No. 06A1150

In the

Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Applicant,

v.

STATE OF NORTH CAROLINA,

Respondent.

On Motion for Leave to File Bill of Complaint

RESPONSE OF THE STATE OF NORTH CAROLINA TO SOUTH CAROLINA'S APPLICATION FOR A PRELIMINARY INJUNCTION

ROY COOPER
Attorney General
State of North Carolina
Christopher G. Browning, Jr.*
James C. Gulick
J. Allen Jernigan
Marc D. Bernstein
Jennie W. Hauser
North Carolina Department of Justice
Post Office Box 629
Raleigh, N.C. 27602
Telephone: (919) 716-6900

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*Counsel of Record

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To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Fourth Circuit:

STATEMENT

On June 7, 2007, South Carolina filed a motion for leave to file a Bill of Complaint against North Carolina to have this Court equitably apportion the Catawba River. *See* Br. in Supp. of Mot. for Leave to File Bill of Compl., p. 14. At the same time, South Carolina also filed an application for a preliminary injunction. In the application, South Carolina asserts that the Catawba River is subject to "'inadequate water volume at ordinary stages.'" Application for Prelim. Inj., p. 2. [hereinafter "Application"] (quoting *Jones v. Duke Power Co.*, 501 F. Supp. 713, 717 (W.D.N.C. 1980), *aff'd mem.*, 672 F.2d 910 (4th Cir. 1981)).[1] South Carolina requests that North

[1] In *Jones*, the district court considered whether the Catawba River constitutes a navigable river, thereby giving rise to admiralty jurisdiction. The use of the phrase

Carolina be preliminarily enjoined from authorizing any interbasin transfers of water from the Catawba River in excess of those transfers that had been authorized by North Carolina as of June 7, 2007. Application, p. 1.

North Carolina law requires a permit for the transfer of more than two million gallons of water per day from one river basin to another. N.C. Gen. Stat. § 143-215.22I(a)(1) (2005).[2] In determining whether a permit should be granted, the North Carolina Environmental Management Commission [hereinafter "NC EMC"] must consider the reasonableness of the transfer, present and future detrimental effect on the river basins and whether reasonable alternatives exist to the proposed transfer. N.C. Gen. Stat. § 143-215.22I(f) (2005).

South Carolina's motion for leave to file a Bill of Complaint was apparently precipitated in part by the NC EMC issuing a permit to the cities of Concord, N.C. and Kannapolis, N.C. to transfer no more than 10 million gallons per day from the Catawba River basin to the Rocky River sub-basin. *See* Mot. for Leave to File Bill of Compl., app. 7-8 [hereinafter "Compl. Mot."] (letter from Attorney General McMaster to Attorney General Cooper). Even if Concord and Kannapolis were to transfer the

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"inadequate water volume" by the *Jones* court is in the context of summarizing three reports prepared by the Army Corps of Engineers dated 1875, 1880 and 1887. Those reports address whether the Catawba River is potentially navigable and pre-date the construction of Duke Energy's dams on the Catawba River. Moreover, neither these reports nor the *Jones* decision addresses whether the Catawba River has adequate water volume for public water supplies and other consumptive uses.

[2] On August 2, 2007, the North Carolina General Assembly ratified House Bill 820. The bill repeals N.C. Gen. Stat. § 143-215.22I, the existing statute governing interbasin transfers, replacing it with a new N.C. Gen. Stat. § 143-215.22L. While the new statute retains many features of the existing regulatory scheme, it places additional requirements on applicants for interbasin transfers. As of the date of the filing of North Carolina's brief in this matter, the Governor had not signed the bill; therefore, it is not yet effective. However, the bill will become law, unless vetoed. N.C. Const. art. II, § 22, pt. 7.

maximum quantity allowed under this permit, the transfer would constitute less than 0.4% of the average daily flow of the river into South Carolina. Although the Concord/Kannapolis interbasin transfer apparently triggered the filing of the present action, South Carolina is not seeking to enjoin the Concord/Kannapolis transfer in its Application. The permit to Concord and Kannapolis was issued on January 10, 2007; however, in the Application, South Carolina seeks only to preliminarily enjoin the issuance of new permits approved after June 7, 2007. *See* Bill of Compl. ¶ 28 (Concord/Kannapolis permit issued January 10, 2007); Application, p. 1 (requesting North Carolina be prohibited from authorizing interbasin transfers "in excess of those authorized as of the date of this application").

The process for obtaining an interbasin transfer permit from the NC EMC is lengthy, complex and expensive. Decl. of Morris, app. 50a. The State's statutes provide for a period to receive public comments, the submission of detailed technical information, and thorough review by both the staff of the North Carolina Department of Environment and Natural Resources [hereinafter "NC DENR"] and the NC EMC. *See* N.C. Gen. Stat. § 143-215.22I(c), (d), (f1) (2005). Accordingly, the process generally requires a minimum of two years from submission of a petition to the issuance of an interbasin transfer permit. In the case of Concord and Kannapolis, for example, the time period between submission of a petition until issuance of a permit was over two years. Decl. of Morris, app. 50a.

Currently, there are no pending petitions with the NC EMC for an interbasin transfer from the Catawba River. Decl. of Fransen, app. 3a. Although Union County, N.C. forwarded a preliminary Environmental Impact Statement to the NC EMC concerning a potential petition for an interbasin transfer, Union County has not taken further steps to pursue an interbasin transfer and has not tendered a petition to the

NC EMC.[3] *Id.* In fact, NC DENR has been informed by Union County that it is exploring options other than applying for a certificate for an interbasin transfer from the Catawba River basin. *Id.*

Further background relating to this dispute is set out in North Carolina's brief in opposition to the motion for leave to file a Bill of Complaint. That brief is being filed contemporaneously with the present response to the Application.[4]

ARGUMENT

In *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987), this Court recognized the fundamental principle that "an injunction is an equitable remedy that does not issue as of course." As this Court has long recognized, the burden upon a State seeking a preliminary injunction in an original jurisdiction action "is much greater than that generally required to be borne by one seeking an injunction in a suit between private parties." *Connecticut v. Massachusetts*, 282 U.S. 660, 669 (1931).

In considering South Carolina's motion, this Court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co.*, 480 U.S. at 542; *accord Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982). This balancing should generally include an analysis of the public interest. *See Weinberger*, 456 U.S. at 312-13, 320. Additionally, whether the plaintiff is likely to succeed on the merits constitutes a substantial factor in determining the appropriateness of a preliminary

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[3] South Carolina's Application erroneously refers to an application pending before the NC EMC by Union County for an interbasin transfer from the Catawba River. Application, pp. 1-2.

[4] The declarations cited herein are contained in the appendix to the brief of North Carolina in opposition to South Carolina's motion for leave to file a Bill of Complaint.

injunction. *See Sole v. Wyner*, 127 S. Ct. 2188, 2195 (2007); *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). Consideration of these factors demonstrates that South Carolina's motion should be denied. Moreover, the motion is premature at this stage of the proceedings.

I. SOUTH CAROLINA WILL SUFFER NO IRREPARABLE HARM IF ITS APPLICATION FOR A PRELIMINARY INJUNCTION IS DENIED.

South Carolina will suffer no irreparable harm if the Application is denied. In fact, the status quo will be maintained for at least the next two years if this Court were to take no action on the Application.

The scope of the preliminary injunction requested by South Carolina is limited. South Carolina only seeks an injunction "prohibiting North Carolina from authorizing transfers of water from the Catawba River in excess of those authorized as of the date of this application." Application, p. 1. Thus, the Application prays that North Carolina be preliminarily enjoined from issuing any additional interbasin transfer permits.[5] Currently, no petitions for interbasin transfer permits for the Catawba River, its lakes or tributaries are pending before the NC EMC.[6] Even if such a petition were filed

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[5] South Carolina's Application uses the words "transfer" and "interbasin transfer" interchangeably. From the context of the Application, it is clear that South Carolina intends the word "transfer" to refer to removing water from one river basin and transferring it to another river basin. If, however, this Court were to read South Carolina's application as seeking to prohibit any additional consumption of water within the Catawba River basin by North Carolina residents (as opposed to the transfer of water from the Catawba River to another basin), North Carolina would suffer substantial and immediate harm if such an injunction were issued.

[6] The North Carolina statute does authorize the Secretary of NC DENR to approve a temporary interbasin transfer under emergency situations. N.C. Gen. Stat. § 143-215.22I(j) (2005). Even under emergency conditions, the Secretary is required to consult with potentially impacted parties. *Id.* The Secretary's authority to approve an emergency transfer has only been exercised once in the 15 years this statute has been in existence. *See* Decl. of Fransen, app. 3a-4a. That emergency authorization did not involve the Catawba River basin. *Id.*

tomorrow, the evaluation process would take approximately two years. Accordingly, should the Court decline to issue a preliminary injunction and should a petition for an interbasin transfer relating to the Catawba River be filed with the NC EMC in the future, South Carolina will have ample opportunity to renew its motion at that time. Thus, South Carolina simply cannot show that it faces any immediate, irreparable harm. This Court should not issue an injunction based upon the possibility of indefinite, future injury. *Nebraska v. Wyoming*, 325 U.S. 589, 608 (1945).

Not only is South Carolina unable to point to any pending petition for an interbasin transfer from the Catawba River, South Carolina also cannot show that it would be harmed should such a hypothetical petition be approved by the NC EMC in the future. In support of its motion for leave to file a Bill of Complaint, South Carolina relies upon the affidavit of A.W. Badr. In this affidavit, Badr testifies: "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 . . . ." Compl. Mot., app. 14a (affidavit of A.W. Badr). Thus, South Carolina cannot claim that it will be harmed by any and all interbasin transfers, regardless of the quantity, duration or permit conditions of such transfers. Accordingly, South Carolina's blanket request that this Court preclude all additional interbasin transfers from the Catawba River should be summarily rejected. Moreover, whether any specific interbasin transfer will have a detrimental effect upon the basin should be entrusted, in the first instance, to the agency (i.e., NC EMC) with the technical expertise to evaluate and weigh those potential effects. If South Carolina disagrees with any such determination, its remedy is to request a preliminary injunction at that time – not to preclude North Carolina from making beneficial use of the waters of the Catawba River through interbasin transfers under all circumstances. This is particularly true given that the Catawba River basin is not currently experiencing extreme or prolonged drought.

In its request to enjoin North Carolina from authorizing any further interbasin transfers, South Carolina ignores the fact that it previously agreed that there is more than enough water in the Catawba River to support all of the interbasin transfers that are the subject of South Carolina's Bill of Complaint. During the current relicensing of the Duke Energy dams on the Catawba River, South Carolina (through its various agencies), North Carolina, Duke Energy and various stakeholders entered into a Comprehensive Relicensing Agreement [hereinafter "CRA"] that has been submitted to the Federal Energy Regulatory Commission [hereinafter "FERC"]. In this document, South Carolina acknowledged that even if North Carolina were to transfer 85 million gallons per day out of the Catawba River basin, the flow into South Carolina would still be "expected to meet existing and projected future (Year 2058) water use needs." Decl. of Fransen, app. 9a-10a (quoting CRA). The total of all existing interbasin transfers approved by the NC EMC is clearly less than 85 million gallons per day. Having executed a settlement agreement before FERC in which South Carolina acknowledges that the flow of the river is sufficient to support additional interbasin transfers over and above all currently authorized transfers, South Carolina can hardly argue to this Court that it will be irreparably harmed if <u>any</u> interbasin transfer is approved by North Carolina in the future.

South Carolina has not shown that it will suffer any irreparable harm should its application be denied. An injunction should only be issued "to prevent existing or presently threatened injuries." *Connecticut v. Massachusetts*, 282 U.S. at 674. An injunction "will not be granted against something merely feared as liable to occur at some indefinite time in the future." *Id.*

II. NORTH CAROLINA WILL SUFFER HARM IF A PRELIMINARY INJUNCTION IS GRANTED.

A preliminary injunction would effectively preclude applicants from submitting a petition to the NC EMC, even if an interbasin transfer were the only feasible option for responding to the water needs of a community or business. The fact that a petition for an interbasin transfer is not pending currently does not mean that issuance of a preliminary injunction would not harm North Carolina. The process by which the NC EMC determines whether to grant a petition for an interbasin transfer is complex and lengthy. Accordingly, if a need for such interbasin transfer arises, any delay in beginning the lengthy and arduous process of obtaining authorization for an interbasin transfer could present a very real harm for the community needing water from the Catawba River.

This Court should not preclude the NC EMC from taking appropriate action should other communities and businesses outside of the Catawba River basin demonstrate a need to draw water from the basin in order to alleviate real and substantial hardships.[7] If other interbasin transfer requests are filed with the NC EMC, South Carolina will have sufficient time to refile a request for a preliminary injunction raising the specific concerns it has with those requests, before any action is taken by the NC EMC. A blanket prohibition precluding the issuance of any interbasin

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[7] The NC EMC has been faithfully fulfilling its statutory obligation to consider harm to both the basin where the water is being withdrawn and the basin to where the water is delivered. In the case of the request by Concord and Kannapolis, for example, the NC EMC considered impacts to flows from and lake levels of all reservoirs along the Catawba River, including those in South Carolina, and concluded that the impacts in both States would be insignificant. Nonetheless, the NC EMC reduced the transfer from the Catawba River from the requested amount of 36 million gallons per day to 10 million gallons per day based on the NC EMC's determination of the cities' need for the water. To the extent South Carolina implies that the NC EMC is not fulfilling its obligation to protect all downstream users on the Catawba River (including users in South Carolina), South Carolina is mistaken.

transfer from the Catawba River during the several years this original jurisdiction action may be before the Court clearly harms North Carolina.[8] Moreover, the blanket prohibition requested by South Carolina would deprive this Court of the opportunity to consider a factual record with respect to specific interbasin transfers.

III. SOUTH CAROLINA IS NOT LIKELY TO SUCCEED ON THE MERITS.

South Carolina is not likely to succeed on the merits for three reasons. First, the present claim is not an appropriate case for the exercise of original jurisdiction by this Court. Second, the material filed by South Carolina in support of its application does not establish by clear and convincing evidence that North Carolina has deprived South Carolina of any right with respect to the Catawba River. Third, South Carolina's arguments are incorrectly premised upon an assumption that interbasin transfers should be presumed to be harmful.

1. The Court should refrain from granting South Carolina leave to file a Bill of Complaint given the pendency of proceedings currently before FERC that will substantially, if not entirely, resolve the present dispute. The present action does not constitute an appropriate case for the exercise of original jurisdiction because an adequate forum exists for the resolution of the issues raised by South Carolina. Accordingly, for the reasons set out in North Carolina's Brief in Opposition to South

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[8] For example, the State of North Carolina would have incurred substantial harm if a preliminary injunction had been in place at the time of application by Concord and Kannapolis. Because these cities lie at the uppermost portion of the Rocky River watershed, very limited yield can be obtained by that watershed. Concord and Kannapolis therefore had no viable option to meet their water needs other than transfers from other river basins. As set out in the declarations of Hiatt and Legg, Concord and Kannapolis would have suffered substantial harm if an interbasin transfer had not been authorized. Decl. of Hiatt, app. 22a-29a; Decl. of Legg, app. 30a-37a.

Carolina's Motion to File a Bill of Complaint, this Court need not, and should not, exercise its original jurisdiction of the complaint.

2. This Court should not exercise "its extraordinary power under the Constitution to control the conduct of one State at the suit of another" unless the threatened invasion of rights is of serious magnitude and is "established by clear and convincing evidence." *Washington v. Oregon*, 297 U.S. 517, 522 (1936) (internal quotations omitted); *accord Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982). The material submitted by South Carolina in support of its motion does not establish by clear and convincing evidence that North Carolina has deprived South Carolina of any right with respect to the Catawba River. As explained in the declaration of Thomas Fransen, the report of A.W. Badr, upon which South Carolina's motion is founded, does not adequately and properly analyze the flow of the Catawba River. Decl. of Fransen, app. 12a-15a. Accordingly, South Carolina has failed to establish that it is being deprived of its fair share of the Catawba River.

3. South Carolina's argument is premised upon an inappropriate assumption that interbasin transfers should be presumed to be harmful. Specifically, South Carolina asks this Court to "enter a decree . . . declaring North Carolina's interbasin statute invalid with respect to inequitable transfers out of the Catawba River." Compl. Mot. 9.

As this Court has long recognized, the "removal of water to a different watershed obviously must be allowed at times" and "has been allowed repeatedly" by this Court. *New Jersey v. New York*, 283 U.S. 336, 343 (1931); *see also Connecticut v. Massachusetts*, 282 U.S. 660 (1931) (allowing Massachusetts to transfer water out of the Connecticut River watershed).

In fact, South Carolina law allows for interbasin transfers. S.C. Code Ann. §§ 49-21-10 to -80 (Supp. 2006). Moreover, South Carolina has authorized interbasin

transfers from the Catawba River basin. Nevertheless, South Carolina argues to this Court that North Carolina's interbasin transfer statute should be declared invalid. Such an argument was rejected by this Court 85 years ago. In *Wyoming v. Colorado*, 259 U.S. 419, *modified*, 260 U.S. 1 (1922), *vacated and new decree entered*, 353 U.S. 953 (1957), Wyoming argued that Colorado should be precluded from diverting water from the Laramie River to another watershed "from which [Wyoming] can receive no benefit" because the diverted water would not flow into Wyoming. *Id.* at 466. This Court rejected Wyoming's position as "untenable," concluding that diversion of water from one watershed to another "does not in itself constitute a ground for condemning it." *Id.* This reasoning holds particularly true here because, unlike the situation in *Wyoming v. Colorado,* any interbasin transfer authorized by the NC EMC ultimately flows to South Carolina in another watershed. In the case of the Concord and Kannapolis interbasin transfer, for example, the South Carolina Department of Natural Resources [hereinafter "SC DNR"] concluded that the interbasin transfer would merely divert water to the Pee Dee River basin "where we may need it more anyway." Decl. of Fransen, app. 18a (quoting SC DNR e-mail).

South Carolina cannot establish that it is likely to succeed on the merits.[9]

IV. THE PUBLIC INTEREST WEIGHS IN FAVOR OF DENYING THE MOTION.

As set out above, South Carolina will suffer no harm should its application be denied. In contrast, North Carolina has demonstrated that its citizens may incur harm if a preliminary injunction is granted. Because both States are acting in their capacity

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[9] Moreover, a preliminary injunction barring North Carolina from transferring water from the Catawba River would be inconsistent with South Carolina's request for equitable apportionment. Equitable apportionment only addresses each State's entitlement to a portion of the flow of the river and leaves to each State the right to determine the most beneficial use of that water. Thus, the Application inappropriately intrudes upon the sovereign prerogatives of a sister State.

as parens patriae, the balancing of the harms also determines the impact upon the public interest. *See United States v. Nevada*, 412 U.S. 534, 539 (1973) (recognizing that State may act as parens patriae with respect to water resources). Here, the public interest weighs in favor of denying the motion.

V. A RULING UPON SOUTH CAROLINA'S APPLICATION FOR A PRELIMINARY INJUNCTION WOULD BE PREMATURE AT THIS STAGE OF THE PROCEEDINGS.

In the event the Court grants South Carolina leave to file a Bill of Complaint, the matter should be referred to a Special Master. A preliminary injunction should not be issued based upon the conclusory affidavits submitted by South Carolina, particularly when the affiants have not been subjected to cross-examination.

South Carolina's argument that it is not receiving its fair share of the waters of the Catawba River rests primarily upon the affidavit of A.W. Badr. North Carolina, however, has not had the opportunity to cross-examine Badr about his prior inconsistent statements. When Badr originally examined the proposed Concord/Kannapolis interbasin transfer, he concluded that such a transfer would have no detrimental impact upon South Carolina. In an e-mail of August 5, 2005, Danny Johnson of the SC DNR informed Thomas Fransen of the NC DENR's Division of Water Resources that Badr had concluded the proposed transfer was not large enough to affect South Carolina:

> As follow-up to our recent conversation . . . regarding the subject IBT [i.e., interbasin transfer], I've re-discussed the matter with [A.W. Badr] and our Division Director, and the consensus opinion is that the transfer is not large enough to be of concern to us. Besides, we get it back in the Pee Dee where we may need it more anyway. So, we have considered the proposed transfer and do not feel we are sufficiently aggrieved to warrant commenting on the permit application. Thanks for the info on it.

Decl. of Fransen, app. 18a (quoting SC DNR e-mail). Importantly, at the time that Badr came to this conclusion, Concord and Kannapolis were proposing to transfer a maximum of 38 million gallons per day from the Catawba River basin – substantially

more than the 10 million gallons per day that was ultimately approved by the NC EMC. *See id.* at 18a-19a. Thus, according to the e-mail, Badr and Johnson had concluded that even if Concord and Kannapolis transferred 28 million gallons per day more than the final authorized transfer amount, it would not even "warrant commenting" by South Carolina.

North Carolina has also not had an opportunity to cross-examine Badr concerning serious deficiencies of the report he has filed with this Court. As explained in the declaration of Thomas Fransen, Badr's analysis of the Catawba River assumes that there are no reservoirs on the river and that North Carolina consumes no water from the river. Consequently, given such artificial and unrealistic assumptions, Badr's report provides virtually no assistance to the Court in determining if South Carolina is being deprived of its fair share of water. Moreover, North Carolina has not had an opportunity to cross-examine South Carolina officials about South Carolina's acknowledgment in the CRA that even if North Carolina were to make interbasin transfers of 85 million gallons per day from the Catawba River, the flow into South Carolina would still be "expected to meet existing and projected future (Year 2058) water use needs." Decl. of Fransen, app. 9a-10a (quoting CRA). If the court determines to invoke its exclusive original jurisdiction, a preliminary injunction should only be considered after the Special Master directs discovery to proceed and considers the scientific evidence with respect to water flow and usage of the Catawba River.

CONCLUSION

South Carolina's application for a preliminary injunction should be denied.

Respectfully submitted,

ROY COOPER
Attorney General of North Carolina

Christopher G. Browning, Jr.*
Solicitor General of North Carolina

James C. Gulick
Senior Deputy Attorney General

J. Allen Jernigan
Special Deputy Attorney General

Marc D. Bernstein
Special Deputy Attorney General

Jennie W. Hauser
Assistant Attorney General

August 7, 2007

*Counsel of Record