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March 28, 2003

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
for Vacated Eagle Nest

Dear Karen:

On Friday, March 21, 2003, we received two emails from you. Each email copied several different individuals. One email included my proposed "draft contract" that I sent to you in regard to the mythical "XYZ Conservation Group." The other email included Pam's statement to Andy Lacatell of The Nature Conservancy (TNC) that "We have no confidence in Karen Mayne and a strong sense that she will do whatever she can to sabatogue (sic) any plans we propose."

You asked us to present our concerns to your supervisors.

Instead of writing two letters to different individuals, further muddying the waters about what was said, when, why, and by whom, we will respond to both of your emails with this letter and send copies to everyone copied by you.

In your email that included my draft contract, you wrote, "The Service will work on a draft Memorandum of Agreement with TNC and the Virginia Department of Game and Inland Fisheries as a basis for continued discussions." You noted that you would be out of town and would not be able to begin work on this until you return until March 31.

From my perspective, a "Memorandum of Agreement" is unnecessary and will entail more meetings, more conference calls, and more delays. I am confident that, if we provide funds to TNC to be used for conservation easements on bald eagle habitat, TNC will use the funds in an appropriate manner, without any supervision or micro-management by FWS or the Virginia Department of Game and Inland Fisheries.

In my legal opinion,¹ the proposed contract should suffice as the Agreement between the Wrights and the recipient of funds.

Between September 2002 and January 28, 2003, when we delivered our Habitat Conservation Plan to your office, Pam and I have spent more than 1,000 hours on research, writing and revising the HCP. Despite this enormous expenditure of time, we continue to experience delays, delays, and requests for more meetings and more documents.

Background

Before addressing the issue of “sabotage,” I need to review the history of our contacts with FWS over the past nine months. I think this history will place our comments and concerns in context.

We signed a contract to buy this land on July 30, 2002. We planned to begin home construction within a few months and thought we would be living in our residence by now. Later that day, my son alerted me to an article in the *Washington Post* about the *John Taylor v. U.S. Fish and Wildlife Service*.

On August 1, 2002, we initiated this process with a telephone call to Jeff Cooper, raptor expert with the Virginia Department of Game and Inland Fisheries (VDGIF). On August 9, 2002, Jeff came to Deltaville for a site visit and explained the HCP and Incidental Take Permit process to us. During his visit, Jeff called Eric Davis, FWS Biologist, in an effort to arrange a site visit by him. He was unable to reach Eric Davis so he left a message on Eric’s voicemail.

On August 13, 2002, Eric Davis called to schedule an appointment for a site visit. Eric could not meet with us until September 10, 2002.

In the interim, I went to the Clerk’s Office of the U. S. Court of Claims in Washington, D. C. I spent two days reviewing the *Taylor* case, a massive file that contained extensive transcripts of hearings, depositions, pleadings, etc. I read the file in chronological order. I wanted to understand how this situation evolved into years of litigation that resulted in FWS having to pay Mr. Taylor and his attorneys over \$200,000.

When I read the file, it was clear that FWS would suffer a significant loss. The Judge repeatedly expressed concerns that the Federal Government had announced that the bald eagle was not endangered, had fully recovered, and was being removed from the list. The Judge was upset with FWS that the process had dragged on for so long for Mr. Taylor to receive an Incidental Take Permit. As you know, in addition to the large monetary settlement paid to Mr. Taylor and his attorneys, FWS created the Habitat Conservation Plan for Mr. Taylor that consisted of an artificial nest platform as the “mitigation.” The eagles did not use the nest platform.

¹ I am an attorney

Telephone Call with Taylor

After I reviewed the file, I talked with Mr. Taylor at length. He explained that the nest blew down and the eagles relocated.

During this time, I also talked to other individuals about Incidental Take Permits and Habitat Conservation Plans. They had litigation experience with FWS in regard to HCP's and ITP's. We were advised that FWS would create obstacles and hope we would become discouraged and go away. These individuals warned me that FWS will delay, delay, delay, will call for more meetings, more documents, and that eventually discussions would shift to dollars, and that the amount of money we were expected to pay would gradually increase. We were advised to document everything and prepare for litigation.

We were very distressed to learn that we should expect these strategies from FWS.

September 10, 2002 Meeting with Eric Davis

Before our September 10 meeting with Eric Davis, we did a "Google" search and learned that Eric is a major in the U. S. Marine Corps. We envisioned that Eric would be a crusty, impersonal, "by-the-book" military bureaucrat, the FWS "point man" who would tell us we could not build a house on our land. Initially, after our meeting with Jeff Cooper, we felt optimistic. After hearing the warnings about FWS, we felt anxious.

On September 10, 2002, we met with Eric Davis, Jeff Cooper, and our real estate agent, Eric Johnson, at the property.

Eric Davis was friendly, with a quick warm smile. His personality and demeanor quickly put us at ease. Our fears about him as a person and "point man" were unfounded. We felt that his mission was to help us through the process as quickly and efficiently as possible. Eric explained that our project would be a low-effect HCP, which was a three-month process.

I did not mention my familiarity with the *Taylor* case or the warnings I had received about the FWS strategy. At one point, Eric Davis and Jeff Cooper started talking about the *Taylor* case. Eric said that the *Taylor* case was the first eagle nest HCP that his office worked on, that FWS made "some mistakes" and had learned from these mistakes.

Eric did not criticize the Judge, the FWS attorneys, or the Defenders of Property Rights. I was impressed. He characterized the case accurately, and explained that increasing numbers of bald eagles are building nests on property owned by small landowners. Because I have a background of working with state and federal government agencies on issues that involve complicated law, regulations, and agreements, he hoped we could develop an HCP that could serve as a "template" for others, especially since this problem will continue to increase.

By the end of this meeting, we felt optimistic and encouraged.

We began exhaustive research into the legal and regulatory issues relating to bald eagles, the endangered species act, habitat conservation plans and incidental take permits. We also did research on the concerns of conservation groups that have sued FWS.

On September 25, 2002, you sent us a draft HCP prepared by Eric. In your cover letter you said that the issuance of our permit would trigger the National Environmental Policy Act of 1969 (NEPA). We would need to obtain written confirmation from Virginia Historical Resources that our permit would not impact any “historic resources.” [When we contacted Virginia Historical Resources, we learned that the Stingray Point area has no historic resources.]

Using language from Eric’s HCP template, we prepared the first draft of our HCP. We revised the document several times, while also being uncomfortable with much of the language about the eagle’s plight. On November 18, 2002, we requested a meeting with Eric to review and revise our draft HCP. [This first draft had the word “DRAFT” watermarked on each page.]

November 26, 2002 Meeting at Gloucester FWS

On November 26, 2002, we went to the FWS Field Office in Gloucester to meet with Eric Davis who would review our HCP. When we arrived at the office, we knew something was wrong. The dynamics had shifted.

In Pam’s later January 28, 2003 letter to you, she described what happened:

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. . . . [I explained that I had reviewed the file and talked with Mr. Taylor. I did not discuss that I had also talked with others and was told that FWS would delay and ask for increasing dollars as the process continued. You expressed concerns that FWS would be sued by the Defenders of Wildlife.]

. . .
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. (Our real estate agent has since advised us that the loss could be as high as \$350,000.00.)

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.

Later that same day, after our first meeting with you, Pam called the Virginia Historical Resources contact person about their review. She learned that Eric Davis had called Virginia Historical Resources a few days earlier and advised them about the need to do a “full-blown NEPA review” of our project. More delays. The VHR contact person said she was “astounded” since this had never been done before for such a small project. [Later correspondence from VHR confirmed that our project does not impact any historic resources.]

December 3, 2002 Meeting with FWS on site

On December 3, we met with you, Eric Davis, Jolie Harrison, and Jeff Cooper of VDGIF at the site. We looked at the two lots that we proposed as compensation. You said the lots were inadequate. We drove to another site [property owned by Middlesex County] that might be a location for a conservation easement. You explained that unless the County agreed to a number of restrictions on use, this property would not be acceptable. The proposed use of the property as a marine museum and nature park is inconsistent with your restrictions on use.

We came back to our house and sat down around the table. Eric Davis had reviewed our HCP and returned it with changes he wanted us to make.

I advised that I attempted to contact the people who own the lots on Stingray Lake but they did not return my calls. We assumed that the lots on Stingray Lake are no longer for sale or have already been sold.

As Pam explained in her January 28 letter, events at this meeting led us to conclude that the advice and warnings we received earlier about FWS strategy to delay and delay was accurate.

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.

We were in shock. This was inconsistent with the *Handbook*. In our extensive research and review of *Federal Register* documents, we found no bald eagle HCPs that required small property owners to purchase land for conservation easements.

Pam has read, re-read, highlighted, indexed, and cross-referenced the *Handbook*. I began to wonder if either you or Eric had given it the study required for a project of this nature.

During the December 3 meeting, we requested that FWS provide us with specific information about mitigation in low-effect HCPs for bald eagle and in bald eagle HCPs in the Chesapeake Bay Region. We repeated this request for information about mitigation several times over the next five weeks, on December 30, January 5, 2003, and January 6, 2003.

On January 6, 2003, Pam wrote to Karen Mayne about our unanswered requests for information about mitigation in bald eagle HCPs:

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.

The dynamics shifted again.

We were requesting information about low-effect HCPs. Four months after we initiated the process, you decided that our project would not be a low-effect HCP after all. We wondered if this was retaliation for our persistent requests for information. If our project was not a "low-effect" HCP, the time delays would be unimaginable. The earlier predictions about delays, delays, delays, and increasing dollars, were coming true.

January 8, 2003 letter - No longer a Low-Effect HCP

On January 8, 2003, Pam sent a detailed letter to you about your new plan to change our project from a low-effect HCP in order to protect FWS from a lawsuit. In that letter, she 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 sent information about mitigation in bald eagle HCPs. From our own independent Lexis/Nexis research and the information provided by Eric, we knew that four Habitat Conservation Plans for bald eagles have been between 1996 and the present. Only one plan involved a small landowner (Taylor / Gunston Manor, 2001). Only one plan involved bald eagles in the Chesapeake Bay region (Taylor / Gunston Manor, 2001). In these HCPs, “off-site mitigation” ranged from a payment of **\$2,083 per acre** (Nick Gross/Snow Construction in Osceola, FL, 1996) to **\$87.59 per acre** (Pinsto, Inc./Lake Wylie, Gaston County, NC, 2001) to **\$0** (Gunston Manor, VA, 2001). Over a five year period, the cost per acre has plunged from \$2,000.00 per acre to \$0.00.

We revised our HCP (now a 33-page document with numerous attachments) to include this information about mitigation and compensation. On January 28, 2003, we submitted the complete package to your office. The package included a completed Permit Application on the form provided by your office, [later determined to be out of date], a check, and the HCP document.

Wright’s HCP Received by FWS on January 29, 2003

The HCP package was received by you on January 29, 2003. As noted in earlier correspondence, the HCP, attachments, and more have been posted on our website in a password protected subdirectory and can be downloaded from the website. The URL is: www.wrightslaw.com/hcp/ . The username and password are “fws” [lower case].

Below is a portion of the HCP that begins at page 27.

VII. FUNDING

One conservation planning requirement is that sufficient funding be available to implement the HCP. Peter Wright and Pamela Wright are committed to provide the necessary funding to support the mitigation as outlined in this Habitat Conservation Plan.

At the election of the Service, applicants will either be responsible for securing a conservation easement for the aforementioned two lots.

OR

In the alternative, Mr. and Ms. Wright will provide mitigation funding in the amount of \$500.00 for each of the 3 home sites, a total of \$1,500.00. The recipient of such funds will be a source recommended by Jeffrey Cooper, Wildlife Biologist and Raptor Specialist, Virginia Department of Game and Inland Fisheries (VDGIF), or his designee, for the purpose of acquisition and management of bald eagle habitat.

The Service does not anticipate that there will be a need for longer-term mitigation funding for this small-scale, low-effect HCP.

We derived the sum of \$1,500.00 from information about mitigation in the bald eagle HCPs that FWS approved.

FWS rejected our HCP because, “The Service and the Office of the Solicitor are concerned that the mitigation you have proposed may not provide sufficient compensation to offset the loss of an eagle nesting territory.” (February 13, 2003 letter from Karen Mayne, page 2.)

On February 11, 2003, you wrote to propose a site visit by Craig Koppie. Mr. Koppie was not available for the site visit until March 17, 2003. If Mr. Koppie’s input was so important, why did FWS delay his involvement until March 2003? We seemed to be running into the delay delay strategy that we had been warned about.

February 28, 2003 Telephone Conference Call

On Friday, February 28, 2003, we participated in a telephone conference call with you and several other FWS personnel about next steps. There was a discussion of a eagle nesting territory which was described as a 350-foot radius around an active nest tree, or between 9 and 40 acres.

The discussion also focused on whether our proposal to pay \$1,500 was adequate. It was clear that FWS staff felt this sum was not sufficient. When I asked how to determine an adequate amount, no one was willing to answer. Jokingly, I said, “If we were to propose Fifteen Million, would that be adequate?” After some laughter, it was obvious that the sole issue was the dollar amount, but no one was willing to venture a figure, except that it was somewhere between \$1,500.00 and \$15,000,000.00. The dollar amount was the real issue, not micro-management of documents and agreements.

This sum is now questionable and may need to be adjusted downward since the eagles vacated the nest and built a new nest elsewhere. Since the eagles vacated the nest, building a house will not cause the loss of an eagle nesting territory.

At one point, during that call we were told that the dollar issue was not related to the costs of land acquisition, but the costs of creating a conservation easement, i.e., Deed of Easement, survey, monitoring, etc. The amount discussed was between \$7,500 and \$10,000. Someone said we should not be responsible for all of this since others would benefit, and that our contribution may be half, i.e., around \$5,000.00.

You suggested that we contact The Nature Conservancy (TNC) to see if they would be willing to accept funds from us for the subsequent creation of such an easement. We are familiar with TNC and their work. Pam’s mother has been a member of TNC for many years and often sends us TNC articles. Our daughter has a Master’s degree in Environmental Policy and works on small island development issues and coral reef protection in the Caribbean.

March 3, 2003 Wrights meet with Lacatell

After the February 28 conference call, I called TNC immediately, and spoke to Andy Lacatell. We scheduled a lunch meeting with Andy on Monday, March 3, 2003. We went online and joined TNC. When we met with Andy, we explained that we needed a letter that TNC would be

willing to accept funds from us to be used for the purpose of creating and maintaining a conservation easement to protect bald eagle nest habitat. It was our understanding from FWS that funds from us could be commingled with funds from other sources, including other landowners who have a nest on their property, to the benefit of bald eagles. TNC has this process in place and has been involved in many conservation easements and spoken highly about TNC many times.

Andy asked how soon we wanted a letter. I said, "By yesterday." Andy said he hoped he could get something to us in a week or two. If we did not hear from him, we should contact him in a week.

We felt enormously relieved. After eight months and many delays, we thought we could move on.

On March 4, Pam sent a progress report to you and the conference call participants. She mentioned that we had some questions about the conservation easement.

I want to provide the group with a progress report after the Feb 28 conference call and ask a couple of questions.

On Monday, March 3, we met with Andy Lacatell of TNC and discussed our desire to fund the legal and administrative costs of a conservation easement for bald eagle habitat. Andy is willing to help us with a conservation easement but had some questions that we were unable to answer definitively.

I am including Andy in this message in case he has additional questions or needs to clarify issues or concerns.

SIZE OF EASEMENT

Andy asked how much land we were attempting to protect with an easement. We advised him about the recent meeting between FWS, VDGIF, Dr. Byrd and Dr. Watts of CCB that was held to quantify bald eagle nesting territory as a means to determine appropriate compensation. My understanding from you is that bald eagle nesting territory was defined as between 9 and 40 acres. Thus, our goal is to protect at least 9 acres of bald eagle habitat in a conservation easement. Is this correct (i.e., at least 9 acres, up to 40+ acres)?

We will be delighted if we can protect more than 9 acres of eagle nesting habitat.

INFORMATION FROM TNC

Andy asked what information you need from TNC to confirm the easement. In other words, what information does TNC need to provide about the easement, how specific does this information need to be (i.e., location, size, etc)?

Do you have specific language that should be used to describe the conservation easement?

What information do you need from him before we can submit our revised HCP?

We look forward to hearing from you soon.

Many thanks for the time you are devoting to our case.

We were prepared to move forward immediately on the easement. However, we could not move forward until we had answers to our questions. We waited for you to answer our questions so we could provide this information to Andy.

On March 11, 2003, we received an email from you that said:

With respect to submitting your revised HCP, have you worked out a definite agreement with The Nature Conservancy and an amount of money? I think it may be good for us to discuss that further. In my conversations with TNC (Andy Lacatell and their state director, Michael Lipford), they have not made a commitment yet, and gave me a potential cost that was substantially higher than the \$5000 that you had suggested to Andy Lacatell. TNC has questions about how this would work out, and they have requested a conference call with the Service, which has been scheduled for March 21 due to the limited availability of their folks. Some of the questions they have raised and you have raised, regarding what has to be shown or committed to in the HCP (i.e., time frames, amount of funding, what level of legal protection) still have to be resolved, and Robin LePore and Glenn Smith have suggested that our Washington Office may need to give us some advice on these questions.

We were surprised. We were waiting for you to answer our questions and also waiting to hear from Andy. Instead, we learned that after we advised you that we met with Andy, there were subsequent discussions with you and Andy that excluded us. We wondered, why the exclusion, Andy said he would get back in contact with us? The “potential cost” of \$5,000.00 was information from FWS that we conveyed to Andy. As we were warned many months before, the dollar amount was increasing steadily, the pattern was unfolding as predicted.

You wrote that questions “still have to be resolved.” We embarked on this process in August 2002. Nine months have passed. Although we have expended an incredible amount of time on this, there is still no light at the end of the tunnel.

March 12, 2003 Email: Lukewarm Response - From FWS or TNC?

On March 12, Pam sent an email to Andy which said, “Andy - When we met with you, you asked us to call if we hadn’t heard from you in a week. We will call tomorrow. - Pam”

While we had been on a first name basis, Andy’s response was very formal:

Mrs. Wright

There have been a number of e-mails and phone calls back and forth between TNC folks and FWS staff since we met. We have a conference call (TNC&FWS) on the 21st. Let’s talk after that, if it’s appropriate. Karen may and probably should continue to be your point person.

Initial reactions to the proposed arrangement have been lukewarm. We’ll try to work some of the issues out on the 21st, but I think TNC will set a very high threshold for us to become involved in this. Conceptually, it is not without precedent, but we’ll have to look at the costs and benefits of this proposal.

When we read the statement, “Initial reactions to the proposed arrangement have been lukewarm” we got angry. FWS advised us to contact TNC and suggested that we pay \$5,000.00 for a conservation easement. We followed through immediately. During our meeting, Andy was enthusiastic, not lukewarm. Then, in the interim, unknown to us, there were discussions between TNC and FWS. When we read Andy’s email, it seemed clear that FWS was lukewarm to involvement by TNC.

We were distressed. From the first paragraph of his email, it was clear that Andy would not talk with Pam, that we were supposed to talk with Karen about whether TNC could accept our funds, and that the response from FWS was lukewarm. From the “high threshold” language, we saw another increase in the dollar amount.

At this point, we felt that you had sabotaged our relationship with TNC.

Fed up, Pam responded in anger:

Dear Andy;

I hope you and TNC will not close doors yet. We are willing to go forward on the easement.

I do not know why FWS is lukewarm to our proposal to work with TNC since they suggested it.

One possibility is that the relationship between us and Karen Mayne is poor. Our confidence in her has been eroded by her repeated unwillingness to provide information on various issues (i.e., questions about how to structure the easement that she has still not answered, claims she must talk with people who are never available or later do not have answers).

We have no confidence in Karen Mayne and a strong sense that she will do whatever she can to sabotage any plans we propose.

I am not sure what we can do about this problem.

She recommended that we “pursue other options” than TNC for an easement. I responded that we do not wish to pursue other options. We are supporters of TNC, my 83 year old mother is a long time member and supporter of TNC. We want to work with TNC. We just want answers to our questions about requirements for an easement.

I would like to speak with you about this.

Thanks,
Pam

We did not copy anyone with this email that expressed concerns about you. Within an hour, Andy replied:

Mrs. Wright,

To clarify, TNC is lukewarm on the proposal.

I have every confidence in Karen. I have been familiar with Karen’s work and working relationships for many years and feel very comfortable in saying that she is doing everything she

can to move this new initiative forward. We will try to work out some answers to your questions re easement language and requirements on the 21st. We'll be in touch with you after that.

Andy

On March 17, Pam sent an email to you, with copies to Andy and others:

Dear Karen:

I hope you had a good trip to Florida.

Pete and I want to thank you for the time and effort you have put into the HCP. We know little about conservation easements and appreciate your willingness to help us learn about this subject.

I need to clarify one issue.

You mentioned a cost of \$5,000 for an easement. This was not our understanding.

During the Feb 28 conference call with members of FWS staff, we asked you all for an estimate of costs for a conservation easement. One person estimated the costs as around \$10,000. Someone mentioned that matching funds may be available that would reduce our out-of-pocket costs by up to 50% (i.e., to \$5,000). I do not recall that anyone mentioned a specific source of matching funds at that time.

When we met with Mr. Lacatell, we tried to convey the essence of this discussion, which is where the \$5,000 figure came from.

It was our understanding from Mr. Lacatell that the costs of a conservation easement on 9 acres of eagle habitat would be substantially the same as an easement on 19 acres or 90 acres of eagle habitat. I may have misunderstood Mr. Lacatell so I will copy him on this email so he can correct any misunderstandings.

Bottom line: We understand that the costs for a conservation easement would be approximately \$10,000. We are willing to go forward with the easement when we find an organization that is willing to accept funding from us for an easement.

We would like to discuss this with you when we meet on Monday March 17. I will wait to contact the other organizations you recommended until after we speak with you.

Many thanks for your help,
Pam Wright

Within a half hour, Andy replied:

All,

Just a quick point of clarification. Karen and I have discussed this already. The cost estimate of \$10,000 would cover a DONATED easement. If an organization, like TNC, was to go out and proactively pursue a conservation easement, the costs are considerably higher as you have staff time and effort costs and monitoring costs, not to mention legal expenses. It is our opinion that the true cost of doing an easement under these conditions is more in the neighborhood of \$25K to \$30K, once you factor in the above costs.

We'll surely talk about this more on Friday and into the following week.

Andy

We were even more confused. We did not ask TNC to go out and “proactively pursue a conservation easement.” Andy’s perception of what was expected of TNC was very different from what you explained to us. Why?

March 17, 2003 Site Visit and meeting with FWS

Later that day, we met with you, Jolie, Craig Koppie of the Annapolis FWS office, and our real estate agent, Eric Johnson.

Craig Koppie confirmed that the eagles have vacated the nest. The nest is not active. Jolie Harrison called Dr. Watts who had completed his flyover. Dr. Watts confirmed that the nest was vacated.

Coincidentally, that morning Jolie received information that a new bald eagle nest had been built on another creek on Stingray Point. The eagles moved. Of course, this is normal eagle behavior. At least 30 percent of bald eagle nests are abandoned every year.

After the site visit, we were standing on the marina road, looking at the first nest tree that blew down. The discussion shifted to the *Taylor* case. I told Craig that I was concerned about his late 11th hour involvement in our case. I explained that I knew he was a key witness in the *Taylor* case. I suspected that FWS decided to bring him into the case so he could testify against us in any subsequent litigation.

Prior Warnings to the Wrights: FWS will delay and increase the \$\$\$

I told you, Jolie and Craig that, in addition to reading the *Taylor* file and talking with Mr. Taylor, I had talked with other individuals who had been involved in FWS / HCP litigation. I had not previously shared with any of you that I had talked with others about FWS litigation and the *Taylor* case.

I told you that I had been warned that FWS would delay, delay, call for more meetings, more documents, and eventually shift discussions to dollars, and that the money we were expected to pay would gradually increase. I said I was advised to document everything and to prepare for litigation. I also told you that it was NOT Mr. Taylor who gave me this advice. Mr. Taylor told me about the struggles, the subsequent death of his wife and son, and that the nest blew down.

The meeting was emotional for us, and, I suspect, also for Craig. He obviously felt like a scapegoat in the *Taylor* case. I wanted Craig to know that, from my perspective after reading the file, it was clear that the Court was about to issue a ruling that would be very adverse to FWS. The reasons were not related to the evidence, the witnesses, or Craig, but was due to the fact that

the eagle is not endangered. The Judge was clearly upset about the time taken by the process and blamed FWS for wasting the Court and Mr. Taylor's time.

This meeting was very intense, but resulted in a healthy clearing of the air.

After this discussion on the marina road, we returned to the house. You emphasized that FWS did not expect us or TNC to buy land or purchase an easement, but to simply have some responsibility for the costs of the creation an easement. I offered to draft a form that would accomplish this objective so you could share this with counsel for the FWS and TNC, or any other such group. On March 21, 2003 I sent you that document and you have forwarded to the others.

You encouraged us to contact other groups in addition to TNC. You had us repeat back to you our understanding of what you said so there would be no confusion. I told you I was impressed that you did this. Pam and I felt relieved.

After the meeting, Pam and I believed that the problems were being resolved. The air had been cleared. After nine months and more than a thousand hours of work, we were finally on the downhill stretch. We could donate funds to the "XYZ Conservation Group," they could put the funds into a pot that would be used to create conservation easements to protect bald eagle nest habitat.

On March 21, we received an email from you that said, in part:

Pam and Pete --

Andy Lacatell forwarded the email exchange below to the participants in the conference call today between The Nature Conservancy, the Virginia Department of Game and Inland Fisheries, and the Fish and Wildlife Service and our Solicitor. I was quite surprised to see your comments of March 12, 2003 to Mr. Lacatell, in which you stated, "We have no confidence in Karen Mayne and a strong sense that she will do whatever she can to sabatogue any plans we propose." Since you have expressed similar concerns about the attitude of the Service in general and me in particular in previous letters to the Service and in meetings, I would like to suggest that you present your concerns directly to my superiors. I am forwarding this e-mail to my immediate supervisor, Jeff Underwood, and our Assistant Regional Director - Ecological Services, Sherry Morgan.

The fact that we believe that FWS was engaged in delay delay and increase the dollar amount strategy should come as no surprise to you. The process has been delayed and proposed dollars have increased. We discussed these issues with you, Craig, and Jolie, face-to-face, on March 17. That discussion was far more frank and honest than the statements Pam made in her email to Andy, which you did not quote in their entirety. After that discussion, we felt that things were finally moving toward resolution. We are prepared to break ground on our house within the next two to three months.

Karen, you have repeatedly told us that you are short-staffed since Eric left, you have no experience with HCPs, you have other responsibilities as a supervisor, and that our HCP is

taking up a great deal of your time. It appears that you may desire to remove yourself from our project.

On March 21, you sent another email that said:

I mentioned to you that I am out of town for the next week, so I will not be able to start work on that until the week of March 31. I would still encourage you to pursue other options for third parties in case things do not work out with TNC, although we are hopeful it will. Once there is a determination of whether there is a third party to work with you on the compensation issue, then the Service can determine what level of information we would need to process your permit application. Glenn Smith and Robin LePore will be instrumental in making such a determination.

If FWS needs more than my draft "Agreement," your proposal puts the cart before the horse. When I contacted Andy, he had questions that had to be answered before TNC was willing to commit. I have called other conservation groups. No conservation group will agree to be involved until these questions are answered. It seems that FWS will not answer the questions until a group agrees to be involved.

Catch-22

Like Yossarian, we are in a "Catch-22" situation.

Before we try to get another conservation group to accept compensation from us, we need you to specify what information, if any, you need from such a group.

We have revised our HCP to include suggestions made during the February 28 conference call and are prepared to submit it now, as a "Final" rather than as a "Draft." The Habitat Conservation Plan is for an Incidental Take Permit of a vacated nest.

HCP Fund Recipient? - National Fish and Wildlife Foundation

There are several ways to handle the payment issue. We can pay the funds to the National Fish and Wildlife Foundation. The Foundation was created by Congress for the purpose of receiving funds from individuals such as us. It seems to be the proper recipient of such funds, since that was its purpose as envisioned by Congress.

In the alternative, if you prefer, we can leave funds in the Trust Account of the real estate closing attorney for subsequent distribution to a recipient selected by you and under the terms and conditions imposed on the recipient by you, or, in the alternative, we can simply pay the funds to TNC.

This proposal should enable us to move forward immediately, without further delays.

To Karen, and by copy to Mr. Underwood and Ms. Morgan, if we modify the "Funding" portion of our HCP to reflect the above two alternatives, wouldn't that suffice? If not, please explain why not. Please provide the dollar amount of such funds.

Query? Change the facts. Yesterday, while walking near our house, the subject property just went on the market, the “For Sale” sign just went up. Last night we immediately contacted Eric Johnson, the real estate agent. He shared with us that there is an eagle’s nest on the property that has been vacant for a year. He explained that there may be a Federal Government permit process. Undaunted, knowing that the eagle is no longer considered endangered, we signed a contract to purchase the property. What would be the impact of a clean slate, i.e., what would be different, knowing that the nest is vacated and no eagle habitat will be disrupted?

I hope that this letter provides a clearer understanding of these issues and leads to speedy resolution.

Sincerely

PWDWright
Peter W. D. Wright

cc: All by email only

FWS:

Jeff Underwood
Sherry Morgan
Jolie Harrison
Glenn Smith
Craig Koppie
Diane Lynch

TNC:

Andy Lacatell
Michael Lipford
bkittrell@tnc.org (name unknown)
lcrowe@tnc.org (name unknown)
gbarlow@tnc.org (name unknown)

VADGIF:

Jeff Cooper
Ray Fernald

Others:

Eric Johnson, Mason Realty

(Note: Robin LePore, FWS omitted, fax number and mailing address is unknown.)