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January 28, 2003

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

Glenn Smith
U. S. Fish & Wildlife, Northeast Regional Office
300 Westgate Center Drive
Hadley, MA 01035-9589

Re: Pete and Pam Wright's Habitat Conservation Plan

Dear Ms. Mayne and Mr. Smith:

Thank you for your January 24, 2003 letter in response to our January 8, 2003 letter. We were unable to go forward until we received information from you about the status of our project. In your letter, you suggested we file a "pre-application review." Since time is of the essence, and to avoid further delays, we are filing our application at this time. Enclosed you will find our application for an incidental take permit, a check for \$25.00, and our Habitat Conservation Plan.

We are writing this letter to clarify what Fish & Wildlife Service staff (FWS) told us and to explain the basis of decisions we made. We apologize for the length of this letter.

As you know, Pete and I live in a small cottage on Stingray Point. Since our children married and began having grandchildren, our home is too small to accommodate the growing number of visiting grandchildren. For several years, Pete and I have been searching for a small piece of land on which to build a home. Since we are nearing the age when many people retire, our plan was to build a house that we can live in for the rest of our lives. Although we did not want to move from Stingray Point, no suitable land has been available in our area for several years.

In July 2002, we saw a sign advertising 4.5 acres of land (28 lots, 11 home sites) located about one-quarter mile from our cottage. The asking price was \$395,000, far more than we can afford and more than we intended to pay for land. The land has several problems that make it less desirable for development. The land is low and is mostly open field with few trees. About half of the land is unusable due to a large mosquito-breeding detention pond and wetlands (see map). If we could re-divide the land and sell off two or three lots, we could afford the land.

The property also includes a bald eagle nest. We knew about these eagles. We have observed these eagles since 1999 when they built their first nest on State Route 33, across the road from Stingray Point Marina. We also knew that FWS declared the bald eagles recovered several years ago. We did not view the eagles in a negative light. We made an offer on the land and called our children to share the good news.

One son did not share our happiness. He is an attorney with the firm that represented FWS in the *Taylor* case. He called and told us to read an article about John Taylor's case in the *Washington Post*. We learned that Mr. Taylor is an elderly Fairfax County man who wanted to build a house that would accommodate his disabled wife who was in a wheelchair. A bald eagle nest was in a tree on a nearby lot. Although Mr. Taylor submitted at least three applications and Habitat Conservation Plans, FWS did not approve these requests, saying that his plans were incomplete. In 1998, Mr. Taylor sued FWS for the "taking" of his land.

On July 2, 1999, while Mr. Taylor's suit was pending, President Clinton announced, "The bald eagle is now back from the brink of extinction, thriving in virtually every state of the union." (FWS news release attached) On July 6, 1999, FWS published the "Proposed Rule to Remove the Bald Eagle in the Lower 48 States from the List of Endangered and Threatened Wildlife." In spite of these events, Mr. Taylor did not receive a permit. His case continued for two more years.

After reading this horror story, Pete traveled to the Clerk's Office of the U. S. Court of Claims in Washington, D.C. He spent two days at the Courthouse, reading depositions and copying large portions of the *Taylor* file. He discovered that when the case settled, FWS paid more than \$200,000 for Mr. Taylor's attorney fees. Pete then talked with Mr. Taylor to find out what happened after his case settled. The nest blew out of the tree. The eagles relocated. Mr. Taylor's wife and son died. Mr. Taylor is now in poor health and never built his house.

We did not want to follow Mr. Taylor's footsteps. On August 1, 2002, almost six months ago, we contacted Jeff Cooper, wildlife biologist and raptor specialist with the Virginia Department of Game and Inland Fisheries (VDGIF). Our telephone call to Mr. Cooper was the first step in this long journey.

August 9, 2002: Site Visit

On August 9, 2002, Mr. Cooper came to Deltaville for a site visit. After looking at the nest and the property, Mr. Cooper advised us to apply for an incidental-take permit before we began construction on a house. He told us about the bald eagle population boom in Virginia and the Chesapeake Bay.

We asked why we were required to apply for an incidental-take permit when bald eagles are not endangered or threatened. Mr. Cooper explained that although Fish & Wildlife proposed to remove the bald eagle from the list of protected species, other federal statutes protect eagles, including the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. These statutes have no provisions for incidental take permits.

Mr. Cooper offered to contact Eric Davis of FWS to discuss our situation and schedule a

meeting. Mr. Davis had a heavy schedule and was unable to meet with us for a month.

In the interim, we downloaded and read the *Habitat Conservation Planning Handbook* (1996) published jointly by the U.S. Fish and Wildlife Service and National Marine Fisheries Service and the *2000 Addendum to the Handbook*. We searched for Federal Register Notices about incidental-take permits and bald eagles. We also read the “Proposed Rule to Remove the Bald Eagle in the Lower 48 States from the List of Endangered and Threatened Wildlife” published by USFWS in 1999 (See *Federal Register*, beginning at 64 FR 36454).

According to FWS, the Chesapeake Bay Recovery Region has experienced a **greater population increase than any other recovery region**. The *Proposed Rule to Delist* reports:

We, the Fish and Wildlife Service (the Service) propose to remove the bald eagle (*Haliaeetus leucocephalus*) from the List of Endangered and Threatened Wildlife in the lower 48 States of the United States. We propose this action because the available data indicate that this **species has recovered**.¹

...

[T]he bald eagle’s population growth has exceeded most of the goals established in the various plans² . . . the current nesting population in the lower 48 States constitutes more than a tenfold increase from the known population level in 1963³ . . . The **bald eagle population has essentially doubled every 7 to 8 years during the past 30 years**.⁴

...

Since 1990, occupied breeding areas for the bald eagle have doubled in the Chesapeake Recovery Region . . . This indicates that **adequate habitat is still available** for an increasing population of bald eagles, despite land development pressures.⁵

...

Nesting and wintering habitats are both critical to the continued survival of the bald eagle. Based on increasing population trends, neither nesting nor wintering habitats appear to be limiting, and there are **no indications that availability of these habitats will limit the bald eagle population in the near future**.⁶

¹ 64 FR 36454

² 64 FR 36456

³ 64 FR 36457

⁴ 64 FR 36457

⁵ 64 FR 36457

⁶ 64 FR 36458

In 2001, the Alliance for the Chesapeake Bay reported that the Chesapeake Bay Basin had 618 active nests that produced 908 young. (See Figure 1 below).

Chesapeake Bay Watershed Bald Eagle Population

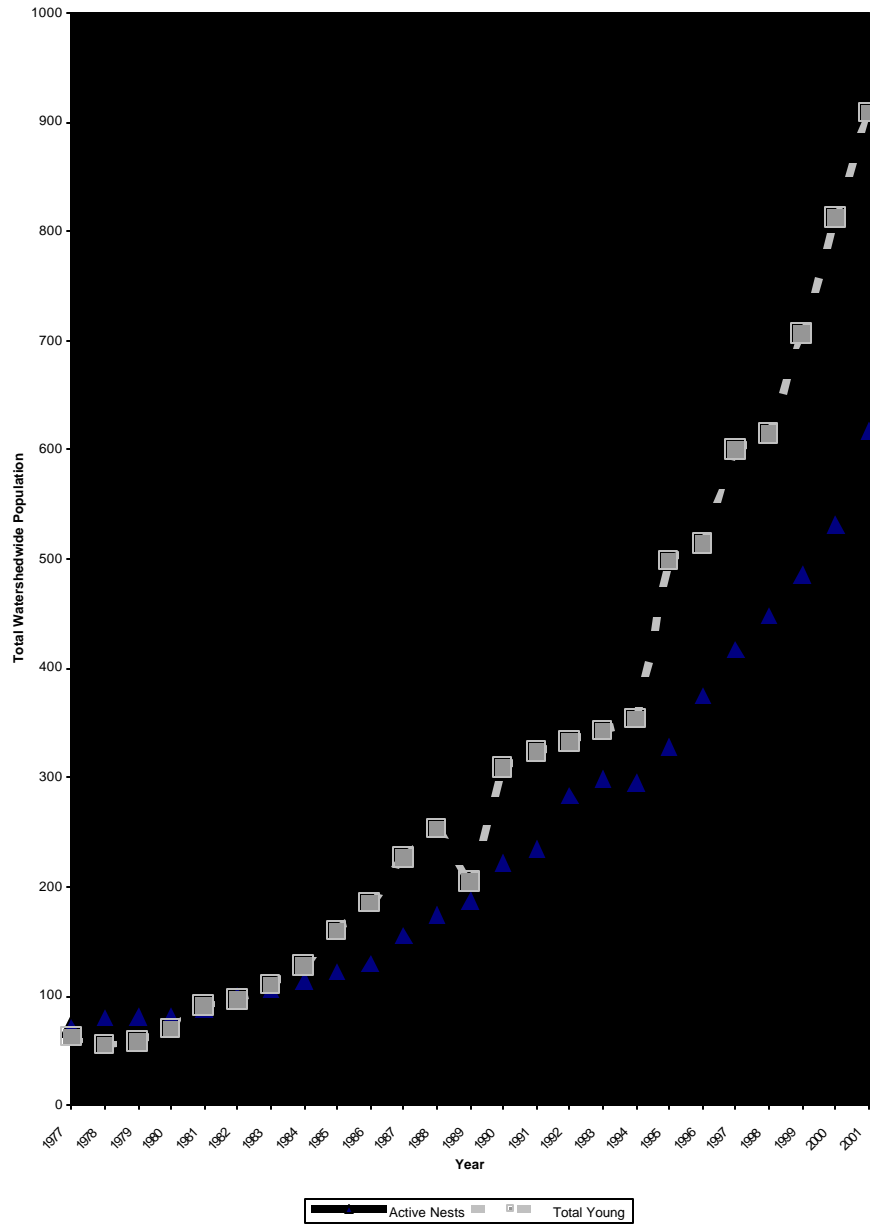


Figure 1. Chesapeake Bay Watershed Bald Eagle Population, 2001

Figure 1 shows the increase in bald eagle nests and young between 1977 and 2001. The dark solid line with triangles represents the number of active nests. The lighter line with squares represents the number of young eagles.

September 10, 2002: Site Visit

On September 10, 2002, we met with Mr. Davis, Mr. Cooper and Mr. Eric Johnson, realtor, at the site. Mr. Davis mentioned a recent negative decision in a case about the endangered Delmarva fox squirrel (*Gerber v. Norton*, U. S. Court of Appeals for the District of Columbia, 2002), and told us to “expect litigation.” We asked, “Who is likely to sue?” Mr. Davis said, “Defenders of Wildlife.” Mr. Davis offered some litigation avoidance strategies. He recommended that we time our application so we obtain the permit very close to July 15. He advised us to begin construction on July 16, 2003, because if a suit is filed, a judge is unlikely to require us to tear down a house that has been built or is under construction.

Pete asked about Mr. Taylor’s case. Mr. Davis said Mr. Taylor was the first permit his field office received and “we made many mistakes.”

We had many questions about the permit process and timelines. Mr. Davis advised that because our project involves a very small amount of habitat loss (essentially the footprint of a house), the project would qualify for a low-effect Habitat Conservation Plan. He explained that low-effect HCPs have short timelines. He described the steps in the application process and approximately how long each step would take. He explained that since we could not begin construction for ten months, we did not have to move quickly.

We advised Mr. Davis that we could not buy the land unless we could re-divide the land and sell 2 or 3 lots. Pete is an attorney who represents children with disabilities. Pam is a writer and publisher who builds websites about special education legal and advocacy issues and publishes a free weekly electronic newsletter. We also co-authored two books about special education law and advocacy.

Mr. Davis did not tell us that FWS might require us to purchase additional land and pay to place the land into a conservation easement before they would process our application for a permit. We were not aware of any Habitat Conservation Plans (HCP) for bald eagles that required a small landowner to purchase land for a conservation easement before USFWS processed the application for a permit. The *Habitat Conservation Planning Handbook* does not mention land purchase for conservation easements as a requirement for a permit.

Mr. Davis explained, “As small property owners, you are our worst nightmare. You are not like big timber companies. You do not have habitat to set aside.”

Mr. Davis assured us that his office was available to help us through the permit process. He said his office would send us a letter and report that would spell out what we were required to do. Because his schedule was heavy, we would not receive this letter until the last week in September. We decided not to make another offer on the land until we received this letter and report that spelled out what we were required to do.

After this meeting with Mr. Davis and Mr. Cooper, we felt relieved. We believed Mr. Davis when he assured us that FWS staff understood the problems we faced as small property owners, and that FWS would help us through the process. Although the first correspondence from FWS

to Mr. Taylor was from Ms. Mayne of the Chesapeake Bay Field Office, we were relieved that we would not follow his footsteps.

I began exhaustive research into the legal and regulatory issues relating to bald eagles, the endangered species act, habitat conservation plans, and incidental-take permits.

Because of Mr. Davis' warnings about litigation, we decided to learn about the concerns of the conservation and environmental groups that bring lawsuits against FWS. If we were sufficiently knowledgeable about these issues and concerns, it was more likely that we can develop a Habitat Conservation Plan that passes muster with these groups.

We joined the Defenders of Wildlife. After reading several publications by the Defenders, the National Wildlife Federation, and other conservation groups, we found ourselves in agreement with many of their concerns and positions. We agree that "biological information and scientific principles underlie the entire process of conservation planning."⁷

We learned that advocates for endangered species and advocates for children with disabilities have similar concerns. Conservation groups want FWS to use sound science and biological information to make decisions. They want Habitat Conservation Plans to include biologically sound goals and objectives. Since monitoring is often inadequate or non-existent, they want FWS to focus on problems related to lack of accountability in monitoring. They want conservation plans to incorporate adaptive management techniques and take into account new information, ecological knowledge, and/or changing environmental conditions. They want FWS to encourage public participation.⁸ We deal with the same issues in our work on behalf of kids with disabilities.

While we do not have control over most of these issues, we can address the public participation issue. To ensure that the public has information about our project, we will publish our HCP, supporting documents, and correspondence on the Wrightslaw web site at www.wrightslaw.com. The URL is <http://www.wrightslaw.com/hcp/hcp.index.htm>

September 25, 2002: Letter & Draft HCP from FWS

On September 25, 2002, we received a letter and a 21-page draft Habitat Conservation Plan from Karen Mayne, Supervisor, FWS. These documents included no surprises, and reiterated Eric Davis' statements to us that our project would be 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,

⁷ Defenders of Wildlife. "Frayed Safety Nets: Conservation Planning Under the Endangered Species Act" by Laura Hood. Web: <http://www.defenders.org/pubs/hcp01.html>

⁸ National Wildlife Federation, "The Need for HCP Reform: Five Points of Consensus." Web: <http://www.nwf.org/smartgrowth/hcpreform.html>

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.

...

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, HCP sent by FWS to Pete and Pam Wright on September 25, 2002)

In her letter, Ms. Mayne offered help as we developed our HCP:

While the contents of the permit application are yours to decide, we are happy to provide you a template to assist in your development of your HCP.

Ms. Mayne did not mention that FWS would require us to purchase land for a conservation easement before they would process our application. The draft HCP did not mention that FWS would require us purchase land for a conservation easement before they would process our application for a permit.

On October 3, 2002, after thoroughly reviewing the information provided by FWS, we made an offer on the property. Our offer was accepted and we now have a binding contract with the seller.

Our Offer to Help

The Chesapeake Bay bald eagle population is doubling every five to seven years. As the eagle population continues to grow, more families will need to apply for permits. We offered to work with U. S. Fish & Wildlife and the Virginia Department of Game and Inland Fisheries to develop an HCP that could serve as a model for others.

A few weeks after the September 10 meeting, Mr. Davis called on behalf of a Northern Neck family. He explained that after the family cleared the land for a house, bald eagles built a nest I a tree near the home site. Mr. Davis asked if we would be willing talk with the family, explain incidental-take permits and habitat conservation plans, and share information with them. We told Mr. Davis we would be happy to help.

As we worked on our HCP, we used the draft HCP provided by Mr. Davis and Ms. Mayne and the *Habitat Conservation Planning Handbook* published by FWS to guide us. When we came to the mitigation section in the Davis-Mayne draft HCP, we were perplexed. Although the other sections of the draft HCP included a great deal of detailed information, the "Measures to Mitigate" section was blank and is reproduced below:

MEASURES TO MITIGATE

you need to decide this (and this is the biggie)

Since we had never written a Habitat Conservation Plan, we did not know what this statement (“this is the biggie”) meant. Since the section was blank, we suspected it was important. We looked up “mitigation” in the dictionary.

Mitigate: 1. To cause to become less harsh or hostile; 2. To make less severe or painful. (*Merriam Webster Dictionary, abridged*)

According to the *Handbook*, “mitigation” includes five actions: avoiding, minimizing, rectifying, reducing or eliminating, and compensating for an adverse impact on a species. [NOTE: In this letter, words in bold are for emphasis by us, unless otherwise noted]

3. Mitigation Programs & Standards

Mitigation programs under HCPs and section 10 permits are as varied as the projects they address . . . Mitigation programs should be based on **sound biological rationale**; they should also be practicable and **commensurate with the impacts they address**.

...
Mitigation actions under HCPs usually take **one of the following forms** :

- (1) **avoiding** the impact (the extent practicable);
- (2) **minimizing** the impact;
- (3) **rectifying** the impact;
- (4) **reducing or eliminating** the impact over time; **or**
- (5) **compensating** for the impact.

For example, project effects can be

- (1) **avoided** by relocating project facilities within the project area;
- (2) **minimized** through timing restrictions and buffer zones;
- (3) **rectified** by restoration and revegetation of disturbed project activities;
- (4) **reduced or eliminated over time** by proper management, monitoring, and adaptive management; and
- (5) **compensated** by habitat restoration or protection at on onsite or offsite location.⁹

Chapter 3 of the *Handbook* includes a separate discussion of mitigation for **small-scale, low-effect projects** like ours:

e. Mitigation for Small-Scale, Low-Effect Projects

It is important that methods be established by state and Federal wildlife agencies and other organizations that . . . make **convenient mitigation strategies accessible to low-effect HCPs**. For example, it is often difficult for an individual to locate and acquire a few acres of mitigation habitat, since lands are usually sold by the lot or in large segments. A good way to accommodate this problem is to establish mitigation fund accounts that accumulate funds until relatively large-scale acquisitions can be effected [see above, Section B.3(c)] Habitat banks are another good way to handle this situation.

⁹ *Handbook*, page 3-19

Avoid requiring permittees to meet habitat mitigation requirements without a practical accessible means of meeting that requirement. In general, flexibility is needed in addressing the unique circumstances often associated with small landowners and small-scale, low-effect HCPs.¹⁰

Later, on the same page, the *Handbook* explains the importance of consistency in mitigation standards. One sentence in the *Handbook* is underlined for emphasis:

f. Consistency in Mitigation Standards

Mitigation measures required by individual FWS or NMFS offices should be as consistent as possible for the same species.

...

The Service should not apply inconsistent mitigation policies for the same species, unless differences are based on biological or other good reasons and are clearly explained.

Consistent mitigation strategies help streamline the HCP development process – especially for smaller HCPs – by providing readily available standards which applicants can adopt in their HCPs.¹¹

Using the *Handbook*, and information from Federal Register notices about incidental-take permits, we devised several mitigation actions that will avoid, minimize, rectify, reduce or eliminate, or compensate for the impact of our project over time:

We will **avoid** impacts by implementing time-of-year limits on exterior construction (between July 16-December 15).

We will **minimize and reduce** impacts by eliminating 8 home sites (reducing the number of home sites by 75%), which would result in a corresponding reduction in human activity.

We will **minimize and reduce** impacts of vehicular and human traffic by eliminating Piankatank Avenue, the road that passes less than 15 feet from the nest tree.

We will **avoid** impacts by ensuring that no bright lights or mercury vapor lamps are used on the property.

We will **compensate** for the impacts by providing two small lots on the headwaters of Stingray Lake, if FWS requires this. (**Note:** We added measures to rectify and restore habitat later)

On November 18, 2002, we wrote to request a consultation with Mr. Davis before we submitted our application and HCP to FWS.

¹⁰ *Handbook*, page 3-23

¹¹ *Handbook*, page 3-23

Meeting at FWS: November 26, 2002

When we arrived at the Field Office, we were surprised when Mr. Davis escorted us into a conference room and introduced us to Karen Mayne and Jolie Harrison. Mr. Davis explained that if he was called up for military service, Ms. Harrison would take his place.

From the outset, the meeting was tense. Even the box of Krispy Kreme donuts we brought did not lighten the atmosphere. Mr. Davis rarely made eye contact. When he made a statement, he watched Ms. Mayne. Since our earlier contacts with Mr. Davis were positive, we did not know what to make of his changed demeanor and behavior. As we tried to make small talk with Ms. Mayne and Ms. Harrison, Pete mentioned that our office is in Deltaville. Ms. Mayne expressed surprise, and said she thought Pete was a "Northern Virginia lawyer." We explained the nature of our work.

We discussed the *Taylor* case. We explained that we wanted to learn the positions and concerns of conservation groups so we could anticipate objections and respond to suggestions from these groups. When I mentioned that we joined Defenders of Wildlife and downloaded several publications from the Defenders website, Ms. Mayne expressed interest in obtaining these publications. I explained that the publications are available to the public at the Defenders web site.

As we discussed the HCP, Ms. Mayne shifted the discussion to conservation easements. We explained that we could provide two undeveloped lots at the headwaters of Stingray Lake, if FWS needed them. Ms. Mayne said she did not think these lots would be sufficient. Pete explained that dozens of people own one or two small lots in the Stingray Lake area. In September, an individual who had an interest in more than 30 lots contacted us about purchasing these lots. Many of the lots do not perk. We did not need land, were concerned about the cost of the land we were planning to buy, so we declined the offer.

Ms. Harrison pulled out a calculator to determine the area encompassed by a 350-foot radius around a tree and came up with 8.8 acres. Ms. Mayne suggested that Pete contact the person to see if he and his partner were still interested in selling the lots. This was the first time anyone broached the subject of our buying additional land and paying to place the land into a conservation easement.

We mentioned our proposal to reduce the number of home sites from 11 to 3. Ms. Mayne asked if we would reduce the number of home sites from 11 to 1 and place the remaining land into a conservation easement. Eric Davis reminded her that there are no trees on most of the land so it is not suitable eagle habitat. Since we had discussed economic issues with Mr. Davis, we were astounded at the proposal that we forgo the sale of two lots for an economic loss of approximately \$250,000.

Ms. Harrison or Mr. Davis gave us an article entitled "A Simplified Guide to the Tax Benefits of Donating a Conservation Easement" by C. Timothy Lindstrom, Esq. Ms. Mayne explained that Mr. Lindstrom "does training about conservation easements – he has done conservation easements on properties he owns in Virginia."

When I skimmed the article, I saw that it described income tax benefits and estate benefits, provided examples of how conservation easements could benefit people who own farms, ranches, and other large properties, and are in the highest tax bracket. For example:

Assume Mr. Jones donates an easement on land valued at \$1,000,000 before the donation and \$700,000 after the donation. The value of the easement is the differences in these values, \$300,000. Assuming sufficient annual income to fully deduct this gift and that all the income would be taxed at the top marginal federal rate of 39.6% and (for example) and 5.75% state income tax rate, the value of the deduction to Mr. Smith would be \$136,050 $((39.6\% + 5.75\%) \times \$300,000)$. If Mr. Smith resided in a state without income tax, then the tax benefit would be \$118,800 $(39.6\% \times \$300,000)$ (page 7)

We did not know what to say. We do not itemize our taxes, are not in a high income tax bracket, and do not need to do estate planning. The article described “post-mortem” easements, intergenerational transfers of land, and “value replacement” and other estate issues for the very wealthy. One scenario involved John and Joan:

Assume that John and Joan are aged 51 and 43 respectively. Assume that they donate an easement worth \$1.5 million and that the income tax deduction saves them \$733,000 in income tax. They spend \$53,000 on a new Boxster and buy a “second to die” life insurance policy with the remaining \$680,000. They place the policy into an “inter-vivos” trust for the benefit of their children and transfer all of the “incidents of ownership” to the trust.

A premium payment of \$680,000 for a second to die policy on a couple John and Joan's age will be \$12,500,000 in coverage. Properly placed in an inter-vivos trust there will be no tax on the policy proceeds. Thus, John and Joan have replaced 1.5 million in reduced land value due to the easement with an \$11,820,000 (face value of the policy less the premium) in cash payable directly to their children tax-free. (Page 29)

Our names are Pete and Pam, not John and Joan. Unlike John and Joan, we do not have land to donate, nor can we purchase land and place the land into a conservation easement. We do not have multi-million dollar insurance policies. We do not even have a Boxster.

We agreed to meet again on December 3, 2002. Pete and I felt discouraged about the permit and the assistance we thought we would receive from FWS personnel.

December 3, 2002: Site Visit and Meeting

On December 3, we met with Karen Mayne, Eric Davis, Jolie Harrison, and Jeff Cooper of VDGIF at the site. Ms. Harrison took photographs of the property and the eagle nest, then left. After a quick walk around, we drove to Gillim Road and walked to the two lots that we proposed as compensation. Ms. Mayne said the lots were inadequate. We explained again that we have no more land.

I said I had read about habitat banks in the *Handbook*. Ms. Mayne said she did not know much about habitat banks but would find out more and let us know what she learned. She also mentioned a “quasi-governmental” organization called Fish and Wildlife Foundation. Karen Mayne, Eric Davis, Jeff Cooper, and Pete and I drove to the “nature park” on Jackson Creek. Ms.

Mayne said the park was not appropriate eagle habitat because the area was too populated. She wanted a large isolated area without human activity that would disrupt eagles. Since there are more than 40 houses within one-quarter-mile of the Stingray Point eagle nest, I bit my tongue. The “nature park” is far more isolated than our property.

We came back to the house and sat down around the table to talk. Eric Davis had reviewed our HCP and returned it with changes he wanted made. Pete advised that we wanted to change the biology section to include information about effects of development on eagles, and eagles that are nesting near the Wilson Bridge, in Washington, D.C. and Manhattan. Ms. Mayne decided we were allowed to make changes to the biology section of our HCP because FWS would create a separate biology opinion.

We amended the mitigation section to include “Applicants will retain existing shoreline vegetation, including large diameter perching and roosting trees. Applicants propose to restore vegetative buffers by planting native evergreen shrubbery, i.e., hollies and wax myrtle.”

Pete advised that he attempted to contact the people who own the lots on Stingray Lake but they did not return his calls. We assume the lots on Stingray Lake are either no longer for sale or have been sold.

During the December 3 meeting, Eric Davis said we were required to prepare a full-scale Environmental Assessment. Based on clear statements in the *Handbook* to the contrary, I disagreed. I said if you make up new rules as you go along and do not follow the written policies and procedures established by FWS in the *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 that our project was a low-effect HCP. He was also reconsidering the decision about allowing us to do interior work on the house after December 16, 2003 because “trucks hauling furnishings” might disturb the eagles. Intimidated, I shut up.

Pete asked Ms. Mayne why she was not following the FWS *Handbook* that includes specific information about how to handle low-effect HCPs and NEPA issues. She said the *Handbook* is not accurate. Pete said the Service continues to publish the *Handbook* and encourages people to use it – why is it not accurate? She responded, “litigation” but offered no information about why “litigation” invalidated the *Handbook*.

At the end of the meeting, Ms. Mayne gave us three options.

Under Option 1, we would purchase 9 acres in the Stingray Lake area and pay to place the land into a conservation easement. Ms. Mayne said she proposed 9 acres because this equals a 350-foot radius around a tree. Pete objected, explaining that waterfront land costs between \$100,000-\$150,000 an acre. Nine acres of waterfront land could easily cost a million dollars.

Ms. Mayne said the land did not have to be waterfront land; it could be “close to the water.” Jeff

Cooper advised that Stingray Point is not high-quality eagle habitat, the water is too salty, and that better eagle habitat exists upstream on the James and Rappahannock Rivers.

Under Option 2, we would purchase 9 acres of land of suitable eagle habitat somewhere in Virginia and place the land in a conservation easement. The land did not have to be in Middlesex County or the Middle Peninsula.

Under Option 3, we would contact individuals and organizations to find out if they knew about land we could purchase and place into a conservation easement. Ms. Mayne and Mr. Davis mentioned refuge managers, Mason Neck, Isle of Wight, and possibly hunt clubs.

Mr. Davis advised that we had to complete the mitigation actions before we could apply for the permit. In other words, **we had to buy 9 acres of eagle habitat and place it in a conservation easement before USFWS would process our application for an incidental take permit.** Mr. Davis also reminded us that the clock was ticking – we had to move on this quickly if we wanted to build the house in 2003.

Our project involves a single-family house on a few hundred square feet of cleared land in the Chesapeake Bay region. The Chesapeake Bay region has experienced a greater population increase than any other recovery region. It was logical to study low-effect HCPs for bald eagles, specifically bald eagle HCPs for small properties in the Chesapeake Bay region. We requested that FWS provide information about bald eagle HCPs for small properties in the Chesapeake Bay region.

We explained that we want to minimize impacts and optimize conditions so the eagles will remain in the area. I asked what happens if the eagles do not leave, but continue to use this nest. Mr. Davis said even if the eagles stay and continue to use the nest, we have harassed the eagles. He launched into a discussion of harassment and the bald eagle nervous system that left us bewildered. Bald eagle specialist Jeff Cooper did not contribute to this discussion.

By the end of this meeting, we were in shock. Obviously, we missed something. Over the next several days, I reviewed the Handbook and Federal Register documents to make sure I understood minimization and mitigation, and specifically what should be included in a HCP for a species that is not endangered nor threatened. I found no bald eagle HCPs that required small property owners to purchase additional land for a conservation easement.

On December 3, 2002, per Ms. Mayne's request, I sent links to Federal Register Notices, Habitat Conservation Plans, incidental take permits, and Defenders of Wildlife publications to all individuals who attended the meeting.

On December 3, I requested that FWS provide specific information about bald eagle HCPs for small property owners and low-effect HCPs for bald eagles in the Chesapeake Bay. When no one responded to this request, I repeated my request on December 30, January 5, 2003, and January 6, 2003.

On January 6, 2003, I wrote to Karen Mayne about my repeated unanswered requests for

information about bald eagle HCPs:

I am sorry to hear that you are under the weather. The past few months have been difficult. I remember when we met for the first time at your office, you had to have your cat put to sleep on the following day. I appreciate your taking the time to respond.

I want to keep Jeff Cooper apprised of our progress so will copy Jeff on any correspondence I send to you or your staff.

During the December 2 meeting, we agreed to collect information about bald eagle HCPs for small property owners. During this meeting, you asked me to send you links to publications by the Defenders of Wildlife and links to Federal Register notice pages. I sent this information to you and your staff on December 3.

Pete and I are concerned that no one from your office provided us with information about bald eagle HCPs for small property owners after the December 2 meeting. We are also concerned that no one has responded to our requests for information.

I am making another request for information about bald eagle HCPs for small property owners. If you or your staff do not have this information, please refer me to someone in your agency who can provide specific information about bald eagle HCPs for small property owners.

We appreciate your help in obtaining this information.

Later that day, Ms. Mayne replied by an email that said, in part:

I think Eric will be able to pass on to you the information we have gathered from around the country on various ideas for HCP compensation. It sounds like the best option at this point may be for you to pursue a conservation easement on an existing nest site.

...

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.

On January 8, 2003, we sent a detailed letter to Ms. Mayne by U. S. Mail and email about this new plan to change our project from a low effect HCP in order to protect FWS from a lawsuit. In that letter, we made the following requests:

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 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 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.

Two hours later, Eric Davis emailed a reply about mitigation in bald eagle HCPs that answered some of our pending questions. I incorporated this information into a table of Bald Eagle Habitat Conservation Plans (see Figure 2).

Date / Permit	Name / State - FR /	Description / Purpose	Mitigation	Duration
10/22/96 PRT-816732	Nick Gross/ Snow Construction Osceola, FL 61 FR 36391	Residential development: 30 houses on 12 acres.	Phased construction within 250-foot buffer zone; limitations on activities within buffer zone during nesting season. Off-site mitigation: Payment of \$25,000 (\$833. per house) to Florida Bald Eagle Conservation Fund held by National Fish & Wildlife Foundation.	Unknown
5/21/01 TE039993-0	Pinsto, inc. / Lake Wylie Gaston County, NC 66 FR 18493	Residential development: 12 lots on 13.7 acres; low-effect HCP; categorical exclusion from NEPA	Time of year restrictions on construction during nesting season. Developer to set aside 2 sites (2.6 acres and 0.5 acres). Off-site mitigation: Payment of \$1,200. (\$100. per lot) to Carolina Raptor Center for eagle rehabilitation and education.	4 years
05/30/01 TE034491-0	Crescent Resources, LLC Southpointe Subdivision, NC 66 FR 15739	Multipurpose: 11,700 acre residential development and timber harvest over 20 years on Lake James in Burke and McDowell counties	Time of year restrictions for construction during nesting season, limitations on vegetation removal. Off-site mitigation: Developer to provide 6 nest sites, each with 300-foot buffer zone (approximately 6.5 acres) for a total of 38.5 acres. Each nest site will include at least one large pine tree.	50 years
09/21/01 TE041642-0	Gunston Manor Fairfax, VA 66 FR 32959	Single family residence: 0.49 acres (21,000 sq. foot lot); low- effect HCP.	Time of year restrictions on construction during nesting season; measures to minimize impacts to habitat (i.e., retain vegetative buffers). Off-site mitigation: None from property owner. Unidentified 3 rd party agreed to pay for 2 artificial nests to be placed within 750' of nest.	30 years

Figure 2. Bald Eagle Habitat Conservation Plans (1996-2002)

Between 1996 and the present, four habitat conservation plans were developed for bald eagles. Only plan involved a small landowner (Gunston Manor, 2001). Only one plan involved bald eagles in the Chesapeake Bay region (Gunston Manor, 2001). In these HCPs, “off-site mitigation” ranged from a payment of \$833.00 per lot (Nick Gross/Snow Construction in Osceola, FL, 1996) to \$100.00 per lot (Pinsto, Inc./Lake Wylie, Gaston County, NC, 2001) to \$0 (Gunston Manor, VA, 2001).

We debated how to handle the “off-site mitigation”/monetary compensation issue.

The Nick Gross/Snow Construction HCP was the first bald eagle HCP. This HCP was developed in 1996, before FWS announced that bald eagles had recovered and before FWS proposed to delist bald eagles. The Nick Gross HCP involved a high-density housing development of 30 houses on 12 acres. Off-site mitigation was \$833.00 per lot.

Five years passed before another bald eagle HCP was developed. In 2001, the Asheville Field Office developed two HCPs for bald eagles. The Pinsto/Lake Wylie HCP is for a small residential development of 12 lots on 13.7 acres. Compensation was \$100.00 per lot. In 2001, the Asheville Field Office also developed an HCP for Crescent Resources, an 11,700-acre residential development and timber harvest project on Lake James in Burke and McDowell counties.

The John Taylor/Gunston Manor HCP (2001) is most similar to our situation. Like us, Mr. Taylor is a small property owner who had no land to set aside in a conservation easement. Mr. Taylor paid no off-site mitigation, although an unidentified third party paid for 2 artificial eagle nests to be constructed within 750' of the nest tree.

FWS requires mitigation to be "as consistent as possible for the same species" and presumably consistent within the same geographical area.

The proposed mitigation in our HCP will, at the discretion of U. S. Fish and Wildlife Service, involve paying of a sum of money for habitat acquisition or placing two small lots into a conservation easement.

A few days ago, we drove to Northern Virginia. Between Deltaville and Port Royal at the intersection of Route 301 and Route 3, we saw seven bald eagles. We routinely see an eagle or two during the 2.5-mile drive from our home on Stingray Point and the office in Deltaville.

The good news is that a bald eagle sighting is no longer the traffic-stopping event it was a few years ago. However, in future months and years, FWS should expect to deal with many more situations like ours that involve bald eagle nests on small parcels of land where small property owners are not in a position to set aside or purchase land.

Our plan allows for a standardized, systematic, structured approach that can be used as a template by FWS and other families like us, without either party having to be concerned about the prospect of litigation.

The eagles that built the nests on Stingray Point are tolerant of human habitation activities. The eagles built one nest adjacent to State Route 33 and a busy marina. After this nest blew down, they built another nest adjacent to a two-story house that was under construction approximately 375 feet away. Five houses are within 350 to 400 feet of this nest. More than 40 houses are within one-quarter mile of the nest.

Approximately 30% of eagle nests are abandoned every year. A bald eagle pair can build a new nest in less than a week. These eagles have used this nest for three seasons. They may abandon this nest and build another nest, with or without construction of another single-family residence. According to wildlife biologist and raptor specialist Jeff Cooper, if these eagles relocate, they are likely to build another nest in the immediate vicinity of their present and former nests.

To summarize, our project involves construction of a single-family house with a footprint of approximately 1500 square feet on cleared land. We are not requesting permission to clear land, move earth, or cut trees. We will take measures to avoid, minimize, reduce, and rectify the

effects of construction and human habitation activities on the eagles.

We will on the road for the next several weeks, but will have our computers and a printer with us. We have email access. When we travel, our office scans incoming mail and posts these documents in a secure directory on one of the websites so we can retrieve mail on the same day it arrives at the office.

We look forward to hearing from you.

Sincerely,

Pamela Darr Wright

Enc: Permit Application & Check for 25.00
Pete & Pam Wright's Habitat Conservation Plan with Supporting Documents

cc: Jeffrey L. Cooper, Wildlife Diversity Biologist
Virginia Department of Game and Inland Fisheries
1320 Belman Road
Fredericksburg, Virginia 22401

P.S: So you do not have to duplicate and mail copies of this letter and HCP to others, we posted these documents in a secure subdirectory on the Wrightslaw website where they can be downloaded, printed and read.

The URL is: <http://www.wrightslaw.com/hcp/hcp.index.htm>

The user name is:

fws

The password is:

fws

all lower case

We will post the HCP and supporting documents on this page later, so they are available to the public.