Oregon Department of Transportation

Highway Division DIRECTIVE

NUMBER	SUPERSEDES
ENV 01-01	New
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REFERENCE	

SUBJECT	APPROVED SIGNATURE
Migratory Bird Treaty Act (16 U.S.C. 703-712)	/s/ Douglas Tindall, Highway Division Deputy Director

PURPOSE:

To provide agency personnel involved in project delivery, construction, and maintenance with guidelines and strategies to ensure that appropriate and reasonable measures are taken to prevent injury to and death of migratory birds.

DEFINITIONS:

- **Active nest** – a nest containing eggs or young.
- **Appropriate** – suitable for a particular condition, occasion, or place.
- **Conservation** – the protection, preservation, management, or restoration of wildlife and natural resources.
- **Context Sensitive and Sustainable Solutions (CS^3)** – an operational approach that addresses the preservation of scenic, aesthetic, historical, environmental, economic, and community values while building safe and enduring transportation projects.
- **Due diligence** – use of reasonable but not necessarily exhaustive efforts.
- **Environmental stewardship** – the careful and responsible management of natural resources.
- **Fledged** – young that are capable of flight and can successfully leave the nest.
- **Indiscriminate** – non-selective, wanton.
- **Migratory bird** – the vast majority of wild bird species encountered in Oregon; notable exceptions include European starling, house sparrow, and rock dove (feral pigeon).
- **Migratory Bird Treaty Act (MBTA)** – implements four bilateral treaties (between the U.S. and Canada, Japan, Mexico, and the former Soviet Union) making it illegal to pursue, possess, injure, or kill migratory birds without a permit.
- **Reasonably expect** – to presume that one has acted sensibly under the circumstances.
- **Safeguard** – strive to protect against potential harm.
- **USFWS** – United States Fish and Wildlife Service, regulatory agency enforcing the MBTA.

BACKGROUND:

The MBTA was developed in 1918 to stop the indiscriminate killing and market hunting of migratory birds. This act applies to activities conducted within the United States by any person, business, organization, institution, and any local, state, or federal agency.

GUIDELINES:

ODOT is committed to environmental stewardship and supporting the conservation intent of the MBTA while designing, constructing, operating, and maintaining the state highway system through Context Sensitive and Sustainable Solutions (CS^3); therefore, ODOT employees must practice due diligence to safeguard migratory birds while carrying out their daily activities. ODOT Highway Division employees are to incorporate the attached MBTA Guidelines and Strategies into their work responsibilities as can reasonably be expected when implementing the agency mission to provide a safe and efficient transportation system in ways that protect and enhance the environment.

RESPONSIBILITIES:

Highway Division Deputy Director:

- Provide guidance and direction on the MBTA to Highway Division personnel.

Technical Services Manager:

- Ensure that the MBTA Guidelines and Strategies associated with this Highway Division Directive are adaptive.

Natural Resources Unit:

- Lead efforts to revise the MBTA Guidelines and Strategies as needed.
- Include internal and external stakeholders in the periodic review and revision of the MBTA Guidelines and Strategies.
- Provide training and updates on the MBTA Guidelines and Strategies.
- Work with the Specifications, Estimating, and Office of Pre-Letting Unit, Project Managers, and other pertinent parties to develop standard specifications language for activities relevant to migratory bird protection.
- Work with the ODOT Bridge Engineering Section to foster bridge designs that dissuade birds from building nests on bridge sections *that are difficult to access*.
- Pursue MBTA permit options and an ODOT Avian Protection Plan with USFWS.

Environmental Leadership Team:

- Provide input on revisions to the MBTA Guidelines and Strategies.
- Incorporate MBTA Guidelines and Strategies into ODOT activities, projects, and contracts.
- Include migratory bird conservation practices into ODOT activities, projects, and contracts when relevant and reasonable.
- Disseminate MBTA information on the MBTA Guidelines and Strategies to appropriate ODOT personnel and contractors.

Project Delivery Leadership Team:

- Ensure that the protection of migratory birds is given due consideration in the entire project delivery system from inception through final project acceptance.
- Bring project MBTA compliance issues to the attention of the Natural Resources Unit.

Project Team Leaders:

- Ensure that migratory bird conservation principles and practices are implemented as stipulated during project design.
- Work with Biologists and Regional Environmental Coordinators to resolve MBTA compliance issues.

Construction Project Managers:

- Assist with developing contract language for implementation of the MBTA.
- Verify that construction contractors understand how to implement MBTA Guidelines and Strategies within projects.
- Ensure that the agreed upon MBTA Guidelines and Strategies are adhered to during construction activities.
- Report to the Project Delivery Leadership Team any MBTA compliance issues that occur on projects.

Maintenance Leadership Team:

- Incorporate changes in MBTA Guidelines and Strategies as needed into the Routine Road Maintenance Guide for Water Quality and Habitat Best Management Practices (2004 Blue Book).
- Disseminate information on the MBTA Guidelines and Strategies to appropriate maintenance personnel.
- Apprise the Natural Resources Unit of maintenance issues that should be considered in future revisions of the MBTA Guidelines and Strategies.

Maintenance District Managers:

- Integrate appropriate MBTA Guidelines and Strategies into maintenance activities.
- Provide training and disseminate information on the MBTA Guidelines and Strategies to maintenance personnel.

Facilities (Maintenance) Managers:

- Incorporate migratory bird conservation practices into facilities management.
- Report MBTA compliance issues at maintenance facilities to the region Biologist.

Biologists and Regional Environmental Coordinators:

- Recommend and support measures to protect migratory birds during project development and maintenance.
- Help identify active bird nests and/or habitat.
- Involve appropriate federal, state, and non-governmental agencies regarding migratory bird issues that arise during project development and implementation.
- Help resolve MBTA compliance issues during project and maintenance implementation.
- Work with the Natural Resource Unit to ensure that the MBTA Guidelines and Strategies document is current and inclusive.

Individual Employees:

- Practice due diligence to safeguard migratory birds while carrying out employment duties.
- Inform managers of activities that should be considered for inclusion in future revisions of the MBTA Guidelines and Strategies.
- Contact the region Biologist or Regional Environmental Coordinator when issues pertaining to the MBTA arise.

ACTION REQUIRED:

MBTA Guidelines and Strategies are to be incorporated into project delivery, construction, and maintenance activities to ensure that appropriate and reasonable measures are taken to prevent injury to and death of migratory birds.

SPECIAL INSTRUCTIONS:

Implementation of MBTA Guidelines and Strategies is to begin immediately.

MBTA Guidelines and Strategies

Statement of Intent: This document provides strategies to guide project decision-making regarding compliance with the Migratory Bird Treaty Act (MBTA). Because each project provides its own set of MBTA challenges, this document recognizes the need for flexibility in selecting compliance strategies by providing a suite of **possible** options for consideration on a project by project basis.

Compliance Summary: Unless and except as permitted by regulation, it shall be unlawful to possess, pursue, hunt, take, capture, kill, or attempt to take, capture, or kill any migratory bird, any part, nest, or eggs of any such bird, or any product of any such bird or any part, nest, or egg thereof (16 U.S.C. 703).

I. Project Delivery

MBTA Focus for Project Delivery – Identify and incorporate migratory bird conservation principles and practices into ODOT projects and contracts through collaboration with appropriate federal, state, and non-governmental groups during planning efforts.

1) Vegetation/Habitat Preservation

Goal – Ensure that project activities are designed such that migratory bird habitat is not unnecessarily disturbed during project implementation and that nesting habitat is not disturbed during the nesting season.

Possible *habitat preservation activities to require in projects to meet this goal:*

- Avoid disturbing nesting habitat (i.e., vegetation or structures) during the nesting season.
- Identify valuable bird nesting habitat within the project area and retain it if possible within project limits.
- Prevent migratory birds from nesting on structures that will be repaired or demolished prior to when young birds will fledge (e.g., employ exclusionary devices or dispersal methods)
- Within the work area, avoid disturbing vegetation designated to remain following project completion; preservation of this vegetation includes keeping equipment and materials off of the critical root zone.
- Avoid directly or indirectly damaging vegetation outside the work area.
- Following consultation with the project Biologist or Regional Environmental Coordinator (REC), undertake other actions not listed above that meet the MBTA goal for preservation of bird habitat (see Construction section for additional possibilities).

2) Vegetation/Habitat Restoration

Goal – Ensure that migratory bird habitat that is negatively impacted during project implementation is restored where feasible.

Possible *habitat restoration activities to require in projects to meet this goal:*

- Prevent fouling topsoil with subsoil or other detrimental matter; consult Oregon Standard Specifications for Construction (2002).
- Following construction, bring the surface area to a condition ready for planting operations; consult Oregon Standard Specifications for Construction (2002).
- Seed/plant using practices outlined in Sections 01030 and 01040 of Oregon Standard Specifications for Construction (2002).
- Plant in riparian areas following practices outlined in the Vegetation Management Program section of the ODOT Routine Road Maintenance Water Quality and Habitat Guide (2004 Blue Book).
- Consult with ODOT Foresters regarding best practices for planting trees.
- Following consultation with the project Biologist or REC, undertake other actions not listed above that meet the MBTA goal for restoration of bird habitat.

3) Vegetation/Habitat Enhancement

Goal – Improve migratory bird habitat within project areas if feasible and reasonable.

Possible *habitat enhancement activities to incorporate into projects to meet this goal:*

- Eliminate weeds (consult Oregon Standard Specifications for Construction, 2002) before beginning planting or seeding operations.
- Identify suitable native plants to utilize in habitat enhancement activities.
- Foster multi-layered vegetative communities in restoration activities when they do not interfere with the safe operation of the highway.
- Provide structural elements for nest sites *on suitable areas* of transportation structures (e.g., bridges).
- In consultation with the project Biologist, REC, or ODOT Foresters, identify other opportunities to improve bird habitat within the project scope.

4) Vegetation/Habitat Mitigation

Goal – Enhance bird habitat off-site when on-site vegetation preservation, restoration, and enhancement opportunities are limited. Off-site areas include mitigation banks and ODOT properties not associated with the right-of-way.

<u>Possible</u> *habitat mitigation activities to incorporate into projects to meet this goal:*

- Create snags in snag deficient areas.
- Provide nest boxes and nesting structures.
- Encourage multi-layered vegetation communities when practical.
- Enhance habitat requirements for bird species in decline.
- In consultation with the project Biologist or REC, identify other opportunities that meet the MBTA goal for bird habitat mitigation.

II. Construction

MBTA Focus for Construction – Put migratory bird conservation principles into practice during construction activities.

1) Vegetation Clearing

Goal – Avoid clearing live or dead vegetation containing active nests of migratory birds.

Possible *activities to meet this goal:*

- Do not damage vegetation by mechanical or chemical means unless it is necessary for project implementation.
- Clear vegetation outside the nesting season; contact the project Biologist for USFWS-provided information on when migratory birds nest in the project area.
- Prevent migratory birds from nesting in vegetation scheduled for clearing (e.g., employ exclusionary devices or dispersal methods).
- Inspect vegetation for active nests prior to clearing.
- If an active nest is encountered, avoid disturbing the nest or associated vegetation until the young have fledged.
- Consult with the project Biologist or Regional Environmental Coordinator (REC) on vegetation issues that arise during a project regarding compliance with the MBTA; seek additional advice from the Terrestrial Biology Team Leader in ODOT Central Services if warranted.
- Undertake other actions not listed above that meet the MBTA goal for vegetation clearing within the context of the particular project.

NOTE: In the event that eggs or birds are injured or killed, contact the REC for advice on how to proceed.

2) Tree/Snag Removal

Goal – Avoid felling trees or snags containing active nests of migratory birds.

Possible *activities to meet this goal:*

- Do not remove trees and snags unless it is necessary for project implementation or there is a safety issue.
- Remove trees and snags outside the nesting period; contact the project Biologist for USFWS-provided information on when migratory birds nest in the project area.
- Inspect trees and snags for active nests prior to their removal (e.g., observation methods or tree rapping).
- If an active nest is encountered, avoid removing the tree/snag until the young have fledged.

- Consult with the project Biologist or REC on tree/snag removal issues that arise during a project regarding compliance with the MBTA; seek additional advice from the Terrestrial Biology Team Leader in ODOT Central Services if warranted.
- Undertake other actions not listed above that meet the MBTA goal for tree/snag removal within the context of the particular project.

NOTE: In the event that eggs or birds are injured or killed, contact the REC for advice on how to proceed.

3) Bridge Demolition or Repair

Goal – Avoid destroying active nests and injuring birds protected by the MBTA during bridge demolition or repair.

Possible *activities to meet this goal:*

- Prevent migratory birds from nesting on bridges that will be demolished or repaired prior to when young birds will fledge (e.g., employ exclusionary devices or dispersal methods).
- Physically remove nests that do not contain eggs to prevent active nests.
- Inspect bridges for active nests prior to demolition or repair.
- Delay demolition or repair if active nests are located.
- Screen active nests from bridge repair activities.
- Demolish or repair bridges outside the nesting season.
- If occupied nests are encountered, continue work if the nests will not be destroyed and their inhabitants will not be injured, and if parent birds will not be precluded from tending their nests to the extent that the eggs or young are negatively impacted.
- Consult with the project Biologist or REC on bridge demolition/repair issues that arise during a project regarding compliance with the MBTA; seek additional advice from the Terrestrial Biology Team Leader in ODOT Central Service if warranted.
- Undertake other actions not listed above that meet the MBTA goal for bridge demolition or repair within the context of the particular project.

NOTE: In the event that eggs or birds are injured or killed, contact the REC for advice on how to proceed.

III. Maintenance

MBTA Focus for Maintenance – Integrate migratory bird conservation principles and practices into routine and extraordinary ODOT maintenance activities through existing programs and practices.

1) Tree Pruning and Tree/Snag Removal

Goal – Avoid pruning trees or removing trees/snags containing active nests of migratory birds.

- Follow appropriate Best Management Practices (BMPs) as described in the ODOT Routine Road Maintenance Water Quality and Habitat Guide (2004 Blue Book).
- In the unlikely event that state or federal endangered migratory birds are encountered during routine maintenance of trees or snags, stop work immediately and contact the Regional Environmental Coordinator (REC) for advice on how to proceed.

Possible *activities to meet this goal, in addition to those outlined in the Blue Book and other management plans:*

- Where feasible, trees/snags along the right-of-way should not be removed unless they pose safety concerns to the highway or motoring public and/or removing trees/snags is required to comply with state and local laws. Hazard trees are to be removed according to the Blue Book.
- As appropriate, prune or remove trees/snags outside the nesting season (as identified by ODFW), particularly the peak nesting period, unless the tree, limb, or snag is an imminent hazard.
- As outlined in the Blue Book, where appropriate, develop and implement highway corridor plans to minimize the removal of hazard trees/snags during the peak nesting season.
- When feasible, inspect trees/snags prior to removal for active nests (e.g., observation methods or tree rapping).
- If an active nest is encountered, when feasible, avoid pruning or removing the tree/snag until the young have fledged.

2) Vegetation Management

Goal – Minimize impacts to migratory birds that may be nesting in vegetation along right-of-ways through implementation of District Integrated Vegetation Management (IVM) plans that include considerations for migratory birds.

- Follow BMPs for vegetation management as described in the Blue Book.
- In the unlikely event that state or federal endangered migratory birds are encountered in vegetation during routine maintenance, stop work immediately and contact the REC for advice on how to proceed.

Possible *actions to include in District IVM plans that meet this goal:*

- When and where feasible, vegetation will be cleared only if it is necessary for the safe operation of the transportation system, to comply with state and local laws, or to control noxious weeds.
- As appropriate, low-growing plants will be planted that do not require maintenance during the nesting season (as identified by ODFW) of migratory birds; preference may be given to native plant species.
- When feasible, vegetation maintenance activities will occur outside the nesting season, especially during the peak nesting season, unless safety, fire, weed control, incident response, or state and local laws dictate otherwise.
- When feasible, the timing and width of required mowing will be adjusted to minimize impacts to nesting birds.
- When feasible, brush removal will be limited to no more than 20 feet from either end and under all maintained bridges unless necessary for sight distance and the structural integrity of the bridge.
- If possible, inspect vegetation for active nests prior to clearing.
- If an active nest is encountered, if possible, avoid disturbing the nest or surrounding vegetation until the young have fledged.

3) Culvert/Bridge Maintenance and Repair

Goal – Avoid destroying active nests and injuring migratory birds while cleaning or repairing culverts and bridges.

- Follow the Bridge Washing Guidelines found in the Blue Book.
- For state and federal endangered migratory birds known to occur on identified ODOT structures, follow BMPs for maintenance activities described in relevant ODOT management plans (e.g., Peregrine Falcon Management Plan 2002-2007).
- If state or federal endangered migratory birds are unexpectedly encountered during maintenance/repair activities, stop work immediately and contact the REC for advice on how to proceed.

Possible *activities to meet this goal, in addition to those identified in the Blue Book and other management plans:*

- When feasible for scheduled work, prevent migratory birds from nesting on sections of transportation structures that will be cleaned or repaired prior to when young birds will fledge (e.g., employ exclusionary devices or dispersal methods); bridges used for nesting by migratory birds are often noted in the bridge inspectors' database.
- For sections of structures that will undergo maintenance/repair, physically remove nests prior to egg laying (to prevent active nests) or after birds have fledged, when feasible.

- If migratory birds are nesting in or on a structure, delay or avoid maintenance/repair work in the vicinity of the nest, when feasible.
- If active nests are present and work can occur around them, when feasible shield the nests from maintenance/repair activities so nest inhabitants are disturbed as little as possible; reasonable attempts should be made to protect active nests and their inhabitants, and to allow parent birds to tend their nests so that eggs and young are not negatively impacted.
- Undertake other actions not listed above that meet the MBTA goal for the maintenance and repair of culverts and bridges.

4) Maintenance Facilities Management

Goal – Avoid destroying active nests and injuring migratory birds while managing facilities and yards utilized by maintenance.

- Follow rest area vegetation management practices identified in District IVM plans.
- In the unlikely event that state or federal endangered migratory birds are encountered during activities associated with the management of maintenance facilities, stop work immediately and contact the REC for advice on how to proceed.

Possible *activities to meet this goal, in addition to those identified in District IVM plans:*

- When feasible, pressure wash facilities outside the migratory bird nesting season (as identified by ODFW) or when active nests are not present.
- If migratory birds normally nest on facilities that must be maintained/repaired during the nesting season, when feasible prevent nesting on affected sections of the structures by employing exclusionary devices or dispersal methods.
- If active nests are present on facilities that must be maintained/repaired, when feasible shield the nests from disruptive activities so that nests are not destroyed and their inhabitants are not injured, and parent birds are not precluded from tending their nests to the extent that the eggs or young are negatively impacted.
- When feasible, physically remove nests that do not contain eggs to prevent active nests on facilities that will require maintenance/repair.
- When feasible, inspect facilities for active nests prior to undertaking repair/maintenance activities that may be disruptive to nesting birds.
- When feasible, delay repair/maintenance activities on facilities if active nests are located and the activities will be disruptive to nesting birds.
- Prior to building new facilities, evaluate designs that will limit or prevent birds from nesting on problematic areas of the structures.
- When active nests of ground-nesting migratory birds are encountered in maintenance yards, when feasible, flag the nests to minimize disturbing activities around the nests.
- When feasible, undertake other actions not listed above that meet the MBTA goal for maintenance facilities management.

DEFINITIONS:

- **Active nest** – a nest containing eggs or young.
- **Best Management Practices (BMPs)** – the performance of activities in a manner that minimizes impacts to protected species and their habitat.
- **Conservation** – the protection, preservation, management, or restoration of wildlife and natural resources.
- **Enhancement** – an improvement.
- **Goal** – an idealistic or long-term purpose.
- **Integrated Vegetation Management (IVM)** – a decision-making and management process that uses knowledge from a broad base of expertise, a combination of treatment methods, and a monitoring and evaluation system to achieve vegetation management goals.
- **Migratory Bird Treaty Act (MBTA)** – implements four bilateral treaties (between the U.S. and Canada, Japan, Mexico, and the former Soviet Union) making it illegal to possess, pursue, wound, or kill migratory birds without a permit.
- **Mitigation** – an action taken to eliminate or reduce long-term damage to a system.
- **ODFW** – Oregon Department of Fish and Wildlife.
- **Preservation** – the activity of protecting something from loss.
- **REC** – Regional Environmental Coordinator
- **Restoration** – returning to a normal or healthy condition.
- **Strategy** – a plan of action intended to accomplish a specific goal.
- **Tree** – vegetation with a stem diameter greater than 6 inches.

METHODS TO PREVENT SUCCESSFUL NESTING BY MIGRATORY BIRDS:

Exclusionary Devices – any method that denies birds physical access to a nest site.

- Nets
- Curtains of vinyl plastic strips
- Smooth, concave, fiberglass panels (for placement between an eave and wall)
- Slick surface coatings (e.g., slick paint)
- Ledge protectors (e.g., coils, pin and wire, points, shock wire, sticky repellents)
- Hole blockers (e.g., foam, steel wool)

Dispersal Methods – any method that deters birds from producing active nests but does not exclude them from nesting areas.

- Visual deterrents (e.g., mobiles, predator models, scare balloons, tapes)
- Auditory deterrents (e.g., sonic devices)
- Sensory deterrents (e.g., chemical repellents)
- Nest removal prior to egg laying (e.g., knock down with a pole, wash down with water). NOTE: swallows are strongly attracted to old nests or to the remnants of deteriorated nests, so all traces of mud should be removed.

U.S. Department of Agriculture – Animal and Plant Health Inspection Service – Wildlife Services (USDA-APHIS-WS) – has the authority to manage wildlife conflicts with humans (including government agencies).