



United States Department of the Interior



FISH AND WILDLIFE SERVICE
Washington D.C. 20240

In Reply Refer To:
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Memorandum

To: Regional Directors

From: Assistant Director, Migratory Birds /sgd/ Jerome Ford 6/14/2018

Subject: Destruction and Relocation of Migratory Bird Nest Contents

The purpose of this memorandum is to clarify the application of the Migratory Bird Treaty Act (50 C.F.R. §§ 703-712; MBTA) to the destruction and relocation of migratory bird¹ nests and provide guidance for advising the public regarding this issue. This Memo replaces Migratory Bird Permit Memorandum MBPM-2 on Nest Destruction (Apr 15, 2003). This memo does not supersede or apply to other Federal, State, or Tribal laws and regulations, including the Endangered Species Act (16 U.S.C. §§ 1531; ESA) and the Bald and Golden Eagle Protection Act (16 U.S.C. §§ 668–668d; Eagle Act).

BACKGROUND:

The MBTA protects migratory birds, including migratory bird nests, eggs, and chicks. The prohibitions of the MBTA include *possession, transport, import, export, purchase, sale, barter, and take*. The regulatory definition of take, as defined by 50 C.F.R. § 10.12, means to *pursue, shoot, wound, kill, trap, capture, or collect, or attempt thereof*. This memo clarifies the Service's interpretation of how these prohibitions apply to migratory bird nests, eggs, and chicks.

The MBTA does not prohibit the destruction of an inactive² migratory bird nest, provided that no possession occurs during the destruction and no permit or other regulatory authorization is required (see Policy #1 below). Additionally, the Service should make every effort to inform the public of how to

¹ A list of species protected by the MBTA can be found at 50 C.F.R § 10.13

² An active nest is one that contains viable eggs and/or chicks. A nest becomes active when the first egg is laid and remains active until fledged young are no longer dependent on the nest. Nests that are empty, contain non-viable eggs, or are being built but do not yet have an egg in them are considered inactive.

minimize the risk of killing migratory bird species whose nesting behaviors make it difficult to determine occupancy status or continuing nest dependency (e.g., cavity and burrow nesting species).

On December 22 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 MBTA. 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, pg. 41). The Opinion clarifies that the MBTA does not prohibit the incidental or unintentional take of migratory birds and/or their active nest contents.

Therefore, an individual or entity may destroy an active nest while conducting any activity where the intent of the action is not to kill migratory birds or destroy their nests or contents. However, because the MBTA specifically protects migratory bird nests, eggs, chicks, and adults from possession and transport without a permit, individuals and entities cannot, in most cases, take reasonable protective actions (such as removing eggs and chicks prior to nest destruction or relocating nests) without first obtaining authorization to do so.

Currently, there are two mechanisms explained in Policy #2 and Policy #3 below for the temporary possession and transport of healthy, unaffected birds for the purpose of removing them from imminent danger (i.e., immediate threat of mortality). Policy #2 explains in more detail the Service’s Good Samaritan provision included in the Rehabilitation regulation (50 C.F.R. § 21.31(a)). Policy #3 outlines the permitting mechanism under the Special Purpose regulation (50 C.F.R. § 21.27) for active nest situations that fall outside the Good Samaritan provision.

POLICY:

1. Inactive Nest Destruction

A permit or other regulatory authorization is not required under the MBTA to destroy an inactive migratory bird nest³, provided no possession occurs during or after the destruction. The MBTA does not authorize the Service to issue permits in situations where the prohibitions of the Act do not apply, such as the destruction of inactive nests.

The public should be made aware that, due to the biological and behavioral characteristics of some migratory bird species, destruction of their nests entails an elevated risk of unknowingly killing them. For example, it is difficult to detect whether or not the nest of a cavity-nesting species, such as a burrowing owl or a bank swallow, is active. Before destroying this type of nest, we recommend consulting with an expert (e.g., USDA-Wildlife Services, Wildlife Professionals, Environmental Consultants, or Rehabilitation experts) who can help determine nest activity.

³ An inactive nest is one that is empty, contains non-viable eggs, or is being built but does not yet have an egg in the nest.

Inactive nests may be protected by federal statutes other than the MBTA, such as nests of bird species federally listed as threatened or endangered under the ESA as well as nests of bald eagles and golden eagles, which are protected under the Eagle Act. State, Tribal, and local laws may also protect inactive bird nests. The Service should make every effort to ensure awareness regarding these possible additional protections and should inform the public of factors that will help minimize the likelihood that bird deaths would occur should nests be destroyed (i.e., when active nesting season normally occurs).

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 regulation (50 C.F.R. § 21.31(a)). This Good Samaritan provision states: “Any person who finds a sick, injured, or orphaned migratory bird may, without a permit, take possession of the bird in order to immediately transport it to a permitted rehabilitator” (50 C.F.R. § 21.31(a)). The Service interprets the definition of “finds” to include encountering 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 is 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 the landowner of where the action is taking place and anyone designated to act on their behalf (e.g., wildlife professionals, pest-control contractors, rehabilitators, etc.). The Good Samaritan provision does not apply to regularly re-occurring actions where a single entity purposefully removes nests (e.g., a company that needs to purposefully remove nests from electrical distribution poles). For these situations a permit is recommended (see #3 below).

If the landowner is not comfortable with collecting the eggs or chicks, they may designate someone else to conduct the work on their behalf. After the eggs or chicks are collected, a federally-permitted rehabilitator may accept them as orphaned birds, consistent with their rehabilitation permit. All requirements and conditions of a rehabilitation permit apply. Rehabilitators have discretion as to what they will and will not accept and to determine the fate of any eggs or chicks accepted, including euthanasia. If a rehabilitator is unavailable or will not accept the eggs or chicks, the landowner (or the person acting on their behalf) may take the eggs or chicks to a licensed veterinarian who may temporarily possess, transfer, or euthanize the eggs or chicks without a permit (50 C.F.R. § 21.12(c)).

The Service can provide contact information for federally-permitted rehabilitators. The Service does not maintain or provide information on contractors, such as wildlife professionals, contractors, or pest control companies. Finally, the Service will provide information for voluntary reporting of active nest destruction in our Injury and Mortality Reporting System.

3. Special Purpose Permits

Permits are required to relocate a nest rather than destroy it, as possession of any nest is prohibited under the MBTA without prior authorization. Permits may also be appropriate for entities with ongoing projects that regularly need to intentionally remove or destroy nests. In these cases, permits can authorize possession of nests for various purposes, including active and inactive nest relocation, collection of nest contents for humane disposal, a combination thereof, or other compelling justifications. The Service can issue Special Purpose permits (50 C.F.R. § 21.27) to individuals or entities in these situations. In the case of utilities, authorization to destroy or relocate active and inactive nests is covered by applying for a specific type of special purpose permit: Special Purpose – Utility (<https://www.fws.gov/forms/3-200-81.pdf>).

Biologically, the success of nest relocation varies widely based on a number of factors, such as the distance moved, the presence of chicks, the nesting substrate, and the tolerance of the species and individual birds. Service biologists can provide technical assistance as to whether or not nest relocation is likely to succeed. Nest relocation should only be recommended for consideration when likely to result in success or when there are no other viable alternatives to achieve a conservation outcome. Relocation permit conditions will include short-term monitoring requirements by the person doing the nest relocation to ensure adults return to attend to the nest and an alternative protocol in the event nest abandonment occurs (such as collection and transport to a rehabilitator or veterinarian for euthanasia).

4. Other Permits and Authorizations

Other situations where there is purposeful take of active nests may fall under different permit types or regulatory authorizations. The Service will advise when a different permit or authorization may be appropriate.