

NOW

BGR's Spotlight on Local Government Issues

Special Counsel Bill Threatens Levee Boards' Independence

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Following the catastrophic levee failures in 2005, state voters overwhelmingly approved a constitutional amendment allowing the Legislature to establish regional flood protection authorities to govern the New Orleans area's balkanized levee districts. Responding to voters' concerns, the Legislature created two independent authorities operating in a governance framework designed to protect them from political interference.

The Legislature is now considering multiple bills that would adversely affect the flood protection authorities' independence. BGR has already taken positions against two of those bills: Senate Bill 79, which would allow the governor to unilaterally remove board members for vague reasons, and Senate Bill 629, which would transfer the two authorities to the executive branch. In this release, BGR addresses a third bill, Senate Bill 553, that impinges on the authorities' independence.

All three bills were filed in response to the lawsuit that the Southeast Louisiana Flood Protection Authority-East (East Authority) filed against oil and gas companies. BGR has not taken a position on the merits or wisdom of the East Authority's lawsuit.¹ In evaluating bills designed to stop that suit, it has focused instead on whether proposed governance changes would adversely affect the long-term independence of the regional flood protection authorities.

SB 553, which has passed the Senate and is pending in a House committee, would change

the process by which the flood protection authorities hire special counsel. Currently, the authorities are treated in the same way as most levee boards, school boards and parish governing authorities. Like those entities, the flood protection authorities must obtain the approval of the state attorney general before entering into a contract with special counsel.

SB 553 would subject the authorities to the more restrictive hiring requirements that apply to state boards and commissions. As a result, both authorities would have to obtain the written approval of the governor as well as the attorney general before hiring special counsel. The compensation payable to such counsel would also be subject to the approval of both.

In addition, SB 553 would prohibit the flood protection authorities from entering into contingency fee agreements unless approved by the Joint Legislative Committee on the Budget.

The provision requiring the governor's approval would apply retroactively. The provision governing contingency fee arrangements would apply prospectively only.

SB 553 states that special counsel contracts for the flood protection authorities that have not been approved by both the governor and the attorney general "are and have always been contrary to the public policy of this state." Such contracts would be null and void unless and until the necessary approvals were obtained. However, existing contracts that include hourly rates for legal services would be ratified, provided that they had been properly approved by the attorney general.

Both flood protection authorities rely heavily on special counsel. The East Authority, for instance, has 10 contracts with them.

Proponents of SB 553 have indicated that the bill is intended to derail the East Authority's lawsuit against energy companies, which was filed by special counsel hired on a contingency-fee basis with the consent of the attorney general but not the governor. Proponents contend that the suit conflicts with the state's mas-

ter plan for restoring the coast and could have significant negative economic repercussions. They also assert that the bill would provide oversight of potentially expensive contingency fee arrangements.

As noted earlier, BGR has taken positions against bills proposing governance changes that would negatively impact the future independence of the flood protection authorities. SB 553 falls into that category. It would allow the governor to block legal actions that he opposes by rejecting requests for special counsel. It would also enable the governor to control the selection of counsel by rejecting all proposed attorneys, except for the attorney or law firm he prefers.

In enacting major levee district governance reforms in 2006, the Legislature placed a priority on safeguarding the authorities from political interference so that they could focus squarely on providing the best flood protection possible. By allowing the governor to intrude in the authorities' legal matters, SB 553 would increase the risk of political interference. It should be rejected.

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ENDNOTES

1 Bd. of Comm'rs. of the Southeast La. Flood Protection Auth. – East v. Tenn. Gas Pipeline Co., No. 13-6911, (Civ. Dist. Ct., Orleans Parish, filed July 24, 2013).