

LOUISIANA STATE LAW INSTITUTE

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Senator Cameron Henry 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,

Guy Holdridge

Director

GH/pc

Enclosure

email cc:

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LOUISIANA STATE LAW INSTITUTE WATER CODE COMMITTEE

2025 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, 2025

Baton Rouge, Louisiana

LOUISIANA STATE LAW INSTITUTE WATER CODE COMMITTEE

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Mark S. Davis, Reporter John David Ziober, Chair Nick Kunkel, Staff Attorney 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

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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

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January 31, 2025

To: Senator Cameron Henry

President of the Senate

P.O. Box 94183

Baton Rouge, Louisiana 70804

2025 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 further dictates that the 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, at the time the Director of the Tulane Institute on Water Resources Law and Policy and currently an affiliated faculty member at the Institute. Members of the Committee 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 asks that the Committee "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." To this end, the Committee submits the present report, noting that it has conducted extensive background research and outreach—identifying states with water "situations" similar to Louisiana, studying the approaches to water management taken by these states, and gauging the effectivity, practicality, and successes and failures of these approaches, with an eye toward achieving desirable outcomes through efficient administration and use of resources. Guided by the Committee's findings in these regards, the Committee leadership has crafted an initial Water Code draft that seeks to apply this working knowledge to model statutory outlines to create a water-management framework that is simultaneously robust and centralized yet susceptible to flexible administration. The specific efforts undertaken in service of this goal are described below.

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 myriad 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 (CPRA), 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 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 comprehensive 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. To the extent practicable, we will approach water comprehensively, recognizing that groundwater, surface water, and diffuse water are related. Doing this requires 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, the Committee's work must be multifaceted and multidisciplinary. In short, the Committee seeks 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 has drawn and will continue to draw on over the course of the project to most effectively carry out its work.

Guiding Principles

Experience teaches that the complex task of developing a Water Code is far more manageable if guided by a number of core understandings and principles, particularly those which are already features of state or federal law. With that in mind, the Committee's work has been and will continue to 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 is integral to effective legal and planning infrastructure.
- 3. Natural processes must be hewed to as closely as possible, and natural cycles and processes should be maximized to aid operations and maintenance of infrastructure.
- 4. Acknowledgment of the limited availability of water as a potential constraint on system management and rehabilitation is imperative.

- 5. The Code will seek to achieve ecological sustainability and diversity while providing interchange and linkages within the hydrologic system.
- 6. Rising sea levels and climate changes must be acknowledged and accounted for.
- 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 also 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.

Overview of the Committee's Task and Progress

The Reporter and the Committee have been working with a constant eye on emerging water trends both within and outside the state. In setting the Committee on its task, the Legislature wisely foresaw the rapidly approaching time when Louisiana's water resources will be envied and coveted. In recent years, multiple proposals have surfaced that seek to divert water from Louisiana via the Mississippi, Atchafalaya, and Sabine Rivers to supplement or substitute for the dwindling water supplies in the Southwest. The states seeking to divert water clearly see the value of the waters with which we are blessed, and the Committee urges the Legislature to keep this value in mind. Water has been and remains Louisiana's greatest natural resource, though it has not always been treated with respect. As America—indeed the world—enters a time in which access to water will, for all purposes, determine which persons and places prosper, Louisiana will be faced with water-management opportunities and challenges unlike any it has faced before. Accordingly, the Committee intends for its work to position the state as advantageously as possible with respect to the management of its waters, in hopes that its most prosperous days may yet be ahead.

To this end, the Committee acknowledges that this project is multidisciplinary and multi-institutional and must reflect a range of local, national, and relevant international experience and expertise. Since the Committee's initial point of departure—the 2014 Report of the LSLI Water Law Committee and the 2012 and 2013 reports of the LWRC—the Committee has coordinated 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 also endeavors to coordinate closely with the CPRA, in recognition of the fact that the 2017 Master Plan is fundamentally a water management plan with the force of law. To facilitate this coordination, Committee Reporter Mark Davis was appointed to the CPRA Master Plan Steering Committee on behalf of the LSLI. The Reporter has also been member of the LWRC—affording a vehicle of coordination between Committee and the LWRC—and has served on the Governor's Advisory Commission on Coastal Protection, Restoration and Conservation.

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 Activities to discuss water law issues and the Committee's progress. The Committee has also included the General Counsel of the Capital Area Ground Water Conservation Commission and the Legislative Auditor's Office in its work. On the legislative side, the Committee has consistently endeavored to keep legislative legal counselors abreast of our work, including by extending invitations to join in both Committee meetings and external meetings with Louisiana's water-management agencies and water managers in Arkansas, Mississippi, Minnesota, and Virginia.

As for the primary advancement of the Committee's legislative directive, the Reporter has worked closely with LSLI staff to synthesize the experience and knowledge gained from these fact-finding efforts, ultimately applying them to Louisiana's water needs and water-law traditions to assemble the outlines of an initial draft code. Throughout this process, the Committee used the Model Regulated Riparian Code—developed by the American Society of Civil Engineers—as a starting point. LSLI staff conducted extensive review and analysis of the Model Code, evaluating its strengths and shortcomings and comparing it to the existing water-law paradigms of both Louisiana and neighboring states. This analysis was memorialized in the form of a detailed memorandum, from which the Committee launched its discussions regarding the ideal contents, structure, substance, and administration of its eventual Code. These discussions and the resulting work product generated by the Committee leadership formed the basis of its activity in 2023 and into the first parts of 2024.

Action Over the Past Year

The Committee's work over the past year represents an inflection point in its progress to craft a comprehensive Water Code for Louisiana. Having established, in 2023 and early 2024, a rough statutory framework and a set of core principles to guide its remaining efforts, the Committee entered 2024 with a primary objective of fleshing out the more granular details of its draft Code. To this end, the Reporter and LSLI staff first conducted a thorough review of the Committee's preliminary draft, with an eye towards identifying and eliminating any potential inconsistencies and conflicts and flagging any major substantive questions demanding the Committee's attention. This process not only primed the draft for supplementation with necessary detail and specificity but revealed a clearer picture of the ultimate substantive challenges facing the Committee. Thus, the Committee leadership's incorporation of more granular detail into the draft prompted reconsideration of certain underlying principles and objectives that had previously guided the Committee's efforts, leading it in some cases to change course in the interest of maximizing the usefulness of its eventual legislation in practice.

Importantly, these shifts did not occur in a vacuum. The Committee leadership undertook the aforementioned tasks with conscious acknowledgment of Governor Landry's planned reorganization of state agencies and corresponding prioritization of certain objectives implicating water management, likewise monitoring major ongoing water-related litigation. In light of this movement in the legal landscape surrounding water law and water management, the Reporter in particular undertook additional coordination efforts with various agencies and agents with roles in Louisiana's current and future water management. These efforts, and the circumstances prompting

them, all informed the Committee leadership's assessments and decisions throughout 2024, and the consequent shifts in the Committee's underlying principles and objectives reflect this fact.

Aside from the Committee's general accumulation of progress towards its ultimate goal of proposed legislation, these substantive shifts represent the most notable developments in the Committee's work over the past year. Accordingly, this Section details the ways in which—and the reasons why—the Committee's plans, goals, and work product have changed over the past year. It concludes by detailing the Committee's plans for 2025.

I. Administrative Reorganization & Coordination and Outreach

In 2024, the inauguration of Governor Landry, and the announcement of his plans for the reorganization of state agencies and prioritization of projects and programs that are or will be reliant on water use and management, prompted the Committee, through the Reporter, to increase its interagency engagement. In particular, the Reporter has begun (where none existed previously) and maintained (where it did) consistent dialogue with individuals and agencies likely to be affected by or to play some role in the future administration of the Committee's Water Code—the Louisiana Department of Energy and Natural Resources, especially—to ensure the compatibility of the Committee's eventual legislation with these agencies' restructured responsibilities and to facilitate coordination with and inclusion of the relevant parties in the Committee's work moving forward. Notably, in the course of its own work, the Committee has engaged with DENR Secretary Tyler Gray and the Governor's DRIVE Initiative, in anticipation of a greater and more active role for the DENR in water planning, regulation, and management. This engagement, and the coordinated work the Committee hopes will result, is ongoing. The Committee has also tracked ongoing water law litigation and other water-use developments that could bear on its work. In particular, Committee leadership has followed and continues to monitor the lawsuit between the Baton Rouge Water Co. and the Capital Area Groundwater Commission and has stayed similarly up-to-date on major water-dependent economic-growth projects like the META data center near Monroe, in recognition of the potential these developments have to impact and inform our work. The Committee is further committed to working with the reorganized versions of the CPRA, the Office of Conservation, and the Governor's Office of Community Development, as well as water utilities, the Attorney General, key legislative staffers, and others in the hopes of facilitating synergies with various interested parties and enhancing the ease with which its eventual Water Code can be administered.

II. Status of and Updates on Draft Water Code

Although the general structure of the Committee's draft Code still mirrors the Model Code on which it was initially based, the substance has gradually and in some cases significantly departed from that of the Model Code. Over the past year, one key point of consideration in this regard has been the draft's treatment of existing riparian rights; it was suggested in conversations with various stakeholders, for instance, that these rights ought to be treated more delicately than contemplated by the Model Code. This and the following determinations have been incorporated into the current draft Water Code:

- 1. The Committee should retain the Model Code's context-dependent approach and decision-making standards. For example, a particular use that is "reasonable" during ordinary conditions should not be considered per se unreasonable during drier-than-usual conditions.
- 2. The Committee should retain some form of heightened standard or enhanced scrutiny of interbasin and interstate transfers of water. Notably, however, the Committee must ensure that these standards comply with the commerce clause of the U.S. Constitution.
- 3. The Committee initially sought to retain the Model Code's unification of surface water and groundwater governance. As the Committee's work has progressed, however, it has become clear that a comprehensive approach to water management does not require actual uniform treatment of groundwater and surface water and that, in Louisiana, while greater coordination of surface water and groundwater management and governance is needed, uniform treatment and fully unified governance is not a practical possibility. Instead, the Committee is pursuing the more provisional goal of bringing all existing and future Louisiana water governance within the confines of a single statutory regime. Insofar as provisions and principles of currents water law are retained, these provisions and principles will be redesignated as part of or incorporated into the Water Code, which the Committee intends to be singular and comprehensive. In accordance with this centralization, the Committee will seek to eliminate, reconcile, or otherwise resolve any duplicative or contradictory water-related directives presently contained in statute. The Committee plans to pursue this objective with the input and coordination of all relevant stakeholders, to ensure the practical viability of the resulting framework.
- 4. The Committee should incorporate less detail in statutory text than contemplated in the Model Code, as leaving particularized, micro-level rules to regulation enhances administrative flexibility. In particular, the Committee should provide generally regarding permit terms; allowing more lax terms for certain categories of permit may preempt or assuage potential concerns that might arise regarding a more broadly applicable permitting requirement, thereby making possible a permitting program capable of "catching" a greater proportion of unanticipated yet potentially harmful uses without regulatory overreach. This serves the objective of flexibility in water management, a key principle underpinning the Committee's draft and its continuing work.
- 5. The Committee should incorporate some version of the Model Code's concept of "Special Water Management Areas" but should ensure coordination with existing water-management bodies in the state. This coordination has become paramount in light of the current administrative organization, and it will thus continue for the duration of the Committee's work.

As for the fundamental structural components of the Committee's draft Code, these include:

- 1. Broadly applicable "background" rules: The Code will first incorporate a series of broadly applicable rules governing the withdrawal and use of water generally. Primary among these is the obligation of "reasonable use," which prohibits the use of water in any manner that is not reasonable under the circumstances. Notably, this rule serves more to enable and facilitate effective oversight of water resources than it does to actually restrict behavior as a general matter. To wit: The monitoring and assessment of every individual use of water across the entire state is impracticable, and attempting such extensive oversight would be an inefficient use of resources in any event; in recognition of these and other inherent limitations, the obligation of reasonable use affords a mechanism by which particularly harmful uses of water can be addressed even if they fall outside the scope of the permitting requirement.
- 2. Permitting program: The permitting program will account for the most significant portion of the Code's substance. Notably, "reasonable use" forms the basis of the permitting decision, allowing the administering agency leeway to define "reasonableness" by regulation and allowing the Committee to add additional secondary standards or requirements as needed by statute.
- 3. Rules for special circumstances: The current construction of the Committee's Code grants the administering agency authority to make special status declarations where particular circumstances demand enhanced restrictions on water use and withdrawal. For example, under drought conditions, the agency might be afforded greater enforcement authority or the ability to restrict permit usage. The particular status designations and the criteria for their declaration will depend in part on the reorganization of administrative authority. This component of the draft builds on foundations already laid by present law, and the Committee continues to engage with relevant stakeholders regarding these and other future administrative responsibilities under its Code.
- 4. Ability to grant area-specific management authority: Finally, the draft Code contemplates the possibility for the designation of geographically based water management, via the creation of so-called "Special Water Management Areas." These areas, if created, would be subject to individualized governance, allowing for the implementation of geographically specialized rules and the application of local knowledge and expertise. These designations may be created or authorized in several varying forms. They can be (1) strictly and individually authorized by statute, thus requiring separate legislative action for the creation of each area; or (2) generally authorized, with authority for their creation vested in the administering agency. They can further be (3) created as wholly independent and autonomous regulatory bodies, or (4) organized under the umbrella of the administering agency and simply tasked with administration of the statewide regulatory scheme in a particular limited area. Similarly, the creation of Special Water Management Areas can either be (5) broadly authorized, for the administration of all "ordinary" functions, or (6) more narrowly authorized, with their creation limited to exigent circumstances and their function specially tailored as a response to particular issues. Once again, the structure that these grants of authority will take under the

Committee's Water Code depends in major part on the ongoing restructuring of administrative authority. The Committee seeks to answer questions on this topic with input from any and all parties likely to be conferred some relevant enforcement responsibility and authority.

III. Work Moving Forward

Presently, the Committee's primary task is to deal with several substantive questions that still require answers following the comprehensive review and drafting process outlined above. Primary among these are the following:

- 1. Ensuring constitutionality under the commerce clause: Because of the importance of preserving water as a resource valuable to the state of Louisiana, the Committee has contemplated the imposition of some form of restriction on transfers of water for out-of-state use. Regardless of what form this restriction takes, it is imperative that the Committee shape the restriction so as to avoid unduly discriminating against interstate commerce and thereby running afoul of the commerce clause of the U.S. Constitution. One proposal for achieving this end is treating such out-of-state transfers not by reference to location of use as it relates to state boundaries but rather by reference to location of use as it relates to the boundaries of the relevant *aquifer*. Arguably, this effectively preserves the resource of the state by ensuring recharge without imposing a discriminatory restriction.
- 2. Ensuring constitutionality under Article VII, Section 14 of the Constitution of Louisiana: Similarly, the Committee must ensure compliance with the state constitution. Because running water has been considered, at various points by certain parties, to be a thing owned by the state in its capacity as a public person, the Louisiana Constitution's prohibition on the donation of public property arguably applies to many, if not all, consumptive surface-level withdrawals. Thus, the Committee must take care that the provisions of its Code not run afoul of this prohibition, for instance by allowing for such withdrawals without some mechanism by which to ensure adequate compensation to the state of Louisiana, if and where necessary. The current Cooperative Endeavor Agreement system attempts to deal with this issue at least partly as it applies to the Committee and may thus provide viable guidance to the Committee in the context of this particular constitutional question.
- 3. Integrating groundwater governance into the Code: In order to bring all Louisiana water-management directives under the single overarching umbrella of the Committee's Water Code—that is, in order to fulfill the Committee's legislative directive to develop a *comprehensive* Water Code—the Committee must determine precisely which rules of present-day groundwater management it wishes to retain, and which it wishes to revise or repeal. This task will require both (a) continued coordination with all relevant stakeholders in light of the current administrative restructuring, and (b) reconciliation with the corresponding rules governing surface water, at least on a generalized, high-level basis. The Committee's goal is to

achieve the greatest consistency in the treatment of groundwater and surface water that is practicable from both (a) a substantive legal perspective, without offending any of the Committee's other core objectives, and (b) an administrative perspective, in light of the ultimate distribution and structure of responsibilities that emerges from the administrative reorganization.

4. Protecting existing riparian rights: In light of Louisiana's deep-rooted riparian traditions, the Committee has resolved to protect riparian rights, if not entirely then largely as they exist today. This issue is implicated by and thus impacts the Committee's decisions regarding the coordination of groundwater treatment with surface water treatment, the prohibition against the donation of state property, restrictions on consumptive use, and the scope of the permitting requirement, among others. Each such issue must be treated with a conscious eye towards existing riparian rights, so as to ensure that any related rules do not serve to abrogate these rights.

As the Committee answers these questions, it will fill the corresponding gaps in its current draft. Once this has been achieved, the Committee's next and final task (prior to its presentation of its recommendations to the Law Institute's Council) will be to review, revise, and approve its draft on a provision-by-provision basis, with an eye towards wordsmithing each rule on a granular level to most effectively implement the Committee's desired substance.

Conclusion and Acknowledgments

At present, the Committee's work is approaching a climax, and the Committee's work product will soon begin to coalesce into viable legislation. Over the coming year, the Reporter anticipates that the Committee will complete the first fully actualized draft of its Water Code and will thus begin the process of finalizing the draft, provision by provision, at the Committee level. The completion of this process will ultimately depend upon the results of the governor's proposed administrative reorganization and will therefore demand of the Committee continued coordination with all relevant stakeholders. While this final step in drafting itself represents a major undertaking, it will be followed by the Committee's presentation of its final recommendations to the Law Institute's Council for approval and subsequent proposal as legislation. The Committee hopes to begin presenting its recommendations to the Council, at least in part, by late 2025, and expects the process to be fully underway by fall of the following year. Until it receives the Council's final approval of its proposed Water Code legislation, the Committee will continue to report to the Legislature annually regarding the status of the project.

Finally, the Committee and the Reporter would like to acknowledge and thank the Baton Rouge Area Foundation, the Greater New Orleans Foundation, the Walton Family Foundation, the Louisiana Sea Grant Program, the McKnight Foundation, 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.