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STATE OF ILLINOIS
SPRINGFIELD

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FILE NO. 87-006

NATURAL RESOURCES:
Definition of "Public
waters or public bodies
of water"

Gregory W. Baise, Secretary
Illinois Department of Transportation
2300 South Dirksen Parkway
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Dear Mr. Baise:

I have your predecessor's letter wherein he posed the following questions regarding the power of the Illinois Department of Transportation, hereafter referred to as "Department", to regulate the waters of the State of Illinois pursuant to "AN ACT in relation to the regulation of the rivers, lakes and streams of the State of Illinois" (Ill. Rev. Stat. 1985, ch. 19, par. 52 et seq.):

1. Is the definition of "public waters or public bodies of water", as that phrase is employed in said Act, co-extensive with what the State of Illinois defines as navigable waters?

2. If not, what types of waters other than commercially navigable waters are public waters?

3. Is there a distinction between "public waters or public bodies of water" and those waters "wherein the State of Illinois or the people of the State have any rights or interests", as the latter phrase is used in sections 5 and 7 of "AN ACT in relation to the regulation of the rivers, lakes and streams of the State of Illinois" (Ill. Rev. Stat. 1985, ch. 19, pars. 52, 54)?

4. What regulatory powers does the Department possess over waters which cannot be considered public waters or public bodies of water?

Pursuant to "AN ACT in relation to the regulation of the rivers, lakes and streams of the State of Illinois", the General Assembly empowered the Department of Transportation to adopt and enforce a regulatory scheme in order to preserve and protect the waters of this State. Section 18 of that Act (Ill. Rev. Stat. 1985, ch. 19, par. 65), which, inter alia, prohibits the building of any structure or the depositing of any material in the public waters of the State without first obtaining a permit from the Department to do so, defines "public waters or public bodies of water" as follows:

" * * *

Wherever the terms public waters or public bodies of water are used or referred to in this Act, they mean all open public streams and lakes capable of being navigated by water craft, in whole or in part, for commercial uses and

> purposes, and all lakes, rivers, and streams which in their natural condition were capable of being improved and made navigable, or that are connected with or discharged their waters into navigable lakes or rivers within, or upon the borders of the State of Illinois, together with all bayous, sloughs, backwaters, and submerged lands that are open to the main channel or body of water and directly accessible thereto. Nothing herein contained applies to a harbor under the jurisdiction and control of a park district, nor to any existing yacht club facilities, improvements thereon and replacements thereof whether in the same or a new location. Nothing herein contained applies to the location of any harbor under the jurisdiction and control of any city or village of less than 500,000 population.
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> (Emphasis added.)

In construing section 18 and the other provisions of the Act, as with all statutory enactments, the cardinal rule of construction, to which all other rules are subordinate, is to ascertain and effectuate the intent of the General Assembly (People v. Agnew (1985), 105 Ill. 2d 275, 279; People v. Boykin (1983), 94 Ill. 2d 138, 141), and in so doing, it is necessary to determine the objective the statute seeks to accomplish and the evils it desires to remedy. (City of Springfield v. Bd. of Election Comm'rs of the City of Springfield (1985), 105 Ill. 2d 336, 341; Chastek v. Anderson (1981), 81 Ill. 2d 502, 511.) It is a basic tenet of statutory construction that the language of a statute should be given its plain and ordinary meaning unless there is a clear legislative intent to the contrary or to do so

would defeat the legislative intent. (Coldwell Banker Residential Real Estate Services of Illinois, Inc. v. Clayton (1985), 105 Ill. 2d 389, 396; People v. Brown (1982), 92 Ill. 2d 248, 256; Space Station 2001, Inc. v. Moses (1983), 118 Ill. App. 3d 658, 661; Frahm v. Urkovich (1983), 113 Ill. App. 3d 580, 585.) The intent underlying "AN ACT in relation to the regulation of the rivers, lakes and streams of the State of Illinois", along with a mandate for liberal construction to accomplish the purposes of the Act, is set forth in section 27 (Ill. Rev. Stat. 1985, ch. 19, par. 76), which provides as follows:

> "§27. At all times this act shall be construed in a liberal manner for the purpose of preserving to the State of Illinois and the people of the State, fully and unimpaired, the rights which the State of Illinois and the people of the State of Illinois may have in any of the public waters of the State of Illinois, and to give them in connection therewith, the fullest possible enjoyment thereof, and to prevent to the fullest extent, the slightest improper encroachment or invasion upon the rights of the State of Illinois, or any of its citizens with reference thereto."

In State of New Jersey v. State of New York (1931), 283 U.S. 336, 342, 51 S. Ct. 478, 479, Justice Holmes declared: "A river is more than an amenity; it is a treasure." The philosophical underpinnings of this statement forbid a narrow, cramped reading of statutes enacted to preserve and protect waters. United States v. Republic Steel Corp. (1960), 362 U.S. 482, 471, 80 S. Ct. 884, 890.

With such principles in mind, it must be emphasized that the focus of the subject Act is not limited to protecting the property interests of the State and preserving the public's right to use navigable waters for commercial purposes. The purpose of the Act is also to establish a regulatory framework in order to protect the public interests of conserving natural resources and preserving water bodies for recreational purposes. (Ill. Rev. Stat. 1985, ch. 19, par. 54, 61a, 63, 66, 68, 69, 73; see also People ex rel. Scott v. Chicago Park District (1976), 66 Ill. 2d 65, 78-9; Livingston, Public Recreational Rights in Illinois Rivers and Streams, 29 DePaul L. Rev. 353, 372 (1980).)

It is well settled that the State has full and complete jurisdiction over all navigable waters within its borders, subject only to the realm of interstate commerce. (DuPont v. Miller (1923), 310 Ill. 140, 145.) The Illinois Supreme Court has held that a water is deemed navigable if in its natural state it is used or capable of being used as a highway for commerce, over which trade and travel may be conducted in the customary modes of travel on water:

" * * *

> * * * The rule in this State is that the public have an easement for purpose of navigation in waters which are navigable in fact, regardless of the ownership of the soil, whether such waters are navigable depends upon whether they are of sufficient depth to afford a channel for use for commerce. [Citation.]
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> * * * "

(DuPont v. Miller (1923), 310 Ill. 140, 145.)

(See also Schulte v. Warren (1905), 218 Ill. 108.) Clearly, the State has an interest in and the Department has authority over navigable waters, but by the express terms of section 18, the subject Act includes and the Department possesses regulatory jurisdiction over waters which may not be navigable. As provided in section 18, quoted in part above, the regulatory framework contemplated by "AN ACT in relation to the regulation of the rivers, lakes and streams of the State of Illinois" extends to:

> 1) lakes, rivers, and streams capable of being navigated by watercraft, in whole or in part, for commercial purposes;
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> 2) lakes, rivers, and streams which in their natural condition were capable of being improved and made navigable for commercial purposes;
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> 3) lakes, rivers, and streams that connect with or discharge into navigable lakes or rivers within or upon the borders of the State of Illinois; and
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> 4) all bayous, sloughs, backwaters, and submerged lands that are open to the main channel of a navigable lake, river, or stream.

The intent of the General Assembly to include non-navigable waters within the ambit of public waters or public bodies of water is further manifested by provisions of the Act which require the Department to prepare separate listings of all navigable and non-navigable waters (Ill. Rev. Stat. 1985, ch. 19, par. 52) and which require the Department to keep data

with reference to those public waters which are navigable to aid in extending the navigation of public waters. (Ill. Rev. Stat. 1985, ch. 19, par. 58.) The clear implication of such provisions is that public waters encompass more than navigable waters.

With respect to the statutory definition of "public waters or public bodies of water", one commentator has noted as follows:

" * * *

> * * * The term 'public bodies of water,' as defined in the statute, includes waterways that would not be considered navigable at common law. A public waterbody is a lake or stream that can be navigated by commercial water craft, one that could be made navigable by man-made improvements, or one that flows into a navigable waterbody. Although the first definition appears to reiterate the common law's emphasis on the commercial aspects of navigation, the second and third significantly expand the older concept. Under Illinois common law, a waterway that could be rendered navigable by artificial means was not considered navigable-in-fact. The statutory definition classifies such waterbodies as public. Moreover, the statute places under the department's jurisdiction waterways not considered navigable under most state and federal definitions: those that discharge their waters into a navigable waterway. The statute does not specify whether a direct connection is required or whether an indirect connection is sufficient. If the latter is enough, then conceivably all streams and rivers in Illinois would be considered public waterbodies because the waters in each eventually flow into one of the major navigable rivers.
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> * * * "

Livingston, Public Recreational Rights in Illinois Rivers and Streams, 29 DePaul L. Rev. 353, 371 (1980).

Accordingly, it is my opinion that the phrase "public waters or public bodies of water", as used in "AN ACT in relation to the regulation of the rivers, lakes and streams of the State of Illinois", includes those waters which with improvements could be rendered navigable and those waters which either connect with navigable waters or discharge into navigable waters, as well as those waters in which the State has a navigational interest. Whether a non-navigable water could be rendered navigable by artificial means or whether it connects with or discharges into a navigable water is a question of fact for the Department to ascertain. If, however, a non-navigable water falls within one of these classifications, it must be considered a public water or public body of water subject to the regulatory powers of the Department.

I am aware that two of my predecessors have advised that the subject Act pertains only to navigable waters. (See 1957 Ill. Att'y Gen. Op. 224; 1953 Ill. Att'y Gen. Op. 80; 1949 Ill. Att'y Gen. Op. 173.) This result was reached on the basis that neither the State nor the people of the State have a proprietary right or interest in non-navigable waters and, therefore, had no power to regulate such. (See 1949 Ill. Att'y Gen. Op. 173, 175.) The Illinois Supreme Court, however, subsequently has held that the public has an interest in waters which extends beyond property considerations and navigational concerns:

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> * * * [I]n considering what is the * * * public interest, courts are not bound by inflexible standards.
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> 'We have no difficulty in finding that, in this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities. The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.' Borough of Neptune City v. Borough of Avon-By-The-Sea (1972), 61 N.J. 296, 309, 294 A.2d 47, 54-55, and cases and authorities cited therein; see also Marks v. Whitney (1971), 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790. On this question of changing conditions and public needs, it is appropriate to observe that there has developed a strong, though belated, interest in conserving natural resources and in protecting and improving our physical environment. The public has become increasingly concerned with dangers to health and life from environmental sources and more sensitive to the value and, frequently, the irreplaceability of natural resources. This is reflected in the enactment of the Illinois Environmental Protection Act (Ill. Rev. Stat. 1975, ch. 111 1/2, par. 1001 et seq.) in 1971 and in ratification by the people of this State of sections 1 and 2 of article XI of the 1970 Constitution. * * *
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> (People ex rel. Scott v. Chicago Park District (1976), 66 Ill. 2d 65, 78-9.)

In light of the liberal construction to be placed upon the subject Act to accomplish its purposes, and the court's determination that the people of the State have an interest in

all waters of the State, it would be inappropriate to limit the regulatory powers of the Department to navigable waters.

As to your predecessor's third question, it is my opinion that, as used in "AN ACT in relation to the regulation of the rivers, lakes and streams of the State of Illinois", there is no distinction between the phrases "public waters or public bodies of water" and those waters "wherein the State of Illinois or the people of the State have any rights or interest". Sections 5 and 7 of that Act (Ill. Rev. Stat. 1985, ch. 19, pars. 52, 54) respectively provide as follows:

> "§5. The Department of Transportation shall upon behalf of the State of Illinois, have jurisdiction and supervision over all of the rivers and lakes of the State of Illinois, wherein the State of Illinois or the people of the State have any rights or interests, and shall make a list by counties of all waters of Illinois, showing the waters, both navigable and non-navigable, that are found in each county of the State, and if the same are lakes, the extent of the shore lines and the amount, extent and area of the water surface; and in a like way, if the same are rivers, and specifying whether the same are navigable or non-navigable, and whether they have or have not been meandered." (Emphasis added.)

> "§7. It shall be the duty of the Department of Transportation to have a general supervision of every body of water within the State of Illinois wherein the State or the people of the State have any rights or interests, whether the same be lakes or rivers, and at all times to exercise a vigilant care to see that none of said bodies of water are encroached upon or wrongfully seized or used by any private interest in any way, except as may be provided by law and then only after permission shall be given by said department, and from time to time for that

> purpose, to make accurate surveys of the shores of said lakes and rivers, and to jealously guard the same in order that the true and natural conditions theeof may not be wrongfully and improperly changed to the detriment and injury of the State of Illinois.
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> In order to expedite the fulfillment of such duties by the department, and to remove or reduce many causes of contention between the State and riparian owners, every subdivision plat drawn for any land bordering or including any public waters of the State of Illinois in which the State has any property rights or property interest, shall be submitted to the Department of Transportation for review and approval as to the boundary line between private interests and public interests, and shall not be recorded until so reviewed and approved by the department. Should the department find such boundary line to be incorrecty indicated on the plat, it shall return the plat unapproved with a statement in detail of the reasons for not approving such plat.
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> The Department of Transportation shall have power and authority to inquire into encroachments upon, wrongful invasion and private use of every stream, river, lake or other body of water in which the State of Illinois has any right or interests. The department shall have power to make and enforce such orders as will secure every stream, river, lake or other body of water, in which the State of Illinois has any right or interest against encroachment, wrongful seizure or private use." (Emphasis added.)

Sections 5 and 7, which refer to those waters "wherein the State of Illinois or the people of the State have any rights or interests" and the other sections of the Act, which refer to "public waters or public bodies of water" all pertain to the regulatory and general supervisory powers of the Department over such waters and their scope is identical. It is axiomatic

that all parts, provisions, or sections of a statute must be read, considered, and construed together, in light of the general purpose and object of the statute, so as to make it harmonious and consistent in all its parts. (Pascal v. Lyons (1958), 15 Ill. 2d 41, 44-5; Griffith v. Dillinger (1983), 117 Ill. App. 3d 213, 219; Estep v. Department of Public Aid (1983), 115 Ill. App. 3d 644, 647.) Accordingly, for purposes of "AN ACT in relation to the regulation of the rivers, lakes and streams of the State of Illinois", those waters "wherein the State of Illinois or the people of the State have any rights or interests" must be considered identical to and synonymous with "public waters or public bodies of water".

Your predecessor's final question concerns the regulatory jurisdiction of the Department over those bodies of water which cannot be considered "public waters or public bodies of water". Section 29a of "AN ACT in relation to the regulation of the rivers, lakes and streams of the State of Illinois" (Ill. Rev. Stat. 1985, ch. 19 par. 78) provides as follows:

> "§29a. After July 1, 1985, no person, State agency, or unit of local government shall undertake construction in a public body of water or in a stream without a permit from the Department of Transportation. No permit shall be required in a stream which is not a public body of water, draining less than one square mile in an urban area or less than ten square miles in a rural area. No permits shall be required for field tile systems, the outlet structures, terraces, water and sediment control basins, grade stabilization structures, or grassed waterways which do

> not obstruct flood flows. Any artificially improved stream channel, drainage ditch, levee, or pumping station existing in serviceable condition on July 1, 1985 may be maintained and repaired to preserve design capacity and function without a permit. Maintenance and repair of improved channels, ditches or levees shall follow accepted practices to reduce, as practical, scour, erosion, sedimentation, escape of loose material and debris, disturbance of adjacent trees and vegetation and obstruction of flood flows."

Section 29a clearly confers upon the Department the power to grant permits for construction in a stream which is not deemed a public body of water within certain constraints. Within such constraints, the intent of the General Assembly is that the Department is to posses and exercise certain regulatory powers over all public and nonpublic waters. (See Remarks of Sen. O'Daniel, May 17, 1985, Senate Debate on Senate Bill No. 418, at 67; and Remarks of Sen. O'Daniel, May 22, 1985, Senate Debate on Senate Bill No. 418, at 174.) Consequently, it is my opinion that the Department may regulate construction in nonpublic waters except as statutorily limited.

Very truly yours,

ATTORNEY GENERAL