



# Ideas to Increase Coastal Nesting Bird Protection in Texas

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The contents herein do not necessarily reflect the views or opinions of CBBEP or other organizations that may have provided funding for this project, No. 2542.

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Cover photo: San Jose Island. Credit: Kristina Alexander



# Ideas to Increase Coastal Nesting Bird Protection in Texas

## Introduction and Background

The coast of Texas, including its islands, is one of the United States' most important nesting areas for coastal birds. Changed conditions, such as an increased population in Texas coastal cities, more boats with more power, and reduced nesting sites due to sea level rise and other natural conditions, have led to concern about nesting success in those areas.

A grant from the Coastal Bend Bays and Estuaries Program (CBBEP) supported a project to see what could be done to increase nesting bird protection on the Texas coast. In particular, CBBEP funded an analysis of the laws of Texas pertaining to coastal bird protection to see what legal protections were in place. A *Law Enforcement Guide to Reducing Human Interference with Coastal Nesting Birds* was prepared summarizing the applicable laws and identifying affected birds. The *Guide* was circulated to relevant officials and experts for comments before a final version was prepared. Copies are available to law enforcement, at key locations, and online.

Additionally, wildlife enforcement officials and conservation groups met with the researcher in December 2024 in a meeting hosted by CBBEP to identify issues and propose solutions to human interference with rookery islands and coastal nesting sites. This group is referred to as the *Working Group* in this document which compiles ideas from the Working Group along with ideas generated during the legal research conducted under this grant. The document is divided into two categories: ideas within the existing authority for the State of Texas; and ideas for which a statutory or regulatory change is required. It is understood that even if the State has the legal authority to make certain changes, it may lack resources, including the political capital, to do so.

## I. Ideas under Existing Authority

### A. Scientific Study

#### 1. *Conduct a scientific study of coastal nesting birds*

Texas Parks and Wildlife Department (TPWD) is authorized under the Texas Parks & Wildlife Code § 61.051(a)(6) to conduct scientific studies of game animals, which designation includes shorebirds of all varieties. Tx. Parks & Wild. § 64.001. TPWD could investigate whether reductions in bird populations among those that nest on the Texas coast are due to preventable human interaction and what types of interactions cause harm.

#### **Benefits:**

- There is uncertainty among the scientific community as to which human actions disrupt nesting. For example, it would be useful to know the distance at which boaters begin to disturb nesting birds in order to place signs at an effective distance.
- Identifying the distance would allow a regulation to define “disturb” to make enforcement easier by making approaches of less than that distance a per se violation of disturbing nesting birds.
- The study would allow the identification of which rookery islands should be named “scientific areas,” per Section I.B.1, *below*.

## B. Designate Specific Habitat

### 1. *Scientific Areas*

Texas Parks & Wildlife Code § 81.501 authorizes TPWD to establish *scientific areas*, which, as those areas are not defined by the law, could be construed broadly to include coastal bird nesting sites. Scientific areas which are “coastal in character” are also identified as *coastal preserves* within Texas regulations. 31 TAC § 26.3. TPWD could identify certain highly productive rookery islands as *scientific areas* and *coastal preserves* as having scientific, educational, and ecological value for the purpose of conserving nesting birds. The designation could be effective only during nesting months to limit impact of the designation on other recreational activities.

While TPWD has the authority to take this action, the law allows the agency to use only the funding specifically appropriated for this use. Tx. Parks & Wild. § 81.506. It is unclear whether TPWD could act without a specific appropriation, or whether TPWD may make the designation provided it did not use State funds – for example, by relying on studies provided by other sources.

#### **Benefits:**

- The public could act with heightened care near a place identified as a *scientific area* or *coastal preserve* perceiving its protection as significant.
- Once scientific areas are designated, policies and rules could be promulgated, under Tx. Parks & Wild. § 81.502, to provide stricter rules to protect nesting birds in scientific areas and coastal preserves than exist for the coast in general.

### 2. *Wildlife Management Areas*

TPWD could identify key rookery islands as *wildlife management areas* under Tx. Parks & Wild. § 81.401 or *wildlife protection areas* under Tx. Parks & Wild. § 81.003. To limit concerns that such a designation would restrict hunting, fishing, or other recreational activity, the designation could be effective only during nesting months. Unlike the law pertaining to scientific areas, the Code does not suggest that further appropriation is needed for TPWD to establish such areas. Tx. Parks & Wild. § 81.401(c).

#### **Benefits:**

- Rules pertaining to *take* are stricter within wildlife management areas than for areas without that designation. § 81.006.
- Restrictions on recreational activities can be placed on wildlife management areas. § 81.405.

## C. Website Revisions

### 1. *Modify websites to include more information*

State agencies should ensure that information on State websites is consistent and accurate. Providing cross-links between websites of different agencies, especially TPWD and the Texas General Land Office (GLO), as well as within different sections of websites would allow uniform information.

Cross-referencing is especially important between TPWD and GLO. For example, TPWD and GLO websites have clear references describing harm caused when nesting birds are disturbed, but the information is slightly different. Accurate cross-references will be challenging as the underlying laws and regulations vary depending on how the birds are classified under State law: *game bird*, *nongame bird*, and *migratory game bird*.

a. Revise the structure of the information on the websites. Introduce the fact that almost all birds are migratory birds, and accordingly, they are protected under federal law. Then state that for many migratory birds hunting is allowed with the proper license and during the proper season. When that season is over or if you are not a licensed hunter in the act of hunting, it is illegal to harm the birds, their eggs, or nests. That structure makes it easier to introduce birds that cannot be hunted for different reasons. *See Appendix B* for how this might look.

b. Include links to and facts from the *Law Enforcement Guide to Reducing Human Interference with Coastal Nesting Birds*, produced under this grant from the Coastal Bend Bays & Estuaries Program.

c. Provide information to people getting a license or registration from TPWD, such as fishing guides, boaters, anglers, and hunters, describing the harm caused by interfering with nesting birds. Share this information at commercial entities such as places selling fishing gear or bait. Many people, if not most people, do not know that causing a bird to fly off its nest could lead to abandoned nests and dead birds. The Working Group recommended that the information given to the public should make an emotional connection between how certain actions impact nesting birds. Information would explain *why* certain behavior is not allowed rather than just banning certain actions. For example, if TPWD posted a photo showing a chick being carried off by a predator because the parent was chased from the nest, it likely would have a higher impact than a sign stating Do not disturb nesting birds.

## 2. Modify websites to include more accurate information

a. TPWD and GLO cross-linked websites should have a prominent link to coastal nesting bird data, such as the mapping information described in Section I.C.2.e, *below*. An example of internal inconsistency is on the TPWD FAQ page, Private Fishing Ponds, (<https://tpwd.texas.gov/faq/landwater/fisheries/#f7>) which correctly states that migratory birds are protected under federal law and that it is illegal to “harm them in any way.” This information does not appear on all pages describing migratory birds, including in the Outdoor Annual, arguably the most public-forward place people get information about interactions with wildlife, as it is used by hunters to find seasons and limits.

b. Make clarifications and corrections to “Species Illegal to Hunt: Migratory Game Bird [sic].” (See <https://tpwd.texas.gov/regulations/outdoor-annual/hunting/migratory-game-bird-regulations/illegal-species>.) Note that Texas has very few game birds that do not migrate – such as turkey and quail – rendering the category *migratory game bird* not meaningful, perhaps further demonstrated by the lack of a specific enforcement scheme

for migratory game birds and the confusion in the Outdoor Annual regarding these species. *See* II.A.2, *below*, for a discussion on the enforcement scheme.

- i. Change the name to “Bird Species Illegal to Hunt” to avoid inaccuracies on the list which includes many nongame species. It would also eliminate the error in the title – “Bird” should be plural.

- ii. Clarify by stating that harming or injuring these birds or their nests and eggs, not just shooting at them (as is stated on the webpage) is illegal absent the correct license or permit. Refer to the federal Migratory Bird Treaty Act (MBTA) as a source.

- iii. Correct the list to include all protected species rather than only eight. For instance, the list does not include the Piping Plover, a species listed under the ESA as threatened and state-listed as endangered, and also designated as a migratory game bird (*see* Tx. Parks & Wild. § 64.021(1) (listing “wild plovers” in the definition)).

- iv. If the name of the list is not changed, remove nongame species included as “migratory game bird[s]” that are illegal to hunt, because, by definition, they are not game birds. For example, the list includes White Pelican, Great Egret, Double-Crested Cormorant. Each is a nongame species.

c. Update and synchronize online information identifying nesting island locations. Update GLO’s nesting islands layer which includes data more than 10 years old and no longer accurate, then share the updated data to identify islands people should avoid during nesting season, clearly identifying those islands by coloring them red from March through August. Add GPS coordinates of the islands where trespass is illegal.

d. Correctly describe which actions are prohibited for threatened or endangered species – State law prohibits “capture, trap, take, or kill” (Tx. Parks & Wild. § 68.015) – to include the federal terms: “harass, harm, pursue, hunt, shoot, wound, or collect.” (*See* 16 U.S.C. § 1532(19) (definition of “take”); 16 U.S.C. § 1538(a) (prohibited acts)). *See* Sec. II.A.1, Sec. II.B, *below*, for more on the differences between Texas law and federal law.

e. Establish a correct uniform list of migratory game birds. The lists of *migratory game birds* in the Texas code and the Outdoor Annual are not the same. The 2024-2025 Outdoor Annual (printed version) lists *migratory game birds* as all wild species of: Coots, Doves, Ducks, Geese, Rails, Gallinules, Mergansers, Sandhill Cranes, Snipe, and Woodcock. The [online version](#) of the Outdoor Annual adds Moorhens and Teal, but does not include Coots. The Texas code’s list of migratory game bird adds the following birds to these two lists: Brant, Plovers, Red-billed Pigeons, and Band-tailed Pigeons. Tx. Parks & Wild. § 64.021(1).

f. State in the Outdoor Annual that 1106 bird species in the United States are migratory but that licenses and seasons authorize hunting many of those birds. However, killing or injuring birds not consistent with the license and the season is illegal. In particular, two

pages of the Annual could be hyperlinked to that information: “Migratory Game Birds,” under “Seasons by Animal and Category” (<https://tpwd.texas.gov/regulations/outdoor-annual/hunting/seasons/statewide/>) and “General Rules: Migratory Game Bird” (<https://tpwd.texas.gov/regulations/outdoor-annual/hunting/migratory-game-bird-regulations/general-rules>).

### 3. Use Outdoor Annual to inform about coastal nesting birds

Add to the online Outdoor Annual in the section, “Seasons by County,” to include restrictions for coastal nesting birds. Include a calendar with red dates for when coastal birds are nesting and fledging, and green dates for when the “coast is clear” to make the point succinctly.

a. Graphics including species as well as types of nests could help inform people using the Outdoor Annual. For example, a photo of a scrape nest and a list of species that use scrape nests could help people understand that not all nests are made of twigs.

b. Revise the Outdoor Annual under “Seasons by Animal & Category” to include a category for birds that cannot be hunted or harmed without a specific permit, clarifying that a hunting license is not enough for certain species.

Referenced link: <https://tpwd.texas.gov/regulations/outdoor-annual/hunting/seasons/statewide/>

c. Create a wallet card based on the *Law Enforcement Guide to Reducing Human Interference with Coastal Nesting Birds* and add the card to the Outdoor Annual Printable Files section.

### 4. Revise TPWD website to provide “Best Practices” for migratory birds

a. The current language on the TPWD website reads “General Recommendations,” a term that does not capture the significance of the advice. For example, the website “recommends” that vegetation and ground disturbing activities “be phased to occur” outside the nesting season to avoid disturbing nesting birds and young in violation of the MBTA or state wildlife laws.

Referenced link

[https://tpwd.texas.gov/huntwild/wild/wildlife\\_diversity/habitat\\_assessment/laws.phtml](https://tpwd.texas.gov/huntwild/wild/wildlife_diversity/habitat_assessment/laws.phtml)

To appeal to those people trying to do the right thing, provide specific language how clearing brush after March 1 can remove both food and shelter for birds, causing birds not to nest or to leave a nest because it is failing. Additionally, consider adding information on how dogs chasing birds, or boaters that land too close, can cause a nest to fail, describing what that means.

Provide specific data on the number of birds (both species and total populations) that migrate along the Texas coast – perhaps in chart form – to show how important this area is.

- b. Include similar information on disturbing coastal nesting birds in the State Wildlife Action Plan.

#### D. Training

##### *1. Develop training modules for influential stakeholders in nesting bird protection*

The Working Group recommended adding training for different stakeholders.

- a. Provide data and legal information on coastal nesting birds, including charts and easily assimilated data, for fishing guides and commercial guides. Distribute this information with guide licenses as well as posting on websites.
- b. Develop a training module for Justices of the Peace, prosecutors, and judges to identify why human interference with a coastal nesting bird has a big influence on the ecology and economy of the coast, and to highlight laws and penalties relevant to coastal nesting birds.
- c. Work with the U.S. Coast Guard to explain the law enforcement structure of different coastal islands and the relative penalties for interfering with coastal nesting birds to encourage their enforcement help.

##### *2. Provide on-call assistance for law enforcement for bird identification*

A suggestion from a member of the Working Group is to provide law enforcement with a link to bird experts who could be reached to make enforcement easier. This could lead to easier prosecutions. For example, the bird expert could help the law enforcement officer identify whether an action “disturbed” a nest or “harmed” a bird. The experts also could identify species or identify nests to assist with prosecutions, enhanced fines, and recovery costs. The expert hotline could be staffed by skilled volunteers from coastal bird conservation groups.

#### E. Improved Signage

##### *1. Distribute educational signs and information*

Put educational signs and information at boat ramps with succinct information on why disturbing coastal birds while they are nesting adversely impacts bird populations. Educational information could also be available at boating- and fishing-related businesses.

- a. Include a QR code that links to a map with GPS coordinates identifying islands where nesting is occurring, as well as leased islands where trespassing is illegal. The Working Group suggested adding a map layer showing how those islands and coastlines have been reduced over the past 30 years.
- b. Ask boaters to video people and their vessels in the act of disturbing nesting birds. Provide a link for people to upload the video to the State for enforcement.
- c. Consider whether to include a QR code linking to relevant laws and penalties, rather than listing the laws on the sign. The Working Group was split on whether having the



laws and penalties listed on a sign was effective, with slightly more participants believing a short, clear message with a QR code would be more effective.

### *2. Create different signs for leased islands*

Landing on certain islands – especially those leased or owned – can be considered trespassing. The Working Group advised using a different sign – by shape, color, or wording – that identifies trespass would be a more effective way to inform the public as well as to help law enforcement.

### *3. Make signs informative, not threatening*

Signs posted near nesting bird islands could explain why certain behavior puts birds at risk rather than identifying what actions are prohibited. People may be more likely to act when they believe they are helping something, rather than just being told what to do. The Working Group agrees that not everybody will comply but that this would be an effective way to educate those who want to help.

Include a QR code that links to information identifying types of nesting birds and their nests to allow for the possibility that members of the public may not understand what to look for. The information could also explain the nesting habits of colonial nesting birds and why disturbing those birds can have a big impact on yearly populations, i.e. that many will not just build a nest somewhere else, or that predators attack when the birds flee the nests even temporarily.

## II. Ideas Requiring Regulatory or Statutory Change

### A. Revise Definitions in the Texas Parks & Wildlife Code and Related Regulations

#### *1. Update the definition of endangered*

The definition of *endangered* under Texas Parks & Wild. Code § 68.002(1) and 31 Texas Administrative Code § 69.21(4), uses obsolete language from a 1966 federal law that was repealed by the Endangered Species Act (ESA). Specifically, Texas law defines *endangered* to mean “wildlife indigenous to Texas” and “listed on the U.S. ‘List of Endangered Native Fish and Wildlife’.” Those terms were based on language that was repealed 52 years ago by the passage of the ESA. In particular, “List of Endangered Native Fish and Wildlife” was established under the federal Endangered Species Preservation Act of 1966 (*see* Pub. L. 93-205, § 14, 87 Stat. 903 (Dec. 28, 1973)) which was repealed in 1973. No such list has existed since then.

*Threatened* species should be defined. That term that did not exist under the 1966 federal law on which Texas modeled its language, so it is unsurprising it is not defined in Texas law. It is worth noting that the Texas Legislature amended Sec. 68.002 twice in the 52 years since the 1966 language was repealed, most recently in 1985, yet the definitions have not been harmonized with the ESA. The federal law requires state laws to be at least as protective of endangered and threatened species as the ESA.

#### **Benefits:**

- Consistency between federal and State law will aid enforcement as there will be just one standard for protecting endangered and threatened species.

- Amending State law to match current federal law will enhance protection for protected bird species by increasing the levels of protection for listed species, including threatened.

## 2. Redefine categories of bird species

Texas, like other states, divides birds into multiple categories to identify which birds can be hunted, and for other reasons. However, these categories are not used consistently within the law or guidance. The Texas Parks & Wildlife Code uses three main categories of birds – *nongame*, *game*, and *migratory game*. The Outdoor Annual includes two other categories, *unprotected species* and *upland game birds*. The current terms create the potential to misidentify a protected bird species as falling under an unprotected category, and perhaps making law enforcement a challenge. See *Appendix A* for a flowchart of the current laws protecting wild birds.

The Code could be amended to recategorize birds into more meaningful classifications that would be consistent with federal law. First, classify wild birds as *migratory* or not. Then, separate birds into *game birds* or *protected species*, referring to either endangered or threatened species. Revising the categories could offer clarity on how species are protected. See *Appendix B* for a flowchart showing the proposed revised protection scheme.

### Benefits:

- Meaningful categories of birds under State law will aid enforcement as the appropriate enforcement will be easier to identify.
- Consistent legal protection offered migratory birds between U.S. law and State law will aid enforcement and offer enhanced protection to the species.
- The change would make State efforts to protect birds by regulating seasons more straightforward.

To illustrate how the current system could confuse protection efforts, consider the Piping Plover. “Wild plover of all varieties” are within the Texas definition of *game birds*. Tex. Parks & Wild. § 64.001. Piping Plovers are also migratory birds, and wild plover are defined by the State as *migratory game birds*. Tex. Parks & Wild. § 64.021(1). However, the Piping Plover is a state-listed endangered species and federally-listed threatened species, meaning it also falls under the definition of a *nongame bird* under State law. Injuring, harming, disturbing, or harassing one, let alone hunting one, is prohibited under federal and State law. Yet it is not on the State list of migratory birds illegal to hunt. No hunting license would excuse killing a listed species, but to know this, someone would need to cross-reference more than one law to determine that the specific plover was in fact *not* a game bird nor a migratory game bird legal to hunt. Instead, Texas protects Piping Plover by not setting a hunting season, a passive form of protection that lacks directness.

- a. The definition of *nongame birds* (and *nongame animals*) in Texas law is too broad – including both nuisance animals and endangered species. In other words, nongame birds have the least *and* the most protection of birds in Texas, depending on the species. *Nongame* applies to those species of “wildlife... that are not classified as game animals, game birds, game fish, [or] ... *endangered species*....” Tex. Parks & Wild. Code §

67.001 (emphasis added.) This definition should also include *threatened species*, but see II.A.1 *above*.

b. Nongame species, according to the Outdoor Annual, have “no closed seasons, bag limits or possession limits” and require a hunting license to kill. It does not clarify that nongame species does not include nongame birds. See <https://tpwd.texas.gov/regulations/outdoor-annual/hunting/nongame-and-other-species>. The statement in the Outdoor Annual does not correctly describe the State and federal prohibitions on taking or injuring nongame birds. (See Tx. Parks & Wild. § 64.002(a).) Additionally, it is not an accurate description of taking endangered or threatened species. Hunting or taking an endangered or threatened species is illegal regardless of possessing a hunting license, for example.

To further the point, the list of nongame animals in the Outdoor Annual includes nuisance animals, such as rabbits, prairie dogs, and ground squirrels, for which takes are allowed “as needed.” While there are exclusions in the Outdoor Annual, such as not taking freshwater turtles for commercial purposes, those exclusions do not discuss endangered or threatened species.

c. Endangered or threatened species should not be included within nongame animals but should be recategorized as *protected species*. Establishing a new category under law for *protected species* would eliminate many conflicts and contradictions within the statutory definitions applied to birds. By defining *protected species* as federally- and state-listed endangered or threatened species, prohibited actions would be clearly separated from those applying to nongame species. The revised law would prohibit harming, harassing, injuring, disturbing, or killing a protected species to comport with the ESA. Note that if *protected species* were separated from the definition of *nongame birds*, Sec. 64.002 would need to be amended to apply to *protected species*.

d. Providing a regulatory definition of shorebirds (which also appears, incorrectly, in the Code as “shore birds” see Sec. 64.001) may provide clarity for protecting coastal nesting birds. It is unclear whether the term as used by the Legislature could be more broadly applied to birds nesting on the coast, but it seems unlikely. The common definition of a shorebird is a bird that frequents the coastline. It is assumed that the Texas Legislature intended the common definition to apply. Ornithologists categorize shorebirds as birds that feed at the coast, rather than nest there.

The difficulty in the context of protecting coastal nesting birds is that “shorebirds of all varieties” are defined as *game birds*, perhaps sending the message that the nesting activities of birds on the shores are not protected. Notably, this means that the prohibition on “disturbing a nest, eggs, or young” does not apply to shorebirds, as Texas Parks & Wildlife Code § 64.002(a)(3) expressly applies only to “a bird that is *not* a game bird” (emphasis added). Also, the prohibition on destroying “the nest, eggs, or young,” of game birds in Sec. 64.003, prohibits the wanton destruction of young birds or eggs, but does not prohibit injuring young birds, or killing birds in general.

e. Another inconsistency between the Texas Code and the Outdoor Annual is the list of *unprotected birds* in the Outdoor Annual. The Texas Code has a shorter list of those birds than does the Outdoor Annual, listing English sparrows, European starlings, and feral rock doves (pigeons) (Tx. Parks & Wild. § 64.002(b)). No hunting license is required for *unprotected birds* which may be killed at any time without violating the law, but if the Outdoor Annual list is incorrect or incomplete, it could cause confusion.

#### B. Clarify the Prohibitions in Statutes

The Texas Parks & Wildlife Code has an intertwined structure which is understandable as it was assembled over more than 50 years. However, typically, laws work better when they begin by defining general rules and then clarify the exceptions. Instead, the Code can be understood only by piecing together subcategories of birds – *nongame*, *game*, *migratory game*, *unprotected*, etc. – to understand what actions are prohibited. See *Appendix A* to see the current structure of Texas law enforcement.

Clear language would promote easier enforcement by providing both law enforcement and the public an easier understanding what actions are allowed. It is difficult to understand a rule by seeing only its exceptions. The Code could include clear language by first acknowledging that almost all bird species in Texas are migratory and that they are protected from injury or death unless there is a permit or license (to meet the federal requirements for migratory birds). Next, Texas could amend the Code to prohibit taking or destroying the nest, eggs, or birds of migratory birds (not just the *young*) and then use as the exception, “except as provided in this code,” to apply to hunting licenses and seasons. Further, the provisions regarding prohibited acts (such as found in § 64.002, § 64.003, § 1.101(5), § 68.015) could cross-reference each other explicitly, rather than require a search for what is meant by “except as provided by this code.” See *Appendix B* for a flowchart showing a proposed revised protection scheme.

a. The prohibitions regarding migratory birds in the Texas Code are not consistent with the MBTA. The MBTA makes it illegal to kill or *injure* the *birds*, nests, and eggs of migratory birds – game or otherwise – outside of season and without a license. See 16 U.S.C. § 703(a); 50 C.F.R. § 10.12. It is not restricted to *young* birds. The MBTA mandates that state provisions be at least consistent with or more protective than the federal requirements. 16 U.S.C. § 708.

In comparison, Texas has a general rule about hunting or possessing migratory game birds: it can be done only as provided by regulation. Tx. Parks & Wild. § 64.026. However, the regulations do not prohibit the specific actions found in the MBTA but instead describe methods and means of hunting. The nongame and game bird provisions of the Texas Parks & Wildlife Code come close to the MBTA standard but do not appear to provide the same level of protection. Sec. 64.002 prohibits killing or injuring nongame birds or disturbing the young of nongame birds. And Tx. Parks & Wild. § 64.003 prohibits destroying or taking the nest, eggs, or young of game birds “except as provided in this code.” However, because migratory birds can be both nongame and game birds in Texas, both provisions apply to migratory birds without saying so, and neither provision is as protective as the MBTA. If the existing language were amended to be more consistent with the MBTA would be to apply *disturb* to all birds, game and nongame,



except during hunting season, and then create an exception that the *young* (and the nest and eggs) cannot be disturbed regardless of season.

b. Also, as mentioned in Sec. II.A.1, the State definition of *endangered* is inconsistent with federal law, as are the corresponding prohibitions regarding those species. The specific prohibitions in Sec. 68.015, prohibit certain actions related to endangered (but not threatened species), typically described as a *take*. Two, more general, provisions of Texas law also address take: Sec. 1.101; and Sec. 64.002.

Texas law prohibits the following actions regarding endangered birds: “capture, trap, take, or kill” or attempt to do those things. Tx. Parks & Wild. § 68.015. *Take* is defined by the State as “collect, hook, hunt, net, shoot, or snare” (and attempting to do those things). Tx. Parks & Wild. § 1.101. In contrast, the ESA defines *take*, to mean “to *harass*, *harm*, pursue, hunt, shoot, *wound*, kill, trap, capture, or collect” (or attempt those actions). 16 U.S.C. § 1532(19) (emphasis added). Take is illegal under the ESA. The difference between the two is that State law lacks language banning harassing, harming, or wounding ESA-listed birds. Yet the ESA requires state laws to be at least as strict or stricter than the federal law. 16 U.S.C. § 1535(f).

If it is argued that the provisions under Texas Parks & Wild Code § 64.002 fill the gap by prohibiting injuring nongame birds or disturbing the eggs, nest, or *young* of nongame birds, Texas is left with what appears to be overlapping, contradictory, and incomplete statutory provisions compared to the ESA. The fact that “disturb” in Sec. 64.002(a)(3) applies only to the *young* of nongame birds is an example how Sec. 64.002 does not offer the equivalent protections under the ESA. Additionally, *injure*, as used in Sec. 64.002(a)(1), does not cover as many acts as *harass* under the ESA. Notably, Sec. 68.015 does not include the phrase “except as provided in this code,” supporting the interpretation that these other take provisions in Texas law do not apply to endangered species.

## C. Change Penalties

### 1. Allow enhanced penalties for violations in Environmentally Sensitive Areas

As discussed above, bird rookeries are defined as *environmentally sensitive areas* under 31 TAC § 19.2: “Environmentally sensitive area includes *bird rookeries*, endangered and threatened species (flora and fauna) habitat, ... beaches, dunes, or any other area protected or managed for its natural resource value” (emphasis added). However, the law does not allow a penalty enhancement for violations occurring in those areas, such as human interference with coastal nesting birds. A regulatory change to the penalty scheme could allow penalty enhancement for violations occurring in an *environmentally sensitive area*. A regulatory definition of bird rookeries would be useful if the enforcement scheme were revised in this way.

a. At present, no restrictions are placed on boaters, fishers, or recreational users near bird rookeries. The regulations for *environmentally sensitive areas* impose only an increased duty for oil spill responses to those areas and for environmental reviews to acknowledge them.

b. Amending the law to allow enhanced penalties for violations in environmentally sensitive areas would identify that harm occurring in bird rookeries has a greater consequence to the ecosystem than from a general disturbance of a bird.

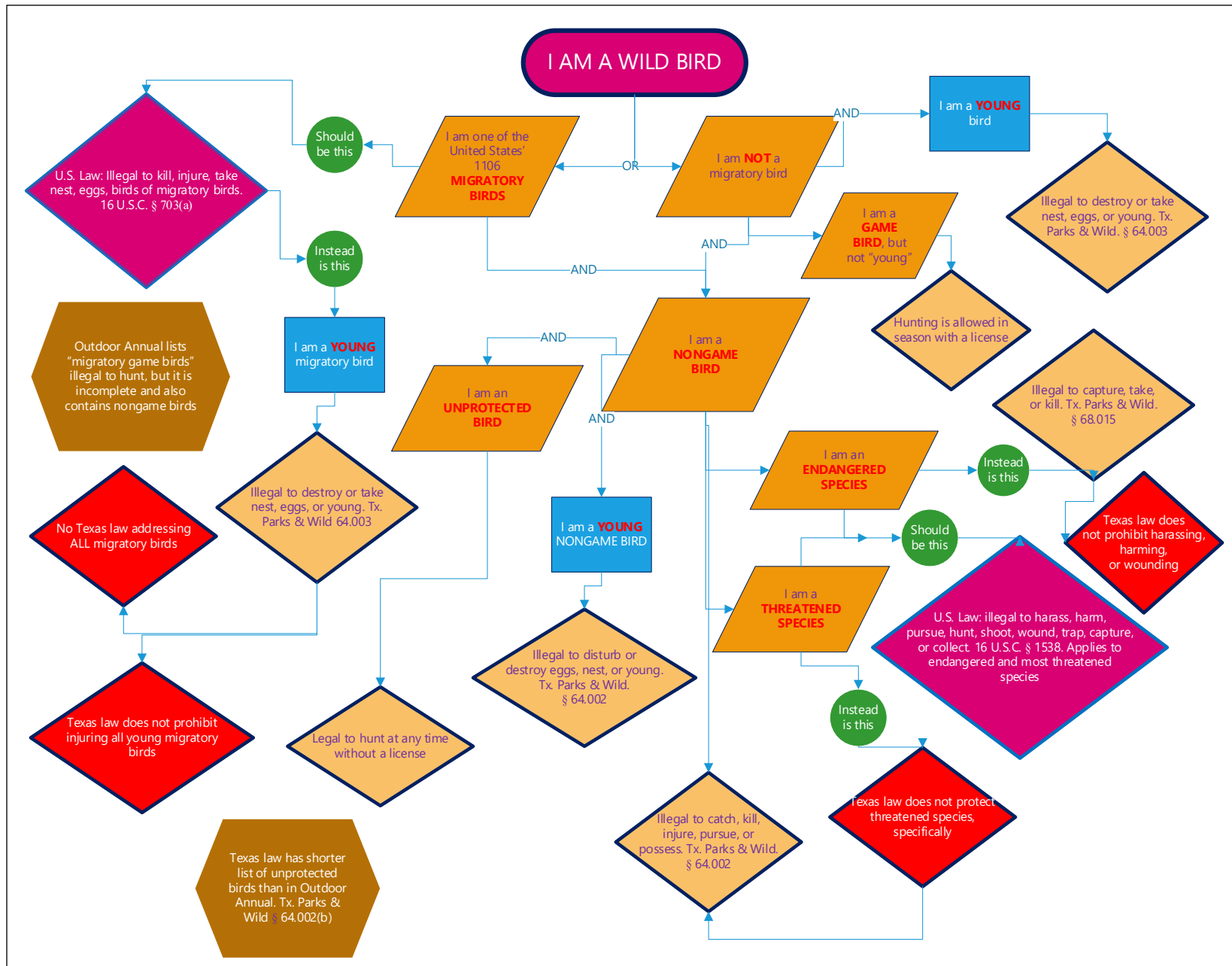
## *2. Allow enforcement against uncontrolled dogs and cats*

Consider extending laws that prohibit harassing or harming birds, nests, and eggs to include barring when a dog or cat that is not a stray does those things. Local ordinances could provide models for the legislation. For example, a regulation could provide that:

Dogs must be under restraint meaning either on a leash or subject to the commands of its human while on beaches or areas where coastal birds are nesting. A person must keep their dog – either owned or possessed by them at the time of the incident – from harassing, threatening, biting, or attacking any other animal or person. It is prohibited for a dog to harass, harm, injure, or kill a nesting bird or its eggs.

Examples include the following: Corpus Christi Code of Ord. § 10-59; Rockport Code of Ord. § 18-27; Port Aransas Code of Ord. § 4-26.

# Appendix A. Identifying Protection of Wild Birds Under United States and Texas Law



Appendix B. Identifying Protection of Wild Birds Based on Proposed Revisions to Texas Law

