**MINUTES OF THE**
**SOUTHEAST LOUISIANA FLOOD PROTECTION AUTHORITY–EAST**
**SPECIAL BOARD MEETING**
**MONDAY, MARCH 2, 2015**

The Special Board Meeting of the Southeast Louisiana Flood Protection Authority-East (Authority or SLFPA-E) was held on Monday, March 2, 2015, in the Orleans Levee District Franklin Administrative Complex, 6920 Franklin Avenue, Meeting Room 201, New Orleans, Louisiana, after due legal notice of the meeting was sent to each Board member and the news media and posted.

Mr. Estopinal called the meeting to order at 1:00 p.m. and led in the pledge of allegiance.

The roll was called by Mr. Wittie and a quorum was present:

**PRESENT:**
Stephen V. Estopinal, President
Lambert J. Hassinger, Jr., Vice President
Louis E. Wittie, Secretary
Wilton P. Tilly, III, Treasurer
Jefferson M. Angers
Tyrone Ben
G. Paul Kemp
Kelly J. McHugh
Richard A. Luettich, Jr.

**ABSENT:**
None

**OPENING COMMENTS:**

Mr. Estopinal explained that the SLFPA-E became aware that the deterioration of wetlands between the protection levees and the Gulf of Mexico was a factor in storm surge height and in the increase in storm surge threat to its member districts. It has been established and is an uncontested fact that oil and gas pipeline activities have accelerated the loss of coastal marshes. Whether the additional cost of the rapidly increasing protection requirements should be borne alone by the people and businesses of the member districts or whether those parties responsible for some form of the acceleration of loss should also be responsible for a portion of the additional cost is a question of law—not a question of fact. The SLFPA-E solicited the legal services of Jones, Swanson, Huddell & Garrison, LLC (Jones Swanson) to pursue the question of law. Jones Swanson and the SLFPA-E entered into a contract defining, among other things, the compensation structure of that contract. The contract was approved by the SLFPA-E by unanimous vote. The contract was reaffirmed after the composition of the Board changed. The decision to appeal the erroneous decision by Judge Brown was

reached after consultation with himself (the President of the Board), in-house counsel and Jones Swanson's legal team. Jones Swanson held the opinion that the decision was sufficiently flawed that it should be appealed. The contract between Jones Swanson and the SLFPA-E has several funding mechanisms that are very clearly stated and completely subject to the SLFPA-E's discretion. The legal team headed by Jones Swanson works for the SLFPA-E and the SLFPA-E has decided to appeal and that the funding arrangement associated with the appeal should go forward. The issue today is whether or not the decision of the President in doing so should be overthrown and the Jones Swanson team be dismissed and paid for work done. It is not a question of who directs the Jones Swanson team—the SLFPA-E does. The real question in hand is does the SLFPA-E serve the interest of flood protection or not.

**ADOPTION OF AGENDA:**

A motion was offered by Mr. Hassinger, seconded by Mr. Ben and unanimously approved, to adopt the agenda.

**PUBLIC COMMENTS:**

John Barry stated that he concurred with Mr. Estopinal's opening comments and that he had several pieces of new information. He stated that land loss endangers lives. The American Petroleum Institute (API) estimated that 34 percent of the total wetland loss in coastal Louisiana was directly related to its operations. The API stated, "This does not include discharges of drilling fluids or brine into the wetlands, which would increase the percentage". The Shell professor of coastal wetlands at LSU thinks that the figure of 34 percent should almost be doubled. Meanwhile, the State has done nothing to enforce its permits. A Department of Natural Resources (DNR) document states, "The ability of the enforcement section to function has almost been non-existent. It has been impossible to pursue enforcement." He commented on a debate on the House floor during the last legislative session in which the question about who would pay for coastal restoration was asked by Representative Lambert and the response was that the taxpayers of Louisiana have already paid for much of it and will continue to do so. He stated that if the President's decision is rescinded by the Board, it is letting off the hook the industry that is directly responsible by its own studies for much of the land loss and expecting taxpayers to pay. He commented that President Obama's budget is zeroed out even on the money promised to the State. Therefore, the only alternative if the suit is killed is for State taxpayers to pay for coastal restoration. He asked that the Board not kill the appeal that would keep the lawsuit alive and could provide a vehicle for obtaining money, if it is won, for coastal restoration. He cautioned that the coast will keep deteriorating as people keep pushing back the difficult decisions.

General Russel L. Honore thanked the Board for its public service. He asked that the Board continue to allow the judicial system to work. The judicial system was significantly challenged last year by the legislature when it decided to pass a retroactive law to try to kill the lawsuit outside of the judicial system. He pointed out that this speaks to the power of the oil and gas industry, which has provided much to the State,

but has also done great damage. He commented on the damage caused by the industry and the significant impact of the damage. He stated that the people of Louisiana need hope that someone will stand and fight for the coast. He commented on old abandoned pits and derricks and noted that the legislature passed a law last year to allow the abandoned derricks, many of which are still leaking, to be left in place for the good of the environment. He stated that the coastal master plan looks good on paper; however, there is no money to execute the plan. The oil companies that own most of the wetlands pay less than 50 cents per acre tax, which is an embarrassment. He stated that Louisiana law provides that once land becomes submerged under water, it reverts to the State along with the royalties. He asked that the Board petition the State to take any land that becomes submerged under water within its area of jurisdiction from the oil and gas industry and begin to use the royalties for coastal restoration.

**NEW BUSINESS:**

The motion to override the February 19, 2015 decision by the SLFPAE President to proceed with an appeal of the February 13, 2015 ruling by Judge Brown dismissing the Authority's claims in the litigation entitled, “Board of Commissioners of the Southeast Louisiana Flood Protection Authority-East, et al, versus Tennessee Gas Pipeline Company, LLC, et al”, USDC EDLA Case No. 13-5410, Sec. “G”(3)”, was offered by Mr. Hassinger and seconded by Mr. Angers.

Mr. Hassinger stated that he appreciated everyone’s attendance today so that this important issue could be discussed. He asked that the Board consider several issues prior to its vote. He discussed the court’s ruling. The motions that were before the court are referred to by attorneys as 12B6 motions (Federal rules) or motions to dismiss. The bar is very high for a defendant to win on a 12B6 motion and very few such motions are granted since a judge has decided from the outset, for example, that a particular plaintiff has no right to sue. Under a 12B6 motion the judge asks, has the plaintiff stated a claim for which relief can be granted or does the party have a claim. The standard used by the court to evaluate a 12B6 motion (motion to dismiss) allows for asserted claims to be liberally construed in favor of the plaintiff. Therefore, the court liberally construed everything in the Board’s favor when determining whether it has a right of action. All facts pleaded in the suit are taken as true. Therefore, the court assumes that everything stated in the suit is true. However, the complaint must offer more than an unadorned “the defendant unlawfully harmed me” accusation. Only if, as a matter of law, it is clear that no relief can be granted under any set of facts, then the claim should be dismissed. This is the standard that the Judge used in deciding whether the Authority is the proper party to bring the suit. The Board fought the fight, but it was someone else’s fight. The issue before the Board today is not about letting the industry off the hook and asking taxpayers to pay more. The court has stated that the Authority is not the right party. It does not have anything to do with what the legislature passed last year or anything else.

Mr. Hassinger stated that the argument is presented that the Board cannot stop the litigation because it would then owe millions of dollars, which would be irresponsible.

He quoted from an editorial published in the Advocate after the Board's last meeting. "A New Orleans area flood protection authority punted its civic obligation Thursday … today's Board members are hamstrung by poor decisions made by their predecessors under the leadership of Tim Doody and John Barry. Two years ago the Southeast Louisiana Flood Protection Authority-East plotted in secret … But the Board's secretly planned lawsuit landed with a giant thud. … The lawyers for the flood authority want to take the case to the U.S. Fifth Circuit Court of Appeals, but the lawsuit foes say it's hard to imagine a Republican-dominated appeals court will look at the case more favorably than Judge Brown, a Democrat who rejected it completely. … Jones said the lawyers will decide whether and when to give up on the appeals process."

Mr. Hassinger addressed the question, is there anything to lose, therefore, why not keep going? He stated that it is a misnomer to say that if the Board stops now that it would owe millions of dollars. He stated that the Board does not owe anyone anything if the lawsuit is stopped. The Board's outside counsel attended the January, 2014, Coastal Protection and Restoration Authority (CPRA) meeting to provide a presentation on behalf of the Board. Mr. Hassinger stated that he asked Gladstone Jones at the CPRA meeting if a court rules that the Authority does not have the authority to file suit, does it owe the attorneys money. Mr. Jones replied, no, at the CPRA meeting. He added that the Board was told the same answer to this question. Mr. Hassinger stated that the contract that was signed on behalf of the Board is unenforceable and illegal. There is nothing in the contract that provides that the Board must go to the Court of Appeals or the U.S. Supreme Court otherwise it would owe fees. He added that even if he is wrong about the contract and a judge rules that the Board owes millions of dollars, no judgment can be enforced against the Board. Therefore, the Board cannot be forced to pay anything.

Mr. Hassinger stated that Board members were initially told that the poison pill provision was meant to make termination maximally unpalatable to the legislature. However, many months later on June 19, 2014, the former Vice President took the podium and stated that he wanted to correct something. The poison pill provision was not placed in the contract for politics to protect against the legislature or the Governor. The purpose of the clause was to give some protection to the lawyers because they are taking so much risk and the lawsuit may be stopped politically. According to the drafter of the contract the provision was meant to stop political interference. The lawsuit has not been stopped by political interference—it has been stopped by the law. He explained that contingency fee contracts are set up because of risk. In this case, the attorneys stood to receive up to 32.5 percent of purportedly billions of dollars that were going to be received. This is the reward for taking the risk—not the poison pill provision that hamstrings the Board into never ending litigation.

Mr. Hassinger pointed out that the contract was approved by the adoption of a resolution of the Board in June, 2013. In October, 2014, outside counsel was questioned about the fees and expenses that would be owed if the litigation was stopped. Outside counsel reported that from September, 2012, through August, 2014, they had accumulated roughly 14,000 hours and $600,000 in costs. He pointed out that

lawyers were working on the case as far back as September, 2012, and that a contract was signed in June, 2013. He reiterated that the Board was told that there was comprehensive, reliable in-depth research, which it relied upon when it approved the suit, that showed that the Authority had standing. He stated that the Board has no risk should it decide to accept the Judge's ruling regarding the law. He asked, if there was no poison pill provision in the contract, would the Board accept the Judge's ruling and recognize that the law states that the Authority has no right of action.

Mr. Hassinger explained that there is a cost to proceeding in that the Board is not able to operate in conjunction and cooperation with stakeholders in government. He noted, as an example, that the Board's outside counsel, while representing the Authority, pointed out to the CPRA at a meeting last year that it should cease efforts to protect the oil and gas industry. Mr. Hassinger pointed out that the sole mission of the CPRA is coastal restoration.

Mr. Hassinger stated that he realized the Commissioners who voted for the lawsuit feel pressure to keep going. He asked that the Board not bow to pressure. He pledged to work constructively with the oil and gas industry, the CPRA and other stakeholders and the legislature to try to find solutions to the issues that the Board tried to address through the lawsuit that cannot be addressed through the lawsuit. He stated that he would rather spend his term on the Board working with stakeholders than continuing the lawsuit and further alienating the Board.

Mr. Tilly stated that at his first meeting as a SLFPA-E Commissioner the Board was briefed by Glad Jones, John Barry and Tim Doody about the potential lawsuit. He stated that he concurred with the Board at that time regarding the suit. Since the Board voted to proceed with the lawsuit he stated he had heard arguments both for and against the lawsuit from various individuals and organizations; however, everyone in the general public was in favor of the lawsuit. He noted that the oil and gas industry does not carry the sole responsibility for coastal erosion; however, it did contribute to coastal erosion and should be made to pay for the damage that it inflicted. He stated that he represented the Board in meetings to discuss how to get the oil and gas industry to the table to discuss its role in the erosion of Louisiana's coast and to find a mutually agreeable way to settle this issue out of court. However, efforts to get the oil and gas industry to the table were stalled by either legislative activity or pending court decisions. He stated that the only reason the industry was willing to come to the table and negotiate was due to the lawsuit. He added that he fears that the oil and gas industry will never come to the table without the lawsuit. Louisiana's coast is an integral and critical speedbump to the flood protection surrounding the levee districts. As the effectiveness of the coast is worn down, the risk to flood protection from storm surge increases. A former Governor commended the Board at an Association of Levee Boards of Louisiana meeting for filing the lawsuit and pointed out that for years the Federal government has not only funded, but through the U.S. Army Corps of Engineers (USACE) constructed, most of the river and flood protection for New Orleans and throughout Southeast Louisiana. The former Governor added that Louisiana cannot keep expecting the Federal Government to come in and fund flood protection projects in

Louisiana without the State attempting to provide some flood control funding of its own. The State has a master plan, which, if executed, could provide a possible solution to coastal erosion. However, without funding it is only a piece of paper. The former Governor went further to state that the lawsuit is an attempt to provide funding for flood protection and preserving Louisiana's coast. The State in its arguments against the lawsuit has said that the SLFPA-E did not have the authority to file the lawsuit. He stated that in the early stages of the lawsuit, the offer was made to turn the suit over to the CPRA; however, the CPRA did not want it. Instead the CPRA filed a lawsuit against the USACE and the Federal government, who poured $14 billion into the flood protection system in Southeast Louisiana since 2005.

Mr. Tilly stated that the question before the Board concerns whether to allow the attorneys to appeal the recent ruling against the lawsuit. He asked was the Board willing to risk digging out of one lawsuit just to get into another lawsuit with its attorneys. He recommended that the Board allow its attorneys to continue with their course of action, appeal the ruling and, hopefully, win the suit and provide funding to help Louisiana's coast.

Mr. Angers commented that it is difficult to see a motion on an agenda to overrule the President; however, when members of the Board emailed to inquire about calling the Special Board meeting, he was unaware that after the last Board meeting the President signed off on allowing outside counsel to proceed with the appeal. Mr. Estopinal pointed out that the decision to proceed was made prior to the letter. He pointed out that Mr. Jones stated at the Board meeting that in consultation with the in-house counsel and himself (the President) the decision was reached. The letter was a confirmation of the earlier decision.

Mr. Angers stated that the Board learned at the last meeting that it is two years away from certifying a non-federal levee in St. Bernard Parish. The Authority is desperately trying to pass a millage so that the Lake Borgne Basin Levee District can conduct future operations. He pointed out that these are the issues that the Board should be about and should bring members together. The things that appear extraneous today should be allowed to go by the wayside.

Mr. Luettich commented that he appreciated today's dialog. The Board has heard some fairly passionate words from Mr. Barry, General Honore and Mr. Tilly about why the suit is necessary. He stated that he would like the Board to consider its position at this point. The Board has not been stopped by the law; it has been delayed and suffered a setback. The legal system has not yet rendered a final judgment and the process is not over. If the lawsuit is terminated, the issue of payment would go into arbitration as opposed to a state court. Typically, state courts are unlikely to overturn arbitration. Therefore, it does not appear that the poison pill is indeed not a poison pill. He pointed out that allowing the attorneys to continue to pursue the lawsuit with their own money seems to be a substantially lower risk than the risk that would be faced and the time that it would take to reach a settlement with the attorneys should the lawsuit be terminated. The risk is much higher if the Board terminates the lawsuit, particularly when

considering that the Board would be giving up on the reason the litigation was started; that is, to compensate the citizens of Louisiana for damages and provide a more secure place to live. Therefore, it makes more sense to allow the attorneys with their own money to continue the process and see it at least one more step down the road.

Mr. Estopinal asked if 12B6 rulings are rarely overturned, what is the concern—the appeal would just be rejected. He added that he was astounded that anyone would deliberately contemplate not paying a judgment.

Mr. Estopinal called for a roll call vote on the motion and clarified that a yes vote would mean that the lawsuit would be terminated and a no vote would mean that the Board would continue with the litigation. The motion failed with Mr. Angers, Mr. Ben, Mr. Hassinger and Mr. McHugh voting yea and Mr. Estopinal, Mr. Kemp, Mr. Luettich, Mr. Tilly and Mr. Wittie voting nay.

Mr. Angers requested that a letter be drafted to the State Bar Association asking whether the contract is legal. Mr. Estopinal recommended that the request be referred to the Legal Committee.

There was no further business; therefore, the meeting was adjourned at 1:45 p.m.