

**Attachment 1:
Migratory Bird Nest Destruction and Relocation
Frequently Asked Questions
June 14, 2018**

The Service recommends conducting activities outside the bird nesting season to avoid the need for active nest relocation or destruction, when appropriate. This is because (1) successful reproduction is essential to healthy bird populations; (2) measures can often be taken in advance to prevent nesting where it will create a problem; (3) inactive nests and nests under construction may be proactively destroyed without a permit; and (4) most bird species have short nesting cycles, and it can be practicable to delay an activity until the nestlings have fledged.

Notes:

- “Bird” refers to any species federally protected under the Migratory Bird Treaty Act (50 C.F.R. § 10.13; MBTA).
- This document does not apply to Bald Eagles and Golden Eagles or federally listed threatened or endangered species. The Bald and Golden Eagle Protection Act (16 U.S.C. §§ 668–668d) and the Endangered Species Act (16 U.S.C. §§ 1531) have additional protections for these species.
- States, Tribes, and local governments may have additional protections for active and/or inactive nests.

1. *Is a permit needed to destroy an inactive migratory bird nest?*

No. A permit is not required to destroy migratory bird inactive nests (i.e., nests without viable eggs or chicks), provided the nest is destroyed and not retained. From the time that one or more eggs are laid until chick(s) fledge, a nest is considered active and a permit is required for purposeful take of that nest. The Destruction and Relocation of Migratory Bird Nests Memorandum (MBPM-068029; 06/14/2018) provides additional guidance on inactive nest destruction (<https://www.fws.gov/policy/m0407.pdf>).

2. *Is a permit needed to conduct activities near an active migratory bird nest?*

No. A permit is not needed to conduct work near an active nest. An active migratory bird nest is one with viable eggs or live chicks present. We recommend caution when conducting activities near active nests due to the risk of nest failure. Nest failure occurs when a bird, egg, or chick is injured or killed or nest abandonment occurs as a result of the activity. If someone chooses to conduct activities near an active nest, we recommend contacting your local FWS Ecological Services or Regional Migratory Birds office to discuss voluntary best practices that may minimize impacts to nesting birds. To determine if best practices have been developed for specific industries see the USFWS, Migratory Bird Program Webpage at <https://www.fws.gov/birds/management/project-assessment-tools-and-guidance.php>

3. *Is a permit required to destroy an active bird nest?*

Yes. A permit is required for the **purposeful** take of an active migratory bird nest, such as active nests removed to resolve a depredation problem or activities that regularly need to intentionally remove or destroy active nests (e.g., purposefully removing nests from a structure such as an electric distribution pole). A permit is **not** required when conducting any activity where migratory birds and/or their eggs and chicks are accidentally killed during the activity (i.e., the intent of the activity is not to kill migratory birds).

Authorization is required to purposefully remove a nest or its contents prior to destruction. When eggs and chicks are in imminent danger of death from a lawful activity, there is a Good Samaritan provision that allows the collection of the nest contents without a permit for one-time, irregular, or highly infrequent occurrences. For frequent, regular occurrences of purposeful removal of an active nest or its contents, a Special Purpose permit may be appropriate. See the Destruction and Relocation of Migratory Bird Nests Memorandum for further information.

4. *Is a permit required to relocate a nest? When is relocation appropriate?*

Yes. A permit is always required to relocate an active nest, as the nest is in possession while being relocated. The decision to relocate or destroy an active nest is specific for each situation, bird species, and nest status. Some things to consider:

- a. *Are there eggs or chicks?* Relocation is most successful with chicks but rarely so with eggs.
- b. *Where is the nest?* If the nest is on a human-made structure, it may be easier to duplicate nest substrate and relocation may be more successful.
- c. *What is the species and its status?* Certain bird species and individuals are more tolerant to relocation than others.
- d. *Is it humane?* While sometimes counter-intuitive, active nest relocation can be less humane than nest destruction. Death from exposure and starvation is not humane; therefore, it is recommended that any nest relocation be monitored closely to verify adult birds return to attend to the nest and a back-up plan for removing the nest contents be in place. If the choice to relocate has a low chance of success, it is often best to contact a permitted rehabilitator to collect the nest contents and determine the appropriate disposition of those contents (i.e., rearing and release or euthanasia).

5. *How can rehabilitators help?*

Nest relocation or destruction cannot be done under a rehabilitation permit. However, migratory bird rehabilitators may provide technical expertise. Rehabilitators often have experience in nest relocations as well as caring for sick, injured, and orphaned birds in the event that removing nest contents is appropriate. They can provide guidance on whether or not chicks or eggs are likely to survive in a nest relocation attempt or during rehabilitation.

A list of federally-permitted rehabilitators can be found on the National Wildlife Rehabilitators Association webpage (http://www.nrawildlife.org/?page=Find_A_Rehabilitator). The Service can provide contact information for federally-permitted rehabilitators. The Service does not maintain or provide information on contractors, such as wildlife contractors or pest control companies.

6. What authorizations are available for bird nests?

6.1. Birds in Buildings Regulatory Authorization

The general public, under certain conditions, may remove migratory bird nests from the interior of a building or structure if (i) posing a health threat, (ii) attacking humans, (iii) posing a threat to commercial interests, and (iv) the bird may injure itself. Additional conditions and requirements are detailed in 50 C.F.R. § 21.12(d).

6.2. Good Samaritan Provision

For active nests, an individual or entity whose activity unintentionally or incidentally destroys an active nest, or is likely to do so, may collect the eggs or chicks and temporarily possess them for the purposes of transport to a federally permitted rehabilitator under the good Samaritan authorization in the rehabilitation regulations at 50 C.F.R. § 21.31(a). The Service interprets the definition of “finds” to include finding birds that become sick, injured, or orphaned while conducting activities where the intention is not to kill migratory birds or destroy their nests. “Finds” also applies when a planned activity is likely to cause or about to cause destruction of an active nest resulting in the death, injury, or orphaning of eggs or chicks because, if nest destruction is imminent, any egg or chick in that nest can be considered orphaned. The Good Samaritan provision applies to one-time, irregular, or highly infrequent occurrences, otherwise a permit is recommended.

6.3. Depredation Permits

Depredation includes agricultural damage, private/public property damage, threats to human health and safety, and threats to recovery of protected wildlife. A depredation permit can authorize active nest destruction or relocation when either the nest itself is causing damage or removal of the nest will relieve a depredation problem. The nest itself or birds attending to the nest must be contributing to physical damage or physical loss to constitute a depredation problem, and must not merely be causing a nuisance.

Applicants must meet depredation issuance requirements, including demonstrating that they have implemented practicable nonlethal measures, such as destroying inactive nests, exclusions, hazing, and habitat modification prior to applying for a permit. For more information see the Fact Sheet on Depredation Permits (<http://www.fws.gov/forms/3-200-13.pdf>).

6.4. Utility Permits

Special Purpose Utility Permits (SPUT) can be issued to utilities with nest concerns. A utility includes, but is not limited to, a business that owns or operates a facility that generates or transmits electricity, gas, oil, water, or communications structures such as cellular towers, microwave transmitters and their related infrastructure, as well as resource development and recovery businesses.

Utility permits can authorize the relocation and/or destruction of nests found on the utility structures when (1) the safety of the migratory birds, nests, or eggs is at risk, or (2) the migratory birds, nests, or eggs pose a threat of serious bodily injury or a risk to human life,

including a threat of fire hazard, mechanical failure, or power outage. This permit does not apply to situations in which birds are merely causing a nuisance or inconvenience, such as construction and routine maintenance, or to eagle nests. This permit also does not apply to clearing an area of active bird nests to reduce the likelihood of collision with infrastructure. For more information see the Fact Sheet for Utility Permits (<http://www.fws.gov/forms/3-200-81.pdf>).

6.5. Scientific Collecting Permits

Scientific Collecting Permits authorize active nest relocation or destruction for scientific research purposes only. The applicant must justify why this is an appropriate methodology for the research question they are seeking to answer. For more information, see the Fact Sheet for Scientific Collecting (<http://www.fws.gov/forms/3-200-7.pdf>).

6.6. Special Purpose Permits

If the activity does not fall into one of the categories above, the applicant may qualify for a Special Purpose permit. The Special Purpose regulation can be used to authorize active nest relocation or destruction when it is consistent with the MBTA for many otherwise lawful activities. The applicant must demonstrate how they meet at least one of the following criteria: (1) a sufficient showing of benefit to the migratory bird resource, (2) important research reasons, (3) reasons of human concern for individual birds, or (4) other compelling justification.

In general, requests for nest relocation or destruction are justified under “sufficient showing of the benefit to the migratory bird resource” (See 6.6.1) or “other compelling justification” (See 6.6.2.).

6.6.1. *What constitutes a sufficient showing of benefit to the migratory bird resource?*

An applicant may demonstrate that there is a benefit to the resource. The migratory bird resource can be the same species or different species as the species for which take is being requested under the permit. Supplemental Information may be requested as part of the application. A single document summarizing the organization’s Best Management Practices may be developed by the applicant that includes benefits to the resource (e.g., habitat restoration, native landscaping, etc.), avoidance and minimization practices that will be implemented, and how the decision to intentionally relocate or destroy active nests will be made. While a Best Management Practices summary document is not required, the document can be referenced to streamline permit applications and conditions.

6.6.2. *What constitutes a compelling justification?*

An applicant may also demonstrate that there is a compelling justification that qualifies for a Special Purpose permit. Most commonly, a compelling justification often involves scenarios of multiple competing mandates, such as the MBTA and other federal laws, federal mandates, and/or court orders. Examples of a compelling justification include: a situation where two federal laws conflict (e.g., ESA requirements restrict the activity to only occur during bird nesting season); a critical infrastructure project that may affect human health and safety if not completed on schedule (such as emergency bridge repair); or protection of species of concern that would be harmed if not relocated (such as cavity or burrow nesters that primarily rely on

other species to create burrows). A compelling justification can also include that a planned activity that extends past the Good Samaritan provision (6.2 above) and is likely to cause or about to cause destruction of an active nest resulting in the death, injury, or orphaning of eggs or chicks.

7. What permits can authorize nest take to resolve financial loss?

Permits cannot be issued to resolve financial loss (i.e., construction delays, access to equipment) unless they meet one of the permit types above. If there is physical damage or physical loss in addition to financial loss, a Depredation permit can be issued for the purposeful removal of a nest. If there is solely financial loss, a Special Purpose permit is most appropriate; applicants must demonstrate a sufficient showing of benefit to the migratory bird resource or other compelling justification as described above.

8. What is incidental take and is an incidental take permit available?

On 22 December 2017, the Department of Interior released M-Opinion 37050 (Opinion) regarding whether incidental take (the taking of migratory birds that results from an activity, but is not the purpose of the activity) is prohibited under the Migratory Bird Treaty Act (16 U.S.C. §§ 703-712). The Opinion concludes that "...the MBTA's prohibition on pursuing, hunting, taking, capturing, killing, or attempting to do the same applies only to direct and affirmative purposeful actions that reduce migratory birds, their eggs, or their nests, by killing or capturing, to human control" (M-Opinion 37050, pg. 41). The Opinion clarifies that, under this interpretation, the MBTA does not prohibit the incidental or unintentional take of migratory birds and/or their active nests.

For individuals or entities seeking to voluntarily minimize impacts on migratory birds and their habitat may request technical assistance for suggested best practices can be referred to Service Migratory Bird biologists or Ecological Services offices. To determine if best practices have been developed for specific industries see the USFWS, Migratory Bird Program Webpage at <https://www.fws.gov/birds/management/project-assessment-tools-and-guidance.php>