS rely on—to reject the physical evidence that shows how creek boating has caused the destruction of the Chattooga’s trout buffer support—and to make this September 6, 2017 assertion there isn’t any need to revisit the 2012 Record of Decision?

The public is entitled to receive an answer to these questions under the implied rights of the public participation mandate.

Freedom of Information Act Request For Documents

Because the USFS offers no explanation or foundation for asserting the discretion to ignore this discrete LRMP planning problem, pursuant to the Freedom of Information, please provide electronic copies of the following documents:

- (1) *For the period of time between July 1, 2017 and September 6, 2017*, any and all internal communications between any USFS personnel, including emails and handwritten notes, that in any way mentions, references, or that instructs or provides orders about how to discharge the decision of Ms. Heather Luczak to advise Bill Floyd via email on September 6, 2017 @ 10:05 am, that “that there is no need to revisit the analysis at this time”, including but not limited to any such communications transmitted or received by any of the following groups:
 - a. (A) the current Chief of the United States Forest Service, Mr. Tony Tooke, and any of the Chief’s Office Staff,
 - b. any executive leadership or staff personnel currently assigned to the Region 8, Southern Regional office in Atlanta
 - c. any leadership or staff personnel working within the Nantahala and Pisgah National Forests;
- (2) Subsequent to January 1, 2017, any and all *sedimentation* studies conducted to monitor and recognize any negative environmental impacts taking place on the North Carolina section of the Chattooga, as necessitated by the terms of Amendment #22 to the Nantahala and Pisgah Forests Land Resource Management Plan (January 2012);
- (3) any and all monitoring studies specifically conducted to assess and inventory any creek boating caused displacement of soils lying within North Carolina’s trout buffer subsequent to the start of creek boating on December 1, 2012;
- (4) any associated communications, emails, memorandums, reports, or documents of any kind exchanged internally between USFS personnel, or exchanged with any external third party, summarizing, analyzing, or describing the significance of the results and details contained within all such monitoring studies enumerated in (2) and (3)
- (5) any internal USFS communications, including emails and handwritten notes, discussing the need to conduct such monitoring in response to public complaints;

- (6) For the period from January 1, 2012 going forward, please provide any back and forth emails, correspondence, or written documents of any kind, either received from American Whitewater, or any representative of American Whitewater, or alternatively transmitted to American Whitewater by any USFS official

Conclusion and Specific Demands:

First and foremost, the USFS *should immediately* post all of my “170 attachments” in the electronic public reading room to prevent any further disadvantaging of my right to participate in the LRMP planning process. My right to participate must not be forced to suffer disadvantage because of the content of the concerns and criticisms being voiced about the failings of the LRMP process.

Second, the Forest Service ought to engage immediately in an iterative dialogue with myself and any other interested parties (including wilderness groups or the creek boating community) regarding what to do about the degradation that is occurring on the Chattooga.

It seems counterproductive to me for the USFS to remain fixed on presuming that counting cars at trailheads and paddler permits has anything to do with managing this unique trout fisheries resource according to the intensity of protection to which it is entitled as an Outstanding Resource Water.

The paucity of metrics documented by the September 2016 trout population study of almost a mile of the sediment blanketed part of the river, when supplemented by affidavits of anglers having decades of experience with the Chattooga’s headwaters in North Carolina, seems to offer a pretty good argument that degradation has occurred over an extended segment of the river.

Not a single rainbow trout was captured and released during that study.

One of my goals is to get everybody on the downhill side of the boulder to try to push it back up the hill together —and to find the money needed to fix the problem so that others that come behind will find what I did over thirty years ago.

Several years ago, I showed some of my photographs of this excessive embedded sediment to a fellow who has never had a fishing rod in his hands but who knows his way around the legal system. As only a Harvard trained native of Moncks Corner could condense down to five words: “Somebody’s not doing their job.”

Continuing to stonewall only serves to sharpen the controversy.

As Notification 07292017 demonstrated through specific examples, the USFS has engaged, and continues to engage today, in a pattern and practice of either providing piecemeal responses to requests for information—or flat out refusing to respond to increasingly narrow questions about policy interpretations having to do with the Chattooga’s problem of excessive embedded sediments. Setting aside my own rights, we are not doing what we should to protect this river.

I understand that my persistence is not welcomed and that the USFS believes that it can squash the merits of my concerns through administrative manipulation. I find the refusal of the USFS to

conduct a follow up trout population study this fall to be probative of a desire to avoid gathering any more data.

For at least the last 5 years, the USFS has not lifted a finger to address the additional degradation being done by creek boating activities to the Chattooga's trout buffer, the in stream trout habitat, and the creek's trout fisheries.

The USFS possesses well documented evidence of the impermissible damage that is being done to North Carolina's trout buffer by creek boating activities. The USFS has been advised why protecting and maintaining the "outstanding" quality and condition of the Chattooga's in stream trout habitat and its rainbow, brown, and brook trout fisheries constitute the specifically designated uses of the Chattooga's ORW water quality. The USFS has been notified how these specific uses of the Chattooga's ORW water quality must not be allowed to suffer any non-temporary degradation precipitated by USFS management initiatives.

Nevertheless, the USFS has refused to conduct the specific scientific studies needed to monitor and recognize the impermissible degradation that has been allowed to occur to the Chattooga's trout habitat and trout fisheries. Ignoring the best available science, the USFS refuses to undertake scientific studies to monitor, to quantify the damages, or to justify putting a halt to the impermissible degradation that creek boating is causing to the Chattooga's once "outstanding" trout habitat and its once "outstanding" rainbow, brown and brook trout fisheries.

The negative consequences of the Forest Service's inexplicable favoritism of creek boaters is evidenced not only by the documented trout buffer damage seen on the headwaters of the Chattooga, but also the physical damage caused by creek boating on other streams in the forest.

This inappropriate favoritism must be addressed in the LRMP—despite any claims to the contrary

In the near term, the USFS ought to consider issuing a closure order on boating on the North Carolina part of the Chattooga for the upcoming season.

This will allow the Forest Service to conduct the various scientific studies that it has neglected to undertake for many years and which are needed to determine if the amount of embedded sediments present on the Chattooga exceeds any reasonable minimum effects threshold for disrupting the early life cycle of trout.

There might be an opportunity to craft a compromise that would allow limited boating downstream of the Bull Pen Iron Bridge but not upstream of the bridge where the sediments are excessive—until such time that this sediment has been properly abated and trout populations restored.

Looking out a little more distant, the USFS should use the LRMP planning process to arrest any additional degradation by adopting the following kinds of Standards:

- 1) Adopt a non-precatory *Standard* mandating a stop use or closure order for those recreational use activities that compel the use of transportation equipment that *systematically* displaces soils lying within the 25 foot trout buffer of any cold water trout stream carrying an Outstanding Resource Waters classification.

- a. Specify that a single location of visible sediment reaching a stream and proximately caused by the use of such recreational transportation equipment constitutes definitive proof of a violation of this Standard compelling the issuance of a closure order to halt that recreational use on that stream
 - b. Specify that any bare ground resulting from the displacement of the trout buffer's surface soils, and arising from the use of recreational transportation equipment, or otherwise, must be entirely revegetated within 30 days of the Forest Service having received public notice of the existence of such point source of pollution/erosion site; failure to fix compels issuance of closure order
- 2) Establish personal fine of \$1,000 for each incident where the pursuit of a recreational activity requiring the use of transportation equipment causes any displacement of soils lying within the 25 foot trout buffer of any cold water trout stream carrying an Outstanding Resource Waters classification;
 - a. Require posting of signage at trailhead disclosing existence of fine
 - b. Specify exemption from fine for damage done by the shoes of pedestrian foot traffic only
- 3) Establish personal fine of \$1000 per incident to prevent any sawing out, cutting loose, or disturbance of any kind, of any kind of vegetation, including rhododendron, mountain laurel, growing within the 25 foot trout buffer of the Chattooga's headwaters
- 4) Establish personal fine of \$1000 per individual for entering onto the waters of the Chattooga's headwaters in violation of any aspect of the rules set forth in Amendment #22
- 5) Mandate law enforcement patrols must be maintained on the Chattooga's headwaters on every day where flows are sufficiently high to permit boating under the terms of Amendment #22
- 6) To pay for the cost of law enforcement on the Chattooga, establish annual user fee \$45 to be able to launch any kind of water transportation equipment into any streams on the Nantahala and Pisgah National Forests including but not limited to kayaks, canoes, paddleboards, surfboards, etc.
 - a. **Exempt commercial outfitters running raft trips from annual fee**
 - b. Mandate fine of \$200 per incident for entering into any water without having paid the annual \$45 user fee
- 7) Adopt mandatory requirement to conduct annual appropriate embedded sediment studies on the Chattooga wherein level of embeddedness get calculated
 - a. If level of embeddedness exceeds minimum effects threshold for disrupting the early life cycle of trout, issue closure order on all recreational pursuits requiring the use of transportation equipment that *systematically* displaces soils lying within the 25 foot trout buffer of any cold water trout stream carrying an Outstanding Resource Waters classification
- 8) Adopt mandatory requirement to conduct annual trout population monitoring on the Chattooga River in North Carolina at designated locations where sediments have become too excessive
 - a. Fix acceptable minimum brown trout standing crop weights for a standardized sampling location which if not satisfied would compel addition investigation,

Based on conversations with other anglers, and a review of the changes that appear to be occurring under the forthcoming LRMP, it appears that there is a subtle hostility emerging towards the traditional hunting and fishing uses of the forests. I hope that isn't true but it seems that other younger recreational user groups, whose sports require the use of more advanced technology are being given wide latitude to disturb the habitats that hunters and anglers must have to pursue their passions.

In short, the USFS doesn't seem to like mandatory *Standards* that provide support for the interests of hunters and anglers in preserving *abundant populations* of game and fish for sporting purposes. The Forest Service seems to prefer guidelines that set a lower subjective bar for obtaining a passing grade for managing our forest resources for game and fish.

Hence, we have the Forest Service offering the following muted response to my complaints about trout fisheries problems on the Chattooga:

“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.*”⁷⁶

This candid admission reflects a possible emerging bias to prefer management guidelines which only require the Forest Service to work towards making sure that a self-sustaining population of trout “*continues to persist*” instead of thrive in abundance.

Lowering the bar for a passing grade seems in keeping with why the 2012 Planning Rule was adopted. In fact, on January 26, 2012, the former Chief of the USFS implicitly confessed that one of the major objectives for adopting the 2012 Planning Rule was to try to vest the agency with greater discretion to thwart and to stifle public lawsuits challenging the agency's future site specific initiatives.

The Washington Post reported Chief Tidwell proudly predicting: “We expect to see much less litigation with this process.”⁷⁷ Despite Chief Tidwell's candid admission, the 2012 Planning Rule does not permit the USFS intentionally to conceal critically relevant information that might otherwise impeach the reasoning or justifications given for some management policy or site specific initiative. The concealment of critical information augurs bad faith motivations.

Finally, and most distressing for wild trout fly fishing enthusiasts, the USFS seems to have become encumbered with a form of “group think.” The USFS appears to place too much emphasis on reestablishing brook trout populations instead of protecting and maintaining our once thriving wild rainbow and wild brown trout fisheries—which the majority of active trout

⁷⁶ Chattooga River Boating Access, Environmental Assessment, USFS, May 15, 2015 at page 205 (the “2015 EA”)(italics added)(otherwise indexed for the administrative record as document “E-1”).

⁷⁷ *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.

anglers prefer to protect. By referring to these highly desirable wild trout as “non-natives” the USFS implies that there is some statutory basis for the USFS to discriminate or perhaps eradicate these species of trout in favor of dedicating a disproportionate amount of its scarce resources to trying to establish small brook trout populations on streams whose water temperatures are no longer suitable.

There is a real concern that the USFS would be satisfied with establishing brook trout populations that continue to persist even if the standing crop of such reestablished brook trout populations proved insufficient for sustaining an “*outstanding*” recreational trout fishery. There appears to be evidence of a concerted effort on the part of the USFS (and perhaps the relevant North Carolina agencies) to ignore the importance of protecting wild populations of rainbow and brown trout as key focal species for measuring the management effectiveness of the USFS in protecting our Aquatic Ecosystems.

Brook trout are not endangered. *What statutory mandate permits this excessive focus on brook trout—other than personal fancy of the folks writing the LRMP?*

In closing, I would ask one more time for the USFS to explain why it is ok for the USFS to endorse recreational uses that employ equipment that displaces the soils of our fragile trout buffers while causing the creation of point sources where these displaced soils are channeled into our streams?

Why does the Forest Service treat the Chattooga differently than the Tellico?

I look forward to receiving a prompt invitation to engage in dialogue, in person, to resolve some of the unanswered questions that I have posed to the Forest Service.

With Best Regards,

Bill Floyd