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January 8, 2003

Sent via U. S. Mail and Email

Karen Mayne, Supervisor,
U.S. Fish & Wildlife, Virginia Field Office
6669 Short Lane,
Gloucester, Virginia 23061

Re: Pete and Pam Wright's Habitat Conservation Plan

Dear Ms. Mayne:

We are writing to express concerns about how you and the U. S. Fish and Wildlife Service are handling our request for a low-effect HCP. We request that you and your staff follow the policies and procedures in the *Habitat Conservation Planning Handbook* published by the U.S. Fish & Wildlife Service and the National Marine Fisheries Service.

On January 6, 2003, we received an email from you that stated, in part:

Although we had discussed a "low effect" HCP, several folks in FWS have told us that we may be better off not to do a low effect HCP, as we may set ourselves up for a lawsuit. I am not sure about that, and Eric and I will try to have a conference call with some of our west coast folks and Washington Office to discuss with them what level of HCP to pursue.

RESPONSE: On September 25, 2002, we received a letter from U. S. Fish and Wildlife Service and a 21-page draft HCP that our project is a low-effect HCP. These documents reiterated statements made by Eric Davis during his September 10 site visit that our project is a low-effect HCP:

This HCP has been determined to be suitable for a low-effect HCP.

The low-effect HCP Category is defined by the Service's Habitat Conservation Handbook, November 1996, as follows:

Low-Effect HCPs – Those involving: (1) minor or negligible effects on Federally listed, proposed, or candidate species and their habitats covered under the HCP; and (2) minor or negligible effects on other environmental values or resources. Low affect incidental take permits are those permits that, despite their authorization of some small level of incidental take, individually and cumulatively have a minor or negligible effect on the species covered in the HCP.

The relationship between the geographic size of a project and the scope or severity of its impacts will not always be clear-cut. The Services must consider each HCP on a case by case basis in determining whether it belongs in the low-effect category, taking into account all relevant factors including biological factors.

This project's impacts are limited to a single pair of eagles and, if building is limited to the times of the year when the eagles are not nesting (July 15 to December 15), the project should not result in direct take of either adult or young eagles. Impacts are limited to an area of habitat near the present eagle nest and the possibility that the adult birds will be driven from the existing eagle nest and forced to nest elsewhere due to disturbances from the construction of the home. (page 2 of HCP sent to Pete and Pam Wright on September 25, 2002)

On September 25, 2002, your office advised us that our project was a low-effect HCP. We respectfully request that you not change the status of our project because you fear that you “may set ourselves up for a lawsuit.” Any action or failure to act, in any direction, is always at risk for a lawsuit, from any quarter.

The Service published the Habitat Conservation Planning Handbook in 1996 and an addendum to the *Handbook* in 2000. The *Handbook* includes a detailed description of roles and responsibilities, pre-application coordination, HCP development, environmental analysis issues, application requirements, processing procedures, processing times, and issuance criteria.

The *Handbook* is a *shield* that will protect you in litigation. The *Handbook* will not protect you if you do not use it. It appears that fear of a lawsuit has caused your agency to disregard the *Handbook*.

Your *Handbook* discusses low-effect permit applications:

3. Processing Low-Effect Permit Applications.

Low-effect HCPs and permit applications often involve a single small land or other natural resource owner and relatively few acres of habitat. The impacts of such projects on federally listed species frequently are minor or negligible and the applicants often do not have the resources to withstand long delays.

NOTE: The *Handbook* emphasizes the following paragraph in bold.

Consequently, an important guiding principle of this handbook is that permit application processing requirements for low-effect HCPs, as defined above, will be substantially simplified and permit issuance for such HCPs will be expedited to the maximum extent possible, consistent with federal law.

This will be accomplished by: (1) establishing clear processing standards for all HCP permit applications; (2) eliminating or standardizing section 10 documents for low-effect projects, whenever possible; (3) eliminating unnecessary review procedures; (4) **categorically excluding low-effect HCPs from NEPA review requirements;** (emphasis mine) and (5) utilizing other techniques described throughout this handbook. (Page 1-9)

On December 1, I wrote to Eric Davis because I was confused about his requirement that we go through a full-scale NEPA assessment and prepare an Environmental Assessment (EA) when your *Handbook* clearly states that we are “categorically-excluded” from NEPA requirements.

Chapter 1, Section 4 of the *Handbook* lists documents required for low-effect HCPs:

(6) **an Environmental Action Memorandum**, a brief document that serves as the Service’s record of NEPA compliance for categorically excluded actions by explaining the reasons the Service concluded that there will be no individual or cumulative significant effects on the environment. (Page 1-9)

I asked Eric Davis and asked about the NEPA:

After reviewing the documents sent by Ethel Eaton of Va Historical Resources, I have a couple of questions.

1. What is a NEPA analysis? Do we need one? (In the section about "Processing Low Effect Permit Applications," the HCP Handbook says "low effect HCPs are categorically excluded from NEPA requirements) (Email to Eric Davis, December 1, 20020

During the December 2 meeting, Eric brought up the NEPA issue, and said we were required to prepare a full-scale Environmental Assessment. Based on the clear unambiguous statements in your *Handbook* to the contrary, I disagreed. I advised that if you make up new rules as you go along and do not follow the written policies and procedures established by your agency in your *Handbook*, you are setting yourself up and increasing the odds of successful litigation against you. Eric interrupted, saying the decision had been made and was final.

When I continued to express concerns about this course of action, Eric Davis said he was "reconsidering" the earlier decision about our low-effect HCP. I was stunned.

Pete turned to you and asked why you were not following your agency’s *Handbook* that includes specific information about how low-effect HCPs and NEPA issues should be handled. You said the *Handbook* is not accurate. Pete said the Service continues to publish the *Handbook* and

encourages people to use it – why do you say it is not accurate. You responded, “litigation” but offered no information about why “litigation” invalidated the *Handbook*.

Since Eric was angry and threatening to change the status of our project, we shut up.

USFWS has not completed an Environmental Assessment.

I have been in frequent contact with Ethel Eaton of Virginia Historical Resources in an effort to expedite the process. I last spoke with Dr. Eaton on January 6, 2003. On December 30, before sending any documents to Ethel Eaton, I wrote Eric Davis to ask what his role was in the process and whether I should send documents to him. Mr. Davis has not responded.

We respectfully request that USFWS adhere to the policies and procedures in the *Handbook* for low-effect HCPs, including the categorical exclusion from NEPA requirements. We request that USFWS follow the procedures outlined in the *Handbook* and prepare an Environmental Action Memorandum which is described in Chapter 1, page 9 of the *Handbook*:

an Environmental Action Memorandum, a brief document that serves as the Service’s record of NEPA compliance for categorically excluded actions by explaining the reasons the Service concluded that there will be no individual or cumulative significant effects on the environment. (Page 1-9)

In your January 6 email, you said:

Eric and I will try to have a conference call with some of our west coast folks and Washington Office to discuss with them what level of HCP to pursue.

Why are you consulting with “west coast folks” to discuss a low-effect HCP for bald eagles in the Chesapeake Bay? Most bald eagle HCPs developed by west coast USFWS personnel involve thousands or hundreds of thousands of acres.

In 1999, USFWS published the “Proposed Rule to Remove the Bald Eagle in the Lower 48 States from the List of Endangered and Threatened Wildlife.” (See *Federal Register*, beginning at 64 FR 36454) According to USFWS, the Chesapeake Recovery Region has experienced a **greater population increase than any other recovery region**.

Since this project involves a single-family house on a small area of habitat in the Chesapeake Bay region and the Chesapeake Bay has experienced a greater population increase than any other recovery region, it seems logical to study low-effect HCPs for bald eagles on small properties in the Chesapeake Bay.

In yesterday’s email you wrote:

I had assumed that we could still do shortened time frames even if we do an environmental assessment (to cover NEPA), but apparently, that is not the case. We are

still trying to learn the ins and outs of HCPS, since this is new to us, too. Please bear with us.

RESPONSE: This is the point I tried to make during the December 2 meeting. If you unilaterally change the rules, you are at sea in a rudderless vessel.

People in your agency spent a great deal of time to write a clear, detailed *Handbook* about how to proceed with incidental take permits. You should use the *Handbook* as your *Bible*. Instead, you have ignored the *Handbook*, unilaterally changed NEPA requirements over our objections, and are out of compliance with your agency's written procedures. These unilateral decisions are making the process unnecessarily complicated and time-consuming.

Now you want to change the status of our low-effect HCP to protect yourselves against litigation.

In your January 6 email, you wrote, "We are still trying to learn the ins and outs of HCPs, since this is new to us too."

Karen, I am going to be blunt and hope you do not take offense. We are not naïve and hope we do not appear stupid.

We know HCPs are not new, and so do you.

Congress added HCPs to the ESA twenty years ago. USFWS published the final implementing regulations seventeen years ago (See your *Handbook*, page 1-2).

As of December 15, 2002, USFWS had approved 414 HCPs and 636 incidental take permits:

Total Number of Habitat Conservation Plans Approved: 414
Total Number of Amendments Approved: 205
Total Number of Permits Approved: 636

Our project involves construction of a single-family house with a footprint of about 1500 square feet. The land was clear-cut in 1996. At least 80 percent of the land is open field. We are not requesting permission to clear land, move earth, or cut trees.

We simply want to build a house on about 1,500 square feet of this land. There are already more than 40 houses within one-quarter mile of the nest.

Your agency's *Handbook* includes specific procedures about how USFWS personnel should handle small low-effect projects like ours that

. . . involve a single small land or other natural resource owner and relatively few acres of habitat. The impacts of such projects on federally listed species are minor or negligible and the applicants often do not have the resources to withstand long delays. (*Handbook*, Chapter 1, page 1-9)

We request that you follow the *Handbook*.

As you are aware, we initiated this project on **August 6, 2002** with a telephone call to Jeff Cooper of Virginia Department of Game and Inland Fisheries (VDGIF). On **August 9, 2002**, Mr. Cooper made a site visit and advised us that we would need to consult with USFWS to obtain an Incidental Take Permit. To facilitate the process, Mr. Cooper called Eric Davis of USFWS to arrange for a site visit by Mr. Davis.

On **September 10, 2002**, Eric Davis and Jeff Cooper made a site visit. During the September 10 visit, we advised Mr. Davis that time was of the essence. He advised that our project would be low-effect HCP with short timelines, and that he anticipated no problems in our getting a permit before July 16, 2003.

On **September 25**, you sent us a letter and a draft of a 21-page HCP, stating our project was a low-effect HCP.

After our December 2 meeting with you, Eric, and Jeff Cooper, Pete and I made extensive revisions to our low-effect HCP. The HCP is nearly complete. We are still waiting for your agency to respond to our requests for information on the following issues:

Please send information about bald eagle HCPs for low-effect projects by small property owners.

Please send information about bald eagle HCPs for small properties on the Chesapeake Bay.

Please advise how your plan to conduct an Environmental Assessment, instead of adhering to the procedures outlined in your *Handbook* for low-effect HCPs that are categorically excluded from NEPA requirements, will affect the timelines we discussed with Eric Davis at the September 10 site meeting.

We respectfully request that you and USFWS follow the *Handbook* that provides clear policies, procedures and deadlines for low-effect HCPs.

We look forward to hearing from you in the immediate future.

Sincerely,

Pamela Darr Wright

Cc: Jeffrey L. Cooper, Wildlife Diversity Biologist
Wildlife Diversity Division

Virginia Department of Game and Inland Fisheries
1320 Belman Road
Fredericksburg, Virginia 22401