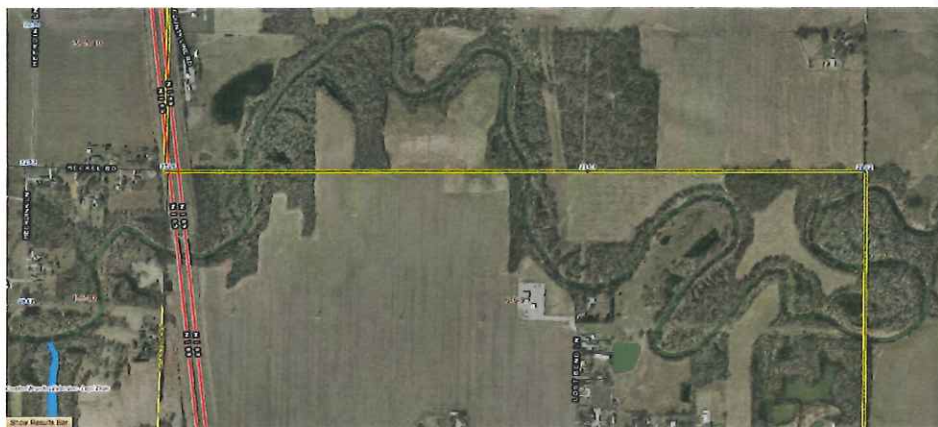


Pigeon 3



Pigeon 4



Navigable ≠ Regulated Drain ≠ Jurisdictional

Definitions

- **Navigable (by state standards)**
- **Regulated Drain**
- **Jurisdictional**

Navigable

- Pigeon Creek is listed on the Indiana Waterways Roster as Navigable for 5.9 river miles beginning at its confluence with the Ohio River-this distance is approximately to the CSX Tracks west of US 41
- Navigable under Indiana State Supreme Court test is a waterway that "... was available and susceptible for navigation according to the general rules of river transportation at the time (1816) Indiana was admitted to the Union"
- Navigable refers to ownership of the riverbed

Regulated or Legal Drain

- A drain in which a process (under revised Indiana Drainage Code 1965) has been petitioned and accepted for maintenance
- Once regulated, the County Drainage Board maintains the drain through an assessment for all parties within the watershed of the drain.
- The County Drainage Board has a right of entry of 75' from the top of the bank on each side of the drain for purposes of maintaining

Regulated or Legal Drain

- Funds from the assessment can **ONLY** be used for maintenance on the drain they were assessed
- Process to become regulated requires a petition process and hearing. As part of the petition process everyone who drains into the drain proposed to be regulated **MUST** be notified by certified mail

Jurisdictional

- In this case refers to streams that are under the Jurisdiction of Army Corp of Engineers (USCOE)
- Rules regarding placement of fill within Jurisdictional Stream
- A Jurisdictional Stream is not by definition maintained by USCOE

Other Important Points

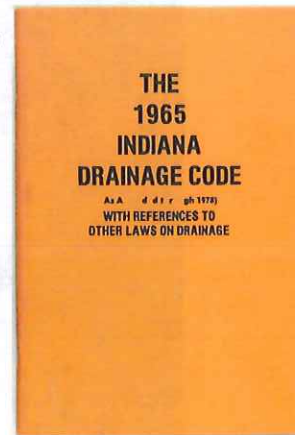
- Vanderburgh County does not have a general stream maintenance fund
- Indiana Department of Natural Resources does not have a general maintenance fund

Pigeon Creek in Vanderburgh County

- Is Navigable for first 5.9 miles, so argument could be made that it is the responsibility of the State to maintain this portion, but not the remaining portion
- Pigeon Creek is jurisdictional through the entire county

Drainage History (Cont)

- 1934-1944-Surveyors Record Book-no record of any activity for Pigeon Creek
- 1957 Book of Allotments and Cleaning-again no record of any allotments or work on Pigeon Creek
- 1965 Drainage Act-repealed all previous acts and combined into the Drainage Law (with some revisions) that we have today



Pigeon Creek in Vanderburgh County

- Pigeon Creek IS NOT a regulated drain
 - There is no record or evidence that the Creek was ever regulated in Vanderburgh County
 - There is no assessment on the thousands of properties that drain into Pigeon Creek
 - The County HAS NO RIGHT OF ENTRY along the banks of Pigeon Creek to perform maintenance (exception would be along right of way of county bridges that cross the creek)

Pigeon Creek in Vanderburgh County

- Pigeon Creek is jurisdictional through the entire county
 - Any work that would fall under an activity requiring permitting would fall under the jurisdiction of the USACE
 - DNR permitting may also be required pending action
 - IDEM/EPA requirements might also be required
 - Pending action to be taken, other agencies such as US Fish & Wildlife may also be involved

What can be done under current law?

- Obstruction Petition
- Create Regulated Drain
- Joint Drainage Board
- Voluntary Removal (grants, etc)

Obstruction Petition

- Petition must be filed. Petitioner must identify obstruction, property owner and mail certified letter to owner specifying obstruction
- Board appoints Surveyor to investigate
- If obstruction is found and found to be intentional than Board orders obstruction removed at landowners expense
- If obstruction is found but is unintentional than Board determines who will pay for removal

Create Regulated Drain

- Petition Board to make Pigeon Creek a regulated drain
- Petitioner is required to send Certified Mail to EVERYONE whose property drains into Pigeon Creek-this in not only those adjacent to the creek but to Evansville urban residents whose water flows to storm sewers that empty to Pigeon Creek

Create Joint Drainage Board

- Already a Board in place, though members no longer in office
 - Vanderburgh County-Catherine Fanello, Richard Murdock
 - Warrick County-Don Williams, Jack Pike
 - Gibson County-Richard Paul
 - Ex Officio Member-Karan Hargrave-Barnhill (Warrick County Surveyor)

Joint Drainage Board

- The Board when it met had some grant funds
- Issue in creating/reactivating old board-funding?

Voluntary Removal (grants, etc)

- In the past there have been various ways that logjams have been removed. This includes WPA in the Depression, Evansville and/or Vanderburgh County allocating funds, Volunteers, Grants from agencies

Question

- What is the problem with Pigeon Creek
 - Logjams
 - Capacity of the stream
 - Loss of flood plain
 - Increased Development
 - New major roads and construction of associated bridges
 - Others?

Answers

- What is the problem with Pigeon Creek
 - Logjams
 - Obtaining funding/grants from outside sources
 - Short term solution
 - Why are logjams occurring
 - Source of material
 - How will this be addressed in the future?

Answers

- What is the problem with Pigeon Creek
 - Capacity of the stream
 - Loss of flood plain
 - Increased Development
 - New major roads and construction of associated bridges

Indiana Natural Resources Commission

Navigable Waterways Roster

- [I. Navigability](#)
- [II. Establishing a Roster](#)
- [III. Roster by Waterway](#)
- [IV. Roster by County](#)

Information Bulletin #3 (Third Amendment)

SUBJECT: Roster of Indiana Waterways Declared Navigable or Nonnavigable

HISTORY: The original bulletin was published at 15 IR 2385 (July 1, 1992). The Natural Resources Commission in March 1997 approved a first revision (published at 20 IR 2920) that superseded the original bulletin. The second revision made technical amendments correcting code citations and an Internet address ([20061011-IR-312060440NRA](#)). This third amendment adds sections of the Tippecanoe River as navigable in White County, Starke County, and Pulaski County, and corrects an Internet Address.

I. NAVIGABILITY

Property rights relative to Indiana waterways often are determined by whether the waterway is "navigable." Both common law and statutory law make distinctions founded upon whether a river, stream, embayment, or lake is navigable.

A landmark decision in Indiana with respect to determining and applying navigability is *State v. Kivett*, 228 Ind. 629, 95 N.E.2d 148 (1950). The Indiana Supreme Court stated that the test for determining navigability is whether a waterway:

was available and susceptible for navigation according to the general rules of river transportation at the time [1816] Indiana was admitted to the Union. It does not depend on whether it is now navigable....The true test seems to be the capacity of the stream, rather than the manner or extent of use. And the mere fact that the presence of sandbars or driftwood or stone, or other objects, which at times render the stream unfit for transportation, does not destroy its actual capacity and susceptibility for that use.

A modified standard for determining navigability applies to a body of water that is artificial. The test for a man-made reservoir, or a similar waterway that did not exist in 1816, is whether it is navigable in fact. *Reed v. United States*, 604 F. Supp. 1253 (1984).

The court observed in *Kivett* that "whether the waters within the State under which the lands lie are navigable or non-navigable, is a federal" question and is "determined according to the law and usage recognized and applied in the federal courts, even though" the waterway may not be "capable of use for navigation in interstate or foreign commerce." Federal decisions applied to particular issues of navigability are useful precedents, regardless of whether the decisions originated in Indiana or another state.

The primary issue in *Kivett* was ownership of the riverbed from which the defendant was removing materials. If the waterway was navigable on the date of statehood, title to the bed of the river passed to the state of Indiana and could not ordinarily be conveyed incident to the adjoining riparian property. Also, once a waterway is found to be navigable it remains so, even if the waterway is no longer used for purposes of commercial navigation. *United States v. United States Steel Corporation*, 482 F.2d 439 (7th Cir. 1973).

In the absence of a contrary state boundary, the appropriate line of demarcation for a navigable waterway is the ordinary high watermark. The Indiana Water Resource, Governor's Water Resource Study Commission, State of Indiana (Indiana Department of Natural Resources, 1980), page 107. The Natural Resources Commission has also adopted this standard by rule. 312 IAC 6-1. If not navigable, title to the bed of the river passes to the adjacent property owner or owners.

Ownership is not the only issue determined by whether a waterway is navigable. Public recreational and commercial usage of the surface of a river or stream often depends upon whether the water is navigable. Other legal foundations may, however, authorize public usage. A prescriptive easement may exist. A waterway may be a "public freshwater lake" subject to IC 14-26-2 and 312 IAC 11-1 through 312 IAC 11-5. Pursuant to IC 14-29-8, the Natural Resources Commission may, by rule, declare a waterway to be a "recreational stream."

State legislation also establishes regulatory functions that rest upon a determination of navigability. For example, a permit is typically required from the Indiana Department of Natural Resources before a person can

- place, fill, or erect a permanent structure in;
- remove water from; or
- remove material from

a navigable waterway. IC 14-29-1-8 and 312 IAC 6.

Other notable regulatory standards applicable to navigable waters include IC 14-18-6 (Lake Michigan fills), IC 14-29-4-5 (dedication of channels into navigable waters), IC 14-19-1-1 (general charge of Indiana navigable waters placed in DNR), and IC 14-29-3 (removal of sand and gravel from the beds of navigable waters).