MIGRATORY BIRD TREATY ACT (MBTA)

Overview and Mitigation Guidance

The MBTA was developed in 1918 to stop indiscriminate killing and market hunting of migratory birds. This act applies to activities conducted within the U.S. by any person, business, organization, institution, and any local, state, or federal agency. The MBTA established a Federal prohibition against the following activities, unless permitted by regulations: to "pursue, hunt, take, capture, kill, attempt to take, capture or kill, possess, offer for sale, sell, offer to purchase, purchase, deliver for shipment, ship, cause to be shipped, deliver for transportation, transport, cause to be transported, carry, or cause to be carried by any means whatever, receive for shipment, transportation or carriage, or export, at any time, or in any manner, any migratory bird, included in the terms of this Convention . . . for the protection of migratory birds . . . or any part, nest, or egg of any such bird." (16 U.S.C. 703)

ADOT projects – Federal Aid Highway Funded, Local Government, or State Operations and Development Activities

When completing general project site visits or biological field surveys consultant biologists should review the project area for the presence of any obvious nest structures of protected species that may be impacted directly by project activities.

Mitigation measures are typically developed for species such as cliff swallows, burrowing owls and raptors (see mitigation framework in scenarios 4-6 below). However, some projects that require vegetation removal may require mitigation for a larger list of potential nesting birds also protected by the MBTA (see mitigation framework scenarios 1-3 below). It is important to note that species-specific surveys are not required for each project. However, densely populated bird habitats such as the case with wetlands and/or riparian areas should be noted and when vegetation removal is necessary for projects in these areas, the mitigation measures listed below should be considered.

Project consultants should take photographs to document situations where mitigation may be required and review and develop the approach with the ADOT biologist. Mitigation should never just be added in because “some trees will be cut”. In most cases it is unlikely nests will occur near roadways with high traffic volumes and associated noise and other disturbances. Also, it may not be feasible to remove vegetation outside the nesting season or to expect an individual nest survey to be completed for each project. The ADOT biologist will consider projects individually to determine if mitigation is necessary by weighing the potential impacts to nesting birds along with mitigation feasibility, cost, and risks involved. The goal is to ensure that mitigation is appropriately applied and followed to allow for the highest level of compliance program wide.

Some possible measures to prevent disturbance of active nests include the framework mitigation measures described in the scenarios below. In general the goal of mitigation is to:

1. Avoid disturbing any existing active nests and/or nesting habitat (vegetation or structures) during the nesting season. The preference is for vegetation that could provide habitat for nesting birds to be cut or cleared prior to construction during non-nesting seasons.
2. Prevent migratory birds from nesting on structures that will be repaired or demolished prior to nest building. For example, exclusionary devices such as tarps, slick surface coatings (polytetrafluoroethylene

(Teflon) sheeting) or ledge protectors (coils, pin and wire) can be placed on structures to prevent nest building.

3. Physically remove nests that do not contain eggs or young to prevent future active nests that may occur during construction (*see specific cliff swallow mitigation*).
   a. Dispersal methods such as visual, auditory, or sensory deterrents (active construction, predator models, scare balloons, tapes, sonic devices, chemical repellants) may be used to deter birds from nesting but will not exclude them from other nesting areas outside the project limits (*see specific cliff swallow mitigation*)
4. Avoid directly or indirectly damaging vegetation outside of the work area.

If all avoidance and/or deterrent methods fail, apply for a MBTA relocation permit through the USFWS.

In the event occupied nests are encountered during construction the district and/or contractor must consult with the ADOT biologist to evaluate the situation. In some cases, active nests may be screened from construction to prevent impacts. Work may continue if the active nests will not be destroyed and if parent birds will not be precluded from tending their nests to the extent that the eggs or young are negatively impacted. **Active nest removal or disturbance will require a permit from the USFWS. The available permits are for relocation only.** This will require a permitted wildlife rehabilitation company or individual to take eggs and/or nestlings into care until they can be released back into the wild. This may be necessary if unavoidable project activities will directly impact active nests.

The below scenarios provide general guidance regarding mitigation measures that can be applied in different circumstances. It is important to note that each project and/or situation will be distinct and measures may need to be modified. Also, it is very important to note that measures should only be used when necessary after careful consideration of information obtained from a field visit. **Coordinate with the ADOT biologist regarding the appropriate mitigation measures.**

SCENARIO 1

General vegetation removal with potential for nesting birds.
Typical mitigation for construction projects with a limited scope of work or ADOT maintenance projects (Requires rewording from Contractor Responsibility to ADOT for maintenance projects).

Local Government Agency (LPA) projects: contact information should be changed to appropriate local government sponsor when the LPA is an approved Certification Acceptance (CA) agency.

Contractor Responsibility:

- If vegetation clearing will occur during the migratory bird breeding season (March 1- August 31), the contractor shall avoid any active bird nests. If the active nests cannot be avoided, the contractor shall notify the Engineer to evaluate the situation. During the non-breeding season (September 1- February 28) vegetation removal is not subject to this restriction.

Local Government or District Responsibility:

- If any active bird nests cannot be avoided by vegetation clearing or construction activities, the Engineer will contact the Environmental Planning Biologist (***Add contact phone number for the assigned ADOT Biologist***) to evaluate the situation.

SCENARIO 2

Vegetation removal with bird nesting known to occur - Habitat evaluation surveys identified existing active or past nests. (*Requires an extension of the project's environmental consultant contract or establishing a post-design services environmental on-call contract*)

LPA projects: contact information should be changed to appropriate local government sponsor when the LPA is an approved CA agency.

District Responsibilities:

- If clearing, grubbing, or tree/limb removal will take place during breeding season (March 1 - August 31) the Engineer will contact the Arizona Department of Transportation Environmental Planning Biologist (***Add contact phone number for the assigned ADOT Biologist***) to arrange for a qualified biologist to conduct active nest surveys of vegetation 10 (ten) days prior to removal. During the non-breeding season (September 1 - February 28) clearing, grubbing, or tree/limb removal may proceed without restriction.
- If active bird nests are identified within the project limits, construction activities will avoid disturbing any active nest. Avoidance areas, if necessary, will be marked in the field with temporary fencing or t-post with flagging. The engineer will confer with the Environmental Planning Biologist (***Add contact phone number for the assigned ADOT Biologist***) to determine the appropriate avoidance strategy until the nestlings have fledged from the nest and the nest is no longer active.

Contractor Responsibility:

- The contractor shall not conduct any clearing, grubbing, or tree/limb removal from March 1 to August 31 unless a qualified biologist approved by the Arizona Department of Transportation Environmental Planning has conducted a bird nest search of the affected vegetation and has determined that no active bird nests are present. Vegetation removal may occur if the area has been surveyed within 10 (ten) days prior to removal as long as only inactive bird nests, if any are present.

Option: example for contractor to hire biologist. **(*Requires a contract pay item*)**

Contractor Responsibility:

- If clearing, grubbing, or tree/limb removal will occur between March 1 and August 31, the contractor shall employ a qualified biologist to conduct a migratory bird nest search of all vegetation within the 10 (ten) days prior to removal. Vegetation may be removed if it has been surveyed and no active bird nests are present. If active nests cannot be avoided, the contractor shall notify the Engineer to evaluate the situation. During the non-breeding season (September 1 – February 28), vegetation removal is not subject to restriction.

Local Government or District Responsibilities:

- If active bird nests are identified within the project limits, construction activities will avoid disturbing any active nest. Avoidance areas, if necessary, will be marked in the field with temporary fencing or t-posts with flagging by the approved biologist. The engineer will confer with the approved biologist to determine the appropriate avoidance strategies until the nestlings have fledged from the nest and the nest is no longer active.
- If any active bird nests cannot be avoided by vegetation clearing or construction activities, the Engineer will contact the Environmental Planning Biologist (***Add contact phone number for the assigned ADOT Biologist***) to evaluate the situation.

SCENARIO 3

Vegetation removal with bird nesting known to occur - Habitat evaluation surveys identified active or past nests and future nesting will likely occur. Example: Riparian zones, large scale tree removal in sensitive areas and away from high traffic areas. Tree removal may also be necessary to prevent impacts to listed species and/or trees located in highly sensitive, visible or public areas.

Contractor Responsibility:

- The contractor shall remove all trees and shrubs during the non-breeding season (between September 1 to February 28) to avoid impacts to nesting birds known to occur in the project area.

SCENARIO 4

Cliff Swallows known to be nesting on bridges or other structures **(*Requires a contract pay item*)**

LPA projects: contact information should be changed to appropriate local government sponsor when the LPA is an approved CA agency.

Contractor Responsibilities:

- The contractor shall not cause injury or death to swallows, including eggs and nestlings. If work will occur that will directly impact nesting swallows from February 1 to August 31 of any calendar year. The contractor shall adhere to the following:
    - The contractor shall completely remove all existing swallow nests within 100 feet of work areas after August 31 but prior to February 1 to prevent swallows from reusing those nests.
    - The contractor shall implement exclusionary measures to prevent swallows from building new nests within areas directly impacted by construction activities. Exclusionary measures shall be implemented in all areas where swallows are likely to nest, and may include (a) continually removing nesting materials during early nest construction when eggs or nestlings are not present, (b) installing deterrent spike strips, and/or (c) installing polytetrafluoroethylene (Teflon) sheeting
    - The contractor shall not disturb any active swallow nests (completed or partially completed nests that contain eggs or nestlings). If any active nest is discovered within 100 feet of construction activities, work shall stop and the Arizona Department of Transportation Environmental Planning biologist shall be contacted (***Add contact phone number for the assigned ADOT Biologist***) to evaluate the potential for disturbance of nests.
    - The contractor shall monitor and maintain the effectiveness of exclusionary measures daily. Spike strips shall be maintained such that they remain in place. Teflon sheeting shall be reapplied as often as necessary to remain effective.
- If swallow exclusion measures fail, the contractor shall:
    - Inform the Engineer as soon as swallow nest building occurs and determine whether the area can be avoided until nests are no longer active;
    - Hire a qualified biologist to survey bird nests within 100 feet of construction areas and provide a report to the Environmental Planning biologist (***Add contact phone number for the assigned ADOT Biologist***) with the number of affected nests for each species of bird. The resume for the

selected biologist shall be approved by the Engineer in coordination with the ADOT Biologist prior to conducting the survey.

- Determine whether to wait for the nestlings to fledge or apply for a US Fish and Wildlife Service Migratory Bird Treaty Act Special Purpose permit from the USFWS Regional office in Albuquerque, New Mexico.
- If the permit is approved, hire a wildlife rehabilitator licensed by USFWS to relocate and rehabilitate all affected eggs or nestlings.
- Any costs incurred as a result of delays related to failure of swallow exclusion measures, including waiting until the nests are not active and/or time required to obtain a Migratory Bird Treaty Act relocation permit and the eggs or nestlings to be relocated from the work area shall be the contractor's responsibility.

- The contractor shall remove all swallow exclusionary measures after project completion to the satisfaction of the Engineer.

SCENARIO 5

Burrowing Owls known to occur in the project area - individuals and/or active nests found during a biological resources site assessment. **(*Requires a contract pay item*)**

LPA projects: contact information should be changed to appropriate local government sponsor when the LPA is an approved CA agency.

Contractor Responsibilities:

- Prior to construction, all personnel who will be on-site, including, but not limited to, contractors, Contractors' employees, supervisors, inspectors, and subcontractors shall review the attached Arizona Department of Transportation Environmental Planning "Western Burrowing Owl Awareness" flyer [or attend the environmental awareness program].
- The contractor shall employ a qualified biologist to complete a pre-construction survey for burrowing owls 96 hours prior to construction in all suitable habitat that will be disturbed. The biologist shall possess a burrowing owl survey protocol training certificate issued by the Arizona Game and Fish Department. Upon completion of the surveys, the contractor shall contact the Arizona Department of Transportation Environmental Planning Biologist (***Add contact phone number for the assigned ADOT Biologist***) to provide survey results.
- If any burrowing owls or active burrows are identified the contractor shall notify the Engineer immediately. No construction activities shall take place that will disturb any burrowing owls or active burrow.
- If the Engineer in cooperation with the Environmental Planning Biologist determines that burrowing owls cannot be avoided, the contractor shall employ a wildlife rehabilitator holding a permit from the US Fish & Wildlife Service to relocate burrowing owls from the project area, as appropriate.

SCENARIO 6

Burrowing Owls with potential to occur in the project area – owls are known to occur in the area and suitable habitat exists, but owls were not found during a biological resources site assessment. **(*Requires a contract pay item*)**

LPA projects: contact information should be changed to appropriate local government sponsor when the LPA is an approved CA agency.

Contractor Responsibilities:

- Prior to construction, all personnel who will be on-site, including, but not limited to, contractors, Contractors' employees, supervisors, inspectors, and subcontractors shall review the attached Arizona Department of Transportation Environmental Planning "Western Burrowing Owl Awareness" flyer [or attend the environmental awareness program].
- If any burrowing owls or active burrows are identified the contractor shall notify the Engineer immediately. No construction activities shall take place that will disturb any burrowing owls or active burrow.
- If the Engineer in cooperation with the Environmental Planning Biologist determines that burrowing owls cannot be avoided, the contractor shall employ a wildlife rehabilitator holding a permit from the US Fish & Wildlife Service to relocate burrowing owls from the project area, as appropriate.

Geotechnical Investigation – Prior to Construction – Mitigation Guidance

The following mitigation measures are intended to apply to geotechnical investigation activities conducted prior to overall project construction. These measures establish a baseline approach and should be applied as appropriate to the nature, scope, and location of the investigation work. Site-specific conditions or project-specific circumstances may warrant modifications to these measures or incorporation of additional mitigation, in which case coordination with the ADOT biologist should occur.

SCENARIO 1

General vegetation removal with potential for nesting birds.

LPA projects: contact information should be changed to appropriate local government sponsor when the LPA is an approved CA agency.

ADOT (or Local Government) Geotechnical Engineer Responsibility:

- If any active bird nests cannot be avoided by vegetation clearing or geotechnical activities, the ADOT Geotechnical Engineer will contact the Environmental Planning Biologist (***Add contact phone number for the assigned ADOT Biologist***) to evaluate the situation.

Geotechnical Contractor Responsibility:

- If vegetation clearing will occur during the migratory bird breeding season (March 1- August 31), the geotechnical contractor shall avoid any active bird nests. If the active nests cannot be avoided, the geotechnical contractor shall notify the ADOT Geotechnical Engineer to evaluate the situation. During the non-breeding season (September 1- February 28) vegetation removal is not subject to this restriction.

SCENARIO 2

Vegetation removal with bird nesting known to occur – active or inactive nest observed.

LPA projects: contact information should be changed to appropriate local government sponsor when the LPA is an approved CA agency.

Option: Requires an extension of the project's environmental consultant contract

ADOT (or Local Government) Geotechnical Engineer Responsibilities:

- If vegetation removal take place during breeding season (March 1 - August 31) the ADOT Geotechnical Engineer will contact the Arizona Department of Transportation Environmental Planning Biologist (***Add contact phone number for the assigned ADOT Biologist***) to arrange for a qualified biologist to conduct active nest surveys of vegetation 10 (ten) days prior to removal. During the non-breeding season (September 1 - February 28) clearing, grubbing, or tree/limb removal may proceed without restriction.
- If active bird nests are identified within the project limits, geotechnical activities will avoid disturbing any active nest. Avoidance areas, if necessary, will be marked in the field with temporary fencing or t-post with flagging. The ADOT Geotechnical Engineer will confer with the Environmental Planning Biologist (***Add contact phone number for the assigned ADOT Biologist***) to determine the appropriate avoidance strategy until the nestlings have fledged from the nest and the nest is no longer active.

Geotechnical Contractor Responsibility:

- The geotechnical contractor shall not conduct any vegetation removal from March 1 to August 31 unless a qualified biologist approved by the Arizona Department of Transportation Environmental Planning has conducted a bird nest search of the affected vegetation and has determined that no active bird nests are present. Vegetation removal may occur if the area has been surveyed within 10 (ten) days prior to removal as long as only inactive bird nests, if any are present.

Option: For contractor to hire biologist

ADOT (or Local Government) Geotechnical Engineer Responsibilities:

- If active bird nests are identified within the project limits, geotechnical activities will avoid disturbing any active nest. Avoidance areas, if necessary, will be marked in the field with temporary fencing or t-posts with flagging by the approved biologist. The ADOT Geotechnical Engineer will confer with the approved biologist to determine the appropriate avoidance strategies until the nestlings have fledged from the nest and the nest is no longer active.
- If any active bird nests cannot be avoided by vegetation removal or geotechnical activities, the ADOT Geotechnical Engineer will contact the Environmental Planning Biologist (***Add contact phone number for the assigned ADOT Biologist***) to evaluate the situation.

Geotechnical Contractor Responsibility:

- If vegetation removal will occur between March 1 and August 31, the geotechnical contractor shall employ a qualified biologist to conduct a migratory bird nest search of all vegetation within the 10 (ten) days prior to removal. Vegetation may be removed if it has been surveyed and no active bird nests are present. If active nests cannot be avoided, the geotechnical contractor shall notify the ADOT Geotechnical Engineer to evaluate the situation. During the non-breeding season (September 1 – February 28), vegetation removal is not subject to restriction.

SCENARIO 3

Burrowing Owls with potential to occur in the project area – owls are known to occur in the area and suitable habitat exists, but no owls or active burrows were found during a biological resources site assessment.

LPA projects: contact information should be changed to appropriate local government sponsor when the LPA is an approved CA agency.

Geotechnical Contractor Responsibilities:

- If any burrowing owls or active burrows are identified, the geotechnical contractor shall notify the ADOT Geotechnical Engineer immediately. No geotechnical activities shall take place that will disturb any burrowing owls or active burrow.
- If the ADOT Geotechnical Engineer determines that burrowing owls cannot be avoided, the geotechnical contractor shall contact the Environmental Planning Biologist (***Add contact phone number for the assigned ADOT Biologist***) to evaluate the situation.
- Prior to construction, all personnel who will be on-site, including, but not limited to, geotechnical contractors, geotechnical contractors' employees, supervisors, inspectors, and sub-geotechnical contractors shall review the attached Arizona Department of Transportation Environmental Planning "Western Burrowing Owl Awareness" flyer.

SCENARIO 4

Burrowing Owls known to occur in the project area - individuals and/or active burrows found during a biological resources site assessment.

LPA projects: contact information should be changed to appropriate local government sponsor when the LPA is an approved CA agency.

Option: Requires an extension of the project's environmental consultant contract

Geotechnical Contractor Responsibilities:

- The geotechnical contractor shall not conduct any vegetation removal or geotechnical activities unless a qualified biologist approved by the Arizona Department of Transportation Environmental Planning has completed a survey for burrowing owls 96 hours prior to geotechnical activities in all suitable habitat that will be disturbed. Upon completion of the surveys, the geotechnical contractor shall contact the Arizona Department of Transportation Environmental Planning Biologist (***Add contact phone number for the assigned ADOT Biologist***) to provide survey results.
- If any burrowing owls or active burrows are identified, the geotechnical contractor shall notify the ADOT Geotechnical Engineer immediately. No geotechnical activities shall take place that will disturb any burrowing owls or active burrow.
- If the ADOT Geotechnical Engineer determines that burrowing owls cannot be avoided, the geotechnical contractor shall contact the Environmental Planning Biologist (***Add contact phone number for the assigned ADOT Biologist***) to evaluate the situation.
- Prior to construction, all personnel who will be on-site, including, but not limited to, geotechnical contractors, geotechnical contractors' employees, supervisors, inspectors, and sub-geotechnical contractors shall review the attached Arizona Department of Transportation Environmental Planning "Western Burrowing Owl Awareness" flyer.

Option: For contractor to hire biologist

Geotechnical Contractor Responsibilities:

- The geotechnical contractor shall employ a qualified biologist to complete a pre-construction survey for burrowing owls 96 hours prior to geotechnical activities in all suitable habitat that will be disturbed. The biologist shall possess a burrowing owl survey protocol training certificate issued by the Arizona Game and Fish Department. Upon completion of the surveys, the geotechnical contractor shall contact the Arizona Department of Transportation Environmental Planning Biologist (***Add contact phone number for the assigned ADOT Biologist****)* to provide survey results.
- If any burrowing owls or active burrows are identified, the geotechnical contractor shall notify the ADOT Geotechnical Engineer immediately. No geotechnical activities shall take place that will disturb any burrowing owls or active burrow.
- If the ADOT Geotechnical Engineer determines that burrowing owls cannot be avoided, the geotechnical contractor shall contact the Environmental Planning Biologist (***Add contact phone number for the assigned ADOT Biologist****)* to evaluate the situation.
- Prior to construction, all personnel who will be on-site, including, but not limited to, geotechnical contractors, geotechnical contractors' employees, supervisors, inspectors, and sub-geotechnical contractors shall review the attached Arizona Department of Transportation Environmental Planning "Western Burrowing Owl Awareness" flyer.