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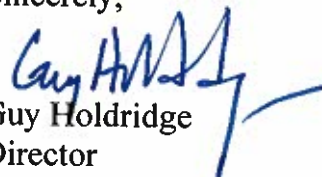
Senator Cameron Henry
President of the Senate
P.O. Box 94183
Baton Rouge, Louisiana 70804

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: David R. Poynter Legislative Research Library
drplibrary@legis.la.gov

Secretary of State, Ms. Nancy Landry
admin@sos.louisiana.gov

**LOUISIANA STATE LAW INSTITUTE
WATER CODE COMMITTEE**

**2024 ANNUAL REPORT TO THE LEGISLATURE
IN RESPONSE TO SR 171 OF THE 2014 REGULAR SESSION**

Relative to the development of a comprehensive Water Code for Louisiana

Prepared for the
Louisiana Legislature on

February 1, 2024

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

February 1, 2024

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

**2024 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 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 susceptible to centralized yet 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. 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, on which it has drawn and will continue to draw over the course of the project in order 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 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. 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 ecosystem 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. Coordination with other states and federal interests is essential to maximize the Code's 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 the dwindling water supplies in the Southwest. These states 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 – as well as 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 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, 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 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 theory, structure, substance, and administration of its eventual Code. These discussions and the resulting work product generated by Committee leadership form the basis of the Committee’s activity in 2023 and early 2024.

Action Over the Past Year

I. Review and analysis of Model Regulated Riparian Code. In fulfillment of its previously charted course of action, the Committee began 2023 by conducting a thorough evaluation of the aforementioned Model Code. With the memorandum drafted by the Committee’s LSLI Staff Attorney serving as the foundation for this assessment, the Committee met to discuss the Model Code and its viability as a roadmap for the Committee’s own legislative drafting efforts. In light of Louisiana’s existing legal and practical relationship with water, the Committee ultimately determined that the Model Code could be mined for high-level concepts and structure but that the details of the Committee’s eventual Code would require an approach more specially tailored to Louisiana. One such detail underscored by these discussions was the Model Code’s treatment of riparian rights; it was suggested that these rights, as they presently exist in Louisiana law, should be treated more delicately than contemplated by the Model Code. As for the Model Code’s general concepts and structure, the Committee’s discussions produced the following agreements:

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 reasonable in drier-than-usual conditions.
2. The Committee should retain some form of heightened standard or enhanced evaluation of interbasin and interstate transfers of water. Notably, however, the Committee must ensure that these criteria comply with the Commerce Clause of the U.S. Constitution.
3. The Committee should retain the Model Code’s unification of surface water and groundwater governance.
4. The Committee should incorporate less detail in statutory text than contemplated in the Model Code, as leaving micro-level particulars to regulation enhances administrative flexibility. In particular, the Committee should provide more generally regarding permit terms; allowing more lax terms for certain categories of permit may assuage potential concerns regarding a more broadly applicable permitting requirement, making possible a permitting program capable of

“catching” a greater proportion of unanticipated but potentially harmful uses without regulatory overreach.

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.

II. Conception and drafting of Code. Consistent with the Committee’s discussions regarding the Model Code and the points of emphasis for its own Code, the Committee leadership, in concert with LSLI staff, undertook to produce an initial, “draft” version of the Committee’s comprehensive Water Code. These drafting efforts were guided in part by reference to aspects, both positive and negative, of the Model Code and the statutory schemes of neighboring states such as Mississippi and Arkansas. While the resulting draft is neither a complete nor fully refined expression of the Committee’s ultimate intent, it nevertheless reflects a number of fundamental components and principles underlying the Code as envisioned by the Committee. These components and principles form the general foundation on which the Committee’s ongoing revisions will build.

The fundamental principles underlying the Code include:

1. Unification of water management: The Committee’s Code will unify the governance, under Louisiana law, of groundwater and surface water. Whereas current Louisiana law treats these sources separately, hydrological science holds this distinction to be fictitious. In the interest of creating a water-management paradigm that acknowledges and accommodates scientific reality to the greatest extent practicable, the Code will treat surface and subsurface water uniformly.

2. Centralization of water management: The Committee’s Code will seek to bring all current and future Louisiana water law within the confines of a single statutory regime. Insofar as existing provisions and principles of 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. Pursuant to this centralization, the Committee will seek to eliminate or resolve any duplicative, redundant, or contradictory water-related directives presently contained in statute. Finally, to the extent practicable, the Committee will provide a plan by which administrative oversight of water-related regulatory schemes can either be unified or coordinated so as to eliminate redundant regulatory functions, achieve more efficient resource allocation, and emphasize interagency synergies, where applicable.

3. Flexibility of water management: Both the structure and substance of the Committee’s Code will be shaped to promote administrative flexibility. This may be achieved through a number of means, including but not limited to (1) calculated, deliberate distribution of substance between statute and regulation; (2) a more broadly applicable permitting requirement with more permissive permit terms in many cases, or, either conjunctively or alternatively, separate categories of permits; (3) provisions for specialized management and authority based on geographic

location, weather-related circumstances, and/or other criteria. This added flexibility is imperative in accounting for unforeseeable and unforeseen circumstances.

The fundamental components of the Code include:

1. Generally applicable “background” rules: The Code will first incorporate a series of generally applicable rules governing all uses and withdrawals of water. 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 facilitate effective oversight of water resources than 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 to do so would be a poor use of resources in any event; nevertheless, the obligation of reasonable use provides a mechanism by which particularly harmful activities 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. At present, the Committee contemplates a general volumetric threshold above which the permitting requirement will apply; it may ultimately provide for several different thresholds applicable to different categories of use, or it may replace the volumetric threshold altogether with some other type of criterion or criteria. 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 specific status designations and the criteria for their declaration are still subject to debate.

4. Ability to grant area-specific management authority: Finally, the draft Code contemplates the possibility for 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 a few different ways: 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. Moreover, they can 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) generally authorized, for the administration “ordinary” functions; or (6) limited to exigent circumstances, as a specialized response to a particular issue.

This initial draft will serve as the starting point for the Committee’s substantive and stylistic refinement of its Code. After an initial evaluation of whether the draft addresses the appropriate range of substantive matters in the optimal manner, the Committee leadership will make the necessary substantive revisions, after which the Committee will proceed finally into a section-by-section review of the proposed statutory text for the purpose of wordsmithing, eliminating ambiguity, and identifying and addressing any remaining micro-level issues.

III. Coordination. In addition to the work called for by SR 171, the Committee and the Reporter have continuously engaged and coordinated with other ongoing water-related initiatives on an ongoing in the state. This has been necessary to both avoid conflicts and to create and optimize synergies. The Committee is committed to working with the CPRA, the Department of Natural Resources, the Office of Conservation, the Governor’s Office of Community Development, the Attorney General, key legislative staffers, and others to more fully discuss the Committee’s work and to coordinate our collective work on water governance.

IV. Outreach. As interest in the state’s water resources and the Committee’s work has grown, the Committee has received occasional requests to provide information to professional and civic organizations. The restrictions on gatherings that were in place from 2020 through 2022 constrained the Committee’s outreach efforts, but legislation allowing for virtual meetings has since facilitated more robust and geographically diverse participation. Transparency and accessibility remain priorities of the Committee and will continue to be emphasized as we grow closer to achieving our goal of proposed legislation.

Conclusion & Acknowledgments

At present, the Committee is approaching a climax, as the Reporter anticipates that the Committee’s work product will soon begin to coalesce into viable legislation. In the interim, the Committee will continue to report to the Legislature on the status of this project. A final report will be submitted 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.

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, the Tulane Institute on Water Resources Law and Policy, and LSLI staff for their invaluable assistance.

Respectfully submitted,

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