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May 11, 2018

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

RE: House Bill 1456 and Senate Bill 1128, "Offshore Drilling Liability Act"

Dear Governor Hogan:

We have reviewed and hereby approve House Bill 1456 and Senate Bill 1128, identical bills entitled the Offshore Drilling Liability Act, for constitutionality and legal sufficiency. We write to discuss issues related to the possibility of federal preemption.

House Bill 1456 and Senate Bill 1128 provide that an offshore drilling activity is an ultrahazardous and abnormally dangerous activity and that a person that causes a spill of oil or gas while engaged in an offshore drilling activity is strictly liable for damages for any injury, death, or loss to person or property that is caused by the spill. The bills also provide that a provision in a contract that attempts to or purports to waive the right to bring an action under the provisions of the bills is void as against public policy.[1]

The Outer Continental Shelf Lands Act ("OCSLA"), 33 U.S.C. §§ 1331 *et seq.*, extends the "Constitution and laws and civil and political jurisdiction of the United States" to the subsoil and seabed of the Outer Continental Shelf ("OCS") and to "artificial islands and fixed structures" built for discovery, extraction, and transportation of minerals. 43 U.S.C. § 1333(a)(1). All law applicable to the OCS is federal law, but to fill the substantial "gaps" in the coverage of federal law, OCSLA borrows the "applicable and not inconsistent" laws of the adjacent states as surrogate federal law. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 480 (1981). Under OCSLA, state law is applied as federal

[1] The bills also amend Courts and Judicial Proceedings Article, § 12-301.1, which caps the amount of supersedeas bonds at the lesser of $100,000,000 or the amount of the judgment. This provision, however, applies only to appeals from the actions of State courts and would not apply to cases brought under the provisions of the bills.

law. *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 357-59 (1969). The incorporation of State law is found at 33 U.S.C. § 1333(a)(2)(A):

> To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

Application of state law under this provision involves three questions: (1) whether the situs of the controversy is the OCS; (2) if the situs is the OCS, whether there is federal law applicable to the dispute; and (3) if there is no applicable federal law, state law applies, if there is applicable federal law it is necessary to consider whether the applicable state law is inconsistent with it. *Newton v. Parker Drilling Management Services, Ltd.*, 881 F.3d 1078, 1088 (9th Cir. 2018). Thus, mere presence of federal law does not bar the incorporation of state law. Thus, state law will apply unless it is in conflict with the federal law. *Id.* at 1095.

In *In re Deepwater Horizon*, 745 F.3d 157 (5th Cir. 2014), the case likely to be cited to support the conclusion that House Bill 1456 and Senate Bill 1128 are preempted, the incorporation of state law did not apply because the court determined that Deepwater, a mobile offshore drilling unit ("MODU"), was a vessel and subject to maritime law. *In re Deepwater Horizon*, 745 F.3d at 166. This is not the only possible conclusion, however. *See* John Costonis, *And Not a Drop to Drink: Admiralty Law and the BP Well Blowout*, 73 Louisiana Law Review 1, 13-15 (2012) (summarizing argument that Deepwater should be treated as an offshore facility and not a vessel). Even if the classification as a vessel is correct, however, OCSLA requires fixed drilling platforms to be treated as artificial islands, not as vessels. *Newton v. Parker Drilling Management Services, Ltd.*, 881 F.3d 1078, 1086 (9th Cir. 2018). Thus, some drilling would be subject to state law under OCSLA to the extent that law is not inconsistent with federal law.

House Bill 1456 and Senate Bill 1128 are designed to reach any damage to Maryland resulting from offshore oil and gas drilling on the OCS if the federal government acts to open the portion of the OCS near Maryland for exploration, development, and production of oil and gas. *See* Fiscal and Policy Notes on House Bill 1456 and Senate Bill 1128. Thus, the OCS would be the situs of any case affected by the bills.[2] The applicable federal law with respect to oil and gas spills is the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. § 2701 *et seq.*, which is the federal liability regime for oil spills. The Clean Water Act (Water Quality Improvement Act of 1970, Pub. L. No. 91-224 (codified at 33 U.S.C. §§ 1151-1174 (1970), amended by Federal Water Pollution Control Act Amendments of 1972, Pub. Law. No. 92-500 (codified at 33 U.S.C. §§ 1251-1274)), is also relevant.

The OPA was enacted to "streamline federal law to provide quick and efficient cleanup of oil spills, compensate victims of such spills, and internalize the costs of spills within the petroleum industry." Brittan J. Bush, *The Answer Lies in Admiralty: Justifying Oil Spill Punitive Damages Recovery Through Admiralty Law*, 41 Environmental Law Journal 1255 (2011) (citing Sye J. Broussard, *The Oil Pollution Act of 1990: An Oil Slick over Robins Dry Dock*, 8 Loy. Mar. L. J. 153, 165-66 (2010)). The OPA makes each responsible party for a vessel or a facility from which oil is discharged into or upon the navigable waters or adjoining shorelines or the exclusive economic zone liable for removal costs made necessary and the damages arising from a discharge. 33 U.S.C. § 2702(a). The damages include injury to and destruction of natural resources and personal property, loss of revenue, loss of profits and earning capacity, and cost of increased or additional public services. 33 U.S.C. § 2702(b)(2). This provision imposes strict liability on responsible persons.[3] Because federal law already imposes strict liability for discharges in the OCS,

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[2] Strict liability already applies to damages for drilling activities occurring on the lands and in the waters of the State. Natural Resources Article, § 5-1703.

[3] *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on April 20, 2010*, 808 F. Supp. 2d at 949, 959 (E.D. La. 2011); *MetLife Capital Corp. v. M/V Emily S*, 132 F.3d 818, 821-23 (1st Cir. 1997); David A. Freedman, *Evolution of Marine Pollution Law 1966-2016*, 91 Tul. L. Rev. 1009 (2017); David Sumpa, *OPA 90: Twenty-Five Years Of Judicial Interpretation*, 39 Tul. Mar. L.J. 439, 454 (2015); Thomas C. Galligan, *Displacement and Preemption: The OPA's Effect on General Maritime Law and State Tort Law Punitive Damages Claims*, 42 Cumb. L. Rev. 1, 11 (2012) (*cf.*, *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973) (upholding Florida law imposing no-fault liability on vessel owners and operators against claim of federal preemption prior to the enactment of the OPA); *U.S. v. American Commercial Lines, L.L.C.*, 759 F.3d 420 (5th Cir. 2014) ("in enacting OPA, Congress intended to build upon the Clean Water Act to create a single Federal law providing cleanup authority, penalties, and liability for oil pollution.").

strict liability under House Bill 1456 and Senate Bill 1128 cannot be considered inconsistent with federal law and would apply as federal law in the OCS.

While the OPA makes each responsible party liable for costs and damages, it also provides for the liability of third parties when a responsible party can establish that a discharge and the resulting removal costs and damages were caused solely by an act or omission of one or more third parties. 33 U.S.C. § 2702(d)(1)(A). The OPA also expressly allows a responsible party to seek contribution from third parties who are "potentially liable." 33 U.S.C. § 2709. Thus, the responsible party can be held liable under the OPA, yet also receive damages from a third party whose actions caused the oil spill. *Mid-Valley Pipeline Co. v. S.J. Louis Const., Inc.*, 847 F. Supp.2d 982, 991 (E.D. Ky. 2012).

The OPA expressly permits contractual indemnification clauses to some extent. It provides:

> (a) Nothing in this Act prohibits any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this Act.
>
> (b) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer liability imposed under this Act from a responsible party or from any person who may be liable for an incident under this Act to any other person.
>
> (c) Nothing in this Act, including the provisions of subsection (b), bars a cause of action that a responsible party subject to liability under this Act, or a guarantor, has or would have, by reason of subrogation or otherwise, against any person.

This provision was applied to indemnification provisions in the drilling contract in the *Deepwater* case, with the court permitting indemnification with respect to removal costs, but finding that indemnification with respect to civil penalties would be contrary to public policy. *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on April 20, 2010*, 841 F. Supp.2d 988, 1003-1006 (E.D. La. 2012). As a result, it is our view that the waiver provision of House Bill 1456 and Senate Bill 1128 would be in conflict with federal law to the extent that it applies outside of the type of indemnification barred by 33 U.S.C. § 2710(b) or indemnification with respect to penalties.

Based on the above, it is our view that provisions in House Bill 1456 and Senate Bill 1128 that are not preempted by 33 U.S.C. § 2710(b) can be applied as federal law under OCSLA with respect to discharges unrelated to vessels. The law with relation to discharges from vessels is less clear. The *Deepwater* case is virtually the only law directly addressing these issues. That case held that a MODU is a vessel, and that the OCSLA did not incorporate state law with respect to vessels. *In re Deepwater Horizon*, 745 F.3d at 166. The court further concluded that the savings clauses of the Clean Water Act and OPA did not apply where the source of the discharge was not within state waters. *Id.* at 171-174. These holdings are not binding on either the state or federal courts of this State.

In *St. Joe Co. v. Transocean Offshore Deepwater Drilling Inc.*, 774 F. Supp.2d 596 (D. Del. 2011), a case that arose from the same incident as the *Deepwater* case and was ultimately combined with it, the court concluded that the MODU was not a vessel, and found that the savings clauses allowed the application of state law in the OSC. The court found that by specifying that states can impose additional liability for "other pollution by oil within such State," the statute contemplated the application of state law to "more than merely discharges occurring within the state's territory," noting that the mere fact that the reported cases to date all involved the waters of a particular state does not establish that no broader application is permitted. *Id.* at 605. This ruling is also not binding on courts in Maryland.

In the absence of well-established law or a controlling case limiting the savings clauses of the Clean Water Act and the OPA to incidents that occur in State waters, we do not find that application of these provisions to spills from vessels would clearly be preempted by federal law. Even if so, that would not render that application unconstitutional, but only unenforceable. Moreover, other applications of the law are, in our view, applicable in the OCS under OCSLA. For these reasons, we approve the bills.

Sincerely,

Brian E. Frosh
Attorney General

BEF/KMR/kd

cc: The Honorable John C. Wobensmith
Chris Shank
Victoria L. Gruber