

Wild & Scenic Rivers Act: Section 7



October 2004
Council Contact: Jackie Diedrich
U.S. Forest Service
Portland, Oregon

Technical Report of the Interagency Wild and Scenic Rivers Coordinating Council

Wild & Scenic Rivers Act: Section 7

Table of Contents

FOREWORD.....	1
INTRODUCTION.....	1
STATUTORY BACKGROUND.....	2
DEFINITIONS.....	2
STANDARDS AND EVALUATION PROCEDURES	4
I. Congressionally Designated Rivers: Section 7(a).....	5
A. Water Resources Projects Within the Wild and Scenic River Corridor	5
B. Water Resources Projects Below, Above or on a Stream Tributary to the Wild and Scenic River Corridor.	6
II. Secretarial-Designated, 2(a)(ii), Rivers: Section 7(a).....	6
III. Congressionally Authorized, 5(a), Study Rivers: Section 7(b).....	7
A. Water Resources Projects Within the Congressionally Authorized Study River Corridor.	7
B. Water Resources Projects Below, Above or on a Stream Tributary to the Congressionally Authorized Study River Corridor.	7
IV. Agency-Identified, 5(d)(1), Study Rivers.	8
SECTION 7, NATIONAL ENVIRONMENTAL POLICY ACT (NEPA), AND COORDINATION WITH PROPONENT/REGULATING AGENCY.....	8
SECTION 7 AND THE FERC LICENSING PROCESS.	10
SECTION 7 AND THE ACOE PERMITTING PROCESS.	11
<i>Appendix A: Section 7 Examples.</i>	<i>13</i>
<i>Appendix B: Section 7 Case Studies.....</i>	<i>17</i>
<i>Appendix C: Evaluation Procedure Under “Direct and Adverse”.....</i>	<i>25</i>

*Appendix D: Evaluation Procedure Under
“Invade the Area or Unreasonably Diminish”*..... 29

*Appendix E: Evaluation Procedure Under
“Invade the Area or Diminish”*. 31

Appendix F: Frequently Asked Questions. 33

Wild & Scenic Rivers Act: Section 7

FOREWORD

Section 7 is one of the most important and powerful parts of the Wild and Scenic Rivers Act (Act). This key provision directs federal agencies to protect the free-flowing condition and other values of designated rivers and congressionally authorized study rivers. Implementation of Section 7 requires development of rigorous and consistent interagency evaluation procedures to protect river resources. This paper provides a basis for consistent interpretation of the standards and presents procedures to evaluate the effects of proposed water resources projects under Section 7.

INTRODUCTION

Congress passed the Act to preserve selected rivers from the dams and developments associated with many of the nation's waterways. While the Act provides a number of important measures to protect and enhance the values for which rivers are added to the National Wild and Scenic Rivers System (National System), none is more significant than the restrictions to water resources projects provided in Section 7. Through the language of this section, Congress expressed the clear intent to protect river values from the harmful effects of water resources projects.

More specifically, the Act prohibits the Federal Energy Regulatory Commission (FERC) from licensing the construction of hydroelectric facilities on rivers that have been designated as components of the National System, or which have been authorized by Congress for study as potential additions. Further, the Act prohibits other federal agencies from assisting in the construction of any water resources project that would have a direct and adverse effect on a designated river or congressionally authorized study river. The Act also includes a standard that governs water resources projects below, above or on a stream tributary to a designated river or congressionally authorized study river. Determinations under Section 7(a) or 7(b) are made by the river-administering agency.

STATUTORY BACKGROUND

Section 7(a) states in part:

The Federal Power Commission [FERC] shall not license the construction of any dam, water conduit, reservoir, powerhouse, transmission line, or other project works under the Federal Power Act, as amended, on or directly affecting any river which is designated in section 3 of this Act as a component of the national wild and scenic rivers system or which is hereafter designated for inclusion in that system, and no department or agency of the United States shall assist by loan, grant, license, or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river was established, as determined by the Secretary charged with its administration. Nothing contained in the foregoing sentence, however, shall preclude licensing of, or assistance to, developments below or above a wild, scenic or recreational river area or on any stream tributary thereto which will not invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the area on the date of designation of a river as a component of the national wild and scenic rivers system.

Section 7(b) of the Act provides the same protection to congressionally authorized, 5(a), study rivers except that the qualifying word “unreasonably” does not appear before “diminish.” The effect is to provide greater protection for study rivers during the shorter term study process.

The first sentence of Section 7(a) and (b) applies a more stringent standard to projects licensed by the FERC than for other federally assisted projects proposed on a designated river or congressionally authorized study river (i.e., a prohibition to the FERC). Importantly, both standards in this sentence apply to projects proposed within the river corridor. The second sentence of Sections 7(a) and (b), which applies to the FERC and other federal agencies, defines a standard for projects proposed below, above or on a stream tributary to the designated river or congressionally authorized study river. It specifically identifies scenic, recreational, fish and wildlife as the four values to be evaluated.

DEFINITIONS

The Act does not define the terms expressed in Section 7; however, the Department of Agriculture has codified regulations for Section 7 at 36 CFR 297, including definitions. The following definitions are based on 36 CFR 297 and additional interpretation by the river-administering agencies.

Construction: Any action carried on with federal assistance affecting the free-flowing characteristics or the scenic or natural values of a wild and scenic river or congressionally authorized study river.

Federal Assistance: Any assistance by an authorizing agency before, during, or after construction. Such assistance may include, but is not limited to: a license, preliminary permit, permit, or other authorization granted by the FERC; a license, permit or other authorization granted by the Army Corps of Engineers, (ACOE), Department of the Army, pursuant to the Rivers and Harbors Act and Section 404 of the Clean Water Act. Assistance also includes federal funding of projects such as state highway proposals.

Free-flowing: Defined in the Act at Section 16(b) as “existing or flowing in natural condition without impoundment, diversion, straightening, rip-rapping, or other modification of the waterway.”

Invade: Encroach or intrude upon.

River Corridor: Means a river and the adjacent area within the boundaries of a designated river, or a river and the adjacent area within one-quarter mile of the banks of a congressionally authorized study river (one-half mile for designated/study rivers authorized under the Alaska National Interest Lands Conservation Act).

River-administering Agency: One of the four federal agencies that may be charged with administration of a component of the National System. These agencies are the Bureau of Land Management (BLM), National Park Service (NPS), U.S. Fish and Wildlife Service (USFWS), and U.S. Forest Service (USFS).

Section 7 Standards: This paper offers an evaluation process to provide context for measuring a proposed project against the specific standard rather than a more precise definition.

Values for Which the River Is Designated or Congressionally Authorized for Study: Defined in the Act at Section 1(b) as the river’s free-flowing condition, water quality, and outstandingly remarkable values (ORVs).

Water Resources Projects: Any dam, water conduit, reservoir, powerhouse, transmission line, or other project works under the Federal Power Act (FPA), or other construction of developments which would affect the free-flowing characteristics of a wild and scenic or congressionally authorized study river. In addition to projects licensed by the FERC, water resources projects may also include: dams; water diversion projects; fisheries habitat and watershed restoration/enhancement projects; bridges and other roadway construction/reconstruction projects; bank stabilization projects; channelization projects; levee construction;

recreation facilities such as boat ramps and fishing piers; and activities that require a 404 permit from the ACOE. Refer to Appendix A for a further discussion of how Section 7 may apply to particular types of projects.

WHEN IS A DETERMINATION UNDER SECTION 7 REQUIRED?	
Project proposed in <i>bed or banks</i> of a designated river or congressionally authorized study river	Project proposed in <i>bed or banks of river below, above or on a stream tributary</i> to a designated river or congressionally authorized study river
AND	AND
Project is proposed by a federal agency or it requires some type of federal assistance such as a permit, license, grant or loan	Project is proposed by a federal agency or it requires some type of federal assistance such as a permit, license, grant or loan
	AND
	Project is likely to result in effects within a designated river or congressionally authorized study river
Only when both of the above conditions exist is a determination required under Section 7	Only when all of the above conditions exist is a determination required under Section 7

STANDARDS AND EVALUATION PROCEDURES

The remainder of this text provides an interpretation of the standards in Section 7 and presents methods to evaluate the effects of proposed water resources projects for: 1) congressionally designated rivers; 2) secretarial-designated, 2(a)(ii), rivers; and 3) congressionally authorized, 5(a), study rivers. It also describes how agency-identified, 5(d)(1), study rivers are evaluated through respective agency policy. The discussion is presented in the form of a key, based on the type of project and location. Refer to Appendix B for Section 7 case studies.

I. Congressionally Designated Rivers: Section 7(a)

A. Water Resources Projects Within the Wild and Scenic River Corridor

1. New Hydroelectric Facilities (Licensed by the FERC)

The FERC is prohibited from issuing a license (or exemption) for construction of any dam, water conduit, reservoir, powerhouse, transmission line, or other project works under the FPA if the project is “on or directly affecting” a designated river.

The FERC routes applications for preliminary permits and licenses for new hydroelectric facilities to river-administering agencies for determinations of whether the project is “on or directly affecting” a designated river. The river-administering agencies apply the statute to prohibit any project work licensed under the FPA within the river corridor.

2. Existing Hydroelectric Facilities (Licensed by the FERC)

In the rare instances where an existing hydroelectric facility is included in a designated river corridor, modifying or relicensing of the facility is not prohibited by the Act. The river-administering agency should evaluate the proposed modification or relicense application to ensure that proposed operations protect or enhance river-related values under the “direct and adverse” effects standard. The baseline for evaluation of existing hydroelectric facilities is the project’s configuration and operation at the time of the river’s designation as subsequently modified through FERC processes. The baseline against which changes in the condition of the river’s ORVs due to the hydroelectric project are measured is their condition on the date of the river’s designation.

In certain situations, the change of operations (per modification or relicense) may be of positive benefit to river-related values. Absent changed conditions or trends of affected resources, a project proposed to operate in the same or similar manner as of the date of designation is unlikely to result in adverse effects. If, however, in the judgement of the river-administering agency the proposed project operations would have a direct and adverse effect, the river-administering agency may, but is not required to, make recommendations that would allow the FERC to license the project. (Application of Section 7 does not, however, restrict an agency’s authority to provide terms and conditions or other article requirements under the FPA.) Refer to Appendix C for the evaluation procedure.

3. Other Proposed Federally Assisted Water Resources Projects (Agency Other than the FERC)

Unlike new FERC-licensed projects, which are prohibited if they are “on or directly affecting” a designated river, other proposed federally assisted water resources projects are prohibited only

if they would have a “direct and adverse effect” on the values for which a river was added to the National System. Examples of projects that would likely be subject to this standard include, but are not limited to: dams; water diversion projects; fisheries habitat and watershed restoration/enhancement projects; bridge and other roadway construction/reconstruction projects; bank stabilization projects; channelization projects; levee construction; recreation facilities such as boat ramps and fishing piers; and, activities that require a Section 404 permit from the ACOE. Refer to Appendix C for the evaluation procedure.

B. Water Resources Projects Below, Above or on a Stream Tributary to the Wild and Scenic River Corridor

1. New or Modification/Relicense of Hydroelectric Facilities (Licensed by the FERC)

The FERC is subject to the river-administering agency’s finding relating to developments (i.e., FERC-licensed projects) located below, above or on a stream tributary to the designated river. The downstream/upstream project may be constructed (new project)—or reconfigured or operations modified (modification/relicense)—as long as the designated river is not invaded by the project, or the scenic, recreational, fish or wildlife values present at the date of designation are not unreasonably diminished. If, however, in the judgment of the river-administering agency the proposed project operations would invade the area or unreasonably diminish its scenery, recreation, fish or wildlife values, the river-administering agency may, but is not required to, make recommendations that would allow the FERC to license the project. (Application of Section 7 does not, however, restrict an agency’s authority to provide terms and conditions or other article requirements under the FPA.) Refer to Appendix D for the evaluation procedure.

2. Other Proposed Federally Assisted Water Resources Projects (Agency Other than the FERC)

The river-administering agency evaluates nonhydroelectric project proposals under the “invade the area or unreasonably diminish” standard. Typical projects that meet this definition are water resources projects visible from the designated river, dams, and upstream diversion structures as they have the potential to affect scenic, recreational, fish or wildlife values in the designated river. Refer to Appendix D for the evaluation procedure.

II. Secretarial-Designated, 2(a)(ii), Rivers: Section 7(a)

Standards and evaluation procedures for the determination of effects of water resources projects are the same as discussed in the preceding section (I.A.1-3 and I.B.1-2). The responsibility for the Section 7 determination lies with one of the four federal river-administering agencies, as this is a federal responsibility not delegated to the state. Unless otherwise defined through a written agreement, responsibility rests with the NPS. Such agreements may be appropriate in situations

where the river flows through lands administered by another federal river-administering agency (BLM, USFWS, USFS).

III. Congressionally Authorized, 5(a), Study Rivers: Section 7(b)

A. Water Resources Projects Within the Congressionally Authorized Study River Corridor

1. New Hydroelectric Facilities (Licensed by the FERC)

Section 7(b) of the Act prohibits the FERC from issuing a license or exemption for a hydroelectric project if the proposed project is on or directly affecting a study river designated under Section 5(a) of the Act. This moratorium is in effect during the study and for three years after the President sends the report and his recommendations to Congress. If Congress designates the river during this three year period, the protection becomes permanent. The study agency is responsible for the determination as to whether a proposed project is on or directly affecting the study river. Refer to the section “new hydroelectric facilities” under water resources projects within the designated river corridor (Section I.A.1.).

2. Existing Hydroelectric Facilities (Licensed by the FERC)

Refer to the section on “existing hydroelectric facilities” under water resources projects within the designated river corridor (Section I.A.2.).

3. Other Proposed Federally Assisted Water Resources Projects (Agency Other than the FERC)

Refer to the section on “other proposed federally assisted water resources projects” under water resources projects within the designated river corridor (Section I.A.3.).

B. Water Resources Projects Below, Above or on a Stream Tributary to the Congressionally Authorized Study River Corridor

For 1 and 2 below, i.e., water resources projects below, above or on a stream tributary to the congressionally authorized study river, the downstream/upstream project will be evaluated as to whether the study river is invaded or the scenic, recreational, fish and wildlife values present on the date of designation of the river for study are diminished.

1. New or Modification/Relicense of Hydroelectric Facilities (Licensed by the FERC)

Refer to the section on “new or modification/relicense of hydroelectric facilities” under water resources projects outside the designated river corridor (Section I.B.1.). Refer to Appendix E for the evaluation procedure.

2. Other Proposed Federally Assisted Water Resources Projects (Agency Other than the FERC)

Refer to the section on “other federally assisted water resources projects” under water resources projects outside the designated river corridor (Section I.B.2.). Refer to Appendix E for the evaluation procedure.

IV. Agency-Identified, 5(d)(1), Study Rivers

Rivers found eligible or suitable for the National System through federal agency planning processes are not protected by the Act from proposed hydroelectric facilities or other federally assisted water resources projects that have the potential to affect the river’s free-flowing characteristics and other identified values. However, the managing agency should, within its authorities, protect the values that make the river eligible or suitable. If a river is listed in the Nationwide Rivers Inventory (NRI), the federal agency involved with the action must consult with the land managing agency, or the NPS, if the river is on private lands, in an attempt to avoid or mitigate adverse effects. This consultation is required pursuant to a directive from the Council on Environmental Quality.

SECTION 7, NATIONAL ENVIRONMENTAL POLICY ACT (NEPA), AND COORDINATION WITH PROPONENT/REGULATING AGENCY

A separate environmental document is not required for a Section 7 determination. Rather, the federal official proposing or permitting the project typically includes analysis of what, if any, impact the proposal would have on a designated or potential wild and scenic river in their respective environmental and/or permitting processes. The river-administering agency is responsible for conducting the Section 7 analysis and making a determination under the statute. This responsibility does not preclude utilizing staff expertise of the proposing/permitting agency in the evaluation process. The Section 7 determination is signed and transmitted to the proposing/ permitting agency via respective river-administering agency processes.

1. Hydroelectric Proposals (Licensed by the FERC)

For hydroelectric proposals evaluated under the FERC's traditional licensing process, a preliminary Section 7 determination should be completed in response to the applicant's final license application. This approach is based on the assumption that sufficient detail of the project proposal is available upon completion of the final license application. This preliminary determination will precede the FERC's environmental assessment (EA) or environmental impact statement (EIS) conducted for the licensing decision. The river-administering agency will evaluate and make its final Section 7 determination based on the FERC's final environmental document. Completing the preliminary determination with the final license application provides the river-administering agency an opportunity to recommend measures to reduce adverse effects to within acceptable levels if the proposal is found inconsistent with the appropriate Section 7 standard.

For hydroelectric proposals evaluated under FERC's alternative or integrated licensing process through an applicant-prepared EA, a preliminary Section 7 determination should be completed in response to the applicant's preliminary draft EA submitted with its final license application. As in the traditional licensing process, sufficient detail of the project proposal should be available at this step in the licensing process.

During the environmental analysis conducted by the FERC in either licensing process, alternative operating regimes and/or mitigation measures will be evaluated. Importantly, the river-administering agency reserves the right to reevaluate a Section 7 determination completed for the final application in the event the alternatives considered in the environmental analysis modify the project, or otherwise create impacts not previously addressed. The river-administering agency will evaluate and make its Section 7 determination based on the FERC's draft and final environmental documents.

2. Other Federally Assisted Water Resources Projects (Agency Other than the FERC)

For proposed water resources projects "assisted" by other federal agencies, the Section 7 determination would be conducted in response to draft and final environmental documents, respectively (i.e., when sufficient alternative detail and discussion of environmental consequences is available in a NEPA document). The river-administering agency should identify wild and scenic river concerns early in the scoping process and should cooperate with the proposing agency to the greatest extent possible.

Section 7 creates a requirement for consultation between the river-administering agency and the federal agency assisting the construction of the project. Project proponents, if not federal agencies, are not required to consult directly with the federal river-administering agency, and no new permits are required under Section 7. However, project proponents should be encouraged

to consult informally with the river-administering agency early in the siting and project design process, in order to avoid delays or costs associated with projects that are unacceptable under Section 7.

The river-administering agency should, as appropriate, coordinate its evaluation process with other agencies that are required to review and comment on the project. Depending on the type of proposed project, this may include: USFWS (Fish and Wildlife Coordination Act, Endangered Species Act, and other statutes); National Marine Fisheries Service (Endangered Species Act); Environmental Protection Agency (Clean Water Act, Clean Air Act); and state fish, wildlife, water quality, and other agencies. Coordination with these other agencies should begin as early as possible in the process, preferably in the first stages of project planning.

For a water resources project proposed by a river-administering agency, the Section 7 analysis should be documented in, or appended to, the environmental analysis. Similarly, for 5(d)(1) study rivers, an analysis of the potential effects of a proposed water resources project on free flow, water quality, and the ORVs should be incorporated, appended, or available in the analysis file.

SECTION 7 AND THE FERC LICENSING PROCESS

A key step to facilitate Section 7 determinations for hydroelectric proposals is the early identification in the consultation process of precisely what information the applicant must collect or analyze to address issues necessary for the determination. This information, which serves as the basis for the preliminary Section 7 determination, should be included in Exhibit E of the applicant's final license application in the traditional licensing process, or in the applicant's preliminary draft EA and final license application in the alternative or integrated licensing process. Careful identification of information and analysis needs, at appropriate steps in the consultation process, will greatly simplify the work associated with completing a Section 7 determination in response to the final license application and draft/final environmental analysis documents.

It is also important to note that the Section 7 determination does not provide the river-administering agency an avenue to require mitigation and enhancement needs (relative to the licensing process). If a determination is made that a project would result in a direct and adverse effect, or, for projects below, above, or on a stream tributary to the designated river, that it would invade the area or unreasonably diminish (or diminish for a congressionally authorized study river) the scenic, recreational, fish, or wildlife values present at the date of designation, the responsible official may recommend measures to eliminate adverse effects. The FERC may not issue a license unless/until any adverse effects are eliminated.

SECTION 7 AND THE ACOE PERMITTING PROCESS

The ACOE's regulations are found at 33 CFR 320-330. Section 404 of the Clean Water Act requires the ACOE to regulate, through permits, the discharge of dredged or fill material into waters of the United States, including wetlands. Section 10 of the Rivers and Harbors Act of 1899 requires the ACOE to regulate, through permits, structures and work in navigable waters of the United States. The scope of the ACOE jurisdiction pursuant to these regulatory authorities is defined at 33 CFR 328-329. ACOE permit applications for activities in wild and scenic rivers are subject to the provisions of Section 7 of the Act.

Federal assistance, as defined by the river-administering agencies, includes ACOE permits. A permit from the ACOE will require a Section 7 determination by the river-administering agency when the proposal occurs in a designated river or congressionally authorized study river and is a water resources project, i.e., affects the river's free-flowing condition. The ACOE process requires a written determination from the river-administering agency for such projects. It is very important for river administrators to develop a close working relationship with regional and district ACOE staff to participate in the review and evaluation process.

Appendix A: Section 7 Examples

The following examples represent typical project proposals that may affect a designated river or a congressionally authorized study river. For some of these examples, whether or not and/or how to apply Section 7 is apparent, for others it may not be as obvious. The answers are based on recommendations by river management experts; however, for these, or more complex situations such as mining activities, threatened and endangered species, and hydroelectric development projects, consultation with agency experts and/or legal counsel may be appropriate. While these examples have general application in an agency-identified study river, the land managing agency would achieve the desired outcome through its general authorities and not the Act.

River-administering agency proposes to place fish habitat improvement structures in a designated river to meet habitat restoration goals.

Section 7 should be applied if the proposed project has the potential to affect the free-flowing condition of the river (i.e., activity within its bed or banks). Consideration of such structures should be based on the need for fish habitat restoration as identified in the River Management Plan (RMP). For example, the RMP may identify a need to recruit large woody debris in a stream where there is a limited natural source due to past management activities.

A federal agency proposes to construct a dam on an upstream tributary of a designated river. The tributary is not a part of the designated river.

Section 7 should be applied if the proposed project has the potential to affect the free-flowing condition of the designated river or its scenic, recreational, fish or wildlife values. The appropriate standard under Section 7(a) is whether the project would invade the designated river or unreasonably diminish the scenic, recreational, fish or wildlife values present at the date of designation. Because the project is upstream of the designated river, the project will not invade it. The river manager should consider, and document, how the project might affect scenic, recreational, fish and wildlife.

River-administering agency proposes to construct a new boat launch facility within a designated river.

Boat launch facilities of traditional designs typically have the potential to affect the free-flowing condition of a river and should be evaluated under Section 7. Such projects should be supported by direction in the RMP.

River-administering agency proposes a vegetative manipulation on public lands in a designated river.

Typically, a vegetative manipulation project within a river corridor does not have the potential to affect the free-flowing condition of the river and is not considered a water resources project. Importantly, however, the effects of the project should be evaluated to assure that the values for which the river was included in the National System are protected.

An existing hydroelectric facility is being relicensed upstream of a designated river. The licensee proposes changes in project configuration and operation.

Section 7 applies specifically to hydroelectric projects licensed by the FERC. For projects below, above or on stream tributary to the designated river corridor, the river-administering agency would evaluate the effects of the proposal on scenic, recreational, fish and wildlife values present in the designated river at the date of designation. The standard of evaluation is whether the proposal would “unreasonably diminish” these stated values.

A small community proposes to withdraw water from a designated river for domestic purposes.

Section 7 would be applied if the project requires construction within the bed or banks of the designated river. The river-administering agency would address the volume of instream flow through the express reservation of water necessary to meet purposes for which a river was designated (Section 13(c) of Act).

A landowner proposes to block a major tributary of a designated river for irrigation purposes. The project is located above the designated river.

It would be appropriate to apply Section 7 if there was federal assistance involved and the construction had the potential to affect the free flow or scenic, recreation, fish and wildlife values of the designated river. Such assistance may include a license, permit or other authorization by a department or agency of the federal government before, during, or after construction of the project. It also includes technical assistance from a federal agency and/or federal funding.

A bridge crossing a designated river washes out and the proposal by the river-administering agency is to replace it similar to its original condition.

An analysis of the bridge replacement should be conducted relative to Section 7. In the analysis process, opportunities for improved design or a better location for the bridge may lessen its impacts on river resources and allow better connection of the river with its floodplain. This

would be true if the bridge replacement was proposed by another federal agency or state/county utilizing federal assistance (federal funding, ACOE Section 404 permit, etc.).

Private landowners with homes on the bank of a wild and scenic river propose to replace a section of existing riprap that is failing and to construct a new section of riprap on a portion of land that is not presently armored.

A proposal to place riprap on private lands typically requires federal assistance in the form of a Section 404 permit by the ACOE. The RMP should address this issue and provide guidance. For example, the RMP might provide guidance that it is permissible to replace existing riprap but, in such replacement, consideration is to be given to improving the existing situation and/or using methods that mimic natural processes. The river-administering agency might offer assistance in the design of the project under authorities given in Section 11(b)(1). New riprap is not typically permitted on a designated river, but careful consideration must be given to the existing development and the river's flow regime.

Appendix B: Section 7 Case Studies

Salmon River Side Channel Restoration, Oregon

Background: The BLM, through development of the RMP, identified an important side channel of the Salmon River for stream habitat restoration. The side channel had been closed 30 years previously by flood control channelization work conducted by the ACOE. During following years, a dike was constructed along the river in order to protect a recreation site and facilities from flooding. Dike construction blocked all flow of Salmon River water to the secondary channel. Restoring flow to the side channel would provide critical off-channel spawning and rearing habitat for anadromous fish. The anadromous fishery of the river was found to be one of the river's ORVs.

Application of Section 7: An interdisciplinary BLM team used the accompanying Section 7 process in preparing an environmental analysis of the proposed project. The Section 7 review analyzed the effects of reopening the secondary channel by breaching the old dike, constructing a diversion structure and diverting flow from the mainstem of the Salmon River into the secondary channel for about one-third of a mile before returning to the mainstem. The stepwise Section 7 analysis resulted in a careful multi-disciplinary review and design process. The final project satisfied the intent of the Act while meeting stream habitat restoration and flood control goals. Construction of a small headgate was required to maintain the flood control integrity of the dike while allowing control of flows that would mimic natural variations occurring on the mainstem. A section 404 permit (under the Clean Water Act administered by the ACOE) was required for construction. The Section 7 analysis satisfied the ACOE, Oregon Department of Fish and Wildlife, and Oregon Department of Water Resources review processes, and the project was approved.

Results: An average of about five to fifteen cubic feet per second (cfs) of water now flows from the mainstem of the river through the side channel and adjacent pools, returning to the mainstem just one-third mile downstream. The Section 7 analysis provided an alternative that minimized disturbance of the bed and bank at the head of the old channel and reduced sedimentation in the side channel. A surface flow diversion structure with headgate was constructed and screened with natural or natural-appearing materials. Regulation of flow was necessary in order to mimic natural flows, maintain flood protection for the recreation site, and ensure that there will be no adverse impacts to the mainstem habitat during extreme low flow conditions. Even at lowest recorded flow conditions (approximately 70 cfs at this location), side channel flows would not exceed 10% of the main channel flows, resulting in negligible effect to the mainstem habitat. The project was successful in restoring approximately 2,700 square meters of prime spawning and rearing (particularly over-wintering) habitat for coho salmon, winter steelhead, and cutthroat trout. First year inventories of coho salmon and winter steelhead populations showed that production vastly exceeded expectations. The channel has been highly acclaimed for its habitat restoration, environmental education, research and aesthetic values.

Lower St. Croix River Marina, Minnesota/Wisconsin

Background: Most of the St. Croix Wild and Scenic River in Minnesota and Wisconsin is administered by the NPS, but the lower 25 miles were designated by the Secretary of the Interior and this segment is administered by the States. The Minnesota and Wisconsin Departments of Natural Resources have entered into an agreement with the NPS to form a Lower St. Croix Management Commission (Management Commission) so that these three form a management triumvirate.

In 1980, the Control Data Employees Recreational Foundation (Control Data) made application to the ACOE for a permit to construct a marina for its employees in the state-administered segment on the Minnesota side of the river. There already was concern that the Lower St. Croix was being overused for recreational boating, and that the proposed facility would worsen the situation. The state of Minnesota supported construction, but Wisconsin and the NPS opposed it. The Secretary of the Interior wrote to the ACOE requesting that the ACOE withhold a decision pending completion of a river use pattern study being performed under contract for the NPS. The purpose of the study was to determine the appropriate level of river use and development.

Application of Section 7: The project would involve dredge and fill in the bed and on the banks of a navigable waterway included in the National System. It clearly was a water resource development project requiring a Section 10 (of the Rivers and Harbors Act of 1899) permit and a Section 404 (under the Clean Water Act) permit from the ACOE. The NPS felt that it was responsible for reviewing the proposal for possible “direct and adverse effects” under Section 7(a). Control Data claimed the Secretary of the Interior (NPS) did not have this authority for a state-administered river and brought suit. The U.S. District Court for the District of Columbia ruled that the Secretary did have this authority.

Results: A key finding of the study, aside from identifying safety concerns associated with crowded conditions during peak use, was that institutional, industrial and commercial users (which would include Control Data) did not contribute significantly to the volume of traffic (less than 2%) during peak use periods. Therefore, the Secretary lifted his moratorium, and the ACOE issued the permit, but for a smaller marina than had been proposed. The Secretary also ordered that a new policy for future boating facilities be developed with several provisos established. These include: no more large marinas because they contributed significantly to peak use, with the Management Commission to define the distinction between “large” and “small” for Lower St. Croix purposes; establishment of thresholds of safety; and the issuing of permits to individual riparian owners since they also did not contribute significantly to congestion of the water surface or in beach areas.

North Umpqua River Highway Project, Oregon

Background: The Oregon Department of Transportation (ODOT), funded by the federal Public Lands Highway Program, proposed to reconstruct Highway 138, including a segment that parallels part of the North Umpqua Wild and Scenic River. The intent of the proposal was to correct existing pavement and safety deficiencies along the route and to enhance access to the multiple resource activities on adjacent federal lands (managed by the BLM, NPS and USFS). The North Umpqua was added to the National System in recognition of its fishery; water quality and quantity; and recreational, scenic and cultural values. The lower portion of the designated river is administered by the BLM and the upper portion (where a 13.5-mile segment of highway reconstruction was proposed) administered by the USFS.

Application of Section 7: Staff of the Umpqua National Forest utilized the management direction in the recently completed North Umpqua Wild and Scenic River Management Plan to provide input into the state's planning process and as a basis for the resulting Section 7 determination. In addition to identification of the desired future condition for the outstandingly remarkable and other important river values, the North Umpqua Wild and Scenic River Management Plan included guidance for the North Umpqua Highway that is a part of the National Scenic Byway System. Components of the proposed highway project that were evaluated as water resources projects under the "direct and adverse effects" standard included redesign of an access site, widening of a bridge spanning the river, and proposed gabion walls to accommodate roadway width and guardrail.

Results: Early consultation with the ODOT, and the application of the Section 7 procedure by a USFS interdisciplinary team, resulted in significant redesign of the project to protect the river's connection with its floodplain and ORVs. Specifically, the access site redesign eliminated encroachment on bank full channel and lower river terraces in the two- to five-year floodplain. The bridge was widened without modifications or additions to the existing footing and columns (protecting an important anadromous spawning area at the site and immediately downstream), and the gabion wall proposal was eliminated and the site redesigned without additional excavation or embankment construction.

Little Miami River Dock and Concrete Pad Project, Ohio

Background: The Little Miami River was designated in stages (1973 and 1980) by the Secretary of the Interior at the request of the Governor of Ohio (via Section 2(a)(ii) of the Act). In December 1986, the NPS received a Public Notice from the ACOE announcing that a landowner was requesting "after-the-fact" Sections 10 (of the Rivers and Harbor Act) and 404 (under the Clean Water Act) permits for construction of a boat landing and scenic overlook on

a designated segment of the river. The river possessed outstanding scenic, recreational, fish and wildlife, geologic and historic values.

Application of Section 7: On state-administered wild and scenic rivers without adjacent federal ownership, the Secretary of the Interior, through the NPS, is responsible for making Section 7 determinations. (Consultation with the state-administering agencies occurs as needed.) The NPS Midwest Region evaluated this water resources project for “direct and adverse” effects on wild and scenic river values.

Results: After consultation with the Ohio Department of Natural Resources, the NPS determined that the project did have a “direct and adverse effect” on the values for which the Little Miami had been designated. Essentially, the owner’s entire riverbank had been converted from a natural condition by covering it with concrete. A letter was sent to the ACOE requesting that the permit not be issued and that the owner be ordered to remove the construction and restore the riverbank. The ACOE denied the permit and ordered that the compliance measures requested by the NPS be implemented. The landowner refused and in due time the ACOE had the U.S. Justice Department bring suit against the landowner to comply. Eventually, a Consent Order and Judgment was handed down in which the landowner agreed to comply with the terms of the ACOE requirement.

North Fork John Day Dredge Pile Restoration, Oregon

Background: Past dredge mining has severely altered the free-flowing characteristics of the North Fork John Day (North Fork) Wild and Scenic River. The dredge tailings, located over an approximate 11-mile portion of the designated river, have acted to direct the flow of the river against the streambanks, causing streambank erosion and aggravating a serious bank stability problem. Past dredging also excavated streambed material down to bedrock, completely rearranging the distribution of the natural sediments of the stream. Little recovery has occurred in the 50 years since the site was dredged because of the large amount of tailings and nonerosive characteristics of the dredge piles.

The North Fork is one of the few remaining rivers in the Columbia River Basin that supports wild runs of anadromous chinook salmon and steelhead. The river also supports populations of bull trout. The purpose of the restoration project is to improve salmonid rearing habitat, water quality, streambank stability, and floodplain function. The project was based on proven restoration techniques and phased in, beginning with a pilot effort in 1993 that focused on alternative placement of tailings material. Phase 2 expanded the treatment area and extended the time frame to a five-year period.

Application of Section 7: Umatilla National Forest staff applied the accompanying Section 7 process to evaluate the potential for “direct and adverse” effects. The project proposal was coordinated with the Oregon Division of State Lands and the ACOE regarding state/federal permits for fill and removal. In addition, USFS staff consulted with the Oregon Department of Fish and Wildlife, Oregon Parks and Recreation Department (the river is also a State Scenic Waterway), and affected county and tribal governments; the USFS conducted an extensive public outreach as part of the environmental analysis process. The project was designed to remove the artificial impediment to the river’s free-flowing characteristics with as little effect to streambank and riparian vegetation as possible, thereby, allowing the river to reconnect with its floodplain over time.

Results: The results of extensive (and ongoing) monitoring of the first phase of the project indicate that floodplain function has been restored. The river has access to its floodplain and is emulating the natural system as typified in the upstream wilderness segment. The channel morphology is evidencing little change except for widening of the river adjacent to where tailings had been piled. Photo point monitoring shows that most of the pre-project vegetation is still on the site and also that vegetative recovery is occurring on the newly established floodplain. Importantly, the restoration was planned and implemented in a manner to allow the river to reconnect with its floodplain by removing the dredge tailings rather than engineering a solution.

Maurice River Boat Dock and Onshore Mining Development, New Jersey

Background: During the study phase for the Maurice Wild and Scenic River in New Jersey, the Genstar Stone Products Company applied to the ACOE for a permit to build a dock and berthing facility on a section of the river under study. This facility was to service barges for a proposed sand and gravel operation landward of the dock. Construction of the dock and berthing space would require removal of 12,000 cubic yards of sand from the river bottom and banks and construction of 400 feet of bulkhead. In order to move the extracted material from the mine site to the barges, a conveyer system was to be built which would be 60 feet above water level. A 40-foot-high section would extend 85 feet over the river. Ancillary facilities would include roads, a sand processing plant, truck scales, offices, parking and refueling areas. Up to four barge loads would have been moved per day.

Application of Section 7: Because the proposal involved dredge and fill in the river, it was clearly a water resources project and because it would occur in a navigable waterway, an ACOE Section 10 permit was required. The NPS, as the study agency for this river, reviewed the application pursuant to Section 7(b) of the Act.

Results: The effects of the project on the river’s free-flowing condition were considered. Some of the ORVs identified by the study were several rare or imperiled plants (specifically the

sensitive joint vetch, Parker's pipewort, the sedge *Carex barrattii*, and the boneset *Eupatorium reinosum*); essential bald eagle habitat; and the occurrence of other rare and imperiled birds such as Cooper's hawk, northern harrier and osprey. It was determined that construction activities would occur in some of the same locale as that of the rare and imperiled plants, and that noise from the mining activities and barge traffic would adversely affect the raptor population along the river. There would also be adverse effects on scenic values in the vicinity of the plant, though these values were not judged to be outstandingly remarkable.

Based on this impact assessment, the NPS, through the USFWS, recommended to the ACOE that the permit be denied on the basis of "direct and adverse effects." The New Jersey Department of Environmental Protection found the proposal to be inconsistent with the New Jersey Coastal Zone Management Program. On the basis of these determinations, the ACOE denied the permit.

Sudbury River Aqueduct, Massachusetts

Background: Boston's regional water supply utility, the Massachusetts Water Resources Authority (MWRA), proposed construction of a major new aqueduct in the form of a bedrock tunnel crossing under the Sudbury River in Framingham, Massachusetts. A major tunnel access shaft, "Shaft L," was excavated a few hundred feet from the river. During the construction period, pumps at Shaft L removed the large volume of groundwater that seeped into the tunnel, and the MWRA discharged this water, after treatment, to the Sudbury River. The water treatment facility removed oil and grease, suspended solids, etc., from the water, which was fairly high in water quality. The MWRA proposed construction of a riprap stilling basin on the banks of the river to reduce the velocity of the discharge to a maximum rate of 3200 gallons per minute (or 7.15 cfs). This was the equivalent of almost one-third of the river's natural flow during extreme low flow periods (ten-year drought).

In addition to its free-flowing character, the resources of interest along this portion of the Sudbury included aquatic wildlife habitat (Great Meadows National Wildlife Refuge is one-quarter mile downstream), scenery, recreation, archaeology, and literary (cultural) values (the adjacent oxbow was one of H.D. Thoreau's favorite haunts and features of his writings).

Application of Section 7: The segment of the Sudbury River that was affected by the discharge was, at the time, a congressionally authorized, 5(a), study river and was thus subject to the protections afforded by Section 7(b) of the Act. The river was designated (April 1999) after favorable recommendation by affected towns, the study committee, and the NPS.

The MWRA needed two permits under the federal Clean Water Act: a National Pollutant Discharge Elimination System (NPDES) permit from the Environmental Protection Agency and

a Section 404 permit from the ACOE. The NPS, in partnership with the Wild and Scenic River Study Committee, was involved in close consultation with both permitting agencies.

Results: As a result of this process, the following provisions were added to the NPDES and Section 404 permits to ensure that the project would have no direct and adverse effect on the river's values:

- The MWRA was not permitted to retain the discharge structure permanently, as originally requested, because of unacceptable direct and adverse impacts on the river's free-flowing character and scenic values.
- The proposed stilling basin was moved from a sensitive archaeological site to a previously disturbed area of riverbank. Riparian wetlands at this site were restored when the basin was removed, enhancing both scenery and riparian habitat.
- Discharge velocities were reduced and decentralized to avoid scouring, thereby protecting water quality and aquatic biota. In addition, the MWRA was required to monitor temperature, turbidity, and total suspended solids continuously up and downstream of the discharge point, and to undertake a study of the discharge's effects on benthic macroinvertebrates.
- A 70-foot high "mountain" of unvegetated crushed rock that was originally proposed to be created at the site, within view of the river, was eliminated. Instead, rock removed from the tunnel was processed as gravel and sold off site. (While this portion of the project was not subject to Section 7 since it did not require any federal permits or funding, the MWRA chose to mitigate the rock pile's impacts voluntarily.)

Appendix C: Evaluation Procedure **Under “Direct and Adverse”**

Evaluation procedure under the direct and adverse effects standard for existing projects licensed by the FERC, or other federally assisted projects inside the designated river (Section 7(a)), or congressionally authorized study river (Section 7(b)).

The following questions should be considered in a typical analysis under this standard. The scope of the evaluation should be consistent with the magnitude and complexity of the proposed activity. The resulting analysis may be documented in a few pages or a much lengthier product, as required.

- 1. Define the Proposed Activity.** Describe the proposed activity in terms of the:
 - a. Project proponent(s);
 - b. Purpose/need for the project;
 - c. Geographic location of the project (include a map);
 - d. Duration of the proposed activities;
 - e. Magnitude/extent of the proposed activities; and,
 - f. Relationship to past and future management activities.

- 2. Describe How the Proposed Activity Will Directly Alter Within-Channel Conditions.** Address the magnitude and spatial extent of the effects the proposed activity will have on within-channel attributes. Give special attention to changes in features that would affect the ORVs. Describe:
 - a. The position of the proposed activity relative to the streambed and streambanks.
 - b. Any likely resulting changes in:
 - (1) Active channel location;
 - (2) Channel geometry (cross-sectional shape, width/depth characteristics);
 - (3) Channel slope (rate or nature of vertical drop);
 - (4) Channel form (straight, meandering, or braided);
 - (5) Relevant water quality parameters (turbidity, temperature, nutrient availability); and,
 - (6) Navigation of the river.

- 3. Describe How the Proposed Activity Will Directly Alter Riparian and/or Floodplain Conditions.** Address the magnitude and spatial extent of the effects the proposed activity will have on riparian/floodplain attributes. Give special attention to changes in features that would affect the ORVs. Describe:

- a. The position of the proposed activity relative to the riparian area and floodplain.
 - b. Any likely resulting changes in:
 - (1) Vegetation composition, age structure, quantity, or vigor;
 - (2) Relevant soil properties such as compaction or percent bare ground; and,
 - (3) Relevant floodplain properties such as width, roughness, bank stability, or susceptibility to erosion.
- 4. Describe How the Proposed Activity Will Directly Alter Upland Conditions.** Address the magnitude and spatial extent of the effects the proposed activity will have on upland attributes. Give special attention to changes in features that would affect the ORVs. Describe:
- a. The position of the proposed activity relative to the uplands.
 - b. Any likely resulting changes in:
 - (1) Vegetation composition, age structure, quantity, or vigor;
 - (2) Relevant soil properties such as compaction or percent bare ground; and,
 - (3) Relevant hydrologic properties such as drainage patterns or the character of surface and subsurface flows.
 - c. Potential changes in upland conditions that would influence archaeological, cultural, or other identified significant resource values.
- 5. Evaluate and Describe How Changes in On-Site Conditions Can/Will Alter Existing Hydrologic or Biologic Processes.** Evaluate potential changes in hydrologic and biologic processes by quantifying, qualifying, and/or modeling the likely effects of the proposed activity on:
- a. The ability of the channel to change course, re-occupy former segments, or inundate its floodplain.
 - b. Streambank erosion potential, sediment routing and deposition, or debris loading.
 - c. The amount or timing of flow in the channel.
 - d. Existing flow patterns.
 - e. Surface and subsurface flow characteristics.
 - f. Flood storage (detention storage).
 - g. Aggradation/degradation of the channel.
 - h. Biological processes such as:
 - (1) Reproduction, vigor, growth and/or succession of streamside vegetation;
 - (2) Nutrient cycling;
 - (3) Fish spawning and/or rearing success;
 - (4) Riparian dependent avian species needs;
 - (5) Amphibian/mollusk needs; and,
 - (6) Species composition (diversity).

- 6. Estimate the Magnitude and Spatial Extent of Potential Off-Site Changes.** Address potential off-site, or indirect effects of the proposed activity, acknowledging any uncertainties.
 - a. Consider and document:
 - (1) Changes that influence other parts of the river system;
 - (2) The range of circumstances under which off-site changes might occur (for example, as may be related to flow frequency); and,
 - (3) The likelihood that predicted changes will be realized.
 - b. Specify processes involved, such as water and sediment, and the movement of nutrients.

- 7. Define the Time Scale Over Which Steps 3-6 are Likely to Occur.** Review steps 3-6, looking independently at the element of time. Define and document the time scale over which the effects will occur.

- 8. Compare Project Analyses to Management Goals.** Based on the analysis of steps 3-7, identify and document project effects on achievement, or timing of achievement, of management goals and objectives relative to free flow, water quality, riparian area and floodplain conditions, the ORVs, and river classification.

- 9. Make the Section 7 Determination.** Based on the analysis of steps 3-8, document:
 - a. The effects of the proposed activity on the river's free-flowing conditions, including identification of any proposed measures to minimize those effects.
 - b. The effects of the proposed activity on the river's water quality.
 - c. Any effects on the ORVs for which the river was designated.

The responsible official should make a conclusion as to whether the project as proposed will result in "direct and adverse effects" to the values for which the river was added to the National System.

Appendix D: Evaluation Procedure Under “Invade the Area or Unreasonably Diminish”

Evaluation procedure under the invade or unreasonably diminish standard for projects licensed by the FERC, or other federally assisted projects outside the designated river corridor (Section 7(a)).

The evaluation procedure for this standard does not lend itself to a common series of questions as developed for the direct and adverse effects standard (Appendix C). Rather, the evaluation should be focused on describing the potential of the proposed project to either invade the designated river, or diminish the scenic, recreational, fish or wildlife values. The following text provides an outline for documenting the determination and, importantly, identifies the questions to consider in evaluating the magnitude of the effects.

Suggested Outline for Determination

Introduction: Briefly describe the project and attributes of the designated river (clearly identify the ORVs).

Section 7(a) Requirement: Describe the standard. Include the following text.

Section 7(a) of the Act provides a specific standard for review of developments below or above or on a stream tributary to a designated river. Such developments may occur as long as the project “will not invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the area as of the date of designation . . .” This standard applies to projects outside the river corridor but on the same river or a tributary.

(Relate the project location to the designated river.)

The initial question to be addressed is whether or not the proposed project invades the designated river. The term invade is defined as encroachment or intrusion upon. If the project is determined to invade the designated river, the proponent would be advised to develop measures to eliminate this unacceptable effect.

If the proposed project does not invade the designated river, the next question to be answered, relative to the standard in Section 7(a), is whether or not the proposed project will “unreasonably diminish” any of the specified values. Given that the standard implies that some diminution of values may be determined reasonable, there are two questions to consider:

1. *Does the proposed project cause diminution of the scenic, recreational, and fish and wildlife values of the designated river as present at the date of designation?*
2. *If there is diminution, is it unreasonable? This would suggest an evaluation of the magnitude of the loss. Factors to be considered include:*
 - (1) Whether the value contributed to the designation of the river (i.e., outstandingly remarkable); and,*
 - (2) The current condition and trends of the resource. (If diminution is determined unreasonable, measures may be recommended to reduce adverse effects to within acceptable levels.)*

Rationale for Determination: Identify the document that provides the basis for the evaluation. For hydroelectric proposals, the application, including Exhibit E, is the basis for the preliminary Section 7 determination, reserving the right for further evaluation based on the results of subsequent environmental analysis. For a nonhydroelectric project, this document is the proposing agency or river-administering agency's environmental document. Also include, if appropriate, that staff specialists utilized available additional data as described in an accompanying Section 7(a) report.

Determination: Describe the findings as to whether the proposed project will invade the area or unreasonably diminish the four identified values: scenic, recreational, fish, wildlife. If the finding is that the proposal will invade the area or unreasonably diminish any of the four specified values, identify recommendations to reduce adverse effects to within acceptable levels, as possible.

Signature: Of the responsible official.

Section 7(a) Report: Include, as appropriate, a report that provides the detailed discussion of the potential effects that lead to the conclusions summarized in the determination.

Note: The completed Section 7 determination (determination and, if appropriate, an accompanying report) should then be included in, or appended to, the project's environmental document. Refer to preceding discussion "Section 7, NEPA, and Coordination with Proponent/Regulating Agency."

Appendix E: Evaluation Procedure Under “Invade the Area or Diminish”

Evaluation procedure under the invade or diminish standard for projects licensed by the FERC, or other federally assisted projects outside the congressionally authorized, 5(a), study river corridor (Section 7(b)).

The evaluation procedure for this standard does not lend itself to a common series of questions as developed for the direct and adverse effects standard (Appendix C). Rather, the evaluation should be focused on describing the potential of the proposed project to either invade the designated river or diminish the scenic, recreational, fish or wildlife values. The following text provides an outline for documenting the determination and, importantly, identifies the questions to consider in making the determination.

Suggested Outline for Determination

Introduction: Briefly describe the project and attributes of the designated river (clearly identify the ORVs).

Section 7(b) Requirement: Describe the standard. Include the following text.

Section 7(b) of the Act provides a specific standard for review of developments below, above or on a stream tributary to a congressionally authorized study river. Such developments may occur as long as the project “will not invade the area or diminish the scenic, recreational, and fish and wildlife values present in the area on the date of designation . . .” This standard applies to projects outside the river corridor but on the same river or a tributary.

(Relate the project location to the congressionally authorized study river.)

The initial question to be addressed is whether or not the proposed project invades the congressionally authorized study river. The term invade is defined as encroachment or intrusion upon. If the project is determined to invade the congressionally authorized study river, the proponent would be advised to develop measures to eliminate this unacceptable effect.

If the proposed project does not invade the congressionally authorized study river, the next question to be answered, relative to the standard in Section 7(b), is whether or not the proposed project will “diminish” any of the specified values. Specifically, does the proposed project cause diminution of the scenic, recreational, and fish and wildlife values of the study river (as present at the date

of designation of the river for study)? A project with long-term, positive benefits which greatly outweigh very short term diminishment of stated values may be determined acceptable. However, the river's eligibility; i.e., its identified ORVs, free flow and water quality, as well as its inventoried (tentative) classification, must be maintained in the short- and long-term.

Rationale for Determination: Identify the document that provides the basis for the evaluation. For hydroelectric proposals, the application, including Exhibit E, is the basis for the preliminary Section 7 determination, reserving the right for further evaluation based on the results of subsequent environmental analysis. For a nonhydroelectric project, this document is the proposing agency or river-administering agency's environmental document. Also include, if appropriate, that staff specialists utilized available additional data as described in an accompanying Section 7(b) report.

Determination: Describe the findings as to whether the proposed project will invade the area or diminish the four identified values: scenic, recreational, fish, wildlife. If the finding is that the proposal will invade the area or diminish any of the four specified values, identify recommendations to reduce adverse effects to within acceptable levels, as possible.

Signature: Of the responsible official.

Section 7(b) Report: Include, as appropriate, a report that provides the detailed discussion of the potential effects that lead to the conclusions summarized in the determination.

Appendix F: Frequently Asked Questions

The following questions and answers are those most frequently asked about Section 7 and are presented in six subject areas:

- River-Administering Agency Responsibility and the NEPA
- Format, Level of Analysis, Definition of Standards, and Effect of Classification
- Water Resources Projects with Adverse Effects
- Coordination with Federal Sponsor/Assisting Agency and Others
- Section 7 for Existing, Emergency and De Minimis Water Resources Projects
- Applicability of Section 7 to Transportation Proposals or Proposals by Fish and Wildlife Agencies

River-Administering Agency Responsibility and NEPA

Q. Which federal agency is responsible for a determination under Section 7(a) of the Act?

- A. The federal agency charged with administration of a river added by Congress under Section 3(a) or, in the case of a state-administered, federally designated river added by the Secretary of the Interior under Section 2(a)(ii), the BLM, NPS, USFWS or USFS managing the adjacent federal lands. On rivers without adjacent federal agency ownership, the NPS is responsible. In some situations (e.g., northern California state-administered, federally designated rivers) a memorandum of agreement has been developed to clarify which federal agency is responsible.

The first sentence of Section 7(a) directs the river-administering Secretary to make a Section 7 determination for water resources projects proposed within a designated river corridor under the “direct and adverse” effects standard. The second sentence of Section 7(a), (“Nothing contained in the foregoing sentence . . .”) changes only the standard that is utilized by the Secretary in making the determination for a water resources project below, above or on a stream tributary to a designated river, but does not shift the responsibility to an entity other than the river-administering Secretary.

Q. Which federal agency is responsible for a determination under Section 7(b) of the Act?

- A. The agency responsible for conducting the study makes the determination.

Q. Is the Section 7 determination a federal action that triggers a decision under the NEPA?

A. No. A separate analysis and decision under the NEPA is not required by the river-administering agency because a Section 7 determination is not a proposed federal action. Responsibility for meeting the NEPA requirements rests with the federal project sponsor or the federal agency considering whether to provide assistance. When a water resources project is initiated by a river-administering agency, such agency is responsible for the decision under the NEPA and a determination under the appropriate standard of Section 7.

Q. When the river-administering agency is not the project sponsor, may the river-administering agency participate in the other federal agency's NEPA process?

A. Yes. To the extent it is feasible, the Section 7 and the NEPA processes should be combined, both to streamline the processes and to develop acceptable water resources projects. Responsibility for engaging the river-administering agency in the NEPA process lies with the project proponent. River managers will provide input for the environmental analysis if requested and if given sufficient information. This should streamline the entire decision-making process and alert project proponents at an early stage whether their project can proceed without violating the Act, or whether it may have to be modified.

The federal sponsor should identify the relationship of the project to a designated river or congressionally authorized study river early in its NEPA process and highlight the need for a Section 7 determination in the scoping process.

Q. What is the role of the river-administering agency when asked to review an after-the-fact permit (a permit for a project constructed without prior approval from the appropriate federal assisting agency)?

A. The river-administering agency evaluates the project under the appropriate standard of Section 7, using pre-construction conditions as a baseline. If the project is not consistent with the appropriate standard of Section 7, the federal assisting agency cannot issue an after-the-fact permit, and appropriate action(s) should be pursued to bring the project into compliance.

Format, Level of Analysis, Definition of Standards, and Effect of Classification

Q. Must the Section 7 determination follow a standard format?

A. No. However, see Appendices C, D and E for evaluation procedures and suggested format for each of the standards.

Q. May the level of analysis vary by the type and/or complexity of the water resources project?

A. Yes. The evaluation procedures provided in Appendices C, D and E define focal questions inherent in an analysis of whether a proposed water resources project adversely affects a designated river or congressionally authorized study river as judged by the appropriate standard. The evaluation process must be rigorous enough to support the determination.

Q. Have the river-administering agencies defined the standards in Section 7 (i.e., “on or directly affecting,” “direct and adverse effect,” “invade,” and “unreasonably”) where it precedes “diminish?”

A. No. A single definition of the evaluation standards would oversimplify the rigor necessary in making a Section 7 determination, and would not reflect adequately the inherent variation in condition and trend of resource values to be protected on a specific river. The standards of Section 7 must be applied in relation to the intent of the Act as specified in Section 1(b)—specifically, the river’s free-flowing condition, water quality and ORVs. It is the responsibility of river managers when making determinations on water resources projects to explain the factors and evaluation process used to reach a conclusion on effect.

Q. Are there different standards for what is permissible under Section 7 as a function of the river’s classification (wild, scenic or recreational)?

A. No. Section 7 applies equally to all three classifications, and there is no provision in the Act that suggests certain types of water resources projects are exempt from review or subject to different standards because of classification.

Water Resources Project with Adverse Effects

Q. May a water resources project found by the river-administering agency to have an adverse effect be implemented?

A. No, absent congressional intervention. Unlike certain other laws, the Act does not allow projects that unavoidably have adverse effects to proceed. There is, however, an exception provided in the Act for projects requiring authorization/appropriations by Congress. Specifically, the statute allows the proposing agency to notify Congress in writing of its preference to proceed with a project in conflict with the purposes of the Act, as determined by the river-administering agency. In such a situation, the Congress will determine if the project is to proceed notwithstanding the identified adverse effects.

Q. Is the river-administering agency required to develop mitigation measures for a water resources project determined to have an adverse effect?

A. No. The river-administering agency may recommend measures to eliminate adverse effects and the authorizing agency may submit a revised proposal for consideration (36 CFR 297.5(3)(b)).

Coordination with Federal Sponsor/Assisting Agency and Others

Q. If additional information is needed in order to make a Section 7 determination, who is responsible to obtain this information?

A. The water resources project proposal must be described in sufficient detail for the river-administering agency to assess its effects. Providing necessary information and fully disclosing effects under the NEPA is the responsibility of the proposing/assisting agency and/or project applicant (e.g., FERC licensing process).

Q. May entities other than the river-administering agency provide input for the Section 7 determination (e.g., state, local, tribal, other organizations or individuals)?

A. Yes. Federal river managers may seek state or local input, particularly in requesting data, but, by law, the applicable Secretary is responsible for making the Section 7 determination. River-administering agencies may delegate their Section 7 review process within their agencies to appropriate field offices. They may not, however, delegate Section 7 responsibility to other entities.

Section 7 for Existing, Emergency and De Minimis Water Resources Projects

Q. Is a review under Section 7 required for an existing facility to be maintained or repaired?

A. No. The operation of existing facilities need not be reviewed unless the project is being maintained or repaired through additional construction in bed/banks of a designated river or congressionally authorized study river or if new federal assistance is required, such as a hydroelectric relicensing.

Q. How are emergency situations handled under Section 7?

A. In emergency situations where Federal assistance is involved in a project subject to Section 7, the river-administering agency will respond as quickly as possible. In other emergency situations, Federal assistance may not be triggered during the event and, therefore, Section 7 would not apply. For example, under ACOE rules at 33 CFR 323.4(a)(2) emergency maintenance of recently damaged infrastructure when there would be no modification changing the character, scope or size of the original fill design is exempt from Section 404 of the Clean Water Act and would not require a permit.

Where emergency situations can be anticipated (e.g., where frequent flood occurrences destabilize roads near a river and relocating the road is impractical), advance planning may be done to determine how a project could be carried out without having a direct and adverse effect on the values for which the river was designated.

Q. Should projects with little or no potential to adversely affect the free-flowing characteristics of a designated river or congressionally authorized study river be subject to review under Section 7?

A. There is no way to draw a clear line establishing a threshold for when a project may have an adverse effect on wild and scenic river values. The size of a river, amount and types of existing development, the outstandingly remarkable values of the river, whether the proposed water resources project is within or outside the designated river or congressionally authorized study river are all critical factors. Projects that clearly will have a *de minimis* effect may be reviewed quickly.

Applicability of Section 7 to Transportation Proposals or Proposals by Fish and Wildlife Agencies

Q. Are transportation projects that are also water resources projects (i.e., some portion of the proposal within the bed/banks of the river) subject to Section 7?

A. Yes. The definition of a water resources project includes “other construction of developments which would affect the free-flowing characteristics of a [designated river] or [congressionally authorized study river]” (36 CFR 297.3). The definition of “free-flowing” in Section 16(b) of the Act includes “modification of the waterway.” Construction activities, including dredge and fill, will modify the waterway, although not necessarily to a great degree or damaging extent. Consequently, the four river-administering agencies agree that any project that affects a river’s free-flowing characteristics is a water resources project within the meaning of Section 7 of the Act. Whether a federally assisted highway bridge was a water resources project under Section 7 was the basis of a recent (1998) court case, Sierra Club North Star Chapter et al., v. U.S. Department of Transportation.

Q. Given the direction in Section 13(a) that nothing in the Act “shall affect the jurisdiction or responsibilities of the states with respect to fish and wildlife,” does Section 7 apply to project proposals by state fish and wildlife agencies?

A. Yes. While the role of the states in managing fish and wildlife is unaffected by the Act, river-administering agencies are responsible for evaluating fish and wildlife restoration and enhancement projects that are also water resources projects under Section 7. While in most instances such projects would have a beneficial effect on wild and scenic river values, nonetheless, they must be designed to avoid adverse effects on the river’s free-flowing condition, water quality and ORVs.