

4. SECTION 7 OF THE WILD AND SCENIC RIVERS ACT – DETERMINATION PROCESS FOR WATER RESOURCES PROJECTS

The U.S. Congress enacted the Wild and Scenic Rivers Act (WSRA) in 1968 to end decades of damming, dredging, and diversion of some of the nation’s most spectacular waterways. Section 7(a) is a key provision of WSRA that directs federal agencies to protect the free-flowing condition, water quality, and outstandingly remarkable values (ORVs) of designated Wild and Scenic Rivers. Section 7 requires a rigorous and consistent interagency process for protecting river resources. This chapter describes the process used to protect the free-flowing condition of the Merced River when a proposed *water resources project* triggers a review and determination under section 7 of WSRA. *Water resources projects* 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 U.S. Army Corps of Engineers⁵.

While no new dams will be proposed on the Merced River in the future due to its status as a Wild and Scenic River, other potential water resources projects along the Merced Wild and Scenic River could be proposed, including projects with the purpose of improving the free-flowing condition of the river or enhancing a particular outstandingly remarkable value. The National Park Service (NPS) will conduct a “Section 7 Determination Process” as described in the next section of this chapter for all proposed projects that require review under section 7 of WSRA. Any proposed project that meets the following conditions must undergo an initial review, as depicted in Table 4-1, to confirm whether the proposed project is subject to the Section 7 Determination process:



- Proposed projects in the bed or banks of the Merced River, or
- Proposed projects in the bed or banks of a river located above, below, or on a stream tributary to the Merced River

The next section in this chapter describes the “Section 7 Determination Process.”

The NPS will conduct the Section 7 Determination process for the preferred alternative in the final Merced River Plan, and the analysis and determination will be included in the Record of Decision for the plan.

⁵ Section 404 of the Clean Water Act requires that a permit is obtained from the U.S. Army Corps of Engineers, prior to beginning any non-exempt activity involving the placement of dredged or fill material in waters of the United States, including wetlands.

TABLE 4-1: DETERMINING THE NEED FOR A SECTION 7 DETERMINATION UNDER WSRA

When is a Determination under Section 7 of the Wild and Scenic Rivers Act Required?	
<p style="text-align: center;">IF</p> <ul style="list-style-type: none"> The project is proposed in the bed or banks of a designated river or congressionally authorized study river <p style="text-align: center;">AND</p> <ul style="list-style-type: none"> The project is proposed by a federal agency or it requires some type of federal assistance such as a permit, license, grant, or loan <p style="text-align: center;">THEN</p> <p style="text-align: center;"></p> <p>A Section 7 Determination is required under when both of the above conditions exist.</p>	<p style="text-align: center;">IF</p> <ul style="list-style-type: none"> The project is proposed in the bed or banks of a river below, above, or on a stream tributary to a designated river or congressionally authorized study river <p style="text-align: center;">AND</p> <ul style="list-style-type: none"> The project is proposed by a federal agency or it requires some type of federal assistance such as a permit, license, grant, or loan <p style="text-align: center;">AND</p> <ul style="list-style-type: none"> The project is likely to result in effects within a designated river or congressionally authorized study river <p style="text-align: center;">THEN</p> <p style="text-align: center;"></p> <p>A Section 7 Determination is required under when all of the above conditions exist.</p>

THE SECTION 7 DETERMINATION PROCESS

Any federally assisted water resources project that would have a “direct and adverse effect” on the values for which a river was added to the Wild and Scenic Rivers System is prohibited. The NPS is responsible for making the final determination as to whether a proposed water resources project would have a direct and adverse effect on river values in the portion of the Merced River within Yosemite. The NPS must coordinate the Section 7 Determination process with other agencies that are required to review and comment on the project. Depending on the type and location of the project, such agencies might include the U.S. Fish and Wildlife Service, the Environmental Protection Agency, the U.S. Forest Service, the Bureau of Land Management, and the U.S. Army Corps of Engineers. “Consultation and Coordination” (Chapter 10) provides specific information on NPS consultation with other agencies. Review of projects subject to Section 7 of WSRA will also be coordinated with other environmental review processes as appropriate, such as those required by NEPA and the National Historic Preservation Act (NHPA). In accordance with WSRA, potential water resources projects that could have a direct and adverse effect on the values of a designated river must be: (1) redesigned and resubmitted for a subsequent Section 7 Determination, (2) abandoned, or (3) reported to the Secretary of the Interior and Congress.

Federal Projects Below, Above, or on Tributaries of a Wild and Scenic River

Proposed non-hydroelectric projects with federal assistance that would take place below, above, or on the tributaries of a Wild and Scenic River have a slightly different evaluation standard than projects proposed directly in the bed and banks of a Wild and Scenic River. These projects must not “invade the area or

unreasonably diminish” wild and scenic river values. Typical projects that meet this definition are water resources projects that would be visible from the designated river, dams, and upstream diversion structures, because such projects have the potential to affect scenic, recreational, and fish or wildlife values in the designated river.

Steps in the Wild and Scenic Rivers Act Section 7 Determination Process

The following WSRA Section 7 Determination process is adapted from a technical report by the Interagency Council (IWSRCC 2004). In conformance with the guidance contained in that report, the NPS will undertake the following steps as part of its Section 7 Determination process for non-emergency projects:

- Describe the purpose and need of the proposed project and its location, duration, magnitude, and relationship to past and future management activities.
- Analyze the potential impacts of the proposed project on the values for which the river was designated wild and scenic. This analysis will follow the guidelines provided by the *Wild and Scenic Rivers Act, Section 7 Technical Report* of the Interagency Council (2004), and other applicable guidance.
- Define the likely duration of the projected impacts.
- Use this analysis to make a WSRA Section 7 Determination. This determination will document the effects of the proposed activity, including any direct and adverse effects on the values for which the river was designated as wild and scenic.
- Redesign and resubmit any water resources projects found to have a direct and adverse effect on the values of this designated river for a subsequent Section 7 Determination. In the event that a project cannot be redesigned to avoid direct and adverse effects on the values for which the river was designated, the NPS will either abandon the project or advise the Secretary of the Interior in writing and report to Congress in writing in accordance with WSRA section 7(a).
- Follow WSRA section 7 procedures to determine if projects above or below the designated river or on its tributary streams would invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the designated corridor.

Emergency projects, such as repairing a broken sewer line in or near the river, may temporarily proceed without a Section 7 Determination. However, a Section 7 Determination must be completed in a timely manner upon completion of the project. Emergency water resources projects that are later determined to have a direct and adverse effect on the river values shall be mitigated based on the findings of the Section 7 determination.

Flowcharts to Illustrate WSRA Section 7(a) Determination Process

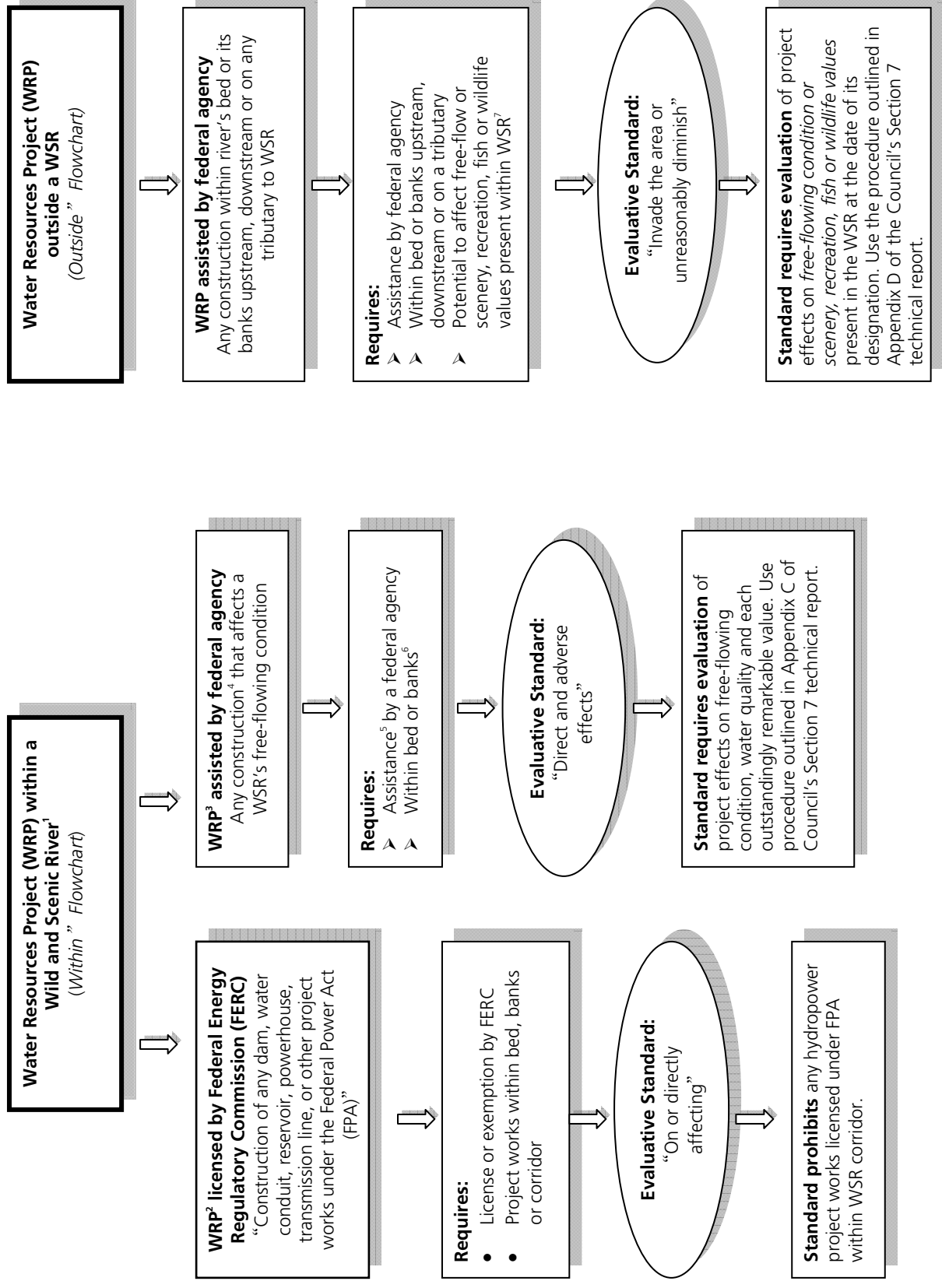
The Interagency Council’s *Wild and Scenic Rivers Act: Section 7 Technical Report* (IWSRCC 2004) suggests procedures to evaluate the effects of proposed water resources projects. The Interagency Council website⁶ also includes examples of section 7 determinations for common types of water resources projects. The Interagency Council developed three flowcharts to guide managers in determining whether a proposal is subject to review under section 7(a) and, if so, which standard and evaluative procedure applies. These flowcharts, as illustrated in Figure 4-1, Figure 4-2 and Figure 4-3 also reference the appropriate detailed

⁶ <http://www.rivers.gov/rivers/documents/section7/flowchart-introduction.pdf>

evaluative process in the Interagency Council’s Section 7 technical report. These flowcharts would be the basis of the section 7 determination process for the *Merced River Plan/DEIS*.

Using the flowcharts, managers would follow the track for proposed water resources projects located either *within* the Merced River corridor, or *outside* (upstream, downstream, or on a tributary to) the Merced River corridor (Figure 4-1). Figure 4-2 and Figure 4-3 provide a more detailed explanation of the process and may be used independent of Figure 4-1. Figure 4-2 would be used for water resources projects that would be located within a designated river corridor, and Figure 4-3 would be used for water resources projects that would be located outside a designated river corridor.

Figure 4-1: Wild and Scenic Rivers Act Section 7(a) Process Flowchart



FLOWCHART FOOTNOTES

- ¹ A **Wild and Scenic River** includes the river channel and adjacent areas within the Wild and Scenic River boundaries pursuant to Section 3(a) or 2(a) (ii) of WSRA.
- ² A **water resources project** (i.e., a hydropower project licensed under the Federal Energy Regulatory Commission) refers to construction of any dam, water conduit, reservoir, powerhouse, transmission line, or other project work under the hydropower provisions (license and exemption) of the Federal Power Act (Part I), as amended (41 Stat. 1063; 16 USC 791a et seq.). Other facilities licensed by the Federal Energy Regulatory Commission under the Federal Power Act (e.g., interstate power transmission lines or natural gas pipelines) are not prohibited outright. They are subject to review under Section 7(a) only if they include construction as described in Footnote 6.
- ³ A **water resources project** is 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 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).
- ⁴ **Construction** refers to any action carried out with federal assistance that would affect the free-flowing characteristics of a Wild and Scenic River.
- ⁵ **Assistance** refers to any loan, grant, license, or other assistance in the construction of any water resources project.
- ⁶ '**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."
- ⁷ Requires a **nexus** between the proposed upstream, downstream, or tributary project and the Wild and Scenic River or such project is not a water resources project for purposes of a Section 7(a) determination. Projects that have the potential to affect the river's free flow or the scenery, recreation, fish, or wildlife values of a Wild and Scenic River are dams, upstream diversion structures and projects that can be seen from the Wild and Scenic River, as they have the potential to affect these characteristics and values in the designated river.

**Figure 4-2: Section 7(a) Flowchart for a Water Resources Project
Within a Wild and Scenic River Corridor¹**

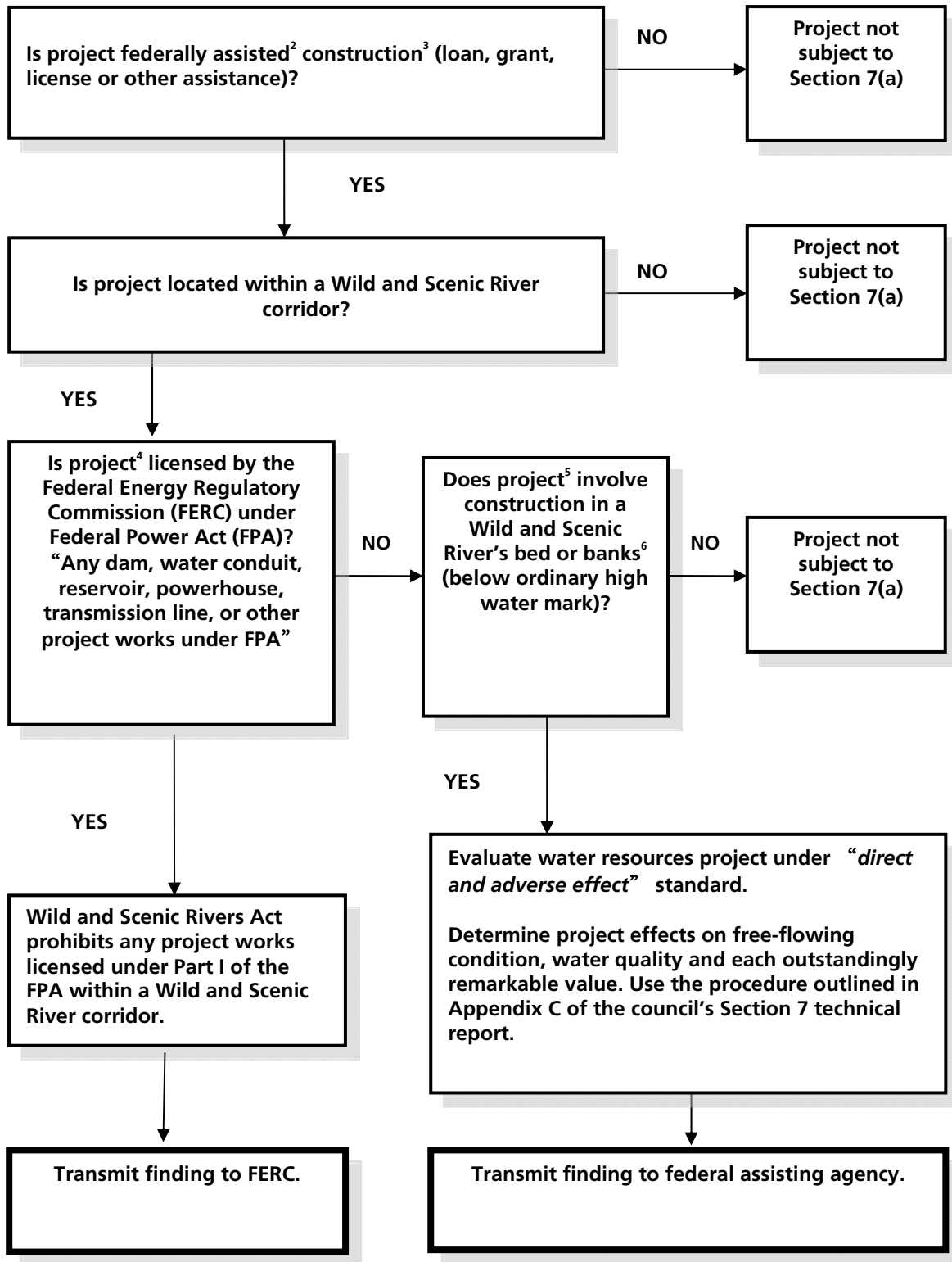


Figure 4-3: Section 7(a) Flowchart for a Water Resources Project Outside of a Wild and Scenic River Corridor

