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IN THE  
**Supreme Court of the United States**

STATE OF SOUTH CAROLINA,  
*Plaintiff,*

v.

STATE OF NORTH CAROLINA,  
*Defendant.*

**On Motion for Leave To File Complaint**

**MOTION OF THE STATE OF SOUTH CAROLINA  
FOR LEAVE TO FILE COMPLAINT,  
COMPLAINT, AND BRIEF IN SUPPORT OF ITS  
MOTION FOR LEAVE TO FILE COMPLAINT**

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June 7, 2007



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**Supreme Court of the United States**

No. \_\_\_\_, Original

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**MOTION FOR LEAVE TO FILE COMPLAINT**

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The State of South Carolina, by its Attorney General, Henry Dargan McMaster, and pursuant to Rule 17 of the Supreme Court's Rules, moves this Court for leave to file its Complaint against the State of North Carolina, for the reasons stated in the accompanying brief in support.

Respectfully submitted,

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**COMPLAINT**

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The State of South Carolina, by its Attorney General, Henry Dargan McMaster, brings this suit against the State of North Carolina, and for its cause of action states as follows:

1. The Catawba River is an interstate river that originates in the mountains of North Carolina and flows through a series of lakes — including Lake Wylie, where it enters South Carolina — and unimpounded stretches for approximately 225 miles until it meets Big Wateree Creek to form the Wateree River in South Carolina.

2. The Catawba River is essential to the generation of hydroelectric power, economic development and commerce, and recreation in the area of South Carolina within the Catawba River Corridor and Basin. Yet the Catawba River is subject to severe periodic fluctuations in water level that can render its volume inadequate. The normal flow of the River has been significantly affected by severe droughts. Indeed, both North Carolina and South Carolina have issued drought advisory warnings for the Catawba River Basin, with both States currently declaring that moderate drought conditions exist. The most recent prior drought lasted from 1998 through 2002.

3. In 1991, North Carolina enacted an “interbasin transfer statute” that purports to authorize the transfer of large volumes of water from one river basin in North Carolina to another basin in that State. Under that statute, North Carolina has authorized the transfer of at least 48 million gallons per day from the Catawba River Basin, with the most recent such transfer authorized in January 2007.

4. These past transfers — and threatened pending transfers — exceed North Carolina’s equitable share of the Catawba River. Because efforts at resolving this dispute through negotiation of an interstate compact have proved fruitless, South Carolina brings this Complaint for this Court to adjudicate the parties’ dispute, to determine (with the assistance of a Special Master) the equitable apportionment of the Catawba River, and to enjoin North Carolina from authorizing past or future transfers inconsistent with that apportionment.

### PARTIES

5. The State of South Carolina brings this suit in its capacity as sovereign and as *parens patriae* on behalf of its citizens.

6. The State of North Carolina has authorized interbasin transfers from the Catawba River through an act of its legislature and the actions of a state agency, the North Carolina Environmental Management Commission (“EMC”), which is equivalent to the State itself for purposes of this Court’s jurisdiction.

### JURISDICTION

7. The exclusive and original jurisdiction of this Court over controversies between two States is invoked under Article III, § 2, clause 2 of the Constitution of the United States and 28 U.S.C. § 1251(a). This Court has long recognized that it has “a serious responsibility to adjudicate cases where there are actual existing controversies over how interstate streams should be apportioned among States.” *Arizona v. California*, 373 U.S. 546, 564 (1963).



## THE CATAWBA RIVER BASIN

8. The Catawba River originates in the mountains of North Carolina. The mainstem of the River in North Carolina is almost entirely impounded by a series of seven hydropower reservoirs running from Lake James, located at the foot of the Blue Ridge Mountains, to Lake Wylie, which extends across the state boundary with the State of North Carolina near Charlotte, North Carolina.

9. The Catawba River enters the State of South Carolina through Lake Wylie. Allison Creek flows into the midlake region of Lake Wylie within South Carolina. The Catawba River flows out of Lake Wylie and is joined by Sugar Creek, Twelvemile Creek, and Cane Creek before draining into Fishing Creek Reservoir. The Catawba River flows out of Fishing Creek Reservoir and joins with Fishing Creek to flow into Great Falls Reservoir. The River then joins with Camp Creek and Rocky Creek to form Cedar Creek Reservoir. Cedar Creek flows into the Catawba River just below the Cedar Creek Reservoir dam. The Catawba River joins Big Wateree Creek to form the Wateree River, which flows through Lake Wateree. Grannies Quarter Creek and Sawneys Creek flow into the Wateree River downstream of Lake Wateree. Twentyfive Mile Creek and Big Pine Tree Creek enter the Wateree River near the City of Camden, followed by Swift Creek, Spears Creek, and Colonels Creek before merging with the Congaree River Basin to form the Santee River Basin.

10. The Catawba River Basin is the most densely populated river basin in the two States. That region includes the Charlotte-Gastonia-Rock Hill Metropolitan Statistical Area, which includes both North Carolina and South Carolina and is home to nearly 1.6 million people. The Catawba River Corridor in South Carolina includes York, Lancaster, and Chester Counties, contains nearly 300,000 people, and is expected to have significant growth over the next decade. The Catawba River Basin, which bisects the north-central portion of South Carolina, includes portions of eight South Carolina counties — most

of Chester, Kershaw, Lancaster, and York Counties, the eastern third of Fairfield County, and portions of Sumter, Lee, and Richland Counties.

11. The Catawba River serves a wide variety of North Carolina and South Carolina water-use purposes, including: aquaculture; golf course irrigation; hydroelectric water use; industrial water use; irrigation water use; mining process; thermoelectric water use; and water supplies.

12. As the North Carolina Division of Water Quality noted in 1995, the water quality of the Catawba River may be jeopardized by growth in the surrounding area. As of that year, 16 percent of the Catawba River Basin's nearly 3,100 miles of free-flowing rivers and streams were considered impaired due to pollution. In that 1995 report, the North Carolina Division identified eight major water-quality issues in the Basin, which include:

- a) Nutrient inputs to lakes from both point and nonpoint sources;

- b) Sedimentation in streams and lakes from urban runoff, construction, and agriculture;

- c) Lack of assimilative capacity for oxygen-consuming wastes in streams and lake coves from wastewater treatment plant discharges;

- d) Stream water quality impairment from urban stormwater runoff;

- e) Health concerns associated with fecal coliform bacteria;

- f) Toxicity from heavy metals and its impacts on aquatic life and water supplies;

- g) Discharges of colored effluent from wastewater treatment plants; and

- h) Enforcement of water-quality regulations and compliance with discharge permits.

13. Of particular relevance to the current dispute, the North Carolina Division recognized that solving these problems is beyond the capabilities of any one agency or

group and that cooperative efforts between the various stakeholders in the Catawba River Basin will be necessary to protect the Basin's water resources.

14. Such a multi-stakeholder negotiation process occurred recently, involving the Federal Energy Regulatory Commission, Duke Energy (which generates hydroelectric power from the Catawba River), and groups from South Carolina and North Carolina. Although more water may be necessary to sustain South Carolina's needs, it was agreed through those negotiations that the minimum continuous flow that South Carolina should receive from the Catawba River is 1,100 cubic feet per second — or about 711 million gallons per day. *See App. 15, 36-37.*

15. The Catawba River, however, is subject to severe periodic fluctuations in water level, and there are periods when the River does not have even minimally adequate flows. *See App. 14-21.* Indeed, a gauge that has long measured the daily flow of the Catawba River into South Carolina has found the average daily flow to be as low as 132 cubic feet per second — or only about 85 million gallons per day. *See App. 16-17, 21.* That gauge has recorded average minimum daily flows that range from roughly 400 to 700 cubic feet per second nearly every day of the year. *See id.* Indeed, there are only two calendar days on which the minimum daily average flow recorded over a 64-year period has always been above 1,100 cubic feet per second. *See id.*

16. In addition, as part of the multi-stakeholder negotiation process discussed in paragraph 14, Duke Energy developed a model to estimate the natural flow of the Catawba River, as if the lakes used to generate hydroelectric power were not there. *See App. 15.* Those data show that the Catawba River, even in its "natural" state, often would not deliver 1,100 cubic feet per second of water into South Carolina. *See App. 15, 18, 36-37.* From 1930 through 2002, that model estimates that the average daily flow would be below the 1,100 cubic feet per second on at least one day of the year — and as many as 104 days (in

2002) — in 61 of those 72 years, and in 17 of the last 20. *See* App. 15, 18.

17. The Catawba River has also been subjected to prolonged droughts in the mid-1950s, the late 1980s, and from 1998 through 2002; and it is currently experiencing moderate drought conditions today. *See* App. 15. During the drought that ended in late 2002, South Carolina and its citizens suffered numerous harms, including:

a) Major boat landings and public access areas were closed due to the low water levels, harming both the public and the businesses that run the marinas. *See* App. 23, 38.

b) Tap water was undrinkable in the City of Camden, South Carolina. *See* App. 38.

c) Duke Energy was forced to reduce dramatically the generation of electricity from its hydroelectric stations located on the Catawba River. *See id.*

d) Businesses, such as the Bowater pulp and paper mill, were forced to incur significant costs — more than \$6,000 per day — because the water flow was no longer sufficient to assimilate treated wastewater in amounts allowed by state permits. *See* App. 32-33, 38-39.

e) The flow in major tributaries of the Catawba River was so reduced that the only water flowing was the discharge from wastewater treatment plants. *See* App. 39.

## NORTH CAROLINA'S UNLAWFUL AUTHORIZATION OF TRANSFERS FROM THE CATAWBA RIVER

18. The harms to South Carolina from reduced flow in the Catawba River have been exacerbated by the “inter-basin transfer statute” that North Carolina enacted in 1991 and that applies by its express terms to the Catawba River. See N.C. Gen. Stat. Ann. § 143-215.22G(1)(h). Any “person” wishing to “transfer . . . 2,000,000 gallons of water or more per day” from a river basin must obtain a permit from the North Carolina EMC. See *id.* § 143-215.22I(a)(1)-(2). Transfers of less than 2 million gallons of water per day are implicitly authorized to occur without regulation by the EMC.

19. The North Carolina statute contains no provisions requiring a reduction in the amount of water transferred in the event of a drought or natural fluctuations in the flow of the Catawba River that limit the water available to downstream users in South Carolina. On the contrary, the statute allows the EMC to remedy “water supply problems” in North Carolina that are “caused by drought” by “grant[ing] approval for a temporary transfer.” *Id.* § 143-215.22I(j).

20. The EMC has granted at least two permits under § 143-215.22I that have resulted in the transfer of tens of millions of gallons of water per day from the Catawba River:

a) In March 2002, the EMC granted the application by the Charlotte Mecklenburg Utilities to transfer up to 33 million gallons per day from the Catawba River Basin to the Rocky River Basin, more than double the 16 million gallons per day limit that had previously applied. This permit, moreover, was granted in the midst of the severe drought affecting the Catawba River from 1998 through 2002, and these inequitable withdrawals of water from the Catawba River necessarily exacerbated the harms that drought was imposing on South Carolina and its citizens.

b) In January 2007, the EMC granted the application by the Cities of Concord and Kannapolis to transfer up to 10 million gallons per day from the Catawba River Basin to the Rocky River Basin. The EMC granted that application over the objection of South Carolina, which noted, among other things, that the Cities' application and the EMC's environmental impact statement gave no consideration to the effects of the transfer on uses of the Catawba River in South Carolina. The EMC also approved the transfer despite the availability of alternative sources of water from other communities in North Carolina that stood ready, willing, and able to provide that water to the Cities of Concord and Kannapolis.

21. The statute also grandfathers the transfer by Union County of at least 5 million gallons per day from the Catawba River Basin. In addition, pending before the EMC is an application by Union County to increase by 13 million gallons per day its transfers of water from the Catawba River Basin to the Rocky River Basin.

22. South Carolina does not know the extent to which the North Carolina statute has implicitly permitted one or more transfers of less than 2 million gallons per day from the Catawba River.

23. South Carolina also does not know the extent to which entities within North Carolina have taken advantage of § 143-215.22I(b), which authorizes transfers without a permit from the EMC up to the full capacity of any facility that was existing or under construction on July 1, 1993.

24. The transfers of water out of the Catawba River that the EMC has approved and the North Carolina statute has permitted necessarily reduce the amount of water available to flow into South Carolina. Such transfers exacerbate the existing natural conditions and droughts that contribute to low flow conditions in South Carolina and cause the harms detailed above. Those transfers also

are in excess of North Carolina's equitable share of the Catawba River.

25. North Carolina's interbasin transfer statute "cannot be used" to resolve this dispute, *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981), because, in "interstate water disputes," "federal common law applies" and "our federal system does not permit the controversy to be resolved under state law," *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 & n.13 (1981).

### **NORTH CAROLINA'S REFUSAL TO AMELIORATE THE HARMS TO SOUTH CAROLINA**

26. On October 31, 2006, South Carolina formally opposed the request of the Cities of Concord and Kannapolis for authority to transfer tens of millions of gallons of water per day from the Catawba River. That opposition expressly noted that the proposed transfer would both adversely affect the water quantity and quality in the South Carolina portion of the Catawba River and impair the affected South Carolina communities' ability to sustain future population growth, to attract new industry and maintain current businesses, to provide adequate drinking water, to protect the local wildlife, and to accommodate recreation. See App. 1-6.

27. On December 19, 2006, South Carolina Attorney General Henry McMaster wrote to North Carolina Attorney General Roy Cooper reiterating South Carolina's opposition to the proposed transfer. South Carolina also proposed to North Carolina that the EMC suspend its ongoing proceeding on the Cities' application while officials of North Carolina and South Carolina sought to negotiate an interstate compact addressing this issue, along with other water issues. Attorney General McMaster noted that, because growth in the Southeast would likely lead to such questions arising with increasing frequency, an interstate compact would be wiser and less costly to the taxpayers than litigating each question as it arises. See App. 7-8.

28. On January 3, 2007 — one week before the EMC's scheduled resolution of the Cities' application — North Carolina Attorney General Cooper responded. In that letter, Attorney General Cooper stated that he had forwarded the letter to Governor Mark Easley and the North Carolina Secretary for Human Resources, but made no mention of negotiating an interstate compact or delaying action on the Cities' application. *See App. 9-10.* The Cities' application was granted on January 10, 2007.

29. In granting the application, the EMC also failed to heed a resolution of the Catawba/Wateree River Basin Bi-State Advisory Commission ("Commission"), which includes elected state officials from both South Carolina and North Carolina. *See App. 25.* On January 8, 2007, the Commission had recommended that the EMC delay action on the Cities' application for at least six months to provide time for negotiation of an interstate compact to resolve the interstate dispute about the Cities' proposed transfer. *See App. 26-27, 29-30.*

### **PRAYER FOR RELIEF**

WHEREFORE, the State of South Carolina prays:

1. That the Court enter a decree declaring that the North Carolina interbasin transfer statute cannot be used to determine each State's share of the Catawba River and equitably apportioning the Catawba River.

2. That the Court enter a decree enjoining North Carolina from authorizing transfers of water from the Catawba River, past or future, inconsistent with that apportionment, and also declaring that the North Carolina interbasin transfer statute is invalid to the extent that it authorizes transfers in excess of North Carolina's equitable apportionment as determined by this Court's decree.

3. For such other and further relief as the Court may deem proper.



Respectfully submitted,

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**On Motion for Leave To File Complaint**

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**BRIEF OF THE STATE OF SOUTH CAROLINA  
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## **QUESTION PRESENTED FOR REVIEW**

Whether North Carolina's interbasin transfer statute is invalid under the Supremacy Clause of the United States Constitution and the constitutionally based doctrine of equitable apportionment because North Carolina, pursuant to that statute, has authorized and continues to authorize transfers of water from the Catawba River in excess of its equitable share of the waters of that interstate river, thereby harming South Carolina and its citizens.

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## INTRODUCTION

The Catawba River originates in the North Carolina mountains and winds 225 miles into South Carolina, crossing the border at Lake Wylie. Both States historically have relied on the Catawba River for hydroelectric power, economic development and commerce, and recreation in an area encompassing more than 1.5 million people and the Charlotte metropolitan area, which spans both States. Yet the flow of the Catawba River is unreliable and subject to scarcity in times of drought, most recently in 1998 through 2002, which created a crisis for South Carolinians dependent upon the River.

Despite the history of shared use and benefit of the Catawba River, in 1991 North Carolina enacted a statute by which persons could transfer up to 2 million gallons of water per day out of the Catawba River Basin and into basins of other rivers in North Carolina, without the prior authorization of that State's officials. In addition, pursuant to that statute, North Carolina has affirmatively authorized the transfer of at least 48 million gallons per day from the Catawba River Basin to basins of other rivers in North Carolina. The most recent such transfer was authorized in January 2007, and a pending application seeks authority to transfer an additional 13 million gallons per day from the Catawba River. These past and threatened future transfers exceed North Carolina's equitable share of the Catawba River and directly harm South Carolina and its citizens, severely reducing the flow of water available for the generation of hydroelectric power, economic development and commerce, and recreation.

South Carolina has attempted to resolve this dispute through negotiations and establishment of an interstate compact, but North Carolina has not been receptive to such efforts and, instead, has continued to authorize diversions from the Catawba River. South Carolina, therefore, has no means of preventing and undoing North Carolina's unlawful appropriation of the waters of the Catawba River other than invocation of this Court's original

jurisdiction. South Carolina, therefore, seeks leave to file a complaint, in which it seeks an equitable apportionment of the Catawba River and an order both enjoining North Carolina from authorizing transfers of water from the River inconsistent with that apportionment and preempting North Carolina's transfer statute to the extent it purports to authorize such transfers.

## JURISDICTION

This case, involving a dispute between two sovereign States<sup>1</sup> over an interstate river, falls squarely within this Court's exclusive and original jurisdiction over controversies between two States under Article III, § 2, clause 2 of the United States Constitution and 28 U.S.C. § 1251(a). Indeed, this Court has long recognized that it has "a serious responsibility to adjudicate cases where there are actual existing controversies over how interstate streams should be apportioned among States." *Arizona v. California*, 373 U.S. 546, 564 (1963).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, § 2, clause 2 of the United States Constitution provides in relevant part:

The judicial Power shall extend . . . to Controversies between two or more States[.]

Section 1251(a) of Title 28, United States Code, provides:

The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

Sections 143-215.22G and 143-215.22I of the General Statutes of North Carolina are reproduced at App. 43-52.

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<sup>1</sup> An agency of the State is the State itself for purposes of original jurisdiction. See *Arkansas v. Texas*, 346 U.S. 368, 370-71 (1953).

## STATEMENT OF THE CASE

### A. The Catawba River

The Catawba River originates in the mountains of North Carolina and flows through a series of lakes — including Lake Wylie, where it enters South Carolina — and unimpounded stretches for approximately 225 miles until it meets Big Wateree Creek to form the Wateree River. See Compl. ¶ 1. The Catawba River has long been viewed as important to both South Carolina and North Carolina. In 1787, recognizing the possibilities for the River's development, the South Carolina legislature established a company to open the River "from the North Carolina line to the Camden Ferry, by means of canals, dams and locks." VII *The Statutes at Large of South Carolina* 549 (David J. McCord ed., 1840). North Carolina likewise established a "private company . . . to improve the Catawba for navigation." *Jones v. Duke Power Co.*, 501 F. Supp. 713, 718 (W.D.N.C. 1980), *aff'd*, 672 F.2d 910 (4th Cir. 1981) (table). These efforts ultimately proved unsuccessful, due in part to the "severe periodic fluctuations in water level" of the River and its "inadequate water volume at ordinary stages," which "rendered the river unfit for navigation in its natural state and an unworthy candidate for improvements to make it fit for navigation in the future." *Id.* at 717.

Despite these setbacks, it would soon be realized that the Catawba River's future in enhancing progress in the Carolinas lay not in making the River navigable in the nineteenth century, but in harnessing its potential for electrical power in the twentieth. Beginning in the 1890s — an era in which textile mills began to flourish throughout the South — a company, later known as Duke Power (now Duke Energy), was founded. That company came into being principally to provide power to the Piedmont's fledgling cotton mills. Today, Duke Energy owns and operates a system of 11 reservoirs — six in North Carolina, four in South Carolina, and one in Lake Wylie, on the border of the two States — in the Catawba-Wateree

Basin, which provides hydroelectric power to the region. See App. 14.

That region includes the Charlotte-Gastonia-Rock Hill Metropolitan Statistical Area, which includes both North and South Carolina and is home to nearly 1.6 million people.<sup>2</sup> The Catawba River Corridor in South Carolina includes York, Lancaster, and Chester Counties, contains nearly 300,000 people, and is expected to have significant growth over the next decade.<sup>3</sup> The Catawba River Basin, which bisects the north-central portion of South Carolina, includes portions of eight South Carolina counties — most of Chester, Kershaw, Lancaster, and York Counties, the eastern third of Fairfield County, and portions of Sumter, Lee, and Richland Counties.

The Catawba River is key to the economic development of these portions of South Carolina, a historically underdeveloped area, and currently supports a number of major industries, including Bowater, Inc., Tyco Electronics, Inc., Springs Global US, Inc., and Celanese Advanced Materials, Inc. Indeed, the Catawba River Basin is today the fastest growing sub-region in the Carolinas, and the River serves a wide variety of North Carolina and South Carolina water-use purposes, including aquaculture; golf course irrigation; hydroelectric water use; industrial water use; irrigation water use; mining process; thermoelectric water use; and water supplies. The River now provides drinking water for and receives waste discharges from 14 counties, 22 municipalities and two States — North Carolina and South Carolina.

The same “severe periodic fluctuations in water level” and “inadequate water volume at ordinary stages” that rendered the Catawba River unfit for navigation, *Duke Power*, 501 F. Supp. at 717, however, continue today. A

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<sup>2</sup> See [http://www.census.gov/population/estimates/metro\\_general/2006/CBSA-EST2006-alldata.csv](http://www.census.gov/population/estimates/metro_general/2006/CBSA-EST2006-alldata.csv).

<sup>3</sup> See <http://www.census.gov/popest/counties/files/CO-EST2006-ALLDATA.csv>; Compl. ¶ 10.

streamflow gauge has been in operation from 1942 to the present below Lake Wylie, which straddles the North Carolina-South Carolina boundary and is where the Catawba River enters South Carolina. *See* App. 15-16. Measurements taken from that gauge show that the daily flow of the Catawba River into South Carolina has fluctuated widely and has been as low as 132 cubic feet per second (January 7, 2002).<sup>4</sup> *See* App. 16-17, 21; *see also* App. 20 (showing daily average flows for the entire year 2001, which ranged from nearly 7,000 cubic feet per second to less than 250 cubic feet per second). Further evidence comes from a model that Duke Energy developed during proceedings before the Federal Energy Regulatory Commission to estimate the natural flow of the Catawba River, as if the lakes used to generate hydroelectric power were not there. *See* App. 15. Those data show that the Catawba River, even in its “natural” state, often would not deliver the 1,100 cubic feet per second of water into South Carolina that a negotiated process involving Duke Energy and groups from South Carolina and North Carolina agreed was the minimum continuous flow that South Carolina should receive from the Catawba. *See* App. 15, 18; *see also* App. 36-37.

In addition, the Catawba River has been subjected to prolonged droughts in the mid-1950s, the late 1980s, and from 1998 through 2002. *See* App. 15. Both North Carolina and South Carolina have recently issued drought advisory warnings for the Catawba River Basin, with both States currently declaring that moderate drought conditions exist.<sup>5</sup> The effects of the drought that ended in 2002 were particularly severe on South Carolina. Major boat

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<sup>4</sup> One cubic foot per second is equivalent to about 646,000 gallons per day. Ten million gallons per day is equivalent to about 15.5 cubic feet per second.

<sup>5</sup> *See* North Carolina Drought Management Advisory Council, <http://www.ncdrought.org> (visited June 6, 2007); South Carolina State Climatology Office, [http://www.dnr.sc.gov/climate/sco/Drought/drought\\_current\\_info.php](http://www.dnr.sc.gov/climate/sco/Drought/drought_current_info.php).

landings and public access areas were closed due to the low water levels, harming both the public and the businesses that run the marinas. *See* App. 23, 38. Tap water was undrinkable in the City of Camden, South Carolina. *See* App. 38. Duke Energy was forced to reduce dramatically the generation of electricity from its hydroelectric stations located on the River. *See id.* And businesses, such as the Bowater pulp and paper mill, were forced to incur significant costs — more than \$6,000 per day — because the water flow was no longer sufficient to assimilate treated wastewater in amounts allowed by state permits. *See* App. 32-33, 38-39. Indeed, the flow in major tributaries of the Catawba River was so reduced that the only water flowing was the discharge from wastewater treatment plants. *See* App. 39.

## **B. The North Carolina Interbasin Transfer Statute**

In 1991, North Carolina enacted a statute governing transfers of water — that is, the “withdrawal, diversion, or pumping of surface water from one river basin and discharge of all or any part of the water in a[nother] river basin.” N.C. Gen. Stat. Ann. § 143-215.22G(3). The statute applies to a large number of enumerated rivers, including the Catawba River. *See id.* § 143-215.22G(1)(h). Any “person” wishing to “transfer . . . 2,000,000 gallons of water or more per day” from a river basin must obtain a permit from the North Carolina Environmental Management Commission (“EMC”). *Id.* § 143-215.22I(a)(1)-(2). Transfers of less than 2 million gallons of water per day are implicitly authorized to occur without the EMC’s prior approval. The statute also grandfathers both previously approved certificates for transfer and pre-existing water-transfer facilities, which may increase their transfers up to their full capacity without obtaining approval from the EMC. *See id.* § 143-215.22I(b), (i).

The North Carolina statute prescribes a number of factors that the EMC must consider in granting a permit, all of which on their face pertain only to North Carolina’s interests. Thus, the EMC is directed to consider, among



other things, the “necessity, reasonableness, and beneficial effects” of the “proposed uses” of the transferred water and the possible “detrimental effects on” the “source river basin” and the “receiving river basin” in North Carolina. *Id.* § 143-215.22I(f). The North Carolina statute contains no provisions requiring a reduction in the amount of water transferred in the event of a drought that limits the water available to downstream users in South Carolina. On the contrary, the statute allows the EMC to remedy “water supply problems” in North Carolina that are “caused by drought” by “grant[ing] approval for a temporary transfer.” *Id.* § 143-215.22I(j).

The EMC has granted at least two permits that have resulted in the transfer of tens of millions of gallons of water per day from the Catawba River. For example, in March 2002, the EMC granted the application by the Charlotte Mecklenburg Utilities to transfer up to 33 million gallons per day from the Catawba River Basin to the Rocky River Basin, more than double the 16 million gallons per day limit that had previously applied. *See* Compl. ¶ 20(a). In January 2007, the EMC granted the application by the Cities of Concord and Kannapolis to transfer up to 10 million gallons per day from the Catawba River Basin to the Rocky River Basin. *See id.* ¶ 20(b). The EMC granted this application over the objection of South Carolina, which noted, among other things, that the Cities’ application and the EMC’s environmental impact statement gave no consideration to the effects of the transfer on uses of the Catawba River in South Carolina. *See id.* Pending before the EMC is an application by Union County to increase by 13 million gallons per day its transfers of water from the Catawba River Basin to the Rocky River Basin. *See id.* ¶ 21.<sup>6</sup>

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<sup>6</sup> In 1989, the South Carolina Water Resources Commission had, pursuant to South Carolina Code Annotated §§ 49-21-10 *et seq.*, authorized both Lancaster County, South Carolina, and Union County, North Carolina — which jointly own a water treatment plant located in South Carolina on Lake Wylie, from which both counties derive their

Those transfers of water out of the Catawba River necessarily reduce the amount of water available to flow into South Carolina, exacerbate the existing natural conditions and droughts that contribute to low flow conditions in South Carolina, and cause the harms detailed above.

### **C. Events Leading To This Dispute**

As noted above, South Carolina actively opposed the most recent application for a grant of authority to transfer water out of the Catawba River. In December 2006, Henry McMaster, the South Carolina Attorney General, wrote to his North Carolina counterpart, Roy Cooper, reiterating South Carolina's opposition to the Cities' application, as also expressed by Governor Mark Sanford and South Carolina's members of Congress. *See App. 7.* Attorney General McMaster noted that, while litigation in this Court was an option, South Carolina's preferred option was to have the officials of the two States negotiate an interstate compact, with the EMC staying its hand pending the outcome of those negotiations. *See App. 7-8.* On January 3, 2007 — one week before the EMC's scheduled resolution of the Cities' application — North Carolina Attorney General Cooper responded that he had forwarded the letter to Governor Mark Easley and the North Carolina Secretary for Human Resources. *See App. 9-10.* The response made no mention of any willingness to negotiate an interstate compact or to delay action on the Cities' application.

On January 8, 2007, the Catawba/Wateree River Basin Bi-State Advisory Commission ("Commission"), which includes elected state officials from both South Carolina and North Carolina, passed a resolution recommending that the EMC delay action on the Cities' application for at

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water supply — to transfer a maximum of 20 million gallons of water per day from the Catawba River. That permit, however, requires both counties to decrease or cease their withdrawal from the Catawba River, when necessary to maintain a sufficient flow of water downstream of Lake Wylie. *See Class I Interbasin Transfer Permit, No. 29 WS01 S02 (May 8, 1989).*

least six months. *See* App. 25, 26-27. That resolution noted South Carolina's opposition to the transfer and offered up the Commission as a possible mediator that could enable both States to reach a solution to this interstate dispute through adoption of an interstate compact. *See* App. 27, 29-30. The Commission, however, operates in a purely advisory capacity and has no regulatory authority or any other authority to bind North Carolina or South Carolina. *See* App. 26. The EMC ignored the Commission's advisory recommendation, as well as the opposition of South Carolina, and granted the Cities' application on January 10, 2007.

### SUMMARY OF ARGUMENT

The North Carolina interbasin transfer statute, and the transfers from the Catawba River authorized under that statute, are directly contrary to this Court's decisions with respect to interstate rivers. Those decisions make clear that North Carolina, as the up-river State, has no right to claim control over the entire flow of the Catawba River, but instead is under a duty to ensure that South Carolina, the down-river State, enjoys the benefits of the Catawba River as well. Because North Carolina has transgressed the bounds of its limited rights under federal law, this Court should accept jurisdiction over South Carolina's Complaint. Following the full development of the record, the Court should enter a decree equitably apportioning the Catawba River, declaring North Carolina's interbasin statute invalid with respect to inequitable transfers out of the Catawba River, and prohibiting all transfers by North Carolina — past and future — that are inconsistent with that apportionment.

To assist in this task, the Court should appoint a Special Master, as has been its customary practice in equitable apportionment cases. A Special Master would be well positioned to compile the record that is characteristic of this type of case and to make recommended findings of fact and conclusions of law with respect to the numerous

factors that this Court considers in applying the doctrine of equitable apportionment.

## ARGUMENT

### I. FEDERAL COMMON LAW PRECLUDES RESORT TO THE NORTH CAROLINA INTERBASIN TRANSFER STATUTE FOR RESOLUTION OF THIS DISPUTE

Because this case “deal[s] with . . . water in [its] . . . interstate aspects, there is a federal common law” that governs this dispute, which is one “upon which state statutes or decisions are not conclusive.” *Illinois v. City of Milwaukee*, 406 U.S. 91, 103, 105 & n.7 (1972). Indeed, 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) (recognizing that, in “interstate water disputes,” “federal common law applies” and “our federal system does not permit the controversy to be resolved under state law”); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 108-10 (1938) (holding that “neither the statutes nor the decisions of either State can be conclusive” of the equitable apportionment under federal common law of an interstate river).

The North Carolina interbasin transfer statute “cannot be used” and is therefore irrelevant to the adjudication of this dispute. 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. 660, 670-71 (1931) (internal quotation marks omitted); *accord Kansas v. Colorado*, 206 U.S. 46, 97-100 (1907). As a result, the transfers from the Catawba River that North Carolina has previously approved 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. Under this Court's settled precedent, North Carolina has the burden of "present[ing] clear and convincing evidence in support of [those] diversion[s]." *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984).<sup>7</sup>

## II. SOUTH CAROLINA IS ENTITLED TO AN EQUITABLE APPORTIONMENT OF THE CATAWBA RIVER, AND NORTH CAROLINA SHOULD BE ENJOINED FROM AUTHORIZING TRANSFERS FROM THE RIVER THAT ARE INCONSISTENT WITH THAT APPORTIONMENT

This Court has repeatedly held that "[f]ederal common law governs interstate bodies of water, ensuring that the water is equitably apportioned between the States and that neither State harms the other's interest in the river." *Virginia v. Maryland*, 540 U.S. 56, 74 n.9 (2003); *see also Kansas v. Colorado*, 206 U.S. at 95-98. At the "root of the doctrine is the same principle that animates many of the Court's Commerce Clause cases: a State may not preserve solely for its own inhabitants natural resources located within its borders." *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025 (1983). Instead, "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.*

The North Carolina interbasin transfer statute, as drafted and applied by the North Carolina EMC, runs directly contrary to those principles. As shown above, the

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<sup>7</sup> *See Colorado v. New Mexico*, 467 U.S. at 317 (explaining that where, as here, 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") (quoting *Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982)).

statute gives no meaningful consideration to South Carolina's uses and users of water that is transferred out of one interstate river basin and into another river basin within North Carolina. See N.C. Gen. Stat. Ann. § 143-215.22I(f). Moreover, the statute makes no provision for accommodating the competing needs of both States in the event of drought conditions or other water supply problems. On the contrary, the statute contemplates that the EMC will approve increased intrastate transfers to respond to such conditions, even though such transfers will necessarily reduce the water available to flow downstream to South Carolina. See *id.* § 143-215.22I(j). 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).

Instead, this Court has repeatedly enforced the rule of equitable apportionment, which "is directed at ameliorating present harm and preventing future injuries to the complaining State." *Idaho ex rel. Evans v. Oregon*, 462 U.S. at 1028. The history of droughts and inconsistent flow that characterizes the Catawba River demonstrates that North Carolina's assertion of authority to transfer tens of millions of gallons of water daily out of the Catawba River — and the threat of further transfers in the future — imposes a serious and direct harm on South Carolina and its citizens. See *Nebraska v. Wyoming*, 325 U.S. 589, 610 (1945) ("deprivation of water in . . . semiarid regions cannot help but be injurious," particularly where there is "inadequacy of the supply of water to meet all appropriative rights"). South Carolina has an important sovereign interest in preventing the harms caused by North Carolina's appropriations of water. See, e.g., *Colorado v. New Mexico*, 459 U.S. at 182 n.9. South Carolina also possesses a significant *parens patriae* interest to

protect her citizens from those same harms. See, e.g., *Nebraska v. Wyoming*, 325 U.S. at 616.

South Carolina, therefore, respectfully invokes this Court's jurisdiction to resolve its dispute with North Carolina by equitably apportioning the Catawba River.

### III. THE COURT SHOULD APPOINT A SPECIAL MASTER

As the Court has commonly done in equitable apportionment cases, it should appoint a Special Master to take evidence and make a recommendation of the equitable apportionment of the Catawba River.<sup>8</sup> Equitable apportionment "calls for the exercise of an informed judgment on a consideration of many factors." *Nebraska v. Wyoming*, 325 U.S. at 618. In *Nebraska*, this Court provided "an illustrative not an exhaustive catalogue" of "relevant factors," which included:

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, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former.

*Id.*; see also *Colorado v. New Mexico*, 459 U.S. at 186-87 (listing factors); *Colorado v. Kansas*, 320 U.S. 383, 385 (1943) (same); *Connecticut v. Massachusetts*, 282 U.S. at 670-71 (same). Unsurprisingly, in light of the multifaceted inquiry involved, cases in which this Court has equitably apportioned interstate rivers have involved submission of "voluminous evidence."<sup>9</sup>

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<sup>8</sup> See, e.g., *Colorado v. New Mexico*, 467 U.S. at 313; *Idaho ex rel. Evans v. Oregon*, 462 U.S. at 1018; *Arizona v. California*, 460 U.S. 605, 609 (1983); *Nebraska v. Wyoming*, 325 U.S. at 591, 617.

<sup>9</sup> E.g., *Nebraska v. Wyoming*, 507 U.S. 584, 593 (1993); accord, e.g., *Colorado v. New Mexico*, 467 U.S. at 313; *Wyoming v. Colorado*, 259 U.S. at 471; *Kansas v. Colorado*, 206 U.S. at 105.

Indeed, this Court routinely “appoint[s] a Special Master to develop the record” when the record as presented in an original action “is not sufficiently developed to permit [the Court] to address the merits.” *South Carolina v. Regan*, 465 U.S. 367, 382 (1984) (plurality); *see also United States v. Raddatz*, 447 U.S. 667, 683 n.11 (1980) (explaining that, “[i]n exercising our original jurisdiction under Art. III, we appoint special masters” who are “generally charged to take such evidence as may be . . . necessary” and “to find the facts specially and state separately his conclusions of law thereon”) (internal quotation marks omitted; ellipsis in original). The appointment of a Special Master is particularly appropriate in this case to enable a full development of the record relevant to the equitable apportionment of the Catawba River, and to make recommended findings of fact and conclusions of law on the basis of the States’ factual and legal submissions.

### CONCLUSION

For the foregoing reasons, this Court should grant South Carolina’s motion for leave to file a complaint and appoint a Special Master to make a recommendation to this Court of the equitable apportionment of the Catawba River between South Carolina and North Carolina.



Respectfully submitted,

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**EXHIBIT 1**

[Seal Omitted]

HENRY MCMASTER  
ATTORNEY GENERAL

October 31, 2006

Phil Fragapane  
Division of Water Resources,  
North Carolina Department of Environment  
and Natural Resources  
1611 Mail Service Center  
Raleigh, NC 27699-1611

Re: Concord/Kannapolis Interbasin Transfer

Dear Mr. Fragapane:

On behalf of the citizens of South Carolina, we oppose the request from the communities of Concord and Kannapolis, NC, for the interbasin transfer ("IBT") of large amounts of water from the Catawba and Yadkin/Pee Dee Basins for use in the Rocky River Subbasin. This proposed transfer would adversely affect the water quantity and quality in both the SC portions of the Catawba River and the Pee Dee River. Ultimately, the IBT would impair the affected SC communities' ability to sustain future population growth, to attract new industry and maintain current businesses, to provide adequate drinking water, protect the local wildlife, and accommodate recreation.

Access to clean water is directly linked to the vitality of these South Carolina communities. There should be bi-state participation and cooperation regarding such fundamentally important decisions which affect both North and South Carolina water rights. Both states, together, should develop a basin wide water management plan in order to facilitate responsible and mutually beneficial water resource allocation. For NC's Environmental

Management Commission ("EMC") to unilaterally grant the proposed Concord/Kannapolis IBT without addressing the needs and rights of SC would be detrimental to future cooperation between the two states with respect to water resource management.

"(f) In determining whether a certificate may be issued for the transfer, the Commission shall specifically consider each of the following items and state in writing its findings of fact with regard to each item:

...

(2) The present and reasonably foreseeable future detrimental effects on the source river basin, including present and future effects on public, industrial, and agricultural water supply needs, wastewater assimilation, water quality, fish and wildlife habitat, hydroelectric power generation, navigation, and recreation. Local water supply plans that affect the source major river basin shall be used to evaluate the projected future municipal water needs in the source major river basin."

(2a) The cumulative effect on the source major river basin of any water transfer or consumptive water use that, at the time the Commission considers the application for a certificate is occurring, is authorized under this section, or is projected in any local water supply plan that has been submitted to the Department in accordance with G.S. 143-355(l).

(3) The detrimental effects on the receiving river basin, including effects on water quality, wastewater assimilation, fish and wildlife habitat, navigation, recreation, and flooding ..."



Importantly, the EIS does not even mention the effects (detrimental or otherwise) on the downstream communities, users or municipalities in South Carolina. The FEIS submitted to the EMC is required to consider, according to N.C.G.S.A. §143-215.22I(f)(2) "present and reasonably foreseeable future detrimental effects on the source river basin . . ." However, it fails to do so, completely omitting any mention of effects on the Catawba River Basin in SC. It also fails to say anything with respect to effects on riverways, instead focusing solely on effects to lakes. Further, the effects to lakes is based on the model used by Duke Power in their current FERC relicensing proposal which has not been finalized. Therefore, the parameters relied upon for the purposes of the FEIS may have changed by the time the Duke FERC relicense is approved.

In Section (f)(2a) of the statute, the EMC is required to consider the cumulative effect that this IBT would have on the river system. In order to address this, the FEIS would need to look at future IBTs within the Catawba and Yadkin/Pee Dee basins and to examine projected population growth along these systems both down and upstream, including population and industry growth in South Carolina.

Section (g) of the statute states:

"(g) A certificate shall be granted for a water transfer if the applicant establishes and the Commission concludes by a preponderance of the evidence based upon the findings of fact made under subsection (f) of this section that: (i) the benefits of the proposed transfer outweigh the detriments of the proposed transfer, and (ii) the detriments have been or will be mitigated to a reasonable degree. The conditions necessary to ensure that the detriments are and continue to be mitigated to a reasonable degree shall be attached to the certificate in accordance with subsection (h) of this section."

This section thus requires that benefits of the proposed IBT outweigh the detriments of the proposed IBT and that the detriments of the IBT be mitigated. The EIS does not accurately establish that the benefits of the proposed IBT outweigh the detriments because it does not address adverse impacts to South Carolina Riparian owners, to community growth, to drinking water supply, or to local environments in South Carolina. Instead, the FEIS focuses upon effect on lake levels based on the previously mentioned, as yet approved, Duke FERC relicense modeling parameters. This analysis simply does not comply with the statute.

Further, the FEIS does not explore in the slightest mitigation in the Catawba Basin at all but only discusses mitigation efforts to be taken in the Rocky River Subbasin., i.e. the receiving basin.

Section (m) of the statute states:

“(m) It is the public policy of the State to maintain, protect, and enhance water quality within North Carolina. Further, it is the public policy of the State that the cumulative impact of transfers from a source river basin shall not result in a violation of the antidegradation policy set out in 40 Code of Federal Regulations § 131.12 (1 July 1997 Edition) and the statewide antidegradation policy adopted pursuant thereto.”

The portion of the Federal Clean Water Act mentioned in section (m) of the statute deals with degradation of waters, which the proposed IBT would violate. (40 CFR §131.12) This section states (in part):

“(a) The State shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy pursuant to this subpart. The antidegradation policy and implementation methods shall, at a minimum, be consistent with the following:

(1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.

(2) Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.

(3) Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected."

The proposed IBT would significantly degrade the waters of SC in terms of water quantity, as well as water quality, in violation of the Clean Water Act's antidegradation requirements. The FEIS does not discuss mitigation for such degradation to South Carolina waters as federal law requires.

B. Water rights in North and South Carolina are based in the common law principle of Riparian Rights. This

doctrine is rooted in the concept of reasonable use of water by landowners adjacent to the waterway. SC contends that the proposed IBT would interfere with the reasonable use of the water of its riparian owners within the Catawba basin while at the same time conferring a benefit on nonriparian owners in the Ricky River Subbasin.

C. Further, for the North Carolina Environmental Management Commission unilaterally to reach a decision which will ultimately affect commerce within South Carolina is in violation of the United States Constitution, article I, section 3 which delegates regulation of interstate commerce to the U.S. Congress. Clearly, the proposed IBT would effect SC's ability to maintain current infrastructure, attract new business, support growth in population and our economy, and encourage tourism.

### Conclusion

The proposed IBT would surely have a detrimental effect upon the economy of SC, our ability to grow and attract new industry, upon the health and vitality of our wildlife, upon recreation and tourism and upon the health and public safety of the citizens of South Carolina. In our view, the proposed IBT contravenes federal statutes as well as the Federal Constitution. We urge rejection of the proposed IBT.

Very Truly Yours,

/s/ L. CHILDS CANTEY

L. Childs Cantey  
Assistant Attorney General

On behalf of  
Henry McMaster  
Attorney General

**EXHIBIT 2**

[Seal Omitted]

HENRY McMASTER  
ATTORNEY GENERAL

December 19, 2006

The Honorable Roy Cooper  
Attorney General, State of North Carolina  
North Carolina Department of Justice  
9001 Mail Service Center  
Raleigh, NC 27699-9001

Re: Proposed Concord/Kannapolis Interbasin Water  
Transfer

Dear General Cooper:

As you know, on January 10, 2007 the North Carolina Environmental Management Commission is scheduled to render its decision concerning an interbasin water transfer proposed by the towns of Concord and Kannapolis. The State of South Carolina submitted comments to the Commission expressing in detail our concerns regarding the adverse impact this transfer would have upon South Carolina. Governor Sanford has expressed in writing his opposition to this interbasin transfer. Our members of Congress from the Catawba and PeeDee regions have likewise expressed their opposition. South Carolina does not believe the current process by which such a transfer is granted exclusively by North Carolina authorities treats South Carolina's interests and water users in accordance with governing legal principles.

This office has recently been approached by public officials and citizens throughout the Catawba and Wateree River area urging us to take whatever legal action is necessary to protect South Carolina's interests and rights. We are preparing to do so. One such option is litigation in the original jurisdiction of the United States Supreme

Court, a process which can take many years, as witnessed by the boundary dispute between Georgia and South Carolina which consumed more than ten years.

There is an alternative to litigation. The North Carolina Environmental Management Commission could suspend its ongoing IBT proceedings concerning the Concord-Kannapolis transfer while officials of North and South Carolina seek to negotiate an interstate compact addressing this issue, along with other water issues. Such a compact would have to be approved by the two states' legislatures and probably by the United States Congress as well. Our reaching an agreement concerning water disputes and related issues would be wiser and less costly to the taxpayers than litigating each question as it arises. As the Southeast grows, unprecedented water questions will likely arise with increasing frequency. A delay in planning could have serious consequences.

Even if the EMC were to turn down the request from Concord and Kannapolis, we will still need to address these issues as outlined above. If the EMC grants the request in virtually any form, South Carolina will have no choice but to take appropriate legal action to block its implementation.

I look forward to hearing from you and to continued discussions and cooperation.

Yours very truly,

/s/ HENRY MCMASTER

Henry McMaster

**EXHIBIT 3**

[Seal Omitted]

**State of North Carolina**

**Department of Justice**

*Roy Cooper, Attorney General*

January 3, 2007

The Hon. Henry McMaster, Attorney General  
State of South Carolina  
P.O. Box 11549  
Columbia, S. C. 29211-1549

VIA: Fax and 1st Class Mail

Dear Henry:

Thank you for your letter of December 19, 2006 regarding water resource issues in the Catawba-Wateree River Basin.

The Catawba Basin is an important resource for both of our states. It's important as a clean water supply, a fish and wildlife habitat, a place for recreation, an economic development tool and a source of hydroelectric power. Your letter recognizes the pressures that continued growth in North and South Carolina may put on these resources. A framework for addressing these pressures will benefit both states.

Your letter, of course, raises issues of a legal nature and I thank you for informing me directly of your position. Your letter also raises complex policy issues and fundamental state policy questions regarding water issues. Therefore, I am forwarding your letter to Governor Mike Easley and Secretary of Environment and Natural Resources Bill Ross for their consideration.

Please keep me informed of your thoughts on these issues and your ideas for how they can be resolved.

With kind regards, I am

Very truly yours,

/s/ ROY

Roy Cooper



**EXHIBIT 4**

No. \_\_\_\_, Original

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In The  
**Supreme Court of the United States**

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STATE OF SOUTH CAROLINA,  
*Plaintiff,*

v.

STATE OF NORTH CAROLINA,  
*Defendant.*

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Affidavit of Dr. A. W. Badr

---

Personally appeared before me Dr. A. W. Badr, who being duly sworn, states under oath that:

1. I am Chief of Hydrology with the South Carolina Department of Natural Resources and have held this position since 1998.

2. I have earned the following academic degrees:

- a. Ph.D. in Biological and Agricultural Engineering awarded by North Carolina State University, Raleigh, North Carolina in 1983 with a major in Soil and Water Engineering and minors in Water Resources and Civil Engineering.
- b. M.Sc. in Biological and Agricultural Engineering awarded by North Carolina State University, Raleigh, North Carolina in 1978 with a major in Soil and Water Engineering and a minor in Mathematics.
- c. B.Sc. awarded by Alexandria University in Alexander, Egypt in 1968.

3. I provide professional and technical guidance and expertise in hydrology in all areas of concern to the South Carolina Department of Natural Resources, including issues that arise with regard to the Catawba River.

4. I am personally familiar with the Catawba River, various studies made of the Catawba River basin, and with various data that provide historic information about the Catawba River basin such as stream flow, precipitation, and use of the waters of the Catawba River.

5. Publications of mine include:

- a. A. W. Badr, A. Wachob, J. A. Gellici (2004). South Carolina Water Plan, Second Edition. South Carolina Department of Natural Resources. 120 pages.
- b. J.A. Gellici, A. W. Badr, M. Kiuchi, and S. L. Harwell (2004). Hydrologic Effects of the June 1998 – August 2002 Drought in South Carolina. South Carolina Department of Natural Resources, Report 34. 49 pages.
- c. R.N. Cherry, A.W. Badr, A. Wachob (2001). General Hydrology of South Carolina. South Carolina Department of Natural Resources, Land, Water and Conservation Division. Hydrology/Geology Map 2.
- d. Tabrizi, M. H., S. E. Said, A. W. Badr (1998). Nonlinear Modeling and Prediction of a River Flow System. Vol. 34 No. 6 Journal of American Water Resources Association, December 1998.

6. Attached hereto and incorporated herein is a report I have prepared at the request of the Attorney General for the State of South Carolina titled *Summary of Catawba-Wateree River Basin natural flows and the impact of water transfers from that basin in North Carolina* dated May 31, 2007, that accurately sets forth my opinion of the hydrologic conditions in the Catawba River basin.

/s/ A. W. BADR

Dr. A. W. Badr, Chief of Hydrology

Sworn to and Subscribed before me

this 31st day of May, 2007

/s/ SANDRA HEATH RUCKER

[notary seal omitted]

Notary Public for South Carolina

My commission expires 4-29-09.

**South Carolina Department of  
Natural Resources**

[Seal Omitted]

John E. Frampton  
Director

May 31, 2007

**Summary of Catawba-Wateree River basin natural  
flows and the impact of water transfers from that  
basin in North Carolina**

There is usually more than enough water in the Catawba River to meet the needs of all of its water users in South Carolina, but even with responsible and cooperative reservoir management, there will be times when the Catawba River does not have enough water in it to meet South Carolina's needs. During most years, this condition may occur for only a few days if at all, but during drought years, this condition may occur for months at a time. Interbasin transfers of water out of the Catawba basin in North Carolina will reduce the amount of water in the river. Most of the time, there will be ample water in the system so that water transfers out of the basin will not be harmful to South Carolina, but there will be times when there is not enough water in the Catawba River to meet South Carolina's needs, and during those times, water transfers out of the basin in North Carolina will have a detrimental effect on the Catawba River in South Carolina.

Duke Energy owns and operates a system of eleven reservoirs in the Catawba-Wateree basin of North and South Carolina. Six lakes are located entirely in North Carolina, four lakes are located within South Carolina, and Lake Wylie is situated on the North Carolina-South Carolina border. Because the six lakes located entirely in North Carolina all drain into Lake Wylie, the outflow or discharge from Lake Wylie can serve as an indicator of how much water is flowing into South Carolina via the Catawba River.

As part of its recent FERC relicensing process, Duke Energy developed a water mass balance model to simulate conditions in its 11 lakes and the rivers that connect them within the Catawba-Wateree basin. Part of this model included developing natural water inflows for the basin for 75 years from 1929 through 2003, to simulate hydrologic conditions as if the lakes were not there. Results of the Duke Energy model were used to develop water allocation strategies for all users in the basin and to reach a formal agreement in the FERC license guaranteeing specific minimum continuous discharges from Lake Wylie into the Catawba River in South Carolina.

The minimum continuous flow requirement agreed to in the FERC license calls for the release of 1,100 cfs (cubic feet per second) from Lake Wylie into the Catawba River. The minimum continuous flow will be provided by a combination of leakage, spillage, and generation from the Lake Wylie dam.

Using data from the Duke Energy hydrologic model, the natural average daily flow of the Catawba River at the location of the Lake Wylie Dam was compared to the minimum continuous flow requirement (1,100 cfs) from Lake Wylie for the period 1930-2002. Table 1 shows the number of days per year in which the natural river flow at the Lake Wylie Dam would have been less than 1,100 cfs. For example, during the year 2002 — after years of drought — the natural inflow into Lake Wylie would have been less than 1,100 cfs for 104 days. When enough water is stored in the lakes, natural inflow can be supplemented to meet required flows. However, during periods of water shortage and consecutive dry years, low lake levels may make supplemental water unavailable. It is clear that during severe or prolonged droughts (such as in the mid-1950's, the late 1980's, and 1998-2002) there would be many days in which there will not be enough water in the basin to meet the required 1,100 cfs release from Lake Wylie.

The U.S. Geological Survey has operated a streamflow gaging station on the Catawba River just below Lake Wylie since 1942. This gage provides measured daily flows of the Catawba River, and because it is located 3.5 miles downstream of the Lake Wylie Dam, it provides a good measure of the releases from Lake Wylie, which has been in existence since 1904. Data from this gage indicate that daily average releases from Lake Wylie were less than 1,100 cfs for many days of each year (Table 2), and during drought years, that number usually exceeds 100 days.

The impact of a severe drought on the Catawba River can be seen in Figure 1, which shows the measured daily flow of the river just below Lake Wylie in the year 2001. Releases from Lake Wylie were less than 1,100 cfs on 205 days of that year, even though Table 1 indicates that the "natural" flow of the river at this location would have been less than 1,100 cfs for 70 days during that year. The actual flow of the river was much less than what it naturally would have been because some water was removed from the river for offstream uses, such as public supplies, and some water was lost to evaporation, but mainly because lake operators did not release as much water from their lakes as flowed into them. With lake levels already low and no idea of how much longer the drought would last, lake managers tried to retain as much water as possible for as long as possible, at the expense of downstream releases.

The Catawba River can experience very low flows at any time of the year, not just during the dry summer and fall months. Table 3, which lists the lowest measured daily average flow for each day of the year for the gage's 64-year period of record, shows that daily average flows of less than 1,100 cfs occurred on all but two days of the year. For example, the lowest flow of the Catawba River at this gage on any January 6 during the period of record was 562 cfs, and the lowest flow on any January 7 during the period of record was 132 cfs (which occurred on

January 7, 2002, and is also the lowest outflow ever recorded from Lake Wylie).

This information indicates that natural hydrologic conditions can cause insufficient flows in the Catawba River at any time of the year, and during severe droughts, the minimum flow requirement of 1,100 cfs may not be met for months at a time. Hydrologic conditions can result in periods when the basin does not have enough water to maintain the Catawba River at even minimally adequate flows, and during these times, transfers of even relatively small volumes of water out of the basin in North Carolina will further reduce the Catawba River flow, increasing the hardship for water users in South Carolina and prolonging the time that the river's flow will be less than 1,100 cfs.

According to the *South Carolina Water Plan – 2<sup>nd</sup> Edition*, trigger mechanisms should be established within a basin to reduce or restrict water transfers out of that basin when water availability becomes reduced to the point that there is not enough water to meet required streamflows or the water-use needs of all users within the donor basin. Applying this concept to the Catawba-Wateree basin, all water transfers out of the basin should be reduced as discharges from Lake Wylie approach 1,100 cfs, and all transfers should cease completely if discharges from Lake Wylie fall to 1,100 cfs or less.

The State *Water Plan* also promotes the concept of managing water allocation within an entire basin using a comprehensive plan that involves the entire basin, regardless of political boundaries. A commission or compact should be created to manage and allocate all the water in the Catawba-Wateree basin.





Table 1. Number of days per year during which the natural average daily flow of the Catawba River at the location of the Lake Wylie Dam would have been less than 1,100 cfs, based on data from the Duke Energy CHEOPS hydrologic model

Year	Number of days during which flow is less than 1,100 cfs	Year	Number of days during which flow is less than 1,100 cfs	Year	Number of days during which flow is less than 1,100 cfs
1930	9	1955	27	1980	4
1931	22	1956	37	1981	32
1932	4	1957	5	1982	13
1933	1	1958	4	1983	4
1934	2	1959	1	1984	3
1935	0	1960	4	1985	10
1936	4	1961	5	1986	43
1937	1	1962	9	1987	18
1938	8	1963	10	1988	44
1939	12	1964	4	1989	6
1940	20	1965	3	1990	0
1941	23	1966	4	1991	10
1942	2	1967	3	1992	0
1943	17	1968	8	1993	10
1944	14	1969	0	1994	1
1945	14	1970	2	1995	0
1946	7	1971	0	1996	1
1947	10	1972	4	1997	13
1948	5	1973	0	1998	11
1949	1	1974	0	1999	47
1950	7	1975	0	2000	62
1951	24	1976	0	2001	70
1952	6	1977	4	2002	104
1953	20	1978	1		
1954	29	1979	0		

Table 2. Number of days per year in which the measured daily average flow of the Catawba River below the Lake Wylie Dam (USGS gage 02146000) was less than 1,100 cfs, for the years 1942 through 2004

Year	Number of days in which flow was less than 1,100 cfs	Year	Number of days in which flow was less than 1,100 cfs	Year	Number of days in which flow was less than 1,100 cfs
1942	27	1963	68	1984	41
1943	31	1964	63	1985	108
1944	3	1965	62	1986	154
1945	21	1966	80	1987	93
1946	29	1967	123	1988	200
1947	15	1968	78	1989	50
1948	23	1969	49	1990	35
1949	4	1970	108	1991	59
1950	13	1971	50	1992	45
1951	61	1972	37	1993	76
1952	30	1973	35	1994	28
1953	78	1974	31	1995	10
1954	135	1975	15	1996	27
1955	115	1976	71	1997	48
1956	117	1977	66	1998	82
1957	53	1978	44	1999	109
1958	56	1979	16	2000	164
1959	47	1980	62	2001	205
1960	38	1981	137	2002	228
1961	35	1982	82	2003	10
1962	90	1983	54	2004	13



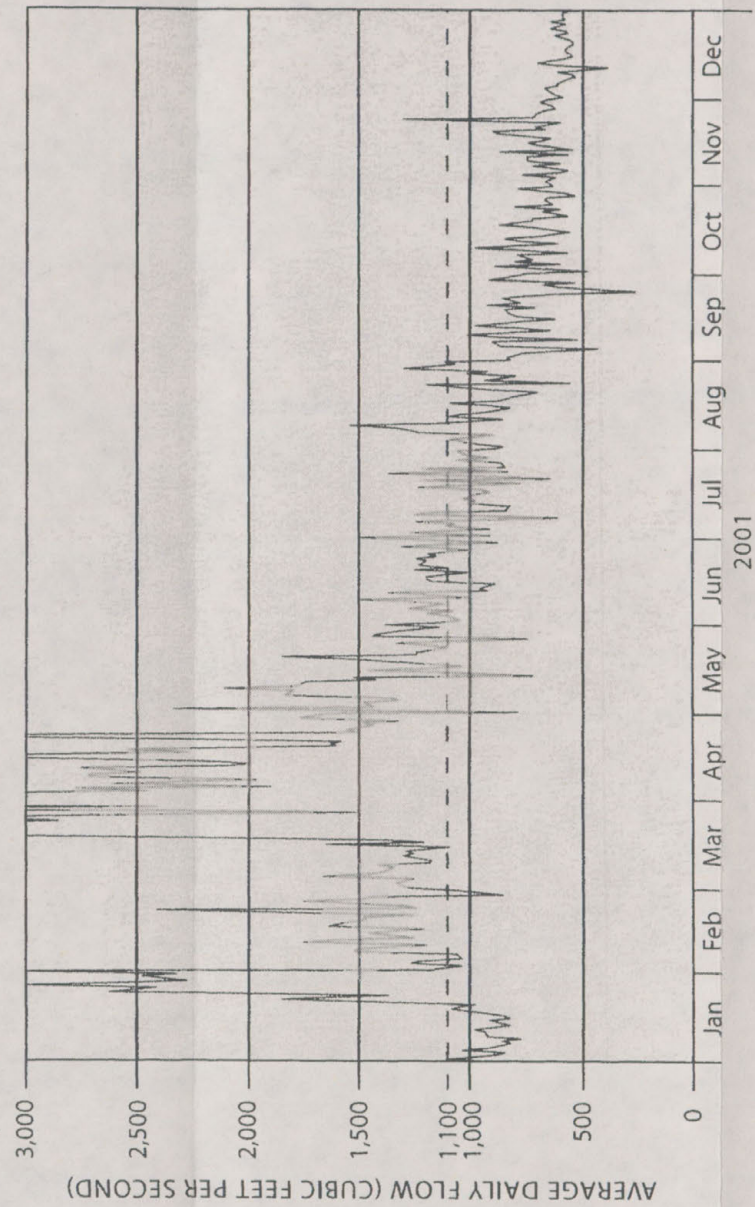
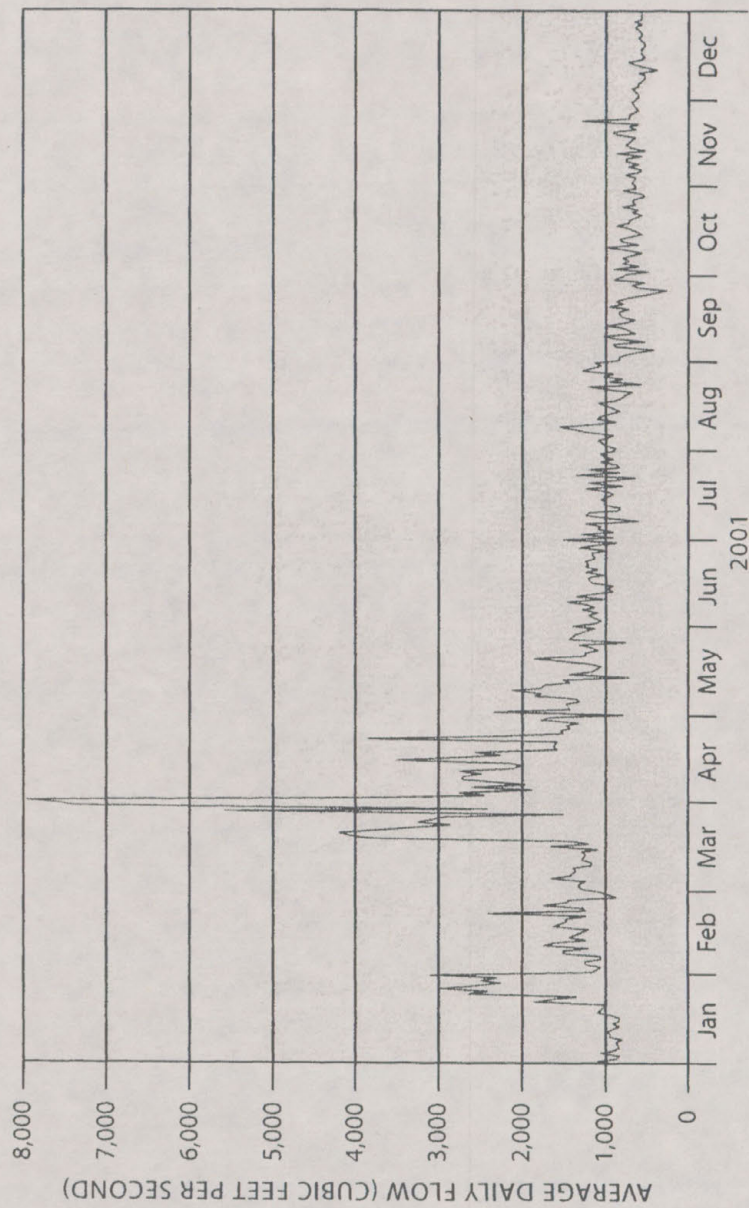


Figure 1. Measured average daily flow of the Catawba River in the year 2001, measured at USGS gage 02146000, located 3.5 miles downstream from the Lake Wylie Dam. The lower graph highlights flows less than 1,100 cubic feet per second.



Table 3. Minimum of daily average flows measured for each day of the year for the Catawba River below the Lake Wylie Dam (USGS gage 02146000), for the years 1942 through 2006

Day of month	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
1	567	606	396	701	638	558	529	648	568	548	552	591
2	554	713	689	672	605	558	572	577	596	475	565	622
3	602	780	633	616	631	566	524	603	567	576	593	649
4	579	756	720	341	572	600	514	565	535	512	602	619
5	597	696	720	286	615	566	576	627	431	598	560	612
6	562	732	641	664	649	576	503	625	562	581	382	600
7	132	609	727	601	602	699	538	660	528	625	409	564
8	646	505	418	592	593	485	612	590	521	560	594	528
9	633	717	620	628	577	626	583	549	581	533	611	545
10	672	661	645	701	610	616	554	587	523	601	615	608
11	546	690	599	676	632	579	535	642	586	572	565	388
12	607	721	688	614	672	605	578	654	523	416	569	627
13	588	742	683	610	624	590	563	561	593	468	541	606
14	616	714	544	618	684	558	589	583	483	266	616	580
15	517	668	478	562	616	620	586	576	625	558	688	537
16	591	758	596	652	663	520	616	535	555	473	565	555
17	549	780	831	618	574	485	518	535	570	368	640	577
18	590	758	1,110	701	684	485	553	642	542	543	622	562
19	587	782	697	579	656	569	730	659	487	513	666	544
20	288	638	732	621	589	533	575	527	528	540	585	537
21	326	590	696	622	660	545	509	564	603	490	592	554
22	594	744	795	664	594	670	616	506	608	538	528	620
23	519	755	623	619	578	539	602	605	496	557	573	564
24	330	714	585	578	574	607	616	309	615	582	676	571
25	587	676	708	350	641	682	608	541	263	545	587	638
26	604	734	645	227	543	578	603	592	593	568	585	550
27	565	652	519	755	573	609	588	636	501	546	591	628
28	647	422	515	667	596	505	616	579	530	527	593	574
29	638	1,110	471	632	588	516	648	588	584	575	593	581
30	759		489	607	582	549	616	468	457	550	654	582
31	657		628		525		605	479		412		555

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**EXHIBIT 5**

No. \_\_\_\_, Original

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In The  
**Supreme Court of the United States**

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STATE OF SOUTH CAROLINA,  
*Plaintiff,*

v.

STATE OF NORTH CAROLINA,  
*Defendant.*

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Affidavit of Mr. Laron A. Bunch, Jr.,  
Manager of Lake Wylie Marina

---

Personally appeared before me Mr. Laron A. Bunch, Jr., who being duly sworn, states under oath that:

1. I am the manager of the Lake Wylie Marina.
2. Lake Wylie Marina has operated continuously as a family owned business since 1975.
3. I was the Manager of the Lake Wylie Marina during the drought of 2002 (the "Drought") and am familiar with the impacts of the Drought on the operations and finances of the Lake Wylie Marina.
4. The Lake Wylie Marina is located on Highway 49 S. at Buster Boyd Bridge, Lake Wylie, in York County, South Carolina.
5. The Lake Wylie Marina is a seven-acre, full service marina located on the shores of Lake Wylie.
6. In addition to operating as a marine retail operation, Lake Wylie Marina has 82 wet slips, approximately 400 dry storage slips, and a marine repair business.

7. The Lake Wylie marina is located adjacent to the Buster Boyd Access Area, a facility on Lake Wylie containing four public use boat ramps for the purpose of allowing the public to launch boats into Lake Wylie.

8. Many people that use the Buster Boyd Access Area utilize the facilities of Lake Wylie Marina to purchase food, fuel, and other services.

9. The dry storage operation consists of large buildings where boats are stacked in racks. To launch these boats at a customer's request, forklifts are used to lift the boats from the storage racks. The forklifts then carry the boats to lakeside facilities (the "Forklift Facilities") where the forklifts lower the boats into the water.

10. Lake Wylie is a reservoir located in the Catawba River basin and water flows in the Catawba River are critical to the lake levels of Lake Wylie during periods of low precipitation.

11. During the summer of 2002, the water levels of Lake Wylie dropped precipitously as the result of drought conditions. As the result of the drops in lake levels (the following are referred to jointly as the "Impacts"):

- a. Duke Energy closed the ramps in the Buster Boyd Access Area for several months because low water levels destroyed the ability of people to launch safely their boats into Lake Wylie. Closing the ramps had a direct financial impact on Lake Wylie Marina by reducing the flow of customers from the Buster Boyd Access Area to the Lake Wylie Marina.
- b. Approximately two thirds of the wet slips at Lake Wylie Marina could not be used for approximately three months.
- c. Boats stored in the dry storage facilities could not be launched because lake levels were too low for the Forklift Facilities to be used for approximately one month.
- d. Lake Wylie Marina lost customers for its wet slips and its dry storage facilities because the wet slips

could not be used and the boats stored in the dry storage facilities could not be launched.

12. The Impacts caused material, financial harm to Lake Wylie Marina and adversely impacted the customers of Lake Wylie Marina.

13. Water transfers out of the Catawba River basin that increase the frequency of low water conditions have a material, adverse financial impact on the Lake Wylie Marina.

/s/ LARON A. BUNCH, JR.

Laron A. Bunch, Jr., Manager, Lake Wylie Marina

Sworn to and Subscribed before me  
this 30 day of May, 2007

/s/ MELISSA WALLACE [notary seal omitted]

Notary Public for South Carolina

My commission expires 4/26/14.



**EXHIBIT 6**

No. \_\_\_\_, Original

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In The  
**Supreme Court of the United States**

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STATE OF SOUTH CAROLINA,  
*Plaintiff,*

v.

STATE OF NORTH CAROLINA,  
*Defendant.*

---

Affidavit of Senator Robert Wesley Hayes, Jr.

---

Personally appeared before me Senator Robert Wesley Hayes, Jr., who being duly sworn, states under oath that:

1. I am presently serving in the South Carolina Senate and have been a member of the South Carolina Senate since September 17, 1991.

2. I am a member of the Catawba/Wateree River Basin Bi-State Advisory Commission (the "Commission") established by S.C. Code Ann. Section 44-59-10 and have been a member since the Commission's first meeting on October 21, 2005, serving as the Commission's first Chairman.

3. The Commission consists of fifteen members who reside in counties which abut the Catawba/Wateree River Basin and includes (1) two members of the North Carolina House of Representatives, (2) two members of the North Carolina Senate, (3) two members of the South Carolina House of Representatives, and (4) two members of the South Carolina Senate. Other members of the Commis-

sion represent various interest groups as set forth in S.C. Code Ann. Section 44-59-50.

4. As set forth in S.C. Code Ann. Section 44-59-20, the purposes of the Commission include (1) providing guidance and making recommendations to local, state, and federal legislative and administrative bodies, and to others as it considers necessary and appropriate, for the use, stewardship, and enhancement of the water, and other natural resources, for all citizens within the river basins [the Catawba Basin in this instance], and (2) providing a forum for discussion of issues affecting the basin's water quantity and water quality, and issues affecting other natural resources.

5. The Commission serves in an advisory capacity only. As set forth in S.C. Code Ann. Section 44-59-20:

(C) All of the authority granted to the River Basins Advisory Commissions shall be advisory in nature and in no way shall the commissions be construed to have any regulatory authority.

(D) The commissions shall have no authority to obligate or otherwise bind the State of North Carolina, the State of South Carolina, or any agency or subdivision of either state.

6. The Commission passed a resolution and sent a memorandum to the North Carolina Environmental Management Commission dated January 8, 2007, with regard to the Concord/Kannapolis Interbasin Transfer Request that stated in part:

Whereas, the Commission has received testimony from a variety of residents and governments along the Catawba river Basin in both States [South Carolina and North Carolina] stating concerns regarding the impact of the transfer of water from this Basin [Catawba] to another river basin [Yadkin/Pee Dee] upon their quality of life; and

Whereas, prior public hearings have failed to eliminate opposition to this proposal, and minimize the anxieties and concerns; and,

Whereas, multiple government entities along the Catawba River Basins, including the South Carolina Attorney General, stated at this last meeting their commitment to litigate with the first action being to seek injunctions to stop any withdrawal until the matter is settled judicially.

Whereas, all parties present felt the duly legislated Catawba/Wateree River Basin Bi-State Advisory Commission represented a knowledgeable body that could mediate a result to this dispute without litigation; and,

Whereas, all parties present with a desire to sue agreed to withdraw their commitment to sue if the EMC would delay action for six months and allow the Catawba/Wateree River Basin Bi-State Advisory Commission the opportunity to attempt to assess this situation and mediate a solution;

Be it therefore resolved, that this body recommends that the North Carolina Environmental Advisory Commission delay further action on this matter at least six months. Be it further resolved that the EMC agrees to participate in dialogues and negotiations with the Catawba/Wateree River Basin Bi-State Commission and corresponding state agencies with the common purpose of solving this conflict, and seeking formal procedures and compacts whereby Interstate resolutions to future issues of similar nature be addressed with all participants contributing to the decision-making process.

7. The Memorandum was submitted by North Carolina Senator, the Honorable Dan Clodfelter, Chairman.

8. A true copy of the memorandum is attached hereto.

9. In spite of the best efforts by the parties from both the States of North Carolina and South Carolina working through the Commission, the EMC issued the inter-basin transfer certificate to the cities of Concord and Kannapolis.

/s/ ROBERT HAYES, JR.

Senator Robert Wesley Hayes, Jr.

Sworn to and Subscribed before me  
this 30 day of May, 2007

/s/ ANN M. JOHN [notary seal omitted]

Notary Public for South Carolina

My commission expires March 5, 2008.

**CATAWBA/WATEREE RIVER BASIN BI-STATE  
ADVISORY COMMISSION**

**MEMORANDUM**

**TO:** North Carolina Environmental Management Commission

**FROM:** Sen. Dan Clodfelter, Chairman  
Catawba/Wataree River Basin Bi-State  
Advisory Commission

**DATE:** January 8, 2007

**SUBJECT:** Resolution to delay Concord/Kannapolis  
Interbasin Transfer Request

Be informed that on January 5, 2007, at its duly constituted meeting, the Catawba/Wataree River Basin Bi-State Advisory Commission unanimously approved the following resolution.

Whereas, the Commission has received testimony from a variety of residents and governments along the Catawba River Basin in both States stating concerns regarding the impact of the transfer of water from this Basin to another River Basin upon their quality of life; and

Whereas, prior public hearings have failed to eliminate opposition to this proposal, and minimize anxieties and concerns; and,

Whereas, multiple government entities along the Catawba River Basins, including the South Carolina Attorney General, stated at this last meeting their commitment to litigate with the first action being to seek injunctions to stop any withdrawal until the matter is settled judicially.

Whereas, all parties present felt the duly legislated Catawba/Wataree River Basin Bi-State Advisory Commission represented a knowledgeable body that could mediate a resolution to this dispute without litigation; and,

Whereas, all parties present with a desire to sue agreed to withdraw their commitment to sue if the EMC would delay action for six months and allow the Catawba/Wateree River Basin Bi-State Advisory Commission the opportunity to attempt to assess this situation and mediate a solution;

Be it therefore resolved, that this body recommends that the North Carolina Environmental Advisory Commission delay further action on this matter at least six months. Be it further resolved that the EMC agrees to participate in dialogues and negotiations with the Catawba/Wateree River Basin Bi-State Commission and corresponding state agencies with the common purpose of solving this conflict, and seeking formal procedures and compacts whereby Interstate resolutions to future issues of similar nature be addressed with all participants contributing to the decision-making process.

Respectfully submitted,

Dan Clodfelter, Chairman

**ATTACHMENTS**

**EXHIBIT 7**

No. \_\_\_\_, Original

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In The  
**Supreme Court of the United States**

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STATE OF SOUTH CAROLINA,  
*Plaintiff,*

v.

STATE OF NORTH CAROLINA,  
*Defendant.*

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Affidavit of Mr. Dale Herendeen

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Personally appeared before me Mr. Dale Herendeen, who being duly sworn, states under oath that:

1. I am employed by Bowater Incorporated ("Bowater").
2. I am the Environmental Manager of Bowater's Catawba Operation (the "Catawba Plant"), located on the Catawba River, Town of Catawba, York County, South Carolina.
3. I have worked at the Catawba Plant as Environmental Manager since May 2001.
4. I am familiar with the impacts of the drought of 2002 on the Catawba Plant.
5. The Catawba Plant:
  - a. Was established in 1957.
  - b. Is one of the largest coated paper and market pulp mills in the world and is the largest in North America.

- c. Has an annual capacity of 649,000 metric tons of coated paper and 245,000 metric tons of market pulp.
6. The South Carolina Chamber of Commerce named Bowater's Catawba Operations South Carolina's 2004 Manufacturer of the Year. In 2005, Industry Week Magazine in association with the National Association of Manufacturers (NAM) named Bowater's Catawba Operations a "Best Plants" award winner.
7. The Catawba Operation employs approximately 1,000 employees.
8. From 2003 through 2005, the Catawba Operation has received capital improvements that included the construction of a \$175 million state-of-the-art kraft-pulping mill, along with a \$106 million paper machine conversion.
9. The Catawba Plant is dependent on water as a resource that is temporarily removed from the Catawba River and used in plant operations that is then returned to the Catawba River in treated form.
10. When operating at full capacity, the Catawba Plant uses approximately 30 million gallons per day of water from the Catawba River that is returned to the Catawba River after appropriate treatment.
11. For the Catawba Plant to operate efficiently, the Catawba River (a) must be high enough to cover the plant intakes located on the Catawba River and (b) flowing at a rate adequate to receive the water discharges from the Catawba Plant within the limits of the Catawba River's assimilative capacity at the discharge point.
12. During one of the worst droughts on record, from 1998 to 2002, the Catawba River was severely depleted and the lack of water threatened the operations of the Catawba Plant.
13. The reduced flows in the Catawba River from 1998 – 2002 reduced the assimilative capacity of the Catawba River at the Catawba Plant such that the Catawba Plant was forced to severely limit its discharge into the



Catawba River because there was not enough flow to assimilate treated wastewater at the limits prescribed by its state permit. As a result, the Catawba Plant had to utilize on-site holding ponds for wastewater and incur extra wastewater treatment costs in excess of \$6000/day to maintain production. By late 2002, the Catawba Plant was close to reaching holding pond capacity. If holding pond capacity had been reached, the Catawba Plant would have had to potentially curtail production which would have likely caused significant financial loss to Bowater and forced layoffs due to the cessation of plant operations.

14. Transfers of water out of the Catawba River basin in the State of North Carolina mean less water is available in the Catawba River to meet the requirements of the Catawba Plant operations.

/s/ DALE HERENDEEN

Dale Herendeen, Environmental Manager

Sworn to and Subscribed before me  
this 30 day of May, 2007

/s/ Donna Uebler [notary seal omitted]

Notary Public for South Carolina

My commission expires February 3, 2010.

**EXHIBIT 8**

No. \_\_\_\_, Original

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In The  
**Supreme Court of the United States**

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STATE OF SOUTH CAROLINA,  
*Plaintiff,*  
v.

STATE OF NORTH CAROLINA,  
*Defendant.*

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Affidavit of Ms. Donna Lisenby, Catawba Riverkeeper

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Personally appeared before me Ms. Donna Lisenby, who being duly sworn, states under oath that:

1. I am the Catawba Riverkeeper and the Executive Director of the Catawba Riverkeeper Foundation, Inc. (the "Foundation").
2. The Foundation is a 501(c)(3) non-profit environmental organization.
3. I have been the Catawba Riverkeeper since 1998.
4. I received a Bachelors of Science from Clemson University in 1987.
5. The mission of the Foundation is to advocate for and secure protection and enhancement of the Catawba River, its lakes, tributaries and watershed so that it will always sustain the human and wildlife populations that depend on it for life.
6. I am personally familiar with the Catawba River from its origins in the State of North Carolina until its terminus in the State of South Carolina.

7. The statements and opinions set forth in this affidavit are based on my experiences working as the Catawba Riverkeeper, including participation in rulemaking and legislative processes, patrolling the river, studying and commenting on permits and developments proposed within the basin, reading studies, documents and other materials, and involvement in a variety of other matters that have an effect on the Catawba River and its environs, and the aquatic life it supports.

8. Part of my job as the Catawba Riverkeeper is to patrol the entire reach of the Catawba River, including the various reservoirs created by dams in the Catawba River, in the States of North Carolina and South Carolina, both by boat and by vehicle.

9. The Catawba River basin, in the States of North Carolina and South Carolina:

- a. Contains 13 hydro stations
- b. Contains 11 reservoirs
- c. Spans over 362 km of river
- d. Has a total drainage area of approximately 2888 km of reservoir and island shoreline
- e. Flows through nine counties in North Carolina and five counties in South Carolina
- f. Has a total drainage area of 12,302.5 square kms
- g. Provides a drinking water supply for over 1.3 million people whose needs are projected to increase over 200% in the next 50 years
- h. Provides the energy to power 116,000 homes and the water to support over 8100MW of fossil and nuclear-fueled power plants

10. There is an intricate set of dependencies on the Catawba/Wateree River system, all hinging upon the delicate balance of water use both now and in the future. Jobs, communities, industry, recreation, and the environment are at stake.

11. The water flows of the Catawba River vary widely from season to season and year to year. For example, the United States Geological Survey has reported the following data for the Catawba River at their stream gauge located on the Catawba River Near Rock Hill, SC:

The numbers are the average minimum, maximum, and mean stream flow in cubic feet per second for the date given calculated for the period Oct. 1, 1895, through Sept. 30, 2006, as reported by the United States Geological Survey.			
	Minimum	Maximum	Mean <sup>1</sup>
March 31	628	19,100	6,550
June 30	549	9,540	3,240
September 30	457	14,200	3,240
December 31	555	93,000	5,820

12. As Catawba Riverkeeper, I meet with stakeholders, interested parties, and representatives of state agencies about issues of concern about the Catawba River.

13. As Catawba Riverkeeper, I have participated on behalf of the Foundation as a stakeholder in the ongoing negotiations (the "FERC Negotiations") between Duke Power Company LLC, doing business as Duke Energy Carolinas, LLC ("Duke") and other stakeholders related to the renewal of various Federal Energy Regulatory Commission ("FERC") licenses for various reservoirs located on the Catawba River that are held by Duke.

14. The FERC Negotiations resulted in certain agreements with regard to the FERC Licenses that are set forth in that certain Comprehensive Relicensing Agreement for the Catawba-Wateree Hydro Project FERC Project No. 2232 effective as of August 1, 2006 (the "Relicensing Agreement").

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<sup>1</sup> <http://waterdata.usgs.gov/nwis>

15. I am familiar with the terms of the Relicensing Agreement.

16. The Relicensing Agreement has been filed with the FERC.

17. As Catawba Riverkeeper and through participation in the FERC Negotiations, I am familiar with the protocols related to river flows, particularly the low in flow protocols (the "LI Protocols") and how the LI Protocols are implemented and the effect that removing water from the Catawba River has on the frequency of implementation of the LI Protocols, particularly in times of drought.

18. The Catawba River begins in the mountains of North Carolina near Mount Mitchell and on its 225 mile course to South Carolina is dammed 11 times creating the following reservoirs: Lake James, Lake Rhodhiss, Lake Hickory, Lake Lookout Shoals, Lake Norman, Mountain Island Lake, Lake Wylie, Fishing Creek Lake, Great Falls Lake, Rocky Creek Lake and Lake Wateree.

19. As Catawba Riverkeeper, I am familiar with various issues impacting the Catawba River, including, but not limited to (a) water quality, (b) water quantity, (c) historic streamflow patterns and their impacts on the users of the Catawba River, (d) historic reservoir levels and their impact on the users of the Catawba River and its associated lakes, (e) development both within and along the shores of the Catawba River, (f) industrial development along the Catawba River, (g) current populations and predicted growth along the Catawba River corridor, (h) the flora and fauna found in and appurtenant to the Catawba River, (i) current and predicted demand for the waters of the Catawba River, (j) the issues with regard to the impacts and potential impacts of interbasin transfers of the waters of the Catawba River to other river basins, and (k) the impact of the LI Protocols, particularly in time of drought.

20. The Catawba River basin has one of the fastest growing populations in the States of North and South Carolina. The largest city in North and South Carolina is

Charlotte, NC. It is located in the Catawba River Basin. The greater Charlotte region added approximately 300,000 residents from 2000 to 2006 or the equivalent of twice the population of Asheville, North Carolina.

21. The consequences of interbasin transfers of water out of the Catawba River basin by the upstream State of North Carolina reach through the agency of natural laws into the territory of the State of South Carolina because the flow of the Catawba River is reduced. The natural consequences of such interbasin transfers impact the State of South Carolina by lowering the quantity of water in the Catawba River that flows into the State of South Carolina.

22. During one of the worst droughts on record, from 1998 to 2002, the Catawba River was severely depleted and struggled to meet water demands at the 2002 population levels. During the last year of the drought, the following impacts were recorded (the "Drought Factors"):

- a. Algae blooms occurred on Lake Wateree in the State of South Carolina that caused such taste and odor problems in finished drinking water for the City of Camden, South Carolina that residents stopped drinking tap water and started buying bottled water.
- b. Most boat landings and public access areas on the Catawba River lakes, in both the States of North Carolina and South Carolina, closed due to low water levels, greatly impacting public recreation and access to these public trust waters.
- c. Duke dramatically reduced electricity generation at their thirteen hydroelectric power generation stations located on the Catawba River.
- d. The Bowater pulp and paper mill in the State of South Carolina was forced to severely limit its discharge into the Catawba River because there was not enough flow to assimilate treated wastewater at the limits prescribed by its state permit. As a result, Bowater had to construct temporary

holding ponds for wastewater, and the plant was within days of reaching holding pond capacity which would have necessitated shut down of one of the State of South Carolina's largest employers.

- e. Major tributaries of the Catawba River basin, including Fishing Creek which flows through York and Chester counties in the State of South Carolina, were so reduced in flow that the only waters flowing were waters from wastewater treatment discharges.

23. The diversion of the waters of the Catawba River in the State of North Carolina into other river basins results, through the agency of natural law, in decreasing the flows into the State of South Carolina and exacerbates the Drought Factors whenever there are drought conditions in the Catawba River basin.

24. The Relicensing Agreement contains certain protocols for the reservoir system operated by Duke known as the "Low In Flow Protocols" (the "LI Protocols"). As set forth in Appendix C of the Relicensing Agreement with regard to the LI Protocols:

### **Low Inflow Protocol (LIP) for the Catawba-Wateree Project**

#### **PURPOSE**

The purpose of this Low Inflow Protocol (LIP) is to establish procedures for reductions in water use during periods of low inflow to the Catawba-Wateree Project (the Project). The LIP was developed on the basis that all parties with interests in water quantity will share the responsibility to establish priorities and to conserve the limited water supply.

#### **OVERVIEW**

This Low Inflow Protocol provides trigger points and procedures for how the Catawba-Wateree Pro-

ject will be operated by the Licensee [Duke], as well as water withdrawal reduction measures and goals for other water users during periods of low inflow (i.e., periods when there is not enough water flowing into the Project reservoirs to meet the normal water demands while maintaining Remaining Usable Storage [defined in the Relicensing Agreement] in the reservoir system at or above a seasonal target level). The Licensee will provide flow from hydro generation and other means to support electric customer needs and the instream flow needs of the Project. During periods of normal inflow, reservoir levels will be maintained within prescribed Normal Operating Ranges [defined in the Relicensing Agreement]. During times that inflow is not adequate to meet all of the normal demands for water and maintain reservoir levels as normally targeted the Licensee will progressively reduce hydro generation. If hydrologic conditions worsen until trigger points outlined herein are reached, the Licensee will declare a Stage 0 - Low Inflow Watch and begin meeting with the applicable agencies and water users to discuss this LIP. If hydrologic conditions continue to worsen, the Licensee will declare various stages of a Low Inflow Condition (LIC) as defined in the Procedure section of this document. Each progressive stage of the LIC will call for greater reductions in hydro station releases and water withdrawals, and allow additional use of the available water storage inventory. The goal of this staged LIP is to take the actions needed in the Catawba-Wateree River Basin to delay the point at which the Project's usable water storage inventory is fully depleted. While there are no human actions that can guarantee that the Catawba-Wateree River Basin will never experience operability limitations at water intake structures due to low reservoir levels or low streamflows, this LIP is intended to provide additional



time to allow precipitation to restore streamflow, reservoir levels, and groundwater levels to normal ranges. The amount of additional time that is gained during the LIP depends primarily on the diagnostic accuracy of the trigger points, the amount of regulatory flexibility the Licensee has to operate the Project, and the effectiveness of the Licensee and other water users in working together to implement their required actions and achieve significant water use reductions in a timely manner.

25. All interbasin transfers authorized by the State of North Carolina, including the recent transfer granted to the North Carolina cities of Concord and Kannapolis that transfer water out of the Catawba River into the Yadkin/Pee Dee River Basin, impact and injure the State of South Carolina by:

- a. Affecting both the quality and quantity of water by permanently removing water from the portion of the Catawba River located in the State of North Carolina upstream of the border with the State of South Carolina, making less water available to the State of South Carolina for drinking, recreation, economic development, and waste assimilation.
- b. Causing an increase in the amount of treated waste water discharged into the Yadkin/Pee Dee Rivers, thereby removing waste assimilation capacity from the South Carolina portion of the Pee Dee River which impacts South Carolina local governments and industries currently dependent on the Pee Dee River for drinking water, recreation, economic development and waste assimilation.
- c. Exacerbating the Drought Factors during any periods of drought conditions in the Catawba River basin.

- d. Increasing the frequency that LI Protocols under the FERC Licenses will be implemented to the detriment of all stakeholders, including the State of South Carolina, its citizens, its municipalities, and the flora and fauna of the Catawba River.
- e. Increasing the frequency that the Catawba River Project's usable water storage inventory will be depleted.

26. Based on materials I have read and conditions I have observed, and the statements made above, it is my opinion that the Catawba River has reached its threshold for sustainable use.

/s/ DONNA LISEBY

Donna Lisenby, Catawba Riverkeeper

Sworn to and Subscribed before me  
this 30th day of May, 2007

/s/ SUSAN ADKINS [notary seal omitted]

Notary Public for South Carolina

My commission expires 2/27/16.

## STATUTORY PROVISIONS INVOLVED

North Carolina General Statutes Annotated § 143-215.22G provides:

### § 143-215.22G. Definitions.

In addition to the definitions set forth in G.S. 143-212 and G.S. 143-213, the following definitions apply to this Part.

(1) "River basin" means any of the following river basins designated on the map entitled "Major River Basins and Sub-basins in North Carolina" and filed in the Office of the Secretary of State on 16 April 1991. The term "river basin" includes any portion of the river basin that extends into another state. Any area outside North Carolina that is not included in one of the river basins listed in this subdivision comprises a separate river basin.

- a. 1-1 Broad River.
- b. 2-1 Haw River.
- c. 2-2 Deep River.
- d. 2-3 Cape Fear River.
- e. 2-4 South River.
- f. 2-5 Northeast Cape Fear River.
- g. 2-6 New River.
- h. 3-1 Catawba River.
- i. 3-2 South Fork Catawba River.
- j. 4-1 Chowan River.
- k. 4-2 Meherrin River.
- l. 5-1 Nolichucky River.
- m. 5-2 French Broad River.
- n. 5-3 Pigeon River.
- o. 6-1 Hiwassee River.

p.	7-1	Little Tennessee River.
q.	7-2	Tuskasegee (Tuckasegee) River.
r.	8-1	Savannah River.
s.	9-1	Lumber River.
t.	9-2	Big Shoe Heel Creek.
u.	9-3	Waccamaw River.
v.	9-4	Shallotte River.
w.	10-1	Neuse River.
x.	10-2	Contentnea Creek.
y.	10-3	Trent River.
z.	11-1	New River.
aa.	12-1	Albemarle Sound.
bb.	13-1	Ocoee River.
cc.	14-1	Roanoke River.
dd.	15-1	Tar River.
ee.	15-2	Fishing Creek.
ff.	15-3	Pamlico River and Sound.
gg.	16-1	Watauga River.
hh.	17-1	White Oak River.
ii.	18-1	Yadkin (Yadkin-Pee Dee) River.
jj.	18-2	South Yadkin River.
kk.	18-3	Uwharrie River.
ll.	18-4	Rocky River.

- (2) "Surface water" means any of the waters of the State located on the land surface that are not derived by pumping from groundwater.
- (3) "Transfer" means the withdrawal, diversion, or pumping of surface water from one river basin and discharge of all or any part of the water in a river basin different from the origin. However, notwithstanding the basin definitions in G.S.

143-215.22G(1), the following are not transfers under this Part:

- a. The discharge of water upstream from the point where it is withdrawn.
- b. The discharge of water downstream from the point where it is withdrawn. (1991, c. 712, s. 1; 1993, c. 348, s. 1; 1997-443, s. 15.48(b).)

North Carolina General Statutes Annotated § 143-215.22I provides:

**§ 143-215.22I. Regulation of surface water transfers.**

(a) No person, without first securing a certificate from the Commission, may:

- (1) Initiate a transfer of 2,000,000 gallons of water or more per day from one river basin to another.
- (2) Increase the amount of an existing transfer of water from one river basin to another by twenty-five percent (25%) or more above the average daily amount transferred during the year ending July 1, 1993, if the total transfer including the increase is 2,000,000 gallons or more per day.
- (3) Increase an existing transfer of water from one river basin to another above the amount approved by the Commission in a certificate issued under G.S. 162A-7 prior to July 1, 1993.

(b) Notwithstanding the provisions of subsection (a) of this section, a certificate shall not be required to transfer water from one river basin to another up to the full capacity of a facility to transfer water from one basin to another if the facility was existing or under construction on July 1, 1993.

(c) An applicant for a certificate shall petition the Commission for the certificate. The petition shall be in writing and shall include the following:

- (1) A description of the facilities to be used to transfer the water, including the location and capacity of water intakes, pumps, pipelines, and other facilities.
- (2) A description of the proposed uses of the water to be transferred.

- (3) The water conservation measures to be used by the applicant to assure efficient use of the water and avoidance of waste.
- (4) Any other information deemed necessary by the Commission for review of the proposed water transfer.

(d) Upon receipt of the petition, the Commission shall hold a public hearing on the proposed transfer after giving at least 30 days' written notice of the hearing as follows:

- (1) By publishing notice in the North Carolina Register.
- (2) By publishing notice in a newspaper of general circulation in the area of the river basin downstream from the point of withdrawal.
- (3) By giving notice by first-class mail to each of the following:
  - a. A person who has registered under this Part a water withdrawal or transfer from the same river basin where the water for the proposed transfer would be withdrawn.
  - b. A person who secured a certificate under this Part for a water transfer from the same river basin where the water for the proposed transfer would be withdrawn.
  - c. A person holding a National Pollutant Discharge Elimination System (NPDES) wastewater discharge permit exceeding 100,000 gallons per day for a discharge located downstream from the proposed withdrawal point of the proposed transfer.
  - d. The board of county commissioners of each county that is located entirely or partially within the river basin that is the source of the proposed transfer.

- e. The governing body of any public water supply system that withdraws water downstream from the withdrawal point of the proposed transfer.

(e) The notice of the public hearing shall include a non-technical description of the applicant's request and a conspicuous statement in bold type as to the effects of the water transfer on the source and receiving river basins. The notice shall further indicate the procedure to be followed by anyone wishing to submit comments on the proposed water transfer.

(f) In determining whether a certificate may be issued for the transfer, the Commission shall specifically consider each of the following items and state in writing its findings of fact with regard to each item:

- (1) The necessity, reasonableness, and beneficial effects of the amount of surface water proposed to be transferred and its proposed uses.
- (2) The present and reasonably foreseeable future detrimental effects on the source river basin, including present and future effects on public, industrial, and agricultural water supply needs, wastewater assimilation, water quality, fish and wildlife habitat, hydroelectric power generation, navigation, and recreation. Local water supply plans that affect the source major river basin shall be used to evaluate the projected future municipal water needs in the source major river basin.
- (2a) The cumulative effect on the source major river basin of any water transfer or consumptive water use that, at the time the Commission considers the application for a certificate is occurring, is authorized under this section, or is projected in any local water supply plan that has been submitted to the Department in accordance with G.S. 143-355(l).



- (3) The detrimental effects on the receiving river basin, including effects on water quality, wastewater assimilation, fish and wildlife habitat, navigation, recreation, and flooding.
- (4) Reasonable alternatives to the proposed transfer, including their probable costs, and environmental impacts.
- (5) If applicable to the proposed project, the applicant's present and proposed use of impoundment storage capacity to store water during high-flow periods for use during low-flow periods and the applicant's right of withdrawal under G.S. 143-215.44 through G.S. 143-215.50.
- (6) If the water to be withdrawn or transferred is stored in a multipurpose reservoir constructed by the United States Army Corps of Engineers, the purposes and water storage allocations established for the reservoir at the time the reservoir was authorized by the Congress of the United States.
- (7) Any other facts and circumstances that are reasonably necessary to carry out the purposes of this Part.

(f1) An environmental assessment as defined by G.S. 113A-9(1) shall be prepared for any petition for a certificate under this section. The determination of whether an environmental impact statement shall also be required shall be made in accordance with the provisions of Article 1 of Chapter 113A of the General Statutes. The applicant who petitions the Commission for a certificate under this section shall pay the cost of special studies necessary to comply with Article 1 of Chapter 113A of the General Statutes.

(g) A certificate shall be granted for a water transfer if the applicant establishes and the Commission concludes by a preponderance of the evidence based upon the find-

ings of fact made under subsection (f) of this section that: (i) the benefits of the proposed transfer outweigh the detriments of the proposed transfer, and (ii) the detriments have been or will be mitigated to a reasonable degree. The conditions necessary to ensure that the detriments are and continue to be mitigated to a reasonable degree shall be attached to the certificate in accordance with subsection (h) of this section.

(h) The Commission may grant the certificate in whole or in part, or deny the certificate. The Commission may also grant a certificate with any conditions attached that the Commission believes are necessary to achieve the purposes of this Part. The conditions may include mitigation measures proposed to minimize any detrimental effects of the proposed transfer and measures to protect the availability of water in the source river basin during a drought or other emergency. The certificate shall include a drought management plan that specifies how the transfer shall be managed to protect the source river basin during drought conditions. The certificate shall indicate the maximum amount of water that may be transferred. No person shall transfer an amount of water that exceeds the amount in the certificate.

(i) In cases where an applicant requests approval to increase a transfer that existed on July 1, 1993, the Commission shall have authority to approve or disapprove only the amount of the increase. If the Commission approves the increase, however, the certificate shall be issued for the amount of the existing transfer plus the requested increase. Certificates for transfers approved by the Commission under G.S. 162A-7 shall remain in effect as approved by the Commission and shall have the same effect as a certificate issued under this Part.

(j) In the case of water supply problems caused by drought, a pollution incident, temporary failure of a water plant, or any other temporary condition in which the public health requires a transfer of water, the Secretary of Environment and Natural Resources may grant approval

for a temporary transfer. Prior to approving a temporary transfer, the Secretary shall consult with those parties listed in G.S. 143-215.22I(d)(3) that are likely to be affected by the proposed transfer. However, the Secretary shall not be required to satisfy the public notice requirements of this section or make written findings of fact and conclusions in approving a temporary transfer under this subsection. If the Secretary approves a temporary transfer under this subsection, the Secretary shall specify conditions to protect other water users. A temporary transfer shall not exceed six months in duration, but the approval may be renewed for a period of six months by the Secretary based on demonstrated need as set forth in this subsection.

(k) The substantive restrictions and conditions upon surface water transfers authorized in this section may be imposed pursuant to any federal law that permits the State to certify, restrict, or condition any new or continuing transfers or related activities licensed, relicensed, or otherwise authorized by the federal government.

(l) When any transfer for which a certificate was issued under this section equals eighty percent (80%) of the maximum amount authorized in the certificate, the applicant shall submit to the Department a detailed plan that specifies how the applicant intends to address future foreseeable water needs. If the applicant is required to have a local water supply plan, then this plan shall be an amendment to the local water supply plan required by G.S.143-355(l). When the transfer equals ninety percent (90%) of the maximum amount authorized in the certificate, the applicant shall begin implementation of the plan submitted to the Department.

(m) It is the public policy of the State to maintain, protect, and enhance water quality within North Carolina. Further, it is the public policy of the State that the cumulative impact of transfers from a source river basin shall not result in a violation of the antidegradation policy set

out in 40 Code of Federal Regulations § 131.12 (1 July 1997 Edition) and the statewide antidegradation policy adopted pursuant thereto. (1993, c. 348, s. 1; 1997-443, ss. 11A.119(a), 15.48(c); 1997-524, s. 1; 1998-168, s. 4; 2001-474, s. 28.)



