



OFFICE OF HOUSING

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-8000

To: MBA Environmental Working Group

From: Sara Jensen

Date: September 1, 2026

Subject: Migratory Bird Treaty Act and HUD 221(d)(4)

HUD has reviewed the MBA's August 13th Letter on HUD 221(d)(4) projects and the Migratory Bird Treaty Act (MBTA). HUD agrees with the summary of legal opinions and guidance memos presented in the letter and plans to defer to the United States Fish and Wildlife Service (USFWS) with respect to Memorandum M-37050. We have reviewed HUD's MBTA implementation in the 221(d)(4) program to better understand the issue.

First, we examined the six example projects the MBA team sent. We pulled additional examples from HEROS and found 26 reviews that contain overly broad statements regarding the MBTA such as this:

"The property contains many mature trees and other vegetation where migratory birds may nest; therefore, project activities which include vegetation removal should occur outside of the peak nesting period of March through August to avoid destruction of individuals or eggs. However, if land clearing activities must be conducted during this time, a survey for active nests should be conducted by a qualified biologist no more than 7-10 days prior to commencing work."

Interestingly 24 of the 26 projects with this type of statement are from the same two consulting firms. Most of the projects are in Texas or Minnesota. For some projects, the consultants include more complex analyses in biological opinion documents. However, the consultants did not include this nuance in the HEROS summary sections, and some HUD staff wrote these recommendations as requirements into Firm agreements.

It's important to note that several of the projects also include restrictions related to species covered under the Endangered Species Act, which are not impacted by Memorandum M-37050. For example, Tapestry at Shelby Farms has restrictions on removing suitable roost trees for the tricolored bat between May 15 to July 31st (although tree clearing could proceed if a survey following USFWS guidelines show no bats). This is required by USFWS to meet the May Affect, Not Likely to Adversely Affect Determination. Tapestry Cahaba, Lookout Residences, and Wichita Apartments have similar ESA restrictions.

Similarly, Memorandum M-37050 does not affect the Bald and Golden Eagle Protection Act, so it may be appropriate to impose restrictions to protect those birds if on site.

We found a few examples where consultants appropriately considered restrictions for migratory birds. In one example, in Omaha, Nebraska, the consultant included a desktop species review with site-specific habitat and species-specific descriptions and analyses for both listed endangered species and potential migratory birds. The findings and conclusions indicated that migratory birds had potential to be at the proposed project site based on geographic area but were excluded based on a review of a detailed existing habitat assessment compared with species-specific suitable habitat. In a second example, also

for a project in Omaha, Nebraska, but conducted by a different consultant, the consultant's analysis included site-specific habitat assessment as well as guidance from USFWS as a result of consultation. In this example, it was determined that there was both suitable habitat and a potential for bald eagles to be located in the vicinity of the project. The consultant's findings indicated that the tree removal restrictions required by USFWS for a listed bat species were also adequate to avoid potential impacts to bald eagles. In this case, the tree removal restrictions were warranted for both ESA and Bald Eagle considerations (the bald eagle is a migratory bird with additional protections specific to bald and golden eagles).

Next Steps

- We recommend that lenders impacted by this issue check in with their consultants about needing a more specific MBTA analysis and determination that ties to current USFWS guidance and avoids overly broad statements like the one quoted above. Lenders and consultants can reach out to our team with any questions.
- HUD will train multifamily staff on the need to discern between requirements (for example, actions needed to reach a "May Affect Not Likely to Adversely Affect" determination under the Endangered Species Act) and recommendations. We will ask HEROS preparers to reach out to the environmental team for technical assistance if this comes up in an environmental review.
- We agree that HUD needs to update the language in its Environmental Assessment Factors Guide with respect to migratory birds and have recommended that it link to USFWS guidance since that guidance frequently changes. We have submitted this suggestion to the HUD staff that manage the HUD exchange.
- Please alert us if HUD needs to update HEROS mitigation requirements related to MBTA for any specific projects that have not yet started or are under construction.

Specific Projects Submitted by MBA:

Name	City/State	Restriction	Comment
Tapestry Cahaba	Birmingham, AL	Migratory Birds- recommend no tree clearing March-August PLUS , ESA restrictions on Bats including tree removal only October -March and Best Management practices	Included in Wildlife EA Factor Analysis ESA Section
Tapestry Shelby Farms	Cordova, TN	Migratory Birds- recommend no tree clearing March-August PLUS , ESA restrictions on Tricolored Bats.	Included in Wildlife EA Factor Analysis ESA Section

		No tree removal May 15-July 31 and specific light fixtures	
Bienville Crossing at MidCity	Monroe, LA	Did not see restrictions related to ESA or Migratory Birds	This project is marked 'canceled' in HEROS
Oaks on Riverside	Bryan, TX	Migratory Birds—recommend no tree clearing March-August	Included in ESA section
Lookout Residences	San Antonio, TX	Migratory Birds—recommend no tree clearing March-August PLUS , ESA restrictions on Tricolored Bat. No tree removal between May 1 and July 15.	Included in Wildlife EA Factor Analysis ESA section
Wichita Apartments	Wichita, KS	Migratory Birds—recommend no tree clearing March-August PLUS , ESA restrictions on the Tricolored Bat. No tree removal between May 15 and July 31 st .	Included in Wildlife EA Factor Analysis ESA section