

# **Designating Rivers Through Section 2(a)(ii) of the Wild & Scenic Rivers Act**

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## Acknowledgments

This paper is a compilation of new text and several existing documents. The history and background on Section 2(a)(ii) of the Wild and Scenic Rivers Act came primarily from a paper by American Rivers commissioned by the National Park Service. That paper, *Section 2(a)(ii) of the Wild and Scenic Rivers Act of 1968: An Underutilized Tool to Designate National Wild and Scenic Rivers*, was written by Jack Hannon and Tom Cassidy. Most of the text dealing with Section 2(a)(ii) requirements was taken from the *Wallowa River (Oregon) 2(a)(ii) Wild and Scenic River Study Report* and the *Lumber River (North Carolina) 2(a)(ii) Wild and Scenic River Eligibility Report and Environmental Assessment* (which also supplied the Lumber River case study), both of which were written by this author. Finally, the Westfield River (Massachusetts) case study was taken almost verbatim from *Grassroots River Protection: Saving Rivers Under the National Wild and Scenic Rivers Act Through Community-Based River Protection Strategies and State Actions*, by Chris Curtis of the Pioneer Valley Planning Commission with his permission.

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*Interagency Wild & Scenic Rivers Coordinating Council*

# Designating Rivers Through Section 2(a)(ii)

## FOREWORD

The primary means of designating America's rivers as wild and scenic has been congressional action, as provided by the landmark Wild and Scenic Rivers Act of 1968 (Act). This paper details a process other than congressional designation of including rivers in the National Wild and Scenic Rivers System (National System); this process is set forth in Sections 2(a)(ii) and 4(c) of the Act. Subject to certain prerequisites and conditions, Section 2(a)(ii) authorizes the Secretary of the Interior to include a river already protected by a state river protection program in the National System upon the request of that state's governor. This paper describes those prerequisites and conditions, provides examples of the successful use of Section 2(a)(ii), and notes certain limitations and opportunities for the future use of this river conservation tool.

## INTRODUCTION

Enacted in 1968, the Act is designed to preserve selected free-flowing rivers in their natural condition for the use and enjoyment of the public. This alternative to dam construction was intended to balance the nation's water resource development policies with river conservation and recreation goals. Pursuant to Section 7(a) of the Act, rivers designated through Section 2(a)(ii) receive the same protection afforded congressionally designated rivers in the National System. Designated rivers receive protection from new hydropower projects, federal water resource development projects, and other federally assisted water-resource projects -- defined as grants, licenses, permits or funding -- that would alter the river's free-flowing characteristics, or have a direct and adverse effect on the river's outstanding resources.

While rivers designated under Section 2(a)(ii) are generally protected like rivers designated by Congress under Section 3(a), there are a few critical differences, especially with regard to management. First and foremost, the river is managed by state or local agencies, except where federal lands are involved. While several of the more recent congressional designations mandate that the river be managed cooperatively with local governments, Section 2(a)(ii) specifically precludes federal management of the river; the federal land managing agency will still continue to manage its lands, preferably in cooperation with the state and/or local river manager. Section 2(a)(ii) is ideally suited to rivers where there is a strong tradition of state or local management and protection of the river.

When a river is added to the National System through Section 2(a)(ii), it is done with the condition that it be administered without cost to the federal government. This also means that there can be no condemnation or other acquisition of lands or water rights by the federal government under the Act. (Of course, this prohibition does not extend to state and local governments.) This prohibition is further enforced through Section 6(a) of the Act; Section 6(a) provisions do not apply to rivers designated through Section 2(a)(ii). Section 6(a) allows the federal government to acquire lands or interests in lands only for rivers designated by Congress under Section 3(a).

There are several advantages to wild and scenic river designation through Section 2(a)(ii). First, administrative designation may be faster than congressional action, which can be difficult to obtain in some instances. Second, Section 2(a)(ii) designation requires the state and/or local jurisdictions -- and often the public -- to demonstrate a commitment to river protection, which is desirable for the long-term health of the river. Stated another way, Section 2(a)(ii) designation usually needs local support and involvement. Another advantage is that where there is local concern over federal regulation or the potential for condemnation, the river can still be designated. Finally, Section 2(a)(ii) rivers receive most of the protections of the Act without federal involvement, with the exception of federal review of federally sponsored or permitted water resource projects (review under Section 7).

However, there may be several disadvantages to designation through Section 2(a)(ii). There is often confusion over who is charged with administration of the river, especially as state and/or local agencies are reorganized, budgets are altered, political courses change, etc. Another significant disadvantage is that there are no federal funds available for management of the river, at least through wild and scenic river designation, with local agencies often having to cover the costs of management. Finally, federal agencies often have professional river managers specifically trained in river-related fields; this is something that state and local governments may be unable to afford. Related to that, federal agencies have specialists who can frequently be relied upon to assist on specific topics. For example, river managers in the National Park Service (NPS) can seek assistance on policy issues from its Water Resources Branch in Fort Collins, Colorado. Local agencies may not have access to specialized expertise such as this to address problems.

## **STATUTORY BACKGROUND**

Section 2(a)(ii) of the Act sets out certain prerequisites for secretarial designation:

*[The national wild and scenic rivers system shall comprise rivers] . . . that are designated as wild, scenic or recreational rivers by or pursuant to an act of the legislature of the State or States through which they flow, that are to be permanently administered as wild, scenic or recreational rivers by an agency or political subdivision*

*of the State or States concerned, that are found by the Secretary of the Interior, upon application of the Governor of the State or the Governors of the States concerned, or a person or persons thereunto duly appointed by him or them, to meet the criteria established in this Act and such criteria supplementary thereto as he may prescribe, and that are approved by him for inclusion in the system. . . . Upon receipt of an application under clause (ii) of this subsection, the Secretary shall notify the Federal Energy Regulatory Commission and publish such application in the Federal Register. Each river designated under clause (ii) shall be administered by the State or political subdivision thereof without expense to the United States other than for administration and management of federally owned lands. For purposes of the preceding sentence, amounts made available to any State or political subdivision under the Land and Water Conservation [Fund] Act of 1965 or any other provision of law shall not be treated as an expense to the United States. Nothing in this subsection shall be construed to provide for the transfer to, or administration by, a State or local authority of any federally owned lands which are within the boundaries of any river included within the system under clause (ii).*

Beyond those prerequisites relating to state management, the same eligibility and classification provisions that apply to congressionally designated rivers also apply to Section 2(a)(ii) rivers. Section 2(b):

*A wild, scenic or recreational river area eligible to be included in the system is a free-flowing stream and the related adjacent land area that possesses one or more of the values referred to in Section 1, subsection (b) of this Act. Every wild, scenic or recreational river in its free-flowing condition, or upon restoration to this condition, shall be considered eligible for inclusion in the national wild and scenic rivers system and, if included, shall be classified, designated, and administered as one of the following:*

*(1) 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.*

*(2) 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.*

*(3) 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.*

Special provisions for the review of proposed Section 2(a)(ii) rivers are included in the Act. Section 4(c) sets mandatory federal agency review periods for proposed designation of rivers under Section 2(a)(ii):

*Before approving or disapproving for inclusion in the national wild and scenic rivers system any river designated as a wild, scenic or recreational river by or pursuant to an*

*act of the State legislature, the Secretary of the Interior shall submit the proposal to the Secretary of Agriculture, the Secretary of the Army, the Chairman of the Federal Power Commission, and the head of any other affected Federal department or agency and shall evaluate and give due weight to any recommendations or comments which the said officials furnish him within ninety days of the date on which it is submitted to them. If he approves the proposed inclusion, he shall publish notice thereof in the Federal Register.*

There is one other difference specifically outlined by the Act regarding Section 2(a)(ii) rivers, concerning rivers that are under a congressionally mandated study for designation.<sup>1</sup> Section 7(b):

*. . . no department or agency of the United States shall assist by loan, grant, license, or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river might be designated, as determined by the Secretary responsible for its study or approval . . . (iii) during such additional period thereafter as . . . is necessary for congressional consideration thereof or, in the case of any river recommended to the Secretary of the Interior under section 2(a)(ii) of this Act, is necessary for the secretary's consideration thereof, which additional period, however, shall not exceed three years in the first case and one year in the second.*

## **DESIGNATING A RIVER UNDER SECTION 2(a)(ii)**

The Act established two processes by which a river may be added to the National System. One is through direct congressional designation. This is frequently preceded by a congressional amendment to Section 5(a) of the Act, authorizing a study to assess a river's qualifications for the National System before Congress takes action to designate the river. Management of these rivers is then usually the responsibility of a federal agency, although there are instances of cooperative management of congressionally designated rivers by local/state/federal agencies.

Rivers can also be added to the National System through an administrative action by the Secretary of the Interior.<sup>2</sup> Section 2(a)(ii) of the Act allows the governor of a state to apply to

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<sup>1</sup> If a river has been authorized by Congress for study through Section 5(a), and the governor of a state subsequently applies for designation through Section 2(a)(ii), that river is protected from water-resource projects for one year following the application for designation to the Secretary of the Interior. This one-year protection from water-resource projects only applies to 2(a)(ii) application rivers that have first been authorized for study by Congress through Section 5(a).

<sup>2</sup> Under Section 2(a)(ii), all nominations are submitted to the Secretary of the Interior. These are then delegated to the NPS for analysis and to make recommendations on designation to the Secretary.



the Secretary for national designation. The NPS then evaluates whether the requirements of Section 2(a)(ii) have been met and prepares a draft report and assessment of the environmental impacts of designation under the National Environmental Policy Act (NEPA). If the NPS recommends designation, it places a notice of proposed administrative designation in the *Federal Register* and, as required by Section 4(c), notifies the Federal Energy Regulatory Commission (FERC) and other affected federal agencies of the pending action. Following a 90-day comment period for federal agencies and a concurrent comment period for the public, the NPS advises the Secretary of its findings. If the NPS finds -- and the Secretary agrees -- that the application meets the requirements as described in this paper, the Secretary publishes a notice of administrative designation in the *Federal Register*, and the river is added to the National System.<sup>3</sup>

## **HISTORY OF SECTION 2(a)(ii)**

Frequently, unfounded concerns over federal government management of a river mean that wild and scenic river designation is not considered for outstanding rivers flowing through state and private lands. However, Congress recognized that federal management of a river is not always warranted or necessary. As a result, it established an alternative to federal management -- an alternative that leaves the river in state or local management -- provided certain conditions are met.

### ***Congressional Intent***

Section 2(a)(ii), which provides a key role to the states in obtaining many of the benefits of the Act, including protection from the harmful effects of federal water-resource projects, was the result of a considerable evolution in thinking by Congress. Indeed, one of the key principles in the House version of the final bill clearly contemplated extensive participation by the states in protecting rivers under the Act:

*A second [principle] is that, since the task of preserving and administering such streams is not one that can or should be undertaken solely by the Federal Government, the states ought to be encouraged to undertake as much of the job as possible and that such encouragement can be given not only by giving the financial aid for which the Land and Water Conservation Fund Act already provides but by assuring them that such Federal agencies as the Federal Power Commission and the Corps of Engineers will not upset their plans by taking adverse action without the full knowledge and consent of the Congress.*<sup>4</sup>

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<sup>3</sup> See generalized schedule of the process in Appendix A of this paper.

<sup>4</sup> House of Representatives Report No. 1623, 90<sup>th</sup> Congress, 2<sup>nd</sup> Session 3 (1968), not part of the Act.

Indeed, the House report expresses the hope that “. . . all the states will become active partners in the development of the national Scenic Rivers System.”

### ***Development of State River Protection Systems***

In the decades prior to passage of the Act in 1968, a few states had initiated protection of certain rivers, but only Wisconsin had enacted a comprehensive legal framework for protecting designated state rivers. However, with the stimulus of the Act, many state legislatures established such frameworks for state designation of protected rivers. In some instances, the state provisions bore a striking resemblance to the Act, with the notable exception that state designation offered no protection against federally assisted water projects, including federally licensed hydroelectric dams. In other cases, state law provided only minimal protections. By the early 1990s, more than 30 states had enacted statutes creating state river protection systems, protecting in excess of 13,500 river miles, a figure which exceeds the total river miles currently protected in the National System.

### ***The First 30 Years***

There was very limited use of Section 2(a)(ii) in the first ten years after passage of the Act. Only five river segments -- the Allagash River in Maine, the Little Miami River and Little Beaver Creek in Ohio, the New River in North Carolina, and the lower St. Croix River in Wisconsin and Minnesota -- completed the 2(a)(ii) process and were designated by the Secretary of the Interior during this period.<sup>5</sup>

A report issued by the General Accounting Office (GAO)<sup>6</sup> in 1978, the Act's tenth anniversary, asserted that Congress “envisioned a prominent state role” and expected that states would become “active partners in developing the national system.” But the GAO found that while 190 rivers were included in 26 state river systems as of 1978, only five states had added rivers to the National System through the 2(a)(ii) process.

The GAO concluded that the 2(a)(ii) process was “not working as intended” for two primary reasons. First, officials in some states held the view that national designation under 2(a)(ii) would be “too costly.” The principal concern was the ability of states to fund the development and administrative costs of a national river, including land acquisition costs. For example, the

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<sup>5</sup> The Wolf River in Wisconsin was added immediately with passage of the Act as a locally managed river.

<sup>6</sup> The GAO is the investigative arm of Congress.

GAO cited studies by the Department of the Interior that recommended inclusion of the Suwanee River in Florida and Georgia and the upper Iowa River in Iowa in the National System with state administration pursuant to Section 2(a)(ii). The GAO noted, however, that none of these states had sought such a designation because of concern with acquisition and administrative costs.

Second, repeated requests by the governor of Oregon for inclusion of a segment of the Deschutes River in the National System were denied on the basis of a 1973 legal opinion from the Interior Department's Office of the Solicitor. The opinion stated that the presence of substantial federal lands along the banks of the proposed rivers would be "contrary to the stipulation that administration of the rivers must be at no expense to the Federal Government." In other words, any river segment including federal lands could not be designated since the federal government could not expend funds to manage the river corridor, including existing public lands. The Interior Solicitor's opinion was applied to various exploratory requests from other states.

The GAO recommended that Congress amend the Act to remove this obstacle to use of Section 2(a)(ii). Congress promptly did so, amending the Act in 1978 to provide that rivers designated under Section 2(a)(ii) are to be administered by the state without expense to the federal government "other than for administration and management of federally owned lands." Congress also added a further clarifying sentence to the effect that use of Section 2(a)(ii) would not transfer to the state any authority to administer federally owned lands within the boundaries of the newly designated river segment. The congressional action thus increased the potential for successful Section 2(a)(ii) designation requests.

Possibly as result, the second decade of the National System saw significant growth in river miles protected under Section 2(a)(ii). Eight river segments were added, increasing the number of miles protected under Section 2(a)(ii) by nearly 1,288 miles. However, these actions occurred in episodic intervals, with the historic designation of portions of five major California rivers (American, Eel, Klamath, Smith, Trinity) providing the greatest addition of protected river miles.<sup>7</sup>

The volume and frequency of designations under Section 2(a)(ii) has increased somewhat in the past ten years, with the designation of the Westfield River (Massachusetts) in 1993, Big and Little Darby Creeks (Ohio) and the upper Klamath River (Oregon) in 1994, the Willowa River (Oregon) in 1996, and the Lumber River (North Carolina) on September 28, 1998, days before the 30<sup>th</sup> anniversary of the Act.

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<sup>7</sup> This action in January of 1981 represented an early dividend from the 1978 congressional response to the GAO report as the segments of the four California North Coast rivers designated included substantial amounts of federally owned lands. Indeed, prior to enactment of the 1978 amendments, the Department of the Interior had informed the state of California of the Solicitor's legal opinion and noted that the North Coast rivers might be ineligible for secretarial designation under Section 2(a)(ii) since substantial federal lands were involved.

## **REQUIREMENTS FOR SECTION 2(a)(ii) DESIGNATION**

Upon receipt of an application from a governor, the NPS looks at the physical environment of the river (eligibility) and the ability of the state applying for designation to manage the river. For a river to qualify for the National System through Section 2(a)(ii) of the Act, four requirements must be met.

- 1) The river must first be designated as a component of a state's river protection system by, or pursuant to, an act of the legislature of that state.<sup>8</sup>
- 2) The river must meet eligibility criteria common to all national wild and scenic rivers, i.e., the river must be free-flowing, as determined by Section 16(b) of the Act and standards set by the Departments of the Interior and Agriculture, and possess one or more "outstandingly remarkable value" (ORV).<sup>9</sup>
- 3) The river must be administered by an agency or political subdivision of the state, except for those lands already administered by an agency of the federal government.
- 4) There must be effective mechanisms and regulations in place -- local, state or federal -- to provide for the long-term protection of those resources for which the river was deemed eligible.

This is a simplified version of what the NPS considers before making recommendations to the Secretary of the Interior. In general, determination of whether the river is in a state river protection system or not, and the assessment of the eligibility of the river, is relatively simple and straight-forward. However, determination of the final two requirements dealing with the state's ability to protect the river without federal intervention is much more difficult and is based on an assessment by the study team of state and local laws and regulations and how effectively they are being applied. The Lumber River case study will help to illustrate some of the factors the NPS considers when assessing the state's ability to protect the river.

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<sup>8</sup> A U.S. District Court has held that a voter initiative, by which a section of the Klamath River was designated into Oregon's state system of wild and scenic rivers, constitutes "direct legislation" by the voters and hence serves as an act of the legislature as required under the Act. *City of Klamath Falls, Oregon v. Babbitt*, 947 F. Supp. I (D.D.C. 1996)

<sup>9</sup> "Outstandingly remarkable values" -- ORVs -- are generally considered to be resources of significance to the region or nation. See "The Wild and Scenic River Study Process" paper in this *Reference Guide* for a complete discussion of standards for assessing ORVs.

In addition, if designated, the river is given one of three classifications. Each classification represents the existing level of development along a river segment, which is used as a guide to determine which future land and water uses might be appropriate along that segment. A designated river may be divided into several different segments, with each segment having a different classification. As defined by the Act, the three classes of rivers are:

- 1) *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.*
- 2) *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.*
- 3) *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.*

Finally, before the Secretary can take action, a proposed wild and scenic river designation must be evaluated for potential impacts to the environment as required by the NEPA, and both the proposal and the NEPA analysis must be circulated to appropriate federal agencies for a 90-day review as required by the Act. The NPS also releases the report and NEPA analysis for extensive public review and comment.

If the 2(a)(ii) proposal proceeds from a 5(a) or 5(d)(1) study by another federal agency, it is important that the NPS be involved in the NEPA analyses process as soon as the possibility of designation through Section 2(a)(ii) is discussed. For example, if other federal agencies are preparing an environmental impact statement (EIS) on designation or management of a river, the NEPA process -- and the cost to the public -- is greatly reduced if the NPS is brought in as a cooperating agency if time and resources allow.<sup>10</sup>

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<sup>10</sup> The Willowa River in Oregon was originally studied under Section 5(a) as a possible congressional designation. However, it was decided early in the process that designation under Section 2(a)(ii) would be more appropriate. The NPS was included as a cooperating agency on the EIS being prepared by the U.S. Forest Service. Then, when the 2(a)(ii) nomination came in from Governor Roberts, the NPS simply adopted the U.S. Forest Service's EIS without having to reconstruct the NEPA process, thereby saving considerable time and money.

## **SECTION 2(a)(ii) CASE STUDIES**

### **Lumber River, North Carolina**

Since one of the key premises of Section 2(a)(ii) is a limited role of the federal government in day-to-day management and protection of the designated river, it is critical that the river will be adequately protected by the state and/or local authorities. Here, we will take a fairly in-depth look at the considerations the NPS took in designating North Carolina's Lumber River.

In April of 1996, Governor James Hunt of North Carolina petitioned Interior Secretary Bruce Babbitt to add 115 miles of the Lumber River to the National System. Located in south-central North Carolina, the Lumber River is a placid, slow-moving, tea-colored waterway illustrative of the ideal of a southern river. Cypress line the banks, canoers have to backtrack from dead ends, bottomland hardwoods flood frequently, and wildlife abounds. Even though most of the land is privately held, the majority of the river corridor is virtually untouched, even where it flows through the fairly large city of Lumberton. At the time of nomination, the Lumber River was also North Carolina's newest state park; in 1989, all 115 miles became part of the Lumber River State Park, although most of the land would remain in private ownership.

Since most of the river is privately owned, the NPS had to rely heavily on the North Carolina Natural and Scenic Rivers Act (NCNSRA) and the state's newly minted Lumber River State Park Master Plan (Master Plan) to show that the state could adequately protect the river without federal assistance or intervention. The NPS also took a very close look at zoning ordinances within the two urban areas, Lumberton and the small community of Fair Bluff.

**North Carolina Natural and Scenic Rivers Act.** Early on, it was evident that the nomination would suffer from a lack of strict state protection for much of the river. North Carolina lacks stringent statewide land use planning, and most of the rural counties lack zoning of any sort. Even the NCNSRA, which on its face is a fairly strong act with regard to control of state actions impacting or potentially impacting state-designated rivers, was suspect due to the lack of a history of enforcement. Theoretically, the NCNSRA -- which is modeled after the national Wild and Scenic Rivers Act -- is designed to preserve, protect and maintain designated rivers and adjacent lands for their outstanding natural, scenic, educational, geological, recreational, historic, fish and wildlife, scientific and cultural values. Under Section 113A-44,

*The State Utilities Commission may not permit the construction of any dam, water conduit, reservoir, powerhouse transmission line, or any other project works on or directly affecting any river that is designated as a component or potential component of the State Natural and Scenic Rivers System. No department or agency of the State may assist by loan, grant, license, permit, or otherwise in the construction of any water resources project that would have a direct and adverse effect on any river that is*

*designated as a component or potential component of the State Natural and Scenic Rivers System . . . No department or agency of the State may recommend authorization of any water resources project that would have a direct and adverse effect on any river that is designated as a component or potential component of the State Natural and Scenic Rivers System, or request appropriations to begin construction of any such project, regardless of when authorized, without advising the Secretary in writing of its intention to do so at least 60 days in advance. Such department or agency making such recommendation or request shall submit a written impact statement to the General Assembly to accompany the recommendation or request specifically describing how construction of the project would be in conflict with the purposes of this act and how it would affect the component or potential component.*

However, this provision of the NCNSRA does not have a long and proven track record in North Carolina court and regulatory systems. The intent of the provisions, however, is clear cut, and the NPS believed that the river would be fairly well protected from state agency actions that could threaten the free-flowing nature or the ORVs of the Lumber River.

**North Carolina State Park System.** Under North Carolina law, the NCNSRA is directly linked to the North Carolina State Park System. According to Section 113A-40 of the NCNSRA,

*Any component of the State natural and scenic rivers system that is or shall become a part of any State park, wildlife refuge, or state-owned area shall be subject to the provisions of this Article and the Articles under which the other areas may be administered, and **in the case of conflict between provisions of these Articles the more restrictive provisions shall apply.** (Emphasis added)*

The North Carolina State Parks Act defines the mission of the North Carolina State Parks System as managing representative examples of the unique natural and cultural heritage of North Carolina, including its archeological, geological, biological, scenic and recreational resources. This reflects the North Carolina Constitution which declares that state policy is to conserve and protect lands and waters for the benefit of the people of North Carolina through the acquisition and preservation of parks, recreation areas and scenic vistas. North Carolina does this through the control and limitation of air and water pollution, excessive noise, and uses all other appropriate methods to preserve North Carolina forests, wetlands, estuaries, beaches, historic sites, open spaces, and scenic areas as part of the state's heritage. The mission of the North Carolina State Parks System is quite specific:

*The North Carolina state parks system exists for the enjoyment, education, health, and inspiration of all our citizens and visitors. The mission of the state parks system is to conserve and protect representative examples of the natural beauty, ecological features and recreation resources of statewide significance; to provide outdoor recreation opportunities in a safe and healthy environment; and to provide environmental education opportunities that promote stewardship of the state's natural heritage.*

**Lumber River State Park Master Plan.** In 1989, the North Carolina General Assembly created the Lumber River State Park to be managed as a Natural and Scenic River “to preserve its outstanding character in perpetuity.” In addition, the North Carolina Department of Parks and Recreation (NCDPR) was directed to “prepare a general management plan for the Lumber River State Park to include a master plan which shall recognize and provide for the State and local government protection of the various parts of the river. . . .”

As a result, the Master Plan became a focal point for designation of any portion of the river. The Master Plan calls for the protection of segments of the river corridor where the highest biologic, scenic, geologic, archaeological and recreation resources values are concentrated. The main objective of the Master Plan is “to identify the river segments where state government action is most appropriate.” The Master Plan acknowledged that, while it is not feasible for the state of North Carolina to purchase and manage the entire river corridor,<sup>11</sup> much of the protection provided to the undeveloped areas of the Lumber River will be through planned purchases of fee title or conservation easements. Lands are being acquired to protect Natural Heritage Priority Areas; provide river corridor buffers between the Natural Heritage Priority Areas; and provide recreational access and facility areas. Where lands cannot be purchased, protection would be encouraged by working with: 1) landowners to create conservation or scenic easements; and 2) local governments through existing and future land use and zoning regulations.

In order to accomplish acquisition and management goals, two major management areas were established, north and south of Lumberton. Within these two areas, there are different acquisition schedules. Phase I incorporates the most immediate acquisition priorities and is centered south of Lumberton; Phase II includes the upstream management area. After these acquisition phases are completed, Lumber River State Park needs will be reassessed to determine if there are other critical needs (Phase III). This reassessment is not expected to take place for years.

In addition to the purchase of Natural Heritage Priority Areas and recreation sites, the Master Plan calls for the purchase of stream corridor lands, an especially important component of protecting the Lumber as a wild and scenic river. The Master Plan sets a goal for vegetative buffers of at least 250 feet from each shoreline, with a preferred width of 400 feet. Given the flat terrain, corridors this wide would provide for substantial screening and would generally protect most of the ORVs of the Lumber River.

Even with the provisions of the NCNSRA and the creation of the state park, the NPS was concerned about lack of any proven method of protecting the river outside of the management

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<sup>11</sup> “State ownership and management of the entire corridor is neither practical nor feasible because of such factors as the length of corridor, fiscal resources, conflicting land use, large number of landowners, and municipal boundaries.” Lumber River State Park Master Plan, 1989.



focus for Phases I and II lands. The potential existed for significant degradation of the river through private land actions, especially in urban areas. In order to determine if urban areas would be protected, the NPS turned to an examination of local zoning.<sup>12</sup>

**Town of Fair Bluff Zoning.** North Carolina law provides local jurisdictions the power to set land use ordinances. Since urban areas are readily susceptible to resource degradation -- at least as far as wild and scenic rivers are concerned -- it is important to look closely at local regulations. Under zoning ordinances for the town of Fair Bluff, the majority of the Lumber River within town limits lies within a 'light density residential-agricultural' district which is intended to "preserve the light density/agricultural character of areas which are removed from readily available urban services." Other, smaller segments of the river had other zoning designations, but none were considered incompatible with wild and scenic river designation due to their nature and/or size.<sup>13</sup>

**City of Lumberton Land Use Ordinance.** Under North Carolina General Statute, Section 160A-360, all the powers granted to municipalities to regulate planning and development -- including zoning and subdivision regulations, historical properties, historic development, land acquisition of open space, building inspections, community appearance, and other miscellaneous powers within corporation limits -- extends to a defined area known as a city's Extraterritorial Jurisdiction. This means that the city of Lumberton has at least some control of the Lumber River outside of city limits.

On May 11, 1998, the city of Lumberton passed a special resolution amending its Land Use Ordinance by adding the Lumber River Protection Overlay District (District).<sup>14</sup> The District includes the Lumber River within the city of Lumberton and the City's Extraterritorial

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<sup>12</sup> The only areas of the river that had zoning were those flowing through the city of Lumberton and the town of Fair Bluff.

<sup>13</sup> All of the permitted uses are readily apparent in the Fair Bluff zoning ordinances; it is not necessary to spell out those uses here. Based on comparisons with other designated rivers, the NPS determined that, with the exception of a few uses within the central business-office district, all of the zoned uses are compatible with a recreational wild and scenic river classification. Given the extremely limited area of the central business-office district, and the overall character of the Lumber River as a whole, these few, minor deviations were not considered an impediment to designation.

<sup>14</sup> When the draft report was released, the initial recommendation was that only 64 miles of the 115-mile nomination be designated. This initial recommendation excluded the section of the Lumber River through Lumberton; the NPS determined that the river would not be adequately protected based on existing land use planning. Following the release of the draft report, the city administration -- which very much wanted the river designated -- worked with the NPS to develop new zoning ordinances, creating the Lumber River Protection Overlay District. This new protection district, acceptable to the NPS, meant an additional 17 miles of the Lumber River could be recommended for designation, bringing the September 1998 designation to 81 miles.

Jurisdiction, extending from river mile 56 to river mile 73 and including a 100-foot buffer strip along both sides of the river. The city of Lumberton's amended Land Use Ordinance established standards and requirements for the use and conservation of land and water within the District, in recognition of the Lumber River's eligibility for national wild and scenic river designation. The ordinance provides for regional conservation of the river corridor. Specifically, the ordinance prevents development of new buildings or septic systems, excavation, or mining, as well as the disturbance of vegetation, scenic areas, and fish and wildlife habitat.

As this case study illustrates, the NPS considers a wide variety of protection mechanisms when considering a Section 2(a)(ii) nomination. It also illustrates that the NPS takes a critical look at those mechanisms and that a nomination is not automatically endorsed.<sup>15</sup>

### ***Key Elements for Successfully Designating the Lumber River***

- ✓ The requirements for designation and the relationship of the river within the National System were established at the outset of the designation process. By way of example, the NPS presented a slide show of wild and scenic rivers at the first public meeting to show exactly what the National System consisted of and to illustrate the high standards expected of rivers in the National System. This indicated the level of scrutiny the NPS would apply to the river and state and local river protections, eliminating any surprises to designation supporters.
- ✓ North Carolina identified and designated experts in various resource fields that the NPS could call on for immediate assistance (e.g., experts in fish, wildlife, recreation, geology, history, and other potential ORVs).
- ✓ Local river protection interests identified and involved key political supporters to help move the nomination through the Department of the Interior's review process.
- ✓ The NPS provided local and state jurisdictions with concrete examples of acceptable zoning ordinances, management plans, forest practice rules, et cetera, so that they could be modeled.

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<sup>15</sup> It is interesting to note that the NPS found the entire Lumber River eligible, but that only 81 miles out of 115 were adequately protected at that point in time. However, the NPS did not preclude the future designation of the other 34 miles. In order to promote protection of the river, the NPS's recommendations conclude that if new land use ordinances are implemented, the NPS would seek designation for those miles without a new study, other than an assessment of those new protections. The existing NPS report covers the entire river, as does the NEPA analysis, negating the need for further study. This strategy has already shown results with the creation of the special overlay district in Lumberton, which allowed an additional 17 miles to be added immediately (see footnote 14).

- ✓ The NPS created incentives and a positive atmosphere for river protection. The fact that the NPS conducted an eligibility assessment and NEPA analysis for the entire river segment nominated -- even though it was apparent that only portions of the river would be found adequately protected -- was critical in providing the incentive for the city of Lumberton to further protect its portion of the Lumber River (see footnotes 14 and 15). It is hoped that the state of North Carolina and/or other local jurisdictions will follow suit and protect additional portions of the Lumber River. Under the NPS strategy, these segments can then be added easily to the existing federal designation.

### **Westfield River, Massachusetts**

Since rivers designated under Section 2(a)(ii) are dependent for long-term protection on state and/or local governments, it is usually imperative that there be strong local support for designation and management. Too often, wild and scenic river designation is sought solely to confront a looming threat, such as construction of a dam. Then, when that threat is removed by designation, a new threat can arise -- the threat of neglect and/or piecemeal degradation of the river. In any event, ensuring public buy-in, support and management is necessary for the long-term health of the river. One of the finest examples of providing for river protection from the ground up can be found on Massachusetts' Westfield River.

With its headwaters in the rolling Berkshire Hills of western Massachusetts, the Westfield River traverses wilderness areas rarely found in Massachusetts and fine working landscapes of maple-lined farms and historic villages. In the spring, the river attracts hundreds of canoers and kayakers from throughout the eastern United States for the excellent whitewater boating and annual river races; in the fall, the hills explode with brilliant reds, yellows and oranges. The Westfield River corridor includes one of Massachusetts' best coldwater fisheries; excellent water quality, suitable for drinking, on the Middle Branch; unique scenic and geologic features such as the beautiful Chesterfield Gorge; over 50 miles of one of the finest whitewater canoeing and kayaking areas in the northeast; outstanding historic resources, including ten magnificent keystone arch railroad bridges and five historic villages; the highest waterfall in Massachusetts, Glendale Falls; one of the largest roadless areas remaining in the state; and habitat for several rare and endangered species.

Clearly, private-land rivers require an entirely new and different approach to protection than has been used traditionally on public-land rivers -- an approach which involves high levels of public participation and support to succeed. This approach must also recognize that the private-land river corridor is a blend of natural and cultural landscapes and must result in a management strategy designed to maintain this working landscape. The approach used on the Westfield is particularly appropriate for rivers with significant privately owned land holdings, as is the case

with most rivers in the eastern two-thirds of the United States. NPS officials have cited the Westfield River protection strategy as a model for future Section 2(a)(ii) designations.

**Planning Process.** The eight-year process of developing a Westfield River protection strategy was fundamentally a grassroots or “bottom-up” process. The process was initiated and led by local groups -- the Pioneer Valley Planning Commission (PVPC; a nonprofit regional planning agency) and the Westfield River Watershed Association (WRWA) -- and supported by local river advocates and community officials. These local river advocates received technical assistance and support from the NPS and the Massachusetts Department of Environmental Management (MDEM).

With the assistance of state and federal planning grants, the Westfield River Greenway Plan (Greenway Plan) was developed and amended between 1984 and 1990. As a first step in the planning process, the PVPC and WRWA formed a 17-member Westfield River Advisory Committee (Advisory Committee), made up entirely of local residents appointed by the boards of selectmen in each of the communities along the river, as well as local businesses and sportsmen’s interests. This Advisory Committee played a key role in formulating the Greenway Plan and in keeping town officials and others informed about the process.

During the planning process, detailed data on the Westfield River was collected and analyzed. The river’s nationally significant values were documented, including: scenic, geologic, recreational and historic resources; fisheries; wildlife and plant species; environmentally sensitive areas; and water quality. River management issues and options were assessed, including: water use; the free-flowing quality of the river; water quality/pollution sources; wilderness and wildlife areas; growth and development impacts/land use controls; forestry practices and impacts; recreational use and impacts; agricultural practices; land preservation; streambank stabilization and erosion; historic resources and preservation; and floodplain management.

River issues and priorities were identified by municipal officials, landowners, river enthusiasts, and the general public and were described in the Greenway Plan. River protection options and potential management strategies were analyzed. Finally, action-oriented recommendations were developed for protecting or managing each segment of the Westfield River. This required a multi-year process, as described below.

**Public Awareness and Involvement.** Before any planning was done, public input was sought from residents and town officials about river protection priorities and problems. PVPC staff met separately with the board of selectmen in each of 11 river communities, held general public opinion meetings, and sent an informational flyer and survey questionnaire to all of the several hundred river landowners. As the plan was developed, an informational slide show was created, a regular greenway newsletter (the *Westfield River Current*) was circulated, regular press releases were issued, a greenway office was opened in a river community (with donated space), canoe

trips were organized, and an annual Westfield River Festival was initiated. All of these strategies helped to increase public awareness of the need to protect the river and of the ongoing greenway planning process.

**Release of the Draft Plan.** In 1986, the draft Greenway Plan was released to the public at a series of public meetings. While public reaction to the draft plan was generally favorable, there was some opposition to certain elements of the plan. Some landowners voiced legitimate concerns about the potential for increased recreational use of the river and for increased trespassing on private lands. A small but vocal group of opponents, however, waged a campaign of misinformation against the Greenway Plan. This group spread rumors that adoption of the plan, and in particular national wild and scenic river designation, would result in a wholesale federal takeover of private lands and property rights along the river.

The Greenway Plan proponents -- the PVPC, with assistance from the WRWA and the Advisory Committee -- responded to the controversy by holding a series of informational meetings in river communities. The purpose of these meetings was to listen to residents' concerns and questions, provide factual information about the draft plan's recommendations and their effect on communities and landowners, and consider possible changes to the draft plan. These meetings were often emotional and heated, but ultimately were very important in building support for the subsequent, revised version of the Greenway Plan. In addition to these public meetings, plan proponents met individually with concerned landowners to discuss their apprehensions.

**Amending the Plan.** Following the public and landowner meetings, PVPC staff worked to build public trust by revising the draft Greenway Plan in response to public comments and concerns. Several major changes to the plan were made, including dropping plans for a hiking trail and new canoe access sites along the river, recommending increased policing and maintenance of existing river access areas, and deleting recommendations for national designation on two river segments where a majority of landowners opposed such action.

**More Public Input.** A new draft, revised Greenway Plan was released in 1988. At this point, plan proponents coordinated a second round of meetings with the public in each river community and with local officials, sportsmen's groups, environmental groups, legislators, and state and federal agency officials. This time, public reaction to the revised plan was very positive, and a growing consensus of support for the plan emerged. The final, revised Greenway Plan, incorporating additional public comment, was released in June of 1990.

**Management Plan.** The final Greenway Plan included recommended management strategies for the entire river system. Only the river's upper branches, involving six of the 11 river communities, were recommended for national designation and are protected using the following strategies:

- 1) *Adoption of an Intergovernmental River Compact.* This compact, or “Memorandum of Understanding,” would clearly define the roles that each riverine community or involved organization should play in managing the Westfield River as a national wild and scenic river. The key players recommended for inclusion in the compact were the six communities through which the river segments flow and seven involved nonprofit, regional, state and federal organizations.
- 2) *Seeking Wild and Scenic River Designation.* Forty-four miles of the Westfield River’s East, Middle and West Branches were recommended for designation under both the Massachusetts Scenic and Recreational Rivers Act and the national Wild and Scenic Rivers Act through Section 2(a)(ii). State designation would give towns priority consideration for state open space grants and provide for more stringent environmental review of state-permitted development projects. National designation would benefit communities by prohibiting federally funded or permitted water resources projects.
- 3) *Establishing Local River Protection Bylaws.* The plan recommended that management of land use along the Westfield River remain primarily a local responsibility, administered through local zoning bylaws. It recommended that the six communities along the upper branches adopt river protection zoning bylaws which would also establish a protected river corridor, including floodplain areas and a 100-foot buffer to protect the river’s natural and scenic values. The bylaws would restrict development of new structures, septic systems, sand and gravel removal, and commercial timber removal in the protected corridor.
- 4) *Promoting Voluntary Conservation Restrictions.* Local conservation commissions and the WRWA would work actively with private property owners to encourage the voluntary donation of conservation restrictions. Under a conservation restriction, property owners would maintain their ownership of riverfront lands, but would voluntarily agree to keep their land in an open, undeveloped state.
- 5) *Increasing Maintenance and Policing at River Access Sites.* Increased policing and maintenance of river access areas by state agencies was considered essential to prevent littering, parking problems, vandalism, and trespassing on adjacent private lands.
- 6) *Providing Grants for Selected Land Acquisitions or Improvements.* Community officials would apply for state or federal grants available to help finance selected land acquisitions or improvements; state agencies would give priority status to grant applications for Westfield River projects.

**Plan Implementation.** The key local and state-administered components of the Westfield River protection plan were largely implemented prior to application for national wild and scenic river

designation. An important mechanism for obtaining commitments from participating communities and organizations to implement the Greenway Plan was the development of the intergovernmental compact. By 1990, the compact had been formally approved by all participants -- by votes of the boards of selectmen in all six river communities; by all three state environmental and natural resource agencies; by two federal agencies; and by the PVPC and the WRWA.

Probably the most important river protection mechanism was the adoption of river zoning bylaws. Between 1989 and 1991, river protection zoning bylaws were adopted in five communities and floodplain zoning in the sixth. In addition, the MDEM formally designated the Westfield River under the Massachusetts Scenic and Recreational Rivers Act in 1990. Later that year, then-Governor Michael Dukakis, at the request of the PVPC, petitioned Secretary of the Interior Manuel Lujan to designate the Westfield as a state-administered component of the National System. The application was supported by Massachusetts' congressional delegation and by national environmental and sportsmen's groups such as American Rivers, Trout Unlimited, and the Appalachian Mountain Club. In 1991, the state's support for wild and scenic river designation was reaffirmed by newly elected Governor William Weld. The designation received final approval from the Secretary of the Interior on November 2, 1993.

### ***Key Elements for Successfully Designating the Westfield River***

- ✓ *Several years of river conservation planning efforts led by local municipalities, the watershed association, and regional planning agency -- and funded through agreements with state and federal conservation programs (MDEM and NPS).*
- ✓ *Communities with a history of self-regulation and appreciation for local resources, which led to a willingness to further restrict local land use in order to "earn" wild and scenic river designation.*
- ✓ *Flexibility in the river planning process.* The focus of the final version moved away from recreational management based on local feedback on the draft plan, which had emphasized the possibility of increased river-based recreation. The final plan was based on local interests and needs, while not compromising the protection of the river's free-flowing character or ORVs.
- ✓ *A cooperative approach (private/state/local/federal) to river conservation.* This cooperation was established early, before the 2(a)(ii) proposal took shape, and allowed trust to build among the various parties, resulting in a strongly supported 2(a)(ii) application -- and one the NPS was prepared to review expediently.

[Insert Westfield River Flow Chart]



## ***Appendix A: Sequence of Events Leading to Designation***

While each designation under Section 2(a)(ii) is unique, there is a general process the NPS follows in evaluating all wild and scenic river designation requests from state governors and in making recommendations to the Secretary of the Interior.

General Sequence of Events:

- The Secretary of the Interior receives a request for designation by the governor(s) of the state(s) the river flows through.
- As the agency with delegated Section 2(a)(ii) responsibility, the NPS:
  - Determines if the river is in a state system.
  - Determines eligibility. (Is the river free-flowing? Does it have one or more ORV?)
  - Determines the appropriate classification -- wild, scenic and/or recreational -- based on criteria in the Act.
  - Determines if there are sufficient local, state and federal mechanisms already in place to protect the river.
  - Makes a judgement about the state's ability to implement these mechanisms.
  - With the applicant's help, fulfills NEPA requirements through an environmental assessment or EIS and prepares a draft report.
  - Director notifies the heads of all potentially affected federal agencies of the pending potential designation and supplies those agencies with the draft report and NEPA documentation, opening a mandatory 90-day review period for those agencies.
  - Publishes a public notice in the *Federal Register* announcing the pending potential designation, opening a public comment period on the draft report and NEPA documentation, and mails the draft report to the public for the comment period.

- Amends the draft report and environmental analysis, if necessary, based on public and agency comments.
- Publishes a notice announcing the availability of the final report and its recommendations and conclusions in the *Federal Register*.
- Mails the final report to the public.
- Forwards the report, NEPA analysis, and the Finding of No Significant Impact (for an environmental assessment) or Record of Decision (for an EIS) to the Secretary of the Interior with recommendations on whether all conditions have been met and whether the river should be designated.<sup>16</sup>
- The Secretary of the Interior announces the final decision in the *Federal Register*. If the decision is favorable, the river becomes part of the National System.

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<sup>16</sup> If an EIS has been prepared, there is a mandatory 30-day waiting period before action can be taken.