

Technical Memorandum

To: Electronic Distribution Recipients

From: Nancy T. Daubenberger, P.E.
Division Director, Engineering Services



Subject: Tree Clearing Timing Requirement

Expiration

This is a new Technical Memorandum and will remain in effect until April 4, 2022, unless superseded prior to this date.

Implementation

The guidance contained in this memorandum shall be effective for projects letting in fiscal year 2018 and maintenance activities effective June 1, 2017 unless previously authorized by MnDOT Office of Environmental Stewardship (OES) or by special exemption due to extraordinary circumstances.

Introduction

MnDOT construction projects and maintenance activities frequently include tree clearing and trimming along existing right-of-ways and new alignments. Limiting clearing and trimming to specific time periods is a way to avoid and minimize impacts to state and federally protected bats and birds, and simplify protected species compliance to ensure on-time project delivery.

The majority of Minnesota's birds are protected by the federal Migratory Bird Treaty Act of 1918 (MBTA), which prohibits the take of birds, their nests, and/or their eggs, whether intentional or unintentional. Tree clearing conducted May 1 to August 31, inclusive, may result in prohibited take under the MBTA.

Additionally, the U.S. Fish and Wildlife Service recently listed the northern long-eared bat (*Myotis septentrionalis*), a bat native to Minnesota, under the federal Endangered Species Act of 1973 (ESA), and the listing of additional bat species is anticipated in the future. Tree clearing conducted April 1 to October 31, inclusive, may affect protected bats by resulting in incidental take¹.

Limiting tree clearing and trimming to specific time periods better conserves Minnesota's bat and bird diversity and will help avoid prohibited take of bats under the ESA and birds under the MBTA, as well as help reduce the spread of invasive weeds and tree pests.

¹ Definitions included below.

Note that bald and golden eagles are also protected from take¹ by the federal Bald and Golden Eagle Protection Act of 1940 (BGEPA), and tree clearing may result in prohibited take under the BGEPA if eagles are present. Bald Eagles are frequently encountered in Minnesota, and in some situations tree clearing conducted November 1 to March 31 may conflict with eagle protections under BGEPA. Please consult the MnDOT Office of Environmental Stewardship to determine the proper course of action when eagles are known at a scheduled tree clearing or trimming site.

Purpose

The purpose of this Technical Memorandum is to facilitate MnDOT compliance with applicable state and federal wildlife regulations when conducting activities that clear, trim, and/or grub trees. This Technical Memorandum is applicable to all state and federally funded MnDOT actions involving tree

clearing, trimming and/or grubbing, including right-of-way maintenance activities. Compliance with this Technical Memorandum does not exempt projects from their ESA review obligations.

Related MnDOT Policies and Guidance

Clearing and Grubbing Spec. # 2101 (<http://www.dot.state.mn.us/pre-letting/spec/>) provides additional guidance related to tree clearing and grubbing for MnDOT projects.

Definitions

Bald and Golden Eagle Protection Act of 1940 (BGEPA): Federal law designed to protect bald and golden eagles. The BGEPA is administered by the United States Fish and Wildlife Service.

Endangered Species Act of 1973 (ESA): Federal law designed to conserve and recover endangered, threatened and candidate species, and their critical habitat where designated. The ESA is administered by the United States Fish and Wildlife Service.

Federal Undertaking: A project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; those requiring a Federal permit, license or approval; and those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

Grubbing: Removal and disposing of tree stumps, roots, or buried logs.

High Risk Tree: A tree, whether live or dead, that requires clearing to protect an immediate threat to human life, property, or roadway safety.

Hibernaculum: A known northern long-eared bat overwintering site, which includes caves, mines, and other locations where bats hibernate in winter. "Hibernacula" is the plural form of hibernaculum.

Low Risk Tree: A tree that is not considered a high risk tree.

Migratory Bird Treaty Act of 1918 (MBTA): Federal law designed to conserve migratory birds. The MBTA is administered by the United States Fish and Wildlife Service.

Pupping Season: The time of the year bats are raising their young, approximately June 1 to August 15 in Minnesota, inclusive.

Maternity Roost Tree: Known occupied trees that have had female northern long-eared bats or juvenile bats tracked to them, or the presence of females or juveniles is known as a result of other methods.

Take (BGEPA): The term “take” means to pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb. Take includes eagle parts (including feathers), eggs, and nests. Unlike protections under MBTA, both occupied and unoccupied eagle nests are protected.

Take (ESA): The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Under ESA, harm includes an act that may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

Take (MBTA): The term “take” means to pursue, hunt, take, capture, kill, and attempt to take, capture, or kill. Take includes bird parts (including feathers), eggs, and occupied nests (nests with eggs).

Tree: Any standing woody plant, whether live or dead, with a diameter greater than or equal to 3 inches measured 4.5 feet above the ground.

Tree Clearing: The act of cutting down, harvesting, destroying, of the above-ground portion of a tree.

Tree Trimming: The act of cutting branches off from the main tree trunk(s). Trimming is defined as a distinct operation, different from clearing, to address removal of tree branches overhanging a roadway.

Guidelines

Endangered Species Act Compliance

Projects receiving federal funds, or any federal undertaking, must have Endangered Species Act clearance through the MnDOT Office of Environmental Stewardship before initiating tree clearing, except in emergency repair situations addressed below, even if tree clearing is conducted under a separate contract using state funds, done by internal forces, or done by MnDOT permit.

Work Completed By Contract

All projects clearing trees, in any amount, shall consult the Minnesota Department of Natural Resources list of [“Townships Containing Documented Northern Long-eared Bat \(NLEB\) Maternity Roost Trees and/or Hibernacula Entrances in Minnesota”](#) to determine if tree clearing will be performed in an identified township (please note this list is updated annually).

Projects clearing trees within 0.50 miles of a known northern long-eared bat hibernaculum and/or 0.25 miles of a known northern long-eared bat maternity roost tree shall contact OES to consult with U.S. Fish and Wildlife Service before initiating tree clearing. Projects occurring greater than 0.50 miles from known hibernacula and maternity roost trees shall contact OES to consult with U.S. Fish and Wildlife Service only if a federal undertaking.

Regardless of funding and proximity to known northern long-eared bat hibernacula and maternity roost trees, all projects clearing greater than or equal to two and a half (2.5) acres of trees shall incorporate into the project-planning process a November 1 to March 31, inclusive, limit on tree clearing unless otherwise authorized by OES. All projects clearing less than two and a half (2.5) acres of trees away from known northern long-eared bat hibernacula and maternity roost trees shall limit clearing to outside of the June 1 – August 15, inclusive, bat pupping season, and may voluntarily limit tree clearing to November 1 to March 31, inclusive, to simplify the project’s environmental review process. Timing restrictions do not apply to grubbing. MnDOT personnel may use the following processes to comply with these requirements:

Projects starting construction November to March:

1. Project Manager shall include a special provision for tree clearing to be limited to November 1 to March 31, inclusive.

Projects starting construction April to October (choose one of the following):

1. Project Manager may include a special provision for tree clearing to be limited to November 1 to March 31, inclusive;
2. Project Manager may use direct-select contract for projects with small amount of clearing when the entire project scope is for clearing and/or grubbing only;
3. Project Manager may set up a separate State Project for projects with large amounts of clearing (or for groups of projects); or
4. Project Manager may work with the MnDOT Office of Environmental Stewardship to set up an indefinite delivery / indefinite quantity (ID/IQ) contract for groups of projects.

Work Completed by Internal MnDOT Forces and Work Completed by MnDOT Permit (Maintenance Activities)

This section assumes the maintenance activity is being executed without federal funds and is not a federal undertaking. If the activity has federal funds or is a federal undertaking, see guidelines above. High risk trees are covered in the section “High Risk Trees.”

Maintenance personnel shall first consult the Minnesota Department of Natural Resources list of [“Townships Containing Documented Northern Long-eared Bat \(NLEB\) Maternity Roost Trees and/or Hibernacula Entrances in Minnesota”](#) (also available in Georilla for MnDOT staff) to determine if tree clearing or trimming will be performed in an identified township (please note this list is updated annually). If tree clearing or trimming, including storm damaged and disease trees, will be performed within an identified township, maintenance personnel or permittees shall contact the MnDOT Office of Environmental Stewardship (OES) before initiating tree clearing or trimming, except in the case of high risk trees, as covered in the section “High Risk Trees.” Tree clearing or trimming may not proceed until approved by OES. OES review will generally be completed within five business days, but may take longer if consultation with outside agencies is necessary.

If tree clearing or trimming will occur outside of an identified township, maintenance personnel or permittees may use the following processes to comply with this Technical Memorandum:

Tree clearing with prior inspection of individual trees that will be cut:

1. Maintenance personnel or permittees shall inspect each tree to the best of their ability for occupied bird nests and hollows, and for flaky bark, cracks, crevices, and/or hollows that may be used by bats.
 - (a) If absent, maintenance personnel or permittee may proceed with tree clearing, but may not clear trees June 1 to August 15, inclusive, without coordination and approval from OES. Timing restrictions do not apply to grubbing.
 - (b) If present, maintenance personnel or permittees shall document with photographs to the best of their ability and contact OES before initiating tree clearing. Tree clearing may not proceed until approved by OES. OES review will generally be completed within five business days, but may take longer if consultation with outside agencies is necessary.

Tree clearing without prior inspection of individual trees that will be cut:

1. Maintenance personnel or permittees shall make a cursory inspection of the complete work limits for nesting birds, including eagles and owls that nest during the winter months.
 - (a) If absent, tree clearing may be completed without coordination and approval from OES, but only during the period from November 1 to March 31, inclusive. Timing restrictions do not apply to grubbing.
 - (b) If present, maintenance personnel or permittees shall document with photographs to the best of their ability and contact OES before initiating tree clearing. Tree clearing may not proceed until approved by the OES. OES review will generally be completed within five business days, but may take longer if consultation with outside agencies is necessary.

Tree trimming to remove overhanging branches to the vertical extension of the shoulder P.I.:

1. Maintenance personnel or permittees shall make a cursory inspection of the overhanging branches within the complete work limits for occupied bird nests and/or hollows that may be used by birds or bats.
 - (a) If absent, tree trimming may be completed without coordination and approval from OES, and without time restrictions.
 - (b) If present, maintenance personnel or permittees shall document with photographs to the best of their ability and contact OES before initiating tree trimming. Tree trimming may not proceed until approved by OES. OES review will generally be completed within five business days, but may take longer if consultation with outside agencies is necessary.

High Risk Trees

High risk trees posing an immediate safety risk may be removed at any time and at any location without contacting OES. Adjacent low risk trees may also be cleared, but the clearing must be in compliance with the process outlined above for "Maintenance Activities."

Emergency Repairs

In emergency repair situations, as defined by the Federal Highway Administration (FHWA) Emergency Relief (ER) Program, trees may be cleared or trimmed, as needed, at any time. Tree clearing or trimming in the FHWA ER Program permanent repair situations should be done in compliance with guidelines

outlined above for “Work Completed by Contract.” Details for the FHWA (ER) program can be found at <http://www.fhwa.dot.gov/reports/erm/er.pdf>.

Federal Highway Administration emergency repair program emergency repair projects (not ER permanent repair) may remove trees, as needed, at any time. Where feasible, compliance with guidelines outlined above to avoid and minimize impacts to protected species shall be incorporated into construction and repair plans.

Office of Environmental Stewardship Contacts

- High risk trees - Roadside Vegetation Management Unit chief, 651-366-3619
- Timing and protected species compliance - Environmental Assessment Unit wildlife ecologist, 651-366-3605

Questions

Any questions regarding the technical provisions of this Technical Memorandum can be addressed to the following:

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Any questions regarding publication of this Technical Memorandum should be referred to the Design Standards Unit, DesignStandards.DOT@state.mn.us. A link to all active and historical Technical Memoranda can be found at <http://techmemos.dot.state.mn.us/techmemo.aspx>.

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