

NEWS FROM THE DOCKS



Louisiana Ports Deliver

ASSOCIATION OF LOUISIANA

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Message from the PAL Office

PAL continues to work toward production of its new "Profiles of Louisiana Ports". This will be the third edition. While we expected to have the document printed by now, we have run into some complications in updating the map showing member ports. Thanks to The Shaw Group and Mr. Ben Holt that will soon be resolved. Once we have the map in hand, it should be a simple matter to get it to the printer.

Shortly, PAL hopes to sign a contract with Dr. Jim Richardson to develop and Economic Impact Study for Louisiana ports. We are anxious to update numbers from the Tim Ryan study done over ten years ago. Dr. Richardson has been invited to our September meeting at Port Fourchon to discuss his approach to the study.

PAL always welcomes new associate members. If you have been considering joining, please contact the PAL office for more information. Information can also be found on our webpage.

And, if you are an associate member, PAL will be happy to include information about your organization in this newsletter. Just write up a short article and send it to the PAL office.

Legislative Update

As reported in the media, the legislative districts have been approved by the U. S. Justice Department. Qualifying for legislative office will take place during the first week of September for the open primary election. The fall elections will be affected by the fact that one third of the members of the House and Senate

are term limited. Some legislators will retire before term limitation, some House members may elect to challenge for Senate seats and some legislators may qualify for other elective offices. This will likely result in 40% of the legislature being newly elected members after the fall elections.

Because of the fall elections, most legislative committees who meet during this time, will likely be those committees which must review rules that have been written to implement recently enacted laws. Other committees meeting during the interim will be the money committees such as the Budget Committee. The Joint Transportation committee will meet at least each quarter to consider any new Port Construction and Development Priority Program projects.

As reported previously, most bills will have an effective date of August 15, 2011 unless, otherwise stipulated.

During the 2010 Legislative session, a law was enacted to permit the Office of Mineral Management (OMM) to lease state water bottoms for "hydro-kinetic generators". The location of the generators may impair navigation. PAL and DOTD were successful in amending the bill to require notice of the permitting process to ports and DOTD when a proposal is received by OMM to lease a site within a port district. The law and proposed rules allow the affected port to challenge the permitting process when the location will hinder navigation. The draft rules will be published in the La. State Register on August 20, 2011, and within 30 days any interested party may comment and/or request changes to the rules. The Joint Legislative Committee on Natural Resources can initiate and hold a public hearing on the rules and suggest changes before they are

finalized.

During 2009 the legislature enacted the Ports of La. Infrastructure Tax Credits, which grants a 100% tax credit at 5% per annum for 20 years for private investors in port infrastructure projects which exceeds \$5 million. The rules for the Infrastructure tax credits were finalized in November of 2010 by the La. Economic Development Department (LED). However, the same bill enacted a \$5 per ton tax credit to La. importers and exporters of breakbulk and container cargo through La. ports. The law requires that La. Economic Development Department implement rules if it can certify that the resultant import and export activity and spinoff benefits will not result in a loss of tax revenue to the state of Louisiana. Although the La. Economic Development Department has reviewed multiple analyses submitted by a respected economist provided by the Port of New Orleans which justify the tax credit, LED has not accepted the conclusions of the studies and has not certified that the import and export tax credits will give the state sufficient revenue to offset the tax credit. As a result, the rules have not been finalized, and the import and export tax credit law has not been implemented.

As a result of this delay, the date for termination of the tax credits (sunset date) was extended by a bill sponsored by Senator Conrad Appel to December 31, 2017. This extension will allow for further efforts to implement the Import and Export tax credits and afford the opportunity for future legislative amendments to put the port tax credits on a par with other tax credits.

Additionally, the Ports of La. Design Build legislation, sponsored by Representative Walt Leger, passed the House 85-3, but was defeated in the Senate Transportation Committee due to opposition from engineering groups. During the interim, an ad hoc group of contractors and engineering associations, together with representatives from PAL will meet to study and draft a Design Build bill that can be supported by ports, contractors and engineers.



Joe Accardo
Executive

Corporate Member News

Port of Vidalia

Vidalia Gets Nearly \$1M More for Port Monroe - The News Star

Vidalia officials scaled down plans for work toward a \$15 million port and got nearly \$1 million in grants from the Economic Development Administration.

Heather Malone — head of the Concordia Parish Economic and Industrial Development District — says the city cut about \$400,000 from a \$1.6 million plan, and the agency took on 80 percent of the cost rather than 55 percent. That means the city will pay \$250,000, instead of \$800,000.

"We had to change what we wanted to do on the project a little bit," she said. "But \$250,000 is a lot better than what we were originally looking at having to pay."

Instead of a road from the port to the western side of Louisiana 131 near the Vidalia Industrial Park, the city will build a short connector road to the east side of 131, Mayor Hiram Copeland said.

He said Vidalia is working with the Louisiana Department of Transportation and Development to get the city's share of the grant.

"We don't have the final word on that, but I feel like we are going to be able to receive those funds," he said.

Copeland says the city should be opening bids by mid-August, and construction should begin within a few weeks after that. He says the city already has \$1.6 million for the next step, taking the road over the levee.

"We almost have \$3 million in grants already," he said.

Copeland said the port will continue to be built in phases, and he expects the entire project to be complete within the next two to three years.

West Cameron Port

Oil rig Support Facility Studied Complex would act as home base for companies operating in Gulf

By Alan Blinder
American Press

On the heels of a \$6 billion investment, Cameron Parish's planning and development chief said that the parish is working on plans to bring a shore-based rig support facility to the area.

Ernest Broussard Jr., who is also the authorized agent for the West Cameron Port, said officials hope to complete a feasibility study by the end of the year. If it comes to fruition, Broussard said, the complex would act as a home base for companies operating in the Gulf of Mexico.

Despite its small population, Broussard said he thinks Cameron Parish is a suitable candidate to provide services for offshore rigs. "Because of the recent deep-water finds and the current shallow-water finds, we believe that we are uniquely positioned to participate in a regional, multi-state, shore-based operation," Broussard said.

It would be another economic development coup for a region devastated by two hurricanes since 2005.

On July 19, Houston-based Cheniere Energy announced that it plans to spend more than \$6 billion to build a liquefied natural gas export facility in Cameron Parish. Gov. Bobby Jindal said the expansion would create 3,000 construction jobs at its peak and an additional 148 permanent jobs.

That was welcome news in a recovering parish that already enjoys the third-lowest unemployment rate in Louisiana. "Cheniere has proven to be an enormously favorable industrial stakeholder in the parish," said Broussard, who credited Cheniere's original \$1.6 billion facility, completed in 2008, as having "created the current job level."

State officials used three incentive programs to lure Cheniere back to Cameron Parish. While the full tax impact on the parish will not be immediate because of the incentives,

Broussard said the area's tax receipts will eventually benefit. One incentive Cheniere received is a 10-year industrial tax exemption. Broussard said that once the exemption expires, the parish will enjoy "significant" revenues.

He said some benefits will come sooner, including improvements in infrastructure and housing availability. Those enhancements will be a part of the \$42 billion overall economic impact the facility is expected to create over its lifetime, Broussard said.

George Swift, president and CEO of the SWLA Economic Development Alliance, said the project would also enhance the state's reputation as a player in the energy industry — which may allow for more opportunities in the future. "It will solidify Louisiana's strength in the energy sector," Swift said. "As the offshore oil industry continues to grow and rebound, the possibility of a deep-water port in Cameron Parish could be a reality."

Legal News



The Borrowed Servant: What it Means

In December 2007, Bruce Langfitt was employed full time by Able Body Temporary Services, Inc. ("Able Body"), a labor broker in the business of furnishing its day laborer employees to clients on a temporary basis. On December 13, Able Body supplied Langfitt and other employees to Federal Marine Terminals, Inc. (FMT), a company that operates longshoring facilities on the Florida coast, to assist in FMT's loading of a cargo ship. Soon after Langfitt began the longshoring services on behalf of FMT, however, a heavy piece of cargo being loaded into the ship's hold fell on him, and he was paralyzed from the waist down.

As compensation for his injury, Langfitt began receiving the benefits guaranteed to him by the Longshore and Harbor Workers' Compensation Act (LHWCA), the federal no-fault workers' compensation program that compensates employees disabled from injuries occurring upon

the navigable waters of the United States or in adjoining areas used in loading and unloading certain vessels. The law requires that every “employer” of covered employees – “person[s] engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations,” *id.* § 902(3) – must secure and pay the Act’s compensation benefits. Langfitt was being paid compensation benefits by Able Body’s LHWCA insurer since Able Body had contractually agreed to secure and pay LHWCA compensation for all day laborers it supplied to FMT for longshoring work.

Nevertheless, Langfitt, seeking to supplement his workers’ compensation benefits, brought this negligence action against FMT, claiming that the negligence of FMT’s employees caused his injury. In response, FMT alleged, as an affirmative defense, that it was Langfitt’s employer, under § 904(a), at the time of Langfitt’s injury and therefore immune from suit under the LHWCA, *id.* § 905(a) (“The liability of an employer prescribed in [§ 904(a)] shall be exclusive and in place of all other liability of such employer to the employee.”) Accordingly, at the close of discovery, FMT moved the district court for summary judgment. The district court granted FMT’s motion and found that FMT qualified as Langfitt’s employer, and was thus insulated from tort liability. The district court dismissed Langfitt’s lawsuit and he appealed to the U.S. Eleventh Circuit Court of Appeals.

In reaching its decision, the district court found that for all practical purposes Langfitt was FMT’s “borrowed servant” and that FMT was Langfitt’s employer at the time of his injury. As such, FMT on the one hand could have been held responsible for any negligent acts on the part of Langfitt, but on the other, also received immunity from lawsuit for personal injury by Langfitt by virtue of the LHWCA.

The Eleventh Circuit issued its decision on July 29, 2011 and provided us with an excellent analysis of the borrowed servant doctrine. The court first set the stage by defining the players. A “principal” is one who has authorized another to act on his account and subject to his control. An “employer” is a principal who employs an agent to perform service in the principal’s affairs and who controls or has the right to control the physical conduct of the other in the performance

of the service. All employers are principals, yet all principals are not necessarily employers.

An “employee” or “servant” is an agent employed by an employer to perform service in the employer’s affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the employer. Thus, an employee is a species of agent. All employees are agents, yet all agents are not necessarily employees.

The court looked at the common law principals for guidance. One of the foremost status distinctions at common law is that between an employee and an independent contractor. The essence of the common law’s test for whether an agent is an employee or an independent contractor is the control of details; that is, whether the principal has the right to control the manner and means by which the agent accomplishes the work. The employer/employee relationship exists only where the employer has the right to control and direct the work, not only as to the result to be accomplished by the work, but also as to the manner and means by which that result is accomplished.

The court held that it is the right, and not the actual exercise of control that is the determining element of employment. Consequently, assessing whether a principal had the right of control is highly fact dependent and a variety of considerations may be probative. These considerations include: (1) direct evidence of the principal’s right to or actual exercise of control; (2) the method of payment for the agent’s services, whether by time or by the job; (3) whether or not the equipment necessary to perform the work is furnished by the principal; and (4) whether the principal had the right to fire the agent.

Distinguishing between an employee and an independent contractor is particularly important in tort law. Ordinarily, a principal is not liable for the incidental physical acts of negligence in the performance of duties committed by an agent who is not an employee, but an employer is held liable to third parties for an employee’s negligence under the doctrine of *respondet superior*. For it is the employer’s ability to control the employee that allows the law to hold an otherwise non-faulty employer vicariously

liable for the negligent acts of its employee acting within the scope of employment

It is in this tort law context that the borrowed servant doctrine arose. Courts recognized that “[i]t sometimes happens that one wishes a certain work to be done for his benefit, and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may [, however,] enter into an agreement with another [to] furnish [] him with men to do the work.” But, in such cases, the question became, which principal should be held vicariously liable when one of the furnished workers negligently injured a third person while acting in the scope of the worker’s duties?

The borrowed servant doctrine was created to help resolve this issue. Therefore, the issue simply is whether the borrowing principal was the employer at the time of the negligent conduct. The important question is not whether or not [the employee] remains the [employee] of the general employer as to matters generally, but whether or not, as to the act in question, he is acting in the business of and under the direction of one or the other.”). In other words, the question is: Was the employee doing the work of and under the control of the borrowing principal?

To answer this question the court noted that probative considerations of the borrowing principal’s right to control might therefore include: (1) direct evidence that the general employer expressly transferred control to the borrowing principal or that the borrowing principal exercised control; (2) evidence that the borrowing principal was responsible for paying the employee; (3) evidence that the borrowing principal furnished equipment necessary for performance of the work; and (4) evidence that the borrowing principal had the right to terminate its relationship with the employee.

In the context of the LHWCA the court borrowed these common law considerations and stated when a general employer transfers its employee to another person or company, the latter is the employee’s borrowing employer for purposes of the LHWCA, and thus is liable for the Act’s compensation and has the benefit of the Act’s tort immunity, if each of the following three criteria is satisfied: (1) the employee is shown to have given deliberate and conformed consent to the new employment relationship, (2)

the employee was at the time of injury doing the work of the borrowing principal, and (3) the borrowing principal had the right to control the manners and details of the employee’s work.

The court found that FMT was Langfitt’s borrowing employer. In doing so it focused on the first criteria and held that courts almost invariably have determined that employees of a labor broker, by accepting their employment with the labor broker, consciously consented to being sent to work in varying employment situations, under the direction and control of their employer’s various clients by taking such employment the employee of a labor broker consented to all temporary employment situations in which his employer placed him. The Eleventh Circuit did not break new ground with its decision, but did provide a concise and well written decision which clearly explains the doctrine, and the criteria one must meet to be considered the borrowed servant of another. *See, Langfitt v. Federal Marine Terminals*, 2011 WL 3207771.



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World Trade Center

Statement of Bobby C. Brannon, President, World Trade Center of New Orleans Regarding the July 20th passing of Eugene Schreiber

Gene Schreiber was a giant in the field of international trade and economic development. His energy and optimism motivated everyone he met, and his tireless work for New Orleans and Louisiana made a lasting and positive imprint on the economy of our state and region.

Gene’s leadership as Managing Director of the World Trade Center, over a career that spanned more than three decades, set the standard by which all of us who work in the field of international trade and commerce should be judged. His initiative and sheer will

were often the difference between real achievement and simply settling for the status quo. Even against the insurmountable odds and overwhelming despair following Hurricane Katrina, Gene was unflappable, a combination of cheerleader and head coach, always charting a clear path to victory and a return to prosperity and “commerce as usual.”

In Gene’s career at the helm of the World Trade Center, and in his work as a Foreign Service officer around the globe, he accomplished things and lived a life most of us can only aspire to. He played host to the world’s most important people including Ronald Reagan, Mikhail Gorbachev and Henry Kissinger. Yet, Gene always made it his highest priority to encourage and assist that budding entrepreneur, that young college graduate looking for advice, or that man or woman with an untested or untried idea that “might just catch on” in the international market.

Gene’s ability to relate to, and connect with people of all walks of life in every stage of his life was a gift he gladly and humbly gave.

A true citizen of the world, Gene shared his brilliance, boundless energy and cheerful optimism with the world and we are all richer for it.

A memorial service was held on Monday, July 25, 12:00 noon at Temple Sinai, 6227 St. Charles Avenue in New Orleans, with a visitation preceding the service at 11:00 a.m. The family has asked that in lieu of flowers, donations be made to the Ochsner Blood Bank (www.ochsner.org) or the Leukemia and Lymphoma Society (www.lls.org).

Hydrokinetic Energy

River Turbine Working
Ted Griggs
Advocate business writer

Boston-based Free Flow Power Corp. said Wednesday it is successfully operating its first full-scale hydrokinetic turbine generator in the Mississippi River attached to Dow Chemical Co.’s dock in Plaquemine.

Hydrokinetic turbines, which resemble the turbines in jet engines, use water currents to generate electricity. The generators can be mounted on riverbeds, bridge piers or beneath barges.

Companies like Free Flow have proposed plans for dozens of hydrokinetic turbines to generate electricity.

Two years ago, Free Flow said it was looking at 55 sites along the Mississippi River, and has bumped that up to 67, Free Flow spokesman Jon Guidroz said.

Free Flow’s turbine at the Dow dock has been in operation since June 20 and marks the first time the company’s equipment has generated electricity in the Mississippi River, Guidroz said.

He said the turbine is rated for 40 kilowatts, and the device is operating at or above its predicted power curve.

“The equipment is handling the Mississippi River conditions without power interruptions or degradation,” Ed Lovelace, Free Flow’s chief technology officer, said in a news release.

The Plaquemine installation is the culmination of three years of research and development by Free Flow, which used a combination of private funds and a \$1.4 million federal Department of Energy grant.

For now, Free Flow will continue operating the turbine and gathering data, probably until the Mississippi River drops to its low-water point, Guidroz said.

The company is considering another pilot project that would deploy a turbine in the riverbed, he said.

Free Flow plans to drive pilings into the river bottom and mount turbines to the pilings, the same as it would in a commercial installation, Guidroz said. The company would then need to complete the study process for that project, take all the information from that project and file a complete license application with the Federal Energy Regulatory Commission.

Free Flow hopes then to secure the first commercial hydrokinetic license and begin installing turbines in the Mississippi for commercial power production, Guidroz said.

Free Flow has begun discussions with the U.S. Army Corps of Engineers about a preliminary location for the riverbed installation, Guidroz said. But that site is “very funding-dependent.”

Free Flow will need to secure additional grant funding for that installation. It hopes to get the Department of Energy’s Advanced Water Power Program grant for a larger project size, Guidroz said.

Applicants that have won in the past have had partnerships with states, “where the states put a little skin in the game,” he said.

Free Flow would like to put together a project where Louisiana joins with DOE to provide grant funding and Free Flow Power brings in private dollars to multiply their money, Guidroz said.

Free Flow has 25 preliminary permits and 42 more are in process, Guidroz said.

Two years ago, Free Flow said it was looking at 55 sites along the Mississippi — 29 of the sites were in Louisiana. At the time, the company said the combined output capacity from its plants would amount to 1,600 megawatts of electricity, enough to power roughly 1.6 million homes.

“We’ve increased the number of sites we’re investigating on the Mississippi River. We’ve surrendered a few of the sites we consider no longer viable at this time,” Guidroz said.

One other firm, Canada-based Northland Power, has applied for three hydrokinetic permits, Guidroz said.

“But it’s a good indicator that the Mississippi River is definitely being noticed as a viable economic hydrokinetic resource,” Guidroz said.

Welcome New Associate Member

PAL welcomes Mabile and Associates as a new associate member. They are located in St. Francisville, LA and are engaged in consulting for compliance and grant administration. They will be represented by Jamie Mabile.

MARK YOUR CALENDARS

August 4, 2011 PAL Monthly Meeting, 10 AM, Best Western Richmond Suites, Baton Rouge, LA

September 1, 2011 PAL Monthly Meeting, 10 AM, Best Western Richmond Suites, Baton Rouge, LA

September 29, 2011 PAL Monthly Meeting, 10Am, Port Fourchon Operations Center

