

WSDOT Bird Protection Protocols and Standards for Migratory Bird Treaty Act and Bald and Golden Eagle Protection Act Compliance

The Migratory Bird Treaty Act of 1918 (MBTA) protects all migratory avian species with the exception of European starlings, non-native pigeons, Eurasian collared dove and house sparrows. Under this law, it is illegal to "pursue, hunt, take, capture (or) kill" migratory birds. The USFWS implements and enforces the MBTA. Similarly, Washington State has a law that makes it illegal to take protected birds (WAC 220-450-030). These laws are of particular concern when birds nest on bridges, buildings, signs, illumination, and ferry dock structures. For WSDOT this means that eggs and nestlings of protected species that use our structures cannot be injured by project activities or removed without a permit. This also applies to nearby nests that could be abandoned because of activities that may keep adults off a nest, thereby affecting egg and nestling survival.

The Bald and Golden Eagle Protection Act (Eagle Act) makes it illegal to take (kill, wound, pursue, shoot, shoot at, poison, capture, trap, collect, molest, or disturb) bald or golden eagles. Disturb is defined in the Eagle Act as "to agitate or bother a bald or golden eagle to a degree that caused, or is likely to cause, based on the best scientific information available,

- Injury to an eagle.
- A decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior.
- Nest abandonment, by substantially interfering with normal breeding, feeding or sheltering behavior."

If your project can't comply with the Eagle Act (for example, your project won't be able to meet the distance or timing restrictions to comply with the management guidelines), you may need a permit. Contact the ESO [Fish and Wildlife Program](#) if you think you need a permit. In general, routine activities such as maintenance of existing facilities would not need to be permitted unless the activity resulted in a significantly different use intensity and would increase the likelihood eagles will be disturbed.

To ensure compliance with the MBTA and the Eagle Act, a WSDOT biologist first conducts an assessment to determine the risk of birds nesting on a structure or otherwise close to proposed activities. If there is a moderate to high risk of birds nesting on a structure or otherwise close to proposed activities, a Bird Protection Plan should be prepared and implemented by a WSDOT biologist (design-bid-build) or the Contractor (design-build). These steps are described below.

Step 1: MBTA and EAGLE ACT ASSESSMENT

WSDOT biologists should follow this guidance to conduct a project specific MBTA and Eagle Act assessment:

1. Conduct GIS and desktop review of the project location
 - Check PHS database. Any historical records?
 - Contact the ESO Fish and Wildlife Program to determine if there are any WSDOT records of bird use of a structure.
 - If the historical record is for a territorial species or breeding colony, chances are it is still in use.

- Look for structures or habitats (concrete bridge with mudflat or muddy shoreline, lake with fish, large river, stand of mature trees, unvegetated or sparsely vegetated ground, gravel lots, equipment) that would attract a bird.
2. Conduct a site visit in the fall or winter as it will be easier to detect nest structures.
 - If you observe a nest and the tree lacks leaves due to it being fall/winter, try to envision the tree with leaves. Will the nest still be visible?
 - If there is a possible raptor nest, how far is it from proposed project activities?
 - Look for nest structures under bridges or near the entrance of large culverts.
 3. Consider proposed project activities that may impact nesting birds, such as clearing, grading, equipment and material storage, construction of temporary structures (work platforms), and painting or washing of structures.
 4. Determine the risk of birds nesting on the structure or project site during the project, or eagles nesting in the project area as Low, Moderate or High (see criteria below). Consider construction activities that may attract nesting birds, including but not limited to clearing, grading, equipment and material storage, construction of temporary structures (work platforms),
 5. Write a project-specific bird memo documenting the results of the desktop, site investigations, and risk level. If your project has moderate to high risk, a Bird Protection Plan shall be prepared.

Low Risk:

1. No historical record in the GIS database and ESO Fish and Wildlife Program records.
2. No adequate structures to support a bird nest.
3. No habitats or structures that would attract a bird to the area to nest.
4. No evidence of previous nesting activity.
5. Suitable nesting habitat has little to no chance of being affected by construction activities.

Requirements:

1. Follow up site visit recommended but not required.
2. If applicable, coordinate with ESO Fish and Wildlife Program to fill out the WSDOT bald eagle database.
3. Complete and save a Low-Risk bird memo to the project folder.
4. For projects assessed as low risk, WSDOT will provide training materials to project staff prior to construction. Training material will include, but is not limited to, an overview of the MBTA protections, Eagle Act, how to identify nesting activity, what to do if an active nest is discovered, and notification protocols. A training log of project staff that have received WSDOT-provided training must be maintained and kept onsite with the Project-specific Bird Memo. The Contractor must immediately notify the Engineer when new project staff are hired to request additional MBTA training.
5. In the event an active nest is found, the Contractor must immediately stop all associated Work within 25 feet and notify the Engineer. A WSDOT biologist will assess and address the situation. Active nest removal shall not proceed prior to approval from the Engineer.

Moderate Risk:

1. Historical record in the database but nesting activity has not been observed in several years.
2. There is a structure to support a bird nest. No nests (old or recent) were observed during the site visit.
3. Suitable nesting habitats near the project sites may be affected by project actions.

Requirements:

1. Use Protocols and Standards to develop a Bird Protection Plan (Step 2).
2. If applicable, coordinate with ESO Fish and Wildlife Program to fill out the WSDOT bald eagle database and/or apply for a bald eagle disturbance permit.
3. Complete and save a Moderate-Risk bird memo to the project folder. Conduct at least one or more site visits before construction season or early spring to see if any birds have returned.
4. Coordinate with Design. Would preventative actions be possible to deter birds from returning to the structure?

High Risk:

1. Recent records in PHS or from WSDOT/WDFW staff and special interest groups that birds are nesting on the structure or have been seen during the breeding season, or if ESO Fish and Wildlife Program records indicate past use.
2. There is a structure to support a bird nest.
3. Suitable nesting habitats near the project sites may be affected by project actions. There are old or new nests present.

Requirements:

1. Use Protocols and Standards to develop a Bird Protection plan (Step 2).
2. If applicable, coordinate with ESO Fish and Wildlife Program to fill out the WSDOT Bald Eagle database and/or apply for a bald eagle disturbance permit.
3. Complete and save a High-Risk bird memo to the project folder.
4. Conduct several site visits before construction season or early spring to see if any birds have returned.
5. Coordinate with Design engineers and permit staff. Would preventative actions be possible to deter birds from returning to the structure?

Step 2: DEVELOP BIRD PROTECTION PLAN

If the MBTA and Eagle Act assessment concludes there is a moderate to high risk for birds to nest on structures or otherwise close to proposed activities, and to prevent Work-related schedule delays caused by the presence of actively nesting birds, a qualified biologist shall prepare a project-specific Bird Protection Plan in accordance with the guidance provided below. At the discretion of the Engineer, either WSDOT staff or the Contractor shall prepare the Bird Protection Plan. Plans prepared by Contractor staff will be submitted for WSDOT review and comment as a Type 2 Working Drawing.

The Bird Protection Plan will be prepared by a qualified biologist that:

1. At a minimum, has a bachelor's degree in biology, zoology, natural resource management, environmental science, or a related degree with a science emphasis, and

2. Has at least one year of experience identifying birds and bird nests in the region surrounding the project area.

The Bird Protection Plan shall, at a minimum, identify:

- **Potential Nesting Habitat**

Birds may build nests on structures, natural features, or equipment in the work area from March 15 to September 15 of any year; however, active nests may occur outside of the nesting season as well. The bald eagle nesting season is January 1 through August 31. The Plan will summarize potential nesting habitat within the Project area and/or the presence of eagle nests within 660 feet of the Project area.

- **Methods for Nest Avoidance or Removal**

An active nest is defined as having eggs or chicks present in or near the nest. The MBTA does not protect active nests of the following non-native species: rock dove (pigeon), house sparrow (English sparrow), starling, and Eurasian collared dove. Nests from these species can be removed at any time. The Plan will include:

- Methods to avoid and minimize disturbance to active nests, such as timing restrictions and visual screening structures.
- Methods, materials, and equipment used to remove nest starts, which are partial or complete nests that don't contain eggs or chicks.
- Exclusion methods to prevent birds from nesting on equipment or structures that would be disturbed by Project construction.
- Active raptor nests must not be removed without specific written permission from the Engineer and WSDOT Project Biologist. The Contractor shall notify the Engineer if an active raptor nest is discovered or suspected. Removal of active raptor nests requires additional coordination with State and Federal agencies and may take up to 30 days.

- **Notification Procedures**

- Describe notification, communication, and documentation procedures to follow in the event an active nest is discovered.
- Provide name and contact information for all persons involved in the notification procedures.
- The WSDOT Lead Biologist and ESO Fish and Wildlife Program must be notified of the active nest removal prior to its removal by an authorized biologist.

- **Monitoring and Reporting Protocols**

- During the nesting season, the Contractor shall conduct inspections a minimum of every other day during active construction to identify nest starts or active nests. Inspections will be completed either in early morning or evening hours.
- If an active nest is found, the Contractor must immediately stop all associated Work within 25 feet, or greater as determined by the qualified biologist, and implement notification procedures. Active nest removal shall not proceed prior to approval from the Engineer.
- A weekly written report summarizing monitoring locations, findings, and number of nest start removals from the past week's inspections shall be submitted to the Engineer.
- Outside the nesting season, the Contractor may cease inspections and at the discretion of the Engineer, remove unoccupied nests. In the rare instance that an active nest is discovered during this time period, the MBTA requirements apply and the Contractor must adhere with the Bird Protection Plan and applicable Contract provision.

- **Training**

The Bird Protection Plan will identify who will provide training depending upon the project delivery method. Training topics will include, but are not limited to, an overview of the MBTA protections, Eagle Act, how to identify nesting activity, what to do if an active nest is discovered, and notification protocols. A training log of project staff that have received training must be maintained and kept onsite.

Step 3: IMPLEMENT BIRD PROTECTION PLAN

Prior to the start of project activities, project staff shall complete Environmental Protection Training that will include an overview of the MBTA, how to identify nesting activity, and notification protocols.

Depending upon the project delivery method, the Bird Protection Plan will be implemented by trained WSDOT staff (design-bid-build) or the Contractor (design-build) with support and oversight by the qualified biologist. Implementation may include, but is not limited to, inspecting and maintaining exclusion devices, removing nest starts, and reporting monitoring locations, findings, and number of nest start removals to the Engineer.

MBTA Awareness Training

Under the 1918 Migratory Bird Treaty Act of 1918, it is unlawful to pursue, hunt, take, capture, kill, possess, sell, purchase, barter, import, export, or transport any migratory bird, or any part, nest or egg, or an such bird, unless authorized under a permit issued by the Secretary of the Interior. Take is defined as an attempt or act of pursuit, hunt, shoot, wound, kill, trap, capture, or collect a bird or animal. Penalties associated with MBTA violations may include six months in prison and \$15,000 fine, up to a felony violation with a maximum penalty of two years imprisonment and \$250,000 fine (\$500,000 for an organization).

An active nest is any nest that has eggs or chicks present. Juvenile birds that are present in the immediate vicinity of a nest are considered part of an active nest. Nests have a wide variety of forms, not just the commonly known mud/twig cup. Nests may be on open graveled areas, in mud cavities, or on exposed platforms (see photos below). The best indicators of an active nest are:

- frequent bird presence at a specific location,
- bird aggression (diving, loud calls), and
- presence of whitewash (bird excrement).

In areas of graveled roads or parking areas, adult birds may be seen moving around on the ground, appearing as “injured”. This is a behavior that draws predators away from eggs or chicks when the nest is threatened. If this behavior is observed, check the immediately vicinity for camouflaged eggs in the gravel. If a nest is suspected but cannot be confirmed due to visibility or access, contact the WSDOT Biologist for support.

If you observe or suspect an active nest is present in the area of construction or staging, discontinue activity within 25 feet of the nest and contact the Project Engineer immediately. The PE will direct the Qualified Biologist to assess the nest and determine next steps to avoid or remove the nest.



Appendix A
Example Low-risk Bird Memo



September 5, 2023

TO:

THRU:

FROM:

**SUBJECT: No Timing Restrictions for Bald & Golden Eagle Protection Act/ MBTA Species
SR 302 MP 4.20 Victor Creek Vicinity - Barrier Replacement**

The Washington State Department of Transportation is proposing to replace the existing concrete and HDPE culverts (measuring 36-inches in diameter and 50-feet in length, and 24-inches in diameter and 46-feet in length, respectively), with a 30-foot span structure to improve fish passage at State Route (SR) 302 at milepost (MP) 4.20. A temporary one lane shoofly detour will be utilized to construct the new bridge. This proposed structure is designed to meet the requirements of the federal injunction utilizing the bridge design criteria outlined in the 2013 WDFW Water Crossing Design Guidelines (WCDG).

The structure is located in Mason County on SR 302 approximately 1.2 miles southeast of Allyn, WA in Water Resource Inventory Area (WRIA) 15. The highway runs north-south at this location, while Victor Creek flows east-west beginning approximately 1.25 miles upstream of the SR 302 crossing. Victor Creek flows into North Bay approximately 400 feet from the SR 302 crossing.

All work will occur within 200 feet of Victor Creek. In-water work will consist primarily of removing the existing material to form the new, wider streambed that will have capacity to pass high stream flows during episodic beaver dam breaks.

A GIS desktop review of Washington Department of Fish and Wildlife (WDFW) documenting bald eagle nesting and roosting locations within 1 mile of the project area was performed. No nest or roosts are documented in the database. A project biologist conducted a site visit of the project area during early scoping and evaluated the potential for the project to affect migratory birds. During the site visit, no birds were observed carrying nesting material or displaying territorial behavior within the project area. No evidence of migratory bird nesting (nests, whitewash, etc.) was identified. No bald eagle nests or bald eagles were observed in the project vicinity. Given this information, this project was evaluated as having low risk for disturbances to nesting migratory birds and bald eagles. Therefore, no timing restrictions are recommended for this project.

It is the finding of the project biologist that this project will not affect bald eagle nesting or roosting sites, or migratory birds or their nests. The project was therefore determined to be low risk for encountering breeding migratory birds and/or an active bird nest. If new information becomes available indicating the potential for previously unknown impacts a biologist will review the site.

Thank you,

Appendix B
Example Moderate-High Risk Bird Memo

To:

From:

Date:

RE: SR 9 Marsh Road to 2nd Street Widening Project: Migratory Bird Treaty Act Compliance

The Washington State Department of Transportation (WSDOT) is proposing to widen State Route (SR) 9 from two to four lanes in the City of Snohomish, Snohomish County, Washington to address safety concerns and improve mobility in the region. The project will also construct a new bridge over the Snohomish River and an overflow bridge in the Snohomish River floodplain. This project will require a permit from the U.S. Army Corps of Engineers. The project will extend from milepost 8.41 to 9.68, T28N R5E, Sections 13 and 24, and is located in WRIA 7, the Snohomish River Basin, and Hydrologic Unit Code 171100110203 (Snohomish River-Frontal Possession Sound).

The project will construct a new southbound bridge over the Snohomish River, build a bridge spanning a portion of the Snohomish River floodplain, construct new southbound lanes between Marsh Road and the 2nd Street interchange, add a second left turn lane from eastbound Marsh Road to northbound SR 9, widen existing lanes, and realign north and southbound off-ramps at the 2nd Street interchange. This work is proposed to be conducted from 2022 through 2026.

Project activities have the potential to disturb nesting native birds. This memorandum documents compliance with the Migratory Bird Treaty Act (MBTA). The MBTA makes it unlawful to take, import, export, possess, sell, purchase, or barter any migratory bird, with the exception of the taking of game birds during established hunting seasons. The law also applies to feathers, eggs, nests, and products made from migratory birds. This law is of particular concern when birds nest on bridges, buildings, signs, illumination, and ferry dock structures. WSDOT has developed guidance on avoiding active nests during highway construction, bridge maintenance, bridge inspection, and other relevant activities to ensure compliance with the MBTA.

GIS and Literature Review

The MBTA analysis for the proposed project included a GIS analysis, literature review, and a site visit. The GIS analysis was conducted to determine if there were any documented bald eagle, osprey, great blue heron, or other nest sites in the vicinity of the proposed project. According to the Washington Department of Fish and Wildlife Priority Habitat and Species (PHS) GIS data, the nearest documented bald eagle nest is located approximately 2,200 feet west of the SR 9/2nd Street interchange. Two great blue heron rookeries are mapped approximately 800 and 5500 feet northwest of the SR 9/2nd Street interchange. No records of osprey nest sites were found in the PHS data.

The WSDOT Fish and Wildlife Program maintains a database of wildlife occurrences on WSDOT bridges. This database contained records of barn owl and swallow use on the existing SR 9 Snohomish River Bridge.

Site Visit

On March 18, 2020, a WSDOT biologist conducted a site visit to determine past and present bird nesting activity in the vicinity of proposed project activities. Because deciduous trees along SR 9 and the Snohomish River had not leafed out, the presence of a large nest structure would be obvious. All large trees visible from the project area were scanned with binoculars. No raptors or their nest structures were observed during the site visit. These results suggest that there is no recent past or present raptor nesting activity in the project vicinity. An active great blue heron rookery was observed south of Riverview Road approximately 1500 feet northwest of the SR 9/2nd Street interchange.

Recommendations

Based on these results, it is unlikely that raptors or great blue herons are nesting within 800 feet of project activities. However, it is possible that a pair of bald eagles, ospreys, or red-tailed hawks could construct a nest in one of the large trees along the project footprint in Spring 2021 or 2022. If so, project activities have the potential to disturb these nesting raptors. It is recommended that follow-up site visits be conducted to determine the future status of these species prior to the initiation of construction activities.

Because swallows have been documented nesting under the existing Snohomish River Bridge, there is a moderate risk that swallows could establish nests on the temporary work trestles that are an element of the proposed project. It is recommended that a bird management plan be prepared, and bird exclusion methods be developed and implemented to prevent swallows from nesting on the temporary work trestles.