

Wild & Scenic Rivers Act Primer Relevant to Yellowstone River & Tributaries

Prepared For the Custer Gallatin Working Group

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I. Classification

Under the Wild & Scenic Rivers Act, the Yellowstone River (YNP boundary in Gardiner to Carbella Fishing Access Site) would be classified as “Recreational”; Bear Creek (headwaters to Jardine) would be classified as “Wild” and Bear Creek (Jardine to confluence with Yellowstone River) would be classified as Recreational; Big Creek would be classified as “Wild.” The Boulder would be classified as “Recreational.” The West Boulder would be classified as “Wild.” Below are the qualifiers for the three levels of classification:

“Wild” river areas -- Those rivers or sections of rivers that are free of impoundments and generally inaccessible except by trail, with watersheds or shorelines essentially primitive and waters unpolluted. These represent vestiges of primitive America.

“Scenic” river areas -- Those rivers or sections of rivers that are free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by roads.

“Recreational” river areas -- Those rivers or sections of rivers that are readily accessible by road or railroad, that may have some development along their shorelines, and that may have undergone some impoundment or diversion in the past.

II. Water Quality & Effluent Discharge

Implementation of Clean Water Act (CWA) programs important in WSR administration is typically delegated to state agencies and also Indian tribal governments, with the EPA maintaining an oversight role. Key CWA programs include: water quality standards; effluent guidelines; national pollutant discharge elimination system (NPDES); nonpoint sources; total maximum daily loads (TMDLs); state water quality certification; and permits for discharge of dredged or fill material in waters of the United States.¹

¹ Implementing the Wild & Scenic Rivers Act: Authorities and Roles of Key Federal Agencies. Technical Report of the Interagency Wild and Scenic Rivers Coordinating Council. Council Contact: Jackie Diedrich. January 1999. (Page 5)

Effluent Guidelines: The EPA is responsible for developing “Effluent Guidelines” under Section 304 of the CWA. This lengthy and expensive process requires the EPA to identify, for each industrial/pollution source sector, the best practicable (reasonably attainable) control technology.²

III. Transportation Corridor (Highway 89)

As part of the Federal Highway Administration’s (FHWA) role in managing activities under the Federal-aid Highway Program, the agency is also responsible for implementing Section 4(f) of the Department of Transportation Act of 1966. Section 4(f) established a national policy for agencies within the United States Department of Transportation (USDOT) to preserve the natural beauty of public park land, recreation land, wildlife refuges, and significant historic sites.

Lands in WSR corridors managed for multiple uses may or may not be subject to Section 4(f) depending on the manner in which they are administered by the managing agency. Close examination of the management plan is required prior to any use of these lands for transportation purposes. Section 4(f) would apply to those portions of the land designated in a management plan for recreation or other Section 4(f) uses. Where the management plan does not identify specific uses or where there is no plan, the transportation agency must consult further with the river-administering agency to make a Section 4(f) determination.³

Section 13(g) of the Act allows the granting of easements and rights-of-way within the boundaries of designated components in accordance with applicable laws, provided that the conditions attached to the grant are consistent with the purposes of the Act. Any portion of a right-of-way project that includes federally assisted construction that may affect the river’s free-flowing condition—and is not automatically prohibited by the Act—is subject to an evaluation by the river-administering agency under Section 7(a). Those projects found to have an adverse effect on the values for which the river was added to the National System are typically prohibited through the authority of the proposing or assisting agency.⁴

IV. Comprehensive River Management Plan (CRMP)

The preparation of a management plan is required within three fiscal years of designation. The plan will address: resource protection, development of lands and facilities, user capacities, and other management practices necessary to achieve the purposes of the Act. Coordination is done with land management plans affected for adjacent federal lands, and with state, local government and interested parties.

V. Social and Economic Benefits

A Wild and Scenic River designation will not lead to restrictions on recreational use of rivers. Recreational use will only be affected if it is “necessary to protect public safety, the river’s water quality, or other resource values... Whether and how to restrict recreational use is a key issue in the planning process [CRMP], which includes extensive local, regional and national public involvement.”⁵

² Ibid. (Page 5)

³ Ibid. (Page 15)

⁴ A Compendium of Questions & Answers Relating to Wild & Scenic Rivers. A Technical Report of the Interagency Wild and Scenic Rivers Coordinating Council Compiled By: Gary Marsh, Bureau of Land Management (Retired), Washington, DC Contact: Dan Haas, U.S. Fish & Wildlife Service, Burbank, Washington. May 2014. (Page 32)

⁵ Ibid. (Page 31)

VI. Bridge Reconstruction or Replacement

The portions of new bridge construction or replacement of existing bridges across designated WSRs with activity in the river's bed or its banks qualify as a federally assisted water resources project and thus require a determination under Section 7(a). A key step is the early identification of the information that will be necessary to prepare the Section 7(a) determination. It is the responsibility of the project proponent to collect or analyze the data and provide it to the river-administering agency. This information serves as the basis for the Section 7(a) determination.

Proposals will be evaluated by the river-administering agency to determine if there are "direct and adverse effects" to the river's free-flowing condition, water quality and its outstandingly remarkable values. Refer to the Council's Wild and Scenic Rivers Act: Section 7 technical report (2004) and appendix C for detail.

*Case 1. Bridge Rehabilitation and Bridge Replacement. White Clay Creek WSR, PA
NPS Report to White Clay Creek Watershed Management Steering Committee. April 13, 2016.*

4) E23-9999 Notification for SR 3044 Ewing Rd Bridge Rehabilitation; Middle Branch White Clay Creek; London Grove Township, Chester County, PA - NPS has determined that the above referenced project, will not significantly or negatively impact the river or its resource values, and should not adversely affect the White Clay Creek National Wild and Scenic River with the implementation of the following: Backfill of proposed rip rap areas for scour protection of structures: a. Backfill of rip rap areas – stockpiled soil and rock material that is excavated during preparation of the site during construction should later be used to fill the voids between rip rap above the ordinary high water mark. This will leave an exposed area of rip rap at the toe of all slopes for enhanced scour protection.

Upstream and downstream from the project site, in somewhat close proximity, are existing critical forested and wetland habitat areas. Following the prescription for filling the voids of the rip rap will prevent migrating reptiles and amphibians from the critical habitats from being trapped and killed within the rip rap areas of this project.

5) Penn Dot's P3 Rapid Bridge Replacement Project - S.R. 3044 (Ewing Road), Section 000 bridge over Middle Branch White Clay Creek in London Grove Township, Chester County, Pennsylvania. - NPS has conducted a review of the proposed bridge replacement and have determined that as proposed the replacement bridge will actually improve

and have a positive effect on the free flow of the Middle Branch by expanding the width between bridge abutments. The existing bridge abutments are right against the edge of the channel. The replacement bridge moves the bridge abutments approximately 8 feet back landward away from the channel, thereby expanding the area for flow of the Middle Branch. While a portion of the existing abutments will remain, most of the existing abutment will be removed. By moving the bridge abutments back from the channel the project achieves a goal of the White Clay Creek & Its Tributaries Watershed Management Plan of improving river or stream free flow.

In terms of other river impacts we do not believe this proposed bridge replacement project will significantly or negatively impact the Middle Branch or its resource values; a bog turtle survey indicated no potential bog turtle habitat within 300 feet of the site and the results were concurred by U.S Fish & Wildlife; bog turtles are an "outstandingly remarkable resource of the White Clay Creek Wild and Scenic River.

This project should not adversely affect the White Clay Creek National Wild and Scenic River or the Middle Branch with implementation of the following: Backfill of proposed rip rap areas for scour protection of structures: a. Backfill of rip rap areas – stockpiled soil and rock material that is excavated during preparation of the site for construction of the replacement bridge should later be used to fill the voids between rip rap used for scour protection of the bridge abutments. After filling the rip rap voids the scour protection areas should be topped with 4-6 inches of topsoil and seeded with a mix of perennial and annual grasses.

Following the prescription for filling the voids of the rip rap will prevent migrating reptiles and amphibians from critical habitats near the project site from being trapped and killed within the rip rap areas of this project.

Case 2. County Road Bridge Replacement. Big and Little Darby Creeks WSR, OH

This National Park Service determination is for replacement of the Amity Pike Bridge (County Road 36) across the Big Darby Creek WSR. Big and Little Darby Creeks WSR is a state-administered, federally designated (2(a)(ii)) WSR. On the Big and Little Darby Creeks WSR, the National Park Service is responsible for Section 7(a) of the Act. The responsible official provided project measures and conditions to be implemented by the project proponent to avoid an adverse determination.

Note: The project proponent was not able to fully meet required project conditions. New designs were submitted (which avoided the use of work pads). The project changes were evaluated in a new Section 7(a) analysis in response to an amended Section 404 (Clean Water Act) permit and were, ultimately, approved.

Case 3. Bridge Replacement. Innaha WSR, OR

This Forest Service determination is for replacement of the Lower Innaha Road Bridge on the Innaha WSR. The responsible official found project effects to be neutral or providing enhancements over the existing situation. The official, however, appropriately made the finding conditional on a concurrence letter from the State Historic Preservation Office.

Case 4. Bridge Replacement. Sturgeon WSR, MI

This Forest Service determination is for replacement of an existing bridge that was removed to its concrete abutments in 2006. The new bridge is to be placed on the same alignment. A detailed hydrological report was developed to evaluate the effects of the new bridge on the river's free-flow, concluding the increased span would better connect the river to its floodplain. The responsible official found no other adverse effects.

VII. Bank Stabilization Projects

The portions of a proposed stabilization measure (e.g. rock revetment, gabion, or groin) within the river's bed or its banks qualify as a federally assisted water resources project and thus require a determination under Section 7(a). These types of projects typically require a permit under Section 404 of the Clean Water Act; this program, except for two states, is administered by the Army Corps of Engineers. Whether authorized under a nationwide or individual permit, the project proponent is responsible to provide information sufficient for a determination by the river-administering agency.

Proposals will be evaluated by the river-administering agency to determine if there are "direct and adverse effects" to the river's free-flowing condition, water quality and its outstandingly remarkable values. Refer to the Council's Wild and Scenic Rivers Act: Section 7 technical report (2004) and appendix C for detail.

Case 1. Section 14 Study Erosion Project. Little Miami WSR, OH

This National Park Service determination is for placement of stone riprap and fill material to stabilize approximately 1400 linear feet of eroding bank. The project was designed to prevent loss of archeological resources and park facilities. The responsible official found the project to have a direct and adverse effect on the river's free-flowing condition, scenic and recreational values. The official, however, recommended further exploration with other agencies to develop alternatives compatible with the Act and the management goals for the river and the park. The project was redesigned based on NPS recommendations and resubmitted relying on bioengineering techniques. This second application was determined consistent with the Act and has been implemented.

Case 2. Garnett Bank Protection Project. Imnaha WSR, OR

This Forest Service determination is for placement of large woody material (logs, rootwads, and limited anchor rock) to stabilize a bank and thereby allow for recovery of the structure and function of the riparian area. The responsible official found the short term nature of the bank protection material and its intent to allow for reestablishment of riparian vegetation consistent with the Act. The official had previously determined a rock revetment (riprap) proposal to have direct and adverse effects on free-flow and other values. Representatives of the Forest Service, federal and state agencies, and the landowner worked together to develop this alternative approach.

Case 3. Mills Bioengineering Project. Deschutes WSR, OR

This Forest Service determination is for a bioengineering project designed to improve bank stability, increase riparian and upland vegetation, maintain channel integrity, improve aesthetics and provide for landowner access to the river (floating community dock). The responsible official found this project consistent with the Act and a significant improvement over current site conditions, which included rock riprap, other site hardening measures, and multiple structures to access the river (e.g. stairways and docks).

VIII. Mining & Leasing

How does WSR designation affect mining operations on federal lands? Federal lands within the boundaries of designated river areas (one-quarter mile—one-half mile for rivers in Alaska located outside national parks—from the bank on each side of the river) classified as **wild** are withdrawn from appropriation under the mining and mineral leasing laws by Sections 9(a) and 15(2) of the Act. Federal lands within the boundaries of designated river areas classified as **scenic** or **recreational** are not withdrawn under the Act from the mining and mineral leasing laws.

Existing valid claims or leases within the river boundary remain in effect, and activities may be allowed subject to regulations that minimize surface disturbance, water sedimentation, pollution, and visual impairment. Reasonable access to mining claims and mineral leases will be permitted. Mining claims, subject to valid existing rights, can be patented only as to the mineral estate and not the surface estate, subject to proof of discovery prior to the effective date of designation.

For river segments classified as **wild**, no new mining claims or mineral leases can be granted; however, existing valid claims or leases within the river boundary remain in effect, and activities may be allowed subject to regulations that minimize surface disturbance, water sedimentation, pollution and visual impairment. For river segments classified as scenic or recreational, filing of new mining claims or mineral leases is allowed but is subject to reasonable access and regulations that minimize surface disturbance, water sedimentation, pollution, and visual impairment.

Are only designated river segments classified as “wild” automatically withdrawn under Section 9(a) of the Act? Yes. To withdraw a scenic or recreational river segment, the managing agency must submit a separate public land order or notice of realty action

IX. Terminology

Bed or banks is an interpretation of Section 16(b) of WSRA, which defines free flowing, in part, as “existing or flowing in natural condition without impoundment, diversion, straightening, riprapping, or other modification of the waterway.” Generally, the applicability of Section 7(a) is limited to the area within the ordinary high-water mark of the river. The ordinary high-water mark is defined in 33 CFR Part 328.3(e) as “...that line on the shore established by fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.”

Non-degradation within the Act’s context is not synonymous with no impact. Non-degradation in the context of a wild and scenic river is assurance that there is no downward trend in conditions that affect ORVs. As stated in the Council’s technical report (Wild and Scenic River Management Responsibilities (March): “To achieve a non-degradation standard, the river administering agency must document baseline resource conditions and monitor changes to these conditions.”

The overarching goal articulated in Section 10(a) of the Act is to protect existing high-quality conditions while improving conditions when unacceptable impacts are documented, thus leaving each river to future generations in better condition than when it was designated.

Protect and enhance from Section 10(a) of the Act

Each component of the national wild and scenic rivers system shall be administered in such manner as to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values.

In its technical report on managing wild and scenic rivers (Wild and Scenic River Management Responsibilities (2002)) the Council interprets Section 10(a) as: “Protect rivers by documenting and eliminating adverse impacts on values (free-flow, water quality, ORVs), including activities that were occurring on the date of designation. Enhance rivers by seeking opportunities to improve conditions.”

While the term “protect” is interpreted by the Council above as “eliminating adverse impacts,” it is not interpreted as an absence of impacts. Rather, each WSR-administering agency must, based on best available scientific information and reasoned professional judgment, ensure that existing values are protected and, to the extent practical, enhanced. The river-administering agency must also establish a positive trajectory for any value that was in a degraded condition on or after the date of the river’s designation.⁶

Water resources projects are federally assisted construction that would affect a designated river’s free-flowing characteristics, as defined in Section 16(b) of WSRA (see footnote 6). Examples of water

⁶ Ibid. (Page 69)

resources projects include, but are not limited to: fisheries habitat and watershed restoration/enhancement projects; water diversion projects; transmission lines and pipelines; bridge and other roadway construction/reconstruction projects; dams; water conduits; bank stabilization projects; channelization projects; powerhouses; levee construction; reservoirs; recreation facilities such as boat ramps or fishing piers; or dredge and fill projects that require a federal permit, such as from the U.S. Army Corps of Engineers as required by Section 404 of the Clean Water Act (33 USC 1344).

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