

Tulane Institute

on Water Resources Law & Policy

6329 Freret Street
New Orleans, LA 70118
504-865-5982

June 10, 2020

Via electronic mail to: jbe@la.gov
The Honorable John Bel Edwards
Office of the Governor
PO Box 94004
Baton Rouge, LA 70804

Re: House Bill 197

Dear Governor Edwards:

On behalf of the Tulane Institute on Water Resources at Tulane Law School I am writing because of concerns we have about House Bill 197 relative to the Criminal Code provisions regarding unauthorized entry of a critical infrastructure, La. R.S. § 14:61. The bill adds “water control structures” to the list of what is considered critical infrastructure and additionally imposes draconian penalties for violation of the statute’s provisions during a state of emergency. While we fully appreciate the intentions behind the legislation, we believe the actual language of the bill is so imprecise that it will lead to more problems than it will solve. Indeed, we believe it will be impossible to fairly enforce.

Specifically, we are concerned about the use of the broad and vague term “water control structure.” While it seems that the bill’s author and proponents had in mind preventing unauthorized entry of facilities like pumps and floodgates which are critical during a weather-related emergency, the bill as passed may capture far more conduct and apply to far more structures than its authors envisioned. This is because the bill does not define what a water control structure is. Does it cover all weirs, jetties, pipelines, levees, armored banks and shorelines? Does it cover private water control structures, which far out-number public ones? Does it cover private structures in public waterways? Does it cover all structures whether they be permitted, maintained or abandoned? Are all of those really critical so as to criminalize otherwise relatively benign conduct on or around them?

Let us give you some examples of our concerns. As you know the bill is an extension of existing law that makes unauthorized entry upon “critical infrastructure” including any movables and immovable there a felony. In the case of water control structures, this could go well beyond floodgates and pump stations. The levees that make up most of the lakefront and riverfront in New

Tulane Institute

on Water Resources Law & Policy

Orleans are unquestionably there to control the flow of water. Are those covered by this bill? Are kids who enter the lake front or the “Fly” at Audubon Park at night (when they are technically closed) now guilty of a felony? Are picnics on the batture now crimes? If someone takes a CD from a car while it is parked at the Fly or anywhere along the levee (a movable located on what is arguably critical water control infrastructure) has that person committed a crime against critical infrastructure? And if any of those things were to happen today when we are under a state of emergency, but one not remotely related to water or water driven risk, would they be subject to heightened penalties? We hope none of these would fall within this law but no one can tell from its wording. To be sure we would not expect this bill to be enforced in such a way often but we do see the risk of selective enforcement. And those are problems.

In short, we fear that the vagueness and serious consequences associated with this bill raise questions of its constitutionality. It is already hard enough to know where the public can go and what they can do on and around our waters and this bill compounds that. The bill could have been and can be easily drafted more narrowly and more carefully to achieve the desired, and clearly important, intent. Getting it right should be done on the front end not via court challenges or corrective legislation that we expect will ensue if this bill becomes law. For these reasons we urge that you veto HB 197.

Respectfully,

/s/ Mark Davis

Mark S. Davis

Eugenie Schwartz Professor of River and Coastal Studies

Director, Tulane ByWater Institute

Director, Tulane Institute on Water Resources Law and Policy

Director, Tulane Center for Environmental Law

6325 Freret Street

New Orleans, LA 70118

504-865-5982

cc (by email): Matthew Block (matthew.block@la.gov)
Leslie Chambers (leslie.chambers@la.gov)