Comments on Illinois Water Plan by Prof. Eric Freyfogle efreyfog@illinois.edu

I would like to offer, in brief form, a legal commentary on the public's existing rights to make use of Illinois waterways and on the state's need to do a better job recognizing and respecting these public rights. The first step for the state, as I say below, is to do what it has to my knowledge never done: to undertake a full review of the relevant law to grasp the exact scope of public rights and the very limited ability of the state to constrict those public rights. I write as a long-time Professor of Law at the University of Illinois College of Law who has specialized for decades in property and natural resources law and who has written at length on these subjects, including public rights in waterways. I would be happy to meet with DNR officials or others if it would seem helpful and to offer my legal views at far greater length if there is receptivity to them.

In very brief form, my main conclusions are the following (my legal points, of course, are not here supported):

First, the issue of public rights to use waterways is far more legally complex than commonly understood. Public rights are not simply set by the Illinois definition of navigability, nor are they set by any administrative action of the DNR or other executive body. Public rights emerge out of the interaction of quite a number of bodies of federal and state law. The state law of navigability is one of them, but only one. (The lead rulings here are all well over a century old, and of uncertain strength today.) Federal law plays a role through the public trust doctrine, under which Illinois took title to the lands beneath navigable waters (when it entered the union) subject to the already existing public rights to use them. All such waterways were and remain "forever free" to public use under the original Northwest Ordinance, reenacted as a still-binding federal statute by the first Congress. The federal navigation servitude also comes into play, protecting public rights. And there is more. Illinois like other states has the legal power to **expand** public access to waterways. It has not done so. It has no power, however, to **curtail** these public rights to the extent that they are protected by federal law.

Second and related, whether or not DNR or another administrative body designates a waterway or waterway segment as navigable is of no real legal significance. The public holds rights on its own; these rights do not derive from, and are not dependent on, anything that DNR does or does not do. So far as I know, no state law authorizes DNR to expand public rights beyond those guaranteed by federal law. It certainly has no power to curtail federally guaranteed rights. DNR does have certain authority to regulate uses of waters in the public interest, but that authority does not extend to eliminating rights—exactly the evil that the public trust doctrine, the Northwest Ordinance (as re-enacted), and the Navigation Servitude are all intended to forestall. Its power to regulate public property is akin to the rights various public bodies have to regulate uses of private property. DNR does not have the power, through any rulemaking process or otherwise, to decide on its own which waterways will be deemed navigable and which will not..

Third, so far as I know, the state AG has never issued a legal ruling that covers the topic of public rights in anything like its full complexity. The ruling that DNR commonly cites deals with a tangential issue and, as a quick glance at it shows, gives no thought to the bulk of the bodies of relevant law. I attempted to get Mr. Marc Miller, when DNR director, to seek a guiding ruling from the AG's office, but to no avail. As I told him then, and repeat now, I'm prepared to draft such a legal review if it would be studied seriously by state lawyers in a position to take action.

Finally, it is my view that, in combination, the various sources of federal and state law that protect longstanding public rights to use waterways empower citizens to make use of any waterway that is navigable in fact during any reasonable period of the year. That use includes travel by canoe, a use that was often, when Illinois entered the Union, a commercial use (as well as recreational) and that is a commercial use today given the actions of canoe outfitters and the like. (I don't mean to suggest that public uses are limited to commercial activities.) Public rights are not dependent on any longstanding public uses of waterways, although such patterns of use can certainly provide evidence of navigability in fact. Public rights, as the U.S. Supreme Court has made clear, are a form of public property and deserve protection that is just as strong as any protection for private property. Further, any obstruction of a public "highway," including a navigable waterway, is a per se public nuisance under Illinois law. Under old precedent (the value of which today is unclear), any member of the public can use "self help" to abate a public nuisance, meaning can rip out any barrier that blocks a public route just as a person could remove a barrier to a public road. There is also a right to travel onto private land as minimally needed to avoid waterway obstacles.

It has been my sense over the years that DNR officers (and law enforcement generally) have been far too inclined to resolve all doubts about public rights in favor of private landowners. There is, I believe, no justification for this, in law or policy. Public rights are a form of property and deserve equal protection. There are and will always be uncertainties about which waterways are navigable in fact and thus subject to the public's property right (easement) to use them. When they arise, such disputes should be handled like all disputes between two parties that claim conflicting property rights: they should be left to the parties to work out as a civil dispute, in court if needed. It is inappropriate for law enforcement officials to take the side of private landowners as they so often have done. It is certainly wrong to arrest a boater when the navigability in fact of a waterway is at all in doubt.

Thanks for taking time to consider my comments. I do hope that this long-delayed and much-needed study of Illinois water law in all its aspects will lead state lawyers, finally, to give the issue of public rights the attention it deserves.