No. 21-1085

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STATE OF SOUTH CAROLINA, et al.,
Plaintiffs/Appellees,

AUGUSTA, GEORGIA
Intervenor/Plaintiff - Appellee

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,
Defendants/Appellants,

GEORGIA PORTS AUTHORITY,
Intervenor/Defendant.

Appeal from the United States District Court for the District of South Carolina
No. 1:19-cv-3132 (Hon. Richard M. Gergel)

BRIEF FOR FEDERAL APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Court Rules

Legislative History

Other Authorities

GLOSSARY

Dam	New Savannah Bluff Lock and Dam
EA	Environmental Assessment
ESA	Endangered Species Act, 16 U.S.C. §§ 1531-44
Fisheries Service	National Marine Fisheries Service
NAVD88	North American Vertical Datum of 1988
NEPA	National Environmental Policy Act, 42 U.S.C. §§ 4321 4347
NGVD29	National Geodetic Vertical Datum of 1929
SHEP	Savannah Harbor Expansion Project

INTRODUCTION

The New Savannah Bluff Lock and Dam near Augusta, Georgia, is in disrepair. In the 2016 Water Infrastructure Improvements for the Nation Act ("WIIN Act"), Congress mandated that the U.S. Army Corps of Engineers choose between two options for passing endangered Atlantic and shortnosed sturgeon beyond the Dam. The Corps must either repair and renovate the existing Dam to allow fish to pass over it, or build a new structure across the river and remove the existing Dam. The Corps chose the second of those options, evaluated a range of alternatives, and ultimately designed a full-river rock weir (a low dam without gates) that would allow sturgeon and other fish to pass as they would in nature, restoring their access to the areas upstream of the existing Dam.

Under the WIIN Act, that new structure must also be "able to maintain the pool for water supply and recreational activities, as in existence on the date of enactment of this Act." Pub. L. No. 114-322, § 1319(c)(1)(A)(ii) (2016). The Corps' chosen structure would maintain the pool above the rock weir, but under normal conditions would reduce the elevation of the pool by about three feet immediately upstream of the Dam, with less pronounced changes farther upstream. After studying the impacts of that modestly lower pool elevation, the Corps concluded that the pool would still maintain the river elevation at a level that would secure the existing water supply and recreational purposes.

The district court vacated the Corps' decision after concluding that the WIIN Act unambiguously requires the Corps to maintain the pool at the precise elevation that existed at the gage immediately upstream of the Dam on the date that the President signed the WIIN Act. Further, the court permanently enjoined the Corps from implementing its chosen alternative "and any other plan involving the removal of the [Dam] if the proposal does not 'maintain the pool' that was in existence on the date of the Act's enactment, which was 114.76 feet." App. 2596.

A requirement to continuously maintain that precise elevation in perpetuity is both absent from the WIIN Act and an impossible task given the normal fluctuations in a dynamic river system based on, among other things, variance in rainfall. The district court's interpretation has no basis in the plain language of the WIIN Act, and the injunction leaves the Corps unable to implement that congressional directive. This Court should reverse because the district court misread the statute. But even if the district court were correct that the Corps failed to comply with the WIIN Act, its injunction against the Corps cannot stand because it goes far beyond "set[ting] aside" the Corps' record of decision here, 5 U.S.C. § 706(2), and was issued without considering the equitable factors governing injunctive relief.

STATEMENT OF JURISDICTION

(A) The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because South Carolina's claim arose under the WIIN Act. Pub. L. No. 114-332, § 1319(c), 130 Stat. 1704 (2016). App. 59.[1]

(B) This Court has jurisdiction under 28 U.S.C. § 1291 because the district court entered a final judgment. App. 2596. This Court also has jurisdiction under 28 U.S.C. § 1292(a)(1) because the district court entered injunctive relief. *Id*.

(C) The court entered that judgment on November 23, 2020. *Id.* The Corps filed a timely notice of appeal on January 19, 2021, 57 days after the judgment. App. 2597; Fed. R. App. P. 4(a)(1)(B).

(D) The appeal is from a final judgment that disposes of all parties' claims and a permanent injunction.

STATEMENT OF THE ISSUES

1. Section 1319 of the WIIN Act authorizes the "construction at an appropriate location across the Savannah River of a structure that is able to maintain the pool for water supply and recreational activities, as in existence on the date of enactment of this Act." Did the district court err when it concluded that the Corps acted contrary to the WIIN Act because the Corps' selected structure would not maintain a precise water surface elevation of 114.76 feet at all times?

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[1] As in the text, the Joint Appendix will be cited as "App. [page]."

2. The district court issued a permanent injunction barring the Corps from building any structure that does not maintain a precise water surface elevation of 114.76 feet at all times. Did the court legally err by issuing an injunction without considering whether injunctive relief was necessary to provide the plaintiffs with complete relief or whether the traditional equitable factors governing injunctive relief supported an injunction?

STATEMENT OF THE CASE

A. Statutory and regulatory background

The merits of this case turn entirely on interpreting section 1319(c) of the WIIN Act. That section reads in full:

> (c) PROJECT MODIFICATIONS.— (1) IN GENERAL.— Notwithstanding any other provision of law, the Project is modified to include, as the Secretary determines to be necessary—
>
> (A)(i) repair of the lock wall of the New Savannah Bluff Lock and Dam and modification of the structure such that the structure is able—
>
> (I) to maintain the pool for navigation, water supply, and recreational activities, as in existence on the date of enactment of this Act; and
>
> (II) to allow safe passage over the structure to historic spawning grounds of shortnose sturgeon, Atlantic sturgeon, and other migratory fish; or
>
> (ii)(I) construction at an appropriate location across the Savannah River of a structure that is able to maintain the pool for water supply and recreational activities, as in existence on the date of enactment of this Act; and

> (II) removal of the New Savannah Bluff Lock and Dam on completion of construction of the structure; and
>
> (B) conveyance by the Secretary to Augusta-Richmond County, Georgia, of the park and recreation area adjacent to the New Savannah Bluff Lock and Dam, without consideration.

Pub. L. No. 114-332, § 1319(c), 130 Stat. 1704 (2016).

Though not directly at issue, two other statutes are relevant to understanding the case. First, the Endangered Species Act requires the Secretary of the Interior to promulgate regulations listing those species of animals that are "threatened" or "endangered" under specified criteria, and to designate their "critical habitat." 16 U.S.C. § 1533. The ESA further requires each federal agency to ensure that its actions are "not likely to jeopardize the continued existence of any endangered species or threatened species" or adversely modify any critical habitat. *Id.* § 1536(a)(2). If an agency determines that action it proposes to take may adversely affect a listed species, it must engage in formal consultation with, in this case, the National Marine Fisheries Service. After formal consultation, the Fisheries Service must provide the agency with a written statement, known as a Biological Opinion, explaining how the proposed action will affect the species or its habitat, *id.* § 1536(b)(3)(A), and any "reasonable and prudent measures" to mitigate impacts to the species or its habitat, *id.* § 1536(b)(4). *See also Bennett v. Spear*, 520 U.S. 154, 157-58 (1997).

Second, the National Environmental Policy Act serves the dual purpose of ensuring that federal agencies consider significant environmental impacts of a proposed action and informing the public of those impacts. *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983). "NEPA itself does not mandate particular results, but simply prescribes the necessary process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). The Corps' action here was supported by a NEPA analysis and a finding that no significant environmental impacts were likely to result from building the Corps' selected fish-passage structure.

B. Factual background

1. The Savannah River and New Savannah Bluff Lock and Dam.

This case concerns the New Savannah Bluff Lock and Dam on the Savannah River near Augusta, Georgia. The Savannah River is a major interstate river that forms the border between the States of Georgia and South Carolina. App. 105. There are three large federal reservoirs formed by dams north of Augusta that operate for hydropower, water supply, recreation, and flood control. *Id.* The southernmost of those is J. Strom Thurmond Dam, which "is responsible for most of the flow regulation that affects the Savannah River at Augusta." *Id.* There is one non-federal dam, Stevens Creek Dam, between Thurmond Dam and Augusta. Stevens Creek Dam impounds a small reservoir and is used mainly to generate electricity. *Id.*

When Thurmond and Stevens Creek Dams are operating normally, flows in the Savannah River at Augusta range from 3,600 cubic feet per second (cfs) to around 8,000 cfs, "though there is daily and even hourly variability in flow due in large part to hydropower generation at Thurmond." App. 106.

Those flows eventually reach the Dam. Congress authorized the Dam in 1933 and the Corps completed its construction in 1937. App. 119. The structure consists of a lock chamber, dam, gates, and operation building. App. 125-26. The Dam sits 13 miles downstream from Augusta and 187 miles upstream from the mouth of the Savannah River. App. 94.

The Dam was originally intended to facilitate commercial navigation of steamships and commercial barges from the Savannah Harbor upstream to Augusta. App. 124. But by the 1970s commercial traffic through the Dam had ceased. *Id.* Given that the Dam no longer served its intended purpose and had fallen into disrepair, the Corps undertook a study to evaluate the Dam's continued viability. App. 88-89, 99-102. The Corps concluded that it should remove the Dam because of the prospective repair, operations, and maintenance costs. *Id.* While Congress initially directed the Corps to rehabilitate the Dam at federal expense, Water Resources Development Act of 2000, Pub. L. No. 106-541, 114 Stat. 2572, Section 348(l) (2000), it never appropriated the necessary funds.

Building the Dam had two incidental effects on the surrounding area.

First, it raised the level of the Savannah River for about 17 miles above the Dam, creating a "pool" of water abutting Augusta's riverfront that the neighboring communities use for water supply and recreation. Though the "pool" is technically considered "lacustrine," meaning having the qualities of a lake, it is not a large lake reservoir in the same sense as the federal reservoirs upstream. App. 110, 112. Instead, to the casual observer, the "pool" looks just like the river. App. 112, 123. The gates at the Dam have historically been used to help "maintain a pool elevation between 111.2 and 114.2 NAVD88 upstream of the dam," App. 106-07, though actual river elevations often vary within and even beyond that range.[2] App. 561-75.

[2] The water surface elevations above mean sea level in the record and in this brief are, unfortunately, rendered in different measurements depending on the date that the elevations were recorded. Initially, the USGS gage recorded measurements at the gage upstream of the Dam as "NGVD29," which is the "National Geodetic Vertical Datum of 1929." But on July 26, 2021, USGS updated the gage to record measurements in "NAVD88," which is the "North American Vertical Datum of 1988," the most current national vertical datum. When the WIIN Act was enacted on December 16, 2016, the gage recorded measurements in NGVD29 and read 114.76 feet. At the location of the Dam, that measurement can be converted to NAVD88 by subtracting 0.61 feet and equals 114.15 feet NAVD88, toward the upper end of the historical range, App. 106-07. Historical gage readings are available on the internet at https://waterdata.usgs.gov/nwis/uv?site_no=02196999. Gage height readings for the years 2015-2018 were attached to the Complaint, App. 561-575, and the Court may also take judicial notice of the publicly available gage readings. *See Hall v. Virginia,* 385 F.3d 421, 424 n.3 (4th Cir. 2004) (taking judicial notice of publicly available statistics on voting-age population).

The primary recreational uses of the pool include private boat docks housing boats requiring two feet or more of water depth, the Ironman 70.3 triathlon, the Head of the South Regatta, and recreational fishing. App. 130-32. In addition, there are eight water supply intakes in the pool upstream of the Dam, six of which are active and might be affected by the project. App. 132-33. Because the pool was incidental to the Dam's navigation purpose, the Corps does not have any water storage agreements with the owners of those water intakes. *Id*. Neither recreation nor water supply is a federal purpose of the Dam, which was limited in the authorizing legislation to navigation, but those purposes are incidentally supported by the creation of the pool.

Second, the Dam prevented fish, including endangered Atlantic and shortnose sturgeon, from migrating upstream to their historic spawning areas. Those species are listed as endangered under the Endangered Species Act and are protected by that statute. App. 113. The Savannah River has been designated as critical habitat under the ESA for Atlantic sturgeon. App. 114. The Fisheries Service concluded that because sturgeon cannot currently pass above the Dam, the Dam is the farthest accessible upstream extent of spawning habitat. *Id.*

2. The Savannah Harbor Expansion Project and ESA Mitigation.

The Savannah Harbor Expansion Project ("SHEP") is a recently completed billion-dollar federal project to deepen and lengthen the Savannah River navigation

channel near Savannah. App. 89. The Garden City Terminal in Savannah is the fourth largest container port in the United States and has been the fastest growing port in the country for the last ten years. App. 93. It supports hundreds of thousands of jobs and generates billions in annual income in Georgia and South Carolina. App. 94. The deepened channel will support larger and more efficient commercial container vessels as they travel upstream from the Atlantic Ocean to the Garden City Terminal. App. 93-94.

Congress authorized SHEP in 1999, in section 101(b)(9) of the Water Resources Development Act, Pub. L. No. 106-53, 113 Stat. 269, and since that time has provided additional funding and authorizations for the project through subsequent legislation. The Corps partnered with the Georgia Department of Transportation and the Georgia Ports Authority, the non-federal sponsors, to finish the project. App. 93. And the Corps has worked, and continues to work, closely with other federal agencies, including the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service, and the Fisheries Service to ensure that the Project includes all appropriate environmental mitigation features.

One such mitigation feature, required by the Fisheries Service in its Biological Opinion examining the impacts of SHEP, is to provide for fish passage above the Dam to the sturgeon's historic spawning grounds. App. 270-71. Doing so would ameliorate the impacts of harbor deepening on Atlantic and shortnosed

sturgeon and bring SHEP into compliance with the ESA. *Id.* The Fisheries Service and the Corps initially proposed to build a fish passage around the Dam to allow sturgeon to bypass the Dam and reach their historic spawning grounds near Augusta. *Id.* At that time, the Dam was a federally authorized project and removal of the Dam to create an in-channel fish passage was not authorized, so the Biological Opinion provided for an off-channel fish passage that would reroute a portion of the River flow to allow for a narrow rock weir lined channel to the side of the River.

Congress upended that plan in 2016 when it passed the WIIN Act. The WIIN Act deauthorizes the Dam, *see* § 1319(b)(1)(A), and provides the Corps only two options for fish passage, neither of which is the original bypass providing fish passage around the Dam that the Corps intended to build. In the first option, Congress provided that the Corps may repair the lock wall and modify the existing Dam so that it is able to both "maintain the pool for navigation, water supply, and recreational activities, as in existence on the date of enactment" and "allow safe passage over the structure to the historic spawning grounds shortnose sturgeon, Atlantic sturgeon, and other migratory fish." Pub. L. No. 114-332, § 1319(c)(1)(A)(i), 130 Stat. 1704. In the second option, the Corps may remove the Dam and build a structure "at an appropriate location across the Savannah River"

that is "able to maintain the pool for water supply and recreational activities, as in existence on the date of enactment of this Act." *Id.* § 1319(c)(1)(A)(ii).[3]

3. The Corps analyzed various alternatives to implement the WIIN Act.

Following passage of the WIIN Act, the Corps conducted additional analysis under NEPA to evaluate fish passage alternatives that would both comply with the WIIN Act and provide the necessary ESA mitigation for SHEP. Over the next two years, the Corps analyzed a range of alternatives and evaluated each for factors such as technical feasibility, environmental impacts, cost, and pool functionality, and considered public comments from various stakeholders. The Corps published its final analysis in a Supplemental Environmental Assessment. App. 75.

The Corps began by examining potential locations for a new fish-passage structure, both upstream and downstream of the existing Dam. The Corps looked at several potential upstream locations, but "no suitable locations for placement of a rock weir were found upstream of the dam," primarily because upstream locations were likely to induce more flooding. App. 143. The increased flooding would require either a larger conveyance for floodwaters or the use of eminent domain to acquire easements over lands likely to be more frequently flooded. *Id.* The Corps

[3] The Second Amended Biological Opinion (dated October 13, 2017), issued by the Fisheries Service after Congress enacted the WIIN Act, clarifies that under both options the Corps must provide safe passage for the fish to their historic spawning grounds to comply with the ESA. App. 583-84.

also examined but ruled out downstream locations because the size of any structure necessary to maintain the pool for its current uses was simply too great. *Id.*

After settling on a location, the Corps fully evaluated eight alternatives. App. 150. The Corps evaluated one alternative to implement the WIIN Act's option 1, but concluded that it would not pass sturgeon as effectively as the other alternatives because of issues with false attraction that might delay migration during the window for spawning. App. 178. After examining several alternatives for a new structure, the Corps concluded that Alternative 2-6d was the best solution as it would "provide[] the highest probability of achieving fish passage objectives while maintaining the functionality of the pool for water supply and recreation." App. 223. Under Alternative 2-6d, the Corps would remove the Dam and construct a 500-foot width in-channel rock weir—a water damming and control structure that allows water to flow over its top—which the Corps predicted would maintain the pool "between 109.7 feet and 110.9 feet NAVD88 near the lock and dam, with an elevation of 110.2 feet NAVD88 (3.0 feet lower than [no action alternative]) being representative of normal conditions." App. 166. Alternative 2-6d would also allow fish to travel upstream to their historic spawning grounds, App. 114-15, as they would in nature, in accordance with design guidance

for nature-like fishways promulgated by the Fisheries Service, the U.S. Geological Survey, and the Fish and Wildlife Service.[4] App. 166.

The Corps then analyzed the likely impacts of the structure on water supply and recreational activities. For water supply, the Corps looked at the six active and potentially affected intakes and worked with their owners to ensure that its design would maintain those water-supply intakes. The Corps examined the pool elevation required to prevent pump failure at each intake. App. 133-34. It then evaluated impacts to the intakes assuming 3,600 cfs flow, the minimum flow during drought, by conducting a simulation in coordination with the water supply users. App. 138, 186-87. The Corps concluded that Alternative 2-6d would not adversely affect any of the water-supply intakes and that none would likely require modification under that alternative. App. 186-87.

The Corps also examined the existing recreational activities. The Corps looked at impacts to recreational docks, many of which do not have the required permits from the Corps. App. 183-85. The Corps concluded that Alternative 2-6d would not interfere with the continued general use of boat docks. App. 184-85. The Corps also looked at the impacts to special events like the Ironman 70.3 triathlon and the Head of the South Regatta, which were also unaffected. App. 185. Similarly, the pool would continue to support fishing. *Id.*

[4] https://repository.library.noaa.gov/view/noaa/28919

The Corps signed an approval memorandum, App. 222, and Finding of No Significant Impact, App. 226, on October 29, 2019, approving Alternative 2-6d.

C. Proceedings below

South Carolina and Augusta challenged the Corps' planned removal of the Dam and construction of the rock weir. App. 21, 885. They alleged that the Corps' environmental analysis violated NEPA, and that the selected rock weir proposal violates the WIIN Act and several other statutes and agreements. Relevant here, the plaintiffs complained that removal of the Dam and construction of the selected rock weir alternative do not comply with the WIIN Act because the weir will lower the elevation of the upstream river pool. App. 59, 930. They alleged that the WIIN Act, by its plain terms, requires that the new structure maintain the upstream river pool at the precise level as it existed on the date of enactment (December 16, 2016), which was 114.76 feet NGVD29. *Id.*

The Corps moved to dismiss all of South Carolina's and Augusta's claims, except the NEPA claims, for lack of jurisdiction and failure to state claims upon which relief could be granted. App. 11 (ECF 37). South Carolina moved for partial summary judgment. App. 11 (ECF 12). Augusta joined South Carolina's motion for partial summary judgment. App. 12 (ECF 46).

In July 2020, the parties jointly moved to stay the litigation because of negotiations that were then underway among the South Carolina and Georgia

Congressional delegations, and local governments, regarding potential legislation in the Water Resources Development Act of 2020 that could have eliminated South Carolina's and Augusta's concerns about Alternative 2-6d (but that ultimately did not address the issues in this litigation). App. 16 (ECF 74). The court granted that motion and stayed the case through October 1, 2020. App. 16 (ECF 76). Following the expiration of the stay on October 1 and the failure of the parties to reach agreement about the terms of extending the stay, the Corps confirmed that it would move forward with construction of the rock weir. Both plaintiffs then moved for a preliminary injunction on all of their claims and sought an order from the court preventing the Corps from moving forward with the project and implementing Alternative 2-6d. App. 17 (ECF 90, 91).

On November 19, 2020, the court held a telephonic hearing on the Corps' motions to dismiss and the Plaintiffs' motions for preliminary injunction, and a trial on the merits of the Plaintiffs' WIIN Act claim under Rule 65(b). App. 2525. Four days later the court entered judgment for the Plaintiffs on their WIIN Act claims and permanently enjoined the Corps from implementing its selected alternative (2-6d) as well as "any other plan involving the removal of the [Dam] if the proposal does not 'maintain the pool' that was in existence on the date of the Act's enactment, which was 114.76 feet NGVD29." App. 2596. It concluded that section 1319 of the WIIN Act requires that any option selected by the Corps for the

removal of the Dam must maintain the pool at the precise level existing on the day of enactment, and that the Corps' selected alternative failed to do that. It found the selected plan was thus "in excess of [the Corps'] statutory authority." App. 2592, 2595.

Separately, the court issued an order denying the Corps' motions to dismiss and denying the Plaintiffs' motions for preliminary injunction as moot, given the permanent injunction it had entered. App. 2570. We appealed both orders. App. 2597.

SUMMARY OF ARGUMENT

1. The Corps correctly read option 2 of the WIIN Act to require it to build a structure that is able to maintain the pool for existing water supply and recreational uses, and it selected a structure that would do so. The district court's reading of the WIIN Act to require the Corps instead to maintain an elevation of precisely 114.76 feet NGVD29 in perpetuity at the gage immediately upstream of the existing Dam suffers from several problems and should be reversed.

First, the plain language of the WIIN Act says nothing about maintaining any particular water level. The district court impermissibly read that requirement into the statute. Second, by creating a requirement to maintain the pool at a specific elevation, the district court read out of the statute the words that Congress actually included, which require the Corps to build a structure that is able to maintain the

pool "for water supply and recreational activities," not to maintain a particular water elevation. The court also ignored the differences in language that Congress used in option 1, which required the Corps to maintain the pool for "navigation, water supply, and recreational activities," and held that under either option the Corps must maintain the pool at precisely 114.76 feet. Finally, the district court's interpretation eliminates the Corps' ability to choose a different "appropriate location" for a new structure upstream of the existing Dam, in direct contravention of the WIIN Act. This Court should reject that interpretation and reverse.

2. Even if this Court were to conclude that the Corps' selected alternative does not comply with the WIIN Act, it should vacate the permanent injunction entered by the district court. That injunction goes beyond the usual relief in an Administrative Procedure Act ("APA") case and is unnecessary to provide complete relief to the Plaintiffs. The extraordinary remedy of an injunction does not issue automatically whenever a plaintiff succeeds on the merits, and the district court completely failed to examine whether injunctive relief was necessary or whether any of the four equitable factors governing the issuance of injunctive relief weighed in favor of that relief here. This Court should therefore vacate the district court's injunction.

STANDARD OF REVIEW

This Court reviews de novo both questions of statutory interpretation and the district court's conclusion that the Corps violated the APA by acting contrary to law. *Outdoor Amusement Bus. Ass'n, Inc. v. Dep't of Homeland Sec.*, 983 F.3d 671, 680 (4th Cir. 2020) ("APA challenges to statutory authority" reviewed de novo); *Stone v. Instrumentation Laboratory Co.*, 591 F.3d 239, 242-43 (4th Cir. 2009) (statutory interpretation reviewed de novo).

This Court reviews for an abuse of discretion the district court's entry of permanent injunctive relief, "reviewing factual findings for clear error and legal conclusions de novo." *PBM Prod., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 125 (4th Cir. 2011).

ARGUMENT

I. The Corps' selected alternative complies with the WIIN Act.

The Corps did not violate the WIIN Act when it selected Alternative 2-6d after concluding that structure would allow sturgeon to pass to their historic spawning ground, would maintain the pool for the water supply and recreational activities occurring when Congress passed the WIIN Act, and would meet both of those objectives while not increasing flooding. The WIIN Act's second option allows "construction at an appropriate location across the Savannah River of a structure that is able to maintain the pool for water supply and recreational

activities, as in existence on the date of enactment of this Act." Pub. L. No. 114-332, § 1319, 130 Stat. 1704 (2016). The Corps interpreted the WIIN Act to require a new structure, not necessarily in the same location as the existing Dam, that is able to maintain the pool for the water supply and recreational uses existing when the Act was passed. The Corps correctly concluded that Congress created no requirement for a specific water elevation at any particular gage. App. 1227, 1240. The Corps' interpretation accords with the plain language of the Act, gives content to every word Congress used, and is well-grounded in the Corps' expertise with water-control projects.

With that understanding of the WIIN Act in mind, the Corps concluded that Alternative 2-6d meets each of the statutory requirements. The current site of the Dam was the most appropriate location for a new structure, as the Dam is located at "the best location where a structure can be placed without adversely impacting water surface elevations during flood events." App. 143. The rock weir contemplated by Alternative 2-6d is a "structure" and would be able to maintain "the pool" at a normal elevation between 109.7 feet and 110.9 feet NAVD88 near the current site of the Dam, with less pronounced elevation changes further upstream, near Augusta. App. 162, 166. Given that pool elevation, the Corps concluded that the pool would pass fish as required by the ESA, continue to support the water supply and recreational activities existing on the date of

enactment, and would not induce undue new flooding in high-water events. App. 183-86. The Corps therefore concluded that Alternative 2-6d complies with the WIIN Act.

The district court, however, disagreed with the Corps' interpretation of the WIIN Act and held that the Corps acted contrary to law when it approved Alternative 2-6d. App. 2592-96. The court did not hold that the Corps violated the WIIN Act because Alternative 2-6d would not be able to maintain a pool for the water supply and recreational activities existing when the Act was passed, or even examine whether those purposes would be preserved. *Id.* Instead, the court effectively held that the statutory purposes for which Congress specified that the pool be maintained are irrelevant, and that Congress meant for the Corps to maintain the pool at the precise elevation, measured at the Dam, that the pool happened to be at on the day the President signed the WIIN Act. As the district court put it, "Section 1319 of the WIIN Act requires that any option selected by the Army Corps for the removal of the Lock and Dam at Savannah Bluff must maintain the pool existing on the day of enactment." App. 2595. The district court's interpretation of the WIIN Act contradicts the Act's plain language and disregards the Corps' significant expertise related to water-control structures. This Court should reverse.

A. The district court's interpretation of the WIIN Act conflicts with the Act's plain language.

When interpreting statutes, this Court starts "with the plain language," with the words read in context and with a "view to their place in the overall statutory scheme." *Lynch v. Jackson*, 853 F.3d 116, 121 (4th Cir. 2017). In ascertaining the meaning of the words Congress used, this Court will give "the words of a statute their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import." *U.S. Dep't of Labor v. N. Carolina Growers Ass'n*, 377 F.3d 345, 350 (4th Cir. 2004) (quoting *Williams v. Taylor*, 529 U.S. 420, 431 (2000) (internal marks omitted)).

The district court's interpretation of the WIIN Act contradicts the Act's plain language in at least three ways: First, the district court read a precise elevation requirement into the statute when Congress did not provide any elevation in the language itself, or even refer to water levels or surface elevations at all. Second, the district court interpretation necessarily reads Congress's references to "water supply and recreational activities" out of the statute, rendering those words superfluous. Third, the district court's myopic focus on a precise water level at a particular gage severely constrains the Corps' ability to select an "appropriate location" for a replacement structure, as Congress contemplated.

1. The district court read into the WIIN Act an unstated requirement to maintain a precise water level.

The WIIN Act does not mention water levels, water depth, or surface elevation. Instead, the plain language of the statute requires only that the Corps build a structure that is "able to maintain the pool for water supply and recreational activities, as in existence on the date of enactment of this Act." WIIN Act § 1319(c)(1)(A)(ii). Yet the district court concluded that any project that the Corps builds must keep the pool at precisely 114.76 feet NGVD29 or violate the WIIN Act, because that was the average elevation at the gage above the New Savannah Bluff Lock and Dam on the date that the President signed the WIIN Act. App. 2596.

That the text of the WIIN Act does not mention water levels is a sufficient basis to reject the district court's interpretation of the Act as requiring the Corps to maintain a single, precise water level. Courts do not "usually read into statutes words that aren't there." *Romag Fasteners, Inc v. Fossil, Inc.*, 140 S. Ct. 1492, 1495 (2020). Thus, as this Court has repeatedly held, "Courts are not free to read into the language [of a statute] what is not there, but rather should apply the statute as written." *O'Hara v. Nika Techs., Inc.*, 878 F.3d 470, 475 (4th Cir. 2017) (quoting *United States v. Murphy*, 35 F.3d 143, 145 (4th Cir. 1994)). The WIIN Act says nothing about water levels, and the district court should be reversed

because it "improperly reads a limitation into the statute that does not appear in its text." *O'Hara*, 878 F.3d at 475.

The lack of any textual support for the district court's requirement that the Corps maintain a specific water level is reinforced by the context in which Congress was legislating. If Congress intended to require a precise water elevation, it would have said so explicitly, as it has done with other water-control structures. Congress routinely legislates in the area of water control structures, and if Congress means to require the Corps to operate for specific water elevations, then Congress typically refers directly to water levels and provides for a range of elevations varying by several feet, not a single, precise number. For example, in Section 21 of the Water Resources Development Act of 1988, Pub. L. 100-676, Congress directed the Secretary "to maintain water levels in the Mississippi River headwaters reservoirs within the following operating limits: Winnibigoshish 1296.94 feet—1303.14 feet; Leech 1293.20 feet—1297.94 feet; Pokegama 1270.42 feet—1276.42 feet; Sandy 1214.31 feet—11218.31 feet; Pine 1227.32 feet—1234.82 feet; and Gull 1192.75 feet—1194.75 feet."[5] When interpreting a statute, Courts may "examine related provisions in other parts of the U.S. Code" and where Congress would be expected to have "used language similar to what it used" in

[5] Section 3175 of the Water Resources Development Act of 2007, Pub. L. 110-114, 121 Stat. 1041, amends Section 21 of the Water Resources Development Act of 1988 by modifying those specific operating limits.

similar statutes but did not, that is good evidence that Congress did not intend the same result. *Boumediene v. Bush*, 553 U.S. 723, 776-77 (2008).

The Corps is unaware of any statute at any other water-control project that explicitly or implicitly requires the Corps to maintain a precise, singular elevation like the one the district court read into the WIIN Act. If Congress had wanted the Corps to maintain a specific water elevation as measured at a particular gage immediately upstream of the Dam, it "easily could have drafted language to that effect." *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 169 (2014). Indeed, the WIIN Act itself twice refers to specific water elevations in other contexts, demonstrating that Congress knew how to specify water elevations when it meant to. *See* Pub. L. No. 114-32, § 1307(a), 130 Stat. 1692 (2016) (noting that flowage easements at another project are "extinguished above elevation 82.2 feet (NGVD29), the ordinary high water line"); *id.* § 3608(b)(11), 130 Stat. 1798 (defining "conservation storage capacity" at another project with a range of surface elevations). But there is no reference to water levels, water elevation, or water depth in Section 1319 of the WIIN Act. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). Thus,

as explained further in section 2 below, the best reading of the statutory language is that Congress was concerned about maintaining the pool for water supply and recreational activities, as they existed on the date of enactment, and not with maintaining a precise water elevation.

The district court seems to have thought that even though the WIIN Act does not mention water levels, it nevertheless requires the Corps to maintain a particular water level because "the pool" is a static thing set in stone on the date of enactment, measured by the water levels at the gage immediately upstream of the Dam, and that if that precise water level is not maintained then it is no longer "the pool." App. 2592-93. But there is no textual support for that interpretation in the statute. A "pool" is this use is "a body of water forming above a dam," Merriam-Webster's Collegiate Dictionary at 964-65 (11th ed. 2004); Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/pool.[6] The elevation of the "pool" above the Dam has historically been maintained typically "between 111.2 and 114.2 NAVD88 upstream of the dam," App. 106-07, and ranged from as low as 111.09 NVGD29 to as high as 119.33 NGVD29 in just the few years of data attached to the Complaint,

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[6] *See also* Julian and Katherine Dunster, Dictionary of Natural Resource Management at 247 (1996) (defining "pool" as a "portion of the stream with reduced current velocity, often with water deeper than the surrounding areas" that can be "classed as several types" including a "dam pool," which is "water impounded upstream from a complete or partly complete channel blockage").

App. 562. After Alternative 2-6d, there would still be a body of water formed above the rock weir (a damming and water-control structure, *see* App. 87) forming a "pool" that serves the same water supply and recreational activities existing above the current Dam. It makes no difference textually if "the pool" is a slightly lower water elevation after Alternative 2-6d; it remains "the pool" because it is still "a body of water forming above a dam" serving the same functions. A pool remains a pool when it continues to serve the same functions, despite a small change in surface elevation, especially where the pool has always fluctuated in elevation. That common-sense understanding should govern here. *N. Carolina Growers Ass'n*, 377 F.3d at 350 (words to be given their ordinary, common meaning). There is nothing about the phrase "the pool" that, as a textual matter, locks in a specific water elevation from a specific date.

Indeed, as explained further in section 3 below, "the pool" as used in the WIIN Act does not even restrict the geographic size of the pool to that which existed on the date of enactment. "The pool" cannot equal an elevation at the gage immediately upstream of the existing Dam because Congress authorized the Corps to build the structure at any "appropriate location." WIIN Act § 1319(c). If the Corps had chosen a different location, the size of "the pool" would have grown (if it were a downstream location) or shrunk (if it were an upstream location), but it would still have been "the pool" so long as it served the same functions and was "a

body of water forming above a dam." There was no cause for the district court to add a specific water surface elevation to the plain language of the WIIN Act to ensure that "the pool" remains "the pool." Congress's use of the phrase "the pool" is too slender a reed on which to hang a requirement that the Corps maintain the water level at 114.76 feet NGVD29 at the gage immediately above the existing Dam.

That Congress did not intend to impose any specific elevation in the WIIN Act is reinforced by the lack of any *current* statutory or regulatory requirement to maintain the pool behind the Dam at any precise elevation. As explained, the elevation of the pool fluctuates within a range of several feet in a typical year even under normal conditions. App. 561-75. It strains belief to think that Congress created in omnibus legislation covering hundreds of projects nationwide a brand new requirement to maintain the pool above the Dam at a precise elevation of 114.76 feet NGVD29 measured just upstream from the existing Dam, but then did not specify that elevation in the statute or include an operating range, as it would typically do.

The district court's interpretation of the WIIN Act also means that Congress left the level of the pool and the pool's ability to serve the purposes set forth in the statute largely up to chance. The level of the pool has always fluctuated by several feet, and is mainly influenced by precipitation and releases from upstream

reservoirs and re-regulation dams, which no one contests. App. 106-07, 561-75. Congress could not have foreseen when it passed the bill the date on which the President would sign it, and there is no reason to think Congress gave talismanic significance to the exact water level on some unknown future date, given the typical daily fluctuation in that level. A particularly low or high flow day on the date of enactment because of weather[7] or happenstance in the operation of the other projects[8] could have caused significant problems under the district court's interpretation, and produced an absurd result where the Corps needed to maintain the pool in permanent low or high flow conditions. That cannot be what Congress intended. *See*, *e.g.*, *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be

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[7] For example, if it had rained for the three days before enactment, water levels could have approached 119 feet NGVD29, as they did in early January 2016, where daily average water elevations went from 114.77 on December 31, 2015, to 118.83 feet on January 2, 2016, after three straight days with more than a half-inch of rainfall. App. 562; https://waterdata.usgs.gov/nwis/uv?site_no=02196999 &agency_cd=USGS (water levels with rainfall data).

[8]For example, in February 2019, the Corps conducted a simulation with a pool target elevation of 111 feet NGVD29. The flash-boards at Steven's Creek Dam (operated by a private utility) were undergoing maintenance during the simulation test, resulting in a lack of stable water levels. The pool fluctuated approximately 2 feet throughout the day while Thurmond Dam was generating hydropower, due to the lack of re-regulation at Steven's Creek Dam. The After Action Report for the Simulation can be found here: https://www.sas.usace.army.mil/Portals/61/docs/ Planning/PlansandReports2019/FishPassage/Final/Appendix_A_Attachment_4.pdf ?ver=2019-10-29-140401-863. Had the Stevens Creek Dam operated in such a manner on the date of enactment, water levels could have been dramatically lower.

avoided if alternative interpretations consistent with the legislative purpose are available."); *Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (rejecting an interpretation that "would produce an absurd and unjust result which Congress could not have intended").

On top of that, under the district court's requirement for a precise elevation of 114.76 feet NGVD29, the Corps could not design a fish-passage structure that *increased* the elevation of the pool, even if doing so would be better for passing fish and would enhance the water supply and recreational purposes. So, for example, if a longer rock weir with less slope that resulted in a pool with an elevation of 115.5 feet were better for sturgeon, the Corps could not construct that project under the district court's interpretation even though the water supply and recreational purposes of the pool would be unaffected or even enhanced. It would be passing strange for Congress to have adopted such a scheme in a statute designed to provide the Corps with options to pass sturgeon to their historic spawning grounds while continuing to serve the existing uses of the pool.

Finally, the plain language of the WIIN Act affirmatively contradicts the notion that the Corps must build a structure that maintains a precise water level at all times, as the district court's order seems to require. By specifying that the structure need only be "*able to*" maintain that pool for water supply and recreational uses, Congress recognized that the Corps does not have complete

control over water levels in a dynamic system, and can only control the type of structure it builds. The district court's holding that the Corps must actually "maintain the pool" at 114.76 feet NGVD29 or violate the WIIN Act, when no such requirement appears in the language of the statute, should be reversed.

2. The district court read the phrase "for water supply and recreational activities" out of the statute.

Not only did the district court read into the WIIN Act a requirement to maintain a precise surface elevation that is not present in the statutory language, the district court's interpretation also reads the modifying phrase "for water supply and recreational activities" completely out of the statute. Had Congress intended to require the Corps simply to maintain the pool at a precise elevation, there would have been no reason to mention the purposes of the pool. It would have been sufficient simply to say that the Corps must maintain the pool and then specify the elevation. Again, the relevant language requires the Corps to build "a structure that is able to maintain the pool for water supply and recreational activities, as in existence on the date of enactment of this Act." Pub. L. No. 114-332, § 1319, 130 Stat. 1704 (2016). But in the district court's reading, "for water supply and recreational activities" has no meaning and does no work in the statute. Courts have long recognized that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or

insignificant." *See, e.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quoting *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879)).

The district court read the statutory language to require the Corps to "maintain the pool" as it was "in existence on the date of enactment of this Act" while ignoring the phrase "for water supply and recreational activities." *See*, *e.g.*, App. 2595 (holding "the WIIN Act requires that any option selected by the Army Corps for the removal of the [dam] must maintain the pool existing on the day of enactment"). But the limiting phrase "as in existence on the date of enactment of this Act" does not, as the district court thought, modify only "the pool," which can then be simplified to a precise elevation existing on the date of enactment. There is no grammatical foundation for concluding that the limiting phrase reaches back over "water supply and recreational activities" to modify only "the pool."

Instead, under any grammatically plausible reading of that language, the limiting phrase must apply to "water supply and recreational activities," meaning that the Corps must maintain the pool for those purposes as they existed when Congress passed the WIIN Act. Consider, for example, the rule of the last antecedent, under which "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). The phrase "water supply and recreational activities" is the phrase immediately preceding the limiting clause "as in existence

on the date of enactment." Applying the rule of the last antecedent, the WIIN Act required the Corps to maintain "the pool" for the water supply and recreational activities that existed on the date of enactment, not "the pool" that existed on that date, and not for other purposes (like navigation) or for predicted future water supply or recreational uses. That reading of the statute is reinforced by Congress's use of the same limiting clause, but with a different antecedent phrase, in option 1 of Section 1319. There, Congress provided that the Corps modify the Dam so that it is able to "maintain the pool *for navigation, water supply, and recreational activities*, as in existence on the date of enactment of this Act." WIIN Act § 1319(c)(1)(A). Applying the rule of the last antecedent throughout the section gives every word in the statute meaning, making clear that Congress instructed the Corps in option 2 to preserve the existing water supply and recreational activities.

Alternatively, even if the rule of the last antecedent did not govern here, the result would still be the same. Sometimes when a limiting clause "immediately follows a concise, integrated clause" that "hangs together as a unified whole," referring to a single thing, the limiting clause modifies the whole integrated clause. *Facebook, Inc., v. Duguid*, 141 S. Ct. 1163, 1169 (2021) (quoting *Cyan, Inc., v. Beaver County Employees Retirement Fund*, 138 S. Ct. 1061, 1076-77 (2018)). Here, the clause "the pool for water supply and recreational activities" might be read as an integrated clause. To use the Supreme Court's example in *Cyan*, in the

construction "the woman dressed to the nines carrying an umbrella, as shown in the picture," the limiting clause "as shown in the picture" could refer to nothing "less than the well-attired and rain-ready woman." *Cyan*, 138 S. Ct. at 1077. Just as in that example, the limiting language "as in existence on the date of enactment" could refer here to nothing less than the "pool for water supply and recreational activities" (or, in option 1, the "pool for navigation, water supply, and recreational activities"). Thus it requires the Corps to examine the water supply and recreational activities supported by the pool, as those purposes existed on the date of enactment, and to maintain the pool for those purposes. Under either the "rule of the last antecedent" or an "integrated clause" reading of the statute, the limiting clause must modify "water supply and recreational activities." The district court's interpretation, by contrast, has no grammatical foundation and renders entirely superfluous the modifiers after "for" in both sections of the statute. This Court ought to reject that interpretation.

The district court's reading is beset by yet another problem. By rendering the phrase "for water supply and recreational activities" superfluous, the district court ignored the plain-language differences between the two options Congress provided the Corps in the WIIN Act. Option 1, which involves repairing the lock wall, provides that the modified dam must be able to "maintain the pool for *navigation*, water supply, and recreational activities." WIIN Act § 1319(c)(1)(A)(i)(I)

(emphasis added). In contrast, option 2, which involves removal of the Dam, eliminates the navigational purpose and only requires that the structure be able to maintain the pool "for water supply and recreational activities." *Id.* § 1319(c)(1)(A)(ii)(I). But the district court held that "each option must 'maintain the pool' existing on the date of the Act's adoption," App. 2593, which gives no content to the different modifying words Congress used in the different sections of the statute. The district court's reading violates the usual presumption that "differences in language like this convey differences in meaning." *Henson v. Santander Consumer USA Inc.*, 582 U.S. ___, 137 S. Ct. 1718, 1723 (2017). It defies the "longstanding canon" that courts "seek to construe Congress's work 'so that effect is given to all provisions, so that no part will be inoperative or superfluous, void or insignificant." *Ysleta del Sur Pueblo v. Texas*, ___ U.S. ___, 142 S. Ct. 1929 (June 15, 2022) (quoting *Corley v. United States*, 556 U. S. 303, 314 (2009)). And it goes against the rule that where Congress provides an agency with multiple, differing options, courts "must hesitate to adopt an interpretation that would eviscerate such significant aspects of the statutory text" by reading the options to allow or require the same thing. *American Hospitals Ass'n v. Becerra*, ___U.S. ___, 142 S. Ct. 1896 (June 15, 2022). The Corps' interpretation, unlike the district court's, gives meaning to all of the words of the WIIN Act.

3. The district court read the words "at an appropriate location" out of the statute.

The district court's interpretation contradicts the plain language of the WIIN Act in one last way. The district court's interpretation of the WIIN Act as requiring an elevation of 114.76 just above the current location of the Dam reads out of the statute the Corps' authority to build a structure at a location upstream of the existing Dam. Any such structure would necessarily shrink the size of the pool and lower the water surface elevation at the current Dam site, which would then sit downstream of the pool. Locating the structure upstream from the current Dam site would therefore necessarily lower the pool elevation at the gage that the district court relied on. But the Act expressly allows that result, demonstrating that Congress did not intend to impose a requirement to maintain a specific water elevation at a particular gage.

The WIIN Act authorizes the Corps to choose an option involving "construction *at an appropriate location* across the Savannah River of a structure." WIIN Act § 1319(c)(1)(A)(ii). The existing Dam is 13 miles downstream from Augusta. The WIIN Act plainly gives the Corps the authority to choose a different "appropriate location" for the new structure, and the Corps examined several possibilities for a new location during the NEPA process. App. 143. The Corps ultimately chose the site of the existing Dam, but if the Corps were to have concluded, for example, that a location one or two or three miles upstream from

the existing Dam is a more appropriate location for a fish-passage structure, and that a structure at that location would not affect water supply or the current recreational uses of the "pool," the plain language of the WIIN Act would allow the Corps to choose that location. Yet the district court equated the "pool" with a precise water elevation at a particular gage immediately upstream of the Dam and permanently enjoined the Corps from building any structure that does not maintain that elevation at that gage. By doing so, the court constrained the Corps' authority to choose a different location, in direct contravention of the WIIN Act.

4. The district court's criticisms of the Corps' interpretation are not persuasive.

The district court leveled two main criticisms at the Corps' interpretation of the WIIN Act's plain language, neither of which is persuasive. First, the court concluded that the Corps' interpretation of the statute to require it to maintain the pool for its existing water supply and recreational activities incorporated "a concept of functionality" that is missing from the statute and requires adding the word "sufficient" to the statute so that it reads "able to maintain the pool [sufficient] for water supply and recreational activities." App. 2592. But it is unnecessary to add the word "sufficient" to the statute to read it as the Corps does. Instead, the word "for" links the word "pool" and the modifying phrase "water supply and recreational activities," providing a clear textual basis for a "concept of functionality." The word "for" is a preposition that is "used as a function word to

indicate," among other things, "purpose" or "an intended goal." *See* Merriam-Webster's Collegiate Dictionary at 490 (11th ed. 2004); Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/for. Here, Congress specified the purpose for which the Corps was to maintain the pool, and only the Corps' reading of the statute gives meaning to those words.

It is no surprise that Congress focused on the purposes of the pool and not a specific elevation, as Congress has vast experience with legislating the purposes of Corps projects without specifying water elevations. It is common for Congress to enact authorizing legislation providing the Corps with purposes for its projects in terms of "general statements of policy goals" that do not serve as "limitations on the Corps' discretion," with the Corps to later "strike a balance among many interests" when deciding how best to operate its projects. *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1027-28, 1030-31 (8th Cir. 2003); *see also In re MDL-1824 Tri-State Water Rts. Litig.*, 644 F.3d 1160, 1190-95 (11th Cir. 2011) (holding Congress included water supply for Atlanta as a purpose of a Corps project but leaving the precise definition of the scope of that purpose to the Corps' discretion); *Britt v. U.S. Army Corps of Engineers*, 769 F.2d 84, 89 (2d Cir. 1985) (concluding that modifications to a Corps project are within the scope of its authority "unless they are so foreign to the original purpose of the project as to be arbitrary and capricious"); *Creppel v. U.S. Army Corps of Engineers*, 670 F.2d 564, 572-73 (5th

Cir. 1982) (same). Though the WIIN Act does not make water supply or recreational activities federal purposes, the Corps' interpretation here is well grounded in how it typically interprets general statutory directives from Congress related to the purposes of water-control projects and does not require adding any words to the statute.

Second, the district court faulted the Corps for reading out of the statute Congress's direction to maintain the pool as it existed on the "date of enactment," rendering that language superfluous because if Congress had intended to adopt the Corps' reading "it did not need to mandate that the 'structure' be 'able to maintain the pool' that existed on the 'date of enactment.' " App. 2595 n.4. But the Corps' interpretation does not render the limiting clause superfluous. Instead, the Corps reads that clause to mean that the Corps must consider the water supply and recreation activities that existed when the WIIN Act was enacted and ensure that its replacement structure maintains a pool that permits those purposes to continue. Thus, the better reading of the limiting clause is that it prohibited the Corps from building a structure that would not be able to provide a pool for water supply and recreation for the existing uses supported by the existing pool. That reading puts a lower bound on the elevation of the pool, such that the Corps could not eliminate the pool entirely or eliminate the water supply or recreational uses, but that lower bound can and should be defined by the Corps in the exercise of its expertise,

considering the actual uses being made of the pool when the statute was enacted. The language Congress chose made clear that the WIIN Act did not require the Corps in settling on the design of the project to, for example, consider predicted growth and increased demands for water supply and recreation in the area when designing the replacement structure for the Dam.

B. If the WIIN Act is ambiguous, the Corps' interpretation is entitled to deference under *Skidmore v. Swift*.

If the WIIN Act is ambiguous, then the Corps' interpretation of the WIIN Act as not requiring it to maintain the pool at a precise elevation should receive deference because it is a reasonable interpretation of the Act. Under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) "an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency." Here, the Corps' interpretation takes the form of implementation guidance issued by Headquarters and the South Atlantic Division that is then formally embodied in the Corps' statutorily mandated decision to select an alternative consistent with that guidance. App. 1227, 1240. Though the guidance itself is internal and does not carry the force of law, it results from an express delegation by Congress. *See*, *e.g.*, WIIN Act, Pub. L. No. 114-322, § 1112, 130 Stat. 1632, 1637 (directing the Secretary to publish on the Corps' website implementation guidance for Title I of the WIIN

Act, constituting the Water Resources Development Act of 2016, which includes section 1319 at issue here).

Congress's instruction to the Corps to publish implementation guidance reflects Congress's recognition of the Corps' considerable expertise with water-control projects and with how Congress legislates in this area. As explained above, the Corps has relied on that considerable expertise here to arrive at a reasonable interpretation of the WIIN Act and, if the Act is ambiguous, the Corps' interpretation is entitled to deference. "[T]he well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' " *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (quoting *Skidmore*, 323 U.S. at 139-40); *see also United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).

II. The district court legally erred when it enjoined the Corps from implementing any of a broad class of actions, without considering whether an injunction was necessary to afford complete relief or evaluating the equitable factors for injunctive relief.

The district court's interpretation of section 1319 of the WIIN Act was deeply flawed, and the court then mistakenly jumped from that erroneous interpretation to the conclusion that the Corps must be permanently enjoined from implementing any project that does not precisely replicate the precise water level that prevailed on December 16, 2016. Thus, the court permanently enjoined the Corps from implementing any project that does not maintain the pool at exactly

114.76 feet NGVD29—not rounding to the nearest inch, or explaining why the court went to the hundredths of feet, or why it picked the gage immediately upstream of the existing Dam instead of another gage in the pool. The entirety of the court's discussion of injunctive relief simply states the remedy:

> Federal Defendants are hereby PERMANENTLY ENJOINED from implementing Alternative 2-6d and any other plan involving the removal of the Savannah Bluff Lock and Dam if the proposal does not "maintain the pool" that was in existence on the date of the Act's enactment, which was 114.76 feet NGVD29. This injunction binds Federal Defendants, their officers, agents, servants, employees and attorneys, and any persons acting in concert with Federal Defendants.

App. 2596. This Court should vacate that injunction because the district court's interpretation of the statute was incorrect, as explained above. But even if this Court were to agree with the district court that the Alternative 2-6d is contrary to the WIIN Act, the district court's injunction cannot stand because it provides unnecessary relief and the district court did not consider the equitable factors necessary for issuing injunctive relief.

The district court's injunction reaches far beyond the project at issue in this case and impermissibly constrains the Corps' future choices. It bars the Corps from building any structure that would maintain a natural, variable waterway at a precise elevation, to the hundredths of a foot, during all conditions. And the injunction also impermissibly constrains the Corps' ability to locate the new structure at an "appropriate location" other than the site of the current Dam. By doing so, the

district court far exceeded the usual APA relief of setting aside the challenged agency action before it, without providing any justification for awarding the "drastic and extraordinary remedy" of an injunction or even examining the equitable factors governing injunctive relief. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). This Court should vacate the injunction.

In an APA lawsuit when, as here, no special statutory review provision applies, the proper form of proceeding under the APA is a suit for declaratory or injunctive relief. *See* 5 U.S.C. § 703 (absent any special statutory review procedure relevant to the subject matter, the form of proceeding under the APA is "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction"). Declaratory and injunctive remedies are equitable and therefore discretionary. *See Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57 (1993). Indeed, the APA's very reference to actions for "declaratory judgments" makes clear that injunctive relief is not in any sense compelled by the APA when a court finds agency action unlawful. *See* H.R. Rep. No. 1980, 79th Cong., 2d Sess. 42 (1946) (referring to possibility of suits for declaratory relief to "determine the validity or application of a rule or order"); *see also* S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945).

And when injunctive relief *is* appropriate, that relief ordinarily is limited to "set[ting] aside" the particular "agency action" that has been challenged. 5 U.S.C. § 706(2); *see also id.* § 704 (authorizing judicial review of "final agency action"). Equitable relief must be tailored to the particular final agency action and parties before the court and "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see United States DoD v. Meinhold*, 510 U.S. 939 (1993) (granting stay of Armed-Forces-wide injunction, except as to individual plaintiff).

This Court will "vacate an injunction if it is 'broader in scope than that necessary to provide complete relief to the plaintiff' or if an injunction does 'not carefully address only the circumstances of the case.'" *PBM Prod.*, 639 F.3d at 128 (quoting *Kentuckians for Commonwealth v. Rivenburgh*, 317 F.3d 425, 436 (4th Cir. 2003)). A party challenging agency action in an APA case must therefore show that a declaratory judgment would be inadequate and that the further relief of an injunction is necessary. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311, 313 (1982) ("The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law.").

Here, had the district court simply declared that the Corps' selected alternative did not comply with the WIIN Act and set aside the record of decision authorizing that particular project, it would have afforded the plaintiffs complete relief. The district court erred when, without explanation, it reached beyond that relief to enjoin the Corps from approving potential future projects rather than remanding to the Corps to determine how to comply with the district court's interpretation of the WIIN Act going forward. Such relief is unnecessary and therefore unwarranted. If the Corps were to take future action inconsistent with the district court's interpretation of the WIIN Act, the plaintiffs "may file a new suit challenging such action and seeking appropriate preliminary relief" so that a "permanent injunction is not now needed to guard against any present or imminent risk of likely irreparable harm." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 162 (2010). When a "less drastic" remedy was available in the form of setting aside the Corps' action, "no recourse to the additional and extraordinary relief of an injunction was warranted." *Id.* at 165-66. If the district court's interpretation of the WIIN Act were correct, and if (contrary to our view) the Corps has some ability to comply with the WIIN Act under that interpretation, then the Corps ought to be able to attempt to comply with the Act without the chilling effect of potential contempt sanctions for violating an injunction.

And the district court further erred when it entered that injunctive relief without considering any of the traditional equitable factors governing the issuance of an injunction. "Injunctive relief is not casually granted," *SAS Inst., Inc. v. World Programming Ltd.*, 874 F.3d 370, 385 (4th Cir. 2017), and "does not follow from success on the merits as a matter of course." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 32 (2008). Instead, the court needed to consider each of the four equitable factors, particularly whether the plaintiffs were likely to suffer irreparable injury absent the injunction. *SAS Inst.*, 874 F.3d at 386 ("[t]he equitable remedy [of an injunction] is unavailable absent a showing of irreparable injury") (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)). To obtain a permanent injunction, a plaintiff must demonstrate: "that (1) that it has suffered an irreparable injury; (2) that remedies available at law … are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

Here the district court did not find that the Plaintiffs had demonstrated a single one of these required four factors, much less all four—in particular, the court made no findings about irreparable harm, the balance of hardships, or the public interest. And given that the Corps' potential actions seek to allow

endangered species to reach their historical spawning habitat while also maintaining the pool for existing purposes, the Plaintiffs would have a heavy burden of establishing that the balance of hardships or public interest supports an injunction. The district court's complete failure to consider the equitable factors here is itself an abuse of discretion and thus reversible error. *See eBay*, 547 U.S. at 394 (2006) (vacating injunction issued without considering equitable factors because courts' equitable discretion "must be exercised consistent with traditional principles of equity").

CONCLUSION

This Court should reverse the district court's judgment, vacate the permanent injunction, and remand to the district court.

Respectfully submitted,

s/ *Michael T. Gray*

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