

Technical Memorandum

To: Electronic Distribution Recipients

From: Michael G. Beer, P.E. Digital signature on file
Acting Assistant Commissioner, Engineering Services

Subject: Tree Clearing Timing Requirement

Expiration

This Technical Memorandum supersedes Technical Memorandum 17-04-ENV-02 and shall remain in effect until April 30, 2027, unless superseded prior to this date.

Implementation

The guidance contained in this memorandum is effective for projects letting in fiscal year 2023 and maintenance activities effective May 1, 2022 unless previously authorized by the 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 pruning along existing right of way and new alignments. Limiting clearing and pruning 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. As one example, most of Minnesota's birds are protected by the federal Migratory Bird Treaty Act of 1918 (MBTA), which prohibits the take¹ of birds, their nests, and/or their eggs whether intentional or unintentional. Tree clearing conducted April 15 to August 31, inclusive, may result in prohibited take under the MBTA.

Additionally, in 2015, the U.S. Fish and Wildlife Service listed the northern long-eared bat (*Myotis septentrionalis*), a bat native to Minnesota, under the federal Endangered Species Act of 1973 (ESA), and additional bat species are anticipated to be listed in the future. Tree clearing conducted April 1 to October 31, inclusive, may adversely affect and cause incidental take¹ of protected bats.

Limiting tree clearing and pruning to specific time periods helps conserve Minnesota's bat and bird diversity, helps avoid prohibited take of bats under the ESA and birds under the MBTA, and helps reduce the spread of invasive weeds and tree pests.

Note: Bald and golden eagles are also protected from take¹ by the federal Bald and Golden Eagle Protection Act of 1940 (BGEPA), and in some situations tree clearing conducted in Minnesota November 1 to March 31 may conflict with bald eagle protections under the BGEPA. Please consult the MnDOT Wildlife Ecologist to determine the proper course of action when eagles are known at a scheduled tree clearing or pruning site.

¹ Definitions included below.

Purpose

The purpose of this Technical Memorandum is to facilitate MnDOT compliance with applicable state and federal wildlife regulations when conducting activities that clear and/or prune trees. This Technical Memorandum is applicable to all MnDOT actions involving tree clearing and/or pruning, including right-of-way maintenance activities. Compliance with this Technical Memorandum does not exempt projects from their environmental review obligations.

Related MnDOT Policies and Guidance

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

Protection and Restoration of Vegetation Spec. 2572 (<https://www.dot.state.mn.us/pre-letting/spec/>) provides additional guidance related to protecting and preserving vegetation 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 U. S. Fish and Wildlife Service.

Take: Under the 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.

Endangered Species Act of 1973 (ESA): Federal law designed to conserve and recover endangered, threatened and candidate species, and any designated critical habitat for these species. The ESA is administered by the U. S. Fish and Wildlife Service.

Take: Under the 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 the 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.

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. Timing restrictions do not apply to grubbing operations.

High Risk Tree: A tree, whether live or dead, that must be cleared to remove an *immediate* threat to human life, property, or roadway safety.

Hibernaculum: A known bat overwintering site. Hibernacula include caves, mines, and other locations where bats hibernate in winter.

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 U. S. Fish and Wildlife Service.

Take: Under the 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).

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

Maternity Roost Tree: Specific trees that have had female bats or juvenile bats tracked to them, or the presence of females or juveniles is known through other methods.

Take: See applicable definition under each regulation above.

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, removal, harvesting, or destroying of the above-ground portion of a tree. Tree clearing timing restrictions do not apply to grubbing.

Tree Pruning: The act of cutting branches off from the main tree trunk(s). Pruning is defined in this Tech Memo as a distinct operation, different from clearing, to specifically address the removal of tree branches, such as but not limited to overhanging a roadway, blocking sight lines, or posing a risk to property off the right of way. Tree pruning may also be conducted to improve tree health.

Winter Months: The time of year bats are generally inactive in Minnesota, approximately November 1 to March 31, inclusive.

Tree Clearing Guidelines

Endangered Species Act Compliance (Federal Undertakings)

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 from the main project using state funds, done by internal forces, or done by MnDOT permit. **Tree clearing timing restrictions will be determined on a case-by-case basis for federally funded projects** and other federal undertakings, with many undertakings recommended or required to conduct clearing November 1 to March 31, inclusive.

Note: Federal Highway Administration (FHWA) undertakings proposing to conduct tree clearing activities during the active season for Minnesota's bats (i.e., April 1 to October 31, inclusive) may not be eligible to use a Programmatic Categorical Exclusion (PCE) environmental document; the undertaking may still qualify to use a Non-Programmatic Categorical Exclusion (non-PCE) environmental document.

Work Completed by MnDOT Forces, or Authorized by MnDOT Contract or Permit (Non-Federal Undertakings)

This section describes guidelines for activities being executed without federal funds and that are not a federal undertaking. If the activity has federal funds or is a federal undertaking, see guidelines above. Guidelines for clearing high risk trees are covered in the subsection below titled "High Risk Trees."

All activities clearing trees, in any amount, must 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).

All tree clearing activities in these townships must contact the MnDOT Wildlife Ecologist before initiating tree clearing. The MnDOT Wildlife Ecologist will consult with U.S. Fish and Wildlife Service, if necessary, to ensure compliance with applicable regulations. The MnDOT Wildlife Ecologist will review the proposed tree

clearing and provide comments to avoid or minimize impacts, if anticipated. The MnDOT Wildlife Ecologist review will generally be completed within five business days, but may take longer if inadequate information is provided and/or if consultation with outside agencies is necessary.

If tree clearing will occur outside of an identified township, the activities may proceed using the following processes to comply with this Technical Memorandum:

Clearing up to one (1) acre of trees per five-mile road segment per calendar year and within 100' of an existing roadway (edge of shoulder), and with thorough inspection of individual trees that will be cut:

- 1) Must inspect each tree for occupied bird nests and hollows, and for flaky bark, cracks, crevices, and/or hollows that may be used by bats. See *MnDOT Bird and Bat Tree Inspection Guide* (in prep).
 - (a) If absent, may proceed with tree clearing, but may not clear trees June 1 to August 15, inclusive, without coordination and approval from the MnDOT Wildlife Ecologist.
 - (b) If present, must document with photographs to the best of ability and contact the MnDOT Wildlife Ecologist before initiating tree clearing. Tree clearing may not proceed until approved by MnDOT Wildlife Ecologist. The MnDOT Wildlife Ecologist review will generally be completed within 10 business days but may take longer if inadequate information is provided and/or if consultation with outside agencies is necessary.

All other tree clearing within 300' of existing roadway, but without thorough inspection of individual trees that will be cut; limited to less than or equal to 20 acres per five-mile road segment per calendar year. Contact MnDOT Wildlife Ecologist if clearing greater than 20 acres of trees, at any time or at any location.

- 1) Must make a cursory inspection of the complete work limits for nesting birds, including eagles and owls that nest during the winter months. See *MnDOT Bird and Bat Tree Inspection Guide* (in prep).
 - (a) If absent, tree clearing may be completed without coordination and approval from the MnDOT Wildlife Ecologist, but only during the period from November 1 to March 31, inclusive.
 - (b) If present, must document with photographs to the best of ability and contact the MnDOT Wildlife Ecologist before initiating tree clearing. Tree clearing may not proceed until approved by the MnDOT Wildlife Ecologist. The MnDOT Wildlife Ecologist review will generally be completed within 10 business days but may take longer if inadequate information is provided and/or if consultation with outside agencies is necessary.

Clearing beyond 300' of an existing roadway and/or greater than 20 acres of trees per five-mile road segment per calendar year, at any time or at any location:

- 1) Must contact the MnDOT Wildlife Ecologist before initiating tree clearing. The MnDOT Wildlife Ecologist will consult with U.S. Fish and Wildlife Service to ensure compliance with applicable regulations. The MnDOT Wildlife Ecologist will review the proposed tree clearing and provide comments to avoid or minimize impacts, if anticipated. The MnDOT Wildlife Ecologist review will generally be completed within 10 business days but may take longer if inadequate information is provided and/or if consultation with outside agencies is necessary. To avoid unforeseen delays, tree clearing beyond 300' of an existing roadway and/or greater than 20 acres per five-mile road

segment per calendar year should be planned for the winter months (i.e., Nov. 1 to March 31, inclusive).

Note: Activities requiring U.S. Army Corps of Engineers (USACE) permits or authorizations may receive tree clearing timing restrictions through the USACE review and permitting processes. Activities must follow the most restrictive tree clearing timing requirements (i.e., USACE review vs. Tech Memo timing restrictions) to ensure compliance with this Tech Memo.

Tree Pruning Guidelines

Endangered Species Act Compliance (Federal Undertakings)

Projects receiving federal funds, or any federal undertaking, must have Endangered Species Act clearance through the MnDOT Office of Environmental Stewardship before initiating tree pruning activities, except in emergency repair situations (addressed below), even if tree pruning is conducted under a separate contract from the main project using state funds, done by internal forces, or done by MnDOT permit. Tree pruning timing restrictions will be determined on a case-by-case basis for federally-funded projects and other federal undertakings.

Work Completed by MnDOT Forces, or Authorized by MnDOT Contract or Permit (Non-Federal Undertakings)

This section describes guidelines for activities being executed without federal funds and that are not a federal undertaking. If the activity has federal funds or is a federal undertaking, see guidelines above. Guidelines for clearing or pruning high risk trees are covered in the subsection below titled "High Risk Trees."

Tree pruning to remove overhanging branches to the vertical extension of the shoulder P.I., regardless of whether the pruning is within a bat-occupied township:

- 1) Must 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. See *MnDOT Bird and Bat Tree Inspection Guide* (in prep).
 - (a) If absent, tree pruning may be completed without coordination and approval from the MnDOT Wildlife Ecologist, and without time restrictions.
 - (b) If present, must document with photographs to the best of ability and contact the MnDOT Wildlife Ecologist before initiating tree pruning. Tree pruning may not proceed until approved by the MNDOT Wildlife Ecologist. The MnDOT Wildlife Ecologist review will generally be completed within five business days but may take longer if inadequate information is provided and/or if consultation with outside agencies is necessary. Timing restrictions may be imposed on a case-by-case basis.

Grubbing Guidelines

Tree clearing timing restrictions do not apply to grubbing under this Tech Memo. Grubbing activities must follow all contract and regulatory agency permitting requirements, if applicable.

High Risk Tree Guidelines

High risk trees posing an immediate safety risk may be cleared at any time and at any location without contacting the MnDOT Wildlife Ecologist. Adjacent low risk trees may also be cleared, but the clearing must follow the process outlined above. Determination of tree risk level must be completed by the Roadside Vegetation Management Unit within the Office of Environmental Stewardship or by staff trained in tree risk assessment, and the tree risk evaluation form must be completed.

Emergency Repair Guidelines

Tree clearing for activities seeking reimbursement through the FHWA Emergency Relief Program must follow FHWA/MnDOT Emergency Relief Program requirements. Training and additional details can be found on iHUB at: <http://ihub/admin/emergency-management/emergency-relief.html>

For other situations, please contact the MnDOT Wildlife Ecologist for guidance on tree clearing timing on a case-by-case basis.

Notification Requirements

Must notify the MnDOT Wildlife Ecologist if a bird or a bat, whether live or dead, is discovered during or following tree clearing or pruning activities. Please document with photographs and provide notification within 24 hours of discovery.

Office of Environmental Stewardship Contacts

- Tree clearing timing and protected species compliance - Environmental Assessment Unit Wildlife Ecologist, Christopher E. Smith, Christopher.E.Smith@state.mn.us
- High risk trees - Roadside Vegetation Management Unit Supervisor, Tina Markeson, Tina.Markeson@state.mn.us

Questions

Direct any questions regarding the technical provisions of this Technical Memorandum to **Christopher E. Smith** at Christopher.E.Smith@state.mn.us.

Direct any questions regarding publication of this Technical Memorandum 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>.

To add, remove or change your name on the Technical Memoranda mailing list, please visit the web page <http://techmemos.dot.state.mn.us/subscribe.aspx>

Attachment:

Tree Clearing Timing Requirements