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MONDAY

21 MAY 2018 ⓘ by **8:00pm** ⓘ

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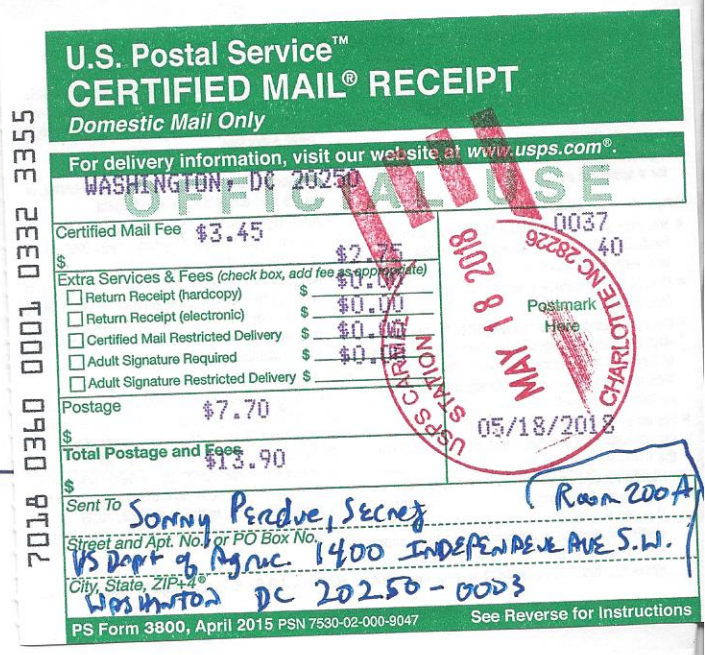
May 21, 2018 at 11:56 am
Delivered, To Agent
WASHINGTON, DC 20250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May 21, 2018, 11:56 am
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Your item has been delivered to an agent at 11:56 am on May 21, 2018 in WASHINGTON, DC 20250.

May 21, 2018, 10:34 am
Arrived at Unit
WASHINGTON, DC 20018

May 20, 2018
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May 19, 2018, 5:49 pm
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May 21, 2018 at 11:56 am
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WASHINGTON, DC 20250

Tracking History

May 21, 2018, 11:56 am
Delivered, To Agent
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May 21, 2018, 10:34 am
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May 20, 2018
In Transit to Next Facility

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May 19, 2018, 1:06 am
Departed USPS Regional Facility
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May 18, 2018, 9:21 pm
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MID CAROLINA-CHARLOTTE NC DISTRIBUTION CENTER

May 18, 2018, 5:18 pm
Departed Post Office
CHARLOTTE, NC 28226

May 18, 2018, 3:59 pm
USPS in possession of item
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Mr. Hunston A. Nicholas, Forest Supervisor
USFS, NANTAHALA NATIONAL FOREST
160 Zillicoa Street, Suite A
Asheville, NC 28801

9590 9402 3110 7166 5291 97

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Ken Arney, Regional Forester, USFS
1720 Peachtree St. N.W.
Suite 760S
Atlanta GA, 30309

9590 9402 3110 7166 5291 80

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Sent To: Chief Vickie Christiansen USFS

Street and Apt. No., or PO Box No.: 1400 Independence Ave S.W. Mail Stop

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1. Article Addressed to:

Chief Vickie Christiansen, USFS
1400 Independence Ave S.W.
Mail Stop Code 1144
Washington DC 20250-0003

9590 9402 3110 7166 5292 10

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X MAY 23 2018 ☐ Agent ☐ Addressee

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wcbfloyd@ix.netcom.com
4110 Quail View Road
Charlotte, NC 28226-7956

May 18, 2018

Via Certified Mail Return Receipt Requested

Hon. Sonny Perdue, Secretary
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Room 200-A
Washington, D.C. 20250-0003

Ms.Vickie Christiansen, Interim Chief
U.S. Forest Service
1400 Independence Ave. S.W.
Mail Stop Code 1144
Washington, DC 20250-0003

Mr. Ken Arney, Regional Forester
U.S. Forest Service, Region 8
1720 Peachtree St NW Suite 760S
Atlanta, GA 30309

Mr. Hurston A. Nicholas, Forest Supervisor
U.S. Forest Service, Nantahala Natl Forest
160 Zillicoa Street, Suite A
Asheville, NC 28801

Re: 60 Day Notice of Intent to Sue For Violations of the Clean Water Act ("CWA"),

Dear Secretary Purdue and Chief Christiansen:

The Chattooga River constitutes 1 of 3 streams, (among 12,000 bodies of water in North Carolina) which has been classified as Class B, Trout, and Outstanding Resource Waters ("ORW") in combination with a National Wild and Scenic River designation.

In 1987 the Rabun County, Georgia, Chapter of Trout Unlimited ("Rabun TU") filed a petition with the state of North Carolina to reclassify this stream as an Outstanding Resource Water. See the document lodged into the administrative record as "N-22 1987 Rabun TU ORW" at page 1. This petition *explicitly* identified the Chattooga's "outstanding" native trout habitat and "outstanding" wild rainbow, brown, and brook trout fisheries as the *exceptional resource values* requiring the highest intensity of Clean Water Act antidegradation protections conferred by 40 C.F.R. §131.12(a)(3)—an intensity of protection which North Carolina has incorporated by reference at 15A NCAC 02B.0201 and 15A NCAC 02B.0225(b)(1).

In March 1989 North Carolina agreed with Rabun TU.

The Chattooga's ORW reclassification imposed a non-discretionary duty on the United States Forest Service ("USFS" or "Forest Service) and the Nantahala National Forest ("NNF") to avoid undertaking any initiative that would threaten any non-temporary degradation in the once *outstanding* quality of the Chattooga's trout habitat and trout fisheries. In addition to this Clean Water Act regulatory duty, the *current* NNF Land Resource Management Plan ("LRMP") obligates the NNF to monitor continuously to assess the relationship between population trends in Management Indicator Species (the wild rainbow, brown, and brook trout) and adverse habitat changes (such as increased embedded sediments).

Despite these non-discretionary duties, the USFS has not scientifically monitored the Chattooga's trout populations, much less used *the best available science* for assessing the impacts of embedded sediments on salmonids. See Bryce, Lomnicky & Kaufmann, *Protecting sediment-sensitive aquatic species in mountain streams through the application of biologically based streambed sediment criteria,* Journal of North American Benthological Society, 29(2):657-672(April 2010).

Instead, the Forest Service has ignored how the stream bottom has become filled in and choked by small sand particles and silt in quantities which exceed any reasonable minimum effects threshold for disrupting the reproductive and early life cycle needs of wild rainbow, brown, and brook trout. For more than a decade the Forest Service has inappropriately focused its limited resources on undertaking management initiatives that have unlawfully exacerbated this problem.

An annotated compilation of photographs has been lodged into the USFS administrative record for the Nantahala LRMP as document N-38. These photos evidence the intensity and widespread nature of this embedded sediment problem. Similar photographs have been repeatedly shared with responsible Forest Service officials for several years.

Such conditions do not exemplify an "outstanding" trout habitat. This blanket of sediment is bank to bank or over a foot in depth in too many locations to be considered insignificant. Nevertheless, the United States Forest Service has promoted the construction and use of recreational infrastructure inside the trout buffer which has caused and continues to cause the physical displacement of soils and their subsequent discharge into an already overstressed ORW body of water—presumably under the erroneous belief that such additional discharges are ok because only a little more pollutant is being released into the water.

Had the *best available science* been applied prior to January 2012, the USFS would have been compelled to admit how small particle sandy sediments (<2mm), and silt (<.6mm), originating from unpaved gravel roads and diffuse land development in the upstream watershed had embedded the stream bed's larger rocky substrates in amounts that exceed any reasonable minimum effects threshold for disrupting the reproductive and early life cycle needs of trout. Instead, the USFS purposely neglected to quantify the significant degrading impacts of this sediment on the protected uses of the ORW water quality. By never recognizing this excessive embedded sediment problem, the USFS preserved an ability to assert agency discretion to do as it pleased—which was to promote the sport of creek boating even though the Forest Service had every reason to know that the endorsement and the promotion of this sport would cause additional sediment inputs into this already overstressed ORW stream.

This pattern and practice of disregarding the law commenced in April 2005 when the USFS violated 36 C.F.R. § 217.11(a)(2)[1] by failing to dismiss American Whitewater's administrative

[1] The Jan. 2004 Record of Decision specified on p. 23 that appeals of the Sumter Forest LRMP were subject to 36 C.F.R. § 217. Historically, 36 CFR part 217 was effectively repealed by the 2000 Planning Rule (November 9, 2000, 65 FR 67515) and removed from the Code of Federal Regulations in 2001. However problems arose with trying to use a new planning rule. This necessitated the continuing use of 36 CFR part 217 in connection with American Whitewater's 2004 appeal. A technical modification was made to the earlier appeals process to remove references to "36 CFR part 217," substituting instead: "the Optional Appeal Procedures Available during the Planning Rule Transition Period." The source of the "Optional Appeal Procedures Available during the Planning Rule

appeal. In April 2004 American Whitewater challenged the authority of the Sumter National Forest to continue denying special use authorization to boat on the Chattooga's headwaters upstream of the Highway 28 Bridge—pursuant to a regulation (36 C.F.R. Part 261.77) lawfully committed to the Forest Service's discretion 27 years earlier.

Lacking any ability to point to a violation of a discrete and nondiscretionary statutory duty to invalidate a long-settled regulation wholly committed to the discretion of the Forest Service, the appellant fabricated a theory that boating could not be restricted on the Chattooga's headwaters "*because no data or studies support the decision.*"[2] There was no legal right to compel the USFS to grant the specific relief requested by appellant's vague and generalized complaint. In fact, American Whitewater admitted that "improved equipment (that brought the headwaters within the skill-level of more paddlers) and a general growth in popularity of whitewater recreation" provided the primary motivation for collaterally challenging this regulation—not because some explicit or implied right to paddle had been violated.[3] American Whitewater further attempted to bootstrap a basis for a complaint by complaining: "The history of the ban is important for two reasons. First, it shows that an open and objective analysis of boating above Highway 28 [had] never been done. Second, it suggests that no weight should be accorded to the fact that the ban has been in place for 28 years."[4]

Ignoring all of the factual and legal incongruities in this appeal, on April 28, 2005, the Reviewing Officer ordered a form of relief that differed from what had been requested by American Whitewater. This decision disregarded the following duty: the "Reviewing Officer shall dismiss an appeal and close the appeal record *without decision on the merits* when:…(2) The requested relief or change *cannot be granted under law, fact, or regulation existing when the decision was made*." 36 C.F.R. § 217.11(a)(2)(italics added) Source: 54 FR 3357. Jan. 23, 1989 as amended at 55 FR 7896, Mar. 6, 1990; 56 FR 4918, Feb. 6, 1991.

American Whitewater's 2004 Appeal had demanded: "Based upon the foregoing, Appellant respectfully requests that the Reviewing Officer enter a decision modifying the Preferred Alternative (Alternative 1) to allow recreational boating year-round on the Chattooga River from NC Road 1107 (Grimshawes Bridge) downstream to the Highway 28 Bridge at all water levels (the self-regulating alternative)." See Floyd indexed document 00-B-1 at page 54.

Because the Nantahala National Forest was not amending its Land Resource Management Plan ("LRMP") in April 2004, American Whitewater lacked any right to ask, much less demand, any form of amendment to the Nantahala's LRMP. Nevertheless, the Reviewing Officer ignored the

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Transition Period" is the Federal Register (FR) as published at 54 FR 3357 (January 23,1989), as amended at 54 FR 13807 (April 5,1989); 54 FR 34509 (August 21, 1989); 55 FR 7895 (March 6, 1990); 56 FR 4918 (February 6, 1991); 56 FR 46550 (September 13,1991); and 58 FR 58915 (November 4, 1993).

[2] *Appeal of Resolution of Issue #13 in the Record of Decision for the Revised Land and Resource Management for the Sumter National Forest, …the Chattahoochee National Forest, and to the extent that this decision is applicable, to the implementation of this decision in the Nantahala National Forest,* American Whitewater 04-13-00-0026 at page 2 (April 2004)(otherwise indexed for the administrative record as document 00-B-1).

[3] Id. at page 4.

[4] Id.

axiomatic rule that where a claim is not ripe, there is no case or controversy over which federal courts have any jurisdiction under U.S. Const. Art. III § 2, cl. 1. Had American Whitewater tried to prosecute this demand before a federal judge, the claim would have been dismissed for lack of ripeness.

Additionally, American Whitewater's appeal *specifically demanded relief* which unlawfully presumed that paddlers possessed a right to trespass/float across private property upstream and downstream of the Grimshawes Bridge in North Carolina ("to allow recreational boating year-round on the Chattooga River from NC Road 1107 (Grimshawes Bridge) downstream to the Highway 28 Bridge at all water levels (the self-regulating alternative).") Id.

Because these headwaters are non-navigable, it would have been tortious for the USFS to grant the relief specifically requested in American Whitewater's 2004 appeal because it would have encouraged paddlers to trespass across private property. See *North Carolina v Alcoa Power Generating Inc.* 853 F.3d 140 (4th Cir 2017)(the Yadkin River was not navigable at statehood in 1789).

Consequently, once again, the Reviewing Officer should have dismissed this appeal because the relief requested could not be "granted under law, fact, or regulation" existing in January 2004 when the Sumter Forest published its LRMP. 36 C.F.R. § 217.11(a)(2; 5 U.S.C. § 701(a)(2) and Heckler v Chaney, 470 U.S. 821 (1985).

Disregarding the law, and without questioning a single factual or legal claim made in American Whitewater's otherwise unopposed ninety four page appeal, the Reviewing Officer issued an abbreviated seven page ruling that ordered relief for the appellant. *Decision For Appeal of the Sumter National Forest Land and Resource Management Plan Revision,* signed by Gloria Manning, Reviewing Officer for the Chief, April 28, 2005 (the "2005 Decision for Appeal")(indexed for this administrative record as "00-B".)

Instead of dismissing American Whitewater's appeal without considering its merits, the Reviewing Officer inexplicably ordered a form of relief that hadn't even been requested by the Appellant:

> After careful review of the record, *particularly Appendix H*, I am reversing the Regional Forester's decision to continue to exclude boating on the Chattooga WSR above Highway 28. I find the *Regional Forester does not provide an adequate basis for continuing the ban on boating above Highway 28.* Because the record provided to me *does not contain the evidence to continue the boating ban,* his decision is not consistent with the direction in Section 10(a) of the WSRA or Sections 2(a) and 4(b) of the Wilderness Act or agency regulations implementing these Acts.
>
> I am directing the Regional Forester *to conduct the appropriate visitor use capacity* analysis, including non-commercial boat use, and to adjust or amend, as appropriate, the RLRMP to reflect a new decision based on the findings." [5]

[5] See document 00-B at page 6 (italics added).

Inexplicably, the explanation that "the record provided to me does not contain the evidence to continue the boating ban" seemed to parrot American Whitewater's vague and undefined allegation that there was a "lack of data or studies in the record." [6]

Such generalized complaints did not justify violating Supreme Court precedent, 5 U.S.C. § 701(a)(2), and 36 C.F.R. § 217.11(a)(2).The 2005 Decision For Appeal pressed an *incongruent claim* that the Regional Forester lacked the discretionary authority to continue enforcing 36 C.F.R. Part 261.77 "because his decision is not consistent with the direction in Section 10(a) of the WSRA or Sections 2(a) and 4(b) of the Wilderness Act or agency regulations implementing these Acts."

Despite the Reviewing Officer's claims, the cited provisions did not/do not impose discrete and non-discretionary duties on the USFS. *Neither do they confer upon the public any special right of enforcement*. The cited provisions constitute guidelines that do not define any ascertainable standard for limiting the wholly discretionary authority granted by the National Forest Management Act ("NFMA") to the Regional Forester regarding the issuance or denial of special use authorizations. The Reviewing Officer's ruling arbitrarily attempted to take these precatory guidelines and to morph them into discrete and non-discretionary obligations capable of being enforced by American Whitewater. The Reviewing Officer could not lawfully do this because there was no such statutory mandate in either the National Wild and Scenic Rivers Act or the Wilderness Act to support the invalidation of discretionary authority granted by the NFMA.

As the Supreme Court explained Section 701(a)(2) of the APA makes it clear that "review is not to be had" in those circumstances where the agency authorizing statute "*is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion*…In such a case, the statute can be taken to have committed the decision making to the agency's judgment absolutely." *Heckler v Chaney,* 470 U.S. 821, 830 (1985), (italics added).

Preparing a visitor capacity analysis did not constitute a mandatory condition precedent for exercising discretionary authority wholly granted to the Regional Forester by a *lawfully promulgated regulation* first put in place 27 years earlier pursuant to the NFMA.

Just as significant, American Whitewater did not request relief by demanding the preparation of a visitor use capacity study. Nevertheless, the Reviewing Officer created a remedy for which there was neither a specific request for relief nor an actionable injury.

Even more prejudicial, the USFS also violated the protectable rights of a discrete group of North Carolina Lifetime Sportsman licensees [7] by orchestrating the equivalent of a sub rosa appeal.

I am one of those injured Lifetime License holders.

---

[6] See 00-B at page 4.

[7] Any use of the gender specific "Lifetime Sportsman License" in lieu of a gender neutral description reflects the text of NCGS 113-270.1D rather than any suggestion that those who have been prejudiced consists only of one gender of licensee. Consequently, to more accurately capture the group whose rights have been prejudiced, we will use the shortened gender neutral term of North Carolina Lifetime License to refer to the originating source of protectable rights belonging to the owners of said Lifetime Licenses.

A Recap of How the USFS Orchestrated A Sub Rosa Administrative Appeal in 2004

First, the Regional Forester *inexplicably* never attempted to intervene to challenge the accuracy of American Whitewater's one sided version of fact and legal interpretations. Neither did he intervene to defend his discretionary authority to preserve a regulatory rule that was properly established almost three decades earlier. This tacit abandonment of a well settled regulation was clearly prejudicial to a finite subset of North Carolina Lifetime Licensees who held contractually protectable interests that were clearly threatened by the demands made in American Whitewater's appeal. *Just as importantly,* the Forest Service neither provided North Carolina Lifetime Licensees nor the North Carolina Wildlife Resources Commission *with reasonably calculated to apprise notice and the opportunity to be heard at the most meaningful time and in the most meaningful manner*—so that those Lifetime License holders might challenge these incongruities.

The Forest Service must have known how the protectable interests of these Lifetime Licensees stood to be diminished and perhaps extinguished were the Sumter National Forest's LRMP to be modified in any way that might introduce creek boating onto the Chattooga's narrow and steeply entrenched headwaters in North Carolina.

No other stream in the Nantahala and Pisgah National Forest offered an equivalent combination of special conditions and regulatory protection for remote wild trout fly fishing. These distinguishable features constitute protectable interests for the owners of a North Carolina Lifetime Licenses. They form part of the bundle of rights that I paid significant consideration to have protected by state authorities—and to be respected by federal authorities.

At the time of American Whitewater's appeal, the Chattooga's headwaters in North Carolina offered a unique trout angling experience that differed and was distinguishable from any other trout stream in North Carolina, South Carolina, and Georgia. Three things set this river apart from all other trout streams in North Carolina. First and foremost, the trout habitat and trout fisheries on the Chattooga had been specifically recognized by the state of North Carolina as the *exceptional resource values* and designated uses of ORW water quality deserving of the highest intensity of antidegradation protection afforded by 40 C.F.R. §131.12(a)(3)—an intensity of protection which North Carolina has incorporated by reference at 15A NCAC 02B.0201 and 15A NCAC 02B.0225(b)(1). *Additionally,* on July 1, 1994, "[a]n experimental wild trout regulation allowing the use of natural bait (WBA) was put into effect on 14 North Carolina streams…following a controversial regulation change that eliminated the use of natural bait on …streams containing wild trout populations." [8] The Chattooga's headwaters was (and continues to be) one of a handful of wild trout streams where fishing for wild trout using natural bait was retained under the "Wild Trout/Natural Bait Waters" classification. In fact, the Chattooga's main

[8] See the 58 page report entitled "*EVALUATION OF WILD TROUT REGULATION WITH A NATURAL BAIT ALLOWANCE,* Final Report, Mountain Fisheries Investigations, Federal Aid in Fish Restoration Project F-24, James C. Borawa, Micky M. Clemmons, NCWRC, 1998 at page 2. (otherwise having been lodged into this administrative record as document "00-T Borawa and Clemmons 1998"). Page 3 cites: "We thank Jeanne Riley, Monte Seehorn, and others of the U.S. Forest Service (USPS) and Steve Moore and others of the National Park Service for their assistance in the collection of the fish population data. *Without their help, it would not have been possible to complete the data collections, particularly on the Chattooga River."* (italics added).

stem and 3 enumerated tributaries constitute 4 or 20% of the total of 21 wild trout streams and tributaries scattered over 5 other distant counties which continue to allow natural bait fishing for wild trout. This special regulatory entitlement to fish for wild trout with natural bait further distinguished the Chattooga from other wild trout streams in 2004.[9] Finally, when 36 CFR 261.77 was promulgated in 1978, the Chattooga became the *only trout stream* in North Carolina where the quality of the angling experience was legally protected by regulation from being disrupted by whitewater enthusiasts paddling through anglers on a narrow but steeply entrenched creek.

Unfortunately, by denying proper notice to North Carolina Lifetime License owners, the USFS orchestrated the equivalent of an unchallenged sub rosa appeal which deprived me of my right and ability to appear and to challenge the incongruities of American Whitewater's claims not just during American Whitewater's appeal but also during the initial preparation of the Sumter LRMP. Because notice had only been provided by publication in *The Atlanta Journal* (Atlanta, GA), *the State* (Columbia SC), *the Daily Journal (*Seneca SC), those who owned a North Carolina Lifetime License should not be held responsible for having failed to track far off newspapers to discover that their protectable rights involving the North Carolina part of the river might be threatened during the revision of a forest plan for a National Forest located outside of North Carolina—e.g. during the rewrite of the Sumter National Forest's LRMP.

Consequently, at a minimum, in April 2004, the Reviewing Officer should have made sure that North Carolina Lifetime Licensees were provided with reasonably calculated to apprise notice and the opportunity to be heard at that most meaningful time. Providing such notice would not have posed an unacceptable administrative burden to the USFS. The USFS could have mailed notice to these interested parties by employing the list of names and addresses of Lifetime License owners maintained by the North Carolina Wildlife Resources Commission—with whom the USFS works closely. However, despite knowing the controversial nature of the appeal, such notice was never provided to those who held protectable interests.

To offer additional explanation why this should have occurred, the Sumter National Forest's Record of Decision ("ROD") stated that "[t]his decision is subject to administrative review pursuant to 36 CFR 217."[10] Similarly, American Whitewater's appeal asserted a right to appeal pursuant to provisions spelled out in 36 CFR Part 217.[11] Both of these statements essentially admit that the 1982 Planning Rule version Part 217 should have governed any appeal of the

[9] Natural bait fishing is allowed on this small set of streams as an accommodation to a specific group of anglers who prefer to fish using culturally traditional methods such as using bee larvae, worms, etc. The premise behind prohibiting natural bait fishing on most streams is that it would deplete populations of fish in otherwise marginally fertile streams.

[10] *Record of Decision, Environmental Impact Statement for the Sumter National Forest Land Resource Management Plan,* United States Forest Service, Southern Region, Robert Jacobs, Responsible Official & Regional Forester, January 15, 2004 ("ROD Sumter Jan 2004")(otherwise indexed for this administrative record as document "N-19").

[11] See Floyd document 00-B-1 at page 57 of 95.

legality of continuing to deny special use authorization to pursue whitewater creek boating on that part of the stream flowing through the Nantahala National Forest.[12]

At that point in time, 36 CFR §217.13(a) provided the Reviewing Officer with discretionary authority to establish procedures to ensure the "orderly and expeditious conduct" of this April 2004 appeal. Stated differently, in the interest of fairness and justice, the Reviewing Officer had the discretionary authority and the obligation to act, sua sponte, to provide North Carolina Lifetime Licensees *with reasonably calculated to apprise notice and the opportunity to be heard at the most meaningful time and in the most meaningful manner*. However, the Reviewing Officer declined to ensure fundamental justice by providing adequate notice to a group whose contractually based rights were being threatened by a collateral proceeding.

Furthermore, pursuant to 36 CFR §217.13(c), the Reviewing Officer had the discretionary authority at any time during the appeal *to request additional information* from either American Whitewater or the Deciding Officer (Regional Forester Robert Jacobs). However, the Reviewing Officer never asked the Regional Forester to provide additional explanation why there was a discretionary right to deny special use authorization to paddle the headwaters. The Reviewing Officer considered only the one sided version of facts and legal arguments pushed forward by American Whitewater.

The Forest Service further orchestrated a sub rosa appeal because the 2005 Decision for Appeal did not specify what gave the Reviewing Officer legal authority to assert a theoretical need for additional "data or studies." Nevertheless, the Reviewing Officer in Washington ordered the Regional Forester to reconsider creek boating upstream of the Highway 28 Bridge because "no data or studies support the [Regional Forester's] decision"[13] to continue enforcing 36 C.F.R. 261.77 by denying special use authorization to boat upstream of the Highway 28 Bridge.

Neither the 1982 Planning Rules nor the 2000 Planning Rules contain any such requirement for sustaining a discretionary decision to require special use authorizations or to restrict specific recreational uses—which the Regional Forester was authorized to do pursuant either to Subpart B, 36 C.F.R. §§261.50-261.58 or based on Subpart C §§ 261.70- 261.79.

Furthermore, while complaining about "no data or studies" pertaining to visitor capacities, the Reviewing Officer entirely *disregarded* the more relevant concern about the total lack of data or studies pertaining to the condition of the trout habitat and trout fisheries located on the Chattooga's headwaters in North Carolina—something which the Forest Service had a non-

[12] Also, an interpretive ruling issued by the USFS on January 10, 2001 makes clear that the Regional Forester, who was the responsible official for signing off on the rewrite of the Sumter National Forest LRMP, had the discretionary authority to proceed in promulgating the LRMP based on the "1982 regulations in effect prior to November 9, 2000, or under the revised regulations [of the 2000 Planning Rule]. ..This interpretive rule makes clear that that paragraph (b) [of §219.35] specifically includes the option to select either the administrative appeal and review procedures of 36 CFR part 217 in effect prior to November 9, 2000, or the new objection procedures to complete a plan amendment or revision process initiated under the 1982 regulations." See 66 Fed. Reg. 1865, Jan. 10, 2001.

[13] See Floyd Document 00-B-1 at page 1.

discretionary duty to monitor because of why the headwaters had been designated an Outstanding Resource Water in 1989.

In 2004, the Nantahala National Forest would have still been governed by the Nantahala's 1987 LRMP—which should have still been informed by the mandates of the 1982 Planning Rules. Nevertheless, the Reviewing Officer also ignored the 1982 Planning Rule mandate that *explicitly* commands: "*Population trends of the management indicator species* [trout on the Chattooga] *will be monitored and relationships to habitat changes determined.* 36 C.F.R. § 219.19(a)(6)(italics added).

Stated differently, the Reviewing Officer arbitrarily cherry picked what specific kinds of "data or studies" were needed. The Reviewing Officer arbitrarily failed to order an *antidegradation* assessment of the current condition of the trout habitat and trout fisheries on North Carolina's headwaters—which the Reviewing Officer should have understood were designated uses of ORW water quality entitled to the highest intensity of protection against any non-temporary degradation. The Reviewing Officer further disregarded a similar antidegradation mandate which was enshrined within the text and legislative history of the National Wild and Scenic Rivers Act which had been editorially cited as the fundamental justification for the appeal decision.

This oversight was highly prejudicial to my protectable interests.

Fourth, the Forest Service processed a sub rosa appeal by disregarding how preventing any displacement of soils and avoiding the creation of point sources of sediment inputs inside North Carolina's trout buffer were mandated under the Clean Water Act. For almost 30 years prohibiting whitewater creek boating upstream of the Highway 28 bridge had also served that critical mandate—as was irrefutably corroborated in 2007 when the Forest Service inventoried all user created erosion sites on the entire river.[14]

This 2007 Biophysical Inventory found that erosion sites (point sources of pollution) were disproportionately concentrated on the downstream sections of river where whitewater paddling activities had been dominant since 1976. In stark contrast, on the North Carolina section of the river, where paddling had always been prohibited, *erosion sites were virtually non-existent.* The North Carolina trout buffer and riparian corridor remained in the most pristine and near natural condition—just as the Chief of the Forest Service had described these North Carolina headwaters in 1976.

The Reviewing Officer never asked American Whitewater to produce evidence showing how creek boating might be pursued in North Carolina without violating either the antidegradation mandate imposed by the Clean Water Act's water quality standards or the National Wild and Scenic Rivers Act's non-discretionary duty of prioritizing the protection of the "esthetic, scenic…features" of the Chattooga's headwaters before promoting any incompatible recreational use (16 U.S.C. §1281(a)).

The Forest Service knew that allowing creek boating would cause the creation of point sources whereby soils displaced by boating activities would get impermissibly channeled into the

[14] See the 2007 Biophysical Inventory indexed as document B-4 at pages 1-14.

Chattooga's ORW waters. The Forest Service ignored its own discrete and nondiscretionary obligations to avoid such a result presumably because it erroneously believed that it was ok to break a rule if you only break the rule a little bit.

This 2005 appeal decision also disregarded how the Nantahala's existing LRMP compelled the continuous monitoring of any changes in trout habitat on trout populations.

See Appendix D of the *Land Resource Management Plan, Amendment 5 for the Nantahala and Pisgah National Forests,* March 1994 (indexed as Floyd document "N-23-1").

"Monitoring Task No. 9" requires the USFS to monitor the Management Indicator Species relevant to Management Area 18 & 15 (e.g. populations of rainbow, brook and brown trout) and their habitat on at least an annual basis. Id. at page D-2. Despite the apex classifications of the Chattooga as an ORW trout habitat and trout fishery and National Wild and Scenic River, the Reviewing Officer never inquired if monitoring had been taking place on the Chattooga. "Monitoring Task No. 10" requires the Forest Service to "evaluate MIS population trends and habitat conditions [by reviewing] monitoring information collected for Task 11." Id. at pages D-2 and D-3.

"Monitoring Task No. 11" compels the USFS to reevaluate "relationships between populations, habitat conditions, and management activities…as new information becomes available." Id. at page D-3.

"Monitoring Task No. 17" compels the USFS to answer the question: "Are directions and standards being met for riparian areas?" Id. at page D-3. This requires annual monitoring by forest hydrologists and fisheries biologists.

Despite all these monitoring obligations, the Reviewing Officer *never asked* if there were any studies of the Chattooga's trout habitat and trout fisheries in North Carolina. Had the Reviewing Officer inquired, the Regional Forester would have disclosed the existence of a 1992-1996 Chattooga trout fisheries study collaboratively prepared by the NCWRC and the USFS. The Reviewing Officer would have learned how the ratio of young-of-the-year trout to other age classes, on the Chattooga Cliffs reach, *was too low compared* to other comparable trout streams in the Nantahala Forest at the same time—a red flag pointing to the possibility that increasing sedimentation was seriously disrupting the reproductive and early life cycle needs of trout on this segment of the Chattooga.

Having been denied notice and the opportunity to be heard, I was prevented from complaining about the Reviewing Officer's disregard of the mandatory standards that applied to Management Area 18 in the Nantahala's current LRMP. The Nantahala's LRMP specified: "…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 PPCRWQ for silviculture." Amendment 5 to the Nantahala National Forest LRMP at page III-185 (1994)(italics added)(indexed for this record as Floyd document "N-23").

In 2004, the Reviewing Officer ignored how allowing creek boating would predictably violate this mandate to "maintain all types of trails so no visible sediment reaches the stream." Id. Instead, the Reviewing Officer implied that such an obvious concern could not provide sufficient justification for restricting boating. Incredulously, the Reviewing Officer implied that boating could only be restricted if the Regional Forester could prove that there was inadequate visitor capacity. Nonsense. There simply was no statutory basis for such an interpretation to be used by a headquarters official to attack collaterally a regulation wholly committed to the discretion of the Regional Forester under the National Forest Management Act.

Neither did American Whitewater present any evidence of *any data or studies to support the fiction* that creek boating could be pursued without disturbing and displacing highly erosive soils lying inside the protected trout buffer. *To the contrary, the Reviewing Officer had been warned about the threats that creek boating posed to the trout buffer*—based on the common knowledge that riverbanks get disturbed where paddling activities are allowed to be pursued.

Ignoring all of this fact and circumstance, the 2005 Decision for Appeal, whether by inadvertent neglect or by intention, created an opening for the appellant to avoid having to explain how it had a legal right to complain about the Nantahala's LRMP during the rewrite of the Sumter LRMP. Had creek boaters attempted to sue the Nantahala National Forest in 2004, they would have had their claims dismissed because they would have lacked any discrete right to compel any amendment to the Land Resource Management Plan of the Nantahala National Forest.

Had I been properly noticed in 2004, I would have appeared to object. Instead, by relying exclusively on uncontested assertions of fact and legal interpretations set forth in American Whitewater's 94 page appeal, the Reviewing Officer overturned three decades of precedent. Ignoring the obligation to dismiss American Whitewater's appeal, the 2005 Decision for Appeal accepted the truth of unproven assertions of fact and legal arguments by American Whitewater, including but not limited to:

1) "Boating Above Highway 28 is a Value That Must Be Protected and Enhanced." 00-B-1 at page 5;
2) Paddling constitutes "one of the oldest and least environmentally impactful forms of primitive recreation." 00-B-1 at page 6;
3) "The Resolution of Issue #13 Violates the Due Process Clause of the Fifth Amendment to the United States Constitution." 00-B-1 at page 23;
4) "Boating Access Will Not Cause New Unofficial Trails or Additional Trampling of Vegetation." 00-B-1 at page 28;
5) "Boating Access Will Not Lead to Additional Search and Rescue or Safety Issues." 00-B-1 at page 29;
6) "Trout Fishing Opportunities Do Not Justify an Angling River Monopoly." 00-B-1 at page 41;
7) "There Is No Adequate Alternative to Paddling the Chattooga Headwaters.: 00-B-1 at page 42;
8) "Hand-Powered Floating Causes No Significant Environmental Impacts." 00-B-1 at page 48;

9) "If Uses Are To Be Banned, Boating Should Be Last Rather Than First." 00-B-1 at page 49;
10) "The Headwaters Are Federally Protected Due In Large Part to Boating." 00-B-1 at page 50.

The validity of appellant's legal claims in items 1 & 3 were ultimately robustly rejected by the Fourth Circuit Court of Appeals. The Court ruled: "We find that the Forest Service reasonably and lawfully identified 'recreational value' as the relevant ORV, and that *floating is not a value of the Chattooga that must be protected and enhanced under §1281." American Whitewater et al, v. Tidwell,* 770 F. 3d 1108, 1118 (4th Cir. Ct. App. 2014)(emphasis added). [15]

The factual assertions made in items 2,4,5, & 8 were also subsequently proven false by irrefutable physical evidence in the field—and yet the damage had been done.

Inexplicably, the Reviewing Officer implicitly endorsed American Whitewater's claim that allowing boating on North Carolina's headwaters would neither cause significant environmental impact nor lead to additional search and rescue or safety issues. The incongruity of American Whitewater's claim was subsequently proven by what took place during the 2013-2014 season.

On March 8, 2014, at 5:12 pm, I photographed the remains of a mangled aluminum canoe. This canoe was not there before the start of the 2013-2014 paddling season. This open decked aluminum canoe was wrecked when some risk taker tried to descend what constitutes a Class 4/5 rapid water fall that some paddlers refer to as Corkscrew.

Shown

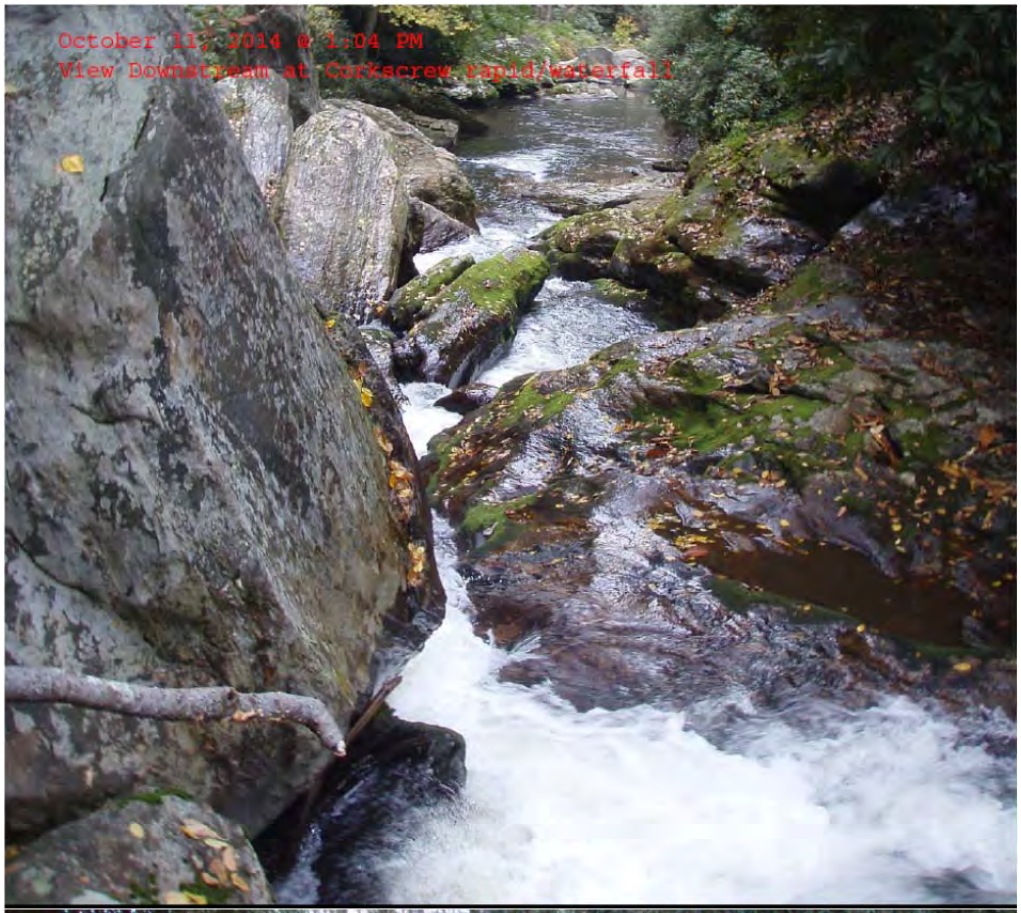
So much for American Whitewater's unsubstantiated claim that hand-powered floating causes no significant environmental impacts.

Below are a series of photos showing the whitewater at Corkscrew (at much lower flows) than those occurring when this boat was wrecked and left as junk.

[15] This ruling related to the Forest Service's obligations under the Wild and Scenic Rivers Act. It did not address the more critical issue of water quality degradation under the Clean Water Act because the presence of this excessive embedded sediment had not been properly disclosed to the public in either of the Forest Service's two environmental assessments published prior to the 4th Circuit ruling. In fact, the Forest Service neither told the public about the rapidly increasing presence of embedded sediment that was excessive by any reasonable standard nor aboutthe existence of the massive logjam that was contributing to this sediment transport imbalance.


AUGUST 1 2013
SUPER CORKSCREW RAPID
275 CFS @ B FORD


#55 @ 2:01 PM
TOP OF POOL BELOW SUPER CORKSCREW RAPID


October 11, 2014 @ 1:04 PM
View Downstream at Corkscrew rapid/waterfall


Top of Supercorkscrew pool @ 6:08PM
Not a single strike in smokehouse.
Evidence of fishing pressure.
March 8 2014
pic #51
140 CFS

The terms "pollutant", "point source" and "waters of the United States" are defined at 40 CFR § 122.2. *Pollutant* means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 *et seq.*)), heat, *wrecked or discarded equipment*, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. 40 CFR §122.2 (italics added for emphasis).

Point source means any discernible, confined, and discrete conveyance, *including but not limited to,* any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, *vessel or other floating craft from which pollutants are or may be discharged.* 40 CFR §122.2 (italics added for emphasis). The National Pollutant Discharge Elimination System ("NPDES") mandates that a properly issued permit must be obtained in order for a person to discharge "pollutants" from any "point source" into "waters of the United States." 40 CFR § 122.1. *This requirement to obtain an NPDES permit applies to rubbish, trash, or other such materials discharged overboard from a vessel or floating craft.* 40 CFR §122.3.

See *United States v. Earth Sciences., Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) ("The concept of a point source was designed to further [the CWA] scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States."); *Ohio Valley Envtl. Coal., Inc. v. Hernshaw Partners*, LLC, 984 F. Supp. 2d 589, 598 (S.D. W. Va. 2013) ("[T]he definition of a `point source' is intended to be interpreted broadly, as indicated by the statute's `including but not limited to' language.").

This metal canoe was apparently wrecked and discarded into the creek sometime between December 1, 2013 and March 8, 2014. Clearly, an aggressive paddler attempted to run this rapid using old technology. They failed. The wrecked canoe was found wedged behind a rock on river left approximately 3/10 to 1/2 mile below this rapid/waterfall. *As I can attest, this wrecked boat was not present prior to the start of the 2013/2014 paddling season.* It was not placed there by hikers, swimmers, anglers, or hunters.

This evidences the absurdity of allowing creek boating on this narrow, remote, and steeply entrenched stream. Because there is no trail or road that provides access to this location, the USFS lacks any practical way to remove wrecked or lost equipment like this from the Chattooga's ORW headwaters in North Carolina. Nevertheless, the Reviewing Officer never challenged American Whitewater to provide the proof of its claim that "Boating Access Will Not Lead to Additional Search and Rescue or Safety Issues." 00-B-1 at page 29.

Serious and life ending accidents are constantly occurring in connection with the pursuit of the sport of creek boating. In recent years, an individual unsuccessfully attempted to paddle Silver Run Falls on the nearby Whitewater River. He broke his back and had to be rescued by the Cashiers Rescue squad. Fortunately, this accident happened adjacent to NC Highway 107 so that the rescue squad could do its job with less risk to themselves and a minimization of costs.

In contrast, had a call for help been made for a serious injury or drowning in connection with the destruction of the aluminum canoe on the Chattooga during the 2013-2014 paddling season, the

Cashiers Rescue squad would have had no safe way to backboard out an injured paddler or to retrieve the body. There is no trail or road—which is the way things should remain per the mandate spelled out in the National Wild and Scenic Rivers Act. These rescue squad members would have been exposed to personal risk in trying to recover a drowning victim from this rugged and remote section of river.

This boater-centric perspective, which was first adopted in April 2005, entirely ignores how the residents of Jackson County, North Carolina fund the Cashiers Rescue squad both through their property taxes and private donations. An operation to recover a body in this rugged and remote environment is unlikely to be an inexpensive proposition. When a disaster eventually happens the taxpayers of Jackson County, North Carolina will be the ones to pick up the tab—not the boaters who consume this resource free of any charge.

As an owner of property in Jackson County, North Carolina, I have an interest in the efficient use of our limited rescue squad funding—but neither I nor any other Jackson County taxpayer was provided *with reasonably calculated to apprise notice and the opportunity to be heard at the most meaningful time and in a meaningful manner during the 2004 appeal.*

Because the Nantahala National Forest was not in the process of revising its LRMP at that time, neither concerned taxpayers in Jackson County nor the owners of a North Carolina Lifetime License had any reason to suspect that their protectable interests in North Carolina might be collaterally threatened during the Sumter National Forest LRMP planning process or as a consequence of an uncontested administrative appeal to that LRMP.

Had proper notice been provided to North Carolina Lifetime License owners in 2004, I could have appeared and contested that appeal. This might have saved hundreds of thousands, if not over a million dollars, from being diverted away from fixing the Chattooga's embedded sediment problem in order to pay boater centric consultants to construct a visitor capacity study.

A. The USFS Must Be Compelled by A Court To Stop Concealing Information and To Refrain From Repeatedly Trying To Thwart Factual Inquiries That Would Otherwise Reveal How the Forest Service Has Purposefully Ignored How Excessive Embedded Sediments Have Degraded the Suitability of the Chattooga's Stream Bed For Meeting the Reproductive and Early Life Cycle Needs of Trout

Subsequent to April 2005, the USFS has repeatedly cut legal corners to avoid being compelled to acknowledge (1) how this river suffers from excessive embedded sedimentation, and (2) how the Forest Service's promotion of the sport of creek boating has caused the creation of additional point sources of sediment input into an already overstressed ORW stream. Even today, the USFS thwarts efforts to compel such an admission by refusing to answer factual inquiries about the Chattooga during the rewrite of the LRMP for the Nantahala National Forest and by repeatedly producing piecemeal responses to Freedom of Information Act requests.

The USFS continues to engage in a poorly disguised effort to use a Four Corners offense[16] to run out the clock on my efforts to make sure that the administrative record underlying the

[16] The Four Corners offense, technically four corner stall, was an offensive strategy for stalling in basketball. Four players stand in the corners of the offensive half-court while the fifth dribbles the ball in the middle. Most of the

forthcoming LRMP gets populated with sufficient facts, data, etc. to compel the USFS to provide the mandated relief owed to the Chattooga's long neglected trout habitat and its once outstanding wild trout fisheries.

However, once the Forest Service approves a new LRMP, an interested party will be severely prejudiced from leveraging any violations of the current LRMP to compel the Forest Service to take proactive steps to fix the degraded trout habitat and degrading wild rainbow, brown, and brook trout populations in North Carolina. The Forest Service's stifling of public participation and its inexplicable neglect of this river's trout habitat and wild rainbow, brown, and brook trout populations cannot be tolerated any longer. *This inexplicable willingness to stifle public participation warrants extra-record discovery.*

The USFS has violated and continues to violate numerous statutory and regulatory legal obligations, including but not limited to,), the Freedom of Information Act (5 U.S.C.§ 552), the National Wild and Scenic Rivers Act (16 U.S.C. §§1271-1287), the National Forest Management Act (16 U.S.C. §§1600-1687), the Administrative Procedures Act, the National Environmental Policy Act, the Clean Water Act (33 U.S.C. §§1251-1387, and North Carolina water pollution and water quality laws.

The Forest Supervisor was provided with a Notification dated July 29, 2017 and a second Notification dated September 22, 2017 that among other things detailed why there is a need for strict and non-discretionary Standards to be put in place by the forthcoming LRMP to provide the requisite intensity of antidegradation protection owed to the Chattooga's trout habitat and wild rainbow, brown, and brook trout populations. I made specific recommendations about how such Standards might be structured. Such overtures have been entirely ignored.

Unless within 60 days, the USFS fully addresses all of the concerns outlined in this Notice of Intent to Sue as well as my prior Notification of July 29, 2017 (lodged into the administrative record as document N-13-A) and my Notification of September 22, 2017(lodged into the administrative record as document N-13-B), pursuant to 33 U.S.C. §1365(a)(1) and (b)(1)(A), etc., my citizen suit claims under the Clean Water Act (33 U.S.C. §§1251-1387, and North Carolina water pollution and water quality laws. will be added as amendments to a complaint to be filed in the Western District of North Carolina seeking relief for other injuries that the Forest Service has caused to me pursuant to the Freedom of Information Act (5 U.S.C.§ 552), the National Wild and Scenic Rivers Act (16 U.S.C. §§1271-1287), the National Forest Management Act (16 U.S.C. §§1600-1687), the Administrative Procedures Act, the National Environmental Policy Act, and the United States Constitution.

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time the point guard stays in the middle, but the middle player would periodically switch, temporarily, with one of the corner players. It was a strategy used by legendary Coach Dean Smith and the UNC Tarheels before the shot clock was instituted. It was epitomized in the 1979 Duke-Carolina matchup that saw the Tarheels employ the stall to try to cover up their own weaknesses compared to Duke by holding their deficiencies to a 7-0 trailing score at halftime.

Here is what the Forest Service unlawfully continues to ignore.

This photo offers a downstream view of conditions in front of the huge logjam @ 35.033897, -83.128544, photographed on June 29, 2015 @ 2:45:18 PM.

This photo shows conditions on a straight and relatively wide reach of riffle water, @ 35.050170, -83.118091. This corresponds to the 600 foot reach of water that the North Carolina Department

of Environmental Quality ("NC DEQ") defined as "Site No. 10" while electro-fishing in September 2016. This photo reflects degraded spawning habitat conditions 1.4 miles upstream from the huge logjam.

Both of these photos show how sediment is impounding upstream of this logjam. These photos show how small particle sandy sediments (<2mm), and silt (<.6mm), originating from unpaved gravel roads and diffuse land development in the upstream watershed, have smothered the stream bed by more than a foot in certain places and bank to bank in other places. Many crevices and interstitial spaces within the granite stream bottom have been filled as if concrete had been poured into them. This excessive embedded sediment constitutes a *hazardous threat* to the health of the various aquatic creatures living in this creek—but especially so to the early life cycle of trout.

Floyd Photograph, June 29, 2015 @ 3:50:07 PM View Downstream @ 35.049947, -83.118506 .

This photo depicts the blanket of sediment that exists on an approximate 100 foot section of the 600 foot reach that NC DEQ defined as "Site No. 10" during the September 2016 trout population study. In September 2016, NC DEQ captured just 2 young-of-the-year brown trout on this 600 foot reach. Similarly, Site No. 10 yielded an extrapolated brown trout standing crop weight of just 10.1 kg/hectare—*a far from outstanding standing crop.* But for the damaging impacts of this blanket of sediment, the physical nature of Site No. 10's stream bottom substrates (availability of cobble) and lower flow characteristics should have yielded much greater young-of-the-year numbers. Excessive levels of sediment disrupt the early life cycle of trout causing decreased abundance of trout populations—but the Forest Service never investigated this visibly obvious trout habitat problem. *Most remarkable, despite their continuing existence further*

downstream, but in less than outstanding numbers, NC DEQ did not capture a single rainbow or brook trout at any of the eight locations sampled upstream of the Bull Pen Bridge in September 2016.

Despite the fact that approximately 1/6 of the overall reach was suffering 100% embeddedness of its stream bed substrates, NC DEQ assigned a *generous* habitat score of 63 out of 100 in 2016. This seems oddly generous.

Just as inexplicably curious, before issuing the Decision approving Land Resource Management Plan Amendment 22 in January 2012, (indexed for the USFS administrative record as document B-3) *the USFS knew, but the public did not*, that USFS employees had assisted the North Carolina Wildlife Resources Commission ("NCWRC") in collecting trout population data between 1992-1996 at two Chattooga monitoring sites. "Site 2" was located approximately 2 km upstream of the Bull Pen bridge or just downstream of the massive log jam.

At "Site 2", trout standing crops averaged 31.22 kg/hectare over the four years sampled—with a high of 43.2 kg/hectare and a low of 22.23 kg/hectare.[17]

However, more importantly, "Site 2" yielded an unacceptably low ratio of young-of-the-year trout[18] relative to other age classes of just 17.9%. In stark contrast, "Site 1"—located miles downstream from this logjam and far away from where this sediment is most pronounced today—yielded an average ratio of young-of-the-year to other age classes of 102%.[19]

In April 2005, the Reviewing Officer entirely disregarded the significance of this young-of-the-year anomaly and how it might augur the need to limit recreational uses that might cause any additional inputs of displaced soils into this already overstressed stream.

On May 15, 2015, the USFS tried to excuse itself for never having investigated this documented young-of-the-year anomaly: "Young-of-the-year Brown Trout densities appeared to be lower than other North Carolina trout populations during the same sampling period*; however, a self-sustaining population continues to persist." Chattooga River Boating Access*, Environmental Assessment, USFS, May 15, 2015 at page 205 (the "2015 EA")(indexed for the LRMP record as Floyd document E-1)(italics added).

In January 2012 and again in January 2016, the USFS *de facto concealed* the existence of this 1992-1996 Chattooga trout population study—despite its central importance to evaluating the degrading condition of the trout habitat and trout fisheries .[20] As the Chief of the Forest Service's office knows, I spent considerable time and effort (between January 4, 2016 and April 21, 2016)

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[17] See the document indexed for this record as "L-1 River Coalition-N" at page 2 and documents L-2 River Coalition H and L-2 River Coalition R.

[18] Young-of-the-year(<101mm long trout) constitute offspring from the most recent spawning season.

[19] See L-1 River Coalition-N" at page 2 and documents L-2 River Coalition H and L-2 River Coalition R.

[20] In fact, the USFS *failed to produce the summary report detailing this 1992-1996 study when repeatedly asked to do so via Freedom of Information Act requests in early 2016. It took appeals to the Chief of the Forest Service to force the production of excerpted results of this study. See documents indexed for this administrative record as C-4,C-5,C-6,C-7,C-8, C-8-A, C-8-B, C-11-1* .

asking the Nantahala National Forest to produce the details of that 1992-1996 Chattooga trout population study and any summarizing narrative reports. Despite the fact that USFS employees were instrumental and closely involved in collecting the field data between 1992-1996, the USFS somehow never managed to archive these records where they could be kept updated by subsequent monitoring or where they could be retrieved and shared with the public (as I had requested).

Just as significantly, the Nantahala National Forest *inexplicably* never thought to pick up the phone during the seven years between April 2005 and January 2012 to ask the North Carolina Wildlife Resources Commission to provide the Forest Service with another copy of this critically important trout population study. Instead, the Forest Service purposefully looked the other way while disregarding the warning signs that had clearly been documented in the 1992-1996 study.

Today, this sediment problem is visibly pronounced in a variety of minor pools, long glides of riffle water, and major pools scattered throughout the reach stretching from the confluence of Green Creek down to the logjam. *However, the problem is also now visible in pools found miles downstream of this logjam.* An aerial survey of the wide reaching nature of the Chattooga's problem can be viewed using Google Earth's April 2014 and March 2017 imagery.

To be clear, this logjam constitutes a blessing because it serves as a sediment catch basin to slow the rate at which this excessive sediment fouls the river further downstream.

To press the point, there is no scientific evidence to presume that removing this logjam would solve the sediment problem. In fact, the physical conditions in the field suggest that the removal of this log jam would make the problem worse by allowing this sediment to spread out faster over a larger downstream area of this trout stream.

To explain, during both periods of normal and high flow, some of these sediments are clearly being pushed through this logjam only to become embedded much further downstream in major and minor pools. The proof of this hydraulic dynamic can be eye-witnessed by considering the increasing amount of fine particle sandy sediments and silt becoming deposited in the tail of "Bull Pen pool"—one of the two largest pools on the North Carolina part of the river. Bull Pen pool is located at 35.024234, -83.127053. This is far downstream of the logjam. Nevertheless, over the last dozen years the depth of the tail of Bull Pen pool has become shallower as sandy sediments have accumulated. An individual wading in the tail of the pool will now find themselves sinking above their shins.

Because the amount of sediment has not dissipated in Bull Pen pool over the last number of years, the normal sediment transport capacity of this river must be insufficient to push this sediment downstream over any acceptable period of time. Otherwise, this sediment would not be permanently accumulating in the major and minor pools lying downstream of this logjam. It would be gradually dissipating.

To further explain how the normal sediment transport capacity of this river appears insufficient, I have also observed trout habitat conditions on the segment of river from Ellicott Rock upstream to the Bull Pen Iron Bridge since the 1980's This constitutes the farthest downstream reach of the river in North Carolina. In the past, this approximate two mile segment of river arguably

remained the most pristine and undisturbed section of the entire 57 mile river corridor. Unless you wade the river, there is no way to see this part of the river because there is no trail following along its course. This lack of accessibility has served to guard this rugged part of river from too much “loving” by all of us who enjoy our public lands. This pristine section of the river also remained largely protected from the sediment problem occurring upstream of the Bull Pen Iron Bridge. No more.

This upstream plume of sediment has now overwhelmed the sediment transport capacity on this downstream section of the river. Sediments have accumulated in the tail of the critical mid-size pool found at 35.013432, -83.114418.This pool forms at the bottom of a series of waterfalls involving a drop in elevation of approximately 25 feet over approximately 250 feet. This constitutes a Class IV/V whitewater feature that some paddlers have referred to as little Corkscrew. Located miles downstream of the logjam, sediment is impounding in the tail of this pool in quantities that did not exist as recently as 2012. This condition showed no evidence of having abated as of April 2017.

These facts and circumstance explain why removing the logjam would most likely result in this sediment fouling a larger reach of the river downstream. This problem will not be solved by simply waiting for this logjam to be removed—either through unapproved human intervention or otherwise.

Solving this sediment problem will prove much more complicated and expensive.

Nevertheless, preserving the outstanding trout habitat and fisheries constitute the specially designated uses of the Chattooga’s ORW water quality. Consequently, it is not enough that wild trout continue “to persist” on North Carolina’s headwaters as the Forest Service has implied in its environmental assessments.

Since April 2005, the United States Forest Service has neglected to conduct continuous monitoring of the impacts of trout habitat diminishment on wild trout populations on North Carolina’s headwaters. While presuming to have the discretion to deny that there is any actionable problem with either the quality of the stream’s trout habitat or the densities of the stream’s wild rainbow, brown, and brook trout populations, the Forest Service has purposely avoided collecting the scientific data that it must have understood was needed to substantiate such denials.

The fact is the United States Forest Service has not properly discharged its duty to manage the National Wild and Scenic Chattooga River in accord with its obligation to avoid undertaking any management initiative that might threaten to cause any non-temporary diminishment in the quality of the trout habitat and wild rainbow, brown, and brook trout populations on this section of the river. To avoid being impeached for having made the problem worse, the Forest Service has refused for years to conduct any objective antidegradation assessment of the Chattooga’s trout habitat and trout populations.The Forest Service now wants to use the pretense of a lack of data to avoid having to admit the additional damage being done by its arbitrary endorsement and promotion of whitewater creek boating.

The photographs below reflect typical conditions (at 35.057500 -83.117778) over 2 miles upstream of the massive logjam. The photo on the left shows how the streambed's cobbled substrates was smothered with sandy sediments on October 31, 2014. The photo on the right shows the non-temporary nature of this embeddedness on June 6, 2015.

Compare these two snapshots of stream bottom conditions to the United States Environmental Protection Agency's ("EPA") rapid assessment protocol photos shown below.

Optimal Range *(William Taft, MI DNR)*

Poor Range *(William Taft, MI DNR)*

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

Unfortunately, these examples of what the EPA would call "Poor" stream bed habitat are representative of the degradation being suffered up and down this extended reach of stream.

In November 2007 and August 2012 the Forest Service inventoried every stick of Large Woody Debris ("LWD") lying in the main stem of the Chattooga's headwaters in North Carolina.

During both of those surveys, agents of the USFS photographed the logjam.

Figure 2. Large Wood jam on the upper Chattooga River, North Carolina, November 2007, as published in the *Executive Summary: Large Wood in the Upper Chattooga River Watershed November 2007,* USFS Southern Research Station, C.Andrew Dolloff, Team Leader at page 4 (delivered via email to the USFS and otherwise indexed as Floyd document "N-15 Executive Summary USFS LWD count Upper Chattooga Nov2007"). This study said: "Wood in this jam was in various states of decay and disintegration, suggesting that it had accumulated over many years. This jam is unique; jams of this size are unusual in the southeastern US, where as a result of past human activities most streams carry small loads of LW." Id. at page 4.

Nevertheless, prior to approving Amendment 22 in 2012, the Nantahala National Forest never told the public how this logjam serves as the functional equivalent of a sediment catch basin which serves to slow the advance of this excessive embedded sediment problem.

Similarly, in January 2007, other agents of the USFS stood in front of the massive logjam.

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

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

Despite the years of visitor capacity study that took place subsequent to April 2005 and leading up to the issuance of Findings of No Significant Impact in January 2012 and January 2016, the USFS never told the truth about the excessive levels of embedded sediment that was accumulating upstream of this logjam.

Under the National Forest Management Act the USFS must adopt regulations "*specifying 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). Presumably the Chattooga's visibly excessive level of embedded sediment constitutes one of the "special conditions… *involving hazards"* that the Congress intended for the Forest Service to identify and to fix. The Nantahala's current LRMP was developed under the 1982 Planning rules published at 47 FR 43047 on September 30, 1982, subsequently codified as 36 CFR Part 219. The 1982 Planning Rule established regulations for identifying hazards to fish and wildlife resources, grazing resources, recreation resources, mineral resources, water and soil resources, and cultural and historic resources. 36 C.F.R. §§ 219.19-219.24.

One regulation *explicitly* commanded: "*Population trends of the management indicator species [trout on the Chattooga] will be monitored and relationships to habitat changes determined*." 36 C.F.R. § 219.19(a)(6)(italics added). Similarly, in order to assess the possible *detrimental* impacts of USFS management initiatives on fish and wildlife populations, the regulations also

compelled that the Forest Service "*shall establish objectives for the maintenance of and improvement of habitat for management indicator species* [trout on the Chattooga]." 36 C.F.R. § 219.19(a)(italics added). Neglectfully, the USFS never assessed any correlation between these excessive embedded sediments and diminished populations of rainbow, brook, and brown trout. Instead, from April 2005 forward, the USFS consumed a disproportionate amount of the Chattooga's resources *unlawfully* trying to find some way to justify accommodating the demands of whitewater creek boaters.

In November 2014, the Forest Service was challenged about its failure to monitor:

> "The administrative record is missing any official report documenting prior or current fish sampling counts by electrical shock to establish population trends. The record lacks any scientific monitoring report on the quantity of newly spawned or less than one year old wild brown trout to ascertain how well wild brown trout are reproducing on that part of the river. The failure to publish such monitoring trends, if they even exist, makes it impossible for the Forest Service to refute what a layperson, with any familiarity of the river, can see for themselves: significant ecological degradation appears to be occurring on the upper Chattooga river." *Chattooga River Boating Access*, Environmental Assessment, USFS, May 15, 2015 at page 205 (the "2015 EA")(indexed for the LRMP record as Floyd document E-1)

The Forest Service responded as follows:

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

Stated differently, to evade its own responsibility for this degraded habitat, the USFS pointed the finger towards the North Carolina Wildlife Resources Commission ("NCWRC"). When this admission was made on May 15, 2015 about low numbers of young-of-the-year trout, the USFS had every reason to suspect a strong correlation between this degraded trout habitat and the paucity of young-of-the-year trout. The USFS should have been on high alert for habitat degradation during the seven years that it consumed after April 2005 *preparing the administratively ordered visitor capacity analysis*.

In November 2014, the USFS should have been fully aware how Norton Mill Creek, a major tributary dumping into this sediment troubled stretch of river, had been listed in 1998 as a Section 303(d) impaired stream *due to excessive sediment*. Presumably, the pitiful 1995 NCIBI score of 38 out of 60 (Fair) provided one of the reasons why Norton Mill Creek was listed on the Section 303(d) list of impaired waters in 1998—but we can't know for sure because the USFS

did not explain this highly relevant issue. In contrast, the Forest Service was quick to offer a terse advisory: "By the following reporting cycle in 2000, Norton Mill Creek was removed." [21]

The USFS never explained how Norton Mill Creek improved from impaired to not impaired—in just two short years. Instead, the Forest Service encouraged the public to presume that the sediment problem had been resolved either because of natural sediment transport or through proactive abatement—*however, this was not the case.*

Norton Mill Creek was removed from the 2000 Section 303(d) list because of a change in how North Carolina scored its Section 303(d) water quality assessments—not because the sediment problem had been mitigated or resolved or that the NCIBI score had increased to a more acceptable number. Stated differently North Carolina applied a lowered standard to declare a passing score for Norton Mill Creek. See the relevant documents lodged in the USFS administrative record as L-8-7, L-8-8, L-8-9.

To presume that Norton Mill Creek's excessive sediment problem became physically dissipated in just 2 short years, this could have only occurred if the sediment got pushed further downstream into the heart of the extended reach of the Chattooga about which I now complain—and which I have photographed. In short, the USFS should have also been on heightened look out for excessive embedded sediment on the main stem of the Chattooga. *Instead, subsequent to April 2005, the USFS never told the truth about this excessive embedded sediment before issuing its controversial and hotly contested 2012 decision to allow creek boating on North Carolina's fragile headwaters.* Even today, the Forest Service refuses to conduct the necessary monitoring studies, using the *best available science,* which would otherwise verify this excessive embedded sediment problem.

Had the USFS used the best available science, the Forest Service would have been compelled to admit that this embedded sediment exceeded any minimum effects threshold for disrupting the reproductive and early life cycle needs of trout.

The *best available science*, that has been embraced by the United States EPA Region 10, is articulated by Bryce, Lomnicky & Kaufmann, *Protecting sediment-sensitive aquatic species in mountain streams through the application of biologically based streambed sediment criteria,* Journal of North American Benthological Society, 29(2):657-672(April 2010), and Bryce, Lomnicky, Kaufmann, McAllister, & Ernst, *Development of biologically-based sediment criteria in mountain streams of the western United States*. North American Journal of Fisheries Management 28:1714–1724 (2008).

Unfortunately, the Forest Service has not used any science, much less the best available science, to assess whether or not the levels of sediment that are present have degraded the suitability of the stream bottom for satisfying the reproductive and early life cycle needs of trout.

Instead, the Forest Service has ignored this chronic stream habitat problem despite having primary responsibility for managing the use of the water, the trout buffer, and the extended riparian corridor associated with this National Wild and Scenic River. This inexplicable neglect

[21] See the Nantahala's 2015 EA at page 70 & 2012 EA at page 265.

can be reconciled. Since April 2005 the Forest Service has inappropriately endeavored to cater to the special interests and demands of the whitewater paddling community while ignoring the discrete and non-discretionary duties owed to the trout habitat and wild rainbow, brown, and brook trout fisheries that once existed on these headwaters in outstanding abundance.

As shown in the photos below, this problem does not constitute a temporary problem. The first photo below was taken on May 22, 2014 at 12:59:43 PM.

The second photo below was taken a year later on June 29, 2015 @ 2:45:18 PM

These photos confirm to what I will attest: the depth of embeddedness has grown and remained measurably excessive over this extended reach of river since 2007. When further criticized *about not having collected any trout habitat or trout population monitoring data* from 1996 to September 2016, the Forest Service again ignored the apex status of the Chattooga River's ORW classification etc. while offering the following excuse:

> 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.[22]

Nonsense. Given the apex ORW water quality classification assigned to the Chattooga, the greatest allocation of Forest Service resources should have been dedicated to monitoring the stream's trout habitat and fisheries—not the least. These headwaters are dominated by bedrock ledge cascades, shallow high gradient riffles, lower gradient runs, and deep low gradient pools. Granitic bedrock, not cobble and gravels, is prevalent. *This limitation in available spawning habitat accentuates the intensity of damage that this excessive embedded sediment causes to the early life cycle of trout.*

The Forest Service must have understood how lifting the boating ban would risk additional sediments being channeled and discharged into the Chattooga as a consequence of the construction and use of boat launch sites, evacuation points, and portage trails inside the trout buffer. The USFS must have also known how *trout population abundance is known to decline even if small increases in sediment loads occur*.[23] Excessive bedded sediments can cause oxygen deprivation in trout redds and reduce the eggs that hatch.[24] The *best available science* evidences how any increase in embeddedness above this minimum effects threshold degrades the suitability of habitat for satisfying the reproductive and early life cycle needs of salmonids.

Unfortunately, for inexplicable reasons, prior to issuing Amendment #22 in January 2012, the USFS did not tell the public about this *visibly obvious* and seeming hazardous threat to the Chattooga's management indicator species: *trout.* The adverse impacts of this sediment *was never quantified* using the best available scientific methodologies. The USFS presumed away any possible problem. Subjective assumptions of benign conditions formed without any scientific investigation constitute the ultimate in arbitrariness.

This neglect of the *ORW Chattooga's* sediment problem stands in stark contrast to how the USFS aggressively addressed the negative impacts of excessive sediments on the trout habitat and trout fisheries on the *non-ORW Tellico River*. The USFS utilized *science* to quantify how the Tellico was suffering sediment inputs by a magnitude that equated to a multiple of the sediment loads being received by nearby reference streams unaffected by off road vehicle trails. See the September 2005 Upper Tellico River Watershed Assessment at 14-15.(lodged into the Forest Service administrative record as document N-20-A).

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[22] See email correspondence otherwise indexed as document "L-6 Email Chain w Sheryl Bryan 10112016."

[23] See Suttle, Power, Levine, & McNeely, *How Fine Sediment in Riverbeds Impair Growth and Survival of Juvenile Salmonids*, Ecological Applications, 14(4) 969-974(2004)("The linear relationship between deposited fine sediment and juvenile steelhead growth suggests that there is no threshold below which exacerbation of fine sediment delivery and storage in gravel bedded rivers will be harmless, but also that any reduction could produce immediate benefits for salmonid restoration."); See also *Sand sediments in a Michigan trout stream. Part II. Effects of reducing sand bedload on a trout population.* North American Journal of Fisheries Management 3:365-372 G.R. Alexander, and E.A. Hansen. 1983.

[24] See generally, *Redd site selection by brook trout and brown trout in southwestern Ontario shores*, Trans. Am. Fish. Soc. 112(6) 1983, L.D. Witzel, H.R. MacCrimmon.

Unfortunately, with respect to the *ORW Chattooga*, the USFS made no effort to measure if embedded sedimentation exceeded any minimum effects threshold for disrupting the reproductive and early life cycle needs of rainbow, brook, and brown trout. This persistent look the other way style of management necessitates this citizen suit.

B. The USFS Violates Sections 301 & 402 of the Clean Water Act:

1) The USFS Did Not Obtain Proper Permits For Discharging Pollutants into the Chattooga Before Allowing the Construction and Use of A Paddler Created System of River Launch Sites, River Evacuation Points, and Portage Trails Lying Inside North Carolina's 25 Foot Protected Trout Buffer

The USFS knows that the sport of "creek boating"[25] cannot be pursued on the remote, steeply entrenched and narrow headwaters of the Chattooga in North Carolina without the construction and use of a changing number of creek boating launch sites, river evacuation points, and portage trails lying inside North Carolina's 25 foot protected trout buffer.

Section 301(a) of the Clean Water Act ("CWA")[26] prohibits the "discharge of any pollutant by any person" into navigable waters from any "point source" except as authorized pursuant to the terms of an NPDES permit authorized and issued under Section 402 of the CWA[27]. See also NCGS 143-215.1(a)(6) which prohibits discharges of any "other waste" to "waters of the state" without a proper permit.

The term "discharge of a pollutant" is defined as "*any* addition of *any* pollutant to navigable waters from *any* point source." 33 U.S.C. § 1362(12)(A)(italics added). The definition of a "pollutant" includes "dredged spoil, solid waste, ... sewage, garbage, ... biological materials, ... heat, *wrecked or discarded equipment, rock, sand, cellar dirt…* and agricultural waste." 33 U.S.C. § 1362(6)(italics added). "Navigable waters" is defined as "the waters of the United States." 33 U.S.C. § 1362(7). Similarly, North Carolina defines "other waste" to include "sediment." NCGS 143-213(18)c.

As the Forest Service was notified in the past, specific point sources of pollution are being systematically created within the Chattooga's 25 foot trout buffer where boats are being *seal*

[25] 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 then 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.

[26] 33 U.S.C. § 1311(a);

[27] *See* 33 U.S.C. §§ 1342, 1344

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launched,[28] where boats are being evacuated from the river to avoid life threatening stream wide strainer logs, and where portages are being created to enable refloating interesting whitewater features—much like an amusement park.

The physical friction of the bottom of creek boats being forcefully *seal launched* etc., *mechanically creates specific point sources* where these displaced soils and other sources of sediment get channeled into an ORW trout stream—as *if a shovel had been used to dig a ditch. It is functionally analogous to a plow blade being pushed/pulled by a tractor across the trout buffer, to create this creek boating infrastructure.*

The Forest Service has violated and continues to violate Section 301 of the Clean Water Act. The USFS did not obtain a Section 402 National Pollutant Discharge Elimination System ("NPDES") permit before endorsing the construction of this creek boating infrastructure inside the Chattooga's 25 foot trout buffer.

A point source discharge includes "surface runoff which is collected or channeled by man." See e.g., *North Carolina Shellfish Growers Ass'n v. Holly Ridges Associates*, 278 F. Supp. 2d 654, 679-80 (E.D.N.C. 2003) (finding failed sediment traps, ditches, gullies and rills to be point sources); *United States v. Law*, 979 F.2d 977, 980 (4th Cir. 1992) (finding section 402 applicable to system collecting polluted runoff and channeling it to water of the United States); *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994) (finding 402 permit required for polluted runoff that was channeled by natural depression into nearby ditch which discharged to stream).

The Forest Service may not dodge responsibility by asserting that it is merely the owner of the land on which the violation takes place. 33 U.S.C. § 1323(a) "requires federal agencies to determine that approved actions do not result in pollution in violation of state water quality standards."*Greater Yellowstone Coalition v USFS*, 628 F.3d 1143, 1149(9th Cir. 2010); The Forest Service can't grant *special use permits* to allow creek boaters to abuse the resource without making sure that the underlying use complies with all other permitting requirements that might exist separate and apart from the one issued by the Forest Service. See *Dubois v US Dept. Agriculture*, 102 F.3d 1273, (1st Cir. 1996)(footnote 25).[29] See also *Commonwealth of Pennsylvania, Dept of Envt'l Res. v U.S. Postal Service*, 13 F. 3d 62 (3rd Cir. 1993)(US Postal Service not immune from suits for Clean Water Act claims , including penalties).

[28] 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.*

[29] The First Circuit reasoned: "The Forest Service also asserts that no claim can stand against it as a defendant because EPA regulations place the responsibility for obtaining an NPDES permit on the 'operator' of a covered activity; the Forest Service is merely the owner of the land on which the activity takes place. This argument is unavailing: if an NPDES permit were required, as plaintiffs contend, then the Forest Service should not have granted a special use permit to Loon Corp. without ensuring that Loon Corp. obtain the NPDES permit."

Neither may the Nantahala National Forest excuse itself for damage caused by its own policy decision. It would be inapposite to accept a we didn't know defense after all the time and money expended in preparing the overhyped visitor capacity analysis—which has proven to be meaningless in protecting the riparian corridor and trout buffer.

The United States Environmental Protection Agency has offered the following summary of **how certain discrete and non-discretionary duties apply to Federal facilities:**

> Under CWA § 301 [e.g. 33 U.S.C. §1311 Effluent Limitations], it is unlawful for any person to discharge any pollutant into waters of the United States without authorization under specific provisions of the CWA, including § 402 (NPDES) and § 404 (discharge of dredged or fill material). While the definition of "person" § 502(5)) does not include the United States, pursuant to § 313, federal agencies are required to comply with all Federal and State requirements respecting the control and abatement of water pollution. [30]

The construction and continuing use of creek boating infrastructure displaces soils lying within the trout buffer and discharges them into the creek as pollutants. Such discharges are unlawful unless the discharge has been authorized under the terms and conditions of either an individual NPDES or general NPDES permit. Issuance of individual NPDES or general NPDES permits [31] are conditioned on the permittee complying with the antidegradation protections owed to Outstanding Resource Waters.

A discharger into the Chattooga must obtain a Certificate of Coverage after submitting a Notice of Intent to the state of North Carolina. This did not occur: "NCDENR's *Basinwide Management System* (BIMS), has no record of issuing to the United States Forest Service (USFS) either an individual NPDES permit, or a General Permit *Certificate of Coverage* for discharge to surface waters of the state."[32]

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[30] "Each department, agency, or instrumentality of the Federal Government possessing the following rights and/or authorities…Having jurisdiction over any facility...Engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall be subject to, and comply with, all Federal, State, interstate, and local requirements and administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner as any nongovernmental entity." …The preceding sentence shall apply… [t]o any requirement whether substantive or procedural, (including any recordkeeping or reporting requirement respecting permits and any other requirement whatsoever)… [t]o the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State or local courts in any other manner."Quoted from the US EPA website page last downloaded and snapshotted on 09/30/2017 from https://www.epa.gov/enforcement/clean-water-act-cwa-and-federal-facilities , otherwise indexed as document N-18 for this administrative record.

[31] North Carolina issues general NPDES permits for (1)non-contact cooling water discharges, (2) petroleum groundwater remediation (3)sand dredging (4)seafood packaging, and (5) discharges from single family residences.

[32] October 26, 2017 Written Statement of Joe Corporon, NCDENR (otherwise indexed for the administrative record as document N-25).

In 2007, the physical condition of the Chattooga's entire 57 mile riparian corridor was inventoried. [33] Conditions on North Carolina's headwaters' remained near natural and pristine — just as the Chief of the Forest Service had described them in 1976.[34]

This changed after the introduction of creek boating on December 1, 2012. Creek boats being *seal launched* into a river can cause a fragile river bank *to collapse*, creating point sources of pollution (See Boater Created Erosion Sites B-5 (@ approximately 35.047649, -83.120699) & B-5-B (@ approximately 35.047640, -83.120714)).[35] See Boater Created Erosion Site B-5.

[33] See documents previously submitted to the Nantahala Forest and indexed as docs B-4 and B-4-B, B-5, B-6,.B-7, B-8, B-9,B-10,B-11,B-12, B-13, B-14, B-15, B-16, B-17,B-18, B-19, B-20, B-21, B-22, B-23, B-24, B-25. B-26.

[34] See document 00-A which contains Chief McGuire's assessment of the Chattooga's original condition in 1976.

[35] Neither the point source of pollution at B-5 nor B-5-B existed prior to December 2012. Both appeared after paddling began. Boater Created Erosion sites B-5 and B-5-B constitute paddler seal launch sites that were created by paddlers within just a few feet of each other. B-5 was the first of those two conjoined seal launch sites to evidence intense damage of the trout buffer. According to the Forest Service's permit counts only a few paddlers supposedly floated this section over the first four paddling seasons. Nevertheless, this numerically infrequent use was sufficiently intense enough to cause the bank to collapse. Not to be discouraged after causing the collapse of the bank at B-5, paddlers simply moved a few feet down the trail and excavated the second seal launch site B-5-B. The earliest photos of B-5-B evidence that it was hand dug with a shovel, etc. to facilitate the repetitive *seal launching* of boats across the top of the bank and across a rock ledge into the creek.

The USFS *never bothered to obtain the proper permitting* to avoid liability for such chronic sources of unlawful discharges *to the surface waters of the state.*[36] After causing the bank to collapse from "seal launching" at B-5, paddlers simply moved several feet further down the Chattooga River trail. At this second spot, paddlers *excavated a narrow trench,* the width of a kayak, into the top of the riverbank, creating point source B-5-B. See the following photos of Boater Created Erosion Site B-5-B taken on September 25, 2015 and September 7, 2015.

The left photograph was taken standing at Boater Created Erosion Site B-5 looking towards B-5-B. The second and third photos look down through the *trench* dug out to create a seal launch site.

[36] See the document indexed as "N-25" which consists of email dated October 26, 2017 from Mr. Joe Corporon, NCDEQ/DWR/NPDES Permitting, North Carolina Department of Environmental Quality (italics added).

As demonstrated by the earliest photos, Boater Created Erosion Site B-5-B *originally evidenced* a *geometric squared and shaped ditch* having the width of an average kayak or canoe. Given the discrete squared sides of this ditch, there can be little doubt that some kind of digging tool—like a shovel—was used initially to create this cut through the top of the river bank.

Other photographs provide the context for why this ditch was dug in this particular location. Creek boaters needed to bypass a large strainer log lying just upstream from where both Boater Created Erosion Site B-5 and B-5-B were constructed. See the compilation of photos at 00-N which was emailed to Forest Supervisor Nicholas and placed into the USFS administrative record on July 28, 2017 @3:37 PM.

33 USC §1362(14) defines a "point source" as "*any* discernible, confined and discrete conveyance including but not limited to any pipe, *ditch, channel,* …conduit…from which pollutants are or may be discharged." The Supreme Court has interpreted the term "any" as being broad and all-encompassing. *United States v. Williams*, 514 U.S. 527, 531-32 (1995) (broadly construing the word "any" in tax refund statute)."The touchstone of the [Clean Water Act] regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste, with the quantity and quality of the discharge regulated. The concept of a point source was designed to further this scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter waters of the United States." *Dague v City of Burlington,* 935 F.2d 1343, 1354-1355 (2d Cir.1991)(quoting *United States v. Earth Sciences, Inc*., 599 F.2d 368, 373 (10th Cir.1979)).

Boater Created Erosion Site B-5-B constitutes the quintessential case of a point source.

"In *United States v. Ottati & Goss, Inc.*, 630 F.Supp. 1361 (D.N.H.1985), the court held that waste materials which collected in a ditch and from there entered a brook and ultimately entered navigable waters violated § 1311(a)." *Dague v City of Burlington* at 1355.

In the Chattooga's case, the previously almost pristine condition of North Carolina's trout buffer has at minimum been *not insignificantly* degraded—if not significantly degraded. However, the Clean Water Act makes no distinction between significant discharges, not insignificant discharges, or de minimis discharges of pollutants. *Dubois v US Dept. Agriculture*, 102 F.3d 1273, 1299 (1st Cir. 1996). All must obtain an appropriate NPDES permit—if the pollutant is discharged from a "point source." See also *Sierra Club v. Abston Constr. Co*., 620 F.2d 41, 47 (5th Cir.1980) (collection and channeling of run-off constitutes a point source).

Unfortunately, *at high flows*, creek boaters must *seal launch* into this narrow and steeply entrenched creek. The bottom of the kayak being pushed across the river bank causes the *mechanical displacement* of the trout buffer's soils and the creation of chronic point sources of pollution. Intermittingly (during rain and high water events) *these point sources channel* displaced soils from the trout buffer and sedimentation suspended in run off into the Chattooga. Because these boater created point sources continue to channel additional sediment into the Chattooga's waters, these discharges do not constitute wholly past violations—*Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield*, Ltd., 844 F.2d 170, 171-72 (4th Cir.1988)

("Gwaltney II"). See also *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 694 (4th Cir.1989) ("Gwaltney III").

Boater Created Erosion Site B-5 is visible in the foreground on March 25, 2016 (during the creek boating season). All ground cover now denuded and point source of pollution remains unaddressed.

Prior to the introduction of creek boating in December 2012, this specific location on the Chattooga River Trail remained undisturbed despite its location within the fragile trout buffer and despite the presence of highly erosive soils. For many years prior to the introduction of creek boating, this trail had been shared by hikers, naturalists, and anglers—without ever creating such an erosion site.

This circumstance alone demonstrates why allowing creek boating on North Carolina's headwaters constitutes a recreational use that is simply incompatible with protecting and preserving the *"outstanding"* quality of the Chattooga's trout habitat and the *outstanding* quality of its rainbow, brown, and brook trout fisheries.

To promote creek boating on the narrow and steeply entrenched Chattooga is to endorse the violation of the Clean Water Act.

See the photographs below which evidence how these creek boater constructed point sources of pollutants have significantly deteriorated over time.

The photograph above was taken on March 25, 2016 while standing at Boater Created Erosion Site B-5, and looking down the Chattooga River Trail at Boater Created Erosion Site B-5-B. Notice how all the ground cover, briars, etc., which were present in the photos taken on September 25, 2015, have now been entirely denuded during the course of the December 2015 to April 2016 paddling season. It looks like elephants have been using the trail and the area around the trail.

The Forest Service has unnecessarily but intentionally catered to the demands of a *single* recreational activity, creek boating, which the Fourth Circuit has ruled has no entitlement to special treatment.[37] The Forest Service has done so by entirely ignoring the creation of these point sources that are channeling pollutants into a very special body of water. This explains this Notice of Intent to Sue.

A more extensive compilation of creek boater caused damage has been shared with the Forest Service, most recently as a document indexed for this administrative record as 00-N. Document 00-N is hereby incorporated by reference.

[37] *American Whitewater v Tidwell*, 770 F. 3d 1108 (4th Cir. 2014)

See the additional photo shown below that demonstrates how the Forest Service has done nothing to abate this problem.

Taken on March 25, 2016, this photo looks back up the Chattooga River Trail, with Boater Created Erosion Site B-5-B *in the foreground,* and Boater Created Erosion Site B-5 *in the background*. The wooden hiking staff marks the location of Boater Created Erosion Site B-5-B. B-5-B has become much larger and deeper since September 2015— one creek boating season and six months later. Bedrock has been exposed. Consequently, there is no way to prevent sediment from being channeled across that bedrock and into the creek.

A point source discharge includes "surface runoff which is collected or channeled by man." See e.g., *North Carolina Shellfish Growers Ass'n v. Holly Ridges Associates*, 278 F. Supp. 2d 654, 679-80 (E.D.N.C. 2003) (finding failed sediment traps, ditches, gullies and rills to be point sources); *United States v. Law*, 979 F.2d 977, 980 (4th Cir. 1992) (finding section 402 applicable to system collecting polluted runoff and channeling it to water of the United States); *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994) (finding 402 permit required for polluted runoff that was channeled by natural depression into nearby ditch which discharged to stream).

Prior to creek boating, this exact spot on the Chattooga River Trail had remained undisturbed for over a decade despite being heavily hiked upon by a myriad of non-creek boating users. In

addition, because of inadequate policing and enforcement, the area suffers additionally from side trails created by creek boaters which have no sediment control structures and which channel additional sediments via run off into the Chattooga's Outstanding Resource Waters. The photo below, taken on March 25, 2016, evidences the degraded condition of B-5-B, where kayaks are being launched across the rock shelf. *Notice how this trench appears wider and deeper compared to earlier photographs taken in September 2015.* Sediment is being channeled into the creek.

The Chattooga constitutes 1 of 3 out of over 12,000 bodies of water to carry Class B, Trout, Outstanding Resource Waters water quality classifications plus a National Wild and Scenic River designation. The other two rivers are the Horsepasture and Wilson Creek.

Among this select group, *the Chattooga is further distinguished* because the state of North Carolina explicitly reclassified the stream to ORW in order to provide the highest intensity of antidegradation protection to the administratively memorialized once outstanding trout habitat and once outstanding naturally reproducing rainbow, brown, and brook trout fisheries. *In other words, if ever there was a trout stream that the Clean Water Act was intended to protect, the Chattooga constitutes that stream.*

Unfortunately, the Forest Service stands in violation of Section 301 because it has neither obtained an individual NPDES nor general NPDES permit before approving and endorsing the creation of these point sources where soils displaced from the trout buffer are systematically

being channeled back into the creek. *Most problematic of all an appropriate antidegradation assessment of the trout habitat and fisheries has never been undertaken.*

C. The USFS Violates Sections 404 & 401 of the Clean Water Act

Federal agencies are subject to Section 404 regulation when they initiate actions that will cause the *discharge of fill* into a body of water. Section 401(a)(1) of the Clean Water Act (CWA) requires that a state certify that any such discharge subject to a federal licensing requirement must comply with all applicable water quality standards. 33 U.S.C. § 1341(a)(1)

The USFS stands in violation of Section 404 because it failed to obtain written authorization to discharge fill into the waters of the Chattooga before it began endorsing creek boaters' construction and use of a crazy quilt of recreational infrastructure inside the Chattooga's fragile 25 foot wide trout buffer.

The *systematic* construction and use of boat launch sites, river evacuation points, and portage trails inside the trout buffer has caused and *intermittently* continues to cause the displacement of soils and the subsequent discharge of such displaced soils into the creek below the ordinary high water mark.

The definition of "fill" has been defined at 33 CFR Part 323 by the Department of the Army, Corps of Engineers ("Corps"). The Corps has primary responsibility for overseeing the issuance of permits allowing "*fill"* to be placed into the waters of the United States of America. See 67 FR 31129, Thursday, May 9, 2002:

> Today's final rule defines ''fill material'' in both the Corps' and EPA's regulations as material placed in waters of the U.S. where the material has the effect of either replacing any portion of a water of the United States with dry land or changing the bottom elevation of any portion of a water. The examples of ''fill material'' identified in today's rule include rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in waters of the U.S. This rule retains the effects-based approach of the April 2000 proposal and reflects the approach in EPA's longstanding regulations.[38]
>
> In contrast to the Section 402 NPDES permitting program which focuses on "the effects of discharges …on water quality …and whether the discharge will adversely affect …the biological integrity"[39] of the designated uses of that water quality, the Section 404 program "has a broader focus on effects of the discharge *on the aquatic ecosystem as a whole*…. It requires evaluation of alternatives to the

[38] *Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material"*, 67 FR 31129, May 9, 2002 (otherwise indexed for this administrative record as document "N-26")

[39] *Controversies over Redefining "Fill Material" Under the Clean Water Act*, C. Copeland, Congressional Research Service Report for Congress, August 21, 2013 at p. 2. (otherwise indexed as document "N-27")

> discharge and of measures to minimize and compensate for unavoidable adverse effects. Discharges that would have significant adverse effects on aquatic ecosystems are not allowed, and *discharges also are not allowed if there are practicable alternatives with less adverse effects on the aquatic ecosystem.* The standard for issuance of a 404 permit is consideration of the full public interest *by balancing the favorable impacts against the detrimental impacts of a proposed* activity to reflect the national concerns for both the protection and utilization of important resources.[40]
>
> "The determination of what is 'fill material' is important, since fill material is subject to 404 permit requirements, while discharge of non-fill material is subject to [Section 402] NPDES permit requirements." [41]

The promulgation of 33 CFR Part 323 (67 FR 31129, May 9, 2002) established a common definition for the meaning of "fill material." This final rule did away with the *purposed based* definition of "fill material" previously applied by the Corps. Instead the EPA's *effects based* definition of "fill material" was adopted. The regulation now states:

> [T]he term fill material means material placed in waters of the United States where the material has the effect of:
>
> (i) Replacing any portion of a water of the United States with dry land; or
> (ii) Changing the bottom elevation of any portion of a water of the United States.[42]

"The examples of 'fill material' identified…include rock, sand, soil…construction debris…or *other excavation activities, and materials* used to create *any…infrastructure* in waters of the U.S."[43]

The Chattooga's unregulated boat launch sites constitute *infrastructure*.

The reference to "*any…infrastructure*" was specifically added to the regulation when the Final rule was published on May 9, 2002 *to provide further clarification* about what types of activities are regulated under Section 404. The key is whether the "discharge of fill material" *will have the effect* of either replacing any portion of a water of the United States with dry land *or changing the bottom elevation of any portion of a water*. Similarly, there are a series of specific exemptions that define what does not constitute "fill material."

A citizen plaintiff need not specify the precise amount of fill that the violator has discharged into the waters causing a reduction in the depth of the water. If the citizen plaintiff can show that the violators' discharge of any material fits the broad definition of "fill" (*any discharge of materials*

[40] Id. at page 2.

[41] Id. at page 3.

[42] 33 CFR §323.2 Definitions

[43] N-26 at page 31130

that changes the bottom elevation of the stream bed) or that isn't specifically one of the categories of discharge that are exempted from being regulated by Section 404, the citizen plaintiff has a justiciable controversy.

In the case of the Chattooga, the discharge of fill occurs as a consequence of the construction and use of recreational infrastructure that creek boating has to have in order to be pursued on this narrow and steeply entrenched creek. The construction of creek boat launching sites, evacuation points, and portage trails inside the trout buffer necessitates a discharge of "fill" materials (soils displaced from the river bank) into the water. *The mechanical friction of the bottom of a creek boat being seal launched into the stream displaces soils lying within the Chattooga's protected trout buffer and causes those displaced soils to be pushed or dragged into the water—analogous to a plow blade.*

The chronic and systematic discharge of "fill" that results from the construction and continued use of *unsustainable* creek boating infrastructure in and around the waters of the US stands separate and apart from the discharge of "dredged material." Only the discharge of "dredged material" might be excused under the "incidental fallback" exception which courts have interpreted as narrowly applying to the "situation in which material is removed from the waters of the United States and a small portion of it happens to fall back" into the water.

The precise volume of soils that gets displaced from the banks of the protected trout buffer and discharged into the water as "fill" is neither determinative nor subject to being excused under the "incidental fallback" exception to the discharge of "dredged material."

There is no doubt that the construction of a boat launch site involving the placement of concrete into the water would require a Section 404 permit. Although concrete is not specifically defined as fill material, clearly, the placement of concrete fits within the expansive definition of "*other excavation activities, and materials* used to create *any…infrastructure* in waters of the U.S." 33 CFR §323.2 (e)(2). Similarly, there is no less degrading impact when a boat launch is built by displacing living vegetation and soils lying inside the Chattooga's ORW trout buffer

Neither the amount nor the type of material *being discharged* is dispositive for triggering Section 404 and 401 compliance. The effects based approach compels compliance with Section 404 and 401 if the discharge of *any* fill material has the effect of changing the bottom elevation of a water body for any purpose—by any amount.

1) The Forest Service Must Be Equitably Estopped From Denying That Section 404 Applies to the Creation of Creek Boating Infrastructure on the Chattooga

The Forest Service understands creating whitewater paddling infrastructure compels compliance with Sections 404 and 401 of the Clean Water Act. This claim is corroborated by how the Forest Service behaved with respect to the Cheoah River in September 2014. Nevertheless, the USFS has ignored the law when it comes to constructing creek boating infrastructure and managing the discharge of "fill" materials into the ORW Chattooga. The negative effects on trout from any discharge of fill materials into the water is the same on both rivers and yet the Forest Service has treated one stream entirely differently than the other.

This must be estopped. The fact is the Chattooga's ORW headwaters are entitled to a much greater intensity of antidegradation protection than the non-ORW Cheoah River.

2) How the Forest Service Addressed the Cheoah River Should Be Referenced to Compel Enforcement of Section 404 on the Chattooga River

On September 22, 2014, the National Forests in North Carolina filed a Pre-construction Notification ("PCN") and a $ 240 processing fee with North Carolina's 401 and Buffer Permitting Unit in connection with constructing a new whitewater access facility at mile 2.3 of the Cheoah River (35.43335, -83.912262), on the Cheoah District of the Nantahala National Forest, in Graham County, North Carolina.[44]

Although buried in the application, the Forest Service nevertheless candidly admitted the primary purpose of undertaking this project was to prevent further damage from being done to the banks of this river and water quality because of whitewater paddling activities, etc. during releases of water from Santeetlah Dam.

> "Currently the Brookfield Smoky Mountain Hydropower releases down the Cheoah River flow events totally [sic] [totaling] 20 days of varying flow releases. *The increased flow brings in recreation users* [whitewater paddlers] *from all over the world for a unique recreation experience,* The existing access area is unsafe and does not provide adequate access to recreation users. *Access is always eroding and movement of sediment into the stream channel is very likely during any rain event."* [45]

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[44] See the PCN and supporting documents prepared and submitted by the Nantahala Forest on September 22, 2014, otherwise indexed for the purposes of this administrative record as Floyd document "N-17 Cheoah River Mile 2.3 Access 404 Permit etc."

[45] Id. document N-17(italics added); quotation taken from page 3 of 11 of the PCN form application.

This statement implicates how the USFS devotes a disproportionate amount of limited budget resources to accommodating whitewater paddling access concerns in lieu of devoting those resources to other discrete and nondiscretionary needs like monitoring the degrading condition of the trout habitat and trout fisheries on streams like the Chattooga—or in lieu of enforcing the existing LRMP which does not allow the pursuit of recreational uses which cause visible sediments to be channeled into a trout stream.

On those occasions when the USFS has gotten involved in catering to the demands of the whitewater paddling lobbyists, you find the Forest Service using hyperbole like "unique recreation experience" to try to ward off any challenges to the reasonableness and defensibility of its actions.

The Cheoah PCN evidences how the USFS uses such broad generalizations instead of narrow descriptions to frame the purpose for this Section 404 permit application in a way, that while perhaps literally accurate, does not truly disclose the primary narrow purpose for the project.

Here the Forest Service pushes an unsupported narrative to justify asking for a Section 404 permit as follows: "The increase flow brings in recreation users from all over the world for a unique recreation experience."

Who are these "recreation users", what are they doing, and why is the experience supposedly "unique'? The Forest Service never explains.

In 2014, the USFS sold a false narrative that endeavored to minimize the damage done by whitewater paddlers to the Cheoah—and in particular to the 25 foot wide trout buffer. In its application for a Section 404 permit, the Forest Service marginalized the disproportionate impacts caused by whitewater enthusiasts by asserting that other recreational uses were also responsible for the damage:

> River mile 2.3 is a popular resting area and access area for boaters thus serving as a stopping point along the Cheoah River for rafters and fisherman. The existing access area is steep and does not provide adequate access for users The stream bank at this location is constructed out of adjacent road fill from US 129 and the blasted rock fill provides an unsafe egress for recreation users. Stream banks are eroding due to concentrated user paths along this corridor from both rafting recreation and fisherman use. Document N-17 at page 3 of 11.[46]

This claim that everybody is responsible distracts the public from recognizing the *disproportionate damage* that has been *mechanically caused by whitewater kayaks, canoes, and rafts*—compared to the shoes of other consumers of the river resource. Through this editorial characterization the USFS deflects complaints about the damage being done by whitewater paddling while hoisting an administrative shield intended to minimize any need to determine if "alternatives to a discharge of [fill materials] are 'practicable' within the meaning of the section 404(b)(1) Guidelines."[47] *With respect to the Cheoah's Section 404 permit, the USFS never considered the no use alternative when weighing the costs/benefits as would be typically required by a Section 401 water quality certification analysis.*

From 2005 to 2014 the Forest Service entirely ignored the physical destruction of the Cheoah's trout buffer caused by hundreds of whitewater enthusiasts showing up at the same time to take advantage of the dam releases. The USFS simply ignored how point sources of pollution were being created during these extremely high flows of released water.

While the Santeelah dam is compelled to release water, there is no legal right to paddle—the Fourth Circuit has already made this clear in the context of the Chattooga and the National Wild and Scenic Rivers Act. More narrowly, the restrictive directives of the Clean Water Act specifically prohibit the creation of point sources of pollution and the discharge of fill into Outstanding Resource Waters—unless properly permitted.

The USFS fictions that whitewater kayaking during flow releases on the Cheoah is so "*unique in recreation experience*" that this somehow offsets the damage being caused to the riparian buffer by this unique recreational experience. It is especially troubling that the Forest Service accepted identical claims of *uniqueness of boating experience* to endorse and to excuse creek boater caused discharge of soils displaced from the trout buffer into the ORW headwaters of the Chattooga

[46] See document N-17; quotation taken from page 3 of 11 of the PCN form application.

[47] *Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material"*, 67 FR 31129, 31133, May 9, 2002.

The reality is the USFS looked the other way when paddlers began to degrade the Cheoah river resource after releases from the dam commenced in 2005. This can be seen by simply flying over the river using GoogleEarth imagery at that prior point in time.

By October 2008, somebody carved a crude boat launch site out of the previously forested riparian area on the river left bank just below the dam (at approximately 35.382243, -83.877642). At that point in time, other than this one boat launch site, the USFS left paddlers free to come and go wherever they wanted to scramble up and down the steep bank that separated Highway 129 from the Cheoah—*without regard for any damage that they might do to the trout buffer immediately adjacent to the water*. It was this laissez faire approach to management that allowed these paddling activities to denude the riparian buffer of its living plant tissue. The USFS was forced to admit in 2014: "*Access is always eroding and movement of sediment into the stream channel is very likely during any rain event.*" [48]

Nevertheless, the USFS tried to minimize the damage done by boaters.

> The existing access area is steep and does not provide adequate access for users. The stream bank at this location is constructed out of adjacent road fill from US 129 and the blasted rock fill provides an unsafe egress for recreation users. Stream banks are eroding due to concentrated user paths along this corridor from both rafting recreation and fisherman use."

Document N-17 at page 3 of 11.This *carefully parsed but not fully accurate* choice of words further evidences the persistent pattern and practice of concealed accommodation of whitewater interests and the lax enforcement of the Nantahala's own rules set forth in the existing LRMP. As GoogleEarth imagery reveals, prior to the releases of whitewater, the immediate riparian corridor was densely packed jungles of green growth lying between Highway 129 and the river.

Anglers did not float this section of the Cheoah prior to the fall of 2005 for the same reason that whitewater enthusiasts didn't float the river: the water was too low for a boat to be used. Hence, the small amount of smallmouth and trout fishing that was taking place prior to the fall of 2005 was pursued by wading. Similarly, anglers who wade are not present when the water is being released at 1,000 cfs because they don't want to drown.

Stated differently, the purpose for building the Mile 2.3 boat ramp was *to mitigate past and future Clean Water Act violations* caused by whitewater kayaking— when flow releases from the dam exceed 1000 cubic feet per second—not to prevent damage by anglers or swimmers, or waders.

Prior to obtaining this Section 404 permit, the Forest Service's nine year look the other way approach *evidences its willingness to ignore* its own interpretation of the LRMP Standard prohibiting *visible sediments from being channeled into a body of water*—for the benefit of paddlers.

[48] See document N-17; quotation taken from page 3 of 11 of the PCN form application

To press the point, in September 2009, the USFS issued an unambiguous ruling: "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*."[49]

This ruling was issued in response to an off road vehicle enthusiast who asked for an interpretive ruling about the Tellico River: "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?"[50]

Unfortunately, from 2009 to 2014 the USFS did not honor this same interpretation of the visible sediment rule with respect to damage being caused on the Cheoah by whitewater paddling activities.

Neither has the USFS enforced this no visible sediment rule on the Chattooga's headwaters after January 2012.

The Forest Service never inventoried the physical condition of the trout buffer or the wider riparian corridor before dam releases commenced on the Cheoah in the fall of 2005. Prior to that point in time, the Cheoah was essentially dewatered except during an unusual rain event. Hence, the river was only infrequently run by whitewater enthusiasts and then in only small numbers. When the dam is not releasing water, the downstream flow is usually less than 100 cubic feet per second.

Subsequent to water releases from Santeelah Dam, the number of whitewater enthusiasts that showed up to float the river exceeded the capacity of the river's immediate riparian buffer to absorb this dramatic increase in physical wear and tear. The boat launching and river evacuation, and portaging activities of large numbers (hundreds) of boaters, wanting to gain access or evacuation from the river, at the same time, at the same place, quickly denuded the river bank of its plant life while creating point sources of pollution that allow sediments to be channeled into the river. At mile 2.3 mile the bank became seriously damaged by the simultaneous presence of hundreds of paddlers scrambling to get in or out of the river.

American Whitewater's website details a hypothetical trip down the Cheoah River. This website contains a photograph that demonstrates the gathering of dozens (maybe hundreds) of kayakers

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[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. *Upper Tellico Decision Response* at page 9.

at a single spot on the Cheoah at the same time.[51] Such photos evidence how the river bank becomes denuded of any live plant cover as a direct consequence of whitewater paddlers pursuing their sport within the Cheoah's trout buffer.

Similarly, American Whitewater's website admits that the upper most 1.5 mile segment of the Cheoah constitutes a "brushy and tree-clogged…section with a number of sticky holes and a potentially troublesome river-wide ledge downstream of the hydroelectric bypass pipe…"[52]

American Whitewater website also reports "Efforts have been made to clear channels in the upper sections of the river, however there are large root balls scattered throughout the stream bed and [paddlers] should be extremely careful."[53] Without regard for any negative impacts on the habitat of the stream's smallmouth bass or trout populations, this influential paddling website *does not condemn the removal of large woody debris blocking the channel.*

Similarly, another paddler website suggests: "If more of the trees and brush were removed, the upper run would almost certainly get easier at every level as paddlers wouldn't be forced to run through the meat of the holes and the entrapment danger would be lower."[54]

The implications of such statements are clear: They clearly express an implicit approval of somebody/anybody taking it upon themselves to cut out the large woody debris etc to free the channels of such obstructions. They implicitly endorse modifying the condition of the stream's habitat for the purpose of accommodating the needs of a single recreational user group—regardless of the impacts on the smallmouth or trout fisheries or other aquatic life uses.

Similarly, one of these websites offers a tacit endorsement of paddlers scrambling up and down the riverbank at whatever location they desire in order to scout the river or to put on or to take off of the river. "It is noteworthy that while much of the middle and lower Cheoah is visible from the road, much of the upper Cheoah is not due to the dense vegetation lining its banks and the greater distance between the river and the road. At higher levels get out of your car and *bushwack t*hrough the brush to get a look at what's up before deciding to put on!"[55]

This recommendation to "*bushwack*" constitutes a candid admission of a standard operating procedure of creek boating. Of necessity, creek boaters "bushwack" to saw out and remove plants and shrubs, etc. that inconvenience their ingress and egress to the water. *Creek boaters bushwacking is what lead to the crazy quilt of boater created trails within the trout buffer that now exists on the Chattooga*. This is why creek boating does not constitute a sport that can be sustained on the most fragile river resources like the Chattooga.

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[51] See the Cheoah River description set forth on the American Whitewater website page at https://www.americanwhitewater.org/content/River/detail/id/3146 last snapshotted on October 8, 2017.

[52] Id.

[53] Id.

[54] See the website page at http://boatingbeta.com/runs/cheoah.htm which was snapshotted on October 8, 2017.

[55] Id.

Unfortunately, none of these admission about unauthorized paddler efforts to alter the river were revealed in the Forest Service's Section 404 permit application.

This is why the recreational use management of the Chattooga's headwaters must be reconsidered before issuing a new LRMP. There are numerous other streams where paddling can be pursued without violating the ORW antidegradation mandate that applies to the Chattooga. This truth has been ignored. Instead, the USFS has repeatedly evidenced its willingness to ignore enforcing any rules pertaining to creek boating on the Chattooga—or on any other stream in the Nantahala National Forest.

D. The USFS Violates the Antidegradation Mandate of the Clean Water Act

The Clean Water Act requires federal agencies "engaged in any activity resulting, or which may result, in the discharge of runoff of pollutants" to comply with North Carolina's water quality standards and procedures. 33 U.S.C. § 1323. This includes the obligation to comply with the antidegradation mandate spelled out at 40 C.F.R. §131.12(a)(3) for Outstanding National Resource Waters, which North Carolina has incorporated by reference in its regulations at 15A NCAC 02B.0201 and 15A NCAC 02B.0225(b)(1).

The following factors "are considered when adopting or evaluating a water quality standard: (1) one or more designated uses of the state waters involved; (2) certain water quality criteria, expressed as numeric pollutant concentration levels or narrative statements representing a quality of water that supports a particular designated use; and (3) an anti-degradation policy to protect existing uses and high quality waters." *Natural Resources Defense Council, Inc. v US EPA*, 16 F. 3d 1395, 1400 (4th Cir. 1993).

1) **The Suitability of the Chattooga's Stream Bed Substrates Must Not Be Allowed To Degrade Below An "Outstanding" Level of Quality in Terms of Satisfying the Reproductive and Early Life Cycle Needs of Trout. Similarly, the Abundance of the Chattooga's Rainbow, Brook, and Brown Trout Fisheries Must Be Preserved In A Measurably "Outstanding" Quantity.**

Both the Chattooga's trout habitat and its rainbow, brown and brook trout fisheries were *administratively defined* as being of *"outstanding"* quality by the state of North Carolina when it reclassified this stream as Outstanding Resource Waters ("ORW") in 1989. Outstanding Resource Waters constitute "unique and special waters of exceptional state or national recreational or ecological significance *which require special protection to maintain existing uses."* 15A NCAC 02B.0101e)(4)(italics added). In the case of the Chattooga, the state of North Carolina administratively guaranteed special protection for the stream's *outstanding* trout habitat and its *outstanding* rainbow, brown and brook trout fisheries—as a much narrower designated use of ORW water quality than providing protection for the broader aquatic life use.

This constitutes a critical distinction that has been intentionally ignored by the United States Forest Service and the state of North Carolina. "The water quality of waters classified as ORW shall be maintained such that existing uses, including the outstanding resource values of said Outstanding Resource Waters, shall be maintained and protected." 15A NCAC 02B.0201(e).

North Carolina conferred this intense antidegradation protection on the Chattooga's trout habitat and rainbow, brown, and brook trout fisheries *in response* to a petition submitted by the Rabun County, Georgia, Chapter of Trout Unlimited. See document "N-22 1987 Rabun TU ORW".

a) **Why Protecting the Administratively Recognized Outstanding Trout Habitat and Outstanding Trout Fisheries Constitute the Specifically Cited Subcategories of Use of the Chattooga's ORW Water Quality.**

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

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

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

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

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

Unfortunately, this EPA mandate to provide strict antidegradation protection to such subcategories of ORW water quality use have been ignored by the United States Forest Service.

For more than a decade, with respect to the Chattooga's headwaters in North Carolina, the USFS has simply ignored its discrete and nondiscretionary obligations under the Clean Water Act, the National Wild and Scenic Rivers Act, and other federal and state statutes and regulations. The Forest Service has also ignored the Nantahala's existing LRMP rules prohibiting visible sediment from being channeled into forest streams as a consequence of human activities.

The plain meaning of North Carolina's regulations is that the Chattooga's trout habitat and trout fisheries must be sustained at an "outstanding" level of quality as measured by comparing typical trout population metrics on the Chattooga to those on an undisturbed reference condition trout stream.

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

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

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

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

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

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

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

The first of these five qualifying outstanding resource values defines a subcategory of water quality use. The shared modifier "*outstanding*" defines the superlative quality of *fish* habitat and the numeric abundance of the associated fisheries that a stream must possess for ORW classification. This subcategory of use is based on "*innate differences …in…species…productivity"* which distinguishes certain waters "into smaller, more homogenous groups *for the purposes of reducing variability* within the group." *2015 WQS Revisions* at 51024)(otherwise indexed as Floyd document 00-J-2).

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

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

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

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

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

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

The Chattooga was reclassified ORW based on this *"outstanding"* subcategory of ORW water quality use.

To press the point, the 1987 ORW petition was submitted by Rabun TU to secure stringent antidegradation protection for the river's exceptional ("outstanding") trout habitat and trout fisheries. This petition has been indexed as document N-22. The significance of that administrative action must not be minimized because ORW designation *has not* been indiscriminately handed out to every trout stream in North Carolina. In fact, there are just 39 Class B, Trout, ORW streams in North Carolina.

Out of those 39 streams, only the Chattooga appears to have been reclassified ORW based *explicitly on the* recognition of "an outstanding native trout habitat and fisheries including eastern brook, rainbow, and brown trout." *Report of Proceedings For the Proposed Reclassification of Fires Creek In The Hiawassee River Basin (Cherokee County), Cataloochee Creek In The French Broad River Basin (Haywood County), Upper South Fork Mills River In The French Broad River Basin (Henderson And Transylvania Counties), Wilson Creek In The Catawba River Basin (Avery And Caldwell Counties), Elk Creek In The Yadkin-Pee Dee River Basin (Watauga And Wilkes Counties), Upper Nantahala River In The Little Tennessee River Basin And Savannah River Drainage Area (Macon And Clay Counties), And Chattooga River In The Little Tennessee River Basin And Savannah River Drainage Area (Macon And Jackson Counties),* North Carolina Department of Natural Resources And Community Development, Division of Environmental Management, Public Hearings, August 1-4 1988 at page S-8 (the

"*1988 Report of Proceedings*") (originally provided to me by the NC DEQ as "*Chattooga Classification history.pdf"* in November 2015 but otherwise indexed for the USFS administrative record as Floyd document "*A-2*").

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

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

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

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

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

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

The Clean Water Act prohibits federal agencies from promoting any human activity that would degrade the specifically designated uses of water quality assigned to streams classified as Outstanding National Resource Waters. See *PUD No. 1 of Jefferson City v Washington Dept. of Ecology,* 511 US 700, 717 (1994)(activities must comport with specific designated uses and

attributes of a particular body of water); *Pronsolino v Nastri*, 291 F. 3d 1123 (9th Cir. 2002)(the CWA is best read to include in the § 303(d)(1) listing and TMDLs requirements waters impaired only by nonpoint sources of pollution.); *Kentucky Waterways Alliance v Johnson*, 540 F. 3d 466 (6th Cir. 2008); 40 CFR § 131.12(a)(3). Pursuant to regulations implementing the Clean Water Act, promulgated by the United States Environmental Protection Agency's ("EPA"), states are required to promulgate a statewide antidegradation policy to ensure that existing in stream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected. 40 CFR § 131.12 (1993).

While Section 510 of the Clean Water Act, 33 U. S. C. § 1370 permits North Carolina to impose more stringent water quality controls, at a minimum, *state water quality standards must be sufficiently intense to achieve this EPA compelled antidegradation mandate.*

The Supreme Court has agreed with the EPA "that under its antidegradation regulation, 'no activity is allowable . . . which could partially or completely eliminate any existing use.' EPA, Questions and Answers on Antidegradation 3 (Aug. 1985). Thus, States must implement their antidegradation policy in a manner 'consistent' with existing uses of the stream." *PUD No. 1 of Jefferson City v Washington Dept. of Ecology*, 511 US 700, 718-719 (1994).

Based on the EPA's *Water Quality Standards Handbook, Chapter 4:Antidegradation*, the Forest Service must not promote any human activities which cause *any* non-temporary degradation of the Chattooga's trout habitat and trout fisheries below the administratively recognized "*outstanding"* level of quality that North Carolina fixed for these ORW headwaters in 1988/1989.

To press the point, the Chattooga's headwaters must be provided with an intensity of protection that "allows only temporary and short-term water quality degradation while maintaining existing uses…consistent with the purpose of the management of the ONRW area." EPA Handbook, Chapter 4:Antidegradation at page 12. *"[S]uch [temporary] changes in water quality should not impact existing uses or alter the essential character or special use that makes the water an ONRW."* Id. at 2. (emphasis added).

The"*EPA's view of temporary* [degradation] *is weeks and months, not years."* Id. at page 12(emphasis added).[56]

The Chattooga's excessive embedded sediment problem is neither temporary nor short term. The Forest Service has *intentionally* breached this discrete duty by undertaking a management initiative that has caused the creation of *permanent* point sources of pollution where additional sediments are being channeled into a body of water already suffering from an excessive embedded sediment problem—without appropriate permitting to do so.

[56] North Carolina's analogous provision is found at 15A NCAC 02B.0205. However, it would be inapposite to claim that North Carolina's provision excuses anything other than *"on occasion, or temporary"* violations of North Carolina's antidegradation policy simply because the source of water quality degradation might be characterized as being "*caused by natural conditions*." Such a position would vitiate the Clean Water Act's intended purpose of providing the greatest intensity of water quality protection to bodies of water classified as Outstanding National Resource Waters.

To press this neglect, the version of 36 C.F.R. §219.19(a)(6) that applied from May 2005 through the January 2012 decision that approved boating on the headwaters in North Carolina compelled the USFS to make sure: *"Population trends of the management indicator species [trout on the Chattooga] will be monitored and relationships to habitat changes determined." (italics added).*

The USFS purposely did not monitor the Chattooga's trout habitat and trout fisheries. Neither did the USFS undertake any effort to determine if the level of embeddedness exceeded any reasonable minimum effects threshold for disrupting the early life cycle of trout. See Bryce, Lomnicky & Kaufmann, *Protecting sediment-sensitive aquatic species in mountain streams through the application of biologically based streambed sediment criteria,* Journal of North American Benthological Society, 29(2):657-672(April 2010),

Having refused to quantify the baseline levels of these embedded sediments and having failed to use the *best available science* for determining if the baseline level of sediment exceeds any reasonable minimum effects threshold for disrupting the early life cycle of trout, the USFS might wish to attempt to use the Chattooga's absence from the Section 303(d) listings as a shield from liability. This would not be proper.

2) **The USFS Cannot Excuse its Neglect of the Clean Water Act's Antidegradation Mandate By Pointing Out That the Chattooga Does Not Appear As An Impaired Stream on North Carolina' Section 303(d) List.**

The USFS cannot excuse its own culpability for having created point sources of pollution and for having violated the Clean Water Act's antidegradation mandate by pointing out that the Chattooga does not appear as an impaired stream on North Carolina's 2016 Section 303(d) list.

The impermissible degradation of a subcategory of use of a stream's ORW water quality can physically occur before a stream reaches the point of being impaired. Stated otherwise, an ORW stream need not be declared impaired on a Section 303(d) list for one of its designated uses of ORW water quality to be deemed degraded. However, if a stream has been classified as impaired, the antidegradation mandate would of necessity be violated.

In addition, the administrative record for the Nantahala Forest's current LRMP planning process contains a detailed critique of why North Carolina's 2016 Section 303(d) list is flawed and incomplete.

First and foremost, NC DEQ has historically based its Section 303(d) determinations on the results of macroinvertebrate monitoring that was taking place at one site that was located miles *upstream* from where this excessive sediment was accumulating and at another site that was located miles *downstream* from where this impairment is occurring.

Stated differently, NC DEQ hasn't been studying macroinvertebrates where the excessive embedded sediment problem is most pronounced—so NC DEQ's existing data has little relevance to the specific problems being suffered on this specific segment of river.

a) The USFS Should Be Equitably Estopped From Pointing Singularly To the Results of Macroinvertebrate Studies Because of How Differently It Behaved With Respect to the Tellico River

Second, the Forest Service should be equitably estopped from denying any degradation by pointing to NC DEQ's bug studies because of how differently the USFS dealt with excessive sediments on the Tellico River.[57] Despite the fact that the Tellico River was not listed as impaired on North Carolina's Section 303(d) list, the USFS articulated an interpretive ruling that stated: "A *single location of visible sediment* reaching a stream is a violation [of the current LRMP] 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*."[58]

More importantly, the antidegradation duties imposed upon the Forest Service stand independent from any Section 303(d) impairment determination made by North Carolina. Hence, North Carolina's incomplete and flawed 2016 Section 303(d) list cannot be held up as a shield to protect the USFS from having further degraded the suitability of the stream habitat for meeting the reproductive and early life cycle needs of trout—*for having promoted the creation of new point sources of sediment input into an already overstressed stream.*

b) The USFS Must Be Estopped Because North Carolina's 2016 Section 303(d) List Does Not Utilize the Best Available Science For Recognizing When Embedded Sediments Degrade Trout Habitat and Trout Populations.

The Forest Service must not rely on reports which fail to use the best available science. When preparing the 2016 Section 303(d) list, North Carolina neither quantified the current levels and impacts of the Chattooga's excessive embedded sediments using the best available scientific methodologies, nor did North Carolina undertake to compare today's levels of embeddedness to a reference condition stream. Neither was today's embeddedness compared to the Chattooga's prior level of embeddedness. North Carolina's refusal to apply the best available scientific methodologies vitiates the integrity of relying on that Section 303(d) report as a proxy for determining whether or not the trout habitat and trout fisheries have suffered impermissible degradation.

The Forest Service knows how the1992-1996 Chattooga trout study documented unacceptably low numbers of young-of-the-year trout. The USFS also knows that this paucity of young-of-the-year trout was corroborated again in September 2016 after North Carolina electro-fished almost a mile of this stream. Just 26 young-of-the-year were caught.

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[57] Even though neither the Tellico River nor any of its tributaries were listed as impaired by North Carolina, the USFS acted to halt off road vehicles from creating point sources of pollution and from causing displaced soils from being discharged into the Tellico River. *Upper Tellico River Watershed Analysis*, USFS, Sept 2005 (document N-20-A at page 32).

[58] Id. document N-20-A at page 32 (italics added).

The USFS must not be allowed to ignore the compelling evidence of the unacceptably low numbers of young-of-the-year trout by pointing to a Section 303(d) report that never conducted any form of antidegradation assessment of the impacts of this embedded sediment on the early life cycle of trout. Instead of undertaking the continuous monitoring of the Chattooga's trout habitat and trout fisheries (as compelled by the National Forest Management Act, etc.) the Forest Service has elected to evade responsibility by claiming a right to rely on North Carolina's essentially flawed Section 303(d) assessments. *To refuse to investigate in the face of this plainly visible evidence of excessive sediment is otherwise inexplicable.*

Despite the Chattooga's apex stream classification as an Outstanding Resource Water and National Wild and Scenic River, for twenty years, from 1996 until September 2016, neither the United States Forest Service nor anybody else bothered to spend any resources on monitoring the trout habitat or trout populations.

In contrast, in less than 12 months, between May 2005 and April 2006, while working on the Chattooga's visitor capacity analysis the USFS spent over "$335,000 in contracting fees…and $425,000 in staff costs (not including travel and consultant costs." [59]

The Forest Service's refusal to spend a penny on studying the Chattooga's ORW trout habitat and trout fisheries tells it all.

It wasn't until September 2016 that the state of North Carolina agreed to conduct a trout population study—but only after I filed a formal objection contesting the completeness of North Carolina's 2016 Section 303(d) report. This September 2016 trout study of almost a mile of water failed to produce outstanding trout population metrics. This study corroborated anglers concerns about the destruction of the river's reproductive spawning habitat.

In addition to counting just 26 young-of-the-year, this study projected low standing crop weights for 7 of the 8 reaches (600 foot long) that were electro-fished.

To make matters worse, North Carolina projected these standing crops using a regression model based on the length of fish instead of weighing individual fish. This model can be shown to have an upward bias of approximately 10% when compared to another model regressed solely on data collected on a comparable stream in North Carolina.[60]

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[59] DECLARATION OF CHRIS LIGGETT**,** Document 11-1 at pages 2-3 (July 7, 2006), *American Whitewater , et al v. Dale Bosworth*, 2:06-CV-00074-WCO N. Dst. Ga (the "AW 2006 Lawsuit").

[60] This September 2016 Chattooga trout study used a regression model detailed in: *Proposed Standard Weight (Ws) Equation and Length-Categorization Standards for Stream-Dwelling Brown Trout (Salmo trutta),* Journal of Freshwater Ecology, Volume 9, Number 2, June 1994, Craig Milewski and Michael Brown, South Dakota State University, Department of Wildlife and Fisheries Sciences ("Milewski and Brown 1994").

However, an extensive Colorado fisheries study has specifically documented how Standard Weight equations (like Milewski and Brown 1994) can grossly overstate Brown trout biomass living in degraded in stream habitats:

> "Weight-length relationships provide a tool to assess the body condition of brown trout (Salmo trutta) populations inhabiting stream reaches where stressors, such as metals, have chronic, sub-lethal toxic impacts. A previously published brown trout standard-weight equation, Ws,

In contrast to what both the USFS and the state of North Carolina have tried to fiction, the fact that a limited number of naturally reproducing rainbow, brown, and brook trout continues "to persist" does not satisfy the required intensity of ORW antidegradation protection compelled by the plain meaning of the word "outstanding." The Forest Service erroneously appears to believe that something like an Endangered Species type standard should apply.

3) Neither Should the Additional Macroinvertebrate Sampling Conducted on the Chattooga's Headwaters in the Fall of 2016 Be Used To Deny How This Excessive Embeddedness Has Degraded the Suitability of the Chattooga's Streambed Habitat For Satisfying the Early Life Cycle Needs of Trout

During the fall of 2016, in addition to collecting trout population data, NC DEQ also conducted *limited* additional macroinvertebrate sampling on the Chattooga. Unfortunately, NC DEQ declined to use the *Full Scale* macroinvertebrate sampling protocol. Consequently, NC DEQ did not retain specimens of all macroinvertebrate taxa collected—both pollution tolerant and pollution intolerant bugs.

Instead, NC DEQ used the more abbreviated EPT methodology which only counts and retains pollution intolerant mayflies (Ephemeroptera, or "E"), stoneflies (Plecoptera, or "P"), and caddisflies (Trichoptera, or "T"). This study protocol allows the calculation of an EPT richness or EPT index *but does not allow the researcher to determine if there has been a shift in the numeric abundance of pollution tolerant bugs compared to pollution intolerant bugs*.

EPT **richness** or the EPT Index simply counts the total number of EPT species present in the sample, the total number of distinct taxa within the Trichoptera, Ephemeroptera, and Plecoptera groups. It does not take into account the numeric abundance of each individual species or their relative abundance distributions. For example, if five species of Ephemeroptera (mayflies), five Plecoptera (stoneflies), and two Trichoptera (caddisflies) are found at a site, the total number of EPT taxa and the EPT Index would equal 12.

> overestimated Colorado brown trout weights. Weight-length data from 16 Colorado brown trout populations (n = 9, 8 16) were used to develop a regional standard weight (Wcl) equation based on fish from waters free of metal contamination. Relative-weights (Wr) were then compared between metal-contaminated and metal-free streams in Colorado using the Wcl equation. Brown trout Wr's were lower in metal contaminated streams than in stream reaches uncontaminated by metals. The development and use of regional standard weight equations is recommended to help assess the weight of brown trout inhabiting metal-contaminated stream reaches."

Standard Weight (Ws) Equations to Assess Body Condition of Brown Trout (Salmo trutta) from Metal-Contaminated Streams, Journal of Freshwater Ecology Volume 16, 2001 Issue 4, Shannon Edward Albeke , John David Woodling & Ann Marie Widmer.

Because of the Chattooga's pronounced embedded sediment problem, the appropriateness of using this statistical methodology should have been vigorously questioned as a best scientific practice. After all, one of the presumed purposes for the study was to determine if the river's trout fishery had suffered negative impacts because of this excessive embedded sediment. Further complicating matters, if NC DEQ had applied the regressed Standard Weight formula developed specifically from Brown trout data collected on Andrews Creek (tributary to Wilson Creek), the amount of biomass projected for the Chattooga's September 2016 sampling would have been 11-13% lower.

The EPT Index can be then be compared to values associated with a reference condition stream in order to judge whether the subject stream appears to be in better condition or worse condition than the reference condition stream. The EPT Index has a positive correlation with improving water quality i.e.; there should be a greater number of EPT insect taxa in cleaner water. Ratings are tailored to account for differences in species pollution tolerance between regions.

However, NC DEQ's procedures *emphatically* caution: "Although the EPT method is a more rapid sampling technique, there are situations where the EPT may provide too little information for an adequate assessment of water quality. Such situations include…where the abundance of more tolerant groups must be assessed." *Standard Operating Procedures for the Collection and Analysis of Benthic Macroinvertebrates,* NC DEQ, February 2016 at p. 9-10(otherwise indexed as document N-21 NC DEQ SOP Bug Monitoring). Similarly, NC DEQ provides that the *Full Scale* method "should be used for all evaluations of impaired streams (those on the state 303(d) list) for which the drainage area is over 3.0 square miles." Id. at page 9. NC DEQ further provides "EPT samples are also inappropriate for sites that require a biotic index calculation (page 19)." Id. at p. 10.

In turn, NC DEQ specifies when a biotic index calculation is required

> 4.5 North Carolina Biotic Index ["NCBI"]
>
> The North Carolina Biotic Index is modeled after the Hilsenhoff Biotic Index (Hilsenhoff 1987) using tolerance values derived from BAB collection data. The Biotic Index for a sample is a weighted average of the tolerance values for the organisms identified from the sample with respect to their abundance. The Biotic Index value, scaled from 0.0 to 10.0, represents the relative tolerance of the benthic community to the presence of general stressors, with lower values indicating more pristine conditions and higher values indicating stress. A Biotic Index value may be calculated for the entire benthic community (where it is identified as NCBI or BI) or just the portion of the community represented by the insect orders Ephemeroptera, Plecoptera, and Trichoptera (identified as EPTBI). The calculation of the Biotic Index (BI) is shown in Equation 1.

Equation 1. Biotic Index

$$B = \frac{\sum(T_i)(n_i)}{N}$$

Where:

B = the Biotic Index (BI)

T_i = the Tolerance Value (TV) for the i^{th} taxon

n_i = the abundance category value (1, 3, or 10) for the i^{th} taxon

N = sum of all abundance category values

Id. at page 19.

Here, with respect to the Chattooga, despite knowing that the *Full Scale* method constitutes the preferred methodology on a stream suspected of being impaired, NC DEQ chose to use the EPT assessment methodology—which effectively surrendered away any ability to determine whether or not the Chattooga's assemblage of bugs on this extended reach of river has seen a noticeable

shift away from pollution intolerant bugs to increased numbers of pollution tolerant bugs—which would constitute evidence of degradation in the Chattooga's ORW water quality.

Curiously inconsistent, NC DEQ has in the past used the *Full Scale* methodology when studying macroinvertebrate assemblage on the Chattooga's headwaters. The EPT index does not offer the best available scientific means for assessing if there has been remarkable degradation in the bug assemblage or the underlying trout populations.

a) The USFS Must Be Equitably Estopped By What It Told A Federal Judge About the Use of Macroinvertebrate Studies on the Tellico River

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

In swearing this critical admission, the Forest Service referenced a study published in a memorandum entitled *Results of Benthic Macroinvertebrate Special Study: Upper Tellico Off-Highway Vehicle (OHV) System (LTN:04, Cherokee County, North Carolina, Monroe County, Tennessee,* Eric Fleek, Acting Supervisor, North Carolina Department of Environmental Quality, Biological Assessment Unit, August 17, 2009. ("Fleek Memo")(otherwise indexed for this record as Floyd document I-1). This referenced study was *specifically* conducted *at the request* of the Nantahala Forest. The purpose of the study was to provide scientific background for the Forest Service's decision to shut down off road vehicle trails within the riparian corridor of the Tellico River and its tributaries—due to concerns about sedimentation getting into those trout waters.

The Fleek Memo concluded that "the [macro invertebrate] data collected on the larger waterbodies sampled…showed no adverse impacts due to sedimentation and (excluding the aforementioned chironomids) were all very similar in invertebrate community structure compared to their respective reference sites. *The moderately high gradients, coupled with the large discharges and abundant, heterogenous habitat available at these locations were likely responsible for attenuating negative impacts to the invertebrate community*. This conclusion is consistent with the results of previous work (Cairns 1977, Lenat et al. 1979, NCDWQ 2008, Zhang et al 2009)." Fleek Memo, document I-1 at page 16 (italics added).

Stated differently, Mr. Fleek explained why the damage being done by excessive sedimentation on the Tellico River's trout habitat was somewhat concealed if one were to look solely at the results of the macroinvertebrate study.

Mr. Fleek's memo went on to explain: "*The lack of response in the BI and EPTBI between reference and experimental sites replicates the results of previous work which have demonstrated that biotic indexes are poor measures of sediment effects (Zweig and Rabeni 2001)*. Conversely, the negative relationship of the EPTS and EPTN in response to increased sediment *from this study's smaller streams* further reinforce the deleterious effects of sediment (Kimble and Wesche 1975, Lemly 1982, Hall et al. 1984, Minshall 1984, Hachmoller et al. 1991, Walters, 1995, Zweig and Rabeni 2001) and embeddedness (McClelland and Brusven 1980,

Griffith et al. 2002) on EPT diversity and abundance as well as on the diversity and abundance of filter-feeding caddisflies (Lemly 1982, Mackay and Walters 1986, Runde and Hellenthal 1993, Walters 1995, Strand and Merritt 1997)." Fleek Memo, document I-1, at page 16-17 (italics added for emphasis).

Nevertheless, in contrast to what the Forest Service told a federal judge in the past about the Tellico River, the Forest Service now implies that the results of bug studies conducted miles above and miles below the sediment impacted segment of the Chattooga should be viewed as dispositive justification for ignoring the degrading impacts of excessive embedded sediments on the once *outstanding* trout habitat and once *outstanding* naturally reproducing trout fisheries on the Chattooga's Outstanding Resource Waters.

The Forest Service should measure the impacts of this embedded sediment using the Bryce et al 2010 study. In fact, the Forest Service might incorporate this measurable embedded sediment metric as a discrete and nondiscretionary *Standard* for managing the Chattooga's headwaters in North Carolina—in order to restore the specifically *designated uses* of this body of water to their once *outstanding* condition.

Similarly, a basic premise of the EPA's antidegradation policy is that aquatic life uses can only be adequately protected from degradation owing to excessive embedded sediments if the calculated annual sediment load for the subject stream is abated such that it falls below the annual sediment load *for a comparable but biologically unimpacted stream*. See *Total Maximum Daily Load (TMDL) Development, For Sediment in the Stekoa Creek Watershed 303(d) Listed Stream Segment,* EPA Region 4, December 28, 2000 at page 4 (the "Stekoa Creek TMDL 2000")(otherwise indexed for the USFS administrative record as document "00-R Final Sediment TMDL Stekoa Creek Watershed").

In contrast to how Stekoa Creek, a tributary to the Chattooga down in Georgia, was addressed, to my knowledge, neither the Forest Service nor North Carolina have conducted field measurements of the actual sedimentation volume/per unit of area/per unit of time on North Carolina's headwaters—*either prior to or subsequent to the introduction of creek boating*.

Neither the Forest Service nor the state of North Carolina have published any evidence of having utilized field observations or remote sensing data to measure erosion rates or the rate of sediment delivery to the headwaters in North Carolina—even though field studies involving direct measurement of erosion and sediment transport processes must be used to validate any projections derived from sediment source assessments.[61]

Neither has the Forest Service nor the state of North Carolina *publicly stated or* identified which stream would constitute a *comparable but biologically unimpacted reference stream* for the Chattooga's headwaters in North Carolina.

In stark contrast, back in 2000, in remediating excessive sediment associated with Stekoa Creek (which flows into the Chattooga in Georgia), the EPA endorsed a Total Maximum Daily Load

[61] See *Comparison of Estimated and Measured Sediment Yield in the Gualala River,* Gen. Tech. Rep. PSW-GTR-238. Albany, CA: Pacific Southwest Research Station, Forest Service, U.S. Department of Agriculture, O'Connor, Matthew et al; pp. 121-129 (2012).

("TMDL") calculation which presumed that the annual sediment loading rate for a biologically unimpacted reference stream should not exceed 100 tons per year per square mile of watershed. Stekoa Creek TMDL 2000 at page 8.

In summary, at the *contemporaneous* moment that it was intentionally looking the other way to ignore the impacts of excessive embedded sediment on the Chattooga, *the USFS was busy swearing to a federal court that relying solely on bug studies was flawed when evaluating the impairing impacts of sediments on trout* habitat on the Tellico River. Stated generally, the Forest Service has admitted in Federal court that the results of macro invertebrate sampling are insufficient for assessing the prospective adverse impacts of excessive sediment on trout habitat.

The USFS must be equitably estopped from denying any degradation of the Chattooga's trout habitat by pointing to a macroinvertebrate study that failed to use the most robust methodologies for determining if the assemblage is moving towards greater numbers of pollution tolerant bugs like chironomids.

b) In Contrast the US EPA Uses A Peer Reviewed Approach Called An Observed/Expected Index Ratio to Determine If Macroinvertebrate Assemblages Have Shifted To More Pollution Tolerant Species

In stark contrast to the short cut methodologies applied by North Carolina to the Chattooga, the US EPA has applied an accepted and peer reviewed approach called an Observed/Expected index (O/E) to determine if shifts in bug assemblages constitute convincing evidence of water quality or in stream habitat degradation :

> where O/E ratios represent the number of the expected taxa that are observed in a sample (O), compared to the number of taxa expected in the sample (E), after predicting the probability that a sample site is a member of one or more fixed sets of reference site types (Hawkins 2006a, Van Sickle 2005) (Figure 14). This method uses a suite of regional reference sites to determine the number of expected taxa; and deviation from this number can be used to identify an degradation threshold (see Appendix 2 for detailed methods and results). A site that is a perfect match to the reference site O/E scores will score 1.0, while downward deviation from 1.0 indicates loss of expected taxa compared to regional reference (e.g., a score of 0.50 indicates a 50% loss of the expected taxa). Upward deviation (greater than 1.0) indicates that more taxa were collected than expected. [62]

The US EPA considers any decreases in macroinvertebrate taxa, documented by the O/E index, as evidence of water quality degradation.

Neither the Forest Service nor NC DEQ undertook anything like the EPA's O/E index evaluation using the additional macroinvertebrate data that it collected on the Chattooga in September 2016.

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[62] *Final Determination of the U.S. Environmental Protection Agency Pursuant to § 404(c) of the Clean Water Act Concerning the Spruce No. 1 Mine, Logan County, West Virginia,* United States Environmental Protection Agency, Peter Silva, Asst. Administrator, Office of Water, January 13, 2011 *at page 65.*

In fact, NC DEQ did not even identify a single reference condition site to which it might compare the results of the Chattooga's macroinvertebrate study in September 2016.

4) Neither the Forest Service Nor North Carolina Have Used the Best Available Science For Evaluating the Impairing Impacts of This Excessive Embeddedness on the Suitability of the Chattooga's Streambed Habitat For Satisfying the Early Life Cycle Needs of Trout

Despite being *told* about the embedded sediment problem, neither the state of North Carolina nor the USFS have used the *best available science*. See Bryce, Lomnicky & Kaufmann, *Protecting sediment-sensitive aquatic species in mountain streams through the application of biologically based streambed sediment criteria,* Journal of North American Benthological Society, 29(2):657-672(April 2010).The scientific literature demonstrates that *excessive* embeddedness of fine particle sized sediments (<2mm in diameter for sands) is particularly problematic in disrupting the early life cycle of salmonids.

The United States Environmental Protection Agency ("US EPA") has acknowledged 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)(EPA report otherwise indexed for this administrative record as Floyd document 00-J).Similarly, the US EPA has generally recognized that relying on traditional macroinvertebrate population indices might not provide an early enough warning signal of diminishing salmonid populations due to reproductive habitat degradation caused by excessive 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"). [63]

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[63] This research was advanced under the guidance of the EPA's Office of Water, Office of Science and Technology after intense consultation with the U.S. EPA Science Advisory Board. As of October 7, 2017, this research, which reflects the latest scientific knowledge regarding the impacts of suspended and bedded sediments on designated uses of water quality, can be retrieved from https://www.epa.gov/wqc/developing-water-quality-criteria-suspended-and-bedded-sediments-sabs.

This webpage archives the following documents: (1) *Developing Water Quality Criteria for Suspended and Bedded Sediments (SABs) - Potential Approaches,* DRAFT, U.S. EPA Science Advisory Board Consultation, Office of Water, Office of Science and Technology, August 2003 (PDF)(58 pp, 169 K); (2) *Appendix 1: The Biological Effects of Suspended and Bedded Sediment (SABS) in Aquatic Systems: A Review,* Berry & Hill et al, U.S. EPA Office of Research and Development, Aug. 20, 2003 (PDF)(58 pp, 277 K); (3) *Appendix 2: Summary of Water Quality Guidelines for Turbidity, Suspended and Benthic Sediments; British Columbia, Canada* (PDF)(9 pp, 28 K); (4*) Appendix 3: Sediment-Related Criteria for Surface Water Quality* (constitutes a survey of all states to determine how they address suspended an bedded sediments for determining whether water quality is being negatively impacted by same) (PDF)(24 pp, 70 K); (5) *Appendix 5: Guide to Selection of Sediment Targets for Use in Idaho TMDLs,* Rowe & Essig, Idaho Dept. of Environmental Quality and Ben Jessup, Tetra Tech, June 2003 (PDF)(54 pp, 163 K).

This *EPA SABs Framework* details the field science available to support water quality standards that recognize impairment of designated uses of water quality using measurable and quantifiable criteria for suspended and bedded sediments.

Although not reduced to a regulation, such guidance constitutes the best available scientific methodology for recognizing the damage caused to salmonid populations by excessive embedded sediments.

The U.S. EPA has summarized why this body of science was created:

> This *Framework* describes a process that states, tribes, and territories can use to develop SABS criteria to support water quality standards and protect designated uses. The *Framework* is intended to provide a consistent, defensible process for developing SABS criteria that also allows flexibility for regional and local application and interpretation. The major chapters of the *Framework* include both programmatic and technical elements. The programmatic elements section contains discussions of resources, integration with state programs, and implementation of criteria and standards. The technical elements section provides analytical methods for SABS criteria development. Examples are provided to illustrate how the *Framework* can be applied…This *Framework* describes what is known and what can be done relative to developing SABS criteria and will evolve as research results and new information becomes available. 00-H at page xi.

In 2010, in connection with the EPA's review of Oregon's Section 303(d) list, EPA determined that Oregon had not considered all readily available data and information when compiling its 303(d) list. From EPA's perspective, this analytical deficiency caused Oregon to omit listing a significant number of water quality limited segments on its Section 303(d) list. The EPA pointed out how the state's Predictive Assessment Tool for Oregon ("PREDATOR") correctly identified macroinvertebrate metrics that suggested the numerous segments should be listed as impaired.

However, Oregon complained that PREDATOR could not identify what specific pollutants were causing these designated uses from being fully supported. Because the specific pollutant(s) could not be identified using existing monitoring metrics, Oregon felt a TMDL could not be developed for these impaired waters. Therefore, Oregon reasoned that these waterbodies could not be put on Oregon's Section 303(d) list. EPA Region 10 disagreed.

EPA Region 10 ruled:

> The § 303(d) list is a comprehensive public accounting of all impaired waterbodies, regardless of the cause or source of the impairment. An impaired waterbody is one that does not attain water quality standards (designated uses, numeric and narrative criteria and anti-degradation requirements defined at 40 CFR 131). The standards violation might be due to an individual pollutant, multiple pollutants, pollution, or an unknown cause of impairment. The source of impairment might be from point sources, nonpoint sources, atmospheric deposition, or a combination of these. Impaired waterbodies must be listed

regardless of whether the pollutant or source of pollution is known and whether the pollutant/pollution source(s) can be controlled.

In addition, all existing and readily available data and information must be used to identify impaired waterbodies. This data and information can include, but are not limited to,

•segment-specific monitoring data -chemical, physical, and/or biological
•observed effects (defined as direct manifestations of an undesirable effect on waterbody conditions. For example, fish kills, fish lesions, depressed populations of certain aquatic species, and bioassessment scores are observed effects indicating changes in aquatic communities.)
•closures, restrictions and/or advisories applicable to swimming, fish consumption, and drinking water
• violations of Safe Drinking Water Act (SDWA) standards
• large-scale probabilistic monitoring designs
• landscape analysis/remote sensing
• complaints from the public [64]

EPA noted that it had analyzed data that Oregon failed to consider for the following pollutants: pH, dissolved oxygen, toxics, temperature, bacteria, *and sediment*.

For bedded sediments, where Oregon has no established measurable methodology for ascertaining impairment, EPA developed and applied measurable metrics that are consistent with federal regulations, etc., and which are based on scientific literature and/or methodologies utilized by other states. Applying these methodologies for bedded sediments, the US EPA compelled Oregon to place additional streams on Oregon's 2010 Section 303(d) list of impaired waterbodies.

Region 10 justified this decision by referencing the following scientific study: "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." *Use of Biological Data in 303d Program*, Memorandum, US EPS Region 10, Office of Environmental Assessment, Gretchen Hayslip, at page 3(indexed for this administrative record as Floyd document "00-I"). Stated differently, Region 10 placed certain segments on the 303(d) list because bedded sediments exceeded the aforementioned minimum effects thresholds.

More specifically, EPA Region 10 endorsed the use of a methodology that applied two tests; "First, [a Fine Sediment Score ("FSC")] 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*,

[64] Document indexed as 00-I at page 1.

EPA Region 10, at page 14 of 36 (attachment outlining methodology used by the EPA to assess water quality data and information for compliance with Oregon's water quality standards) downloaded on 12/29/2016 from http://www.deq.state.or.us/wq/assessment/docs/2010EPAenclosure2.pdf. (indexed for this administrative record as document 00-I-A).

This EPA endorsed listing methodology offers the *best available science* for assessing impacts of excessive bedded sediments on a specific reach of a specific wadeable stream. 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 Relative Bed Stability (RBS) value that is less than a predicted benchmark value, and it has to exhibit a greater percentage of embeddedness compared to actual reference condition 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).

Even before EPA's recommendation to utilize more precise criteria for recognizing the impairing impacts of excessive suspended and bedded sediments ("SABs") on designated uses of water quality, the United States Forest Service had *routinely measured embedded sediments* for the purpose of characterizing the impacts of sediments on in-stream habitats of streams flowing within the National Forests. However, the Forest Service has arbitrarily declined to do the same on the Chattooga's headwaters in North Carolina.

To demonstrate, the Forest Service conducted interstitial and stream bed surface sediment monitoring *for over twenty years* 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.

This sediment data constitutes one of the metrics used by the USFS to compare actual Watershed Condition Indicators ("WCI") against undisturbed reference condition Watershed Condition Indicators. Through this process the USFS identifies which watersheds (and streams) within a national forest should be prioritized for physical restoration due to degradation.

See also how the U.S. Forest Service used various sediment monitoring tools in developing the Blackwood Creek Restoration Plan. 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, closer to home, as part of the Forest Service's 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, despite all this attention paid to sediments elsewhere, the Nantahala National Forest has repeatedly declined to study the negative impacts of excessive embedded sediment on the trout habitat and trout fisheries found on the Chattooga's headwaters in North Carolina.

To summarize, the USFS has intentionally refused to apply the best available science for assessing impacts of embedded sediments on the Chattooga's trout habitat and trout fisheries.

Consequently, the Forest Service cannot rely on North Carolina's *flawed* Section 303(d) list to deny its own culpability for having encouraged further degradation in the suitability of the Chattooga's streambed habitat for satisfying the reproductive and early life cycle demands of trout. The Forest Service cannot offer a post hoc rationalization advanced to defend past agency action against attack. "[T]he courts may not accept ... counsel's post hoc rationalizations for agency action." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 50, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

5) The USFS Inappropriately Excuses the Degradation of the Trout Habitat and Trout Fisheries Being Suffered on An Extended Segment of the Chattooga's Headwaters in North Carolina By Implicitly Claiming That All Remains Well With Trout Habitat and Trout Fisheries On A Larger Watershed or Forest Wide Scale

The significance of the trout habitat degradation occurring on the ORW Chattooga cannot be excused by the Forest Service asserting that all is well with trout habitat and trout fisheries on a larger forest wide scale.

This legal standard has already been addressed within the context of habitat suitability for an endangered species. *Pacific Coast Federation of Fishermen's Association, Inc. v. National Marine Fisheries Service,* 265 F.3d 1028 (9th Cir.2001).

Pacific Coast concerned a habitat jeopardy analysis conducted by the National Marine Fisheries Service (NMFS) with respect to the negative impacts of timber harvests on private lands. NMFS approved harvesting protocols that would allow individual timber sales to go forward unless there was evidence that harvesting a particular site would cause habitat degradation on a watershed scale—which constitutes a very large area of land. The *Pacific Coast* plaintiffs complained that measuring the impact of individual harvests on such a large scale made it literally impossible for the protections of the ESA to be triggered. The Ninth Circuit agreed:

> [The agency's] disregard of projects with a relatively small area of impact but that carried a high risk of degradation when multiplied by many projects and continued over a long time period is the major flaw in NMFS study. *Without aggregation, the large spatial scale appears to be calculated to ignore the effects of individual sites and projects. If the effects of individual projects are diluted to insignificance and not aggregated, then [plaintiff] is correct in asserting that NMFS's assessment ... is tantamount to assuming that no project will ever lead to jeopardy of a listed species.* See *Pacific Coast* at 1036 (emphasis added).

This reasoning was endorsed by *National Wildlife Federation v Norton*, 332 F. Supp. 2d 170, 179 (Dst. Col. 2004): "FWS may not disregard reasonably foreseeable projects "with a relatively small area of impact but that carr[y] a high risk of degradation when multiplied by many projects and continued over a long time period." (citing *Pacific Coast,* 265 F.3d at 1036).

In the case of the Chattooga's ORW headwaters, the USFS has entirely neglected to collect any habitat suitability data for tracking how the condition of the stream bed habitat has degraded since 1989. The USFS has not monitored how small particle sized sandy sediments have embedded the stream bottom's larger substrates in amounts that exceed any reasonable minimum effects threshold for disrupting the reproductive and early life cycle needs of trout. Since 1996, neither has the USFS undertaken any effort to monitor the declining standing crop densities of the wild rainbow, brook, and brown populations which inhabit these headwaters.

This neglect stands in stark contrast to the intensity of science being applied by the United States Forest Service in monitoring the habitat needs of salmonids on other National Forests out west. The United States Forest Service understands how to provide intensified protection of trout habitat—*when it wants to do so*—which apparently it does not wish to do with respect to the ORW headwaters of the Chattooga River.

On July 28, 1995, the Northern, Intermountain, and Pacific Northwest regions of the United States Forest Service adopted the Inland Native Fish Strategy for protecting trout habitat on 25 million acres of National Forest System lands on 22 National Forests in eastern Washington and Oregon, Idaho, western Montana, and portions of Nevada. This fish habitat protection strategy regulates all site specific activities requiring compliance with the National Forest Management Act, the Endangered Species Act, and the National Environmental Policy Act and other applicable laws. Here is how the USFS implemented this fish habitat protection strategy:

> The [strategy] will provide for a network of priority watersheds within the geographic area. These priority watersheds were designated where watersheds have excellent habitat or strong assemblages of inland native fish, particularly bull trout, or watersheds that provide for population distribution goals, or where the watersheds have a high restoration potential. Within the priority watersheds, ongoing projects have been screened to determine their potential habitat effects and whether they will need to be modified to reduce risk to inland native fish habitat. Watershed analysis would also be required for some management activities within the riparian habitat conservation areas in priority watersheds. [65]

The Inland Native Fish Strategy adopted specifically measurable Standards to be applied in implementing this strategy. Measurable Riparian Management Objectives ("RMO's") were adopted to provide metrics for preserving acceptable pool frequency, large woody debris, bank stability, lower bank angles, and stream width to depth ratios.

As the Inland Native Fish Strategy explains

> The …RMOs for stream channel conditions provide the criteria against which attainment or progress toward attainment of the riparian goals is measured.

[65] *Inland Native Fish Strategy,* Decision Notice and Finding of No Significant Impact, Environmental Assessment, USDA Forest Service, Regional Foresters Salwasser, Bosworth, and Lowe, at page (July 28, 1995)(otherwise indexed for this administrative record as document "N-24").

Interim RMOs provide the target toward which managers aim as they conduct resource management activities across the landscape. It is not expected that the objectives would be met instantaneously, but rather would be achieved over time. However, the intent of interim RMOs is not to establish a ceiling for what constitutes good habitat conditions. Actions that reduce habitat quality, whether existing conditions are better or worse than objective values, would be inconsistent with the purpose of this interim direction. Without the benchmark provided by measurable RMOs, habitat suffers a continual erosion.[66]

…Objectives for six environmental features have been identified, including one key feature and five supporting features. These features are good indicators of ecosystem health, are quantifiable, and are subject to accurate, repeatable measurements.[67]

Set forth below is the table detailing the standards selected for these metrics in 1995.

Table E-2. Interim Riparian Management Objectives.

Habitat Feature	Interim Objectives
Pool Frequency (kf[1]) (all systems)	Varies by channel width (see Table E-3).
Water Temperature (sf[2])	No measurable increase in maximum water temperature (7-day moving average of daily maximum temperature measured as the average of the maximum daily temperature of the warmest consecutive 7-day period). Maximum water temperatures below 59F within adult holding habitat and below 48F within spawning and rearing habitats.
Large Woody Debris (sf) (forested systems)	Coastal California, Oregon, and Washington: >80 pieces per mile; >24 inch diameter; >50 foot length. East of Cascade Crest in Oregon, Washington, Idaho: >20 pieces per mile; >12 inch diameter; >35 foot length.
Bank Stability (sf) (non-forested systems)	>80 percent stable.
Lower Bank Angle (sf) (non-forested systems)	>75 percent of banks with <90 degree angle (i.e., undercut).
Width/Depth Ratio (sf) (all systems)	<10, mean wetted width divided by mean depth

[1] Key feature.
[2] Supporting feature.

Table E-3. Interim objectives for pool frequency.

Wetted width (feet)	10	20	25	50	75	100	125	150	200
Pools per mile	96	56	47	26	23	18	14	12	9

[66] See Document N-24 at Appendix E page E-3.

[67] Id.

See Document N-24 at Appendix E page E-4.

The Inland Native Fish Strategy also placed intensified emphasis on protecting

> [certain specific Riparian Habitat Conservation Areas] portions of watersheds where riparian-dependent resources receive primary emphasis, and management activities are subject to specific standards and guidelines. Riparian Habitat Conservation Areas include traditional riparian corridors, wetlands, intermittent streams, and other areas that help maintain the integrity of aquatic ecosystems by (1) influencing the delivery of coarse sediment, organic matter, and woody debris to streams, (2) providing root strength for channel stability, (3) shading the stream, and (4) protecting water quality (Naiman et al. 1992).

Here is what the Inland Native Fish Strategy has to say about Recreation Management.

> RM-1 Design, construct, and operate recreation facilities, including trails and dispersed sites, in a manner that does not retard or prevent attainment of the Riparian Management Objectives and avoids adverse effects on inland native fish. Complete watershed analysis prior to construction of new recreation facilities in Riparian Habitat Conservation Areas within priority watersheds. For existing recreation facilities inside Riparian Habitat Conservation Areas, assure that the facilities or use of the facilities would not prevent attainment of Riparian Management Objectives or adversely affect inland native fish. Relocate or close recreation facilities where Riparian Management Objectives cannot be met or adverse effects on inland native fish cannot be avoided.
>
> RM-2 Adjust dispersed and developed recreation practices that retard or prevent attainment of Riparian Management Objectives or adversely affect inland native fish. Where adjustment measures such as education, use limitations, traffic control devices, increased maintenance, relocation of facilities, and/or specific site closures are not effective in meeting Riparian Management Objectives and avoiding adverse effects on inland native fish, eliminate the practice or occupancy.
>
> RM-3 Address attainment of Riparian Management Objectives and potential effect on inland native fish in Wild and Scenic Rivers, Wilderness, and other Recreation Management plans.[68]

All of this history serves to contrast how grossly negligent the Forest Service has been in failing to provide for even the most minor semblance of protection for the ORW protected trout habitat on the Chattooga River. This neglect is particularly obvious from 2004 forward because the Forest Service had every reason to consider the implications of the condition of trout habitat while assessing whether or not to allow creek boating on North Carolina's headwaters.

[68] Document N-24 Appendix E at pages E-9 to E-10.

6) The Forest Service Has Recently De Facto Admitted That Scotsman Creek Has A Sediment Problem: the "Southside Project"

The Southside Project has been described as a set of proposed management actions impacting 18,943 acres concentrated in the vicinity of the Chattooga's headwaters in Macon and Jackson counties. These initiatives include commercial timber cutting, site preparation for forest regeneration, the introduction of prescribed burning on the Bull Pen and State Line forestry units, and wildlife and fisheries habitat improvements. See the original February 2017 scoping letter lodged into the administrative record as document N-35.

The associated scoping record lodged on the Forest Service's website advised that the USFS planned to conduct *repetitive* prescribed burns on 722 acres along the west bank of the Chattooga—for the purpose of decreasing the amount of rhododendron and mountain laurel and encouraging hardwood regeneration The Southside Project calls for the Bull Pen unit to be burned every other year right down to the water's edge—despite the fact that this section of this ORW stream suffers already from excessive embedded sediment.

"Two areas would be added to the Nantahala Ranger District's prescribed burning rotation. The Bull Pen unit (722 acres) and the State Line unit (1,762 acres) for a total of 2,484 acres" See N-35 at page 5.

The scoping letter promised that "This 'Proposed Action' and alternatives analyses will be documented in the project Environmental Assessment (EA), to be developed in 2017." Id. at page 4.

The scoping letter further stated that the EA would analyze the effects of the proposed actions on the Aquatic Resources within the area of analysis. Id. at page 4.

Stated differently, before conducting any prescribed burn on the Bull Pen unit, the Forest Service implicitly promised to make sure that the burn would not cause any adverse environmental impacts on the Chattooga's headwaters which constitutes the most important Aquatic Resource lying within the area of analysis.

Finally, the scoping letter promised "a notice of this scoping record will be sent to *interested parties,* planning team members/consultants, and Forest Supervisor's Office staff. Their comments will be used to identify other issues and further shape the environmental analyses to be conducted."

Prior to February 17, 2017, I researched, drafted, and submitted the following documents in opposition to the Forest Service's neglectful management of the Chattooga's headwaters in North Carolina: (1) on August 30, 2011, 61 pages of comments and photographs were submitted in response and in objection to the draft environmental assessment that was dated July 15, 2011 and which was entitled *Managing Recreation Uses on the Upper Segment of the Chattooga Wild and Scenic River;(2)* on November 5, 2014, a 80 page comment/objection was submitted in response to the draft environmental assessment that was dated September 26, 2014 and which was entitled *Chattooga River Boating Access;* (3) on July 7, 2015, a 16 page objection

accompanied by 113 pages of exhibits was submitted in response to the revised Environmental Assessment and draft Decision Notice and FONSI dated May 25, 2015 and entitled *Chattooga River Boating Access;* (4)on March 21, 2016, a 79 page objection was submitted in response to the Forest Service's proposed changes to the language of 36 C.F.R. 261.77 regarding the regulation of paddling on the headwaters in North Carolina; (5) prior to February 2017, no less than 15 requests for records were submitted pursuant to FOIA seeking factual information about what the Forest Service had been doing or had not been doing while managing the river's use—at least 5 of which required appeals to the Chief of the United States Forest Service.

The Nantahala District Ranger was personally involved in responding to my FOIA requests dated January 4, 2016 and February 4, 2016—both of which involved appeals to the Chief of the United States Forest Service. These requests sought a copy of the report summarizing the results of the joint USFS-NCWRC trout population study that had been conducted on the North Carolina headwaters of the Chattooga between 1992-1996. In fact, Ranger Wilkins reached out to me to complain "Mr. Floyd, I may be incorrect but reading between the lines of your last Freedom of Information Action appeal I am not sure you have a clear picture of what we have for records and what we don't." See the document placed into the administrative record as N-37 at page 2.

Despite my well documented advocacy on behalf of the river's degrading trout habitat and degrading wild trout populations, neither the Nantahala District Ranger nor his staff provided me with a *notice* of the Southside Project scoping record in February 2017—despite the scoping letter having promised to provide actual notice to *interested parties.*

By not providing me with the promised notice, the Forest Service denied me the opportunity to participate in the planning process for the Southside Project—and in particular to try to focus the Forest Service on honoring its duty to provide the highest intensity of antidegradation protection to the Chattooga's trout habitat and wild trout populations.

Stated differently, the Southside Project remained hidden from my view throughout 2017—even as the Nantahala National Forest was fully involved in rewriting its LRMP and even as I continued to press the Forest Service to reconsider its management policies regarding the Chattooga's headwaters in North Carolina during the LRMP rewrite.

In addition to being denied notice and the opportunity to be heard about the Southside Project in February 2017, on December 11, 2017, in the middle of rewriting the LRMP, the Nantahala National Forest unexpectedly created additional confusion by issuing a notice indicating a desire to reauthorize prescribed burning on up to 19,038 acres in Jackson, Macon, and Swain Counties. While this notice named the units of land to be burned and the associated acreage involved, this notice did not advise the public where these burn units were specifically located.

Neither the Nantahala District Ranger nor his staff made sure that this notice of the plan to conduct prescribed burning on the Bull Pen unit was published in the Cashiers Crossroads Chronicle in December 2017—even though they must have understood how this newspaper constitutes the primary source of news for residents of southern Jackson County.

The Nantahala District Ranger must have also understood the elevated threat of additional sediments being swept into the Chattooga from increased runoff after conducting a controlled burn along the banks of this stream. Nevertheless, neither the Nantahala District Ranger nor his staff undertook any effort to make sure that *interested parties* such as myself were fully informed of this plan to reauthorize the burning of the Bull Pen unit (722 acres).

I did not learn about this plan to conduct repetitive burning of the Bull Pen unit until January 10, 2018—a full month after it had first been noticed on December 11, 2017. It was only because the Cashiers Crossroads Chronicle reprinted a newsfeed article that the public in Southern Jackson County became generally aware of the Nantahala Forest's stated request for comments regarding the plan to burn 19,038 acres in Macon, Jackson, and Swain counties. However, the Crossroads Chronicle article did not outline the plan to conduct repetitive burns right down to the water's edge of the sediment plagued Chattooga's headwaters—for the stated purpose of killing off the rhododendron and mountain laurel that anchor the soils on the steep slopes that entrench the Chattooga's headwaters.

An interested member of the public was required to conduct additional research to gain an understanding of exactly where these burns would take place and how frequently.

After additional time consuming research I learned that the burning of the 722 acres on the Bull Pen unit had been previously discussed in the February 2017 scoping notice for the Southside Project—a notice that had neither been provided to me by the Nantahala District Ranger nor his staff.

What remains to be determined by extra record evidence is how the Nantahala District Ranger and his staff went about deciding in February 2017 who constituted an *interested party* worthy of receiving the notice of the Southside Project scoping record.

The Bull Pen unit encompasses the steep slopes that entrench the west bank of the Chattooga River and being south of Cane Creek tributary. The Bull Pen burn unit is located upslope from where excessive embedded sediments have embedded the tail of Bull Pen pool at 35.024234, -83.127053. Bull Pen pool constitutes one of the two major pools existing on the North Carolina section of the river.

The Forest Service's December 11th notice solicited comments until January 19, 2018 about the plan to reauthorize prescribed burning on 19,038 acres in Macon, Jackson, and Swain counties. However, this Notice did not tell the public that the Forest Service intended to proceed with this controversial initiative without conducting any additional environmental investigation into its impacts on the designated uses of the Chattooga's ORW water quality.

No mention was made of the Forest Service's belief that this initiative to reauthorize burning on the Bull Pen unit was categorically excluded from any further environmental analysis—despite the visibly obvious problem of embedded sediment on the headwaters of the Chattooga.

Neither did the Crossroads Chronicle's January 10, 2018 article inform the public as to what form of NEPA analysis was needed to reauthorize the burning of the Bull Pen unit.

In short, local Forest Service officials did not make it easy for the public to understand how the Forest Service intended to claim that the Bull Pen burn was categorically excluded from requiring the preparation of an environmental assessment or environmental impact statement. See 40 C.F.R. § 1508.4.

Given the well documented allegation about excessive sedimentation having degraded the river's trout habitat and its wild rainbow, brown, and brook trout fisheries, one would have hoped that the Forest Service would have been forthright in detailing how it intended to prevent any additional sedimentation from getting into the river as a consequence of increased runoff after the Bull Pen burn.

Unfortunately, very little information was provided to the public about how this prescribed burn could be conducted without causing additional problems for the Chattooga. This paucity of information mirrors a recurrent pattern and practice dating back to April 2005 of delayed disclosure and de facto concealment of critically important information. This historic practice of non-disclosure has disadvantaged me from gathering information needed to challenge the Forest Service for having inappropriately breached it management duties with respect to the Chattooga's headwaters.

While the December 11, 2017 notice spoke about the reauthorization of burning, the Chattooga's excessive embedded sediment problem should have been recognized as a changed condition—*an extraordinary circumstance*—which should have precluded the Bull Pen burn from being reauthorized or approved without first conducting additional environmental assessment into the impacts of the burn on this excessive embedded sediment problem.

Burning the leaf litter and other living ground cover exposes top soils. This increases the threat of runoff from rain causing additional sedimentation—until that point in time where new ground covers become established in sufficient amounts to hold in place the soils that have been exposed on the steep slopes that flank the Chattooga's headwaters.

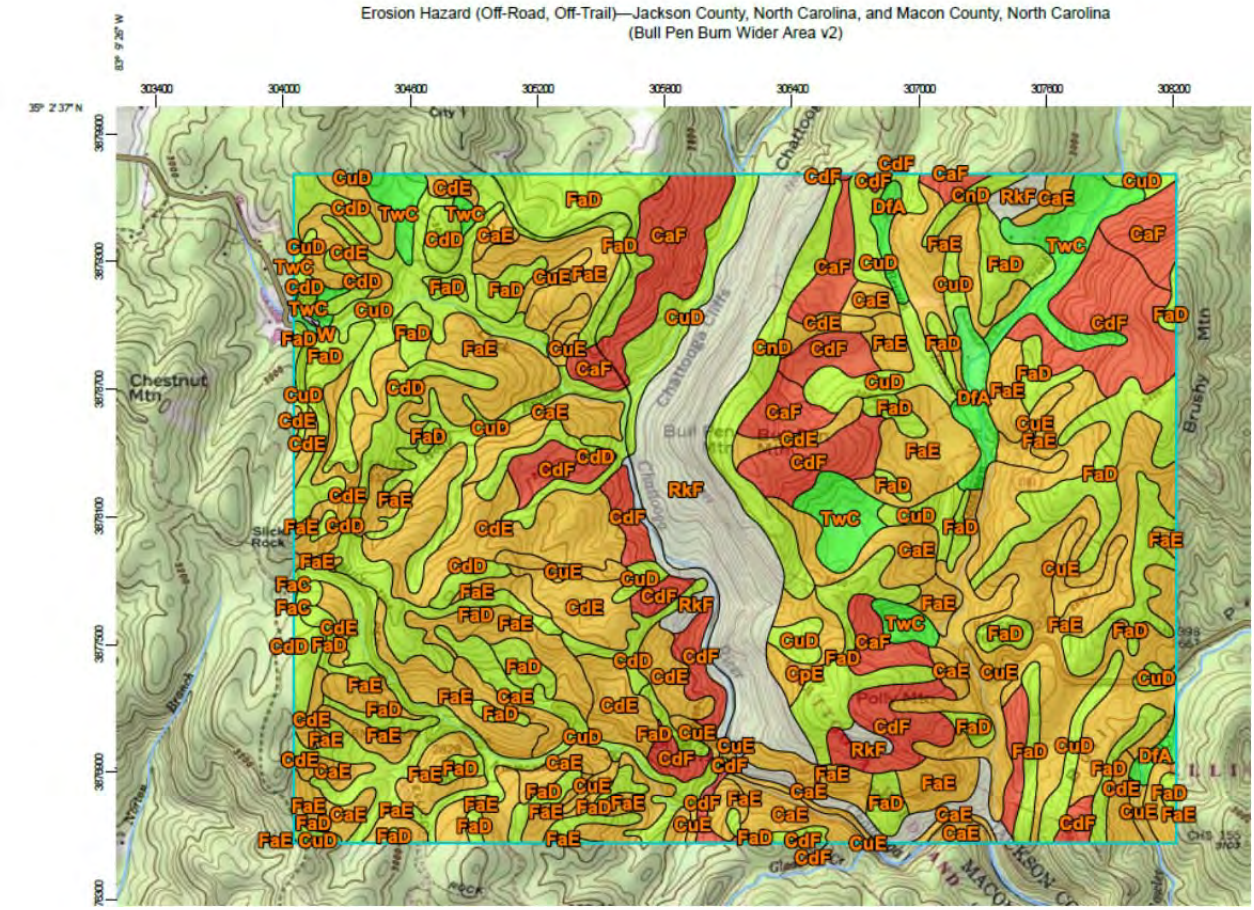
Specifically, the Forest Service should have evaluated the threat of additional sediments being discharged into this ORW trout stream as a consequence of increased runoff eroding these exposed soils.

An antidegradation analysis of the Chattooga's trout habitat and its wild rainbow, brown, and brook trout populations should have been conducted before approving the burning of the Bull Pen unit. Unfortunately, once again the Forest Service cut corners.

The Bull Pen burn unit is unlike any other burn site because of the excessiveness of the embedded sediment that is present in the stream lying downslope from the Bull Pen burn unit. "[I]n order to show extraordinary circumstances, [a plaintiff] must show circumstances that are present…that are not present in every [prescribed burn unit] of this size and type." See N*at'l Trust for Historic Preservation v. Dole,* 828 F.2d 776, 781 (D.C.Cir.1987) ("By definition, CE's [categorical exclusions] are categories of actions that have been predetermined not to involve significant environmental impacts, and therefore require no further agency analysis absent extraordinary circumstances.").

Stated differently, the Nantahala District Ranger should have recognized the existence of *extraordinary circumstances* pertaining to the Bull Pen burn unit.

Burning away the ground cover increases the risk of displaced soils being swept downslope into the stream as runoff. Burning the leaf litter and other living ground cover threatens to expose 50 to 75 percent of the top soils all the way from the top of the ridge down to the water's edge. In fact, the Forest Service's stated goal is to burn hot enough to kill back the evergreen rhododendron and mountain laurel that hold the soils in place on these steep slopes—in order to pursue the long term goal of encouraging hardwood regeneration. According to the Natural Resources Conservation Service's Web Soil Survey, the hazard of soil loss from sheet or rill erosion is severe or very severe on a disproportionate amount of the area of interest that encompasses the Bull Pen burn unit. See the hazard of soil loss map lodged into the administrative record as N-36 Bull Pen Hazard of Soil Loss.



As you can see, much of the area along the west bank of the river is colored bright red which denotes areas where the threat of erosion is *very severe.*

It is the significance of this prospective impact that the USFS has ignored—which unfortunately constitutes another example of a pattern and practice of purposeful disregard of threats to the Chattooga's trout habitat. This neglect started in April 2005.

The *significance* of any prospective impact requires consideration of both the context and intensity of the impact. 40 C.F.R. §1508.27.

Given the ORW classification of the Chattooga, and the severe threat of soil loss when top soils become exposed to rain, the Forest Service should have recognized the need to evaluate these extraordinary circumstances before *summarily* approving the Bull Pen burn. Similarly, when considering the intensity of the impact, the Forest Service should have scientifically investigated whether or not conducting multiple prescribed burns on the Bull Pen unit during a short period of time might violate the water quality standards and the antidegradation mandate by increasing the risks of exposed top soils getting eroded by rain and discharged into this ORW stream by runoff.

My Notification of July 29, 2017 and my Notification of September 22, 2017 should have been sufficient notice of the existence of such *extraordinary circumstances* and the non-discretionary need to conduct an antidegradation evaluation of the river's trout habitat and wild trout populations.

Disregarding the existing excessive embedded sediment problem, the Forest Service has elected to move forward with burning the Bull Pen unit without fully considering the potential impacts of additional sediments getting discharged into this stream. It did so with a hurry up offense.

What remains to be explained is why the Forest Service solicited the public's comments on December 11, 2017 regarding its plan to conduct a prescribed burn on the Bull Pen unit—if it had no intention to respond to those comments before conducting the Bull Pen burn.

The Forest Service created an administrative smoke screen that distracted the public form realizing how the Forest Service had altered the scope of the environmental assessment for the Southside Project subsequent to the publication of the February 2017 scoping letter.

To explain how the Forest Service created confusion, the February 2017 Southside Project scoping letter had promised the public that the introduction of prescribed burning to the Bull Pen unit would be analyzed for its impacts on the Aquatic Resources (e.g. the Chattooga River) through an environmental assessment pursuant to the National Environmental Policy Act ("NEPA"). See N-35 at page 4.

On December 11, 2017, the Nantahala National Forest did nothing to repudiate the promise made by the Southside Project's February 2017 scoping letter that an environmental assessment would be conducted prior to undertaking any prescribed burning on the Bull Pen Unit. In fact, the Forest Service prejudiced interested members of the public by giving them every reason to believe that any comments submitted in connection with the announced plan to reauthorize prescribed burning across Macon, Jackson, and Swain counties would be considered as qualifying comments under NEPA to object and to contest the burning of the Bull Pen unit under the Southside Project environmental assessment.

Consequently, on January 18, 2018, I submitted a detailed objection to the planned use of categorical exclusion in authorizing the prescribed burn of the Bull Pen unit—only to become advised later that the Forest Service had no intention of responding to those comments or of

considering my comments as an objection to any prospective Finding of No Significant Impact that might be published with respect to the Southside Project's promised environmental assessment.

To further explain this confusion, just after the Forest Service asked for comments pertaining to the plan to reauthorize prescribed burning all over Macon, Jackson, and Swain counties, the Nantahala Ranger District quietly published a notice in the Franklin Press on February 16, 2018 announcing that an environmental assessment had been published for the Southside Project. This notice detailed how comments would be accepted for 30 days subsequent to the publication of this notice.

This notice was not widely disseminated and I did not see it. It was only published in the Franklin NC newspaper—even though the Forest Service must have understood how these management initiatives might cause additional injury to the *protectable interests* of those who owned a North Carolina Lifetime Sportsman license as those interests pertained to preventing any additional sedimentation from further degrading the once outstanding quality of the trout habitat and wild rainbow, brown, and brook trout populations on the Chattooga's headwaters in North Carolina.

When confronting more general questions about the adequacy or sufficiency of the method used to give notice to those holding a protectable interest, the Supreme Court has preferred the reasoning adopted by *Mullane v. Central Hanover Bank & Trust Co*., 339 U. S. 306, 314 (1950). In *Mullane*, the Supreme Court held that notice had to be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.*, at 314, 319. "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it". Id at 315.

On February 16, 2018, the Nantahala Forest Supervisor and the Nantahala District Ranger must have understood my demonstrated status as an interested party with protectable interests because I had specifically explained the nature of those protectable interests in my Notification of July 29, 2017 and my Notification of September 22, 2017.

Nevertheless, the Forest Service made no effort to provide notice intended to apprise the owners of a North Carolina Lifetime Sportsman license of the Forest Service's plan to approve the burning of the Bull Pen unit without conducting either an environmental assessment or an environmental impact statement.

Neither did the December 11, 2017 notice disclose that the Forest Service was getting ready to release the Southside Project's environmental assessment.

The December 11, 2017 notice induced interested parties to presume that submitting such comments would insure the party's right to seek to enjoin the Bull Pen burn. The Nantahala District Ranger and the Nantahala Forest Supervisor must have known that that the Nantahala Forest did not intend to respond to any comments regarding the plan to burn the Bull Pen unit or any other unit associated with this planned reauthorization of prescribed burning.

By asking the public to submit comments the Forest Service also induced me to believe that the Forest Service had finally recognized that the Chattooga's excessive embedded sediment problem should be viewed as an extraordinary circumstance requiring further NEPA analysis. However, after encouraging interested members of the public to use their time to prepare comments, the Nantahala National Forest never responded to any of these comments before going ahead with burning the Bull Pen unit on April 12, 2018.

Just as prejudicial, on February 16. 2018, the Forest Service announced the publication of the Southside Project environmental assessment in a tiny ad printed in the Franklin Press—a paper that residents of Jackson County North Carolina would have no reason to read. What remains to be determined is to whom the Forest Service provided actual notification of the publication of the Southside Project environmental assessment.

Remarkably contrary to what the February 2017 Southside Project scoping letter promised, the Southside Project's environmental assessment claims that the Nantahala District Ranger's decision to conduct the Bull Pen unit burn needed no further environmental assessment of the potential adverse impacts on the Chattooga River's trout habitat and trout populations:

> "Prescribed Burns: The Bull Pen and State Line prescribed burns are currently planned within the Southside AA *and are covered under separate decision documents: 2013 Nantahala Ranger District Prescribed Burns Project* and 2017 State Line Prescribed Burn Project, respectively. The first Bull Pen prescribed burn (722 acres) and State Line prescribed burn (1,762 acres) have not yet taken place. The plan is to burn these areas every other year for six years then every five years thereafter; the burns will occur during the dormant season, generally between October 15 and April 15. The Bull Pen burn area encompasses the group selection harvest unit 31-20. The purpose of these burns is to reduce fuel accumulation to better protect national forest and adjacent ownerships from wildfire; improve wildlife habitat by increasing the availability and quality of nutritious forage for grazing and browsing animals such as deer, turkey, and bear; reduce undesirable shade tolerant species such as mountain laurel, red maple, and white pine in pine beetle areas to allow for regeneration of desirable species; and to establish burn units in a mosaic pattern to mimic natural fire behavior.[69]

Inexplicably, the Forest Service elected to segment out the reauthorization of the burning of the Bull Pen and State Line units from both the approval of the Southside Project as well as the approval of the forthcoming revision to the Nantahala's LRMP

Once again, in lieu of quantifying the baseline embedded sediment that exists on the Chattooga's headwaters, the Forest Service cuts corners by summarily implying that burning the Bull Pen unit could never cause any additional discharges of displaced soils into the Chattooga's headwaters—despite the fact that the Southside Project calls for the Bull Pen unit to be burned every other year during the coming years in order to kill the rhododendron and mountain laurel that hold the soils in place along this ORW stream.

[69] *Southside Project Environmental Assessment*, Nantahala Ranger District, Nantahala National Forest, February 2018 at page 12 (italics added)

The Forest Service implies that repeatedly burning the Bull Pen unit would not involve any kind of *extraordinary circumstance* compelling additional NEPA analysis.

Nonsense. As the soil maps reflect, there is a very severe threat of soil loss after disturbance activities that cause 50-75% of the surface soils in an area to become exposed to run off caused by the high amount of rain that occurs in this rainforest like microclimate. Annual rainfall in this particular area not infrequently exceeds 100 inches per year.

The simple fact is the Forest Service has repeatedly used improper segmentation in analyzing the adverse impacts of various management initiatives that in combination threaten to cause significant adverse impacts to the designated uses of the Chattooga's ORW water quality and its ORW designated tributaries—a practice the Forest Service first began to utilize in January 2012.

The Southside Project's environmental assessment has been used to slip information into the administrative record to convey a false impression that the Forest Service has conducted an adequate assessment of the impacts of its Southside Project timber cutting initiatives on the Aquatic Resources lying inside the area of analysis.

The fact is the impacts of both the prescribed burning initiative and the timber cutting initiative of the Southside Project ought to be assessed pursuant to the environmental impact statement being prepared for the rewrite of the Nantahala's LRMP—not through using a hurry up offense to manipulate the administrative decision making process in order to avoid having to acknowledge that there is no additional capacity for any additional inputs of sediment into the main stem of the ORW Chattooga or those tributaries that have been designated ORW—like Scotsman Creek.

The Forest Service has demonstrated an intention to use a check the box mentality in justifying its *predetermined plan* to build new roads along the steep flanks and to the top of Brushy Mountain to achieve the harvesting of old growth timber lying inside Unit 35/41 (25.79 acres) and Unit 35/42 (24.86 acres)—both of which are upslope in the drainage of either Scotsman Creek or North Fowler Creek. See the Forest Service's map depiction lodged into the administrative record as document N-35-A at page 2.

As the crow flies, the harvesting of this timber will occur at locations that are less than one mile directly upslope and within the drainage of the headwaters of Scotsman Creek.

As the Nantahala District Ranger must know, Scotsman Creek constitutes a critically important ORW tributary to the Chattooga River, whose headwaters located upstream of Bull Pen Road once contained outstanding spawning habitat for brook trout. In fact, Scotsman Creek was designated as an Outstanding Resource Water in March 1989 in order to secure the highest intensity of antidegradation protections for the native trout habitat and wild brook trout populations that were known to exist upstream of Bull Pen road and to insure the integrity of the main stem of the Chattooga River into which this stream flows.

Unfortunately, the United States Forest Service has for too long ignored the degrading habitat conditions on the headwaters of Scotsman Creek. This creek's stream bed is now embedded with

small sandy sediments, and silt in quantities that exceed any reasonable minimum effects threshold for disrupting the reproductive and early life cycle needs of brook trout.

Scotsman Creek's degraded trout habitat evidences how the Forest Service has for years purposely foregone any monitoring of a trout stream whose trout habitat and trout populations were supposed to be receiving the highest intensity of antidegradation protection. At the same time that it has purposely neglected Scotsman Creek and the main stem of the Chattooga River in North Carolina, the Forest Service has continued to defend its willingness to cater to the demands of the whitewater paddling community—even though the Fourth Circuit Court of Appeals has clearly ruled 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).

During this long period of neglect, which can be traced back to April 2005, excessive amounts of sediment have been allowed to embed the larger pieces of streambed cobble on Scotsman Creek upstream of Bull Pen road. Stated differently, this ORW brook trout stream has been impermissibly degraded since 1989.

Consequently, as the Forest Supervisor for the Nantahala National Forest, the Nantahala District Ranger and their staffs ought to know, any additional contributions of sediment into this creek from diffuse runoff associated with timber operations would prospectively violate the antidegradation protections conferred by the Clean Water Act upon Scotsman Creek's trout habitat and brook trout populations.

Amazingly, buried in the Southside Project's February 2017 environmental assessment, the Nantahala National Forest admits the following:

> Three locations along Scotsman Creek (Figure 3.7.1.1) are currently experiencing severe stream bank erosion. Each site has high, steep banks which are contributing sediment to Scotsman Creek. Additionally, these eroding banks reduce habitat quality of pools. Each site is approximately 50 feet in length (linear length of stream bank) but actual length of ground disturbance may be approximately 100 feet when installing structures. Approximately 100 feet (measured from top of bank perpendicular to stream flow) of material may need to be excavated at each site to construct toe-wood structures, log j-hooks, and multi-stage flood plain.[70]

Unfortunately, this admission doesn't fully reveal the extent of the damage that has been done to this trout habitat since ORW designation in March 1989. In fact, this statement creates a false impression by implying that these three locations constitute the only places where the stream bed of Scotsman Creek has been degraded and that these three locations constitute the only source of the problem

Consistent with the Forest Service's documented pattern and practice of providing less than full disclosure of information pertaining to its management or mismanagement of the Chattooga's

[70] *Southside Project,* Environmental Assessment, Nantahala Ranger District, Nantahala National Forest, February 2018 at page 64.

headwaters in North Carolina, this brief discussion neglects to disclose fundamental information like the precise latitude and longitude locations of these three sites. In order to be able to field verify what the Forest Service has asserted, an interested member of the public would need to know the latitude and longitude coordinates for the subject erosion sites.

See the document lodged into the Forest Service's administrative record as N-35-B.

N-35-B reveals a back and forth email dialogue that evidences my attempts to gather this basic information about the Scotsman Creek project. This dialogue occurred between myself and the designated point contact for the interdisciplinary team overseeing the Southside Project—Mr. Bushman. N-35-B also contains copies of all of the documents provided to me by Mr. Bushman as of April 16, 2018.

On April 16, 2018, Mr. Bushman declared: "You have all of the documents we have on the Scotsman Creek project." N-35-B at page 1.

Because Scotsman Creek constitutes a critically important tributary to the Chattooga's headwaters, this assertion that "you have all…we have on the Scotsman Creek project" raises unanswered questions. If the paucity of information provided to me constitutes all the scientific data that the Forest Service has, this further evidences a Forest Service intent on doing the utmost minimal amount of field monitoring of the designated uses of the Chattooga River's ORW water quality. It further evidences a Forest Service intent on refusing to use the best available science for recognizing how the quantities of embedded sediment present on Scotsman Creek exceeds any minimum threshold for disrupting the reproductive and early life cycle needs of trout—just like conditions on the main stem of the Chattooga's headwaters in North Carolina.

Due to the paucity of information shared with me I expressed the following concern to Mr. Bushman:

> "I don't feel like I know everything that is relevant about the situation on Scotsman Creek as those collapsing banks relate to my ongoing concerns about the degraded condition of the Chattooga's trout habitat due to excessive embedded sediments. My need to know this information relates to the upcoming revision to the LRMP—as well as other more urgent needs.
>
> First and foremost, it is entirely unclear when Mr. Farmer's field notes were created—in other words when he was in the field.
>
> Do you have access to any documents that would substantiate when Mr. Farmer first discovered this problem?
>
> I am also still looking to obtain all documents, including emails and internal memorandums that would provide a broad overview for when and why Mr. Farmer went looking for erosion sites on Scotsman Creek in the first place and to whom he reported his findings.

> I presumed that your role as Interdisciplinary Team Leader might have put you in a position to be aware of all communications with Mr. Farmer or others about this limited subject matter.
>
> Somebody must have asked Mr. Farmer or instructed Mr. Farmer to go investigate conditions on Scotsman Creek as it relates to the plan to cut timber on Brushy Mountain.
>
> Perhaps the District Ranger or the Forest Supervisor communicated back and forth with Mr. Farmer.
>
> What you sent me does not disclose any of those communications.
>
> Could you revisit the records that might be available regarding Scotsman Creek?[71]

Mr. Bushman responded as follows:

> During the 1-3 years prior to finalizing an Environmental Analysis (EA) for the public the fisheries biologist, wildlife biologist, botanist, and archaeologist will all look at the area to determine resource needs and write their sections of the EA. It was during this time frame and while doing a field review that our fisheries biologist identified and proposed this as a project to be considered in our analysis. We do not know exactly when our fisheries biologist visited the site, but he previously saw the erosion sometime during the spring of 2017…
>
> There are no other communication documents or emails between the ranger or the planning team leader on the Scotsman Creek stream proposal. The fisheries biologist wrote the Scotsman Creek section of the EA himself. The document you questioned was a draft pre-decisional write-up and edited to reflect the final version which appeared in the Southside EA.[72]

As the administrative record corroborates the degraded condition of the Chattooga's main stem had been well documented for the Nantahala's Forest Supervisor and the Nantahala District Ranger long before the spring of 2017—which Mr. Bushman speculates was when "our fisheries biologist" first discovered this problem.

This dialogue raises many unanswered but logically relevant questions.

For example, once the problem on Scotsman Creek was discovered, why didn't the fisheries biologist expand the scope of his assessment to studying the documented degraded conditions occurring on over 2 miles of the main stem of the Chattooga's headwaters in North Carolina? Why didn't the fisheries biologist report on the large amounts of sediment that were impounding in a minor pool that is located just upstream from where Scotsman Creek dumps into the

[71] Document N-35-B at page 2.

[72] Document N-35-B at page 1.

Chattooga? Why did the fisheries biologist choose to recommend a watershed improvement project on Scotsman Creek while totally neglecting the main stem of the Chattooga? What specific criteria were used to make that decision to use scarce resources on a project that is unlikely to fix the underlying problem on Scotsman Creek?

Because these and other unanswered questions, the public has a compelling need to verify the correct timeline for when the United States Forest Service first recognized these problems on Scotsman Creek. Establishing the correct timeline constitutes a critical aspect of determining to what extent the Nantahala National Forest has complied with its existing LRMP, and its antidegradation duties under the Clean Water Act and the National Wild and Scenic Rivers Act.

Just as important the public has a compelling need to verify whether Mr. Farmer, Fisheries Biologist, operated in total isolation from his superiors and peers in making this recommendation regarding Scotsman Creek—as Mr. Bushman seems to imply.

Clearly, there are limited resources and one would presume that the Forest Service would want to address the Chattooga's embedded sediment problems and degrading wild trout populations before using its limited time and resources on a small tributary like Scotsman Creek that does not attract much recreational use by anglers—unless there is some other reason to explain the Forest Service's willingness to put the cart before the horse.

Given the controversial nature of Scotsman's degraded condition, and the possibility of future litigation, one would presume that this fisheries biologist would have been closely supervised by both the Nantahala District Ranger and the Nantahala Forest Supervisor.

The Southside Project environmental assessment does not fully disclose the intensity of stream bed trout habitat degradation that has taken place on Scotsman Creek—similar to the Forest Service's disregard of the intensity of this sediment problem on the main stem of the Chattooga.

The public has a compelling need to collect extra record evidence to reconcile how it is that the Forest Service could manage to recognize a need to undertake a "watershed improvement project" on Scotsman Creek while continuing to insist that there is no actionable habitat problem on the main stem of the Chattooga's headwaters in North Carolina.

The incongruity of this circumstance raises many questions that the public deserves to have answered through appropriate attested responses.

Neither the Nantahala District Ranger nor the Forest Supervisor for the Nantahala Forest asked for additional details about the excessive embedded problem on Scotsman Creek before allowing an environmental assessment for the Southside Project to be published with a draft Finding of No Significant Impact.

Both of these responsible officials must have known how the Southside Project calls for the clearing and construction of .67 miles of new unpaved roads in the upstream watershed of Scotsman Creek. Each must have known how the Forest Service has insisted that: "Roads and

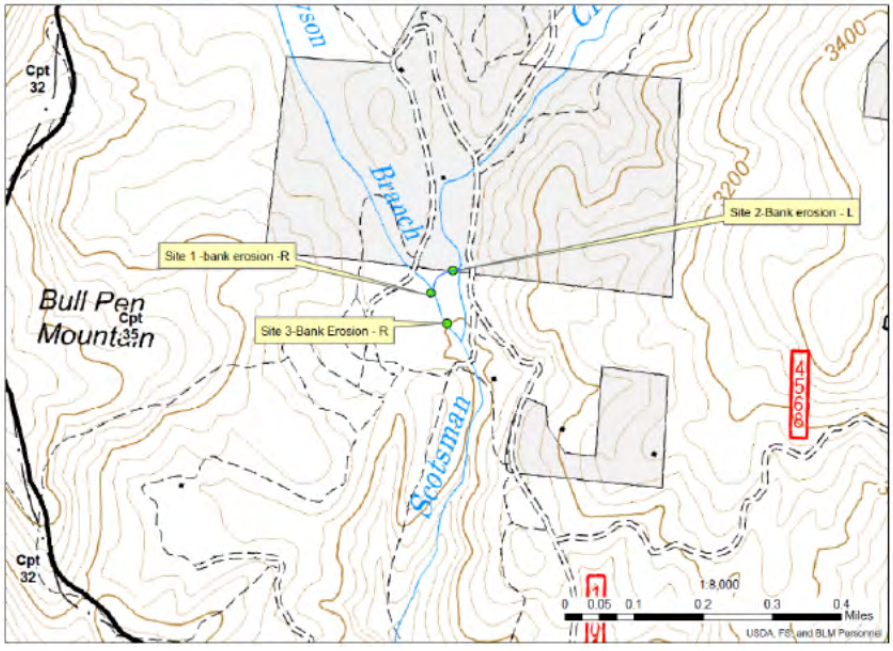
road maintenance are the chief contributors of erosion and sediment in the Chattooga drainage (Van Lear et al. 1995)." [73]

Similarly, because of the detailed complaints and allegations set forth in my Notification of July 29, 2017 and my Notification of September 22, 2017, both of these responsible officials must have understood how the best available science had not been used to recognize how the sediments that currently choke the Chattooga's stream bed already exceeds any reasonable minimum effects threshold for disrupting the spawning and early life cycle needs of trout.

Nevertheless, the Forest Service has not accurately disclosed the intensity of the habitat degradation on Scotsman Creek because of excessive embedded sediment. Instead, because of the paucity of information disclosed, the Forest Service has created an impression that the problem is minor and tolerable. Nonsense. To prove this point, on April 16, 2018 I waded and took photographs of the stream bed's degraded condition starting at the culvert running under Bull Pen Road and concluding upstream at the three erosion sites identified in the Southside Project's environmental assessment.

This constitutes almost a mile of water. Set forth below is a map lifted from the materials provided to me by Mr. Bushman on April 6, 2018 and lodged into the administrative record as document N-35-B. This map shows the erosion sites but not how close in proximity that Scotsman Creek is to where the USFS plans to build new logging roads to Brushy Mountain. I find this map's editorial non-disclosure troubling because it does not accurately portray the threat posed to Scotsman Creek by this new road construction.

Figure 1. Locations of 3 eroding stream banks. Installation of a log j-hook and toe wood structures would occur at each site.



[73] See document B-1 at page 271(Environmental Assessment, *Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor*, USFS, January 2012).

Here are photos that document the excessive embedded sediment problem that exists on Scotsman Creek—which must be protected as an Outstanding Resource Water.

This sediment is bank to bank throughout a large distance of this 1 mile reach.

These photos evidence conditions just downstream of the juncture of Bryson Branch with Scotsman Creek and looking east from that juncture.

This does not constitute what an outstanding native trout habitat should look like.

A photographic compilation of current conditions on Scotsman Creek has been lodged into the administrative record as documents N-35-C photos 1-40 and N-35-D photos 41 to 81.

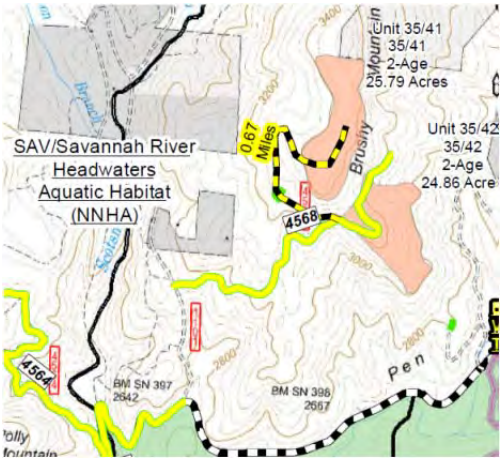
Once again the Forest Service has used its editorial discretion to convey an impression which minimizes the amount of trout habitat degradation that has already occurred. Admitting the full scope of the problem would hinder the Forest Service's ability to assert a finding of no significant impact in connection with its plan to build new logging roads, or to undertake new timber cutting initiatives that might threaten additional inputs of sediment into Scotsman Creek.

The Forest Service never discusses how the sediments that now exist in Scotsman Creek got there. The Forest Service implies that these three eroding bank sites account for the problem—but it presents no scientific evidence to support such a presumption. The amount of sediment present in my photographs seems too great to have been sourced solely from this bank erosion.

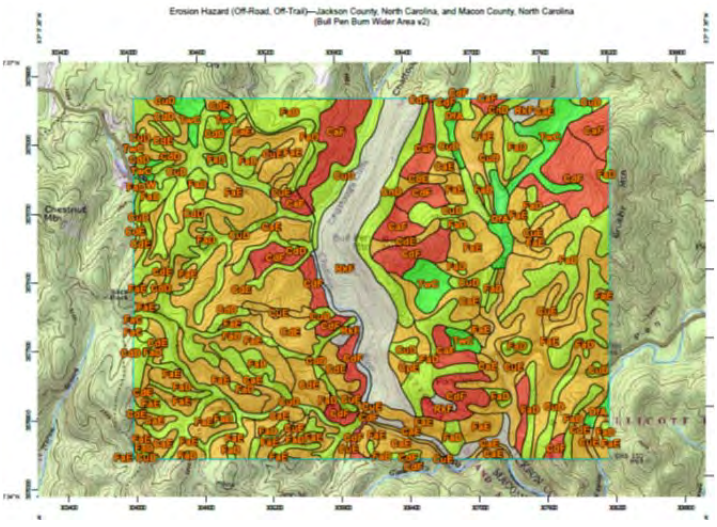
Once again, the best available science has not been used to recognize the impermissible impacts of this degraded habitat on the quality of the brook trout populations that reside in Scotsman Creek. The Southside Project's stream bank restoration project is unlikely to fix this problem. It equates to putting a band-aid on a compound fracture.

By proclaiming an intention to undertake this initiative the Forest Service fabricates a possible defense against charges that it has not conducted adequate monitoring of Scotsman Creek prior to developing its plans to build new roads along the steep flanks and the top of Brushy Mountain. The Forest Service needs these new roads to harvest the old growth timber lying inside Unit 35/41 (25.79 acres) and Unit 35/42 (24.86 acres)—both of which are upslope from either Scotsman Creek or North Fowler Creek.

Please compare the topo map location of the .67 miles of unpaved logging roads to be constructed to the top of Brushy Mountain (see document N-35-A at page 2 of 3) with the NCRS topo map (document N-36) showing the hazard of soil loss associated with areas where 50 to 75 percent of the surface top soils have been exposed by logging or similar kinds of land disturbances.



Document N-35-A at page 2 of 3



Document N-36

These maps demonstrate how the area where unit 35-41 is to be harvested and where the logging road is to be constructed suffers from a "very severe" (red color) hazard of soil loss when 50 to 75 percent of the surface area has been disturbed. *The Southside Project environmental assessment conveniently disregards this inconvenient fact.*

The Forest Service has neglected to tell the whole show-stopping story how excessive embedded sediments have already degraded the designated uses of the ORW water quality of Scotsman Creek, and how there is a threat of additional sediment being discharged into the stream due to the "very severe" risk of soil loss from erosion associated with the proposed timber harvest.

In addition, the Forest Service has also created unnecessary confusion about the kind of NEPA analysis that should have been done to move forward with the Bull Pen burn.

Had the impacts of the Bull Pen burn been assessed in the Southside Project's environmental assessment—as promised by the February 2017 scoping letter—the Forest Service would have been forced to reconcile the incongruity of admitting the need to address the excessive embedded sediment problem that exists on Scotsman Creek without explaining why there was no need to address the excessive embedded sediment problem that has been shown to exist on the main stem of the Chattooga upstream of Bull Pen Iron bridge.

Stated differently, had the impacts of conducting the Bull Pen burn been assessed during the Southside Project environmental assessment—as promised—the Forest Service could not have escaped being impeached for claiming that the Bull Pen unit was categorically excluded from any additional investigation.

The Forest Service would have been compelled to admit that this excessive embedded sediment on the main stem of the Chattooga constituted an *extraordinary circumstance* requiring additional scientific investigation.

As a last point on this matter, Mr. Bushman stated that "1-3 years prior to finalizing an Environmental Analysis (EA)…the fisheries biologist…will all look at the area to determine resource needs and write their sections of the EA."[74]

This statement suggests that under normal procedures the *visibly obvious* sediment problems on Scotsman Creek should have been recognized (by somebody) as early as circa February 2015. When you build roads to cut timber, clearly the primary concern is the adverse impacts that the construction and use of such roads might have on the designated uses of ORW water quality on stream lying downslope of the timber harvest site.

Unpaved gravel and forest service roads are known to be sources of sediment input. In fact the Forest Service has stated "Roads and road maintenance are the chief contributors of erosion and sediment in the Chattooga drainage (Van Lear et al. 1995)." [75]

[74] See document N-35-B at page 1.

[75] See document B-1 at page 271(Environmental Assessment, *Managing Recreation Uses in the Upper Segment of the Chattooga Wild and Scenic River Corridor,* USFS, January 2012).

Hence because of the controversial nature of this timber cut on Brushy Mountain, it would have been prudent for the Forest Service to conduct as much due diligence as early as possible into the impacts of run off on the designated uses of the ORW water quality of Scotsman Creek.

Nevertheless, Mr. Bushman inexplicably reports: "We do not know exactly when our fisheries biologist visited the site, but he previously saw the erosion sometime during the spring of 2017."[76]

Surely, there must be some way to pin down the exact date when somebody from the Forest Service first learned that Scotsman Creek (an Outstanding Resource Water) was suffering from excessive amounts of embedded sediment. This explains why extra record evidence needs to be collected—to pin down reconciling explanations for such otherwise incongruent statements.

If in fact the Forest Service learned about the degraded conditions on Scotsman Creek prior to January 2016, this critical piece of information should have been disclosed to the public when the Nantahala Forest issued a FONSI approving the construction of new special paddler access trails inside North Carolina's protected trout buffer.

In any case, the Forest Service has now admitted knowing that Scotsman Creek has a problem.

However, the USFS still can't bring itself to admit how the excessiveness of this embeddedness exceeds any reasonable minimum threshold for disrupting the reproductive and early life cycle needs of the brook trout that once thrived in this tributary.

To do so would also reveal the Forest Service's longstanding look the other way disregard of similar conditions on the main stem of the Chattooga. This neglect of the Chattooga's trout habitat and wild trout populations started in April 2005 when the USFS began to provide special privileges to the whitewater paddling community in defiance on its own regulations.

E. The USFS Has Violated North Carolina's Sedimentation and Pollution Control Act of 1973 ((NCGS §§113A-50 to 113A-69)

The public policy underlying the Sedimentation and Pollution Control Act of 1973 is as follows: "The continued development of this State will result in an intensification of pollution through sedimentation unless timely and appropriate action is taken. Control of erosion and sedimentation *is deemed vital* to the public interest and necessary to the public health and welfare, and expenditures of funds for erosion and sedimentation control programs shall be deemed for a public purpose." NCGS §113A-51(italics added).

The word *"vital"* emphasizes how monitoring land disturbing activities and preventing sediments from being discharged into our streams (especially trout streams) are of *life saving importance.*

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[76] See document N-35-B at page 1.

Excessive sedimentation can cause the habitat to become unsuitable for trout populations and macroinvertebrates to survive—much less thrive in outstanding abundance.

The purpose of the Sedimentation and Pollution Control Act of 1973 is to prevent any sediments from reaching a stream as a consequence of land disturbing activities. The statute intends to achieve that objective by requiring land disturbing activities to follow highly technical plans designed to prevent displaced soils from being transported off the site where the land disturbing activity takes place—hence preventing any discharges into water bodies.

Any degradation of the Chattooga's trout aquatic habitat violates state law.

In North Carolina, a permit is required to "cause or permit any waste, directly or indirectly, to be discharged to or in any manner intermixed with waters of the State in violation of the water quality standards applicable to the assigned classifications . . . ." N.C. Gen. Stat. § 143-215.1(a)(6).

The North Carolina Sedimentation Pollution Control Act imposes a discrete duty on landowners to maintain sediment control measures which are sufficient to meet performance-based sedimentation standards. The North Carolina Sedimentation Pollution Control Act and implementing regulations regulate sedimentation, not just land-disturbing activity.

See *State ex rel. Lee v. Penland-Bailey Co*., 274 S.E.2d 348, 350 (N.C. Ct. App. 1981). "To determine the answer to this question posed by this appeal, we look to the statute itself and other materials to find the legislative intent. The name of the act, 'Sedimentation Pollution Control Act of 1973,' gives the first clue as to the intent of the legislature. It refers to sedimentation control rather than the control of land-disturbing activity. The legislative purpose to control erosion and sedimentation is set out in the preamble of the statute."

In developing recreational infrastructure such as boat launch sites, river evacuation points, and portage trails inside the trout buffer, by implication, "the land owner or person in possession or control of the land shall install and/or maintain all necessary permanent erosion and sediment control measures." 15A NCAC 04B .0113.

In addition, the construction and use of boat launch sites and river evacuation points on the Chattooga's headwaters violates North Carolina's prohibition against land-disturbing activities within 25 feet of a designated trout stream. N.S. Gen. Stat. §113A-57(1).

Even if the construction and use of this boater infrastructure was argued to be part and parcel of some silvicultural activity, the Forest Service would be obligated to comply with with Best Management Practices and NC Forest Practice Guidelines. Such Best Management Practices would compel the Forest Service to establish and to preserve a Streamside Management Zone (SMZ) of sufficient width to confine and to prevent any visible sediment resulting from accelerated erosion from being discharged into the Chattooga.

The Forest Service has not complied with that requirement.

1) Federal Agencies Must Comply With North Carolina's Sedimentation and Pollution Control Act of 1973

Section 1323(a) of the Clean Water Act provides that the Federal Government:

> shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions *respecting the control and abatement of water pollution in the same manner*, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner.

33 U.S.C. § 1323(a)(italics added). Surely the protective requirements and punitive sanctions of North Carolina's Sedimentation and Pollution Control Act of 1973 fall within the scope of duties that federal agencies must discharge to effectuate the control and abatement of water pollution as compelled by the Clean Water Act's Section 1323(a).

It would be inapposite for the USFS to deny being subject to North Carolina's mandate to control sedimentation caused by land disturbing activities associated with the development of recreational infrastructure on lands managed by the USFS—in particular the mandate to avoid any land disturbing activities inside the 25 foot trout buffer associated with the National Wild and Scenic Chattooga's Outstanding Resource Waters in North Carolina.

How the USFS *eventually* got around to abating sedimentation being caused by whitewater boating on the Cheoah River *reveals* how the USFS understands its *legal* obligations to prevent its management of recreational uses from causing water pollution through increased sedimentation. See pages 42 to 48 of this Notice of Intent to Sue. The USFS was *ultimately* compelled to act, but only years after having *ignored how* whitewater boaters cause the *unregulated* displacement of soils lying inside the Cheoah River's riparian buffer and the subsequent discharge of those soils into the river as unpermitted sediment.

Periodic scheduled releases of water from Santeetlah Dam creates world class whitewater which *concentrates unregulated numbers* of whitewater enthusiasts at the same time on a small section of the Cheoah River. The concentrated presence of literally hundreds of paddlers attempting to float the same small stretch of whitewater at the same time places too much *physical* stress on the fragile riverbanks from where these paddlers must launch and evacuate. The USFS has attempted to inoculate the *unlawful* displacement and discharge of soils into the water that is caused by whitewater boating by building an evacuation site alongside the bank of the river.

Unfortunately, regarding paddler caused damage to the Chattooga's trout buffer, the USFS has evidenced a willingness to ignore its discrete and nondiscretionary duty to avoid contributing to any non-temporary degradation of the Chattooga's *once outstanding* trout habitat and wild

rainbow, brown, and brook trout fisheries. The Forest Service has demonstrated a willingness to cut legal corners, with a wink and a nod, to advance the singular interests of whitewater enthusiasts. In contrast, the Forest Service has not conducted any scientifically measurable monitoring of either the degrading condition of the trout habitat or the degrading trout population trends on the Chattooga since 1996.

2) The USFS Has Undertaken Unapproved Land Disturbing Activities By Endorsing the Construction and Use of Creek Boat Launch Sites, Evacuation Points, and Portage Trails Inside North Carolina's 25 Foot Protected Trout Buffer

" '*Land disturbing activity'* means *any* use of the land by *any person* in residential, industrial, educational, *institutional* or commercial development, highway and road construction and maintenance that results in a change in the natural cover or topography and that may cause or contribute to sedimentation." NCGS 113A-52(6) (italics added).

The statute's intended coverage is broad—as made clear by North Carolina's choice of words in specifying that "Land disturbing activity" encompasses "any use" by "any person" "that may cause or contribute to sedimentation." Id. The statute does not specify that the land disturbance must occur as the consequence of bulldozers or track-hoes etc. The statute seeks to regulate any form of land disturbing activity "that may cause or contribute to sedimentation." Id. Hence, even recreational uses of the land (such as the seal launching of boats from the Chattooga's fragile and highly erosive river bank) would be compelled to adhere to the statute if by necessity the seal launching of the boat could be expected to displace soils from the trout buffer causing additional sediments to be discharged into an ORW trout stream. Id.

Institutional development must encompass USFS endorsed land disturbing activities undertaken by third parties on our national forests. The USFS must be held accountable for the damages caused by endorsing and encouraging the construction and use of recreational infrastructure by whitewater paddlers on our most fragile trout streams lying within our national forests.

Agencies of the federal government are not excused from complying with the restrictions placed on land disturbing activities by North Carolina's Sedimentation and Pollution Control Act of 1973. Federal agencies must comply with the Act of 1973 pursuant to 33 U.S.C. § 1323(a),

Boater Created Erosion Sites B-5 and B-5-B (see pages 16-22 of this Notice) are just two examples evidencing how the construction and use of boat launch sites, evacuation points, and portage trails inside the Chattooga's protected 25 foot trout buffer *constitute land disturbing activities* that must comply with the nondiscretionary mandates of North Carolina's Sedimentation and Pollution Control Act of 1973.

A broader photographic inventory of the *dynamically* changing damage being done by paddling activities was lodged in the Forest Service's administrative record on July 28, 2017 @ 3:37 PM as document 00-N.

3) What Is Required by the Sedimentation and Pollution Control Act of 1973 With Respect To Protecting the Chattooga's 25 Foot Trout Buffer

Most importantly the 1973 Act prohibits *any* land disturbing activities inside a stream's 25 foot trout buffer with limited exceptions. Any disturbance of the 25 foot trout buffer must take place according to an erosion and sedimentation plan approved by the state of North Carolina. Such a plan may only approve temporary disturbances of the trout buffer and the extent of disturbance must be minimal. NCGS 113A-57(1) provides:

> No land disturbing activity during periods of construction or improvement to land shall be permitted in proximity to a lake or natural watercourse unless a buffer zone is provided along the margin of the watercourse of sufficient width to confine visible siltation within the twenty five percent (25%) of the buffer zone nearest the land disturbing activity. Waters that have been classified as trout waters by the Environmental Management Commission *shall have an undisturbed buffer zone 25 feet wide or of sufficient width to confine visible siltation within the twenty five percent (25%) of the buffer zone nearest the land disturbing activity, whichever is greater.* Provided, however, that the Sedimentation Control Commission may approve plans which include land disturbing activity along trout waters when the duration of said disturbance would be temporary and the extent of said disturbance would be minimal. *This subdivision shall not apply to a land disturbing activity in connection with the construction of facilities to be located on, over, or under a lake or natural watercourse*.[77]

The last *italicized* sentence of NCGS 113A-57(1) does not mean that land disturbing activities on a trout stream go unregulated where the purpose is to construct some type of facility on (dock), over (bridge) or under (tunnel) a trout stream or lake containing trout. To the contrary, although such land disturbing activities might be allowed inside the 25 trout buffer in certain limited circumstances, the state of North Carolina must first consider the public policy pros and cons of approving any such variance as well as the specific restrictions that would apply to that land disturbing activity. The land disturbing activity inside the trout buffer would need to be highly regulated according to a written erosion and sedimentation control plan approved by the agency having jurisdiction over the land disturbing activity.

No such mitigating approvals or variances were ever requested or obtained by the USFS before it approved the creek boating related land disturbing activities within the Chattooga's 25 trout buffer. The USFS simply turned boaters loose to access the river as they see fit—just as American Whitewater has insisted in public meetings that the Forest Service must do.

"No doubt the thoughtful folks who leave cauldrons of candy on their front porches at Halloween hope the neighborhood trick-or-treaters will behave themselves and take only their fair share, but common experience has shown that those hopes often remain unfulfilled. While the betrayal of trust on All Hallows' Eve might cost the credulous a bag or two of sweets, the potential cost to the [the designated uses of the Chattooga's ORW water quality] from the [Forest Service's]

[77] NCGS 113A-57(1)(italics added).

hopefulness is, inarguably, considerably higher." *Friends of Back Bay v USACE*, 681 F. 3d 581, 589 (4th Cir. 2012).

Stated differently, it would be unlawful to disturb the 25 foot trout buffer without first obtaining all required approvals and permits from the state of North Carolina etc. This would include complying with the terms of an approved erosion and sedimentation control plan.

North Carolina's regulations speak specifically to this circumstance.

> 15A NCAC 04B .0112 OPERATIONS IN LAKES OR NATURAL WATERCOURSES
>
> Land disturbing activity in connection with construction in, on, over, or under a lake or natural watercourse shall minimize the extent and duration of disruption of the stream channel. Where relocation of a stream forms an essential part of the proposed activity, the relocation shall minimize unnecessary changes in the stream flow characteristics.
>
> History Note: Authority G.S. 113A 54;
> Eff. February 1, 1976;
> Amended Eff. November 1, 1984.

Those who would seek approval to disturb the Chattooga's trout buffer must be able to demonstrate a capacity to "minimize the extent and duration of disruption of the stream channel." Id.

Due to the ever changing nature of large wood obstructions that can change locations in a stream, there simply is no way to predict where paddles will need to construct and use portage trails to get around such obstructions. Stated differently there is no way for the Forest Service to provide assurance to the citizens of the state of North Carolina that such disturbances of the Chattooga's 25 foot trout buffer can be minimized.

Before any land disturbing activity can occur within the Chattooga's trout buffer, the disturber must first obtain appropriate approval of a written erosion and sedimentation control plan that will set forth how to achieve the requirements of 15A NCAC 04B .0112, etc. *This must be true even if the size of the trout buffer to be disturbed does not exceed one acre of land.*

The USFS neither submitted nor obtained any approval by North Carolina of an erosion and sedimentation control plan spelling out how the Chattooga's trout buffer might be *temporarily disturbed.*

The Act of 1973 presumes that every land disturbing activity must also comply with all other permitting requirements under the Clean Water Act as well as all other North Carolina statutes and regulations including the state's water quality standards, etc. An erosion and sedimentation control plan *cannot be approved unless there is compliance with these other duties.*

As discussed earlier in this Notice of Intent to Sue, the USFS has not obtained other obligatory regulatory approvals such as a Section 404 permit for discharging fill into the water. Unless and until the USFS complies with all of its obligations under the Clean Water Act, (including a Section 401 water quality certification) it would be inappropriate for the state of North Carolina to grant any form of approval or variance to disturb the trout buffer.

The Sedimentation and Pollution Control Act is performance oriented:

> *[I]t prohibits visible off-site sedimentation* from construction sites but permits the owner and developer to determine the most economical, effective methods for erosion and sedimentation control. This flexibility in the law allows for innovation and considers the uniqueness of each construction site; however, it also requires the developer to plan his activities carefully in light of their erosion potential. To control erosion and sedimentation and satisfy the intent of the law, the developer should employ an integrated system of control measures and management techniques. An effective control system is based on an understanding of the processes of erosion and sedimentation and the basic principles for their control. Chapter 2 discusses these processes and principles.[78]

Any person seeking to conduct land disturbing activities has a legal obligation to do so according to best practices that serve to prevent soils *from being discharged into streams* and from being transported offsite from where the land disturbance is taking place. These provisions are set forth in the *Erosion and Sediment Control Planning and Design* manual.

"Erosion and sedimentation control are required regardless of the size of the disturbance."[79]

This statement reflects the reality that even where less than one acre is impacted by land disturbing activities, the party displacing soils must still prevent sediments from being discharged onto the lands of neighboring properties in order to avoid causing tortious injury to the owners of the neighboring property.

This ought to hold true for preventing unpermitted discharges of sediments into our ORW trout streams like the Chattooga's headwaters—whose water quality belongs to the citizens of North Carolina not the United States Forest Service which owns the land from the soils are being displaced.

15A NCAC Chapter 4 dictates the regulations that apply to the Sedimentation and Pollution Control Act of 1973.

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[78] *Erosion and Sediment Control Planning and Design Manual,* North Carolina Sedimentation Control Commission, North Carolina Department of Environment and Natural Resources, and North Carolina Agricultural Extension Service, Chapter 1 at page 1.1.

[79] Id.

The regulations impose an affirmative duty on those who conduct land disturbing activities. "Persons conducting land disturbing activity shall take all reasonable measures to protect all public and private property from damage caused by such activities." 15A NCAC 04B .010

> *The law requires installation and maintenance of sufficient erosion control practices to retain sediment within the boundaries of the site*. It also requires that surfaces be non-erosive and stable within 15 working days or 90 calendar days after completion of the activity, whichever period is shorter. In certain High Quality watersheds this stabilization must be achieved within 15 working days or 60 calendar days after completion of the activity, whichever is shortest.[80]

Where the land disturbing activity involves greater than one acre of land, the person conducting the land disturbing activity is compelled to follow the specifications of an erosion and sedimentation control plan that has been submitted to and approved by the agency having jurisdiction over the land disturbing activity. NCGS 113A-57(4) & (5).
Land disturbing activities associated with agricultural production of crops etc., or the production and harvesting of timber are specifically exempted from having to comply with the Sedimentation and Pollution Control Act. See NCGS 113A-52.01.

Similarly, "[p]ursuant to G.S. 113A-57(3), provisions for a ground cover sufficient to restrain erosion must be accomplished within 15 working days or 90 calendar days following completion of construction or development, whichever period is shorter, *except as provided in 15A NCAC 4B .0124(e).*" 15A NCAC 04B .0107 (italics added). 15A NCAC 4B .0124(e) provides for a more limited time period for re-establishing ground cover on High Quality Waters, like the Chattooga. The following applies: "Pursuant to G.S. 113A-57(3) provisions for a ground cover sufficient to restrain erosion must be provided for any portion of a land-disturbing activity in a HQW zone within 15 working days or 60 calendar days following completion of construction or development, whichever period is shorter." 15A NCAC 4B .0124(e).*The USFS has not made any effort to comply with any of these time critical provisions.*

F. The USFS Violates the National Wild and Scenic Rivers Act

Additionally, the Forest Service owes a second set of *antidegradation duties* that applies to the *esthetic, scenic, historic, archeologic, and scientific features* of the Chattooga. The National Wild and Scenic Rivers Act ("WSRA") compels:

> "Each component of the national wild and scenic rivers system shall be administered in such manner as to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith, limiting *other uses* that do not substantially interfere with public use and enjoyment of these values. *In such administration primary emphasis shall be given to protecting its esthetic, scenic, historic, archeologic, and scientific features.* Management plans for any such component may establish varying degrees of

[80] *Erosion and Sediment Control Planning and Design Manual*, North Carolina Sedimentation Control Commission, North Carolina Department of Environment and Natural Resources, and North Carolina Agricultural Extension Service, Chapter 1 at page 1.1 (italics added).

intensity for its protection and development, based on the special attributes of the area." 16 U.S.C.§1281(a) (italics added for emphasis).

The legislative history explains the WSRA policy of non-degradation as follows: "Section 10 [of the National Wild and Scenic Rivers Act] provides for the administration of scenic rivers with primary emphasis on their esthetic, scenic, historic, archeologic, and scientific features but allows *other uses* which do not *substantially interfere* with the public use and enjoyment of the *characteristics* which caused [the Chattooga's] inclusion in the system."[81]

It is critical to distinguish how both *recreational uses* and *commercial uses* were omitted from being specifically enumerated as one of the *features* for which Congress ultimately specified "primary emphasis shall be given to protecting."

This omission was not accidental.[82] Congress did not use descriptive language such as "recreational uses" and "commercial uses" within this authorizing command because the WSRA seeks primarily to protect the innate physical condition of the river and its riparian corridor, even if this means restricting recreational or commercial uses of the river. Preserving the quality of the physical habitat trumps creek boating or any other recreational use that would cause unacceptable damage to the *esthetic, scenic, historic, archeologic, and scientific features* of the Chattooga.

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[81] H.R. Rep. No. 1623, 90th Cong., 2d Sess. 10 (1968), p.12 (referencing *Water Recreation Needs in the United States 1960-2000* (Committee Print No.17;1960)(italics added for emphasis).

[82] It was intentional, and represented the end product of the legislative process following debate between the Senate and the House. Considering the House Committee's report in its entirety, this Committee excerpt is *remarkably probative* and unambiguous in establishing what must be explicitly prioritized for protection in managing a National Wild and Scenic River. It spells out the conditions under which *other uses* (recreational or commercial) might be permitted without running afoul of the aforementioned priorities. *The House Committee Report demonstrates that Congress wanted to give these other uses (e.g everything other than the enumerated esthetic, scenic, historic, archeologic and scientific features) a less intense mechanism of protection.* This could still allow some protection to one such *other use* (e.g. timber harvesting) from being singled out by having restrictions placed on them by a second more politically powerful *other use* (e.g. whitewater paddlers) of the resource. By applying a *"substantially interferes"* standard to protect these "other uses", Congress addressed the hypothetical circumstance, in which a powerful champion of one of these *"other uses"* might employ his or her lobbying power and connections with decision makers at respective agencies to muscle out *"other use"* proponents lacking the same well-funded lobbyists. Most likely, this *"substantial interferes"* standard anticipated the battle between economic interests, preservationist interests, and recreation interests.

The essential point is that the House Committee explanation of Section 10 is straightforward in lending an interpretation that the three separate sentences of §1281(a) are intended to rank the intensity of protection based on a continuum, perhaps roughly analogous to the following (1) the highest intensity of protection, in effect a zero tolerance towards any degradation, without any limitation on application, is owed to the *special features* of a river, e.g. the specifically enumerated esthetic, scenic, historic, archeologic, and scientific features of a river, (2) a more limited form of protection is to be provided to any other *outstandingly remarkable value* other than *"special attributes"* or *esthetic, scenic, historic, archeologic, scientific features (e.g. recreational or commercial uses)* and (3) zero protection is owed for any *"other use"* of the river resource that *"substantially interferes*" with one of the outstandingly remarkable values (e.g. special attributes, features, characteristics*)* that *initially* qualified the river for wild and scenic designation.

Stated differently, preserving the streambed's physical capability for sustaining outstanding wild trout fisheries must constitute a *scientific feature* for which "primary emphasis shall be given to protecting." As applied to the Chattooga, preventing any diminishment in the trout habitat's physical quality constitutes the WSRA standard for assessing if site specific management initiatives will cause impermissible degradation. In evaluating negative impacts the USFS ought to apply various criteria, including but not limited to alkalinity, chlorine, water hardness, lead, mercury, dissolved oxygen, pH, temperature, suspended and bedded sediments, and temperature. Nevertheless, the USFS has refused to undertake the necessary steps to discharge these fundamental antidegradation management responsibilities.

The USFS refuses to protect these "features" even as it extends unwarranted special accommodation to the ever increasing demands of a single recreational user group—creek boaters. This augurs something more than mere negligence.

It is true that the state of North Carolina establishes the classification of water quality standards that apply to every stream flowing through the state—even for those flowing inside a national forest. Similarly, the state of North Carolina holds the public trust right to set harvest limits, etc. pertaining to game fish on all streams in North Carolina.

However, the USFS retains the primary authority and management obligation to protect and to prevent any physical diminishment of the in stream trout habitat, the trout buffer, and the extended riparian corridor on this National Wild and Scenic River.

In other words the Forest Service must not allow recreational activities to cause the creation of chronic point sources of sediment input under either the National Wild and Scenic Rivers Act or the Clean Water Act.

Unfortunately, the USFS has ignored the Fourth Circuit Court of Appeal's unequivocal ruling 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).

G. Conclusion

Unfortunately, in lieu of discharging the non-discretionary duties imposed upon it by law, the USFS has used its resources to paint over these obligations while catering to the demands of whitewater enthusiasts.

The USFS has refused to use the best available science for recognizing how the stream bottom on the North Carolina part of the Chattooga has become filled in and choked by small sized sandy sediments and silt in quantities which exceed any reasonable minimum effects threshold for disrupting the reproductive and early life cycle needs of wild rainbow, brown, and brook trout.The Forest Service's recent admission of a need to undertake a watershed improvement project on Scotsman Creek underscores this complaint.

For too long, the Forest Service has engaged in a pattern and practice of de facto concealing information that might otherwise reveal how the Forest Service has repeatedly disregarded this duty to avoid undertaking any initiative that might cause any non-temporary diminishment or degrading in the quality of the wild trout habitat and wild trout fisheries on this Outstanding Resource Water.

The Forest Service has repeatedly caused informational injuries to me through its purposeful stonewalling of requests for factual information, whether styled as requests for records under the Freedom of Information Act ("FOIA") or questions posed pursuant to my *public participation* rights during the rewrite of the Land Resource Management Plan for the Nantahala National Forest.

The Forest Service's strategy of refusing to answer factual inquiries and of slow walking requests for information can be analogized to the legendary North Carolina Coach Dean Smith's infuriating but sometimes effective practice of trying to run out the clock using his "Four-corners offense".

This "four cornering" of information is pernicious because it prevents me from fully exercising my public participation rights during the rewrite of the Land Resource Management Plan ("LRMP") for Nantahala National Forest. A draft version of the LRMP is expected to be released any day now. This LRMP will govern how the Nantahala National Forest manages the Chattooga River in the coming years.

If this forthcoming LRMP is approved without the Forest Service giving appropriate reconsideration of the deficiencies in its current and future plans for regulating the recreational use of the Chattooga's headwaters, the protectable interests of those who own a North Carolina Lifetime Sportsman license will be irreparably harmed. I am one of those individuals.

Presumably, the USFS has read my Notifications dated July 29, 2017 and September 22, 2017.

The Forest Service must understand that these Notifications indicate why the Forest Service is in violation of its current LRMP. The promulgation of a new LRMP might possibly complicate my ability to prosecute such claims.

Consequently, the USFS has a powerful motivation for refusing to answer my factual inquiries pertaining to the Chattooga. The USFS has an opportunity to run out the clock before being required to disclose additional information that might compel the Forest Service to modify its management plans for the Chattooga River going forward. In fact, the Forest Service has stonewalled critical requests for information and records first made on September 22, 2017 that would help me to make the case that the Forest Service has violated the current LRMP.

This unresolved request for information is the current subject of an appeal to the Chief of the United States Forest Service. Attempts to resolve that matter have gone on too long.

Based on the law applied to the facts and complicated history of how the Forest Service has managed the Chattooga's headwaters, the Forest Service has violated the Freedom of Information

Act ("FOIA"), the National Forest Management Act (16 U.S.C. §§ 1600-1687), the National Wild and Scenic Rivers Act (16 U.S.C. §§ 1281-1287), the Administrative Procedures Act (5 U.S.C. §§ 551-559 & §§ 701-706 et al), the National Environmental Policy Act (42 U.S.C. §§ 4321-4370m), the Clean Water Act, and North Carolina's Sedimentation and Pollution Control Act of 1973, and associated federal and state regulations.

Finally, with respect to the Chattooga's headwaters, the *original but for cause* of the my injuries can be traced back to 2005 when the USFS orchestrated the equivalent of a sub rosa appeal that singularly benefitted the interests of whitewater creek boaters at the expense of the river and at the sacrifice of the *protectable rights* of North Carolina Lifetime Licensees. Stated differently, I was denied proper notice and the opportunity to be heard during American Whitewater's 2004 appeal because the Forest Service orchestrated the functional equivalent of a sub rosa appeal.

Because of the Forest Service's practice of not offering full disclosure of critical information, I had no way to recognize how those protectable rights had been violated until May 15, 2015 when the Forest Service admitted that it was fully aware of an anomaly documented by a 1992-1996 study of trout populations on North Carolina's headwaters: "Young-of-the-year Brown Trout densities appeared to be lower than other North Carolina trout populations during the same sampling period…" *Chattooga River Boating Access*, Environmental Assessment, USFS, May 15, 2015 at page 205 (the "2015 EA")(indexed for the LRMP record as Floyd document E-1)(italics added). This explains why I should be allowed to pursue this distant violation of due process.

In order to avoid additional harm, legal action must be pursued immediately to guarantee relief from these Forest Service caused injuries.

Unless the Forest Service takes immediate action to remedy the concerns spelled out here in this 60 Day Notice of Intent To Sue, as well as in my Notification of July 29, 2017, and my Notification of September 22, 2017, I will amend my complaint to add the highlighted Clean Water Act Citizen Suit claims.

Respectfully,

William C.B. Floyd

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