

State	<p align="center"><b>Has your State changed policy regarding compliance with the Migratory Bird Treaty Act (MBTA) as a result of the US Department of Interior’s M-Opinion 37050 and the subsequent guidance memo from USFWS which states that the take of migratory birds during bridge demolition is not prohibited by the MBTA?</b></p>
Alabama	No change
Arkansas	No change
Connecticut	No change
Delaware	No change
Idaho	No change
Illinois	No change
Indiana	<p>Our policy is to implement avoidance and minimization measures appropriate for the type of work. If active nesting occurs even though measures were implemented and maintained the situation would be evaluated to determine if other reasonable measures to avoid were possible. If no reasonable measures were available, work would continue and impacts would be considered incidental.</p>
Indiana	<p>Our policy is to implement avoidance and minimization measures appropriate for the type of work. If active nesting occurs even though measures were implemented and maintained the situation would be evaluated to determine if other reasonable measures to avoid were possible. If no reasonable measures were available, work would continue and impacts would be considered incidental.</p>
Iowa	No change
Kentucky	No change
Massachutes	No change

Michigan	<p>At this time, we are not recommending making changes to what we do for migratory bird protection. Right now, we use exclusion netting or other materials in the spring to keep birds from nesting on bridges over water. We have not received feedback indicating that this practice is difficult to implement. We believe it best for MDOT to continue for the following reasons: At this time, we are not recommending making changes to what we do for migratory bird protection. Right now, we use exclusion netting or other materials in the spring to keep birds from nesting on bridges over water. We have not received feedback indicating that this practice is difficult to implement. We believe it best for MDOT to continue for the following reasons:</p> <ol style="list-style-type: none"> <li>1. We maintain a positive relationship with the Fish and Wildlife Service and have found that low cost best practices buy considerable good will from the regulatory agency.</li> <li>2. Past experience indicates that the bird watching community pays attention to our construction sites, which are visible to the public. We have received calls about potential construction impacts on nesting birds when projects are under construction and had to adapt our practices in the field. We prefer to plan ahead vs. being reactive. One might argue when a citizen calls that we are allowed to kill birds, however, sharing that kind of message with the public does not garner much goodwill for our agency.</li> <li>3. Natural resource protection organizations frequently sue the Fish and Wildlife service when they feel guidance runs counter to the intent of the law. We anticipate a lawsuit over the 2018 guidance and would prefer to remain consistent with our practice in the event that the guidance is rescinded.</li> <li>4. Lastly, we are in alignment with information sent out by FHWA May 11, 2018. To quote from that memo:       <ol style="list-style-type: none"> <li>a. "The DOI Solicitor's M-Opinion should not affect FHWA's environmental commitments regarding migratory birds. Federal law and Presidential Executive Order 13186 identified migratory birds as an important natural resource. As such, FHWA actions under NEPA should incorporate measures necessary to mitigate adverse impacts (§771.105(d)) to migratory birds. This is consistent with Executive Order 13186, Responsibilities of Federal Agencies To Protect Migratory Birds, that encourages migratory bird conservation and established the Council for the Conservation of Migratory Birds. FHWA is a member of this Council."</li> </ol> </li> </ol>
Missouri	No change
Nebraska	No change
New Hampshire	No change
North Dakota	No change
Ohio	No change

<b>Oklahoma</b>	<i>We have been provided guidance by our State FHWA office. The guidance came from FHWA headquarters in Washington DC. FHWA expects state DOT's to continue to implement avoidance measures, such as netting, for migratory birds for those projects covered under NEPA (even in cases of purely incidental take). We are in the process of reviewing our policy for migratory birds for state-funded/non NEPA projects. We have not made any changes to our policies at this time and preventative measures, such as netting and seasonal avoidance, are the standard practices regardless of funding.</i>
<b>Oregon</b>	Good question. There was a 5th Circuit Court decision in 2018 that precipitated the Interior and USFWS policy memos related to not interpreting the MBTA take prohibitions as a “strict liability” law. Currently, the Circuit Courts are split regarding whether to interpret MBTA as strict liability for incidental take, or to only apply liability for actions deliberately intended to kill birds. How the MBTA is applied differs depending on where you live. Last September, Governor Brown joined a lawsuit with several other states arguing that the Interior Opinion is inconsistent with the MBTA and that the Act should be interpreted as a strict liability law (any take requires a permit, regardless of the intent of the action that resulted in take) and seeking to have the Opinion vacated. So, in Oregon, we are continuing to follow the strict liability interpretation of the MBTA and we are party to a lawsuit seeking to vacate the Interior Opinion.
<b>Pennsylvania</b>	No change
<b>Rhode Island</b>	No change
<b>South Carolina</b>	Following strict liability interpretation of MBTA and Presidential Executive Order 13186 on Federally funded bridge projects. Following USDOJ M-Opinion (allowing incidental takes) on bridge projects without Federal Funding.
<b>SD</b>	No change
<b>Texas</b>	No change, State law is comparable to Strict Liability interpretation of MBTA
<b>Utah</b>	No change
<b>Vermont</b>	No change

## VDOT BRIDGE PROJECTS AND MBTA

### Bridge Maintenance Activities

- Bridge inspectors or environmental staff perform bat/bird inventory of structure(s)
- Bridges with evidence of active nests will include Special Provision for nesting birds on bridges
- Multi-bridge contracts will schedule structures with active nests outside the TOYR and prioritize structures with no active nests during the TOYR, which should have minimal impacts to schedule
- Use of TOYR will now focus on bridges where active nests have been previously identified

JUSTIFICATION - All bridge maintenance activities that purposefully destroy known active nests to allow the activity to be accomplished, constitute intentional take (USFWS memo dated 4/11/18 providing guidance on implementation of M-Opinion including examples for State DOTs in Attachment, No. 1a)

### Bridge Demolition/Bridge Removal Activities

- Bridge inspectors or environmental staff perform bird/bat inventory of structure(s)
- Bridges with evidence of active nests will include a Special Provision Copied Note for TOYR;
- Bridges without evidence of nests at the time of the inventory will not include any contract provisions and work will not be suspended if active nests are observed after project is advertised

JUSTIFICATION – Demolition/removal of a bridge structure would not be a violation of the MBTA if it destroys active nests or nesting birds because such destruction is not intentional nor considered part of the purpose of the project (USFWS memo dated 4/11/18 providing guidance on implementation of M-Opinion including examples for State DOTs in Attachment, No. 1c). However, this memo is in conflict with recent verbal comments of the current Secretary of Natural Resources has indicated an intention to “uphold” the MBTA regarding the now-dispersed regulation of incidental take and can also conflict with state regulation for state-listed threatened and endangered migratory species. Therefore, due diligence during project development and inclusion of the TOYR SPCN attempts to find middle ground between these interests and will eliminate potential delay claims for birds that might inhabit a bridge following pre-advertisement project environmental clearances.

Virginia

Wisconsin

No change