



State of North Carolina

ROY COOPER
ATTORNEY GENERAL

Department of Justice
PO Box 629
Raleigh, North Carolina
27602

REPLY TO:

James C. Gulick
Senior Deputy Attorney General
(919) 716-6600
(919) 716-6767

FAX:

February 3, 2009

Bye-mail and first class mail

Special Master Kristin L. Myles
Munger, Tolles & Olson, LLP
560 Mission Street, 27th Floor
San Francisco, CA 94015

**RE: *South Carolina v. North Carolina*, No. 138, Original;
North Carolina's Progress Report No. II**

Dear Special Master Myles:

Document discovery among the parties is ongoing. The parties have exchanged lists of search terms and proposed modifications to those lists and have made progress toward finalizing the terms to be used going forward in discovery.

Additionally, since the last conference call with the Special Master the parties have conducted a number of meet-and-confer calls with respect to the framing of issues to be addressed during Phase I and Phase II. Although the parties have had full and frank discussions of the division of issues, the parties have not been able to agree completely on a statement for the Special Master. Consequently, the attached document is North Carolina's general statement of the issues for Phase I and Phase II.

Sincerely,

A handwritten signature in black ink that reads "James C. Gulick".

James C. Gulick
Senior Deputy Attorney General

JCB/dhm

Attachments

cc: All Counsel of Record (via e-mail and hard copies as requested w/attachment)

NORTH CAROLINA'S STATEMENT WITH RESPECT TO DIVISION OF ISSUES BETWEEN PHASE I AND PHASE II

The parties have engaged in extensive discussions concerning the scope of Phase I and Phase II. While at times these discussions appeared close to consensus, in the end the parties were unable to agree to the precise statement of the general issue to be resolved at the conclusion of Phase I and various potential sub-issues.

North Carolina believes that there is considerable merit and efficiency in conducting this case in two phases, as the Case Management Plan proposed by both parties contemplated. The first phase would deal with South Carolina's obligation to prove by clear and convincing evidence that particular water uses in North Carolina are causing South Carolina specific harm of serious magnitude.¹ The second phase would involve weighing the benefits against the proven harms and balancing of the equities, provided South Carolina prevails in Phase I. More particularly, North Carolina would identify the main issues as follows.

Phase I

Issue 1. Whether South Carolina has shown by clear and convincing evidence that specific water uses or withdrawals in North Carolina have caused or imminently threaten to cause harm of serious magnitude to specific, existing uses of the Catawba River in South Carolina.²

Without being comprehensive, some potential subsidiary issues in Phase I are:

Sub-Issue 1.A. The effect of drought and low in-flow on determining available water.

Sub-Issue 1.B. The relevance of a "low inflow protocol" in the Catawba River.

Sub-Issue 1.C. The relevance of the Comprehensive Relicensing Agreement and Duke's FERC license.

Sub-Issue 1.D. The relevance of the operation of Duke's reservoirs.

¹ North Carolina strongly believes that South Carolina has the obligation to provide a Statement of Particularized Harm. North Carolina will not be able to conduct focused discovery until South Carolina has specifically identified its harms and the causes of those harms. Moreover, North Carolina believes that South Carolina must prove these harms and their causation with particularity in phase I. South Carolina apparently strongly disagrees.

² Just as it did in its Brief Regarding Issues for Phase I, filed herein on June 16, 2008, at footnote 1, North Carolina continues to preserve its position that the Bill of Complaint is limited to interbasin transfers and that the Complaint is limited to harms during times of drought and harms in a limited segment of the river.

Sub-Issue 1.E. The relevance of water management practices and conservation measures.³

Phase II

Issue 2. If South Carolina prevails with respect to Issue 1, whether North Carolina can demonstrate by clear and convincing evidence that benefits to North Carolina or South Carolina from existing water uses in North Carolina outweigh the harm of serious magnitude, to South Carolina's present water uses proven in Phase I.

Issue 3. If South Carolina prevails with respect to Issue 2, how the waters of the Catawba River should be equitably apportioned between North Carolina and South Carolina.

Sub-Issue 3.A. *Equitable apportionment factors.* How the following factors, among others, affect the equitable apportionment of Catawba River water between North Carolina and South Carolina:

- physical and climactic conditions
- consumptive uses of water in the several sections of the river
- the character and rate of return flows
- the extent of established uses (including irrigation, protection of fisheries, recreational uses, navigation, hydropower, public water supply, wildlife, wildlife habitat, and similar environmental concerns)
- the availability of storage water
- the practical effect of wasteful uses on downstream areas
- the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former
- reasonable conservation measures in both states
- the relevance of North Carolina's interbasin transfer statute to the apportionment and/or to the framing of any decree

³ What sub-issues may have to be litigated in Phase I depends in significant part upon precisely what harms South Carolina proposes to prove and what may be the causes of those harms.