

WILD AND SCENIC RIVERS: Protection through BLM's Land Use Planning Process

The Bureau of Land Management (BLM) is required to identify, evaluate and protect rivers and river segments that may eventually be designated Wild and Scenic Rivers by Congress. This fact sheet provides background on how the BLM carries out its responsibilities and describes the opportunities for public participation.

Overview

The Wild and Scenic Rivers Act (WSRA) of 1968¹ was passed in order to preserve America's free-flowing and extraordinary rivers and river segments. Wild and Scenic Rivers (WSR) may be designated and added to the National Wild and Scenic Rivers System (NWSRS) in 3 ways: (1) Congress may designate a WSR directly; (2) the Secretary of Interior may make a designation via application by a State Governor if the State has already protected the river under its laws; and (3) an agency may study and recommend a river for inclusion to Congress. BLM can make recommendations through the land use planning process that can influence all three of these designation options.

The BLM's study and recommendation process involves 3 steps:

1. identifying rivers that are "eligible" for designation;
2. classifying them as "wild" "scenic" or "recreational"; and
3. deciding which of those are ultimately "suitable" for designation, which serves as a recommendation to Congress.

Once found eligible, the BLM must apply interim protective management for the rivers' outstanding river values while BLM conducts a suitability study. Management may change depending on if the BLM finds them "suitable" for designation. After legislative designation, BLM must prepare a comprehensive resource management plan and impose protective management prescriptions for designated rivers. Throughout the BLM's identification and management process, there are important opportunities for public engagement to ensure rivers are protected by identifying rivers and the values that make them eligible and suitable, as well as ensuring that the BLM implements sufficiently protective management.

The Path to Designation

The BLM is required to identify and evaluate potential rivers and river segments that may later be deemed suitable and eventually designated WSRs by Congress.² This process must occur

¹ 16 U.S.C. §§ 1271-1287

² BLM Manual 8351.06; *see also*, 16 U.S.C. § 1276(d)(1) (requiring Secretaries of Interior and Agriculture to make "specific studies and investigations" to what additional rivers should be evaluated for the NWSRS during planning).

through proper NEPA analysis (usually during the preparation or amendment of a Resource Management Plan (RMP)), including public notice and comment. It is important to the BLM and the NWSRS for the public to get involved during these processes to provide the agency with the tools needed to preserve these critical waterways.

A. Identification

The BLM must identify all rivers on BLM-administered lands that may have potential for addition to the NWSRS.³ The definition of river is “a flowing body of water or estuary or a section, portion, or tributary thereof, including rivers, streams, creeks, runs, kills, rills, and small lakes.”⁴ If there is any question about a river’s potential for eligibility, the BLM must err on the side of evaluating it.⁵ There is no restriction for how long or short a river segment may be.⁶ The BLM is also instructed to use **all available sources of information** to identify potential WSRs.

Public Participation: To make sure that no river is overlooked during this process, the public should make every effort to provide BLM with materials for identification. The agency may formally include this in the general RMP process, but the public can also propose rivers for evaluation at different stages of the planning process, including: pre-planning, scoping, and public review of a draft RMP or plan amendment. Information should include vivid and accurate descriptions and photographs if possible.

B. Evaluation

After a river has been identified as a potential WSR, the BLM must evaluate the river by determining a river’s eligibility, tentative classification, and suitability for designation. This occurs during the RMP process⁷ and the public should be involved at all levels of the evaluation. However, if the BLM has not conducted an evaluation and there is not an ongoing planning process, the BLM should evaluate rivers **prior** to approving activities that could affect them, such as permitting livestock grazing in a watershed.⁸

1. Eligibility

A river must possess the following certain qualities to be considered eligible for inclusion in the National Wild and Scenic Rivers System:

- Be **free-flowing** defined as, “existing or flowing in natural condition without impoundment, diversion, straightening, rip-rapping, or other modification of the waterway. Note that just because a river has been slightly blocked or altered, does not exclude it as free-flowing.”⁹
- Contain **at least one** “**outstandingly remarkable value**” (ORV). Examples of ORVs include scenic, recreational, geological, fish and wildlife, historical, cultural, or other

³ BLM Manual 8351.06A

⁴ 16 U.S.C. § 1286(a).

⁵ BLM Manual 8351.06A

⁶ BLM Manual 8351.24A

⁷ BLM Manual 8351.06B

⁸ *Center for Biological Diversity v. Veneman*, 394 F.3d 1108, 1113-1114 (9th Cir. 2005) (holding that § 1276(d)(1) may be considered a “discrete agency action that the agency is required to take” under *Norton v. SUWA* if an agency fails to consider a specific river during a specific management action).

⁹ The existence, however, of low dams, diversion works, and other minor structures at the time any river is proposed for inclusion in the national wild and scenic rivers system shall not automatically bar its consideration for such inclusion . . .” 16 U.S.C. § 1286(b).

similar values. Such values are considered outstandingly remarkable if they are exemplary, rare, unusual, unique, exceptional, or significant on a national or regional basis. These are broad categories and include values within the river corridor areas in addition to the river itself.¹⁰

Public Participation: Due to the breadth of the definition of eligible, many of the rivers identified as potential WSRs should also be found eligible. The public should review the BLM's determination of eligibility for both mistaken exclusions of free-flowing conditions and missed ORVs within free-flowing rivers.

2. Tentative Classification and Protective Management

Once determined eligible, BLM classifies rivers as wild, scenic, or recreational,¹¹ based on the type and degree of human developments on or adjacent to eligible rivers. BLM classification is considered tentative because only Congress makes the binding determination. Each classification is defined as follows:

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.

As soon as a river is deemed eligible, the BLM must initiate “protective management” for the areas.¹² This means that the BLM cannot allow eligibility or the tentative classification to be adversely affected during the time it is found to be eligible until either a finding of nonsuitability or a Congressional determination not to include the river in the NWSRS.

Public Participation: The BLM's classification of eligible WSRs focuses on how much development the area has when it becomes eligible, but ultimately affects the types of protection provided. Public comment can focus on the accuracy of the BLM's classification and also on the agency's obligation for protective management such that the river and adjacent lands are managed so as not to adversely affect eligibility or the tentative classification.

3. Suitability

Suitability is the final step of the BLM's evaluation process, and culminates in a determination of suitability or non-suitability, which is the basis for a recommendation for designation legislation.¹³ The suitability report and record of decision (ROD) prepared during this step must

¹⁰ See generally, BLM Manual 8351.31C

¹¹ 16 U.S.C. § 1273(b)

¹² BLM Manual 8351.32C. Note that while protective management must begin immediately after eligibility, the public notification for protective management need only come by the time the draft RMP (or plan amendment) is released.

¹³ 16 U.S.C. § 1275(a).

be detailed with maps and illustrations and consider many factors.¹⁴ Although suitability determinations are supposed to be completed as part of the RMP process, the BLM not infrequently only completes eligibility in a planning process. A schedule for a delayed suitability determination must be set out in the RMP and then completed through a separate EIS.¹⁵

If river segments are determined nonsuitable, then they are to be managed as directed in the RMP. If deemed suitable, then actions can be taken by the agency to withdrawal the river from certain activities (e.g. entry, sale, mining) if necessary to protect the river from threats or nonconforming uses.¹⁶ If the suitable river is not withdrawn, then it should be managed at the highest tentative classification and no action can interfere with eligibility or downgrade the tentative classification.¹⁷

Once a determination of suitability is made, a BLM State Director may take a variety of actions, including:

- Encouraging the State Legislature to afford the highest protection to the river and the Governor to petition the Secretary of Interior for designation;
- Encourage the Congressional delegation of the State to introduce designation legislation;
- Forward recommendations for designation through the BLM Director and Secretary;
- Defer recommending designation until there is enough public support for it.¹⁸

Public Participation: A determination of suitability should be strongly supported by the public in comments to the BLM during the planning process as well as letters to state and federal legislators. The BLM State Director should also be contacted and encouraged to take action on the determination. Non-suitability determinations should be heavily scrutinized and the BLM should be made aware of inaccuracies and errors in judgment in their analysis during the public comment period. The public can help keep suitable rivers protected by monitoring and submitting comments to the agency on any activity or project that may harm the eligibility a river.

Management After Designation

A. Protective Management

A WSR must be managed to preserve the river's free-flowing quality¹⁹ as well as to protect and enhance the values for which it was designated.²⁰ The WSRA also dictates that "primary emphasis shall be given to protecting [the WSRs] esthetic, scenic, historic, archeologic, and scientific features."²¹

¹⁴ 16 U.S.C. § 1275(a); BLM Manual 8351.33A. No report is necessary for State-initiated designations under § 2(a)(ii).

¹⁵ BLM Manual 8351.33A. Note also that the RMP or separate EIS for suitability must have included a reasonable range of alternatives, including at least one alternative with all eligible rivers as designated and another with none designated. BLM Manual 8351.33C.

¹⁶ BLM Manual 8351.53A

¹⁷ BLM Manual 8351.53B

¹⁸ BLM Manual 8351.41A

¹⁹ 16 U.S.C. § 1278(a).

²⁰ 16 U.S.C. § 1281(a).

²¹ 16 U.S.C. § 1281(a). This is similar to the compatibility standard for National Wildlife Refuge Act.

Management prescriptions for a WSR vary according to how a river is classified, from more to less protective based on classification as wild, scenic, or recreational. However, above all, **a river must be managed in order to protect and enhance the values that led to its designation**, regardless of its level of development classification. The BLM's obligation to "protect and enhance" precludes the agency from authorizing any use that will substantially degrade the WSR.²²

Public Participation: The public should monitor and comment on projects to ensure that only activities that protect and enhance the values of the WSR are authorized.

B. Comprehensive Resource Management Plans

For federally-managed WSRs that are designated by Congress, a Comprehensive Resource Management Plan (CRMP) must be developed within three years of its designation, through a NEPA process.²³ This requirement does not apply to WSRs designated by the Secretary of Interior and administered by the State. Each CRMP must include the following:

- Description of the existing resource conditions including a detailed description of the ORVs.
- Definition of goals and desired conditions for protecting river values.
- Discussion of development of lands and facilities.
- User capacities.
- Water quality issues and instream flow requirements.
- Reflection of a collaborative approach with all interested parties, including consultation with State and local governments and the interested public.
- Inclusion of a monitoring strategy to maintain desired conditions.
- Other management practices necessary or desirable to achieve the purposes of the WSRA.

In addition, the CRMP may also be coordinated with and may be incorporated into RMP process for affected adjacent federal lands.

Public Participation: The public must have notice and the opportunity to comment during the NEPA process for the development of CRMPs. Comments should focus on whether the management prescriptions will protect and enhance the values for which the WSR was designated, including recommendations for improvement.

²² *Oregon Natural Desert Ass'n v. Singleton*, 47 F.Supp.2d 1182 (D.Or. 1999).

²³ 16 U.S.C. § 1274(d)(1).