

Oklahoma Ecological Services Field Office Migratory Bird and Eagle Impact Avoidance Measures for Actions Associated with Oil and Gas Projects

April 2014

Note to Users: This U.S. Fish and Wildlife Service (Service) document is intended to assist the oil and gas industry with project evaluation and compliance with the Migratory Bird Treaty Act (MBTA) and the Bald and Golden Eagle Protection Act (BGEPA) for activities within Oklahoma. These recommendations may also be useful for other industries and activities in Oklahoma. Guidance herein may also be useful in planning by agencies and organizations concerned with protecting avian resources, such as the Avian Power Line Interaction Committee (APLIC). The APLIC recently released an updated version of their guidance document entitled, Reducing Avian Collisions with Power Lines: State of the Art in 2012, available at www.aplic.org.

The following are general considerations that may apply to most, but not every situation that may occur during oil and gas activities within Oklahoma. Additional conservation measures may be considered and/or required to avoid or minimize impacts to eagles and other species of migratory birds.

With the exception of Arizona, the bald eagle is no longer protected under the Endangered Species Act. However, eagles (both bald eagles and golden eagles) in the United States are protected by the BGEPA, in addition to the MBTA. The BGEPA prohibits the take, possession, sale, purchase, barter, offer to sell, purchase, or barter, transport, export or import, of any eagle, alive or dead, including any part, nest, or egg, unless authorized by permit. Further, activities that would disturb an eagle are prohibited under the BGEPA. "Disturb" means to agitate or bother an 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 there are nesting, feeding, or roosting eagles, proponents of the project may need to take additional conservation measures to comply with BGEPA. New regulations (50 CFR § 22.26 and § 22.27) allow the take of eagles and their nests, respectively, to protect interests in a particular locality. However, consultation with the Service's Migratory Bird, Ecological Services, and Law Enforcement programs will be required before a permit may be issued for such take.

If eagles might be taken in association with oil and gas activities in a given area, the responsible party should develop an Eagle Conservation Plan and apply for a take permit under the BGEPA. Relevant recommendations and guidance can be accessed on the Service's Eagle Management web page:

<http://www.fws.gov/migratorybirds/BaldAndGoldenEagleManagement.htm>.

AVOIDING AND MINIMIZING NEGATIVE IMPACTS TO EAGLES

Both bald and golden eagles occur in Oklahoma. The western portion of Oklahoma has a small nesting population of golden eagles. Some golden eagles also winter throughout the state. However, this document primarily focuses on bald eagles, which have a larger population (both nesting and wintering) in Oklahoma. Please contact the Oklahoma Ecological Services Field Office for more information regarding potential impacts to golden eagles.

I. Thoroughly Document Area Use by Bald Eagles

For bald eagles, use Appendix 2 of the Service's 2009 Bald Eagle Post-delisting Monitoring Standard Operating Procedures to conduct aerial surveys for nests and communal roost sites. This protocol should be used for any aspect of oil and gas activities. Persons conducting bald eagle nest surveys must have previous experience conducting eagle nest surveys. Eagle nest surveys must be conducted during winter, when leaves are off deciduous trees. This protocol only applies to nesting bald eagles. Refer to the following website for the most recent version:

<http://www.fws.gov/migratorybirds/CurrentBirdIssues/Management/BaldEagle/NationalBaldEagleManagementGuidelines.pdf>

Avoidance measures for eagles include protection of nests and nest sites, nesting adults, eggs, nestlings, and fledglings. Eagle nest surveys must be conducted prior to activities that may alter potential nest site habitat. Not all eagle nest locations are documented and new nests are found each year, as the resident population of bald eagles in Oklahoma expands. Examples of activities that may harm a nest or nest tree include construction of pads, roads, pipelines, and distribution lines. It is paramount to collect information regarding bald eagles well in advance of construction activities.

Surveys could be conducted from the ground or from aircraft. Ground-based surveys may be most appropriate for open terrain with good access for ground survey crews. Aerial surveys may provide the best coverage for large areas with rugged terrain (i.e., inaccessible by ground) and heavily forested areas.

Ground Surveys – Methods for nest surveys must be consistent with accepted, published methodologies and consider species-specific characteristics, terrain, vegetation, and accessibility of the survey area. Smaller projects with limited and open nesting habitat can be effectively surveyed from the ground by qualified observers with experience in identifying eagle nests. Survey routes or transects must adequately cover all potential nesting habitat. Potential eagle nests must be documented with photographs and GPS locations. If observers are unsure of species and occupancy status, and it's during what could be laying through early nestling stages, observers should avoid line-of-sight closer than 660' (per National Bald Eagle Management Guidelines) and return during what normally would be late nestling to fledging stage, or observe activity with scope from a distance (> 660' line-of-sight) for 4+ hours under good weather conditions to validate species and occupancy status.

At minimum, appropriate search protocol for each site must include timing and number of surveys needed, search area, and search techniques. Selecting the method with the lowest probability of causing disturbance to target species is a key element when developing survey protocols. Protocols should follow the most recent recommendations from the Service.

II. Avoidance and Minimization Measures for Bald Eagles

Examples of oil and gas activities that may harm an eagle nest or nest tree include construction of pads, roads, pipelines, and electrical distribution lines. If an oil and gas activity is proposed within 1 mile of a critical component of the bald eagle's life history, such as a nest, communal roost site, river, or freshwater wetland or reservoir covering more than 20 acres, measures listed below, or similar measures approved by the Service should be implemented. These critical life history needs are hereafter referred to as Eagle Use Areas (EUAs).

Bald eagles occurring in a given area throughout the year may also include migrants, overwintering individuals, immature and sub-adult residents, and non-breeding adult residents. Some oil and gas related activities could affect eagles and EUAs. All eagle life history stages should be considered when attempting to avoid and minimize negative impacts. In order to avoid take of bald eagles and their habitats, use the following recommendations as follows:

- a) For a complete description of how to avoid negative impacts to bald eagle nests refer to the National Bald Eagle Guidelines on pages 12-15.
<http://www.fws.gov/migratorybirds/CurrentBirdIssues/Management/BaldEagle/NationalBaldEagleManagementGuidelines.pdf>
- b) All flared gases should produce no exposed flames and ends of pipes for flaring gases should be fitted with devices that deter birds from perching.
- c) For a given project, avoid locating electrical distribution lines in EUAs or else bury lines.
- d) If a new electrical distribution line cannot be buried in an EUA, it should be marked with special diverter devices, per the Service recommendations in APLIC 2012, to alert birds to the line so they can more readily avoid it. As a minimization measure for the above ground electrical distribution lines in EUAs, if possible, mark an equal amount of existing electrical distribution lines within 1 mile of other EUAs.
- e) All power poles within an EUA should be designed to protect eagles from electrocution risk, following standard practices in the APLIC document referenced above.
- f) As a minimization measure, pre-existing electrical distribution lines and power poles in EUAs also need to be marked per Service recommendations in APLIC 2012.

Before eagle nest surveys are conducted, check with appropriate state agencies or interest groups to determine what data is already available.

AVOIDING AND MINIMIZING NEGATIVE IMPACTS TO OTHER SPECIES OF MIGRATORY BIRDS

The MBTA prohibits the taking, killing, possession, and transportation and importation of migratory birds, their eggs, parts, and nests, except when specifically authorized by a permit from the Service or by regulations. However, there is no provision for incidental take under the MBTA. Species of birds protected by the MBTA are listed in 75 FR 9282 or on the Service's website:

<http://www.fws.gov/migratorybirds/RegulationsPolicies/mbta/mbtandx.html>

Recommendations for avoiding and minimizing potential impacts to migratory birds are provided in Appendix A. Additional information may be obtained through the Service's Migratory Birds Division.

Suggested Conservation Actions for Projects to Avoid or Minimize Potential for Take of Protected Species of Migratory Birds

**U.S. Fish and Wildlife Service, Division of Migratory Birds, Southwest Region
P.O. Box 1306, Albuquerque, NM 87103; Phone 505-248-6878**

May 2013

The Migratory Bird Treaty Act (MBTA, 16 U.S.C. 703-712) prohibits, among other actions, the taking, killing, possession, transportation, and importation of migratory birds, their eggs, parts, and nests, except when specifically authorized by the Department of the Interior through a permit or other regulation. Protected species of birds are listed under Title 50, Code of Federal Regulations, Part 10. Currently 1,007 species of birds are protected by the MBTA, including nearly all species that are native to the United States.

Activities that involve modification of habitats in which birds are nesting, or occurring adjacent to habitats in which birds are nesting may take protected birds through direct mortality of eggs, nestlings, or adults, or indirectly by causing nest abandonment, thereby leading to death of eggs or nestlings. The MBTA is a strict liability statute, in that the developer need not know that the nesting birds are present and potentially at risk by the development activities. There is also no permit available under the MBTA that will authorize the unintentional take of migratory birds. The only way to ensure compliance with the MBTA is to avoid the take altogether. Below are suggestions for minimizing or eliminating the potential for take during construction activities.

1. Conduct the activity outside the local nesting season so there are no active nests of birds that may be inadvertently damaged or destroyed by the project actions, and no need to conduct surveys for active nests.
2. Minimize the loss, destruction, or degradation of migratory bird habitat during the local nesting season if activities must occur during that timeframe. Within the Southwest Region, although most species nest between early April and mid-August, some nesting activity may occur during all months of the year depending on location. In desert regions, for example, nesting may begin in January and continue into November. Some eagles, owls, and finches may nest in mid-winter. Due to this variability, project proponents should contact the U.S. Fish and Wildlife Service's (Service) Regional Migratory Bird Office (see above) for details on timing of nesting in the area of the project. The proponent should be knowledgeable of which species may nest outside of the core "nesting season" that is often cited by various entities.
3. Document extent of below- and above-ground construction activities and the habitats through which those will pass. Recommendations on avoidance practices, timing of surveys, and the suite of species potentially affected may differ accordingly.

4. For projects planned well in advance, clearing of vegetation in the year prior to construction (outside the nesting season) may discourage future nesting attempts of birds in the proposed project area, thereby decreasing chance of take during construction activities.
5. If a proposed project or action may take migratory birds through disturbance or alteration of nesting habitat, and work cannot occur outside the local nesting season, project proponents should provide the Service with an explanation for why work has to occur during the migratory bird nesting season. In these cases, project proponents should also demonstrate that all efforts to complete the 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.
6. To determine if migratory birds are nesting on-site and therefore potentially at risk by the activity, project proponents should conduct initial general surveys of the project area during the best biological timeframe for detecting the presence of the locally nesting birds (to locate potential territories that may be in harm's way), followed by nest searches in the project area shortly before the disturbance will occur (ideally within a week of the start of construction due to the speed with which nests may be built). Contact the Service's Division of Migratory Birds for survey protocol recommendations.

Except for the nests of large species, bird nests are well hidden and very difficult to find, and nest searches can be time intensive. Surveyors must be experienced in locating nests, as doing so successfully often relies on the ability to interpret subtle behavioral cues by the adult birds. Project proponents should also be aware that results of migratory bird surveys are subject to spatial and temporal variability and should be conducted at the most appropriate times of day and season for detection of territories and ultimately nests.

7. 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.
8. If protected species of birds are present and nesting in the proposed project or action area when project activities are slated to occur, contact your nearest Service Ecological Services Field Office and the Service's Regional Division of Migratory Birds for guidance on appropriate next steps for minimizing risk of violating the MBTA.

* These proposed conservation measures presume that no Endangered or Threatened animal or plant species (including migratory birds) exist in the project/action area. If Endangered or Threatened species are or potentially could be present and the project/action may affect these species, then consult with your nearest Service Ecological Services Office before proceeding with any project/action.

** The 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. Although the Act has no provision for allowing unintentional take, the Service realizes that some birds may be killed due to construction activities, even if all known reasonable and effective measures to protect birds are used. The Service's Office of Law Enforcement (OLE) 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 OLE 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.

*** Bald and golden eagles receive additional protection under the 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. Regulations at 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. Consultation with the Migratory Bird and Ecological Services programs of the Service will be required before a permit may be considered.

**** Under the Service's Nest Destruction Policy, empty nests (except for eagles) may be destroyed without need for a permit from the Service. See the policy language below.

MBPM-2
Date: April 15, 2003

MIGRATORY BIRD PERMIT MEMORANDUM

SUBJECT: Nest Destruction

PURPOSE: The purpose of the memorandum is to clarify the application of the Migratory Bird Treaty Act (MBTA) to migratory bird nest destruction, and to provide guidance for advising the public regarding this issue.

POLICY: The MBTA does not contain any prohibition that applies to the destruction of a migratory bird nest alone (without birds or eggs), provided that no possession occurs during the destruction. To minimize MBTA violations, Service employees should make every effort to inform the public of how to minimize the risk of taking migratory bird species whose nesting behaviors make it difficult to determine occupancy status or continuing nest dependency.

The MBTA specifically protects migratory bird nests from *possession, sale, purchase, barter, transport, import, and export, and take*. The other prohibitions of the MBTA – *capture, pursue, hunt, and kill* – are inapplicable to nests. The regulatory definition of *take*, as defined by 50 CFR 10.12, *means to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue hunt, shoot, wound, kill, trap, capture, or collect*. Only *collect* applies to nests.

While it is illegal to collect, possess, and by any means transfer possession of any migratory bird nest, the MBTA does not contain any prohibition that applies to the destruction of a bird nest alone (without birds or eggs), provided that no possession occurs during the destruction. The MBTA does not authorize the Service to issue permits in situations in which the prohibitions of the Act do not apply, such as the destruction of unoccupied nests. (Some unoccupied nests are legally protected by statutes other than the MBTA, including nests of threatened and endangered migratory bird species and bald and golden eagles, within certain parameters.)

However, the public should be made aware that, while destruction of a nest by itself is not prohibited under the MBTA, nest destruction that results in the unpermitted take of migratory birds or their eggs, is illegal and fully prosecutable under the MBTA.

Due to the biological and behavioral characteristics of some migratory bird species, destruction of their nests entails an elevated degree of risk of violating the MBTA. For example, colonial nesting birds are highly vulnerable to disturbance; the destruction of unoccupied nests during or near the nesting season could result in a significant level of take. Another example involves ground nesting species such as burrowing owls and bank swallows, which nest in cavities in the ground, making it difficult to detect whether or not their nests are occupied by eggs or nestlings or are otherwise still essential to the survival of the juvenile birds.

The Service should make every effort to raise public awareness regarding the possible presence of birds and the risk of violating the MBTA, the Endangered Species Act (ESA), and the Bald and Golden Eagle Protection Act (BGEPA), and should inform the public of factors that will help minimize the likelihood that take would occur should nests be destroyed (i.e., when active nesting season normally occurs).

The Service should also take care to discern that persons who request MBTA permits for nest destruction are not targeting nests of endangered or threatened species or bald or golden eagles, so that the public can be made aware of the prohibitions of the ESA and the BGEPA against nest destruction.

In situations where it is necessary (i.e., for public safety) to remove (destroy) a nest that is occupied by eggs or nestlings or is otherwise still essential to the survival of a juvenile bird, and a permit is available pursuant to 50 CFR parts 13 and 21, the Service may issue a permit to take individual birds.

Note: A signed version of this Policy may be found at:

<http://www.fws.gov/migratorybirds/mbpermits/PoliciesHandbooks/MBPM-2.nest.PDF>

LITERATURE CITED

U.S. Fish and Wildlife Service. 2007. National Bald Eagle Guidelines. U.S. Fish and Wildlife Service, Divisions of Endangered Species and Migratory Birds and State Programs, Washington, D.C. 25 pp.

U.S. Fish and Wildlife Service. 2009. Post-delisting Monitoring Plan for the Bald Eagle (*Haliaeetus leucocephalus*) in the Contiguous 48 States. U.S. Fish and Wildlife Service, Divisions of Endangered Species and Migratory Birds and State Programs, Midwest Regional Office, Twin Cities, Minnesota. 75 pp.

Avian Power Line Interaction Committee (APLIC), 2012. Suggested Practices for Avian Protection on Power Lines: The State of Art in 2012. Edison Electric Institute, APLIC, and the California Energy Commission. Washington, D.C. and Sacramento, CA.