



# Guidance

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## Complying with Laws Protecting Birds and Managing Potential Violations

This guidance describes TxDOT's responsibilities to comply with the Migratory Bird Treaty Act, 16 USC §703-711 and Texas Parks and Wildlife Code Title 5, Subtitle B, Chapter 64, Birds.

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## **1.0 Introduction**

Migratory birds use a wide variety of Texas Department of Transportation (TxDOT) infrastructure for nesting, foraging, and hunting. They may be most conspicuous at or on bridges and culverts, but they also utilize mowed and maintained TxDOT right-of-way (ROW), unmaintained ROW, and brushy fence lines. Habitat for migratory birds is also likely to be found in all but the most urbanized locations. This document describes the department's responsibilities to comply with the [Migratory Bird Treaty Act](#) (MBTA) and [Texas Parks and Wildlife \(TPW\) Code, Title 5, Subtitle B, Chapter 64](#) and how to manage potential violations. This guidance does not apply to species listed as endangered or threatened species under the Endangered Species Act or TPW code, or to bald eagles or golden eagles, which are protected under the Bald and Golden Eagle Protection Act.

## **2.0 Migratory Bird Treaty Act**

The MBTA<sup>1</sup> makes it unlawful to pursue, hunt, take, capture, kill or sell migratory birds, which includes all native migratory bird species. The MBTA is a strict-liability criminal statute, meaning liability does not depend on actual negligence or intent to harm. The MBTA is implemented and enforced by the U.S. Fish and Wildlife Service (USFWS) within the U.S. Department of the Interior (DOI). and under the provisions of the MBTA, a "knowing" violation is a felony, while other violations are misdemeanors.<sup>2</sup>

The MBTA is implemented by the U.S. Fish and Wildlife Service (USFWS) within the U.S. Department of the Interior (DOI). In December 2017, DOI released a Solicitor's Opinion, M-37050, announcing a reversal in longstanding DOI interpretation of the scope of MBTA liability.<sup>3</sup> Solicitor's Opinion M-37050 concluded that the MBTA prohibition on "take" applies only to "affirmative actions that have as their purpose the taking or killing of migratory birds, their nests, or their eggs."<sup>4</sup> "The "MBTA's prohibition on pursuing, hunting, taking, capturing, killing, or attempting to do the same applies only ...to direct and affirmative purposeful actions that reduce migratory birds, their eggs, or their nests, by killing or capturing, to human control."<sup>5</sup>

## **3.0 Texas Parks and Wildlife Code Title 5. Wildlife and Plant Conservation; Subtitle B. Hunting and Fishing; Chapter 64 Birds; Subchapter A; Section 64.002**

TPW code states that no person may "catch, kill, injure, pursue, or possess ...a bird that is not a game bird; ...disturb or destroy the eggs, nest, or young of a bird that is not a game bird."<sup>3</sup>These restrictions

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<sup>1</sup> The Migratory Bird Treaty Act, 16 U.S.C. §§ 703–711, and implementing regulations found at 50 CFR. part 21, protect native migratory birds, their nests, and their eggs.

<sup>2</sup> 16 U.S.C. § 707.

<sup>3</sup> Texas Parks and Wildlife Code, Title 5, Subtitle B, Chapter 64.002.

<sup>3</sup> Memorandum to U.S. Department of the Interior Secretary, Deputy Secretary, Assistant Secretary for Land and Minerals Management, Assistant Secretary for Fish and Wildlife and Parks from U.S. Department of the Interior Principal Deputy Solicitor Exercising the Authority of the Solicitor Pursuant to Secretary's Order 3345, M-37050, "The Migratory Bird Treaty Act Does Not Prohibit Incidental Take" (Dec. 22, 2017).

<sup>4</sup> *Id.* at 2.

<sup>5</sup> *Id.* at 41.

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also extend to game birds except as provided through permitting, as outlined in the code. TPW code does not make a distinction between purposeful and non-purposeful killing or destruction.

### **4.0 Avoiding Migratory Birds**

Project-related actions such as clearing land or engaging in roadway construction or maintenance activities should avoid violations of the MBTA or TPW code. While TxDOT project activities do not have the purpose of taking or killing migratory birds, the MBTA and TPW code do not make a distinction between purposeful and non-purposeful killing or destruction.

Because there are limited options to remove birds on a project site, preemptive and preventative measures to avoid migratory bird species are highly encouraged. Measures to consider include:

- Conducting ROW clearing activities outside of the nesting season (approximately October 1 through February 14)
- Preventing nest establishment on structures by various measures, such as netting or other means of interference
- Removing and disposing of unoccupied nests prior to their occupation
- Removing and disposing of partially constructed nests before they are established (without eggs or nestlings)

In limited and relatively rare circumstances it is possible to purposefully remove active nests. This involves special permitting from the USFWS or working with another permitted entity. Contact the Natural Resources Management section (NRM) of the Environmental Affairs Division to see if these alternative methods are practicable. If so, NRM can assist in obtaining the necessary permissions. These methods are generally discouraged because the approvals are difficult to obtain and time consuming; therefore, they are seldom of any practical benefit.

### **5.0 Handling a Potential Violation**

In the event that migratory birds are encountered onsite during project construction, the person(s) working on the project must take reasonable care to avoid taking, killing, or collecting protected birds, active nests, eggs, and/or the young. A person that violates the MBTA may be held strictly liable for actions that result in unpermitted take.<sup>6</sup> A person that violates TPW code Section 64.002 commits an offence that is a Class C Parks and Wildlife Code misdemeanor<sup>7</sup> and is also liable to the state for the value of each bird unlawfully killed, caught, taken, possessed, or injured.<sup>8</sup>

If active migratory bird nests are purposefully disturbed on a project site, take the following steps:

1. Immediately notify the district environmental coordinator and NRM.

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<sup>6</sup> While MBTA contains no provisions allowing a private party to be sued for an alleged MBTA violation, suits have been brought against federal agencies under the Administrative Procedures Act to prevent an agency from conducting its activities until MBTA compliance is achieved (*Humane Soc'y of the U.S. v. Glickman* 217 F.3d 882 (D.C. Cir. 2000); *Public Employees for Envt'l Responsibility v. Hopper*, 827 F.3d 1077, 1088 n.11 (D.C. Cir. 2016))

<sup>7</sup> Texas Parks and Wildlife Code, Title 5, Subtitle B, Chapter 64.005. An individual found guilty shall be punished by a fine of not less than \$25 nor more than \$500 (Texas Parks and Wildlife Code, Title 2, Chapter 12.406).

<sup>8</sup> Texas Parks and Wildlife Code, Title 2, Chapter 12.301

2. Within 48 hours, or as soon as possible, provide NRM with an initial assessment of the situation. This communication should include the nature, timing, and scope of the activity, to the best of your knowledge. You do not need to perform a complete investigation to determine who may be at fault but provide an account of direct observations. Include any photos or other relevant information and documentation you may have. Provide contact names and phone numbers or email addresses.

### **6.0 Emergency Procedures**

Emergency activities in an area subject to a Federal disaster declaration, or which address immediate human health and safety concerns, but have active protected bird nests, may proceed without prior communication with USFWS or TPWD.

In the event of emergency repairs, take the following steps:

1. Conduct emergency repairs to address immediate human health and safety concerns.
2. Immediately notify the district environmental coordinator and NRM.
3. Upon completion of the emergency repairs, provide NRM with a report on the nature, timing, and scope of the activity that was conducted to address the emergency, and an estimate of the impact to birds or nests. NRM will assist in notifying USFWS and TPWD, as necessary.

### **7.0 FAST Act Provisions**

The Fixing American Surface Transportation (FAST) Act allows at-risk bridges (those bridges with a sufficiency rating of less than 3 on any component) an exemption from MBTA protection for nesting swallow species. If swallow nests will be removed from a bridge using the FAST Act exemption, NRM will work with districts to complete FAST Act coordination as follows:

1. NRM will coordinate with USFWS regional MBTA contact and provide the location, a summary of work, the engineer's sufficiency rating, any avoidance and minimization measures used, the time period for activity, along with an estimate of take of swallows (birds, nestlings, and eggs).
2. After conducting bridge repairs, within 60 days of the take, NRM will send the USFWS regional MBTA contact a brief summary of the work and a final summary of take of swallows (birds, nestlings, and eggs).
3. NRM will include copies of all correspondence with USFWS regional MBTA contact in the project file.

## **8.0 Abbreviation and Acronyms**

ENV	Environmental Affairs Division of TxDOT
FAST	Fixing American Surface Transportation Act
FHWA	Federal Highways Administration
MBTA	Migratory Bird Treaty Act
NRM	Natural Resources Management section of the Environmental Affairs Division
ROW	Right of Way
TPP	Transportation Planning and Programming
TxDOT	Texas Department of Transportation
USFWS	U.S. Fish and Wildlife Service

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### **Appendix A**

The following table shows the revision history for this guidance document.

<b>Revision History</b>	
<b>Effective Date Month, Year</b>	<b>Reason for and Description of Change</b>
July 2025	Version 4 was released. Updates include addressing the April 2025 DOI Solicitor's Opinion, M-30785.
January 2023	Version 3 was released. Updates include removal of discussion of December 2017 DOI Solicitor's Opinion, M-37050 on the scope of MBTA.
October 2018	Version 2 was released. Updates include addressing December 2017 DOI Solicitor's Opinion, M-37050 on the scope of MBTA and <a href="#">TPW Code, Title 5, Subtitle B, Chapter 64</a> on Birds.
February 2017	Version 1 was released.