



This document is scheduled to be published in the Federal Register on 09/30/2020 and available online at federalregister.gov/d/2020-19109, and on govinfo.gov

Billing Code 4333–15

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-R4-ES-2018-0074; FF09E21000 FXES11110900000 201]

RIN 1018-BD43

Endangered and Threatened Wildlife and Plants; Section 4(d) Rule for Trispot Darter

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), adopt a rule under section 4(d) of the Endangered Species Act of 1973 (Act), as amended, for the trispot darter (*Etheostoma trisella*), a fish from Alabama, Georgia, and Tennessee. This rule provides measures that are necessary and advisable to conserve the species.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: This final rule is available on the Internet at <http://www.regulations.gov> under Docket No. FWS-R4-ES-2018-0074 and at <https://www.fws.gov/southeast/>. Comments and materials we received, as well as supporting documentation we used in preparing this rule, are available for public inspection at <http://www.regulations.gov> under Docket No. FWS-R4-ES-2018-0074.

FOR FURTHER INFORMATION CONTACT: William Pearson, Field Supervisor, U.S. Fish and Wildlife Service, Alabama Ecological Services Field Office, 1208-B Main Street, Daphne, AL 36526; telephone 251–441–5870. Persons who use a telecommunications device for the deaf

(TDD) may call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Previous Federal Actions

On October 4, 2017, we published in the *Federal Register* (82 FR 46183) a proposed rule to list the trispot darter as a threatened species under the Act (16 U.S.C. 1531 *et seq.*). On December 28, 2018, we published the following documents in the *Federal Register*: (1) The final rule listing the trispot darter as a threatened species (83 FR 67131), (2) the proposed rule to provide measures necessary and advisable to conserve the species under section 4(d) of the Act (a “4(d) rule”) for the species (83 FR 67185), and (3) the proposed rule to designate critical habitat for the species (83 FR 67190). Elsewhere in today’s *Federal Register*, we issue a final rule to designate critical habitat for the trispot darter. Please see these documents for additional previous Federal actions affecting the trispot darter.

Summary of Changes from the Proposed Rule

This final rule incorporates one change to our proposed rule based on the comments we received. Specifically, we replaced the term “highest-standard best management practices” with the term “State best management practices.”

In addition, in this rule, we change the way in which the provisions of the 4(d) rule for the trispot darter appear in 50 CFR 17.44 from what we proposed; here, we do not refer to the prohibitions and provisions set forth in section 9(a)(1) of the Act. Instead, we refer to the prohibitions set forth at 50 CFR 17.21, which apply to endangered species. However, the substance of the prohibitions, and exceptions to those prohibitions, in the 4(d) rule for the trispot darter have not changed.

Background

The trispot darter is a small-bodied, freshwater fish found in the Coosa River System, above the fall line in the Ridge and Valley of Alabama, Georgia, and Tennessee. It is a migratory species that uses distinct breeding and nonbreeding habitats. From approximately April to October, the species inhabits its nonbreeding habitat, which consists of small to medium river margins and lower reaches of tributaries with slower velocities. After October, trispot darters move from the main channels into tributaries, eventually reaching adjacent seepage areas where they congregate and remain for the duration of spawning, until approximately late April. Breeding sites are intermittent seepage areas and ditches with little to no flow and shallow depths (12 inches (30 centimeters) or less).

For a full summary of species information, please refer to the October 4, 2017, proposed listing rule (82 FR 46183) and the species status assessment (SSA) report for the trispot darter (Service 2018, entire). Both documents are available at <http://www.regulations.gov> under Docket No. FWS-R4-ES-2017-0063, and on the Service's South Atlantic-Gulf Region website at <https://www.fws.gov/southeast/>.

Summary of Comments and Recommendations

On December 28, 2018, we proposed a 4(d) rule for the trispot darter (83 FR 67185). We accepted public comments on the proposed 4(d) rule for 60 days, ending February 26, 2019. During the comment period, we received 13 comments addressing the proposed 4(d) rule. Eight of the comments supported the general protections of the proposed 4(d) rule, and five explicitly expressed support for our conservation strategy of sustainable forest management and best management practices. None of the comments opposed the proposed 4(d) rule. All substantive information provided during the comment period has either been incorporated directly into this final rule or is addressed in our responses below.

State Comments

Comment: The Alabama Forestry Commission commented that limiting silvicultural and forest management activities to May 1 through December 31 is concerning and may be unnecessary with BMP compliance.

Our Response: The 4(d) rule identifies actions that are prohibited in order to protect the darter, as well as actions that are excluded from those prohibitions, including certain forest management activities. Because trispot darters spawn from January through April, making this the most sensitive period of the species' lifecycle, the exclusions for forest management activities in spawning habitat apply only from May 1 through December 31. During the spawning period, the exclusions do not apply in areas where spawning habitat is present; however, in non-spawning habitat, the exclusions apply year-round. In some cases, silvicultural and forest management activities may still be undertaken in areas that are spawning habitat during the spawning season, as long as there is consultation with the Service under section 7 of the Act or a conservation agreement under section 10 of the Act. Performing silvicultural and forest management activities in the range of the trispot darter between May 1 and December 31, while applying State best management practices, will not adversely affect, and may provide conservation benefits for, the species.

Public Comments

Comment: In regard to silviculture practices or forest management activities, we received three public comments and one comment from the Alabama Forestry Commission concerning our use of the term "highest-standard best management practices." Specifically, one public commenter requested clarification of the term, and two other public commenters requested amending the term to "State best management practices." The State agency commented that

Alabama's best management practices for forestry clearly state that stream management zones, stream crossings, and forest roads must always be sufficient in design and filtering capacity to not impact water quality and passage of aquatic species. Thus, complying with Alabama's best management practices should ensure water quality and the reference for the need to "implement the highest-standard best management practices" is not needed.

Our Response: Best management practices can change over time as new scientific and commercial information becomes available. Therefore, rather than specifying a particular set of best management practices, we interpreted "highest-standard best management practices" to refer to the most stringent ones available at the time of project implementation. To clarify the terminology, we removed the term "highest-standard" and now refer to these practices (the most stringent ones currently available) as "State best management practices," which constitute the highest standard.

Final Rule Issued Under Section 4(d) of the Act

Background

Section 4(d) of the Act contains two sentences. The first sentence states that the "Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation" of species listed as threatened. The U.S. Supreme Court has noted that statutory language like "necessary and advisable" demonstrates a large degree of deference to the agency (see *Webster v. Doe*, 486 U.S. 592 (1988)). Conservation is defined in the Act to mean "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the Act] are no longer necessary." Additionally, the second sentence of section 4(d) of the Act states that the Secretary "may by regulation prohibit with respect to any threatened species any act prohibited under

section 9(a)(1), in the case of fish or wildlife, or 9(a)(2), in the case of plants.” Thus, the combination of the two sentences of section 4(d) of the Act provide the Secretary with wide latitude of discretion to select and promulgate appropriate regulations tailored to the specific conservation needs of the threatened species. The second sentence grants particularly broad discretion to the Service when adopting the prohibitions under section 9.

The courts have recognized the extent of the Secretary’s discretion under this standard to develop rules that are appropriate for the conservation of a species. For example, courts have upheld rules developed under section 4(d) as a valid exercise of agency authority where they prohibited take of threatened wildlife, or include a limited taking prohibition (see *Alsea Valley Alliance v. Lautenbacher*, 2007 U.S. Dist. Lexis 60203 (D. Or. 2007); *Washington Environmental Council v. National Marine Fisheries Service*, 2002 U.S. Dist. Lexis 5432 (W.D. Wash. 2002)). Courts have also upheld 4(d) rules that do not address all of the threats a species faces (see *State of Louisiana v. Verity*, 853 F.2d 322 (5th Cir. 1988)). As noted in the legislative history when the Act was initially enacted, “once an animal is on the threatened list, the Secretary has an almost infinite number of options available to him with regard to the permitted activities for those species. He may, for example, permit taking, but not importation of such species, or he may choose to forbid both taking and importation but allow the transportation of such species” (H.R. Rep. No. 412, 93rd Cong., 1st Sess. 1973).

Exercising its authority under section 4(d), the Service has developed a final rule for the trispot darter that is designed to address the species’ specific threats and conservation needs. Although the statute does not require the Service to make a “necessary and advisable” finding with respect to the adoption of specific prohibitions under section 9, we find that this final 4(d) rule as a whole satisfies the requirement in section 4(d) of the Act to issue regulations deemed

necessary and advisable to provide for the conservation of the trispot darter. As discussed in the final listing rule (83 FR 67131; December 28, 2018), the Service has concluded that the trispot darter is likely to become in danger of extinction within the foreseeable future primarily due to threats that degrade instream habitat and reduce water quality and water quantity, all which reduce connectivity between populations. The provisions of this final 4(d) rule promote conservation of the trispot darter by encouraging management of stream systems and the landscapes they drain while also meeting land use management considerations. The provisions of this final 4(d) rule are one of many tools that the Service will use to promote the conservation of the trispot darter.

Provisions of the 4(d) Rule for Trispot Darter

This final 4(d) rule provides for the conservation of the trispot darter by prohibiting the following activities, except as otherwise authorized or permitted: importing or exporting; take; possession and other acts with unlawfully taken specimens; delivering, receiving, transporting, or shipping in interstate or foreign commerce in the course of commercial activity; and selling or offering for sale in interstate or foreign commerce. We also include several standard exclusions to these prohibitions, which are set forth under **Regulation Promulgation**, below, as well as some species-specific exclusions.

As discussed in the final listing rule (83 FR 67131) a range of natural and anthropogenic factors that affect aquatic systems may impact the status of the trispot darter. The largest threat to the future viability of the species is habitat degradation from stressors that influence four habitat elements: water quality, water quantity, instream habitat, and habitat connectivity. These stressors include hydrologic alteration, sedimentation, loss of connectivity, loss of riparian vegetation, contaminants entering the water system due to agricultural activities (such as

excessive poultry litter and livestock entering streams), and urbanization within the watersheds inhabited by the species. Regulating these activities would reduce their combined negative effects, providing for the conservation of the trispot darter by helping to preserve remaining populations.

Conservation actions that benefit the trispot darter include habitat restoration and protection. Additionally, conservation may be achieved through augmentation of populations to increase their size (number of individuals), which increases resiliency to adverse events such as storms and droughts, inadvertent runoff of pollutants and sediment, and contaminant spills. This rule provides exceptions from the Act's incidental take prohibitions, accommodating species restoration efforts by State wildlife agencies, channel restoration projects, and streambank stabilization projects. Further, this rule enhances habitat protection, by providing exceptions to incidental take provisions for silviculture and forest management that implement best management practices; transportation projects that provide for fish passage in waters occupied by the trispot darter; and projects carried out under the Working Lands for Wildlife program of the Natural Resources Conservation Service, U.S. Department of Agriculture. The provisions in this rule for channel restoration and habitat protection can occur only between May 1 and December 31, to avoid the trispot darter's spawning period, when seasonal spawning areas are wetted. This curtails the likelihood of incidental take occurring. Although the exceptions for certain activities may result in some minimal level of harm or temporary disturbance to the trispot darter, overall, these activities benefit the species by contributing to conservation and recovery.

The provisions in this rule are necessary and advisable because the species needs active conservation to improve the quality of its habitat and, absent protections, the species is likely to become in danger of extinction within the foreseeable future. These provisions can encourage

cooperation by landowners and other affected parties in implementing conservation measures. This allows for use of the land while at the same time ensuring the preservation of suitable habitat and minimizing impact on the species.

Under the Act, “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Some of these provisions have been further defined in regulation at 50 CFR 17.3. Take can result knowingly or otherwise, by direct and indirect impacts, intentionally or incidentally. Regulating intentional and incidental take under this 4(d) rule will help preserve the species’ remaining populations; enable beneficial management actions to occur; and decrease synergistic, negative effects from other stressors.

We may issue permits to carry out otherwise prohibited activities, including those described above, involving threatened wildlife under certain circumstances. Regulations governing permits are codified at 50 CFR 17.32. With regard to threatened wildlife, a permit may be issued for the following purposes: for scientific purposes, to enhance propagation or survival, for economic hardship, for zoological exhibition, for educational purposes, for incidental taking, or for special purposes consistent with the purposes of the Act. There are also certain statutory exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

The Service recognizes the special and unique relationship with our State natural resource agency partners in contributing to conservation of listed species. State agencies often possess scientific data and valuable expertise on the status and distribution of endangered, threatened, and candidate species of wildlife and plants. State agencies, because of their authorities and their close working relationships with local governments and landowners, are in a unique position to assist the Services in implementing all aspects of the Act. In this regard, section 6 of the Act

provides that the Services shall cooperate to the maximum extent practicable with the States in carrying out programs authorized by the Act. Therefore, any qualified employee or agent of a State conservation agency that is a party to a cooperative agreement with the Service in accordance with section 6(c) of the Act, who is designated by his or her agency for such purposes, would be able to conduct activities designed to conserve trispot darter that may result in otherwise prohibited take without additional authorization.

Nothing in this 4(d) rule changes in any way the recovery planning provisions of section 4(f) of the Act, the consultation requirements under section 7 of the Act, or the ability of the Service to enter into partnerships for the management and protection of the trispot darter. However, interagency cooperation may be further streamlined through planned programmatic consultations for the species between Federal agencies and the Service.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this rule is not significant.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public

participation and an open exchange of ideas. We have developed this final 4(d) rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. Thus, for a regulatory flexibility analysis to be required, impacts must exceed a threshold for “significant impact” and a threshold for a “substantial number of small entities.” See 5 U.S.C. 605(b). Based on the information that is available to us at this time, we certify that this rule will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

On December 28, 2018, we published the final rule listing the trispot darter as a threatened species (83 FR 67131). In this issue of the *Federal Register*, we publish (1) this final rule to establish a 4(d) rule for the trispot darter, and (2) a final rule designating critical habitat for the species. Any economic impacts resulting from these three final rules under the Act stem from listing the trispot darter and designating its critical habitat rather than this 4(d) rule. This 4(d) rule will not add to any costs due to section 7 consultation for the species and its critical

habitat because, while this rule establishes prohibitions on acts with regard to the trispot darter, it also provides exceptions to those prohibitions. These exceptions will reduce the amount of time, and therefore costs, to complete consultations because the effects of the activities excepted by the 4(d) rule will not require analysis during those consultations. Therefore, a final regulatory flexibility analysis is not required.

Executive Order 13771

This rule is not an Executive Order (E.O.) 13771 (“Reducing Regulation and Controlling Regulatory Costs”) (82 FR 9339, February 3, 2017) regulatory action because this rule is not significant under E.O. 12866.

Energy Supply, Distribution or Use (Executive Order 13211)

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking actions that significantly affect energy supply, distribution, or use. This rule will not have any significant effect, nor is it likely to have any effect, on energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following finding:

This rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both “Federal intergovernmental mandates” and “Federal private sector mandates.” These terms are defined in 2 U.S.C. 658(5)–

(7). “Federal intergovernmental mandate” includes a regulation that “would impose an enforceable duty upon State, local, or tribal governments” with two exceptions. It excludes “a condition of Federal assistance.” It also excludes “a duty arising from participation in a voluntary Federal program,” unless the regulation “relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,” if the provision would “increase the stringency of conditions of assistance” or “place caps upon, or otherwise decrease, the Federal Government’s responsibility to provide funding,” and the State, local, or tribal governments “lack authority” to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. “Federal private sector mandate” includes a regulation that “would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.”

This rule will not impose an unfunded mandate on State, local, or tribal governments, or the private sector of more than \$100 million per year. The rule will not have a significant or unique effect on State, local, or tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*) is not required.

Takings—Executive Order 12630

In accordance with Executive Order 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), this rule does not have significant takings

implications. We have determined that the rule has no potential takings of private property implications as defined by this Executive Order because this 4(d) rule, with limited exceptions, maintains the regulatory status quo regarding activities currently allowed under the Endangered Species Act. A takings implication assessment is not required.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this 4(d) rule does not have significant Federalism effects. A federalism summary impact statement is not required. This rule will not have substantial direct effects on the States, on the relationship between the Federal government and the States, or on the distribution of powers and responsibilities among the various levels of government.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We issue this 4(d) rule in accordance with the provisions of the Act. To assist the public in understanding the conservation needs of the species, the rule identifies the prohibitions and exclusions to those prohibitions that are necessary and advisable to the conservation of the species.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) is not required. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We have prepared a final environmental assessment, as defined under the authority of the National Environmental Policy Act of 1969. For information on how to obtain a copy of the final environmental assessment, see **ADDRESSES**, above.

Government-to-Government Relationships with Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes. We have determined that no tribal interests will be affected by this rule.

References Cited

A complete list of references cited in this rulemaking is available on the Internet at <http://www.regulations.gov> and upon request from the Alabama Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this rule are the staff members of the Fish and Wildlife Service's Species Assessment Team and the Alabama Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as follows:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361-1407; 1531-1544; and 4201-4245, unless otherwise noted.

2. Amend § 17.11 in paragraph (h) by revising the entry for “Darter, trispot” under FISHES in the List of Endangered and Threatened Wildlife to read as set forth below.

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
* * * * *				
FISHES				
* * * * *				
Darter, trispot	<i>Etheostoma trisella</i>	Wherever found	T	83 FR 67131, 12/28/2018; 50 CFR 17.44(q); ^{4d} 50 CFR 17.95(e). ^{CH}
* * * * *				

3. Amend § 17.44 by adding paragraph (q) to read as follows:

§ 17.44 Special rules—fishes.

* * * * *

(q) Trispot darter (*Etheostoma trisella*). (1) *Prohibitions.* The following prohibitions that apply to endangered wildlife also apply to the trispot darter. Except as provided under paragraph (q)(2) of this section and §§ 17.4 and 17.5, it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or cause to be committed, any of the following acts in regard to the trispot darter:

- (i) Import or export, as set forth at § 17.21(b) for endangered wildlife.
- (ii) Take, as set forth at § 17.21(c)(1) for endangered wildlife.
- (iii) Possession and other acts with unlawfully taken specimens, as set forth at § 17.21(d)(1) for endangered wildlife.
- (iv) Interstate or foreign commerce in the course of commercial activity, as set forth at § 17.21(e) for endangered wildlife.
- (v) Sale or offer for sale, as set forth at § 17.21(f) for endangered wildlife.

(2) *Exceptions from prohibitions.* In regard to this species, you may:

- (i) Conduct activities as authorized by a permit issued under § 17.32.
- (ii) Take, as set forth at § 17.21(c)(2) through (c)(4) for endangered wildlife.
- (iii) Take, as set forth at § 17.31(b).
- (iv) Take incidental to an otherwise lawful activity caused by:
 - (A) Species restoration efforts by State wildlife agencies, including collection of broodstock, tissue collection for genetic analysis, captive propagation, and subsequent stocking into currently occupied and unoccupied areas within the historical range of the species.
 - (B) Channel restoration projects that create natural, physically stable, ecologically functioning streams (or stream and wetland systems) that are reconnected with their groundwater aquifers and, if the projects involve known trispot darter spawning habitat, that take place

between May 1 and December 31. These projects can be accomplished using a variety of methods, but the desired outcome is a natural channel with low shear stress (force of water moving against the channel); bank heights that enable reconnection to the floodplain; a reconnection of surface and groundwater systems, resulting in perennial flows in the channel; riffles and pools comprised of existing soil, rock, and wood instead of large imported materials; low compaction of soils within adjacent riparian areas; and inclusion of riparian wetlands.

(C) Streambank stabilization projects that utilize bioengineering methods to replace pre-existing, bare, eroding stream banks with vegetated, stable stream banks, thereby reducing bank erosion and instream sedimentation and improving habitat conditions for the species. Stream banks may be stabilized using live stakes (live, vegetative cuttings inserted or tamped into the ground in a manner that allows the stake to take root and grow), live fascines (live branch cuttings, usually willows, bound together into long, cigar-shaped bundles), or brush layering (cuttings or branches of easily rooted tree species layered between successive lifts of soil fill). Stream banks must not be stabilized solely through the use of quarried rock (rip-rap) or the use of rock baskets or gabion structures.

(D) Silviculture practices and forest management activities that:

(1) Implement State best management practices, particularly for streamside management zones, for stream crossings, for forest roads, for erosion control, and to maintain stable channel morphology; or

(2) Remove logging debris or any other large material placed within natural or artificial wet weather conveyances or ephemeral, intermittent, or perennial stream channels; and

(3) When such activities involve trispot darter spawning habitat, are carried out between May 1 and December 31.

(E) Transportation projects that provide for fish passage at stream crossings that are performed between May 1 and December 31 to avoid the time period when the trispot darter will be found within spawning habitat, if such habitat is affected by the activity.

(F) Projects carried out in the species' range under the Working Lands for Wildlife program of the Natural Resources Conservation Service, U.S. Department of Agriculture, that:

- (1) Do not alter habitats known to be used by the trispot darter beyond the fish's tolerances; and
 - (2) Are performed between May 1 and December 31 to avoid the time period when the trispot darter will be found within its spawning habitat, if such habitat is affected by the activity.
- (v) Possess and engage in other acts with unlawfully taken wildlife, as set forth at § 17.21(d)(2) for endangered wildlife.

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Aurelia Skipwith,
Director, U.S. Fish and Wildlife Service.

[FR Doc. 2020-19109 Filed: 9/29/2020 8:45 am; Publication Date: 9/30/2020]