IN THE
SUPREME COURT OF THE UNITED STATES

No. 138, Original

STATE OF SOUTH CAROLINA,
Plaintiff,
v.

STATE OF NORTH CAROLINA,
Defendant.

Before the Special Master
Hon. Kristin L. Myles

BRIEF OF THE STATE OF SOUTH CAROLINA CONCERNING PHASE ONE AND PHASE TWO ISSUES AND TIMING

In the May 23, 2008 status conference, the Special Master ordered simultaneous opening and reply briefs on the scope and structure of the case to be filed, respectively, on June 16 and 23, 2008. And in the Joint Proposed Case Management Plan submitted June 4, 2008 ("Joint Proposed CMP"), the party States agreed that "this matter will be bifurcated as set out in a separate order," following resolution of this dispute over the scope of "Phase One" and Phase Two" of the case. Joint Proposed CMP § 4.1.[1] Accordingly, South Carolina respectfully submits its opening brief concerning (1) the issues to be resolved in Phases One and Two of this

[1] In addition, "the parties will make best efforts to conduct all discovery efficiently, and any party may, for convenience, conduct discovery into matters relevant to Phase Two questions during Phase One." Joint Proposed CMP § 4.1.

case, and (2) the duration of Phase One fact and expert discovery, including the time for the exchange of expert reports.

The Supreme Court's equitable apportionment cases typically have first evaluated the sufficiency of the injury suffered by the downstream State. Once the downstream State's injury has been proved, the Court has then proceeded to balance that injury against the upstream State's interests. Moreover, although the downstream State has the initial burden of proving threshold injury, in the subsequent determination of equitable apportionment the Court weighs the respective uses of the river. Because that analysis applies in this case, the Court should bifurcate discovery in this case in precisely the same manner.

North Carolina has likewise taken the position that South Carolina must show injury as a threshold requirement for this lawsuit to proceed. In opposing the filing of South Carolina's bill of complaint, North Carolina argued that the harms alleged in its complaint were insufficient to meet the Court's threshold standard. *See* Brief of the State of North Carolina in Opposition at 17-21 (Aug. 7, 2007) ("NC Complaint Opp.") (Point II, entitled "South Carolina Has Not Demonstrated a Threatened Invasion of Its Rights"); *id.* at 20 ("South Carolina's allegation simply does not constitute a claim of such serious magnitude so as to require relief from this Court."). The Court, however, granted South Carolina's request for leave to file its complaint. In doing so, the Court made clear that the harms alleged in South Carolina's complaint, when proved, will undoubtedly meet the threshold injury requirement.

Consistent with the Supreme Court's equitable apportionment jurisprudence, along with North Carolina's own claim that South Carolina's showing of injury is a threshold requirement, Phase One should be limited to South Carolina's showing of injury; that is, the harms to South Carolina caused by acts in North Carolina. If, at the conclusion of Phase One, the Special Master finds that South Carolina has met its burden of proving injury, then Phase Two should commence and will concern the type of equitable apportionment decree that should be entered.

With regard to the schedule, South Carolina contends that Phase One fact discovery should conclude on August 31, 2009, and Phase One expert discovery should conclude on March 31, 2010, followed by a trial in June 2010.

A. Phase One and Phase Two

Equitable apportionment doctrine rests on the fundamental premise that "a State may not preserve solely for its own inhabitants natural resources located within its borders." *Idaho v. Oregon*, 462 U.S. 1017, 1025 (1983). "Consistent with this principle," the Court has explained, "States have an affirmative duty under the doctrine of equitable apportionment to take reasonable steps to conserve and even to augment the natural resources within their borders for the benefit of other States." *Id.* Accordingly, this case must be decided "on the basis of equality of right," recognizing the "equal level or plane on which all the States stand." *Connecticut v. Massachusetts*, 282 U.S. 660, 670-71 (1931) (internal quotation marks omitted); *accord Kansas v. Colorado*, 206 U.S. 46, 97-100 (1907).

Although the Catawba River originates in North Carolina, that upstream State has no right to exhaust or unreasonably diminish the River's resources before it flows into South Carolina. As Justice Holmes explained for the Court in *New Jersey v. New York*, 283 U.S. 336 (1931):

> A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the river might come down to it undiminished.

Id. at 342. The Court has explained that its "aim is always to secure a just and equitable apportionment 'without quibbling over formulas.'" *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982) (quoting *New Jersey v. New York*, 283 U.S. at 343).

1. Phase One: South Carolina's Proof of Threshold Injury

This Court's equitable apportionment "cases establish that a state seeking to prevent or enjoin a diversion by another state bears the burden of proving that the diversion will cause it 'real or substantial injury or damage.'" *Colorado v. New Mexico*, 459 U.S. at 187 n.13 (quoting *Connecticut v. Massachusetts*, 282 U.S. at 672; and citing, *inter alia*, *New Jersey v. New York*, 283 U.S. at 344-45). The Court has required that "the threatened invasion of rights is of serious magnitude and established by clear and convincing evidence." *Connecticut v. Massachusetts*, 282 U.S. at 669.

The Court has made clear that the injury requirement is a threshold showing that must be met before the Court weighs the equities of each State's claimed uses

of the river. The downstream State must "bear the initial burden of showing that a diversion by [the upstream State] will cause substantial injury to the interests of [the downstream State]." *Colorado v. New Mexico*, 459 U.S. at 187 n.13. In the cited case, the Court found that the downstream State had shown serious injury by clear and convincing evidence, and therefore that "[t]he burden has therefore shifted to [the upstream State] to establish that a diversion should nevertheless be permitted under the principle of equitable apportionment." *Id.*; *see also Colorado v. New Mexico*, 467 U.S. 310, 317 (1984) (same).[2] In *Nebraska v. Wyoming*, 325 U.S. 589, 607, 608 (1945), the Court denied a motion to dismiss by an upstream State claiming that the State "has not injured nor presently threatens to injure any downstream water user," explaining that the downstream state had met its initial burden to show threshold injury, *see id.* at 607-08, and proceeded therefore to weigh the equitable apportionment factors, *see id.* at 618. In *Connecticut v. Massachusetts,* the Court applied the threshold injury requirement to dismiss the case based on insufficient injury to "navigability of the river, agriculture, fish life or pollution." 282 U.S. at 672-73.

North Carolina itself has argued that injury is a threshold showing that must be made before the Court engages in the balancing phase of an equitable

[2] In thus shifting the burden, the Court has made clear that an upstream State seeking to take water formerly available to the downstream State must likewise justify its proposed new diminishment by establishing "not only that its claim is of a 'serious magnitude,' but also that its position is supported by 'clear and convincing evidence.'" *Colorado v. New Mexico*, 459 U.S. at 187 n.13 (quoting *Connecticut v. Massachusetts*, 282 U.S. at 669); *see also Colorado v. New Mexico*, 467 U.S. at 317 (same); *infra* p. 14 (discussing Phase Two).

apportionment case. In (unsuccessfully) opposing the filing of South Carolina's bill of complaint, North Carolina asserted that "South Carolina Has Not Demonstrated a Threatened Invasion of Its Rights." NC Complaint Opp. at 17-21 (title of argument Point II). North Carolina thus asserted that "South Carolina's allegation simply does not constitute a claim of such serious magnitude so as to require relief from this Court." *Id.* at 20 (citing *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995)); *see also* Reply Brief of the State of South Carolina in Support of Its Motion for Leave To File Complaint 9-10 (Aug. 22, 2007) (rebutting this argument). North Carolina's own argument thus recognizes that bifurcation on this basis is appropriate. And the Court's rejection of North Carolina's claim necessarily ruled that South Carolina's allegations of harm, if proved, fully satisfy the Court's threshold standard. *See also infra* p. 12.

Importantly, the harm the upstream State causes need *not* be independently tortious, wrongful, or otherwise improper under state (or federal) law. Instead, "[t]he question of apportionment of interstate waters is a question of 'federal common law' upon which state statutes or decisions are not conclusive." *Illinois v. City of Milwaukee*, 406 U.S. 91, 103, 105 & n.7 (1972); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938).

Moreover, this "federal common law exists" precisely because "state law cannot be used" to resolve disputes between States about the use of an interstate river. *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981); *see also Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 & n.13 (1981) ("our federal

system does not permit the controversy to be resolved under state law"); *Hinderlider*, 304 U.S. at 108-10.

Before setting forth the factors from this Court's equitable apportionment cases that establish a downstream State's injury, it is important to place North Carolina's interbasin transfer statute in its proper perspective. Although the transfers made under North Carolina's interbasin transfer statute help to quantify the extent of harm sustained by South Carolina, that state statute "cannot be used" as a justification for North Carolina's uses of the Catawba River. Instead, this case must be settled under federal common law, "on the basis of equality of right," recognizing the "equal level or plane on which all the States stand." *Connecticut v. Massachusetts*, 282 U.S. at 670-71 (internal quotation marks omitted); *accord Kansas v. Colorado*, 206 U.S. at 97-100. North Carolina's previously approved transfers from the Catawba River cannot be presumed to be part of North Carolina's equitable share, and North Carolina's statute should be declared invalid to the extent that it authorizes transfers in excess of North Carolina's equitable apportionment as determined by federal common law. "The doctrine of equitable apportionment is neither dependent on nor bound by existing legal rights to the resource being apportioned." *Idaho v. Oregon*, 462 U.S. at 1025. And this Court has long rejected the principle, implicit in North Carolina's interbasin transfer regime, that "a state rightfully may divert and use, as she may choose, the waters flowing within her boundaries in [an] interstate stream, regardless of any prejudice that

this may work to others having rights in the stream below her boundary." *Wyoming v. Colorado*, 259 U.S. 419, 466 (1922).

The Court's precedents have established a number of ways that a State may satisfy its burden to show injury, without foreclosing other means based on different facts. As discussed below, South Carolina may satisfy its threshold burden of proving injury based on a range of factors, or a combination thereof, resulting from harms to water quantity and water quality (including assimilative capacity for waste water). Those harms may include (but are not limited to) harms to environmental, recreational, commercial, industrial, agricultural, and other similar interests.

The Court has made clear that the downstream State may show injury by proving that river flows are insufficient to support the existing uses made by the downstream State's water users. Thus, in *Colorado v. New Mexico*, the Court found the requisite injury where existing uses had appropriated the entire flow of the river. *See* 459 U.S. 187 n.13. The Court explained that New Mexico had proven injury by clear and convincing evidence "since *any* diversion by Colorado, unless offset by New Mexico at its own expense, will necessarily reduce the amount of water available to New Mexico users." *Id.*[3] Thus, proof that a river is fully appropriated is sufficient to show injury from which any subsequent withdrawals would trigger the need for an equitable apportionment decree.

[3] The Court has referred to rivers in cases involving western States that follow the state-law doctrine of prior appropriation as being "fully appropriated." *See Colorado v. New Mexico*, 459 U.S. at 177 ("The water of the Vermejo River is at present fully appropriated by users in New Mexico.").

At the same time, the Court has made clear that the injury need not be suffered year round. Rather, the Court has found serious injury where the flow of a river is inadequate to support and sustain existing uses at times of low flow – even if the flow at other times of the year is sufficient to do so. In *Wyoming v. Colorado*, for example, the Court found clear and convincing evidence of significant injury based on the dependable flow of the waters at issue. *See* 259 U.S. 471-84. In rejecting the defendants' proposal to use the "average yearly flow," the Court explained that, "[t]o be available in a practical sense, the supply must be fairly continuous and dependable." *Id.* at 471.

In *Nebraska v. Wyoming*, the Court likewise found that the complaining State made a clear and convincing showing of substantial injury based solely on evidence of the "dependable natural flow of the river during the irrigation season." 325 U.S. at 608. The Court again rejected the use of average yearly flows as the sole basis for injury. *See id.* ("The evidence supports the finding of the Special Master that the dependable natural flow of the river during the irrigation season has long been over-appropriated. A genuine controversy exists."). In addition, the Court took into account recent droughts. *See id.* at 626 (excluding higher water flow data from pre-drought years). Because it was unclear whether the drought was a cycle about to end or a new norm, the Court concluded in 1945 that "the decree which is entered must deal with conditions as they obtain today. If they

substantially change, the decree can be adjusted to meet the new conditions." *Id.* at 620 (citing *Wyoming v. Colorado*, 259 U.S. at 476).[4]

In *New Jersey v. New York*, which concerned New York's proposed diversion of the Delaware River for municipal water needs of New York City, the Court found the requisite injury based solely on harms to river recreation and oyster fishing. *See* 283 U.S. at 345. Although Justice Holmes's opinion for the Court found that New York's request to divert 600 million gallons per day ("mgpd") from tributaries of the Delaware River "will not materially affect the River or its sanitary condition, or as a source of municipal water supply, or for industrial uses, or for agriculture, or for the fisheries for shad," it nevertheless found sufficient proof of serious injury based on (1) harm to New Jersey's "use for recreation and upon its reputation in that regard" and (2) "the effect of increased salinity of the River upon the oyster fisheries." *Id.*; *cf. Nebraska v. Wyoming*, 515 U.S. at 12-15 (holding that proof of environmental harms or water depletion can be used to show injury in seeking enforcement of an equitable apportionment decree).

Thus, South Carolina may base its showing of injury on inadequate water flows either at certain times of the year or all year. It need not prove that the flows are inadequate year-round and in all years, but only that the flows are inadequate

[4] In *Kansas v. Colorado*, 514 U.S. 673 (1995), which concerned enforcement of an interstate compact, the Court found the clear and convincing standard met where pumping from ground wells "caused material depletions of the usable Stateline flows of the Arkansas River, in violation of the Arkansas River Compact." *Id.* at 693-94 (internal quotation marks omitted). The parties there disputed whether the standard for enforcing an existing interstate compact should be by a preponderance of the evidence or by clear and convincing evidence. The Court found it unnecessary to decide that question because it found both standards easily met by the well-pumping depletions. *See id.* at 694.

during times of low flows or drought. In times when flows are inadequate to support existing or reasonably contemplated uses, then "*any* diversion" by the upstream State "necessarily" harms the downstream State. *Colorado v. New Mexico*, 459 U.S. 187 n.13. Alternatively, South Carolina may satisfy the Court's injury standard by showing that water diversions or water pollution in North Carolina have caused certain of the harms South Carolina has suffered to recreational interests and fishing interests. There is no requirement that South Carolina also show, for example, harms to downstream municipal water supplies, the sanitary condition of the river, industrial harms, or other harms. *See New Jersey v. New York*, 283 U.S. at 345. Nevertheless, South Carolina expects to be able to prove such harms as well, even beyond what is required for its threshold showing of injury.

South Carolina will surely meet the Court's threshold injury standard. As alleged in its complaint, South Carolina has suffered substantial harms from the low water flows, including as a result of North Carolina's interbasin transfer to the City of Charlotte in March 2002. Moreover, the interbasin transfer permit granted by North Carolina to the cities of Concord and Kannapolis was awarded in January 2007, and no waters have yet been withdrawn pursuant to that permit. *See* Motion for Leave To Intervene of the City of Charlotte, North Carolina at 7 (Feb. 13, 2008) ("the actual method for transferring 10 MGD from Lake Norman to Concord/Kannapolis has not been selected"). If those cities begin taking waters

from the Catawba River, then the harms to South Carolina will be substantially increased.

Importantly, the Court has necessarily already ruled that the harms alleged in South Carolina's complaint satisfy the Court's injury requirement. By rejecting North Carolina's claims that "South Carolina Has Not Demonstrated a Threatened Invasion of Its Rights," and that South Carolina failed to allege "a claim of such serious magnitude so as to require relief from this Court," NC Complaint Opp. 17, 20, the Court necessarily has ruled that South Carolina's allegations, if proven, are of the types that satisfy the Court's injury requirement. In addition, by asserting unsuccessfully that South Carolina's complaint should be rejected, North Carolina has acknowledged the threshold injury requirement, thus indicating that bifurcation on that basis is logical, reasonable, and appropriate.

2. Phase Two: What Type of Equitable Apportionment Decree Should Be Entered

Once injury is proven, the Court then weighs the respective equities. *See supra* p. 4-5. In doing so, the Court has characterized federal common law of equitable apportionment as "a flexible doctrine which calls for 'the exercise of an informed judgment on a consideration of many factors' to secure a 'just and equitable' allocation.'" *Colorado v. New Mexico*, 459 U.S. at 183 (quoting *Nebraska v. Wyoming*, 325 U.S. at 618). The Court has "stressed that in arriving at 'the delicate adjustment of interests which must be made,' we must consider all relevant factors, including:

> 'physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, [and] the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former.'"

Id. (quoting 325 U.S. at 618) (citation omitted; alteration by the Court). These factors "are merely an illustrative not an exhaustive catalogue." *Nebraska v. Wyoming*, 325 U.S. at 618.

Thus, in Phase Two, the nature and extent of all the harms proven in Phase One will inform the inquiry into what type of a decree should issue. In *New Jersey v. New York*, for example, the Court based its equitable apportionment decree on the finding that the damage to New Jersey's recreational and oyster fishing interests could be ameliorated by reducing New York's diversion from 600 to 440 mgpd; requiring New York to improve and increase its sewage treatment capacity; and requiring New York to release waters from certain reservoirs into the Delaware River during times of low flow. *See* 283 U.S. at 345-46. In other cases, the Court has tailored its decree to the loss of water flows suffered by the downstream State. *See Nebraska v. Wyoming,* 325 U.S. at 616-57; *Wyoming v. Colorado*, 259 U.S. at 471-95. And in *Wisconsin v. Illinois*, 278 U.S. 367, 408-09, 420 (1929) (Taft, J.), the Court enjoined a substantial portion of the City of Chicago's withdrawals from Lake Michigan, used to flush raw or partially treated sewage downstream after it was dumped into the Chicago River, based on the proven harms to interests including navigation, commerce, structures, summer resorts, fishing and hunting grounds, public parks and other enterprises, and riparian property generally.

In addition, the Court has made clear that an upstream State seeking to take water formerly available to the downstream State must likewise justify its proposed diminishment based on clear and convincing evidence. *See Colorado v. New Mexico*, 459 U.S. at 187 n.13; *Colorado v. New Mexico*, 467 U.S. at 316. Thus, where the downstream State "has met its initial burden of showing 'real or substantial injury,'" the "burden shift[s]" to the upstream State "to show, by clear and convincing evidence, that reasonable conservation measures could compensate for some or all of the proposed diversion and that the injury, if any, to [the downstream State] would be outweighed by the benefits to [the upstream State] from the diversion." *Colorado v. New Mexico*, 467 U.S. at 317 (quoting *Colorado v. New Mexico*, 459 U.S. at 187 n.13). In Phase Two, therefore, North Carolina will have the burden to prove that many if not all of its diversions from or discharges into the Catawba River, especially its recently authorized interbasin transfers, should be permitted on the basis of the Court's equitable apportionment doctrine. Any failure of proof on that point by North Carolina will inform the nature of the equitable apportionment decree that would be fashioned in Phase Two.

3. South Carolina's Proposal Is Efficient, Reasonable, and Consistent with The Court's Precedents

In view of the legal requirements that, first, the downstream State show injury, and, second, that if the downstream State carries its burden the various equitable apportionment factors be weighed, it is appropriate to bifurcate the case in the same fashion. Phase One, therefore, should be limited to South Carolina's showing of harm under the principles set out above by the Court (including any

other applicable precedents, depending on the facts revealed in discovery). Assuming South Carolina carries its burden in Phase One, Phase Two would commence and would focus on balancing the relevant equitable apportionment factors and conducting any additional discovery on those issues.

This is functionally the same approach the Court took in *Colorado v. New Mexico*. The Court first found that New Mexico had shown the requisite threshold injury. *See Colorado v. New Mexico*, 459 U.S. at 187 n.13. Then the Court remanded to the Special Master for additional factfinding and a weighing of the equities on issues including "the extent to which reasonable conservation measures by existing users can offset the reduction in supply due to diversion [by the upstream state], and whether the benefits to the [upstream] state seeking the diversion substantially outweigh the harm to existing uses in another state." *Id.* at 190. South Carolina's proposal is thus consistent with this Court's two-step approach to assessing equitable apportionment claims. Conducting the threshold inquiry into injury before weighing the equities and evaluating North Carolina's justifications for any diversions will bring efficiency to the case.

South Carolina's proposal has the added benefit of streamlining somewhat the Phase One inquiry due to the intervenors' limited interest in the issues to be decided therein, aside from providing relevant documents and other information in discovery. The City of Charlotte and the Catawba River Water Supply Project ("CRWSP") were each permitted to intervene "for th[e] limited purpose" of "defending its ability to execute the [interbasin] transfer challenged by South

Carolina." Order Granting Interventions at 11 (May 27, 2008) (CRWSP); *see id.* at 9-10 (same regarding Charlotte). Only if South Carolina first proves threshold harm at the Phase One trial will those interests come into play – in the balancing portion of Phase Two and in fashioning any equitable apportionment decree. For its part, Duke was granted intervention in order to protect its "direct interest in defending [a] negotiated agreement, as well as its current and future licenses" issued by the Federal Regulatory Energy Commission. *Id.* at 12. Similarly, that interest can be addressed in Phase Two, assuming South Carolina has proved the requisite injury in Phase One. Accordingly, the intervenors' interests are limited such that they should only participate to the extent their own withdrawals are threatened, which means they should not be participants in the Phase One trial and should have no or very limited roles in deposing witnesses during Phase One.

B. Phase One Fact and Expert Discovery

In § 5 of the Joint Proposed CMO, the party States agreed to separate dates for the close of fact and expert discovery, but could not agree on the specific dates. In § 5.7, the party States have agreed to opening expert reports by South Carolina, followed by opposing expert reports by North Carolina, and then reply expert reports by North Carolina; but they were unable to agree on the time between reports.

South Carolina proposes that the Phase One discovery should close on August 31, 2009. That is approximately a little more than one year from now, and should give each party ample time to investigate further and to propound and

respond to discovery concerning the harms to South Carolina caused by acts in North Carolina.[5] South Carolina also proposes that its expert reports be served 60 days later; that North Carolina's opposition reports be served 60 days later; that South Carolina's reply reports be served 60 days later; and that expert depositions be concluded 30 days later. Accordingly, South Carolina proposes that expert discovery close on March 31, 2010, and that a trial be scheduled for May 2010.

In proposing that schedule, South Carolina has conferred with its experts and determined that this amount of time is reasonable and sufficient for the work that needs to be done. In addition, South Carolina is committed to dedicating the resources necessary to avoid unnecessary delays in the discovery process. Moreover, in Phase One, South Carolina will presumably have more work to do than North Carolina, given its burden to show the harms caused by acts done in North Carolina. In addition, South Carolina's expert reports will be due first, thus giving North Carolina more time to prepare its expert reports.

Nevertheless, South Carolina understands that North Carolina may seek five years or more for Phase One discovery (although North Carolina's proposal for Phase One may advocate a broader scope of issues than does South Carolina's proposal). Such a lengthy discovery period is patently unreasonable and would impose undue delay and hardship on the citizens of South Carolina, while North Carolina – which naturally benefits from any delay in the entry of an equitable apportionment decree – continues its inequitable overuse of the Catawba River.

[5] South Carolina will soon serve its initial discovery requests.

Compare Jim Nesbitt, *Water Wars*, The News & Observer, Raleigh, NC, Sept. 30, 2007, at A25 (quoting David Moreau, chairman of North Carolina's Environmental Management Commission, as saying that North Carolina has traditionally followed "the Big Straw theory," meaning that "you pump out all the water you can from streams and from underground"), *with Wyoming v. Colorado*, 259 U.S. at 466 ("The contention of Colorado that she as a state rightfully may divert and use, as she may choose, the waters flowing within her boundaries in this interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary, cannot be maintained.").

In contrast, South Carolina's proposals strike the correct balance between efficiency and providing reasonable opportunity for both States to advance their claims and defenses and to bring this case to an efficient conclusion without undue delay. The Special Master in *New Jersey v. Delaware* stated that he expected the parties to dedicate sufficient resources to the case to meet the discovery schedule set out in that case. *See* Telephone Conf. Tr. at 3-4, *New Jersey v. Delaware*, No. 134, Orig. (Aug. 8, 2006) ("I would urge counsel to devote sufficient human resources to this project at this stage so that there won't be any extended delay in addressing legitimate concerns expressed by opposing counsel. I'm confident that with that endeavor, we can stay on schedule."). The principle that each party should dedicate sufficient resources to prosecuting the case efficiently and without undue delay applies equally here, and counsels for adoption of South Carolina's proposals.

Conclusion

For the foregoing reasons, South Carolina respectfully requests that the Special Master adopt its proposals for the scope of issues to be addressed in Phase One and Two, and for the timing of Phase One discovery and trial.

Respectfully submitted,

DAVID C. FREDERICK
SCOTT H. ANGSTREICH
SCOTT K. ATTAWAY
W. DAVID SARRATT
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

Special Counsel to the
State of South Carolina

HENRY DARGAN MCMASTER
Attorney General
JOHN W. MCINTOSH
Chief Deputy Attorney General
ROBERT D. COOK
Assistant Deputy Attorney General
Counsel of Record
T. PARKIN HUNTER
Assistant Attorney General
LEIGH CHILDS CANTEY
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3970

Counsel for the State of South Carolina

June 16, 2008