State of Louisiana
Office of the Governor
GOVERNOR BOBBY JINDAL

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Legal Memo on Senate Bill 469

BATON ROUGE - The following is a legal memorandum from Thomas Enright, Executive Counsel to Governor Jindal, on the subject of Senate Bill 469.

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MEMORANDUM FOR FILE

This memorandum addresses the so-called "litigation risk" posed by the Legislature's passage of SB 469 to state and local government claims available under the federal Oil Pollution Act of 1990 (OPA), if the bill is signed into law. The assertions, first appearing in media outlets subsequent to its passage, are that SB 469 poses an unacceptable risk to the claims brought by the state and local governments in the ongoing British Petroleum (BP) litigation resulting from the tragic explosion approximately fifty miles off Louisiana's shores on April 20, 2010. That explosion developed into the first-ever declared Spill of National Significance (SONS) under the OPA, as BP was unable for weeks to obtain source control over its well, and millions of gallons of oil drifted primarily onto Louisiana's shores, causing immense ecological damage. This ecological damage, combined with the subsequent federally-declared moratorium on drilling in the Gulf of Mexico, resulted in massive economic damages to the state and local government, as well as people of Louisiana.

For the reasons provided herein, we disagree with the assertion that SB 469 overrides the clear language of the federal Oil Pollution Act.

It is both black-letter law and conventional wisdom that the Supremacy Clause of the U.S. Constitution mandates that federal law preempts state law when in conflict. U.S. Const. Art. VI, cl. 2. The OPA, in its very first substantive section, begins with the unmistakably clear language:

"*Notwithstanding any other provision or rule of law and subject to the provisions of this Act, each responsible party…is liable for the removal costs and damages specified [in the Act] that result [from a discharge of oil] into or upon the navigable waters or adjoining shorelines…" 33 USC 2702 (a).*

The OPA, in 33 U.S.C § 2701, defines both "claimant" and "person" to clearly include state and local governments. Subsection (4) defines "claimant" as *"any person or government who presents a claim for compensation under this subchapter;" while Subsection (27)* defines "person" as *"an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." While "claimant" and "person" overlap in some respects, both are clearly eligible for the damages and compensation that the OPA requires a responsible party to pay.*

It is important to note that at least one body of federal law – the U.S. Bankruptcy Code – does allow state law to determine the right of the state's own municipalities to access the federal law, by declaring bankruptcy. The elements for when a municipality is eligible to file for bankruptcy are laid out in 11 U.S.C. §109(c):

(1) the entity must be municipality
(2) the municipality must be "specifically authorized, in its capacity as a municipality or by name," to be a debtor under [Chapter 9] ***by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor*** under [Chapter 9]." (Emphasis added.)

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In reliance upon this federal authority, R.S. 13:4741 explicitly denies authority to declare bankruptcy to *"any parish, municipality, political subdivision, public board or public corporation, taxing district, or other agency of the state . . . without the written approval of the [State Bond Commission]."*

Thus, where Congress enacts law that either clearly preempts conflicting state laws or clearly allows a state to determine eligibility for its political subdivisions to avail themselves of the federal law, it does so in unmistakable language. The Oil Pollution Act and the Bankruptcy Code are excellent examples of both.

Additional points:

SB 469 does not impact the OPA claims raised in the BP litigation.
• SB 469 relates to claims arising from a "use" occurring within the coastal zone.
• The Coastal Zone Management Act (CZMA) provides that "use" *"shall mean any use or activity within the coastal zone which has a direct and significant impact on coastal waters."* (R.S. 49:214.23(13)).
• All BP claims arise out of the event that occurred approximately fifty miles off Louisiana's shores, and clearly outside the coastal zone. For this reason, BP claims plainly are not impacted by the bill.
• Even if a similar event occurred within the Coastal Zone, the OPA would preempt SB 469 from precluding the state or local governments from making claims for damage.
• Relying on the preemptive language contained in the OPA, BP has already obtained the dismissal of claims by local governmental agencies seeking to recover under a state law that expressly authorizes damages for injuries to wildlife. It would represent a complete reversal by BP, and one to its own detriment, to argue now that a state statute implicitly prohibits OPA claims. See In re DEEPWATER HORIZON, 745 F.3d 157 (5th Cir. 2014).

SB 469 preserves parish claims.
• Current law (La. R.S. 49:214.36(D)) grants broad authority to the Secretary of DNR, the AG, an appropriate district attorney or a parish with a local program to bring "injunctive, declaratory, or

other actions as are necessary to ensure that no uses are made of the coastal zone for which a coastal use permit has not been issued when required or which are not in accordance with the terms and conditions of a coastal use permit." (emphasis added)
• The statute authorizes any claims relating to activities requiring a permit in the coastal zone, not just permit enforcement proceedings. It covers both uses "for which a coastal use permit has not been issued when required" or uses "which are not in accordance with the terms and conditions of a coastal use permit".

SB 469 preserves the court's ability to impose penalties as it sees fit.
• This same statute (La. R.S. 49:214.36(E)) grants the court broad authority to "impose civil liability and assess damages; order, where feasible and practical, the payment of the restoration costs; require, where feasible and practical, actual restoration of areas disturbed; or otherwise impose reasonable and proper sanctions for uses conducted within the coastal zone without a coastal use permit where a coastal use permit is required or which are not in accordance with the terms and conditions of a coastal use permit."
• Not only do statutory claimants have the express authority to bring "injunctive, declaratory, or other actions as are necessary", BUT the court also has the authority to "impose civil liability and assess damages", "order…the payment of restoration costs", "require the actual restoration of areas disturbed," as well as "otherwise impose reasonable and proper sanctions".

SB 469 does not affect any existing or future contracts.
• The bill specifically preserves contractual rights. In paragraph (4) on page 2, SB 469 states: "(4) Nothing in this Section shall prevent or preclude any person or any state or local governmental entity from enforcing contractual rights or from pursuing any administrative remedy otherwise authorized by law arising from or related to a state or federal permit issued in the coastal area pursuant to R.S. 49:214.21 et seq., 33 U.S.C. 1344 or 33 U.S.C. 408."

SB 469 does not have any impact on the authority of any state agency.
• Current law (La. R.S. 49:214.31) expressly preserves the constitutional authority of all state agencies and specifically preserves existing statutory authority unless otherwise repealed.
• This means that all state agencies, including for example CPRA, DEQ and DNR, can continue to issue and enforce permits, regulate air and water quality, and perform all the functions provided in the Constitution or other provisions of law.
• In addition, the bill specifically preserves "any administrative remedy otherwise authorized by law" for any state or local governmental entity, which would include the regulatory enforcement of state agencies.

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