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# United States Department of the Interior

## FISH AND WILDLIFE SERVICE

Division of Ecological Services  
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March 2013

Thank you for your request for threatened and endangered species, fish and wildlife, environmental, and/or aquatic resources information, comments, and/or recommendations within the United States Fish and Wildlife Service (Service) Clear Lake Ecological Service's area of responsibility. Our comments are provided in accordance with the provisions of the Endangered Species Act (ESA) (16 U.S.C. 1531 et seq.), the Migratory Bird Treaty Act (MBTA) (16 U.S.C. 703 et seq.), the Bald and Golden Eagle Protection Act (BGEPA) (16 U.S.C. 668 et seq.), the Fish and Wildlife Coordination Act (16 U.S.C. 661-667(e)), and the National Environmental Policy Act (42 U.S.C. §4321-4347 et seq.).

### Endangered Species Act

The ESA and Federal regulations prohibit "take" of threatened or endangered species of fish and wildlife within the U.S. or its territorial waters. Please note that "take" is defined to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." A county-by-county listing of federally listed threatened and endangered species that occur within this office's work area can be found at [http://www.fws.gov/southwest/es/ES\\_Lists\\_Main.cfm](http://www.fws.gov/southwest/es/ES_Lists_Main.cfm).

#### *Section 7 of the ESA*

According to Section 7(a)(2) of the ESA, it is the responsibility of each Federal agency to ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of any federally listed species. As such, Federal agencies are required to consult with the Service if it appears that any action they are proposing "may affect" a listed species.

To evaluate a project for its potential effect(s) to listed species, project proponents should use the county-by-county listing and other current species information<sup>1</sup> to determine whether habitat for a listed species is present at the project site. If potential habitat is present, a qualified individual should conduct surveys to determine whether a listed species is present. After completing a habitat evaluation and/or any necessary surveys, project proponents should evaluate the project for potential effects<sup>2</sup> to listed species and make one of the following determinations:

**No effect** – the proposed action will not affect federally listed species or critical habitat (i.e., suitable habitat for the species occurring in the project county is not present in or adjacent to the action area). No coordination or contact with the Service is necessary. However, if the project changes or

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<sup>1</sup> For information regarding habitat requirements of federally listed species please visit <http://ecos.fws.gov/>.

<sup>2</sup> The effects of any action under Section 7 should be analyzed together with the effects of other activities that are interrelated to, or interdependent with, that action. Therefore, if your proposed action(s) is part of and depends on a separate action for its justification, or has no independent utility apart from the separate action, then it should be considered interrelated or interdependent and should be analyzed under Section 7 of the ESA.

additional information on the distribution of listed or proposed species becomes available, the project should be reanalyzed for effects not previously considered.

Is not likely to adversely affect – the project may affect listed species and/or critical habitat; however, the effects are expected to be discountable (extremely unlikely to occur), insignificant (can't be measured or detected), or completely beneficial. Certain avoidance and minimization measures may need to be implemented in order to reach this level of effect. You should seek written concurrence from the Service that adverse effects have been eliminated. Be sure to include all of the information and documentation used to reach your decision with your request for concurrence. The Service must have this documentation before issuing a concurrence.

Is likely to adversely affect – adverse effects to listed species may occur as a direct or indirect result of the proposed action or its interrelated or interdependent actions, and the effect is not discountable, insignificant, or beneficial. If the overall effect of the proposed action is beneficial to the listed species but also is likely to cause some adverse effects to individuals of that species, then the proposed action “is likely to adversely affect” the listed species. An “is likely to adversely affect” determination requires the Federal action agency to initiate formal Section 7 consultation with the Service.

Regardless of the determination, the Service recommends developing a complete record of the evaluation, including steps leading to the determination of effect, the qualified personnel conducting the evaluation, habitat conditions, site photographs, and any other related articles.

Please be advised that while a Federal agency may designate a non-Federal representative to conduct informal consultations with the Service, assess project effects, or prepare a biological assessment, the Federal agency must notify the Service in writing of such a designation. The Federal agency shall also independently review and evaluate the scope and contents of a biological assessment prepared by their designated non-Federal representative before that document is submitted to the Service.

The Service's Consultation Handbook is available online to assist you with further information on definitions, process, and fulfilling ESA requirements for your projects at [http://www.fws.gov/endangered/esa-library/pdf/esa\\_section7\\_handbook.pdf](http://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf).

### *Section 10 of the ESA*

Projects that do not involve a federal nexus can be evaluated under Section 10 of the ESA. If “incidental take” of a listed species is likely to occur during a proposed non-federal activity, then the project sponsor or landowner may apply for an incidental take permit under Section 10 of the ESA. Please see the following links for further guidance on Section 10 <http://www.fws.gov/endangered/permits/index.html> and [http://www.fws.gov/southwest/es/AustinTexas/ESA\\_HCP\\_FAQs.html](http://www.fws.gov/southwest/es/AustinTexas/ESA_HCP_FAQs.html).

### **Candidate Species**

#### *Freshwater Mussels*

The following species of mussels occur in Texas and are candidates for listing under the ESA: Texas fatmucket *Lampsilis bracteata*, golden orb *Quadrula aurea*, smooth pimpleback *Quadrula houstonensis*, Texas pimpleback *Quadrula petrina*, and Texas fawnsfoot *Truncilla macrodon*. We are also reviewing the status of six other species for potential listing under the ESA. One of the main contributors to mussel die offs is sedimentation, which smothers and suffocates mussels. To reduce sedimentation within rivers, streams, and tributaries crossed by a project, the Service recommends

that that you implement the best management practices within the enclosed document entitled *Best Management Practices for Projects Affecting, Rivers, Streams and Tributaries*.

#### *Candidate Conservation Agreements*

Candidate Conservation Agreements (CCAs) or Candidate Conservation Agreements with Assurances (CCAAs) are voluntary agreements between the Service and public or private entities to implement conservation measures to address threats to candidate species. Implementing conservation efforts before species are listed increases the likelihood that simpler, flexible, and more cost-effective conservation options are available. A CCAA can provide participants with assurances that if they engage in conservation actions, they will not be required to implement additional conservation measures beyond those in the agreement. For additional information on CCAs/CCAAs please visit the Service's website at <http://www.fws.gov/endangered/what-we-do/cca.html>.

#### **Migratory Birds**

The MBTA protects all native migratory birds and prohibits the taking, killing, possession, and transportation (among other actions) of migratory birds, their eggs, and parts, except when specifically permitted by regulations for specific intentional uses. A list of birds protected under the MBTA can be found in 50 CFR 10 of the MBTA and at <http://www.fws.gov/migratorybirds/RegulationsPolicies/mbta/mbtandx.html>. Activities that have the potential to take migratory birds as well as recommendations for reducing such take include:

#### *Utility Lines*

The construction of overhead power lines creates threats of avian collision and electrocution. The Service recommends the installation of underground rather than overhead power lines whenever possible. For new lines and/or the modification, maintenance, and update of old lines, we recommend that you implement the Avian Protection Plan guidelines for power lines found at <http://www.fws.gov/migratorybirds/CurrentBirdIssues/Hazards/BirdHazards.html>.

#### *Communication Towers*

Telecommunication towers are estimated to kill millions of birds per year. We recommend that you implement the guidance in *Service Guidance on Siting, Construction, Operation, and Decommissioning of Communication Towers*. This guidance can be found at <http://www.fws.gov/habitatconservation/communicationtowers.html>.

We request that you provide us with the final location and specifications of your proposed towers, as well as the recommendations implemented. A Tower Site Evaluation Form is also available via the above website; we recommend you complete this form and keep it in your files.

#### *Land Clearing*

Land clearing work can destroy active nests (eggs or young present) and kill birds. The Service recommends you review and implement the conservation actions for migratory birds outlined in the enclosed document entitled *Suggested Priority for Migratory Bird Conservation Actions for Projects*.

#### **Colonial Water Bird Rookeries**

Disturbance from construction activities and project operations can adversely affect breeding bird use of nesting sites and can result in nest abandonment and loss of reproduction. We recommend that

project activities do not occur within 1,000 feet of colonial waterbird rookeries during the nesting season from February 15 to September 1.

### **Bald Eagles**

The bald eagle *Haliaeetus leucocephalus* is protected by the BGEPA and the MBTA. Accordingly, the Service recommends that project proponents use the *National Bald Eagle Management Guidelines* to avoid and minimize harm and disturbance of bald eagles. These guidelines can be found at <http://www.fws.gov/migratorybirds/BaldAndGoldenEagleManagement.htm>. Eagles are particularly vulnerable to disturbance throughout the nesting season, which in Texas is generally from October 1 to May 30.

### **Wetlands, Streams, and Other Aquatic Resources**

Numerous projects along the Texas coast often impact wetlands, streams, or other aquatic resources or require work in a navigable waterway. Section 404 of the Clean Water Act regulates the discharge of fill material into waters of the U.S. (e.g., wetlands and streams) and Section 10 of the Rivers and Harbors Act of 1899 regulates work and/or structures within navigable waterways. The U.S. Army Corps of Engineers (Corps) is tasked with administering these regulations and we recommend that you coordinate your activities with the Corps for proper permitting and compliance with these regulations.

Thank you for the opportunity to provide comments on your project. If you need any additional information, you can contact one of our biologists (Donna Anderson, Moni Belton, Kelsey Gocke, Jeff Hill, Charrish Stevens, or Arturo Vale) at 281/286-8282.

Sincerely,



Edith Erfling  
Field Supervisor

Enclosures

**Suggested Priority of Migratory Bird Conservation Actions for Projects  
U.S. Fish and Wildlife Service (USFWS), Migratory Bird Management**

**March 9, 2010**

1. Avoid any take of migratory birds and/or minimize the loss, destruction, or degradation of migratory bird habitat while completing the proposed project or action.
2. Determine if the proposed project or action will involve below- and/or above-ground construction activities since recommended practices and timing of surveys and clearances could differ accordingly.
3. If the proposed project or action includes a reasonable likelihood that take of migratory birds will occur, then complete actions that could take migratory birds outside of their nesting season. This includes clearing or cutting of vegetation, grubbing, etc. The primary nesting season for migratory birds varies greatly between species and geographic location, but generally extends from early April to mid-July. However, the maximum time period for the migratory bird nesting season can extend from early February through late August. Also, eagles may initiate nesting as early as late December or January depending on the geographic area. Due to this variability, project proponents should consult with the appropriate Regional Migratory Bird Program (USFWS) for specific nesting seasons. Strive to complete all disruptive activities outside the peak of migratory bird nesting season to the greatest extent possible. Always avoid any habitat alteration, removal, or destruction during the primary nesting season for migratory birds. Additionally, clearing of vegetation in the year prior to construction (but not within the nesting season) may discourage birds from attempting to nest in the proposed construction area, thereby decreasing chance of take during construction activities.
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 primary or maximum nesting season), project proponents will need to provide the USFWS with an explanation for why work has to occur during the migratory bird nesting season. Further, in these cases, project proponents also need to 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.

Also, where project work cannot occur outside the migratory bird nesting season, project proponents must survey those portions of the project area during the nesting season prior to construction occurring to determine if migratory birds are present and nesting in those areas. In addition to conducting surveys during the

nesting season/construction phase, companies may also benefit from conducting surveys during the prior nesting season. Such surveys will assist the company in any decisions about the likely presence of nesting migratory birds or sensitive species 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 in the year before construction allows the company to become familiar with species and numbers present in the project area well before the nesting season in the year of construction. Bird surveys should be completed during the nesting season in the best biological 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. Finally, project proponents will need to conduct migratory bird surveys during the actual year of construction, if they cannot avoid work during the primary nesting season (see above) and if construction will impact habitats suitable for supporting nesting birds.

5. 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 the project activity may proceed as planned.
6. If migratory birds are present and nesting in the proposed project or action area, contact your nearest USFWS Ecological Services Field Office and USFWS Region Migratory Birds Program for guidance as to appropriate next steps to take to minimize impacts to migratory birds associated with the proposed project or action.

\* Note: these proposed 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 present in this area. If Endangered or Threatened species are present, or they could potentially be present, and the project/action may affect these species, then consult with your nearest USFWS Ecological Services Office before proceeding with any project/action.

\*\* The Migratory Bird Treaty Act 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 Act has no provision for allowing unauthorized take, the USFWS realizes that some birds may be killed during construction and operation of energy infrastructure, 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 prosecuting 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 Service 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. 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. However, consultation with the Migratory Bird, Ecological Services, and Law Enforcement programs of the Service will be required before a permit may be issued.

## **BEST MANAGEMENT PRACTICES FOR PROJECTS AFFECTING RIVERS, STREAMS AND TRIBUTARIES**

The project crosses or potentially affects river, stream or tributary aquatic habitat. Therefore the Service recommends implementing the following applicable Best Management Practices:

1. Construct stream crossings during a period of low streamflow (e.g., July - September);
2. Cross streams, stream banks and riparian zones at right angles and at gentle slopes;
3. When feasible, directionally bore under stream channels;
4. Disturb riparian and floodplain vegetation only when necessary;
5. Construction equipment should cross the stream at one confined location over an existing bridge, equipment pads, clean temporary native rock fill, or over a temporary portable bridge;
6. Limit in-stream equipment use to that needed to construct crossings;
7. Place trench spoil at least 25 feet away landward from streambanks;
8. Use sediment filter devices to prevent movement of spoil off right-of-way when standing or flowing water is present;
9. Trench de-watering, as necessary, should be conducted to prevent discharge of silt laden water into the stream channel;
10. Maintain the current contours of the bank and channel bottom;
11. Do not store hazardous materials, chemicals, fuels, lubricating oils, and other such substances within 100 feet of streambanks;
12. Refuel construction equipment at least 100 feet from streambanks;
13. Revegetate all disturbed areas as soon as possible after construction to prevent unnecessary soil erosion. Use only native riparian plants to help prevent the spread of exotics;
14. Maintain sediment filters at the base of all slopes located adjacent to the streams until right-of-way vegetation becomes established;
15. Maintain a vegetative filtration strip adjacent to streams and wetlands. The width of a filter strip is based on the slope of the banks and the width of the stream. Guidance to determine the appropriate filter strip (stream management zone, SMZ) width is provided below; and
16. Direct water runoff into vegetated areas.

SMZ widths should consider watershed characteristics, risk of erosion, soil type, and stream width. SMZ widths are measured from the top of each bank and established on each side of the stream. Erosion risk is increased with sandy soil, steep slopes, large watersheds and increasing stream widths. Recommended primary and secondary SMZ widths are provided in the table below.

Stream Width (Feet)	Slope (Percent)	Primary SMZ (Feet)	Secondary SMZ (Feet)
<20	<7	35	0
<20	7-20	35	50
<20	>20	Top of slope or 150	75
20-50	<7	50	0
20-50	7-20	50	50
20-50	>20	Top of slope or 150	75
>50	<7	Width of stream or 100 max.	0
>50	7-20	Width of stream or 100 max.	50
>50	>20	Top of slope or 150	75

## Reference

Arkansas Forestry Commission. 2001. Draft Arkansas Forestry Best Management Practices for Water Quality Protection.