



**Joint Meeting of the House and Senate Committees on Transportation
Wednesday, August 14, 2013**

The House and Senate Committees on Transportation met today to review and discuss Civil Action No. 13-6911, Division J-5, filed July 24, 2013 in the Civil District Court of the Parish of Orleans, State of Louisiana, entitled “Board of Commissioners of the Southeast Louisiana Flood Protection Authority – East, Individually and as the Board Governing the Orleans Levee District, the Lake Borgne Basin Levee District and the East Jefferson Levee District v. Tennessee Gas Pipeline Company, LLC, et. al.” This is the suit filed by the SLFPA-E against 97 oil, gas and pipeline companies that seeks to require those companies to repair or pay for damages to wetlands caused by oil, gas and pipeline operations.

Senate Committee Chairman Robert Adley, R-Benton, indicated the meeting was called to hear from the levee board itself. Adley said at issue is the constitutional authority of the levee board to file this suit.

John Barry, vice president of and Orleans Parish representative to the authority, thanked the committee for its role in creating SLFPA-E, calling the authority a “board of experts.”

Barry said SLFPA-E is an independent board, created by a constitutional amendment approved by 81 percent of the vote. The board is made up of nine members, three of whom have expired terms; four members must be from outside the jurisdiction. The board was created post-Katrina to “prevent further catastrophe.” Members are appointed by the governor and confirmed by the Senate, but do not serve at the pleasure of the governor. The state’s Coastal Protection and Restoration Authority has representation on the nominating board.

“Nobody has said our science is wrong. We’ve never said oil, gas and pipeline companies are solely responsible for loss of wetlands in the state,” Barry said, adding that levees, the shipping industry and dams far upriver in Missouri are also at fault. “Multiple causes do not mean an entity responsible for part of the cause should not be responsible for the part of the damage they created,” he

said. A U.S. Geological Survey study found that 36 percent (249,000 acres) of statewide damage is due to industry activity, Barry said. "Additionally, industry operated under permits requiring that they minimize damages and repair damages when done," he said. He indicated the board's job is not to operate and maintain the U.S. Army Corps of Engineers' levee system, but to protect lives and property. Adley indicated he was unable to find the permits that were referenced as being violated by industry.

Barry said the 100-year protection required "sounds great, but is the lowest standard of protection in the civilized world." Other countries, including the Netherlands, requires a 10,000-year level of protection. "Our vision statement is 500 years," he said. "We are totally in support of the state's master plan; let's give it a chance. Nothing is in variance with the master plan. That plan has no funding." Similarly, he said the board supports U.S. Sen. Mary Landrieu's FAIR Act, but the Act alone will not provide enough money.

Gladstone Jones is the attorney for the SLFPA-E. Barry said he is "confident we have the authority to file the lawsuit. Court is where that question will and should be answered." He addressed the issue of the contingency fee, saying the Mississippi River Gulf Outlet litigation cost \$14 million, and this is "much bigger. The attorney assumes tens of million of dollars of risk. They are not Exxon. There is a chance they could go bankrupt if we don't win," Barry said. He indicated the state's Attorney General reviewed the contract for a month and found the proposed fees were reasonable. He also indicated lobbyist Randy Haynie does not work for the SLFPA-E, but is on permanent retainer to the board's counsel.

Levee board member Stephen Estopinal gave a presentation on behalf of the board. He said the three separate districts within the authority still exist as taxing entities. "Studies show surface subsidence related to removal of water, oil or other substances underground...I do not believe sea level rise is a factor," he said. He compared industry activity to a rock band coming to a small town. "The oil and gas industry is our rock band. They generate a lot of money, but we're just asking them to fix the hotel room they trashed," he said. He addressed saltwater intrusion, which is exacerbated by digging canals. "When subsidence rates occur, vegetation dies. The soil is no longer held together by the roots, and there is a very sudden change from land to marsh to water."

Estopinal said CPRA has acknowledged the role of industry in the problem. With regard to remedy, he said raising the levees is not a solution, but levees need to be armored to prevent overtopping and breaches. "New Orleans will be an island by the end of this century. How do we protect that island from storm surges?" he asked.

Adley said that projected erosion is “shocking. The issue we’re about to deal with is who is responsible. Did you ask the Attorney General to represent you when you sought his advice?”

Barry said no, but the Attorney General approved the contingency contract, which Adley indicated was not the information he received from that office. Adley said the resolution excluded contract language requiring the board to pay expenses incurred by attorneys if “you or any future board withdraws this suit. Those expenses today total roughly \$300,000.”

Levee board counsel Robert Lacour said, after the board resolution passed, he spoke with the assistant attorney general, who requested the resolution but not the contract. “This is the same procedure used to hire an attorney for the BP suit,” he said. Adley expressed concern over the “poison pill provision” that ties the hands of future boards, and noted the Attorney General “is saying he did not receive the contract from you until after lawsuit was filed.”

Adley continued, “CPRA has by statute, the governor has by statute, requirements for cooperative effort. You took it upon yourself to make decisions about what you’re going to do. This committee created this to provide better coordination. What coordination occurred?”

Barry indicated that the board did not consult with the Department of Transportation and Development’s drainage and flood protection division, nor with the state’s coastal management.

“What work has the district done to implement a plan for the levees since 2007?” Adley asked.

“We instituted the reevaluation of storm modeling threat; we’ve been fighting with the Corps,” Lacour said.

“You couldn’t get money from the Corps, so you went where you could get money,” Adley said.

“Industry is responsible for some of the damage; it is reasonable and fair, and would be an abdication of our responsibility if we did not ask them to fix the damage for which they are responsible,” Barry said.

Adley said the restoration in the suit requires backfilling, which coastal management said is “the worst thing you can do. When you handle material once or twice, it turns to sugar, and we lose it much faster. Rogue operation for the solution is not the best answer. You have filed a lawsuit requiring what coastal management says is a terrible idea.”

Lacour said, "I think if there was a settlement or judgment, it would bring in experts to determine the course to take for remedy."

"You don't have a dollar amount, you don't know what will be required in terms of a remedy," Adley said. "Your number said it takes \$2 billion per year just to maintain the coast today." Barry indicated that number originated from CPRA head Garrett Graves.

"We try to do coordinated efforts for the gain of the entire state because of issues of which you're not aware – like backfilling. You are not a state unto yourself," Adley said.

He added that Louisiana is second in the United States for the worst legal environment for lawsuits costing the state more than \$3 billion per year. "Forty-one percent of America drains here. Fifty-seven percent of state revenue comes from industry" that has provided jobs, grown the economy and "did what we asked. Why sue them without coordination? Why this shroud of secrecy?"

"If we felt they complied, we would not have a lawsuit. They have not complied with very well established Louisiana law," Barry said.

Adley indicated Article 9 of the Constitution, under which the suit is filed, applies to the Legislature and the State. "Article 6 applies to you," he said.

"We do not represent ourselves to represent the state of Louisiana," Barry said.

If the case moves forward and receives a judgment of \$9 billion, the board's outside trial lawyer attorneys will receive 22 percent, or close to \$2 billion.

Rep. Chris Leopold, R-Belle Chasse, said his area cannot support 500-year protection and has to be protected from the outside in. Barry answered that the point of the suit is to restore areas that can be restored. He also questioned the authority of SLFPA-E to file the suit.

Sen. Gary Smith, D-Norco, asked if the SLFPA-E discussed the issue with the oil and gas industry or its representatives prior to filing suit. "No," Barry said, "I didn't feel I could speak for the state."

"All I keep hearing is, 'money, money, money,'" Smith said, indicating the industry was being targeted for its deep pockets.

"I think science is on our side. I think fact is on our side. I think the law is on our side," Lacour said.

"It's not about money, it's about survival," Barry said.

Barry likened the situation to prosecuting the one thug (of five) who was caught after “jumping someone on the street,” since he was responsible for part of the damage. Adley took exception, saying the instances differ because “the thugs on the street broke laws. Show me where industry is breaking these laws. We’ve asked for invalidated permits, which you can’t show me. We’re setting a precedent by which we’ll woo you to the state, benefit from the business you do, then when we run out of money, we’ll sue you to get some more.”

“We believe industry did break the law. The courts will determine if we’re right,” Barry said. “If I said the industry did not do anything, that’s not fair.” He indicated the hope was that the Legislature would pass an Act requiring remediation that would render the lawsuit moot.

Rep. Karen St. Germain, D-Pierre Part, said the 2005 creation of the SLFPA-E could be boiled down to one statement. “We did not want political involvement in the protection of people,” she said. The current debate should “not be about hurting a specific entity. It’s about protecting the state and its people.”

“It was never designed to be nonpolitical to the point that it did not involve other people. We were doing our best after a horrific storm to better coordinate efforts to protect our people,” Adley said.

CPRA head Garrett Graves addressed the coastal crisis, post-Katrina reform, government structure and standing and the contract. He said he agreed with Estopinal’s presentation, saying the state’s resources have been mismanaged for 80 years, and the state has lost 1,900 square miles of coast.

Graves indicated there are 24 levee districts over which DOTD and CPRA exercise oversight. He said historic energy production has contributed to land loss; Louisiana had a growing delta up until the 1920s. “It was getting larger, and some say it would have been bigger than Texas instead of just better. Then the 1927 flood happened, followed by the Mississippi Rivers Tributaries Project, a successful public works project. We have five of the top 15 ports in the nation today because the river stays between those levees. The levees were also one of nation’s largest environmental disasters in terms of what it’s done to the wetlands, which is largely attributable to how the Corps put the levees in place. If it had been you or me, we would have had to mitigate for wetlands loss and ongoing losses.

“In the last five years, this body has provided more funds for this than in any other period in history. We are now using 30-40 different funding sources and have cobbled together \$18 billion. To say ‘nothing is happening’ is absolutely untrue and ill-informed. The master plan is \$50 billion over 50 years. The greater New Orleans area has the best protection system it’s ever had, and has 100-

year protection based on current conditions and ongoing land loss. The Netherlands have a 10,000-year protection level, but they don't have hurricanes," he said.

Graves indicated the profile of the issue has been significantly raised under Gov. Bobby Jindal. The state has in excess of \$20 billion in projects for south Louisiana for hurricane protection.

"This lawsuit fundamentally conflicts with constitutional and statutory structure and has profound consequences. We have discussed the issue. This is a much bigger picture. We have 24 levee districts, 20 parishes in coastal Louisiana and 2 million people in south Louisiana. We need a more holistic approach. The levee districts opposed this lawsuit because they understand the bigger picture. Policy issues like this are the job of CPRA with coordinated effort," he said.

"The energy industry provides 300,000 jobs. They provide \$80 billion in annual economic activity and \$2.5-3 billion to the state treasury. You can have the best system in the country, but if you don't have the associated economic activity and employment opportunities, who is going to live there?" Graves said. "If we allow the Corps to continue what they're doing, a \$10 billion settlement buys us five years. The fundamental challenge we have is the Corps management of the Mississippi River system. We've been discussing strategies to address that, and will be rolling some out. I would love someone to ask BP if Louisiana takes it easy on oil and gas companies."

"The lawsuit offends ongoing efforts," Graves said, indicating the state is appealing \$570 million with FEMA to repair barrier islands, and is working to address disparities among states with regard to revenue sharing. He said the state received last year \$80,000 for offshore production, which would have been \$3 billion had that production occurred onshore.

He said the lawsuit sets up a scenario where the board decides how billions of dollars will be spent without oversight from the legislature or governor, and in one area of the state. "The water has to go somewhere. We cannot take these stovepipe approaches," Graves said.

Public Service Commissioner Foster Campbell spoke in support of the lawsuit. "We want to blame it all on the Corps. The Corps, the politicians and the oil companies are at fault," he said, noting that the board brought the suit precisely because it is non-political. "It's an independent body acting independently and should be praised."

He said he hopes the suit goes to court, but "if it goes to court and you don't get anything, big deal." Campbell compared the lawsuit to the tobacco settlement in the 1990s, saying then Gov. Mike Foster said, "If you smoke,

nobody makes you smoke.” Then DHH Sec. Bobby Jindal sent a letter to Attorney General Richard Ieyoub asking him not to sue, which he did anyway. The judgment was \$4 billion.

Adley noted that the difference in the cases is that the state’s Attorney General filed suit against the tobacco companies on behalf of the state. Campbell said, “If the AG doesn’t have the courage to file suit, somebody should.”

Campbell likened the issue to a person severely eroding another person’s land and being held responsible. Adley said, “We told them to erode the land. That’s what we’ve done here,” saying the lawsuit is tantamount to changing the rules in the middle of the game.

Also speaking briefly in support of the lawsuit was Sierra Club organizer Darryl Malek Wiley. Regional Director of the Southeast Louisiana Flood Protection Authority – West Giuseppe Miserendino spoke briefly in opposition to the lawsuit, saying his branch of the levee board is supportive of doing its job of providing and maintaining flood protection while working closely with state agencies charged with making policy decisions.