

EXHIBIT 61

February 20, 2018

4110 Quail View Rd.
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Mr. Tony Tooke, via email to wo_foia@fs.fed.us
Chief, United States Forest Service

Re: **FOIA APPEAL_** FOIA Request 2018-FS-R8-00827-F
Floyd Appeal Disputing Any Claim Made In Correspondence Postmarked on January 25, 2018 That Notification Was Previously Provided To Me On November 21, 2017 That My Request For A Fee Waiver Had Been Rejected, And Disputing the Lawfulness of Demanding Payment of \$905.97 Before Providing Me With Electronic Copies of Documents Reasonably Described in FOIA Request 2018-FS-R8-00827-F, and Disputing Any Intention To Redact Certain Documents While Withholding the Production of Other Potentially Responsive Documents

Dear Chief Tooke:

Today's appeal *disputes every adverse determination* communicated in that certified letter, postmarked on January 25, but received January 31, 2018, authored by the office of Regional Forester Arney, Southern Region, United States Forest Service ("USFS" or "Forest Service") pertaining to my Freedom of Information Act ("FOIA") request which was submitted to the attention of the Forest Supervisor for the Nantahala National Forest on September 22, 2017 and which was previously assigned a FOIA tracking number of #2018-FS-R8-00827-F.¹

As a matter of clarification, it wasn't until January 31, 2018, when I retrieved the Regional Forester's adverse determination letter dated January 24, 2018, that I learned of the allegation that my request for a fee waiver had been rejected back on November 21, 2017. The Regional Forester's January 24th letter, postmarked on January 25th, asserted an entitlement to redact 12 pages of documents and to withhold 16 pages of records otherwise deemed to be responsive to my September 22, 2017 request for records. This January 24, 2018 adverse determination also referenced an earlier notification alleged to have communicated the rejection of my request for a fee waiver on or about November 21, 2017.

I have no record of having received this November 21, 2017 correspondence until a copy of a document entitled "2018-FS-R8-00827-F_Floyd_FEE_Response_Signed" was first provided to me by Mr. Fuller-Bennett as an attachment to an email sent to me on February 7, 2018 @ 2:14

¹ This tracking number ties to the text of a reasonably described request for records emailed to the Forest Supervisor on September 22, 2017 @ 3:38 PM but which the United States Forest Service has arbitrarily alleged was received on October 25th. This tracking number was assigned to the text of my September 22nd FOIA by Mr. Doug Meloche who offered the following acknowledgement on November 8, 2017 @ 2:08 PM: "We received your FOIA request , October 25, 2017, and assigned it the following tracking number, 2018-FS-R8-00827-F. Your request is currently on hold as we work to clarify information needed to proceed with a fee waiver determination. We will continue to process the information that you recently submitted via email on 11/6/2017"

PM—in response to my complaint about not having been provided with this notification either through email, United States Postal Service, or Federal Express overnight mail.

To avoid confusing the exact dates when communications occur in connection with this appeal, to avoid any further delays in producing documents, and to avoid wasting the public's purse on unnecessary postal costs, please communicate about this appeal electronically via email. Please provide me with electronic copies of any determinations and supporting documents.

First, this appeal seeks a finding that the disclosure of the records targeted by my September 22nd request satisfied the “public interest” of 5 U.S.C. §552(a)(4)(A)(iii). Second, this appeal asks for the release of all documents, without exemption. Third, because these remedies will be inadequate alone to prevent the same misapplication and misinterpretation of non-binding internal guidelines, the Chief of the United States Forest Service shall declare

- (1) During the rewrite of the Nantahala and Pisgah National Forests Land Resource Management Plan, the USFS will comply with the National Forest Management Act's non-discretionary public participation mandate by *promptly* providing detailed and non-evasive answers to specific questions of Floyd pertaining to USFS initiatives impacting the Chattooga River's trout habitat and trout fisheries including providing policy justifications for specific initiatives;
- (2) The USFS shall *promptly respond* to Floyd's future requests for records regarding the Chattooga's headwaters in North Carolina *without requiring* further proof of entitlement to a fee waiver under 5 U.S.C. §552(a)(4)(A)(iii).
- (3) The USFS shall acknowledge that because records had not been identified as of October 26, 2017 @ 10:30 AM, the following representation, which was made by a subordinate per the orders of a superior official was speculative and arbitrary: “This referral was made due to the likelihood of redactions, need to clarify fee waiver status, and the voluminous nature of the request.”²
- (4) The USFS did not comply with 5 U.S.C. § 552(a)(6)(A).

The September 22nd request was intended to disclose information needed by the public *to assess* the Forest Service's potential *mifeasance, nonfeasance, or malfeasance*³ for having refused on September 6th, during the rewrite of the Nantahala's Land Resource Management Plan, (1) to apply the best available science in assessing the impacts of excessive embedded sediments on salmonids and (2) for refusing to revisit the additional measurable damage being caused by the Forest Service's 2012 decision to promote the sport of creek boating on the Chattooga's headwaters in North Carolina.

² See the text of D. Meloche, Regional FOIA Coordinator, email dated Thursday, October 26, 2017 @ 10:30 AM to B. Floyd, with email copies to Forest Supervisor Nicholas and Ms. Heather Luczak, Forest NEPA Coordinator; Set forth fully in Attachment A-1 to this appeal. (italics added).

³ Misfeasance: the improper performance of some act which a [person] may lawfully do. “Nonfeasance” means the omission of some act which a person ought to do; “mifeasance” is the improper doing of an act which a person might lawfully do; and “malfeasance” is the doing of an act which a person ought not to do at all. Black's Law Dictionary 902 (5th ed. 1979).

A. The Common Public Interest Served By My September 22nd FOIA Request

Similar to no less than 17 prior FOIA requests dating back to October 2015, this request sought the release of records believed to contain information whose disclosure would help to inform the public about the appropriate or inappropriate role being played by the Forest Service in either addressing or ignoring the Chattooga's degrading trout habitat and trout fisheries. To explain, the USFS has a nondiscretionary duty—arising from the Clean Water Act and the National Wild and Scenic Rivers Act to prevent any diminution in the quality of the Chattooga's trout habitat and wild trout fisheries. The USFS denies any responsibility. To explain why this is wrong, preventing any non-temporary degrading of the once “outstanding” quality of the Chattooga's trout habitat and trout fisheries constitute the designated uses of these Outstanding Resource Waters (“ORW”).⁴ These designated uses of this stream's ORW water quality have suffered degradation because *small particle sized sandy sediments (<2mm) have embedded the stream bed's larger substrates in quantities that visibly exceed any reasonable minimum effects threshold for disrupting the reproductive and early life cycle needs of trout*. So far, the Forest Service has studiously avoided undertaking any scientific investigation into the negative impacts on the trout habitat and wild trout fisheries being caused by this excessive embedded sediment.

B. The USFS Has Repeatedly Disregarded the Best Available Science

The USFS has entirely disregarded the *best available science* that has been applied out west for quantifying when embedded sediments will negatively impact the health of salmonid populations. See Bryce, Lomnický & 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)(“Combining all lines of evidence, we concluded that for sediment-sensitive aquatic vertebrates, minimum-effect sediment levels were 5% [for <=.06mm fines] and 13% [for <=2mm sand and fines], respectively, both expressed as areal percentages of the wetted streambed surface.”); Bryce, Lomnický, 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); 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”)(italics added). See also how Region 10 of the Environmental Protection Agency has embraced the Bryce, Lomnický & Kaufmann model for recognizing degraded conditions in trout streams out west due to excessive embedded sediments.⁵

⁴ The Chattooga's headwaters in North Carolina constitute 1 of 3 out of 12,000 bodies of water that carry Class B, Trout, Outstanding Resource Waters classifications in combination with a National Wild and Scenic River designation. This obligation follows from 40 C.F.R. §131.12(a)(3) which North Carolina incorporates by reference at 15A NCAC 02B.0201; See also 15A NCAC 02B.0225(b)(1).

⁵ “Fine Sediment Score (FSS): EPA is supportive of the development of biologically based sediment criteria (Cantilli et al. 2006), where biological data are used to set sediment criteria that protect and maintain populations of

These peer reviewed studies detail the best available science for assessing the embedded sediment problem that plagues the Chattooga's ORW headwaters in North Carolina. Rejecting the best available science, and ignoring the plainly visible evidence blanketing the stream bottom, the USFS promotes a false public message that all is well.⁶ The USFS has not conducted the trout population monitoring studies that the Nantahala's existing Land Resource Management Plan ("LRMP") compels to be done on management indicator species on an annual basis. When pressed to explain why young-of-the-year trout numbers are unacceptably low on the segment of river where this sediment chokes the spawning habitat, the Forest Service defends by asserting all is well because trout continue "to persist."

Despite these claims, the fact is an extended segment of these Outstanding Resource Waters (approximately 2.0 miles), now lacks the physical stream bed capacity to sustain an *outstanding wild trout fishery* as defined by population standing crop weights, relative abundance, and the ratio of young-of-the-year to other age classes. *Based on the best available science regarding the impacts of embedded sediments on salmonids, the Chattooga's sediments are simply too excessive.*

Because the USFS seeks to *project a false public image that all is well*, the USFS possesses motivation to prevent me from gathering *additional* records, data, and information needed for the public to recognize how the USFS has intentionally ignored (1) *how these embedded sediments exceed any reasonable minimum effects threshold for disrupting the suitability of the Chattooga's stream bed for satisfying the reproductive and early life cycle requirements needed to sustain an outstanding wild trout fishery; and (2) how creek boating has impermissibly aggravated the sediment problem by causing the displacement of soils and the subsequent discharge of those trout buffer soils into the Chattooga's ORW headwaters.* This conflict of interest provides sufficient justification to ask an appropriate authority for the opportunity to compel answers that might reconcile this inexplicable denial of this sediment.

The Chattooga's excessive embedded sediment problem has measurably reduced the availability of suitable spawning and early life cycle trout habitat because it is a foot deep in certain places and is bank to bank in other places. The USFS denies any problem while thwarting my efforts to gather additional evidence by first delaying a decision, by second rejecting my entitlement to a FOIA fee waiver based on 5 U.S.C. §552(a)(4)(A)(iii), and third by claiming an entitlement to redact or withhold documents otherwise deemed responsive to my September 22nd FOIA request.

native, sediment sensitive species. Sediment is a leading cause of biological impairment in rivers and streams of the US (USEPA 2000). 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 (<2 mm). The median optima for percent fines was 6.5% for sediment sensitive salmonids and 2.8% for sediment sensitive macroinvertebrates. The median optima for percent sand and fines was 13% for sediment sensitive salmonids and 9.7% for sediment sensitive macroinvertebrates." G. Hayslip, Aquatic Biologist, Office of Water and Watershed, United States Environmental Protection Agency, Region 10, *Use of Biological Data in the 303(d) Program*, Memorandum. http://www.deq.state.or.us/wq/tmdls/docs/midcoast/Advisory/102814EPA_memo.pdf last downloaded 1/13/2017

⁶ District Ranger Mike Wilkins was quoted in the Cashiers, North Carolina, Crossroads Chronicle newspaper on December 20, 2017 as stating: "The Chattooga River is one of our healthiest rivers...It's in good shape."



This photo was taken on October 31, 2014 @ 4:49 pm. This typifies the trout habitat problems being suffered on this extended segment of the Chattooga's headwaters in North Carolina. As the USFS has been shown with an *extensive compilation of photographs*⁷ the stream bottom is blanketed with small particle sized sandy silt and organic sediments over an approximate two mile segment of the Chattooga's headwaters in North Carolina.

The Forest Service has ignored its law enforcement duty to prevent creek boating activities on North Carolina's headwaters from exacerbating this fundamental problem. The construction and use of creek boat launch sites, evacuation points and portage trails within the trout buffer has impermissibly caused the displacement of fragile soils and the discharge of those soils into the water. Nevertheless, the USFS refuses to revisit the ill-conceived management decision to prioritize promoting the interests of creek boaters over all other interests—including the public's interest in providing the Chattooga's trout habitat and trout fisheries with the antidegradation protections that they are owed under both the Clean Water Act and the National Wild and Scenic Rivers Act. The USFS incorrectly presumes an ability to call such damage de minimis.

⁷ See this compilation of photos indexed as document 00-N which was emailed to the Chief of the USFS via wo_foia@fs.fed.us in connection with a prior FOIA appeal submitted on 05302017 @ 10:29 AM asking for records evidencing any law enforcement efforts to monitor and to prevent creek boating activities from damaging North Carolina's protected trout buffer during the limited paddling season.

Shown below is a September 2015 photo evidencing Boater Created Erosion Sites B-5 located @ approximately 35.047649, -83.120699. This photo captures how the previously pristine trout buffer has been destroyed by creek boaters “seal” launching their boats across the highly erosive stream bank. The 2012 authorization of this recreational use has also caused the violation of the Nantahala’s existing Land Resource Management Plan (“LRMP”) Standards pertaining to Management Areas 15 & 18.



These sites develop as a consequence of paddlers’ unavoidable need to “seal launch” their boats off of the fragile and protected trout buffer when the river is running in excess of 350 cfs. Such boater created erosion sites constitute point sources of pollution. Back in 2007, the Forest Service conducted a physical inventory of all erosion sites and user created trails up and down the entire 57 mile river corridor. This 2007 biophysical inventory inventoried 182 erosion sites. At that point in time, and up to December 2012, the Chattooga’s headwaters in North Carolina *had virtually zero erosion sites*. In contrast, this 2007 inventory documented that chronic stream side erosion sites were disproportionate on that part of the river where whitewater kayaking and rafting constitute the primary recreational uses of the river. The North Carolina part of the river was as pristine as the condition noted by Chief McGuire in 1976. Unfortunately, this is no longer the case after the introduction of creek boating to North Carolina’s headwaters. The Forest Service would have us believe that any additional sediment inputs caused by creek boating activities should be excused as having de minimis impacts. However, such a view does not square with the nondiscretionary obligations imposed upon the Forest Service by both the Clean Water Act, the National Wild and Scenic Rivers Act and the Nantahala’s existing LRMP regarding visible sources of sediment being discharged into our ORW trout streams.

See Boater Created Erosion Site B-5-B taken on September 25, 2015 and September 7, 2015.



The left photograph was taken looking down the Chattooga River Trail from Boater Created Erosion Site B-5 towards Boater Created Erosion Site B-5-B. The red arrow points to B-5-B. The second and third photos look down through the *trench* dug out to create a seal launch site.



Neither the point source of pollution at B-5 nor B-5-B existed prior to December 2012—when boating commenced on North Carolina’s headwaters. Both were observed by anglers after the first paddling season ended. Boater Created Erosion site B-5 and B-5-B constitute paddler seal launch sites that were created by paddlers within just a few feet of each other. B-5 was the first of those two conjoined seal launch sites to evidence intense damage of the trout buffer.

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 Forest Service’s permit counts evidence that only a few paddlers have allegedly floated this section over the first four paddling seasons. *Nevertheless, this numerically infrequent use was sufficiently intense to cause the river bank to collapse in two different places within eyesight of each other.*

The earliest photos of B-5-B evidence a trench characterized by *clearly squared sides and having the width of an average kayak*. These *squared sides* evidence how the initial trench must have been 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. Over time, these squared sides have disappeared as additional erosion occurs. Fortunately, we have the before and after photographic evidence of the perceptible handiwork of creek boaters in creating recreational infrastructure inside the protected trout buffer. *See the annotated compilation of photos previously placed into the Forest Service’s administrative record and indexed as document 00-N.*

Similar to no less than 17 prior FOIA requests, dating back to October 2015, my September 22nd FOIA targeted records and information that could be synthesized to compel the United States Forest Service to do its part to bring relief to the degraded trout habitat and trout fisheries on the Chattooga River’s headwaters in North Carolina.

The September 22nd FOIA constitutes one in a series of continuing FOIA requests targeting records containing information pertinent to answering whether or not the Forest Service has adequately discharged its *nondiscretionary* management obligation to avoid undertaking any kind of management initiative that might cause any non-temporary degradation in the quality of the trout habitat and trout fisheries on the Chattooga’s headwaters in North Carolina.

I am appealing both the denial of a fee waiver and the redaction and withholding of otherwise responsive records based on a claim of entitlement per Exemptions 5 and 6 of the FOIA. Furthermore, *in view of the the Forest Service’s most recent effort to hinder my attempts to use FOIA, there is justification to reserve the right to ask for a second search of records.*

C. Regarding FOIA Request #2018-FS-R8-00827-F, Notice That A Fee Waiver Had Been Rejected Was First Constructively Received on January 31, 2018

As stated previously, I have no record of receiving any notification on or about November 21, 2017 detailing why an adverse determination was being issued in connection with my request to be provided with a fee waiver, based on my entitlement to such a fee waiver under 5 U.S.C.

§552(a)(4)(A)(iii) in connection with my September 22nd FOIA request. Instead, I only received actual notification of the specific reasons for this adverse determination on February 7, 2018.

Before detailing why there is sufficient reason to be concerned about this administrative difference of opinion about when adequate notification was delivered to me, this appeal will first rebut the specific reasons cited by the Regional Forester for having denied this fee waiver request.

D. The Reasons Asserted For Denying A Fee Waiver For Request #2018-FS-R8-00827-F⁸

This request was considered perfected under FOIA on November 6, 2017, when you requested a fee waiver for this specific request. The USDA FOIA regulation (7 CFR Appendix A to Subpart A Part 1 Section (6)(a)(1) sets forth six factors that the Forest Service is required to evaluate in determining whether the applicable standard for a fee waiver has been met: (1) Whether the subject of the requested records concerns ‘the operations or activities of the government,’ (2) Whether the disclosure is ‘likely to contribute’ to an understanding of government operations or activities, (3) Whether the disclosure of the requested information will contribute to ‘public understanding,’ (4) Whether the disclosure is likely to contribute ‘significantly’ to public understanding or government operations or activities, (5) Whether the requester has a commercial interest that would be furthered by the requested disclosure, and (6) Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison to with the public interest in disclosure, that disclosure is ‘primarily in the commercial interest of the requester.’”

Upon review of your emails (October 27, 2017) and November 6, 2017), along with email correspondence sent to you from Mr. Harald Fuller-Bennett (WO-FOIA) on November 1, 2017, it has been determined that you have failed to provide adequate information to satisfy the fee waiver standard.

In particular, you failed to provide any information regarding factor (3). According to FOIA, the key element considered when evaluating this factor includes:

1. The contribution to understanding of the subject by the general public likely to result from disclosure; will disclosure of the requested records contribute the ‘public understanding’ of Government operations or activities.
 - a. How will the information be made available to the public at large? How will it be made available to a reasonably broad audience? How

⁸ This text is drawn from correspondence entitled “2018-FS-R8-00827-F_Floyd_FEE_Response_Signed” first emailed to me as an attachment by Mr. Fuller-Bennett on February 7, 2018 @ 2:14 PM.

will the requester disseminate the information? Passive availability is not enough to meet this standard.

- b. Does the requester have the knowledge and expertise to synthesize and analyze the requested information? What is the requester's experience in the subject matter of the requested records? Can the requester effectively convey the results of the synthesis and analysis? Simply providing duplicates of the records to members of the public is insufficient to meet the criteria.

...The current estimate for processing this request is \$2,354.69. A copy of that estimate is being provided with this letter.

Due to an increasing number of FOIA requests...we may encounter some delay in processing your request...Although the ...goal is to respond within 20 business days of receipt of your request, the FOIA does permit a 10-day extension of this time period in certain circumstances. As your request will require a thorough and wide-ranging search of offices separate from this office, the Forest Service will invoke a 10-day extension for your request pursuant to 5 U.S.C. §552 (a)(6)(B).⁹

E. Why the Reasons Given For Denying My Fee Waiver Constitute Pretense

The Regional Forester has selectively picked internally inconsistent provisions taken from *Freedom of Information Act/Privacy Act Handbook*, FSH 6209.13, Chapter 10, to suggest these *internal guidelines* constitute *determinative rules* that must be satisfied by a requester to prove *dispositive* that "disclosure of the requested information will contribute to 'public understanding.'" See 7 CFR Appendix A to Subpart A Part 1 Section (6)(a)(1)(iii). In particular the Regional Forester implies that "you failed to provide any information regarding factor (3)" because he asserts the "key element considered when evaluating this factor includes" a requester doing something to provide sufficient evidence that the information disclosed will be "made available to a reasonably broad audience" and "[how]...the requester [will] disseminate the information."¹⁰

Meanwhile, the Regional Forester has entirely disregarded the facts that existed on September 22, 2017 when the Forest Supervisor for the Nantahala National Forest was presented with my request for records. On that date, Forest Supervisor Nicholas, as the responsible official, *could not in good faith* have denied knowing with *reasonable specificity* "the link between [my September 22nd FOIA] request and the enhancement of public awareness and understanding of governmental activities." *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Educ.*, 593 F.Supp.2d 261, 270 (D.D.C.2009).

⁹ This text is drawn from correspondence entitled "2018-FS-R8-00827-F_Floyd_FEE_Response_Signed" first emailed to me as an attachment by Mr. Fuller-Bennett on February 7, 2018 @ 2:14 PM (italics added).

¹⁰ This text is drawn from correspondence entitled "2018-FS-R8-00827-F_Floyd_FEE_Response_Signed" first emailed to me as an attachment by Mr. Fuller-Bennett on February 7, 2018 @ 2:14 PM (italics added).

On September 22, 2017, Forest Supervisor Nicholas had firsthand knowledge of the contents of two separate Notifications dated July 29, 2017 and September 22, 2017—because both of these Notifications were directed to his attention. Each has been included in Attachment A-1 to this Appeal. These two Notifications had offered criticism and suggestions about what to do about the Chattooga’s degraded trout habitat that was based on a synthesis of factual information and data—otherwise unpublished by the USFS—but collected through no less than 17 prior FOIA requests dating back to October 2015. As the responsible official for the management of the Nantahala National Forest, the Forest Supervisor must not be excused from knowing about controversial issues and the contents of the forest’s administrative record pertaining to those controversial issues.

The Forest Supervisor and/or his staff would have been aware of my detailed concerns about the Chattooga’s degraded trout habitat and the refusal of the Forest Service to do its part in restoring that habitat and the once outstanding wild brown, brook, and rainbow trout fisheries that have been diminished by the river’s excessive embedded sediment problem. The Forest Supervisor and his staff would have been fully aware of my concerns that allowing creek boating had caused additional sediments to be discharged into a stream already overstressed by embedded sediments and that the Nantahala National Forest had inexplicably ignored that damage. He would have understood my charges that the Forest Service had provided special accommodation to whitewater boating enthusiasts—despite the Fourth Circuit having unequivocally 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)(emphasis added).

Finally, he would have been aware of my complaint that the Forest Service had *purposefully* not conducted any assessment of the impacts of this sediment on the trout populations.

Clearly all of these issues constitute public concerns because they pertain to whether or not the Forest Service has been honoring its obligations and doing its job under the current Nantahala National Forest LRMP, the Clean Water Act and the National Wild and Scenic Rivers Act.

Neither may the USFS try to deny the Forest Supervisor’s actual knowledge of the readily available proof of my entitlement to a fee waiver by having the Regional Forester and/or his staff usurp the responsibility for processing my September 22nd FOIA.

More troubling than these fundamental problems, the proffered reasons for denying my fee waiver are dependent on certain fundamental assertions of fact that do not square with my understanding of the administrative record tied to my September 22nd FOIA request.

Such disputed facts concern how the Regional Forester’s staff may have misapplied nonbinding guidelines in an effort to alter the proper *date of receipt* of my FOIA, to alter the date when a *request for a fee waiver* was first submitted, and to assign inappropriate determinative importance to when the request became “*perfected*”. How the Regional Forester’s staff went about interpreting the concept of a “perfected” FOIA holds great significance in my case

because the misapplication of that concept has been used to try to fix a much later date in time for when the FOIA 20 day statutory clock should have expired.

First, I will discredit the assertion that “you failed to provide any information regarding factor (3)” and then I will itemize the disputed assertions of fact that the Regional Forester has allowed to creep into the administrative record.

1) The Forest Service’s Allegation “you failed to provide adequate information to satisfy the fee waiver standard” Constitutes Pretense.

It might have been *good faith instead of obstructionist* to make this allegation had this September 22nd request been the first FOIA instead of one mirroring 17 earlier FOIA requests *pertaining to the same narrow public interest* defined on page 3 of this appeal. However this wasn’t my first FOIA inquiring into factors relevant to allowing the public to undertake an assessment of the Forest Service’s management or mismanagement of the Chattooga’s headwaters in North Carolina. On September 22nd, Forest Supervisor Nicholas and his staff *knew that dispositive proof* linking my efforts in using FOIA to surface otherwise unpublished records and to synthesize the contents of those records for the stated public purpose had already been lodged within the Nantahala Forest’s administrative record. The Forest Service’s inexplicable amnesia about the common public interest concern involved in my 17 prior FOIAs *raises serious concerns about the motivations* for using forced interpretations of guidelines to refuse initially to process my request and ultimately to deny a fee waiver based on 5 U.S.C. §552(a)(4)(A)(iii).

Given this history the USFS proffers pretense when it alleges “you failed to provide any information regarding”...[[w]hether the disclosure of the requested information will contribute to ‘public understanding’”]. On September 22nd, Forest Supervisor Nicholas and his staff *must have recognized with reasonable specificity* “the link between [my September 22nd FOIA] request and the enhancement of public awareness and understanding of governmental activities.” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Educ.*, 593 F.Supp.2d 261, 270 (D.D.C.2009). Given the Forest Service’s *written* refusal on September 6th to answer my questions regarding the Chattooga and its refusal to revisit how it has been managed since 2012, the Forest Supervisor must not claim that he had not been told the specific reason why the records being requested sought “to ferret out and make public worthwhile, previously unknown government information — precisely the activity that FOIA’s fees provision seeks to promote.” *Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 999 F. Supp. 2d 61, 69 (D.D.C. 2013)(quoting *Davy v. CIA*, 550 F.3d 1155, 1160 (D.C. Cir. 2008).

To press this specific point, neither the Forest Supervisor nor his staff *ever* challenged any particular item on the September 22nd request *as being irrelevant or not closely enough tied to my stated objectives* in using FOIA for the public good. *The absence of any complaint about the relevance of the records being requested tells it all.* This further evidences how the Regional Forester’s stated reasoning for denying my fee waiver constitutes legal pretense. Nevertheless, the Regional Forester now suggests that somehow I have failed to satisfy the requisite standard—but without providing sufficient specificity for a reasonable person to understand what the requisite standard requires.

a) The First Illustration of Pretense: The Forest Supervisor's Disregard of the Existing Administrative Record of the Nantahala National Forest

To explain, the Forest Service Handbook provides:

If the disclosure *will primarily benefit the general public* and is not primarily in the commercial interest of the requester, fees may be waived or reduced, *regardless of whether a requester sought a waiver or reduction of fees.*¹¹

Stated differently, *if a requester's entitlement to a fee waiver is self-evident to the responsible USFS official based on common knowledge gained from a prior course of dealing with the requester or from common awareness of facts already lodged within the Nantahala's administrative record*, the USFS should not deny a requester from receiving a fee waiver simply because the requester did not include a specific demand for a fee waiver in their FOIA request. When reviewing my September 22nd FOIA, the Forest Supervisor and his staff should have *sua sponte* considered the proof of my entitlement to a fee waiver already lodged within the administrative record—*about which they had actual and constructive knowledge*.

By analogy, neither should I be denied a fee waiver because I chose to instruct the Forest Supervisor and his staff to consider the proof of my entitlement to a fee waiver that was already lodged within the Nantahala's contemporaneous administrative record. The result should logically be one and the same. Instead the USFS implies foul.

The Forest Supervisor for the Nantahala National Forest and his staff were/are fully aware how the administrative record contains dispositive evidence of my efforts to disseminate otherwise unpublished information for the purpose of informing other interested parties regarding (1) the Chattooga's degraded trout habitat and trout fisheries and (2) the Forest Service's relative level of success or failure in managing the Chattooga's trout buffer, riparian corridor and in stream trout habitat to accomplish the preservation of an "outstanding" wild trout fishery. Such evidence consists of detailed notifications, comments, and formal objections that have criticized and made recommendations about Forest Service management initiatives that have caused incremental harm to the Chattooga's degraded trout habitat and trout fisheries.

FOIA does not preclude a requester from asserting their entitlement to a fee waiver by *incorporating by reference*¹² the various facts and arguments that the requester has already lodged within the administrative record that would prove such entitlement. It would be administratively inapposite to require the requester to resubmit hundreds of pages of information that was already in the possession of the Forest Supervisor and his staff. Incorporation by

¹¹ *Freedom of Information Act/Privacy Act Handbook*, FSH 6209.13, Chapter 10, paragraph 11.45 Discretionary Waiver of Fees, at page 15 (06/20/2012).

¹² Under the doctrine of incorporation by reference, a Court may consider "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading." *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005)

reference in my circumstance economizes because the records are already in the possession of the Forest Service and *because there is no doubt about their authenticity* of authorship.

The Forest Service knows the only way to reconcile what Paragraph 11.45 Discretionary Waiver of Fees¹³ says about the *granting of a fee waiver* is to recognize how responsible officials have an implicit duty, *to sua sponte consider* a requester's entitlement to a fee waiver, especially when such officials have actual knowledge of proof of entitlement that is already lodged within the Nantahala's administrative record, from knowledge gained through a prior course of dealing with the requester, or just common knowledge from what such officials have read in public newspapers etc.

There is no compelling public policy reason to prohibit a requester from incorporating by reference records that the requester had previously lodged within the Forest Service's administrative record. To deny that ability would prejudice a requester's due process rights by limiting the administrative record to which the requester might refer in pressing an appeal of the prospective denial of a requested FOIA fee waiver.

This is true because the FOIA statute limits the rights of a requester in any subsequent legal appeal as follows:

“In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: Provided, That *the court's review of the matter shall be limited to the record before the agency.*” 5 U.S.C. 552(a)(4)(A)(vii)(italics added).

This same fact and circumstance characterizes my September 22nd FOIA.

On October 27, 2017, through correspondence entitled “FLOYD FOIA Fees Correspondence w Meloche 10272017.pdf “, I reminded Forest Supervisor Nicholas and Mr. Meloche of the Forest Service's implicit duty under FOIA to consider the contemporaneous contents of the Nantahala's administrative record in evaluating my entitlement to a fee waiver. *To make that implied duty an explicit one I specifically directed*

The existing administrative record underlying my current FOIA request offers an abundance of context for why my September 22, 2017 FOIA should be treated exactly the same. *I incorporate all of that administrative record into my FOIA request of September 22, 2017.*¹⁴

Similarly, I reminded the Forest Supervisor and Southern Region staff that I had already directed the Forest Service on October 25th to honor its implicit duty to consider all the dispositive

¹³ *Freedom of Information Act/Privacy Act Handbook*, FSH 6209.13, Chapter 10, paragraph 11.45 Discretionary Waiver of Fees, at page 15 (06/20/2012).

¹⁴ See page 1 of the correspondence entitled “FLOYD FOIA Fees Correspondence w Meloche 10272017.pdf “sent by B. Floyd via email to Forest Supervisor Nicholas and Mr. Meloche on October 27, 2017 at 4:28 PM.(italics added). This document is included in Attachment A-1 to this appeal.

evidence of my entitlement to a fee waiver that had already been lodged within the Nantahala's administrative record.

As I clearly stated to you in my response email dated October 25, 2017 @ 10:23 pm, it remains my contention that the United States Forest Service has more than enough information already within its administrative records to draw the conclusion that my September 22, 2017 FOIA request also seeks "disclosure of information [which] is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. §552(a)(4)(A)(iii).¹⁵

Stated differently, the USFS was wrong to assert that "you failed to provide any information regarding Factor (3)."¹⁶ On September 22nd, Forest Supervisor Nicholas and staff had an obligation to consider what they knew from their own administrative record, including what they knew about their own communications with me as recent as September 6th about my involvement in the Nantahala Forest's LRMP planning process and my efforts to disclose otherwise unpublished information needed by the public to recognize (1) *how the embedded sediments present on the Chattooga's headwaters in North Carolina exceed any reasonable minimum effects threshold for disrupting the suitability of the stream bed for satisfying the reproductive and early life cycle requirements for sustaining an outstanding wild trout fishery; and (2) how allowing creek boating to be pursued on these headwaters has impermissibly aggravated the sediment problem by causing the additional displacement of soils and the subsequent discharge of those trout buffer soils into the Chattooga's ORW headwaters.*

It would be inapposite to the public policy purpose of FOIA as well as the public participation mandate of the National Forest Management Act to condone the Forest Service's denial of any duty to remain aware of the comments, objections, and administrative appeals that I had/have placed into the Nantahala's administrative record regarding the Forest Service's need to fix the Chattooga's degraded trout habitat and trout fisheries—especially since much of this information was disseminated into the administrative record during designated public comment periods pertaining to management initiatives specifically involving the Chattooga.

Further auguring the appropriateness of holding these officials accountable for knowing about my contributions to the administrative record, only a handful of interested individuals and organizations had/have submitted administrative objections to management initiatives impacting the use of the Chattooga's trout buffer, its riparian corridor, and the specially designated uses of the Chattooga's ORW water quality. I constitute one of those hand full of participants who have perfected their right of appeal to adverse determinations associated with the Chattooga.

¹⁵ See page 5 of the correspondence entitled "FLOYD FOIA Fees Correspondence w Meloche 10272017.pdf" sent by B. Floyd via email to Forest Supervisor Nicholas and Mr. Meloche on October 27, 2017 at 4:28 PM. This document is included in Attachment A-1 to this appeal.

¹⁶ This text is drawn from correspondence entitled "2018-FS-R8-00827-F_Floyd_FEE_Response_Signed" first emailed to me as an attachment by Mr. Fuller-Bennett on February 7, 2018 @ 2:14 PM (italics added).

b) A Second Example of Information Disseminated to Other Interested Individuals and Organizations

In addition to knowing how I have prepared and published multiple comments, objections, and administrative appeals in connection with management initiatives impacting the use of the Chattooga's trout buffer, riparian corridor and ORW water quality, the Forest Supervisor also knows how I synthesized information gathered through FOIA requests and published two lengthy Notifications detailing otherwise undisclosed facts pertinent to evaluating the degree of the Forest Service's neglect in ignoring the degrading impacts of this excessive embedded sediment on the quality of the trout habitat and wild trout populations on the Chattooga's headwaters in North Carolina. These lengthy Notifications were emailed directly to the attention of the Forest Supervisor on July 29, 2017¹⁷ and on September 22, 2017.¹⁸

On September 22, 2017 @ 3:38 PM the Forest Supervisor had actual knowledge that the detailed contents of my work product, *Floyd Notification USFS Nicholas 07292017 FINAL*, had been published for the benefit of other interested parties in the Nantahala's LRMP electronic public reading room.¹⁹

What better place to disseminate information in order to achieve the goal of bringing otherwise unpublished information to the attention of a broad audience of highly interested parties.

This targeted dissemination of this written work product to this audience of individuals and organizations interested in the LRMP planning process should have been recognized by the Forest Supervisor as dispositive evidence of my having contributed significantly to the public's ability to evaluate and to reach an understanding about the relative attention or neglect paid by the Forest Service to the Chattooga's degraded trout habitat and trout fisheries.

This fact should have given the Forest Supervisor more than sufficient justification to recognize my entitlement to a fee waiver for requesting documents containing unpublished information whose disclosure "is in the public interest because it is likely to contribute significantly to public

¹⁷ See the *Floyd Notification USFS Nicholas 07292017 FINAL*, was emailed to Forest Supervisor Nicholas on Saturday, July 29, 2017 @ 9:44 AM.

¹⁸ See the *Floyd Notification USFS Nicholas 09222017 FINAL* emailed on September 22nd at 3:38 PM to Forest Supervisor Nicholas and various other members of his staff including Ms. Michelle Aldridge.

¹⁹ On August 28th, I complained because the USFS had failed to publish my Notification of July 29, 2017 and its supporting documents in the LRMP electronic public reading room at <https://cara.ecosystem-management.org/Public/ReadingRoom?Project=43545>. I asked for the Notification and *all 170* supporting documents to be posted so that other interested members of the public might benefit from learning about facts and circumstances not otherwise disclosed by the USFS. Subsequently, sometime around August 29, 2017, the Nantahala and Pisgah Forests posted my Notification of July 29, 2017 *but not the documents providing the supporting evidence for the points raised in the Notification*. I have contested this refusal to post these other documents to the electronic reading room being maintained for the free exchange of information during the LRMP planning process. The refusal of the Forest Service to post all of those supporting documents is particularly probative because another member of the public, Mr. Michael Bamford, has advised me that he also requested that these documents be posted to the electronic public reading room in an email dated September 19, 2017 @ 1:35 PM to Forest Supervisor Nicholas.

understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. §552(a)(4)(A)(iii).

Nevertheless, both the Forest Supervisor and subsequently the Regional Forester entirely ignored this prima facie evidence of my entitlement to a fee waiver that was so prominently known to Forest Supervisor Nicholas back on September 22, 2017.

c) A Third Example of Information Disseminated to Other Interested Individuals and Organizations

It was only because of my persistence in collecting information through FOIA that the public became informed in 2016 how the Forest Service had neglected since 1996 to conduct any form of trout population assessment on the Chattooga’s headwaters in North Carolina—*despite the current LRMP’s focus on monitoring management indicator species*. The Chattooga should have been receiving continuous monitoring of the stream’s trout habitat and trout populations—especially after the April 2005 Decision for Appeal was issued to provide unnecessary accommodation of the demands of American Whitewater.

Using the information collected by FOIA I was able *to alert select scientists and members of the public* about the paucity of young-of-the-year trout which had been counted back in 1992-1996 at a sampling location that was close in proximity to where this excessive embedded sediment is now bank to bank in certain places and over a foot deep in other places. Using that information I successfully pressed the state of North Carolina to agree to undertake a comprehensive electrofishing trout population study on approximately a mile of stream in September 2016—the first trout population study conducted on those degrading headwaters since 1996. This study corroborated a paucity of young-of-the-year trout numbers at eight different sampling locations and after electrofishing almost a mile of water on that section of the river where this embedded sediment is bank to bank in certain places and over a foot deep in other places. This study further documented less than outstanding standing crop weights at seven of the eight locations sampled.

This September 2016 trout study has been repeatedly brought up with the Forest Service in order to try to secure the Forest Service’s acknowledgement that there is a habitat problem. Even so, we have responsible Forest Service officials continuing to fabricate a public impression that all is well.

On September 22, 2017, the Forest Supervisor would have known about my involvement in convincing the state of North Carolina to conduct that study. This also should have been recognized by the Forest Supervisor as offering dispositive proof of my entitlement to a fee waiver pursuant to 5 U.S.C. 552(a)(4)(A)(iii). Nevertheless, no such recognition occurred.

d) A Fourth Example of Information Dissemination to Other Interested Individuals and Organizations

In addition to communicating synthesized summaries of the otherwise undisclosed information drawn out of records produced by FOIA to the state of North Carolina regarding its need to conduct trout population studies, this same trout fisheries data has been communicated to select scientists and organizations having an interest in salmonids and sediment. The quality of the

organizations and the individuals to whom these documents have been submitted constitutes a more important element of establishing that disclosure will contribute to public understanding. When sent to experts in stream hydraulics and those who have studied the impacts of excessive sediments on salmonids, these disseminations are much more important than fax blasting out hundreds of emails to individuals who have neither the interest nor expertise to use the information. After discussing this FOIA gathered information, etc. with scientists I was able to inform both the USFS and the public that the Forest Service has not been using the *best available science* for recognizing the *minimum effects threshold for sediments on trout*.

e) A Fifth Example of Information Dissemination to Other Interested Individuals and Organizations

Similarly, the factual information that I have collected through FOIA has been disseminated and used as the basis for published articles that have run in the Crossroads Chronicle in Cashiers, North Carolina regarding the excessive embedded sediment problem and the exacerbating impact of continuing to allow creek boating on this same segment of stream.

Multiple letters to the editor have been published regarding what the Forest Service has allowed to occur under its management responsibility.

f) A Sixth Example of Information Dissemination to Other Interested Individuals and Organizations

The Forest Supervisor never assigned any significance to the fact that I had used the information collected through FOIA to publish summaries of conditions being suffered on the Chattooga which were then shared with key members of the select Stakeholders Forum for the Nantahala and Pisgah Plan Revision—who subsequently incorporated my work-product recommendations *into their September 1, 2017 recommendation* to the USFS about how to manage the Highland Domes, Rivers GEOGRAPHIC AREA (GA) /MANAGEMENT AREA (MA) PROPOSALS in rewriting the Nantahala’s LRMP.

Here is what the Fish and Wildlife Conservation Council advised should be done with the future management emphasis assigned to the Chattooga River in the upcoming LRMP.

Highland Domes, Rivers: We propose that the Chattooga River shall be managed as “outstanding waters”, as they are designated, to provide an abundance of rainbow, brown and brook trout. This proposal originates from a paper submitted to the FWCC by Mr. Bill Floyd, Cashiers, NC. The paper has been submitted to the FS by the FWCC.²⁰

My sharing of information with this member of the Stakeholder’s Forum and their subsequent adoption of my work product in making a formal LRMP recommendation on September 1st, should have been understood by Forest Supervisor Nicholas and his staff on September 22nd as providing *dispositive proof* how the *alleged need* to disseminate to a reasonably broad audience had been satisfied. *But this obvious contemporaneous proof was entirely ignored.*

²⁰ See the text of an attachment to an email from Dave Whitmire, Fish and Wildlife Conservation Council, to B. Floyd dated September 7, 2017 @ 9:57 PM whose contents are included in Attachment A-1 to this Appeal.

These six examples demonstrate how the Forest Supervisor and his staff knew or should have known that the *contemporaneous* administrative record contained more than sufficient evidence of my entitlement to a fee waiver based on 5 U.S.C. 552(a)(4)(A)(iii)—a fee waiver which was requested from Forest Supervisor Nicholas via email on October 24, 2017 @ @ 1:52 AM.

Like my prior FOIAs, the September 22nd FOIA sought records containing information that would inform on the Forest Service's involvement in managing or mismanaging the physical condition of the Chattooga's trout habitat and trout fisheries. Nevertheless, neither the Forest Supervisor and his staff nor the Regional Forester, et al, assigned an appropriate intensity of importance to their obligation to be informed by the *contemporaneous* content of the Nantahala's existing administrative record in evaluating my fee waiver request. This disregard of what they must have known or should have known constitutes a worrisome element of this FOIA dispute.

What is more troubling is that the *content* of the administrative record offers more than speculative reasons for fearing that the Forest Service's behavior is motivated by something different than a desire to interpret its own guidelines in a consistent fashion—that it constitutes one more example of a pattern of behavior that has had the pernicious impact of unnecessarily delaying the production of information for reasons that have nothing to do with the difficulties of finding records that are responsive to a reasonably described request.

The *time urgencies placed on me by the USFS control of the LRMP planning timeline* justifies further inquiry into the Forest Service's otherwise inexplicable interest in applying inconsistent interpretations of its guidelines as pretense for imposing significant financial penalties on me. Such financial burdens thwart the use of FOIA in surfacing additional evidence of the continuing disregard of the Forest Service's obligation to prioritize the protection of the Chattooga's trout habitat and trout fisheries. The Forest Service has not placed sufficient emphasis on preventing any non-temporary diminution in the quality of the stream's trout habitat and wild brown, brook, and rainbow trout fisheries—even though the Forest Service must understand that preventing any diminution in the quality of the trout habitat and trout fisheries constitute the specially designated uses of the Chattooga's ORW water quality. The USFS also obstinately ignores how "*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).

A careful review of the chronological history of my September 22nd FOIA justifies a rational rather than speculative fear that the Forest Service has embarked on a campaign to stifle any further discovery of critical information regarding the Forest Service's management or mismanagement of the Chattooga using the FOIA.

The administrative record associated with my September 22nd FOIA request evidences how and why. The Forest Service spends its resources looking for some interpretation of its guidelines to claim an entitlement first to delay making a decision and ultimately to assert the right to charge me unaffordable FOIA processing fees. A review of the chronological history leaves no doubt that these orchestrated processes have prejudicially forced me to use my limited time and energy preparing administrative appeals to respond to these forced delays.

F. The Regional Forester Has Created New Regulatory Law Without Following Proper Administrative Rulemaking. He Has Conditioned the Waiver of FOIA Fees on An Indeterminate Internal Guideline Regarding Dissemination to a “Reasonably Broad Audience”.

First, as a matter of administrative law, the Regional Forester’s adverse determination letter *incorrectly states*: “ *According to FOIA*, the key element considered when evaluating this factor includes...[how a requester will disseminate to a] “reasonably broad audience”.²¹

The fact is neither the FOIA statute nor the regulations found at 7 C.F.R. Appendix A to Subpart A Part 1 Section (6)(a)(1) impose *any such* specific burden on a requester of a fee waiver.

Inexplicably, without clarifying how the quoted provision actually constitutes a nonbinding internal guideline contained with the Forest Service Handbook 6209.13 Ch. 10 at Paragraph 11.46a - Factors to Consider When Determining Whether to Waive or Reduce Fees, the Forest Service creates an impression that *this provision constitutes the single critically determinative standard* for approving or denying my request for a fee waiver. Nonsense.

The Regional Forester cherry picks from the administrative record to assert: “Upon review of your emails (October 27, 2017 and November 6, 2017), along with email correspondence sent to you from Mr. Harald Fuller-Bennett (WO-FOIA) on November 1, 2017, it has been determined that you have failed to provide adequate information to satisfy the fee waiver standard.”²²

Setting aside the *nonbinding* guideline being used to deny my fee waiver, the Regional Forester further failed to detail why he believed that I had failed to satisfy the standard that he alleged was determinative—“How will [information] be made available to a reasonably broad audience? How will the requester disseminate the information?...Simply providing duplicates of the records to members of the public is insufficient to meet the criterion.”²³

Despite summarily repeating the text of the guidelines, the Regional Forester offered no case law involving the Forest Service’s interpretation of these guidelines as applied to specific facts. In fact, the Regional Forester *did not specify how* the cited emails etc. prove the Forest Service’s case that I have not disseminated information to a reasonably broad audience—something which the FOIA statute never mandates. Nowhere does the Regional Forester define what constitutes a “reasonably broad audience.”

The Regional Forester’s adverse determination entirely ignored how the USFS had been *specifically* directed, when evaluating my entitlement to a fee waiver, to consider the entirety of

²¹ See the Regional Forester’s correspondence entitled “2018-FS-R8-00827-F_Floyd_FEE_Response_Signed” first emailed to me as an attachment by Mr. Fuller-Bennett on February 7, 2018 @ 2:14 PM.

²² See the Regional Forester’s correspondence entitled “2018-FS-R8-00827-F_Floyd_FEE_Response_Signed” first emailed to me as an attachment by Mr. Fuller-Bennett on February 7, 2018 @ 2:14 PM.

²³ See the Regional Forester’s correspondence entitled “2018-FS-R8-00827-F_Floyd_FEE_Response_Signed” first emailed to me as an attachment by Mr. Fuller-Bennett on February 7, 2018 @ 2:14 PM.

my specific contributions placed into the Nantahala's administrative record regarding the Chattooga's degraded trout habitat problem.

The FOIA statute does not prohibit the requester from incorporating by reference *extensive corroborating information* already residing within the administrative records of the United States Forest Service—in order to justify a fee waiver. This distinction is not insignificant because the FOIA statute limits the rights of a requester in any subsequent legal appeal as follows:

“In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: Provided, That *the court's review of the matter shall be limited to the record before the agency.*” 5 U.S.C. 552(a)(4)(A)(vii)(italics added).

In my case, because of the Forest Service's prior obdurate pattern of creating unnecessary delays in processing my FOIA requests, as documented in my Notification provided to Forest Supervisor Nicholas back on July 29, 2017, there is an accentuated need for me to preserve a sufficiently broad and comprehensive administrative record in order to protect my due process rights in appealing any future adverse determination—which is exactly where we are today with my September 22nd request for records under FOIA.

Although the Forest Service has demonstrated a newly invigorated practice of assigning determinative importance to a requesters' dissemination of information to a *reasonably broad audience*, the Forest Service never evaluated whether or not the Nantahala's existing administrative record contained sufficient evidence that would compel the Forest Service to conclude that I had satisfied that alleged dispositive standard.

Instead on November 21, 2017 the Forest Service summarily declared that “you have failed to provide adequate information to satisfy the fee waiver standard” in connection with your September 22nd request for records. Without repeating everything that has already been reviewed, the inexplicable and erroneous nature of this allegation can be best understood by recalling how one of the key members of the select Stakeholders Forum for the Nantahala and Pisgah Plan Revision *incorporated my work product* into their September 1, 2017 recommendation to the USFS about how to manage the Highland Domes, Rivers GEOGRAPHIC AREA (GA) /MANAGEMENT AREA (MA) PROPOSALS in rewriting the Nantahala's LRMP.

Here is what the Fish and Wildlife Conservation Council advised should be done with the future management emphasis assigned to the Chattooga River in the upcoming LRMP.

Highland Domes, Rivers: We propose that the Chattooga River shall be managed as “outstanding waters”, as they are designated, *to provide an abundance of rainbow, brown and brook trout*. This proposal originates from a paper submitted to the FWCC by Mr. Bill Floyd, Cashiers, NC. The paper has been submitted to the FS by the FWCC.²⁴

²⁴ See the text of an email and attachment from Dave Whitmire, Fish and Wildlife Conservation Council, to B. Floyd dated September 7, 2017 @ 9:57 PM whose contents are included in Attachment A-1 to this Appeal (italics added).

This important recommendation made by a member of the Stakeholders Forum was made on September 1, 2017—*just five days in advance* of the Forest Service telling me on September 6, 2017 that:

*[W]e will not be responding to individual questions and allegations raised in your comment letter as part of the plan revision process, nor do we respond individually to all of the 1000's of public comments that we receive as part of the planning process.*²⁵

To the contrary, this is exactly what has been occurring with specific parties interested in the LRMP planning process—such as the select members of the Stakeholders Forum. This is one of the primary reasons why my September 22, 2017 request asked to be provided with any records of back and forth communications between USFS officials and American Whitewater—records which the Forest Service has so far succeeded in preventing me from seeing.

Ignoring the Fish and Wildlife Conservation Council's call for special emphasis to be placed on preserving a wild brown, rainbow and brook trout fishery on the Chattooga, on September 6, 2017, the USFS further advised me

*[The] Forest Supervisor has the discretion to determine the scope and scale of the revised Forest Plan. The Nantahala...completed an environmental analysis of management of the Chattooga ...in 2012, and there is not a need to revisit the analysis at this time. The Forest has publicly stated that we will not be revisiting the management direction for the Chattooga River as part of this plan revision...Any updates to the management of the [Chattooga's] will not be considered until after the plan revision, in subsequent analysis, and after several years of monitoring data is available to inform the analysis.*²⁶

It was obdurate to refuse to investigate this visibly obvious sediment problem at the same time when the Forest Service had committed resources for developing an LRMP that would regulate the use of the Chattooga for the next 10 to 15 years—especially after having received a recommendation from the Fish and Wildlife Conservation Council that the Forest Service ought to manage the Chattooga with the goal of preserving abundant wild populations of brown, rainbow, and brook trout—as opposed to placing singular focus on brook trout. This flat out refusal to answer LRMP questions and the weakness of the explanation given for refusing to revisit the failed policy of introducing creek boating on the Chattooga's headwaters motivated me to prepare and to submit my September 22, 2017 request for records. I requested records that were anticipated to contain information that would demonstrate the continuing failure on the part of the Forest Service to undertake any monitoring of the degrading condition of the trout habitat

²⁵ Id.(italics added).

²⁶ See email clocked on September 6, 2017 @ 10:05 am from Ms. Heather Luczak, Forest NEPA Coordinator, National Forests in North Carolina to Bill Floyd, to USFS officials Mr. Allen Nicholas, Mr. Paul Arndt, and Ms. Michelle Aldridge(italics added)(email to be otherwise introduced into the administrative record as “N-29 Luczak 09062017 email no review of boat policy.”

and trout fisheries—despite the Forest Service’s awareness of the dismal results of the Chattooga’s September 2016 trout population study.

Without clearly stating so, the Regional Forester rejected my fee waiver because I had insisted that the proof of my entitlement to a fee waiver *was already known to the Forest Service* based on records already lodged in the administrative record of the Nantahala National Forest—and also because I had refused to allow my due process rights under FOIA to be strong-armed away from me by a Forest Service that had explicitly refused to process my request for a fee waiver *unless and until* I provided written answers to six specific questions as tardily compelled by the Regional Forester’s staff on October 25, 2017 @ 3:01 PM. FOIA does not compel a requester to abandon their due process rights in order to have an up or down decision made within the 20 day statutory deadline for approving or rejecting a request for a fee waiver. The Forest Service’s obdurate refusal to grant my fee waiver has prejudiced my efforts to uncover additional information bearing on the Forest Service’s breach of its own responsibilities under the Nantahala’s existing LRMP, the Clean Water Act and the National Wild and Scenic Rivers Act. *The USFS knows that I am a volunteer with limited time and resources to wage this campaign. The Forest Service understands the benefits of denying me information through causing delay.*

- 1) The Regional Forester Did Not Cite Dispositive Case Law To Support His Claim That the “key element considered when evaluating [whether the disclosure of the requested information will contribute to public understanding] includes:...How will the information be made available to the public at large? How will it be made available to a reasonably broad audience? How will the requester disseminate the information? Passive availability is not enough to meet this standard.”**

Just as troubling as the failure to explain exactly why my request did not meet the alleged standard, the Regional Forester’s adverse determination does not cite any case law particular to the Department of Agriculture or the United States Forest Service. The Regional Forester did not provide legal support for the undefined burden of disseminating information to a reasonably broad audience—something which merely constitutes a recital of the internal guidelines found in the USFS Handbook—not the FOIA statute.

The case law regarding the concept of a “reasonably broad audience” is limited and selectively applies to the properly promulgated regulations of other agencies instead *of the non-binding internal guideline of those same other agencies*. None of these cases involve the Department of Agriculture or the Forest Service.

It seems inapposite to allow the Forest Service to impose a financial penalty for gathering records using FOIA by asserting an ability *to borrow* the more restrictive regulations drawn from a wholly separate agency or department. This goes to the heart of my concern about improperly created administrative law and the prejudicing of my ability to protect my due process rights, etc.

In addition, the few cases which touch upon the agency created concept of “reasonably broad audience” seem much more interested in *the quality of the targeted recipient of dissemination* and not the quantity of downstream recipients to whom the FOIA derived information gets disseminated. Stated differently, the quality of the dissemination is valued---not the quantity.

“FOIA does not require that a requester be able to reach a *wide audience*. Rather, ...the *relevant inquiry* ... is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.” *Cause of Action v FTC*, 799 F.3d. 1108, 1116 (D.C. Ct App 2015)(citing *Carney v USDOJ* 19 F.3d 807,815(2nd Cir 1994)(internal quotations omitted; italics added).

The key factor is the requester’s dissemination to “persons interested in the subject.” Id.

To press further, the Regional Forester entirely disregarded the critical *specificity of my allegations* and *stated concerns* which provide the underlying motivations for my continuing requests for FOIA records—*which constitutes the key element for proving that disclosure is in the public interest*. The Regional Forester never disputes whether or not I have demonstrated with reasonable specificity "the link between the request and the enhancement of public awareness and understanding of governmental activities." *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Educ.*, 593 F.Supp.2d 261, 270 (D.D.C.2009).

Instead, Regional Forester Arney incorrectly implies that my message hasn’t reached a sufficient number of people to qualify for a fee waiver—without telling me what that number is. Alternatively, he implies that because the Forest Service had classified me as falling within the category of “All Other Requesters”²⁷ that I must somehow carry a greater burden of proof in demonstrating how I could possibly manage to disseminate this information to a large enough group of people to satisfy an otherwise arbitrary standard for being entitled to claim a fee waiver pursuant to 5 U.S.C. §552(a)(4)(A)(iii).

The facts and circumstance defining my campaign to bring relief to the Chattooga’s degraded trout habitat does not constitute a case where the requested information is aimed solely at enlightening the requester.

Instead the purpose of using FOIA is to campaign to demonstrate to other concerned anglers, etc. how in deciding how to allocate the use of the Chattooga’s fragile trout buffer, extended riparian corridor, and its ORW water quality, the Forest Service has *spent too much of its scarce budget and personnel resources* counting cars at the Bull Pen Bridge on behalf of paddling enthusiasts who have no protectable interests²⁸ instead of counting young-of-the-year trout—*which are owed special protection under the Clean Water Act’s ORW regulations*.

²⁷ See statement of Mr. D. Meloche made in an email transmitted to me on November 1, 2017 @ 9:05 AM with visible electronic copies included to Forest Supervisor Nicholas and Regional Planner Peter Gaulke.

²⁸ American Whitewater’s litany of claims of deprived legal rights were *ultimately* rejected by the Fourth Circuit Court of Appeals—unfortunately a decade later after the Reviewing Officer had de facto ordered a modification of 36 CFR 261.77. The Fourth Circuit ultimately ruled: “We find that the Forest Service reasonably and lawfully

In order to establish the result that it desires, the Forest Service has repeatedly refused to use the *best available science* for quantifying the *minimum effects threshold* for when embeddedness must be viewed as having disrupted the early life cycle needs of salmonids. The simple fact is the Chattooga's headwaters lack the capacity to absorb any additional inputs of sediment caused by boating activities. This charge should compel the Forest Service to reconsider its duties under the *antidegradation mandate* of the Clean Water Act and the National Wild and Scenic Rivers Act.

The Forest Service refuses to investigate the river's physically degraded condition. Instead, it punishes the messenger by employing pretense to deny me a fee waiver in order to impose a financial burden. This unaffordable burden will stifle my ability to use FOIA to uncover and to disseminate otherwise undisclosed proof of the Forest Service's continuing neglect of this river's trout habitat and trout fisheries.

G. Neither FOIA Processing Fees Nor Duplication Fees Can Be Assessed If the USFS Fails To Grant or To Reject A Request For A Fee Waiver Within 20 Working Days After A Reasonably Described Request Is Filed With the Appropriate Forest Service Official

5 USC 552(a)(4)(A)(viii)(I) provides

Except [if *unusual circumstances* apply per 5 USC 552(a)(4)(A)(viii)(II)], an agency shall not assess any search fees (or in the case of a requester described under clause (ii)(II) of this subparagraph, duplication fees) under this subparagraph if the agency has failed to comply with any time limit under [5 USC 552(a)(4)(A)(6)].

H. The Forest Service Did Not Comply With the Statutory 20 Business Day Deadline For Granting or Rejecting A Fee Waiver For the September 22nd Request For Records

The USFS has attempted to use a disputable and internally inconsistent interpretation of the Forest Service Handbook to alter and to assign much later dates in time for the *date of receipt* and the date of *perfection* of my September 22nd FOIA.

- 1) **The Statutory 20 Day Clock Begins To Run From the “Date of Receipt” of the Request For Records. 7 C.F.R. §1.13 [65 FR 46339, July 28, 2000]**
 - a) **The USFS Has Applied An Inconsistent Interpretation of a “Perfected” FOIA Request To Reassign A Much Later “Date of Receipt” For Starting the 20 Day Statutory Clock.**

The Department of Agriculture's regulations that pertain to FOIA are found in Title 7 of the Code of Federal Regulations. Title 7 does not employ the concept of a “*perfected*” FOIA for

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).

determining the original “*date of receipt*” for starting the 20 *business* day statutory clock for the Forest Service to provide a response to an otherwise *reasonably described* request for records.

Instead, 7 C.F.R. §1.13 [65 FR 46339, July 28, 2000] plainly states: “The date of receipt of a request or appeal shall be the date it is received in the agency and office responsible for the administrative processing of FOIA requests or appeals.” .

The Forest Service Manual explicitly delegates authority to the Forest Supervisor to process FOIA requests at paragraph 6270.42d:

Forest Supervisors, or their designated acting, are authorized to sign responses to initial requests or portions of initial requests, when records are released in entirety. This authority shall not be redelegated to District Rangers. The Forest Supervisor shall assign a Forest FOIA/PA Coordinator to administer the FOIA/PA programs for the forest; except where management decides to have only one Coordinator for more than one forest.

It is the responsibility of the forest supervisor to:

1. Ensure timely and reasonable searches for responsive records;
2. Grant requests for expedited processing within 10 days of receipt, or refer a denial of expedited processing to the Regional FOIA/PA Coordinator;
3. *Grant a request for a fee waiver prior to any records delivery, or refer a fee waiver denial to the Regional FOIA/PA Coordinator;*
4. Extend the response time by 10 days for unusual or exceptional circumstances (FSM 6270.5, Definitions).
5. Ensure timely responses to initial requests, or portions of initial requests, for records that are released in entirety;
6. Promptly refer, to the Regional FOIA/PA Coordinator for Regional Forester decision, findings of “no records” and records which the forest FOIA/PA Coordinator recommends be withheld in part or in entirety.²⁹

In my case the September 22, 2017 FOIA request was sent by email to Forest Supervisor Nicholas on Friday, September 22nd @ 3:38 PM. Hence the *date of receipt* should have been fixed at September 22, 2017 when the email was transmitted without being bounced back.

²⁹ *Forest Service Manual 6200*, Office Management, Chapter 6270, Paragraph 6270.42d at page 8 (effective 07/27/2012)(italics added).

7 C.F.R. §1.15(c) [65 FR 46339, July 28, 2000] further provides: “If an agency determines that a request *does not reasonably describe* the records, the agency shall inform the requester of this fact and extend the requester an opportunity to clarify the request or to confer promptly with knowledgeable agency personnel to attempt to identify the records the requester is seeking. The ‘date of receipt’ in such instances, for purposes of § 1.13, shall be the date of receipt of the amended or clarified request.” (italics added).

Stated differently, the initial *date of receipt* for starting the 20 day clock for providing a response to a fee waiver request may only be pushed out to a later point in time where the agency can make the case that the requester has *not reasonably described* the targeted records.

A *reasonably described* request for records “ must ...enable agency personnel to locate them with reasonable effort. Where possible, a requester should supply specific information regarding dates, titles, names of individuals, names of offices, and names of agencies or other organizations that may help identify the records.” 7 C.F.R. §1.5(b) [65 FR 46337, July 28, 2000].

“The ‘linchpin inquiry is whether the agency is able to determine precisely what records [are] being requested.” *Yeager v Drug Enforcement Administration*, 678 F. 2d 315, 326 (D.C. Ct App 1982)(citing S.Rep. No. 854, 93d Cong., 2d Sess. 10 (1974); Source Book at 162. See also H.Rep. No. 876, 93d Cong., 2d Sess. 5-6 (1974), U.S.Code Cong. & Admin.News, p. 6267; Source Book at 125-26.).

The good faith foundation underlying the concept of a *reasonably described* record does not presume an agency’s ability to fabricate a pretense of insufficient specificity for claiming that a request for records falls afoul of this regulatory rule thereby entitling the Forest Service to extend the statutory 20 day deadline by resetting the *date of receipt* to a much later date in time—as the Forest Service has attempted to do in the case of my September 22nd FOIA (assigned a FOIA Request #2018-FS-R8-00827-F).

Title 7 asks only if the requester has reasonably described the records being requested. This is how Title 7 establishes the starting point for running the statutory 20 day clock for providing a response to a request for a fee waiver.

As the text of my September 22nd FOIA evidences, the scope of my records request was *narrowly fenced in* with specific search dates, specific names of individuals, specific names of organizations, as well as specific descriptions of the subject matter of the targeted records.

Just as importantly, the Forest Supervisor was specifically advised that the request was necessitated by the *Forest Service’s September 6th stated refusal* to answer specific LRMP related planning questions seeking the Forest Service’s scientific “explanation or foundation for asserting discretion to ignore this discrete LRMP planning problem [e.g. the Chattooga’s degraded trout habitat and degraded wild trout fisheries].”³⁰

³⁰ See pages 58-60 of the letter directed to the attention of Forest Supervisor Nicholas, as an attachment to an email directed to Forest Supervisor Nicholas and Ms. Luczak, Forest NEPA Coordinator, on September 22, 2017 @ 3:38 PM. This attachment was entitled “Floyd Notification USFS Nicholas09222017”. The transmittal email and a copy of the attached letter are included in Attachment A-1 of this appeal.

Set forth below is the text of my September 22nd FOIA request for records:

Freedom of Information Act Request For Documents

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

(1) *For the period of time between July 1, 2017 and September 6, 2017*, any and all internal communications between any USFS personnel, including emails and handwritten notes, that in any way mentions, references, or that instructs or provides orders about how to discharge the decision of Ms. Heather Luczak to advise Bill Floyd via email on September 6, 2017 @ 10:05 am, that “that there is no need to revisit the analysis at this time”, including but not limited to any such communications transmitted or received by any of the following groups:

- a. (A) the current Chief of the United States Forest Service, Mr. Tony Tooke, and any of the Chief’s Office Staff,
- b. any executive leadership or staff personnel currently assigned to the Region 8, Southern Regional office in Atlanta
- c. any leadership or staff personnel working within the Nantahala and Pisgah National Forests;

(2) Subsequent to January 1, 2017, any and all *sedimentation* studies conducted to monitor and recognize any negative environmental impacts taking place on the North Carolina section of the Chattooga, as necessitated by the terms of Amendment #22 to the Nantahala and Pisgah Forests Land Resource Management Plan (January 2012);

(3) any and all monitoring studies -specifically conducted to assess and inventory any creek boating caused displacement of soils lying within North Carolina’s trout buffer subsequent to the start of creek boating on December 1, 2012;

(4) any associated communications, emails, memorandums, reports, or documents of any kind exchanged internally between USFS personnel, or exchanged with any external third party, summarizing, analyzing, or describing the significance of the results and details contained within all such monitoring studies enumerated in (2) and (3);

(5) any internal USFS communications, including emails and handwritten notes, discussing the need to conduct such monitoring in response to public complaints;

(6) For the period from January 1, 2012 going forward, please provide any back and forth emails, correspondence, or written documents of any kind, either received from American Whitewater, or any representative of American Whitewater, or alternatively transmitted to American Whitewater by any USFS official.³¹

³¹ See pages 61-62 of the document entitled “*Floyd Notification USFS Nicholas 09222017 FINAL.pdf*” transmitted to Forest Supervisor Nicholas and Ms. Heather Luczak as an attachment to an email on September 22, 2017 @ 3:38 PM.

7 C.F.R. §1.5(b) offers the following description of a *reasonably described* request for records:

A request must reasonably describe the records to enable agency personnel to locate them with reasonable effort. Where possible, a requester should supply specific information regarding dates, titles, names of individuals, names of offices, and names of agencies or other organizations that may help identify the records.

As the text of my September 22nd FOIA evidences, the scope of my records request was *narrowly fenced in* with specific search dates, specific names of individuals, specific names of organizations, as well as specific descriptions of the subject matter of the targeted records.

Similarly, the overarching purpose for requesting the reasonably described records was detailed in the 66 page Notification ³² in which the FOIA was articulated on pages 61-62. This Notification outlined why the Nantahala National Forest ought to reconsider its recreational use policy regarding creek boating on the Chattooga's headwaters during the rewrite of the Nantahala's Land Resource Management Plan ("LRMP"). This request for records explained the purpose of the request in order to assist the Forest Service in responding to the request on a timely basis—even though the FOIA does not compel a requester to reveal the underlying purpose in asking for records.

The District Court for the District of Columbia has summarized a *reasonably described* FOIA as follows

The phrase "requests for records which ... reasonably describes such records" was added to the FOIA in 1974, and it replaced the phrase "request for identifiable records." See Pub.L. No. 93-502, § 1(b)(1), 88 Stat. 1561, 1561 (1974). The Senate Judiciary Committee Report accompanying this amendment stated that, "the identification standard in the FOIA should not be used to obstruct public access to agency records" and the amendment "makes explicit the liberal standard for identification that Congress intended." S.Rep. No. 93-854, at 10 (1974). The House Committee on Government Operations Report accompanying the amendment clarified that, "a `description' of a requested document would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort." H.R.Rep. No. 93-876, at 5-6, 1974 U.S.C.C.A.N. 6267, 6271. The D.C. Circuit has held, in this regard, that "[t]he linchpin inquiry" in determining whether a request "reasonably describes" the records sought is "whether the agency is able to determine `precisely what records [are] being requested.'" *Yeager*, 678 F.2d at 326 (alteration in original) (quoting S.Rep. No. 93-854, at 10).³³

³² *Floyd Notification USFS Nicholas 09222017 FINAL.pdf*"

³³ *National Security Counselors v CIA*, 898 F. Supp2d 233, 274 (Dst. Co 2012).

Whether or not [a federal agency's] interpretation of the term "reasonably describes" in the FOIA is inconsistent with the FOIA is a purely legal question of statutory interpretation that the Court will review de novo. See *United States v. Cook*, 594 F.3d 883, 886 (D.C.Cir.2010) (holding that "the proper interpretation of a statute is a question of law"); *Collins v. Nat'l Transp. Safety Bd.*, 351 F.3d 1246, 1253 (D.C.Cir.2003) ("For generic statutes like the APA, FOIA, and [Federal Advisory Committee Act], the broadly sprawling applicability undermines any basis for deference, and courts must therefore review interpretive questions de novo."); *Tax Analysts v. IRS*, 117 F.3d 607, 613 (D.C.Cir.1997) ("The meaning of FOIA should be the same no matter which agency is asked to produce its records.") Therefore, "because a court can fully resolve any purely legal questions on a motion to dismiss, there is no inherent barrier to reaching the merits at the 12(b)(6) stage." *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C.Cir.1993).³⁴

My narrowly defined September 22nd FOIA fits this description. To press this claim, during the 20 day period following the submission of my September 22nd FOIA, neither the Forest Supervisor of the Nantahala National Forest nor his staff ever stated their contention that my FOIA did not *reasonably describe* the records being requested.

Despite the simplicity of applying the Title 7³⁵ concept of "date of receipt" to the facts of my case, the USFS needlessly created confusion with respect to when the 20 day clock began to run on my September 22nd FOIA. The Forest Service did so by using an internally inconsistent explanation about how the concept of a perfected FOIA request might alter the date of receipt of my September 22, 2017 request.

b) The USFS Should Not Employ Internally Inconsistent Guidelines To Alter the Plain Meaning of the FOIA and Title 7 Regulations

In contrast to the Title 7 regulations, the Forest Service Handbook applies the concept of the original "date of receipt" in an entirely different way: The Forest Service Handbook offers the following definition:

Date of receipt. The date a request is received in the office (Washington Office, regional office, station, Area, *supervisor office*) responsible for the records responsive to the request; but no later than 10 working days after a request is received by any USDA office. *If the request is not perfected when it is received, a new date of receipt is established.*³⁶

³⁴ *National Security Counselors v CIA*, 898 F. Supp2d 233, 274 (Dst. Co 2012).

³⁵ 7 C.F.R. §1.13

³⁶ *Freedom of Information Act/Privacy Act Handbook*, FSH 6209.13, Chapter 10, paragraph 11.05 Definitions, at page 8 (06/20/2012)(italics added).

The Handbook's definition of "date of receipt" introduces the concept of a *perfected* FOIA. If misapplied, this guideline has the potential for impermissibly curtailing the FOIA requester's right to have a response produced for a fee waiver request within 20 days of submitting the request. The Forest Service Handbook offers inconsistent interpretations of *what constitutes a "perfected" FOIA request for records*.

The misapplication of the concept of perfection could contradict the open disclosure mandate of the superseding FOIA statute and the Title 7 regulations.

The Forest Service Handbook defines a "perfected" FOIA at Paragraph 11.05 as follows:

Perfected request. A request is perfected when it:

- a. Is received in writing,
- b. Clearly describes the records sought, and
- c. Contains a statement about willingness to pay unless a fee waiver is granted, *unless processing costs will not reach the level of charging fees.*³⁷

Alternatively, Paragraph 11.1 offers a substantively different definition of a perfected request.

11.1 - Review the Request

Determine if the request is perfected and which processing track it should initially be placed in. A request must meet three criteria in order to be considered perfected. The request must:

1. Be submitted in writing, including paper submissions such as fax, mail, or delivery service and electronic submissions such as email or use of Web-based templates.
2. Clearly describe the records sought. Based on the description of the records, determine whether the records are Forest Service records and where they are most likely to be located.
3. Either contain a statement requesting a fee waiver *or* indicate the willingness of the requester to pay fees, *unless fees will not be an issue*.

Requests meeting all three of these criteria are perfected and should be considered for purposes of meeting the time response requirements of the FOIA.

Notify requesters in writing and/or by telephone or email if their request is not perfected...³⁸

³⁷ *Freedom of Information Act/Privacy Act Handbook*, FSH 6209.13, Chapter 10, paragraph 11.05 Definitions, at page 8 (06/20/2012)(italics added).

Paragraphs 11.05 and 11.1 are internally inconsistent—one requires much more of the requester than the other to achieve perfected status.

The definition of a “perfected request” set forth in Paragraph 11.05 compels a requester to provide “a statement about willingness to pay unless a fee waiver is granted, unless processing costs will not reach the level of charging fees.”

In contrast Paragraph 11.1 item 3 uses the conjunction “or” which evidences an intention to draw a distinction between two different alternatives. Stated differently, Paragraph 11.1 *merely requires* that a requester proffer “a statement requesting a fee waiver.” Paragraph 11.1 of the handbook does not compel a requester to pledge his willingness to pay fees “unless a fee waiver is granted.” Furthermore, and more importantly, Paragraph 11.1 specifies a third way that a request for records might be deemed “perfected.”

c) The Third Path to A Perfected Request for Records Under Paragraph 11.1

The qualifying clause “*unless fees will not be an issue*” offers a third path where the requester need neither ask for a fee waiver nor express a willingness to pay FOIA processing fees in order to achieve a “perfected” request for records. “[U]nless fees will not be an issue” constitutes a critical qualifier because Forest Service Handbook 6209.13, Chapter 10, Paragraph 11.05 Definitions Paragraph 11.05 implies that the *date of receipt* (7 C.F.R. §1.13 [65 FR 46339, July 28, 2000]) should coincide with when a request for records becomes “perfected.”

This qualifier “*unless fees will not be an issue*” implicates the circumstance where fees would not otherwise be charged. This could be the case where the charges are below the statutory minimums for collecting a fee.

More importantly, the third path to perfection via “*unless fees will not be an issue*” must take into account and *be informed* by a separate handbook provision that provides:

If the disclosure *will primarily benefit the general public* and is not primarily in the commercial interest of the requester, fees may be waived or reduced, *regardless of whether a requester sought a waiver or reduction of fees.*³⁹

Stated differently, as implied by reading these provisions in combination, *a written request for a fee waiver need not be explicitly stated in the FOIA request to attain “perfected” status* for the FOIA request. This follows in my case where the official responsible for receiving a FOIA and processing a fee waiver, knows or should know that the administrative record *contains sufficient evidence* of the requester’s entitlement to a fee waiver based on 5 U.S.C. §552(a)(4)(A)(iii).

³⁸ *Freedom of Information Act/Privacy Act Handbook*, FSH 6209.13, Chapter 10, paragraph 11.1 Review the Request, at page 9 (06/20/2012)(italics added).

³⁹ *Freedom of Information Act/Privacy Act Handbook*, FSH 6209.13, Chapter 10, paragraph 11.45 Discretionary Waiver of Fees, at page 15 (06/20/2012).

On September 22nd, the Forest Supervisor and his staff knew or should have known how one of the key members of the Stakeholders Forum for the Nantahala and Pisgah Plan Revision had adopted my work product and used it as their September 1st recommendation for how the Highland Domes, Rivers, Geographic Area/Management Area should be managed under the forthcoming LRMP.⁴⁰ Forest Supervisor Nicholas had *actual knowledge* of the two Notifications that had been emailed to him on July 29, 2017 and again on September 22, 2017.⁴¹ He should have also been aware of the other elements of proof of my entitlement to a fee waiver that he and his staff would have held as common knowledge from having processed no less than 17 prior FOIA requests dating back to October 2015.

In summary, if a records request is entitled to a fee waiver by operation of law as informed by FSH 6209.13, Chapter 10, Paragraph 11.45 Discretionary Waiver of Fees, at page 15 (06/20/2012), then the request would also be deemed *perfected* on the date on which the request was first submitted by the requester.

In my circumstance, based on what these officials knew about the history of my 17 prior FOIA requests, plus the evidence of entitlement to a fee waiver demonstrated in my work product that had been published and previously lodged into the administrative record of the Nantahala National Forest, this would mean the date of receipt for my September 22nd should have been fixed at September 22nd without regard for whether or not I had specifically asked for a fee waiver.

Nevertheless, in my case, at the last possible moment, the Forest Service tried multiple tactics to assert a disputable and hyper-technical entitlement to reset the determinative *date of receipt* to a later point in time. In my case, establishing a later *date of receipt* would have prospectively eliminated the Forest Service's need to worry about the adverse consequence that follows from allowing the FOIA's 20 business day statutory clock to run without providing a response on whether or not fees will be charged, etc. To understand how this motivation to avoid the running of this 20 day clock appears to have impacted the Forest Service's processing of my September 22nd FOIA, the chronological history of my September 22nd FOIA request must be examined in detail.

However, before providing that chronological summary it is first constructive to itemize some of the specific ways that disputed assertions of fact have been placed into the administrative record by the Regional Forester's adverse determination letters.

⁴⁰ See the text of an attachment to an email from Dave Whitmire, Fish and Wildlife Conservation Council, to B. Floyd dated September 7, 2017 @ 9:57 PM whose contents are included in Attachment A-1 to this Appeal.

⁴¹ See the notification entitled "Floyd Notification USFS Nicholas 07292017 FINAL" transmitted by email to Forest Supervisor Nicholas, and Ms. Luczak, NEPA Coordinator on Saturday, July 29, 2017 at 9:44 AM and a second notification entitled "Floyd Notification USFS Nicholas 09222017 FINAL" transmitted by email to Forest Supervisor Nicholas, and Ms. Luczak, NEPA Coordinator on Friday, September 22, 2017 at 3:38 PM.

I. The Stated Justification For Denying My Fee Waiver Was Based On Critical Misstatements of the Administrative Record

- 1) **First and foremost, the Forest Service *erroneously* states “This request [my September 22nd request] was considered *perfected* under FOIA on November 6, 2017, when you requested a fee waiver...”⁴²**

In making this assertion, the Regional Forester ignores two critical facts.

First, as previously detailed in this appeal, the Regional Forester overlooked how a fee waiver *need not be explicitly requested* in order to be granted relief when the entitlement to the fee waiver should be self-evident *to the responsible USFS official based on common knowledge gained from a prior course of dealing with the requester or from common awareness of facts already lodged within the Nantahala’s administrative record.*⁴³

Second, while I did not need to ask for a fee waiver to be granted one, to eliminate any doubt about my entitlement to one, I went ahead and made such a request long before the asserted date of November 6th cited by the Regional Forester. My request for a fee waiver was emailed to Forest Supervisor Nicholas and Ms. Luczak, Forest NEPA Coordinator on Tuesday, October 24, 2017 @ 1:52 AM as follows:

Regarding Ms. Luczak’s comment set forth below regarding the possibility of assessing fees in responding to my September 22, 2017 FOIA, *any and all fees should be waived* because my request seeks “disclosure of ... information [which] is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”⁴⁴

Nevertheless, it wasn’t until Wednesday, October 25, 2017 @ 3:01 PM, a full day later, that Mr. Doug Meloche, Staff Assistant, Law Enforcement & Investigations, Southern Region, USFS, unexpectedly became involved by emailing: “In your request you failed to indicate your willingness to pay fees or ask for a fee waiver.”⁴⁵ First of all, this intervention by a Staff

⁴² See the document entitled “2008-FS-R8-00827-F_Floyd_FEE_Response_Signed” attached to an email sent on February 7, 2018 @ 2:14 PM from Mr. Fuller-Bennett to Bill Floyd. This contains the text of an adverse determination signed by Regional Forester Arney and carrying an inside letterhead date of November 21, 2017.

⁴³ On September 22nd, Forest Supervisor Nicholas and his staff had actual as well as constructive knowledge of the substantial proof of my entitlement to a fee waiver *based on 5 U.S.C. § 552(a)(4)(A)(iii)* which was already lodged in the administrative record of the Nantahala National Forest. See also *Freedom of Information Act/Privacy Act Handbook*, FSH 6209.13, Chapter 10, paragraph 11.45 Discretionary Waiver of Fees, at page 15 (06/20/2012).

⁴⁴ See the Floyd email to Ms. Luczak, Forest Supervisor Nicholas, Ms. Aldridge, and Ms. Milholen clocked on Tuesday, October 24, 2017 @ 1.52 A.M as entirely set forth in Attachment A-1 of this appeal.

⁴⁵ See the text of D. Meloche, Regional FOIA Coordinator, email dated Wednesday, October 25, 2017 @ 3:01 PM to B. Floyd, as set forth fully in Attachment A-1 to this appeal

Assistant, Law Enforcement & Investigations, Southern Region occurred out of the blue and without explanation. Second, his statement was incorrect. Although not absolutely necessary an explicit request for a fee waiver had been made on October 24, 2017 to Forest Supervisor Nicholas. He should have been able to recognize how my September 22nd FOIA shared the same purpose as my 17 earlier FOIAs which was “to ferret out and make public worthwhile, previously unknown government information — precisely the activity that FOIA’s fees provision seeks to promote.” *Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 999 F. Supp. 2d 61, 69 (D.D.C. 2013)(quoting *Davy*,550 F.3d at 1160).

On that *same evening* of October 25th at 10:23 PM, I corrected Mr. Meloche’s statement via email transmitted to Forest Supervisor Nicholas, Mr. Meloche and Ms. Luczak.

In any case, to avoid any further delay by the Forest Service in complying with the time deadlines of FOIA, delays which prejudice my ability to participate effectively in the Nantahala and Pisgah Forests LRMP planning process, I would direct [Mr. Meloche] to close the loop with [his] teammates in North Carolina—to whom a fee waiver request was tendered on October 24, 2017 @ 1:52 AM in response to an email message from Ms. Luczak dated October 23, 2017 at 9:31 PM.

The text of that fee waiver request was as follows” “any and all fees should be waived because my request seeks ‘disclosure of ... information [which] is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.’”⁴⁶

Forest Supervisor Nicholas was expected to respond. Instead, Mr. Meloche responded via email on October 26, 2017 @ 10:30 AM. In that email he *advised that he was acting in the role of Regional FOIA Coordinator for the Southern Region*. He commanded me to do the following:

To move forward, I would appreciate it if you could send me a copy of the fee waiver request you “tendered on October 24, 2017 @ 1:52 AM in response to an email message from Ms. Luczak dated October 23, 2017 at 9:31 PM.” I ask for it because I will be the one drafting a response to the waiver request. I will also contact Ms. Luczak and ask her to forward me a copy. Did you send Ms. Luczak the request in the same format I sent you yesterday? I ask this because to process the waiver request *it is imperative you address all six questions* as they relate to the information you are asking for. This requirement is set forth in the fee waiver sections of the FOIA and Forest Service (FS) policy. If you did not address all six

⁴⁶ The full content of this email sent to Mr. Meloche at 10:23 PM on October 25, 2017 @ 10:23 PM is set forth in Attachment A-1.

questions, we are not required to process the request any further unless you indicate a willingness to pay fees.⁴⁷

This email compelled me to accept “it is imperative you address all six questions as they relate to the information you are asking for.”⁴⁸ “If you [do] not address all six questions, we are not required to process the request any further unless you indicate a willingness to pay fees.”⁴⁹

I disputed this claimed right to refuse to process my fee waiver request until I complied with the demand to provide answers to a six question fee criteria sheet. This disagreement was articulated in a 7 page letter entitled “FLOYD FOIA Fees Correspondence w Meloche 10272017” that was transmitted as an attachment to an email to Forest Supervisor Nicholas, and Mr. Meloche on Friday, October 27, 2017 @ 4:28 PM. A copy of that correspondence is incorporated in Attachment A-1 to this appeal.

More importantly, my October 27th correspondence reminded that the administrative record contained more than sufficient proof of my entitlement to a fee waiver—while presuming that the Forest Service would in good faith honor FSH 6209.13, Chapter 10, paragraph 11.45 Discretionary Waiver of Fees, at page 15 (06/20/2012). On September 22nd Forest Supervisor Nicholas must have known with reasonable specificity how the record demonstrated "the link between [my September 22nd FOIA] request and the enhancement of public awareness and understanding of governmental activities." Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Educ., 593 F.Supp.2d 261, 270 (D.D.C.2009).

Given what the Forest Supervisor and/or his staff knew from past communications with me and the content of the administrative record, the Forest Supervisor should have been able to study the records being requested on September 22nd and recognize how my request aimed “to ferret out and make public worthwhile, previously unknown government information — precisely the activity that FOIA's fees provision seeks to promote.” *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 999 F. Supp. 2d 61, 69 (D.D.C. 2013)(quoting *Davy v. CIA*, 550 F.3d 1155, 1160 (D.C. Cir. 2008).

To press this specific point, neither the Forest Supervisor nor his staff *ever* challenged any particular item on the September 22nd request *as being irrelevant or not closely enough tied* to my objectives in using FOIA for the public good. *The absence of any complaint about the relevance of the records being requested tells it all.* This further evidences how the Regional Forester’s stated reasoning for denying my fee waiver constitutes legal pretense.

⁴⁷ See the text of D. Meloche, Regional FOIA Coordinator, email dated Thursday, October 26,2017 @ 10:30 AM to B. Floyd, with email copies to Forest Supervisor Nicholas and Ms. Heather Luczak, Forest NEPA Coordinator; Set forth fully in Attachment A-1 to this appeal. (italics added).

⁴⁸ Id.

⁴⁹ Id.

To repeat, the Regional Forester *misinterpreted* the administrative record when he asserted “[Your] request was considered perfected under FOIA on November 6, 2017, when you requested a fee waiver for this specific request.”⁵⁰

Without explicitly stating so, and without explaining why, the Regional Forester’s statement constitutes a de facto attempt to reset the *date of receipt* from September 22nd to November 6th. By resetting the date of receipt the USFS attempts to reset FOIA’s 20 day statutory clock for informing a requester about whether or not a request for records will incur FOIA processing and duplication fees.

By doing so the USFS would prospectively avoid losing the leverage of being able to thwart my use of FOIA by conditioning the production of records on my payment of unaffordable FOIA fees.

2) Second, the Regional Forester Does Not Explain What Specifically Occurred to Cause the September 22nd Request To Become Perfected on November 6, 2017 That Had Not Already Occurred As of October 24, 2017

The Regional Forester’s adverse determination letter dated November 21, 2017 asserts “This request was considered perfected under FOIA *on November 6, 2017 when you requested a fee waiver for this specific request.*”⁵¹

This statement is incongruous because a fee waiver request was submitted to Forest Supervisor Nicholas and Ms. Heather Luczak, Forest NEPA Coordinator via email clocked on October 24, 2017 @ 1:52 AM. Either the Regional Forester has not been fully informed about the administrative record or alternatively he is implicitly suggesting that the form of my request for a fee waiver somehow does not satisfy a standard which he did not elect to articulate.

The Regional Forester summarily declared, without applying the *presumed* standard to the facts of my case, that: “Upon review of your emails (October 26, 2017 and November 6, 2017), along with email correspondence sent to you from Mr. Harald Bennett-Fuller (WO-FOIA) on November 1, 2017, it has been determined that you have failed to provide adequate information to satisfy the fee waiver standard.”⁵²

⁵⁰ See the document entitled “2008-FS-R8-00827-F_Floyd_FEE_Response_Signed” attached to an email sent on February 7, 2018 @ 2:14 PM from Mr. Fuller-Bennett to Bill Floyd. This contains the text of an adverse determination signed by Regional Forester Arney and carrying an inside letterhead date of November 21, 2017.

⁵¹ See the document entitled “2008-FS-R8-00827-F_Floyd_FEE_Response_Signed” attached to an email sent on February 7, 2018 @ 2:14 PM from Mr. Fuller-Bennett to Bill Floyd. This contains the text of an adverse determination signed by Regional Forester Arney and carrying an inside letterhead date of November 21, 2017.

⁵² See the document entitled “2008-FS-R8-00827-F_Floyd_FEE_Response_Signed” attached to an email sent on February 7, 2018 @ 2:14 PM from Mr. Fuller-Bennett to Bill Floyd. This contains the text of an adverse determination signed by Regional Forester Arney and carrying an inside letterhead date of November 21, 2017

The Regional Forester does not explain why a fee waiver request made on October 24, 2017 was somehow redefined as having been submitted on November 6, 2017. Neither does he cite where this fee waiver request was made on November 6, 2017.

Finally, he does not explain the link between this assertion that a fee waiver was only requested on November 6, 2017 and his assertion that the denial was based on a review of “your emails (October 26, 2017 and November 6, 2017), along with email correspondence sent to you from Mr. Harald Bennett-Fuller (WO-FOIA) on November 1, 2017...”⁵³

3) Third, the Southern Region Misstated the Law By Claiming That An Internal Guideline Justified Refusing To Approve or Deny a Fee Waiver: “requestors in your category (All Other), requests are not processed unless the requestor agrees to a willingness to pay fees or ask for a waiver.”⁵⁴

Without citing the specific source of authority, this assertion of fact suggests that those who are classified as “All other requesters” have a *specific* burden imposed upon them by FOIA or the Title 7 Regulations that is not imposed on other categories of FOIA requesters when requesting a fee waiver. This assertion overstates what 7 C.F.R. Appendix A to Subpart A Part 1—Fee Schedule actually says about All Other Requesters.

Although the Regional Forester never acknowledges this October 25, 2017 interpretation offered by the Regional FOIA Coordinator, this erroneous assertion of law applied to fact constitutes one more example of the Forest Service’s proffering of pretense in addressing my September 22nd FOIA. *If left unchallenged this practice would shut down my use of FOIA by compelling me to pay unaffordable fees to retrieve records.*

This incongruity is obvious because the Forest Service *never disputed or challenged any of the records* requested on September 22nd as being too far afield from the fundamental public interest that is the subject of my campaign. For example, the Forest Service has never disputed the relevance of item (3) which asked for “any and all monitoring studies specifically conducted to assess and inventory any creek boating caused displacement of soils lying within North Carolina’s trout buffer subsequent to the start of boating on December 1, 2012.” Neither did the Forest Service challenge the relevance of item (6) which asked: “For the period from January 1, 2012 going forward, please provide any back and forth emails, correspondence, or written documents of any kind, either received from American Whitewater, or any representative of American Whitewater, or alternatively transmitted to American Whitewater by any USFS official.” Similarly, the Forest Service never challenged the relevance of item (2) which asked

⁵³ See the document entitled “2008-FS-R8-00827-F_Floyd_FEE_Response_Signed” attached to an email sent on February 7, 2018 @ 2:14 PM from Mr. Fuller-Bennett to Bill Floyd. This contains the text of an adverse determination signed by Regional Forester Arney and carrying an inside letterhead date of November 21, 2017

⁵⁴ See the text of the email that I received unexpectedly from Mr. Doug Meloche, Staff Assistant, Law Enforcement & Investigations, Southern Region on October 25, 2017 @ 3:01 PM.

for “Subsequent to January 1, 2017, any and all *sedimentation* studies conducted to monitor and recognize any negative environmental impacts taking place on the North Carolina section of the Chattooga, as necessitated by the terms of Amendment #22 to the Nantahala and Pisgah Forests Land Resource Management Plan (January 2012).”⁵⁵

The Forest Service must have known that it lacked a good faith foundation for challenging the obvious link between [my September 22nd FOIA] request and the enhancement of public awareness and understanding of governmental activities.” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Educ.*, 593 F.Supp.2d 261, 270 (D.D.C.2009). Instead, the Forest Service served up various inconsistent interpretations of nonbinding internal guidelines. If left unchallenged this practice would vitiate the open disclosure mandate of the Freedom of Information Act.

a) What Title 7 Actually Says About All Other Requesters

Neither the Freedom of Information Act nor the Title 7 Regulations compel an “All other requester” *to do what the asserted statement claims*: “requestors in your category (All Other), requests *are not processed* unless the requestor agrees to a willingness to pay fees or ask for a waiver.”⁵⁶

7 C.F.R. Appendix A to Subpart A Part 1 speaks to the different types of fees that might be assessed against the different types of requesters and under what kinds of circumstances.

Here is what Title 7 has to say about All Other Requesters:

Section 5. Levels of fees for each category of requesters.

Under the FOIA, there are four categories of FOIA requesters: Commercial use requesters, educational and non-commercial scientific institutions; representatives of the news media; and all other requesters. FOIA prescribes specific levels of fees for each category:

(a) Commercial use requesters—For commercial use requesters, agencies shall assess charges which recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Commercial use requesters are not entitled to the free search time or duplication referenced in section 3(a) of this appendix. Agencies may recover the cost of searching for and reviewing records for commercial use requesters even if there is ultimately no disclosure of records.

⁵⁵ All of these quoted requests are drawn from the text of the September 22nd FOIA (#2018-FS-R8- 00827-F).

⁵⁶ See the text of the email that I received unexpectedly from Mr. Doug Meloche, Staff Assistant, Law Enforcement & Investigations, Southern Region on October 25, 2017 @ 3:01 PM (italics added)Included in Attachment A-1.

(1) A commercial use requester is defined as one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made.

(2) In determining whether a requester properly belongs in this category, agencies must determine whether the requester will put the records to a commercial use. Where an agency has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, the agency may seek additional clarification from the requester.

(b) Educational and non-commercial scientific institution requesters—Fees for this category of requesters shall be limited to the cost of providing duplication service alone, minus the charge for the first 100 reproduced pages. No charge shall be made for search or review services. To qualify for this category, requesters must show that the request is being made as authorized by and under the auspices of an eligible institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly research (if the request is from an educational institution) or scientific research (if the request is from a non-commercial scientific institution).

(1) The term educational institution refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

(2) The term non-commercial scientific institution refers to institution that is not operated on a “commercial” (see section 5(a)(1)) of this appendix basis, and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry.

(c) Requesters who are representatives of the news media—Fees for this category of requesters shall also be limited to the cost of providing duplication service alone, minus the charge for the first 100 reproduced pages. No charge shall be made for providing search or review services. Requests in this category must not be made for a commercial use.

(1) The term representative of the news media refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public.

(2) The term news means information that is about current events or that would be of current interest to the public.

(3) Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals which disseminate news and who make their products available for purchase or subscription by the general public.

(4) Freelance journalists may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it.

(d) *All other requesters*—Fees for requesters who do not fit into the categories described in paragraphs (a), (b), or (c) of this section shall be assessed for the full reasonable direct cost of searching for and duplicating records that are responsive to a request. No charge, however, shall be made to requesters in this category for: (1) The first 100 duplicated pages; or (2) the first two hours of manual search time, or the equivalent value of computer search time as defined in section 4(e) of this appendix.⁵⁷

b) How This Misinterpretation of “All other requesters” Injured Me

Mr. Meloche’s October 25th interpretation was the first attempt to excuse the USFS from making its own determination, within the 20 day statutory deadline, based on the existing administrative record and my prior 17 FOIAs, about whether or not the September 22nd FOIA could be processed without charging any fees.

Whether right or wrong this distracting focus on how to treat All other requesters occurred after the 20 day statutory deadline should have expired on October 24, 2017. The Forest Service has never acknowledged the importance of the 20 day deadline.

*First, the Forest Service erroneously asserts that no fee waiver can be provided unless a waiver is requested—which does not square with *Freedom of Information Act/Privacy Act Handbook*, FSH 6209.13, Chapter 10, paragraph 11.45 Discretionary Waiver of Fees, at page 15 (06/20/2012).*

Next, the Forest Service erroneously asserts that no request for a fee waiver was made in connection with the September 22nd FOIA.

Third, the Forest Service asserts that because the Forest Service has categorized me as an All other requester: “requestors in your category (All Other), requests are not processed unless the requestor agrees to a willingness to pay fees or ask for a waiver.”⁵⁸

⁵⁷ 7 C.F.R. Appendix A to Subpart A Part 1, Section 5 (italics added).

⁵⁸ See the text of the email that I received unexpectedly from Mr. Doug Meloche, Staff Assistant, Law Enforcement & Investigations, Southern Region on October 25, 2017 @ 3:01 PM.

Even more alarming, on October 25th, while proffering the excuse that record requests submitted by *All other requesters* must not be processed until “*the requestor agrees to a willingness to pay fees or ask for a waiver*”⁵⁹ the Forest Service *never disclosed* the contradicting obligation that the Forest Service *knew that it owed* to *All other requesters* as plainly stated by the Forest Service Handbook:

11.43d - All Other Requesters

*...If the Agency does not respond to the request within 20 working days, do not assess any applicable search or duplication fees except where “unusual” or “exceptional” circumstances occur. Duplication fees may still be assessed.*⁶⁰

By directing me to focus on a misstated guideline while never disclosing the substantive impact of another guideline that plainly states what happens when the 20 day clock expires, the Forest Service added one more brick to a factual foundation, possessing reasonable specificity, for compelling further inquiry into possible less than good faith motivations for having first delayed the processing of my request for a fee waiver and ultimately having rejected that request for a fee waiver—an adverse determination about which I did not receive actual notification until January 31, 2018.

This inexplicable set of facts and circumstances warrant answers to specific questions, including:

First, prior to October 25th at 3:01 PM, did any Southern Region *and/or* Nantahala National Forest officials engage in any discussions or consultations about the impacts of allowing the statutory 20 day clock to expire on the Forest Service’s *ability to refuse to provide a fee waiver* in connection with the September 22nd FOIA?

Second, did any Southern Region *and/or* Nantahala National Forest officials engage in any discussions or consultations about how to use the interpretation of guidelines set forth in the Forest Service Handbook to avoid having the 20 day clock from expiring on October 23rd or October 24th?

Despite any assertions to the contrary made by the Southern Region via Mr. Meloche’s October 25th email, the fact remains that FOIA *does not distinguish* “*All other requesters*” in determining what constitutes the qualifying criteria for being entitled to a fee waiver based on 5 U.S.C. §552(a)(4)(A)(iii). Neither does such categorization allow the Forest Service to evade having to approve or reject a fee waiver request within 20 days of the “*date of receipt*” of an otherwise reasonably described FOIA request for records—as the term “*date of receipt*” is defined by the Title 7 regulations.

⁵⁹ See the text of the email that I received unexpectedly from Mr. Doug Meloche, Staff Assistant, Law Enforcement & Investigations, Southern Region on October 25, 2017 @ 3:01 PM (italics added)Included in Attachment A-1.

⁶⁰ *Freedom of Information Act/Privacy Act Handbook*, FSH 6209.13, Chapter 10, paragraph 11.43d All Other Requesters, at page 15 (06/20/2012).

Instead the Title 7 regulation *only* bars “Commercial use requesters” from being provided with FOIA requested records free of charge.

Because of my long term involvement with this public interest concern, and since I had never previously been challenged as being a commercial requester in seeking information about the Chattooga River, it would be inapposite to conclude that the Forest Supervisor did not have a good faith obligation to provide sua sponte consideration of my entitlement to have the records produced without being charged search, processing or duplication fees—especially because Forest Supervisor Nicholas had sufficient actual and constructive knowledge to recognize my entitlement to a fee waiver based on 5 U.S.C. §552(a)(4)(A)(iii).

While typographical errors and poorly phrased responses might be part of the normal administrative dilemma that an agency has to contend with in addressing the demands of large numbers of requests for records, this assertion of fact and legal implication, like others itemized elsewhere in this appeal, was deliberate and informed. Such assertions of fact and legal implication have been used to try to compel me to accept the Forest Service’s use of nonbinding guidelines to supplant the Title 7 regulations and the overarching open disclosure mandate of the Freedom of Information Act. This exemplifies one more example how the Forest Service has employed pretense to deny the prompt processing of my September 22nd FOIA

Despite all the technicalities proffered by the Southern Region, the question that needs to be answered is why the Regional Forester’s staff usurped the processing of this September 22nd FOIA so late in time after the request had been tendered.

4) A Fourth Mischaracterization of the Administrative Record by the Regional Forester

The Regional Forester’s November 21, 2017 adverse determination letter (a copy of which was only seen for the first time on February 7, 2017) suggests that I am somehow at fault for having created confusion with respect to my September 22nd FOIA. The Regional Forester implies that this alleged confusion should *excuse* the Forest Supervisor for the Nantahala National Forest from complying with the 20 day deadline. It implies that the Forest Supervisor should not be held accountable for employing what he already knew about my campaign on behalf of the Chattooga to approve the production of records without charging any FOIA fees—just as the USFS had done no less than 17 times in the past.

Disregarding the actual evidence of my entitlement to a waiver of any fees, the Regional Forester instead implies that the Forest Supervisor *was so confused* by my September 22nd FOIA that he recognized a need to ask for help from the Regional FOIA Coordinator (who was new to the job) *but only after the Forest Supervisor and his staff had spent over 20 days fretting about the request*. Nonsense. The USFS must not be allowed to deny knowing that the requested records sought “to ferret out and make public worthwhile, previously unknown government information — precisely the activity that FOIA’s fees provision seeks to promote.” *Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 999 F. Supp. 2d 61, 69 (D.D.C. 2013)(quoting *Davy v. CIA*, 550 F.3d 1155, 1160 (D.C. Cir. 2008).

The Regional Forester asserts:

Over the last few years both the Forest and Regional office have made every effort at being thorough and responsive to your FOIA requests and to do so in a timely manner.

However, over the last couple of months the Forest has had numerous communications with you regarding both your FOIA request as well as your comments on the plan revision process. *It has become increasingly difficult to differentiate between your questions and comments on the content of the plan revision from your FOIA requests.* To be timely in responsiveness, the Forest requested guidance and clarification from the Regional FOIA coordinator.”⁶¹

Despite this ex post facto allegation of confusion created by me, neither the Nantahala National Forest nor *the Regional Forester’s staff complained that my September 22nd request did not reasonably describe the records being requested.*

Because of the narrowly fenced in nature of my September 22nd FOIA, the Forest Service cannot in good faith argue that my request was not reasonably described.

Instead, disregarding the 17 prior FOIAs and the substantial original work product that I had published to the Nantahala’s administrative record for the benefit of other interested parties, the Regional Forester implies something improper about my efforts by stating: *“It has become increasingly difficult to differentiate between your questions and comments on the content of the plan revision from your FOIA requests.”*⁶² The nonspecific vagueness of such an allegation provides minimal if any evidentiary support for the Regional Forester’s explanation: *“To be timely in responsiveness, the Forest requested guidance and clarification from the Regional FOIA coordinator.”*⁶³

⁶¹ On January 31, 2018 I retrieved the Regional Forester’s certified letter (postmarked on January 25, 2018) from the postal service office. I learned for the first time that the Forest Service was alleging that it had rejected my request for a fee waiver on November 21, 2017—with respect to my September 22, 2017 FOIA. (which the USFS had assigned request #2008-FS-R8-00827-F).

Upon reading that correspondence, I emailed Mr. Fuller-Bennett to advise of that unexpected discovery. On February 7, 2018, I spoke at length with Mr. Fuller-Bennett about the continuing confusion created by the Southern Region’s inconsistent practices in using naming nomenclatures for tracking FOIA requests and appeals. On that same date, while sorting through the confusion created by these administrative inconsistencies, Mr. Fuller-Bennett emailed me a copy of the Regional Forester’s adverse determination (carrying an inside letterhead date of November 21, 2017 and entitled “2008-FS-R8-00827-F_Floyd_FEE_Response_Signed”). However, I was not provided with any cover letter or other evidence indicating how this document was allegedly sent to me back on November 21, 2017 as stated by the Regional Forester’s January 24, 2017 adverse determination letter.

⁶² See the document entitled “2008-FS-R8-00827-F_Floyd_FEE_Response_Signed” attached to an email sent on February 7, 2018 @ 2:14 PM from Mr. Fuller-Bennett to Bill Floyd. This contains the text of an adverse determination signed by Regional Forester Arney and carrying an inside letterhead date of November 21, 2017

⁶³ Id.

This explanation proves incongruous when evaluated against the timeline before and after the first appearance of the Southern Region on October 25, 2017 @ 3:01 PM. The timeline evidences facts and circumstances that establish a foundation, with reasonable specificity, for inquiring further into incongruent explanations given first for delaying the processing of my FOIA and second for denying my entitlement to a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). These incongruities are recognized by studying (1) the Forest Supervisor and his staff's actual and constructive knowledge of the Nantahala National Forest's administrative record (2) the Forest Supervisor's actual and constructive knowledge of the Nantahala National Forest's prior course of dealing with my 17 prior FOIAs and (3) the clear "link between [my September 22nd FOIA] request and the enhancement of public awareness and understanding of governmental activities [for the Nantahala Forest having refused on September 6th to answer my LRMP questions and for having refused to revisit the issue of boating on the Chattooga during the LRMP planning process]." *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Educ.*, 593 F.Supp.2d 261, 270 (D.D.C.2009).

J. The Timeline Reveals Facts and Circumstances Demonstrating the Pretense of Incongruent Explanations Provided Initially For Refusing To Process the September 22nd FOIA and Second For Refusing To Produce Records Free of Charge.

The documents referenced by this timeline have been included in Attachment A-1 of this appeal.

September 15, 2015 At this point in time, I had a pending administrative objection pertaining to a draft environmental assessment that had been prepared to justify the construction of special paddler access trails inside the Chattooga's protected trout buffer.

District Ranger Wilkins was scheduled to hear my objection. Consequently, on September 15th @ 3:26 PM, District Ranger Wilkins instructed Mr. Jason Farmer, Fisheries Biologist, to do the following:

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

He thinks we have never done any past surveys for fish and bugs and we have. Before the end of the day on Thursday 9/24 I need you to summarize when various types of surveys were done in our section of the river over the years. Just list the type of survey and date. THEN provide us a summary statement on general trends that we know or what we think we

know. Not a written summary of each fish survey. I figure you have some general info that you could say about the Chattooga Coalition's annual survey that might help even though it is usually in SC/GA.

*I do NOT need you to respond to his objections. We have a written response prepared. I just need an outline of past surveys .. etc and generally what we found. Limit your time to 3-4 hrs. If you need to call me I will be in on the road Thursday and travel back from Alaska on Tuesday. Call my cell if you need to just remember 4 hrs difference.”*⁶⁴

This email is remarkable for two reasons. First, it reveals the District Ranger instructing his subordinate, the Fisheries Biologist, to create a document *for the singular purpose of dissuading me* from continuing my effort to have the USFS use the *best available science* for assessing the impacts of the Chattooga’s excessive embedded sediment problem on the trout fisheries. What this email reveals is the District Ranger *candidly instructing* a scientist (Fisheries Biologist) to pick and choose data to create a document that would reach a predetermined conclusion that the District Ranger wanted to articulate when processing my objection.

Second, this email evidences District Ranger Wilkin assert his strong belief in the fact that: “[Floyd] *thinks we have never done any past surveys for fish and bugs and we have.*”

On September 24, 2015, Fisheries Biologist Jason Farmer complied with the instruction of his boss by fabricating a new document in lieu of producing in full the comprehensive 1992-1996 Chattooga trout population study.

January 4, 2016

Having recognized the demonstrated indifference of the Forest Service towards the Chattooga’s embedded sediment problem, and the obvious management bias towards accommodating paddlers at all cost, it became necessary to use FOIA, repeatedly, to obtain records that had not otherwise been disclosed to the public regarding the Chattooga’s degrading trout habitat and trout fisheries.

On this date @ 8:43 AM, the following FOIA was submitted to the Nantahala National Forest:

⁶⁴ This constitutes the text of an email written on September 15, 2015 @ 3:26 PM by District Ranger Wilkins to Mr. Jason Farmer, Fisheries Biologist, Ms. Sheryl Bryan, Biologist, Ms. Heather Luczak, Forest NEPA Coordinator, Mr. James Melonas, Acting Forest Supervisor, and Mr. Steverson Moffat. A copy of the entire email chain dating between September 15 to September 24, 2015 has been included in Attachment A. This document was previously placed into the administrative record as otherwise indexed document “C-6 email”(italics added).

“On May 15, 2015, the Forest Service published an Environmental Assessment *Chattooga River Boating Access*.

On page 205 of this May 15, 2015 Environmental Assessment, the Forest Service states “Electrofishing surveys were conducted within the upper Chattooga River from 1992 through 1996 by the NCWRC. Young-of-the-year Brown Trout densities appeared to be lower than other North Carolina trout populations during the same sampling period; however, a self-sustaining population continues to persist.”

- (1) Please provide me with any document, electrofishing survey results report, memorandum, written analysis that the Forest Service relied on, used, read, or studied to make this written factual assertion, as a true and accurate statement, that electrofishing surveys were conducted on the Upper Chattooga by the North Carolina Wildlife Resources Commission from 1992 to 1996 and that young-of-the-year Brown Trout densities appeared to be lower than other North Carolina trout populations during the same sampling period.
- (2) Please provide me with any handwritten notes of conversations (by telephone or in person) that pertain, relate, reference, or discuss these electrofishing surveys: (A) between any of the individuals involved in the preparation of the Environmental Assessment as listed on pages 110-111 of the Environmental Assessment or (B) between any one of these listed Preparers (on pages 110-111) and any individual outside that group of listed Preparers.”⁶⁵

First, to demonstrate the longstanding pattern and practice of less than full and accurate disclosure of issues pertaining to the Chattooga, the Forest Service’s May 15, 2015 environmental assessment *used a poor choice of words at best when it stated* “Electrofishing surveys were conducted within the upper Chattooga River from 1992 through 1996 by the NCWRC.”

This draft environmental assessment created the *false* impression that the 1992-1996 Chattooga trout study had been exclusively conducted by the North Carolina Wildlife Resources Commission without any help from the USFS. Despite my repeated efforts over the next few months to obtain a copy of the narrative report pertaining to the 1992-1996 study, the Forest Service continued to promote the impression that it did not have a copy of the report because it had not been involved in its preparation. Instead of obtaining a copy of this critical report for its own file, *the USFS proved content to not have to produce the report, that it had referenced in detail*

⁶⁵ Text of FOIA request for records submitted by Bill Floyd to the FOIA Coordinator for the Nantahala National Forest on January 4, 2016 @ 8:43 AM; A copy is included in Attachment A-1 to this appeal.

in its 2015 Environmental Assessment, by claiming not to be in possession of this essential piece of data for managing the river's trout habitat.

Disappointingly, it wasn't until May 8, 2017, after trying *unsuccessfully* for over a year to have the USFS provide me with any narrative summarizing the results of this critically important 1992-1996 Chattooga trout population study, that the North Carolina Wildlife Resources Commission incidentally provided me with a copy of a 58 page report entitled "*EVALUATION OF WILD TROUT REGULATION WITH A NATURAL BAIT ALLOWANCE*, Final Report, Mountain Fisheries Investigations, Federal Aid in Fish Restoration Project F-24, James C. Borawa, Micky M. Clemmons, NCWRC, 1998 ("Borawa and Clemmons 1998")(otherwise to be indexed for the USFS administrative record as document "00-T Borawa and Clemmons 1998").

On page 3 of this report, Borawa states: "We thank Jeanne Riley, Monte Seehorn, and others of the U.S. Forest Service (USFS) 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." Id.

Stated differently, despite any claims to the contrary, the USFS was *actively* involved in the collection of the Chattooga's trout population data from 1992-1996.

It was hoped that my January 4, 2016 request to be provided with this 1992-1996 study would be honored promptly due to the narrow and straight forward nature of the requested records. Clearly, it was expected that the Forest Service would have monitoring records regarding the Chattooga's trout fishery in North Carolina. Alas, this was not to be the case.

This inability to produce this study seems entirely incongruous with District Ranger Wilkins insistent claim: "*[Floyd] thinks we have never done any past surveys for fish and bugs and we have.*"

Instead, obtaining a complete copy of this critically important 1992-1996 study turned into an extended obstacle course requiring an appeal to the Chief of the United States Forest Service that still failed to produce the critical report.

February 2, 2016

On this date, the USFS provided its first response to the January 4, 2016 FOIA that targeted the Chattooga's 1992-1996 trout study.

This response was entirely inadequate. However, one of the records produced was a series of emails between District Ranger Wilkins and Fisheries Biologist Jason Farmer starting on September 15, 2015 @ 3:26 PM.

This email chain evidenced District Ranger Wilkins instructing his Fisheries Biologist, Mr. Jason Farmer, to create a document for the purpose of dissuading me of the merits of my concerns about degrading trout habitat and degrading trout fisheries during my September 2015 objection hearing pertaining to building special access trails for paddlers. Refer back to September 15, 2015 in this timeline.

February 4, 2016

After learning on February 2nd how the District Ranger had ordered his fisheries biologist back on September 15, 2015 to create an editorialized document instead of disclosing the raw trout population study data collected in 1992-1996, it became apparent that there were an ongoing effort to serve up editorialized information in lieu of providing me with the actual raw data associated with the Chattooga's 1992-1996 trout population study.

The fact that the Forest Service had served up Mr. Farmer's report prepared in September 2015 as being responsive to my January 4, 2016 FOIA was particularly remarkable for its inattentiveness. The Forest Service could not have published an environmental assessment in May 2015 **that relied on a document created four months subsequent in September 2015.**

In effect, the USFS supplied documents that hadn't been requested while entirely failing to provide the one essential document that had been targeted (the 1992-1996 Chattooga trout population study). This evasiveness incentivized me to submit a follow up FOIA on February 4, 2016. Among other things, this FOIA asked for:

“...Please provide me with **any emails or memorandum** that pertain, relate, reference, or discuss **any aspect of trout habitat, trout populations, trout monitoring, pertaining to the North Carolina part of the Chattooga**, for the period of time between January 1, 2012 and September 24, 2015, and **authored by any one of the individuals** involved in the preparation of the Environmental Assessment, *Chattooga River Boating Access*, published on May 15, 2015, as listed on pages 110-111 of that Environmental Assessment. (a copy of which is attached for your convenience).

...Please provide all emails pertaining to, relating to, referencing, or discussing electrofishing for trout on the North Carolina part of the Chattooga, in any way, for the period of time between November 1, 2014 and February 4, 2016, authored by any one of the following: Jason Farmer, Fisheries Biologist, Nantahala National Forest, Mike Wilkins, District Ranger, Nantahala Ranger District, James Melonas, Acting Forest Supervisor, Nantahala National Forest, Kristin Bail, former Forest Supervisor, Nantahala National Forest.

...For the period of time December 21, 2015 to February 4, 2016, please provide all emails sent to the United States Forest Service from either Doug A. Besler, North Carolina Wildlife Resources Commission (doug.besler@ncwildlife.org); Powell Wheeler, District 9 Fisheries Biologist, North Carolina Wildlife Resources Commission (powell.wheeler@ncwildlife.org); Ms. Andrea Leslie, Aquatic Habitat Biologist (andrea.leslie@ncwildlife.org).”⁶⁶

Similarly, I continued to try to work with the Nantahala Forest to try to obtain a copy of the report summarizing the results of the Chattooga’s 1992-1996 trout study—a study which the USFS had referred to but could not put its hands on.

February 17, 2016 Via teleconference with the Nantahala FOIA Coordinator and the Regional FOIA Coordinator in Atlanta, I was led to believe that additional efforts were being made to find additional responsive documents to my January 4, 2016 request, including a copy of any narrative detailing the results of the 1992-1996 Chattooga trout population study. After no further progress occurred I recognized that I would likely need to file an appeal of my January 4, 2016 FOIA. It is interesting to note that the Forest Service could have simply asked the NCWRC to provide it with a copy of the 1992-1996 study report. But this did not happen.

February 24, 2016 @ 4:10 PM, an appeal was filed with the Chief of the USFS regarding my January 4, 2016 request to be provided with the Chattooga’s 1992-1996 trout population study etc.

This appeal explained the kinds of documents that must have existed in connection with the Chattooga’s 1992-1996 trout study but which had not been provided to me: “Such field data sheets would normally contain a host of critical scientific details, including but not limited to: latitude and

⁶⁶ See the text of the February 4, 2016 FOIA request set forth in a document entitled “Floyd FOIA Request 02042016 re electrofishing survey NCChattoga 1992-1996” which was attached to an email sent to the FOIA Coordinator for the Nantahala National Forest on February 4, 2016 at 6:00 AM.

longitude of sampling locations, the identity of the samplers, the distance of the section of river electrofished (with fixed starting and ending points identified with latitude and longitude), stream width, degree of turbidity, water level, water depth, water temperature, conductivity, pH, a total tally of each of the individual fish species present, the length and weight of individual specimens collected, comments about the health of the specimens, (including any evidence of gill lice or whirling disease), the existence of any barriers preventing fish from migrating upstream, etc.”⁶⁷

March 4, 2016

In response to the FOIA request made on February 4, 2016, the Nantahala National Forest produced several emails evidencing a form of quiet collaboration whereby key fisheries personnel within the North Carolina Wildlife Resources Commission had been keeping their USFS counterparts informed that the state’s fisheries biologists were ignoring my concerns—with the clear implication being don’t worry about the state of North Carolina holding the Forest Service accountable for having encouraged additional degradation of the trout habitat and trout fisheries resource.

One of the records provided to me was a copy of an email sent on Tuesday, December 22, 2015 @ 9:38 AM, from Mr. Doug Besler, the Regional Fishery Supervisor for the North Carolina Wildlife Resources Commission to his subordinates.

Mr. Besler also copied Forest Service Biologists Jason Farmer and Sheryl Bryan to advise them that it was the intention of Mr. Besler, as the supervising fisheries biologist responsible for the Chattooga, to ignore my complaints about the degrading impacts of the Chattooga’s excessive embedded sediment on the once outstanding trout habitat and trout fisheries. Mr. Besler directed in his email:

“This relates to my 2+ hour phone conversation yesterday with Mr. Floyd. No need to act on this or respond to Mr. Floyd aside from the note request I had yesterday. *I made it very clear to Mr. Floyd that we have no plans to initiate any trout studies in this section of the Chattooga.* I reiterated to Mr. Floyd that any specific water quality concerns need to be directly relayed, by him, to NCDEQ and that any specific issues with sediment inputs from USFS trails need to be directly relayed, by him, to USFS. He is currently engaged in some level of discussions, or interventions, with both agencies. He is obviously "fishing" to have anyone within our agency intervene into the processes of both the USFS and NCDEQ to derail the lifting of the boating ban by showing that there has been both impacts to the trout community and to water quality since boaters have had access to

⁶⁷ This text is drawn from the appeal filed with the Chief of the USFS on February 24, 2016 @ 10:10 PM. A copy of which has been included in Attachment A-1 to this appeal.

the resource. I am not biting. To save you both long phone calls, feel free to decline conversation and direct Mr. Floyd to me.”⁶⁸

Stated differently the Regional Fisheries Supervisor for the North Carolina Wildlife Resources Commission greenlighted a behind the scenes attempt to isolate and marginalize the merits of my complaints that the *best available science* was not being used to quantify how the amount of sediment present exceeded any reasonable minimum effects threshold for disrupting the reproductive and early life cycle of trout on an extended segment of this river.

Similarly, this FOIA produced additional communications, dated February 2, 2016 @ 3:03 PM, in which one of Mr. Besler’s subordinates at the North Carolina Wildlife Resources Commission (“NCWRC”) emailed again to update Mr. Jason Farmer, USFS and to keep him informed about the continuing willingness of the NCWRC to greenlight the Forest Service’s neglectful management of the Chattooga’s trout buffer, riparian corridor and the river’s in stream habitat. From these communications it is pretty clear that there was a concerted effort to shut down increasingly narrowed questions about what had and hadn’t been done by federal and state agencies to monitor the degrading conditions of the Chattooga’s trout habitat and trout fisheries.

These dismissive messages constitute honest and unguarded communications that make clear that the Forest Service made no effort to challenge the state’s dismissal of the merits of my documented concerns. The evidence also points to a purposeful effort to ignore the *best available science* for recognizing the adverse impacts of embedded sediments on salmonid fisheries. See page 3 of this appeal.

It was disappointing to read about professionals denigrating the messenger instead of embracing the 30+ years of fly fishing experience that I have with that part of the river reaching from Ellicott Rock up to the Bull Pen Bridge.

Back in January 2015, the USFS had inexplicably doubled down on its accommodation of creek boaters *by announcing its intention to construct a special boater access trail below the Bull Pen Bridge* (that duplicated access that was already available to paddlers upstream of the bridge.) Concerned anglers understood that the construction of this trail would cause additional sediments to be channeled off of the graveled road above

⁶⁸ See the text of an email from Mr. Doug Besler, NCWRC to Powell Wheeler & Andrea Leslie (NCWRC) and Jason Farmer and Sheryl Bryan (USFS). (italics added This email was retrieved from USFS records pursuant to a FOIA request submitted on February 4, 2016.

the stream and into a pool below the bridge where trout had been known to spawn.

Given the documented problems with excessive embedded sediments this initiative to build a special trail for boaters made little sense because they already had access to the river immediately above the bridge on river right. The only purpose for constructing this trail was to give a handful of paddlers the ability to re-run the Class V-VI rapid that exists under the bridge at high water—analogueous to creating a ride at an amusement park. I had formally objected to that initiative and had tried to get the North Carolina Wildlife Resources Commission to weigh in to challenge this unnecessary construction of a new trail that would serve only to convenience a hand full of creek boaters—to the detriment of the protected trout buffer and highly erosive riparian corridor. Unfortunately, leadership sets the tone for how their subordinates entertain difficult and complex issues. Here is the text of a February 2, 2016 email message from Mr. Powell Wheeler, NCWRC which was prepared in connection with my efforts to raise awareness about the negative impacts of building a special trail for creek boaters. Mr. Wheeler copied his counterpart, Mr. Jason Farmer, Fisheries Biologist for the USFS. The message was directed to Mr. Monte Seehorn, a retired but long time former USFS employee who had become involved in protecting the South Carolina and Georgia sections of the Chattooga—but not the North Carolina part of the river.

“Hey Monte,

Thanks for forwarding the Bill Floyd info to me.

The NCWRC doesn't have any concerns with the USFS's boating proposal. In addition, I don't have any desire to devote any more of my career to dealing with Mr. Floyd. So, I'm not going to attend the meeting [being organized by Monte Seehorn].

Thanks,

Powell”⁶⁹

In combination with other information gathered through FOIA, these emails make clear that neither the responsible federal nor state agencies had any intention to do anything to investigate my concerns about excessive embedded sediments using the *best available science*.

⁶⁹ See the email from Mr. Powell Wheeler, NCWRC to Mr. Monte Seehorn, with electronic copy to Mr. Jason Farmer, Fisheries Biologist, USFS, dated February 2, 2016 @ 3:03 PM; An original copy has been included in AttachmentA-1 to this appeal.

The record also makes clear that there has been a concerted effort to impugn me because of my refusal to accept these agencies applying their substantial administrative power to control the dialogue and to fiction away the problem that is so visibly obvious.

Despite Ranger Wilkins insistence on September 15, 2015, (“*Floyd* thinks we have never done any past surveys for fish and bugs and we have.”) the Forest Service never managed to produce the details of this critical 1992-1996 Chattooga trout study *despite my subsequently discovering that the USFS was instrumental in collecting the field data.*

April 21, 2016 On this date, the Chief’s Office responded to my FOIA appeal filed on February 24, 2016 in connection with my FOIA first filed on January 4, 2016. This second search produced additional information *but not the elusive study that had been prepared to summarize the results of the Chattooga’s 1992-1996 trout population study.*

May 13, 2016 Despite these efforts on the part of the Forest Service and NCWRC to bury my concerns, these issues were successfully brought to the attention of the Savannah River Basin planner at the North Carolina Department of Environmental Quality. Using my workproduct and based on the strength of the evidence put before her, Ms. Heather Patt, NCDEQ Savannah River Basin Planner asked for a special trout population study to be conducted on the Chattooga’s headwaters in North Carolina. One of the purposes of the study was to begin to fill the gap on current information pertaining to the Chattooga’s trout population metrics.

June 22, 2016 NCDEQ staff visited the Chattooga to conduct site assessment for determining where to sample for trout in the upcoming trout study.

July 22, 2016 To determine if the Forest Service had ever bothered to advise the state about the Chattooga’s embedded sediment problem, a FOIA was sent:

“(1) For the period commencing January 1, 2006 through the current date, with respect to the records of the Southern Region (R8) of the United States Forest Service, as well as the Nantahala National Forest, and **pertaining exclusively to the North Carolina part of the Chattooga River**, please provide any document, memorandum, report, emails, correspondence, memorandum, etc., either prepared or received by the United States Forest Service, analyzing, discussing, evaluating, or referencing **any trout population and habitat monitoring results pertaining only to the North Carolina part of the river, including any information pertaining to population density trends, relative abundance assessments, etc.**

Please make sure that your search is extensive enough to locate *any archived records* which are relevant to the narrow subject matter of this request. For the purposes of avoiding future clarifications, please make sure that your search efforts **are inclusive of but not limited to the records** (including any records archived in offsite document retention centers) associated with the following specific individuals Mr. Jason Farmer, Fisheries Biologist (NNF), Ms. Sheryl Bryan, Biologist (NNF), Brady Dodd, Hydrologist (NNF), Mike Wilkins, Nantahala District Ranger, Ms. Marisue Hilliard (Forest Supervisor NNF 2006), Ms. Diane Rubiaco (Acting Forest Supervisor NNF Jan. 2012), Kristin M. Bail (former Forest Supervisor NNF 2014), James Melonas (acting Forest Supervisor NNF Fall 2015), and Hurston A. Nicholas (Forest Supervisor NNF current).

(2) For the period commencing January 1, 2006 through the current date, with respect to the records of the Southern Region (R8) of the United States Forest Service, and the records of the Nantahala National Forest, (whether lodged on site or archived at remote offsite locations) please provide any document, memorandum, report, emails, correspondence, memorandum, etc., either prepared by or received by the personnel of the Forest Service, discussing, analyzing, evaluating, or referencing any condition of *sediment transport imbalance* or *excessive embedded sediment* on the Chattooga in North Carolina above the Iron Bridge on Bull Pen Road.

Please make sure that your search is extensive enough to locate *any archived records* which are relevant to the narrow subject matter of this request. For the purposes of avoiding future clarifications, please make sure that your search efforts **are inclusive of but not limited to the records** (including any records archived in offsite document retention centers) associated with the following specific individuals Mr. Jason Farmer, Fisheries Biologist (NNF), Ms. Sheryl Bryan, Biologist (NNF), Brady Dodd, Hydrologist (NNF), Mike Wilkins, Nantahala District Ranger, Ms. Marisue Hilliard (Forest Supervisor NNF 2006), Ms. Diane Rubiaco (Acting Forest Supervisor NNF Jan. 2012), Kristin M. Bail (former Forest Supervisor NNF 2014), James Melonas (acting Forest Supervisor NNF Fall 2015), and Hurston A. Nicholas (Forest Supervisor NNF current).

This request has a narrow objective of determining if the Forest Service *ever* advised/notified the North Carolina Department of Environmental Quality (“NC DEQ”) to go investigate the existence of the sediment transport imbalance or excessive embedded sediment condition that

exists above the log jam located just north of the confluence of Cane Creek on this part of the Chattooga.”⁷⁰

August 24, 2016

On August 24, 2016 the Nantahala National Forest responded to my July 22, 2016 FOIA whose purpose had been specifically defined for the Forest Service as follows: “This request has a narrow objective of determining if the Forest Service ever advised/notified the North Carolina Department of Environmental Quality (“NC DEQ”) to go investigate the existence of the sediment transport imbalance or excessive embedded sediment condition that exists above the log jam located just north of the confluence of Cane Creek on this part of the Chattooga.”

The explanation of purpose emphasized the narrow specificity of documents being targeted. Nevertheless, the Nantahala Forest claimed to have located 14 responsive records containing 330 pages.

Unfortunately, not a single one of those approximate 330 pages (in 13 documents) evidenced any effort on the part of the Forest Service to advise/notify NC DEQ to go investigate the existence of the visibly obvious embedded sediment plaguing the North Carolina part of the Chattooga.

In fact, 6 of the attachments were essentially duplicative and pertained to inventories of large woody debris that had been conducted in the Chattooga watershed. These large woody debris counts were already available in the administrative record for either the 2012 EA or the 2015 EA.

Just as importantly, the Nantahala Forest *critically modified* the nature of my original request. I specifically explained: “This request has a narrow objective of determining if the Forest Service ever advised/notified the North Carolina Department of Environmental Quality (“NC DEQ”) *to go investigate* the existence of the sediment transport imbalance or excessive embedded sediment condition that exists above the log jam located just north of the confluence of Cane Creek on this part of the Chattooga.”⁷¹

The USFS altered the specificity of my request as follows: “Specific to managing recreation uses in the upper Chattooga corridor, you are requesting...[d]ocuments prepared or received by the Forest Service

⁷⁰ See the FOIA request submitted to the Nantahala Forest FOIA Coordinator by Bill Floyd via email on July 22, 2016 @ 2:06 PM. (otherwise indexed for the administrative record as document N-2).

⁷¹ See the FOIA request submitted to the Nantahala Forest FOIA Coordinator by Bill Floyd via email on July 22, 2016 @ 2:06 PM. (otherwise indexed for the administrative record as document N-2).

discussing, analyzing, evaluating, or referencing any condition of sediment transport imbalance or excessive embedded sediment on the Chattooga in North Carolina above the Iron Bridge on Bull Pen Road.”⁷²

First, the USFS *unilaterally altered the scope of my requested search by narrowing it to the following* “[s]pecific to managing recreation uses in the upper Chattooga corridor.”

I never imposed any such *file subject matter* restriction on the scope of the search. My request was for documents held near and far in the *archives* or current working files of either the Southern Region of the Nantahala National Forest. As was described with *particular specificity* my request targeted documents in which the USFS advised NC DEQ “*to go investigate*” the existence of a sediment transport imbalance or excessive embedded sediment condition that existed “above the log jam located just north of the confluence of Cane Creek.”

Because the Nantahala Forest elected to change the specificity of my request, there was justified concern that the USFS may not have conducted a proper search of both the records of the Nantahala National Forest as well as the records of the Southern Region in Atlanta. Consequently, on September 9, 2016, an appeal was filed with the Chief of the United States Forest Service. (otherwise indexed for this administrative record as document N-4).

Sept. 9, 2016

This was the date that an 80 page appeal was filed with respect to the Nantahala’s August 24th production of records in response to my July 22, 2016 FOIA. This appeal painstakingly itemized why the initial search was inadequate while requesting a second search of records. The Chief of the USFS responded by email on February 22, 2017. The Chief’s response did not provide any records evidencing any written communication from the Forest Service to the state of North Carolina about a need to go investigate the excessive embedded sediments that existed on an extended segment of the river.

However, it did produce a document that contained a highly probative admissions about the prior existence of “native”rainbow trout on this river—that the USFS has recently denied.

Please see the February 22nd 2017 entry in this timeline.

⁷² For this administrative record, see document N-3 at page 1.

The central point of all of this history is twofold. First, the Forest Service lacks any credible science for drawing any conclusion that all is well on the Chattooga. *In fact, the evidence is to the contrary.* Second, the Forest Service never managed to put its hands on the written report detailing the critical 1992-1996 Chattooga trout population assessment. This seems incongruous and inexplicable given the fact that the Forest Service was instrumental in gathering the field data that was used by Jim Borawa to write the NCWRC report. The USFS never asked the NCWRC to provide them with a copy of that report. This seems almost unfathomable since it was the only trout fishery study done on the Chattooga prior to my forcing a new study in September 2016.

Sept. 19-22 2016

These are the dates when NCDEQ finally conducted the Chattooga's trout population assessment at 8 different sites consisting of approximate 600 foot reaches. 6 of these sampling sites were in the middle of the section that suffers the most from this embedded sediment problem.

Despite sampling almost a mile of water, this study only counted 26 young-of-the-year trout—clearly not outstanding and in fact worrisome. Furthermore, this study documented an alarmingly low ratio of young-of-the-year to other age classes of 16.8% (26 YOY/155).

Despite these alarming metrics the USFS continues to ignore them while refusing to apply *best available science* for evaluating the impacts of embedded sediments on salmonids. The USFS continues to promote recreational creek boating which has caused further damage to the trout habitat.

February 22, 2017

This is the date that the Chief's office responded to a FOIA appeal submitted back on September 9, 2016 in connection with an original FOIA submitted on July 22, 2016.

Just like the Nantahala National Forest's original response, this second search did not yield any record evidencing any attempt by the USFS to advise/notify the North Carolina Department of Environmental Quality ("NC DEQ") to go investigate the existence of the sediment transport imbalance or excessive embedded sediment condition which is most pronounced upstream of the log jam.

Stated differently, the USFS *twice* declined to provide me with any records evidencing how the USFS had satisfied its nondiscretionary duty to disclose this *visibly obvious* water quality concern to the state of North Carolina—even after the Forest Service had been provided with *photographic evidence of the problem.*

However, the second search did produce one additional document that was important for proving the degrading condition of the fishery today.

Without providing any explanation of the documents source, somebody within the USFS combined all of these 19 pages into a single document.

On page 6&9 of the additional document produced by the Chief's office, the Forest Service publishes documentation substantiating how wild rainbow trout were present on the Chattooga River in the past. On page 6 of this Forest Service record there is a handwritten statement

“A good trout stream providing fishing for native rainbow and brown of F.S. lands. Supplemented with 3500 brown per year (1966) from Cane Creek to Ellicott Rock. This stream is important due to its large size.

*No population sample has been made due to large size. Personal fishing experience + information from local sources supplied what information was gathered.

With better soil erosion control practices in the headwaters the stream could be one of the best large trout streams.”⁷³

Similarly, on page 13 of this compiled record there is an excerpt of a report that appears to be dated June 5, 1963 which states “Evidence of successful reproduction of brown and rainbow trout was apparent.”⁷⁴

*These facts demonstrate relevant incongruities in what the Forest Service would prefer to have the public believe. The Forest Service would like to claim falsely that this stream has never had rainbows in it—in order to avoid any need to explain why NCDEQ did not capture a single rainbow or brook trout when it sampled almost a mile of water in September 2016. This additional document produced after a second search impeaches the view that rainbow trout have never been reproducing in this river. Second, this record offers a baseline for asking: *if degradation of habitat hasn't occurred then why hasn't the Forest Service or anyone else documented the continuing presence of a reproducing population of rainbow trout?**

⁷³ This was contained in a 19 page compilation of documents supplied to me by the office of Chief of the USFS via an attachment to an email clocked on February 23, 2017 @ 10:25 AM from Mr. Harald Fuller-Bennett. The file name of the attachment was “Floyd-Records-Combined”. A copy has been included in Attachment A-1 to this appeal.

⁷⁴ See page 13 of 19 in the of documents supplied to me by the office of Chief of the USFS via an attachment to an email clocked on February 23, 2017 @ 10:25 AM from Mr. Harald Fuller-Bennett. The file name of the attachment was “Floyd-Records-Combined”. A copy has been included in Attachment A-1 to this appeal.

Unfortunately, this key piece of evidence was not provided by the Nantahala National Forest on a timely basis. It took a second search that blocked me from sharing it with the US EPA when I tendered my comments explaining why an extended segment of the Chattooga River must be added to North Carolina's 2016 Section 303(d) list. Such comments were due on February 17, 2017. The Chief of the USFS did not respond to my appeal until February 22, 2017.

July 29, 2017

On this date, the USFS should have been fully aware of the poor results of NCDEQ September 2016 trout study. Nevertheless, the Forest Service was continuing to ignore the Chattooga's issues. The Forest Service was implicitly signaling that it did not intend to consider the Chattooga's degraded condition during the LRMP planning process. This signaling of purpose was witnessed by how difficult it had proven for me to ask and receive answers to narrow questions about the Chattooga as well as how difficult it had proven to get narrow FOIA requests for records processed without having to appeal repeatedly to the Chief's office for second searches for responsive records. My experience had left an impression of a Forest Service intent on stonewalling my efforts to raise awareness about the degrading condition of the trout habitat and trout fisheries.

The inability of the United States Forest Service to put its hands on the only scientific evidence that existed regarding the condition of the Chattooga's trout populations (the 1992-1996 study) constitutes the telltale proof of this pattern of indifference towards the duties it owed to the Chattooga's trout habitat and trout fisheries in North Carolina.

This inability to locate this document is particularly *incongruous* because of the September 15, 2015 statement of District Ranger Wilkins who insisted “[Floyd] *thinks we have never done any past surveys for fish and bugs and we have.*”⁷⁵

Because of these inconsistencies, I synthesized information from various sources to compile a detailed Notification of what was wrong with how the USFS was approaching the management of the Chattooga's headwaters in North Carolina. In that Notification, the Forest Supervisor for the Nantahala National Forest was shown seven specific examples of the Forest Service's pattern and practice of neglecting to disclose critical information and providing piecemeal responses to requests for records—whether asked for pursuant to the *public participation* mandate that applies during the LRMP planning process or requested pursuant to FOIA.

⁷⁵ See the email written on September 15, 2015 @ 3:26 PM by District Ranger Wilkins to Mr. Jason Farmer, Fisheries Biologist, Ms. Sheryl Bryan, Biologist, Ms. Heather Luczak, Forest NEPA Coordinator, Mr. James Melonas, Acting Forest Supervisor, and Mr. Steverson Moffat. A copy of the entire email chain dating between September 15 to September 24, 2015 has been included in Attachment A.

This Notification endeavored to demonstrate why the Forest Service was not discharging its *public participation* duties under the National Forest Management Act and to complain about the implied claim that the public participation mandate did not require the USFS to answer narrowly drawn factual questions about the Chattooga. This Notification also cataloged special *administrative accommodation* shown to creek boaters while documenting the neglect of the protected trout habitat and trout fisheries. I offered concrete recommendations about how the Chattooga River should be managed in the forthcoming LRMP.

- September 1, 2017 On this date, my work product regarding the Chattooga's degraded condition was adopted and used by the Fish and Wildlife Conservation Council, a member of the select Stakeholders Forum for the Nantahala and Pisgah Plan Revision, to recommend that the Chattooga River should be managed in the upcoming LRMP by focusing on protecting the trout habitat *and rainbow, brook and brown trout fisheries*. The Fish and Wildlife Conservation Council recommended the following to the USFS: *"Highland Domes, Rivers: We propose that the Chattooga River shall be managed as 'outstanding waters', as they are designated, to provide an abundance of rainbow, brown and brook trout. This proposal originates from a paper submitted to the FWCC by Mr. Bill Floyd, Cashiers, NC. The paper has been submitted to the FS by the FWCC.*⁷⁶
- September 6, 2017 On this date, disregarding the *public participation* mandate of the National Forest Management Act during the LRMP planning process, the Nantahala National Forest stated both its refusal to answer my LRMP questions pertaining to the Chattooga, as well as its refusal to use the LRMP to revisit the *documented* damage being done by creek boating on North Carolina's headwaters.
- September 22, 2017 To respond to the Forest Service's September 6th flat out refusal to provide non-evasive and detailed answers to increasingly narrowed questions pertaining to different aspects of the Chattooga's degrading trout habitat and degrading trout fisheries problem, and its refusal to reconsider the additional damage being done by creek boating activities, a 66 page Notification was emailed to Forest Supervisor Nicholas, and Ms. Luczak, Forest NEPA Coordinator.

This Notification supplied the Forest Supervisor with sufficient fact and circumstance to allow him to reconsider the September 6th refusal to revisit the Chattooga's problems through using a narrowing dialogue during the LRMP planning process.

⁷⁶ See the text of an attachment to an email from Dave Whitmire, Fish and Wildlife Conservation Council, to B. Floyd dated September 7, 2017 @ 9:57 PM whose contents are included in Attachment A-1 to this Appeal.

This Notification documented specific examples evidencing how the Forest Service had been stifling *public participation for some interested parties (such as myself) while providing special accommodation and access to others* such as the members of the Stakeholders Forum for the Nantahala and Pisgah Forests.

This Notification charged that the Forest Service was not using the *best available science* for recognizing when embedded sediments exceed any reasonable minimum effects threshold for disrupting the reproductive and early life cycle needs of salmonids. *This Notification provided the Forest Supervisor with the specific peer reviewed scientific methodologies that have been used out west to quantify precisely when embedded sediments should be viewed as causing excessive stress to salmonids.* See page 3 of this appeal.

This Notification reminded the Forest Supervisor of the absolute paucity of young-of-the-year trout that had been counted in September 2016—and the canary in the coal mine significance of that metric. This September 2016 study only took place because of pressure that I applied by pointing out (repeatedly) how the Chattooga’s trout populations in North Carolina had not been studied since 1996—by the Forest Service or anybody else.

This Notification advised the Forest Supervisor how correspondence *retrieved through a prior FOIA request*, evidenced a form of quiet collaboration whereby key fisheries personnel within the North Carolina Wildlife Resources Commission had signaled their biologist counterparts at the USFS that the state’s fisheries biologists were *purposefully* ignoring my concerns—with the clear implication being don’t worry about the state of North Carolina holding the Forest Service accountable for having encouraged additional degradation of the trout habitat and trout fisheries resource.

The Forest Supervisor was reminded how the Nantahala National Forest had *irrefutably* ignored monitoring the Chattooga’s degrading trout habitat and trout fisheries subsequent to the introduction of creek boating. The Forest Supervisor was reminded of the demonstrated pattern and practice of looking the other way. This letter demonstrated how the USFS had been inconsistently applying its own interpretation of the Nantahala’s existing LRMP *Standards* pertaining to visible sources of sedimentation being directed into a stream because of human activities. He was encouraged to contrast how differently the Forest Service had approached the Chattooga compared to the Tellico River.

This Notification challenged the permissibility of creek boaters being allowed to displace soils within the Chattooga’s fragile trout buffer or the

legality of creek boaters being allowed to create point sources of pollution where these displaced soils get channeled into the Chattooga's Outstanding Resource Waters.

This Notification complained to the Forest Supervisor about the Forest Service's refusal to explain why it hadn't simply *fixed the offending creek boating infrastructure*, the various evacuation points, portage trails, and boat launch sites where soils are being displaced from the *fragile trout buffer* and where chronic new point sources of pollution are being created.

The Forest Supervisor was reminded how in the absence of providing a permanent fix for these point sources of pollution, the Nantahala National Forest ought to have recognized these boater caused erosion sites as violations *of the current LRMP regarding visible sedimentation and trails*.

This Notification offered the following summary on page 63:

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

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

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

This inappropriate favoritism must be addressed in the LRMP—despite any claims to the contrary.”⁷⁷

⁷⁷ See p. 63 of the document entitled Floyd Notification USFS Nicholas 09222017 attached to an email to Forest Supervisor Nicholas on September 22, 2017 @ 3:38 PM. Also included in Attachment A-1 to this appeal.

Because the Nantahala had specifically stated its intention on September 6th to block my efforts to exercise my *public participation* rights by refusing to answer any narrowly drawn questions about the Chattooga, I drafted a request for records under the FOIA and included it in this Notification. The text of that FOIA was incorporated on pages 61-62 of the Notification.

In addition, I made specific recommendations of Standards that might be adopted in the forthcoming LRMP.

Despite the substantial effort that was put in to preparing this Notification, and despite offering to work together to solve this problem, I heard nothing from the Nantahala National Forest regarding this Notification or the FOIA that was embedded within it.

October 17, 2017

On Tuesday, October 17th, because I had not heard from the Forest Supervisor regarding my Notification and FOIA of September 22nd, *and as a courtesy to the Nantahala National Forest*, I reached out by phone and subsequently by email at 11:33 A.M, to alert Forest Supervisor Nicholas and his LRMP planning staff that I had not yet received any form of acknowledgement to my Friday, September 22nd FOIA pertaining to the Chattooga River's headwaters in North Carolina. Based on the Forest Service's guidelines, when records will not be released within 10 days of the date of receipt the Forest Service is supposed to send an acknowledgement—which in my case should have occurred on or before Friday, October 6th.⁷⁸

The stated purpose for requiring an acknowledgement within 10 days is to confirm the original *date of receipt* for a request, but also to avoid unnecessary delay in processing the request. The guidelines require the Forest Service to take the early opportunity of “seeking clarification, seeking additional information concerning willingness to pay estimated FOIA processing fees or to narrow the scope of the request, responding to requests for fee waivers and/or expedited processing, *or re-routing the request to another office or agency.*”⁷⁹

During my brief October 17th phone conversation with Ms. Luczak, Forest NEPA Coordinator, I was left to believe that the Nantahala National Forest was working to send me records that were responsive to the September 22nd FOIA. At that point in time, I was not advised of any perceived deficiencies with my September 22nd request for records.

⁷⁸ *Freedom of Information Act/Privacy Act Handbook*, FSH 6209.13, Chapter 10, Paragraph 11.2 (06/20/2012).

⁷⁹ *Id.* (italics added).

To the contrary, I was advised that the Forest Service might dump large numbers of documents on me—which might not comport with the narrowed descriptions of the records being requested. The Nantahala had done this very thing back on August 14, 2016 when it had produced over 300+ pages of documents that were unresponsive to the records being narrowly requested.

Consequently, I emailed that same date to warn: “It serves no constructive purpose for the Forest Service to use its time to dump numerous documents on me if they are not narrowly connected to the subject matter.”⁸⁰

I also made a point of explaining the distinction between questions that the Forest Supervisor was being asked to answer pursuant to the *public participation* rights afforded to me under the National Forest Management Act during the LRMP planning process and my separate request for records pursuant to the Freedom of Information Act.

I repeated what had been stated in my Notification of September 22nd:

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

... “The Forest has *publicly stated* that we will not be revisiting the management direction for the Chattooga River as part of this plan revision.”

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

- 1) How does making such a *public statement* shield the USFS for ignoring the well documented and ongoing violation of the no visible sediment *Standard* articulated by the Nantahala and Pisgah National Forests’ existing Land Resource Management Plan as applied to the Chattooga River?**
- 2) Who made such a *public statement* and when did they make it?**
- 3) To whom did the USFS make such a public statement?**

⁸⁰ See the email from Bill Floyd to Forest Supervisor Nicholas and Ms. Luczak, Forest NEPA Coordinator, transmitted Tuesday, October 17, 2017 at 11:33 A.M. See Attachment A-1.

4) Has this public statement and the reasons for making it been memorialized in emails, correspondence, memorandums or written documents of any kind?

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

These questions are different from the FOIA request summarized on page 61 of that September 22, 2017 Notification.”⁸¹

The fact is, as of October 17th, neither the Forest Supervisor nor his staff had claimed confusion about the specifics of my records request. Neither had the Nantahala National Forest complained that it had become “increasingly difficult to differentiate between [my] questions and comments on the content of the plan revision from [my] FOIA requests.”⁸²

Despite the Regional Forester's ex post facto claim made on November 21, 2017, *nobody at the Nantahala National Forest had advised as of October 17th of any need to request “guidance and clarification from the Regional FOIA Coordinator” regarding the preparation of a response to my otherwise reasonably described September 22nd FOIA*

This fact evidences an inexplicable incongruity with what the Regional Forester or his staff asserted on November 21, 2017.

October 20, 2017

Three days later on Friday @ 10:18 AM, Ms. Luczak, Forest NEPA Coordinator emailed me to advise:

“Mr. Floyd,

I apologize for not getting back to you yesterday. I would like to discuss refining your requests in your FOIA. Please let me know what number I can reach you at.

Thank you.”⁸³

⁸¹ Floyd email to Forest Supervisor Nicholas, Ms. Luczak, Forest NEPA Coordinator on October 17, 2017 @ 11:33 AM.

⁸² See the document entitled “2008-FS-R8-00827-F_Floyd_FEE_Response_Signed” attached to an email sent on February 7, 2018 @ 2:14 PM from Mr. Fuller-Bennett to Bill Floyd. This contains the text of an adverse determination signed by Regional Forester Arney and carrying an inside letterhead date of November 21, 2017

⁸³ Luczak email to Floyd October 20, 2017 @ 10:18 AM; included in Attachment A-1.

On Friday @ 2.56 PM I responded by email as follows:

“I am traveling with limited windows...if you would like, send me your questions or suggestions by email and I can try to respond over the weekend.”⁸⁴

I did not hear from Ms. Luczak that afternoon or at any point in time over the weekend.

Once again, nobody from the Nantahala National Forest had asserted that the records being requested were not reasonably described in my September 22, 2017 FOIA. Neither did anyone state a need to refer my request for records to the Regional Planner, the Regional FOIA Coordinator, or the Regional Forester.

To press the timeline, the Forest Service Manual specifies that the Forest Supervisor has the authority and responsibility to “[g]rant a request for a fee waiver prior to any records delivery, or *refer a fee waiver denial* to the *Regional FOIA/PA Coordinator*.” Similarly, the Forest Supervisor has the responsibility for promptly referring “to the Regional FOIA/PA Coordinator [when required to obtain a] Regional Forester decision, findings of “no records” and records which the forest FOIA/PA Coordinator recommends be withheld in part or in entirety.”⁸⁵

Stated differently when a Forest Supervisor makes a FOIA referral of an adverse determination to the Regional Planner, Regional FOIA Coordinator or Regional Forester, the FOIA requester is normally provided with an acknowledgement of the date of receipt, a control number that can be used to track the progress of the FOIA going forward, and *an explanation for why the referral is being made to the Regional Office*—which would be particularly relevant in this dispute *because the first-hand knowledge* about the records being requested and the proof of my entitlement to a fee waiver would logically reside with the administrative records of the Nantahala National Forest—*not with officials at the Southern Region office in Atlanta.*

⁸⁴ Floyd email to Ms. Heather Luczak, Forest NEPA Coordinator October 20, 2017 @ 2:56 PM; included in Attachment A-1.

⁸⁵ *Forest Service Manual 6200-Office Management, Chapter 6270-Availability of Records, at pp. 8-9(07/27/2012)(italics added).*

October 23, 2017

Three days later on Monday @ 9:31 PM, long after the close of business, Ms. Heather Luczak, NEPA Coordinator, National Forests in North Carolina *tardily* emailed the following message on behalf of Forest Supervisor Nicholas:

“Mr. Floyd,

We are working to compile the documents that you have requested in your Sept 22, 2017 FOIA and I have a couple questions to narrow the scope and provide you with a timely response.

I would like to clarify what you are requesting in item 6 of your FOIA request. Numerous public mailings and notifications have been made during the plan revision process since 2012. Are you looking for direct communication between the FS and American Whitewater or all public mailings and notifications that included American Whitewater on the mailing list? It would help to narrow the scope of item 6 as this covers five years’ worth of communication with the public.

Regarding your question about when we publicly stated that the revised Forest Plan would not be revisiting the management of the Chattooga River, the Forest Planner made this statement to a collaborative group of stakeholders at a meeting in April 2016:

- MEETING RECORD Stakeholders Forum for the Nantahala & Pisgah Plan Revision DRAFT Meeting Record, Tuesday April 12, 2016 10:00 AM - 4:00 PM

o https://www.nationalforests.org/assets/pdfs/2016-4-12-Stakeholders-Forum-Meeting-Record_finaldraft.pdf

- There was also public discussion at the July 11, 2017 Franklin public meeting between Ms. Luczak and members of the public. This discussion was not captured in meeting minutes. (July 11, 6-8 p.m.: Nantahala Ranger District at Tartan Hall, 26 Church St., Franklin)

Please also review the information on fee waiver requests (see attached), as it is my understanding that there may be some fees associated with the response to this FOIA request.

<https://www.fs.fed.us/im/foia/feefactors.htm>.”⁸⁶

Nowhere in Ms. Luczak’s late breaking email does the Nantahala National Forest complain that my September 22nd request for records had failed to *reasonably describe the targeted records*—which would have provided a

⁸⁶ See the text of the email clocked on Monday, October 23, 2017 @ 9:30 P.M. from Ms. Heather Luczak, Nantahala NEPA Coordinator, to Bill Floyd, with copies to Forest Supervisor Nicholas, Forest Planner Aldridge and Nantahala NEPA Coordinator Milholen as contained in Attachment A-1 of this appeal.

possible basis to reset the original *date of receipt* to a later date than September 22nd.

Neither does Ms. Luczak state anything about the Forest Supervisor's need for clarification about any confusion in responding to the narrowly defined request for records articulated back on September 22nd. Ms. Luczak's *last minute* request for a single clarification regarding item 6 of my FOIA request does not provide a substantive justification for the Southern Region staff's subsequent attempt to claim a basis for altering the *date of receipt* for this FOIA to October 25, 2017.

In fact, as of 9:31 PM on the evening of Monday, October 23rd—on the 20th business day after I submitted my September 22nd FOIA—there was no indication given of any effort, need, or intention on the part of the Nantahala National Forest to request guidance from the Regional FOIA Coordinator (who was new in his position).

Assuming the *hypothetical* benefit of the doubt to Ms. Luczak's late night October 23rd message, her request for clarification regarding item 6 could have only *temporarily* tolled the 20 day statutory deadline from running in accord with 5 U.S.C. § 552(a)(6)(A)(i) through (iii).

October 24, 2017

After stumbling on Ms. Luczak's after business hours email sent to me at 9:31 PM on Monday, October 23rd, almost immediately, on Tuesday, @ 1:52 AM (in the morning) I responded to Ms. Luczak (and to Forest Supervisor Nicholas) by providing the requested clarification regarding item 6:

“With respect to your request for clarification regarding “item 6” in my September 22, 2017 FOIA, the intention of the request is to capture individual communications. However, as you know American Whitewater has been given special access as a member of the Stakeholders Forum For the Nantahala and Pisgah LRMP Plan Revision. **Consequently, the response should also include any communications back and forth between American Whitewater and the National Forest Foundation.**”⁸⁷

Furthermore to eliminate any doubts about whether I would be charged FOIA fees, which had suddenly crept into the discussion, *I also specifically requested that a fee waiver should be granted because of the public's interest in the Chattooga's degraded trout habitat.* Hence, any tolling of the 20 day clock should have been brought to an end leaving me

⁸⁷ See the Floyd email to Ms. Luczak, Forest Supervisor Nicholas, Ms. Aldridge, and Ms. Milholen clocked on Tuesday, October 24, 2017 @ 1.52 A.M as entirely set forth in Attachment A-1 of this appeal.

qualified to claim an exhaustion of my administrative remedies based on 5 U.S.C. § 552(a)(6)(C)(i)—*if not based on some other equitable basis.*

The fact remains that neither the Forest Supervisor nor his staff ever notified me of any intention to refer my September 22nd request for records to the Regional Forester's staff. *Neither did the Forest Supervisor or his staff advise that my FOIA was not properly perfected.*

October 25, 2017

Instead, on October 25 @ 3:01 PM, belatedly out of the blue and without introduction by the Forest Supervisor or his staff, I received an email from Mr. Doug Meloche, Staff Assistant, Law Enforcement & Investigations, Southern Region. His email stated an implied justification for avoiding the running of the 20 day statutory deadline for providing a FOIA “determination”.⁸⁸

This sudden but *tardy* appearance by Mr. Meloche was entirely incongruous with the illusion of open and good faith communications created by Nantahala Forest officials on October 17th, on October 20th, and again on October 23rd—during which the Nantahala National Forest never hinted at the possibility that the processing of my FOIA request was going to be usurped by a Staff Assistant, Law Enforcement & Investigations, Southern Region.

It is informative that this response did not arrive during the early business hours on October 24th. *Instead it took almost two full business days for a response to appear from Mr. Meloche at 3:01 PM on the afternoon of October 25th.*

This delay in time suggests that there might have been some form of internal discussion taking place about the fact that the 20 day clock had been allowed to expire.

Despite any claim to the contrary, the fact remains that prior to 3:01 PM on October 25th, neither the Forest Supervisor nor his staff and provided any kind of notification explaining why my *September 22nd FOIA* was going to be referred to the Regional Forester and his staff. In fact, I never received any kind of notification from the Nantahala National Forest that my FOIA was being referred to the Southern Region.

Without explaining who he was or why he was contacting me, Mr. Doug Meloche *corresponding under the title of Staff Assistant, Law*

⁸⁸ Mr. Meloche subsequently emailed on November 8th @ 2:08 P.M. to assert that the Forest Service's original date of receipt for this FOIA (assigned tracking number 2018-FS-R8-00827-F) should be fixed at October 25th instead of September 22nd. Mr. Meloche emailed again on November 16th @ 8:24 A.M to assert that my September 22nd FOIA finally became “perfected on November 6, 2017.”

Enforcement & Investigations, Southern Region, dictated the following command:

“before we can continue to process your request please respond with a willingness to pay fees (set amount, all, only \$25, etc.) or complete the attached fee waiver criteria sheet completely and return it to me as soon as possible so we can make a waiver determination. **If we do not hear from you by November 15, 2017, we will consider your request withdrawn and administratively close the file.**⁸⁹

The prospect of being ordered to do something by somebody purporting to play an unexplained role in federal Law Enforcement & Investigations would prove intimidating for most persons.

Additionally disturbing was the compulsory nature of Mr. Meloche’s demands. However what I was ordered to do by an official working in Law Enforcement and Investigations did not square with how no less than 17 of my prior FOIAs had been processed by the Nantahala National Forest—each seeking information *that might inform the public about the relative success or failure of the Forest Service in satisfying its discrete and nondiscretionary obligation to prevent any non-temporary diminishment in the once outstanding quality of the wild trout habitat and wild trout fisheries on the Chattooga’s headwaters in North Carolina.*

The combined impact of this fact and circumstance was to create an impression of a subtle effort on the part of the Forest Service to leverage the respect owed to federal Law Enforcement to compel me to comply with this demand without questioning its legitimacy.

However, upon studying the FOIA statute, it became clear that the statute does not compel a requester to fill out *any* specified form before having a fee waiver request processed. Neither does the applicable Title 7 regulation. Instead, when evaluating a request for a fee waiver based on the public interest, the USFS owes an implicit duty to undertake a sua sponte evaluation of the justifications for granting a fee waiver already lodged within the administrative record, to consider common knowledge that the Forest Service already has about a requester’s entitlement, and to consider any justifications submitted by the requester of a fee waiver.

Mr. Meloche’s demand incentivized me to determine why personnel purporting to be a part of the Southern Region had *inexplicably usurped* the processing of my September 22nd FOIA request—more than twenty working days *after it had been first submitted* to the Forest Supervisor of the Nantahala National Forest.

⁸⁹ See the text of Mr. Doug Meloche’s email directed to Bill Floyd clocked on October 25, 2017 @ 3:01 PM (bold emphasis in original).

October 25 2017

Consequently, on October 25th @ 10:23 PM, the following inquiry was directed to Forest Supervisor Nicholas, Ms. Luczak, and Mr. Meloche: “Could somebody explain the reason for Mr. Meloche’s involvement, and why he is seeking information from me? My September 22, 2017 FOIA was directed to Forest Supervisor Nicholas.”⁹⁰

In order to deflect any charges that I did not qualify for a public interest fee waiver, I advised Mr. Meloche, Mr. Nicholas, and Ms. Luczak to consider the evidence of my entitlement to a fee waiver that was already lodged in the Nantahala’s administrative record:

“I would direct [Mr. Meloche] to close the loop with [his] teammates in North Carolina—to whom a fee waiver request was tendered on October 24, 2017 @ 1:52 AM in response to an email message from Ms. Luczak dated October 23, 2017 at 9:31 PM.

The text of that fee waiver request was as follows: “any and all fees should be waived because my request seeks ‘disclosure of ... information [which] is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.’”⁹¹

I further complained:

“The information gathered from my prior FOIAs have been used repeatedly to draft comments for various US Forest Service administrative proceedings pertaining to the Nantahala National Forest and the mismanagement of the Chattooga River under the current LRMP—or to provide comments regarding the current pending revision of the LRMP. The information requested on September 22, 2017 will also be used to inform the public about this issue of mismanagement of the Chattooga River.

Again rather than wasting any more of my time citing book and page to justify my fee waiver request, I would direct you to close the loop with your teammates at the Nantahala National Forest—who I am sure can attest to the “public interest served” by my longstanding efforts to shine light on a pattern and practice of the USFS using its editorial discretion to keep critical information out

⁹⁰ See the email from Bill Floyd to Forest Supervisor Nicholas, Mr. Meloche, and Ms. Heather Luczak, clocked on October 25, 2017 @ 10:23 pm which is hereby incorporated in full by reference.

⁹¹ See the email from Bill Floyd to Forest Supervisor Nicholas, Mr. Meloche, and Ms. Heather Luczak, clocked on October 25, 2017 @ 10:23 pm which is hereby incorporated in full by reference.

of the hands of the public—information that the public needs in order to understand the neglectful way that the USFS has addressed habitat destruction on the Chattooga.

My various prior published comments should be found in the administrative records of the Nantahala National Forest.”⁹²

I had anticipated that Forest Supervisor Nicholas would respond. Instead I heard from Mr. Meloche on the following day at mid morning. But before emailing an answer to me, unbeknownst to me, Mr. Meloche consulted with Regional Planning Director Gaulke to receive directions about how to respond to my pointed question about why and how the Southern Region had tardily appeared to usurp the processing of my September 22nd FOIA.

October 26, 2017

@ 8:30 AM, Mr. D. Meloche, Regional FOIA Coordinator emailed Mr. Peter Gaulke, Regional Planning Director seeking instruction and approval in responding to my implicit charge that the last minute appearance by the Southern Region was pretense for causing me unnecessary delay and trouble.

Mr. Meloche’s 8:30 AM email contained a terse message to Mr. Gaulke: “This is what I would like to respond with.” Mr. Meloche was referring to how he wanted to respond to my question asked the prior evening on October 25th @ 10:23 PM about the motivations and need for the involvement of the Southern Region in my September 22nd request for records. In that email, I had questioned the motivations for the inexplicable and sudden last minute involvement of the Southern Region personnel in the processing of my September 22, 2017 FOIA.

Given the controversial nature of the subject, and based on the terse and abbreviated nature of Mr. Meloche’s early morning email to Mr. Gaulke, it would seem logical to presume that other communications had taken place with Mr. Gaulke prior to his having sent his 8:30 AM email. Similarly, the brevity of Mr. Gaulke’s emailed response to Mr. Meloche at 10:20 AM on October 26th also presumes a level of common knowledge about this subject matter that must have been developed at an earlier point in time.

@ 10:20 AM Mr. Gaulke responded by emailing the following instruction to Mr. Meloche:

“Please coordinate with the Forest, but I would start out the response with something similar to:

⁹² See the text of B. Floyd email on Wednesday, October 25, 2017 @ 10:23 PM to Mr. D. Meloche, Forest Supervisor Nicholas and Ms. Heather Luczak, Forest NEPA Coordinator; included in Attachment A-1.

‘In my role as Regional FOIA Coordinator, the National Forest in North Carolina referred your request for Agency Records to me. This referral was made due to the likelihood of redactions, need to clarify fee waiver status, and the voluminous nature of the request. All redactions and fee waiver determinations are made by the Regional Forester, hence the need for my engagement in your request.’”

“Or something similar. *Need to answer directly why you are involved.*”⁹³

Just nine minutes later, at 10:29 AM, Mr. Meloche emailed me the following message:

“In my role as Regional FOIA Coordinator, the National Forests in North Carolina referred your request for Agency Records to me. This referral was made due to the likelihood of redactions, need to clarify fee waiver status, and the voluminous nature of the request. All redactions and fee waiver request determinations are made by the Regional Forester here in Atlanta, GA., hence the need for my engagement in your request. “⁹⁴

In other words, Mr. Meloche basically mirrored Mr. Gaulke’s instruction verbatim. Mr. Meloche’s October 26, 2017 email further demanded: “If you [do] not address all six questions, we are not required to process the request any further unless you indicate a willingness to pay fees.”⁹⁵

Mr. Meloche copied Forest Supervisor Nicholas and Ms. Luczak on his 10:29 AM email to me—but *he inexplicably did not include a visible copy of his communication to Mr. Peter T Gaulke, Regional Planning Director.*

This omission of Mr. Gaulke from this email is curious because Mr. Meloche had just been *consulting with Mr. Gaulke nine minutes before he sent his response to me.* In an open communication environment, where parties have nothing to hide, one would presume that Mr. Meloche would have wanted to provide his boss with a copy of his email to me to show how he had followed the bosses’ instruction and to keep the boss informed.

⁹³ See text of P. Gaulke, Regional Planning Director email dated Thursday, October 26, 2017 @ 10:20 AM to D. Meloche. See Attachment A-1 to this appeal.

⁹⁴ See the text of D. Meloche email dated Thursday, October 26, 2017 @ 10:30 AM to B. Floyd, with email copies to Forest Supervisor Nicholas and Ms. Heather Luczak, Forest NEPA Coordinator; Attachment A-1 to this appeal.

⁹⁵ I dispute that this was an accurate statement of either my rights or the Forest Service’s obligations under FOIA. I contend that the USFS had a nondiscretionary obligation to provide an up or down decision on whether to grant me a fee waiver 20 business days after I submitted this FOIA request on September 22, 2017—irrespective of whether I answered the six questions identified by the Southern Region.

By not visibly copying Mr. Gaulke on this email, Mr. Meloche gives the appearance of trying to conceal the involvement of Mr. Gaulke in the usurpation of the processing of my September 22nd request.

By not visibly copying Mr. Gaulke on this email, Mr. Meloche made it impossible for me to recognize on October 26th how he had been taking his instructions from Mr. Gaulke—a *tacit concealment of consultations which goes to the heart of my complaint and inquiry about the possibility of inappropriate motivations for the last minute transfer of responsibility for processing of my September 22, 2017 FOIA.*

This hidden involvement of Mr. Gaulke remained undiscovered until 49 days later on December 15, 2017 when Mr. Meloche emailed at 6:34 AM to provide me with a copy of an attached document entitled 2018-FS-R8-01064-F_Floyd_Final_Response.

In that attached correspondence, Regional Forester Arney declared: “This letter acknowledges and serves as a final response to your ...(FOIA) request 2018-FS-R8-00000-F dated November 6th.”⁹⁶

One of the documents produced in that FOIA response was the email sent by Mr. Meloche first thing on Thursday, October 26, 2017 @ 8:30 AM to Mr. Peter Gaulke, Regional Planning Director for the Southern Region.

The implications of later learning about these prior in time back and forth communications between Mr. Meloche and Mr. Gaulke are various.

Clearly, Mr. Gaulke and Mr. Meloche must have understood the criticism that I had already communicated about the possible inappropriateness of the last minute appearance of Southern Region personnel. *They must have also been aware that the Forest Service did not intend to grant or to deny my request for a fee waiver until I complied with their demand to answer a series of fee waiver criteria questions—a demand to which I could not comply because of concerns about having my procedural and substantive due process rights adversely impacted.*⁹⁷

⁹⁶ Apparently, based on a conversation with Mr. Fuller-Bennett on February 7, 2018, the referenced FOIA tracking number does not constitute a valid FOIA tracking number under the Forest Service’s file naming nomenclature. More important from my perspective, this reference to a FOIA dated November 6th overlooks how the original FOIA request was actually tendered back on October 27, 2017—with a clarification offered on November 6th.

⁹⁷ It is also informative how the draft of the text of what Mr. Meloche wanted to “respond with” was not produced in response to my FOIA request that the Regional Forester defined as request “2018-FS-R8-00000-F dated November 6th.” If what Mr. Meloche wanted to “respond with” was reduced to writing, it should have been produced on December 15, 2017 when the Regional Forester responded to the FOIA. The nonproduction of a document believed to be responsive and specifically referenced in a record that was produced, evidences a need for a second search of records. An appeal seeking a second search was submitted to the Chief’s office back on January 29, 2018.

This is why the circumstance of Mr. Meloche having not visibly included Mr. Gaulke on his October 26th response to me is probative for raising alarms about how my September 22nd request has been systematically hindered.

Determining the *precise instructions* that Mr. Gaulke gave to Mr. Meloche about how to respond to my complaint about the sudden involvement of the Southern Region was one of the primary motivations for submitting that separate FOIA request that the Regional Forester *incorrectly* referenced as “#2018-FS-R8-00000-F dated November 6, 2017.”

What is clear is that effective October 26, 2017, the Southern Region was intent on *alleging* that my September 22nd FOIA (request #2018-FS-R8-00827) request for a fee waiver could not be processed *because it was not perfected*. This is what Mr. Meloche began to contend.

Finally, the fact that Mr. Meloche did not copy Mr. Gaulke on his email to me raises additional concerns because it de facto prevented me from recognizing the close involvement of Regional Planner Gaulke on a highly controversial issue about which he had an undisclosed conflict of interest due to his stated passion for kayaking.

See *Gaulke Named as Director of Planning*, USFS Southern Region Press Release, September 14, 2014. <https://www.fs.usda.gov/detail/r8/news-events/?cid=STELPRD3830401> last downloaded 11/6/2017.

The unstated nature of this conflict of interest is worrisome. Here is why.

Back on October 26, 2017 @ 10:30 A.M., Mr. Meloche stated the “National Forests in North Carolina referred your request for Agency Records to me.”

He made no mention of any involvement by his boss and *self-professed* paddling enthusiast Regional Planner Gaulke in the decision making process. Clearly, Mr. Gaulke is empowered to be closely involved with the preparation of the Nantahala’s forthcoming new LRMP. He would be in a position to influence the contents of that LRMP—including whether the Environmental Impact Statement being prepared to support that LRMP would objectively examine the damages being done by creek boaters.

In stark contrast, on November 1, 2017 @ 9:05 AM, Mr. Meloche offered a different explanation about how he came to be involved in the processing of my September 22nd FOIA.

This November 1st explanation occurred after I had submitted my October 27th FOIA asking for clarification about why the Southern Region had usurped the processing of my September 22nd request for a fee waiver.

On November 1, 2017, Mr. Meloche stated that my September 22nd FOIA was “transferred...by the forest staff *and the Regional Planning Director who has the overall responsibility to manage the Southern Region’s FOIA program.*”⁹⁸

These constitute two widely different explanations—although subtle. *The later in time explanation on November 1st (after I raised pointed questions) admits that Peter M. Gaulke had directed Mr. Meloche to take over the processing of my September 22nd FOIA.*

The earlier in time explanation did not reference Mr. Gaulke’s involvement.

Just as inexplicable, despite the capacity for proving the administrative propriety of what took place, the USFS never produced any transmittal email *evidencing who* within the National Forests in North Carolina had made the referral of my September 22nd FOIA to Mr. Meloche prior to the expiration of the 20 day statutory deadline for responding—which was October 24th.

Similarly, the Nantahala National Forest never wrote to me to advise how my FOIA had been transferred to the Southern Region for additional processing etc. Apparently, it just happened without correspondence documenting the handover of responsibility. This seems inappropriate.

Just as incongruent, later on November 21, 2017, the Regional Forester stated “To be timely in responsiveness, the Forest requested guidance and clarification from the Regional FOIA Coordinator.”⁹⁹

This statement points to certain administrative incongruities. Consider how differently the referral of my September 22, 2017 FOIA request was handled compared to an earlier FOIA involving a referral to the Regional Office. Please refer back to my FOIA request submitted October 1, 2015 (assigned FOIA request #2016-FS-R8-01010-F).¹⁰⁰

⁹⁸ See D. Meloche email to B Floyd, November 1, 2017 @ 9:05 AM (italics added); included in Attachment A-1 of this appeal.

⁹⁹ See the document entitled “2008-FS-R8-00827-F_Floyd_FEE_Response_Signed” attached to an email sent on February 7, 2018 @ 2:14 PM from Mr. Fuller-Bennett to Bill Floyd. This contains the text of an adverse determination signed by Regional Forester Arney and carrying an inside letterhead date of November 21, 2017

¹⁰⁰ Deputy Forest Supervisor Melonas,

It was well within your discretion to have allowed other attendees to direct questions to the Forest Service during the 2nd objection resolution meeting with American Whitewater—especially because of the confusion that the Forest Service had created on the prior American Whitewater

In response to that much earlier in time October 1, 2015 FOIA request, the Nantahala National Forest had produced a partial response of 45 pages of records while providing the following notification “Additional records were located; however, these records required review by the Regional Office prior to release. We have referred these additional records to the Regional Office for review and final response to you.”¹⁰¹

In contrast to the way the October 1, 2015 FOIA referral was handled, with respect to my September 22, 2017 FOIA, the Nantahala National Forest neither produced any notification of the need to make a referral to the Regional Office for further review and final response, nor an explanation for why a referral was required. Why not?

Again, the Forest Service Manual (6270.42d) specifically delegates authority to the Forest Supervisor to “Grant a request for a fee waiver

objection meeting. It is disappointing that you refused to do so. This would have saved everyone a lot of time and perhaps avoided further appeals.

Your refusal to allow the public to ask questions of the Forest Service during this *extraordinary* second objection resolution meeting with a single party, constitutes just one more example in a discriminatory pattern of behavior designed to promote creek boating no matter the impacts. The Forest Service’s willingness to grant American Whitewater a second objection meeting while denying other interested parties the same opportunity exemplifies this same discriminatory intent.

There is no time constraint to excuse your refusal of my requests made on behalf of the public interests. It is quite clear that the Forest Service seeks to exclude public involvement by arbitrarily granting greater access to American Whitewater—100% more access.

Mr. Melonas, the exact language employed in 36 CFR 218.11 was explicitly modified to make clear that multiple objection meetings with a single objector should not occur. See Federal Register Vol. 78, No. 59, March 27, 2013 at page 18489. Nevertheless, the Forest Service demonstrated its discriminatory favoritism by going ahead and granting a second objection resolution meeting with American Whitewater—while denying the same right to others.

It is even more distressing that the Forest Service abruptly closed a public meeting this morning, to the prejudice of multiple parties who had a significant need to gain an understanding of the Forest Service’s changing position on what boaters must do in paddling the North Carolina part of the Chattooga.

Consistent with your obligations under the Government in Sunshine Act, 5 USC 552b, which requires the Forest Service to maintain a transcript or an electronic recording of today’s closed meeting with American Whitewater, please consider the following request for information pursuant to the Freedom of Information Act: (1) please provide copies of the transcript or electronic recording of today’s closed meeting between yourself, Mike Wilkins, and Kevin Colburn of American Whitewater, (2) please provide any handwritten notes, memorandum, and any and all emails authored and sent by either James Melonas, Mike Wilkins, James Knibbs from Thursday, September 24, 2015 until Friday, October 2, 2015.

¹⁰¹ See USFS FOIA response letter entitled “Letter_10_19_15” transmitted via email by Ms. Carol Milholen to B. Floyd on November 3, 2015 @ 4:23 PM.

prior to any records delivery, *or refer a fee waiver denial to the Regional FOIA/PA Coordinator.*”

Furthermore, any denial of a request for a fee waiver originally submitted to the Forest Supervisor would have required the Forest Supervisor to communicate a proper adverse determination letter to me.

No such notification of referral or adverse determination letter was provided to me by Forest Supervisor Nicholas or his staff.

Instead, we have the Southern Region personnel unilaterally announcing their appearance on October 25th by demanding that I comply with certain instructions to provide written answers to six questions before the Southern Region would begin to process my request for a fee waiver.

I had already effectively directed the USFS to consider the evidence of my entitlement to a fee waiver that was already contained within the Nantahala’s administrative record. The totality of these internal inconsistencies begs for a logical explanation to reconcile away any possibility of the Forest Service’s inappropriate handling of my request for records—especially the possibility that the Forest Service has used pretense to delay responding to an otherwise reasonably described request for records for the purpose of orchestrating the evasion of the 20 day statutory deadline for responding to the FOIA submitted on September 22, 2017

October 27, 2017

On this Friday at 4:28 PM, I submitted a 7 page response to Mr. Meloche’s email of October 26,2017 @ 10:29 AM in which he referred to himself as the Regional FOIA Coordinator despite still having a different title on his email header. This correspondence is included in Attachment A-1 (pages 1-282 of 433 total) of this appeal. In this message I asked: *“Was the referral of my FOIA to Region 8 compelled by an order from the Regional Forester or was the referral voluntarily initiated by Forest Supervisor Nicholas and his staff?”*

November 1, 2017

Three days later, at 9:05 AM, Mr. Meloche responded to my October 27th correspondence. In this message, the Regional FOIA Coordinator stated “Your FOIA request was referred to me by Forest staff and the Regional Planning Director who has the overall responsibility to manage the Southern Region’s FOIA Program.”¹⁰²

On October 25th, and again on October 26th, in response to my inquiries, Mr. Meloche did not disclose his superior’s involvement in the decision to have the Southern Region take over the processing of this FOIA after

¹⁰² See the email from Mr. Meloche to Floyd on November 1, 2017 @ (9:05 AM with visible electronic copies sent to Forest Supervisor Nicholas and Regional Planning Director Gaulke.

more than 20 days had passed since my request was first delivered to the Forest Supervisor for the Nantahala Forest. In those earlier communications Mr. Meloche did not provide a *visible* electronic copy to his boss when he emailed me on the 26th—despite the fact that he was carefully consulting *with his boss nine minutes before sending that email to me*.

In contrast, *after I asked a second time on October 27th* with a request to be provided with “any relevant documents” about how my FOIA came to be transferred to the Southern Region, Mr. Meloche stated something slightly different than what he had previously advised:

“Your FOIA request was referred to me by forest staff and the Regional Planning Director who has the overall responsibility to manage the Southern Region’s FOIA Program.”¹⁰³

November 6, 2017

On this Monday at 1:40 PM I emailed a letter entitled “FLOYD FOIA Fee Waiver Request 11062017 Regional Forester FINAL” to Regional Forester Arney with electronic copies delivered to Forest Supervisor Nicholas, Regional Planning Director Gaulke, and Regional FOIA Coordinator Meloche.

In the email transmitting this letter, I drew attention to the fact that I had asked for additional documents on October 27, 2017 but had not heard back from the Southern Region.

“Finally, I must also ask you to pay special attention to an additional FOIA request that was first submitted to your Regional FOIA Coordinator on October 27, 2017—and which I have reiterated for your benefit on page 16-17 of the attached correspondence. This October 27, 2017 FOIA request has to do with closing the gaps on how my September 22nd FOIA got referred at the last moment to Region 8 instead of being processed by the Nantahala National Forest. Most of the information requested would be logically presumed to have been information that the Nantahala would have had in its possession since these requests were isolated to the North Carolina part of the Chattooga.”¹⁰⁴

In the body of the letter to Regional Forester Arney, I observed “...somewhere along the line this FOIA request was taken over by your Regional Planning Staff—although as of right now, I still have neither

¹⁰³ See the email from Mr. Meloche to Floyd on November 1, 2017 @ (9:05 AM with visible electronic copies sent to Forest Supervisor Nicholas and Regional Planning Director Gaulke. Included in Attachment A-1.

¹⁰⁴ See the email from Floyd to Regional Forester Arney, Forest Supervisor Nicholas, Regional Planning Director Gaulke, and Regional FOIA Coordinator Meloche dated Monday, November 6, 2017 @ 1:40 PM.(italics added).

received any notification of that fact nor been provided with any file tracking number for this FOIA request.”¹⁰⁵

November 8, 2017 At 2:08 PM I received the following emailed message from Mr. Meloche “We received your FOIA request, October 25, 2017, and assigned it the following tracking number, 2018-FS-R8-00827-F. Your request is currently on hold as we work with you to clarify information needed to proceed with a fee waiver determination. We will continue to process the information you recently submitted via email on 11/6/2017.”¹⁰⁶

November 13, 2017 At 1:17 PM, I received the following email message from Mr. Meloche “I am emailing you to determine if in fact you wish to submit a new Freedom of Information Act (FOIA) request for the below information or if this is an amendment to your most recent request that is currently on hold? The below paragraph was located on page 17 of the attachment to your email of 11/6/2017.

‘I now reiterate that FOIA demand for you—to be provided with relevant documents including but not limited to emails, internal memoranda, etc., discussing any aspect of the decision to have my September 22, 2017 FOIA processed by Region 8 instead of by the Nantahala National Forest—including any written communications created by you, Peter T. Gaulke, or anyone working within the office and staff of the Chief of the United States Forest Service.’”¹⁰⁷

November 15, 2017 In response to Mr. Meloche’s November 13th inquiry, on this day @ 3:33 PM, I emailed a 4 page response entitled “Floyd Response to D Meloche email of Nov 13 2017 at 1 17 pm” to Mr. Meloche with electronic copies to Regional Forester Arney, Forest Supervisor Nicholas, and Regional Planning Director Gaulke.

November 16, 2017 On this day at 8:24 AM Mr. Meloche emailed me to state:

“I am emailing you to provide a status of your current request...As of today, you have one FOIA request that has been submitted (2018-FS-R8-00827-F). This request was originally submitted on September 22, 2017 and finally perfected on November 6, 2017. ..

¹⁰⁵ See p.1 of the letter entitled “FLOYD FOIA Fee Waiver Request 11062017 Regional Forester FINAL” sent by email to Regional Forester Arney on November 6, 2017 @ 1:40 PM with electronic copies to Forest Supervisor Nicholas, Regional Planning Director Gaulke, and Regional FOIA Coordinator Meloche.

¹⁰⁶ See the email from Mr. Meloche to Floyd on November 8, 2017 at 2:08 PM. A copy is included in Attachment A-1.

¹⁰⁷ See the email from Mr. Meloche to Floyd on November 13, 2017 @ 1:17 PM. Copy included in Attachment A-1.

This request (2018-FS-R8-00827-F) is currently on hold pending a fee waiver determination. Please remember, the timeline for processing a request **does not** begin until the request is considered by the agency to be perfected. A request is considered perfected when it meets **all** of the following requirements: (1) it is received in writing, (2) Clearly describes the records sought, (3) Contains a statement about willingness to pay or a request for a fee waiver. This request (2018-FS-R8-00827-F) was finally perfected on November 6, 2017.”¹⁰⁸

This November 16, 2017 email is the last email communication that I have a record of receiving regarding (FOIA Request #2018-FS-R8-00827-F) until January 31, 2018 when I retrieved a certified return receipt letter from Regional Forester Arney dated January 24, 2018. The Regional Forester’s letter was postmarked on January 25th and was first unsuccessfully attempted for home delivery on January 30, 2018.

November 29, 2017 On this day at 1:17 PM, I received an acknowledgment of receipt of a request for records submitted on November 24, 2017 to Forest Supervisor Nicholas and Regional Forester Arney. For some unknown reason the Forest Service continues to refer to a much later date of receipt than when these emailed FOIAs are first being presented to the responsible officials. In this case, despite having been sent by email on November 24th Mr. Meloche asserts that “This email acknowledges receipt of your FOIA request dated November 24, 2017 which was received in the FS Region 8 office on November 29, 2017.”

It remains a mystery why the Southern Region continues to help itself to a claimed *five day delay* between when this email was received in the inbox of the responsible officials and when the Regional FOIA Coordinator seems to imply the “date of receipt” should be fixed. *This does not comport with the plain meaning of FOIA or the relevant Title 7 regulation* which plainly states: “The date of receipt of a request or appeal shall be the date *it is received in the agency and office responsible* for the administrative processing of FOIA requests or appeals.” 7 C.F.R. §1.13 Date of receipt of requests and appeals. Both the Regional Forester and Forest Supervisor constitute the responsible officials for discharging FOIA. See Forest Service Manual Paragraph 6270.42d.

December 15, 2017 At 6:34 AM on this date I received an email containing a FOIA response letter from Mr. Meloche, Regional FOIA referencing a FOIA Request #2018-FS-R8-01147. This adverse determination letter, which carried an inside letterhead date of December 5, 2017 (*ten days earlier than when this letter was emailed to me*) rejected my request for expedited processing and denied my request for a fee waiver. A certified return receipt copy of this letter was also postmarked on Friday, December 15th and was

¹⁰⁸ See the email from Mr. Meloche to Floyd with electronic copies to Forest Supervisor Nicholas and Regional Planning Director Gaulke dated November 16, 2017 @ 8:24 AM. Included in Attachment A-1.

retrieved from the post office on Monday, December 18th. An appeal was filed on January 29, 2017.

Curiously, despite the Southern Region's adverse determination communicated in its letter dated December 5th but received December 15th, the Nantahala National Forest went ahead and produced *some* responsive documents via email on January 12, 2018 @ 4:26 PM.

The Nantahala's response was delivered to me by email as has been the course of dealing in the past.

January 31, 2018 On this date, I retrieved a certified return receipt letter from Mr. Meloche which had been unsuccessfully attempted for home delivery on the 30th. This certified letter contained an adverse determination from Regional Forester Arney that was dated January 24th and which had been postmarked on January 25th. With respect to 2018-FS-R8-00827-F, this letter communicated an intention to redact and to withhold otherwise responsive documents. This correspondence also referenced an earlier correspondence on November 21, 2017 and stated that my request for a fee waiver had been rejected in the past.

I did not lay eyes on this November 21, 2017 adverse determination until February 7, 2018 when Mr. Fuller-Bennett emailed me a copy of that correspondence.

Inexplicably, the USFS did not make use of email to send me an electronic copy of this January 24, 2018 adverse determination letter—despite the prior course of dealing associated with 17 prior FOIAs. I have no record of having received an email in connection with the earlier November 21, 2017 rejection of my fee waiver request.

This stands in stark contrast to how on December 15, 2017 the Regional FOIA Coordinator did make use of email to transmit two separate responses to other FOIA requests.

K. My Interests Have Been Prejudiced Because I Did Not Learn Until January 31, 2018 About the Forest Service's November 21, 2017 Refusal To Process the September 22nd Free of Any Charges. This Prejudice Has Been Further Exacerbated Because the Forest Service Has Not Provided Sufficient Specificity For Claiming An Entitlement To Use Exemption 5 and Exemption 6 For Redacting or Entirely Withholding Otherwise Responsive Records.

The Regional Forester has layered one form of prejudicial impact on top of another by declaring that Exemption 5 and Exemption 6 should apply. Because I am now being forced to appeal the Forest Service's denial of my entitlement to have records produced free of charge, I would be logically delayed from being able to contest the Forest Service claimed entitlement to redact or withhold otherwise responsive documents. Stated differently, in order to avoid any further delay, I am being forced to commence the appeals process regarding the planned redaction and withholding of otherwise responsive documents *without ever having seen the documents* that the Forest Service asserts a right to redact.

My due process rights have been adversely impacted, because *I have no record of having received constructive notice* of the Forest Service’s refusal to grant a waiver of fees until January 31, 2018—although the Regional Forester states that the decision to reject was made back on November 21, 2017. *In fact, as I can attest, I did not lay eyes on the November 21, 2017 adverse determination letter until a copy was sent to me via email on February 7, 2018 by Mr. Harald Fuller-Bennett.*

Until January 31, 2018, the last communication I had received pertaining to my September 22nd FOIA (2018-FS-R8-00827-F) was a November 16, 2017 email clocked at 8:24 AM. from Mr. Meloche.

In that email Mr. Meloche advised:

I am emailing you to provide a status of your current request and also clarify a problem with your new request. As of today, you have one FOIA request that has been submitted (2018-FS-R8-00827-F). This request was originally submitted on September 22, 2017 and finally perfected on November 6, 2017...

This request (2018-FS-R8-00827-F) is currently on hold pending a fee waiver determination. Please remember, the timeline for processing a request **does not** begin until the request is considered by the agency to be perfected. A request is considered perfected when it meets **all** of the following requirements: (1) Is received in writing, (2) Clearly describes the records sought, and (3) Contains a statement about willingness to pay or a request for a fee waiver. This request (2018-FS-R8-00827-F) was finally perfected on November 6, 2017.¹⁰⁹

This over two month delay has prejudiced me in particular because of the time pressures associated with my need to press my concerns and rights before the dissemination of the forthcoming rewrite of the Nantahala National Forest’s LRMP.

The Forest Service’s failure to insure actual notice of that November 21, 2017 adverse determination is particularly prejudicial to me—especially since the risk of undelivered notice could have been minimized had the USFS complied with its prior course of dealing by sending the decision to me via email as well as overnight or certified mail.

In now asserting the right to redact 12 pages and to withhold 16 pages in entirety, the Regional Forester simply restates the text of Exemptions 5 and 6 without explaining how those Exemptions apply to the specific facts and circumstances associated with my September 22, 2017 request for records.

Given the prejudicially delayed refusal to produce documents free of charge, coupled with the Forest Service’s prior documented¹¹⁰ pattern and practice of providing piece meal responses to

¹⁰⁹ See the text of Mr. Meloche’s email sent to Floyd on November 16, 2017 at 8:24 AM a copy of which is included in Attachment A-1 to this appeal.

record requests pursuant to FOIA and of refusing to provide answers to narrow questions pursuant to the *public participation* mandate of the NFMA, this additional attack on timely disclosure of otherwise responsive information is suspect. Today's appeal takes issue with the Regional Forester's stated intention to redact 12 pages and to withhold 16 pages of the 211 pages that he states are responsive to my FOIA.

This appeal respectively asks the Chief to reverse that determination and to provide all documents without redactions.

1) **Deliberative Process Privilege**

The Regional Forester's January 24, 2018 adverse determination letter (postmarked on January 25th but first unsuccessfully attempted for home delivery on January 30th) states that "certain information...must be withheld pursuant to the deliberative process component of Exemption 5."

However, the Regional Forester offer no further context for why this is true. He simply states that the exemptions apply.

Given the past pattern and practice of slow-walking responses for information etc.as well as the inexplicable failure of the Forest Service to produce critical factual information about the condition of the Chattooga's trout habitat and trout fisheries, I must have more than the Forest Service's summarily stated assertions that such exemptions apply.

Similarly, given the oddity of how the Southern Region usurped the processing of this September 22nd FOIA request, there is no doubt that I must provide a blanket objection to the stated intention to redact 12 pages and to withhold 16 other pages of otherwise responsive documents.

It seems hard to believe that there would be as much as 12 pages of blocked out material that could not be segregated between otherwise disclosable information and properly protected information.

Courts have held that the deliberative process privilege can be overcome.

The D..C. Court of Appeals has explained

"[E]ach time [the deliberative process privilege] is asserted the district court must undertake a fresh balancing of the competing interests," taking into account factors such as "the relevance of the evidence," "the availability of other evidence," "the seriousness of the litigation," "the role of the government," and the "possibility of future timidity by government employees." *In re Subpoena Served Upon the Comptroller of the Currency*, 967 F.2d 630, 634 (D.C.Cir.1992) (internal quotations omitted) (quoting *In re Franklin Nat'l Bank Securities Litig.*, 478 F.Supp. 577, 583 (E.D.N.Y.1979))...¹¹¹

¹¹⁰ See

¹¹¹ *In re sealed Case*, 121 F. 3d 729, 737-738 (D.C. Ct. App 1997

More significant in my case, the incongruent explanations given for treating this September 22nd request so differently than 17 prior requests begs the issue of whether or not the Forest Service has acted in good faith.

To qualify for the deliberative process privilege, a document needs to be prepared by a government agency and "fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Dep't of Interior v. Klamath Water Users Protective Assoc.*, 532 U.S. 1, 8 (2001).

"To invoke the privilege successfully, the government must show that, in 'the context in which the materials are used,' the documents are both predecisional and deliberative." *Competitive Enterprise v. US Dept. of State*, 225 F. Supp. 3d 582, 585 (E.Dst. Va 2016)(quoting *City of Virginia Beach, Va. v. U.S. Dep't. of Commerce*, 995 F.2d 1247, 1252 (4th Cir. 1993).

Citing precedent from other Circuits, the D.C. Court of Appeals has narrowly emphasized:

[W]here there is reason to believe the documents sought may shed light on government misconduct, "the privilege is routinely denied," on the grounds that shielding internal government deliberations in this context does not serve "the public's interest in honest, effective government." *Texaco Puerto Rico, Inc. v. Department of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir.1995); see also *In re Comptroller of the Currency*, 967 F.2d [630],634 ("the privilege may be overridden where necessary ... to 'shed light on alleged government malfeasance'") (quoting *Franklin Nat'l Bank*, 478 F.Supp. [577], 582 [E.Dst. NY 1979)...¹¹²

See also *Bank of Dearborn v. Saxon*, 244 F.Supp. 394, 401-03 (E.D. Mich. 1965) ("the real public interest under such circumstances is not the agency's interest in its administration but the citizen's interest in due process")(aff'd, 377 F.2d 496 (6th Cir. 1967).

In my case, the Regional Forester for the Southern Region has not explained how the redacted or withheld records relate to the formulation of actual agency policy or *what decision, if any, the redacted or withheld information would be antecedent.*

2) The Purpose of the September 22nd FOIA Was To Ferret Out Records That Might Explain the Forest Service's Inexplicable Behavior on September 6th

The very essence of the September 22nd request for records was to seek out records that might *inform as to the otherwise inexplicable motivations* for the *flat out refusal* to use the Nantahala National Forest's LRMP planning process to review and reconsider the destructive impacts that have been caused by allowing creek boating to be pursued on the fragile headwaters in North Carolina. The Forest Service has chosen to ignore the highest intensity of antidegradation

¹¹² *In re sealed Case*, 121 F. 3d 729, 737-738 (D.C. Ct. App 1997)(italics added).

protection that is owed to the Chattooga's trout habitat and wild trout fisheries. As repeated too frequently, preserving the “*outstanding*” quality of the trout habitat and wild brown, brook, and rainbow trout fisheries constitute the specially designate uses of the Chattooga's ORW water quality. These designated uses must not be allowed to suffer any non-temporary diminishment in quality—which the EPA has defined in terms of days and weeks but not months and years.

Similarly, the Forest Service has refused to acknowledge how the embedded sediments that blanket the stream bottom over an extended length of the North Carolina river plainly appear to exceed the minimum effects threshold for disrupting the reproductive and early life cycle needs of salmonids based on the *best available science* (see page 3 of this appeal).

Finally, the Forest Service has purposefully neglected to monitor the condition of the trout habitat and trout fisheries at any time after 1996—including recently after being shown the plainly visible evidence of excessive sedimentation. Despite the Forest Service's neglect, the fact is a trout population study was conducted by the state of North Carolina in September 2016. This study managed to capture only 26 young-of-the-year trout despite having electrofished 8 separate sampling reaches totally almost a mile of stream.

Unfortunately, the Forest Service has entirely ignored this warning sign by resorting to the broad generalization that trout populations can suffer great variability on a year to year basis.

However, in the Chattooga's case, the Forest Service also knows that this young-of-the-year problem was also previously documented on this same section of river in each year during the 1992-1996 Chattooga study.

While entirely neglecting the Chattooga's degraded trout habitat and degraded trout fisheries, the Forest Service has simultaneously gone out of its way to accommodate the demands of a handful of whitewater creek boaters. This *inexplicable accommodation* began back in 2005 when the Reviewing Officer for the Chief achieved an appeal decision on behalf of American Whitewater by refusing to adhere to 36 C.F.R. §217.11(a) as informed by United States Supreme Court precedent.¹¹³ The case law and the regulation constituted nondiscretionary sources of legal guidance which should have compelled the Reviewing Officer to dismiss American Whitewater's appeal *without considering the merits*.

The regulation, *in effect at that time*, provided that 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).

To explain, the United States Supreme Court has repeatedly denied Article III standing for challenges of agency action *that involve decisions wholly committed to the discretion* of the agency. In the case of American Whitewater's appeal, the Regional Forester was well within his discretionary authority back in 2004 pursuant to 36 C.F.R. Part 261 *to refuse to issue a special*

¹¹³ *Citizens to Preserve Overton Park Inc. v Volpe*, 401 US 402 (1971); *Chevron USA Inc. v Natural Resources Defense Council, Inc.*, 467 US 837 (1984); *Heckler v Chaney*, 470 US 821 (1985); *Lujan v National Wildlife Federation*, 497 US 871 (1990); *Norton v Southern Utah Wilderness Alliance*, 542 US 56 (2004).

use authorization allowing creek boating on the narrow and steeply entrenched headwaters in North Carolina.

Unfortunately, nobody showed up to contest American Whitewater's appeal in 2005. Inexplicably the Regional Forester did not appear to defend his own record of decision made thirty days earlier, and other interested parties like North Carolina anglers were deprived of appropriate notice and therefore had no way to know of their need to appear and be heard. In effect, the 2005 Appeal Decision was reached through what might be viewed as the equivalent of a sub rosa appeals process where the only information placed into the administrative record was American Whitewater's one sided documentation.

The September 22nd request was intended to disclose information needed by the public *to assess* the Forest Service's potential *misfeasance, nonfeasance, or malfeasance*¹¹⁴ for having *explicitly* refused on September 6th, during the rewrite of the Nantahala's Land Resource Management Plan, (1) to apply the best available science in assessing the impacts of excessive embedded sediments on salmonids and (2) for refusing to revisit the additional measurable damage being caused by the Forest Service's 2012 decision to promote the sport of creek boating on the Chattooga's headwaters in North Carolina.

When pressed to offer an explanation for why the Forest Service was refusing to reconsider the damage done by creek boating, on October 23, 2017, the Nantahala National Forest asserted that the damage being caused by creek boating could not be revisited because the Forest Planner had told a small select group (prominently including American Whitewater) in April 2006 that the Nantahala National Forest would not be revisiting the recreational use policy governing the Chattooga's headwaters.

I'm not sure that simply telling American Whitewater that you don't intend to examine the policy constitutes a legally binding reason to ignore the documented damage that has impermissibly been allowed to occur on the Chattooga because of creek boating activities.

According to the Forest Service's own records and public statements, only a handful of creek boaters have caused the physical displacement of soils lying inside the trout buffer and the subsequent creation of permanent erosion sites. These erosion sites did not exist prior to the introduction of boating in December 2012. These boater created erosion sites constitute chronic places where additional sediments are being channeled into a stream that already suffers from excessive embedded sediment as measured by the *best available science* (see page 3 of this appeal).

Nevertheless, the Forest Service has adopted an obdurate fascination with defending the rights of the individuals who cause this damage—despite knowing how the Fourth Circuit Court of Appeals unequivocally 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)(emphasis added).

¹¹⁴ Misfeasance: the improper performance of some act which a [person] may lawfully do. “Nonfeasance” means the omission of some act which a person ought to do; “misfeasance” is the improper doing of an act which a person might lawfully do; and “malfeasance” is the doing of an act which a person ought not to do at all. Black's Law Dictionary 902 (5th ed. 1979).

Similarly inexplicable, the Forest Service ignores the special antidegradation protection owed to the Chattooga's trout habitat and trout fisheries pursuant to the Clean Water Act's regulatory rules associated with Outstanding Resource Waters. Creek boating has proven incongruent with the antidegradation mandate as documented for the USFS in detail.

Shelving the issue of whether or not the Forest Service has acted in good faith by now asserting an entitlement to redact and withhold documents, the fact remains that I have no way to gauge that good faith other than to see what the Forest Service wishes to conceal.

This dispute does not involve state secrets. It involves a garden variety dispute about whether or not an agency has done what it is required to do under its own LRMP, the Clean Water Act, and the National Wild and Scenic Rivers Act.

The Regional Forester claims

Over the last few years both the Forest and Regional office have made every effort at being thorough and responsive to your FOIA requests and to do so in a timely basis.

However, over the last couple of months the Forest has had numerous communications with you regarding both your FOIA request as well as your comments on the plan revision process. It has become increasingly difficult to differentiate between your questions and comments on the content of the plan revision from your FOIA requests. To be timely in responsiveness, the Forest requested guidance and clarification from the Regional FOIA coordinator.¹¹⁵

If this constitutes a true belief, and not a mere argumentative position taken for the purpose of muddying up the administrative record, there should be no need for the Forest Service to redact the requested records. The Forest Service would need only cling to secrecy in the event that the Forest Service has engaged in the practice about which I complain and about which there is evidence within the administrative record.

In any case, there are additional reasons to challenge the use of Exemption 5 in my particular circumstance.

The deliberative process privilege under FOIA exemption 5 excuses disclosure of documents that reflect "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Klamath*, 532 U.S. at 8, 121 S.Ct. 1060. Only documents that are both predecisional and deliberative fall within the scope of this privilege. *Trentadue*, 501 F.3d at 1227. This privilege does not extend to factual information contained in an otherwise deliberative agency document unless disclosure of this information "would so expose the deliberative process within an agency that it must be deemed exempted." *See INFORM*, 611 F.Supp.2d at 1186 (citing *Trentadue*, 501 F.3d at 1228). Consistent with FOIA's general policy of broad

¹¹⁵ Quoted from the text of a document entitled "2018-FS-R8-00827-F_Floyd_FEE_Response_Signed" which was first provided to me by Mr. Fuller-Bennett as an attachment to an email sent to me on February 7, 2018 @ 2:14 PM.

disclosure, the Tenth Circuit has emphasized that the deliberative process privilege "is to be construed as narrowly as [is] consistent with efficient Government operations." *INFORM*, 611 F.Supp.2d at 1186 (citing *Trentadue*, 501 F.3d at 1227). Further, the Tenth Circuit has determined that the district court has the duty to determine whether any factual materials can be segregated from deliberative materials and disclosed as required by FOIA. *Trentadue*, 501 F.3d at 1230-31.

Here, the Forest Service has indicated that many of the redacted documents are draft agency documents, with internal draft comments on them, which are, by definition, predecisional. See *INFORM*, 611 F.Supp.2d at 1187; *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 188, 95 S.Ct. 1491, 44 L.Ed.2d 57 (1975). Specifically, these documents include documents 6 through 12 on the Vaughn index. I agree that the pages in documents 1 through 5 on the Vaughn index that pertain to the agency's draft EIS and ROD are predecisional documents within the meaning of the deliberative process privilege and are therefore exempt under exemption 5.

However, the Forest Service has not met its burden to demonstrate that the information it redacted from these documents is deliberative. The Forest Service has withheld in full 1,684 pages for documents 1 through 5 on the Vaughn index, and has redacted 158 pages of responsive records in documents 6 through 12. See Def.'s Mot. for Summary Judgment (ECF No. 15), Ex. 9. The Forest Service's justification for this withholding under the deliberative privilege exemption is as follows on each document: "These emails contain frank exchanges of ideas and advice between employees. Disclosure of these comments and thoughts would impede the candid and full exchange of ideas within the agency, but all reasonably segregable factual material has been released." *Id.* *This justification is insufficient repetition of the legal standard, and does not provide the court with enough information to determine whether there exists segregable factual information.* The Bennett declaration 1226*1226 offers little to bolster the Defendants' argument that this information is truly deliberative. Bennett states that these records are deliberative because "disclosure would inhibit the drafters of the documents from freely exchanging ideas, language choice, and comments in drafting documents." Again, this merely recites part of the legal standard for the privilege under exemption 5, and is insufficient as stated to warrant withholding all or parts of responsive documents.

However, in the Vaughn index, for documents 9, 11, and 12, the Forest Service adds this language to its justification for withholding: "The `Comments on [Administrative Draft of the Final Environmental Impact Statement]' document has been reviewed internally within the [Forest Service] and contains comments from reviewing officials. If one compares the draft version with the final version, he will be able to discern which ideas were accepted and which were rejected by the [Forest Service]." This additional justification is sufficient to meet Defendants'

burden to demonstrate that the documents were deliberative in nature. As such, the pages of documents 9, 11, and 12 of the Vaughn index that pertain solely to comments made on the Administrative Draft of the Final Environmental Impact Statement are properly withheld under exemption 5 as both predecisional and deliberative.

The Forest Service's exemption explanations in its Vaughn index and its agent declarations provide me with an inadequate basis to make a full determination regarding documents that have been withheld under exemption 5. While the required Trentadue review process may not require a separate justification for each redacted record, *it does require a certain level of specificity and detail regarding the redactions*. Therefore, for documents 1 through 5 on the Vaughn index, Defendants shall submit to me a revised Vaughn index with sufficient explanation of any withheld pages as to segregable factual information and sufficient justification for both the attorney/client privilege and the deliberative privilege under exemption 5 of FOIA. For documents 6, 7, 8, and 10 on the Vaughn index, Defendants shall submit to me a revised Vaughn index with sufficient explanation as to why these documents should be withheld as deliberative in nature under exemption 5 of FOIA.¹¹⁶

L. Summary and Conclusion

Today's appeal would not be necessary had the Nantahala National Forest followed the same course of dealing used in processing no less than 17 prior FOIA requests. The Forest Service is well aware how each of those prior FOIAs surfaced otherwise critical information pertaining to the Chattooga that had not otherwise been revealed by the USFS—which some people might say revealed embarrassing information that the Forest Service would prefer to fiction away.

1) The Forest Service Has Disregarded Facts and Misapplied the Administrative Record To Achieve A Desired Result of Arbitrarily Defending the Refusal To Reconsider A Failed Policy Decision That Has Caused Additional Damage To the Chattooga's Trout Buffer, Riparian Corridor, and Instream Trout Habitat

The administrative record associated with this request evidences how the Regional Forester's adverse determination letter dated November 21, 2017, as well as the adverse determination letter of January 24, 2018 *made assertions of fact that do not square* with my understanding of the administrative record associated with the September 22nd request (FOIA Request #2018-FS-R8-00827-F).

Just as informative about the this neglect, the USFS has *repeatedly* disregarded the credible evidence of a need to revisit the policy of allowing creek boating on the Chattooga's headwaters in North Carolina. *The Nantahala National Forest* has excused itself from discharging obligations that arise from the existing LRMP, the Clean Water Act, and the National Wild and

¹¹⁶ Rocky Mountain Wild v US Forest Service 138 F Supp 3d 1216, 1225-1226 (Dst Ct Co. 2015)(italics added).

Scenic Rivers Act. The Forest Service has justified this refusal to revisit this failed policy by asserting that it told the Stakeholders Forum for the Nantahala & Pisgah Plan Revision in April 2016 “that the revised Forest Plan would not be revisiting the management of the Chattooga River.”¹¹⁷ *What remains to be determined is who on the Stakeholders Forum asked if the Forest Service would be revisiting the boating policy and why.*

It comes as no surprise that American Whitewater was selected to participate in this select group to whom this nonbinding promise was made. American Whitewater has been very successful in pushing their interests to the top of the pile of Forest Service initiatives. Unfortunately, their interests have been over accommodated by the Nantahala National Forest since 2005.

What does come as a surprise is that the Nantahala National Forest would ignore the inescapable evidence of the degraded trout habitat and trout fisheries on the Chattooga’s headwaters—and the documented fact that creek boaters have created additional point sources of sediment input into this overstressed stream. This occurs from paddlers’ creation and use of “seal” launch sites, evacuation points, and portage trails inside the protected trout buffer.

The Forest Service has spent hundreds of thousands of dollars constructing a user capacity analysis that had every intention in justifying the introduction of creek boating to these headwaters. However, not one penny of those Federal funds were used to apply the *best available science* to quantify if the level of sediment that was present in the river was so excessive that any additional sources of sediment input would be impermissible under the Clean Water Act and National Wild and Scenic Rivers Act.

This history and the administrative record raises logical questions about the motivations of the Forest Service officials up and down the chain of command. The administrative record evidences an otherwise inexplicable willingness to disregard the damage that has been done to the trout buffer by creek boaters. This protection of this trout buffer is essential to preventing any diminishment in the quality of the trout habitat and trout fisheries.

Preventing any non-temporary (measured in weeks and months not years) degrading of this river’s trout habitat and its wild trout fisheries constitute the specifically designated uses of this river’s ORW water quality. The same is not the case for promoting the sport of creek boating.

The Forest Service’s predisposition for accommodating boaters—no matter what—is even more inexplicable because it flies in the face of what the Fourth Circuit Court of Appeals unequivocally ruled: “*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).

This is why I must demand to be provided with all responsive documents free of any redactions—with respect to my September 22nd FOIA.

¹¹⁷ See the text of the email clocked on Monday, October 23, 2017 @ 9:30 P.M. from Ms. Heather Luczak, Nantahala NEPA Coordinator, to Bill Floyd, with copies to Forest Supervisor Nicholas, Forest Planner Aldridge and Nantahala NEPA Coordinator Milholen as contained in Attachment A-1 of this appeal.

2) **Allowing the Forest Service To Redact and Withhold Records Would Frustrate the Stated Objective of the September 22nd FOIA Which Was To Ferret Out Records That Might Explain the Forest Service’s Inexplicable Behavior on September 6th**

The FOIA Improvement Act of 2016 was intended to tighten up on government agencies’ improper use of Exemption 5 to avoid disclosing information to the public—where there was no reasonably foreseeable harm from disclosing requested records. The Senate Judiciary report explains how this important amendment specifically stated that one of the purposes for this amendment was to prevent agencies from relying on Exemption 5 in an overly broad way to thwart the open disclosure purposes of FOIA.¹¹⁸

The legislation embraced President Obama’s understanding that: “The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve.”¹¹⁹

The Senate Judiciary Report explains that the “FOIA Improvement Act clarifies that agencies may not charge search or duplications fees when the agency fails to meet the notice requirements and time limits set by existing law, unless a request is considered voluminous.”¹²⁰ *The Report further explained how “voluminous” should not be confused because Section 2 was being amended to “remove... ambiguity and make clear that agencies may not charge search and duplication fees unless more than 50,000 pages are necessary to respond to a single request.”*¹²¹

This legislative history clarifies that 50,000 pages of records equates to a “voluminous” FOIA request—not the 211 pages that the Forest Service now claims to have found in response to my September 22nd request for records.

This differs from the cry of wolf made by the Forest Service when trying to explain the purpose for the inexplicable *late* arrival of the Southern Region in processing my records request.

To press further, the Southern Region originally explained its need to be involved (*based on Regional Planner Gaulke’s emailed instruction*) in the processing of my FOIA by asserting an entirely speculative pretense about the “*voluminous nature of the request.*”¹²² Clearly, not only was this pretense speculative, it wasn’t even mathematically close to being true. 211 pages is less than 1% of 50,000 pages.

¹¹⁸ Senate Judiciary Report, FOIA Improvement Act of 2015, Report 114-4, 114th Congress,

¹¹⁹ President Barack Obama, *Memorandum for the Heads of Executive Departments and Agencies, Subject: Freedom of Information Act* (Jan. 21, 2009).

¹²⁰ Senate Judiciary Report, FOIA Improvement Act of 2015, Report 114-4, 114th Congress at page 7.

¹²¹ Senate Judiciary Report, FOIA Improvement Act of 2015, Report 114-4, 114th Congress.at page 7.

¹²² See the email from Doug Meloche to Bill Floyd clocked on October 26, 2017 @ 10:30 AM; Included in Attachment A-1.

Just as troubling as this false claim about a “voluminous” number of records, the Southern Region explained its sudden involvement by asserting the speculative need to redact documents for which a search had not yet been conducted.

The fact is the Regional Forester, and his Southern Region staff have proffered an after the fact excuse to explain the sudden appearance of Southern Region personnel that does not square with the facts of the administrative record at that point in time.

This understanding is buttressed by the content and circumstance of the back and forth email traffic between Mr. Meloche and Mr. Gaulke on October 26, 2017.

The fact is the Forest Service has used pretense to deny my entitlement to a fee waiver under 5 U.S.C. §552(a)(4)(A)(iii). This same pretense is now being summarily used to create further delay by asserting a need to redact and withhold records that are otherwise responsive to my request for records.

Enough is enough.

With best regards



Bill Floyd

ATTACHMENT A-1
COMPILATION OF EMAILS

Bill Floyd

From: Bill Floyd <wcbfloyd@ix.netcom.com>
Sent: Tuesday, November 21, 2017 10:21 AM
To: 'Meloche, Douglas -FS'
Cc: Gaulke, Peter T -FS; anicholas@fs.fed.us; karney@fs.fed.us; wcbfloyd@ix.netcom.com
Subject: RE: FLOYD 11212917 Response to USFS Email re FOIA dated October 27, 2017 and Floyd FOIA dated September 22, 2017 USFS Control #2018-FS-R8-00827-F
Attachments: Floyd 11212017 Response FINAL Meloche email Nov 8 2017 2 08 pm Nov 16 2017 8 24 am.pdf
Importance: High

Mr. Meloche

I remain disappointed that the USFS won't join with me to solve the excessive embedded sediment problem that plagues an extended segment of the Chattooga's headwaters in North Carolina.

Unfortunately, I must continue to object to how the USFS has recently decided to refuse to process my Freedom of Information Act ("FOIA") requests for records—unless I comply with certain demands being made by the Region 8 of the USFS.

Attached is a detailed response dated November 21, 2017 regarding your recent comments on both of the subject FOIAs.

I realize it is a short week. However, I hope the USFS will consider my complaints and demands as soon as possible.

Regards

Bill Floyd

From: Meloche, Douglas -FS [mailto:dmeloche@fs.fed.us]
Sent: Thursday, November 16, 2017 8:24 AM
To: Bill Floyd
Cc: Gaulke, Peter T -FS; Nicholas, Allen -FS
Subject: RE: FOIA Request #2018-FS-R8-00827-F

Mr. Floyd,

I am emailing you to provide a status of your current request and also clarify a problem with your new request. As of today, you have one FOIA request that has been submitted (2018-FS-R8-00827-F). This request was originally submitted on September 22, 2017 and finally perfected on November 6, 2017. This request asked for the following records:

1. *For the period of time between July 1, 2017 and September 6, 2017, any and all internal communications between any USFS personnel, including emails and handwritten notes, that in any way mentions, references, or that instructs or provides orders about how to discharge the decision of Ms. Heather Luczak to advise Bill Floyd via email on September 6, 2017 @ 10:05 am, that "that there is no need to revisit the analysis at this time", including but not limited to any such communications transmitted or received by any of the following groups:*
 - a. *the current Chief of the United States Forest Service, Mr. Tony Tooke, and any of the Chief's Office Staff*
 - b. *any executive leadership or staff personnel currently assigned to the Region 8, Southern Regional office in Atlanta*

- c. *any leadership or staff personnel working within the Nantahala and Pisgah National Forests;*
2. *Subsequent to January 1, 2017, any and all sedimentation studies conducted to monitor and recognize any negative environmental impacts taking place on the North Carolina section of the Chattooga, as necessitated by the terms of Amendment #22 to the Nantahala and Pisgah Forests Land Resource Management Plan (January 2012);*
 3. *any and all monitoring studies specifically conducted to assess and inventory any creek boating caused displacement of soils lying within North Carolina's trout buffer subsequent to the start of creek boating on December 1, 2012;*
 4. *any associated communications, emails, memorandums, reports, or documents of any kind exchanged internally between USFS personnel, or exchanged with any external third party, summarizing, analyzing, or describing the significance of the results and details contained within all such monitoring studies enumerated in (2) and (3);*
 5. *any internal USFS communications, including emails and handwritten notes, discussing the need to conduct such monitoring in response to public complaints;*
 6. *For the period from January 1, 2012 going forward, please provide any back and forth emails, correspondence, or written documents of any kind, either received from American Whitewater, or any representative of American Whitewater, or alternatively transmitted to American Whitewater by any USFS official.*

This request (2018-FS-R8-00827-F) is currently on hold pending a fee waiver determination. Please remember, the timeline for processing a request **does not** begin until the request is considered by the agency to be perfected. A request is considered perfected when it meets all of the following requirements: (1) Is received in writing, (2) Clearly describes the records sought, and (3) Contains a statement about willingness to pay or a request for a fee waiver. This request (2018-FS-R8-00827-F) was finally perfected on November 6, 2017.

On a separate matter, the following request for records: *"I now reiterate that FOIA demand to you—to be provided with any relevant documents including but not limited to emails, internal memoranda, etc. discussing any aspect of the decision to have my September 22, 2017 FOIA processed by Region 8 instead of by the Nantahala National Forest—including any written communications created by you, Peter T. Gaulke, or anyone working within the office and staff of the Chief of the United States Forest Service."* was not considered as part of your FOIA request #2018-FS-R8-00827-F. If you are now requesting these records, the request will be considered a new FOIA request.

As such, if it is your intent to request these records, you did not indicate your willingness to pay fees or ask for a fee waiver. The FOIA establishes four categories of requesters; commercial use requesters, educational and noncommercial scientific institutions, representatives of the news media and all other requesters. It seems you are asking for this information under the category of an "all other requester". Because of this and in accordance with 7 C.F.R. Subtitle A, Part 1, Subpart A, Appendix A, we are required to collect fees for search, review and duplication of records. While the Forest Service (FS) does provide 2 hours of search time and the first 100 pages of records to requestors in your category (All Other), requests are not processed unless the requestor agrees to a willingness to pay fees or ask for a waiver. Basically, as stated above, the request must be perfected before it can be processed any further. The timeline has not begun.

If the requestor indicates a willingness to pay (all fees, \$25, up to \$100 etc.) they are considered to be "all in" for the total cost of processing the request. That is why many requestors indicate a set amount or ask to be contacted if a set amount is not enough. A fee estimate will be provided prior to any search or reproduction of records and should the requestor agree to the fee, a bill of collection will be prepared and sent to the requestor along with the records responsive to the request. We will not hold records until the fee is paid unless the requestor is delinquent of previous request fees or the amount is large enough where we are required to receive a portion of fees beforehand.

If you feel you are entitled to a fee waiver, I have again attached a fee waiver criteria sheet for you to use as a guide to prepare your response. Please answer the six questions in full as they apply to the information you are requesting and your current status as an "all other" requestor.

Again, as mentioned previously, before we can continue to process your new request it must be perfected. Please respond with a willingness to pay fees (set amount, all, only \$25, etc.) or provide me with a response to the six fee waiver criteria to begin the processing of a fee waiver determination. Please limit your response regarding this new request to the requested information only since it has become increasingly difficult to differentiate between your questions and comments on current forest activities and your previous FOIA requests. If we do not hear from you about this new request by December 1, 2017, we will consider your request withdrawn and administratively close the file.

I encourage you to contact me at the below number should you have any questions about your current request (2018-FS-R8-00827-F) or for any assistance in perfecting this new request.

Best,
Doug M.



Douglas J. Meloche
Staff Assistant

Forest Service
Law Enforcement & Investigations, Southern Region

p: 404-347-4427

f: 404-347-1849

dmeloche@fs.fed.us

1720 Peachtree Rd., NW, Suite 870S

Atlanta, GA 30309

www.fs.fed.us



Caring for the land and serving people

From: Bill Floyd [<mailto:wcbfloyd@ix.netcom.com>]

Sent: Wednesday, November 15, 2017 3:33 PM

To: Meloche, Douglas -FS <dmeloche@fs.fed.us>

Cc: Gaulke, Peter T -FS <pgaulke@fs.fed.us>; Arney, Ken S -FS <karney@fs.fed.us>; Nicholas, Allen -FS <anicholas@fs.fed.us>; wcbfloyd@ix.netcom.com

Subject: Reasonably Described FOIA Already Submitted October 27 2017 But Not Yet Adcknowledged by USFS With Appropriate Date of Receipt

Importance: High

Mr. Meloche

With respect to your email of November 13, 2017 @ 1:17 PM please see my attached correspondence to you.

Thank you.

Bill Floyd

From: Meloche, Douglas -FS [<mailto:dmeloche@fs.fed.us>]

Sent: Monday, November 13, 2017 1:17 PM

To: Bill Floyd