

Bird Nesting Issues During Transmission Line Construction

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U.S. Fish and Wildlife Service



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Laws and Regulations: Overview



Migratory Bird Treaty Act -- Interpretation:

- The MBTA has a strict liability standard for violations. Prosecution can occur for violations that occur in the course of otherwise lawful activities.
- If the take (or loss) can be directly attributed to the construction activity, then this would constitute a MBTA violation.
- The FWS has prosecutorial discretion over the MBTA. Entities should implement BMPs and put forth good-faith efforts to preserve and protect Migratory Birds to avoid violating the MBTA.

Laws and Regulations: Overview (cont.)



MBTA Interpretation (cont.)

- An “active nest” is defined in <http://www.fws.gov/policy/m0208.pdf>
[2003 nest destruction memorandum -- being revised]
- Currently, MOUs exist or are being prepared between the FWS and other federal agencies to protect Migratory Birds
 - Per Executive Order 13186 – Responsibilities of Federal Agencies to Protect Migratory Birds
- These MOUs, however, do not allow for take of Migratory Birds but rather emphasize conservation measures that agencies will undertake to benefit birds.

Laws and Regulations: Overview (cont.)



MBTA Interpretation (cont.)

- The FWS does not have the ability to require mitigation to offset incidental loss of Migratory Birds.
- However, the FWS can work with others to develop Bird Conservation Strategies to help lessen take that is incidental to otherwise lawful activities.

Laws and Regulations: Overview (cont.)



Biological Opinions

- Biological Opinions (BiOps) are designed to address effects (and how to minimize those effects) to federally-listed species.
- Measures designed to avoid or minimize effects to listed species may also benefit non-listed nesting bird species; these will be noted in BiOps.
- Some renewable energy and transmission BiOps include general conservation measures related to bird nesting to streamline CPUC and other agency permitting processes. These measures may provide an overall benefit to the landscapes and habitats.

USFWS Solutions



Solutions that have been implemented have included:

- BMPs to protect nesting birds, such as -
 - Vegetation clearing during the non-breeding season
 - Maintaining vegetation-free construction areas to discourage bird use
 - Covering stationary equipment and staged materials to reduce substrates for nesting.

USFWS Solutions (cont.)



- Nesting Bird Management Plans:
 - The FWS is in favor of NBMPs as a tool to proactively avoid unintentional take of Migratory Birds.
- Plan construction activities in the off season (non-breeding season)
- Actively remove nest material for nests under construction
- Place nest deterrents in locations where birds continually build (Note: deterrents placed inside nests would require MBTA permit)
- Monitor 7 days/week during peak breeding season

USFWS Solutions (cont.)



- Harass birds using various hazing techniques
- Develop appropriate buffer distances should nests be found
- Work within specified noise thresholds (varies by species)
 - If thresholds can't be met, then pre-construction surveys may be employed to determine if nests occur within a certain distance (Sunrise Powerlink).
- Remove inactive raven nests outside of the breeding season (TRTP)