No. 21-1085

IN THE 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.

On Appeal from the United States District Court
for the District of South Carolina

JOINT BRIEF OF PLAINTIFF-APPELLEES AND INTERVENOR/PLAINTIFF-APPELLEE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
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- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 21-1085 Caption: South Carolina, State of et al. v. U.S. Army Corps of Eng'rs et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

State of South Carolina
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /Chad N. Johnston Date: 02/04/2021

Counsel for: State of South Carolina

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 21-1085 Caption: South Carolina, State of et al. v. U.S. Army Corps of Eng'rs et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Savannah River Maritime Commission
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /Chad N. Johnston Date: 02/04/2021

Counsel for: Savannah River Maritime Comm'n

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No. 21-1085 Caption: South Carolina, State of et al. v. U.S. Army Corps of Eng'rs et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

South Carolina Department of Health and Environmental Control
(name of party/amicus)

---

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /Chad N. Johnston Date: 02/04/2021

Counsel for: S.C. Dep't of Health & Envtl. Control

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No. 21-1085 Caption: South Carolina, State v. US Army Corps of Engineers

Pursuant to FRAP 26.1 and Local Rule 26.1,

Augusta, Georgia
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /s/ David M. Moore Date: February 4, 2020

Counsel for: Augusta, Georgia

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

State Statutes

Other Authorities

INTRODUCTION

The United States Army Corps of Engineers (Corps) was required to design a mitigation project that "maintain[ed] the pool" of the Savannah River above the New Savannah Bluff Lock and Dam (NSBLD) "as in existence on the date of the enactment of the [2016 Water Infrastructure Improvements for the Nation] Act" (WIIN Act) for the purposes of "water supply and recreational activities." It is undisputed that the alternative selected and advanced by the Corps—removal of the NSBLD and construction of a shallow "weir" identified as "2-6d"—does not "maintain the pool" but instead lowers it by approximately three and a half (3.5) feet,[1] a drastic amount in a riverbody that ranges from inches at its shore to fifteen (15) feet in depth. The failure to maintain the pool effects a 17-mile area between South Carolina and Georgia, miles of shoreline, acres of wetlands and aquatic habitat, miles of waterfront property, and socioeconomic and economic resources.

The mitigation project itself derives from a requirement included in the permit, authorization, and settlement agreement resulting from litigation associated with the Savannah Harbor Expansion Project (SHEP) and the adverse impacts to shortnose and Atlantic sturgeon habitat caused by its inner harbor dredging program.

[1] The Corps admits that its chosen structure "would reduce the elevation of the pool by about three feet," *see* ECF No.29, Corps Br. at 1, but this is a minimum and the exact reduction is unknown due to errors in Corps modeling and the unavailability of that data to the Appellees.

In seeking to fulfill its mitigation and legal obligations, the Corps has sought to use the WIIN Act as a shield to avoid the regulatory authority of the State of South Carolina, the South Carolina Department of Health and Environmental Control (SCDHEC), and the Savannah River Maritime Commission (Commission) (all collectively hereinafter South Carolina), the interests of the City of Augusta, and the collective will of the citizens and businesses on both sides of the Savannah River. Favoring expediency above consensus and appropriate oversight, the Corps selected a mitigation alternative involving removal of the NSBLD, despite that option having been roundly criticized and opposed by the public and local government business stakeholders. The removal alternative was advanced by the Corps without being properly vetted or approved by South Carolina pursuant to its permitting authority under the Clean Water Act, 33 U.S.C.A. §§ 1251 *et seq.* (CWA), and in contradiction of the Corps' express agreement resulting from the settlement of South Carolina's prior legal challenge to the SHEP.

Those infirmities aside, the Corps admits, as it must, that its selected alternative will lower the level of upriver "pool" created by the NSBLD, which fails to comply with the plain language of the WIIN Act's requirement that the selected alternative be designed to "*maintain* the pool" in the future. Throughout their opening brief, the Corps hyperbolically mischaracterizes the Appellees' arguments and the order of the district court below, while selectively ignoring controlling

portions of the WIIN Act. In doing so, the Corps argues that the district court's order, which found the Corps' preferred alternative to be contrary to the plain language of the WIIN Act and enjoined the authority of the Corps to design and construct a conflicting a fish passage project at the NSBLD, is an "absurd result" that it cannot implement.

Far from absurd, the district court properly employed cannons of statutory interpretation to give proper effect to the plain meaning of the WIIN Act. By contrast, neither the law nor the facts support the Corps' argument or forced construction of the Act. The Corps must design a fish passage project that meets the terms of the WIIN Act; because it has not done so, the decision of the district court should be affirmed.

STATEMENT OF JURISDICTION

This district court had jurisdiction pursuant to 28 U.S.C.A. § 1331 (federal question), 28 U.S.C.A. §§ 2201 and 2202 (declaratory judgment and injunction), the Federal Administrative Procedures Act, 5 U.S.C.A. §§ 701 *et seq*., as well as continuing jurisdiction under the district court's order dated May 29, 2013, in the related case bearing C.A. No. 9:12-cv-00610-RMG, ECF No.99 (Settlement Order). This Court has jurisdiction under 28 U.S.C.A. § 1291 based on the district court's entry of a final judgment against the Corps on the WIIN Act cause of action, as well

as its grant of South Carolina's request for an injunction under 28 U.S.C.A. § 1292(a)(1). [JA 2596]. The Corps timely filed a notice of appeal. [JA 2597].

STATEMENT OF THE ISSUES

1. The WIIN Act unambiguously requires that, should the Corps (as it did) opt to construct a new water control structure on the Savannah River and remove the NSBLD, any such structure must be able to maintain the upriver pool for specified purposes as was in existence on the date of its enactment.[2] Did the district court properly determine that the Corps exceeded its statutory authority when it selected a replacement for the NSBLD that failed to meet this requirement?

2. Given the Corps' misinterpretation of the discretion afforded it under the WIIN Act, the district court further enjoined the Corps from constructing a structure that does not comply with the express parameters set forth in the Act. The Corps identifies no equitable factors that would justify destroying a feature enjoyed by generations of residents of South Carolina and Augusta, Georgia. Did the district court properly exercise its discretion in enjoining the Corps from selecting or constructing a replacement structure for the NSBLD that is not designed to and is therefore unable to maintain the pool in conformance with the WIIN Act?

[2] By contrast, the Corps asks this court to review whether the district court was correct to require the Corps to design a structure at the NSBLD that will "maintain a precise water surface elevation of 114.76 feet at all times." That is not an accurate characterization of the appealed order.

STATEMENT OF THE CASE

I. Background

In 1932, the South Carolina General Assembly created the Savannah River Navigation Commission (Navigation Commission) for the purpose of aiding in the construction and future maintenance of the proposed channel or channels by the United States in the Savannah River below Augusta, Georgia. 1932 S.C. Acts 1190. The Navigation Commission was, among other duties, empowered to secure the purchase of land, or rights therein, for the purpose of flowage rights, easements, and/or other facilities as might be required by the United States for the construction and operation of the NSBLD. *Id*.

The Navigation Commission exercised this power by obtaining easements on properties in South Carolina adjacent to the Savannah River and the proposed project site. The easements obtained by the Navigation Commission conveyed the perpetual right or easement to flood as may be necessary, "by the erection and operation of a dam across the Savannah River near New Savannah Bluff, Georgia, with crest control gates so operated as to maintain a pool elevation at said dam of 114.5 feet mean sea level (11.9 feet above the point of zero on the gage located on this date at the 5th Street Bridge leading from the State of South Carolina to the City of Augusta, Georgia), except when the natural discharge of the river exceeds that elevation at

that point."[3] *Id.* The Navigation Commission thereafter conveyed these easements to the United States via deeds recorded in Aiken County, South Carolina. *Id.* Thus, the flowage easements which were necessary for the construction and operation of the NSBLD, were obtained by the Navigation Commission and transferred to the United States and required, as an express condition of their conveyance, that the pool be maintained at 114.5 NGVD29.

Consistent with the flowage easements obtained, in 1937, the United States constructed the NSBLD across the Savannah River, encumbering portions of South Carolina, in Aiken County, and Georgia, in Richmond County and Augusta. The NSBLD is located approximately 13 miles below the cities of North Augusta and Augusta. [JA 2589]. The original purpose of the NSBLD was to assist in commercial navigation of the Savannah River from the Savannah Harbor to Augusta via steamship and commercial barge through a channel authorized to a depth of nine feet and a width of 90 feet. The WIIN Act confirms the current purposes of the NSBLD as being water supply, recreation and, depending upon the alternative, navigation.

[3] Until 1973, the dataset for vertical control surveying was referred to as "mean sea level." In 1973, the name of the dataset was changed to "National Geodetic Vertical Datum," utilizing the mean sea level datum of 1929 as the reference point, *i.e.*, the "National Geodetic Vertical Datum of 1929" (NGVD29). Therefore, at the time of the conveyance of the flowage easements by the Navigation Commission to the United States for construction of the NSBLD, "mean sea level," for all intents and purposes, was NGVD29.

The NSBLD creates a pool that currently serves critical water supply uses, users and water-related recreation activities such as boating, fishing, and rowing events, as well as tourism activities that are instrumental to quality of life of this region of South Carolina and Georgia. [JA 2265]. Weir Alt 2-6d threatens water supply of Augusta and other water users, and would curtail and prevent these recreational activity uses as well as regional events such as The Ironman, Southeast Masters Rowing Regionals, Head of the South Regatta, Augusta Southern Nationals, as well as subsistence fishing. [JA 2522, 2263]. Weir Alt 2-6d also converts a large part of the popular NSBLD Park on the waterfront, which had over 70,000 visitors in the past year, to a flood pathway. [JA 2263-2264].

The Corps first proposed to demolish the Dam in 2000. [JA 99]. However, Congress denied this request due to strong local opposition to the proposal. *Id.* As a result of non-use and lack of maintenance, the NSBLD has fallen into disrepair over the years. [JA 100]. Due to the lack of funding, the Corps has not taken any substantive steps to rehabilitate the NSBLD.

As part of the development and approval of the SHEP, on November 4, 2011, the National Oceanic and Atmospheric Administration's (NOAA) National Marine Fisheries Service (NMFS) provided a biological opinion on impacts of the SHEP dredging project in Savannah on species listed under the Endangered Species Act, 16 U.S.C.A. §§ 1531 *et seq.* (ESA). [JA 265]. The Biological Opinion included non-

discretionary terms of implementation in order for the SHEP to satisfy consultation requirements under the ESA and as mitigation measures to address the impacts to fish habitat in the Savannah River resulting from the SHEP. The mitigation measure selected by the Corps and NMFS requires fish passage at the NSBLD, some 180 miles upstream from the Savannah Harbor, to mitigate for adverse impacts to shortnose and Atlantic sturgeon habitat caused by SHEP inner harbor dredging. [JA 459].

On or about December 12, 2011 and July 22, 2012, the Commission commenced state and federal litigation, respectively, regarding the environmental impacts of the SHEP. Subsequently, in 2012, the Corps' issued a Final Environmental Impact Statement and Final General Reevaluation Report (FEIS), the Report of the Chief of Engineers (Chief's Report), and a Record of Decision (ROD) for the SHEP. [JA 151]. In the FEIS, the Corps stated that removal of the NSBLD—as it now seeks to do—was "infeasible" and "unacceptable due to the development that now occurs upstream along the pool created by the dam." [JA 915, 986, 2495, 2515]. Following extensive settlement negotiations, the Corps, DHEC, the Commission, and the Georgia Ports Authority executed an agreement settling all claims related to the permitting of the SHEP. [JA 512]. The Settlement Agreement addressed the ESA fish passage mitigation but provided that the NSLBD would remain in place. [JA 2589-2590, 2153]. As part of the Settlement Agreement, DHEC

agreed to issue the requisite 401 Certification, and the Commission agreed to issue the requisite Construction in Navigable Waters Permit, for the SHEP, conditioned on compliance with certain express terms and conditions. Specifically, the Settlement Agreement provides that "[t]he Corps will comply with the terms and conditions of the Final Biological Opinion issued by [NMFS] on or about November 4, 2011." *Id.* at § 1.A.13 [JA 518]. The Settlement Agreement was expressly adopted and incorporated in the order of U.S. District Judge Richard Gergel issued on May 29, 2013, which dismissed the lawsuit with prejudice but expressly retained jurisdiction to enforce the terms of the Settlement Agreement. [JA 556], *Savannah River Keeper v. United States Army Corps of Engineers*, No. 9:12-610-RMG (D.S.C.), ECF No.99.

On or about June 10, 2014, Congress enacted the Water Resources Reform and Development Act of 2014 (2014 WRDA), Public Law 113-121. Section 7002(1) of the 2014 WRDA reauthorized the SHEP "to be carried out by the Secretary substantially in compliance with the plan, and subject to the conditions" described in the Chief's Report. The plan and conditions described in the Chief's Report provide for construction of a fish passage around the NSBLD along the South Carolina side of the lock and dam. Chief's Report [JA 501]. Under the SHEP plan, the lock and dam components of the NSBLD remained in place and were not removed and no alternative analyzed the complete removal of the NSBLD or the

impacts related to the construction of a river-wide weir structure. Instead, the Corps determined at the initial stage that complete removal of the NSBLD was not feasible due to the concerns of water supply users. [JA 290].

On December 16, 2016, Congress enacted the WIIN Act. Section 1319(c)(1)(A) of the WIIN Act provided the Corps with the authority to either repair the NSBLD, or construct a new structure, so long as final structure is able to maintain the pool for (1) navigation (if the NSBLD lock is repaired), (2) water supply, and (3) recreational activities (as to any of the two WIIN Act options), as in existence on the date of enactment. Maintenance of the pool was an explicit requirement for repairing or removing the NSBLD Project. "[O]n the date of enactment of [the WIIN] Act," according to United States Geological Survey data, the pool level was 114.76 feet NGVD29, approximately the same level for the pool required by the flowage easements provided to the United States as a condition for the original construction of the NSBLD. This pool elevation is also within the normal, standard operating range for the pool. USGS Gage 02196999 Water Year Summaries ((Sav. River above NSBLD) daily minimum, maximum, and mean heights for the water years 2016-2018 demonstrating a mean pool elevation of between 114 and 115 feet NGVD29, with a water year measured between October 1 and September 30) [JA

560].[4] This depth was also consistent with the normal operation of the NSBLD, as confirmed by the Corps in the 2012 FEIS that it "maintains stable pool elevations near EL 115 feet during most river flows." [JA 971]. Further, a published Operations Plan for the NSBLD specified that the upper pool should normally be maintained between elevation 115 and 116 feet NGVD. [JA 1353, 1451].[5]

On or about February 9, 2019, the Corps began a simulated drawdown test in order to demonstrate the effects of Weir Alt 2-6d on the pool level. The drawdown

[4] The gates at the NSBLD are adjusted throughout the day to keep the pool within its normal operating range, based on inflow to the dam. Inflows to the dam are a function of releases from J. Strom Thurmond Dam (which are reregulated by Stevens Creek Dam), tributary inflows, and diversions to the Augusta Canal. During extreme storm events, the spillway gates controlling the pool are eventually raised completely out of the water to allow the passage of high water flow. [JA 747]. The Corps' target elevation is between 114.5 to 115 feet NVGD29. [JA 972, 1006-07, 2318-19]. The NSBLD was designed to maintain a minimum pool level of 114.5 NVGD29, per the flowage easements, and to provide seven feet of clearance over the highest shoals, allowing for navigation. *See* Elevations of Rivers and Harbors, House Docs., 74th Congress, 1st Sess., at paragraph 95. Data collected by the United States Geological Survey shows that the pool is generally maintained at 115 feet NVGD29. [JA 557-75].

[5] The Corps' assertion that it has historically maintained the pool elevation as low as 111.2 NAVD88, Corps Br. at 26, is incorrect and misleading. Augusta provided evidence, which is unrebutted, that "[a] water surface elevation [in the NSBLD pool] of 113.2 or lower only occurred less than 5% of the time" over a four year period (March 2015 to March 2019). [JA 1069]. The Corps' citation to historical maintenance levels is only indicative of historically extraordinary circumstances, not the normal elevation of the pool. Even so, the Corps elsewhere admits that Wier 2-6d would lower the pool to "between 109.7 feet and 110.9 feet NAVD88," Corps Br. at 13, even lower than the extraordinary elevation the Corps itself cites as representative of the lowest condition.

test was an unmitigated failure, and the Corps was forced to halt the drawdown simulation on February 15, 2019. The field test left hundreds of feet of shoreline for the 17-mile long pool dry, recreational facilities such as docks, rowing facilities, marina, boathouses were on mudflats and without water, and the drawdown threatened Augusta's N. Max Hicks water intake. [JA 2252-2269]:

[JA 2262].

[JA 2261].

Pool levels during the field test were so low that subsidence of property and damage to structures was observed:

[JA 2259].

[JA 2258].

Notwithstanding the failure and halting of the drawdown due to its unquestionable failure, on or about February 14, 2019, just a few days following the failed field test, the Corps issued a Notice of Availability of a Draft Integrated Post Authorization Analysis Report and Supplemental Environmental Assessment for the Fish (Draft SEA), and Draft Finding of No Significant Impact to evaluate proposed plans for the NSBLD Project. The Draft SEA set forth the Corps' preferred plan for the NSBLD Project, which consists of constructing an in-channel fish passage involving a fixed crest weir with a rock ramp sloping upstream from the existing NSBLD and removal of the existing NSBLD. The proposed action would take place in South Carolina's and Georgia's waters and riverbed, as the project stretches across the entire width of the Savannah River. None of the action alternatives evaluated in the Draft SEA (or the final SEA) maintained the pool elevation as it existed on or about December 16, 2016. [JA 558].

Upon the request of the Chairman of the Commission, the South Carolina Attorney General issued an opinion on April 8, 2019 regarding South Carolina's permitting authority. [JA 755]. The opinion found that the NSBLD Project as proposed by the Corps was not analyzed under the EIS for the SHEP, was outside the scope of the Settlement Agreement, and therefore constituted a new project proposal requiring a separate Construction in Navigable Waters permit and 401 Certification, both of which should be obtained from SCDHEC. *Id.* The Attorney

General Opinion was transmitted to the Corps by letter dated April 9, 2019. [JA 765]. The Commission's letter also informed the Corps that, to the extent that the proposed removal of the NSBLD and construction of a full river rock weir under proposed Alternative 2-6d constituted a departure from the fish passage mitigation feature approved by the SHEP and thereby an entirely new proposed project, SCDHEC has permitting authority and jurisdiction over the issuance of a new 401 Certification and Construction in Navigable Waters permit for the NSBLD Project. *Id.*

Also on April 9, 2019, members of the South Carolina and Georgia Congressional delegations, including all four United States Senators and the respective members of Congress whose districts include the areas impacted by the NSBLD Project, sent a joint letter to the Assistant Secretary of the Army and the Commanding General of the Corps expressing their concerns regarding the Corps' preferred Weir Alt 2-6d. [JA 776]. The stated purpose of the letter was to "express the intent of [the WIIN Act]." *Id*. The letter rejected the Corps' interpretation that the WIIN Act only requires that the current functionality of the pool must continue to allow for water supply, recreation, and navigation. *Id.* Rather, the letter reiterated that the plain language of the statute requires the Corps to "maintain the river conditions that were in place on the date of enactment." *Id.* The Congressional Letter further encouraged the Corps "to consider the intent of Congress and to only pursue

an alternative that fulfills the environmental requirements of SHEP while also protecting the investments of our riverfront communities." *Id*.

On April 16, 2019, Augusta, joined by the City of North Augusta, filed comments with the Corps explaining errors in engineering calculation and elevations which the decision to remove the NSBLD were based upon and which caused the Corps to overestimate pool elevation in its planning documents. [JA 957-1177].

On May 16, 2019, the congressionally-required peer report[6] for the project, the Final Independent External Peer Review Report Savannah Harbor Expansion Project Georgia and South Carolina, Fish Passage at New Savannah Bluff Lock and Dam Integrated Post-Authorization Analysis Report and Environmental Assessment (IEPR) was released. [JA 783].[7] The IEPR was prepared *for the Corps* by Battelle to provide an independent assessment of the engineering, economic, environmental, and plan formulation analyses of the project study. The IEPR found that the Corps had failed to consider a number of alternatives that would meet the WIIN Act's requirement to maintain the pool. The IEPR also found that the draft SEA did not

[6] Water Resources Development Act of 2007 (WRDA 2007), Public Law (P.L.) 110-114 (Nov. 8, 2007). Section 2034 requires that project studies conducted by the U.S. Army Corps of Engineers (Corps) be subject to a peer review by an independent panel of experts.

[7] The IEPR noted the same errors in engineering calculation and elevations reflected in Augusta and North Augusta's April 16, 2019, comments. [JA 783, 816].

present adequate information on (1) the likelihood that the Recommended Plan will meet the project objectives related to the fish passage, (2) the risk of injury/death during up- or downstream passage at the rock weirs, or (3) the probability of passage success overall. [JA 800].

In particular, the IEPR made the following findings and conclusions with respect to the Draft SEA and Weir Alt 2-6d:

a. The project does not consider a wide range of alternative fishway types and does not consider alternatives that provide a smaller fishway with low discharge capacities. [JA 801].

b. Several design features of the recommended plan pose risk of injury and potential lethal danger to downstream migrant sturgeons due to head-on strikes and stranding, and that information provided in the draft SEA and other supplemental documents on the design of the arch rock barriers is not adequate to ensure safe and sure passage for sturgeons under any weir alternative. [JA 802, 2271-2280].

c. The draft SEA does not consider a wide range of alternative fishway types that could satisfy the first provision of the WIIN Act, "repair of the lock wall of the NSBLD an modification of the structure" to maintain the pool for navigation, water supply, and recreational activities and to allow safe fish passage. [JA 804].

d. The draft SEA is incomplete without a discussion of all potential types of fishways that are known to be effective at providing safe fish passage. [JA 804].

e. Retaining the existing spillway gates "seems like the simplest way of accomplishing" the WIIN Act's objectives. [JA 806].

f. None of the evaluated rock weir alternatives "seem to fully satisfy" the WIIN Act's requirement that the pool be maintained. [JA 806].

g. Because none of the evaluated rock weir alternatives fully satisfy the WIIN Act, the Corps should reconsider whether the proposed alternatives meet the intent of the WIIN Act's requirement that the pool be maintained as in existence on the date of enactment of the Act. [JA 807].

h. The cost analysis of the alternatives cannot be determined, nor was there any analysis to determine the costs of mitigation of the recreation and water supply impacts under the alternatives. [JA 808].

i. The economic assumptions and calculations used in the alternatives analysis were not described in enough detail to evaluate their acceptability. [JA 809].

j. The Corps did not provide an explanation for the criteria used to evaluate navigation, water supply, recreation, and flooding impacts, making it

difficult to determine whether the criteria meet the intent of the WIIN Act. [JA 810].

k. The alternatives analysis failed to consider the differential effectiveness of each project at meeting the project objective of providing for utilization of upstream habitat areas, which significantly impacts the cost effectiveness analysis and the alternative selection process. [JA 811].

l. The SEA did not adequately describe how the recommended plan would meet the objectives related to upstream and downstream passage of migratory fish. [JA 812].

m. The Corps failed to include conditions observed during the February 2019 drawdown test in the SEA, and the results were not used to verify the hydraulic modeling of post-project conditions. [JA 816].

n. The SEA did not adequately convey the status of the Section 106 consultation process. [JA 825].

o. The alternatives analysis failed to evaluate the relative impacts of the alternatives that would avoid or minimize adverse effects on the NSBLD. [JA 827].

Having received neither a response from the Corps nor an application for a Navigable Waters Permit and 401 Certification for the NSBLD Project, the South Carolina Attorney General followed up with the Corps by letter dated August 12,

2019. Notwithstanding, the Corps did not—and has not—applied for either. Instead, the Corps ignored and thereby implicitly rejected the South Carolina's sovereign conclusion as to the requirements of federal and state water quality laws. Despite having no legal authority to make such a determination, the Corps responded by letter dated September 20, 2019, asserting its conclusion that no 401 Certification was needed for the NSBLD Project and that the Project is exempt from obtaining a Navigable Waters Permit. [JA 881]. As set forth in South Carolina's Complaint, this conclusion is contrary to State and Federal law. [JA 30-35].

On October 29, 2019, the Corps publicly announced and released the Integrated Post Authorization Analysis Report and Supplemental Environmental Assessment, dated August 30, 2019. [JA 75]. It also announced that Weir Alt 2-6d was the preferred and approved option for the NSBLD. U.S. Army Corps of Eng'rs Mem., Maj. General Holland, Approval of Final Report, Savannah Harbor Expansion Project (SHEP), Georgia and South Carolina: Fish Passage at the New Savannah Bluff Lock and Dam (NSBLD) Integrated Post Authorization Analysis Report and Supplemental Environmental Assessment (EA), dated Oct. 29, 2019 (Approval Memo). [JA 221]. *See also*, Finding of No Significant Impact, SHEP Fish Passage at New Savannah Bluff Lock and Dam Richmond County Georgia and Aiken County, South Carolina dated Oct. 29, 2019 (FONSI). [JA 225]. Weir Alt 2-6d is expected to lower the existing pool elevation by more than 3.5 feet, NGVD29—

from approximately 114.76 NGVD29 as of the date of the WIIN Act, to approximately 111.01 NGVD29 during normal operating conditions (if one assumes the Corps' data is accurate).[8]

II. Procedural History.

On November 4, 2019, South Carolina filed this action seeking declaratory and injunctive relief from the Corps' unlawful actions regarding the NSBLD Project. On December 6, 2019, Augusta sought and was ultimately granted intervention status in the case. South Carolina thereafter filed a motion for summary judgment, in which Augusta joined, and later both filed motions for a preliminary injunction, seeking to prohibit the Corps from altering the status quo by proceeding with the project during the pendency of this matter. The Corps filed motions to dismiss and responses in opposition to the other motions. Following briefing, and prior to the hearing on the State's motion for preliminary injunction, the district court notified the parties that it would conduct a trial on the merits regarding whether the Corps' selected alternative violates the WIIN Act.

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[8] The SEA provides that the height of the rock weir as a component of Weir Alt 2-6d will be 109 NGVD29, *see*, SEA at p. ii.; however, the Corps has not provided the underlying modeling to verify that the pool level will exceed the weir height (if one measures from the weir height, the difference is approximately 5.5 feet) at a flow rate of 3,600cfs, *see id.*, at p. 100 (Table 27); *see also* [JA 892, 1343-1451, 2147-2156, 2256, 2275, and 2574]. The pool level is estimated to be approximately 111.01 NGVD29 under Weir Alt 2-6d at a flow rate of 5,000cfs.

A merits hearing was held on November 19, 2020, and on November 23, 2020, the district court entered an order granting Appellees judgment as a matter of law as to the WIIN Act claim. The Order further enjoined the Corps from implementing its selected alternative and any other plan involving removal and replacement of the NSBLD, unless the selected replacement structure is able to maintain the pool as in existence on the date of enactment. The district court also denied the Corps' motion to dismiss. [JA 2570]. This appeal by the Corps followed.

SUMMARY OF THE ARGUMENT

1. The Corps' interpretation of the Act to merely require a pool that can serve the same type of functions as the existing pool is inconsistent with principles of statutory interpretation. The district court correctly interpreted the WIIN Act to unambiguously require the Corps to design a project that is able to maintain the pool and purposes as in existence on the date of enactment of that Act.

2. The Corps' interpretation of the WIIN Act is not entitled to deference.

3. The district court did not abuse its discretion in enjoining the Corps from pursuing an alternative that is contrary to the plain language of the WIIN Act.

STANDARD OF REVIEW

This Court reviews the resolution of an APA claim *de novo*. *Perez v. Cuccinelli*, 949 F.3d 865, 872 (4th Cir. 2020). Questions of statutory interpretation

are also reviewed *de novo*. *United States v. Turner*, 389 F.3d 111, 119 (4th Cir. 2004).

This Court reviews the grant of an injunction for abuse of discretion. *PBM Prods., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 125–26 (4th Cir. 2011). "A court 'has abused its discretion if its decision is guided by erroneous legal principles or rests upon a clearly erroneous factual finding.'" *Id*. (quoting *Brown v. Nucor Corp.,* 576 F.3d 149, 161 (4th Cir. 2009)). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer, N.C.*, 470 U.S. 564, 573–74 (1985). The scope of injunctive relief likewise rests within the "sound discretion" of the district court. *Dixon v. Edwards*, 290 F.3d 699, 710 (4th Cir. 2002).

ARGUMENT

I. The Corps' Interpretation of the WIIN Act is erroneous.

The Corps asks this court to overturn the decision of the district court and hold that the WIIN Act does *not* require the Corps to maintain the pool above the NSBLD as was in existence at the time of enactment of the WIIN Act. The WIIN Act unambiguously requires the Corps to replace the Dam with a structure that is able to

maintain the actual pool as it existed in December of 2016. Nonetheless, and despite the plain language of the statute, the Corps has erroneously interpreted and superimposed a lesser standard to the WIIN Act that would allow it to construct a structure at the NSBLD that merely maintains some degree of the "functionality" of the pool such that it would be "sufficient" for the type of existing pool uses to continue. [JA 2558]. The Corps' interpretation fails to follow canons of statutory interpretation and is inconsistent with the plain language of the Act.

The Corps makes three statutory interpretation arguments. First, it argues that the district court read a precise elevation requirement into the statute. Second, it argues that the district court's interpretation reads "water supply and recreational activities" out of the statute. Third, it argues that the second project modification option authorized in the WIIN Act could not be implemented under the Court's decision. Each allegation is incorrect.

A. The district court did not require the Corps to maintain a static pool, frozen at a precise water level.

The Corps' brief consists of several successive and strategically-set up straw man arguments, mischaracterizing the findings of the district court in each before predictably knocking them down. First, the Corps complains that the district court interpreted the WIIN Act to require the pool of water above the NSBLD to remain at a specific and static level at all times, arguing that this would be an absurd result

that this court must set aside. Corps Br. at 39-40. This argument cannot prevail because that is not what the court held.

For example, denying the Corps' motion to dismiss, the district court held that "the WIIN Act unambiguously requires that if the Army Corps elects the option to remove the Savannah Bluff Lock and Dam, the agency must construct a replacement structure 'that is *able to maintain* the pool for water supply and recreational activities' at a very precise level—that level existing on the date of the adoption of the Act." [JA 2592] (emphasis added). And in entering its judgment in favor of Appellees, the court held that "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." [JA 2595].

The court cites the 114.76 feet NGVD29 pool level on the date of enactment as the benchmark against which to evaluate whether the Corps' preferred alternative would "maintain the pool." [JA 2588, 2592]. Appellees agree that the pool existing on the date of enactment of the WIIN Act is not static, [JA 563-565], but contrary to the Corps' assertions, the district court's order did not assume it to be. The district court did not order the Corps to maintain the pool at 114.76 NGVD, or any static level. Rather it held that Weir Alt 2-6d "does not maintain the pool that existed on December 16, 2016 114.76 feet NGVD." [JA 2591]. It has a normal operating range

which is clear from the record and which is determined by the structure and its historical operation. [JA 747].

The Corps also argues that it is aware of no other Corps authorization that requires it to maintain a static water level. Corps Br. at 35. This argument is irrelevant, because that is not what the district court held in its order; to the contrary, the district court found the WIIN Act to be unambiguous, likewise rendering a review of extraneous authority inappropriate and irrelevant. As such, the Corps' request that this court look to other Corps authorizations to interpret section 1319 of that Act, including other authorizations in the WIIN Act, is misplaced and the cited cases (*Boumediene v. Bush*, 553 U.S. 723, 776-77 (2008), *Russello v. United States*, 464 U.S. 16, 23 (1983)) are inapposite. Corps project authorizations do not appear in the U.S. Code. They are found in Water Resources Development Acts (WRDAs) and (formerly) in Rivers and Harbors and Flood Control Acts. Each project has its own authorization, and an authorization for one project cannot be interpreted by reference to another, different, project. Title I of the WIIN Act is a WRDA bill. *See* Pub. L. No. 114-322, § 1001. A WRDA bill is correctly viewed as "omnibus legislation covering hundreds of projects nationwide" (Corps Br. at 38), not a single integrated statute. Consequently, there is no overall statutory scheme providing context to project authorizations in a WRDA bill. Correspondingly, the lack of a

prior statutory or regulatory requirement to maintain the pool at a specific level is irrelevant and offers no support for the Corps' interpretation. Corps Br. at 38.

B. The district court properly interpreted the WIIN Act.

The Corps' explanation for why it disagrees with the district court's interpretation of the WIIN Act has no support in the statute or from canons of statutory interpretation. In fact, it is the Corps' reading that fails to give meaning to all the words of section 1319 by replacing the word "activities" with the word "functions" and then reading the statute to require only the maintenance of the types of navigation, water supply, and recreation functions that were in existence on the date of enactment. The Corps' interpretation is grammatically incorrect and reads the words "maintain" and "pool" out of the statute.

The cardinal rule of statutory interpretation is to ascertain the clear intent of Congress. *N.L.R.B. v. Wheeling Elec. Co.*, 444 F.2d 783, 787 (4th Cir. 1971). A court must look to the plain and unambiguous meaning of the statutory language without using a forced construction. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). When Congress has spoken clearly on an issue, there is no need for further interpretation. If the statute is unambiguous, "our inquiry into Congress' intent is at an end, for if the language is plain and the statutory scheme is coherent and consistent, we need not inquire further." *Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d at 645. Courts must interpret the statutory language as written and are not

permitted to add words of their own choosing. *United States v. Sonmez*, 777 F.3d 684, 688 (4th Cir. 2015).

In pertinent part, Section 1319(c)(1)(A) of the WIIN Act provides:

> (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 ….

(Emphasis added). Thus, both applicable sections of the WIIN Act require that any structure must be "able to maintain the pool … as in existence on the date of enactment of this Act." WIIN Act, § 1319(c)(1). While the Secretary may choose between repairing the lock wall and modifying the NSBLD structure or constructing a new structure and removing the NSBLD, there is no discretion as to what effect either option may have on the elevation of the pool – it must be maintained as in existence on the date of enactment. *Id*.

The WIIN Act contains a clear declaration to maintain the pool as in existence on the date of enactment. The Corps' analysis effectively ignores the word "maintain," which Appellees submit is the guiding principle of the Act's grant of

authority to the Corps. "The ordinary meaning of the word 'maintain' is 'to keep in existence or continuance; preserve; retain.'" *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 433 (2002) (quoting Random House Dictionary of the English Language 1160 (2d ed.1987)). Webster's Dictionary defines "maintain" as "to keep in a state of repair, efficiency, or validity" and as to "preserve from failure or decline." *Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1042 (9th Cir. 2011) (quoting Webster's Third New International Dictionary 1362 (2002)).

Maintain is a transitive verb, with pool as its object. Further, this directive is attached to both of the options between which Congress has left for the Secretary to choose. Thus, Congress left no discretion for the Corps to alter the statutory mandate by requiring only that the structure maintain the "functionality" of the pool, a word that does not appear in the applicable provisions of the WIIN Act. Just as the district court was prohibited from adding words of its own choosing to the statute, so too is the Corps. The statute does not require the Corps to only ensure that the pool remains usable for navigation, water supply, and recreational purposes that existed on the date of its enactment. Nor does it require that the pool remain functional for those purposes. Rather, it clearly requires that the pool itself be "maintain[ed]" as in existence on the date of the enactment.

Furthermore, the Corps now contradicts the position it took in the district court below, as well as its 2017 WIIN Act implementation guidance. During the hearing

preceding the order on appeal, the district court asked Corps counsel whether the pool's level would be irrelevant under the Corps' interpretation of the WIIN Act, Corps counsel responded "no," that was incorrect. [JA 2557]. Corps counsel explained that the phrase "as in existence on the date of enactment" means "that the Corps had to look to what uses of recreation, water supply, were in place at that time and develop alternatives that would allow those to continue or that would provide a sufficient pool level for those activities to continue." [JA 2558]. In other words, not just any such recreational and water supply purposes, but rather the specific activities that existed on the date of enactment.[9] By contrast, in its brief, the Corps appears to now argue that it was only required to ensure the continued viability of the *type* of activities or purposes that existed on the date of enactment, regardless of whether the actual activities and purposes could continue. *See* Corps Br. at 34. In fact, we know from the record that the reduction in level by Weir Alt 2-6d and its lowering of the pool by at least 3 feet threatens regional recreational events such as The Ironman, Southeast Masters Rowing regionals, Head of the South Regatta, Augusta Southern Nationals, as well as subsistence fishing. [JA 2522, 2263]. It also results in the numerous docks, boat ramps, and other features being unusable, *see* [JA 2261-

[9] Similarly, the Corps implementation guidance for the WIIN Act confirms that to properly implement the WIIN Act and its pool requirements, the Corps was required to "identify and characterize all recreational uses in the pool and river downstream of the NSBLD as of 16 Dec 2016 ...." [JA 1246].

2264], results in the loss of use of a large portion of the NSBLD Park, *see* [JA 2263-2264, 2323-2324], and fails to meet water supply needs, *see* [JA 2155, 2279, 2265, 2311, 2322-2323].

The Corps' brief correctly notes that in section 1319 of the WIIN Act the phrase "for water supply and recreational activities," is a "modifying phrase." The Corps then argues that the "modifying phrase" is the only subject of the "limiting phrase" "as in existence on the date of enactment of this Act." Corps Br. at 42. This argument is contrary to two separate canons of statutory interpretation, the "Nearest Reasonable Referent Canon" and the "Punctuation Canon." *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012), at 153, 161.[10]

The example of the "Nearest Reasonable Referent Canon" in *Reading Law* is apt. Scalia and Garner point out that the phrase "manufacturing for his domestic consumption" both "manufacturing" and "consumption" are nouns, but the second is in a prepositional phrase modifying the first. Scalia & Garner at 153. Similarly, in section 1319(c) of the WIIN Act the phrase "for navigation, water supply, and recreational activities" is a prepositional phrase modifying the noun "pool." In the

[10] This treatise points out that "Nearest Reasonable Referent Canon" is a more appropriate name for the "Last Antecedent Canon" when a pronoun is not involved. Scalia & Garner at 152.

WIIN Act, this prepositional phrase adds project purposes. That is, the purposes of the modified project include navigation, water supply, and recreational activities under Option 1 and water supply and recreational activities under Option 2.[11] This reading is consistent with the Corps' implementation guidance. [JA 1242-43 (reading the new project purposes authorized by the WIIN Act to mean the navigation, water supply and recreation that existed on the date of enactment, not commercial navigation, and the supply of water without charge, not subject to water storage contracts)].

The discussion of the "Punctuation Canon" in *Reading Law* also is apt. Under the "Punctuation Canon," "[p]unctuation ... will often determine whether a modifying phrase or clause applies to all that preceded it or only to a part." Scalia & Garner at 161. In section 1319(c) of the WIIN Act the phrase "as in existence on the date of enactment of this Act" is separated from the rest of the sentence by a comma. The comma conveys the meaning that the phrase applies to all that precedes it.

Applying the "Nearest Reasonable Referent" and "Punctuation" canons of statutory interpretation, the requirement to "maintain the pool for navigation, water

[11] The distinction between the two options was purposeful. For option 1, because it is maintaining the lock, the structure must allow for some type of through navigation, as well as recreational and water uses of the river. For option 2, Congress omitted the navigation requirement because it does not contemplate maintenance of the lock. Nor is navigation possible with the construction of a full-river rock weir structure.

supply, and recreational activities, as in existence on the date of enactment of this Act" means that the condition at the end of the sentence applies to all of the nouns preceding the condition, not just the nouns in the prepositional phrase. Thus, the district court was correct to hold that the WIIN Act requires the Corps to implement a project that is able to maintain the pool as it was at the time of enactment.

In this instance, Congress instructed the Corps to maintain the pool "as in existence" on a specific date rather than explicitly detailing the pool's physical characteristics within the language of the statute. This is likely attributable to the fact that the Corps has not completed a deauthorization study or otherwise provided this information to Congress. Regardless of Congress's reasoning, its requirement that the pool must be maintained "as in existence" should not be overlooked. A review of historical legislative enactments reveals only a sporadic use of the phrase "as in existence," and it does not appear that Congress has previously utilized this specific language when referring to water resource development projects. Thus, the district court was correct to pay heed to Congress's inclusion of the phrase in the WIIN Act. Congress had previously rebuffed the Corps' desire to remove the NSBLD. When it finally determined to address this desire, Congress issued a clear and unambiguous directive—the Corps would be authorized to remove the NSBLD, but only if any replacement structure is capable of maintaining the pool as in

existence. The district court's interpretation of the WIIN Act comports with this clear and unambiguous statutory language.

The cases cited by the Corps do not lead to a different conclusion. Under the statute at issue in *Barnhart v. Thomas*, 540 U.S. 20 (2003), a person qualified as disabled, and thereby eligible for Social Security benefits, "only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." *Id.* at 21. Writing for a unanimous court, Justice Scalia held that the qualifying phrase "which exists in the national economy" applies only to "any other kind of substantial gainful work" and not to the elevator operator's previous work (which no longer existed in the national economy), applying the grammatical "rule of the last antecedent." *Id.* at 26. Justice Scalia gave the following hypothetical:

> Consider, for example, the case of parents who, before leaving their teenage son alone in the house for the weekend, warn him, "You will be punished if you throw a party or engage in any other activity that damages the house." If the son nevertheless throws a party and is caught, he should hardly be able to avoid punishment by arguing that the house was not damaged.

Id. at 27.

Citing this opinion, the Corps asserts that "[t]here is no grammatical foundation for concluding that the limiting phrase [as in existence on the date of enactment of this Act] reaches back over 'water supply and recreational' activities

to modify 'the pool.'" Corps Br. at 42. That assertion is incorrect as a matter of grammar and canons of statutory interpretation. As Justice Scalia articulated in his 2013 treatise regarding the interpretation of legal texts, punctuation will often determine whether a modifying phrase or clause applies to all that preceded it or only to a part. Scalia & Garner at 161. In that treatise Justice Scalia returns to his example of a partying teenage son and notes that:

> If the parents' note read, "You will be punished if you throw a party, or engage in any other activity, that damages the house," the added punctuation would make it clear that the final clause modified not just *activity* but *party* as well. (Nonharmful parties are allowed.)

Scalia & Garner at 161-62.

The Supreme Court employs this grammatical canon as articulated by Scalia and Garner. In *Facebook, Inc. v. Duguid,* 141 S. Ct. 1163 (2021), Justice Sotomayor, writing for herself and seven other justices (Justice Alito wrote an opinion concurring in the judgment), distinguished *Barnhart v. Thomas* because of a comma that proceeded the qualifying phrase:

> Recall that the phrase "using a random or sequential number generator" follows a comma placed after the phrase "store or produce telephone numbers to be called." As several leading treatises explain, "'[a] qualifying phrase separated from antecedents by a comma is evidence that the qualifier is supposed to apply to all the antecedents instead of only to the immediately preceding one.'" W. Eskridge, Interpreting Law: A Primer on How To Read Statutes and the Constitution 67-68 (2016); *see also* 2A N. Singer & S. Singer, Sutherland Statutes and Statutory Construction §47:33, pp. 499-500 (rev. 7th ed. 2014); Scalia & Garner 161-162. The comma in §227(a)(1)(A) thus further suggests

> that Congress intended the phrase "using a random or sequential number generator" to apply equally to both preceding elements.

141 S. Ct. at 1170; *see also Cyan, Inc., v. Beaver County Employees Retirement Fund,* 138 S. Ct. 1061, 1077 n. 6 (2018) (distinguishing *Barnhart).*

The Corps discusses the aforementioned *Facebook, Inc.* and *Cyan, Inc.*, as though those cases support their argument. Corps Br. at 43-44. They do not. As noted above, *Facebook, Inc.* gives meaning to a comma to hold that a limiting phrase applied to all that preceded the phrase, supporting the district court's interpretation of the WIIN Act. In *Cyan, Inc.*, the Court rejected an argument that was remarkably similar to the one advanced by the Corps in this matter. In *Cyan*, the federal government argued that the rule of last antecedent means that the limiting phrase in a securities act did not modify the entire preceding phrase but only a subset of that phrase. 138 S. Ct. at 1076. The Court declined to adopt that interpretation.

> But even putting aside respect for precedent, that argument is in many ways flawed. To start with, the Government provides no good reason to think that "as set forth in subsection (b)" modifies only the phrase "involving a covered security." As stated above, the most natural way to view the modifier is as applying to the entire preceding clause—again, "[a]ny covered class action brought in any State court involving a covered security." *See supra*, at ___, 200 L. Ed. 2d, at 349. That is so because that clause hangs together as a unified whole, referring to a single thing (a type of class action). Consider the following, grammatically identical construction: "The woman dressed to the nines carrying an umbrella, as shown in the picture . . ." Would anyone think that "as shown in the picture" referred to anything less than the well attired and rain-ready woman? No. And so too here, *the modifier goes back to the beginning of the preceding clause*. The rule of the last antecedent is not to the contrary.

138 S. Ct. at 1076-77 (emphasis added). Thus, *Cyan* too supports the district court's interpretation of the statute.

In section 1319 of the WIIN Act, the phrase "as in existence on the date of enactment of this Act" is separated from the previous phrases by a comma. That comma means that it modifies all that precedes it, not just "activities." Far from reading the words "for navigation, water supply, and recreational activities" out of the statute, this reading gives the phrase its proper interpretation. That is, the Corps must maintain the pool as it was on the date of enactment and the purposes of the pool include navigation, water supply, and recreational activities existing on the date of enactment.

Under the Corps' interpretation, section 1319 of the WIIN Act is only concerned with the ability to carry out activities, or "functions" as the Corps restates it. In addition to its flawed reading of the statute, the Corps appears to also rely on its implementation guidance as support for this proposition. Corps Br. at 50-51. However, the implementation guidance does not support the position the Corps is taking in this litigation. The implementation guidance states that the WIIN Act requires the Corps to "maintain the current pool" in existence on the date of enactment as well as supply additional project purposes of navigation, water supply, and recreation in existence on the date of enactment. [JA 1231, 1242-43]. As incorporated into the Savannah Harbor Expansion Project, the new project

authorization in the WIIN Act now includes the multiple purposes of water supply and recreation as well as navigation. [JA 1242-43] (Corps' August 9, 2017, clarification of its implementation guidance reading section 1319 of the WIIN Act to authorize project purposes of navigation, water supply, and recreation, but limiting those purposes to those in existence on the date of enactment).[12]

Here, maintenance of the pool elevation is a concept that is both easily discernable and capable of definitive, objective determination; it requires inquiry only to the elevation of the pool "on the date of enactment" of the WIIN Act. Appellees do not, as the Corps suggests, disregard the functions and uses identified by the WIIN Act. Quite to the contrary, we correctly recognizes that these functions and uses identified by Congress provide the descriptive purpose behind the Congressional intent to maintain the pool elevation.

C. The district court's interpretation of the WIIN Act does not make Option 2 an impossibility.

Setting up and knocking over another straw man, the Corps alleges that requiring the Corps to implement a project that is able to maintain the pool as it

[12] The reference to project purposes in the August 9, 2017, implementation guidance does not mean that in 2017 the Corps believed that *only* the listed project purposes needed to be maintained. The Savannah District of the Corps of Engineers asked for clarification of the project purposes. It did not ask for clarification of the statement in the May 25, 2017, implementation guidance stating that the WIIN Act requires the Corps to *maintain the pool.*

existed on the date of enactment of the WIIN Act makes it impossible for the Corps to implement Option 2 (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 removal of the NSBLD on completion of construction of the structure). Corps Br. at 46. Not so.

The straw man here is the assertion that the authority granted in Option 2 to select an "appropriate location" gives the Corps unfettered discretion to choose any location for a new structure and that the interpretation of the district court would constrain the ability of the Corps to locate a new structure two or three miles upstream. Corps Br. at 46-47. But the Corps' discretion under Option 2 is not unfettered. The Corps can pick a different location, as long as the project is able to maintain the pool as it existed on the date of enactment. If the Corps cannot meet that condition, then it cannot remove the dam. Congress' concern over the pool (and not just activities or functions) is further supported by the additional condition in Option 2 requiring the Corps to wait until the new structure (that meets the condition that it will maintain the pool) is constructed before removing the dam.[13]

[13] Section (c)(1)(a)(ii)(II) unambiguously conditions the removal of the NSBLD on "completion of construction of the structure." In other words, if Option 2 is selected, completion of the new rock weir structure is required prior to removal of the NSBLD.

As noted by the district court: "There is, however, no suggestion under the statutory language that the Army Corps is free to make a standardless judgment about functionality. To the contrary, Congress' statutory language clearly limited the agency discretion, requiring that any project at the site not alter the pool existing on the date of enactment." [JA 2578, 2594].

For all the foregoing reasons, the district court's interpretation of section 1319 of the WIIN Act is correct and should be upheld by this court.

II. The Corps' Interpretation of the WIIN Act is not entitled to deference.

The district court correctly found that the Corps' interpretation of section 1319 of the WIIN Act was not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), based on its conclusion that the WIIN Act is not ambiguous. [JA 2578-79, 2594-95]. The Corps is now seeking deference under *Skidmore v. Swift & Co*., 323 U.S. 134 (1944), which applies to agency interpretations that are not developed through an adjudication or rulemaking. *See United States v. Mead Corp*., 533 U.S. 218, 226–27 (2001) (refusing to extend Chevron deference to a tariff classification ruling); *Christensen v. Harris County,* 529 U.S. 576, 587 (2000) (refusing to extend *Chevron* deference to an opinion letter). As discussed above, the WIIN Act is not ambiguous, thus ending the deference inquiry. Even if the Court were to find the WIIN Act is ambiguous, it need

not defer to an agency interpretation that is not consistent with the clear direction of Congress. *Chevron,* 467 U.S. at 842-43.

A. Section 1319 of the WIIN Act is not ambiguous.

The determination as to whether a statute is ambiguous (*Chevron*, Step 1) is made entirely by the reviewing court. An agency's position is irrelevant at this stage of the inquiry. *Cajun Elec. Power Coop. v. FERC*, 924 F.2d 1132, 1136 (D.C. Cir. 1991) (the agency receives no deference on the question of whether a statute is ambiguous). If, applying ordinary canons of statutory interpretation, there is no ambiguity in section 1319 of the WIIN Act, then the intent of Congress must be given effect. *Chevron*, 467 U.S. at 843 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."); *Brown & Williamson Tobacco v. FDA*, 153 F.3d 155, 162 (4th Cir. 1998) (same), *aff'd*, 529 U.S. 120 (2000); *see also INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001) (a court relies on normal tools of statutory construction when evaluating a statute for ambiguity). As discussed above, the proper application of ordinary canons of statutory interpretation demonstrate that Congress intended the Corps to maintain the pool above the NSBLD as it existed prior to the enactment of the WIIN Act. Accordingly, the district court's decision not to proceed to the next step of deference

analysis is supported, does not constitute an abuse of discretion, and must be affirmed.

B. Even if the statute is ambiguous, the Corps' interpretation is not entitled to deference.

Even if this court determines that the WIIN Act is ambiguous, this court is still not required to and should not defer to the Corps' interpretation of the Act, because the Corps' interpretation lacks the power to persuade, has shifted, and is self-interested.

Under *Skidmore*, the weight given to an unofficial interpretation by an agency "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140. The expressed intent of Congress is that the WIIN Act requires the Corps to maintain the pool as it existed on the date of enactment. The Corps' argument with respect to the Act requires the Court to look beyond the plain language of the statute and infer Congressional intent from words that do not appear therein. Courts need not defer to an agency interpretation that is not consistent with the clear direction of Congress. *Chevron,* 467 U.S. at 842-43. The district court correctly reviewed the WIIN Act *de novo* without affording deference to the Corps' erroneous interpretation that is contrary to the publicly expressed intent of Congress.

Not only has Congress directly spoken to the precise question at issue, but the Corps has not acted with the force of law that would entitle its interpretation to *Skidmore* respect. The Corps has not attempted to provide any reasoning for its erroneous interpretation of the WIIN Act or its decision to alter the Act's plain language by adding the word "functionality" to the statute. The interpretation is devoid of any statutory analysis, and is nothing more than a one-off decision that has little explanatory or persuasive power.

The Corps cites just one *Skidmore* factor, specialized expertise, to argue in favor of deference. Corps Br. at 50. To demonstrate its expertise, the Corps points to the implementation guidance it has issued that interprets section 1319 of the WIIN Act. However, as discussed above, the Corps fails to forthrightly advise the Court that its implementation guidance plainly states that the WIIN Act requires the Corps to "maintain the current pool" in existence on the date of enactment, not just functions provided by the pool. [JA 1231, 1242-43]. Thus, the Corps' specialized expertise supports the decision of the district court, not the position that the Corps took when it recommended Weir Alt 2-6d and is now taking in this litigation. This Court is being asked to look to the implementation guidance only for the fact that they exist, not for their content. The Corps' interpretation of the WIIN Act in 2017 was correct and is the same as the one adopted by the district court.

The position taken by the Corps in this litigation also fails to persuade under the other *Skidmore* factors. As discussed above, not only is the Corps' analysis of the statute presented in its brief inconsistent with its prior interpretation, but it also fails to properly apply canons of statutory interpretation. *Accord Larios-Reyes v. Lynch*, 843 F.3d 146 (4th Cir. 2016) (declining to afford *Skidmore* deference to the Board of Immigration Appeals notwithstanding its expertise in immigration matters because its analysis of the statute at issue was not thorough, valid, or consistent with precedent in the BIA or the Fourth Circuit).

In deciding the weight to give the Corps' position, this court also should consider that the Corps is not a disinterested party in this matter. It has an economic interest in the outcome of this dispute.[14] The Corps does not want to keep the dam and incur the costs of its upkeep. Corps Br. at 17. For example, if the Corps proceeds with a project under Option 1, it will be responsible for all costs of maintaining the dam. [JA 1230] (if Option 1 is chosen, the federal share of post-construction costs,

[14] Some commentators have argued that no deference should be given to the interpretation of an agency that has an economic interest in the outcome. Armstrong, Timothy K., "Chevron Deference and Agency Self-Interest," *Cornell Journal of Law and Public Policy*, Vol. 13, at 203 (2004), available at http://scholarship.law.uc.edu/fac_pubs/147. However, this court does not need to adopt that position. Appellees are only asking this court to consider the economic self-interest of the Corps when evaluating whether the Corps' position has the power to persuade.

including the costs of monitoring, adaptive management, and operation and maintenance, will be 100 percent). If Option 2 is chosen, the Corps will be responsible only for operation and maintenance of the fish passage only. [JA 1230].[15]

After the Corps' analysis showed that removal of the dam (Option 2 alternatives) would not maintain the pool, the Corps changed its interpretation of the WIIN Act from requiring maintenance of the pool to requiring maintenance of certain functions. *Compare* [JA 1231] (May 25, 2017, implementation guidance stating that the WIIN Act requires the Corps to *maintain the pool*) *with* [JA 96] (August 30, 2019, Integrated Post Authorization Analysis Report and Supplemental Environmental Assessment stating that the objective of the project is to "[m]aintain the *functionality of the pool* for navigation, water supply, and recreational activities for 100 years from the start of construction."). The sole focus on activities or functions appears to be a *post hoc* justification for the Corps' inability to design a project that would allow the Corps to remove the dam (thereby avoiding costly operation and maintenance) and still achieve the requirement to maintain the pool as it existed on the date of enactment of the WIIN Act.

[15] The Corps performed a cost-effectiveness analysis of various alternatives for implementing the WIIN Act. The average annual costs of Alternative 1-1 (keeping the dam) exceed the average annual cost of Alternative 2-6d (removing the dam and building a rock weir) due to assumed higher operation and maintenance costs and the addition of the cost of the major rehabilitation at year 50. As a result, the Corps found alternative 2-6d to be the lowest cost alternative.

The Corps' bias against options that would keep the dam is further demonstrated by its analysis of alternatives. To conclude that any option that kept the dam was much more costly, the Corps violated its own engineering regulations regarding the planning horizon for the project. The Corps' own engineering guidance requires use of a 50-year period of analysis for all benefits and costs of projects, including operation, maintenance, repair, rehabilitation, and replacement costs. Engineering Regulation 1105-2-100, Appendix D, Amendment #1, June 30, 2004.[16] Under this Engineering Regulation only multipurpose reservoirs use a 100-year period of analysis. For example, the planning horizon for the Savannah Harbor Expansion Project, of which the NSBLD is now a part, is 50 years. General Re-Evaluation Report, Appendix D: Plan Formulation Savannah Harbor Expansion Project, Jan. 2012, at 3.[17] But, in Corps evaluation of alternatives to carry out section 1319 of the WIIN Act, the Corps used a 100-year planning horizon. [JA 99]. Then, the Corps failed to make consistent assumptions about the need for major rehabilitation of the alternatives evaluated. The Corps assumed the costs of a major

[16] Available at https://planning.erdc.dren.mil/toolbox/library/ERs/entire.pdf**.** Corps engineering regulations are not formally promulgated. They provide direction to the Corps staff.

[17] Available at https://www.sas.usace.army.mil/Portals/61/docs/SHEP/reports/GRR/SHEP%20FINAL%20GRR%20Appendix%20D%20Plan%20Formulation.pdf

rehabilitation at year 50 in its estimate of the costs of the Option 1 alternatives. [JA 195]. But the Corps made no such assumption for the Option 2 alternatives, which rely on a rock weir, and appears to have purposefully omitted the cost of a major rehabilitation of the rock weir at year 50 to Alterative 2-6d (or any other alternative that did not retain the dam). *Id*.

The Corps assumed the rock weir would last for 100 years with no major rehabilitation. This is inconsistent with the experience of the Bureau of Reclamation with rock weirs. The Bureau of Reclamation's 2016 guidance on Rock Weir Design assumes a 50-year life span for rock weirs, with 100 percent probability of maintenance or replacement within 50 years, and notes that the "failure rates of rock weirs are generally high over a 10-year time frame." Bureau of Reclamation, Rock Weir Design Guidance (Mar. 2016), at 143, 145, 148.[18] The Corps' cost-effectiveness analysis was thus not an apples to apples comparison and was intentionally skewed in favor of an analysis that falsely deflated the cost of the Corps' preferred alternative. The inconsistent assumptions in the Corps' cost analysis allowed it to conclude that Weir Alt 2-6d was the least costly effective alternative, which was the basis for the Corps' selection of that alternative. [JA 194].

[18] Available at https://www.usbr.gov/tsc/techreferences/mands/mands-pdfs/RockWeirDesignGuidance_final_ADAcompliant_031716.pdf.

The Corps made similar biased assumptions regarding the ability of project alternatives to effectively pass fish.[19] *See supra* at p.20-22 (discussing the findings and conclusions in the IEPR). [JA 791]. These inconsistencies in its evaluation of alternatives suggests that the Corps was placing a thumb on the scale in favor of alternatives that would remove the dam, relieving the Corps of the responsibility to pay the operation and maintenance costs of the project. For all of these reasons, the Corps' interpretation of section 1319 of the WIIN Act lacks the power to persuade and therefore fails to satisfy the *Skidmore* factors, even assuming the Court were to find the WIIN Act ambiguous. As such, the district court correctly reviewed the statute *de novo*. *Sierra Club v. U.S. Dep't of Interior*, 899 F.3d at 288 (quoting *William v. Gonzales*, 499 F.3d 329, 333 (4th Cir. 2007)).

III. The District Court's Grant of Injunctive Relief was a Proper and Necessary Exercise of its Discretion.

Given its conclusion that the Corps was statutorily barred from selecting any project alternatives that failed to properly maintain the pool, the district court's grant of injunctive relief was a proper exercise if its discretion, even in the absence of a

[19] The Corps describes certain conclusions drawn by it regarding how effective various project alternatives would be in passing fish. Corps Br. at 23. Appellees do not agree with those conclusions and the court should not accept them as uncontested facts. Those issues have been preserved for litigation in the district court as part of Appellees' claims under NEPA. However, the manner in which the Corps addresses those issues demonstrate a bias on the part of the Corps against constructing a project under the authority of Option 1.

discussion of the traditional injunction test. *Legend Night Club v. Miller*, 637 F.3d 291, 302 (4th Cir. 2011). At the time the district court issued the Order, the Corps was proceeding full speed ahead with its decision to remove and replace the Dam. Indeed, the Corps informed the district court that demolition of the NSBLD park was scheduled to begin in December 2020, just a few short weeks after the injunction hearing. [JA 5626]. As the district court had just determined that the Corps' chosen replacement did not meet the clearly delineated statutory prerequisites, it was entirely proper for it to enjoin the Corps from proceeding with irreparable demolition activities associated with construction of that alternative, particularly where such a schedule contravened the plain language of the WIIN Act's prohibition of removing the NSBLD[20] prior to "completion of construction of the [new rock weir] structure."

Further, while the district court did not explicitly reference the traditional test for injunctive relief, the record before it clearly established that such relief was proper. A party seeking a permanent injunction must demonstrate "actual success" on the merits, rather than a mere "likelihood of success" required to obtain a

[20] The NSBLD is defined in the WIIN Act to include "(A) the lock and dam at New Savannah Bluff, Savannah River, Georgia and South Carolina; and (B) the appurtenant features to the lock and dam, including-- (i) the adjacent 50-acre park and recreation area with improvements made under the project for navigation …; and (C) other land that is part of the project and that the Secretary determines to be appropriate for conveyance under this section." § 1319(a)(1). To the extent the Corps refers to the NSBLD as only the dam itself, *see* Corps Br. at 17, 21 (removal or rehabilitation of "the Dam"), that is not accurate.

preliminary injunction. *Mayor of Baltimore v. Azar*, 973 F.3d 258, 274 (4th Cir. 2020). As discussed above, Appellees successfully demonstrated actual success on the merits of its claim that the Corps exceeded its statutory authority by selecting a project alternative that failed to meet the WIIN Act's explicit requirement that the pool be maintained "as in existence" on the date of enactment.

In addition to establishing success on the merits, a plaintiff seeking injunctive relief must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, 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).

The record before the district court sufficiently established that Appellees would have been irreparably harmed in the absence of an injunction, because the Corps expressed a desire to proceed with the removal of the NSBLD notwithstanding the fact that its chosen alternative did not meet the statutory requirements set forth in the WIIN Act. If the Corps had, in fact, proceeded with the removal of the NSBLD, the dam structure and the park feature on the Georgia side of the river utilized by the public would have been demolished and irreparably harmed, and the pool permanently lowered, a harm that Congress explicitly sought to prevent when

it mandated that the Dam only be destroyed once construction was completed on a replacement structure that was able to maintain the existing pool.

As to the Appellees' remedies, the district court correctly concluded that monetary damages would not adequately remedy the State's injuries. [JA 2595]. Had the Corps been allowed to proceed with its announced plans, the State would have suffered injuries to its interests, including the flowage easements transferred by the State of South Carolina to the federal government for construction of the NSBLD and in maintaining the existing pool for water supply and recreational purposes, in addition to injuries to the local environment caused by the lowered pool elevation.

Because the federal government is a party to this suit, the balance of equities and the public interest may be considered in tandem. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) (observing that assessing harm to the opposing party and weighing the public interest "merge" when the government is the party opposing a stay). Here, the record established that both the balance of the equities and the public interest weigh heavily in Appellees' favor. Requiring the government to act in accordance with the law "invokes a public interest of the highest order: the interest in having government officials act in accordance with the law." *Seattle Audubon Soc'y v. Evans*, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991) (citing *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)); *see also Am. Signature, Inc. v. U.S.*, 598 F.3d 816, 830 (Fed. Cir. 2010). ("The public interest is served by

ensuring that governmental bodies comply with the law[.]"). When the alleged action by the government violates federal law, the public interest factor generally weighs in favor of the plaintiff. *W. Watersheds Project v. Bernhardt*, 392 F. Supp. 3d 1225, 1260 (D. Or. 2019). Injunctive relief serves the public interest where it furthers the clearly-expressed purposes of a statute. *Johnson v. United States Dep't of Agric.*, 734 F.2d 774, 788 (11th Cir. 1984) ("Congressional intent and statutory purpose can be taken as a statement of public interest."). For these reasons, the balance of equities and the public interest weigh heavily in Appellees' favor.

The district court correctly concluded that a permanent injunction was the necessary and proper remedy in this matter. The Corps was determined to proceed with actions that were in excess of its Congressional authority and which would cause immediate and irreparable injuries to Appellees and the environment. There was no abuse of discretion and the district court should be affirmed.

CONCLUSION

The order of the district court properly employed the cannons of statutory interpretation to give effect to the plain meaning of the WIIN Act, correctly finding Section 1319 to be unambiguous, giving effect to the key guidance contained in the Act to "maintain" the pool, as well as applying the temporal condition "as in existence on the date of enactment of this Act" equally to each of the subjects preceding its placement in the Act. It is undisputed that the alternative selected by

the Corps does not "maintain the pool" but instead lowers it by approximately 3.5 feet. As such, the district court was correct to find that the Corps has exceeded its authority under the WIIN Act and should be affirmed. Even if this Court were to disagree as to the WIIN Act's ambiguity, the district court correctly determined that the Corps' interpretation was not entitled to deference and should be affirmed on that additional basis. Finally, the order and the record appropriately reflect the fact that the district court did not abuse its discretion in enjoining the Corps from taking further action regarding the NSBLD in contravention of the plain meaning of the WIIN Act. For all of these reasons, the order of the district court should be affirmed in its entirety.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2022, I electronically filed the foregoing using the court's CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system, and I will serve a copy of the foregoing on all participants in the case who are not registered CM/ECF users by mailing a copy, first-class, postage paid, to the address listed on the Court's CM/ECF system.

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