



U.S. Department
of Transportation
Federal Highway
Administration

Memorandum

Subject: **ACTION:** Interim Guidance for
Implementing FAST Act Section 1439:
Elimination of Barriers to Improve At-Risk
Bridges

Date: August 17, 2016

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In Reply Refer To:
HEPE

To: Directors of Field Services
- Division Administrators &
Environmental Staff

On December 4, 2015, the President signed into law the *Fixing America's Surface Transportation Act* (FAST Act) (Pub. L. 114-94). Section 1439 of the FAST Act temporarily authorizes, under the Migratory Bird Treaty Act (MBTA; 16 U.S.C. 703 *et seq.*), the take of nesting swallows between April 1 and August 31 for bridge construction projects that are: (1) eligible for funding under title 23, United States Code, and (2) have any component condition rated 3 or less as defined by the National Bridge Inventory General Condition Guidance. The FHWA published general condition guidance in *Recording and Coding Guide for the Structure Inventory and Appraisal of the Nation's Bridges* (1995) (FHWA Report No. FHWA-PD-96-001), which will be used as the source for general condition ratings. The purpose of this memorandum is to provide guidance on the required procedures for implementation of this section of the FAST Act. Our guidance was developed in collaboration with the Migratory Bird Program at the U.S. Fish and Wildlife Service's (USFWS) headquarters office. I request that you share these resources with your State partners and work with them to ensure that appropriate action is taken when applying this provision.

If you have any questions about this matter, please contact Daniel Buford (202-366-8168) or Susan Jones (202-493-2139) of the Office of Project Development and Environmental Review.

Attachments

FHWA Interim Guidance on Implementing FAST Act Section 1439

Section 1439 of the *Fixing America's Surface Transportation Act* (FAST Act) provides a temporary authorization, between April 1 and August 31 of each year, for the take of nesting swallows on certain bridge construction projects. This authorization will remain in full force until the effective date of a final rule from the U.S. Fish and Wildlife Service (USFWS) authorizing the take of nesting swallows to facilitate bridge repair, maintenance, or construction. The USFWS, in consultation with the Federal Highway Administration (FHWA), may suspend or withdraw the temporary take authorization through notice in the Federal Register if it is determined that the taking of nesting swallows is having a significant adverse effect on swallow populations. The FHWA provides the following guidance and recommendations in implementing section 1439 of the FAST Act.

Definitions

Take. The Migratory Bird Treaty Act (MBTA) specifically protects swallows and their nests from possession, sale, purchase, barter, transport, import, export, and “take.” “Take” is defined by regulation to mean “to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect.” (50 CFR 10.12).

Person. Section 1439 places notification requirements upon the “person” acting with the temporary authority to take nesting swallows. Regulations applicable to the MBTA at 50 CFR 10.12 define “person” as any “individual, firm, corporation, association, partnership, club, or private body, any one or all, as the context requires.” Thus, in the context of implementing bridge construction projects pursuant to title 23, United States Code (U.S.C.), the term “person” includes all of the following that apply: the contractor doing the work and the agencies responsible for authorizing or carrying out the action.

Population. This term is defined in 50 CFR 21.3 to mean “a group of distinct, coexisting, conspecific individual[birds], whose breeding site fidelity, migration routes, and wintering areas are temporally and spatially stable, sufficiently distinct geographically (at some time of the year), and adequately described so that the population can be effectively monitored to discern changes in its status.” Determination of population should also be relevant to the species’ status in Bird Conservation Regions and flyways.

Significant adverse effect on a population is defined in 50 CFR 21.3 as “an effect that could, within a reasonable period of time, diminish the capacity of a population of migratory bird species to sustain itself at a biologically viable level. A population is ‘biologically viable’ when its ability to maintain its genetic diversity, to reproduce, and to function effectively in its native ecosystem is not significantly harmed. This effect may be characterized by increased risk to the population from actions that cause direct mortality or a reduction in fecundity. Assessment of impacts should take into account yearly variations and migratory movements of the impacted species.”

Applicability

Section 1439 of the FAST Act authorizes the temporary take of nesting swallows that is otherwise prohibited under the MBTA. “Nesting swallows” include all members of the swallow family occurring in the U.S. and its territories. The temporary authorization of “take” does not apply under any other Federal, State, or local laws.

Swallow Species. Take is authorized for the following members of the swallow family (*Hirundinidae*):

Gray-breasted Martin *Progne chalybea*
Caribbean Martin *Progne dominicensis*
Purple Martin *Progne subis*
Cave Swallow *Hirundo fulva*
Cliff Swallow *Hirundo pyrrhonota*
Barn Swallow *Hirundo rustica*
Bank Swallow *Riparia riparia*
Northern Rough-winged Swallow *Stelgidopteryx serripennis*
Tree Swallow *Tachycineta bicolor*
Violet-green Swallow *Tachycineta thalassina*
Bahama Swallow *Tachycineta cyaneoviridis*

Section 1439 of the FAST Act does not authorize take of any other species protected by the MBTA (see 50 CFR 10.13 for a full list). It is prohibited to take members of the swift family (*Apodidae*), which are similar in appearance to swallows. White-throated swifts (*Aeronautes saxatalis*), for example, occur in the Western United States and have been documented utilizing bridges for nesting. For taking of species other than those swallow species listed in this document, applicants must apply for a depredation permit in instances of Human Health and Safety or Bird Health to the Regional Migratory Bird Permit Office in their Region. For more information on these types of permits, visit: <http://www.fws.gov/birds/policies-and-regulations/permits/regional-permit-contacts.php>.

Bridges. The temporary authorization of take of nesting swallows applies to bridge construction projects (1) that are eligible for funding under title 23, U.S.C., and (2) that have any component condition rated 3 or less as defined by the National Bridge Inventory General Condition Guidance. The FHWA published general condition guidance in *Recording and Coding Guide for the Structure Inventory and Appraisal of the Nation's Bridges* (1995) (FHWA Report No. FHWA-PD-96-001), which will be used as the source for general condition ratings. The component condition ratings of a bridge that are included in the National Bridge Inventory are as follows: deck, superstructure, substructure, and culvert. Section 1439 of the FAST Act applies to bridges with any component condition rating of 3 or less.

Rating	Description
3	Serious Condition – loss of section, deterioration, spalling or scour have seriously affected primary structural components. Local failures are possible. Fatigue cracks in steel or shear cracks in concrete may be present.
2	Critical Condition – advanced deterioration of primary structural elements. Fatigue cracks in steel or shear cracks in concrete may be present or scour may have removed substructure support. Unless closely monitored it may be necessary to close the bridge until corrective action is taken.
1	“Imminent” Failure Condition – major deterioration or section loss present in critical structural components or obvious vertical or horizontal movement affecting structure stability. Bridge is closed to traffic but correction action may put back in light service.
0	Failed Condition – out of service – beyond correction action.

Period take is authorized. The take of nesting swallows is temporarily authorized from **April 1 through August 31** in any year unless, as described in detail below, the provision is terminated, suspended, or withdrawn. (FAST Act § 1439(b)(2) or (c)). Swallows may begin nesting in some parts of their range before April 1, but section 1439 of the FAST Act does not authorize take prior to April 1.

Termination. The temporary authorization will remain in full force until the effective date of a final rule promulgated under the authority of section 3 of the MBTA (16 U.S.C. 704) that authorizes the take of nesting swallows to facilitate bridge repair, maintenance, or construction—(A) without individual permit requirements; and (B) under terms and conditions determined to be consistent with treaties relating to migratory birds that protect swallow species occurring in the United States. (FAST Act § 1439(b)).

Suspension or withdrawal of authorization. The temporary authorization may be suspended or withdrawn through publication in the Federal Register if the USFWS, in consultation with the FHWA, determines that taking of nesting swallows is having a significant adverse impact on swallow populations. (FAST Act § 1439(c)).

Other statutes and laws. The authorization of take under the MBTA does not remove protections afforded pursuant to other Federal, State, or local laws.

Procedural Requirements and Recommendations

Section 1439(a)(2) of the FAST Act requires that notifications be sent to the USFWS before and after taking. All notifications *before* and *after* taking should be sent by the State or local transportation agency or Federal agency proposing the action. Notifications may be sent by the contractor(s) on behalf of the agencies proposing the action if authorized by the agencies to do so. Copies of notifications should be retained in the administrative record/project file for the action.

Notification before taking

Notifications shall be submitted to the Migratory Bird Program at the appropriate USFWS Regional Office (see below) prior to taking nesting swallows. (FAST Act § 1439(a)(2)(A)). A response from USFWS is not required or expected. However, notifications should be sent at least 30 calendar days prior to the taking to afford the opportunity to USFWS to communicate any special or unforeseen circumstances. Notifications before taking shall include the following information required by the FAST Act (bolded). Notifications should include additional information (not bolded) to support the administrative record and to assist the USFWS in managing trust resources:

- 1) project/bridge name, location, and bridge rating;
- 2) **the name of the agency(s) and contractors acting under the authority of section 1439 of the FAST Act to take nesting swallows;**
- 3) **list of practicable measures that will be undertaken to minimize or mitigate significant adverse impacts on the population of that species** (see below);
- 4) **the time period during which activities will be carried out that will result in the taking of swallows;** and
- 5) the number of swallow nests (from species listed above) estimated to occur on the bridge each year (based upon a survey or assessment method); and
- 6) **an estimate of the number of individuals, by species and age class (egg, juvenile, adult), to be injured or killed.**

Notification after taking

Notifications shall be submitted to the appropriate USFWS Regional Office, Migratory Bird Program, no later than 60 calendar days after the last taking of a nesting swallow by the project in a calendar year. (FAST Act § 1439(a)(2)(B)). Notifications after taking shall include the following information required by the FAST Act (bolded). Notifications should include additional information (not bolded) to support the administrative record and to assist the USFWS in managing trust resources:

- 1) the project/bridge name, location, and bridge rating;
- 2) the name of the agency(s) and contractor(s) that acted under the authority of section 1439 of the FAST Act to take nesting swallows;
- 3) the list of measures implemented to minimize or mitigate adverse impacts;
- 4) the time period activities were carried out that resulted in the taking of swallows; and
- 5) **the number of individuals, by species and age class (egg, juvenile, adult), that were found to be injured or killed.**

The FHWA strongly recommends that any unauthorized take be reported to the Migratory Bird Office in the region where take occurred within 2 working days.

Measures to Minimize Impacts

Mitigation can include avoidance, minimization, and compensation, as appropriate (23 CFR 777). The FHWA recommends implementing actions prior to and during the nesting season to discourage swallows from nesting on work areas, to attract them to alternative habitats, to

minimize reproductive failures, and to benefit the swallow's conservation by improving habitat conditions. The measures implemented should be scaled to the expected impact and can be coupled with other mitigation requirements.

As noted earlier, the person undertaking the bridge construction project must submit a document that contains the practicable measures that will be undertaken to mitigate or minimize significant adverse effects on nesting swallows. The following, developed in collaboration with USFWS, are examples of measures that would minimize adverse effects on nesting swallows:

1. Time bridge construction activities to avoid the nesting season to the extent possible.
2. Apply bird exclusion devices to work areas prior to nest initiation in the spring, potentially before April 1. Devices may include plastic sheeting that is thick enough to withstand the elements; or weather-resistant polypropylene netting with 0.25-inch or smaller openings. Netting is an option that is often used, but is not recommended as nets have been known to result in mortalities by trapping adult swallows. Install bird exclusion devices such that bird access to the underside of the bridge, including its exterior girders, is completely blocked. Clean bird waste or other debris from the contact surfaces of the bridge girders before installing the exclusion devices. Monitor the devices daily and maintain and repair them to keep them effective. Remove bird exclusion devices from the job site at the end of each nesting season.
3. Swallow nests that are near but not in the immediate work area can be left alone if they do not pose a safety concern.
4. Conduct nest removal efforts at the onset of nest-building activity, potentially *before* April 1, in order to encourage use of alternative areas and avoid mortality of eggs, hatchlings, and adults. Take of eggs, juveniles, and adults is authorized only from April 1 to August 31.
5. If an established nest must be removed from a work area before young have fledged, then remove the nest as early in the nesting cycle as possible, from April 1 to August 31, to encourage re-nesting elsewhere.
6. Construct temporary alternative habitat/nesting substrate(s) in the vicinity of the bridge to attract displaced swallows prior to their return in spring. Alternative habitats should be species-specific and could include temporary structures for swallows and/or traditional purple martin houses.
7. Restore, rehabilitate, and/or preserve habitats that will benefit swallows.
8. Injured swallows may be taken to an authorized wildlife rehabilitation facility.
9. Dead swallows that are retrieved should be disposed of appropriately either by burial or in a landfill if allowable.

Contacts

Send notifications to the Migratory Bird Program at the appropriate U.S. Fish and Wildlife Service Regional Office:

Pacific Regional Office (R1)
U.S. Fish and Wildlife Service
911 NE 11th Ave.
Portland, Oregon 97232

Northeast Regional Office (R5)
U.S. Fish and Wildlife Service
300 Westgate Center Drive
Hadley, Massachusetts 01035-9589

Southwest Regional Office (R2)
U.S. Fish and Wildlife Service
P.O. Box 1306
Albuquerque, New Mexico 87103-1306

Mountain-Prairie Regional Office (R6)
U.S. Fish and Wildlife Service
134 Union Boulevard
Lakewood, Colorado 80228

Midwest Regional Office (R3)
U.S. Fish and Wildlife Service
5600 American Blvd. West, Suite 990
Bloomington, Minnesota 55437-1458

Alaska Regional Office (R7)
U.S. Fish and Wildlife Service
1011 E Tudor Rd #200
Anchorage, Alaska 99503

Southeast Regional Office (R4)
U.S. Fish & Wildlife Service
1875 Century Blvd., Suite 400
Atlanta, Georgia 30345

Pacific Southwest Regional Office (R8)
U.S. Fish and Wildlife Service
2800 Cottage Way W-2606
Sacramento, California 95825