

Migratory Bird Conservation Actions for Projects to Reduce the Risk of Take during the Nesting Season*

U.S. Fish and Wildlife Service (USFWS) Region 6, Migratory Bird Management

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Goal: Avoid take of migratory birds and/or minimize the loss, destruction, or degradation of migratory bird habitat while completing the proposed project or action. Under the Migratory Bird Treaty Act (MBTA) take is defined as “pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture or collect” a migratory bird (50 CFR § 10.12). **

1. Determine if the proposed project or action will involve below- and/or above-ground construction or habitat-altering activities, because recommended practices and timing of surveys could differ accordingly.
2. If the proposed project or action includes a reasonable likelihood that take of migratory birds will occur, then complete the project or those actions expected to take migratory birds outside of their nesting season to the greatest extent possible. Examples of actions that may take migratory birds include, clearing or cutting of vegetation, burning vegetation, driving or parking equipment on vegetation that may harbor nesting birds, etc. The primary nesting season for migratory birds varies greatly among species and geographic locations, but generally extends from early April to mid-July. However, the maximum time period for the migratory bird nesting season can extend from early January through late August. Due to this variability, project proponents should consult with the USFWS for specific nesting seasons of birds in your project or action area. As early as possible please consult the USFWS in the planning stages of your project for other input on conservation measures to avoid and minimize the take of migratory birds.
3. Complete all project activities that could result in migratory bird take outside the maximum migratory bird nesting season (early January through late August) to the greatest extent possible. If this is not possible, then avoid any habitat alteration, removal, or destruction during the primary nesting season for migratory birds (early April to mid-July).
4. If a proposed project or action includes the potential for take of migratory birds and/or the loss or degradation of migratory bird habitat, and work cannot occur outside the migratory bird nesting season (either the maximum or primary nesting season), project proponents should provide USFWS with an explanation for why work has to occur during the migratory bird nesting season. Further, in these cases, project proponents also should demonstrate that all efforts to complete work outside the migratory bird nesting season were attempted, and that the reasons work needs to be completed during the nesting season were beyond the proponent’s control.

5. Where project work must occur during the migratory bird nesting season, project proponents should utilize a qualified biologist to survey those portions of the project area during the nesting season (but prior to the project or action occurring) to determine if migratory birds are present and nesting in those areas. These bird surveys should occur no more than 7-10 days prior to when work actually begins on the project site. In addition to conducting surveys during the nesting season, entities may also benefit from conducting surveys during the previous nesting season. Such surveys will serve to inform the likely presence of nesting migratory birds in the proposed project or work area. While individual migratory birds will not necessarily return to nest at the exact site as in previous years, a survey in the nesting season the year before the project or action allows the company to become familiar with bird species and numbers present in the project area well before the nesting season in the year of proposed action. Migratory bird surveys also should be completed during the best timeframe for detecting the presence of nesting migratory birds, using accepted bird survey protocols. USFWS Offices can be contacted for recommendations on appropriate survey guidance. Project proponents should also be aware that results of migratory bird surveys are subject to spatial and temporal variability.
6. If no migratory birds are found nesting in proposed project or action areas immediately prior to the time when construction and associated activities are to occur, then proceed with your project activity as planned.
7. If migratory birds are present and nesting in the proposed project or action area, contact your nearest USFWS Ecological Services Field Office and/or USFWS Regional Migratory Bird Management Office for guidance on appropriate next steps to avoid and minimize impacts to (and take of) migratory birds associated with the proposed project or action. Although bald and golden eagles are protected under MBTA they are also covered under BGEPA. Please consult USFWS if there are eagles or eagle nests in or near your proposed project area ***.

* Note: these recommended conservation measures assume that there are no Endangered or Threatened migratory bird species present in the project/action area, or any other Endangered or Threatened animal or plant species, or any designated critical habitat for Endangered or Threatened species present in this area. If Endangered or Threatened species or designated critical habitat are present, or they could potentially be present, and the project/action may affect these species or designated critical habitat for them, then consult with your nearest USFWS Ecological Services Office before proceeding with any project/action.

** The Migratory Bird Treaty Act (MBTA) prohibits the taking, killing, possession, and transportation, (among other actions) of migratory birds, their eggs, parts, and nests, except when specifically permitted by regulations. While the MBTA has no provision for allowing unauthorized take, the USFWS realizes that some birds may be killed during construction or through other project activities, even if all known reasonable and effective measures to protect birds are used. The USFWS Office of Law Enforcement carries out its mission to protect migratory birds through investigations and enforcement, as well as by fostering relationships

with individuals, companies, and industries that have taken effective steps to avoid take of migratory birds and by encouraging others to implement measures to avoid take of migratory birds. It is not possible to absolve individuals, companies, or agencies from liability even if they implement bird mortality avoidance, or other similar protective measures. However, the Office of Law Enforcement focuses its resources on investigating and undertaking enforcement actions against individuals and companies that take migratory birds without identifying and implementing all reasonable, prudent, and effective measures to avoid that take. Companies are encouraged to work closely with USFWS biologists to identify available protective measures when developing project plans and/or avian protection plans, and to implement those measures prior to/during construction or similar activities.

*** Also note that Bald and Golden Eagles receive additional protection under the Bald and Golden Eagle Protection Act (BGEPA). BGEPA prohibits the take, possession, sale, purchase, barter, offer to sell, purchase, or barter, transport, export or import, of any Bald or Golden Eagle, alive or dead, including any part, nest, or egg, unless allowed by permit. BGEPA also defines take to include “pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest, or disturb,” 16 U.S.C. 668c, and includes criminal and civil penalties for violating the statute. Further, activities that would disturb Bald or Golden Eagles are prohibited under BGEPA. “Disturb” means to agitate or bother a Bald or Golden Eagle to a degree that causes, or is likely to cause, based on the best scientific information available, (1) injury to an Eagle, (2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or (3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior. If a proposed project or action would occur in areas where nesting, feeding, or roosting eagles occur, then project proponents may need to take additional conservation measures to achieve compliance with BGEPA. New regulations (50 CFR § 22.26 and § 22.27) allow the take of bald and golden eagles and their nests, respectively, to protect interests in a particular locality provided that the USFWS finds that such take is compatible with the goal of maintaining stable or increasing eagle breeding populations. However, consultation with the USFWS Migratory Bird, Ecological Services, and Law Enforcement programs will be required before a permit may be issued.