



**Late-Filed Exhibit 22**

Migratory Bird Plan

**Subject:** MIGRATORY BIRD PLAN



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ENVIRONMENTAL PLANS

**Owner:** Environment – Large Construction Projects Management

**ONEOK CHERRY CREEK PIPELINE CONVERSION PROJECT  
MIGRATORY BIRD PLAN  
REV. 0**

April 2018

## 1. INTRODUCTION

ONEOK, Partners, L.P., its divisions, subsidiaries and affiliates (ONEOK) developed this Migratory Bird Conservation and Compliance Plan (Plan) to outline measures it will implement to avoid, minimize, and reduce possible impacts on migratory birds. Conservation measures were developed in consideration of statutory authority, regulatory guidance, and through experience with state and federal agencies on past projects in the region. The Plan demonstrates a good-faith effort by ONEOK to protect species of concern and achieve compliance with regulations as they relate to the Cherry Creek Pipeline Conversion Project (Project) as described below.

## 2. REGULATORY FRAMEWORK

This Plan was developed in consideration of federal and state laws including the Migratory Bird Treaty Act (MBTA), Federal Executive Order 13186 (EO 13186), the Bald and Golden Eagle Protection Act (BGEPA) as well as agency guidance. This regulatory framework is defined and described in this section as it applies to the Project.

### 2.1 Migratory Bird Treaty Act and Federal Executive Order 13186

The MBTA prohibits the “take” of individual birds, their eggs and chicks, and active nests. For purposes of the MBTA, “take” is defined as “to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, wound, kill, trap, capture, or collect” (50 Code of Federal Regulations (CFR) 10.12). Unlike the federal Endangered Species Act, the MBTA does not include harassment or destruction of habitat in its list of prohibitions or within its definition of take. The MBTA applies to migratory birds that are identified in 50 CFR 10.13 (defined hereafter as “migratory birds”). Removal of any active migratory bird nest or any structure that contains an active nest (e.g., tree) where such removal results in take is prohibited. Activities, intentional or unintentional, resulting in take of migratory birds are prohibited unless otherwise permitted by the U.S. Fish and Wildlife Service (FWS) (e.g., authorization for incidental take of a federally listed migratory bird).

While the MBTA has no provisions for allowing unauthorized take, the FWS realizes that some birds may be killed even if all reasonable and practicable conservation measures to protect them are used. The FWS carries out its mission to protect migratory birds through investigations and enforcement; by fostering relationships with individuals, companies, and industries that have taken effective steps to minimize their impacts on migratory birds; and by encouraging others to enact such programs. It is not possible to absolve individuals, companies, or agencies from liability even if they implement avian mortality avoidance or similar conservation measures. However, the FWS focuses its resources on investigating and prosecuting individuals and companies that take migratory birds without identifying and implementing all reasonable, prudent, and effective measures to avoid that take.

Federal EO 13186 was issued in 2001 to provide further direction to federal agencies regarding implementation of the MBTA. Federal EO 13186 states that when evaluating impacts on migratory birds under the MBTA, federal agencies should place particular importance on species of concern, priority habitat, and key risk factors.

### 2.2 Bald and Golden Eagle Protection Act

The Bald and Golden Eagle Protection Act (BGEPA) provides protection to bald and golden eagles in addition to the MBTA. The BGEPA prohibits the take; possession; sale; purchase; barter; offer to sell, purchase, or barter; transport; export; or import of any bald or golden eagle, alive or dead, including any part, nest, or egg, unless allowed by permit (16 USC 668(a)). “Take” under this statute is defined as to pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, or molest or disturb (50 CFR 22.3). “Disturb,” in turn, is defined as to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, (1) injury to an eagle; (2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior; or (3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior.

### **3. MIGRATORY BIRD SPECIES POTENTIALLY UTILIZING THE PROJECT AREA**

Although the MBTA provides protection for all migratory birds, the FWS developed lists of Birds of Conservation Concern (BCC) to foster proactive conservation actions by federal and state agencies and private parties by focusing first on species of concern (FWS, 2008). In addition, the United States is divided into Bird Conservation Regions (BCRs); each BCR has a list of birds present or possibly present within the region that are considered BCC. The Project is located within BCR 11 or Prairie Potholes and BCR 17 or Badlands and Prairies (U.S. NABCI Committee, 2000). ONEOK used this list as a starting point for prioritizing bird conservation measures.

### **4. POTENTIAL CONSTRUCTION IMPACTS ON MIGRATORY BIRDS**

The Project is most likely to impact migratory birds if construction and operation activities occur during the nesting season. Within the project areas, birds generally nest from April through July. Vegetative clearing during the nesting season would increase the potential for the Project to result in the take of a migratory bird. Typically, take from pipeline construction is not of adult birds or juveniles that have fledged from the nest because they are mobile and avoid project-related activities; instead, take is typically of eggs and nestlings due to nest destruction and loss of young.

### **5. PLAN IMPLEMENTATION AND PROPOSED CONSERVATION MEASURES**

This section describes conservation measures ONEOK will implement during construction of the Project, all of which focus on efforts to minimize potential impacts on migratory birds.

#### **5.1 Points of Contact for Plan Implementation**

The Plan identifies actions and conservation measures that will facilitate compliance with the MBTA during Project construction. While it is the responsibility of each member of the Project team to comply with the Plan, ONEOK also expects that all Project staff will notify the Manager - Environmental when an active migratory bird nest is identified so that appropriate protection measures can be implemented, as described in more detail below.

Points of contact for plan implementation can be found in Appendix B.

#### **5.2 Environmental Training**

Prior to initiating pre-clearing activities and construction, ONEOK will conduct environmental training for company and contractor supervisory personnel. The training program will include conservation measures described within this Plan. In addition, ONEOK will provide large-group training sessions before each crew commences construction with periodic follow-up training for groups of newly assigned personnel. Contractors will be obligated to comply with the conservation measures and protect active nests or face disciplinary actions, including dismissal from the Project.

In addition, Project staff will be informed that they should assume that any active bird nest they encounter should be protected unless a qualified avian biologist determines the nest need not be protected. If additional active nests are identified after pre-clearing surveys, the additional nests must be brought to the attention of the Points of Contact identified in section 6.1, so that appropriate conservation measures can be implemented.

#### **5.3 Surveys**

This section provides descriptions of the surveys and a summary of the methods for both aerial and ground-based surveys that could be completed in support of this Plan depending on construction schedules and scope.

#### 5.3.1 Aerial Surveys

Aerial surveys would be conducted prior to construction to identify raptor nests within approximately 1 mile of the Project. Aerial surveys will determine whether the raptor nests are active, which will be verified if possible with ground surveys.

#### 5.3.2 Pre-Clearing Surveys

Where constructing the Project outside of the peak nesting season for migratory birds is not feasible, ONEOK will conduct ground surveys to identify migratory bird nests that could be impacted by construction activities. The peak nesting season for migratory birds in the Project area begins April 15 and ends July 30 at which time surveys will cease. The survey program will be implemented with support of trained biologists with experience in bird identification (hereinafter referred to as Avian Biologist).

The boundaries of the project workspace and additional or extra workspace areas will be demarcated prior to clearing and grading. Through frequent communication and coordination between the nest surveyor/Avian Biologist, civil survey, and the construction crews, avian pre-clearing surveys will typically be completed 2 to 5 days ahead of clearing/construction but no more than 14 days ahead of clearing/construction, where feasible.

Surveys will occur within the planned construction workspace and along access roads where project traffic could impact nesting birds such as vegetated two-tracks or newly established roads. Based on the expertise of the Avian Biologist, and with authorization from ONEOK, previously disturbed areas such as active farmland, developed land, and other intensively used areas may be excluded from surveys since use of these areas for nesting by migratory birds is unlikely.

Along private access roads that occur outside of the aerial survey corridor for raptor nests described in Section 6.3.1, visual surveys will be conducted for raptor nests within line of site of the road. Landscape barriers between any nests and the access road will sufficiently buffer noise or visual disturbance on nesting raptors that could occur as a result of project-related traffic.

Conservation measures to be implemented around nests identified during these surveys are described below. Upon completion of surveys and marking of active nests and associated buffers as discussed below, the surveyed area found free of active nests will be available for construction.

### 5.4 Activity Restriction Buffers

Varying activity restriction buffers around active nests will be utilized as conservation measures for the Plan. The buffers that will be implemented based on the species of bird or class of bird are described within the following sections.

#### 5.4.1 Birds of Conservation Concern

For nests of BCC, a buffer will be placed 25 feet around active nests. Construction activities within the buffer will be avoided where feasible. If necessary to meet key Project objectives, ONEOK may authorize limited activity within the buffer to move equipment along the construction right-of-way and through a nest buffer in order to facilitate construction in adjacent areas. See section 6.5, Nest Monitoring for more information.

#### 5.4.2 Raptor Species

For raptor nests, spatial buffers and seasonal timing restrictions will be placed around active nests in accordance with Table 1 below. No eagle nest may be destroyed by Project activities without a permit from the FWS, regardless of whether the nest is inactive or active per the BGEPA.

Table 1			
CHERRY CREEK PIPELINE CONVERSION PROJECT			
Raptor Species Active-Nest Buffer Distances and Dates <sup>a</sup>			
Species Common Name	Species Latin Name	Spatial Buffer (miles)	Seasonal Timing Restrictions
American Kestrel	<i>Falco sparverius</i>	0.125	April 1 - August 31
Bald Eagle <sup>b</sup>	<i>Haliaeetus leucocephalus</i>	0.5	January 1 - August 15
Boreal Owl	<i>Aegolius funereus</i>	0.25	February 1 - July 31
Burrowing Owl	<i>Athene cunicularia</i>	0.25	April 1 - September 15
Common Barn Owl	<i>Tyto alba</i>	0.125	February 1 - September 15
Cooper's Hawk	<i>Accipiter cooperii</i>	0.25	March 15 - August 31
Eastern Screech -owl	<i>Megascops asio</i>	0.125	March 1 - August 15
Ferruginous Hawk	<i>Buteo regalis</i>	1.0	March 15 - July 31
Golden Eagle	<i>Aquila chrysaetos</i>	0.5	January 15 - July 31
Great Gray Owl	<i>Strix nebulosa</i>	0.25	March 15 - August 31
Great Horned Owl	<i>Bubo virginianus</i>	0.125	December 1 - September 31
Long-eared Owl	<i>Asio otus</i>	0.25	February 1 - August 15
Merlin	<i>Falco columbarius</i>	0.5	April 1 - August 31
Northern Goshawk	<i>Accipiter gentilis</i>	0.5	March 1 - August 15
Northern Harrier	<i>Circus cyaneus</i>	0.25	April 1 - August 15
Northern Pygmy-Owl	<i>Glaucidium gnoma</i>	0.25	April 1 - August 1
Northern Saw-whet Owl	<i>Aegolius acadicus</i>	0.25	March 1 - August 31
Osprey	<i>Pandion haliaetus</i>	0.25	April 1 - August 31
Peregrine Falcon	<i>Falco peregrinus</i>	0.5	March 1 - August 15
Prairie Falcon	<i>Falco mexicanus</i>	0.5	April 1 - August 31
Red-tailed Hawk	<i>Buteo jamaicensis</i>	0.25	March 15 - August 15
Sharp-shinned Hawk	<i>Accipiter striatus</i>	0.25	March 15 - August 31
Short-eared Owl	<i>Asio flammeus</i>	0.25	March 15 - August 1
Swainson's Hawk	<i>Buteo swainsoni</i>	0.25	May 1 - August 31
Western Screech-owl	<i>Megascops kennicottii</i>	0.125	March 1 - August 15

<sup>a</sup> Adopted Stewart, R. E. 1975. Breeding Birds of North Dakota. Tri-College Center for Environmental Studies, Fargo, North Dakota.

<sup>b</sup> The National Bald Eagle Management Guidelines (FWS 2007) call for a 660-foot-radius buffer around bald eagle nests. However, the Guidelines stipulate that in open areas without forest or topographic buffers, as is the case in many western states, the buffer may be increased to protect eagle nests. The 0.5-mile buffer distance in the table is adopted from the FWS' North Dakota Ecological Services Field Office which would also apply to winter roosts for construction activity outside the nesting season.

5.4.3 Other Migratory Bird Buffer Restrictions

For nests of other bird species not described in the preceding sections, a buffer will be placed 5 feet around active nests. In instances where this buffer cannot be implemented, ONEOK will attempt to reconfigure the workspace to leave the vegetation containing the nest undisturbed.

## 5.5 Nest Monitoring

Active nests will be monitored by Avian Biologists and buffers will be maintained until the young fledge. Nests will generally be visited every 7 to 10 days once identified. Once a nest has been determined to be inactive by the Avian Biologist, the nest buffer will be removed and construction activities may continue without restriction.

If a nest buffer and its associated restrictions pose a substantial risk to key Project objectives then ONEOK may determine that construction activities can proceed through a buffer (i.e., pass-through), avoiding direct impact to the nest. Where ONEOK authorizes a pass-through of a non-eagle raptor buffer or BCC buffer, the Avian Biologist will first attempt to determine the stage of development of the young in the nest. If young are near fledging, ONEOK may choose to maintain the buffer until the young fledge upon evaluation of alternatives. If the nest is at an earlier stage of development (e.g., eggs just laid, young just hatched), construction equipment will be allowed through the buffer in an escalating frequency and duration. As the disturbance in the buffer is escalated, the nest will be monitored by the Avian Biologist to determine if the adults or young are being disturbed by construction activities. If the Avian Biologist notes that bird activities appear to be such that the success of the nest is at risk, construction actions will be reduced to a point where nest success is not at risk from construction.

Nest monitoring may also include determining that construction activities are not visible from a non-eagle raptor nest location. On a case-by-case basis ONEOK, with input from the Avian Biologists, may determine that construction can proceed through the non-eagle raptor buffer without disturbing the nest. If this similar exception is to be applied to an eagle nest, vigilant monitoring of the nest must occur in order to ensure the eagles are not disturbed.

If non-raptor nests are identified adjacent to the construction workspace after ground clearing activities have commenced in an area, ONEOK will attempt to limit extensive disturbance in the area, but will assume that because the birds initiated nesting after construction began in an area that the nesting individuals are acclimated to construction-related noise and disturbance and, therefore, additional protections will not be implemented.

## 6. CONCLUSION

ONEOK is committed to implementing the pre-construction survey program, environmental training for key construction personnel, appropriate spatial buffers, seasonal timing restrictions, and nest monitoring. ONEOK expects its Project team to take reasonable, prudent, and effective measures towards protection of migratory birds. While the MBTA is the responsibility of all members of the Project team, ONEOK has designated key staff (identified in Appendix B) to oversee and help implement this Plan. Please contact these individuals if you have questions regarding implementation of the Plan.

**Owner:** Environment – Large Construction Projects Management

## 7. LITERATURE CITED

U.S. Fish and Wildlife Service (FWS). 2008. Birds of Conservation Concern 2008. U.S. Fish and Wildlife Service, Division of Migratory Bird Management. 87 pp.

U.S. Fish and Wildlife Service (FWS). 2007. National Bald Eagle Management Guidelines.

U.S. NABCI Committee. 2000. North American Bird Conservation Initiative Bird Conservation Regions map. U.S. Fish and Wildlife Service, Arlington, Virginia. <http://nabci-us.org/resources/bird-conservation-regions-map/>

**Owner:** Environment – Large Construction Projects Management

## **APPENDIX A**

### **Project Description**

DATE 4/7/2018

The Project will convert approximately 45 miles of pipeline in Williams and McKenzie Counties, North Dakota. As a part of the pipeline conversion, two new remote actuators will be installed at two existing above ground manually operated valve settings, one located approximately 1.7 miles north of the Missouri River and one 0.5 mile south of the Missouri River. Additionally, in-facility piping will be constructed at ONEOK's Lonesome Creek and Stateline plants.

**Owner:** Environment – Large Construction Projects Management

**APPENDIX B**  
**Key Points of Contact**

Position	Name	Phone #	Responsibility
ONEOK Project Manager	Mitchell Shields	(918) 732-4886 (office) (612) 532-1727 (cell)	Responsible party for implementing the Plan
ONEOK Environmental Manager	Loretta Earnest	(918) 732-1320 (office) (918) 519-8618 (cell)	Primary Point of Contact
ONEOK Construction Manager	TBD	TBD	Key point of contact in the field during construction
Environmental Inspector	TBD	TBD	Key point of contact in the field during construction