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January 31, 2018

Senator John A. Alario, Jr.
President of the Senate
P.O. Box 94183
Baton Rouge, Louisiana 70804

RE: SENATE RESOLUTION NO. 171 OF THE 2014 REGULAR SESSION

Dear Mr. President:

The Louisiana State Law Institute respectfully submits herewith its annual report relative to developing a comprehensive Water Code for Louisiana.

Sincerely,

William E. Crawford
Director

WEC/puc

Enclosure

cc: Senator Dan Claitor

email cc: David R. Poynter Legislative Research Library
drplibrary@legis.la.us
Secretary of State, Mr. Tom Schedler
admin@sos.louisiana.gov

LOUISIANA STATE LAW INSTITUTE
WATER CODE COMMITTEE

2018 ANNUAL REPORT TO THE LEGISLATURE
IN RESPONSE TO SR NO. 171 OF THE 2014 REGULAR SESSION

Relative to developing a comprehensive Water Code for Louisiana

Prepared for the
Louisiana Legislature on
January 31, 2018

Baton Rouge, Louisiana

LOUISIANA STATE LAW INSTITUTE
WATER CODE COMMITTEE

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Mark S. Davis, Reporter
Nick Kunkel, Staff Attorney

Regular Session, 2014 **ENROLLED**

SENATE RESOLUTION NO. 171

BY SENATOR CLAITOR

A RESOLUTION

To urge and request the Louisiana State Law Institute to create a Water Code Committee.

WHEREAS, Senate Concurrent Resolution No. 53 of the 2012 Regular Session of the Legislature requested the Louisiana State Law Institute to conduct a study on surface water and groundwater law in Louisiana; and

WHEREAS, on April 4, 2014, the Louisiana State Law Institute submitted its report to the Legislature in response to Senate Concurrent Resolution No. 53; and

WHEREAS, such report discusses at length the issues, problems, and questions arising from the present state of Louisiana law concerning surface water and groundwater, and concludes by stating:

> "The time has come for water law reform in Louisiana. It is recommended that a Louisiana State Law Institute Water Code Committee be created and invested with the responsibility of continuing to study Louisiana's current treatment of running surface water and groundwater, with a view towards the development of a comprehensive Water Code that integrates all of Louisiana's water resources.
>
> The Louisiana State Law Institute recommends that the proposed Water Code Committee be an interdisciplinary committee, composed of academicians, practitioners, scientists with expertise in hydrology, and government representatives with expertise in Louisiana's water resources and the state's existing administrative system of water management.
>
> Current Louisiana law provides insufficient guidance on the rules that govern the nature and scope of riparian and groundwater rights. Louisiana needs a Water Code that integrates all of its water resources, a Water Code that will enable Louisiana to successfully manage and conserve its water resources as it prepares to face the inevitable challenges that lie ahead. Therefore, it is recommended that the legislature implement the foregoing recommendations and that it entrust this important project to the Louisiana State Law Institute."

THEREFORE, BE IT RESOLVED that, in accordance with the above recommendation, the Senate of the Legislature of Louisiana does hereby urge and request the Louisiana State Law Institute to create a Water Code Committee in order to develop proposed legislation establishing a comprehensive Water Code that integrates all of Louisiana's water resources.

BE IT FURTHER RESOLVED that such Water Code Committee shall be an interdisciplinary committee and shall include academicians, practitioners, landowners, scientists with expertise in hydrology, and government representatives with expertise in

Louisiana's water resources and the state's existing administrative system of water management.

BE IT FURTHER RESOLVED that such Water Code Committee shall provide annual reports to the Legislature not later than February first of each year indicating its status in developing a comprehensive Water Code for Louisiana, and including as appropriate, specific recommendations in the form of proposed legislation to achieve establishment of a comprehensive Water Code that integrates all of Louisiana's water resources.

BE IT FURTHER RESOLVED that a copy of this Resolution be transmitted to the director of the Louisiana State Law Institute.

PRESIDENT OF THE SENATE

January 31, 2018

To: Senator John A. Alario, Jr.
President of the Senate
P.O. Box 94183
Baton Rouge, Louisiana 70804

2018 ANNUAL REPORT TO THE LEGISLATURE
IN RESPONSE TO SR NO. 171 OF THE 2014 REGULAR SESSION

Senate Resolution No. 171 of the 2014 Regular Session urges and requests the Louisiana State Law Institute "to create a Water Code Committee in order to develop proposed legislation establishing a comprehensive Water Code that integrates all of Louisiana's water resources." The Resolution also states that "such Water Code Committee shall be an interdisciplinary committee and shall include academicians, practitioners, landowners, scientists with expertise in hydrology, and government representatives with expertise in Louisiana's water resources and the state's existing administrative system of water management."

In fulfillment of this request, the Law Institute created a Water Code Committee and placed it under the supervision of Reporter Mark S. Davis, Director of the Tulane Institute on Water Resources Law and Policy. Members of the Committee also include professors and other academicians who both teach and study water law, practitioners in the area of water law, government representatives with expertise in Louisiana's water resources and existing system of water management, and others.

Senate Resolution No. 171 also requires the Committee to "provide annual reports to the Legislature not later than February first of each year indicating its status in developing a comprehensive Water Code for Louisiana, and including as appropriate, specific recommendations in the form of proposed legislation to achieve establishment of a comprehensive Water Code that integrates all of Louisiana's water resources." Extensive background research concerning the Committee's charge has been conducted and compiled, and the Committee has met to develop the project and engage in the research done on several key topics. The following summary, prepared by Reporter Mark S. Davis, provided the focus of the Committee's initial meeting:

Background and Vision

Rising seas, collapsing coasts, and ever-evolving demands on water resources for energy development, coastal restoration, healthy coastal ecosystems, increasing human consumption, and a myriad of other uses are forcing Louisiana to reassess its relationship with water and to revisit the legal and policy architecture of water management. Through the efforts of entities such as the Louisiana Water Resources Commission (LWRC), the Coastal Protection and Restoration Authority, the New Orleans Sewerage and Water Board, and the Louisiana State Law Institute (LSLI), great strides have been made in understanding and explaining the vital role that water plays in the ecologic, cultural, and economic vitality of the state and the nation. Bold plans and programs have been developed to sustainably promote that vitality, but those plans and programs all depend on the availability and management of water resources whose legal status is nebulous at best. The

need to clarify the legal status of water and its uses has been recognized in recent reports by the LWRC (2012 and 2013) and the Louisiana State Law Institute (LSLI) (2014). Most recently, the Louisiana Legislature called for the LSLI to develop a "water code" for Louisiana (SR 171 (2014)). This Water Code Committee was formed in response to that call.

This Committee is charged with developing a model water code for the state of Louisiana that is both grounded in traditional water rights and responsibilities (public and private) and responsive to the evolving dynamics of water supplies and water uses. We will approach water comprehensively, recognizing that groundwater, surface water, and diffuse water are related. Doing this will require not only an appreciation of traditional water law and emerging trends but also a respect for the hydrologic and ecologic aspects of our water resources. For these reasons there must be a multifaceted and multidisciplinary aspect to this Committee's work. In short, the Committee has been asked to develop a water code that is purpose driven, scientifically informed, and legally comprehensive.

Fortunately, the Committee has access to resources and technical expertise in the public and private sectors that it can draw on over the course of the project to greatly enhance its capacity to carry out its work.

Guiding Principles

Experience teaches that the complex task of developing a water code is much more manageable if it is guided by some core understandings and principles, particularly those which are already features of state or federal law. With that in mind the Committee's work will be informed by these guiding principles:

1. Management of Louisiana's waters is at a point of decision. Only a concerted effort will stem the degradation of Louisiana's coast and position the state as a whole to benefit from its most abundant resource.
2. Appreciation of the increasing dynamism of the hydrologic system must be integral to legal and planning infrastructure.
3. Natural processes must be hewed to as closely as possible, and natural cycles and processes can be maximized to aid operations and maintenance of infrastructure.
4. Limited availability of water must be acknowledged as a potential constraint on system management and rehabilitation.
5. The code will seek to achieve ecosystem sustainability and diversity while providing interchange and linkages within the hydrologic system.
6. Future rising sea levels and climate changes must be acknowledged and incorporated.
7. Displacement and dislocation of resources, infrastructure, and possibly communities may be avoidable under some scenarios. In the course of restoring a sustainable balance to Louisiana, sensitivity must be shown to those who may be adversely affected by the implementation of the code. Careful consideration must be paid to existing water related rights, uses, and duties.
8. The rehabilitation of the Louisiana hydrologic system will be an ongoing and evolving process.

9. Coordination with other states and federal interests is essential to ensure that the code will be most conductive to maximizing effectiveness.

Approaching the Task

As mentioned earlier, this project is multidisciplinary and multi-institutional and needs to reflect a range of local, national and relevant international experience and expertise.

The point of departure for the Committee was the 2014 report of the LSLI Water Law Committee and the 2012 and 2013 reports of the Louisiana Water Resources Commission (LWRC). The Committee continues to coordinate closely with LWRC's ongoing work to draw from its efforts (such as commissioning a framework for developing a water budget for the state) and to gain perspective from the Commission's diverse membership. The Committee is also endeavoring to coordinate closely with the Coastal Protection and Restoration Authority since the 2017 Master Plan is fundamentally a water management plan with the force of law. To facilitate that coordination, Committee Reporter Mark Davis was appointed to the Coastal Protection and Restoration Authority Master Plan Steering Committee on behalf of the LSLI. The reporter and his supporting team from the Tulane Institute on Water Resources Law and Policy have met several times with senior staff from the Governor's Office of Coastal Protection and Restoration to discuss water law issues and the Committee's progress. We have also kept legislative legal counselors abreast of our work including inviting them to join in our meetings with water managers in Arkansas and Mississippi (as discussed in more detail below).

Over the course of the year the Committee responded to stakeholder interest in its work by accepting invitations to address meetings of the Louisiana Farm Bureau, the Louisiana Association of Conservation Districts, the Louisiana Water Resources Commission, and the Port Authority of Lake Charles and the Environment & Health Council of Louisiana.

The Committee's capacity to do its work is enhanced by the availability of resources from The Tulane Institute on Water Resources Law & Policy (Tulane), LSU Sea Grant Program (Sea Grant), The Water Institute of the Gulf (TWIG), The Nature Conservancy's Fresh Water Initiative and others.

This project continues to be a multiyear effort with a timeline that reflects the dynamics of both water itself and the ebb and flow of public affairs. Over the course of the Committee's second year we took on three principal tasks:

1. Concluded survey-level background work on the state water law and code formation procedures. This included a robust review of the water code experience elsewhere that might inform Louisiana's efforts and options. This effort included
    i. The creation of a water law atlas that surveyed aspects and definitions of water law in all fifty states. Aspects such as:
        1. Public trust
        2. Prioritization
        3. Agency mandate
        4. Takings law

5. Administrative structure
6. Defined resources
7. Dispute resolution

ii. Demanding work continued in the form of comparative analysis of the laws and water management practices of countries such as
    1. Chile
    2. Ecuador
    3. Panama
    4. Bolivia

2. Took on in depth research on the water law and water resources administration of a handful of states. To that end, research has been undertaken to understand the laws and experiences of Mississippi and Arkansas. Researchers travelled to Arkansas to meet with members of the Water Resources Division of the Arkansas Natural Resources Commission on December 18, 2017. Additionally, researchers travelled to Mississippi to meet with members of the Office of Land and Water Resources of the Mississippi Department of Environmental Quality. While that meeting was scheduled in 2017, it did not take place until January 9, 2018.

3. Continued to work with a multidisciplinary team that ensures that the project has hydrologic and ecologic integrity. This team, which was assembled by the Tulane Institute on Water Resources Law and Policy includes TWIG, The Nature Conservancy, LSU, Tulane University and others to combine their various efforts to better understand how much water Louisiana has, where it is, how it interacts, and what it is needed for. This is vital for the Committee since a comprehensive water code demands some understanding of those things. This team's ultimate goal is to combine team members' existing single-resource specific models to create a comprehensive hydrologic model that could serve the entire state of Louisiana. This team has drafted a proposal for a pilot study to create this comprehensive model within a smaller Louisiana basin. Team members have been seeking funding for this pilot study.

This project has relied, and will continue to rely, heavily on existing sources of information. We will be depending on existing laws and public policy pronouncements to guide our work. We will also be depending on externally developed water use and capacity studies, such as those done by TWIG, the U.S. Geological Survey, the Louisiana Coastal Protection and Restoration Authority, the Army Corps of Engineers, EPA, and the International Panel on Climate Change to guide the scope and structure of the project. The Committee will also welcome input from the public and endeavor to be open and transparent.

The Committee will continue meeting over the course of the next year to continue its process of researching and developing a Louisiana Water Code. As this reconnaissance work continues, we will engage in more in depth research of specific states – Minnesota and Virginia – and schedule meetings with their respective water management agencies. Additionally, by the end of the calendar year, we should begin to draft our water code recommendations. As directed, the Law Institute will continue to provide annual reports to the Legislature indicating the status of this project. A final report will be submitted to the Legislature once the Committee has developed a

comprehensive Water Code for Louisiana and has received approval of the project from the Council of the Law Institute.

Respectfully submitted,

Mark S. Davis, Reporter
Water Code Committee
Louisiana State Law Institute