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January 31, 2020

Senator Patrick Page Cortez
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 its annual report to the legislature relative to developing a comprehensive Water Code.

Sincerely,

A handwritten signature in black ink, appearing to read "Guy Holdridge".

Guy Holdridge
Director

email cc: David R. Poynter Legislative Research Library
drplibary@legis.la.gov
Secretary of State, Mr. R. Kyle Ardoin
admin@sos.louisiana.gov

**LOUISIANA STATE LAW INSTITUTE
WATER CODE COMMITTEE**

**2020 ANNUAL REPORT TO THE LEGISLATURE
IN RESPONSE TO SR NO. 171 OF THE 2014 REGULAR SESSION**

Relative to the development of a comprehensive Water Code for Louisiana

Prepared for the
Louisiana Legislature on
January 31, 2020

Baton Rouge, Louisiana

**LOUISIANA STATE LAW INSTITUTE
WATER CODE COMMITTEE**

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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

SR NO. 171

ENROLLED

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, 2020

To: Senator Page Cortez
President of the Senate
P.O. Box 94183
Baton Rouge, Louisiana 70804

**2020 ANNUAL REPORT TO THE LOUISIANA LEGISLATURE
IN RESPONSE TO SR NO. 171 OF THE 2014 REGULAR SESSION**

Senate Resolution No. 171 of the 2014 Regular Session, attached, 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 “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, academic, 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 conducive 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. In late 2018 he was also appointed to the Governor's Advisory Commission on Coastal Protection, Restoration and Conservation. The Reporter is also a member of the LWRC, which affords an vehicle of coordinating the work of the Committee and the LWRC,

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 Committees progress. We have also endeavored to keep legislative legal counselors abreast of our work including inviting them (and all Committee members, of course) to join in our meetings with water managers in Arkansas (2017) and Mississippi, Minnesota, and Virginia (as discussed in more detail below) as well as with Louisiana's water management agencies. The work described builds on the work described in previous reports. It is Reporter's opinion that the research and contextual work of the Committee is near completion and that substantive discussions and recommendations will dominate its future work as it works toward completing its assignment.

Action over the past year.

Research. The Committee's work over the past year focused on the following areas:

1. Researching how the doctrine of correlative rights, as currently embraced under the Louisiana Mineral Code, compares with the doctrine of correlative rights as it is understood in the context of groundwater law. Under Louisiana's Mineral Code, private rights to fugacious minerals correlate with the ownership of surface rights. Groundwater falls within the jurisdiction of the Mineral Code but is fundamentally different in origins and uses than oil and gas which raises the issue of what correlative rights means in the context of groundwater. Other states have come to terms with that issue which has led to the development of a distinct doctrine of correlative rights as it applies to water. Under that doctrine, which has been described as "riparian law turned on its side" in that rights of access correlate to the ownership of the overlying land and a preference for use on that tract. That approach seems to fit well with Louisiana surface water law and Louisiana

law has not yet spoken to this issue. The Committee will be considering that question and possible recommendations in the coming year.

2. Investigate how a comprehensive approach to managing groundwater and surface water that is grounded in correlative rights and regulated riparian rights (building from the state's experience with cooperative endeavor agreements as a management approach) might be administered given the state's current administrative system. The current state of water management in Louisiana is both unclear and in flux as demonstrated by a report of the Louisiana Water Resources Commission on the regulation and management of out of state water sales (attached) and by the confused scope of the Capital Area Groundwater Commissions jurisdiction as reflected in a 2019 report by the Louisiana Legislative Auditor (attached). The Committee's reporter participated in the former report in order to both leverage the Committee's efforts with those of the Water Resources Commission and to reduce the chances of competition or conflict between the Committee and the Commission. During 2019, interstate water disputes were a prominent feature in the Supreme Court of the United States which were tracked closely by the Committee. In particular the suits between Mississippi and Tennessee and between Florida and Georgia offered insights into the issues Louisiana will be contending with and the degree to which states and state laws are the masters of their water resources and futures. Those cases are still pending but it is clear that without a coherent and purposeful approach to legally managing its waters Louisiana will find itself at the mercy of others states that we share waters with.

3. Investigate how Louisiana can balance its need to manage its surface and ground water resources with the evolving demands on water resources, especially with regard to out of basin and out of state pressures. This a topic that will increasingly influence the shape and direction of Louisiana water law so it is an important issue for the Committee. Research on this topic, as alluded to above, was pursued in conjunction with the LWRC during the past year due to resurgent interest in the possibility of water sales by the Sabine River Authority to interests in Texas. Those sales were tabled but a report was prepared by the Water Sales Working Group of the LWRC that will be used by the Committee to inform its work. The Committee's reporter was a member of the Water Sales Working Group and contributed to its work and report.

4. Updating our comparative review of other jurisdictions water law and administration programs. Over the course of the year, the Committee, supported by the Tulane Institute on Water Resources Law and Policy, updated its comparative review of other states' experience with "comprehensive water law and management" which will soon be synthesized for consideration and discussion by the Committee and others as appropriate. The Reporter and the Committee continued to explore key aspects of Louisiana water law that will bear on Committee's ultimate recommendations. These include research into the laws and policies governing or restricting sales of water by the state and its subdivisions and the legal status of groundwater and the implications the correlative rights doctrine on Louisiana ground water (the doctrine has distinct meanings under general principles of water law that do not pertain to other fugacious resources). That work is ongoing.

Coordination. In addition to carrying on the work called for in SR 171, the Committee and the Reporter have had to engage and coordinate with other water related initiatives on an ongoing in the State. This has been necessary to both avoid conflicts and to create/optimize

synergies. The Committee is currently working to arrange briefings with the Coastal Protection and Restoration Authority, Department of Natural Resources, the Office of Conservation, the Governor's Office of Community Development, the Attorney General and key legislative staffers to more fully discuss the Committee's work and to coordinate our collective work on water governance. With the changes in the composition of the Legislature there is much less institutional memory of water issues and the Committee's work this outreach will be a priority in 2020. This work will including interfacing with the following agencies and organizations.

- Coastal Protection, Restoration and Conservation Authority. Since the CPRA's Coastal Master Plan is fundamentally a water management plan that has some legal force and effect it is vital that the Committee and the CPRA be in contact and on the same page.
- Department of Natural Resources and Office of Conservation. To the extent that Louisiana vests any existing executive branch agencies with surface and groundwater management responsibilities, it is DNR (surface water) and the Office of Conservation (groundwater). The Committee has worked carefully to coordinate its work the Secretary of DNR and the Commissioner of Conservation.
- Louisiana Water Resources Commission. The LWRC is a statutorily chartered body charged with assisting the state, mainly through DNR and the Office of Conservation, in planning for its water resources. During the past year, the LWRC responded to a legislative request to investigate the extent of the state's authority (specifically the Sabine River Authority) to pursue commercial water sales to out of state customers. Since this raises issues that are fundamental the state's right and duties vis a vis water management. The Committee's Reporter was reappointed to the LWRC last year and was named to Working Group on Water Sales. That report was completed in November 2018 and among its findings was the need to avoid drawing conclusions of law or policy until the Committee's work is complete.
- State Office of Community Development -Louisiana Watershed Initiative. The Office of Community Develop is within the Department of Administration. In light of the flooding of the Baton Rouge Area in 2016, the Governor tapped the OCD to lead the newly formed Louisiana Watershed Initiative and charged it with developing regional approaches to flooding. The LWI was created without reference to the Committee's work. Since this deals with both water governance and surface waters, it is important for them to be aware of the Committee's work and vice versa. The Reporter and his Tulane team have reached out to ODC to urge close collaboration, overtures that have been well received. Indeed, LWI team members were invited to participate and did, in fact, attend the meeting arranged by the Committee with water managers in Minnesota and Virginia. That collaboration is ongoing and will help shape whatever water management recommendations come out of the LWI or the Committee. The Tulane team has presented at LWI events and conferred often with the LWI team – most especially in regards to the scientific base that the LWI will be adding to and on which a comprehensive water code can effectively build.

- Attorney General’s Office. The evolution of Louisiana water law does not wait on the Committee’s work so it has been important to maintain a line of communication with the Louisiana Attorney General’s office. That includes but also goes beyond the participation of the AG’s office on the Committee. This has helped the Committee to stay abreast of emerging develops and also to ensure that the AG is able to take advantage of the work being done by the Committee.
- City of New Orleans Mayor’s Office—Mayor’s Urban Water Planning and Management. One of the most dynamic areas of Louisiana water law is municipal water management. The woeful performance of the New Orleans Sewerage and Water in managing stormwater and drinking water is spawning a community conversation about water management and governance that the Committee is following and that could have some bearing on its future recommendations.

Outreach. As more people become interested in the State’s water resources and the Committee’s work, the Committee has received occasional requests to provide information to professional and civic organizations. The Reporter and the collaborative team at the Tulane Institute on Water Resources Law and Policy have responded to these requests and made the following informational presentations:

- Louisiana Association of Conservation Districts, January 9 2020
- Louisiana Watershed 2019 Initiative Interstate Summit, June 12, 2019

Conclusion. 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 directed, the Committee will continue to provide annual reports to the Law Institute for its review and transmission 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.

Acknowledgements. The Committee and the Reporter would like to acknowledge and thank the Baton Rouge Area Foundation, the Greater New Orleans Foundation, the McKnight Foundation, the Louisiana Sea Grant Program, Tulane Law School and the Tulane Institute on Water Resources Law and Policy, and the staff of the Louisiana State Law Institute for their assistance. It has made a huge difference.

Respectfully submitted,

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