

January 20, 2024

Nathan Reiner
Head of Enforcement
Region 1, FWP

Dear Nathan,

I am writing you a letter regarding the current regulation on page 43.

“SWAN RIVER”

- **No intentional fishing for Bull Trout.**
- **Catch-and-release for Cutthroat Trout.**
- **Closed to angling June 1 through September 30 within a 300-year radius of the Woodward Creek and Lion Creek stream mouths, unless posted at a great distance.**

Piper Creek Bridge downstream to Swan Lake

- **Artificial lures only**

Swan Lake outlet downstream to the Highway 35 Bridge

- **Open entire season**

At first glance this regulation seems to be trying to protect the Swan River but in fact this regulation is in violation of federal ESA, and state law. I will separate both violations independently.

SPECIES COMPOSITION OF THE SWAN RIVER

- We have 4 distinct populations of Char in the Swan River, Lake Trout, Bull Trout, Brook Trout, a Brook Trout-Bull Trout Hybrid. The problem for anglers is that they are going to have difficulty trying to explain to them which one you can legally harvest. We have had for years multitude of violations of people keeping fish that they can't keep. Example, 10lb Brown that are actually Bull Trout. Multiple occasions, Swan and Flathead, I have run into anglers who have stringers of fish that are Bull Trout, they think they are Brook Trout but they are small Bull Trout. There is a continuous problem with people not understanding the regulation such as bait fishing continually goes on. I am sending you a field guide "A guide to the field identification of Bull Trout, Brook Trout, and their Hybrids." Here is the confusion, you have 2 species that virtually have identical dorsal fins, Bull Trout & Lake Trout then you have 2 species that have mottled fins. In addition, they all have different spot patterns but all 4 species have the same "tennis shoe", a black with a white leading edge. More confusion. I am not sure a lot of sportsmen are aware of the penalties of taking a Bull Trout over 18 inches, considered an adult, is a \$1000.00 fine per fish. Enclosed I am sending you a copy of "US Fish & Wildlife Service-Section 4(d) rules under the Endangered Species Act." The current regulation on page 43 allows the take of fish that legally need to be protected because of misidentification.

SPECIES COMPOSTION OF THE SWAN RIVER 2

- The population of the fish in the Swan River are Cutbows. The entire population of trout are a derivative of Rainbows, and Cutthroat hybridization. I was personally on a Cutthroat sampling on the Swan River. I know for a fact that out of 3000 plus samples there are no genetically pure Cutthroat. On an email dated 3-23-23 from Lee Anderson the response from him points out the problem it is highlighted in blue. “While we have collected many tissue samples (fin clips) for WCT in Swan tributaries over the years, we have found very few large cutthroats in the main Swan River in all of the years of electrofishing. Currently we have 16 WCT populations in Swan tributaries that we consider “conservation populations”. The populations are fish that are >90% WCT when we look at the genetics. These populations are only found above barriers. The rest of the Swan populations would be considered hybridized. Most large-bodied trout found in the Swan River are rainbows.”
Now we are in violation of state law, you cannot take Cutbows out of the river. No difference you can't take a Brook-Bull Trout hybrid. You have fish that look like Cutthroats but they are not. If there is no pure strain Cutthroats left in the Swan River then there is no genetically pure Rainbows. They are a derivative of Cutthroat-Rainbow crosses. $1 + 1 = 2$. So in essence you have created a regulation, on page 43, Swan River for a species that does not exist. There are no pure strain Cutthroats in the Swan. The Swan Rive4 is not a grocery store that people can go and rummage through. This regulation creates problems for the resource, it's problematic for sportsmen to completely understand. It potential has nightmares for enforcement. This is why we had the Swan River shut down for catch and release so that people were not misidentifying fish. Sportsmen in the Bigfork, and Swan Valley want the Swan River protected again.

Sincerely,
Mac Vinnedge



A Guide to the Field Identification of Bull Trout, Brook Trout, and their Hybrids



Directions: This guide is used to identify bull trout, brook trout, and their hybrids that are at least 125 mm in length. The guide uses **only** color patterns in the dorsal fin to distinguish these three kinds of fish. Therefore, observers should disregard all other features and focus **only** on the dorsal fin when making identifications. It may be easier to see the color patterns in the dorsal fin if the fish is submerged in water.

Bull Trout

Dorsal fin lacks light or dark markings. Some fish may have a few light markings along the base of the dorsal fin.

Examples:



Note the light markings along the base of the dorsal fin

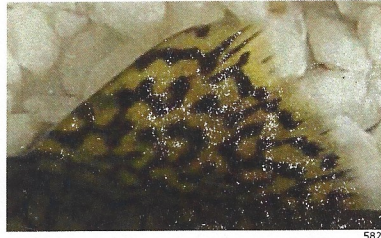


Note the light markings along the base of the dorsal fin

Brook Trout

Dorsal fin has solid black markings with distinct edges.

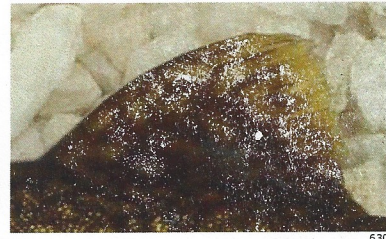
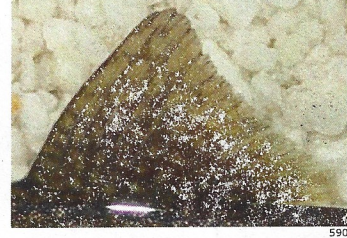
Examples:



Hybrid

Dorsal fin has light or dark markings but dark markings are not solid black and lack distinct edges. In some fish less than about 175 mm the markings may be very faint.

Examples:



Note the dark colored bands but they are not solid black and lack distinct edges



Note the very faint markings in this 161 mm fish



Section 4(d) Rules Under the Endangered Species Act

Frequently Asked Questions

What is a 4(d) rule?

A “4(d) Rule” is one of many tools in the Endangered Species Act (ESA) for protecting threatened species. This rule gets its name from section 4(d) of the ESA, which directs the Secretary of Interior (and therefore the U.S. Fish and Wildlife Service [Service]) to issue regulations deemed “necessary and advisable to provide for the conservation of” threatened species.

Why is a 4(d) rule needed?

The ESA (section 9) provides a specific list of protections for endangered species, but the ESA does not automatically provide these same protections to threatened species. Without a 4(d) rule, threatened species do not receive section 9 protections (although federal agency ESA section 7 consultation requirements, recovery requirements, etc., still apply). Given the reduced protections for threatened species without a 4(d) rule, the Service proposes a species-specific 4(d) rule concurrently with any proposed rule classifying a species as a threatened species, and finalizes the rules concurrently as well. In addition, section 10(j) of the ESA provides for a special application of section 4(d) to facilitate reintroducing species to contribute to their conservation. When designating an experimental population under a 10(j) rule, that rule also contains the prohibitions and exemptions necessary and appropriate to conserve the designated experimental population.

What were the “blanket rules”?

Early in the administration of the ESA, the Service promulgated “blanket rules,” which by default extended to threatened species the majority of the protections that apply to endangered species under section 9. In 2019, we revised our regulations to no longer apply the “blanket rules” to species listed as threatened after the revisions (84 FR 44753). Because the revised regulations do not extend automatic protections to species listed



June Sucker Recovery Implementation Program

The joint conservation efforts of state, local, and federal partners have moved the June sucker one step further on the path to recovery. In December 2020, the Service announced the reclassification of the fish from endangered to threatened. A 4(d) rule was also issued to reduce the need for permits for activities that benefit and conserve the species.

as “threatened species,” we must now issue species-specific 4(d) rules to establish appropriate protective regulations for the species.

Did the Service issue species-specific 4(d) rules while the “blanket rules” were in effect?

Yes. The “blanket rules” did not prevent the Service from issuing species-specific 4(d) rules; of the 490 species listed as threatened by 2021, 113 have species-specific 4(d) rules.

What are benefits of a 4(d) rule?

A 4(d) rule provides for the conservation of a threatened species by tailoring protections to those needed to prevent further decline and facilitate recovery. First, we use these rules to incentivize proactive conservation efforts, by streamlining ESA compliance for actions that have long-term benefits but might result in “take” in the short term. Secondly, we often use 4(d) rules to streamline ESA compliance for actions that

result in low levels of take but do not threaten a species’ continued existence. This approach focuses our attention on the threats that individually or cumulatively make a difference to the species’ recovery. The exact requirements depend on the species’ biology, conservation needs, and threats affecting the species. 4(d) rules can help maintain and improve threatened species status to help prevent further declines while simultaneously reducing undue regulatory burden.

How does the Service determine which regulations are “necessary and advisable”?

We use the best available information to determine which regulations are needed to conserve threatened species. This information may come in the form of published scientific papers, input from species’ experts, or other written materials or data. In general, the provisions of a 4(d) rule are closely tied to the species’ needs and primary factors influencing the species

identified in our analyses of the species' biological status. Public involvement during a rulemaking process can also help us identify those activities programs that may affect the species as well as potential changes to the protections.

What information needs to be in HCPs?

We consider the conservation needs of the species and generally start with all protections under section 9.

For example, under section 9 it is illegal, with respect to any endangered wildlife species to:

- import any such species into, or export any such species from the United States;
- take any such species within the United States or the territorial sea of the United States;
- take any such species on the high seas;
- possess, sell, deliver, carry, transport, or ship, by any means whatsoever any such species taken;
- deliver, receive, carry transport, or ship in interstate or foreign commerce and in the course of commercial activity; and
- sell or offer for sale in interstate or foreign commerce any such species.

We then determine if we should allow some of these prohibited actions to occur without the need for a permit (these are called exceptions to the prohibitions). For example, we routinely allow for the Service, National Marine Fisheries Service (NMFS), and State natural resource agencies to conduct recovery actions or to aid injured or dispose of dead individuals without a permit. We may also craft the rule to incentivize specific conservation actions or provide regulatory relief for actions that are not contributing to the overall status of the species.

Do Federal agencies still need to consult with the Service under section 7 of the ESA for species with 4(d) rules?

Yes. If a Federal agency's action (authorize, fund, or carry out) may affect that species, consultation is required. A 4(d) rule does not remove that requirement. Regardless of whether take related to certain

proposed activities is excepted (or not prohibited), those activities, and thus the proposed action, may still affect threatened species, triggering the requirement for consultation under section 7 of the ESA.

Is the consultation process or criteria different for species with 4(d) rules?

A 4(d) rule does not change the process or criteria for informal or formal consultations and does not alter the analytical process used for biological opinions or concurrence letters. However, it may streamline consultations and influence how the incidental take statement is constructed.

Can a 4(d) rule streamline consultation?

Given that a 4(d) rule will provide rationale that excepted activities or forms of take are consistent with the species conservation – then a consultation and jeopardy analysis for those kinds of activities or forms of take should be simpler and more streamlined. In addition, the Service may develop tools with action agencies such as programmatic consultations and online determination keys to further streamline the consultation process.

Can a 4(d) rule streamline permitting under section 10 of the ESA?

This is specific to each species' 4(d) rule and coordination with the local Ecological Services Field Office is recommended. For most species, recovery actions conducted by the Service, NMFS, or State natural resource agency that result in take (capture, handling, etc.) of the species will not require any additional section 10(a)(1)(A) permitting. Recovery actions that result in take of the species conducted by anyone else will often continue to require a Service permit. Some forms of incidental take may not be prohibited or may be excepted by the 4(d) rule, therefore no incidental take permit under section 10(a)(1)(B) would be required for those forms of take.

What's an example of a 4(d) rule aiding in the conservation of a threatened species?

The June sucker was recently downlisted from endangered to threatened. The 4(d) rule for the June sucker excepts take (take is not a violation under the ESA) associated with multiple conservation actions such as:

- activities intended to reduce or eliminate predatory nonnative fish from the range of the species;
- habitat restoration projects or projects that allow for the increase of instream flows in the species habitat, such as diversion removals;
- monitoring;
- monitoring and management of recreational sportfish populations educational or outreach efforts to increase public awareness, engagement, and support for June sucker recovery efforts; and
- maintaining June sucker refuges and stocking population, and stocking June sucker in the wild.

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October 2021