

NOW

BGR's Spotlight on Local Government Issues

Bill Would Open Floodgates to Gubernatorial Interference

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Two weeks ago, BGR issued a report asking the Legislature to reject Senate Bill 79, which would change the appointment process for the two regional flood protection authorities in the New Orleans area. Among other things, the bill would greatly increase the governor's power to repeatedly reject nominees.

Sen. Robert Adley, the author of SB 79, has introduced another bill that could accomplish the same thing – and do additional damage to the integrity of the flood protection authorities. The newer bill, SB 629, would move the regional flood protection authorities into the executive branch, placing them under the Coastal Protection and Restoration Authority.

The ramifications of the bill for the two flood protection authorities and their operations are wide-ranging. They are also difficult to discern, since they are not spelled out in the bill. One thing is clear, however: The bill strikes at the very heart of the independence of the flood protection authorities by exposing them to political pressure and intervention from the governor. This should alarm anyone who sought to temper the role of politics in levee board governance following the 2005 levee failures.

While there are many problems with SB 629, this release focuses on the bill's implications for the flood protection authorities' appointment process.

SB 629 does not mention modifying the levee board's appointment process. However, if ad-

opted and successfully implemented, it could give the governor unlimited veto power over appointments to the levee authorities. To understand how this would work, a little legal background is necessary.

The two regional flood protection authorities were established pursuant to Article VI, the local government provision of the Louisiana Constitution, and are outside of the executive branch. SB 629 purports to move the two authorities into the executive branch.

Assuming that this is constitutional, the flood protection authorities would become subject to Article IV, Section 5(H)(1) of the Constitution, which states: “The governor shall appoint, subject to confirmation by the senate ... the members of each board and commission in the executive branch whose election or appointment is not provided for by this constitution or by law.”¹

An appellate court has interpreted Article IV, Section 5(H)(1) to mean that the Legislature can provide for a person or entity other than the governor to make the appointments to an executive branch board or commission. However, if the Legislature does not completely remove the governor from the appointment process, its ability to rein in the governor’s discretion is limited. While it can establish qualification requirements and nomination processes, it cannot eliminate the governor’s veto power.²

If SB 629 passes and moves the regional flood protection authorities into the executive branch, the qualification requirements and nominating and appointment processes set forth in current law for the two flood protection authorities’ boards would stand. However, if the appellate court’s interpretation carried the day, the governor would be able to veto appointments to those boards, leading to the same unfortunate outcome as SB 79: a large increase in gubernatorial control over the composition of the flood protection boards and the corresponding potential for political considerations to creep back into the selection process.

As the qualifiers in the preceding paragraphs indicate, the effect of SB 629 on the nominating process is far from a foregone conclusion. But the risk that a governor intent on controlling the regional flood protection authorities would assert veto power is a real one.

In 2006, when the Legislature was considering the levee board reforms that were ultimately enacted, BGR asked the following question: How will posterity view Louisiana lawmakers if they spurn the chance to depoliticize flood control in the wake of the worst levee failure in U.S. history? The answer was clear: Badly.

How will posterity view Louisiana lawmakers if they re-politicize flood control less than a decade later?

The answer is the same: Badly.

The bill should be rejected.

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END NOTES

¹ The Attorney General has opined that Article IV, Section 5(H), applies only to executive branch appointments. He has further opined that certain entities (including levee districts) established pursuant to Article VI are not a part of the executive branch and therefore are not subject to Article IV, Section 5(H). La. Op. Att’y. Gen. No. 85-601 (1985); La. Op. Att’y. Gen. No. 81-724 (1981).

² *Murrill v. Edwards*, 613 So. 2d 185 (La. App. 1 Cir. 1992), *cert. denied*, 614 So. 2d 65 (La. 1993). According to the court, the Legislature can require the members of a board or commission to meet certain qualifications or to be representative of certain areas of society. It can also require that certain groups submit nominees. But the governor has full discretion to reject the nominees. “[A]ny requirement that attempts to limit the discretion of the governor to reject the nominees submitted would amount to an impingement on the appointment powers.” *Id.* at 190-191.