

A Compendium of Frequently Asked Questions Relating to Transportation & Infrastructure Projects

*A Technical Report of the Interagency Wild and Scenic Rivers Coordinating Council
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Acknowledgments

This product is the culmination of several years of work, with contributors including David Cernicek (U.S. Forest Service), Steve Chesterton (U.S. Forest Service), Joan Harn (National Park Service), Emma Lord (National Park Service), Darin Martens (U.S. Forest Service), Jim MacCartney (National Park Service) and Risa Shimoda (River Management Society).

This Frequently Asked Questions (FAQ) summary [or “document”] is intended to be a living document that provides clear and accurate answers to common questions or misconceptions about the Wild and Scenic Rivers Act (Act) and its effects on transportation or (non-Federal Energy Regulatory Commission [FERC] hydropower) infrastructure projects. The FAQs will be amended as new questions arise or further clarification is needed. For answers to questions that are not included here, see also “Wild and Scenic Rivers Act: Section 7” and “A Compendium of Frequently Asked Questions Relating to Wild & Scenic Rivers” or contact the local river manager or appropriate river-administering agency. For questions about this document, please contact the Interagency Wild and Scenic Rivers Coordinating Council.

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Interagency Wild & Scenic Rivers Coordinating Council

Acronyms & Abbreviations

ACHP	Advisory Council on Historic Preservation
ACOE	Army Corps of Engineers
Act	Wild and Scenic Rivers Act
BLM	Bureau of Land Management
BMP	Best Management Practice
CE	Categorical Exclusion (National Environmental Policy Act)
CFR	Code of Federal Regulations
Corps	Army Corps of Engineers
Council	Interagency Wild and Scenic Rivers Coordinating Council
DOT	Department of Transportation
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
FAA	Federal Aviation Administration
FAQ	Frequently Asked Question
FEMA	Federal Emergency Management Agency
FERC	Federal Energy Regulatory Commission
FHWA	Federal Highway Administration
FR	<i>Federal Register</i>
FWS	United States Fish and Wildlife Service
Interagency Guidelines	<i>Department of the Interior and Agriculture Interagency Guidelines for Eligibility, Classification and Management of River Areas</i> published in the <i>Federal Register</i> (Vol. 47, No. 173; September 7, 1982, pp. 39454-39461) providing direction to agencies in the study and administration of wild and scenic rivers.
LEIS	Legislative Environmental Impact Statement
National System	National Wild and Scenic Rivers System
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NPS	National Park Service
NRI	Nationwide Rivers Inventory
NWP	Nationwide Water Permit
OHWM	Ordinary High Water Mark

Interagency Wild & Scenic Rivers Coordinating Council

OMB	Office of Management and Budget
ORV	Outstandingly Remarkable Value
P.L.	Public Law
Q&A	Question and Answer
<i>Reference Guide</i>	<i>Interagency Wild & Scenic River Coordinating Council Reference Guide</i>
SCORP	State Comprehensive Outdoor Recreation Plan
Secretary	Secretary of the Interior or Agriculture, generally specified in the text
USC	United States Code
USFS	United States Forest Service
WSR	Wild and Scenic River

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INTRODUCTION

In 1968, Congress enacted legislation (16 USC, Sections 1271-1287) to recognize and protect the special attributes of certain rivers in perpetuity by designating them as wild and scenic rivers (WSR). These rivers are protected from unreasonable impacts from federal projects.

Roads and infrastructure in designated river corridors provide important transportation networks, but they may also threaten the values for which the WSRs were designated, particularly their free-flowing condition, water quality and outstandingly remarkable values (ORV). Working with each designated river's federal administering agency, transportation professionals can play a critically important role in helping to protect and enhance the river's special values and attributes. These frequently asked questions (FAQ) are intended to facilitate conversations and increase the exchange of important information and valuable expertise between transportation professionals and river managers.

WSR BACKGROUND

Q1: Who administers the Wild and Scenic Rivers Act (Act) and National Wild and Scenic River System (National System)?

A: The National System is administered by four lead federal agencies—the Bureau of Land Management (BLM), National Park Service (NPS), U.S. Forest Service (USFS) and U.S. Fish and Wildlife Service (FWS). Rivers included in the National System at the request of a governor and designated by the Secretary of the Interior (under Section 2(a)(ii) of the Act) are administered by their respective state(s), with the NPS or another of the three lead agencies making determinations under Section 7 of the Act.

Q2: Where is the most current list of designated WSRs?

A: There is a map of the National System at www.rivers.gov/map.php. The map is searchable by state or river name. There also is a list of “congressional study rivers” authorized under Section 5(a) of the Act at www.rivers.gov/study.php.

BEFORE YOU GET STARTED

Q3: What first should a project proponent or federal assisting agency do when considering initiating a project near or in a river or stream?

A: Determine whether the river is: 1) part of the National System; 2) recommended for designation under Section 2(a)(ii) for its possible inclusion into the National System; 3) authorized by Congress for study under Section 5(a) for possible designation; or 4) included in the Nationwide Rivers Inventory (NRI; www.nps.gov/nri/). If any of these apply, promptly contact the appropriate river-administering agency for guidance on compliance with the Act. See www.rivers.gov/map.php to determine which agency or agencies should be involved in the discussion and the specific office to contact. It is never too early to contact the river-administering agency.

Note: Section 7 of the Act does not apply to Section 5(d)(1) study rivers.

SECTION 7 BACKGROUND

Q4: What effect does WSR designation have on federally assisted water resources projects?

A: Section 7 of the Act prohibits any department or agency of the United States from assisting in the construction of any water resources project that would have a “direct and adverse” effect on the values for which the river segment was established, namely its free-flowing condition, water quality and ORVs. It also precludes federal assistance to projects below or above a designated river that have been determined to “invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values present . . . as of the date of designation.” The “direct and adverse” standard applies to water resources projects within the river corridor, and the “invade or unreasonably diminish” standard applies to water resources projects below, above or on a stream tributary of the designated river. Stronger protection under an “invade or diminish” standard (with the word “unreasonably omitted”) is provided during a finite study period for: 1) congressional study rivers; and 2) proposed Section 2(a)(ii) rivers that were previously authorized for study under Section 5(a).

Q5: What is a water resources project?

A: Any federally assisted (by loan, grant, permit, license, or otherwise) construction project, which would affect the free-flowing condition of a WSR or Section 5(a) study river; this includes any hydroelectric project licensed by the FERC under Part 1 of the Federal Power Act (36 CFR 297).

Q6: What types of projects may fall under the purview of Section 7 of the Act?

- A. Examples include, but are not limited to, bank stabilization/revetments; bridges (e.g., abutments, piers, approaches); emergency repairs; channelization; channel restoration; culverts; dams and dam removal; dredging or excavation; fish habitat/passage restoration or enhancement; gravel mining, in-channel transmission towers; levees; pipelines; recreation facilities, such as boat ramps and fishing piers; water diversions/wells; and activities that are authorized under Section 404 of the Clean Water Act by the U.S. Army Corps of Engineers (ACOE).

Q7: Does Section 7 of the Act apply to rivers congressionally authorized for study under Section 5(a) of the Act?

- A: Yes. Section 7(b) of the Act provides the same protection to study rivers authorized by Congress, except that the qualifying word “unreasonably” does not appear before “diminish” for projects located above, below, or on a stream tributary to the study segment’s boundaries. The intent and effect is to provide greater protection for study rivers from proposed hydroelectric facilities or other federally assisted water resource projects during the time-limited study process. Identical protection from water resource projects also applies to rivers that were previously authorized for study by Congress under Section 5(a) and are later recommended to the Secretary of the Interior for designation under Section 2(a)(ii) of the Act; this protection applies for one year from the date of recommendation.

Q8: Does the Act require a special permit for construction work on a WSR or congressionally authorized study river?

- A: No. There are no special or additional permits required under the Act for construction on WSRs; however, any project that involves work below the ordinary high water mark (OHWM) of a designated river or congressionally authorized study river— or downstream, upstream or on a tributary—requires clearance from the river’s administering agency (BLM, NPS, USFS or FWS) in what is called a Section 7 analysis and determination. The Section 7 determination process typically coincides with other required environmental reviews, including the National Environmental Policy Act (NEPA) and Section 404 of the Clean Water Act. In addition to Section 7, other sections of the Act affect development on federal lands along WSRs and require the river-administering agency to protect the values for which the river was designated. Furthermore, in some locations a special use permit or authorization for may be required for construction by the land manager or zoning administrator.

RIVER AGENCY CONSULTATION

Q9: How does the Section 7 determination process work, and what information is required?

A: The goal is to render a Section 7 decision as soon as adequate, detailed, site-specific information is provided by the proponent on the project design and construction methods. Such information is needed in order to determine what impact the project would have on relevant WSR values. Section 7 analyses and determinations typically are conducted when other federal agencies are reviewing applications for required federal permits, such as those issued by ACOE, or coincident with NEPA compliance. The federal agency(s) assisting on the project cannot issue permits or provide funding until a favorable Section 7 determination is made by the river-administering agency. While the Section 7 determination does not trigger NEPA analysis on its own, river-administering agencies generally participate as cooperating or participating agencies, unless the agency also is the project proponent and thus the lead agency under the NEPA. Each river-administering agency strives to synchronize its Section 7 analysis and determination with state and federal environmental review and permitting processes.

The Section 7 process may be fairly simple for a project located far from a WSR or congressional study river. The process may be more complex for projects located below the OHWM of a WSR or study river and require a detailed engineering plan and specifications explaining how the design of a new or modified structure will avoid adverse effects, “protect and enhance” river values and blend into the landscape.

Q10: What procedures are used to evaluate proposed projects under Section 7?

A: The detailed procedures used to evaluate proposed projects under Section 7 are found in Appendix C, D and E of the Interagency Wild and Scenic Rivers Coordinating Council’s (Council) technical report *Wild & Scenic Rivers Act: Section 7* (www.rivers.gov/documents/section-7.pdf). Projects within a WSR corridor, Section 5(a) study area, or qualifying Section 2(a)(ii) application area are evaluated under the “direct and adverse effect” standard using the procedure outlined in Appendix C of the Council’s technical report to determine effects on free-flowing condition, water quality and each ORV. Projects upstream, downstream, or on a tributary of a WSR are evaluated under the “invade the area or unreasonably diminish” standard for WSRs and “invade the area or diminish” standard for Section 5(a) rivers and proposed 2(a)(ii) rivers that were previously authorized for study by Congress through Section 5(a) using the procedure outlined in Appendix D or E of Council’s technical report. This evaluation can determine a project’s potential encroachment (e.g., backwater) and effects on scenery, recreation and fish and wildlife values present at the time the river was designated, 5(a) study was authorized, or 2(a)(ii) application was submitted.

Q11: Is a Section 7 determination needed to perform all work within the river corridor of a WSR or congressionally authorized study river?

A: Any project that involves construction below the OHWM of a WSR or congressionally authorized study river—or downstream, upstream or on a tributary—requires a Section 7 analysis and determination by the river’s administering agency (NPS determination for state-administered rivers) before the ACOE can issue a permit. This includes any temporary construction work below the OHWM. The Section 7 analysis conducted by the river-administering agency is used to determine whether a project would adversely affect river values. Designs adversely affecting the river’s values will not be approved for a permit from the ACOE. Applicants are strongly encouraged to contact the river-administering agency early in the design process—ideally before the 30% design phase and well before application submittal—to avoid assumptions or miscommunications that can result in delay and/or expense.

Q12: Who is responsible for making a Section 7 determination?

A. The federal river-administering agency; the agency conducting a congressionally authorized study; or, in the case of a state-administered, federally designated rivers added by the Secretary of the Interior under Section 2(a)(ii), the agency (BLM, NPS, FWS or USFS) managing the adjacent federal lands, make all Section 7 determinations. On rivers without adjacent federal agency ownership, the NPS is responsible. While federal assisting or permitting agencies do not determine whether a proposed project would adversely affect the river or its values, it is the responsibility of the project proponent or federal assisting agency to provide sufficient information about site characteristics, project design and construction methods for the river-administering agency to make its determination about effects on river values.

Q13: What is required of river-administering agencies under Section 7?

A: River-administering agencies must evaluate proposed water resources projects under the appropriate standard of Section 7. The evaluative standard for projects located within a WSR corridor, Section 5(a) study area, or qualifying Section 2(a)(ii) application area is whether the project would have a “direct and adverse effect.” The evaluative standard for projects located downstream, upstream or on a tributary to a WSR corridor or Section 5(a) study area is whether the project would “invade the area or unreasonably diminish” for WSRs, and “invade the area or diminish” for Section 5(a) study rivers. The result of that evaluation is provided to the federal proponent or federal agency providing assistance. A Section 7 determination is typically conducted parallel to another federal agency’s permitting or environmental analysis process; it is not conducted as an independent NEPA analysis.

Q14: What basic information do river-administering agencies need to determine if a Section 7 evaluation is needed for a project?

A: After contacting the river-administering agency, the project proponent may be asked to provide basic project information to assist the river-administering agency in determining whether the project falls under their jurisdiction under Section 7 of the Act. The project proponent should provide the river-administering agency with basic project information including, but not limited to:

- Name and contact information of the project proponent;
- Map of the project area showing the location of the project; and
- Brief project description, including the type of project and structures involved, basic physical specifications (length, width, grading, etc.), and duration and timing of construction.

Some river-administering agencies use the form SF-299 - Application for Transportation and Utility Systems and Facilities on Federal Lands. This form is used to present basic project information to the federal land management agency. Proponents of other projects may opt to use this form as a reference to understand what types of basic information a river-administering agency may ask for to determine if a Section 7 evaluation is required for the project.

Q15: What information do river-administering agencies need to conduct their Section 7 evaluations and to support their determinations?

A: River-administering agencies may request a variety of data or information related to the type and scale of the project. Requested information may exist in the project engineering plans and specifications or be developed as part of other environmental review processes (e.g., NEPA, Section 404). However, river managers often request that key pieces of supporting information be included in the engineering plans and specifications to ensure that Section 7 standards are met. It is common for the river-administering agency to request information about the project, such as, but not limited to:

Site Information

- Hydrology and hydraulics (e.g., HEC-RAS, scour analysis, discharge estimates, flood elevations).
- Geomorphology (e.g., bankfull width/depth, longitudinal profile, pebble counts).

- Water quality protection measures (e.g., erosion and sediment control, water diversion specifications).
- Channel bed restoration materials specifications (e.g., particle size class distribution, quantities).
- Scour countermeasure materials specifications (e.g., rock composition, size, shape, color).

Design/Construction Information

- Duration and timing of construction.
- Resources likely to be affected (e.g. water quality/quantity, scenery, fisheries, vegetation, historic structures).
- List of plant species and specifications (e.g., seed mixes, potted plants, live stakes).
- Bioengineering materials specifications (e.g., geotextile fabrics).
- Grade control structure specifications (e.g., configuration, spacing, elevations, materials).
- Habitat structure specifications (e.g., location, configuration, tree species and sizes).
- Substructure and superstructure materials (e.g., type, composition, color).
- Determination of other federal and state agencies regarding compliance with visual resources and recreational access.

Proponents are strongly encouraged to provide the requested information in a timely manner. Without it, a river-administering agency may be unable to make its Section 7 determination, which will delay the project.

In addition to project information provided by the project proponent, river-administering agencies use information from the river's comprehensive management plan, foundation document (NPS) and other resources to guide them to make a Section 7 determination. These documents present approaches to manage, protect and enhance the free-flowing natural character, water quality and ORVs of the river, and they describe conditions for the river corridor, monitoring guidelines and management direction. River-administering agencies may weigh all of these factors when making a Section 7 determination.

PROJECT COORDINATION

Q16: How can project proponents minimize adverse Section 7 determinations, permit delays or denials, or the need for project redesign?

A: Project proponents can minimize or eliminate the need for project siting or design changes, and help avoid costly delays, through early consultation with the river-administering agency before conducting a feasibility analysis to determine whether the project is achievable and within cost constraints; certainly, there should be consultation before proceeding to project design. Doing so can offer the project proponent potentially valuable information, such as identified river values and Act standards, including the protect and enhance mandate. The river manager also may be able to provide a variety of resources that may be helpful during the design process. Proponents are strongly encouraged to provide the river-administering agency with review copies of the engineering plans and specifications as major design phases (e.g., 30%, 60%, 90%, 100%, Approved for Construction), are completed. Generally, a title and web address is acceptable for standard specifications; however, supplemental specifications and special provisions should be provided digitally or in hardcopy. Project proponents should also provide notification as permit applications are submitted. Providing these details and notifications enables the river manager to offer feedback about possible design elements that could result in an adverse Section 7 determination and to suggest modifications for ensuring the project will be compliant.

Q17: How can project designs be modified from traditional/standard practices to improve the likelihood of a favorable Section 7 determination?

A: Project designs that enhance (i.e., improve existing conditions), as well as protect river values, are most likely to result in a favorable Section 7 determination. Generally, only minor design modifications are needed to achieve Act-compliant projects. Examples include minimizing the footprint of the project below the OHWM, minimizing post-construction effects on natural channel processes and form, using native materials for construction within the river's bed and banks, and minimizing impacts on the river's ecological, recreational, cultural and scenic values. Projects generally are considered more harmonious with riverine ecosystems and river values if they:

- 1) Do not impede natural channel processes, such as bank erosion, bar formation/island building, bed aggradation/degradation, channel migration, or the transport of sediment, wood and ice.
- 2) Match the channel width, depth, slope and substrate of upstream and downstream reaches or a comparable and undisturbed nearby river system.

- 3) Are constructed of native materials (e.g., wood, rock, vegetation) that are similar in type, composition or species to those in the vicinity of the project.
- 4) Use construction materials that are natural in appearance, e.g., logs with bark intact as opposed to being peeled, or whole, naturally weathered rocks as opposed to split or fractured rock (i.e., riprap).
- 5) Place materials in locations, positions and quantities mimicking natural conditions, form and processes.
- 6) Avoid the use of anchoring materials, such as cables and rebar. If this is not possible, the materials should be installed in such a manner so as to be safe to wildlife, anglers, swimmers and boaters and visually acceptable.
- 7) Consider the project's effects (temporary or permanent) on other ORVs, such as recreation and scenery; the creation of unreasonable hazards; the substantial interference with boating and other existing recreational use; and the measures used to inform the public about unavoidable temporary construction closures or detours.

Q18: Can mitigation can be implemented to offset adverse project effects?

A: No. Mitigation is not an option if a determination is made that: 1) a project would result in a direct and adverse effect to a designated river, 5(a) study river, or 2(a)(ii) recommended river; or 2) a project above, below, or on a stream tributary to a designated river 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. Responsible officials may identify measures that would reduce project impacts to the point where they satisfy the protect and enhance standards.

In cases where a project's adverse effects are avoidable, the proponent may modify the original project design, siting, or construction approach to reduce its impacts to be within acceptable limits. For example, a bridge initially designed to be constructed using materials that would have an unacceptable impact on visual resources on a WSR that possesses scenic ORVs may be redesigned using alternative materials that will not as adversely impact the scenic value. Similarly, riprap treatment at a bridge abutment determined to offer possible adverse effect could be resubmitted with a specification for native bed material to cover the riprap and a native seed mix to revegetate the bank.

Q19. What is Section 4(f) of the Department of Transportation Act of 1966?

A: Section 4(f) refers to the original section within the United States Department of Transportation (DOT) Act of 1966 (49 U.S.C. Section 303(c); 23 U.S.C. Section 138). The DOT Act was enacted to ensure that transportation plans and programs include measures to maintain or enhance the natural beauty of publicly owned public parks, recreation areas, wildlife/waterfowl refuges and historic sites of local, state, or national significance transversed by highways.

Q20: How does Section 4(f) of the Department of Transportation Act of 1966 apply to WSRs?

WSRs may qualify as a Section 4(f) property, but designation of a river under the Act does not invoke Section 4(f) in the absence of significant Section 4(f) attributes and qualities. The Federal Highway Administration (FHWA), in consultation with the river-administering agency, determines on a case-by-case basis whether Section 4(f) applies. For example, Section 4(f) may apply to reaches of designated WSRs that are publicly owned, open to the public and include recreation as a primary purpose, feature, attribute, or value. Possible application of Section 4(f) is based on potential impacts—either by the permanent or temporary incorporation of land into a transportation facility or by proximity effects (e.g., noise, visual, atmospheric, access)—that could substantially impair protected public parks, recreation areas, wildlife/waterfowl refuges, or historic sites.

An agency of the DOT (usually the FHWA) cannot approve a transportation project or program requiring the use of Section 4(f) properties unless the following conditions apply:

- 1) There is no prudent and feasible alternative to using that land, AND
- 2) The program or project includes all possible planning to minimize harm to the Section 4(f) property resulting from the use.

- OR -

- 1) The DOT agency has determined, after public notice and opportunity for public review and comment, that the transportation program or project will not adversely affect the activities, features and attributes of the Section 4(f) property, AND
- 2) The finding of the DOT agency has received concurrence from the river-administering agency (officials with jurisdiction).

Q21: What are the roles of the DOT and the river-administering agency under Section 4(f)?

The DOT, in coordination with the river-administering agency, performs compliance reviews for qualifying properties. While Section 4(f) requires that the river-administering agency's recommendations for minimizing harm are considered during the planning process, the authority to administer and make Section 4(f) approvals ultimately resides with the DOT. The river-administering agency's concurrence on any DOT Section 4(f) compliance documents should clearly state that its concurrence is contingent upon a favorable final Section 7 determination for the project.

DESIGNATION AND RIVER VALUES

Q22: Does the classification (i.e., wild, scenic, recreational) of a designated river segment affect the standards for what is permissible under Section 7?

A: No. Section 7 applies equally to all three classifications. Classification of a river segment solely reflects the level of development that existed when the river was designated. The standard for determining whether a water resources project is permissible under Section 7 is the same for all classifications, i.e., "recreational" segments have the same level of protection that "wild" segments do. A Section 7 determination must be completed for any water resources project proposed by a federal agency or that requires some type of federal assistance, such as a permit, license, grant or loan, AND is located below the OHWM of a designated river, 5(a) study river, or 2(a)(ii) recommended river, OR is located below the OHWM downstream, upstream, or on a tributary of a designated river, 5(a) study river, or 2(a)(ii) recommended river.

Q23: How far from the river does the scenic value apply, and who judges the potential impact?

A: Scenic ORVs extend to the boundary of the designated river corridor. Typically, the boundary is located one quarter mile to each side of the river. However, there are some exceptions, such as a boundary adjustment to include an exemplary river-related historic structure or other ORV. Where non-federal lands are involved, the boundary marks the area within which the river-administering agency will focus work with local communities and landowners in developing effective strategies for the protection of river values. As a practical matter in delineating boundaries, some form of on-the-ground identification, either physical features (topography, natural or manmade features such as canyon rims, roads, etc.) or legally identifiable lines (survey or property lines) may be used so that boundaries can be more easily identified on the landscape or accurately described legally. For some rivers on

non-federal land, including some Partnership WSRs and many 2(a)(ii) rivers, there are no specific lateral boundaries for the river corridor. For these rivers, the river-administering agency is committed to protecting the WSR values wherever they are located. The river-administering agency determines the potential impact during its Section 7 review process.

Q24: How are minor and temporary effects during construction considered compared to significant or permanent effects?

A: Minor and temporary effects to the river's free-flow, water quality and ORVs during project construction may be allowed, provided the effects will be remedied before the completion of construction. Examples of minor and temporary effects include, but are not limited to, denudation of the banks during construction; use of large equipment and machinery on a channel constricting causeway; a decrease in scenic quality during construction; rerouting of recreational boat passage during construction; temporary sedimentation and turbidity during construction; and the effects of dewatering on native fish and other aquatic species. Both temporary and permanent effects are considered during a Section 7 evaluation and determination. Significant or permanent effects on free flow, water quality and ORVs are prohibited. The project proponent should work with the river-administering agency to seek avoidance measures to eliminate adverse effects during the preliminary planning stage.

EXISTING STRUCTURES AND MAINTENANCE

Q25: If a road, bridge, or other such structure was in place before the river was designated as part of the National System or congressionally authorized for study do Section 7 provisions apply?

A: Yes. Protections for a WSR or congressional study river are inclusive of structures present at the time of designation or study authorization. Any proposed alteration or replacement of an existing structure must undergo a Section 7 analysis to determine if it would meet WSR standards. Project proponents may choose to shrink the footprint of the existing structure, but generally they will be allowed to replace the structure in-kind, as long as acceptable construction methods are used. The project proponent should consult with the river-administering agency about any proposed project that requires working within the river corridor, downstream, upstream, or on a tributary of a WSR or congressionally authorized study river.

Q26: Do historic buildings and structures within a WSR corridor have any special protections?

A: Yes. Section 106 of the National Historic Preservation Act of 1966 (NHPA) requires federal agencies to consider the effects of their undertakings on historic properties and afford the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment. The Section 106 process seeks to align historic preservation concerns with the needs of federally assisted projects through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties. Commencing at the early stages of project planning, the goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on the property.

WSRs may possess cultural and historic ORVs that are also protected under the NHPA. Within the river corridor of a WSR, both NHPA Section 106 and Section 7 may apply to federally assisted projects involving designated historic districts, sites, buildings, structures and objects.

Q27: If riprap already exists in the river (e.g., along a highway embankment or bridge abutment), can it be repaired, replaced, or augmented?

A: The Wild and Scenic Rivers Act defines “free-flowing” as existing or flowing in a natural condition without impoundment, diversion, straightening, rip-rapping, or other modification of the waterway. Although some modifications (e.g., riprapping) may have existed on the date of designation, the intent of the Act is to protect rivers from modifications, such as unnatural armoring, that research shows can harm riverine ecosystems and downstream or opposing shorelines. Engineering technology has come a long way since passage of the Act in 1968 and the Clean Water Act in 1972. “Hard” armoring methods, such as riprap, increasingly are being replaced by “softer” approaches, such as bioengineering or relocation of vulnerable buildings or infrastructure. Some bank-side repairs along WSRs do incorporate riprap below the water surface or at the toe of a slope. In these cases, the riprap generally is covered with native bed materials or vegetated geogrids that are more visually appealing and that reduce the impact of this infrastructure on aquatic and riparian ecosystems. An appropriate treatment can avoid or eliminate ecological impacts such as increased water temperatures and energy transference, while still providing reliable bank protection.

Q28: Is a Section 7 determination needed to conduct routine or seasonal roadway maintenance?

A: A Section 7 analysis and determination may not be required, depending on the type and scope of the proposed work. While deferred maintenance may not be able to wait, it is always a

good idea to consult with the river-administering agency before commencing culvert, bridge, or roadway maintenance. It generally is mutually beneficial to establish and maintain a relationship with the local river manager so that, when routine or infrequent maintenance is needed, each agency has a clear understanding of the other's roles, responsibilities and perspectives.

EMERGENCY REPAIRS

Q29: If the project is classified as a Categorical Exclusion (CE) under NEPA, is Section 7 analysis and determination needed?

A: Yes. Projects triggering Section 7 review must be evaluated regardless of their NEPA pathway. A pathway resulting in a categorical exclusion does not eliminate the need for a full Section 7 analysis; Section 7 analysis is not limited to projects requiring an EA or EIS. A Section 7 determination is required for any water resources project that may affect the free-flowing character or ORVs of that river, including those classified as CEs under the NEPA. However, because the Section 7 determination is not a final federal action, it doesn't require a separate decision and analysis under the NEPA. Water resources projects include, but are not limited to, new construction or repair of dams, bridges, bank stabilization actions, recreational facilities and restoration activities that are proposed by a federal agency or require some type of federal assistance such as a permit, license, grant or loan and located:

- Below the OHWM of designated rivers and study rivers; or
- Upstream, downstream or on tributaries of designated rivers and study rivers.

Q30: How can emergency repairs under Section 7 also protect and enhance river values?

A: There are times, such as after a major flood event, when critical infrastructure may require immediate repairs to restore a safe travel route for essential traffic, minimize the extent of ecological damage, or protect remaining facilities and infrastructure. In such situations, emergency repairs should be done in a way that avoids environmental impacts and minimizes the need for subsequent permanent repairs. Permanent repairs can include justified 'betterments' that result in long-term savings and ecological benefit by reducing the need for future repairs, such as replacing a culvert with a new structure that has greater hydraulic capacity and accommodates aquatic organism passage. If the FHWA determines that the proposed betterment is not justified, the river-administering agency may, depending on content of the river management plan, be able to provide financial assistance with the upgrade under its enhancement responsibility. 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 is advised 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.

PROGRAMMATIC AGREEMENTS

Q31: Do nationwide permits (NWP) administered by the ACOE cover work in WSRs?

A: WSRs are addressed under the general conditions of 33 CFR 330 – Nationwide Permit Program administered by the ACOE. NWPs do not authorize an activity on a WSR without a written determination from the river-administering agency that the activity will not adversely affect the river, unless the activity is specifically exempted by the Clean Water Act (such as farming and silvicultural practices). The current NWPs are published in the *Federal Register* Volume 82, Number 4, January 6, 2017 (82 FR 1952), effective March 19, 2017. General Condition 16 – Wild and Scenic Rivers states:

“The Wild and Scenic Rivers Act does not prohibit activities in a Wild and Scenic River or a study river; it requires coordination with the federal agency with direct management responsibility for that river to ensure that the activity will not adversely affect the river’s designation as a Wild and Scenic River or a study river. Therefore, NWPs are an appropriate mechanism for providing [Department of the Army] authorization for some activities in these rivers. The proposed modifications to this general condition were based on federal agency regulations and guidance for implementing the Wild and Scenic Rivers Act, and the text of section 7(a) of the Wild and Scenic Rivers Act. For the purposes of [Department of the Army] authorizations issued by the Corps section 7(a) of the Wild and Scenic Rivers Act limits the Corps’ responsibilities to activities that might have a “direct and adverse effect on the values” for which the river was established. Therefore, the location of the proposed NWP activity is relevant to determining whether coordinating an NWP [pre-construction notice] with the federal agency with direct management responsibility for that river is required. Section 7(a) of the Wild and Scenic Rivers Act requires the federal agency authorizing the water resources project to do the coordination with the federal agency with direct management responsibility for that river.”

Q32: Are notifications required before beginning work in WSRs?

A: General Condition 16 of the ACOE has been modified to require pre-construction notifications for any NWP permitted activity within WSRs, effective March 19, 2017. The *Federal Register* announcing the issuance of the NWPs states the following (Volume 82, Number 4, January 6, 2017, page 1952):

“. . . When a Corps district receives a PCN from a non-federal permittee for a proposed NWP activity that will occur in a component of the National Wild and Scenic River System or in a study river, the district engineer will follow the coordination procedures described in the regulations and guidance for implementing the Wild and Scenic River [sic] Act. Until the federal agency with direct management responsibility for that river issues its written determination, the project proponent cannot proceed under the NWP authorization . . .”

Q33: Is the use of explosives permitted in WSRs?

A: Yes, but the situations that call for their use are quite limited. The administering transportation agency is able to use explosives on WSRs only when there is no other option and human life or critical infrastructure are severely threatened. Project proponents should contact the river manager immediately should a situation materialize that points towards explosives as the only remaining tactic. A basis for blasting might be a landslide that has diverted river flow out of channel, thereby threatening a housing area or critical infrastructure. In this scenario, explosive intervention could reopen the natural channel and avert an immediate threat to life and infrastructure.

Q34: Is Section 7 review required for routine maintenance or repair of existing infrastructure (e.g., debris removal from culverts, minor bank stabilization, and crack and chip sealing), and are programmatic agreements available for such activities?

A: River-administering agencies generally do not create programmatic agreements for routine activities such as roadway maintenance. The operation of existing facilities needs to be reviewed only if the project is being maintained or repaired through additional construction below the OHWM of a designated river, 5(a) study river, or 2(a)(ii) recommended river. If the activity or maintenance does not involve work below the OHWM, the river-administering agency does not have jurisdiction under Section 7. An abbreviated list of allowable activities would include tasks such as chip sealing, road resurfacing, snowplowing and most projects implemented on the road surface or within the right-of-way that have internal protections like best management practices (BMPs) in place. These activities are low-impact, frequent in nature and have no direct or obvious impact on free flow, water quality, or values for which

the river was designated. They do not require river-administering agency permission or agreements if there are no impacts to the river or its values.

Some states have existing programmatic agreements covering specific, non-WSR components of environmental review, such as biological assessments in Oregon, aquatic resources permit requirements in Washington and Section 106 historic preservation in Maryland and Vermont. In May 2010, the Federal Emergency Management Agency (FEMA) and NPS adopted a protocol agreement for disaster response related to major disaster declarations in March and April 2010 for Connecticut (DR-1904-CT), Massachusetts (DR-1895-MA) and New Hampshire (DR-1892-NH).

Q35: Can transportation departments get programmatic agreements for replacement projects, such as culverts, bridges, or other structures?

A: No. However, it may be possible, on a case-by-case basis, to group projects together; the local river manager should be consulted. Propose an accurate list of projects; specify the tasks or work that may require Section 7 analysis; and identify other information the river-administering agency will need to understand the elements being proposed and their possible effects on river values. Retain specialists to draft the needed project design documents for the river-administering agency to review. Allow enough time to ensure that conceptual and preliminary plans can be reconfigured to meet the Section 7 standard and that final plans can be approved long before the project needs to go to bid.

LAND OWNERSHIP

Q36: Are Section 7 determinations required when the proposed project would be located on non-federal land?

A: Yes. Section 7 determinations are needed before federal water resource projects affecting a WSR can proceed, regardless of who owns or manages the land, including submerged lands, where the project would be located. Section 7 analysis and determination is needed if the project is proposed by a federal agency or requires some type of federal assistance such as a permit, license, grant or loan, and: 1) is located below the OHWM of a designated river or study river; or 2) is located downstream, upstream, or on a tributary of a designated river or study river. This is the case regardless of the type of land ownership or who is proposing the project. While the ACOE is responsible for issuing permits for all work in waters of the United States (e.g., river channels or adjacent wetlands), it may not issue a permit to a private landowner, municipality, or state for work in the river without first obtaining a Section 7 determination from the river-administering agency as to whether or not the project would

have “direct and adverse effects” on or “invade or (unreasonably) diminish” the free-flowing character or other values on rivers protected through the Act.

COMPLIANCE

Q37: Whose responsibility is it to make sure that the river-administering agency is informed about the project and makes a Section 7 determination?

A: The ultimate notification responsibility rests with the federal agency proposing the water resources project or providing some type of federal assistance, such as a permit, license, grant, or loan. However, it is in the best interest of the project proponent or applicant to directly notify and coordinate with the river-administering agency at the earliest possible stage, ideally while designs are still conceptual (e.g., before or during the 30% design phase). Coordination should continue all the way through design development, permit issuance and project construction. Doing so can help to avoid costly delays, project redesigns, or required corrective actions, up to and including project removal and site restoration in cases where construction occurred without compliance under Section 7.

Q38: Who ensures compliance with the Act?

A: The first level of compliance rests with the local river-administering agency. Inquiry and response to permitting violations is generally addressed cooperatively with federal regulatory agencies, such as the ACOE. Federal regulatory agencies routinely coordinate with the river-administering agency before issuing a work permit to applicants, requiring corrective measures, or taking other enforcement actions.