

IN THE
Supreme Court of the United States

No. ____, Original

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

COMPLAINT

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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