



State of North Carolina

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ROY COOPER
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July 14, 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:

Pursuant to your directive during the conference call of June 30, 2008, North Carolina hereby responds to the letter filed by South Carolina on July 3, 2008. Specifically, North Carolina raises the following concerns with respect to South Carolina's most recent proposal: 1) the proposal does not allow adequate time for North Carolina's experts to respond to South Carolina's expert reports; 2) the form of South Carolina's Statement of Particularized Harm should be resolved at the outset of discovery rather than being relegated to contention interrogatories that would not be served for another eight months; 3) South Carolina's proposal appears to provide South Carolina with an open-ended opportunity to modify its Statement of Particularized Harm; and 4) South Carolina's proposal with respect to rebuttal reports by experts should be modified to make the process more streamlined and even-handed.

Timing of Expert Reports

North Carolina's counsel has had numerous conversations with North Carolina's experts regarding the length of time that will be necessary to perform the required modeling and analysis of the Catawba River. Our experts have consistently stated that nine months is the bare minimum necessary to perform this work and that this work cannot effectively begin until they receive the reports of South Carolina's experts.

Modeling by North Carolina's experts can only be conducted once the inputs (i.e., the harms claimed by South Carolina and, more specifically, the specific water uses in North Carolina that

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South Carolina contends should be eliminated or reduced to cure those harms) used by South Carolina in its modeling are made available to North Carolina. Those inputs will not be available to North Carolina's experts until reports are filed by South Carolina's experts.¹

Under South Carolina's current proposal, its experts will have 21 months from the issuance of the Case Management Order until the reports of those experts are due. In contrast, North Carolina will have only three months to respond to the reports of South Carolina's experts. North Carolina's experts cannot effectively begin their analysis prior to the issuance of the reports by South Carolina's experts. Once the reports have been issued by South Carolina's experts, North Carolina's experts should be given a fair opportunity to respond. The Case Management Order should provide that the reports by North Carolina's experts are due nine months after the issuance of reports by South Carolina's experts.

Form of South Carolina's Statement of Particularized Harm

South Carolina proposes that its Statement of Particularized Harm be in the form of a response to contention interrogatories. South Carolina apparently intends for these contention interrogatories to be served eight months from now so that the response would be due in nine months. Presumably, South Carolina intends to reserve the right to object to the form of such contention interrogatories. If so, North Carolina would not have the benefit of South Carolina's response until after nine months from now.

North Carolina believes that it would be much more efficient to agree upon the form of South Carolina's Statement of Particularized Harm at the outset and to set out this required disclosure in the Case Management Order. By setting out what South Carolina needs to disclose in the Case Management Order a full nine months before the deadline, it will allow South Carolina to be more thorough in its disclosures. Additionally, such a process would eliminate the potential for bickering and delay that might result if the disclosures were in the form of responses to contention interrogatories.

¹ North Carolina's experts will not be able to use South Carolina's Statement of Particularized Harm to start their modeling and analysis. Rather, they will need South Carolina's expert reports to begin their analysis. First, South Carolina has requested a broad re-opener of the Statement of Particularized Harm in the event that it learns of additional activities by North Carolina "the significance of which was not readily apparent." Letter of David Frederick to the Special Master, p. 1 (July 3, 2008). Second, when North Carolina receives the Statement of Particularized Harm, many of the purported harms set out in that disclosure will not have been probed through discovery. Requiring North Carolina to have its experts conduct modeling based upon ever-changing inputs would be neither cost-efficient nor fair.

A thorough and complete Statement of Particularized Harm is essential to the efficient management of this case, and the form of the Statement should be resolved at the outset of the discovery process. North Carolina suggests that South Carolina's Statement of Particularized Harm set out the following information:

1. A detailed and specific statement of each and every harm on which South Carolina bases its claim, including a description of the nature, type and extent of harm; the location of the harm; the time the harm occurred; the length and duration of the harm; and such other details as are necessary to assess the claim of injury. In the event that any such harm is limited to drought or low-flow conditions, South Carolina must set out: (1) the specific conditions (e.g., flow parameters) that it contends give rise to such harm and (2) the manner in which South Carolina determined that harm occurs during those specific conditions (e.g., how South Carolina calculated or determined the flow necessary to eliminate each such harm).
2. A detailed and specific statement of each act of North Carolina that South Carolina contends caused any of these harms, including the identification of any consumptive uses, interbasin transfers or other activities in North Carolina that South Carolina believes caused such harms and the basis for South Carolina's belief that these acts caused such harms.
3. A detailed and specific identification of the point furthest downstream on the Catawba/Wateree River where South Carolina contends that it has suffered harm as a result of any act of North Carolina.

North Carolina requests that the Special Master incorporate this disclosure requirement into the Case Management Order.

Supplementation of South Carolina's Statement of Particularized Harm Should be Limited

Although South Carolina's proposal provides that it will make available a Statement of Particularized Harm within nine months of the Special Master's approval of the Case Management Plan, South Carolina's proposal would give South Carolina the opportunity to supplement freely the Statement of Particularized Harm. Specifically, South Carolina appears to be requesting the opportunity to provide a supplemental response in the event: 1) evidence adduced following the date of the disclosure identifies additional activities in North Carolina that allegedly are causing harm in South Carolina, 2) any activities occur in North Carolina subsequent to the date of the disclosure, or 3) South Carolina learns of "additional activities [by North Carolina] the significance of which was not readily apparent within [the initial] 9-month period." Letter of David Frederick to the Special Master, p. 1 (July 3, 2008).

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South Carolina's proposal appears to allow South Carolina to modify freely its Statement of Particularized Harm if it believes that any one of these three criteria is met. South Carolina should not be given an open-ended invitation to modify its Statement of Particularized Harm late in the discovery period. South Carolina should be permitted to supplement its Statement of Particularized Harm only if it first demonstrates to the Special Master that it could not reasonably have made the disclosure at the time of its deadline for doing so. Such a procedure will ensure that South Carolina is as thorough and precise as possible when it makes its disclosure at the end of the nine month period, will protect North Carolina from last-minute supplementation at the end of the discovery period, and will allow the Special Master to assess the impact upon the discovery period at the time that South Carolina requests the opportunity to supplement.

Rebuttal Reports by Expert Witnesses

Under South Carolina's proposal, its experts are given the opportunity to file both an original report and a rebuttal report. South Carolina's proposal, however, makes no provision for North Carolina to respond to the rebuttal reports of South Carolina's experts. Moreover, South Carolina's proposal appears to place no limits on the scope of what may be included in the rebuttal reports of its experts. If rebuttal reports are to be allowed, they should be limited to material that could not have been, with due diligence, addressed in the original report. Moreover, if each of South Carolina's experts is permitted to file two reports, North Carolina's experts should be given the same opportunity.

North Carolina respectfully urges the Special Master to structure the Case Management Order consistent with the concerns set out in this letter.

Sincerely,



Christopher G. Browning, Jr.
Solicitor General

cc: All Counsel of Record