

Fish and Wildlife

Contact

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Purpose

To conserve, maintain, and manage fisheries and wildlife resources; to minimize effects of development on aquatic and wildlife habitat; and to re-establish aquatic and wildlife habitat after construction.

Threshold Criteria

The Minnesota Department of Natural Resources (MNDNR) Public Waters Work Permit Program applies whenever public waters and public water wetlands may be impacted. Avoidance, minimization, and mitigation for fisheries and wildlife resources may be included within the MNDNR public waters work permit. See HPDP [Wetlands](#) document for additional information.

The federal Migratory Bird Treaty Act (MBTA) applies whenever protected bird species may be impacted. Most bird species that live in Minnesota are protected. The current exceptions are house sparrows, pigeons, and starlings. This means that a depredation permit from the U.S. Fish and Wildlife Service (USFWS) is required to destroy active nests. A MNDNR permit may also be required for bird species protected under state law. Depending on the species involved, the nesting season is approximately from March 15 to August 15. Common transportation-related activities that *may* impact protected birds include but are not limited to:

- Building structure maintenance and demolition
- Bridge painting
- Bridge rehabilitation
- Bridge construction

- Mowing and haying
- Shrub and tree clearing

The Bald and Golden Eagle Protection Act (BGEPA) applies whenever bald or golden eagles may be impacted. The act protects both occupied and unoccupied nests. A permit from the USFWS is needed to destroy or harass bald and golden eagles. Construction activities in close proximity (660') of a nest may result in harassment and require a permit. Common transportation-related activities that *may* impact eagles include, but are not limited to:

- Road and bridge construction within 660' of a nest
- Shrub and tree clearing within 660' of nests or known roosts
- Clearing of nest tree at any time of the year (**requires permit**)

Both the state and federal Endangered Species Acts are covered in other HPDP documents (see: Threatened and Endangered Species – Federal, Threatened and Endangered Species – State).

Prepared Statements

Prepared statements for fisheries:

Fisheries - no impacts to fisheries habitat

The proposed project will have no direct impacts on fisheries habitat. It is expected that any indirect impacts will be limited to minor changes in water clarity during and immediately after construction.

Fisheries - possible direct impacts mitigated by timing

The proposed project will involve work in a stream or river supporting fisheries resources. Work in the water will not occur during the critical spawning period identified by the MNDNR Area Fisheries Manager. No long term impacts are anticipated.

Prepared statements for wildlife (other than swallows and bats):

Include comments from MNDNR and MnDOT Wildlife Ecologist, and address each comment. If there are not any comments, no statement is needed.

Prepared statements for birds:

Swallows - if swallow nests are not present on the bridge (or other structure, e.g., a building), no statement is required.

Swallows - if swallow nests are present on the bridge (or other structure), use the following statement:

Bridge No. # contains barn swallow and/or cliff swallow nests. In accordance with MnDOT policy and in compliance with the federal Migratory Bird Treaty Act, 50 CFR 21.41, the destruction of swallows will be avoided by (*choose one of the following*): conducting the work outside of the nesting season (Sept. 1 to May 15, inclusive), or preventing the birds from nesting until completion of the project.

Other Protected Birds

The proposed action includes work that is not anticipated to impact protected birds based on the scope of work and/or the inclusion of avoidance measures.

See Appendix A for information on ways to prevent birds from nesting on bridges.

Prepared statements for bats:**Bridge and Structure Work**

Bats – if bats or bat signs are not present on the bridge (or other structure), no statement is required.

Bats – if bats or bat signs are present on the bridge (or other structure), use the following statement:

Bridge No. # contains bats and/or bat signs. In compliance with the Range-wide Programmatic Consultation for Indiana Bat and Northern Long-eared Bat, impacts to protected bats will be avoided or minimized by (*choose one of the following*): conducting the work outside of the bat active season (Nov. 1 to March 31, inclusive) unless a hibernating bat colony is present; or by conducting a USFWS approved bat survey and determining absence of protected bats.

Coordinate with MnDOT Wildlife Ecologist to determine proper bat avoidance and minimization measures for the project.

Tree Clearing and Trimming

Bats – if tree clearing and/or trimming is not anticipated, no statement is required.

Bats – if tree clearing and/or trimming is anticipated, use the following statement if:

Outside MNDNR / USFWS identified NLEB Township:

This project includes tree clearing and/or trimming activities. In accordance with MnDOT Technical Memo [17-04-ENV-02](#), project proponents have checked the MNDNR / USFWS [map](#) of townships known to contain northern long-eared bat hibernacula and/or roost trees, and the project falls outside an identified township.

Select one:

The project anticipates clearing less than 2.5 acres of trees, and tree clearing will be limited to August 16 to May 31, inclusive, to minimize impacts to protected bats.

The project anticipates clearing more than or equal to 2.5 acres of trees, and tree clearing will be limited to November 1 to March 31, inclusive, to minimize impacts to protected bats.

Inside MNDNR / USFWS identified NLEB Township:

Coordinate with MnDOT Wildlife Ecologist.

See Appendix B for additional information.

Relationship to the HPDP

Class I Actions (EIS)

Initiate MNDNR and MnDOT Wildlife Ecologist review using the Early Notification Memorandum Form.

Scoping Documents (SD) & Scoping Decision Document (SDD)

Conduct early assessment of magnitude of potential impacts. Assess need for further study.

Draft Environmental Impact Statement (DEIS)

Conduct inventory of potential impacts for project alternatives. Contact the MnDOT Wildlife Ecologist and MNDNR to determine level of USFWS and MNDNR involvement.

Public Hearing

Include information on potential impacts of various alternatives.

Final Environmental Impact Statement (FEIS)

Include specifics of any required mitigation measures. Include letter of coordination/concurrence from MnDOT Wildlife Ecologist and MNDNR questionnaire.

Class II Actions (CATEX)

Initiate MNDNR and MnDOT Wildlife Ecologist review using the Early Notification Memorandum Form.

Class III Actions (EA)

Environmental Assessment (EA)

Initiate MNDNR and MnDOT Wildlife Ecologist review using the Early Notification Memorandum Form. Conduct inventory of potential impacts for project alternatives. Include letter of coordination/concurrence from MnDOT Wildlife Ecologist and MNDNR questionnaire.

Agencies Involved

Agency(s)	When they are involved and why
Minnesota Department of Natural Resources (MNDNR)	The MNDNR is charged with protecting the fish and wildlife resources of the state. They should be involved in early project development through the MnDOT Early Notification Memorandum Form. MNDNR also receives a copy of most MnDOT approved project development documents and issues Public Waters Work Permits prior to construction. (For more information, see MnDOT-MNDNR memorandum of understanding dated November 1999).
United States Fish and Wildlife Service (USFWS)	If any of the threshold criteria listed above for the MBTA or BGEPA are met, USFWS will be involved.

Permits and Approvals

Permit/Approval	Agency with Oversight
Public Waters Work Permit	MNDNR; mitigation for fisheries and wildlife impacts may become part of the MNDNR Public Waters Work Permit.
Depredation Permit (MNDNR)	MNDNR; if active migratory bird nests are destroyed, a depredation permit is required.
Depredation Permit (USFWS)	USFWS; if active migratory bird nests are destroyed, a depredation permit is required.
Bald Eagle Permit	USFWS; if bald eagles and/or nests are destroyed or harassed / disturbed a permit is required.
Endangered Species	See HPDP: Threatened and Endangered Species – Federal, Threatened and Endangered Species – State

Legal Basis

Description	Code
Federal Endangered Species Act	50 CFR 17
Federal Migratory Bird Treaty Act	50 CFR 13 and 50 CFR 21
Bald and Golden Eagle Protection Act	50 CFR 22.26
Public Waters Work Permit	Minnesota Statutes 103G.222
State Endangered Species Act	Minnesota Statutes 84.0895

Glossary

MNDNR - Minnesota Department of Natural Resources

MnDOT – Minnesota Department of Transportation

USFWS - U.S. Fish and Wildlife Service

Helpful Links

Department of the Interior, USFWS

- Federal Migratory Bird Treaty Act: [50 CFR 21 - Migratory Bird Permits](#)
- Federal Migratory Bird Treaty Act: [50 CFR 13 -General Permit Procedures](#)
- Bald & Golden Eagle Protection Act: [50 CFR 22.26 – Non-Purposeful Take](#)

Minnesota Department of Natural Resources

- [Minnesota’s Endangered, Threatened, and Special Concern Species](#)
- [Minnesota Rare Species Guide](#)
- [Protected Birds](#)
- [Public Waters Work Permit](#)

FHWA Office of Environmental Policy

[U.S. Fish and Wildlife Service Mitigation Policy](#)

Appendices

A. Swallow Procedure & Depredation Permit

MnDOT Wildlife Ecologist (2017)

B. Bat Procedure

MnDOT Wildlife Ecologist (2017)

Appendix A

Swallow Procedure & Depredation Permit

Background

Swallows are protected by the federal Migratory Bird Treaty Act (MBTA) and state law (MINN. STAT. 97A.015; MINN. STAT. 97B.701), and the destruction of swallows or their active nests is a misdemeanor punishable by a \$500 fine or a jail term. An "active" nest is one that contains eggs or young birds. Nests that are in the process of being constructed or nests that have been abandoned after a breeding season are not "active" nests.

Cliff swallows and barn swallows, along with a few other species of migratory birds, often build their nests on bridges or highway overpasses. Bank swallows tunnel into open sandy vertical surfaces near wetlands and streams and may try to take advantage of vertical surfaces in borrow sites or construction sites.

Under the regulations of the federal Migratory Bird Treaty Act, depredation permits are required for the destruction of any active migratory bird nests. All permits issued by the USFWS contain the requirement that any young swallows and eggs removed from the bridges must be turned over to a federally licensed rehabilitator for care and subsequent release (see section below on depredation permits). The MNDNR also has permit authority over the destruction or possession of protected wildlife. The MNDNR permits contain the same restrictions and requirements as the USFWS permits.

Avoidance and Minimization Measures

The following options for dealing with swallows on bridges are acceptable to the USFWS and the MNDNR. The following measures should be identified in bridge removal and maintenance contracts, depending on how much responsibility is given to the contractor:

1. Bridge work may be performed outside of the nesting season, i.e., before May 1st or after September 1st. No permit is required for this activity.
2. Bridge work may begin before May 1st and nest completion can be prevented by knocking down or hosing down the nests (at least three times a week) as they are being built. The success of this measure depends on the number of nests on a bridge. If the bridge contains only a few nests, the birds should be easily deterred from nesting. If the bridge contains a large number of nests, it is an indication that the site is very attractive to the birds and they will not be easily deterred from nesting. Preventing the birds from nesting by knocking down unfinished nests is acceptable to the USFWS, which considers this to be non-lethal harassment. No permits are required for this activity.
3. The portions of the bridge providing nesting sites (overhangs and ledges) may be temporarily covered with fabric or netting to prevent the birds from nesting. One option is for the entire underside of a bridge to be "diapered." Alternatively, for small bridges (over streams that do not carry canoe traffic), filter fabric reinforced with wire mesh can be suspended so that it hangs down from the side of the bridge to about a foot below the water line. When covering nesting sites it is crucial to seal off the entire area with a continuous barrier, as the birds can enter through small openings in the netting. No permit is required for this activity. **Please note that netting and mesh**

may entangle some species of wildlife, especially snakes, so they should be completely removed from the project area once no longer needed.

4. Another, more permanent product that may be used to reduce swallow nesting on bridges, ledges, etc. are bird spikes.
5. Other non-lethal preventative measures, such as sprays, may be tried to discourage the birds from nesting, keeping in mind that water quality below the bridge should not be threatened. Such measures have not been officially proven to be effective, but they may work in specific cases.

Depredation Permits

Applying for a depredation permit and complying with its requirements should be used as a last-resort option because the procedure is costly and can cause delays. When the procedure is warranted, the MnDOT Wildlife Ecologist must be contacted prior to initiating the permit process. Depredation permits should be applied for under the following circumstances:

1. If the project is scheduled to begin before the end of the nesting season, e.g., August 15th, and birds are still actively nesting on a bridge (see above).
2. If the avoidance and minimization measures listed above fail to prevent birds from nesting on a bridge.
3. If the bridge contains a small number of nests (i.e., a small enough number that a federally licensed rehabilitator is willing to provide the service of caring for the three to five nestlings that each nest may contain), the timing of bird work need not be restricted.

The two major steps involved in working with depredation permits are a) obtaining the USFWS and MNDNR permits, and b) obtaining the services of a federally licensed rehabilitator

1. **Obtaining Permits:** The permit applicant should be the party responsible for the bridge work (i.e., in most cases the contractor). In some cases the District Project Manager or Maintenance Supervisor may be the responsible party. The MnDOT Wildlife Ecologist may serve as the permit holder in select cases. The applicant must first contact USDA Wildlife Services to request form WS-37 (contact below); include project details and amount of anticipated take. Once form WS-37 is received, the applicant should review Section E of [the USFWS application](http://www.fws.gov/forms/3-200-13.pdf) for process instructions (<http://www.fws.gov/forms/3-200-13.pdf>). A copy of the USFWS application along with form WS-37 should be sent to USFWS (see application instructions for contact information), and another copy of both forms should be sent to MNDNR attention Lori Naumann (contact information below).

The USFWS maintains its records on a calendar year basis and would prefer that the permit applications be submitted in the same year for which the permits are being requested. The turn-around time for receiving the approved permits is approximately 15 days.

USDA/ APHIS/ Wildlife Services
644 Bayfield Street, STE 215
Saint Paul, MN 55107
Phone: (651) 224-6027
Fax: (651) 224-4271

In State Toll free (866) 4USDA-WS or (866-487-3297)

Lori Naumann
MN DNR, Division of Ecological and Water Resources
500 Lafayette Road
St. Paul, MN 55155
Phone: (651) 259-5148
E-mail: Lori.Naumann@state.mn.us

2. **Obtaining rehabilitator services:** The USFWS and MNDNR permit issuers should be contacted to determine if there are any federally licensed rehabilitators in the project area. It is possible that the nearest rehabilitator may be hundreds of miles away. The network of rehabilitators was originally established to take care of limited numbers of orphaned or injured wildlife from the local area. The network, as it is presently set up, is neither able nor willing to commit to handling large numbers of young nestlings on a statewide basis. Most of the rehabilitators have full-time jobs from which they take time off to go and salvage the birds. Therefore the rehabilitators should be contacted at least several weeks in advance to make sure that their services will be available.

Bank Swallows and Vertical Surfaces

At this point in time, bank swallow nesting does not need to be addressed in the project documents since the potential for a swallow presence cannot easily be predicted. The potential for a problem may not be known until borrow or construction activities actually begin. The Resident Engineers have been alerted to this issue and will respond accordingly. Avoidance is emphasized in cases where bank swallows have colonized vertical surfaces because the ability to rescue birds from sandy tunnels is unlikely. The suggested measures to prevent bank swallows from nesting in banks are as follows:

1. Cover up the vertical surface while it is not being excavated.
2. Avoid having a vertical surface by leaving a slope at the excavation site.

Appendix B

Bat Procedure

Background

USFWS listed the northern long-eared bat (*Myotis septentrionalis*), a bat native to Minnesota, under the federal Endangered Species Act of 1973 (ESA) in 2015 and listings of additional Minnesota bat species are anticipated in the future. The ESA prohibits various forms of disturbance to listed species, which are punishable by up to a \$50,000 fine or imprisonment up to one year.

Bats use select trees, bridges, and other structures to roost during the day and/or night, and as a result, activities such as tree clearing and bridge work conducted April 1 to October 31 may incidentally affect them. Since 2016, Minnesota bridge inspectors have been responsible for recording whether or not bats, or bat signs, are present during inspections. These data are recorded under Element #900 in Minnesota Bridge Inspection Reports.

Guidance

The following documents provide some guidance for dealing with bats on projects that include tree removal and/or bridge work. The applicable avoidance and minimization measures must be identified in project and maintenance contracts if they will be contractor responsibilities:

- [Tree Clearing Timing Requirement Technical Memo 17-04-ENV-02](#) sets MnDOT policy related to tree clearing timing based on location and quantity. Note guidelines on pages 3-6. A few key points are included below:
 - If working inside a township with documented NLEB roost trees and/or hibernacula, contact the MnDOT Wildlife Ecologist to determine the appropriate course of action.
 - Minimize tree clearing to the maximum extent practicable.
 - If clearing trees outside a township with documented NLEB roost trees and/or hibernacula:
 - Less than 2.5 acres – May clear trees between August 16 and May 31, inclusive.
 - Great than or equal to 2.5 acres – May clear trees between November 1 and March 31, inclusive.
 - On all projects, tree clearing must be avoided June 1 to August 15, inclusive, unless trees are high risk and posing a threat to human life or property, or the MnDOT Wildlife Ecologist has provided an exception based on habitat suitability.
- [Range-wide Programmatic Consultation for Indiana Bat and Northern Long-eared Bat](#) webpage includes a link to the “User’s Guide,” which includes several avoidance and minimization measures that are required on some federally funded projects - and recommended on others - that may affect the northern long-eared bat. A few key points are included below:
 - The MnDOT Wildlife Ecologist identifies federally funded projects that are subject to the linked avoidance and minimization measures while reviewing

- project Early Notification Memos or State Aid E&T Species Review Request Forms for compliance with Section 7 of the federal ESA.
- Consultation with USFWS is required before undertaking any activity that may affect the entrance of a cave, mine, or sewer used as a hibernaculum by protected bats, as well as other activities that may affect the northern long-eared bat, like some tree removal and bridge work activities. This includes activities using percussives within 0.5 mile of a hibernaculum and activities that may alter hibernaculum hydrology.
 - A bat-bridge inspection should be completed no more than two years prior to initiating bridge work. If the bridge inspection determines that bats may be present, contact the MnDOT Wildlife Ecologist.
 - Non-federally funded projects seeking to implement the guide's avoidance and minimization measures are encouraged to download the most recent version of the guide before use, as it gets updated periodically.

Please note that not all of the avoidance and minimization measures identified in Appendix C of the Programmatic Agreement are required for all actions. Please contact the MnDOT Wildlife Ecologist to determine which, if any, are recommended or required before undertaking an action.

- [Bats on Bridge Projects](#) provides guidance on what to do if bats are encountered during bridge construction activities.