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September 1, 2015

Mr. Andrew Edwards
S.C. Department of Health and Environmental Control, Bureau of Water
2600 Bull Street
Columbia, SC 29201
edwardaj@dhec.sc.gov

Via Email

Re: Public Notice No. 15-137-H, Reissuance of Carolina Water Service's NPDES Permit for the I-20 Wastewater Treatment Plant

Dear Mr. Edwards:

On behalf of Congaree Riverkeeper, the Southern Environmental Law Center submits these comments on the draft National Pollutant Discharge Elimination System (“NPDES”) permit proposed for reissuance to Carolina Water Service, Inc. (“CWS”)¹ for operation of its I-20 wastewater treatment plant (the “I-20 plant”). CWS is currently operating the I-20 plant under NPDES Permit Number SC0035564, issued November 17, 1994 and effective January 1, 1995 (the “1995 Permit”). The South Carolina Department of Health and Environmental Control (“DHEC”) is now proposing to reissue CWS’s NPDES Permit, and has requested public comment on the draft permit released on July 16, 2015.²

As described in detail below, while we appreciate DHEC’s attempt to update the 1995 Permit and impose more stringent effluent limitations on CWS’s I-20 discharge, under its own regulations, DHEC does not have authority to reissue this permit. Further, if DHEC were to reissue the permit as currently drafted, it would violate the Clean Water Act (“CWA”), 33 U.S.C. §§ 1251 *et seq.* Finally, if DHEC nevertheless decides to proceed with issuing a new permit, it cannot weaken any of the terms or conditions that are currently imposed on CWS under the 1995 Permit. Any such weakening would violate the CWA’s anti-backsliding provision. 33 U.S.C. § 1342(o).

¹ CWS is a subsidiary of Utilities, Inc., one of the largest privately owned water and wastewater utilities in the country. *See* http://www.utilitiesinc-usa.com/about_us/cs_area.php?state=SC; http://www.utilitiesinc-usa.com/about_us/index.php.

² As an initial matter, the permit application that DHEC is acting on in proposing this permit reissuance was submitted by CWS in February of 2003. *See* Permit Rationale (Apr. 9, 2015) at 1. It is unclear to us how an application that is over twelve years old – or in NPDES terms, was submitted two and a half NPDES permit cycles ago – is not considered outdated. The entire premise of the Clean Water Act is that permits are based on the best technology, and this technology has certainly changed in twelve years. We believe this constitutes an additional basis for denying the proposed permit reissuance.

I. Background

The Lower Saluda River, which flows from Lake Murray to its convergence with the Broad River in Columbia, South Carolina, is a regional destination popular for fishing, kayaking, rafting, canoeing, and swimming. Known for its cold water trout fishery, stretches of class II to class V whitewater rapids, and popular swimming holes, the Lower Saluda was designated as a South Carolina State Scenic River in 1991. S.C. Code Ann. § 49-29-230. According to the South Carolina Department of Natural Resources (“DNR”):

The Lower Saluda Scenic River is recognized as an outstanding recreational resource. The tailrace waters from Lake Murray reservoir provide a cold water fishery and varying water levels for recreational boating. Trout and striped bass fishing as well as whitewater (class II to V rapids) and flatwater paddling are very popular on this piedmont river. These factors, combined with the surrounding topography and rock outcrops similar to mountain streams and the heavily wooded landscape, make the Lower Saluda River corridor an outstanding natural resource within the urban environment of metropolitan Columbia.

DNR, Lower Saluda Scenic River, *available at* <https://www.dnr.sc.gov/water/envaff/river/scenic/saluda.html>.

As a result of the scenic river designation and increasing recreational use, a number of management entities, including the Lower Saluda River Advisory Council and the Central Midlands Council of Governments (“CMCOG”), have sought to eliminate domestic wastewater discharges into the Lower Saluda River. Accordingly, the CMCOG, pursuant to Section 208 of the CWA, 33 U.S.C. § 1288, directed in 1993 and again in 1997 that CWS connect its I-20 plant to the City of Cayce regional treatment plant via the Town of Lexington regional sewer system.

As DHEC is well-aware, the NPDES permitting and compliance history of CWS’s I-20 plant has been long and complicated. Pursuant to the 208 Plan, CWS’s 1995 Permit requires that CWS connect the I-20 plant to the Town of Lexington’s regional sewer system.³ The 1995 Permit also contains effluent limitations, monitoring requirements, and other conditions intended to protect water quality in the Lower Saluda River until the I-20 plant is connected to the regional sewer system and the discharge is eliminated. The Town of Lexington received its permit to operate the regional sewer system in 1999, triggering CWS’s obligation to connect the I-20 plant. However, CWS has not connected the I-20 plant to the regional sewer system, nor has it otherwise ceased its discharge into the Lower Saluda.⁴ Furthermore, CWS is continually

³ Specifically, the Permit requires that “[w]ithin 90 days after the issuance date of the Permit to Operate for the regional sewer system, the Permittee will connect to the regional sewer system and cease the discharge to the Saluda River.” 1995 Permit at 7.

⁴ Notably, in 2009, the CMCOG stated that the infrastructure for the I-20 plant to be taken off-line and consolidated into the regional sewer system “is currently in place,” such that it is “physically possible for the I-20 plant to consolidate into the regional system.” CMCOG, Central Midlands Regional 208 Water Quality Management Plan Research Report at 10 (Oct. 2009). While the CMCOG also noted that resolution of economic, political, and legal constraints would

failing to comply with interim provisions of its 1995 Permit put in place to protect water quality until the discharge is eliminated, including effluent limitations for fecal coliform, biochemical oxygen demand, and flow, as well as the provision that “there shall be no discharge of floating solids or visible foam in other than trace amounts nor shall the effluent cause a visible sheen on the receiving waters.” 1995 Permit at 4. Since January 2009, twenty-four violations have been reported in CWS’s own discharge monitoring reports for the I-20 plant.

After years of unabated violations and because of CWS’s continuing failure to connect the I-20 plant to the regional sewer system, Congaree Riverkeeper brought a CWA citizen suit against CWS in the United States District Court for the District of South Carolina in January of 2015. That suit seeks to force CWS to comply with the 1995 Permit’s numeric effluent limitations and other permit terms and conditions, including the requirement that CWS connect the I-20 plant to the regional sewer system. CWS asked the court to dismiss Congaree Riverkeeper’s claims seeking to enforce the 1995 Permit’s connection requirement, but the court denied that request, allowing the case to proceed. CWS has now asked the judge to stay Congaree Riverkeeper’s citizen suit pending DHEC’s reissuance of CWS’s NPDES permit, arguing that when the new permit is issued, most if not all of Congaree Riverkeeper’s claims will become moot. In this latest effort to dispense with Congaree Riverkeeper’s case, CWS assumes that DHEC’s reissuance of its NPDES permit in exactly the form CWS desires is a foregone conclusion.⁵ A copy of CWS’s motion to stay the case, as well as Congaree Riverkeeper’s response, is attached. *See* Attachments 1 & 2.

The presumptuousness of CWS’s position that its NPDES permit will be reissued at all and that it will be reissued as currently drafted was made abundantly clear at the public hearing held on August 25, 2015. That hearing had an estimated attendance of close to 300 people, over 30 of whom – including state and local politicians, national, regional, and local organizations, and private citizens – made statements urging DHEC to deny CWS’s requested permit reissuance. Tellingly, not a single person spoke in favor of the proposed permit. And just this week, a bi-partisan group of politicians held a press conference to again urge DHEC not to reissue an NPDES permit to a company that was required to stop discharging over a decade ago. For the reasons discussed below, we too urge DHEC to deny the proposed permit reissuance.

II. CWS is Ineligible for Reissuance of its NPDES Permit.

As an initial matter, DHEC does not even have authority to reissue CWS’s permit. Under DHEC regulations, “[a] permittee with a permit which requires connection to a regional sewer system or other treatment facilities under the water quality management plan under section 208

be needed for an “acceptable resolution for all of the parties involved,” *id.*, the reality remains that the regional collection system has been built and is operating very close to the I-20 plant and the infrastructure to consolidate the CWS discharge into the system is in place.

⁵ Given that DHEC may decide not to reissue the permit at all, or may decide to reissue the permit with significant revisions based on feedback received during the public comment period, Congaree Riverkeeper opposes CWS’s request for a stay as premature and based entirely on a hypothetical reality constructed by CWS. Additionally, many of Congaree Riverkeeper’s claims would not be moot even if DHEC reissued CWS’s NPDES permit as currently drafted.

of the CWA is ineligible for reissuance of a permit once notified by the Department that the regional sewer system is operational.” S.C. Code Ann. Regs. 61-9.122.64(a)(5).

As discussed above, CWS’s 1995 Permit requires connection to the Town of Lexington regional sewer system pursuant to the 208 Plan, and DHEC notified CWS on April 21, 1999 that the permit to operate the regional system had been issued. Therefore, under the clear terms of DHEC’s own regulations, CWS is ineligible for reissuance of its NPDES permit. Since a decision to proceed with reissuing the permit would violate this regulation, DHEC should deny CWS’s requested renewal permit for the I-20 plant on this basis alone.

III. Re-Issuance of The Permit As Currently Drafted Would Violate the Clean Water Act.

In addition to CWS being ineligible for reissuance of its NPDES permit, DHEC should also deny the permit reissuance because, as currently drafted, this permit would violate the CWA. Specifically, the changes to the schedule of compliance for connection to the Town of Lexington’s regional sewer system would conflict with the CWA’s anti-backsliding and anti-degradation provisions and would result in a failure to meet water quality standards.

A comparison of the schedule of compliance in the draft permit to that in the 1995 Permit demonstrates that the draft permit would impermissibly weaken the connection requirement. The 1995 Permit requires that:

Within 90 days after the issuance date of the Permit to Operate for the regional sewer system, the Permittee will connect to the regional sewer system and cease the discharge to the Saluda River. This Permit will expire on the date of issuance of the Permit to Operate the connection between this facility and the regional sewer system. In accordance with the Area Wide 208 Management Plan, this facility is considered as a temporary treatment facility that will be closed out when the regional sewer system is constructed and available.

1995 Permit at 7. The Town of Lexington received its permit to operate on April 7, 1999, triggering the 90-day timeline for CWS to connect the I-20 plant to the regional sewer system. Thus, under the 1995 Permit, which CWS is operating under and will continue to operate under for the foreseeable future, it has a *current* obligation to connect to the regional sewer system. This obligation began in 1999, and because CWS has yet to connect to the regional sewer system, it has been operating the I-20 plant in violation of its NPDES permit ever since.

In contrast, the schedule of compliance in the draft permit provides that:

The existing facility is designated by the 208 Plan as a temporary treatment facility to be connected to the currently operational Town of Lexington (Town) regional sewer (i.e., force main sewer transferring flow from Lexington to Cayce). Such connection would eliminate the discharge to the Saluda River. To connect to the Town, DHEC recognizes that the Public Service Commission (PSC) must approve an agreement related to the connection to the regional sewer line. No

later than November 30, 2016, the permittee shall either submit to the PSC a request for interconnection to the Town's system or provide a justification as to why pursuit of PSC approval is not warranted at that time.

Draft Permit at 25. There is no explanation provided in the permit rationale for this change to the schedule of compliance.

The changes to the existing schedule of compliance are problematic for several reasons. First, the draft permit's schedule of compliance introduces a new timeline for connection. Although CWS is currently obligated to connect the I-20 plant to the regional sewer system, the draft permit would allow CWS to wait over a year to even begin one of the routes for connection, and contains no deadline by which CWS must achieve connection.

Second, the draft permit implicitly presumes that PSC approval is necessary for connection to the regional sewer system. Although the permit correctly states that the "[PSC] must approve an *agreement* related to connection to the regional sewer line," (emphasis added), the addition of this language suggests that an agreement between CWS and the Town of Lexington is the only method for achieving connection. As DHEC is aware, this is simply not the case. All that DHEC should require is that CWS achieve connection to the regional sewer system – it is up to CWS to figure out how best to accomplish that outcome.

Third, the schedule of compliance as currently drafted would allow CWS to avoid connecting the I-20 plant to the regional sewer system at all by "provid[ing] a justification as to why pursuit of PSC approval is not warranted at that time." It is unclear from the draft permit what would constitute a valid justification, and this vague language would likely be interpreted broadly by CWS to include any number of reasons why connection might be inconvenient, difficult, costly, or otherwise not in the company's interest. Again, CWS is *currently* under an obligation to connect the I-20 plant to the regional sewer system. DHEC cannot allow CWS to avoid its obligation by simply providing DHEC with reasons why pursuing connection would not be "warranted" – we have no doubt CWS would come up with a long list of reasons, all of which would serve their own self-interest.

The anti-backsliding provision of the Clean Water Act prohibits any NPDES permit from being renewed, reissued, or modified to contain effluent limitations that "are less stringent than the comparable effluent limitations in the previous permit," subject to certain exceptions. 33 U.S.C. § 1342(o). Under the CWA, the term 'effluent limitation' includes schedules of compliance, such as the one in the 1995 Permit requiring connection of the I-20 plant to the regional sewer system. 33 U.S.C. § 1362(11).⁶ As discussed above, the draft permit's schedule

⁶ See also *Citizens for a Better Env't-Cal. v. Union Oil Co. of Cal.*, 83 F.3d 1111, 1120 (9th Cir. 1996) ("[E]ven if the [agency Cease and Desist Order] were to be construed as having effectively extended the compliance date in the NPDES permit, such a modification would likely run afoul of the substantive constraint on the ability of regulators to modify permits found in 33 U.S.C. § 1342(o) (the "anti-backsliding" provision)."); *Ohio Valley Env'tl. Coal., Inc. v. Coal-Mac, Inc.*, 775 F. Supp. 2d 900, 905 (S.D. W.Va. 2011) ("Defendant Coal-Mac sought a modification of this WV/NPDES permit from the WVDEP, specifically requesting an extension of the

of compliance would impermissibly (1) extend the timeline for CWS to even attempt to connect the I-20 plant, (2) necessitate PSC involvement in achieving connection, and (3) ultimately give CWS an excuse to avoid compliance indefinitely. Each of these clauses contributes to a significant weakening of the existing connection requirement, which would violate the anti-backsliding provision.

Additionally, South Carolina's anti-degradation rules – found in Regulation 61-68 – require that “[e]xisting water uses and the level of water quality necessary to protect these existing uses shall be maintained and protected.” S.C. Code Ann. Regs. 61-68(D)(1). Where water quality exceeds the level necessary to support fish, wildlife, and recreation in and on the water, that level must be maintained and protected unless DHEC determines that allowing lower water quality is necessary to important economic or social development. *See id.* at (D)(2). This determination requires an alternatives analysis demonstrating that there are no economically and technologically reasonable alternatives – including “connection to other wastewater treatment facilities” – that would minimize or eliminate the lowering of water quality. *See id.* at (D)(2)(a). Such an analysis is required here, and would demonstrate clearly that degradation of the Lower Saluda is not necessary to promote any important economic or social interests – there is a simple and readily available alternative to the discharge: connection to the regional sewer system. No such analysis appears to have been completed by DHEC or CWS.

Finally, this section of the Saluda River is classified as “Trout Put Grow Take” (“TPGT”). The water quality standards for TPGT waters provide that discharges cannot adversely affect the taste, color, odor, or sanitary condition of the water. Clearly, CWS's discharge is negatively affecting the receiving waters – many individuals commented at the public hearing about the unpleasant sight and smell of the water near the discharge, as well as the health risks posed by sewage wastewater. Allowing CWS to continue discharging would violate the water quality standards, constituting an additional contravention of the CWA.

Because the draft permit would violate the CWA, including its anti-backsliding and anti-degradation provisions and water quality standards, DHEC should deny CWS's application for reissuance of its NPDES permit.

IV. If a New Permit is Issued, it Must Maintain the 1995 Permit's Connection Requirement and Impose More Stringent Effluent Limitations Than the 1995 Permit.

We appreciate DHEC's attempt to impose more stringent effluent limitations on CWS's discharge by reissuing its NPDES permit. We were encouraged to see that the draft permit contained stronger effluent limitations than those CWS is currently required to comply with under the 1995 Permit. If DHEC proceeds with reissuing CWS's NPDES permit, we strongly urge DHEC to retain the effluent limitations as currently drafted in the proposed permit.

compliance schedule for the selenium effluent limitations. The state agency denied this request on March 8, 2010 on the grounds that granting the modification would violate the anti-backsliding provisions of the CWA.”).

We are, however, deeply concerned about the schedule of compliance as it is written in the draft permit. As discussed above, the new language would significantly weaken CWS's current obligation to connect the I-20 plant to the regional sewer system and would violate the CWA. To avoid this violation, we suggest the following revisions be made to any final permit:

- Do not extend the timeline for connection. CWS has a current obligation to connect the I-20 plant to the regional sewer system under the 1995 Permit. Any new timeline that allows CWS to further delay this connection would undermine that current obligation, which should have happened over fifteen years ago. Such a provision would constitute backsliding, and would therefore violate the CWA.
- Remove any reference to the PSC. As previously discussed, a PSC-approved agreement between CWS and the Town of Lexington is one way to achieve connection, but it is not the only option. Other available options should not be implicitly foreclosed by assuming PSC approval is necessary.
- Do not allow CWS to avoid the connection requirement by providing an "out" that would allow it to continue polluting indefinitely. The clause in the draft permit allowing CWS to provide DHEC with "a justification as to why pursuit of PSC approval is not warranted at that time" essentially negates any requirement to connect if CWS provides what DHEC determines to be a valid excuse not to. A clause to this effect renders any connection requirement meaningless and must not be included in a final permit.

While we urge DHEC to deny the proposed permit reissuance, at a bare minimum, DHEC must revise the schedule of compliance in the draft permit to prevent any weakening of CWS's current obligation to connect and comply with the CWA.

V. Conclusion


For the reasons discussed above, DHEC cannot legally reissue CWS's NPDES permit for the I-20 plant because it would violate DHEC's own NPDES regulations as well as the CWA. If, however, DHEC proceeds with reissuing the permit, we strongly urge DHEC to maintain the draft permit's more stringent effluent limitations, and revise the schedule of compliance for connection to the regional sewer system to ensure that CWS's ongoing obligation to connect the I-20 plant and cease its discharge entirely is not weakened.

Thank you for the opportunity to submit these comments. Please do not hesitate to contact us with any questions.

[signature page follows]

Sincerely,


Catherine M. Wannamaker


Heather A. Murray

Attachment 1

**IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION**

CONGAREE RIVERKEEPER, INC.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 3:15-CV-194-MBS
)	
CAROLINA WATER SERVICE, INC.,)	
)	
Defendant.)	
)	

**DEFENDANT’S
MOTION TO STAY CASE**

Carolina Water Service, Inc. (CWS), by and through its undersigned counsel and pursuant to Rule 7(b) of the Federal Rules of Civil Procedure (FRCP) and Local Civil Rules 7.04 and 7.05, submits this motion to stay and supporting memorandum in the above-captioned matter. By this motion, CWS seeks an order staying this case pending resolution of an independent administrative matter with a direct impact on the claims raised in this case.

As described in more detail below, on July 16, 2015, the South Carolina Department of Health and Environmental Control (DHEC), the permitting agency for National Pollution Discharge Elimination System (NPDES) permits¹ in South Carolina, issued for public notice a draft renewal NPDES permit (Renewal Permit) for the CWS I-20 Wastewater Treatment Facility (I-20 WWTF) at issue in this case. *See* Exh. 1, Renewal Permit. The Renewal Permit will replace and supersede CWS’s existing NPDES Permit No. SC0035564, which was issued on November 17, 1994 (effective January 1, 1995) (1994 NPDES Permit), and which serves as the basis for the

¹ Pursuant to 33 U.S.C.A. § 1342(b).

citizen suit of Plaintiff Congaree Riverkeeper, Inc. (CRK)² under the Clean Water Act³ (“Clean Water Act” or “CWA”). As explained below, the issuance of the Renewal Permit will moot most if not all of the claims of CRK advanced in this case. Therefore, CWS contends that the most efficient course for the parties, judicial resources, and resolution of the claims is for this action to be held in abeyance pending resolution of the state administrative process attendant to the issuance of the Renewal Permit. CWS respectfully requests the Court to exercise its discretion to stay these proceedings until such time as the aforementioned administrative proceedings are resolved.

BACKGROUND

CWS owns and operates the I-20 WWTF in Lexington County which is used to provide sewer service to customers within CWS’s service area authorized by the Public Service Commission of South Carolina (PSC). Dkt.#8, Answer. Since 1994, the I-20 WWTF has been authorized to operate and discharge wastewater into the Lower Saluda River pursuant to the 1994 NPDES Permit, issued by DHEC in accordance with the CWA and provisions of South Carolina law.

On November 6, 2013, CRK served on CWS and DHEC a notice of its intent to sue CWS in a citizen suit under the CWA for alleged failures to comply with the 1994 NPDES Permit. This action resulted, as CRK filed its complaint on January 14, 2015. Dkt.#1. More specifically, the complaint alleges two general permit violations: (1) failure to interconnect the WWTF with a regional sewer line owned by the Town of Lexington (Town); and (2) exceedances of certain wastewater permit parameters pertaining to the constituents in the wastewater CWS discharges from the WWTF. On July 16, 2015, DHEC issued for public notice

² See 33 U.S.C.A. § 1365.

³ 33 U.S.C.A. §§ 1251 *et seq.*

a draft renewal discharge permit for the I-20 WWTF, a copy of which is attached hereto as Exhibit 1. Relevant to CRK's allegations, the draft Renewal Permit expressly recognizes that the PSC is required to approve any agreement related to the connection of the I-20 WWTF to the Town's regional sewer line. *Id.* at 25. The Renewal Permit also sets different and new effluent limitations and monitoring requirements, including the elimination of several parameters, *id.* at 19-24, from the 1994 NPDES Permit. *Compare* dkt.#1.1 with Exh. 1. However, the Renewal Permit provides for new effluent limitations to be achieved by the I-20 WWTF over the course of three (3) years through an upgrade of the facility, with such upgrade to be completed by CWS on or before September 1, 2018. Exh. 1, Renewal Permit at 25.

The issuance by DHEC of the Renewal Permit for public notice is the start of the administrative review process. An interested party (such as CRK) may challenge the issuance of the Renewal Permit through the procedures outlined in the South Carolina Administrative Procedures Act. *See* S.C. Code. Ann. §§ 1-23-500 *et seq.* Only after the administrative review process has run its course, including, *inter alia*, any contested case before the South Carolina Administrative Law Court, *see* S.C. Code Ann. § 1-23-600, and any subsequent appeal of a decision by the Administrative Law Court to the appellate courts of South Carolina, *see* S.C. Code Ann. § 1-23-610, will the terms of the Renewal Permit become final.⁴

STANDARD

A trial court has broad discretion to stay all proceedings in an action pending the resolution of independent proceedings elsewhere. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also Rhines v. Weber*, 544 U.S. 269 (2005) (holding that courts possess the authority to hold a motion in abeyance if resolution of a pending matter will help clarify the current issues

⁴ The Renewal Permit becomes operative and effective upon issuance, subject to an administrative stay and other provisions of state law. *See, e.g.*, S.C. Code Ann. § 1-23-600(H).

or make currently disputed issues moot). “The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Air Line Pilots Ass’n v. Miller*, 523 U.S. 866, 879 n. 6 (1998) (quoting *Landis*, 299 U.S. at 254–55). Indeed, “[a] trial court may, with propriety, **find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case.**” *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863–64 (9th Cir. 1979) (emphasis added).

When considering a motion to stay, this Court should consider three factors: “(1) the interests of judicial economy; (2) hardship and equity to the moving party if the action is not stayed; and (3) potential prejudice to the non-moving party.” *See, e.g., Impulse Monitoring, Inc. v. Aetna Health, Inc.*, C/A No. 3:14-cv-02041-MGL, 2014 WL 4748598 at *1 (D.S.C. Sept. 23, 2014); *Murphy-Pittman v. DePuy Orthopaedics, Inc.*, C/A No. 3:12-cv-3179-JFA 2012 WL 6588697 at *1 (D.S.C. Dec. 17, 2012).

ARGUMENT

CWS respectfully contends that a stay of these proceedings is warranted in light of the issuance by DHEC of the Renewal Permit for public comment, which will replace and supersede the 1994 NPDES Permit that serves as the basis for this citizen suit. As discussed herein, the Renewal Permit significantly alters the landscape of this citizen suit and will have a substantial effect on claims advanced by CRK, including, *inter alia*, clarifying the issue raised by Count I of the Complaint with respect to the availability to CWS of interconnection of the I-20 WWTF to the Town’s regional WWTF, as well as altering many of the effluent limitation terms for the I-20 WWTF, rendering the exceedances advanced in Count III wholly past violations without the

likelihood of future similar exceedances, rather than continuing or ongoing violations as currently advanced by CRK.

Regardless, proceeding with the litigation of this case, including discovery, is not an efficient and just use of either the parties' or the Court's resources, given the fact that a final version of the Renewal Permit will supersede the 1994 NPDES Permit, and its terms and conditions will govern the continued viability of CRK's claims. The Renewal Permit has been published by DHEC for public comment, which is the beginning of the administrative review process. The next step is consideration of the comments received, issuance of the final permit, and then litigation of any challenge (which could come from CRK) to the terms and conditions of the Renewal Permit.

Given that the Renewal Permit directly addresses the current availability of interconnection to the Town's regional sewer line by CWS, it would stand to reason that the primary jurisdiction over a determination of that, and any other, term of the Renewal Permit governing discharges from the I-20 WWTF, should be achieved through the state administrative process that governs the terms and conditions of the Renewal Permit. Only after a final determination has been made as to whether interconnection is a required and operative term of the Renewal Permit will this Court be able to determine the continued viability of CRK's citizen suit on that ground.

Further, the Renewal Permit alters the terms and conditions of many of the effluent limitations by which CWS must abide. Certain of the monitoring parameters of the 1994 NPDES Permit are dropped altogether, while one key monitoring requirement (fecal coliform) is replaced with an E. coli test based on the U.S. Environmental Protection Agency's (EPA) position that E.

coli testing is the most suitable indicator for water quality standards.⁵ Under case law, these changes to the operative terms and conditions of a NPDES permit affect the viability of a citizen suit that bases alleged permit violations on displaced effluent standards, rendering many (if not all) of those alleged violations wholly past and moot. *See infra*, § I. Without complete information and an understanding of the final terms of the Renewal Permit, the ability of this Court to evaluate the merits of this citizen suit is rendered impossible.

Consequently, because it is likely that the issuance of the final Renewal Permit will moot many, if not all, of the claims advanced by CRK in this citizen suit, it is in the best interest of the parties and judicial economy that this citizen suit be stayed pending resolution of the final terms and conditions of the Renewal Permit, and any resultant administrative proceedings and appeals, that might arise from a challenge to DHEC's Renewal Permit.

I. THE TERMS OF THE RENEWAL PERMIT WILL MOOT CRK'S CLAIMS.

- a. The Renewal Permit expressly clarifies that interconnection of the I-20 WWTF is unavailable to CWS in the absence of PSC approval, and thus CWS is in compliance with the permit conditions and the permit shields CWS from this citizen suit.

As this Court is aware from extensive briefing by the parties for the Rule 12(b) motion, the current availability of interconnection of CWS's I-20 WWTF to the Town's regional WWTF is the issue of Count I of the Complaint. In its motion to dismiss, CWS argued, and still contends, that interconnection of the I-20 WWTF is not a currently operative term or condition of the 1994 Permit, because the plain language of both the permit and the Section 208 Plan⁶

⁵ *Escherichia coli* (*E. coli*) is a subset of fecal bacteria (and fecal coliform). EPA "recommends *E. coli* as the best indicator of health risk from water contact in recreational waters; some states have changed their water quality standards and are monitoring accordingly." U.S. Env'tl. Protection Agency, *Water: Monitoring & Assessment* § 5.11 ("Fecal Bacteria"), located at <<http://water.epa.gov/type/rsl/monitoring/vms511.cfm>>. South Carolina is changing its standards accordingly.

⁶ *See* 33 U.S.C.A. § 1288(b) of the CWA.

make clear that interconnection is only required when it is “available” to CWS. Again, briefly, CWS contends that the I-20 WWTF is unavailable for interconnection for two basic reasons: (1) the Town, which is a municipality, is not obligated to offer its regional facility for interconnection, and although CWS and the Town have twice tried to interconnect, and as recently as March 2014, the Town informed CWS that it is not interested in interconnection; and (2) each of the two times that CWS and the Town agreed to terms of an interconnection of the facilities, the (PSC), which has the sole authority and jurisdiction⁷ over public utilities in the State (including the authority to approve or disapprove any such interconnection agreement), denied the requested interconnection.

The “availability” of interconnection referenced in the schedule of compliance of the 1994 NPDES Permit can only be interpreted in accordance with its meaning under state law and consistent with the terms and conditions recognized and imposed by DHEC in other NPDES permits referencing this same subject. Notwithstanding, the Renewal Permit removes all doubt as to the meaning of “available” in the context of interconnection of the I-20 WWTF to the regional system. Not surprisingly, the Renewal Permit’s language is consistent with that of NPDES permits issued by DHEC for discharges into the Lower Saluda River subsequent to CWS’s current permit⁸ and clarifies the requirement that the PSC approve any such interconnection

⁷ See S.C. Code Ann. § 58-5-210; 26 S.C. Code Ann. Regs. 103-503, -541.

⁸ As noted in CWS’s motion to dismiss and supporting memorandum in this action, three other NPDES permits issued by DHEC subsequent to the 1994 NPDES Permit (also for discharges into the Lower Saluda River) expressly reference and make explicit that PSC approval for interconnection to the Town’s regional WWTF is required. See *dkd.#16-4*, NPDES Permit SC0032743, issued Sep. 8, 2009, p.21 (regarding interconnection, the permittee must “obtain all necessary approvals and permits, e.g. the construction permit for the connection and the Public Service Commission approval”) (emphasis added); *dkd.#16-5*, NPDES Permit No. SC0029483, issued Sept. 30, 2005, reissued May 13, 2010, p.23 (regarding interconnection, the permittee must “obtain all necessary permits and approvals (e.g., DHEC construction permits and Public Service Commission approvals” and “In determining whether it is feasible to connect

agreement—which is the position taken by CWS in this action. Specifically, in the schedule of compliance, the Renewal Permit provides:

The existing facility is designated by the 208 Plan as a temporary treatment facility to be connected to the currently operational Town of Lexington (Town) regional sewer (i.e., force main sewer transferring flow from Lexington to Cayce). Such connection would eliminate the discharge to the Saluda River. **To connect to the Town, DHEC recognizes that the Public Service Commission (PSC) must approve an agreement related to connection to the regional sewer line.** No later than November 30, 2016, the permittee shall either submit to the PSC a request for interconnection to the Town's system or provide a justification as to why pursuit of PSC approval is not warranted at that time.

Exh. 1, Renewal Permit at 25 (emphasis added).

Consequently, should the schedule of compliance contained in the Renewal Permit remain unchanged through any administrative challenge, the Renewal Permit will reflect the universally understood (outside of CRK) fact that approval of an interconnection agreement by the PSC is required.⁹

to the regional system (which includes financial feasibility issues), it is acknowledged that Public Service Commission approval (e.g., bulk service contract) is a requirement.") (emphasis added); and dkt.#16-6, NPDES Permit No. SC0029475, issued Sept. 8, 2009, p.21 (regarding interconnection, the permittee must "obtain all necessary approvals and permits, e.g. the construction permit for the connection and the Public Service Commission approval") (emphasis added). As also noted earlier by CWS, both DHEC and CMCOG have necessarily recognized that these permit conditions conform to the water quality management plan promulgated by the Central Midlands Council of Governments (CMCOG) pursuant to 33 U.S.C.A. § 1288 (208 Plan) as required by 33 U.S.C.A. § 1288(e). *See* dkt.#16-2, *Carolina Water Serv. v. S.C. Dep't of Health & Env'tl. Control*, 2002 WL 385126 *5-6 (Feb. 25, 2002) (S.C. Admin. Law Ct.) ("Although Carolina Water has not connected to the regional sewer system, the COG has determined that it is in conformance with the 208 Plan because the system was not available for connection by Carolina Water ... I find that the [CM]COG's decision is binding upon [DHEC].").

⁹ Further, since CWS has (unsuccessfully) sought PSC approval for just such an interconnection with the Town, and the Town has, subsequent to the issuance of the 60 Day Notice of Intent to Sue in this matter, refused to consider interconnection, interconnection of the I-20 WWTF to the Town's regional sewer line is unavailable as contemplated by CWS's current permit and the 208 Plan. Because interconnection is unavailable, it is not required by the 1994 NPDES Permit and therefore CWS is not in violation of the permit on that ground.

Thus, while CWS submits that judgment could be entered on Count I *today* based on the plain language of the 1994 NPDES Permit and the 208 Plan, the Renewal Permit leaves no doubt as to the operative terms and conditions of the permit with respect to the availability of interconnection. Accordingly, resolution of Count I of the Complaint should be stayed until such time as the Renewal Permit becomes final, at which time the above-quoted language of the schedule of compliance would render CRK's claims related to interconnection moot.

- b. A final Renewal Permit will supersede and void the 1994 NPDES Permit; thus many, if not all, of the permit terms and conditions alleged to constitute effluent limitations which have been exceeded and sought to be enforced by CRK will no longer apply and this citizen suit will be mooted.

The Renewal Permit's terms, including the effluent limitations and monitoring requirements set out therein, become operative on the effective date of same. *See* Exh. 1, Renewal Permit at 19. The natural effect of the implementation of the new effluent limitations and monitoring requirements of the Renewal Permit is that the limits, terms, and conditions of the 1994 NPDES Permit No. SC0035564 are no longer in effect and have been, to the extent they have not been incorporated in the Renewal Permit, superseded.¹⁰ While the reissuance of a revised NPDES permit does not, in and of itself, moot the claims advanced in a citizen suit filed *prior* to the final reissuance, this relatively unique circumstance necessitates a comparison of the terms of the 1994 NPDES Permit to the terms of the Renewal Permit—as other courts confronted with this issue have done.

The starting point for this analysis is the landmark United States Supreme Court decision in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987). In

¹⁰ Logically, three possibilities exist for the effluent limitations of the 1994 NPDES Permit No. SC0035564: (1) a limitation remains the same and continues to be a term and condition of the Renewal Permit; (2) a limitation is removed and thus is no longer operative under the Renewal Permit; or (3) a limitation is made more stringent by the terms of the Renewal Permit.

Gwaltney, the Supreme Court addressed the question of whether citizen suits are authorized under the CWA for violations of NPDES permits occurring prior to the provision of the required 60-day notice and institution of the citizen suit. In holding that a plaintiff must assert a good faith allegation of an ongoing violation or a reasonable likelihood of future violations, *see id.* at 64, the Supreme Court unequivocally held that citizen suits are not authorized for wholly past violations, *id.* at 64-67.

The Supreme Court also recognized the language in 33 U.S.C.A. § 1365(f) that expressly restricts citizen suits to violations of an NPDES permit limitation “which is in effect.” *See Gwaltney*, 484 U.S. at 59 (citing § 1365(f)(6) “a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter”). By its express language, the citizen suit provision thus does not confer jurisdiction on the court for a suit seeking compliance with a permit or condition of an NPDES permit which is not currently in effect.

Courts that have been confronted with the situation at hand, where an NPDES permit has been renewed or re-issued during the pendency of a citizen suit, have evaluated the terms of the new permit to see if the terms of the previous permit at issue in the case have been carried over, strengthened, or relaxed. In *Public Interest Research Group of New Jersey, Inc. v. Carter-Wallace, Inc.*, the District Court for the District of New Jersey evaluated multiple permit issues similar to those before this Court. 684 F. Supp. 115, 116 (D.N.J. 1988). A citizen suit was brought under an NPDES permit that had been renewed two years prior to the institution of the action. The complaint alleged violations of both the old and new permits, and the permittee moved to partially dismiss many of the alleged violations of the NPDES permit, including all of the alleged violations of the old permit under *Gwaltney*. The plaintiff, meanwhile, asserted that once jurisdiction had been properly established, all alleged violations—even those of the old

permit—were properly considered. The district court disagreed with both parties and instead held that a plaintiff could maintain a citizen suit seeking monetary penalties for violations of an expired permit only to the extent that the terms and conditions of the old permit alleged to have been violated have been carried over into and would constitute violations of the new permit. *Id.* at 120. The court reasoned that if enforcement of expired permits is sought only on those terms or conditions incorporated into the new permit, this balanced the equities between the parties and met the intent of the citizen suit provision. *Id.*

Similarly, in *Massachusetts Public Interest Research Group v. ICI Americas, Inc.*, the District Court for District of Massachusetts was confronted with a factually analogous situation to this case, where a new NPDES permit was issued during the pendency of a citizen suit challenge to the predecessor permit. 777 F. Supp. 1032, 1034 (D. Mass. 1991) (“*MPIRG*”). Similar to the *Carter-Wallace* court, that district court looked to the specific terms and conditions of the respective NPDES permits. The court, noting that in circumstances where the terms of the new permit were the same as or stricter than those in the superseded permit it would be appropriate to allow the continuation of a citizen suit asserting exceedances of the old permit, extended that logic and reasoning to situations where the terms of the new permit were more relaxed. *Id.* at 1035. In those situations where the effluent limitations of the new permit were less stringent than the old permit, the court interpreted the change as a statement by the regulating authority that what was previously impermissible is now permissible. *Id.* Thus by extension, claims related to exceedances of the old permit terms and conditions that were no longer operative in the new permit issued after the institution of the citizen suit were also found to be mooted by new permit. *Id.* at 1035-36.

The logic and reasoning of the *Carter-Wallace* and *MPIRG* courts has direct application to the situation presented in this citizen suit. The terms and conditions of the Renewal Permit alter the terms and conditions of the 1994 NPDES Permit. In some instances, as proposed, the terms and conditions of the 1994 NPDES Permit remain the same and are carried forward into the draft Renewal Permit (*e.g.*, the monthly average limitations for both pounds per day and milligrams per liter for Biochemical Oxygen Demand, 5 Day (BOD₅)). In others, new effluent limits have been imposed (*e.g.*, the Renewal Permit imposes monthly average and daily maximum pounds per day limitations for Total Residual Chlorine, where none existed in the 1994 Permit). Finally, several limitations have been dropped altogether (*e.g.*, monthly average for flow) or replaced (*e.g.*, a limitation for fecal coliform in the 1994 NPDES Permit was replaced by the more appropriate indicator, *E. coli*).

Under *Gwaltney*, *Carter-Wallace*, and *MPIRG*, alleged violations of those effluent limitations that have been dropped altogether in the Renewal Permit may not support a citizen suit. However, the Court need not, nor is it able to, make an informed evaluation and comparison of the terms and conditions between the 1994 NPDES Permit and the Renewal Permit at this time because the administrative review process for the Renewal Permit has not been exhausted. Consequently, a stay of this case is warranted here, as the final terms and conditions of the Renewal Permit directly implicate and will control this Court's analysis and the continued viability of CRK's citizen suit.

- i. Certain effluent limitations relied upon in this citizen suit will no longer be operative under the Renewal Permit and thus may not support the alleged violations advanced by CRK.*

Many of the exceedances alleged to constitute violations of the 1994 Permit under Count III of the Complaint, *see* dkt.#1-3, relate to effluent limitations that will no longer be conditions

of the Renewal Permit. These include both effluent constituents that will no longer be subject to monitoring, as well as limitation standards that have been dropped by the Renewal Permit.

First, under the 1994 NPDES Permit, BOD₅ discharges were limited, *inter alia*, to a weekly average testing cycle of 45 mg/l. *See* 1994 NPDES Permit at 2. Further, BOD₅ discharges were limited to a monthly average testing cycle of 30 mg/l, but not subjected to a daily maximum discharge limit. *Id.* However, under the Renewal Permit, CWS is no longer subject to a weekly average discharge limitation for BOD₅. Instead, the Renewal Permit drops the weekly average limitation for BOD₅ altogether, while maintaining the same monthly average discharge limitation of the 1994 NPDES Permit and imposing a new, daily maximum discharge limitation of 60 mg/l. Consequently, because the Renewal Permit no longer imposes the discharge limitation sought to be enforced by CRK, this term is no longer a condition of CWS's permit that is in effect, and thus allegations of past exceedances, to the extent they are not subject to an affirmative defense,¹¹ are not continuing violations (and are, in fact, wholly past violations) and are therefore not the proper subject of a citizen suit under *Gwaltney*.

Second, the 1994 NPDES Permit monitors fecal coliform at the discharge site and imposes discharge limitations of 200 per 100 mL for a monthly average, and 400 per 100 mL as a daily maximum. However, even prior to the issuance of the 1994 NPDES Permit, studies of the EPA indicated that fecal coliform was not a reliable indicator of organisms that could cause gastrointestinal illnesses in humans.¹² The Renewal Permit reflects the EPA's official position

¹¹ *See infra* II.b.ii, regarding CWS's upset defense to many of the alleged exceedances.

¹² Fecal coliform have been used as indicators of water quality for decades. However, research calling into question the accurateness and reliability of fecal coliform as a reliable indicator prompted EPA to issue a new bacteria criteria document that recommended replacing the use of fecal coliform with *E. coli* as a more reliable pathogen indicator. 69 Fed. Reg. 67218 (Nov. 16, 2004). Thereafter, Congress passed the Beaches Environmental Assessment and Coastal Health (BEACH) Act in 2000, *see* PL 106-284, Oct. 10, 2000, 114 Stat. 870 (2000)

that fecal coliform is no longer an appropriate pathogen indicator and is thus no longer monitored. As a result, seven of the exceedances advanced by CRK in the Complaint related to fecal coliform violations are for wholly past violations¹³ that have no likelihood of future occurrence, and therefore do not constitute continuing or ongoing violations required to maintain a citizen suit.

Consequently, viewing the alleged effluent limitation exceedances in light of the terms of the Renewal Permit, only one parameter (using CRK's nomenclature from dkt.#1-3) of alleged violation would still be in effect under the Renewal Permit, that being the monthly average BOD₅ limitation of 30 mb/L.

ii. Certain of the alleged violations are subject to the affirmative defense of upset.

In addition to the potential elimination of effluent limitations, the issues that will be in play when the merits of CRK's allegations of exceedances are considered by the Court will be subject to CWS's affirmative defense of upset under the 1994 Permit.¹⁴ The affirmative defense of "upset" derives from the regulations implementing the NPDES permitting program, *see* 40 C.F.R. § 122.41, which provides certain conditions that are incorporated into all issued NPDES

(H.R. Conf. Rep. No. 999 (S.522), 106th Cong., 1st Sess. (2000), which required 35 coastal states and territories, including South Carolina, to update their recreational water quality standards to conform with the EPA's pathogen criteria indicators (*i.e.*, E. coli). DHEC has adopted (and is adopting) these standards in the handful of applicable permits issued during the last few years and currently.

¹³ In addition, an upset defense exists for at least one of the alleged fecal coliform exceedances as discussed in the next section.

¹⁴ This discussion is offered to provide the Court with context of the issues that will be subject to proof during the merits phase of this case. While it remains CWS's burden of proving the occurrence of an upset, and those affirmative defenses are not the subject of the within motion, CWS provides the Court with this description of its defenses as further exposition of the viability of many of the effluent exceedances alleged by the Complaint.

permits. Among the conditions expressly incorporated into both the 1994 NPDES Permit and the Renewal Permit is the affirmative defense of “upset,” which is defined in the regulation as:

[A]n exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

40 C.F.R. § 122.41(n)(1).

In its Answer, dkt.#8, CWS affirmatively asserted as a defense to the exceedance violations alleged in Count III of the Complaint that eleven (11) of the reported exceedances were upsets and subject to proof of that affirmative defense.¹⁵ Thus, subject to proof of upset, those exceedances are excused from constituting violations of the NPDES Permit by its plain language and by reference to and operation of 40 C.F.R. § 122.41(n).

iii. The single remaining alleged violation which could arguably be asserted under the Renewal Permit, and which is not subject to an upset defense, has not occurred since January 2013.

Once this Court takes into consideration the effluent limitation terms and conditions that remain in effect from the 1994 NPDES Permit (in light of the terms and conditions of the Renewal Permit), only one (1) alleged exceedance, out of the twenty-three (23) alleged in the Complaint, *see* dkt.#1-3, is arguably proper to advance in this citizen suit.¹⁶ That single alleged exceedance of the monthly average BOD₅ limitation occurred in January 2013, over two and a half years ago. However, the fact that a single occurrence may not constitute a “continuing” or

¹⁵ These exceedances include ten (10) related to BOD₅ including 02/09, 06/09, 04/10, 04/11, 04/12, 04/13, 05/13, 07/13, and 02/14, as well as the flow discharge limitation exceedance for 07/13.

¹⁶ As discussed above, all of the alleged exceedances but for the monthly average BOD₅ limitation are parameters or effluents that are subject to monitoring under the Renewal Permit, and of the five, monthly average BOD₅ limitations alleged, four are subject to the affirmative defense of upset.

“intermittent” violation of an NPDES Permit is self-evident from the meaning of those two terms, which necessarily require, at a minimum, more than one occurrence. *See, generally, Gwaltney*, 484 U.S. at 64 (requiring citizen-plaintiffs to make a good-faith allegation of continuous or intermittent violation of the permit); *see also Allen Cnty. Citizens for the Env’t, Inc. v. BP Oil Co.*, 762 F. Supp. 733, 744 (N.D. Ohio 1991) (“The Court need not rule on the cause of the problem or the likelihood of its reoccurrence ... evidence of one exceedance is insufficient as a matter of law to raise a genuine issue of material fact as to whether there is a continuing violation.”). Moreover, if an occurrence has not occurred in over two and half years, CRK cannot meet its burden of showing a likelihood of reoccurrence or repetition, and an allegation of a single effluent limitation exceedance is insufficient to maintain a citizen suit.

- c. The issuance of the Renewal Permit demonstrates action taken by the permitting body to ensure compliance with the effluent standards.

A citizen suit under the CWA is intended to supplement the government’s role as the primary enforcer of the provisions of the CWA. *See* 33 U.S.C.A. 1365(b) (providing that no citizen suit may be commenced if an administrative action is pending or being diligently prosecuted by the permitting authority); *see also Gwaltney*, 484 U.S. at 60 (“The bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action.”). Here, DHEC is clearly taking action on CWS’s NPDES Permit, including explicit clarification of the “availability” issue advanced by CRK as the primary basis of its citizen suit, as well as updating the Renewal Permit to reflect changes in the EPA’s recommended use of more reliable pathogen criteria indicators (*i.e.*, *E. coli* instead of fecal coliform). Based on DHEC’s actions in issuing the Renewal Permit for public comment, these changes to CWS’s permit would render the interconnection issue moot, and all but one of the alleged effluent exceedances wholly past violations or excused by

the upset defense. Consequently, continuation of CRK's citizen suit at this stage, rather than the issuance of the stay of proceedings requested herein, would serve to undermine the supplementary role envisioned for citizen suits, *see Gwaltney*, 484 U.S. at 60, and DHEC's actions in issuing the Renewal Permit—and the terms contained therein—is further justification for a stay and suspension of this citizen suit until such time as the parties and this Court are operating on full information with respect to the operative terms of CWS's NPDES Permit.

II. A STAY OF THESE PROCEEDINGS DURING THE PENDENCY OF THE ADMINISTRATIVE PROCESS INVOLVING THE RENEWAL PERMIT IS WARRANTED UNDER THE COURT'S DISCRETIONARY STANDARD AND BALANCING TEST.

As set forth above, in considering a motion to stay, this Court should consider three factors: "(1) the interests of judicial economy; (2) hardship and equity to the moving party if the action is not stayed; and (3) potential prejudice to the non-moving party." *Impulse Monitoring*, 2014 WL 4748598 at *1. A stay is warranted in the circumstances before the Court and the Court should exercise its discretion in staying this citizen suit pending final resolution of the issuance and terms of the Renewal Permit.

First, the interests of judicial economy weigh heavily in favor of a stay. CRK's citizen suit was brought pursuant to an NPDES permit that will be superseded by final issuance of the Renewal Permit. Moreover, the terms of the Renewal Permit directly impact both remaining counts of CRK's Complaint. In fact, there is a substantial likelihood that many (if not all) of allegations and violations advanced in the citizen suit will be rendered moot by the terms and conditions of the Renewal Permit. Because a citizen suit seeking the imposition of monetary penalties for violations of an NPDES permit must be based on actual violations of permit terms and conditions that are "in effect," *see Gwaltney*, 484 U.S. at 59, a necessary precondition to the Court's evaluation of the monetary penalties is knowledge as to the operative terms on which

CWS is being evaluated. Only after the state administrative process has run its course and the terms and conditions of the Renewal Permit are finalized can this Court properly exercise its jurisdiction over the monetary penalty component of this citizen suit and evaluate the violations alleged in the Complaint vis-à-vis the permit terms that remain in the Renewal Permit. Consequently, both the parties' and the Court's time and resources are better served by staying these proceedings until such time as the terms and conditions of the Renewal Permit have been finalized.

Second, the substantial hardship and inequity that will flow to CWS as a result of the continuation of the citizen suit also weighs heavily in favor of a stay. If this citizen suit were to continue, the effect would be confusion in the traditional administrative process and raise the specter of actions in this proceeding being outside the scope of citizen suit jurisdiction. In South Carolina, DHEC is the administrative agency authorized under the Clean Water Act to issue NPDES permits pursuant to Section 402 of the CWA. Concomitant to that authority under the CWA is the *state* administrative review process of any DHEC permitting decision in South Carolina.¹⁷ Meanwhile, this Court's jurisdiction over citizen suits under the CWA extends only to those active NPDES permits which are "in effect." While the 1994 NPDES Permit is in effect until such time as it is superseded by the Renewal Permit, under these unique circumstances, CWS would be substantially prejudiced if it is made to litigate issues under the 1994 NPDES

¹⁷ That CRK has been satisfied with the result of these processes—and in particular the recognition by both DHEC and CMCOG that PSC approval of interconnection agreements is an appropriate provision of plan promulgated under 33 U.S.C.A. § 1288—is evidenced by the fact that CRK has never sought to force an interconnection by other sewer utilities discharging into the Lower Saluda River. *See* n.8, *supra* and dkt.#13-6, October 2009 CMCOG 208 Water Quality Management Plan Research Report (including a map of current domestic dischargers authorized by DHEC NPDES permits to discharge into the Lower Saluda in close proximity to CWS's discharge, including Development Services, Inc. (dkt.#16-4), Alpine Utilities Stoop Creek (dkt.#16-5), and Woodland Hills West SD (dkt.#16-6).

Permit, only to have those issues rendered moot upon the final issuance of the Renewal Permit. Moreover, because the Renewal Permit may be challenged (including by CRK, assuming it demonstrates standing) in an administrative proceeding, at a minimum CWS could be forced into simultaneously litigating the issue of the availability of an interconnection and permit limitations and argument about past actions and exceedances in multiple proceedings, likely against the same party. Likewise, if discovery in this case is permitted to proceed, it will be duplicative in both time and cost, while the administrative proceedings related to clarification of the issue of interconnection availability and effluent limitations would inform this Court's judgment as to CRK's citizen suit. Respectfully, CWS submits that the better course would be to stay these proceedings until such time as the parties and the Court are working with full information and knowledge of the terms and conditions of the operative NPDES permit.

Third, CRK would incur no prejudice by a stay of these proceedings pending any administrative review process of the Renewal Permit. First, CRK is able (and perhaps certain) to participate in any such administrative process and has the opportunity to challenge the permit in a full merits trial at the contested case stage (assuming it demonstrates standing); therefore, it has the ability to meaningfully participate to any challenge to the terms and conditions of the Renewal Permit. Additionally, a stay in these proceedings which permits the administrative review process to run its course will *at worst* narrow the issues and focus of this citizen suit, reflecting the most efficient and timely manner in which to resolve the issues raised by CRK.

Consequently, a balancing of the interests which this Court is required to review in considering a motion to stay all weigh in favor of the Court exercising its discretion to order a stay of these proceedings during the pendency of the administrative review process of the Renewal Permit.

A similar conclusion was reached in the case of *S.C. Wildlife Fed'n v. Limehouse*, C/A No. 2:06-cv-2528-DCN, 2009 WL 2244210, at *1 (D.S.C. July 27, 2009). There, the Court was confronted with, *inter alia*, a voluntary remand and stay of the proceedings pending a reevaluation of the Final Environmental Impact Statement (FEIS) for proposed construction of the Briggs-Delaine-Pearson Connector, which was the subject of the administrative review under NEPA.¹⁸ *Id.* In evaluating the appropriateness of the motion to stay, this Court noted that the revised—or new—FEIS that emerged from the reevaluation process might have revised terms or analyses that impacted upon the claims of the plaintiffs in the pending litigation, including, in some instances, the potential to moot certain of the claims altogether. *Id.* at *5. Accordingly, this Court determined that “[u]ntil the reevaluation occurs, however, there is no way to predict what the outcome of the process will be and how that outcome will impact this litigation. Under these circumstances, the court finds that a remand and a stay of this litigation are in order.” *Id.* Respectfully, CWS contends that the same logic and balancing of the equities applied by the Court in *S.C. Wildlife Fed'n* is appropriate under this Court’s discretionary stay standard in this case and a stay is warranted.

Lest there be any confusion, although CWS contends that the terms and conditions of the Renewal Permit have the potential to moot many, if not all, of CRK’s claims, the within request for a stay is not a request for a determination of mootness of the claims at this juncture. At this stage, all that is necessary is that CWS demonstrate that the Renewal Permit has the potential to impact and affect the scope of this claims and this Court’s analysis and adjudication, including the potential to moot some or all of the claims—which it has done. Therefore, this Court need

¹⁸ National Environmental Policy Act, 42 U.S.C.A. §§ 4332 *et seq.*

not, and, in fact, cannot, determine the effect of the terms and conditions of the Renewal Permit until such time as the Renewal Permit has been finalized.

WHEREFORE, having fully set forth its motion and supporting memorandum, CWS respectfully requests that a stay be issued until such time as the State administrative process is completed and a final decision on the Renewal Permit is issued and fully and finally adjudicated.

Respectfully submitted,

s/Randolph R. Lowell

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Attorneys for Defendant

Carolina Water Service, Inc.

August 5, 2015
Columbia, South Carolina

Attachment 2

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION**

CONGAREE RIVERKEEPER, INC.,)	
)	
Plaintiff,)	
)	
v.)	Case No. 3:15-CV-194-MBS
)	
CAROLINA WATER SERVICE, INC.,)	
)	
Defendant.)	
)	

**PLAINTIFF CONGAREE RIVERKEEPER’S RESPONSE TO
DEFENDANT’S MOTION TO STAY CASE**

In moving to stay this litigation, Defendant Carolina Water Service (“CWS”) asks this Court to ignore the harm from ongoing unlawful pollution to the public and Congaree Riverkeeper and derail a Clean Water Act citizen enforcement case because of a three-part hypothetical. That hypothetical assumes that: (1) the South Carolina Department of Health and Environmental Control (“DHEC”) reissues a new National Pollution Discharge Elimination System (“NPDES”) permit to CWS that contains terms that CWS seeks; (2) the new permit becomes final and effective before the end of this litigation; and (3) the final changes to the permit terms completely moot and alleviate CWS’s liability for violations set forth in the Complaint. CWS contends that this three-part hypothetical justifies delaying resolution of this case – already once delayed by a CWS motion to dismiss – and staying the matter in advance of potential motions CWS may file in the future.

The law applicable to stays makes it plain that there is no basis to again delay this case. A stay would be patently prejudicial to Congaree Riverkeeper, its members, and the environmental and human health interests they seek to protect by allowing pollution that has

been unabated for over fifteen years to continue indefinitely. CWS, on the other hand, would suffer no prejudice by proceeding with this litigation that enforces permit conditions which have been violated for years and that in all likelihood will not change. The draft permit proposed by DHEC, if ever finalized in the form CWS claims, would be unlawful on its face, but even if it were not, it would fail to moot all of Congaree Riverkeeper's claims. Thus, a stay would do immediate harm to Congaree Riverkeeper and the public in return for no gain in judicial economy. CWS's bid to derail this duly noticed and filed suit based on hypothetical future permits would also directly undercut the citizen enforcement regime enacted by Congress at 33 U.S.C. § 1365. As other courts have recognized, allowing future permit terms to excuse present violations would lead to absurd results and, in effect, reward noncompliance.

The Court should reject CWS's motion for a stay and allow this case to proceed to the merits as expeditiously as possible to address the serious ongoing environmental harm that the Clean Water Act's citizen suit provision is designed to remedy.

BACKGROUND

Congaree Riverkeeper brought this citizen suit under the Clean Water Act ("CWA") against CWS to cease illegal discharges from the I-20 wastewater treatment plant ("I-20 plant") that are polluting the Lower Saluda River, a heavily utilized recreational resource protected as a South Carolina Scenic River. Congaree Riverkeeper's claims involve two separate, but interrelated, violations occurring at the facility: (1) CWS's ongoing discharge of wastewater and failure to connect this facility to the regional system; and (2) repeated violations of effluent limitations and other provisions of the NPDES permit designed to protect water quality.

CWS filed a motion to dismiss several of Congaree Riverkeeper's claims on March 16, 2015, arguing that the Court lacked subject matter jurisdiction under the CWA citizen suit

provision, that Congaree Riverkeeper did not have standing, and that Congaree Riverkeeper's claims were barred by the statute of limitations. *See* Dkt. 7-2. The Court denied CWS's motion and proposed a scheduling order with a timeline under which the case was to proceed. *See* Dkt. 20 & 21.¹ Under the proposed scheduling order, the case would be briefed on summary judgment in early 2016, with a potential trial occurring in April of 2016.

Shortly before the parties submitted their initial disclosures and Rule 26(f) Report, DHEC released for public notice and comment a new draft NPDES permit for the I-20 plant. *See* DHEC Public Notice No. 15-137-H (July 16, 2015). DHEC plans to hold a public hearing on the proposed permit reissuance on August 25, 2015, and written comments on the draft permit are due by September 1, 2015. By its very terms, this is a *draft* permit, proposed for reissuance. Even if a new final permit is issued, the terms and conditions of the permit may change significantly from the draft to the final version based on public input, and moreover, the permit may be challenged by any aggrieved party, delaying the effective date of any new permit indefinitely. S.C. Code Ann. § 1-23-600(H)(2).

The permitting history of CWS's I-20 plant shows just how long and protracted the permitting process can be. In 2001, after years of negotiations between CWS and the Town of Lexington ("the Town") regarding the connection of the I-20 plant to the regional sewer system, the Central Midlands Council of Governments ("CMCOG") – at the request of CWS and the Town – submitted a misguided proposed amendment to the regional 208 Plan which would allow CWS to continue operating the I-20 plant as a permanent regional facility. *See* Dkt. 7-2 at 4-5. DHEC rejected the proposed amendment and reissued CWS's NPDES permit in 2001 with language that maintained CWS's obligation to connect to the Town's regional sewer system. *See*

¹ With the consent of Congaree Riverkeeper, the Court dismissed the second cause of action relating to the Section 208 Plan. *See* Dkt. 21 at 2.

Dkt. 7-2 at 4-5; *CMCOG v. DHEC*, 2002 WL 31716469, at *6 (Oct. 22, 2002). CWS, the CMCOG, and the Town challenged the decision in the South Carolina Administrative Law Court (“ALC”) in 2001.² *See* Dkt. 7-2 at 5-6. The Lexington County Joint Municipal Water and Sewer Commission intervened in the case. *See id.* at 5. A protracted legal battle ensued, which eventually ended up in state Circuit Court.³ *See id.* at 6. The Circuit Court case was indefinitely continued in May of 2006 – almost five years after the final 2001 permit was issued – and has been stayed ever since, *see id.*, meaning that the 2001 permit has never gone into effect, fourteen years after it was issued.

As noted, on July 16, 2015, DHEC issued its draft proposed NPDES permit. Parties have until September 1, 2015 to file comments. There is no legal deadline by which DHEC must issue a final permit.

STANDARD OF REVIEW

“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). CWS bears the burden of proving that a stay is warranted, *see Clinton v. Jones*, 520 U.S. 681, 708 (1997) (citing *Landis*, 299 U.S. at 255), and “must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay . . . will work damage to some one else.” *Landis*, 299 U.S. at 255. The District of South Carolina considers the following

² When administrative agency decisions, such as permit issuances, are challenged in the ALC, the decisions are automatically stayed pending resolution of the matter. S.C. Code Ann. § 1-23-600(H)(2).

³ Notably, under the review process applicable at that time, regulatory permitting decisions were not automatically stayed in the Circuit Court as they are in the ALC; however, CWS *et al.* requested, and were granted, a stay of the 2001 NPDES permit pending the Circuit Court’s review.

factors in determining whether to grant a stay: “(1) the interests of judicial economy; (2) hardship and equity to the moving party if the action is not stayed; and (3) potential prejudice to the non-moving party.” *Impulse Monitoring, Inc. v. Aetna Health, Inc.*, No. 3:14-CV-02041-MGL, 2014 WL 4748598, at *1 (D.S.C. Sept. 23, 2014) (quotation and citation omitted).

ARGUMENT

While styled as a motion for a stay, CWS spends the bulk of its motion arguing that the draft permit issued by DHEC “will moot” Congaree Riverkeeper’s claims, *see* Dkt. 28 at 6-17.⁴ At the same time, CWS is forced to concede that the Court is not “able to[] make an informed evaluation and comparison of the terms and conditions between the 1994 NPDES Permit and the Renewal Permit.” *Id.* at 20. This tension goes to the core problem of CWS’s motion: it does not meet the standard for a stay *or* a mootness-based motion to dismiss.⁵ Accordingly, there is no need for the Court to engage in a technical analysis of CWS’s three-part hypothetical because the future of the draft permit is entirely speculative and CWS has not made a threshold showing that a stay is justified.

Congaree Riverkeeper’s claims arising from the current operative permit remain live and unabated – as set forth by the Complaint and the record before the Court concerning CWS’s motion to dismiss. Allowing CWS’s pollution to continue without redress would result in significant harm to Congaree Riverkeeper, while CWS has utterly failed its duty to “make out a clear case of hardship or inequity in being required to go forward.” *Landis*, 299 U.S. at 255. Additionally, a stay would not further judicial economy, since it is unknown if DHEC will issue

⁴ Notably CWS disclaims any mootness argument at this juncture. *Id.* at 20.

⁵ While arguably not relevant because CWS disclaims any mootness argument at this point, it is worth noting that a defendant’s burden to demonstrate mootness in CWA cases is a heavy one; the defendant must demonstrate that it is “*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.” *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 66 (1987) (quotation and citation omitted, emphasis in original).

a new final permit that matches the draft, or whether that permit would be finalized and effective by the end of this case. Past experience teaches that such a schedule is unlikely. Even if timing could be put aside, DHEC could not *lawfully* issue a final and effective permit along the lines of what CWS wants, and even if it could, Congaree Riverkeeper's claims would *still* be live and in need of resolution by this Court. Thus, no judicial economy would be served by a stay.

Finally, but importantly, staying this litigation would be contrary to the purposes of the Clean Water Act's citizen suit provision enacted by Congress, and lead to the perverse result of CWS being free to ignore its current permit until such time as a new permit is issued (and any challenges to that permit are concluded). If anything, that route would give CWS – which has challenged this permit in the past – an incentive to delay implementation of a new permit to avoid compliance. The Court should deny CWS's motion and this case should proceed to the merits as expeditiously as possible pursuant to the Court's proposed scheduling order of June 18, 2015.

I. CWS's Permit Hypotheticals Do Not Justify a Stay.

CWS does not discuss how this case satisfies the standard for granting a stay until page 17 of its motion – with good reason. Not only has CWS failed to “make out a clear case of hardship or inequity in being required to go forward,” *Landis*, 299 U.S. at 255, it has failed to show that the governing factors – (1) the interests of judicial economy; (2) hardship and equity to the moving party if the action is not stayed; and (3) potential prejudice to the non-moving party, *see Impulse Monitoring*, 2014 WL 4748598, at *1 – support staying this litigation.

A. The Interests of Judicial Economy Favor Denial of a Stay.

The interests of judicial economy do not weigh in favor of a stay. CWS's entire argument that judicial economy favors a stay is premised on the triple hypothetical that (1) the

final permit will be issued and finalized in the very near future; (2) the final permit will be exactly like the draft and can be read as CWS proposes; and (3) the final permit will moot all claims this litigation. *See* Dkt. 28 at 17. But the “draft” permit that has been publically noticed by DHEC is just that – a draft. Its path to finality is anything but certain or swift, as demonstrated by the history of the very permit at issue in this case, in which a permit reissuance proposed in 2001 still has not been resolved. *See supra* at 3-4. It is undisputed that CWS is currently operating under, and is governed by, NPDES Permit No. SC0035564, issued November 17, 1994 and effective January 1, 1995 (the “1995 Permit”). *See* Dkt. 8 at ¶ 2.

In addition to past experience, this Court has another reason to expect that the draft permit will not take effect prior to resolution of this case: the permit as currently drafted violates various provisions of the CWA and its implementing regulations and cannot be legally finalized. While the draft permit retains the current permit’s language about the I-20 plant being a temporary facility that will be connected to the regional sewer system, CWS interprets it to modify CWS’s duty to have the I-20 plant connected to the regional sewer system and cease discharging. In particular, CWS interprets the draft as making the cessation of discharge and the physical connection of the I-20 system to the regional sewer system contingent upon South Carolina Public Service Commission (“PSC”) approval of an interconnection agreement between CWS and the Town of Lexington.

CWS has never maintained that PSC approval is a prerequisite for all scenarios that would result in the I-20 plant being connected to the regional sewer system. Thus, the condition of the permit, as interpreted by CWS, is counter-factual, and Congaree Riverkeeper plans to submit detailed comments explaining why the draft permit, to the extent it can be read to mean what CWS claims, would violate the CWA and its implementing regulations, including the

provisions regarding antidegradation and anti-backsliding. *See* 33 U.S.C. § 1313(d)(4)(B); 40 C.F.R. § 131.12; S.C. Code Ann. Regs. 61-68(D); 33 U.S.C. § 1342(o). DHEC must consider and respond to each comment it receives before moving forward with a final permit, if it decides to do so. *See* S.C. Code Ann. Regs. 61-9.124.11; S.C. Code Ann. Regs. 61-9.124.17. There is no basis to assume that DHEC will proceed with issuing an illegal permit; more likely, it will decide to clarify the language to repudiate CWS's reading before issuing a final permit.

“Judicial economy is not served by a delay.” *Humphrey Enters., Inc. v. United States*, No. 78-C-826, 1980 WL 1538, at *1 (E.D. Wis. Feb. 13, 1980). And delay is all that CWS seeks. Given the uncertainty of a new permit being issued and the potentially long process before that permit even takes effect, this litigation will conclude before there is a new binding permit. Moreover, as explained *infra* at 13-16, the new permit, even if finalized and made effective along CWS's wishes, will not moot all of Congaree Riverkeeper's claims, meaning this Court would still need to resolve issues in this case. A stay here would do nothing but delay this Court's resolution of Congaree Riverkeeper's claims to a later date, allowing evidence to become stale and environmental harm to continue unabated. In contrast, a “decision[] from this Court may aid the parties in reaching a resolution.” *Sierra Club, Hawaii Chapter v. City & Cnty. of Honolulu*, No. CV. 04-00463-DAE-BMK, 2007 WL 2694489, at *5 (D. Haw. Sept. 11, 2007).

All of Congaree Riverkeeper's claims in this case stem from the currently operable 1995 Permit,⁶ and Congaree Riverkeeper seeks relief for violations of that permit (a permit which will apply for the foreseeable future). Congaree Riverkeeper has also asked the Court for appropriate penalties for years of ongoing violations. For its part, CWS has taken the position that “[m]any

⁶ CWS cites the Supreme Court's decision in *Gwaltney*, 484 U.S. at 49, to support its claim that citizen suits may only be brought to enforce violations of an NPDES permit “which is in effect.” CWS does not contend however, nor could it, that the 1995 Permit is not currently in effect.

of the fundamental, underlying facts are undisputed.” *See* Dkt. 24 at 2.⁷ Thus, this case could move quickly to resolution, and “a stay would not further the orderly course of justice but will instead delay something that should have already happened [over fifteen] years ago.” *See United States v. Guam*, Civ. No. 02–00022, 2013 WL 5809289, at *11 (D. Guam Oct. 29, 2013), appeal dismissed, 596 F. App’x 562 (9th Cir. 2015).

B. CWS Will Not Experience Significant Hardship Without a Stay.

CWS argues that it will suffer “substantial hardship and inequity” if this citizen suit proceeds. Dkt. 28 at 18. This hardship and inequity, CWS claims, arise because the violations challenged here may supposedly be rendered moot if a new permit is issued. *Id.* at 18-19. However, as discussed *infra* at 13-16, issuance of a new permit, if and when it ever happens at all, and even hypothesizing that it contains exactly the terms that CWS wants, would not moot Congaree Riverkeeper’s claims for violations of the 1995 Permit. Moreover, CWS faces no hardship in having to litigate violations that have been ongoing for years, and which it had multiple opportunities to cure prior to the commencement of this litigation. *See Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) (quoting *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005)) (“[B]eing required to defend a suit [without more] does not constitute a ‘clear case of hardship or inequity’ within the meaning of *Landis*.”); *Sierra Club, Hawaii Chapter*, 2007 WL 2694489, at *4-5 (rejecting argument of hardship in “having to expend limited resources to draft and file an opposition to Plaintiffs’ pending motion for partial summary judgment and/or otherwise defend this lawsuit” when a defendant was also pursuing settlement negotiations with regulatory authorities).

⁷ Congaree Riverkeeper agrees that the operative facts here are largely undisputed, but seeks limited discovery to counter what will apparently be repetitive CWS motions concerning standing and redressability, as well as the issue of penalties.

CWS further argues that if a new permit is issued and challenged, CWS may be forced to simultaneously litigate similar issues in multiple fora. Dkt. 28 at 19.⁸ This assertion is both speculative and wrong. It is speculative because no one knows what the terms of a final permit would be, and thus what issues would be litigated in state administrative proceedings *if* a final permit is issued, and *if* that final permit is challenged. CWS's assertion is wrong because the state administrative hearing process does not allow citizen plaintiffs to bring analogous claims regarding enforcement of permit violations, and therefore CWS would not be subject to the risk of inconsistent judgments. *See, e.g., Sierra Club, Hawaii Chapter*, 2007 WL 2694489, at *5 (finding no harm in party having to continue litigating CWA action when "there is no pending EPA or DOH litigation in which either agency is seeking injunctive relief for the claims that remain in this lawsuit. Accordingly, there is no possibility of inconsistent results."). In sum, CWS has failed to "make out a clear case of hardship or inequity in being required to go forward." *Landis*, 299 U.S. at 255. CWS is no stranger to Court proceedings, nor is its parent company, Utilities, Inc. Because it will suffer no real hardship in having to litigate this case, the Court should deny the stay.

C. Congaree Riverkeeper and Its Members Will be Significantly Prejudiced by a Stay.

⁸ As it did with its motion to dismiss, CWS hints at but does not squarely raise abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Because the CWA citizen suit provision is intended to supplement state government actions, the *Burford* doctrine is inapplicable in this context. *See, e.g., Cmty. of Cambridge Env'tl. Health and Cmty. Dev. Grp. v. City of Cambridge*, 115 F. Supp. 2d 550, 560–61 (D. Md. 2000) (to apply the *Burford* doctrine to CWA citizen suits would essentially derogate the policy choices made by Congress); *Culbertson v. Coats Am., Inc.*, 913 F. Supp. 1572, 1578 (N.D. Ga. 1995); *Natural Res. Def. Council, Inc. v. Outboard Marine Corp.*, 692 F. Supp. 801, 810 (N.D. Ill. 1988); *Brewer v. City of Bristol*, 577 F. Supp. 519, 524 (E.D. Tenn. 1983) (citations omitted). Should CWS squarely raise abstention, Congaree Riverkeeper reserves the right to respond in full.

Even if there were any hardship to CWS, which there is not, that hardship is heavily outweighed by the harm that Congaree Riverkeeper and its members would suffer if this case were stayed indefinitely and the ongoing pollution was allowed to continue. The Supreme Court has explained that “[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.” *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987); *see also S. Appalachian Mountain Stewards v. A & G Coal Corp.*, No. 2:12-CV-00009, 2013 WL 5149792, at *2 (W.D. Va. Sept. 13, 2013) (holding that harm from potential selenium pollution significantly outweighs harm to discharger; “the public has a strong interest in disallowing unpermitted discharges of pollutants and . . . no interest of the public would be harmed by denying A & G’s motion to stay.”).

Congaree Riverkeeper has submitted declarations detailing just this sort of environmental harm as a result of CWS’s illegal pollution of the Lower Saluda River. Congaree Riverkeeper’s members use the Lower Saluda frequently for recreational activities including kayaking, canoeing, fishing, and swimming. *See, e.g.*, Dkt. 15-3 (Odum Dec.) at ¶ 3; Dkt. 15-2 (Norris Dec.) at ¶ 3. One member, Hartley Barber, also owns a river recreation outfitter business near the banks of the Lower Saluda that provides gear to paddlers and guided tours of the River. *See* Dkt. 15-5 (Barber Dec.) at ¶ 2. Since January 2009, CWS has reported twenty-four violations of the effluent limitations in its NPDES permit. *See* Dkt. 15-1 at 8-9. There is also a constant sheen and visible foam on the surface of water at the I-20 discharge site, *see* Dkt. 15-1 at 9, as well as an unpleasant odor, *see, e.g.*, Dkt. 15-2 at ¶ 6. The discharge has a detrimental impact on the members’ use and enjoyment of the Lower Saluda because they are concerned about health risks posed by the pollutants in the discharge and disgusted by the sight and smell of the discharge. *See, e.g.*, Dkt. 15-3 at ¶ 6; Dkt. 15-2 at ¶ 6; Dkt. 15-5 at ¶¶ 3-5. The members have

altered their use of that part of the River because of their concerns about the discharge. *See, e.g.*, Dkt. 15-5 at ¶ 3; Dkt. 15-3 at ¶ 5; Dkt. 15-2 at ¶ 6.

If this case is stayed and CWS is allowed to continue discharging into the Lower Saluda River in violation of its NPDES permit, Congaree Riverkeeper and its members will continue to suffer significant harm. Their decreased use and enjoyment of the River will persist, as will their concerns about the health risks posed by pollutants from the discharge. This injury is irreparable, and allowing it to continue is antithetical to the very purpose of the citizen suit provision of the CWA. *See Gwaltney*, 484 U.S. at 62 (citizen suit provision of the Clean Water Act has the “central purpose of permitting citizens to abate pollution when the government cannot or will not command compliance”).⁹

In sum, halting these proceedings pending the issuance and implementation of a new final permit would allow CWS to continue polluting the Lower Saluda River completely unchecked for months, or even years. This possibility alone warrants denial of the stay request. *See Sierra Club, Hawaii Chapter*, 2007 WL 2694489, at *4 (denying stay in CWA enforcement action because “[i]f [discharger] is granted a stay, then Plaintiffs will be denied the possibility of prompt injunctive relief to stop the water pollution”); *United States v. Guam*, 2013 WL 5809289, at *8 (denying a stay that “would also result in continued violation of federal law and negatively

⁹ The case cited by CWS as analogous to the present situation, *S.C. Wildlife Federation v. Limehouse*, Civ. No. 06-CV-2528, 2009 WL 2244210 (D.S.C. July 27, 2009), contains no analysis whatsoever of the factors determining whether a stay should be granted. Instead, that court, after finding that a voluntary remand to an agency for further evaluation was appropriate, stayed the proceedings pending the results of the remand. No such situation exists here. Further, although the court in *S.C. Wildlife Federation v. Limehouse* did not engage in any analysis of hardship or prejudice to either party, that case is easily distinguishable for one important reason: the environmental plaintiffs were challenging the approval of a *future* project that had not yet begun construction, and in fact, more than three years after the final project approval, had not moved forward at all. 2009 WL 2244210, at *4. Here, by contrast, Congaree Riverkeeper is seeking to cease an ongoing illegal discharge that is currently polluting the Lower Saluda River, and has been for decades.

affect the United States' enforcement of the Clean Water Act" after years of inaction or noncompliance); *S. Appalachian Mountain Stewards*, 2013 WL 5149792, at *3.

II. Even If CWS's Permit Hypotheticals Came True, the New Permit Would Not Moot All of Congaree Riverkeeper's Claims.

As noted, CWS relies on three underlying premises to support its motion for a stay: (1) that CWS will receive a final and effective renewed permit before this litigation is complete; (2) that the final renewed permit will be exactly the same as the draft permit; and (3) that the future final permit will moot "most, if not all," of Congaree Riverkeeper's claims for violations of the 1995 Permit. *See, e.g.*, Dkt. 28 at 2. Congaree Riverkeeper has demonstrated that it is unlikely that CWS will receive a final and effective permit before this litigation is over, and that a final effective permit could (lawfully) do what CWS contends the draft permit does. *See supra* at 6-9. But even if DHEC issued a final permit incorporating all of the terms of the draft permit, and even if the terms are construed as CWS wishes, all of Congaree Riverkeeper's claims would not be moot.

Courts faced with similar situations have rejected mootness arguments based on potential future regulatory actions. In *Adams v. Teck Cominco Alaska, Inc.*, No. 3:04-CV-00049-JWS, 2006 WL 2105501, at *6 (D. Alaska July 28, 2006), the court rejected a "regulatory mootness" argument based on a proposed change in a NPDES permit. There, like here, a defendant argued that "'an anticipated change' to its . . . NPDES permit renders plaintiffs' claim for violations of [permit terms] moot." *Id.*

The *Teck Cominco* court found that the defendant could not meet its heavy burden to demonstrate mootness because it was currently operating under an existing permit, which it had violated. *Id.* Moreover, the court held, even if it "assume[d] the renewed permit will moot plaintiffs' claims for injunctive relief related to violations of the [permit terms], the court could

still impose civil penalties for violations that have already occurred provided the violations are ongoing or capable of repetition.” *Id.*; see also *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1135 (11th Cir. 1990) (“the mootness of injunctive relief will not moot the request for civil penalties as long as such penalties were rightfully sought at the time the suit was filed”); *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1153 (9th Cir. 2000) (“As is ordinarily the case with monetary relief, liability for civil penalties under the Clean Water Act attaches at the time the violations occur, not at the time of the judgment. Further, such monetary penalties continue to fulfill their purpose after the issuance of a new permit: Civil penalties deter future violations of the Clean Water Act even when injunctive relief is inappropriate.”) (internal citation omitted).

These holdings are grounded in a rationale that polluters should be held accountable for past violations so long as these violations were live at the time the suit commenced. As explained in *Atlantic States*,

If post-suit compliance results in a mootness of the suit for civil penalties, then citizens will have less incentive to bring suit since they know that the case may be deemed moot and dismissed before judgment. The potential for a citizen suit also will become a less effective deterrent to violators, since they know that they may be able to avoid paying *any* penalties by post-complaint compliance.

Perhaps the most dangerous result of the district court’s holding is that it encourages violators to delay litigation as long as possible, knowing that they will thereby escape liability even for post-complaint violations, so long as violations have ceased at the time the suit comes to trial or is decided on summary judgment. Under such a holding, dischargers could intentionally violate the Clean Water Act until they are sued and then obtain a stay while continuing their violations until they eventually are in compliance with the law. At this point, the case would be dismissed and they would have escaped all penalties. The district court’s understanding of mootness reads the civil penalties provision out of the Clean Water Act.

897 F.2d at 1136-37 (emphases added). It is just this procedure – delaying litigation as long as possible by seeking a stay while violations continue until it is eventually in compliance with the law – that CWS attempts here.

CWS is wrong to analogize this case to one in which “an NPDES permit has been renewed or re-issued during the pendency of a citizen suit.” Dkt. 28 at 10. No NPDES permit has been renewed or reissued here. DHEC has merely released a *draft* permit for public comment. The cases cited by CWS are thus inapposite. In both *Public Interest Research Group of New Jersey, Inc. v. Carter-Wallace, Inc.*, 684 F. Supp. 115 (D. N.J. 1988), and *Massachusetts Public Interest Research Group v. ICI Americas Inc.*, 777 F. Supp. 1032 (D. Mass. 1991), a new permit had been issued and taken effect, and the courts were grappling with how to proceed with claims for violations under both the old and new permits. 684 F. Supp. at 116; 777 F. Supp. at 1033. This is not the situation here, given that no final permit has issued or is effective (and in fact, DHEC is only at the beginning of its permit review process).

CWS also argues that the terms and conditions in the draft permit would moot some of Congaree Riverkeeper’s claims under *Carter-Wallace* and *ICI Americas* because certain effluent limitations that form the bases of Congaree Riverkeeper’s claims will no longer be in place under the revised permit. *See* Dkt. 28 at 12-14. Not only is this pure speculation, but *Carter-Wallace* and *ICI America* make clear that claims brought under a previous permit are only moot once a new permit is issued *if* the permitting agency deliberately relaxed the permit requirements or eliminated them completely, because this is “in effect, a statement by the government agencies that, to an extent, conduct that was impermissible before is now permissible.” 777 F. Supp. at 1035.

The draft permit does not relax CWS's effluent limitations with respect to fecal coliform and BOD5.¹⁰ Rather, the proposed change to these limitations reflects DHEC's expertise on the most appropriate way to *monitor* these pollutants. Under the draft permit, CWS is still required to meet limits for BOD5, but that pollutant is monitored on a daily instead of weekly basis. Similarly, DHEC has not determined that bacteria in CWS's discharge is no longer a concern, it has just proposed the replacement of the fecal coliform parameter with *e coli*, which, as CWS points out in its motion, has been recommended by EPA as a more reliable pathogen indicator. *See* Dkt. 28 at 13 n. 12.¹¹

In sum, as in *Teck Cominco*, even if CWS's assumptions prove to be true and a new permit is issued that is essentially identical to the draft, Congaree Riverkeeper's claims flowing from the old permit would not be moot, at least insofar as the availability of penalties for violations that were properly alleged at the time suit was filed. *See Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351, 356 (8th Cir. 1998) ("Plaintiff retains 'a concrete interest' in enforcing its penalties claim, even if any penalties recovered from the polluter go to the United States Treasury. When there is no agency enforcement action in the picture, a polluter should not be able to avoid otherwise appropriate civil penalties by dragging the citizen suit plaintiff into costly litigation and then coming into compliance before the lawsuit can be resolved."); *Atl. States Legal Found., Inc., v. Stroh Die Casting Co.*, 116 F.3d 814, 820 (7th Cir. 1997); *Natural Res. Def. Council v. Texaco Ref. & Mktg., Inc.*, 2 F.3d 493, 502-03 (3d Cir. 1993); *Atlantic States*, 897 F.2d 1128 at 1135; *Chesapeake Bay Found., Inc. v. Gwaltney of*

¹⁰ As noted above, DHEC could not relax these requirements under CWA anti-backsliding provisions. *See supra* at 7-8.

¹¹ CWS's claims about upset are similarly unavailing. Upset is an affirmative defense that must be proven by CWS, yet CWS asks the Court to presume that it is true in support of CWS's mootness argument. The Court should reserve this issue for adjudication after discovery is complete.

Smithfield, Ltd., 890 F.2d 690, 696–97 (4th Cir. 1989). CWS has not – nor could it – meet the heavy burden of demonstrating that all of Congaree Riverkeeper’s claims would be mooted by the hypothetical issuance of a new NPDES permit. Given this, there is simply no basis for the Court to stay this action, only to have to deal with it again later after months or years of more violations.

III. Important Public Policies Require Denial of the Stay.

By asking this Court to stay this action while pollution continues unabated in the Lower Saluda River because some future permit may (or may not) change the situation, CWS’s motion asks this Court to overlook the fundamental purposes of the CWA citizen suit provision. As the Fourth Circuit has recognized, the “citizen suit provision is ‘critical’ to the enforcement of the CWA” since it “allows citizens ‘to abate pollution when the government cannot or will not command compliance.’” *The Piney Run Pres. Ass’n v. The Cnty. Comm’rs of Carroll Cnty., MD*, 523 F.3d 453, 456 (4th Cir. 2008) (quoting *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 152 (4th Cir. 2000); *Gwaltney*, 484 U.S. at 62). The citizen suit plays a key role in ensuring that dischargers do not have a license to pollute indefinitely in cases where government action to abate the pollution is delayed. See *Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1013 (3d Cir. 1988). “In such a case, the citizen suit is ‘interstitial’ rather than ‘intrusive.’” *Id.* (quoting *Gwaltney*, 484 U.S. at 61).

Congaree Riverkeeper filed this citizen suit because although CWS’s NPDES permit has required it to connect the I-20 plant to the regional sewer system for well over a decade, it continues discharging sewage wastewater into the Lower Saluda to this day. CWS has also consistently violated the effluent limitations and other permit terms that were put in place to protect water quality in the Lower Saluda.

Taken to its logical conclusion, CWS's argument that it cannot be held accountable for violations of its current permit because a new permit may be issued in the future would lead to absurd results. CWS could stop even attempting to comply with its current permit and avoid any liability for doing so. Accepting CWS's reasoning would not only undermine the purpose of the citizen suit provision, it would also undermine this Court's jurisdiction to enforce the CWA. It would also create a situation whereby CWS could further postpone its obligation to comply with any restrictions or limitations at all by challenging any new permit that issued and thereby delaying – potentially for years – its implementation. In other words, CWS, the polluter, would have unfettered ability to discharge whatever it wanted into the River, and Congaree Riverkeeper and its members, those who are directly harmed by the discharge, would have no recourse. This cannot be a permissible outcome.

CONCLUSION

For the foregoing reasons, Congaree Riverkeeper respectfully requests that this Court deny CWS's motion to stay this citizen suit.

Respectfully submitted this 24th day of August, 2015.

/s/ J. Blanding Holman IV
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