ROY COOPER
ATTORNEY GENERAL

State of North Carolina
Department of Justice
PO Box 629
Raleigh, North Carolina
27602

REPLY TO: Christopher G. Browning, Jr.
Office of the Solicitor General
(919) 716-6900
FAX: (919) 716-6763

June 4, 2008

By e-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 Letter Brief re Proposed Case Management Order**

Dear Special Master Myles:

As discussed during the conference call of May 23, 2008, North Carolina and South Carolina have been able to reach agreement on much of a proposed Case Management Order. The States, however, disagree on the following items: 1) who may attend depositions, 2) preparation of privilege logs, 3) the length of time needed for discovery, 4) the exchange of expert reports, and 5) the issues to be resolved in the various phases. Pursuant to your directive on May 23, 2008, this letter brief addresses the first two issues. The remaining issues will be addressed in our submission of June 16, 2008. It is our understanding that South Carolina will be forwarding to you a copy of the proposed Case Management Order that North Carolina and South Carolina have exchanged.

Please note that the discussions between South Carolina and North Carolina took place before the Special Master's rulings on the motions to intervene. South Carolina and North Carolina have not attempted to modify the attached document as a result of that ruling. Accordingly, North Carolina recognizes that it will be necessary to make certain modifications in light of that ruling and that it would now be appropriate to include the intervenors in that process.

Attendance at Depositions

Rule 26(c)(1)(E) of the Federal Rules of Civil Procedure provides that the trial court may limit attendance at a deposition as justice so requires. North Carolina proposes that this Rule be incorporated into the Case Management Order. South Carolina objects and instead proposes that attendance at a deposition be limited to the parties, their attorneys and expert witnesses. Under Rule 26(c)(1)(E), the court, on a case-by-case basis, determines whether the persons who may be present for a deposition should be limited. North Carolina believes that a blanket rule limiting attendance

at a deposition is inappropriate. Rather, the Court should track the case-by-case approach envisioned by the Federal Rules.

When the United States Supreme Court promulgated the Federal Rules of Civil Procedure, it concluded that depositions should only be closed when necessary to protect the rights of the parties or witnesses. FED. R. CIV. P. 26(c), 30. "As a general rule, any party or representative of a party, or witness with information relevant to the claims or defenses, or any investigator or expert witness may attend depositions. On the other hand, individuals may be excluded from a deposition on a specific showing that some harm or prejudice might occur to a party or to the deponent . . . ." 6 JAMES WM. MOORE, ET AL, MOORE'S FEDERAL PRACTICE ¶ 26.105[6], at 26-541-42 (3d ed. 2008). The Advisory Committee's note to Rule 30 reiterates that under the Federal Rules, witnesses should not be "automatically excluded from a deposition simply by the request of a party. Exclusion, however, can be ordered under Rule 26(c)(5) when appropriate . . . ." FED. R. CIV. P. 30 advisory committee's note (1993 amendment). When the Supreme Court drafted Rule 26, it recognized that it is impossible to set out by rule at the outset of a case all of the circumstances that may require limitations on discovery. Accordingly, the rules leave it to "the enlightened discretion of the district court to decide what restrictions may be necessary in a particular case." 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE § 2036, at 488 (2d ed. 1994). The case-by-case approach adopted by the Federal Rules would best serve the parties and the Court in this original action.

Under South Carolina's proposal, should the United States or one of its agencies choose to monitor the progress of this original action, the United States would need to obtain either approval of all parties or obtain an order from the Special Master to attend a deposition. Similarly, if South Carolina were conducting a deposition of a former employee of the Concord/Kannapolis Water Treatment facility, the City Attorneys for Concord and Kannapolis would be unable to attend the deposition without agreement by the parties or an order of the Court. Under South Carolina's proposal, one party essentially has veto power over another party's strategic decision to tap an outside resource (such as city attorneys) who may be able to help the deposing attorney during breaks in the deposition with the formulation of questions.

South Carolina's proposal is particularly problematic in that South Carolina seeks to even limit the attendance of intervenors to specific depositions. Under South Carolina's proposal, the parties will continually be calling upon the Special Master to determine which depositions fall within the scope of a particular intervenor's interest.

The issue of whom should be allowed to attend a deposition is best addressed on a case-by-case basis in the event that a dispute arises in the future. A blanket rule limiting who may attend depositions would not be appropriate at this stage of the proceedings.

Privilege Logs

Rule 26(b)(5)(A)(ii) of the Federal Rules of Civil Procedure provides that when a document is withheld from production based upon a claim of privilege, the withholding party must "describe the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." North Carolina proposes that this rule be incorporated by reference into the Case Management Order. South Carolina objects to incorporating this Rule and instead proposes that for every document for which a claim of privilege is asserted, the withholding party must list (a) author's name, place of employment and job title; (b) addressee's name, place of employment and job title; (c) recipient's name, place of employment and job title, if different than that of addressee; (d) general subject matter of document; (e) site of document; and (f) nature of privilege claimed.

The United States Supreme Court rejected the procedure now being advocated by South Carolina. The advisory committee notes to Rule 26(b) state that the rule "does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories." FED. R. CIV. P. 26 advisory committee's note (1993 amendment). As Professors Wright and Miller have concluded, Rule 26(b) stands as a pragmatic, cost effective approach to preparing privilege logs:

> This realistic provision should make clear the need to provide reasonable specifics while also showing that care is desirable to avoid undue effort in preparing logs or similar listings of withheld materials. . . . The basic objective is a sufficient description of the matters withheld to satisfy the needs of the case; rigid insistence on certain logging or indexing procedures may go well beyond that, particularly in larger cases.

8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE § 2016.1, at 234-35 (2d ed. 1994).

Under the Case Management Order being proposed by South Carolina, if South Carolina were to serve a document request on North Carolina that requests "all documents that refer or relate to North Carolina's approval of interbasin transfer permits for the Catawba River," the request, if read literally, would require North Carolina to prepare a privilege log of all emails and memoranda among attorneys at the North Carolina Department of Justice who have been involved in defending

this case. The broad sweep of South Carolina's proposal would result in significant inefficiencies and greatly increase the litigation costs to all parties, as well as any recipient of a discovery request.

Rule 26(b) stands as the appropriate directive that should be issued to parties and witnesses in this case with respect to the preparation of privilege logs. South Carolina's approach has been rejected by the Federal Rules of Civil Procedure and would needlessly increase costs and attorneys' fees in this action.

Sincerely,

Chris Browning

Christopher G. Browning, Jr.
Solicitor General

cc: All Counsel of Record