

# EXHIBIT 35

## bill floyd

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**From:** bill floyd <wcbfloyd@ix.netcom.com>  
**Sent:** Friday, December 06, 2019 8:50 AM  
**To:** 'Nicholas, Allen -FS'  
**Cc:** 'Luczak, Heather L -FS'; 'Arney, Ken S -FS'; 'Christiansen, Victoria C -FS'; wcbfloyd@ix.netcom.com  
**Subject:** RE: North Carolina Headwaters of the Chattooga River  
**Attachments:** C-8-B FOIA Response\_March 4\_2016.pdf; C-6 email.pdf; C-6-1 Chattooga Aquatic Monitoring Summary.pdf

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

Allen,

Thank you for your message from Sunday afternoon...on your day off.

I have been deliberating this week about how to respond constructively to your suggested goals and format—especially given the time pressures imposed upon me by the approaching adoption of a new LMRP.

Before sitting down to pen this email, I spoke again with a thought leading scientist in Oregon. This scientist has proven repeatedly helpful in sharing his time and in educating me about the *best available science* for assessing the adverse impacts on salmonids from the excessive accumulation and impoundment of fine particle sized sediments on the stream bed.

This guidance has allowed me to become informed about what scientific processes are already available to be used in the field in assessing the impacts of sediments on salmonids.

The Forest Service should adopt the specific scientific metrics which have already been developed to find a path forward with respect to the headwaters of the Chattooga.

Several questions, observations and recommendations arise regarding your outline of expectations offered Sunday.

From the public's perspective, the common goal *must be to restore* the Chattooga's once outstanding biological capacity for sustaining outstanding densities and/or biomass of naturally reproducing populations of trout by (1) implementing pro-active spawning habitat improvement projects which are more sophisticated than the one being planned for Scotsman Creek; (2) by planning and undertaking the technically difficult challenge of removing the sediment which has been allowed to accumulate on the stream bed in visibly obvious and quantifiably excessive quantities according to the best available science; (3) by redoubling the Forest Service's efforts

to stay alert and protect the downstream waters which it manages from inappropriate land disturbing development in the upstream watershed.

To dispel any confusion about my position, the agency owes certain non-discretionary duties which arise as a consequence of the Chattooga's classification as an Outstanding Resource Water ("ORW") and designation as a national Wild and Scenic River ("WSR").

In 1971, the United States Forest Service told Congress how the main stem of the Chattooga River possessed a trout "*stream productivity*" which "*ranges from excellent in upper areas [in North Carolina] to extremely marginal in lowermost reaches [in South Carolina and Georgia.]... Stream productivity is best* discussed by dividing the river and the West Fork [flowing exclusively in Georgia] into 5 sections. *The Chattooga River and its tributaries above the [Bull Pen Iron Bridge in North Carolina] are excellent trout waters, comparing favorably with the better streams in all three states.*" See pp.19-20 (italics added), *Wild & Scenic River Study Report, Chattooga River*, USDA, Forest Service Southern Region, June 15, 1971 (the "1971 Chattooga Study")(otherwise placed into the administrative record being compiled during the revision of the LRMP as document Q-1).

Stated differently, the United States Forest Service described this excellent trout stream productivity as the quintessential "scientific feature" (16 U.S.C. §1281(a)) and "outstandingly remarkable...value" (16 U.S.C. §1271) which was unique to North Carolina's headwaters.

This explains why the Forest Service owes a non-discretionary duty to place "primary emphasis" on "protecting" the single quintessential "scientific feature", 16 U.S.C. §1281(a), which the Forest Service had described to Congress in 1971 as being unique to the North Carolina headwaters of the Chattooga River.

Similarly, this duty to place primary emphasis on protecting the trout habitat and that habitat's biological potential for sustaining an excellent trout stream productivity became further intensified when the river was reclassified as an Outstanding Resource Water in 1989.

These non-discretionary duties must be kept in mind as you endeavor to find a path forward for working together to resolve the excessive bedded sediment problem and for restoring the trout population densities back to a first in class or outstanding level of quality.

## **PRELIMINARY CONSIDERATIONS**

We need (1) to consider if any of your proposed players are compromised from participating objectively as a consequence of having already expressed a predetermination of the issues being debated and (2) to find a way to narrow the focus of the questions to be asked and discussed during the proposed meeting.

With respect to the first concern, I have no issue with Dr. Dolloff.

However it might prove more constructive to use the Forest Service's prestige to invite two other thought leaders, working independent and outside of the hierarchy of the United States Forest Service and the North Carolina Wildlife Resources Commission, to become involved in achieving our shared objective. The participation by outside thought leadership is the preferred way to make sure that you (as the official ultimately responsible for properly managing these headwaters) obtain the full benefit of objective input from dispassionate individuals having the qualifications to weigh in (without any predetermined bias) about these two closely correlated water pollution concerns.

## **POSSIBLE CONFLICTS OF INTEREST DUE TO PREDETERMINATION**

First, I am concerned about the consensus destroying impact of Mr. Farmer's and Mr. Besler's potential participation in your proposed meeting.

This doubt arises because (in September 2015) Mr. Farmer published expressions of a predetermined view denying the concerns about which I complain.

On September 15, 2015, former District Ranger Wilkins emailed Mr. Jason Farmer to order him 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 [the planned construction of special creek boater access trails]...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...*" See the document attached to this email as C-6 at page 2 (italics added).

Mr. Wilkins placed some of his commands in all capital letters. The implicit purpose for employing caps was to make clear Mr. Wilkins' desire to restrict the amount of scientific analysis given to the factual assertions that I had made about excessive sediments having caused adverse impacts on the trout productivity of these headwaters. In particular, Mr. Farmer was instructed to avoid providing a written summary of any particular trout population study.

Mr. Farmer responded by doing exactly what he had been instructed to do by his boss: District Ranger Wilkins.

Mr. Farmer prepared an abbreviated 5 page report (attached to this email as document "C-6-1 Chattooga Aquatic Monitoring Summary") which was editorially constrained in its scientific

methodology because it only contained information which his superior had instructed Mr. Farmer to include.

Mr. Farmer's 5 page presentation (document C-6-1) made no more than a summarily stated effort to rebut my factual claim that the Forest Service lacked any data to dispute my allegation that these headwaters were experiencing a non-temporary decline in the number of young-of-the-year trout being observed—something which I continue to insist constitutes a canary in the coal mine indicator that the reproductive cycle of the trout is being disrupted in a significant way.

Mr. Farmer's abbreviated 5 page report attempted to rebut by summarily reiterating a commonly understood fact that the densities of adult trout and young-of-the-year trout can vary dramatically from year to year on any given stream.

Mr. Farmer editorially attempted to comply with District Ranger Wilkins implicit instructions to provide the District Ranger with a justification for asserting “[Floyd] *thinks we have never done any past surveys for fish and bugs and we have.*”

To do so, Mr. Farmer offered up an editorially developed and summarily stated assessment intended to mute my complaints about decreased densities of both adult and young of the year trout: “Mean Brown Trout densities [on the Chattooga] ...were within the range of 9 other wild trout populations across the forest.” See C-6-1 at page 1.

Mr. Farmer's 5 page presentation further summarily stated “When compared to a wild Brown Trout population of similar density, the Chattooga River population varied in a similar pattern which suggests that both populations are affected by similar large-scale factors (Figure 2). These factors are likely to be climatic variability (e.g. droughts or floods) rather than local site variability.” See C-6-1 at page 2.

Mr. Farmer did not identify the other streams being used in this summarily stated comparison. Neither did he explain why any of these 9 streams should be viewed as being comparable to the Chattooga.

I don't doubt that what Mr. Farmer summarily stated presentation constitutes an accurate editorially compiled statement of facts taken from a variety of sources.

However, what Mr. Farmer's summarily stated and editorially compiled presentation failed to recognize and what the Forest Service is still in danger of failing to recognize today is the appropriate standard of care which must be discharged in managing these headwaters.

**The Chattooga's trout habitat and the densities of the trout populations must be sustained at an “outstanding” or first in class level of quality—not just “within the range of 9 other wild trout populations across the forest.” Id.**

Finally, and most remarkably, despite District Ranger Wilkins' insistence that satisfactory trout population monitoring had been taking place on the Chattooga, Jason Farmer's response confirmed that no monitoring of trout populations had taken place on the North Carolina part of the river subsequent to 1996—20 years in the distant past.

Mr. Besler (North Carolina Wildlife Resources Commission) has similarly demonstrated a potential bias by having made statements evidencing a predetermined conclusion about my concerns. Mr. Besler did so in late 2015 and early 2016 without ever having done any field investigation, using the best available science, to refute my concerns in a systematic and scientifically defensible way.

On December 22, 2015, Mr. Doug Besler emailed the following instructions to his direct report, Mr. Powell Wheeler (NCWRC), as well as Ms. Andrea Leslie (NCWRC), while sending copies to Mr. Jason Farmer (USFS) and Ms. Sheryl Bryan (USFS): "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 the resource. I am not biting. To save you both long phone calls, feel free to decline conversation and direct Mr. Floyd to me." See the attached document entitled "*C-8-B FOIA Response\_March 4\_2016*" at page 5.

First, Mr. Besler presumed to misstate the purpose for my having raised the boating issue.

To clarify, the objectionable nature of the boating decision was brought up to point out the unlawful incongruence of the Forest Service having spent hundreds of thousands of dollars (if not over a million dollars) tailor making a special recreational use entitlement (where there was no legal requirement to do so) while simultaneously disregarding the non-discretionary duties that the agency owes to protecting and enhancing the reproductive suitability of the river's in stream habitat and that habitat's biological capacity for sustaining outstanding densities and/or biomass of naturally reproducing populations of trout.

The money which the Forest Service wasted on tailor making a special accommodation for whitewater paddling enthusiasts money should have been devoted to discharging the agency's non-discretionary duty to place "primary emphasis" on "protecting" the single quintessential "scientific feature", 16 U.S.C. §1281(a), a quintessential "scientific feature" which the Forest Service had described to Congress in 1971 as being unique to the North Carolina headwaters of the Chattooga River. Refer to pp.19-20 of the 1971 Chattooga Study.

Mr. Besler dismissive email, of December 22, 2015, clearly evidences his unwillingness to undertake any objective scientific assessment of the problems about which we are still debating four years later.

Mr. Besler's statement implies a predetermination of opinion that there was no actionable problem being suffered on the Chattooga. It also indirectly encouraged Mr. Farmer (USFS) and Ms. Bryan (USFS) to presume the same. No other explanation has been provided why it was necessary or proper for Mr. Besler to copy employees of the USFS on an email instructing employees of the NCWRC to dismiss my protests about the too much sediment and too few trout problems.

The consensus undermining problem of including Mr. Besler and Mr. Farmer on your evaluation team is amplified because the too much sediment and too few trout problems were first brought to both the attention of the Forest Service (in November 2014) and the North Carolina Wildlife Resources Commission (in December 2015).

Much could have been done systematically over the last five years, but wasn't, to collect field data (employing the best available science) to determine whether the accumulation of sediments on the Chattooga's stream bed has remained the same, abated, or increased.

Similarly, the agencies could have conducted annual trout population counts at the same locations at the same point in time to eliminate any confusion between what I assert constitutes a non-temporary decline in the densities of the naturally reproducing populations of trout as opposed to merely being the manifestation of the normal annual variability of trout populations.

Neither the NCWRC nor the Forest Service did so.

To press further, there is another reason to be concerned that Mr. Farmer's participation will undermine any ability to find consensus.

On February 1-2 2016, (almost five months after following the instructions of District Ranger Wilkins by penning his five page report intended to dissuade me of my concerns), Mr. Farmer was also included in a back and forth email chain between Mr. Powel Wheeler (NCWRC) and former Forest Service employee (Mr. Monte Seehorn) in which Mr. Wheeler openly confided with Mr. Seehorn (retired USFS employee) and Mr. Farmer "...In addition, I don't have any desire to devote any more of my career in dealing with Mr. Floyd." See C-8-B at page 5.

Mr. Farmer's inclusion as one two addressees on this clearly dismissive email chain discourage me from believing that Mr. Farmer's involvement can help us achieve consensus. I find his being included on such an email troubling when I think about the fact that the author of the email chose what he wrote and to whom he intended to communicate based on the presumption that the inflammatory and dismissive nature of his message would only be seen by the two parties to whom he had decided to confide.

On a more positive note, I am unaware of any evidence that Dr. Dolloff has ever formed any predetermined conclusions about the issues of concern today.

In order to establish consensus, the players who become involved must exhibit an unbiased capacity to consider the legal significance of the drastic degradation in trout population metrics which can be recognized simply by comparing the results of the trout population study done in September 2016 against the prior results of the five year study conducted from 1992-1996.

The September 2016 trout population study would have never taken place if I had not resisted the interagency attempts to marginalize my requests for such a study.

Eventually, I made contact with the Savannah River basin planner at NCDEQ (Ms. Heather Patt) who understood the clear need for a trout population study.

With Ms. Patt's urging, NC DEQ agreed to undertake a trout population assemblage study on these headwaters in September 2016.

NC DEQ electrofished eight reaches of 600 feet (almost one mile of water) at locations where this bedded sediment is visibly pronounced.

The raw trout population data collected by the September 2016 study was anything but "outstanding."

Not a single rainbow trout was caught and released by NC DEQ.

This demonstrated absence of rainbow trout stood in stark contrast with the administrative record evidence of their prior existence on this segment of stream.

Just as troubling, only 26 young-of-the-year brown trout were caught and released despite sampling approximately a mile of stream stretched out over eight different locations

Both of these disappointing trout population metrics constitute the equivalent of a canary in the coal mine.

In early 2016, far in advance of NCDEQ undertaking the September 2016 trout population study, I started asking the Forest Service to provide me with a copy of the report detailing the results of the five year trout population study which had been conducted by Forest Service employees in 1992-1996.

The Forest Service had briefly mentioned the existence of the 1992-1996 trout population study in an environmental assessment dated May 15, 2015. This environmental assessment created a false impression that the North Carolina Wildlife Resources Commission was exclusively responsible for this trout five year trout population study—and that the Forest Service had nothing to do with it.



Throughout 2016, the Forest Service repeatedly failed to produce a copy of the 1992-1996 report, despite being asked to do so multiple times as well as pursuant to an appeal to the Chief's office pursuant to the Freedom of Information Act.

Eventually, on May 8, 2017, without my ever having asked for a copy of the report, a copy of the full 58 page report detailing the results of the 1992-1996 trout population assemblage study was sent to me via email by Mr. Christian Waters, Chief Inland Fisheries, NCWRC.

I was shocked to read on page 3: “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.*” Please refer to the 58 page report entitled “*EVALUATION OF WILD TROUT REGULATION WITH A NATURAL BAIT ALLOWANCE*, Final Report, Mountain Fisheries Investigations, Federal Aid in Fish Restoration Project F-24, James C. Borawa, Micky M. Clemmons, NCWRC, 1998 at page 3 (italics added). (otherwise having been lodged into the administrative record being compiled during the revision of the LRMP as Floyd document “00-T Borawa and Clemmons 1998”).

On May 8, 2017, I learned for the first time that this 1992-1996 Chattooga trout population study had in truth been a joint effort of the USFS and the NCWRC—in stark contrast to the completely different impression created by the USFS back on May 15, 2015. It finally became possible for to make a side by side comparison of the results of the 2016 Study contrasted against the results of the 1992-1996 trout population study.

A quick comparison of the poor trout population densities and biomass reported by the 2016 study to the outstanding trout population metrics reported by the five year 1992-1996 study accentuates the incongruity of the predetermined positions taken by Mr. Farmer and Mr. Besler back in 2015-2016.

In short, in order to avoid any consensus undermining concerns about a predetermined opinion having already been reached, the more objective and desirable approach would be to see if we could find a mutually agreeable outside thought leader, or two, to participate.

These outside thought leaders could provide a way to build consensus for deciding what scientific tools need to be applied to make objective determinations and to draw meaningful conclusions based on the best available science.

I have thoughts about several people that might prove willing to participate, assuming the United States Forest Service was to make clear **that the agency wishes to start with the presumption that something is going on which needs to be identified and corrected**—in lieu of encouraging the predetermined denial of any problems which the Forest Service has attempted to encourage me to accept dating back as far as May 2015.

Please take note of the work done on sedimentation by the USDA-ARS, National Sedimentation Laboratory, Water Quality & Ecology Research Unit in Oxford, Mississippi.

More importantly, please consider the most valuable contributions to the best available science for assessing the impacts of sediment on streams which has been spearheaded by members of the US EPA National Health and Environmental Effects Research Lab/ORD Western Ecology Division in Corvallis, Oregon.

I am certain that Dr. Dolloff knows of the work done by scientists such as Dr. Phil Kaufmann et. al.

To persuade outside thought leaders to participate, the Forest Service must refrain from creating any impression that the agency does not wish to discover there is an actionable problem being suffered on these headwaters.

The controversial and highly politicized nature of the debate that took place between April 2005 and January 2012 over creating a recreational use entitlement for whitewater paddling enthusiasts has discouraged outside independent parties from getting involved because of the fear of taking a position in opposition to the Forest Service and of subsequently being disadvantaged when seeking grant money for those individuals' projects of special research interest.

The Forest Service should approach these thought leaders by making sure that they do not feel coerced to disregard the compelling evidence of non-temporary declines in the trout population densities—something which is made clear by comparing the raw results of the 2016 trout population study against the raw results of the 1992-1996 trout population study.

From my perspective, we need to come to an agreement about what particular scientific processes can be relied upon to draw conclusions about what is causing the non-temporary declines in the densities and/or biomass of the naturally reproducing populations of trout on a section of river.

We need to agree about what methodologies should be employed to determine whether or not the amount of the sediment which has accumulated on the stream bed in visibly excessive amounts exceeds any reasonable minimum effects threshold for disrupting successful spawning by mature trout and the survival of their newly hatched alevin.

In the past, I have sent you copies of scientific studies that have established a *minimum effects threshold* for recognizing when sediments should be presumed to disrupt successful spawning by mature trout and the survival of their newly hatched alevin.

A minimum effects threshold or breakpoint occurs where an ecosystem responds in a statistically noticeable way to the impacts of human activities which cause disruptions to some critical function of the ecosystem.

The development and application of minimum effects thresholds constitutes a concept which is important in understanding and managing complex ecosystems like the Chattooga River.

The use of a minimum effects threshold can assist resource managers in avoiding undesirable human actions from triggering undesirable rapid ecosystem changes and potentially an unwanted new adverse status quo whose reversal will require far more resources and time than would be expended by simply preventing the threshold from being breached.

We need to focus our discussion on what scientific methodologies should be used to reach a conclusion and to identify the path for moving forward.

We need to focus on applying a minimum effects threshold for sediment.

## **THE TERMINOLOGY TO BE USED IN SEEKING CONSENSUS**

You itemize two stated objectives for holding a meeting to encourage a “dialogue ...around the following thoughts:

1. Is the trout habitat *impaired* in the Chattooga? If so what is degrading the habitat.
2. Assuming the issue is sedimentation, what is the best method(s) to address this issue.” (italics added by me)

The choice of terminology that you have selected to describe your objective seems problematic and needs to be clarified.

First of all, I presume this meeting is intended to help you (as the responsible official) to become better informed about solving a problem that the agency has a duty to fix—not just to give me an opportunity to hear discredited explanations about why there is no problem.

My interest is in the objectivity and appropriateness of the process that the Forest Service employs to figure out how to solve this problem—not in debating with any one about whether there is a problem to be fixed.

*Please clarify this point.*

*Does the Forest Service believe it has an obligation to do anything about this bedded sediment problem?*

More narrowly, based on this fundamental presumption that we share the same purpose for the meeting, the Forest Service should not be asking “is the trout habitat impaired.”

The word “*impaired*” has a specific legal significance under Section 303(d) of the water quality standards of the Clean Water Act—a **significance which does not apply to the facts and circumstances about which we are debating.**

There is **no preliminary need to reach a technical finding** that the trout habitat has become legally “**impaired**” for purposes of Section 303(d) listing **before** acknowledging that the Forest Service has a non-discretionary duty to do whatever is necessary to sustain “**outstanding**” **densities and/or biomass of trout on the Outstanding Resource Waters (“ORW”) of the Chattooga River.**

The precise issue that needs to be determined is whether or not **the subcategorized designated use of the Chattooga’s ORW water quality has suffered** any form of non-temporary decline in its ability **to be fully attained** as a consequence of the accumulation of an excessive amount of sediment on the stream bed.

The Forest Service needs to recognize how impermissible degradation of a specifically assigned subcategorized use of water quality for an Outstanding National Resource Water (or an individual state’s named equivalent) can occur long before the broader aquatic life use of water quality might be recognized as being technically *impaired* under Section 303(d) of the Clean Water Act.

This constitutes the whole reason for creating a subcategorized designated use of ORW water quality.

To establish a consensus for moving forward and beginning to find the necessary mix of private and public funding required to fix this problem, the Forest Service needs to recognize how preserving the Chattooga’s outstanding trout habitat and that habitat’s biological capacity for sustaining outstanding densities of wild trout constitutes the Chattooga’s subcategorized use of ORW water quality. The other narrowly defined subcategorized use of the ORW water quality speaks to maintaining an outstanding trout fishery.

Consequently, tracking the changing number of trout population densities ought to constitute the most critical form of data and information capable of being relied on to make a determination of whether or not the Chattooga has suffered impermissible degradation in this subcategorized designated use of the river’s ORW water quality.

This logically follows because the final accounting of the end result for which some form of productivity is intended constitutes the tangible mark of success or failure of the underlying productive function.

The trout population monitoring data which has already been developed from September 2016 and 1992-1996 suggests that the Chattooga’s headwaters no longer constitute an outstanding

wild trout fishery—*because the trout population densities have suffered significant declines over time.*

Such a decline does not comport with the purposes of the codified antidegradation mandate of the Clean Water Act.

This is why your 1<sup>st</sup> question needs to be reworked.

In addition, your 2<sup>nd</sup> question erroneously presumes that there is no duty to do anything about the sediment unless the sediment can be shown to constitute the only cause for the decline in the trout population densities.

There is no need to make a determination that the accumulation of this sediment **constitutes the only cause of the decline of the trout population densities.**

The Forest Service owes a non-discretionary duty to take pro-active steps **to eliminate any source of water pollution which constitutes a contributing cause** to a non-temporary decrease in the densities and/or biomass of the naturally reproducing populations of trout.

This constitutes the crux of the debate about which we are having.

The Forest Service's long overlooked duty to take action to remedy the sediment and to restore the trout population densities arises because of the plainly stated administrative history (1987-1989) underlying the reclassification of these headwaters to Outstanding Resource Waters.

To make the point clear, it's all about the trout—and not the bugs or any other form of aquatic life residing in the river.

In 1987, the Rabun County Georgia Chapter of Trout Unlimited (“Rabun TU”) filed a petition seeking to reclassify these headwaters as Outstanding Resource Waters.

Rabun TU did so to obtain the highest intensity of antidegradation protection for the outstanding trout habitat and that habitat's biological capacity for sustaining outstanding densities and/or biomass of wild trout. See 15A NCAC 02B .0225(b) (Outstanding Resource Waters) and 15A NCAC 02B .0201 (Antidegradation Policy).

Rabun TU's petition asserted: “...the entire Chattooga River watershed qualifies for the classification of ‘Outstanding Resource Waters’ because ...[1] There is outstanding native trout habitat and fisheries; including Eastern Brook trout, Rainbow trout and Brown Trout...[ 2] A wild and remote trout stream with the size, beauty and water quality of the Chattooga River is unique in the Eastern United States...” See Rabun TU's ORW reclassification petition at p. 1, retrieved from the North Carolina Department of Environmental Quality (“NC DEQ”) on October 12, 2017 via an emailed attachment entitled “1987 Petition for Chattooga River ORW.pdf”)(otherwise placed into the administrative record for the revision of the Land

Resource Management Plan for the Nantahala and Pisgah National Forest as Floyd document N-22) (the “Rabun TU Petition”).

Rabun TU’s Petition explicitly identified the stream’s “outstanding” quality of trout habitat and “outstanding” wild rainbow, brown, and brook trout fisheries as the “exceptional resource value” (15A NCAC 02B.0225(d))(italics added) which “may not be protected by the [existing] assigned narrative and numerical water quality standards.” (15A NCAC 02B.0225(a)(2)).

Rabun TU also asserted “this watershed presently has exceptional water quality with no significant impacts from pollution. We also feel that this watershed’s unique characteristics and quality may not be protected without classification as ‘Outstanding Resource Waters.’ ” Id. at page 2 (italics added).

North Carolina responded: "The Chattooga River Basin was petitioned for consideration as ORW by the Rabun, Georgia Chapter of Trout Unlimited and Friends of Norton Mill Creek...Several reasons have been cited as the basis for this reclassification request including...an outstanding native trout habitat and fisheries including eastern brook, rainbow, and brown trout." See page S-8 of the *Report of Proceedings For the Proposed Reclassification of Fires Creek In The Hiwassee River Basin (Cherokee County), Cataloochee Creek In The French Broad River Basin (Haywood County), Upper South Fork Mills River In The French Broad River Basin (Henderson And Transylvania Counties), Wilson Creek In The Catawba River Basin (Avery And Caldwell Counties), Elk Creek In The Yadkin-Pee Dee River Basin (Watauga And Wilkes Counties), Upper Nantahala River In The Little Tennessee River Basin And Savannah River Drainage Area (Macon And Clay Counties), And Chattooga River In The Little Tennessee River Basin And Savannah River Drainage Area (Macon And Jackson Counties)*, North Carolina Department of Natural Resources And Community Development, Division of Environmental Management, Public Hearings, August 1-4 1988 (the "1988 Report of Proceedings")(originally provided to Floyd in November 2015 by the North Carolina Department of Environmental Quality via an emailed attachment entitled "Chattooga Classification history.pdf" but otherwise lodged into the administrative record of the LRMP for the NPNF on July 28, 2017 as Floyd document "A-2").

Stated differently, the state of North Carolina reaffirmed how the outstanding native trout habitat and the outstanding fisheries including eastern brook, rainbow, and brown trout fisheries constituted the exceptional resource value(s) that were intended to be provided with the intense antidegradation protection afforded by ORW reclassification.

North Carolina explained: "The DEM staff conducted a study of the Chattooga River Basin in January 1988 and collected information on the chemical/ physical and biological characteristics of the river and several tributaries at 12 locations. This report can be found on page 70 of this handout. Most sites in the Chattooga River basin had very good water quality characterized by low conductivities, high dissolved oxygen and low nutrient concentrations. Fecal coliforms were detected only at the upstream site on Chattooga River, but at very low concentrations

(30/100 ml). Residue values were elevated at 3 sites, indicating some land disturbance in those watersheds (Clear Creek, Upper Chattooga River, and Big Creek)." Id. at page S-9.

North Carolina concluded: "The Chattooga River Basin represents a case where there is not excellent water quality throughout the entire watershed. Only the portions of the Chattooga having excellent water quality are recommended for the ORW designation (see map on page S-31). Based on...water quality...and fisheries information provided by the Wildlife Resources Commission, the Chattooga River from its source to the North Carolina-Georgia state line, including the Overflow Creek watershed, the Big Creek watershed, and Scotsman Creek are recommended for ORW. Not recommended for ORW are North and South Fowler Creeks and associated tributaries, Green and Norton Mill Creeks , Cane Creek and associated tributaries, Ammons Branch , Glade and Bad Creeks, East Fork Chattooga River, Jacks Creek, and Clear Creek and associated tributaries." Id. at pages S-10 and S-11 (italics added).

North Carolina's administrative record makes clear that protecting these headwaters' unique biological capacity for sustaining outstanding densities and/or biomass of naturally reproducing populations of trout constitutes the narrowly defined subcategorized use of the ORW water quality.

## **WHAT NEEDS TO BE DONE TO FIND A PATH FORWARD**

If the agency is truly looking to construct a collaborative path forward with me, what the Forest Service should be asking is:

1. In North Carolina, what measurable densities and/or biomass of trout must be sustained to preserve an "***outstanding***" or ***first in class*** or ***exceptional*** population of naturally reproducing trout?
2. Have the Chattooga's naturally reproducing populations of trout suffered a non-temporary decline below the requisite "***outstanding***" or ***first in class*** densities which must be sustained on the ORW classified headwaters of the Chattooga River?
3. What is the applicable minimum effects threshold for when the accumulation of sediment on the stream bed of a cold water trout stream in North Carolina will disrupt successful spawning by mature trout and the survival of their newly hatched alevin.
4. What are the measurable amounts of sediment present on the highest quality reference condition streams in North Carolina?
5. Has the accumulation of fine particle sized sediment on the Chattooga's stream bed occurred in quantities which according to the *best available science* exceed any relevant minimum effects threshold for disrupting successful spawning by mature trout and the survival of their newly hatched alevin?

We need to restate the questions which the Forest Service should be asking and answering.

## **ONE WAY TO STAVE OFF CONTROVERSY AND TO FACILITATE EXTENDED DEBATE ABOUT WHAT MUST BE DONE GOING FORWARD**

The Forest Service possesses the unique ability to make this a win-win proposition by simply complying with the direction and authority which Congress has already provided.

Congress has also directed the United States Forest Service “*shall assist, advise, and cooperate with... individuals to plan, protect, and manage river resources. Such assistance, advice, and cooperation may be through written agreements or otherwise.* This authority applies...to rivers which are components of the National Wild and Scenic Rivers System... Any agreement under this subsection may include provisions for limited financial or other assistance to encourage participation in the ...management of river resources.” 16 U.S.C. §1282(b)(italics added).

What we need is some form of written agreement to make sure that we are both standing on the downhill side of a large boulder of a problem which we need to roll back up and over the hill.

Congress has also directed the United States Forest Service “shall cooperate with the... Environmental Protection Agency and with the appropriate State water pollution control agencies for the purpose of eliminating or diminishing the pollution of waters of the river.” 16 U.S.C. §1283(c).

The simple fact is the discharge of sediments into a stream constitutes water pollution.

To be transparent, I raise this issue of urgency as a matter of tone because my ability to leverage and compel change (if change does not occur voluntarily) will be eviscerated once the Forest Service adopts a new Land Resource Management Plan for the Nantahala and Pisgah National Forests.

My confessed disadvantage stands in contrast to the way that large organizations operate. Nevertheless, I throw it out to avoid any confusion about the fear that I have of being prejudiced by the adoption of the new LRMP before our issues have been fully resolved.

As detailed above, I think we have some hard issues that we should place primary emphasis on debating and resolving prior to holding a meeting—but we should do so promptly.

However, I am the one suffering the prejudicial pressure of time.

Entering into an agreement would increase the odds of achieving your stated goal of finding a path forward—but this would need to be done prior to the adoption of the new LRMP.

In closing, what is the dollar funding requirement for the small habitat restoration project which is being delayed from being executed on Scotsman Creek?

I am having lunch with a friend today, who has retired, and who has been involved in the past with raising funds for the benefit of trout. He has not made any commitment to me other than he is sympathetic and to come back to him when something concrete has been established with the



Forest Service regarding the agency's willingness to fix the problems being suffered on the North Carolina headwaters of the Chattooga.

Maybe finding funding for this small Scotsman Creek project could help jumpstart the larger effort that will have to be undertaken over a longer period of time to fix the main stem of the river.

I look forward to hearing back from you about my suggestions about the need to narrow the focus of the meeting that you are recommending and about entering into an agreement pursuant to 16 U.S.C. §1282(b).

We need to expedite determining if we can find a consensus. I hope the Forest Service agrees.

I know we can resolve this problem by working together.

Bill

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**From:** Nicholas, Allen -FS [mailto:allen.nicholas@usda.gov]  
**Sent:** Sunday, December 01, 2019 6:11 PM  
**To:** bill floyd  
**Cc:** Luczak, Heather L -FS; Arney, Ken S -FS; Christiansen, Victoria C -FS  
**Subject:** RE: North Carolina Headwaters of the Chattooga River

Hi Bill,  
I hope you and yours had a great holiday.

As promised, I discussed the timeframe for the project work in Scotsman Cr. The timeframe of 2-5 years is accurate based on existing project work and available funding. With additional funding we might reduce this timeframe.

In a recent email you asked the following about the attendees to the meeting I proposed:

**“But who are three individuals with good cold water experience in WNC? How did you come to pick them? When could this discussion take place? What do you specifically hope to determine from consulting with them that we haven’t already discussed? Have these individuals considered the body of science that I have already provided to you—science which has already been applied out west by the Forest Service??”**

The individuals I contacted are:

1. Jason Farmer – Zone Fisheries Biologist – Nantahala N.F.
2. Andy Dolloff – Fisheries Biologist and currently serving as the Director for the Coweta Laboratory in Otto, NC.
3. Doug Besler – Regional Fishery Supervisor, Inland Fisheries Division, NCWRC.

I have commitments from Mr. Farmer and Mr. Besler and will follow up with Mr. Dolloff this week. How I came up with these individuals is as follows:

Mr. Farmer – Is a forest employee and is very familiar with the Chattooga both the habitat and project work occurring in this watershed.

Mr. Dolloff – is a well-known researcher with the Southern Research Station and has tremendous experience in many aquatic systems in the SE and specifically with the Chattooga.

Mr. Besler – I came to meet Mr. Besler through another Fisheries Biologist who works for NCWRC, Jacob Rash and he agreed to participate.

As to dates, I have not set one as I'm trying to finalize the individuals attending then I'll send out a request for dates.

Here is what I will accomplish by this meeting. I'd want a dialogue between you and these folks around the following thoughts:

1. Is the trout habitat impaired in the Chattooga? If so what is degrading the habitat.
2. Assuming the issue is sedimentation, what is the best method(s) to address this issue.

So in truth, there will be potentially nothing we have not already discussed. What I will learn at this meeting is what efforts need to move forward related to the habitat of the Chattooga in NC. As I mentioned early on in our relationship I will bring folks together to learn and strive to develop partnerships to solve issues. This meeting is my attempt to coalesce a group of knowledgeable people around an issue, validate the issue and solve it via appropriate collaborative means. Thanks and I'll be in touch when I get final commitments on attendees and we'll set a date/place. Take care.  
Allen



**Allen Nicholas, MBA**  
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**From:** bill floyd [mailto:wcbfloyd@ix.netcom.com]

**Sent:** Wednesday, November 27, 2019 6:48 AM

**To:** Nicholas, Allen -FS <allen.nicholas@usda.gov>

**Cc:** wcbfloyd@ix.netcom.com; Luczak, Heather L -FS <heather.luczak@usda.gov>; Arney, Ken S -FS <ken.arney@usda.gov>; Christiansen, Victoria C -FS <victoria.christiansen@usda.gov>

**Subject:** FW: North Carolina Headwaters of the Chattooga River

Allen,

Hope you are well and will have an opportunity to enjoy a peaceful Thanksgiving.

I have attached a document (Q-7\_Habitat Suitability Index HSI Models and Instream Flow Suitability) which has allowed me to become better informed about trout habitat suitability:

I particularly find informative certain facts communicated on p.4 and p. 9 of the report.

The take away is how small the amount of truly suitable spawning habitat is on any given stream.

Perhaps, the solution for solving our problem is to go identify and fix those riffle waters on the Chattooga which offer the greatest opportunity for facilitating successful spawning and survival of newly hatched alevin.

Could you please see that Q-7\_Habitat Suitability Index HSI Models and Instream Flow Suitability gets placed into the administrative record being compiled during the revision of the LRMP for the Nantahala? Thanks.

In addition, I haven't heard anything more from you since Saturday November 9<sup>th</sup> when you emailed to comment about: "...a meeting I'd like to see if you would participate in. I know three individuals with good cold water experience in WNC that I could perhaps pull together for a discussion on the science around sedimentation and trout populations specifically in the Chattooga. Would you have an interest in such a discussion? If not I understand but I'm planning to pull them together anyway to see if they can raise my I.Q. on the issues you have identified and come to a conclusion on a path forward."

Are you still planning to hold the meeting to try to come to a conclusion on a path forward? When?

Regarding the issue of sedimentation, the United States Environmental Protection Agency ("US EPA") has developed Rapid Bioassessment Protocols which can be used (1) to characterize the existence and severity of impairment of a stream; (2) to identify sources and causes of impairment; (3) for evaluating the effectiveness of pollution abatement and restoration activities; (4) for undertaking designated uses of water quality attainability studies and cumulative impact assessments, and (5) for characterizing regional biotic attributes representative of undisturbed conditions on reference streams.

See *Rapid Bioassessment Protocols for Use in Streams and Wadeable Rivers: Periphyton, Benthic Macroinvertebrates, and Fish*, Second Edition, Barbour et al, United States Environmental Protection Agency, EPA 841-B-99-002 (1999)(hereinafter "US EPA RBP") last downloaded on July 30, 2019 from <https://www3.epa.gov/region1/npdes/merrimackstation/pdfs/ar/AR-1164.pdf>.

This document has already been placed into your administrative record as document Q-6 USEPA Rapid Bioassessment Protocols For Use in Streams and Wadeable Rivers.

I know that the money can be found to fix the two closely correlated problems about which we have been discussing since your arrival in North Carolina.

All that is required is the Forest Service's willingness to be the leader in moving this challenging project forward, by placing primary emphasis on protecting and enhancing the trout habit that has become so degraded.

I remain dedicated to finding a path forward—in resolving this water pollution problem.

Regards,

Bill

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**From:** bill floyd [<mailto:wcbfloyd@ix.netcom.com>]

**Sent:** Tuesday, November 12, 2019 6:16 PM

**To:** 'Nicholas, Allen -FS'

**Cc:** 'Christiansen, Victoria C -FS'; 'Arney, Ken S -FS'; [info@chattoogariver.org](mailto:info@chattoogariver.org); 'Michael Bamford'; 'Ham, Christopher P -FS'; [wcbfloyd@ix.netcom.com](mailto:wcbfloyd@ix.netcom.com)

**Subject:** RE: North Carolina Headwaters of the Chattooga River

Allen,

Thank you for taking the time to email me on Saturday. I reiterate my respect for the fact that you have a big job and I have only one concern.

I will always remain prepared to collaborate—and would like to do so in order to get moving on removing the excess sediment and restoring the trout populations to their prior outstanding densities on the headwaters of the Chattooga.

**But who are three individuals with good cold water experience in WNC? How did you come to pick them? When could this discussion take place? What do you specifically hope to determine from consulting with them that we haven't already discussed? Have these individuals considered the body of science that I have already provided to you—science which has already been applied out west by the Forest Service??**

Most of the problems we are facing happened long before you arrived on the scene...but players can arrive and depart in mid stride.

The fix is likely to be expensive and we need to get moving on finding the money now. The two development projects upstream (High Hampton and Cashiers Canoe Club) pose the threat of additional land disturbances in the upstream watershed.

**Allen, as I suggested to you on Friday the 8<sup>th</sup>, the best thing that we could do right now is to go ahead and reach some form of a written memorandum of understanding (at least) regarding an admission of a need to address the sediment problem, etc. 16 U.S.C. §1281(b).**

I feel somewhat threatened in my ability to achieve the stated objective of compelling a fix for these problems...because the Forest Service controls the LRMP planning process and once the new LRMP gets approved some of my ability to compel a solution might dissipate.

Having attended the University of North Carolina twice—(because I only figure things out slowly) there were many times that I had the opportunity to witness the legendary Coach Dean Smith put in play his famous but frustrating “Four-corners” offensive stall—which the NCAA ultimately passed a rule to end.

I am being candid because we have been talking for quite a while—however like lawyers who get paid by the hour its appears the Forest Service still hasn’t reached a point where it is ready to start working to solve this problem.

To press why I feel concerned that the Forest Service (not you) might be running a “four-corners offense”, please review the email chain that I copied you on earlier today at around 1:56 pm. This email was directed to Ms. Sullivan regarding my ongoing attempts to use the FOIA to supplement the administrative record currently being compiled during the revision of the LRMP for the Nantahala and Pisgah National Forests.

I find it troubling that the Forest Service now suggests that I somehow made a verbal “commitment to pay” FOIA fees in connection with my September 22, 2017 request for records.

I am quite certain that no such commitment to pay was ever made...and I do not intend to let this suggestion to go unresolved.

**Setting that separate but related problem aside, again, I would like to know more specifics about who are the individuals with good cold water experience in WNC that you want to pull together. Could you email me their names and where they work on Wednesday???**

Also, maybe you and I speak could over the phone for maybe 20 minutes during the next couple of days to discuss what you hope to achieve?

I have appointments from 10 am to 1:30 pm tomorrow but am clear on Thursday and Friday.

Thanks.

Bill

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**From:** Nicholas, Allen -FS [<mailto:allen.nicholas@usda.gov>]  
**Sent:** Saturday, November 09, 2019 2:40 PM  
**To:** bill floyd  
**Cc:** Christiansen, Victoria C -FS; Arney, Ken S -FS; [info@chattoogariver.org](mailto:info@chattoogariver.org); Michael Bamford; Ham, Christopher P -FS  
**Subject:** RE: North Carolina Headwaters of the Chattooga River

Hi Bill,  
I hope this note finds you well.

About the project work in Scotsman Creek. I'm not sure what document/decision this quote is from but I'll ask Chris Ham the Acting District Ranger to provide me a status this project. The 2-5 year timeline may have been language in an EA to bound the effects analysis. This project may be ready sooner than later I'm just not sure at this point of the timing, complexity or cost. I'll check and get back to you.

I mentioned in a previous email a meeting I'd like to see if you would participate in. I know three individuals with good cold water experience in WNC that I could perhaps pull together for a discussion on the science around sedimentation and trout populations specifically in the Chattooga. Would you have an interest in such a discussion? If not I understand but I'm planning to pull them together anyway to see if they can raise my I.Q. on the issues you have identified and come to a conclusion on a path forward.

I'll get back to you on the Scotsman Cr. Project once I get the information from Chris and please let me know if you would like to participate in the discussion. Take care. A



**Allen Nicholas, MBA**  
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**From:** bill floyd [<mailto:wcbfloyd@ix.netcom.com>]  
**Sent:** Friday, November 8, 2019 12:56 PM  
**To:** Nicholas, Allen -FS <[allen.nicholas@usda.gov](mailto:allen.nicholas@usda.gov)>  
**Cc:** Christiansen, Victoria C -FS <[victoria.christiansen@usda.gov](mailto:victoria.christiansen@usda.gov)>; Arney, Ken S -FS <[ken.arney@usda.gov](mailto:ken.arney@usda.gov)>; [wcbfloyd@ix.netcom.com](mailto:wcbfloyd@ix.netcom.com); [info@chattoogariver.org](mailto:info@chattoogariver.org); Michael Bamford <[mbamford123@gmail.com](mailto:mbamford123@gmail.com)>  
**Subject:** North Carolina Headwaters of the Chattooga River

Allen,

I am sure you have many pressing problems to address in your job while I have only one concern about which I am dedicated to solving.

Nevertheless, the United States Forest Service has not placed a high enough priority on addressing the trout habitat and trout population problems being suffered on the North Carolina headwaters of the Chattooga River. The agency has had since November 5, 2014 to move forward.

Please see the attached letter.

I remain willing to do my part in helping the United States Forest Service to find additional private funding to support a clean up and restoration of the once outstanding densities of naturally reproducing populations of trout.

The trout have been waiting way too long to have their habitat and their population densities restored.

On October 23<sup>rd</sup>, the Forest Service attempted to push off addressing the excessive sedimentation problem being suffered on the main stem of the Chattooga River as well as on Scotsman Creek: “Field work conducted as part of the Southside Project found streambank erosion along Scotsman Creek which contribute to reduced habitat quality of pools. In response to this finding, treatments to reduce the potential for stream bank erosion and sedimentation were included in the project. Implementation of these treatments is expected to begin in the next 2 to 5 years...”

We cannot wait 2 to 5 years to do anything. The Forest Service must start *today to restore the trout habitat and wild trout populations* on the main stem of the Chattooga as well as on Scotsman Creek under both the Clean Water Act as well as the national Wild and Scenic Rivers Act.

The USFS consumed almost a decade of time and hundreds of thousands of dollars (if not more than a million dollars) on creating a special recreational use entitlement for whitewater paddlers—where there was no legal obligation to do so. Simultaneously, the Forest Service has not spent a penny on fixing the excessive bedded sediment problem which is being suffered on the North Carolina headwaters of the Chattooga River.

**The Chief of the United States Forest Service or the Regional Forester for Region 8 should immediately enter into an agreement about what will specifically be done by the agency to remove the excessive amounts of sediment which has become impounded on the stream bed of these headwaters.**

**This negotiated agreement must also detail what will be done to restore “outstanding” (or first in class) naturally reproducing populations of rainbow, brown, and brook trout on these headwaters.**

I cannot waste anymore time watching the further diminishment of this wild trout resource—especially while the agency continues to deprive me of my information gathering rights not only

under the Freedom of Information Act but also those that are associated with my right to participate fully in the revision of the LRMP for the Nantahala and Pisgah National Forests.

Intentionally delaying the voluntary disclosure of otherwise unpublicized but critically relevant institutional knowledge, records, and reports mocks the concept of encouraging both *informed decision-making and informed public participation*.

Why not just go the whole way and begin *truly* collaborating with me and others in fixing the problem in lieu of trying to rely on illogical denials and presumed agency expertise to continue denying that there is an actionable problem?

The fundamental fact remains a self-sustaining population of brown trout *that manages only “to persist”* does not satisfy the *intense standard of care* which the Forest Service must discharge in managing the day to day beneficial uses of the North Carolina headwaters of the ORW classified Chattooga River.

Regards,

Bill Floyd

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4110 Quail View Road  
Charlotte, NC 28226  
November 8, 2019

Re: Continuing Failures During the Revision of the LRMP for the Nantahala and Pisgah National Forests: The United States Forest Service Has Intentionally Refused to Voluntarily Disclose Otherwise Unpublicized Institutional Knowledge, Records, and Reports Which the Agency Actually or Constructively Controls and Which the Agency Has Reason To Know Contain Critically Relevant Information Pertaining to the Agency's Management of the North Carolina Headwaters of the Chattooga River

VIA EMAIL [anicholas@fs.fed.us](mailto:anicholas@fs.fed.us)

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

Dear Forest Supervisor Nicholas:

The Chattooga River's headwaters, which flow through a small part of the Nantahala National Forest, constitute *one of only three streams* (out of an estimated 12,000 bodies of water in North Carolina) to carry a water quality classification consisting of Class B, Trout waters, Outstanding Resource Waters ("ORW") in combination with a national Wild and Scenic River ("WSR") designation.

The headwaters of the Chattooga River were the first in North Carolina to be afforded with the non-discretionary *intense physical protections* which Congress has conferred upon outstanding National Resource Waters (e.g. Outstanding Resource Waters in North Carolina) and National Wild and Scenic Rivers.

Similarly, Scotsman Creek is the only tributary to the North Carolina headwaters of the Chattooga River which carries a water quality classification of Class C, trout waters, Outstanding Resource Waters ("ORW") in combination with a *national* Wild and Scenic River ("WSR") designation.

I am writing to you to achieve several objectives with respect to Scotsman Creek and the main stem of the headwaters of the Chattooga River:

- 1) To restate a desire to work collaboratively to a) remove the excessive sediments that have accumulated on the stream bottom and, b) to restore the now diminished trout populations that previously were sustained on these headwaters in *outstanding* densities and/or biomass;
- 2) To ask the agency to establish an agreement with me (pursuant to 16 U.S.C. §1282(b)) about what the agency will do, and when, and to determine how much money will be required to fix these two closely correlated problems;

- 3) To remind the United States Forest Service how the agency has refused to apply the *best available science* for quantifying and recognizing how the amount of sediment which has *non-temporarily* accumulated on the stream bed of the main stem of the Chattooga and Scotsman Creek exceeds the minimum effects threshold for disrupting the successful spawning by mature trout and the survival of their yolk-sac bearing alevin.
- 4) To recap how this *non-temporary* disruption in the successful spawning by mature trout and the survival of their newly hatched alevin has made it impossible for these headwaters to sustain *outstanding* densities and/or biomass of naturally reproducing populations of trout;
- 5) To remind the agency of the administrative history which demonstrates why preserving this unique biological capacity for sustaining outstanding densities and biomass of trout constitutes a narrowly defined subcategorized use of these high quality waters;
- 6) To restate why the United States Forest Service must properly discharge a non-discretionary duty which compels the agency to place primary emphasis on preventing any non-temporary degradation in this subcategorized designated use of the ORW water quality of the main stem of the Chattooga and Scotsman Creek; to prevent any degradation in these two streams' biological capacity for sustaining outstanding naturally reproducing populations of trout.
- 7) To demonstrate how the agency has not been doing what it should to recognize these problems and fix them;
- 8) To review some of the most relevant portions of recent facts and events circa January 2018 through today (including some details dating back to November 5, 2014) which support my contention that we should reach an agreement now to fix these problems;
- 9) To demonstrate how the agency has stalled and prevented me from collecting critically relevant institutional knowledge and non-privileged records and reports pertaining to the agency's management of the North Carolina headwaters of the Chattooga River: (a) by producing piece meal answers and off point disclosures to narrowly framed questions and requests for reports and records; (b) by stalling the disclosure of properly requested and narrowly identified reports and records (sometimes for months and, in several cases, indefinitely); (c) by forcing me to waste my limited time and energy in reviewing and recognizing the total irrelevancy of large numbers of records dumped onto me under the pretense that such records were responsive to my otherwise narrowly framed request for records, and; (d) by failing to identify and to share (voluntarily ) other institutional knowledge and records and reports which the agency constructively controls and which the agency knows to contain critically relevant non-privileged information pertaining to the narrow subject matter about which I have demonstrated an intense concern during the LRMP planning process;
- 10) To demonstrate how the agency purposely continues to fabricate a voluminous but otherwise editorially sanitized administrative record which prevents the public from understanding the truth about how the trout habitat and trout populations on these headwaters have been mismanaged since April 2005;
- 11) To itemize how the United States Forest Service has employed legal pretense to deprive me of my information gathering rights, not only under the Freedom of Information Act, but also pursuant to my right to participate fully in the revision of the Land Resource Management Plan for the Nantahala and Pisgah National Forests; and

12) To demand that the agency cease publicly alleging that I agreed to accept any pecuniary liability in connection with the processing of my September 22, 2017 FOIA request for records, or alternatively provided me with the evidence demonstrating when, how, and to whom a *commitment to pay* was made.

## **STATEMENT OF SEDIMENT AND DECLINING TROUT POPULATION ISSUE AND FOREST SERVICE PRIMARY RESPONSIBILITY TO ACT**

Both Scotsman Creek and the main stem of these headwaters suffer from the same two problems which must not be allowed to remain unfixed. The primary issue is the fine particle sized sandy sediments and silt (<2mm in size) which has increasingly filled in the interstitial spaces between the larger coarse substrates resting on the stream bed (e.g. the stream bed's gravels and cobble, 4.5 cm to 30cm in size). Second, this excessive sediment has caused a correlated and impermissible decline in naturally reproducing populations of rainbow, brown, and brook trout.

This sedimentation continues to accumulate and impound on the stream bed in quantities which, according to the *best available science*, exceed any reasonable minimum effects threshold for disrupting successful spawning by mature trout and the early life cycle survival of newly hatched alevin. This non-temporary degradation in successful spawning and the survival of newly hatched alevin has made it impossible for these headwaters to sustain outstanding densities and/or biomass of naturally reproducing populations of trout.

Instead, as the agency has admitted, these trout populations merely manage *to persist* as opposed to thrive on these headwaters in outstanding densities and/or biomass.

Since November 5, 2014, I have shared hundreds of photographs inventorying these degraded habitat conditions at the same locations but at different points in time. These photographs demonstrate how extended reaches of this river now suffer from a blanket of sediment on the stream bed which is bank to bank in certain places and over a foot deep in others. This bedded sediment has eliminated mature trout hiding spaces in moderately flowing waters by filling in upstream facing crevices. It has also decreased the depth of minor pools that the Chattooga's trout have historically used to sustain themselves during the low flows and heat of the summer.

This blanket of sediment has not dissipated since November, 2014. This explains how this problem constitutes a non-temporary problem. This suggests the supply of sediment being discharged into the river (whether because of point source or non-point source human activities) has overwhelmed the normal hydraulic capacity of this river. This prevents the river from maintaining a proper balance of sediment on the stream bed.

This sediment transport imbalance explains why the United States Forest Service must take action to remove this sediment which has destroyed suitable trout spawning habitat up and down those portions of this ORW classified and WSR designated river flowing through the Nantahala National Forest.

On November 5, 2014, I specifically warned the United States Forest Service ("Forest Service" or "USFS") about the excessive accumulation and impoundment of fine particle sized sandy

sediments and silt on the stream bed of these headwaters. The agency was warned about the degraded reproductive suitability of the in stream trout habitat being suffered on the North Carolina headwaters of the Chattooga River. I have fly fished certain sections of these headwaters for three decades. Based on my own long term experience in fly-fishing this river, I warned that the densities of the naturally reproducing populations of trout appeared to have suffered a non-temporary but measurably significant decline over an extended period of time—a decline which appeared to be closely correlated with the increasing accumulation of an excessive amount of sediment on the stream bed.

On May 15, 2015, (six months after I complained on November 5, 2014) the United States Forest Service tried to evade taking accountability for the excessive sediment and decreased densities of trout, by offering the following carefully worded response: “The Brown Trout is a non-native species managed by the North Carolina Wildlife Resources Commission (NCWRC) and maintained as a wild trout population within the upper Chattooga River (this reach of the river is not listed as hatchery supported waters). Electrofishing surveys were conducted within the upper Chattooga River from 1992 through 1996 by the NCWRC. Young-of-the-year Brown Trout densities appeared to be lower than other North Carolina trout populations during the same sampling period; *however, a self-sustaining population continues to persist.*” See p.205 *Chattooga River Boating Access*, Environmental Assessment, United States Forest Service, May, 15, 2015 (italics added)(the “2015 EA”)(otherwise placed into the administrative record being compiled during the revision of the Land Resource Management Plan (“LRMP”) for the Nantahala and Pisgah National Forests (“NPNF”) as document E-1”.

*This statement made assertions of fact which were far less than the whole truth.*

The statement that “[y]oung-of-the-year Brown Trout densities appeared to be lower than other North Carolina trout populations during the same sampling period” *served to confuse the public into believing that these headwaters were suffering from a trout stream productivity problem as far back as 1992-1996.*

In fact, the less than truthful nature of several of the express and implied assertions of fact made on May 15, 2015 only became apparent subsequent to May 8, 2017 when a copy of the report written by the North Carolina Wildlife Resources Commission (“NCWRC”) *was finally forced to the surface* (albeit indirectly from a source other than the United States Forest Service). See the *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 (otherwise placed into the administrative record being compiled during the revision of the Land Resource Management Plan (“LRMP”) for the Nantahala and Pisgah National Forests (“NPNF”) as Floyd document “00-T Borawa and Clemmons 1998”).

Despite what was stated on May 15, 2015, the Borawa and Clemmons 1998 report revealed factual data demonstrating the outstanding nature of the densities and biomass of the Chattooga’s trout populations—*data which had been collected in the field by very experienced fisheries biologists employed by the United States Forest Service.*

The actual densities and biomass trout population data detailed in the Borawa and Clemmons 1998 report also pointed to the less than fully truthful editorial nature of the carefully worded statement “[y]oung-of-the-year Brown Trout densities appeared to be lower than other North Carolina trout populations during the same sampling period”

**Setting aside the erroneous generalization that this stream has always suffered from low numbers of young-of-the-year trout, the fact that trout have been allowed to merely continue “to persist” as opposed to thrive in “outstanding” densities and/or biomass pinpoints the precise problem.**

We should not quibble about which federal or state agency has what responsibility for fixing the issues of excessive sediment and declining trout populations (as the Forest Service implicitly attempted to do in its May 15, 2015 email response). The United States Forest Service **must** assume the leadership role in fixing these problems, as it has the day-to-day responsibility for managing the beneficial uses of this national Wild and Scenic River. *This responsibility includes both the natural resources existing in the river as well as those resources resting inside the protected riparian corridor bordering both sides of the river.*

## **STATUTES COMPELLING FIX**

The federal Wild and Scenic Rivers Act “WSRA” compels “the head of any agency administering a component of the national wild and scenic rivers system *shall cooperate* with ...the appropriate State water pollution control agencies *for the purpose of eliminating or diminishing the pollution of waters of the river.*” 16 U.S.C. §1283(c) (italics added). The word “pollution” contemplates cooperation in eliminating both point-source as well as non-point source forms of pollution.

Similarly, the Forest Service is compelled to comply with “all Federal, state, ...and local requirements...respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity.” Section 313 of the Clean Water Act; 33 U.S.C. §1323(a).

The Secretarial Guidelines for the WSRA offer specific guidance about what must be done by the Forest Service to protect a river’s designated uses of water quality: “Consistent with the Clean Water Act, water quality in wild, scenic, and recreational river areas will be maintained or, where necessary, improved to levels which meet Federal criteria or federally approved State standards for...fish and wildlife propagation. *River managers will work with local authorities to abate activities within the river area which are degrading or would degrade existing water quality.*” 47 Fed.Reg. 39,454, 39,459 September 8, 1982 (italics added).

Congress has further directed the United States Forest Service “**shall assist, advise, and cooperate with...individuals to plan, protect, and manage river resources.** Such assistance, advice, and cooperation may be through written agreements or otherwise. This authority applies...to rivers which are components of the National Wild and Scenic Rivers System... Any agreement under this subsection may include provisions for limited financial or other assistance

to encourage participation in the ...management of river resources.” 16 U.S.C. §1282(b)(emphasis added).

More narrowly, Congress has articulated a plainly stated non-discretionary duty to manage the day to day beneficial uses of the North Carolina headwaters of the Chattooga River by placing “primary emphasis” on “protecting” the quintessential “scientific feature” (16 U.S.C. §1281(a)) which this agency described to Congress in 1971 as being unique to North Carolina’s headwaters and distinguishable from all other segments of the Chattooga River flowing further downstream in South Carolina and Georgia.

See pp.19-20 (italics added), *Wild & Scenic River Study Report, Chattooga River*, USDA, Forest Service Southern Region, June 15, 1971 (the “1971 Chattooga Study”)(otherwise lodged into the administrative record being compiled during the revision of the Land Resource Management Plan (“LRMP”) for the Nantahala and Pisgah National Forests (“NPNF”) as document Q-1).

The “excellent” trout “stream productivity” of these headwaters constitutes the “scientific feature” which the Forest Service described to Congress in 1971 as being unique to these headwaters. This constitutes the “scientific feature” which Congress compels the agency must place “primary emphasis” on “protecting”.

Furthermore, the protections that must be afforded to this “excellent” trout “stream productivity” were intensified when the state of North Carolina explicitly reclassified this particular trout stream as an Outstanding Resource Water in order *to confer the greatest intensity of federal antidegradation protections* upon the stream’s administratively recognized *outstanding* wild trout habitat and *outstanding* naturally reproducing rainbow, brown, and brook trout fisheries.

Most importantly, North Carolina’s administrative record (1987-1989) evidences how protecting these headwaters’ unique biological capacity for sustaining *outstanding* densities and/or biomass of naturally reproducing populations of trout constitutes *the narrowly defined subcategorized use of the ORW water quality* assigned to these headwaters pursuant to the water quality standards associated with the Clean Water Act.

The Clean Water Act compels each of the states to administer water quality standards *which must at a minimum comply with the federal water quality standards*—including the proper enforcement of the codified antidegradation mandate (33 U.S.C. §§ 1313(d)(1) to (d)(3))—whose proper implementation has been further informed by the regulatory objectives set forth by the United States Environmental Protection Agency (“US EPA”) at 40 C.F.R. §131.12, 48 FR 51405, Nov. 8, 1983, as further informed by the *1983 Water Quality Standards Handbook*.

The 1983 Handbook was subsequently revised in 1994 when the *Water Quality Standards Handbook: Second Edition* (the “1994 Handbook”) was published. In particular see Chapter 2: *Designation of Uses, Water Quality Standards Handbook*, US EPA, Office of Water, EPA 823-B-94-005a (1994) (otherwise placed into the administrative record as document 00-J-3); Please also review *Water Quality Standards Handbook* Chapter 4: *Antidegradation*, US EPA, Office of Water, EPA 823-B-94-005a, 1994, which was placed into the administrative record as document “00-J-1”.

The Chattooga's ORW reclassification made it the law that human activities occurring in or adjacent to these headwaters *must not be permitted* to contribute to any non-temporary diminishment in the *outstanding* quality of the in stream trout habitat and that habitat's unique biological capacity for sustaining *outstanding* densities and/or biomass of naturally reproducing populations of rainbow, brown, and brook trout.

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

“Subcategories of aquatic life uses may be on the basis of attainable habitat (e.g., coldwater versus warmwater habitat); innate differences in community structure and function (e.g., high versus low species richness or productivity); or fundamental differences in important community components (e.g., warmwater fish communities dominated by bass versus catfish). Special uses may also be designated to protect particularly unique, sensitive, or valuable aquatic species, communities, or habitats.” See p. 6 of document 00-J-3.

Chapter 2: *Designation of Uses, Water Quality Standards Handbook* explains with plainly stated words how a subcategory of water quality use can be differentiated by “*innate differences ...in...species...productivity*.” Id. at p. 6 (italics added).

Stated differently, some bodies of water may exhibit an innate ability to sustain a measurably higher re-productivity and survival of a specific individual species of aquatic life when contrasted against other similarly situated bodies of water.

The protection of an identified stream's uniquely distinguishable biological capacity for sustaining “*innate differences ...in...species...productivity*” for a specified individual species of aquatic life (e.g. a particular species of fish) can be defined as *a subcategorized use of water quality*. This *subcategorized use of water quality* must be afforded a greater intensity of protection against an form of water quality pollution when contrasted against the intensity of protection afforded to other species of aquatic life (e.g. a particular species of macro invertebrate).

This constitutes the precise purpose for designating subcategories of designated use of high quality waters.

This higher intensity of protection against water quality pollution, (which can be afforded to a narrowly defined individual species of aquatic life) incorporates a non-discretionary duty to provide protection against both point source as well as non-point source forms of water quality pollution.

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

## **NORTH CAROLINA OUTSTANDING RESOURCE WATERS**

In defining the strict anti-degradation protections afforded to *Outstanding Resource Waters*, North Carolina mandates that a body of water be of “exceptional state or national recreational or ecological significance and that the waters have exceptional water quality” while being administratively recognized to possess one or more of the following outstanding resource values/subcategories of water quality use: “[1] there are *outstanding fish* (or commercially important aquatic species) habitat and fisheries; [2]there is an unusually high level of water-based recreation or the potential for such recreation; [3] the waters have already received some special designation such as a North Carolina or National Wild and Scenic River, Native or Special Native Trout Waters or National Wildlife Refuge, which do not provide any water quality protection; [4] the waters represent an important component of a state or national park or forest; or; [5] the waters are of special ecological or scientific significance such as habitat for rare or endangered species or as areas for research and education.” See 15A NCAC 02B.0225(b)(italics emphasis added).

The first provision, 15A NCAC 02B.0225(b)(1), equates substantively to a narrowly defined subcategory of water quality use based on “innate differences ...in...species...productivity.”

15A NCAC 02B.0225(b)(1) defines a subcategory of water quality use which distinguishes certain waters “into smaller, more homogenous groups for the purposes of reducing variability within the group.” 2015 WQS Revisions at 51024.

15A NCAC 02B.0225(b)(1) employs the shared modifier “outstanding”.

The word “outstanding” narrowly defines the acceptable level of quality which both the fish habitat and fisheries must satisfy in order for a body of water to be granted the special anti-degradation protections (15A NCAC 02B.0201(c) and 15A NCAC 02B.0201(e)) which are exclusively afforded to Outstanding Resource Waters.

In North Carolina, a body of water can qualify for ORW anti-degradation protection, if it possesses a) “outstanding” in-stream fish habitat (or commercially important aquatic species habitat) plus, b) an “outstanding” fishery. There is a dual requirement. A stream’s in-stream fish habitat (whether cold or warmwater habitat) must be sufficiently “outstanding” to maintain an “outstanding” fishery for a specific species of fish.

Stated differently, the use of the word “outstanding” differentiates the comparatively higher “innate differences ...in...species...productivity” (See p. 6 of document 00-J-3) which a river’s in stream fish habitat must possess, in comparison to all other similarly situated streams, to qualify for the stringent anti-degradation protections afforded to Outstanding Resource Waters. See 15A NCAC 02B .0225(b) (Outstanding Resource Waters) and 15A NCAC 02B .0201 (Anti-degradation Policy).



North Carolina's use of the word "outstanding" is synonymous with having chosen "first in class," "exceptional," "superlative," "first rate," or "excellent." It is conceptually distinguishable from "average," "sufficient," "ordinary" or "minimally proficient."

In addition, 15A NCAC 02B .0225(b) employs "outstanding" to distinguish how the in-stream habitat must be capable of supporting the highest level of abundance for the species of fish (cold-water versus warm water; (trout versus bass) which ORW classification is intended to protect. A stream qualifies for North Carolina's special ORW anti-degradation protection if it possesses the requisite "outstanding" in-stream fish habitat capable of maximizing in-stream reproduction and recruitment of juveniles into adults of catchable size sufficient to sustain an "outstanding" standing crop of harvestable fish.

Protecting this outstanding biological capacity for sustaining outstanding densities and/or biomass of naturally reproducing populations of rainbow, brown, and brook trout constitutes the narrowly defined subcategory of ORW water quality use which was assigned in 1989 to the North Carolina headwaters of the Chattooga River.

## **FOREST SERVICE UNWILLINGNESS TO ACCEPT RESPONSIBILITY**

*The United States Forest Service has a responsibility to re-establish the once outstanding densities and/or biomass of naturally reproducing populations of trout which were previously recognized to exist on the North Carolina headwaters of the Chattooga River. (note that these "outstanding" densities of naturally reproducing trout were recognized to be all three species of trout residing in North Carolina (rainbow, brown, and brook trout (charr)) as opposed to just brown trout.)*

Unfortunately, the United States Forest Service continues to demonstrate an unwillingness to enter into any negotiated agreement about what the agency will do to fix the two primary issues sediment and declining trout populations - despite any personal interest you might share in cooperating with me (and others) in pushing this heavy boulder back up the hill.

Let me demonstrate the basis for this assertion of fact.

On August 14, 2019, I emailed to advise you about two separate but large land-disturbing real estate development projects being planned or implemented in the upstream watershed of the main stem of the Chattooga's headwaters. These two projects are referred to by the regulatory authorities as (1) the High Hampton LLC project and (2) the Cashiers Canoe Club Development, LLC project.

*Both of these real estate development projects are seeking Section 404 permits from the United States Army Corps of Engineers to conduct dredge and fill activities and Section 401 water quality certifications from the North Carolina Department of Environmental Quality.*

On August 15, 2019 you emailed a response: "I was unaware of these proposed actions but forest staff may have been contacted. I'll check on the status of any response. That said, I will discuss

this internally and will provide comments as part of this proposed action...On another note I had a team look at portions of the watershed north of the iron bridge. I plan on having them do further inventories to look at sediment production. You are welcome to visit or go with this team once we get it developed. I'll keep you in the loop on our progress."

I appreciated your response but I haven't received anything from you regarding (1) any actions the agency has taken either to endorse or to challenge the wisdom of these two developments being granted permission to conduct dredge and fill activities in the waters of the Chattooga or tributaries of the Chattooga, or (2) what your team has been doing to inventory the sediment problems north of the Bull Pen Iron Bridge.

The state of North Carolina must soon respond (one way or the other) to these applications for Section 401 certifications - but the administrative deadline for offering comments in support or in opposition to the issuance of these permits has already passed. These two large developments might be required to provide offsetting mitigation to compensate for the damage that they plan to do in moving forward with their projects if approved.

It would be a shame for any compensatory mitigation to be used *on anything other than* fixing the excess sediment problems being suffered downstream on the public segments of the Chattooga upstream of Bull Pen Iron Bridge.

What if anything has the Forest Service done to address this particular concern/opportunity?

My objective remains steadfast.

- 1) the United States Forest Service must spend whatever amount of money is required and must do whatever is technically required to remove the excessive bedded sediments which have accumulated/impounded on the stream bed up and down the main stem of the Chattooga River and its unique tributary, Scotsman Creek.
- 2) the agency must reestablish the Chattooga's in stream habitat's biological capacity for sustaining outstanding (or first in class) densities and/or biomass of naturally reproducing populations of rainbow, brown, and brook trout.

To support the agency in achieving this formidable task, I continue to insist that an appropriate mix of private funding can be found to supplement and to alleviate in part some of the financial burden which must primarily fall upon the United States Forest Service.

However, arranging supporting funds for this project can't occur until the United States Forest Service establishes a viable plan for fixing these two correlated problems, after formally acknowledging there is a problem which needs to be fixed.

**The Forest Service must bear this burden because it constitutes the agency to whom Congress has assigned the fundamental responsibility for managing the day-to-day beneficial uses of the North Carolina headwaters of the Chattooga River.**

## **FOREST SERVICE WASTE OF FUNDS AND MISMANAGEMENT OF THE HEADWATERS OF THE CHATTOOGA BY MIS-PLACING PRIMARY EMPHASIS ON IMPROPERLY CREATED ENTITLEMENTS FOR WHITEWATER PADDLING ENTHUSIASTS**

The United States Forest Service must hold itself accountable for having improperly wasted hundreds of thousands of dollars between April 2005 and January 2016 (if not in excess of a million dollars) in a headquarters-driven attempt to score political points with a powerful national recreational use constituency. In short, the Forest Service fabricated a special recreational use entitlement for a dedicated group of whitewater paddlers who lacked any legal right to be afforded with any form of special accommodation.

The United States Forest Service should **never** have agreed to modify an otherwise properly promulgated regulation, *especially because* this small group of paddlers lacked any non-discretionary legal right to compel the Forest Service to do so.

The absence of any justification for having provided any accommodation to this small group was made clear on November 5, 2014 when the Fourth Circuit Court of Appeals upheld the court below while cautioning the United States Forest Service (and the whitewater paddling community) 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).

**In short, for more than a decade, the agency has mismanaged North Carolina’s headwaters by placing primary emphasis on the wrong concerns.**

The Forest Service must (without any further delay) start placing primary emphasis on protecting and enhancing the single “*scientific feature*” which the agency described to Congress in 1971 as being unique to the North Carolina headwaters of the Chattooga River. 16 U.S.C. §1281(a).

The Forest Service’s comments in 1971 evidences the uniqueness of North Carolina’s headwaters.

In 1971, the United States Forest Service described to Congress how the main stem of the Chattooga River possessed a trout “stream productivity” which “ranges *from excellent* in upper areas [in North Carolina] to *extremely marginal* in lowermost reaches [in South Carolina and Georgia.]... Stream productivity is best discussed by dividing the river and the West Fork into 5 sections. The Chattooga River and its tributaries above the [Bull Pen Iron Bridge in North Carolina] are excellent trout waters, *comparing favorably with the better streams in all three states.*” See pp.19-20 (italics added), *Wild & Scenic River Study Report, Chattooga River*, USDA, Forest Service Southern Region, June 15, 1971 (the “1971 Chattooga Study”)(otherwise lodged into the administrative record being compiled during the revision of the Land Resource Management Plan (“LRMP”) for the Nantahala and Pisgah National Forests (“NPNF”) as document Q-1).

The 1971 Chattooga Study *highlighted* how North Carolina's excellent "stream productivity...*compar[ed] favorably with the better streams in all three states*" (id.)(Italics added).

The remarkable "*excellent*" biological re-productivity of the trout stream habitat above the Bull Pen Iron Bridge in North Carolina was described as being distinguishable from the marginal trout stream productivity being maintained further downstream on the main stem of the Chattooga in South Carolina and Georgia.

Stated differently, the United States Forest Service de facto characterized this excellent trout stream productivity ( this biological capacity for sustaining outstanding populations of wild trout) as an "outstandingly remarkable...value" (16 U.S.C. §1271) and "scientific feature" (16 U.S.C. §1281(a)) which was unique to North Carolina's headwaters.

**Consequently, the Forest Service owes a non-discretionary duty to place "primary emphasis" on "protecting" and enhancing this outstandingly remarkable "scientific feature". 16 U.S.C. §1281(a). This non-discretionary duty to place "primary emphasis" on "protecting" this "scientific feature" was further intensified in 1989 when North Carolina reclassified these headwaters as Outstanding Resource Waters.**

**For more than a decade (dating back to April 2005) the agency has mis-managed these headwaters by spending all of its time and money inappropriately placing *singular emphasis on catering to the demands of a small set of whitewater creek boating experts.***

#### **THE FOREST SERVICE'S VOLUMINOUS BUT OTHERWISE SANITIZED ADMINISTRATIVE RECORD PREVENTS THE PUBLIC FROM UNDERSTANDING HOW THESE HEADWATERS HAVE BEEN GROSSLY MIS-MANAGED SINCE 2005**

Unfortunately, the United States Forest Service has not compiled an administrative record at any point in time subsequent to April 2005 which tells the whole truth about the legal significance of the administrative histories underlying the river's designation as a national Wild and Scenic River ("WSR")(1969-1974) or its reclassification as Outstanding Resource Waters ("ORW") (1987-1989).

The agency has been previously provided with copies of the most critical components of those administrative histories. The legal significance of those administrative histories compel the Forest Service to manage the day-to-day beneficial uses of the North Carolina headwaters of the Chattooga River by complying with certain non-discretionary statutory duties arising under the national Wild and Scenic Rivers Act ("WSRA") and the Clean Water Act ("CWA").

Instead, the agency has chosen to undertake significant management initiatives adversely impacting the headwaters based on the fabrication of a voluminous but otherwise editorially sanitized administrative record which fails to tell the whole truth (how the agency has mismanaged these headwaters by inappropriately placing *singular emphasis* on the wrong concern - the demands of a small set of whitewater creek boating experts). As the Chattooga River paddling permits evidence, only a hand full of these expert creek boaters have been using

this improperly created entitlement. Check the permits pulled each year since boating commenced in late 2012. Even worse, based on the signed admissions made on the face of the permit, paddlers have been violating the rules by paddling: (1) on days that do not meet the minimum flow; (2) in groups that exceed the maximum allowable size of six; (3) in a single boat instead of the minimum of two; (4) as a single paddler instead of the minimum of two; (5) using an unapproved raft instead of a boat; (6) putting in at unlawful launch points; (7) taking out at unlawful evacuation points.

There is no legal justification for the agency having fabricated a special entitlement whose rules are being flaunted—an entitlement whose rules are not being enforced by the Forest Service.

Much of this political pandering took place before your arrival in North Carolina. However, it is now November, 2019 - five years later - and nothing has been done to fix either the embedded sediment or trout population issues. More recently, there have been some back and forth discussions about the problems, which I appreciate. However, the agency has failed to undertake any physical effort to remove the sediment and/or restore the wild trout populations to their once outstanding densities.

The way to fix this past mistake (without any further delay) is to *start placing primary emphasis* on protecting and enhancing the single “*scientific feature*” which the agency described to Congress in 1971 as being unique to the North Carolina headwaters of the Chattooga River. 16 U.S.C. §1281(a).

Since November 5, 2014, and prior to the agency promulgating a new LRMP for the Nantahala and Pisgah National Forests (“NPNF”), I have tried to make certain that the United States Forest Service constructs an administrative record which logically considers (1) the true legal significance of the administrative histories underlying WSR designation in 1974 and ORW reclassification in 1989, and (2) the whole truth about the legal importance of the Fourth Circuit’s plainly stated admonition: “floating is not a value of the Chattooga that must be protected and enhanced under §1281.” *Id.*

Unfortunately, this has proven extremely difficult to do because the agency continues to employ a *whack-a-mole* approach to information disclosure during the revision of the LRMP.

### **AGENCY HAS STALLED AND PREVENTED COLLECTION OF CRITICALLY RELEVANT INSTITUTIONAL KNOWLEDGE AND RECORDS AND REPORTS**

Multiple times during the revision of the LRMP, I have asked the United States Forest Service to comply with its duty to share information in an open way during the revision of the LRMP.

Unfortunately, the agency has repeatedly failed to disclose critically relevant but otherwise unpublicized institutional knowledge, records, reports, etc. which the agency actually or constructively controls—and to do so voluntarily long before ever being asked to do so.

To press this point, back on July 29, 2017, I took the time and energy required to pen a 127 page Notification.

This Notification detailed *seven specific events demonstrating* how the agency has stalled and prevented me from collecting critically relevant institutional knowledge and non-privileged records and reports pertaining to the agency's management of the North Carolina headwaters of the Chattooga River: (1) by producing piece meal answers and off point disclosures to narrowly fenced in questions and requests for reports and record; (2) by stalling the disclosure of otherwise properly requested and narrowly identified reports and records (sometimes for months, and in several cases indefinitely), (3) by forcing me to waste my limited time and energy in reviewing and recognizing the *irrelevance* of large numbers of records dumped onto me under the pretense that such records were responsive to my otherwise narrowly fenced in request for records, and (4) by failing to identify and to share (voluntarily ) other information and records and reports which the agency actually or constructively controls and which the agency knows to contain critically relevant non-privileged information pertaining to the narrow subject matter about which I have demonstrated an intense concern during the LRMP planning process. See "*Floyd Notification USFS Nicholas 07292017 FINAL.pdf*", dated July 29, 2017, otherwise placed into the administrative record being compiled during the rewrite of the LRMP for the NPNF as document N-13-A.

The agency continues this de facto concealment of information today.

The agency's *whack-a-mole* like information disclosure practices fall far short from complying with what the agency has admitted it should do: "The responsible official *should be proactive...* and *should share information in an open way with interested parties*" 36 C.F.R. §219.4(a)(italics added). "[T]he responsible official shall encourage participation by...(i) Interested individuals...including those interested at the local...levels. " 36 C.F.R. §219.4(a)(1)(i)(italics added).

Neither does this continuing obfuscation comply with the agency's admitted public policy duty to "*support... a transparent and collaborative approach to planning.*" *Final Rule and Record of Decision, National Forest System Land Management Planning*, 36 C.F.R. Part 219, 77 FR 21162, 21178, April 9, 2012 (italics added).

This refusal to share information openly (*and on a timely basis*) has prevented an honest *scientific debate* about what must be done to fix the now degraded suitability of the in stream trout habitat and that habitat's biological capacity for sustaining outstanding densities and/or biomass of naturally reproducing populations of rainbow, brown, and brook trout.

The agency's demonstrated stiff resistance to acknowledging there is a sediment and correlated trout population problem, the highly controversial recreational use debate which played out from 2004 to 2012, coupled with the agency's ability to control the awarding of financial grants for studies conducted by university academics, has chilled the willingness of multiple river advocates from taking on the controversial project of setting the record straight.

Despite the legal significance of the administrative histories underlying ORW reclassification and WSR designation, the well-being of the trout habitat and trout populations residing on the North Carolina headwaters of the Chattooga River has been lost in the contentious politics

surrounding the agency's demonstrated willingness to mismanage these headwaters by catering to a small subset of a single recreational use constituency: whitewater creek boating enthusiasts.

Subsequent to publishing my Notification dated July 29, 2017, the United States Forest Service abandoned the more subtle approach of slow walking my information requests or alternatively of offering incomplete piece meal responses to requests for critically relevant institutional knowledge, etc.

Instead, the agency explicitly declared on September 6, 2017 that the agency would not engage in a back and forth iterative factual discussion and debate about the plainly obvious physical degradation of the trout habitat and wild trout populations being suffered on the North Carolina headwaters of the Chattooga River.

On September 6, 2017, Ms. Luczak, Assistant Forest Planner and Forest NEPA Coordinator responded to my August 28th complaint about the fact that neither my Notification of July 29<sup>th</sup> nor any of the Notification's 170 supporting attachments had appeared on the electronic public reading room being maintained during the revision of the LRMP.

I had specifically requested that all of these documents be posted to the public reading room (being maintained during the revision of the LRMP) in order to give other *interested* members of the public with an opportunity to review relevant information which the Forest Service had chosen not to disclose to the public.

Ms. Luczak copied Regional Planner Paul Arndt, yourself, and Forest Planner Michelle Aldridge, when she emailed the following final agency decision: "Your comment letter... is included in the record...and your comment letter has been posted in the public reading room on the Plan Revision website. *The 170 attachments...will be available [only] upon request to the public.* To clarify, the public comment reading room is used primarily as a way of sharing the comments that we have received during plan revision. The public comment reading room is not the comprehensive administrative record of all information used in the plan development, nor does it include all of the hard copy public comments that we have received over the last four years during plan revision." See page 1, of an email chain from Aug 28, 2017 to September 6, 2017 between Ms. Heather Luczak and Ms. Sheryl Bryan and myself (otherwise placed into the administrative record as document N-29).

Ms. Luczak also declared: "...*We will not be responding to individual questions and allegations raised in your comment letter [July 29, 2017] 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.*" Id. (italics added). "Regarding management of the Chattooga River, the Forest Supervisor has the discretion to determine the scope and scale of the revised Forest Plan. *The Nantahala, Sumter, and Chattahoochee NFs completed an environmental analysis of management of the Chattooga River in 2012, and there is not a need to revisit the analysis at this time.*" Id. (italics added).

Next, Ms. Luczak made the jaw dropping admission: "*The Forest has publically 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 River will not be considered until after the plan revision, in subsequent analysis, and after several years of monitoring data is available to inform that analysis.” Id. (italics added).*

Ms. Luczak’s statement did not identify *which* Forest Service official had “publicly stated” that the management of the Chattooga River would not be reevaluated during the rewrite of the LRMP.

Neither did Ms. Luczak advise when, where, and to whom this *implied promise* was made.

Ms. Luczak did not explain what kind of monitoring needed to be done to inform the analysis.

However, Ms. Luczak did copy her superiors on these emails.

This fact, plus the fact that Ms. Luczak repeatedly used the plural pronoun “we” evidences how she was communicating the *final decisions* of the United States Forest Service as opposed to her own personal opinions.

This email exchange evidences how the agency appeared prepared on September 6, 2017 to disregard all of the information, scientific data, and legal precedent that I had shared with the agency dating back to November 5, 2014.

It was and remains my position that all of this information (which has been placed into the administrative record) demonstrates why the Forest Service owes a clear and pressing duty to review (during the revision of the LRMP) how these headwaters have been mismanaged since 2004 as well as how they should be properly managed going forward.

Promising some unidentified party that the agency would not reevaluate how the Chattooga’s headwaters might be managed in the future seemed particularly troubling to me back on September 6th—especially because of the clear need to reestablish the proper priorities in fixing the visibly pronounced sediment problem which has degraded the condition of the trout habitat and diminished the densities of wild trout populations on North Carolina’s headwaters.

Ms. Luczak’s statement suggests that the promise which was made to this unidentified group (or perhaps a single individual) afforded a form of special accommodation and administrative deference not otherwise afforded to other similarly interested members of the public—a sort of tacit veto power over the forthcoming LRMP.

The bottom line is Ms. Luczak’s September 6, 2017 email also tacitly communicated the Forest Service’s denial of any duty or practical need to undertake a thorough review of (1) the true legal significance of the administrative histories underlying WSR designation in 1974 and ORW reclassification in 1989, as well as (2) the closely correlated truth about the legal importance of the Fourth Circuit’s plainly stated admonition: “floating is not a value of the Chattooga that must be protected and enhanced under §1281.” *Id.*



The objectionable nature of these final decisions (and the demonstrated favoritism being shown to some unknown party) motivated me to pen a second Notification dated September 22, 2017.

This second Notification (consisting of 66 pages of factual recitation and argument) also sought to make sure that the LRMP administrative record tells the whole truth about the duties which the Forest Service owes to the trout habitat and wild trout populations residing on these headwaters.

My second Notification itemized some of the most pronounced deficiencies in the LRMP planning process. See “*Floyd Notification to USFS 09222017 FINAL.pdf*”, otherwise placed into the administrative record as document N-13-B.

This September 22, 2017 Notification also contained a narrowly fenced in request for records pursuant to the FOIA.

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

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

- (5) any internal USFS communications, including emails and handwritten notes, discussing the need to conduct such monitoring in response to public complaints;
- (6) For the period from January 1, 2012 going forward, please provide any back and forth emails, correspondence, or written documents of any kind, either received from American Whitewater, or any representative of American Whitewater, or alternatively transmitted to American Whitewater by any USFS official.”

See pp. 61-62 of document N-13-B.

The simple fact is the records being requested under FOIA were reasonably identified and submitted to the proper Responsible Official for the Nantahala National Forest.

Nevertheless, the Forest Service responded *tardily* by refusing to share the requested information. The agency refused to do so in stark contrast to the agency’s stated public policy duty to share information openly in order to “*support... a transparent and collaborative approach to planning.*” *Final Rule and Record of Decision, National Forest System Land Management Planning*, 36 C.F.R. Part 219, 77 FR 21162, 21178, April 9, 2012 (italics added).

The agency responded to my September 22<sup>nd</sup> FOIA by asserting a thinly veiled and convoluted legal pretense for denying me a waiver of any FOIA processing fees based on the public interest exception spelled out at 5 U.S.C. §552(a)(4)(A)(iii).

The agency’s continuing endorsement of this *legal pretense* still obstructs me *two years later* from using the Freedom of Information Act. The Forest Service has de facto shut down my practical ability to gather factual information and records during the revision of the KRMP unless (1) I agree to waive my rights and pay what amounts to an improperly assessed penalty for asking unwelcomed questions about the agency’s potential neglect or (2) I bring a lawsuit to defend my rights.

Since the fall of 2017, the agency has thwarted me from lawfully compelling the agency to disclose all of the factual information (resting within the actual or constructive control of the agency) needed to demonstrate how this agency has been *intentionally mismanaging* North Carolina’s headwaters—to demonstrate how the agency has done nothing to prevent the densities of the naturally reproducing populations of trout from suffering measurably significant and non-temporary declines.

Just as legally incongruent, the Nantahala National Forest has engaged in a systematic policy of *don’t fully investigate Floyd’s documented evidence* of trout habitat degradation and decreased trout densities being suffered on the North Carolina headwaters of the Chattooga River.

This assertion of fact can be validated by considering how the agency has repeatedly refused to undertake any monitoring (much less continuous monitoring) of the densities and/or biomass of the naturally reproducing populations of trout residing on these headwaters.

The agency has offered every excuse for this neglect despite having a non-discretionary duty to monitor these trout populations because they constitute the specific management indicator species that are supposed to be monitored on national Wild and Scenic Rivers pursuant to the currently enforceable Land Resource Management Plan for the Nantahala and Pisgah National Forests.

This *don't fully investigate policy* has afforded the agency a convenient way to avoid coming into possession of data and information which would otherwise highlight the agency's long standing neglect of the degrading condition of the in stream trout habitat and the decline in that habitat's biological capacity for sustaining outstanding naturally reproducing populations of trout—populations of trout which ought to consist of rainbow, brown, and brook trout.

This don't fully investigate policy has allowed the agency to evade answering critically relevant information inquiries made by interested members of the public by offering a simple *we don't possess that information response*.

The most distressing example of the Forest Service's pattern and practice of de facto concealing critically relevant information played out over a lengthy period of time reaching from November 5, 2014 to May 8, 2017. See pp. 28-39; pp.56-73; pp.74-88 of "*Floyd Notification USFS Nicholas 07292017 FINAL.pdf*" (otherwise placed into the administrative record being compiled during the revision of the LRMP for the NPNF as document N-13-A).

As detailed in my Notification of July 29, 2017 (document N-13-A), neither the Nantahala National Forest nor the Chief of the United States Forest Service managed to produce a copy of the written report which the North Carolina Wildlife Resources Commission had prepared summarizing the *significance* of the results of the *critically important* five year (1992-1996) study of the trout populations residing on the North Carolina headwaters of the Chattooga River.

The Forest Service failed to produce a copy of this report *despite being asked to do so in two different requests for records made pursuant to the Freedom of Information Act in early 2016*—FOIA requests which were both appealed to the Chief of the United States Forest Service to compel the production of additional records.

Instead, on May 8, 2017, without having been asked to do so, Chief Waters of the North Carolina Wildlife Resources Commission ("NCWRC") unexpectedly sent me a copy of the report that had been prepared to summarize the results of the 1992-1996 Chattooga trout population study.

I was shocked to read the following revelation on the third page of the document: "*We thank Jeanne Riley, Monte Seehorn, and others of the U.S. Forest Service (USFS)...for their assistance in the collection of the fish population data. Without their help, it would not have been possible to complete the data collections, particularly on the Chattooga River.*" See p.3 of the 58 page report entitled "*EVALUATION OF WILD TROUT REGULATION WITH A NATURAL BAIT ALLOWANCE*, Final Report, Mountain Fisheries Investigations, Federal Aid in Fish Restoration Project F-24, James C. Borawa, Micky M. Clemmons, NCWRC, 1998 (otherwise placed into the administrative record being compiled for the revision of the LRMP for the NPNF as Floyd document "00-T Borawa and Clemmons 1998").

I do not know why Chief Waters unexpectedly and unilaterally took it upon himself to send me a copy of the report which the United States Forest Service could not find.

I cannot know why the Forest Service (when asked to publicize the report twice in early 2016) did not fix this critical gap in their administrative record by picking up the phone and asking the North Carolina Wildlife Resources Commission to send them a copy of the report.

What I do know is that this failure seems remarkably incongruent because on May 15, 2015 the Forest Service published an environmental assessment which cited to the results of that five year (1992-1996) trout population study to refute the allegations *which I had first made on November 5, 2014*:

On November 5, 2014 I had complained: “The administrative record is missing any official report documenting prior or current fish sampling counts by electrical shock to establish population trends. The record lacks any scientific monitoring report on the quantity of newly spawned or less than one year old wild brown trout to ascertain how well wild brown trout are reproducing on that part of the river. The failure to publish such monitoring trends, if they even exist, makes it impossible for the Forest Service to refute what a layperson, with any familiarity of the river, can see for themselves: significant ecological degradation appears to be occurring on the upper Chattooga river.” See page 205 of the *Chattooga River Boating Access, Environmental Assessment, USFS, May 15, 2015* (the "2015 EA")(otherwise lodged into the administrative record for the rewrite of the LRMP of the NNF as Floyd document E-1).

*Six months later*, on May 15, 2015, the United States Forest Service specifically responded to my complain as follows: “The Brown Trout is a non-native species managed by the North Carolina Wildlife Resources Commission (NCWRC) and maintained as a wild trout population within the upper Chattooga River (this reach of the river is not listed as hatchery supported waters). Electrofishing surveys were conducted within the upper Chattooga River from 1992 through 1996 by the NCWRC. Young-of-the-year Brown Trout densities appeared to be lower than other North Carolina trout populations during the same sampling period; however, a self-sustaining population continues to persist.” Id.

This three sentence response was eye opening for several specific reasons.

- 1) The Forest Service could have responded by using the next six months (between November 5, 2014 and May 15, 2015) to undertake any one of a number of scientific investigations.
- 2) The Forest Service could have quantified the sediment transport capacity of the river.
- 3) The agency could have measured how much of the interstitial spaces lying between the larger stream bottom substrates had been become filled in with sediment.
- 4) The Forest Service could have applied the *best available science* for determining whether or not the amount of bedded sediments being suffered on North Carolina’s headwaters

exceeds the minimum effects threshold for disrupting the *successful* spawning by mature trout and the early life cycle survival of their newly hatched alevin.

- 5) The Nantahala National Forest could have counted the densities and/or biomass of the wild trout populations (including the numbers of young-of-the-year trout compared to other age classes of trout) to refute my complaints about the lack of any scientific monitoring.

The Forest Service did not do so.

All of this fact and circumstance offers support for asserting that the Forest Service neglected to do so because the agency must have understood how capturing and reporting such kinds of scientific data would have spotlighted the agency's complete failure to place "*primary emphasis*" on "*protecting*" the single "*scientific feature*" (16 U.S.C. §1281(a)) which the Forest Service had identified as being unique to North Carolina's headwaters in its 1971 Chattooga Study.

It seems fairly obvious that you can't "protect" naturally reproducing trout populations from the adverse impacts of excessive bedded sediment if you never bother to do any scientific investigations.

"[I]t is one thing to give a word [e.g. "primary emphasis"] limited effect and quite another to give it no effect whatever." *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001).

The Forest Service's May 15, 2015 response was eye opening for several other reasons. *First*, the Forest Service asserts that the densities of young-of-the-year ("YOY") trout on these headwaters appeared to be lower than other trout streams inside the Nantahala National Forest during the 5 years of the 1992-1996 study—an admission which was entirely incongruent with how the Forest Service had described the baseline condition of these same trout populations in the 1971 Chattooga Study.

In fact, *this statement did not tell the whole truth.*

As the whole truth was revealed subsequent to May 8, 2017, the 1992-1996 study *unequivocally* documented how the North Carolina headwaters of the Chattooga River were sustaining "outstanding" densities and biomass of naturally reproducing populations of trout—comprised of a mix of all three species of trout residing in North Carolina (rainbow, brown, and brook trout).

The obfuscation created by this May 15, 2015 statement only became clear some time subsequent to May 8, 2017 when Chief Waters of the NCWRC *unexpectedly and without being asked to do so* sent me a copy of the 1998 report summarizing the results of the 1992-1996 trout population study. ("00-T Borawa and Clemmons 1998").

One thing is clear. The statements made on May 15, 2015 did not offer any specific evidence underlying the factual assertion that the 1992-1996 study had documented how the number of

young-of-the-year trout counted on the Chattooga proved less than those counted on other North Carolina streams during the same period of time.

The Forest Service never opined if the agency's unverified allegation about the Chattooga's comparatively lower young-of-the-year numbers could be traced back to a lack of suitable in stream habitat needed to enable successful spawning and the sufficient survival of newly hatched alevin.

Instead, the Forest Service created a vague but unverified impression that the reproductive suitability of the in stream habitat was generally far less than outstandingly remarkable. **The May 15, 2015 statement created a confusing false impression that some kind of trout habitat deficiency reconciled why the 1992-1996 study had allegedly documented a lower number of young-of-the-year trout on the North Carolina headwaters of the Chattooga River as contrasted against the densities counted on other *unspecified* North Carolina trout streams during the same period of time.**

Just as troubling, this carefully crafted statement did not explain the scientific significance why the number of young-of-the-year trout ("YOY") constitutes a *critically relevant* measurable metric used by fisheries biologists to assess the productivity of a trout stream.

YOY constitute fingerling fish that are presumed to be the offspring of the most recent spawning season. YOY are generally discussed in the scientific literature as trout of less than 100 mm in length although some biologists have used a larger cut off length in defining YOY.

A low count of YOY/per mile of river sampled or a low ratio of YOY/other age classes can warn of potential stream habitat problems or fisheries management issues.

**Consistently low counts of young-of-the-year trout can constitute the proverbial canary in the coal mine pointing to significant trout habitat problems—where habitat degradation is observed over a large enough segment of a trout stream.**

Subsequent to May 8, 2017, and after extensively studying a copy of the 1998 report prepared by the North Carolina Wildlife Resources Commission, I learned that the Forest Service had for some reason mischaracterized the *true health* of the young-of-the-year trout densities that had actually been documented by the 1992-1996 study.

*The May 15, 2015 statement misled in a second way:* the Forest Service attempted to forestall and to inoculate against any attempt by the public to use the unsubstantiated and generalized declaration about the comparatively lower young-of-the-year brown trout densities *as an admission* of the agency's continuing mismanagement of the trout habitat and trout populations residing on the North Carolina headwaters of the Chattooga River.

The Forest Service did so by asserting that although young-of-the-year Brown Trout densities appeared to be lower than other North Carolina trout populations during the same sampling period, nevertheless "a self-sustaining population continues to persist." See page 205 of Floyd document E-1.

*Third*, the 2015 EA also misled by tacitly declaring that all was well on the North Carolina headwaters of the Chattooga River by offering the following generalization: “Continued monitoring indicates that, while individual populations exhibit high annual variability in age class structure and biomass, overall trends in...populations across the Nantahala and Pisgah National Forests have remained stable during the last 13 years.” *Id.* at p.3.

The fact that densities of wild trout populations remained stable in May 2015 on other streams spread all over the Nantahala and Pisgah National Forest does not mean that the Chattooga’s trout densities have similarly remained stable.

*Fourth*, and most important, the May 15, 2015 statement admitted how the trout population densities and assemblage of age groups on North Carolina’s headwaters had not been monitored since 1996—almost twenty years in the distant past.

**Stated differently, the Forest Service had failed for more than twenty years to do the basic monitoring required to prove that the agency was indeed discharging its duty to place “primary emphasis” on “protecting” and preventing any non-temporary diminishment in the densities and/or biomass of the wild trout populations residing on the North Carolina headwaters of the Chattooga River.**

Because such periodic counts of trout densities were not undertaken, the Forest Service lacks the scientific foundation for denying how there has been measurable non-temporary diminishment in the densities of the Chattooga’s trout populations subsequent to 1996.

**The fundamental fact is the Forest Service failed to produce a copy of the 1998 NCWRC report summarizing the results of the 1992-1996 trout population study despite being asked to do so in two different requests for records made pursuant to the Freedom of Information Act in early 2016.**

The Forest Service **never produced this report** in early 2016, despite the fact that the Forest Service must have understood how this 1992-1996 count was the only source of objective data that had been compiled about a naturally reproducing population of trout which the law requires to be sustained in “outstanding” densities and/or biomass.

More importantly, in early 2016, I was pressing for these trout populations to be counted again in order to determine if the densities and/or biomass of trout had suffered a non-temporary and significant decrease since 1992-1996.

The agency **failed to produce a copy of this report** in response to a request for records originally made on January 4, 2016. The adequacy of the agency’s search for responsive records was appealed to the Chief of the United States Forest Service on February 24, 2016. On April 21, 2016 the Chief of the United States Forest Service produced *three* additional *critically relevant* records (inexplicably omitted from the originally document production)—However, the Chief’s office failed to locate and produce the 1998 report which the North Carolina Wildlife Resources Commission had compiled to summarize the *significance* of the trout population counts *which Forest Service employees had collected for five years between 1992-1996.*

The additional *three records tardily* produced by the Forest Service on April 21, 2016 disclosed critically relevant factual information which motivated me to submit a second FOIA request on April 22, 2016.

The eye opening nature of the Nantahala District Ranger's inability (or refusal) to locate and produce a copy of the critically relevant report that summarized the 1992-1996 study of trout on North Carolina's headwaters was ultimately made clear on December 6, 2016.

On December 6, 2016, the office of Deputy Chief Weldon, United States Forest Service issued an appeal decision with respect to a request for records originally submitted to the Nantahala National Forest on April 22, 2016 and subsequently appealed on September 8, 2016 to the Chief's office.

Deputy Chief Weldon , United States Forest Service, wrote the following discomfoting explanation: “ *...although the records you seek may have been previously obtained and utilized by the Forest Service, they were not under the control of the Forest Service at the time you submitted your FOIA request.*” See page 2 of Chief Weldon's final response to my FOIA appeal (italics added) (emailed correspondence otherwise lodged into the administrative record for the LRMP as document “M-4”).

**This explanation is remarkable: Why would the United States Forest Service spend five years collecting trout population data on the North Carolina headwaters of the Chattooga River but never keep a copy of the report prepared by the North Carolina Wildlife Resources Commission summarizing the significance of the trout population data collected?**

**What this history proves is that from May 15, 2015 until May 8, 2017, the Forest Service prevented the public from learning the whole truth about the outstanding results of the 1992-1996 study as well as how employees of the United States Forest Service (led by Mr. Monte Seehorn) had physically done all of the electro-fishing during the 5 year study.**

In fact, the statements made on May 15, 2015 created a false impression that the Forest Service had no involvement whatsoever in the 1992-1996 study of trout populations on the North Carolina headwaters of the Chattooga River.

Page 3 of the 1998 NCWRC report makes clear how it was the fisheries biologists employed by the United States Forest Service (in particular Mr. Monte Seehorn) who had collected the field data on the Chattooga and shared that data with the North Carolina Wildlife Resources Commission.

The Forest Service's *professed* admission that the agency had failed to keep a copy of this 1992-1996 report powerfully undercuts any claim that the Forest Service has complied with its duty to manage North Carolina's headwaters by placing “*primary emphasis*” on “*protecting*” the single “*scientific feature*” which the agency had described to Congress as being unique to the North Carolina headwaters of the Chattooga River.



A much more detailed summary of the fact and circumstances surrounding this obfuscation are detailed at pp. 28-39; pp.56-73; pp.74-88 of “*Floyd Notification USFS Nicholas 07292017 FINAL.pdf*” (otherwise placed into the administrative record being compiled during the revision of the LRMP for the NPNF as document N-13-A).

**This history (dating back to November 5, 2014) demonstrates how the Forest Service has slow-walked making any cooperative admissions about the visibly obvious and measurable problems being suffered on these headwaters: the closely correlated problems of excessive bedded sediments and *significantly* decreased densities and/or biomass of wild trout.**

**A careful review of this history creates the distinct impression that the agency wants to run out the LRMP clock on my agitations instead of earning accolades for having fixed a visibly obvious and non-temporary problem.**

Let’s review the recent timeline which leads me to this conclusion.

### **THE NEPA CONFUSION THAT THE AGENCY FOSTERED IN EARLY 2018**

Given the controversial nature of the degraded trout habitat allegations that I have been making since November 5, 2014, coupled with the special ORW classification and WSR designations that apply to the North Carolina headwaters of the Chattooga River (and Scotsman Creek), an objective person might have logically expected the Forest Service to be very careful in explaining and justifying management initiatives which might result in any incremental discharges of sediment into these headwaters since the stream bed habitat lacks any assimilative capacity to absorb any additional inputs of sediment.

Unfortunately, the Forest Service continues to disregard the legal significance of what happened when North Carolina reclassified these headwaters as Outstanding Resource Waters.

ORW reclassification established a narrowly defined subcategorized designated use of the ORW water quality of these headwaters—a use which is much narrower than the broad aquatic life use of water quality. Preserving an “outstanding” trout habitat and “outstanding” wild trout fisheries constitute the narrowly defined subcategorized use of the Chattooga’s ORW water quality.

Pursuant to the Clean Water Act, this narrowly defined subcategorized designated use of ORW water quality must not be allowed to suffer any non-temporary diminishment as a consequence of human related activities including managerial initiatives of the United States Forest Service.

Unfortunately, the Forest Service have chosen to be arbitrary and capricious in justifying management initiatives which pose significant risks of causing additional degradation of the Chattooga’s in stream habitat as well as that habitat’s biological capacity for sustaining outstanding densities and/or biomass of naturally reproducing populations of trout.

To press this point, in late 2017 and early 2018, the Forest Service chose to introduce and approve plans for conducting several closely related managerial initiatives which created confusion under the National Environmental Policy Act. Despite the closely related and highly

interdependent nature of these managerial initiatives, these initiatives weren't consolidated and analyzed within a single environmental assessment under the National Environmental Policy Act ("NEPA").

Instead the District Ranger went forward with one of these managerial initiatives without even undertaking any form of true updated NEPA analysis in consideration of the new information about the excessive bedded sediment problem being suffered on these headwaters.

The District Ranger chose to employ *categorical exclusion* to approve a plan to conduct a prescribed burn of a 722 acres of land being proximate to the Bull Pen Iron Bridge and lying along the steep and highly erosive slopes which entrench the west bank of the North Carolina headwaters of the Chattooga River.

This approach proved particular troubling to me because the agency did not make much of an effort to allow the public to become fully informed about what the agency wanted to do before the agency struck the match.

Despite my demonstrated concerns about the excessive bedded sediment problem being suffered on the Chattooga River, I did not receive any equivalent notification such as the letter which the District Ranger suggests was sent to those on the "district scoping list".

The District Ranger's failure to provide me with the equivalent notification provided to those on the "district scoping list" is even more remarkable because as you know I was then embroiled in a vigorous dispute regarding the processing of a request for records first made to your attention on September 22, 2017 pursuant to the Freedom of Information Act. I find it curious that my name did not exist on some list for requesting input about the plan to employ a *categorical exclusion* to approve the prescribed burning of 722 acres lying immediately adjacent and on the steeply entrenched west bank of the Chattooga River upstream of Bull Pen Iron Bridge.

I discovered the prescribed burn plan almost by accident—when I read about it on Wednesday, January 10, 2018 in the Crossroads Chronicle newspaper—a local newspaper distributed around Cashiers, North Carolina. This gave me just 8 days to try to gain an understanding of what was being proposed and to offer informed comments.

### **FLOYD JANUARY 18, 2018 OBJECTION TO PROPOSED PRESCRIBED BURN OF BULL PEN ROAD AREA**

On January 18, 2018 I emailed you an *11 page objection* to the District Ranger's stated plan to employ *categorical exclusion* to approve a plan to conduct *periodic* prescribed burns on an estimated 722 acre unit resting along the banks of the Chattooga River reaching roughly from the confluence of Cane Creek downstream to the Bull Pen Iron Bridge.

I specifically asked that this objection be placed in the administrative record being compiled during the revision of the Land Resource Management Plan for the Nantahala and Pisgah National Forests.

This objection complained about how poorly this planned burn had been detailed for the public's consideration—as well as how it appeared to have not been widely noticed to interested individuals such as myself.

More narrowly, I complained “the USFS proposes to conduct this burn without conducting a Clean Water Act antidegradation assessment or a NEPA examination of the negative impacts of the planned burn on the Chattooga's trout habitat and trout fisheries.”

“Burning alongside this stream should not be approved without first undertaking an intense assessment of whether or not the current condition of the river's trout habitat and trout fisheries have suffered non-temporary diminishment from the baseline ‘outstanding’ quality...that must be preserved and maintained...[as] designated uses of these Outstanding Resource Waters.”

I acknowledged “Prescribed burns can produce important benefits—but not when applied to lands sitting right next to an ORW wild trout stream that is already suffering from excessive embedded sediment.”

As you and I have discussed, I have personally conducted prescribed burns on stands of long leaf and yellow pine in blocks of as large as three hundred acres.

I reminded you “the Forest Service continues to ignore the reasons why the Chattooga was reclassified Outstanding Resource Waters in 1989. It wasn't to protect the general aquatic life habitat. It wasn't to protect the bear, turkey, or deer. *The reason why the Chattooga was designated ORW was to secure the highest intensity of antidegradation protection for its wild trout habitat and wild trout fisheries—each of which have been allowed to suffer substantial diminishment over the subsequent period of time.*” (italics in original).

I observed “...my bottom line is that collaboration starts with acknowledgement that we have a ...degraded trout habitat and trout fisheries [problem being suffered] over an extended reach of the [the Chattooga's] headwaters in North Carolina.”

Finally, I implored the agency: “Might I ask that you...cease obstructing my informational requests...which are isolated to gathering documented information and answers to factual questions about what the USFS has done or not done in managing the Chattooga River's trout habitat and trout fisheries.”

All of these comments and objections from January 18, 2018 were disregarded.

Instead, your staff proceeded to ignite the burn by indiscriminately dropping incendiaries from a helicopter and leaving the fire to go wherever the wind might take it all over the 722 acre unit resting along the banks of the Chattooga River. I remain unaware of any fire breaks having been established to fence off the fire in the event the wind picked up to drive the fire.

Instead, the agency's stated intention was to use the river as the fire break.

This burn plan ignored the fact that fallen trees frequently span from one bank to the other bank of the river—in very remote locations. The agency never considered the possibility that the fire might use this wood as a crosswalk to burn to the east bank of the river.

The agency never considered how fire might reduce or eliminate the number of pieces of large woody debris (“LWD”) which constitutes a critically essential part of reestablishing the Chattooga’s unique in stream habitat’s biological capacity for sustaining outstanding densities of naturally reproducing populations of trout.

Fortunately, despite the Forest Service’s stated intention, the fire failed to burn to the water’s edge.

However, the fire set by the Forest Service burned too hot in some locations. This excessive heat and flame height succeeded in scorching and killing mast producing hardwoods—the polar opposite result from what the Forest Service had promised the burn would achieve.

The 2018 burn managed to black scorch the bark of mast producing hardwoods 4 to 8 feet up the side of trees having a diameter of 16 inches or more.

In certain places, the fire caused mast producing trees to split and fall over. I took photos on April 15, 2018 to document how this helicopter ignited and grossly undermanaged fire had burned hot in different locations near Bull Pen Iron Bridge.

You and I later visited several of these locations near the Bull Pen Iron Bridge where this grossly undermanaged fire had been allowed to burn too hot.

Nevertheless, in October 2018, the District Ranger signed a Decision Notice approving the future use of prescribed burns on this fragile area while emphasizing the position that his decision was not subject to appeal pursuant to 36 CFR 215.9.

## **THE FEBRUARY 2018 ADMISSION OF SEDIMENT PROBLEMS ON SCOTSMAN CREEK**

During the same time that the Forest Service was rushing to conduct this spring 2018 burn adjacent to the Chattooga River under the thinnest disguise of public notification, the agency also set out to promulgate a Finding of No Significant Impact in connection with a more sweeping management initiative. This management initiative has been referred to as the Southside Project.

In February 2018, the Nantahala National Forest published a draft environmental assessment which described the Southside Project as consisting of eleven different management initiatives to be implemented over approximately 18, 944 acres scattered across Jackson County and Macon County. *Southside Project, Environmental Assessment*, Nantahala Ranger District, Nantahala National Forest, Jackson and Macon Counties, North Carolina (the “2018 EA”).

One of these Southside Project initiatives called for the felling of old growth trees located in Section 35-41 off the flanks of Brushy Mountain.

Brushy Mountain lies upgrade and immediately to the east of Scotsman Creek and north of Lower Fowler Creek—both tributaries emptying in the Chattooga River.

As you know, Scotsman Creek carries a water quality classification of Class C, trout waters, Outstanding Resource Waters (“ORW”) in combination with a *national* Wild and Scenic River (“WSR”) designation.

Scotsman Creek constitutes the only tributary to the main stem of the North Carolina segment of the Chattooga which carries ORW classification. This makes Scotsman Creek a unique tributary to the North Carolina segment of the Chattooga River.

In proposing the harvesting of timber off the flanks of Brushy Mountain (Section 35-41), which is situated upgrade and which lies within the watershed of Scotsman Creek and lower Fowler Creek, *the 2018 EA never discussed how the harvesting of this timber might cause suspended sediments to be carried into either Scotsman Creek or into lower Fowler Creek and ultimately into the Chattooga River—despite the fact that Scotsman Creek clearly lacks any assimilative capacity to absorb any additional inputs of sediment.*

If necessary to validate the accuracy of my assertion, please study the discussion about Stand 35-41 which was addressed on page 60 of the Southside Project environmental assessment. The 2018 EA also admitted that “most of the soils...(in the Southside Project area] have a moderate *to very severe erosion hazard rating.*” 2018 EA at p. 61 (italics added).

The 2018 EA boldly claimed “Several different measures of stream health are expected to show little change as a result of the proposed activities. These would include stream chemistry, stream temperature, *sediment accumulation*, and quantity of streamflow after storms. Implementation of past projects using the NC BMPs and FS design criteria has demonstrated that these practices are an effective means of controlling erosion and sedimentation from management activities.” 2018 EA at p. 63.

Nevertheless, the 2018 EA never specified how much sediment had already accumulated in Scotsman Creek, lower Fowler Creek or the main stem of the Chattooga River. Without a quantified baseline, it seems fiction for the Forest Service to assert that sediment accumulation is expected to show little change as a result of the timber harvest.

Despite all of these self-proclaimed predictions about the acceptable manageability of the environmental risks to streams like Scotsman Creek and lower Fowler Creek, nevertheless, the 2018 EA also incongruently and tersely admitted: “Three locations along [ORW] Scotsman Creek are *currently experiencing severe stream bank erosion*. Each site has high, steep banks which are contributing sediment to [ORW] Scotsman Creek. To stabilize these banks and improve the condition of in-stream pools, the Forest Service would construct tow-wood structures, log j-hooks, and a multi-stage flood plain.” See pp. 12-13(italics added)(See also Figure 3.7.1.1 on p. 65 of the 2018 EA). “Additionally, these eroding banks reduce habitat quality of pools. Each site is approximately 50 feet in length (linear length of stream bank) but actual length of ground disturbance may be approximately 100 feet when installing structures.

Approximately 100 feet (measured from top of bank perpendicular to stream flow) of material may need to be excavated at each site to construct toe-wood structures, log j-hooks, and multi-stage flood plain.” Id. at p. 64.

Stated differently, by explicitly admitting that Scotsman Creek was “experiencing severe stream bank erosion” (Id.), your staff tacitly admitted that there is an excessive accumulated sediment problem being suffered on the ORW waters of Scotsman Creek—something which I have been endeavoring since November 2014 to have the Forest Service acknowledge is being suffered up and down the main stem of the North Carolina segment of the Chattooga River.

However, this tacit admission (Scotsman Creek lacks any further assimilative capacity for tolerating additional discharges of sediment) was made broadly without your staff taking the next logical scientific step of *specifically* explaining or reporting to the public (1) how much sediment had filled in the interstitial spaces lying between the quartz cobbled substrates which characterize Scotsman’s stream bed, (2) whether or not the natural hydraulic sediment transport capacity of this small tributary had been overwhelmed, or (3) based on the *best available science*, whether or not the amount of sediment which had accumulated on the stream bed exceeded any reasonable minimum effects threshold for disrupting successful spawning by mature brook trout and the early life cycle survival of newly hatched alevin.

Curiously, and in stark contrast to the 2018 EA’s tacit admission of a problem, made just two months earlier, District Ranger Mike Wilkins (the responsible official who signed off on the 2018 EA)) had been quoted in the Cashiers, North Carolina based *Crossroads Chronicle* newspaper as *adamantly denying* the existence of *any kind of sediment problems* on the Chattooga River: “‘We don’t have a sediment problem out at the Chattooga in Jackson County...The Chattooga River is one of our healthiest rivers,’ Wilkins said. ‘It’s in good shape.’” “ ‘If [Floyd] feels there is a great amount of sediment in the stream, his issue is with private lands or whatever lands are above the national forest, as it is not a paddler or camper issue,’ Wilkins said, reiterating ‘We’re not concerned with the water quality of the Chattooga River. I think the water is in very good shape.’” *Crossroads Chronicle*, Dec. 20, 2017, at 7A, col.2-3.

This stark inconsistency constitutes one of the reasons why I asked you *four questions* about Scotsman Creek on October 2, 2019. I asked these questions in order to learn the factual details underlying the agency’s tacit recognition that the wild trout residing on Scotsman Creek are being forced to suffer the adverse reproductive consequences of an excessive bedded sediment problem. This tacit recognition occurred when the agency admitted: “Three locations along [ORW] Scotsman Creek are *currently experiencing severe stream bank erosion*.” See the 2018 EA at pp. 12-13(italics added).

Even more remarkable in this neglect, the 2018 EA did not provide the public with arguably the single most important piece of factual information.

*Your staff failed to inform the public how the deterioration of the bank along Scotsman Creek was so severe that the Forest Service would be compelled to obtain a Section 404 permit and a*

*Section 401 water quality certifications under the Clean Water Act before attempting to fix this problem.*

Had the 2018 EA revealed this *eye opening* need to obtain Section 404 and Section 401 regulatory approvals, I would have recognized the true legal significance of the passing mention of this bank erosion problem and I would have filed a formal objection to the Southside Project.

This constitutes another example how the Forest Service has repeatedly cherry picked what it chooses to reveal to the public about the degraded stream habitat conditions being suffered up and down the North Carolina headwaters of the Chattooga River.

Several other intervening events also motivated the *four straightforward* questions which I ultimately submitted to you on October 2, 2019.

Let me recount those events.

Subsequent to my having objected to the District Ranger's plan to conduct a prescribed burn along the steep and highly erodible banks of the Chattooga River, and during the time that the Southside Project was being studied, you suggested a meeting (between you, Regional Forester Arney, and myself) might prove helpful in trying to seek common ground regarding my concerns about excessive sediments having impounded in the main stem of the Chattooga River and Scotsman Creek. My expectation was that the Forest Service wanted to meet to discuss establishing some framework for working together to fix these correlated problems.

### **THE MARCH 27, 2019 MEETING REGARDING THE CHATTOOGA**

I had hoped that this meeting would confirm any mutual concerns that we might share about the degrading condition of the trout stream habitat on the North Carolina headwaters of the Chattooga River, as well as the concomitant decline in wild trout population densities which had been suffered.

Unfortunately, at the end of that meeting you asserted that I was the only person who had been complaining about how the excessive accumulation of sediments had degraded the Chattooga's biological capacity for sustaining outstanding densities and/or biomass of naturally reproducing populations of trout consisting of a mix of rainbow, brown, and brook trout.

You suggested a need to review the situation further in order to validate my stated concerns. As far as I can tell, the meeting which took place on Wednesday, March 27, 2019 did little to bring any relief to either the main stem of the Chattooga River or Scotsman Creek.

Ironically, precisely one year earlier, on March 27, 2018, I had been instructed by Ms. Michelle Aldridge (Planning & NEPA Staff Officer) to contact Mr. Matthew Bushman, (Nantahala Zone Botanist and Acting NEPA Coordinator) to gain greater insight *into why* the agency had chosen to place primary emphasis on undertaking an in stream habitat restoration project designed to halt severe stream bank erosion on Scotsman Creek.

A subsequent back and forth email conversation with Mr. Bushman produced scant additional knowledge *about why* the Forest Service was planning to attack the excessive bedded sediment problem taking place on Scotsman Creek while *entirely continuing to disregard the visibly more pronounced bedded sediment problem being suffered over a much larger reach of the main stem of the Chattooga River.*

On May 17, 2018, this email chain was placed into the administrative record being compiled during the revision of the LRMP as document N-35-B.

It was subsequently provided to you again on October 2, 2019 as document N-35-E.

This back and forth email dialogue concluded on April 16, 2018 @ 11:36 a.m. with Mr. Bushman asserting: “*You have all the documents we have on the Scotsman Creek project.* When the Forest Service looks at an analysis area the silviculturist develops a timber prescription and a list of needed timber management actions. During the 1-3 years prior to finalizing an Environmental Analysis (EA) for the public the fisheries biologist, wildlife biologist, botanist, and archaeologist will all look at the area to determine resource needs and write their sections of the EA. It was during this time frame and while doing a field review that our fisheries biologist identified and proposed this as a project to be considered in our analysis. *We do not know exactly when our fisheries biologist visited the site,* but he previously saw the erosion sometime during the spring of 2017.” See N-35-B at p. 1 (italics added).

Mr. Bushman’s April 16<sup>th</sup> email corroborates how neither the fisheries biologist *nor his superiors* (after discovering that severe stream bank erosion was occurring at 3 different locations on Scotsman Creek) ever took the next logical scientific step of *specifically* investigating (1) how much sediment had filled in the interstitial spaces lying between the quartz cobbled substrates which characterize Scotsman’s stream bed, (2) whether or not the natural hydraulic sediment transport capacity of this small tributary had been overwhelmed, or (3) based on the *best available science*, whether or not the amount of sediment which had accumulated on the stream bed exceeded any reasonable minimum effects threshold for disrupting successful spawning by mature brook trout and the early life cycle survival of their newly hatched alevin.

The fisheries biologist failed to do so despite presumably being fully aware how Scotsman Creek constitutes a part of the national Wild and Scenic Chattooga River system which also carries a Class C, Trout, ORW water quality classification.

Remarkably, (based on what Mr. Bushman had stated on April 16, 2018 about “You have all the documents that we have on Scotsman Creek”) the Forest Service’s fisheries biologist appears to have *never bothered to take any photographs documenting the degraded condition of Scotsman Creek* whenever the “fisheries biologist actually visited the site.” See N-35-B at p. 1

Consequently, to demonstrate how easy it would have been to fill in this logical gap in information, I undertook a photographic survey of the degraded stream bed conditions being suffered on Scotsman Creek. I did so on the afternoon of April 16, 2018—the precise same date that Mr. Bushman reported at 11:36 a.m. (“You have all the documents we have on the Scotsman Creek project”).



To conduct this photographic survey merely required approximately an hour and a half. This assertion of fact evidences how easy it is to access Scotsman Creek and how little time is required to survey the creek upstream of the culvert passing under Bull Pen Road to Forest Service property line—a distance of approximately 1 mile.

My photographs of the degraded condition of Scotsman Creek were emailed to you (and to Ms. Aldridge and Ms. Luczak) on May 17, 2018 with a specific request to be placed into the administrative record as documents N-35-C and N-35-D.

These photographs demonstrate how the bedded sediment problem being suffered on Scotsman Creek is *far more extensive* than what is tacitly admitted by the February 2018 EA.

Inexplicably, the fisheries biologist did not report this visibly pronounced problem on whatever date he actually visited the site. *Amazingly*, Mr. Bushman advised that nobody knew that date but that it could have been at any point time 1-3 years before the publication of the 2018 EA.

Neither has any record been produced evidencing how the fisheries biologist (Mr. Jason Farmer) undertook any scientific investigation to determine to what extent this admitted *severe stream bank erosion* had caused a non-temporary decline in the densities of wild trout residing on Scotsman Creek.

Making such a factual determination would seem highly relevant in applying and getting approved for the Section 404 permit and the Section 401 water quality certification which constitute admitted prerequisites to undertaking any attempt to fix the severe stream bank erosion occurring on Scotsman Creek.

My photographs demonstrate how non-temporary damage is being suffered over a much larger area of trout stream habitat than just the “three locations [which] are currently experiencing severe stream bank erosion.” 2018 EA at pp. 12-13.

In fact, the long neglected problem of excessive sediment in Scotsman Creek has allowed this blanket of sediment *to expand* and *to be discharged downstream* into the main stem of the Chattooga River.

Allen, if you would like, you, your staff, and I can hike into the river gorge to look together at the sediment impounded condition which also exists on the downstream portions of Scotsman Creek—something which your staff has apparently not yet done. I know a short cut. The lower most segment of Scotsman Creek drops quite precipitously over a waterfall and the amount of sediment which has accumulated at the base of that waterfall was quite remarkable the last time that I visited that remote and difficult to access out of the way location.

### **THE SUNDAY, JUNE 9<sup>TH</sup>, 2019 REQUEST FOR RECORDS UNDER FOIA**

After the meeting which took place on March 27, 2019 between you, Regional Forester Arney, and myself, I was under the impression that you would be following up to provide me with more information about what the agency planned to do (if anything) about my long stated concerns.

In fact, on April 3, 2019 you had emailed me at 3:06 p.m. to advise:

“Thanks for the conversation last week. Much appreciated. *I have reviewed the pictures in the NOI and fully agree there is sediment in the creek...* We discussed sampling the river and what process we could use. I believe you said there is no need to develop a method as you have already provided the research/science. I need to know if this is the research paper you are referring to: Protecting sediment-sensitive aquatic species in mountain streams through the application of biologically based streambed sediment criteria - Author(s): Sandra A. Bryce, Gregg A. Lomnicky, and Philip R. Kaufmann...If this is not the paper you referred to, please forward the one you mentioned. Once I have the correct paper, I plan on having this reviewed by specialists (likely with the Southern Research Station) with expertise in this type of research to determine applicability for the Chattooga... You expressed some concerns about me wanting to validate the process. I just want to get the research and associated sampling methodologies in front of someone that can answer the question, “Will this process will work in NC or are the variables different; if so, what are they?” I feel like we need an answer on this before we can develop a plan of action going forward. If we are going to implement a process proposed by a partner in a sensitive system, it needs validation. The process you have identified seems to make sense to me, but I’m neither a biologist nor a researcher... This validation does not mean we cannot move the rock forward. In the NOI you asked for a candid and continuous dialogue – I’m willing to engage and seek answers. I would value the opportunity to coordinate a meeting with biologists to assess the issues you brought forward as well as the process to remove sedimentation... I do not discount what you tell me and I believe, based on what you have shared, we have things to address. I value the relationship we have developed... If you would, please confirm I’ve got the correct paper. I have already contacted the Southern Research Station to solicit their involvement in the review of the paper and field methodologies. I will update you on timelines once I have the paper in review so we can discuss future steps... Bill, thanks for your time and the cornbread. Allen.” On October 29, 2019, this email chain (italics added) was lodged into the administrative record being compiled during the revision of the LRMP for the NPNF as document “Q-5 Nicholas email 04032019 re validation of sediment impacts on Chattooga trout.pdf”.

I felt encouraged that the United States Forest Service (via your efforts) and I were about to come together *voluntarily* to start pushing this rock back up the hill—and to finding the right mix of private/public funding needed to achieve this goal.

You appeared to be steering this conversation in a positive direction.

On April 19, 2019 @ 6:57 a.m., I emailed you to provide you with additional scientific information and context for working with the US EPA and the state of North Carolina in pushing this restoration project forward: (1) “Extracted Pages for Fasselt\_P-7 Chattooga River Sept 2016 Study Results FINAL.pdf”; (2) “00-T Borawa and Clemmons 1998.pdf”.

I also directed you to pay close attention to the findings of three specific scientific studies pertaining to the adverse impacts of sediments on salmonids: (1) 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); (2) 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 (June 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.”); and (3) 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).

On May 20, 2019, in order to assist you in pushing this process forward, I emailed you a copy of the trout habitat assessment documents which had been prepared by NC DEQ in September 2016.

As you might recall, in September 2016, the state of North Carolina conducted the first count of trout since Mr. Monte Seehorn and other Forest Service employees undertook an extensive five year trout population study between 1992-1996.

The September 2016 trout population study validated the seriously diminished trout populations which now exist on these headwaters. A summary of the results of that study have been placed into the administrative record being compiled during the revision of the LRMP for the NPNF as document “P-7 Chattooga River Sept 2016 Study Results.FINAL.pdf”.

The September 2016 Chattooga River trout population study was conducted on 8 different 600 foot sampling sites spread out over 2 miles of the river upstream of the Bull Pen Iron Bridge—at 8 locations whose selection had been vigorously debated and agreed to by NC DEQ and myself.

These 8 sample sites rest within the reach of river where the problem of excessive sedimentation is most measurably pronounced.

Most distressingly, the September 2016 Study captured just 26 *young-of-the-year* brown trout despite *actually electrofishing almost a mile of water* spread out over 8 different six hundred foot sample sites spread out over a 2 mile reach of the river—a remarkably low number of YOY given that the river’s designated uses of ORW water quality is to preserve the “outstanding” trout habitat and “outstanding” wild trout fisheries. See the table set forth in P-7 at p.9.

As you know young-of-the-year trout constitute a classification used by fisheries biologists to describe fingerling fish that are presumed to be the offspring of the most recent spawning season. YOY are generally discussed in the scientific literature as trout of less than 101 mm in length although some biologists have used a larger cut off length in defining YOY.

Lower comparative counts of young-of-the-year trout often constitute an early warning sign of density independent habitat problems—especially where in stream habitat is plagued with

excessive embedded sediment. Persistently low counts of young-of-the-year trout constitute a canary in the coal mine.

This September 2016 trout population study further documented a far less than outstanding ratio of YOY/other age classes of brown trout of just 26/155 or 16.8%.

In stark contrast, the *five year* study of trout populations on these headwaters (conducted by Forest Service personnel in 1992-1996 ) had reported much higher numbers of YOY brown trout *at each* of the two sampling sites which were electro-fished.

At Site 2, (located just upstream of the mouth of Cane Creek tributary) YOY brown trout were reported as follows: 123 in 1992, 45 in 1993, 18 in 1994, 113 in 1996. No sampling occurred at Site 2 in 1995 because of high water condition. See document "00-T Borawa and Clemmons 1998.pdf" at p. A-5, which was sent to you via email (on Friday, July 28, 2017 @ 3:54 p.m.) and which I asked to be placed into the administrative record being compiled during the revision of the LRMP for the NPNF.

At Site 1, (located just downstream of the mouth of Scotsman Creek) YOY were reported in even more *outstanding numbers*: 372 in 1992, 254 in 1993, 51 in 1994, 242 in 1995, and 158 in 1996. Id

Amazingly, the combined total number of *YOY* aged fish captured during the 1992-1996 Study at Site 1 and Site 2 *was higher in every year* (except 1994) than the combined total number of trout *of all age classes* captured during the September 2016 study at 8 different 600 foot sample sites spread out over an approximate 2 mile reach of water.

This numeric delta convincingly evidences the non-temporary decline in trout population densities which have been suffered on the North Carolina headwaters of the Chattooga River. On May 20, 2019, I shared with you the habitat information excerpted from the 2016 trout population study. I remained under the impression that you would correspond about what had physically been done or what was being done to investigate the well documented declines in the trout populations on these headwaters and the excessive bedded sediment problem.

Having not heard anything from you, I telephoned your office in early June, 2019. We had an abbreviated call which was cut short by your need to attend a medical appointment. You were not clear about what was being done to address the problems being suffered on these headwaters. You spoke generally about making the Chattooga's watershed a national priority watershed.

During that brief telephone call, you repeated your prior cautionary statement that you were having a difficult time finding anybody other than myself who believes there is a bedded sediment problem down on the Chattooga's headwaters in North Carolina. You mentioned Trout Unlimited. This echoed what you had stated subsequent to our March 27, 2019 meeting.

Consequently, I emailed you on June 9, 2019 to see if the conversation could be restarted by summarizing the science underlying my concerns and by asking for additional information.

As I explained on Sunday, June 9, 2019 @ 1:23 pm, “I presume that you will correspond with me (as you indicated...[during] our phone conversation this past week). However, I wanted to make sure that I obtain as much information as possible about your efforts to validate the problems that are taking place on the Chattooga’s headwaters. Hence, I am submitting a FOIA [Freedom of Information Act] request for records.”

I asked you to “please share electronic copies of any and all records and documents and emails created, evaluated, read, or reviewed by any official or employee of the United States Forest Service (subsequent to Tuesday, March 26, 2019) and which pertain to the following narrow subject matter: What Regional Forester Arney, Forest Supervisor Nicholas, or any staff members of the USFS, have been doing (subsequent to Tuesday, March 26, 2019) to investigate my stated concerns about the loss of trout habitat and the non-temporary declines in the densities and/or biomass of wild trout populations on the North Carolina headwaters of the Chattooga. This includes back and forth emails communicating those investigations.”

Having received no response from you, on Tuesday, June 11, 2019 @ 7:13 a.m., I forwarded a copy of my email containing the FOIA request to your staff at the Nantahala National Forest: Ms. Milholen, Ms. Luczak, and Ms. Aldridge.

This FOIA implicitly emphasizes the urgent need for the agency to disclose *the factual information* about what it has been doing to investigate the excessive sediments and decreased trout population densities being suffered up and down the North Carolina headwaters of the Chattooga River.

Unfortunately, neither you nor anyone else voluntarily responded to me about what had been done or what might soon be done to investigate my stated concerns about the loss of trout habitat and the non-temporary declines in the densities and/or biomass of wild trout populations on the North Carolina headwaters of the Chattooga.

Instead, the Nantahala National Forest waited an entire day (until June 12, 2019 @ 8:45 a.m.) before *inexplicably* pushing my June 11, 2019 FOIA request over to Mr. Doug Meloche at the Regional Office in Atlanta

### **THE PREJUDICIAL IMPACT OF THE FOREST SERVICE’S CONTINUING UNSUBSTANTIATED ASSERTION OF AN UNPAID FOIA LIABILITY**

On June 12, 2019 @ 3:13 p.m. Mr. Meloche emailed me to offer a carefully worded defense of the Forest Service’s refusal to share *fundamentally critical factual information* during the revision of the LRMP.

Mr. Meloche’s communication defaulted to the agency’s erroneously asserted legal claim that I owe unpaid FOIA processing fees in connection with a request for records originally submitted to your attention on September 22, 2017.

Mr. Meloche's email never addressed how the Forest Service has continued to push this long disputed claim *without ever* producing a shred of evidence *demonstrating when and to whom I agreed to be held liable* for any amount of FOIA processing fees.

Similarly, Mr. Meloche's email overlooked what Deputy Chief Weldon, National Forest System specifically admitted while rejecting my administrative appeal of the agency's refusal to grant me a fee waiver in connection with my September 22, 2017 FOIA.

Deputy Chief Weldon had stated: "Please note that fee waiver requests are evaluated on a case-by-case basis. Your being granted a fee waiver in the past does not guarantee you will receive one in the future. *Similarly, this denial of a fee waiver does not bar you from seeking and being granted a fee waiver in conjunction with future FOIA requests.*" See pp. 1-2 of the USFS final response to FOIA appeal assigned tracking number 2018-FS-R8-00827-F which was sent to me via email on August 9, 2018 @ 2:43 p.m. by Mr. Harald Fuller-Bennett (USFS) (*italics added*).

My long held position remains that the United States Forest Service made a unilateral *decision* to go looking for the records requested on September 22, 2017 and to do so *self-servingly* prior to the processing of my request for a waiver of any fees pursuant to the public interest exception spelled out at 5 U.S.C. §552(a)(4)(A)(iii).

It remains my contention that the agency wanted to make sure that there wasn't some *embarrassing subject matter content contained* within any prospective back and forth communication that might have taken place between senior Forest Service officials and representatives of American Whitewater or other whitewater paddling enthusiasts.

There is no need today to unravel all the facts demonstrating how the agency has systematically violated my rights under the Freedom of Information Act. Much of that has already been laid out in the administrative appeal that was filed with the Chief's office back on February 20, 2018 and which was ultimately rejected by Deputy Chief Weldon in August 2018.

**However, I would also stress how the plainly stated protocol (according to the Forest Service Guidelines) is to suspend the processing of a FOIA request until the requester explicitly expresses an agreement to be held liable for all or some finite amount of fees—not to go ahead and process a FOIA where the requester has opted to exercise their rights to appeal the denial of a fee waiver request—an appeals process which did not reach a final conclusion until August 2018.**

Furthermore, I would stress that any future challenge of Deputy Chief Weldon's curious rejection of my rights would be conducted under the *de novo* standard of review.

Consequently, I would respectively demand that the United States Forest Service comply with my prior requests that the agency pinpoint for me when and how I specifically agreed to be held personally liable for any records search undertaken by the United States Forest Service—regarding the request for records which was first submitted to your attention on September 22, 2017.

On June 12, 2019, I reiterated to you and Regional Forester Arney: “I do not believe that I ever explicitly or implicitly agreed to pay anything for the 195 pages of un-redacted and redacted records that the Forest Service went looking for and which you ultimately recovered—much less to have the FOIA processed. In fact, I repeatedly stated my intention that I would not pay any fees. Where is the contract that your invoice alleges that I entered into with the USFS?...Could you please cite when I agreed to assume liability for the processing of my FOIA request of September 22, 2017?” Please see document Q-2 at pp.1-2 placed into the administrative record on October 28, 2019.

It remains my contention *today* that I have never agreed that the agency should undertake any search for records *unless and until* I was granted my request for a waiver of any FOIA related fees based on the public interest exception spelled out at 5 U.S.C. §552(a)(4)(A)(iii).

*If I am mistaken, or if my records are incomplete in this regard, please kindly provide me with the clarifying record upon which the Forest Service relies to insist that I accepted personal liability for the agency going ahead and processing a search for the records first requested from you in an email clock stamped on September 22, 2017.*

My denial of any personal liability was vigorously defended when Ms. Sara Sullivan, Acting Assistant Director, ORMS-FOIA/PA wrote to me via an email clock stamped on June 20, 2019 @ 10:16 a.m.

The facts surrounding this long disputed claim (as I understand them) were detailed in a 12 page letter (dated June 21, 2019) which was emailed to Ms. Sullivan on June 21, 2019 @ 11:40 a.m. with copies directed to Chief Christiansen, Regional Forester Arney, yourself, and Mr. William Low, Acting Executive Assistant to Chief Christiansen. This correspondence has been incorporated into the administrative record being compiled during the revision of the LRMP for the NPNF as document Q-2-B.

My June 21, 2019 correspondence with Ms. Sullivan took exception to the vaguely implied assertion that my requests were not being properly submitted in compliance with the FOIA and that I had somehow created confusion which should excuse the Forest Service in some unstated way.

To get to the substantive nature of the dispute I reminded Ms. Sullivan: “Clearly, the public has a right to know how communications between American Whitewater and USFS officials might have encouraged the failed management of the Chattooga’s headwaters in North Carolina—how those communications may have encouraged the USFS to neglect the nondiscretionary [d]uty of placing primary emphasis on protecting the outstanding quality of the in stream trout habitat and that habitat’s biological capacity for sustaining outstanding densities and/or biomass of naturally reproducing populations of trout on the North Carolina headwaters of the Chattooga River.” See Q-2-B at p. 3.

Ms. Sullivan was advised of the time line associated with the way in which my September 22, 2017 FOIA was handled—including my insistence that the Forest Service has not provided a shred of evidence that I ever agreed to be held personally liable for any records that the agency

might find. The assertion that I owe anything to the Forest Service further overlooks the fact that the agency's own regulations specify that no charges are to be assessed for *the first two hours of research and the first 100 pages of copying costs*. See Q-2-B at p. 7.

In addition, Ms. Sullivan was advised on June 21, 2019 of my contention that the Forest Service had no legal entitlement to impose any FOIA processing fees because the agency had failed to comply with the statutory 20 day time limit specified in 5 USC 552(a)(6)(A) and therefore the agency was precluded from charging me any fees whatsoever pursuant to 5 USC 552(a)(4)(A)(viii)(I).

Neither Ms. Sullivan nor anyone else *ever* responded to my June 21, 2019 letter.

The agency continues to engage in a pattern and practice of depriving me of my rights by not providing me with a shred of evidence of when, how, and to whom I agreed to become personally liable for the agency's unilateral decision to go looking for the records first requested on September 22, 2017.

Let me reiterate: please immediately provide me with the clarifying record evidencing when, how, and to whom I agreed to be held personally liable for the actions of Mr. Meloche (and/or as applicable) Mr. Peter Gaulke, Mr. Arney, (or some higher up Forest Service official) for having made a *unilateral* decision to move forward with processing the September 22, 2017 request for records despite my insistence that I was entitled to a waiver of all FOIA processing fees based on the public interest exception of 5 U.S.C. §552(a)(4)(A)(iii).

My administrative appeal of my entitlement to a fee waiver was submitted to the attention of then Chief Tony Tooke on February 29, 2018—who prior to becoming the Chief of the USFS on September 1, 2017 had served as the Regional Forester for the Southern Region.

### **CHIEF TOOKE'S UNIQUE INSTITUTIONAL KNOWLEDGE ABOUT THE MANAGEMENT AND ADMINISTRATION OF WILD AND SCENIC RIVERS**

As an additional factual matter, prior to becoming the Regional Forester for Region 8, Mr. Tooke had served in the headquarters where he was the Associate Deputy Chief for the National Forest System *with primary oversight responsibility for Wilderness and Wild and Scenic Rivers*.

Mr. Tooke also had responsibility as Associate Deputy Chief for implementing the new 2012 Planning Rule as well as for improving implementation of the National Environmental Policy Act ("NEPA").

Mr. Tooke is presumed to have played a key decision making role in the development and adoption of a new 2012 Planning Rule which has largely eliminated the duty to monitor management indicator species ("MIS") on our National Forests.

Monitoring management indicator species had previously been used as an enforceable "standard" for evaluating the relative success or failure of individual national forests in doing what the



forest's Land Resource Management Plan had promised the public would be done in managing the individual forest.

Wild trout constitute one of the most critical management indicator species on trout streams under the current LRMP for the Nantahala National Forest—most importantly on the Wild and Scenic Chattooga River's headwaters.

Given Mr. Tooke's prior headquarters based jobs, and in particular his supervision of Wilderness and Wild and Scenic Rivers, the public has a need to verify to what extent Mr. Tooke played a role in the development of a January 2012 headquarters cobbled together solution for an essentially political dispute regarding the legality of a single component of the LRMP for the Sumter National Forest.

This politically driven controversy raged from April 2005 until January 2012.

As you might know, in April 2005, the Sumter National Forest and the then Regional Forester for the Southern Region desired to continue enforcing 36 C.F.R. §261.77, 43 Fed. Reg. 3706, January 27, 1978 on the national Wild and Scenic Chattooga River—a properly promulgated regulation which had first been put in place in 1978 and which indirectly prohibited whitewater paddling enthusiasts from pursuing their recreational passion on the North Carolina headwaters of the Chattooga River.

From April 2005 to January 2012, the headquarters staff of the United States Forest Service systematically encouraged the Regional Forester and the Forest Supervisor for the Sumter National Forest to provide special accommodation for whitewater paddling enthusiasts despite the fact that this recreational user group lacked any legal standing to demand any form of accommodation—and certainly not the creation of a recreational use entitlement.

It was over this same period of time that Mr. Tooke held a Forest Service headquarters position with *primary managerial oversight responsibility for Wilderness and Wild and Scenic Rivers*.

From 2015 until September 1, 2017, during his tenure as Regional Forester for the Southern Region (R8), Mr. Tooke is presumed to have had occasion to become aware of my numerous FOIA requests pertaining to the Chattooga River.

Based on letters received in response to my prior FOIA requests (correspondence which had been signed by staff on behalf of Regional Forester Tooke) there is every reason to believe that Mr. Tooke was aware of my persistent inquiries about the degrading condition of the trout habitat and decreased densities of wild trout on North Carolina's headwaters—inquiries which had begun on November 5, 2014—the exact same date that the Fourth Circuit Court of Appeals had made clear to the Forest Service 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).

Similarly, during Mr. Tooke's tenure as the Regional Forester for Region 8, the Stakeholders Forum for the Nantahala and Pisgah Plan Revision was organized to provide special input into the rewrite of the LRMP for the Nantahala and Pisgah Forests.

The Stakeholders Forum constitutes a small group of individuals and organizations, who guided by the National Forest Foundation, have been provided with special access to Forest Service information and the opportunity to provide detailed input into the LRMP planning process—a level of access not otherwise made available to other interested members of the public like myself.

The Stakeholders Forum for the Nantahala and Pisgah Plan Revision held its first organizational meeting on September 23, 2015. The whitewater paddling advocacy group, American Whitewater, was given a seat on the Stakeholders Forum.

Mr. Tooke is understood to have played a not-insignificant role in the appointment of at least one of the members of the Stakeholders Forum for the Nantahala and Pisgah Plan Revision.

Mr. David Whitmire (who in 2015 owned and operated Headwaters Outfitters on the North Fork of the French Broad) has stated to me that he was personally asked by then Regional Forester Tooke to become a member of the Stakeholders Forum as the leader of the Fish and Wildlife Conservation Council. Mr. Whitmire stated to me that Mr. Tooke wanted Mr. Whitmire to participate in particular because Headwaters Outfitters (which is physically located on the bank of the North Fork of the French Broad) serves both the recreational interests of whitewater paddling enthusiasts as well as trout fly fishing enthusiasts.

Clearly, before becoming elevated to Chief of the United States Forest Service, Mr. Tooke had a special background and headquarters based understanding of Wild and Scenic Rivers. This background and knowledge augurs why I have a need to find out to what extent Chief Tooke had become informed about the controversial issues impacting the North Carolina headwaters of the Chattooga River during his tour as the Regional Forester for the Southern Region.

It seems implausible that Mr. Tooke, while serving as the Regional Forester for Region 8, would have been entirely unaware of my persistent allegations that the United States Forest Service has improperly managed the North Carolina headwaters of the Chattooga River by misplacing primary emphasis on promoting the interests of whitewater paddling enthusiasts instead of properly discharging the agency's non-discretionary duty of placing primary emphasis on protecting and enhancing the trout habitat and wild trout populations that now only manage "to persist" on these headwaters.

All of this factual history explains why there was a compelling public interest on September 22, 2017 (pursuant to the FOIA's fundamental public policy purpose of preserving an *open and transparent government*) for me to ask the Forest Service to provide me with the requested records free from any FOIA processing fees.

Among other objectives, my September 22, 2017 FOIA sought to determine the depth of Mr. Tooke's tacit involvement, or any indirect influence Mr. Tooke's promotion to the Chief of the

United States Forest Service may have had on his subordinates, in shaping the specific content of the following adverse decision emailed to me on September 6, 2017: “Regarding management of the Chattooga River, the Forest Supervisor has the discretion to determine the scope and scale of the revised Forest Plan. The Nantahala, Sumter, and Chattahoochee NFs completed an environmental analysis of management of the Chattooga River in 2012, and there is not a need to revisit the analysis at this time. The Forest has publically stated that we will not be revisiting the management direction for the Chattooga River as part of this plan revision. The revised forest plan for the Nantahala and Pisgah NFs will include management direction for the Chattooga River consistent with Amendment 22 (Chattooga Wild and Scenic River) and will include forestwide direction to protect and maintain water quality as well as provide protection for the outstandingly remarkable values of all designated Wild and Scenic Rivers on the Nantahala and Pisgah NFs. Any updates to the management of the Chattooga River will not be considered until after the plan revision, in subsequent analysis, and after several years of monitoring data is available to inform that analysis.” See document N-29 at p. 1 which was previously placed into the administrative record being compiled during the revision of the LRMP for the NPNF on May 17, 2018.

Ms. Luczak’s September 6, 2017 message was delivered just 5 days after Mr. Tooke left his position as the Regional Forester for the Southern Region to become the Chief of the United States Forest Service.

I look forward to having an opportunity to develop a complete administrative record which will inform the public about the depth of any involvement that Mr. Tony Tooke may or may not have played, in how my September 22, 2017 FOIA has been handled—or how his promotion to the Chief of the United States Forest Service may have influenced how my request was processed by subordinate Forest Service officials.

Given the intensity of my past information gathering efforts, the pointedness of my allegations about the Forest Service’s mismanagement of the North Carolina headwaters of the Chattooga, and the agency’s sudden discovery that my information inquiry of September 22, 2017 was not deserving of a waiver of all FOIA fees based on the public interest exception, the agency has created an unsettling impression that the Forest Service has made a top down systematic decision to prevent me from gathering any additional information during the LRMP revision.

Why the agency has taken this approach remains baffling to me given my stated desire to work tirelessly in finding private funding to supplement the public funding needed to fix this problem,

If the United States Forest Service can provide me with the relevant documentation (e.g. any admission made by me in an email, correspondence, appeal, etc. evidencing my expressed acceptance of personal liability) this would eliminate any confusion that I might be under with respect to what actually happened.

Otherwise, if the Forest Service can’t provide me with that documentation, the Forest Service should stop leveraging an incorrect statement of fact as a pretense for depriving me of my rights to participate fully in the revision of the LRMP for the NPNF.

The simple fact is the Forest Service never responded to my June 9, 2019 request to be provided with the records detailing the *specific facts about what* Regional Forester Arney, yourself, or any Forest Service staff members had already done to investigate the loss of suitable trout habitat and the non-temporary declines in the densities and/or biomass of wild trout populations residing on the headwaters of the Chattooga River or the Scotsman Creek tributary.

This claim about an unpaid FOIA obligation has now resurfaced again in connection with the four questions that I submitted on October 2, 2019.

## **JULY AND AUGUST 2019 COMMUNICATIONS WITH THE FOREST SERVICE**

On July 25, 2019, the Nantahala National Forest was provided with an 11 page annotated set of photographs (Floyd document P-14 Minor Pool Sediment Comparison May 31, 2019 vs June 29, 2015) documenting: (1) the non-temporary nature of the excessive bedded sediment problem being suffered on North Carolina's headwaters; (2) how somebody has been using a chain saw to cut up pieces of Large Woody Debris ("LWD") in front of the massive log jam located at 35.033897, -83.128544, and (3) how the stream bed substrates which are suitable for trout reproduction are being rendered unusable because they are being smothered by massive amounts of sediment.

The set of photos provided to you on July 25, 2019 documented how a minor pool (located at 35.035512, -83.127586) had shown no positive natural abatement in the amount of excessive sediment which was documented as being present in this pool on May 31, 2019 @ 6:18 p.m. as contrasted against the amount of excessive sediment which was documented as being present on June 29, 2015 @ 3:12 p.m. See P-14 at pp. 6-11.

Subsequently, on August 14, 2019 @ 9:06 p.m., I detailed for you how the redevelopment of the High Hampton golf course had already been cited for a violation of federal law under the Clean Water Act, Section 301( 33 USC 1311).

On August 16, 2019, I shared with you a copy of the comments that I had submitted to the North Carolina Department of Environmental Quality objecting to any issuance of a Section 401 Water Quality Certification in connection with the High Hampton golf course redevelopment project, etc. *unless and until* the degraded trout habitat problem being suffered downstream has been resolved. This document was subsequently placed into the administrative record being compiled during the revision of the LRMP as document Q-3.

On Thursday, September 5, 2019, a public hearing was held pertaining to the possible issuance of a Section 401 water quality certification for the Cashiers Canoe Club project.

I attended but I did not bump into anybody from the United States Forest Service. New information was disclosed during this hearing about the possibility that the sediment impounded in the lake might contain pollution from a former plastic molding company which had previously operated just upstream of Cashiers Lake.

The Cashiers Canoe Club project calls for dredge and fill activities in and around Cashiers Lake (which constitutes an impoundment of the Chattooga's headwaters).

Public comments pertaining to the requested issuance of a Section 404 dredge and fill permit and Section 401 water quality certification were due by 5:00 p.m. on Monday, October 7, 2019.

I submitted comments objecting to the issuance of the requested permits. I have placed those comments into the administrative record being compiled during the revision of the LRMP for the Nantahala and Pisgah Forests as document Q-4.

Based on what appears on NC DEQ's website, it appears the United States Forest Service never filed any comments regarding the Cashiers Canoe Club project subsequent to the Public Hearing held on September 5, 2019.

Did the Forest Service take a position on whether or not the Section 404 and Section 401 permits should be issued for the Cashiers Canoe Club project?

## **MY OCTOBER 2<sup>ND</sup> FACTUAL INQUIRIES**

On October 2, 2019, I submitted four questions in order to learn the *specific facts about what* Regional Forester Arney, yourself, or any Forest Service staff members had already done to investigate the loss of suitable trout habitat and the non-temporary declines in the densities and/or biomass of wild trout populations residing on Scotsman Creek.

Back on October 2<sup>nd</sup>, three of those four questions also incorporated a request to be provided with "all" of the supporting documents and records which might inform on what had been done by the agency to investigate (1) the current sediment transport imbalance being suffered on Scotsman Creek; (2) all documents and records associated with any study of trout populations on Scotsman Creek; (3) all documents and records associated with any effort made by the Nantahala National Forest to apply the *best available science* for recognizing when fine particle sized sediments fill in the interstitial spaces lying between the larger stream bed substrates in quantities which exceed any reasonable minimum effects threshold for disrupting successful spawning by mature salmonids as well as the early life cycle survival of newly hatched alevin.

To be transparent, one of the reasons why I submitted this information request was to try to figure out why the United States Forest Service has gotten so excited about fixing 3 erosion sites located on Scotsman Creek *while entirely disregarding the long suffered excessive bedded sediment problem known to be occurring on the main stem of the Chattooga River.*

On October 23<sup>rd</sup>, Ms. Luczak provided the Forest Service's response to my October 2<sup>nd</sup> information inquiry by asserting: "We have provided answers to your questions to the best of our knowledge."

Despite this statement, the Forest Service has not *provided on point answers* to two of my four questions—much less a response evidencing even the slightest degree of *scientific curiosity* about measuring the adverse impacts that this accumulated sediment is having on both the wild

trout populations in Scotsman Creek as well those trout populations *merely* managing to persist in the downstream main stem of the Chattooga River.

The United States Forest Service has yet to *explain specifically why it is appropriate* to consume any financial resources and personnel time on Scotsman Creek *while entirely refusing to do anything to abate the visibly obvious and more pervasive excessive bedded sediment problem being suffered on the main stem of the river*. This visibly obvious problem of excessive bedded sediments is being suffered over a comparatively much larger reach of the main stem of the Chattooga River upstream of Bull Pen Iron Bridge—and also now downstream of the Bull Pen Iron Bridge.

As documented for you in my July 29, 2017 and September 22, 2017 Notifications, there are multiple chronic erosion sites which have been created subsequent to 2012 by whitewater paddlers on the banks of the main stem of the Chattooga River upstream of Bull Pen Iron Bridge.

These erosion sites have been created by paddlers “seal launching” into the river, and by paddlers evacuating and portaging around potentially life threatening stream wide strainer logs.

*These paddler created erosion sites constitute point sources where sediments are being channeled into a body of water that lacks any assimilative capacity to absorb any additional inputs of sediment.*

These paddler created erosion sites did not exist prior to the introduction of creek boating in 2012. This can be substantiated by sworn attestation as further validated by the biophysical inventory which the Forest Service conducted in 2007.

All of this was discussed in detail at pp. 44-50 of my Notification dated July 29, 2017 which was placed into the administrative record being compiled during the revision of the LRMP as document N-13-A.

As I advised you on July 29, 2017: “the inescapable need to seal launch into the Chattooga has unlawfully caused the river bank to collapse at Boater Created Erosion Site B-5 and Boater Created Erosion Site B-5-B. To see photographs of these erosion site please reference Floyd document ‘00-N Evidence of Creek Boating Caused Sedimentation and Destruction of the Trout Buffer.’ This collapsed bank (inside North Carolina’s trout buffer) and other similar point sources of pollution did not exist before creek boating was introduced in 2012. We know this to be true because the Forest Service inventoried all erosion sites in 2007—and *none of these boater created erosion sites existed*. These chronic sources of sedimentation have been developed by boaters (1) at those locations where life threatening hemlock strainers (which creates a risk of drowning) require paddlers to portage and (2) at those locations where paddlers wish to repeat running a particular whitewater feature similar to a ride in an amusement park. These facts impeach any suggestion that such damage has been caused by general recreational use—instead of just paddlers. *Other recreational users would have no reason to get into the creek or out of the creek at those specific locations but paddlers do.*” See pp. 106-107 of my July 29, 2017 Notification indexed into the administrative record as document N-13-A (italics as in original).

The entirety of this factual history raises serious questions about why the agency has prioritized spending time and money to fix stream bank erosion on Scotsman Creek in lieu of attacking the problems of paddler created erosion sites where sediments suspended in run-off are being channeled into the main stem of the Chattooga River—an ORW classified body of water which has long lacked any assimilative capacity to absorb any additional discharges of sediment.

The Forest Service should also explain to the public why the agency hasn't fully investigated and quantified the adverse impacts which the excessive bedded sediment problem being suffered on Scotsman Creek has had on the densities of wild trout that might reside on this ORW classified tributary.

## **THE OCTOBER 2<sup>ND</sup> 2019 REQUEST FOR SUPPORTING DOCUMENTS AND RECORDS**

This explains in part why on October 2<sup>nd</sup>, 2019, I asked you to provide me with “all” supporting documents and records to gain a better understanding of not only the results of any sediment and trout populations studies conducted on Scotsman Creek *but also to understand any reasons why you and your team might have declined to conduct such studies.*

I asked for “all” supporting documents and records in order to test and challenge the validity of my own understandings of the problem. We all need to apply an objective scientific method of analysis. Consequently, I asked for these documents and records in order to avoid drawing any erroneous conclusion as a consequence of not having seen all of the factual data, information upon which the Forest Service might be relying to reach a different conclusion.

I wanted to become fully informed about how you and your team had gone about applying the *best available science* for recognizing how the densities and/or biomass of the wild trout residing on Scotsman Creek have suffered non-temporary declines because of the accumulation of over a foot of fine particle sized sandy sediments and silts on the stream bottom.

Allen, as I have detailed in this letter, my October 2, 2019 request for information followed on the heels of another request for information which had been emailed to you on Sunday, June 9, 2019.

## **WHAT HAS HAPPENED SINCE OCTOBER 2, 2019**

Initially, on October 4, 2019, the Forest Service advised that my four questions had been forwarded to the district Fisheries Biologist and that answers to those LRMP questions would be shortly provided.

On October 7, 2019, Ms. Heather Luczak emailed again on behalf of the United States Forest Service to provide the following terse and vaguely worded response to the four questions I had submitted on October 2, 2019: “In response to your questions regarding studies on Scotsman Creek, the Forest Service has not taken any comprehensive studies or undertaken any count of trout populations.”

This constituted the entirety of the agency's response.

Clearly, such an abbreviated answer falls far short from encouraging full public participation during the revision of a Land Resource Management Plan.

Given the ORW classifications enjoyed by both Scotsman Creek and the Chattooga River, combined with the 2018 EA's admission of a sediment problem being suffered on Scotsman Creek, the Forest Service should have been logically encouraged *to investigate* several dispassionate scientific questions including but not limited to: (1) Have there been any non-temporary declines in the densities of the brook trout populations that are known to have inhabited Scotsman Creek in the past? (2) Based on the *best available science*, does the amount of fine particle sized sediments which have become embedded within the interstitial spaces of the larger stream bed substrates exceed the *minimum effects threshold* for disrupting successful spawning by mature trout as well the early life cycle survival of newly hatched alevin? (3) Has the long neglected sediment problem being suffered on Scotsman Creek caused improper downstream discharges of sediment into the main stem of the ORW classified Chattooga River?

Instead, on October 7<sup>th</sup>, 2019, your staff advised that the Forest Service had skipped the logical next step of explaining the scientific reasons why "the Forest Service has not taken any comprehensive studies [of sediment] or undertaken any count of trout populations."

On October 8, 2019 at 9:08 a.m., I emailed to complain (1) about how the agency's terse response was preventing me from participating fully in the revision of the LRMP for the NPNF; and (2) to clarify how my request for any records and documents which might validate the factual accuracy of the answers given by the Forest Service did not constitute a request for records pursuant to the Freedom of Information Act ("FOIA").

I distinguished how the limited record gathering rights provided by the FOIA differ drastically from the more focused *information gathering rights* afforded to the public during the revision of a Land Resource Management Plan.

I explained how these broader information gathering rights are derivative of the public's right to participate fully in the revision of an LRMP.

On October 8, 2019, I pressed you to provide me with more detailed on point answers to my four questions as well as the records and documents which might support the accuracy of those on point answers.

On October 23<sup>rd</sup>, the Forest Service finally responded via an email sent by Ms. Heather Luczak which asserted: "Forest Service responses to your October 8th email are in red, embedded in your email below."

Ms. Luczak's email of October 23<sup>rd</sup> also asserted: "We [the United States Forest Service] are not aware of the "*information gathering rights*" to which you are referring."



The agency also fell back to the long disputed claim that I owe money to the United States Forest Service: “Regarding your request for supporting records, the Forest is unable to process your request for records at this time. Please contact Doug Meloche, Regional FOIA Coordinator regarding your outstanding FOIA request and any subsequent requests for records.”

In addition, the agency claimed: “The 2012 Planning Rule is clear that public participation during the planning process is intended to be dynamic, so that the Agency can both inform the public and accept feedback on the overall approach to the planning process as well as specific phases of the plan (FSH 1909.12 Ch 40); *however, there is no requirement that the Agency transmit deliberative process records during the planning process outside of our commitments through the Freedom of Information Act.*” (italics added).

Stated differently, throughout the revision of the Land Resource Management Plan (“LRMP”), the Forest Service now insists a FOIA request *must still be submitted and processed* each time that an individual might wish to see a report or record which can prove or disprove the factual accuracy of statements or assurances given by Forest Service officials regarding the Nantahala National Forest’s proper management of the headwaters of the Chattooga River—which arguably constitutes the single most important river flowing through the Nantahala and Pisgah National Forests.

The Forest Service implies that the agency has no duty to recognize the importance of revealing such critically relevant documents on a voluntary basis and long before anyone makes a specific request for such records.

This statement also suggest the Forest Service has the right to refuse disclosure of *records or documents* based on the *deliberative process privilege* of FOIA—even where disclosure of the record might constitute the only way to validate the accuracy or validity of assertions of fact made by the Forest Service about the agency’s management of these headwaters during the revision of any LRMP.

This blanket assertion of privilege does not comport with the duty to encourage public participation during the revision of an LRMP.

Such a view regarding document disclosure serves to discourage public participation.

In response to the Forest Service’s objection to the claimed existence of such rights, please consider the derivative source of these “*information gathering rights*”.

Throughout the lengthy period of time that it takes to assess, prepare, revise and adopt an LRMP, Congress has directed the United States Forest Service “*shall provide for public participation* in the development, review, and revision of land management plans *including, but not limited to*, making the plans or revisions available to the public at convenient locations in the vicinity of the affected unit for a period of at least three months before final adoption, during which period the Secretary shall publicize and hold public meetings or comparable processes at locations that foster public participation in the review of such plans or revisions.” 16 U.S.C. §1604(d)(1) (italics added).

As applied in the context of §1604(d)(1), the use of the phrase “*including but not limited to*” plainly emphasizes how Congress did not intend for this non-discretionary duty to “provide for public participation” to be properly discharged by merely giving the public 90 days to review, digest, and comment on a draft LRMP before final adoption by the Forest Service.

Congress used the term “*including but not limited to*” to stress how the Forest Service “shall provide for public participation” throughout the extended time period during which the development, review, and revision of a land management plans remains ongoing—not just after the draft LRMP and a draft environmental impact statement have been published.

The statute’s use of the phrase “including, but not limited to” evidences a statutory intention that the Forest Service *has not been granted* the authority to behave dictatorially by limiting the amount of participation by any particular individual or by de facto concealing critically relevant information from interested members of the public during the revision of an LRMP.

“Knowledge is the most democratic source of power”. See generally *Powershift: Knowledge, Wealth, and Violence at the Edge of the 21st Century*, Alvin Toffler, October 1990.

In 2012, the United States Forest Service described the agency’s duty to foster public participation as follows: “The responsible official *should be proactive... and should share information in an open way with interested parties*” 36 C.F.R. §219.4(a)(italics added). “[T]he responsible official shall encourage participation by...(i) Interested individuals...including those interested at the local...levels.” 36 C.F.R. §219.4(a)(1)(i)(italics added).

The implicit corollary is that interested individuals also have some right (during the revision of an LRMP) to ask and to expect the United States Forest Service *to share critically relevant but non-privileged factual information and records, reports, etc. in an open way*. In fact, this implicit right to become fully informed might constitute the single most critical component of an interested individual’s right (and pragmatic ability) to hold the United States Forest Service accountable for not doing what the agency has made written promises to do in an LRMP.

*Public participation* in the revision of an LRMP cannot occur without the Forest Service openly sharing otherwise unpublicized institutional knowledge, records, studies, data, etc. which rests within the agency’s actual or constructive control.

Logically, the Forest Service cannot properly discharge this duty to provide for public participation if the agency refuses to share relevant information with interested individuals who seek to become fully informed about a specific issue of local concern during the revision of an LRMP.

In fact, the Forest Service has admitted the public policy concern from which the agency’s duty to share information openly derives. The duty to provide for the full and open sharing of otherwise unpublicized institutional knowledge and records “*supports a transparent and collaborative approach to planning.*” *Final Rule and Record of Decision, National Forest System Land Management Planning*, 36 C.F.R. Part 219, 77 FR 21162, 21178, April 9, 2012 (italics added).

The adjective “*collaborative*” describes a process “involving two or more people working together for a special purpose: e.g. the presentation was a *collaborative* effort by all the children in the class.” Cambridge Dictionary.

Similarly, as used by the Forest Service, the adjective “*transparent*” means “*open and honest, without secrets.*” Cambridge Dictionary.

The United States Forest Service has admitted: “the [2012 Planning] rule does place a strong emphasis on developing opportunities early and throughout the planning process, *with costs of planning projected to be redirected toward collaboration, assessment, and monitoring activities* and away from development and analysis of alternatives, as compared to the 1982 procedures. The public participation requirements are expected to improve plans and increase planning efficiency in a variety of ways. *Collaborative efforts* during the early phases of planning are expected to result in improved analysis and decisionmaking efficiency during the latter stages of planning; lead to improved capacity to reduce uncertainty by gathering, verifying, and integrating information from a variety of sources; reduce the need for large numbers of plan alternatives and time needed for plan revisions; *potentially offset or reduce monitoring costs as a result of collaboration during monitoring*; improve perceptions regarding legitimacy of plans and the planning process; increase trust in the Agency, and potentially reduce the costs of litigation as a result of receiving public input before developing and finalizing decisions. Overall, it is the Department’s view that investment in providing opportunities for public engagement will lead to stronger and more effective and relevant plans.” Id. at 21195-21196 (italics added). “Because the make-up and dynamics of the communities surrounding each planning area differ, and because the level of interest in decisionmaking may vary, *based on the scope and potential impact of the decision being contemplated, the responsible official needs the flexibility to select the public participation methods that would best meet the needs of interested people and communities.* The wording ‘feasible and appropriate’ provides the responsible official the flexibility needed to develop effective participation opportunities, including using existing opportunities for collaboration.” 36 C.F.R. Part 219, 77 FR 21162, 21195 (italics added).

The Forest Service’s administrative record underlying the adoption of the 2012 Planning Rule speaks frequently about the agency’s duty to be “collaborative”.

The adjective “*collaborative*” describes a process “involving two or more people working together for a special purpose.”

This self-professed duty to be “collaborative” evidences why records (which constitute the only source of information for validating assertions of fact made by Forest Service officials) should be produced free from the constraints of the Freedom of Information Act.

The Forest Service must not continue to deny access to records which substantiate the validity of the answers given to plainly stated questions of concern during the LRMP revision.

“Section 219.4 of the final rule lists the minimum specific points during the planning process when opportunities for public participation will be provided, and includes direction to provide meaningful opportunities for public engagement and share information with the public in an

*open way*. To meet these requirements, the responsible official must be proactive in considering who may be interested in the plan, those who might be affected by a plan or a change to a plan, and how to encourage various constituents and entities to engage, including those interested at the local, regional, and national levels.” 36 C.F.R. Part 219, 77 FR 21162, 21184 (italics added).

“Share” implies “that one as the original holder or owner of something grants to another the partial use, enjoyment, of possession of a thing”. Cambridge Dictionary

The verb “participate” further implies “a taking part with others in an undertaking, activity, or discussion”. Cambridge Dictionary

Section 219.4 “give the responsible official discretion to tailor the scope, scale, and types of participation opportunities *to be congruent with the need and [any increased] level of interest*, subject to the [minimum] requirements of section 219.4. *Collaborative processes would be used where feasible and appropriate.*” 36 C.F.R. Part 219, 77 FR 21162, 21189 (italics added).

Logically, there is no way to achieve a “*transparent [open and honest, without secrets] and collaborative approach*” to the revision of an LRMP *unless* the Forest Service properly discharges the regulatory admitted duty *to share critically relevant factual information in an open way with interested individuals such as myself*. Neither can public participation be fully encouraged unless the public possesses a right to compel the Forest Service to disclose otherwise unpublicized but critically relevant institutional knowledge, records, reports, etc. which the agency actually or constructively controls.

The Forest Service cannot hope to achieve a “*transparent [open and honest, without secrets] and collaborative approach*” to the revision of an LRMP unless the agency engages in a free exchange of back and forth communications with those who seek to become fully informed about site specific issues of local concern during the revision of an LRMP.

These are the “*information gathering rights*” to which I refer and about which Ms. Luczak suggested on October 23<sup>rd</sup>, 2019 that the Forest Service remains unaware.

These are the information gathering rights which are afforded to interested individuals (like myself) *during the significant revision of an LRMP* and which derive from the right to participate fully in the significant revision of an LRMP.

Some might argue that these intensified information gathering rights evaporate once a new LRMP is adopted and the Forest Service’s duty to provide for public participation during the significant revision of an LRMP comes to an end.

**Such an understanding of the time limited nature of these information gathering rights augurs why the agency’s information stonewalling has caused and continues to cause concrete and particular informational injuries to me.**

Unless the public is afforded some right to become fully informed about a controversial issue of local concern during the preparation of an LRMP, the concept of encouraging public

participation at the local level evaporates into an *entirely illusory concept* whereby the Forest Service awards itself with *carte blanche* authority to evade the most controversial issues that are taking place at discrete locations in the Nantahala National Forest.

Unfortunately, evasion of a controversial issue is precisely what is taking place with respect to the North Carolina headwaters of the Chattooga River.

On October 23<sup>rd</sup>, 2019, the Forest Service tried to justify its refusal to share information openly by asserting: “the 2012 Planning Rule is clear that public participation during the planning process is intended to be dynamic, so that the Agency can both inform the public and accept feedback on the overall approach to the planning process as well as specific phases of the plan (FSH 1909.12 Ch. 40); however, there is no requirement that the Agency *transmit deliberative process records* during the planning process outside of our commitments through the Freedom of Information Act [(“FOIA”).]” (italics added)

This statement mistakenly confuses the distinct differences between the unique and pervasive information gathering rights which are only afforded to the public during the pendency of a *significant* revision of an LRMP as contrasted against the tightly constrained right to ask for non-privileged documents and records pursuant to the Freedom of Information Act at any point in time.

The public must be afforded broader information gathering rights during the limited period of time required to assess, design, revise and adopt a new LRMP.

This is so because the LRMP (once adopted) becomes the only legally enforceable standard to which the public might refer to try to hold the agency legally accountable for having failed to do what the agency has promised to do.

To hold the Forest Service accountable for having mismanaged a controversial issue of local concern the public must prove the agency has acted arbitrarily and capriciously.

In general, the public must overcome dual presumptions that the Forest Service has acted in good faith and that the agency possesses a unique expertise to pick and choose what the agency must do or decline to do in discharging the agency’s duties.

Similarly, the evidence needed to overcome these presumptions must be found somewhere within an administrative record whose substantive content is exclusively controlled by the United States Forest Service.

The prospects for supplementing the content of this administrative record after the LRMP has been adopted are limited. Being given an opportunity to undertake any form of limited discovery is similarly difficult to achieve.

Unfortunately, the United States Forest Service has consistently over time fabricated a voluminous but otherwise editorially sanitized administrative record pertaining to its management of the North Carolina headwaters of the Chattooga River

This editorially sanitized administrative record fails to tell the whole truth about what the agency is compelled to do under the law while managing these headwaters.

Since November 5, 2014 (and during the ongoing revision of the LRMP for the NPNF) I have worked to make sure that the agency compiles an administrative record which does tell the whole truth about what must be done in properly managing the North Carolina headwaters of the Chattooga River.

## **QUESTIONS #2 FROM OCTOBER 2, 2019**

Here is the text of Question #2: "...Does the Nantahala National Forest suspect that the densities of the brook trout populations residing in Scotsman Creek have suffered a non-temporary decline?..."

Stated differently, given the admission made by the Forest Service's biologist in the 2018 EA about the discharge of sediments into the stream, as further informed by my photographs evidencing how (based on the *best available science*) fine particle sized sandy sediments have excessively embedded the *quartz* stream bed substrates on Scotsman Creek, Question #2 asked for a purely factual answer about whether or not the United States Forest Service *suspected* that the densities of brook trout on Scotsman Creek had suffered a concomitant non-temporary decline.

The Forest Service has been provided with copies of the studies which constitute the *best available science* for quantifying when the accumulation of fine particle sized sediments on a stream bed should be considered as exceeding the *minimum effect threshold* for disrupting the successful spawning by mature trout and the survival of their newly hatched alevin.

Based on the photographs evidencing the excessive amount of sediment which has blanketed the quartz cobbled stream bed on Scotsman Creek, as well as the availability of the *best available science*, the Forest Service could have answered Question #2 with a straight forward "yes" or "no".

In lieu of answering Question #2 in a factually honest "yes" or "no" fashion, the Forest Service obfuscated by responding with an entirely off point statement of fact which was already well known by the public since May 15, 2015: "...the [Forest Service] has not undertaken any count of brook trout populations on Scotsman Creek."

Question #2 asked if the agency had reason *to suspect* that the densities of the brook trout populations residing in Scotsman Creek have suffered a non-temporary decline because of the presence of an excessive amount of bedded sediment—an amount of sediment which my photos and the best available science would suggest exceeds any reasonable minimum effects threshold for disrupting the successful spawning and survival of newly hatched alevin.

This constitutes another example of the agency purposely refusing to provide on point answers to straightforward questions during the revision of the LRMP for the NPNF—even when the question only requires a simple "yes" or "no" answer.

#### **QUESTION #4, ASKED OCTOBER 2, 2019**

Similarly, Question #4 asked: “Has anyone at the Nantahala National Forest attempted (since December 2012) to apply the *best available science* regarding the adverse impacts of bedded sediments and the minimum effects threshold beyond which the successful spawning by mature trout and the early life cycle survival of their newly hatched alevin will be adversely disrupted by the accumulation of these sediments?”

In my email of October 8, 2019 @ 9:08 pm I explained: “If you need to be refreshed about what the *best available science* is regarding bedded sediments and the *minimum effects threshold* beyond which any additional accumulation of sediment will disrupt successful spawning by mature trout and the early life cycle survival of newly hatched alevin, please see the detailed review of the *best available science* which was provided to you on pages 43-44 of the September 22, 2017 Notification which was emailed to you on September 22, 2017 @ 3:38 p.m.”

Nevertheless, instead of providing a simple “yes” or “no” answer to this very specific and straightforward factual inquiry, the Forest Service chose to articulate an off point and obfuscated answer: “Field work conducted as part of the Southside Project found streambank erosion along Scotsman Creek which contribute to reduced habitat quality of pools. In response to this finding, treatments to reduce the potential for stream bank erosion and sedimentation were included in the project. Implementation of these treatments is expected to begin in the next 2 to 5 years.”

More specifically, could you answer “yes” or “no” whether or not the Nantahala National Forest has utilized the *best available science* for assessing whether or not Scotsman Creek’s biological capacity for sustaining *outstanding* spawning by mature trout and the early life cycle survival of their alevin has suffered non-temporary disruption because of the accumulation of too much fine particle sized sediments within the interstitial spaces of the larger stream bed substrates lying on the stream bed of Scotsman Creek?

#### **QUESTION #1, ASKED OCTOBER 2, 2019**

On October 2, 2019, the following question was submitted to you: “Has the Nantahala National Forest (or any other federal or state agency) undertaken any comprehensive study since December 2012 of the current sediment transport imbalance being suffered on Scotsman Creek? What were the findings? Could I please be provided with all of the documents and records associated with such a study? What is the normal sediment transport capacity of Scotsman Creek?”

Stated differently, and as explained on October 8, 2019, Question #1 presumed that the Forest Service would tell the public about what the agency had done or decided not to do to cooperate and collaborate with the North Carolina Department of Environmental Quality (“NC DEQ”), the North Carolina Wildlife Resources Commission (“NCWRC”) and the United States Environmental Protection Agency *in eliminating or diminishing the excessive bedded sediment problem being suffered on the North Carolina headwaters of the Chattooga River*—as the United States Forest Service is compelled to do by 16 U.S.C. §1283(c).

The Forest Service responded to the October 8<sup>th</sup> explanation with a little more detail than the cursory response offered on October 7<sup>th</sup> to Question #1. The Forest Service responded: “We have not had any communications with NC DEQ nor US EPA regarding Scotsman Creek outside of the regular NEPA process for the Southside Project. In advance of implementing restoration on Scotsman Creek, the FS will submit a 401 water quality permit application to the NC Division of Water Quality and a 404 permit application to the Army Corps of Engineers; that communication has not yet been initiated.”

Nevertheless, the agency still has not answered whether or not any other federal or state agency had undertaken to study the sediment transport imbalance which exists up stream of the Bull Pen Iron Bridge. Neither has the Forest Service provided any explanation why the agency has elected to forego taking the next logical scientific step of studying the natural sediment transport capacity of Scotsman Creek to determine if it has become overwhelmed.

Informing the public about what is being done to fix the sedimentation problem (tacitly admitted to exist on Scotsman Creek by the 2018 EA) constitutes critically relevant information which should be disclosed and explained to the public *far in advance of the publication of any environmental impact statement pertaining to the adoption of a new LRMP for the NPNF*.

Similarly, the agency should explain why the agency presumes that fixing these three stream bank erosion sites will prove sufficient for satisfying the dictates of the antidegradation mandate of the Clean Water Act as mandate applies to the wild trout populations residing on Scotsman Creek.

Fully informing the public about these concerns should occur today, not sometime later, because a significant revision of a Land Resource Management Plan cannot be lawfully adopted unless and until after the United States Forest Service reaches a finding of no significant impact in connection with an environmental impact statement whose “form, content, and preparation *foster both informed decision-making and informed public participation.*” *Webster v. US Dept. of Agriculture*, 685 F. 3d 41, 421 (4th Cir. 2012)(italics added).

Intentionally delaying the disclosure of institutional knowledge, records, and reports mocks the concept of encouraging both *informed decision-making and informed public participation*.

Consequently, it is difficult to understand the Forest Service’s blanket assertion made on October 23<sup>rd</sup>, 2019: “Please keep in mind *any communications* with other agencies, departments, etc. while conducting government business is considered ‘privileged communication’ and would need to be requested through the FOIA process and possibly subject to FOIA exemption b5 (deliberative process) and other exemptions if released.”(italics added).

Stated differently, the Forest Service implies that there might have been some discussions with other agencies about the sediment transport imbalance plaguing the main stem of the Chattooga River and Scotsman Creek but the Forest Service won’t describe those discussions based on a blanket claim of “privileged communication”.



The Forest Service has not provided even the slimmest indication as to what deliberative process the prospectively withheld information is supposed to concern or what role the otherwise undisclosed information plays in the formulation of policies or recommendations for policy changes.

Such a blanket claim that any communication with other agencies is considered privileged implies that there is some compelling need for secrecy that seems entirely incongruent with the prerequisite duty to *foster both informed decision-making and informed public participation* during the revision of an LRMP and the approval of a Finding of No Significant Impact. The issues being debated are not about something as secrecy sensitive as national security. The concerns which we are debating are about irreplaceable natural resources which the Forest Service has been entrusted to protect for the benefit of the public—and to do by openly sharing information with the public.

I disagree that the Forest Service is entitled to keep secret any discussions which the agency might have had or which it might have in the future with the US Army Corps of Engineers, the US EPA, NC DEQ or the North Carolina Wildlife Resources Commission regarding the excessive bedded sediment problem, the sediment transport imbalance, and the correlated declines in trout population densities, which are being suffered on the North Carolina headwaters of the Chattooga River.

These water quality discussions are precisely what the public should be allowed to become *fully informed* during the revision of an LRMP.

How else could the public ever hope to determine if the Forest Service is managing these headwaters by complying with the plainly stated non-discretionary duties spelled out by the national Wild and Scenic Rivers Act?

The deliberative process privilege generally encompasses documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated, as well as other subjective documents that reflect the personal opinions of the writer prior to the agency's adoption of a policy. To withhold a responsive document under the deliberative process privilege, the agency must demonstrate that the document is both pre-decisional and deliberative.

A communication is pre-decisional if it was generated before the adoption of an agency policy and it is deliberative if it reflects the give-and-take of the consultative process.

Here, the factual information being requested has nothing to do with a deliberative process. Interested individual members of the public have a right to know how the various agencies view the water quality problems which have been documented to exist on these headwaters.

Most importantly in my case, Congress has further directed the United States Forest Service “**shall assist, advise, and cooperate with...individuals to plan, protect, and manage river resources**. Such assistance, advice, and cooperation may be through written agreements or otherwise. This authority applies...to rivers which are components of the National Wild and

Scenic Rivers System... Any agreement under this subsection may include provisions for limited financial or other assistance to encourage participation in the ...management of river resources.” 16 U.S.C. §1282(b)(emphasis added).

Withholding information which might inform about the degraded condition of the Chattooga’s trout habitat and the river’s documented diminished trout populations constitutes the antithesis of what Congress has compelled the United States Forest Service to do.

Any *information* being exchanged between the various federal and state agencies about these two closely correlated problems should be openly disclosed to the public.

If the Forest Service doesn’t know what conversations have or haven’t been taking place between the various federal and state agencies, the agency ought to find out. It is insufficient for the Forest Service to declare that it doesn’t know what the other relevant federal and state agencies are doing to address these two correlated problems.

This must be done in order to afford the public with a way to determine whether or not the Nantahala National Forest had done what it promised the public it would do pursuant to the enforceable “standards” of the current LRMP for the NPNF—a plan whose enforceable “standards” are about to be changed and vitiated.

The proper disclosure of the information that I have requested will allow the public to determine what actions the agency has undertaken or declined to undertake in properly discharging the non-discretionary duty imposed by 16 U.S.C. §1283(c).

It remains my allegation that the Nantahala National Forest has not done what the current LRMP promised would be done with respect to monitoring the trout habitat and wild trout populations residing on the North Carolina headwaters of the national Wild and Scenic Chattooga River.

The duty to disclose purely factual material during the revision of an LRMP should not be vitiated by the agency claiming that every request for a record automatically triggers an entitlement to assert the deliberative process privilege—unless disclosure of the factual material is more likely to reveal the decision-making process of the agency with respect to a particular policy being currently contemplated.

The monitoring “standards” associated with the *existing LRMP* are not being debated.

Therefore, there is no deliberative process which would apply to requests for information such as those posed by Question #1.

What policy decision is the Forest Service currently considering regarding Scotsman Creek which would preclude you from answering my factual inquiry about what the agency has specifically done historically to comply with 16 U.S.C. §1283(c)?

Although the agency admits to not having had any discussions “with NC DEQ nor US EPA regarding Scotsman Creek” the Forest Service has failed to advise whether or not any

communications have taken place with the North Carolina Wildlife Resources Commission (“NCWRC”) regarding the need to undertake a sediment transport capacity study on Scotsman Creek.

Neither has the Forest Service advised whether or not any discussions about the excessive bedded sediment and degraded trout populations has occurred with the United States Army Corps of Engineers.

The Forest Service should find out and fully disclose what other federal and state agencies have been doing to investigate the degraded condition of the trout habitat, the wild trout populations, and the relevance of those investigations for making sure that the antidegradation mandate of the Clean Water Act is being properly fulfilled on the North Carolina headwaters of the Chattooga River.

**THE FOREST SERVICE HAS A GOOD FAITH BURDEN (DURING THE REVISION OF AN LRMP) TO VOLUNTARILY DISCLOSE CRITICALLY RELEVANT BUT OTHERWISE UNPUBLICIZED INSTITUTIONAL KNOWLEDGE AND RECORDS**

Ms. Luczak’s October 23, 2019 email stated: “Regarding your request for supporting records, I am sending the Scotsman Creek restoration proposal that was included in the Southside Project...*Please let us know what additional specific records you are seeking.* If we have them and can provide them to you legally outside of the FOIA process we will. If not, you will need to contact Doug Meloche, Regional FOIA Coordinator (douglas.meloche@usda.gov or 404-347-4427) to request records.”(italics added).

*First*, there is nothing *collaborative* about your staff having *taken three weeks* to forward me an essentially valueless copy of (1) a document which had already been produced on April 6, 2018; (2) a document which fails to explain why there is any need to devote any amount of the agency’s finite resources to fixing this sediment problem on Scotsman Creek while the agency simultaneously refuses to acknowledge the much more extensive and visibly obvious bedded sediment problem being suffered on the main stem of the Chattooga.

*Second*, the assertion “Please let us know what additional specific records you are seeking” demonstrates the agency’s continuing employment of a less than good faith practice in responding to information requests.

The Forest Service behaves as if there were a table contents to which the public might refer before asking the Forest Service to provide access to the otherwise unpublicized library of institutional knowledge, information, records and reports which the agency actually or constructively controls. In fact, as you know, there is no such table of contents.

During the significant revision of an LRMP, the good faith burden falls on the Forest Service to search its own unpublicized library for any institutional knowledge, records, reports etc. which contain critically relevant non-privileged information pertaining to the water quality related issues about which I am concerned.

The Forest Service also has a good faith burden to undertake the scientific studies needed to investigate the alleged claim that excessive bedded sediments have degraded the trout habitat to a point that the river no longer sustains outstanding densities and/or biomass of naturally reproducing populations of trout.

Again, this follows because a significant revision of a Land Resource Management Plan cannot be lawfully adopted unless and until after the Forest Service reaches a finding of no significant impact in connection with an environmental impact statement whose “form, content, and preparation foster both informed decision-making and informed public participation.” *Webster v. US Dept. of Agriculture*, 685 F. 3d 41, 421 (4th Cir. 2012)(italics added).

Questions #1, #3, and #4 presume the Forest Service has a unique familiarity and understanding of the contents of the agency’s otherwise unpublicized library of institutional knowledge, records, etc. under the agency’s actual or constructive control.

Each of these questions further presume the Forest Service possesses a good faith obligation to identify and to disclose “all” of the documents and records which might be critically relevant institutional knowledge for validating or invalidating (1) the alleged sediment transport deficiency being suffered on Scotsman Creek; (2) the alleged decreased densities of brook trout which now reside on Scotsman Creek; and (3) for proving or disproving how the Forest Service has applied the *best available science* in evaluating the adverse impacts of this sedimentation on the naturally reproducing populations of trout which reside on Scotsman Creek.

Unfortunately, the Forest Service has not voluntarily identified and shared otherwise unpublicized institutional knowledge, records and reports which the agency actually or constructively controls and which the agency knows to contain critically relevant non-privileged information pertaining to the narrow subject matter about which I have been complaining since November 5, 2014.

Disregarding how no table of contents exists to which an interested individual might refer before asking for “specific records”, the Forest Service nevertheless tries to shift the burden onto me by suggesting “Please let us know what additional specific records you are seeking”—something which the Forest Service fully understands constitutes an impossible requirement unless the agency discharges its good faith duty to share otherwise unpublicized institutional knowledge, records and reports which the agency actually or constructively controls and which the agency knows to contain critically relevant non-privileged information pertaining to my stated concerns.

To capstone off the agency’s effort to forestall me from gathering any additional information which is in the public interest, the Forest Service goes on to issue a self-serving pledge: “If we have...[the additional records you specifically identify] and can provide them to you legally outside of the FOIA process we will. If not, you will need to contact Doug Meloche, Regional FOIA Coordinator (douglas.meloche@usda.gov or 404-347-4427) to request records. This is a requirement since you have an outstanding debt for the processing of a previous FOIA request. In an email on June 20, 2019, Ms. Sara Sullivan, Acting Assistant Director, FOIA/PA made you aware of this requirement for all future records requests from the Forest Service. In short, the email stated this - In accordance with USDA FOIA Regulations, Section 8(d), where a requester

has previously failed to pay a fee, the requester is being required to pay the full amount owed, plus any applicable interest, as well as the full estimated fee associated with any new request prior to the agency commencing to process a new or subsequent request. Please contact Doug Meloche for assistance in bringing this matter to a close.”(internal quotation marks removed).

As I have consistently insisted to the United States Forest Service, I dispute any suggestion that I ever agreed to pay any amount of fees much less an indeterminate amount of fees to have my September 22, 2017 FOIA processed.

If I am mistaken, please kindly provide the documentation evidencing where and when and to whom I explicitly agreed to assume liability...or alternatively point out to me where by operation of law the Freedom of Information Act imposes such a liability without a member of the public having explicitly assented to assuming such liability.

The fact of the matter is the Forest Service unilaterally went looking for those records on its own.

The question that needs to be answered is why the Forest Service would go looking for such records without my having ever agreed to absorb any liability.

### **THE CHANCE TO WORK TOGETHER**

We can fix the sediment problem...but first we must honestly and openly admit that there is a sediment problem and that we have a responsibility to fix it.

There are people who will write checks to restore this river's sediment transport capacity to equilibrium and to reestablish the necessary stream bed habitat required to sustain "outstanding" (e.g. first in class) naturally reproducing densities of rainbow, brown, and brook trout.

These check writers are waiting for the Forest Service to take a leadership role in admitting there is a problem and in implementing the aggressive abatement process needed to fix the problem once and for all.

Allen, I am sure you have many pressing problems to address in your job while I have only one concern about which I am dedicated to solving.

Why not just go the whole way and begin *truly* collaborating with me and others in fixing the problem in lieu of trying to rely on illogical denials and presumed agency expertise to continue denying that there is an actionable problem?

The fundamental fact remains a self-sustaining population of brown trout *that manages only "to persist" does not satisfy the intense standard of care* which the Forest Service must discharge in managing the day to day beneficial uses of the North Carolina headwaters of the ORW classified Chattooga River.

The Forest Service must place “primary emphasis” on “protecting” the single quintessential “scientific feature” which the agency narrowly described to Congress in 1971 as being unique to North Carolina’s headwaters. 16 U.S.C. §1281(a).

It would be ludicrous to expect an objective person to conclude that the Forest Service has in fact placed “primary emphasis” on “protecting” this “scientific feature”.

This is so for four distinct reasons: (1) the densities and biomass of the naturally reproducing populations of rainbow, brown, and brook trout have suffered measurably significant and non-temporary declines under the management of the United States Forest Service; (2) the Forest Service has purposely failed to undertake any recurrent monitoring of the trout population densities on the North Carolina headwaters of the national Wild and Scenic since the 1992-1996 study was conducted by former USFS employee (Monte Seehorn) despite the fact that the currently enforceable LRMP contains non-discretionary “standards” which obligate the Nantahala National Forest to undertake such monitoring; (3) the Forest Service has admitted to having never bothered to undertake any sediment transport capacity study to determine precisely how much excessive sedimentation has been allowed to accumulate on the stream bottom; (4) the United States Forest Service has *admitted* consuming hundreds of thousands of dollars (and what I believe will ultimately be discovered to be well in excess of a million dollars) and untold personnel time (dating back to April 2005) studying a way to justify creating a special recreational use accommodation for a single politically favored group who lack any legal entitlement to receive such special accommodation.

Also, to remind everyone, the Fourth Circuit Court of Appeals has already tacitly warned/reminded the Forest Service: “*floating is not a value of the Chattooga that must be protected and enhanced under §1281.*” *American Whitewater et al, v. Tidwell*, 770 F. 3d 1108, 1118 (4th Cir. Ct. App. 2014)(emphasis added).

Nevertheless, for some yet to be discovered reason, the Forest Service continues to ignore this self-proving history of fact and circumstance.

The Forest Service continues to ignore how the weight of this historical record augurs why the agency should be collaborating in good faith with interested individuals (like me) instead of purposely using every possible pretense to shut down their information gathering efforts until the clock expires on the revision of the LRMP for the Nantahala and Pisgah National Forests (“NPNF”).

Similarly, as demonstrated in this correspondence, the Forest Service has also tacitly admitted there is a bedded sediment problem and concomitant trout population problem being suffered on Scotsman Creek.

In fact, the amount of sediment which has been allowed to accumulate on the stream bed of Scotsman Creek is more than the amount that the *best available science* suggests should drive an objective person to suspect a disruption in the successful spawning of mature trout as well as the early life cycle survival of their newly hatched alevin.

If the agency disputes that a non-temporary decline has taken place in the brook trout densities, could you please explain to me the evidence upon which such an opinion might rest?

If the *Nantahala National Forest* honestly doesn't suspect that brook trout populations have suffered a non-temporary decline on Scotsman Creek, then by all means, please explain the scientific basis for drawing such a benign conclusion despite the agency's stated admission about the sedimentation problem that needs to be fixed on Scotsman Creek.

The Forest Service should cease trying to excuse its own neglect by asserting a right to rely on "statistically valid monitoring" of trout populations on an undefined but much wider universe of trout streams—at who knows where locations conducted by unspecified parties.

In Ms. Luczak's October 23<sup>rd</sup> email, the Forest Service asserted: "Monitoring of MIS and associated riparian areas are conducted on an annual basis; however, there is no requirement or expectation that the monitoring items identified in the Forest Plan be carried out on all trout bearing waters on the Nantahala NF. This monitoring has not occurred on Scotsman Creek, *nor is it necessary to know the magnitude of the potential reduction in sedimentation rates from the eroding stream bank(s) in order to provide benefits to the aquatic resources.*" (italics added).

This statement *precisely* pinpoints the problem with how this agency continues to ignore the legal significance of the administrative records underlying WSR designation (1969-1974) and ORW classification (1987-1989).

The Forest Service tries to suggest it has done its job by providing the barest minimal benefit to river's "aquatic resources"—without stating what those aquatic resources are.

This generalized statement fails to acknowledge the requisite intensity of physical protection which must be singularly delivered to the narrowly designated subcategorized designated use of the Chattooga's ORW water quality.

Preserving the in stream trout habitat's biological capacity for sustaining outstanding densities and/or biomass of naturally reproducing populations of trout comprised of not only brown trout, but also rainbow and brook trout constitutes one of the two administratively recognized subcategorized designated uses of the ORW water quality of these headwaters.

In addition, the aggregate number of fish and/or the aggregate weight of these reproducing trout populations must not be allowed to suffer any non-temporary declines below the original plainly stated administrative benchmark: "outstanding". 15A NCAC 02B.0225(b)(1).

This constitutes the second of two subcategorized designated uses of the ORW water quality of the North Carolina headwaters of the Chattooga River.

The Forest Service cannot evade accountability for the significantly decreased trout densities and the site specific excessive bedded sediment problems being suffered on Scotsman Creek and the main stem of the Chattooga River by redirecting the focus to the more acceptable trout

population metrics collected on the entire universe of streams spread out all over the Nantahala and Pisgah National Forests.

Permitting the Nantahala National Forest to employ such an excuse would constitute the most arbitrary justification for not doing what the agency promised would be done according to the enforceable standards of the current LRMP. Permitting the Nantahala National Forest to employ such an excuse would allow the agency to vitiate the non-discretionary duties that plainly apply to Scotsman Creek and the main stem of the Chattooga River.

The trout have been waiting way too long to have their habitat and their population densities restored.

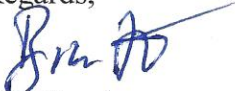
On October 23<sup>rd</sup>, the Forest Service attempted to kick the excessive sedimentation problem on Scotsman Creek down the road: "Field work conducted as part of the Southside Project found streambank erosion along Scotsman Creek which contribute to reduced habitat quality of pools. In response to this finding, treatments to reduce the potential for stream bank erosion and sedimentation were included in the project. Implementation of these treatments is expected to begin in the next 2 to 5 years..." We cannot wait 2 to 5 years to do anything. The Forest Service must start *today to restore the trout habitat and wild trout populations* on Scotsman Creek under both the Clean Water Act as well as the national Wild and Scenic Rivers Act.

The USFS spent a decade of time and hundreds of thousands of dollars (if not more than a million dollars) on creating a special recreational use accommodation for which there is no legal entitlement. Simultaneously, the Forest Service has not spent a penny on fixing the excessive bedded sediment problem which is being suffered on the North Carolina headwaters of the Chattooga River.

**The Chief of the United States Forest Service or the Regional Forester for Region 8 should immediately enter into an agreement about what will specifically be done by the agency to remove the excessive amounts of sediment which has become impounded on the stream bed of these headwaters.**

**This negotiated agreement must also detail what will be done to restore "outstanding" (or first in class) naturally reproducing populations of rainbow, brown, and brook trout on these headwaters.**

Regards,



Bill Floyd

Cc: Chief Christiansen  
Regional Forester Arney

via email [vcchristiansen@fs.fed.us](mailto:vcchristiansen@fs.fed.us)  
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