

MAHTOOK & LAFLEUR, L.L.C.

ATTORNEYS AT LAW

1000 CHASE TOWER
600 JEFFERSON STREET
POST OFFICE BOX 3605
LAFAYETTE, LOUISIANA 70502

ROBERT A. MAHTOOK, JR.
rmahtook@mandllaw.com

TELEPHONE: (337) 266-2189
FACSIMILE: (337) 266-2303

August 28, 2013

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED
AND FEDERAL EXPRESS

Mr. James D. "Buddy" Caldwell
Office of the Attorney General
1885 North Third Street
Baton Rouge, LA 70802

RE: Approval of Resolution No. 06-06-04-13 -
Engagement of Jones, Swanson, Huddell &
Garrison, LLC"

Dear Mr. Caldwell:

This firm has been retained on behalf of the members of the Louisiana Oil & Gas Association, Inc. ("LOGA") to review and comment upon your approval of "Resolution No. 06-06-04-13 - Engagement of Jones, Swanson, Huddell & Garrison, LLC" submitted by the Southeast Louisiana Flood Protection Authority-East ("SLFPA-E") and, thereby, your approval of the "Contingency Fee Agreement and Authority to Represent" executed by the SLFPA-E with Jones, Swanson, Huddell & Garrison, LLC for legal services.

After careful review of constitutional and legislative provisions, we have concluded that the approval was not in compliance with Louisiana law.

Louisiana Revised Statutes § 38:330.6 mandates that the Attorney General and his assistants shall be counsel to the SLFPA-E in any and all matters. Therefore, only the Attorney General can provide representation and/or retain special counsel for the SLFPA-E.

In the event that the SLFPA-E can retain its own counsel other than the Attorney General, then the SLFPA-E and the Attorney General must comply with Louisiana Revised Statutes § 42:261 *et seq.* for the approval of hiring and compensating such counsel. Our review indicates that your office acted outside its authority in approving a resolution that did not provide a "real necessity" or "stat[e] fully the reasons for the action and the compensation to be paid" as required by La. R.S. § 42:263.

Additionally, the approval of the Resolution results in an unconstitutional diversion and appropriation of state funds and usurpation of legislative power by your office.

Mr. James D. "Buddy" Caldwell
August 28, 2013
Page 2

As a result of our findings, we call upon your office to withdraw your approval of "Resolution 06-06-04-13 - Engagement of Jones, Swanson, Huddell, & Garrison, LLC" submitted by the SLFPA-E. In the event your office does not withdraw the approval, we will have no alternative but to file the attached Petition for Declaratory Judgment and Injunctive Relief.

With best regards, I remain

Very truly yours,

ROBERT A. MAHTOOK, JR.

RAMJr/dpp
Enclosure

THE LOUISIANA OIL & GAS
ASSOCIATION, INC.

19TH JUDICIAL DISTRICT COURT

VERSUS

DIVISION _____

HONORABLE JAMES D. "BUDDY"
CALDWELL,
IN HIS CAPACITY AS
ATTORNEY GENERAL OF THE STATE
OF LOUISIANA

CIVIL ACTION NO. _____
PARISH OF EAST BATON ROUGE

PETITION FOR DECLARATORY JUDGMENT
AND INJUNCTIVE RELIEF

NOW INTO COURT, through undersigned counsel, comes petitioner, The Louisiana Oil & Gas Association, Inc. ("LOGA"), who in seeking a declaratory judgment and injunctive relief, respectfully avers as follows:

1.

Made defendant herein is Honorable James D. "Buddy" Caldwell, in his capacity as Attorney General of the State of Louisiana, (hereinafter "Attorney General"), domiciled in Baton Rouge, Louisiana, and executive and chief administrative officer of the Department of Justice of the State of Louisiana.

2.

LOGA is a non-profit trade association whose membership includes individuals and independent oil and gas exploration, development, production and transportation companies conducting oil and gas activities in Louisiana and on public lands owned by the State of Louisiana. The functions of LOGA include the promotion of the interests of its members with respect to environmental compliance and natural resource conservation. LOGA has a substantial interest in the execution and validity of the Attorney General's approval of "Resolution No. 06-06-13-04 – Engagement of Jones, Swanson, Huddell & Garrison, LLC" submitted by the Southeast Louisiana Flood Protection Authority-East ("SLFPA-E") and, thereby, the Attorney General's approval of the "Contingency Fee Agreement and Authority to Represent" executed by the SLFPA-E.

3.

Venue is proper in East Baton Rouge Parish pursuant to La. R.S. 13:5104.

BACKGROUND

4.

Under the Louisiana Constitution Article VI, § 38.1, “[t]he legislature by law may establish regional flood protection authorities . . . for the purpose of constructing and maintaining levees, levee drainage, flood protection, and hurricane flood protection within the territorial jurisdiction of [such] authorit[ies].” The legislature thereby created the Southeast Louisiana Flood Protection Authority – East (“SLFPA-E”) in Louisiana Revised Statutes §§ 38:330.1 – 38:330.13, effective January 1, 2007. The SLFPA-E was established as a “levee district,”¹ and “[l]evee district’ means a political subdivision of this state organized for the purpose and charged with the duty of constructing and maintaining levees, and all other things incidental thereto within its territorial limits.”² The statute states that the specific purpose of SLFPA-E is “regional coordination of flood protection in order to promote such coordination over parochial concerns.”³ Pursuant to that purpose, the SLFPA-E governs certain levee districts, namely: Orleans Levee District, Lake Borgne Basin Levee District, and East Jefferson Levee District.⁴

5.

On July 24, 2013, Civil Action No. 13-6911 was filed 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.” The suit was filed by SLFPA-E against 97 oil, gas, and pipeline companies to require those companies to repair and pay for damages to wetlands caused by oil, gas, and pipeline operations.

6.

SLFPA-E’s Petition for Damages and Injunctive Relief is herein referred to as the “Original Petition” and attached as Exhibit 1. The Original Petition alleges that SLFPA-E’s “mission of protecting the communities within its jurisdiction from catastrophic storm surge and consequent flooding is increasingly impracticable as a direct result of Defendants’ acts and

¹ La. R.S. 38:330.1(A)(1) (“The [SLFPA-E and SLFPA-W], referred to herein as ‘flood protection authority’ or ‘authority,’ are established as levee districts pursuant to Article VI, Sections 38 and 38.1 of the Constitution of Louisiana.”) (emphasis added).

² La. R.S. § 38:281(6).

³ La. R.S. § 38:330.1(F)(2)(a).

⁴ La. R.S. § 38:330.1(B)(1)(a)(i)-(iii).

omissions.” Specifically, SLFPA-E alleges that a network of canals dredged along the state’s coastal lands to access oil and gas wells and transport products of oil and gas production has caused direct land loss and increased erosion, resulting in increased storm surge risk and increased flood protection costs. SLFPA-E claims that the oil and gas companies exacerbated the land loss by failing to maintain the canal network and banks of the canals. The petition demands damages for the increased flood protection costs that have been and will further be imposed on the SLFPA-E as well as “injunctive relief in the form of abatement and restoration of the coastal land loss at issue.”

7.

Prior to filing suit, the SLFPA-E sought employment of special counsel to represent them in the suit. On June 14, 2013, the SLFPA-E adopted “Resolution No. 06-06-13-04 – Engagement of Jones, Swanson, Huddell & Garrison, LLC” – hereinafter referred to as the “Resolution” and attached as Exhibit 2. In the Resolution, the SLFPA-E claimed that the recovery of “damages due to land loss and erosion caused by third parties” would require “a law firm with special expertise and experience.” The SLFPA-E authorized its President or Vice President “to engage Jones, Swanson, Huddell & Garrison, LLC, on behalf of itself and the levee districts within its jurisdictions.” The Resolution further stipulates that Jones, Swanson, Huddell & Garrison, LLC, would be compensated “on a contingency basis ranging from 32.5 percent to 22.5 percent of any gross recovery depending on the amount of the recovery.”

8.

The Attorney General, acting in his official capacity, approved the Resolution by letter dated July 16, 2013 - hereinafter referred to as the “Approval” and attached as Exhibit 3. In the Approval, the Attorney General states: “[W]e find that the employment of counsel and the fee arrangements set forth therein conform to Louisiana law and are hereby approved.”

9.

On July 17, 2013, SLFPA-E entered into a contract with Jones, Swanson, Huddell & Garrison, LLC entitled “Contingency Fee Agreement and Authority to Represent” - hereinafter referred to as the “Contract” and attached as Exhibit 4.

COUNT ONE

10.

The Attorney General improperly approved the Resolution for SLFPA-E to hire and compensate special counsel because under La. R.S. § 38:330.6, hiring special counsel for the SLFPA-E is solely the responsibility of the Attorney General.

11.

Generally, “the district attorneys of the several judicial districts ... shall ... be the regular attorneys and counsel for ... every state board or commission domiciled therein.” Levee boards, however, “may employ one or more attorneys to represent it and to offer advice and assistance of a legal nature.”⁵ In the event a levee board retains counsel other than the district attorney, the levee board must comply with the requirements under La. R.S. §§ 42:261 *et seq.* regarding the necessity of employing special counsel and the approval of compensation for such special counsel.

12.

SLFPA-E differs from other levee boards in terms of counsel. The statutory provisions establishing the SLFPA-E specifically provide that the Attorney General, rather than any district attorney, will serve as counsel for the SLFPA-E. La. R.S. § 38:330.6, which pertains specifically to the SLFPA-E, provides:

The state attorney general and his assistants shall be and are hereby designated as counsel for each flood protection authority in the execution of the purposes of this Chapter and are hereby charged with the responsibility of representing each authority in any and all matters when called upon to do so.

13.

La. R.S. § 38:330.6 was added by Acts 2006, 1st Ex. Sess., No. 1, Section 1. La. R.S. § 42:263, which allows levee boards other than the SLFPA-E to obtain special counsel with approval, was amended by Acts 1979, No. 78, Section 1; Acts 1982, No. 570, Section 2. Therefore, La. R.S. § 38:330.6 supersedes the provisions of La. R.S. § 42:263 as being the later expression of legislative intent.

14.

In the statutory provisions that establish the SLFPA-E, La. R.S. § 36:330.1 *et seq.*, the Legislature did not provide any authority for the SLFPA-E to retain and compensate its own

⁵ La. R.S. § 38:305

special counsel. In contrast, the Legislature granted other levee boards general authority to employ special counsel through La. R.S. § 38:305 and La. R.S. § 42:261 *et seq.* for approval of hiring and compensating such counsel. La. R.S. § 38:330.6, establishing the Attorney General as counsel for the SLFPA-E, supersedes those provisions regarding other levee boards, and the Legislature did not expressly grant the SLFPA-E any similar authority to retain or compensate special counsel within La. R.S. § 38:330.1 *et seq.*

15.

Without express Legislative authority to hire special counsel, the SLFPA-E must rely solely on the Attorney General as counsel under La. R.S. § 38:330.6. If the Attorney General and his assistants are unable to represent the flood protection authority because of the need for special expertise and experience, the Attorney General would hire the special counsel, and the special counsel would be paid on an hourly rate rather than under a contingency fee basis.

COUNT TWO

16.

In the event that SLFPA-E *can* hire its own special counsel other than the Attorney General, the SLFPA-E and the Attorney General must still comply with La. R.S. § 42:261 *et seq.* for the approval of hiring and compensating such counsel.

17.

The Attorney General acted outside his authority in approving the Resolution that did not provide a “real necessity” for special counsel or “stat[e] fully the reasons for the action and the compensation to be paid” as required under La. R.S. § 42:263.

18.

La. R.S. § 42:262 addresses the approval of hiring and compensating special counsel “in the event it should be necessary” to retain such special counsel. La. R.S. § 42:263 further provides the procedure for how such “necessity” may be established. La. R.S. § 42:263, entitled “Resolution requesting special counsel,” provides, in pertinent part:

No parish governing authority, levee board ... or other local or state board shall retain or employ any special attorney or counsel to represent it in any special matter or pay any compensation for any legal services whatever ***unless a real necessity exists***, made to appear by a resolution thereof ***stating fully the reasons for the action and the compensation to be paid***. The resolution then shall be subject to the approval of the attorney general and, if approved by him, shall be spread upon the minutes of the body and published in the official journal of the parish. (emphasis added).

La. R.S. § 42:263 applies to the SLFPA-E as a levee board created under La. R.S. §

38:330.1 with special authority over numerous levee districts.

Under La. R.S. § 42:263, the Attorney General approved an improper resolution that did not “stat[e] fully the reasons for the action.” The Resolution submitted by SLFPA-E set forth the following:

WHEREAS, the levee districts within jurisdiction of the Southeast Louisiana Flood Protection Authority-East (SLFPA-E) have experienced damages due to land loss and erosion caused by third parties; and
WHEREAS, retaining counsel to represent SLFPA-E in this matter will require a law firm with special expertise and experience.
BE IT HEREBY RESOLVED, that the SLFPA-E authorizes its President or Vice President to engage Jones, Swanson, Huddell & Garrison, LLC, on behalf of itself and the levee districts within its jurisdictions, regarding claims for damages due to land loss and erosion, for the benefit of and on behalf of the residents within its jurisdiction.
BE IT FURTHER RESOLVED, that Jones, Swanson, Huddell & Garrison, LLC, shall be paid on a contingency basis ranging from 32.5 percent to 22.5 percent of any gross recovery depending on the amount in controversy.

The Resolution states that the reason for the action will be “land loss and erosion caused by a third party.” However, the Resolution does not indicate the type of damages SLFPA-E seeks and does not identify from whom the damages will be sought. The Resolution provides only vague, imprecise, and unspecified allegations without providing sufficient information to establish whether a “real necessity” exists for hiring special counsel.

Additionally, under La. R.S. § 42:263, the Attorney General approved an improper resolution that did not “stat[e] fully ... the compensation to be paid.” The Resolution submitted by SLFPA-E provided only a range of percentages under the contingency fee agreement. The day after the Attorney General approved the Resolution, SLFPA-E entered into a contingency fee contract with Jones, Swanson, Huddell & Garrison, LLC (“JSHG”) that contained not only the percentages stated in the Resolution but also a significant “poison pill” provision that provided:

Client understands that, in the event that JSHG’s representation under this agreement is terminated prior to full and final recovery and payment of attorney’s fees, costs and expenses owed to JSHG under this agreement, Client will be responsible for any attorney fees or costs incurred prior to such discharge or termination, whether such discharge or termination is at Client’s impetus or that of third parties. In such circumstances, fees shall be based on all of the facts and circumstances deemed relevant by Louisiana statutory law and/or jurisprudence, including JSHG’s prevailing standard hourly rates and the risk taken by JSHG ...

The Contract does not provide the exact hourly rates to be considered in assessing costs and fees, and the Resolution also fails to mention or provide these provisions of the contingent fee agreement. The Attorney General's Approval of the Resolution allows for an unclarified compensation agreement in violation of La. R.S. § 42:263.

22.

Under La. R.S. § 42:263, the Attorney General approved an improper resolution that did not establish a "real necessity" for the hiring and compensation of special counsel. In his Approval, the Attorney General noted the following:

[T]his office is not involved in deciding which claims the Board may or may not pursue. Neither is this office involved in deciding which party or parties the Board wishes to pursue, if the Board decided to move forward with a claim. Under Louisiana law, the role of this office includes a review of the resolution the Board has submitted and a determination that counsel chosen by the Board is in good standing and is licensed to practice law in Louisiana and that the fee to be paid to counsel by the Board is reasonable under the circumstances.

Any finding of "real necessity" for retaining special counsel logically requires some knowledge of the claims the SLFPA-E intended to bring and against whom the SLFPA-E intended to bring them. Generally, the Attorney General would serve as counsel for the SLFPA-E.⁶ Therefore, the hiring of special counsel would require special skill, expertise, or other need beyond that which the Attorney General and his assistants may provide.⁷ The Resolution stated *only* that SLFPA-E "will require a law firm with special expertise and experience" but did not indicate or explain what area of expertise would be required or how general representation by the Attorney General would otherwise be unsuitable.

COUNT THREE

23.

The approval of the Resolution results in an unconstitutional diversion and appropriation of state funds and usurpation of legislative power by the Attorney General.

⁶ La. R.S. § 38:330.6.

⁷ *Compare Bd. of Comm'rs of Buras Levee Dist. v. Perez*, 12 So.2d 670 (La. 1943) (held that a levee board did not show "real necessity" for special counsel when they "were ably represented by the Attorney General ... without added expense"), with *Cortina v. Gulf States Utilities-Cajun Elec. Power Co-op., Inc.*, 594 So.2d 1326 (La. App. 1 Cir. 1991) (held "real necessity" existed for a school board to hire special counsel to pursue delinquent taxpayer because evidence of the volume and technical aspects of the tax litigation supported that an attorney specializing in taxes was needed).

24.

Article VII, § 9 of the Louisiana Constitution provides: “All money received by the state or by any state board, agency, or commission shall be deposited immediately upon receipt in the state treasury . . .”

25.

Funds received in settlement or judgment of the suit must be deposited into the state treasury due to the state-wide environmental nature of SLFPA-E’s claims. SLFPA-E asserts that the oil companies are liable for the following “highly costly but necessary remedial measures” that have been or will be taken to reduce the risk to the coastal lands, with SLFPA-E and the levee districts it governs bearing the costs:

- 1) Abatement and restoration including backfilling and re-vegetating the canals, wetlands creation, reef creation, land bridge construction, hydrologic restoration, shoreline protection, structural protection, bank stabilization, ridge restoration, and diversion projects
- 2) Managing the Hurricane and Storm Damage Risk Reduction System, which was developed by the Federal Government and designed by the Corps of Engineers to provide 100-year level storm protection. The system is being turned over to the State of Louisiana and shifting future costs to the State and the flood protection authorities for operation, maintenance, repair, rehabilitation, and replacement.
- 3) Mandatory levee certification costs for components of the flood protection systems other than the Risk Reduction System that the flood protection authorities are responsible.
- 4) Additional flood protection expenses including more safe houses for employees.

Many of these restoration and flood protection costs are shared by the state and the flood protection authorities, and therefore, some, if not all, funds received in damages for SLFPA-E’s claims should be deposited into the state treasury then appropriated to the flood authorities at the direction of the Legislature.

26.

Additionally, some or potentially all of the funds received in settlement or judgment of these claims must be deposited into the state treasury due to the position of the SLFPA-E as merely a component of a comprehensive state-managed and established system for coastal and flood protection.

27.

The SLFPA-E is part of a hierarchy for comprehensive management over coastal affairs meant to operate as one collaborative state effort. Under Louisiana Revised Statutes Title 49, the legislature declared a public policy of the state “to develop and implement, on a comprehensive and coordinated basis, an integrated coastal protection program in order to reduce if not

eliminate the catastrophic rate of coastal land loss in Louisiana.”⁸ In furtherance of this public policy, the legislature created the Coastal Protection and Restoration Authority (“CPRA”) as “a single agency with authority to articulate a clear statement of priorities and to focus development and implantation of efforts to achieve comprehensive integrated coastal protection.”⁹ The legislature created the CPRA within the office of the governor and mandated “joint coordinat[ion]” among the CPRA, flood authorities, levee districts, and other agencies for implementing the state’s coastal protection plan.¹⁰ The SLFPA-E and the levee districts encompassed therein remain “subject to Part II of Chapter 2 of Title 49 of the Louisiana Revised Statutes.”¹¹

28.

Article VII, § 10 of the Louisiana Constitution governs the expenditure of all state funds deposited into the state treasury: “[M]oney shall be drawn from the state treasury only pursuant to an appropriation made in accordance with law.”

29.

Appropriation of state money is vested in the legislative branch of government. Article III, § 16 of the Louisiana Constitution states that “no money shall be withdrawn from the state treasury except through specific appropriation.”

30.

The Attorney General approved the SLFPA-E’s statement in the Resolution that special counsel “shall be paid on a contingency basis ranging from 32.5 percent to 22.5 percent of any gross recovery depending on the amount of the recovery.”

31.

Pursuant to the Attorney General’s approval, the SLFPA-E entered into a contract with Jones, Swanson, Huddell & Garrison, LLC, entitled “Contingency Fee Agreement and Authority to Represent.” The Contact provides that the firm will represent SLFPA-E “in connection with

⁸ La. R.S. § 49:214.1(D).

⁹ La. R.S. § 49:214.1(B).

¹⁰ La. R.S. § 49:214.1(E) (“[T]he legislature places responsibility for the direction and development of the state’s comprehensive master coastal protection plan with the Coastal Protection and Restoration Authority Board within the office of the governor. In order to maximize the effectiveness of integrated coastal protection efforts, the Coastal Protection and Restoration Authority Board shall use an integrated effort to jointly coordinate master plan and annual plan development with the Coastal Protection and Restoration Authority, state agencies, political subdivisions, including flood protection authorities, levee districts, and federal agencies.”).

¹¹ La. R.S. § 38:330.1(A)(2).

Client's and the Levee Districts' claims for damages, including but not limited to increased costs and property damages, sustained as a consequence of the ongoing land loss and erosion." As compensation for such representation, SLFPA-E contracted to pay the firm as follows:

- a) Thirty-two and a half percent (32.5%) on any gross recovery totaling up to and including one hundred million dollars (\$100,000,000);
- b) Twenty-seven and a half percent (27.5%) on any gross recovery totaling more than one hundred million dollars (\$100,000,000) up to and including three hundred million dollars (\$300,000,000); and
- c) Twenty-two and a half percent (22.5%) on any gross recovery totaling more than three hundred million dollars (\$300,000,000).

32.

The Contract provides that the contingency fee be deducted from all amounts collected; therefore, the Contract deducts from funds that are, in part, due to the State.

33.

The Attorney General's approval of such a contingency fee arrangement by his approval of the Resolution that proposed the Contract amounts to an unconstitutional usurpation of the power vested in the Legislature to appropriate state monies, pursuant to Article III, § 16, in violation of the Article VII, § 10.¹²

INJUNCTIVE RELIEF

34.

The matters set forth in Counts One through Three constitute direct violation of prohibitory law entitling petitioners to injunctive relief without the necessity of demonstrating irreparable injury.

35.

Implementation and performance of said Contract pursuant to the Attorney General's invalid approval of the Resolution will result in irreparable injury to the Petitioner as a result of its chilling effect on the exploration, production, development and transportation of the oil and gas resources of the State, and the resulting diminution in sales taxes, severance taxes, royalties on state leases, and other funds that would otherwise be available for public use.

¹² *Meredith v. Ieyoub*, 96-C-1110 (La. 9/9/97); 700 So.2d 478 (held that the Attorney General acted without express grant of power in contracting with private firms, and thus violated separation of powers doctrine).

WHEREFORE, petitioner Louisiana Oil & Gas Association, Inc. prays for judgment

against the defendant, the Honorable James D. "Buddy" Caldwell, as follows:

1. For a declaration that the Attorney General's approval of SLFPA-E's Resolution for retaining and compensating special counsel is invalid under Louisiana Law;
2. For a preliminary and permanent injunction for the withdrawal of the Attorney General's approval of SLFPA-E's Resolution for retaining and compensating special counsel;
3. For all costs of suit incurred herein; and
4. For all other general and equitable relief.

Respectfully submitted,

BY: _____

ATTORNEYS FOR PETITIONER

PLEASE SERVE:

Honorable James D. "Buddy" Caldwell