

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF VIRGINIA
Charlottesville Division

THE HISTORIC GREEN SPRINGS, INC.,)
REGINALD MURPHY, JANE STUART)
MURPHY, SERGIO SOBRAL, AND)
GAIL FLEURY SOBRAL)

Plaintiffs,)

v.)

Civil Action No.: _____

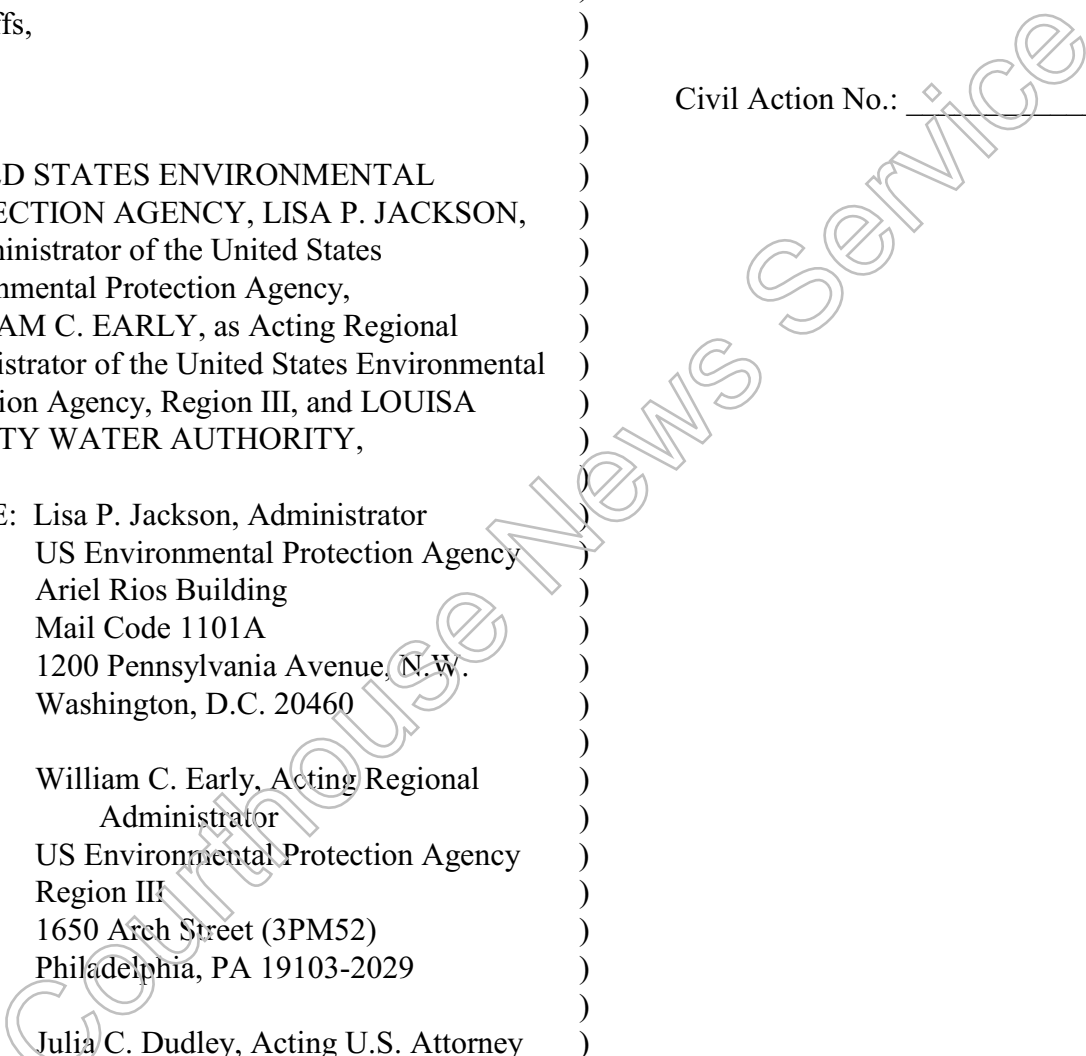
UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY, LISA P. JACKSON,)
as Administrator of the United States)
Environmental Protection Agency,)
WILLIAM C. EARLY, as Acting Regional)
Administrator of the United States Environmental)
Protection Agency, Region III, and LOUISA)
COUNTY WATER AUTHORITY,)

SERVE: Lisa P. Jackson, Administrator)
US Environmental Protection Agency)
Ariel Rios Building)
Mail Code 1101A)
1200 Pennsylvania Avenue, N.W.)
Washington, D.C. 20460)

William C. Early, Acting Regional)
Administrator)
US Environmental Protection Agency)
Region III)
1650 Arch Street (3PM52))
Philadelphia, PA 19103-2029)

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 Defendants.)
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COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER RELIEF

I. INTRODUCTION

1. This is an action for a declaratory judgment pursuant to 28 U.S.C. § 2201 and mandamus pursuant to 28 U.S.C. § 1361 against Defendant Lisa P. Jackson, Administrator of the United States Environmental Protection Agency and William C. Early, Acting Regional Administrator of the United States Environmental Protection Agency Region III, (collectively “EPA” or “Defendant EPA”) and the Louisa County Water Authority, challenging the Defendant EPA’s failure to comply with the Federal Water Pollution Control a.k.a. Clean Water Act (“CWA”), 33 U.S.C. § 1251 et seq., and the National Historic Preservation Act (“NHPA”), 16 U.S.C. § 470 et seq., prior to approving a National Pollution Discharge Elimination System (NPDES) permit for the Zion Crossroads Wastewater Treatment Plant (“WWTP”) located in

Louisa County, Virginia from which treated sewage is discharged into an impoundment of Camp Creek, a small tributary to the South Anna River, York River, and Chesapeake Bay.

2. On December 4, 2008, the Virginia Department of Environmental Quality (“DEQ”) ex rel. the State Water Control Board issued the subject permit pursuant to program delegation under the CWA while the EPA retains “primacy” over the subject permit issued as a Virginia Pollution Discharge Elimination System (“VPDES”) permit. The permit is one of a subset of permits that require EPA approval because of water quality conditions. Plaintiffs filed a judicial appeal of the DEQ decision to reissue the subject permit, which action is styled *HGS, Inc., et al. v. Virginia Department of Environmental Quality, et al.*, Case No. CL09-20 (Circuit Court for the County of Louisa 2009). This federal action is necessary because EPA has statutory duties under the CWA and NHPA which duties EPA did not exercise during its approval process, while the DEQ denies any duty to comply. Therefore, this Court’s authority to enjoin the state-issued permit under 28 U.S.C. § 2283 may be necessary to aid this Court’s jurisdiction and/or effectuate this Court’s judgments.

3. The EPA failed in its duty to undertake such planning and actions as may be necessary to minimize harm to the Green Springs National Historic Landmark District through which the sewage discharge flows, and thereby denied Plaintiffs’ rights to the consultation process mandated by the National Historic Preservation Act for such federal undertakings.

4. Plaintiffs seek a declaratory order pursuant to 28 U.S.C. § 2201 that the EPA’s approval of the pollution-discharge-elimination-system permit for the Zion Crossroads sewage treatment plant is unlawful and invalid, an order of mandamus pursuant to 28 U.S.C. § 1361 and 33 U.S.C. § 1365(a) directing the EPA to perform its non-discretionary duties under the Clean

Water Act and the National Historic Preservation Act, and injunctive relief to stay Virginia state court proceedings pursuant to 28 U.S.C. § 2283 where such injunction is necessary in aid of this Court's jurisdiction and to protect or effectuate its judgments.

II. JURISDICTION AND VENUE

5. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1367 (supplemental jurisdiction) 28 U.S.C. §§ 2201-2202 (declaratory judgment and further relief), 28 U.S.C. § 1361 (mandamus), 28 U.S.C. § 2283 (injunctive relief to stay state court proceedings), 33 U.S.C. § 1365(a)(2) (citizen suit provision to compel non-discretionary duty under the Clean Water Act) and 5 U.S.C. § 702 (right of review under Federal Administrative Procedure Act).

6. Plaintiffs provided 60 days notice of the pending action to all Defendants in accordance with 33 U.S.C. § 1365(b) by certified letter dated March 18, 2009. Defendants have taken no action to redress the notice of complaint.

7. For purposes of the declaratory relief sought in this Complaint, an actual case or controversy within the meaning of 28 U.S.C. § 2201 exists between the parties as to whether the Defendant EPA has a non-discretionary duty to comply with the National Historic Preservation Act.

8. Venue is proper in the Western District of Virginia under 28 U.S.C. § 1391(e), 33 U.S.C. § 1365(c), and 5 U.S.C. § 703 in which district the properties and the permitted facility that are the subject of this action are situated.

III. PARTIES

9. The Historic Green Springs, Inc. ("HGSI") is a non-profit land conservation and

preservation organization established in 1970 and incorporated under the laws of Virginia. The purpose of HGSI is in part to preserve and protect more than two-hundred-fifty 18th and 19th century structures and the properties encompassed by the Green Springs National Historic Landmark District (“Landmark District”). The Landmark District is a unique 14,000 acre land area administered by the U.S. Department of Interior National Park Service. The Landmark District is unique not only due to its historic significance and its preserved agricultural and architectural heritage, but is unique among all National Landmarks in that all of the real property comprising the Landmark District land is owned in fee by private interests who have voluntarily placed approximately 13,000 acres of the 14,000 acres in and adjacent to the District in conservation easements. The easements are specifically drafted and enforced to protect the agricultural and historic values of the District as a whole, and each easement was granted in consideration of the grant of every other such easement. HGSI alone has facilitated the placement of over 10,000 acres of land inside the District into binding conservation easements designed under state and federal guidelines to protect and preserve in perpetuity the pristine qualities of the agricultural land and the historic structures located therein. The Landmark District conservation easements, recognized by both state and federal law, are real property interests held in trust by the easement holders for the benefit of the public at large including the land owner. The conservation easements create obligations and benefits in the easement holder to enforce the conservation interests and maintain value in the easement and the property burdened thereby. HGSI itself holds easements on several thousand acres of land within the Landmark District, while the National Park Service holds conservation easements on approximately 8,000 acres of land. HGSI property interests in the easements include obligations

to monitor, enforce and protect its easement interests against any threat which may impair the value of the easement, threaten the purpose of the Landmark District or weaken the effectiveness of such easement, as well as enforcement to protect other property owners who granted easements in consideration of the grant of similar easements by other property owners and in reliance on the easement program in the Landmark District as a whole. The principal nature of the easements is to forego most or all development rights in favor of preservation of agricultural land uses and protect the integrity of the historic structures. As a direct consequence thereof, any action or inaction that threatens the dedicated agricultural use of the easement-burdened properties also directly threatens the continued operation of all easements and the preservation of the Landmark District. HGSI has a forty-year history of enforcing conservation easements as well as the Landmark District designation in a representative capacity.

10. Camp Creek is the water body into which the treated sewage from the Zion Crossroads WWTP is discharged. At least two of the easements held by HGSI are on properties through which Camp Creek flows. These two include Aspen Hill Farm (Plaintiffs Murphys' 218 acre property) and the property known as Fair Oaks, owned by Nancy Daniel Somoza as Trustee of the Nancy Daniel Somoza Revocable Trust (approximate 215 acre easement held by HGSI and approximate 400 acre easement held by the Department of Interior). In addition to the same rights and interests that the easement-grantors have in protecting their riparian rights and the beneficial uses of Camp Creek, HGSI has additional interests in its easement monitoring and enforcement responsibilities and its mission to preserve the Landmark District as a whole. Degradation of the instream and offstream beneficial uses of Camp Creek would adversely impact the values of the easements that HGSI is charged with protecting and preserving, thereby

directly impacting the dedicated and exclusive agricultural land uses and riparian rights that HGSI must enforce. HGSI rights and injury are therefore separate from and in addition to any rights and interests of Plaintiffs Murphy and Sobral. These enforcement rights, duties and obligations are specific to the easement property rights of HGSI and are not shared with the public at large, and HGSI claims may be redressed by the conduct of such planning and actions as may be necessary to minimize harm to the Green Springs National Historic Landmark District as mandated by section 110(f) of the NHPA.

11. HGSI actively performs its mission to preserve and protect the properties encompassed by the Landmark District. HGSI, by counsel and through its President Rae H. Ely, participated in the state permit administrative process by submitting comments, and attending public meetings and hearings. At no time was any representative of HGSI made part of any historic resource consultation process as prescribed by the NHPA. Since the time the Zion Crossroads WWTP began discharging into Camp Creek, the DEQ has discovered evidence of pollution where Camp Creek flows into Wheeler Creek. The beneficial use of Wheeler Creek for the support and propagation of aquatic life is “impaired” at the location where Camp Creek flows into Wheeler Creek. The DEQ is required by the CWA to determine the cause of such impairment, and to develop and implement plans to eliminate the cause of impairment. Such plans have the potential to impose additional agricultural land use restrictions on farms within the Landmark District thereby limiting the only legal use of the land and the purpose for which the Landmark District was designated. In the meantime, the permit for the WWTP allows the continued discharge of toxic metals and the County has petitioned the state to allow the discharge of more nitrogen and phosphorus as well into Camp Creek. The County also has plans underway

to bring several million gallons of water to supply further development at Zion Crossroads adjacent or near to the Landmark District and the only sewage treatment plant available to potentially serve to such growth is the WWTP that now discharges into the Landmark District.

12. HGSI is harmed by the process that considers separately each of the proposals or plans for the Zion Crossroads WWTP to utilize Camp Creek for waste disposal. The permit process at issue here is separate from the request to discharge more nutrient pollutants, and the County's plan to bring more water and therefore more sewage is separate yet again. With the evidence of a water quality impairment where Camp Creek joins Wheeler Creek, that problem will be addressed by yet another separate process. Not one of these decision-making processes takes into consideration the collective impacts of these additional waste loads into Camp Creek on the character and preservation of the Landmark District. The National Historic Preservation Act, and the mandated consultation process, is intended to assure a comprehensive assessment of the impacts to the Landmark District, as well as each component of the Landmark such as Aspen Hill Farm, Green Springs Plantation, Oakleigh, and Fair Oaks from incremental activities that affect their preservation. Concerns about the impacts of pollution on Camp Creek to the Landmark District as a whole have never been considered in any comprehensive assessment, and the state denies any legal responsibility under state law to do so. Loss of agricultural uses to which the Murphys' Aspen Hill Farm is dedicated in perpetuity will defeat the purpose of their conservation easement and the Landmark District as a whole, and in turn the easement on Green Springs Plantation, Oakleigh, Fair Oaks, and so on. As a result, HGSI will suffer loss of the entity's purpose and mission which is not shared in common by the public at large. The asserted injuries and concerns of HGSI will be redressed by the conduct of such planning and actions as

may be necessary to minimize harm to the Green Springs National Historic Landmark District as mandated by section 110(f) of the NHPA. These and other interests of HGSI are more fully attested to by declaration filed herewith, and incorporated herein.

13. HGSI is, and continues to be, aggrieved and adversely affected by the actions of the Defendant EPA, and it has suffered and will continue to suffer injury in fact due to the past, current, ongoing, and prospective failure by Defendant EPA to comply with the law.

14. Plaintiffs Reginald Murphy and Jane Stewart Murphy (collectively “Plaintiffs Murphy” or “Murphys”) are fee owners of 218 acres known as Aspen Hill Farm. The Historic Green Springs, Inc. holds a conservation easement on Aspen Hill Farm. The easement was granted “in consideration of the grant to the Grantee of similar easements in gross by other owners of the land in the said Green Springs Historic District for similar purposes.” Deed of Easement, Murphy to Historic Green Springs, Inc., August 7, 1974, Deed Book 185, Page 250, Circuit Court Clerk’s Office, Circuit Court for the County of Louisa, Virginia. Aspen Hill Farm is located about 400 yards downstream of the impoundment on Camp Creek into which treated sewage from the Zions Crossroads WWTP is discharged. Aspen Hill Farm is the first farm downstream of the WWTP. Camp Creek bisects and runs through the Murphy farm for about one-fourth mile. Aspen Hill Farm is used for agricultural and residential land uses, and Camp Creek, as it traverses Aspen Hill Farm, is used for used for agricultural, recreational, aesthetic and other riparian rights uses. Agricultural purposes include livestock propagation and crop growth as seasonal uses and conditions permit; Aspen Hill Farm is the home and private residence of the Murphys. The Murphys own recognized riparian rights, and they employ Camp Creek’s resources on their land for wildlife and livestock watering, as well as for recreational and

aesthetic uses. All such uses are adversely impacted by pollution of Camp Creek from the treated sewage discharges.

15. The discharge of toxic metals in toxic amounts presents a serious, immediate and actual threat to the Murphys' rights of reasonable use and enjoyment of the water flowing past their land, as well as their right to enjoy the recreational and aesthetic uses that are conferred on such land adjoining a watercourse. Any impairment of agricultural uses, to which Aspen Hill Farm is dedicated in perpetuity, will defeat the purpose of the conservation easement and the Landmark District as a whole. As a result, the Murphys will suffer loss of the already restricted use and enjoyment of their own lands which is not shared in common by the public at large. The Murphys' asserted injuries and concerns will be redressed by the conduct of such planning and actions as may be necessary to minimize harm to the Green Springs National Historic Landmark District as mandated by section 110(f) of the NHPA.

16. Plaintiffs Sergio Sobral and Gail Fleury Sobral (collectively "Plaintiffs Sobral" or "Sobral") are fee owners of approximately 255 acres known as Green Springs Plantation. Green Springs Plantation is comprised of two parcels each of which parcels are encumbered with a conservation easement conveyed by a predecessor in title. The initial easements were held by Historic Green Springs, Inc. In 1978, Historic Green Springs, Inc., in cooperation with the landowner, assigned the easements on Green Springs Plantation to the United States of America, as executed by the Secretary of the Interior. Deed of Assignment, HGSI to United States of America, June 6, 1978, Deed Book 218, Page 491, Circuit Court Clerk's Office, Circuit Court for the County of Louisa, Virginia. The easements were granted "in consideration of the grant to the Grantee of similar easements in gross by other owners of the land in the said Green Springs

Historic District for similar purposes.” Deed of Easement, Kimball to Historic Green Springs, Inc., March 12, 1974, Deed Book 185, Page 443, Circuit Court Clerk’s Office, Circuit Court for the County of Louisa, Virginia; and Deed of Easement, Kimball to Historic Green Springs, Inc., March 12, 1974, Deed Book 185, Page 445. Green Springs Plantation is located east of, and downstream in Camp Creek of Aspen Hill Farm. Green Springs Plantation is the second farm downstream of the WWTP. Camp Creek bisects and runs through Green Springs Plantation. Green Springs Plantation is used for agricultural and residential land uses, and Camp Creek, as it traverses Green Springs Plantation, is used for agricultural, recreational, aesthetic and other riparian rights uses. Agricultural purposes include livestock propagation and crop growth as seasonal uses and conditions permit. Sergio Sobral and Gail Fleury Sobral own recognized riparian rights, and they employ Camp Creek’s resources on their land for wildlife and livestock watering, as well as for recreational and aesthetic uses. All such uses are adversely impacted by pollution of Camp Creek from the treated sewage discharges.

17. The discharge of toxic metals in toxic amounts presents a serious, immediate and actual threat to the Sobrals’ rights of reasonable use and enjoyment of the water flowing past their land, as well as their right to enjoy the recreational and aesthetic uses that are conferred on such land adjoining a watercourse. Any impairment of agricultural uses, to which Green Springs Plantation is dedicated in perpetuity, will defeat the purpose of the conservation easement and the Landmark District as a whole. As a result, the Sobrals will suffer loss of the already restricted use and enjoyment of their own lands which is not shared in common by the public at large. The asserted injuries and concerns will be redressed by the conduct of such planning and actions as may be necessary to minimize harm to the Green Springs National Historic Landmark District as

mandated by section 110(f) of the NHPA.

18. Plaintiffs Murphy and Sobral actively engage in matters that affect the Landmark District and support the efforts of the Historic Green Springs, Inc. in executing its mission. Plaintiffs Murphy and Sobral actively protect their interests in the Landmark District. Plaintiffs Murphy and Sobral live a lifestyle that represents personal investment in historic preservation. The Murphys submitted written comments to the DEQ expressing their concerns about the impact the sewage discharge on their property interests. Reginald Murphy addressed the Virginia State Water Control Board (“SWCB”) at the public hearing conducted by the SWCB and at the meeting of the SWCB where the members of the SWCB made its decision to uphold the staff recommendation to grant the reissuance of the pollutant discharge permit to the Louisa County Water Authority.

19. HGSI, Reginald Murphy, Jane Stuart Murphy, Sergio Sobral, and Gale Fleury Sobral have been and continue to be irreparably harmed by the acts and omissions of Defendant EPA as alleged herein, have suffered a legal wrong, and are adversely affected and aggrieved by such acts and omissions within the meaning of the APA, 5 U.S.C. § 702. Plaintiffs’ interests herein are within the zone of interest protected by the laws sought to be enforced in this action.

20. Defendant Environmental Protection Agency is the agency of the United States Government responsible for administering and implementing the Clean Water Act (“CWA”) and a federal agency within the meaning of 16 U.S.C. § 470h-2(f).

21. Defendant Lisa P. Jackson is Administrator of the United States Environmental Protection Agency and is sued in her official capacity. If ordered by the court, Ms. Jackson has the authority and ability to remedy the harm inflicted by Defendants’ actions.

22. Defendant William C. Early is Acting Regional Administrator of US EPA Region III and is sued in his official capacity. If ordered by the court, Mr. Early has the authority and ability to remedy the harm inflicted by Defendants' actions.

23. Defendants Jackson and Early are responsible for the review and approval of certain NPDES permits issued by the Commonwealth of Virginia, in accordance with a 1999 litigation settlement agreement and Memoranda of Understanding for program delegation, and are responsible for compliance with the CWA and the NHPA.

24. At all relevant times, the EPA Defendants acted in their official capacity and under color of state and/or federal law.

25. Defendant Louisa County Water Authority is an entity created by the local government of Louisa County for the operation and administration of the water and wastewater facilities of the County. The Louisa County Water Authority is the owner and operator of the Zion Crossroads WWTP, and the entity to which the subject discharge permit is issued and the EPA approval of which is challenged in this case. No direct claims are made against the Authority; however, the Authority may be deemed a necessary party in this case as the permit holder in interest.

IV. FACTS

The Green Springs National Historic Landmark District

26. The Green Springs National Historic Landmark District is comprised of 14,000 acres of land in western Louisa County that lies immediately to the north, east, and southeast of the Zion Crossroads Wastewater Treatment Plant ("WWTP"). It is the first and largest multi-owner rural Landmark District in the United States.

27. The Landmark District is subject to policy and procedures mandated by 16 U.S.C.

§ 470h-2(f) [section 110(f)] of the National Historic Preservation Act of 1966 (16 U.S.C. § 470 et seq.).

28. The Landmark District was designated as a Virginia Historic Landmark and placed on the National Register of Historic Places in 1973, and designated as a National Historic Landmark by the Secretary of the Interior in 1974.

29. In 1973, the Commonwealth issued a State Commission study which identified Virginia's "Critical Environmental Areas." The Green Springs Historic District was designated as one of Virginia's Critical Environmental Areas which land area and resources should be protected.

30. Green Springs also is a designated Virginia Rural Historic District:

The designation of an area as a "rural historic district" by the Commonwealth of Virginia's Board of Historic Resources is intended to inform the public about the significance of the designated areas. It encourages local governments and property owners to take the registered areas' historic, architectural, archaeological, cultural, and natural significance into account in planning and decision making.

Virginia's Rural Historic Districts: Making the Case, Preservation Alliance of Virginia (1998).

Green Springs National Historic Landmark District encompasses over 14,000 acres in the Piedmont of central Virginia. The homes and farms are a continuum of Virginia rural vernacular architecture, reflective and respectful of their location, preserved in their original context with little alteration. Here the landscape has been enhanced, rather than despoiled, by the presence of civilization.

<<http://www.nps.gov/grsp/>>.

From the earliest days of settlement in the Piedmont, the Green Springs area has been known for its exceptional fertility, prosperity, and beauty. Contrasted with the surrounding hilly land with its thin soil and scrub woodlands, this 14,000-acre bowl, a geological formation that defines Green Springs, is composed of lush, rolling pastures. . . . The area has been farmed continuously for more than 200 years and the fertility of the land has made possible its remaining unspoiled today. In the 19th century Green Springs was famous for its abundant wheat crops. In 1841 Cyrus McCormick chose to test his reapers on the wheat fields of Green

Springs.

<[http://www.hallowedground.org/component?option,com_jthg/theme,region/task,view/county,Location/Itemid,1/id,97/](http://www.hallowedground.org/component?option=com_jthg/theme,region/task,view/county,Location/Itemid,1/id,97/)>.

31. The Landmark District is unique not only due to its historic significance and its preserved agricultural and architectural heritage, it is unique due to the nature of the public-private conservation partnership under which it is administered by the U.S. Department of Interior National Park Service.

32. The land within the Landmark District is privately owned while development rights on 13,000 acres within and adjacent to the 14,000 acre Historic District have been conveyed by conservation easement to various recipient-entities/holders of the easements in the public interest, including the National Park Service, Virginia Outdoors Foundation, Virginia Department of Historic Resources, and Historic Green Springs, Inc.

33. Conservation easements are real property interests held in trust for the benefit of the public at large including the land owner.

34. The purpose of the conservation easements are variously stated in the deeds themselves for the preservation, protection, and maintenance of the historical, architectural, cultural, open space, natural, environmental and ecological values and character of each historic property for the continuing benefit of the people of the Commonwealth of Virginia and of the United States of America.

35. The terms of the conservation easements throughout the Landmark District restrict in perpetuity the use of each property to agricultural and conservation purposes only.

36. Conservation easements create obligations in the easement holder to enforce the

conservation interests and values in the easements.

37. The National Park Service holds conservation easements on approximately 8,000 acres of land within the Green Springs National Historic Landmark District. Easements held by the National Park service include those on properties with riparian rights to Camp Creek including the property of Plaintiffs Sobral.

38. The Historic Green Springs, Inc. holds conservation easements on several thousand acres of property within the Landmark District and owns approximately 25 acres of land in fee simple inside the Landmark District, which it has dedicated to conservation and preservation purposes.

39. Significantly, the Green Springs National Historic Landmark District designation can be lost forever for all parties if damaging, incompatible outside forces intrude sufficiently to destroy the integrity of easements and the qualities for which the District was designated. Should the agricultural land become unusable or the land unmarketable, the viability of the Landmark District as a whole will be in jeopardy.

Camp Creek and Zion Crossroads WWTP Discharge Permit

40. The treated sewage discharge from the Zion Crossroads WWTP flows into an impoundment of Camp Creek, which impoundment overflows to the otherwise free-flowing stream.

41. Camp Creek above the impoundment and below the impoundment has a low flow (“7Q10”) of zero gallons per day.

42. The boundary of the Green Springs National Historic Landmark District is located just beyond the overflow of the impoundment where Camp Creek resumes its course.

43. The Historic Green Springs, Inc. holds conservation easements adjoining and adjacent to Camp Creek including the property known as Aspen Hill Farm, owned by Plaintiffs Murphy, and the property known as Fair Oaks. Exhibit 2, Deeds of Easement, incorporated herein.

44. The character and quality of Camp Creek are essential elements to the mission of HGSI in the preservation of the historic agricultural and cultural values that Camp Creek represents within the Green Springs National Historic Landmark District and to maintaining the overall integrity of the Landmark District.

45. Section 402 of the Clean Water Act (33 U.S.C. § 1342) authorizes the issuance of permits for the discharge of pollutants into navigable waters under the National Pollution Discharge Elimination System (NPDES).

46. In 1975, the US EPA delegated the its authority to administer and enforce NPDES permits to the Commonwealth of Virginia State Water Control Board (“SWCB”) by Memorandum of Understanding. Exhibit 3. The Commonwealth of Virginia Department of Environmental Quality receives federal funding to implement the NPDES permit program.

47. The SWCB granted an initial Virginia Pollution Discharge Elimination System (VPDES) permit for the Zion Crossroads WWTP in 2002. The treatment plant was constructed and in 2003 began discharging.

48. The Department of Interior National Park Service objected to the issuance of the initial permit by comments dated February 12, 2002.

49. Camp Creek is a tributary of Wheeler Creek which flows through additional tributaries to the York River and the Chesapeake Bay.

50. Water quality standards are not maintained for certain pollutants in the York River and some of its tributaries.

51. The DEQ is required by sections 305(b) and 303(d) of The Clean Water Act to develop plans to determine the cause(s) of and correct impairments to attainment of water quality standards, which law has been enforced by settled litigation styled *American Canoe Association, Inc. and The American Littoral Society v. U.S. EPA and U.S. EPA Region III*.

52. The federal water pollution permit program has been delegated by US EPA to the Commonwealth of Virginia for implementation which program is funded in part by the US EPA. Through settlement of litigation against it, the EPA retained primacy over wastewater discharges into impaired surface waters. Exhibit 4, *Settlement Agreement*, ¶ 12, p. 5 p X, ¶ X. The delegation agreement also maintains the US EPA's the authority to "object to the issuance of NPDES permits or specific terms and conditions contained in the permit." Exhibit 3, *Memorandum of Understanding Regarding Permit and Enforcement Programs Between the State Water Control Board and the Regional Administrator, Region III, Environmental Protection Agency*, Part III (1.), page 3 of 14.

53. In 2006, the US EPA approved the Commonwealth's plan for correcting one impairment for bacterial contamination in the York River basin which plans are generally referred to as Total Maximum Daily Load (TMDL) development.

54. The Commonwealth also has adopted a regulatory scheme to allocate nutrient (phosphorus and nitrogen) loading to the Chesapeake Bay by which the subject sewage discharge is regulated. The County of Louisa has petitioned the DEQ to increase the nutrient allocations for the Zion Crossroads WWTP by amendment to the regulation, consideration of which petition

was deferred by the agency pending the reissuance of the VPDES permit and that process now has resumed.

55. On or about June 16, 2008, the DEQ published the 305(b)/303(d) Water Quality Assessment Integrated Report which report identifies a new water-quality impairment where Camp Creek flows into Wheeler Creek.

56. The residents of Green Springs and National Park Service representatives asked the DEQ to require the collection of background data on the Camp Creek prior to the commencement of sewage flow from Zion Crossroads WWTP. “Without baseline sampling, there are no guarantees that water quality will not be degraded & affect the fauna & flora (& residents) of the Landmark District.” Email from Rick Childs, Project Manager [NPS], Green Springs National Historic Landmark District, to Anna Westernick, DEQ, February 13, 2002. No background monitoring has ever been performed.

57. The treated sewage has been flowing from Zion Crossroads WWTP since 2003 in which at times toxic metals are present in toxic amounts, there are still no instream monitoring requirements, abnormal algae colonies in Camp Creek have been observed by citizens and by DEQ staff, and where Camp Creek flows into Wheeler Creek, an aquatic life impairment of stream quality was identified in 2006 which continues unabated.

58. The declared Congressional goals and policy of the federal water pollution prevention and control program (Chapter 26 of Title 33; 33 U.S.C. §§ 1251, et. seq.) include

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter -

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited; . . .

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; . . .

U.S. Code 33 U.S.C. § 1251.

59. The antidegradation policy is one element of the regulatory scheme that is intended to achieve the objectives of the water pollution prevention and control program. The concept of antidegradation is to cause existing water quality to be maintained and to protect existing instream uses. Under Virginia regulations, approved by US EPA,

A. All surface waters of the Commonwealth shall be provided one of the following three levels, or tiers, of antidegradation protection. This antidegradation policy shall be applied whenever any activity is proposed that has the potential to affect existing surface water quality.

1. As a minimum, existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.

2. Where the quality of the waters exceed water quality standards, that quality shall be maintained and protected unless the board finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the Commonwealth's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the board shall assure water quality adequate to protect existing uses fully. Further, the board shall assure that there shall be achieved the highest statutory and regulatory requirements applicable to all new or existing point source discharges of effluent and all cost-effective and reasonable best management practices for nonpoint source control.

3. Surface waters, or portions of these, which provide exceptional environmental settings and exceptional aquatic communities or exceptional recreational opportunities may be designated and protected as described in subdivisions 3 a, b

and c of this subsection. . . .

9VAC25-260-30.

60. The DEQ designated Camp Creek a Tier 2 water under the antidegradation policy when the Zion Crossroads WWTP discharge was first proposed.

61. The DEQ staff supports each VPDES permit with a Fact Sheet where data and rationale for decision-making are documented.

62. The initial sewage discharge permit expired on March 28, 2007. The final Fact Sheet states that the permit application for the reissued permit was deemed complete August 8, 2007.

63. The permit application does not request an increase in the sewage discharge flow from the previously issued permit which permit allowed such discharge up to 700,000 gallons per day.

64. The final Fact Sheet and prior versions of the Fact Sheet state that the staff drafted the permit by June 22, 2007.

65. On June 5, 2008, prior to public release for comment, DEQ staff transmitted to staff of the US EPA a copy of the draft permit and fact sheet by electronic mail. The message from DEQ informed the US EPA of the approved TMDL plan for the bacterial impairment but it did not inform the US EPA of the pendency of publication of the draft updated 305(b)/303(d) Water Quality Assessment Integrated Report (published on or about June 16, 2008) in which an additional impairment would be revealed where Camp Creek flows into Wheeler Creek.

66. The June 5, 2008, electronic mail transmittal from DEQ staff to US EPA staff stated, "We are trying to get this permit processed quickly, so I'm hoping you can expedite your

review. We are trying to get the public comment period started during the week of June 23; it would be helpful if you can get your review completed as early as possible during the week of June 16.”

67. The Fact Sheet supporting the draft permit did not inform the US EPA of material and relevant information including the newly identified impairment where Camp Creek flows into Wheeler Creek.

68. The Fact Sheet also did not inform of the well-publicized and documented plans and agreements between Louisa and Fluvanna Counties to bring 3 million to 6 million gallons of additional water from the James River to supply development at Zion Crossroads where the sewage treatment capacity is limited by the reissued permit to 700,000 gallons per day and the receiving stream has a low flow (7Q10) of zero.

69. The Fact Sheet sent to the US EPA did not describe the fact of two water withdrawals from the Camp Creek watershed, one permitted by DEQ and one permitted by the US Army Corps of Engineers about which DEQ had knowledge but was not revealed in the record until the SWCB meeting on December 4, 2008.

70. The Fact sheet did not disclose to the US EPA the material fact that the subject sewage treatment plant is located on the boundary of a National Historic Landmark District that is administered by the National Park Service, and which sewage discharge flows through the Historic District.

71. By electronic mail dated June 12, 2008, US EPA staff responded to the DEQ request for review stating, “Hello All, based on our review, we have no objection to the issuance of the permit. Thanks.”

72. By electronic mail dated June 18, the Manager of Easements for the National Park Service informed the US EPA staff that the Park Service had just received a copy of the heretofore described email exchange between DEQ and US EPA, that the Park Service had no information about the pending permit reissuance before receiving the email, and that the duties prescribed by the National Historic Preservation Act had not been fulfilled and could not possibly be fulfilled in the extraordinarily short review period.

73. During the subsequent public comment period for the draft permit, the Petitioners and other residents and parties in interest in the Green Springs National Historic Landmark District provided written comments to the DEQ expressing their concerns. The DEQ received one comment letter supporting the reissuance of the permit from legal counsel for the permittee.

74. Thirteen residents of the Green Springs National Historic Landmark District and the surrounding community submitted written comments raising concerns of significant adverse effects from the reissuance of the subject permit, such as: the imprudence of reissuing the permit for the sewage discharge on Camp Creek, with a low flow of zero, when the County intends to bring millions of gallons of water supply to the area; algae blooms in Camp Creek; procedural and notice concerns; loss of use and enjoyment of Camp Creek; the dismal compliance and enforcement record since the permit was issued; the fact that the DEQ promised them that the limitations would be so stringent that Camp Creek would be protected, but since the discharge is frequently in violation (nearly 50% of the permit conditions), the discharge could not meet water quality standards; the illogical rationale, in light of the compliance and enforcement records, that making the permit limits even harder to meet will subsequently protect Camp Creek; the calculation of toxic metals limits contrary to agency guidance; the failure to impose a limit to

control hardness in the sewage discharge as hardness effects metals toxicity and is a factor in the calculation of the limits; and the concern that allocation of nutrient loads to the point source sewage discharge will lead to the imposition of further land use restrictions on agricultural practices to account for non-point source reductions in nutrient loads to the Chesapeake Bay, thereby limiting the use of the land which can only be used for agricultural purposes by deed restriction.

75. During the public comment period for the draft permit, the National Park Service provided comments expressing significant concerns in regard to the impact to historic resources, impacts to agricultural lands under conservation easement, and impacts to Camp Creek which is an essential feature of the rural historic character within the Green Springs National Historic Landmark District. The Park Service requested consultation pursuant to Sections 106 and 110(f) of the National Historic Preservation Act.

76. During the public comment period for the draft permit, the Virginia Department of Historic Resources stated its belief that the permit would not cause adverse impacts on historic properties but requested the DEQ fully address the concerns raised by the National Park Service.

77. The Thomas Jefferson Planning District Commission, of which Louisa County is a member, requested compliance data from the DEQ during the public comment period for the draft permit. By letter dated November 4, 2008, the Thomas Jefferson Planning District Commission expressed concerns in regard to the facility's compliance and enforcement history, the four-year compliance schedule for metals, bank scour and high algal growth in Camp Creek that was not present before the permit was issued, the anticipated inter-basin transfer of millions of gallons of water from the James River, the decoupling of the request for increase in nutrient

allocations from the permit reissuance process, the need to transfer jurisdiction to the US EPA in order to investigate impacts to the Green Springs National Historic Landmark District, and the potential for the wastewater to be reused instead of being discharged to Camp Creek.. The Thomas Jefferson Planning District Commission “felt that DEQ should not reissue the permit until these issues are addressed, corrected, and mitigated, with assurance of enforcement by DEQ.” Upon information and belief, the Thomas Jefferson Planning District Commission was politically pressured to recant its November 4, 2008 letter at the SWCB hearing on December 4, 2008.

78. The DEQ and SWCB conducted a public hearing on October 22, 2008 and allowed for another comment period which hearing was recorded and transcribed by the Plaintiffs in this case.

79. Counsel for the Louisa County Water Authority addressed the SWCB stating that the WWTP had already been built to substantially accommodate the 700,000 gallon per day capacity authorized in the permit but not yet utilized, despite the locality’s contrary representation of funding required to upgrade the facility.

80. On December 3, 2008, the Department of Historic Resources sent a follow-up letter to the DEQ recanting its assessment that no adverse impact on historic resources was expected and expressing concerns with the proposed permit and its impacts on historic resources.

81. On December 4, 2008, the SWCB heard final comments including argument from the Solicitor General for the Department of Interior National Park Service, and decided to reissue the permit in accordance with the staff recommendations.

82. On December 29, 2008, Plaintiffs’ counsel requested by Freedom of Information

Act all documents in the EPA Region III offices related to the subject permit. The documents received in response to the FOIA request included copies of comments sent to the DEQ during the permit comment period and other correspondence from counsel for the National Park Service. The documents did not include any record of the US EPA addressing or considering its duties under the National Historic Preservation Act, nor did the response indicate that any documents were withheld.

83. The Plaintiffs, who have invested their values, financial resources, and commitment to conserving our national heritage, command and deserve the support and respect of the EPA through enforcement of the National Historic Preservation Act and the avoidance of harm to the historic, agricultural and cultural heritage being preserved within the Green Springs National Historic Landmark District.

84. The EPA has admitted its obligation to federalize state issued permits which may adversely impact National Historic Resources. In 2001, EPA federalized an otherwise state issued NPDES permit with such impacts to historic properties eligible for listing on the National Register of Historic Places, and to a National Park. “In December 2001, the Environmental Protection Agency (EPA) convened a Section 106 consultation meeting at Harper’s Ferry, West Virginia, to discuss the proposed development of nearby Murphy Farm and the project’s required National Pollutant Discharge Elimination System (NPDES) permit.”

<<http://www.achp.gov/casearchive/caseswin02WV.html>>.

85. Because the US EPA failed to perform its admitted duties under the National Historic Preservation Act, 16 U.S.C. 470h-2(f) [Section 110(f)], the impacts of the Virginia permit on the historic, agricultural and cultural values that Camp Creek contributes to the Green

Springs National Historic Landmark District were not considered, assessed or minimized in the decision.

V. CLAIMS

COUNT I

Failure to Perform Non-discretionary Duty Under the Clean Water Act

86. Paragraphs 1 through 85 are realleged and incorporated herein.

87. Camp Creek is an integral component of the landscape for which the Landmark District was designated, which land uses within are limited in perpetuity to agricultural purposes. The character and quality of Camp Creek are vital to the preservation of the agricultural values for which the Landmark District is forever dedicated.

88. Residents of Green Springs and the National Park Service raised significant and documented concerns about the existing and projected impacts of the subject pollution discharge elimination system permit on the preservation of the Landmark District.

89. 40 C.F.R. § 122.49 mandates application of the National Historic Preservation Act of 1966 (16 U.S.C. 470 et seq.) to the NPDES permit process.

90. EPA has a statutory duty to minimize harm to National Historic Landmarks. “Prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking.” 16 USCS § 470h-2(f) [Section 110(f)].

91. The duty to minimize harms to National Historic Landmarks arises by the definition of “undertaking” under the National Historic Preservation Act:

As used in this Act [16 USCS §§ 470 et seq.], the term--

(7) “Undertaking” means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including--

(A) those carried out by or on behalf of the agency;

(B) those carried out with Federal financial assistance;

(C) *those requiring a Federal permit license, or approval*; and

(D) *those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.*

16 USCS § 470w [Section 301(7)] (emphasis added).

92. The US EPA approval of the VPDES permit for the Zion Crossroads WWTP is an undertaking for the purposes of Section 110(f), which may directly and adversely affect the Green Springs National Historic Landmark District.

93. The Department of Interior National Park Service has jurisdiction over National Historic Landmarks pursuant to Guidelines published in the Federal Register.

All Historic Properties

(a) *Each Federal agency has an affirmative responsibility under section 110 of the National Historic Preservation Act [NHPA] to consider its activities’ effects on our nation’s historic properties. This responsibility extends to a systematic consideration of properties not under the jurisdiction or control of the agency, but potentially affected by agency actions. (Sec.110(a)(2)(C)).*

(b) Full consideration of historic properties includes assessment of the widest range of preservation alternatives early in program or project planning, coordinated to the extent feasible with other kinds of required planning and environmental review.

(c) Full consideration of historic properties includes consideration of all kinds of effects on those properties: direct effects, indirect or secondary effects, and cumulative effects. Effects may be visual, audible, or atmospheric. Beyond the effects from physical alteration of the resource, itself, effects on historic properties may result from changes in such things as local or regional traffic patterns, land use, and living patterns.

(d) Full consideration of historic properties includes an obligation to solicit and consider the views of others in planning and carrying out agency preservation activities (See Standard 5 on Consultation). (Sec. 110(a)(2)(D)). . . .

National Historic Landmarks

(j) National Historic Landmarks (NHL) are designated by the Secretary under the authority of the Historic Sites Act of 1935, which authorizes the Secretary to

identify historic and archaeological sites, buildings, and objects which “possess exceptional value as commemorating or illustrating the history of the United States.” *Section 110(f) of the NHPA requires that Federal agencies exercise a higher standard of care when considering undertakings that may directly and adversely affect NHLs.* The law requires that agencies, “to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark.” *In those cases when an agency’s undertaking directly and adversely affects an NHL, or when Federal permits, licenses, grants, and other programs and projects under its jurisdiction or carried out by a state or local government pursuant to a Federal delegation or approval so affect an NHL, the agency should consider all prudent and feasible alternatives to avoid an adverse effect on the NHL.* (Sec. 110(a)(2)(B) and sec. 110(f)).

The Secretary of the Interior’s Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act, 63 Fed. Reg. 20,495 at 20,503 (1998) (emphasis added).

94. The US EPA approved the VPDES permit for the Zion Crossroads WWTP without consideration of any potential adverse effect on the immediately-adjacent Green Springs National Historic Landmark District through which the treated sewage flows.

95. The US EPA record of its review and approval of the subject permit is void of any record of the performance of its duties and obligations under the National Historic Preservation Act.

96. The Plaintiffs raised significant and material concerns about the effects of the CWA discharge permit on their properties and on the Landmark District, which concerns remain unaddressed because at no time did Defendant EPA “undertake such planning and actions as may be necessary to minimize harm to such landmark.” Plaintiffs are injured by the Defendant EPA’s failure to comply with the NHPA.

97. The antidegradation policy mandates the maintenance and protection of surface waters that exceed the water quality standards “unless the [State Water Control] board finds, after

full satisfaction of the intergovernmental coordination and public participation provisions of the Commonwealth's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the board shall assure water quality adequate to protect existing uses fully." Virginia Administrative Code 9VAC25-260-30(A)(2).

98. Intergovernmental coordination and public participation provisions of the continuing planning process have not been satisfied nor is there any assurance of adequate protection of existing beneficial uses of Camp Creek in its vital role in serving the agricultural uses of the Landmark District.

99. EPA has previously invoked its primacy for NPDES permit issuance in the case of the Murphy Farm development proposal at Harper's Ferry, West Virginia (no relation to the Plaintiffs in this case) in order to direct consultation under the National Historic Preservation Act, and cannot now unilaterally disavow such obligation. *See infra* ¶ 79.

100. In the case of the Zion Crossroads WWTP affecting the Green Springs National Historic Landmark District, Section 110(f) of the NHPA requires that Federal agencies exercise a higher standard of care when considering undertakings that may directly and adversely affect National Historic Landmarks. *The Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act*, 63 Fed. Reg. 20,495 at 20,503 (1998).

101. EPA failed to perform non-discretionary duties under the Clean Water Act, and thereby the National Historic Preservation Act, when it approved the VPDES permit for the Zion Crossroads WWTP, wherein injured Plaintiffs, whose concerns about the adverse impacts of the

permit were never addressed by EPA, nor was consultation undertaken with the NPS ever performed, all of which is necessary to minimize harm to the Landmark District. The failure to undertake planning and actions as may be necessary to minimize harm to the Landmark District denied Plaintiffs lawful process to protect their property rights and interests in their lands and in the Landmark District.

**COUNT II - IN THE ALTERNATIVE
Failure to Perform Non-Discretionary Duty
Under the National Historic Preservation Act**

102. Paragraphs 1 through 101 are realleged and incorporated herein.

103. To the extent that this Court deems the EPA review decision to approve the subject state permit was a decision subject to review under the U.S. Administrative Process Act, 5 U.S.C. § 706, solely or in addition to the statutory mandates under the CWA and the NHPA, Plaintiffs reallege all of the foregoing to assert that EPA violated the APA (1) for failure to perform nondiscretionary duties; and (2) for performing an unlawful approval not in accordance with law, without observance of procedure required by law, and unsupported by substantial evidence.

104. Pursuant to 5 U.S.C. § 706, the US EPA must be compelled to perform the duties mandated by the NHPA which action by EPA has been unlawfully withheld.

VI. Relief Requested

WHEREFORE, Plaintiffs respectfully request this Court to grant the following relief:

1. Declare the obligations and duties of Defendant EPA to comply fully with the requirements of CWA and NHPA to undertake such planning and actions as may be necessary to minimize harm to the Green Springs National Historic Landmark District.

2. Declare the Defendant EPA's June 12, 2008 approval of the VPDES permit no. 0090743 for the Zion Crossroads WWTP Decision contrary to law and in violation of the CWA, the NHPA, and the APA, void and without affect, and all subsequent actions to issue the permit by the delegated state to be without legal authority and void.

3. Issue an order directing Defendant EPA to perform its non-discretionary duties under the Clean Water Act and the National Historic Preservation Act to undertake such planning and actions with the Plaintiffs and the United States Department of Interior National Park Service as may be necessary to minimize harm to the Green Springs National Historic Landmark District by issuance of the CWA permit for wastewater discharge from the Zion Crossroads WWTP.

4. Issue injunctive relief to stay Virginia state court proceedings (*HGS, Inc., et al. v. Virginia Department of Environmental Quality, et al.*, Case No. CL09-20, Circuit Court for the County of Louisa 2009) pursuant to 28 U.S.C. § 2283 where such injunction is necessary in aid of this Court's jurisdiction and to protect or effectuate its judgments.

5. Award Plaintiffs their attorneys' fees and costs pursuant to 33 U.S.C. § 1365, the Clean Water Act citizen suit provision, 28 U.S.C. §2412, the Equal Access to Justice Act and Rule 54(d), Fed.R.Civ.P.; and

6. Award such other and further relief as the Court may deem appropriate.

DATED this 21st day of October, 2009.

Respectfully submitted,
The Historic Green Springs, Inc.,
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