

Technical Memorandum

To: Electronic Distribution Recipients

From: Michael Beer Digital Signature on file
Assistant Commissioner, Engineering Services

Subject: Tree Clearing Timing Requirements

Expiration

This Technical Memorandum supersedes Technical Memorandum 17-04-ENV-02 and 22-05-ENV-01 and shall remain in effect until December 31, 2028, unless superseded prior to this date.

Implementation

The guidance contained in this memorandum shall be effective for projects occurring on Trunk Highways letting in fiscal year 2024 and beyond, Trunk Highway maintenance activities, and MnDOT permits and agreements impact Trunk Highway rights-of-way or other MnDOT administered lands effective April 1, 2024 unless previously authorized by the MnDOT Office of Environmental Stewardship (OES) or by special exemption due to extraordinary circumstances.

Purpose

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

Introduction

MnDOT construction projects and maintenance activities frequently include tree clearing and pruning along existing rights-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, as well as shrub clearing, conducted April 15 to August 31, inclusive, may result in prohibited take under the MBTA.

On March 31, 2023 the U.S. Fish and Wildlife Service listed the northern long-eared bat (*Myotis septentrionalis*), a bat native to Minnesota, as endangered 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 November 14, inclusive, may adversely affect and cause incidental take¹ of protected bats.

¹ Definitions included below.

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.

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 15 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 eagle nests are known at a scheduled tree clearing or pruning site.

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.

Georilla: Internal agency Geographic Information System (GIS) for information mapping and visualization.

Grubbing: Removal and disposing of tree stumps, roots, or buried logs. Timing restrictions do not apply to grubbing operations.

High Risk Tree: A tree or branch(es), 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/Medium 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. 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. Tree pruning may also be conducted to improve tree health.

Winter Months: The time of year bats are generally inactive in Minnesota, generally November 15 to March 31, inclusive. Exact dates may vary by species and location.

Tree Clearing Guidelines

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. This requirement includes federal aid projects administered by the Office of State Aid for Local Transportation. Tree clearing timing restrictions for federal undertakings will be determined on a case-by-case basis as part of the Endangered Species Act, section 7 consultation process. Note that federally funded projects and other federal undertakings may be required to remove trees during the winter months (e.g., November 15 to March 31, inclusive). Deviations from these dates may require additional coordination with OES Wildlife Ecologist.

Note: Federal Highway Administration (FHWA) undertakings proposing to conduct tree clearing activities during the active season for Minnesota’s bats (approximately April 1 to November 14, inclusive) *might* result in adverse effects to listed bats, and therefore might be ineligible to use a Programmatic Categorical Exclusion (PCE) environmental document; please consult the d-list Attachment B thresholds.

Non-Federal Undertakings

This section describes guidelines for activities being executed without federal funds and includes work completed by MnDOT Forces, authorized by MnDOT Contract, or authorized by MnDOT Permit on Minnesota Trunk Highways or other lands administered by MnDOT. 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.”

Step 1. Consult “Bat Protection Areas” within Georilla to determine if the proposed tree clearing will occur in an area identified as having a high probability of endangered bat presence. Also consult “Bumble Bee High Potential Zones” within Georilla. If within a “Bat Protection Area” or “Bumble Bee High Potential Zone” identified in Georilla, notify the MnDOT wildlife ecologist to discuss the proposed tree clearing in more detail prior to proceeding. If not within a “Bat Protection Area” and/or a “Bumble Bee High Potential Zone” continue to Step 2.

Step 2. If clearing less than (1) acre of trees (or approx. 20 individual trees) per five-mile road segment per calendar year, and with thorough inspection of each individual tree that will be cut. **If clearing greater than or equal to one (1) acre of trees continue to Step 3.**

- a) If no bird nests, shaggy bark, cracks, crevices, and/or hollows are observed following a thorough inspection of each individual tree. See *MnDOT Bird and Bat Tree Inspection Guide*. Tree clearing may occur **at any time** without coordination and approval from the MnDOT Wildlife Ecologist.
- b) If bird nests, shaggy bark, cracks, crevices, and/or hollows that may be used by birds or bats are present or suspected. 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.

Step 3. If clearing up to ten (10) acres of trees per five-mile road segment per calendar year. **If clearing greater than 10 acres of trees continue to Step 4.**

- a) If no bird nests, including large stick nests that may be used by eagles and owls during the winter months, are observed during an inspection of the complete work limits. Tree clearing may be completed without coordination and approval from the MnDOT Wildlife Ecologist, but only during the period from October 1 to April 15, inclusive. If unable to complete clearing within these dates, 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.
- b) If bird nests, including large stick nests that may be used by eagles and owls during the winter months, are observed or suspected during an inspection of the complete work limits. 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.

Step 4. Clearing greater than 10 acres of trees per five-mile road segment per calendar year, at any time or at any location, and any tree clearing not addressed in this tech memo. 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 greater than 10 acres per five-mile road segment per calendar year should be planned for the winter months (i.e., Oct. 1 to April 15, 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

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.

Non-Federal Undertakings

This section describes guidelines for activities being executed without federal funds and that are not a federal undertaking and occur on Minnesota Trunk Highways or other lands administered by MnDOT. 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 complete an 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

Contact the Roadside Vegetation Management Unit (RVMU) within the Office of Environmental Stewardship to determine whether a tree risk assessment is required. RVMU will coordinate with the MnDOT Wildlife Ecologist to determine whether timing restrictions or surveys are required. A tree risk assessment must be completed 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

Any questions regarding the technical provisions of this Technical Memorandum should be directed to **Christopher E. Smith** at Christopher.E.Smith@state.mn.us.

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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