



**MID-STATES
CORRIDOR**

APPENDIX MM – WILD AND SCENIC RIVERS

Mid-States Corridor Tier 1 Environmental Impact Statement

Prepared for
Indiana Department of Transportation
Mid-States Regional Development Authority

MARCH 23, 2021

Prepared by
Mid-States Corridor Project Consultant





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1. NAVIGABLE WATERWAYS IN INDIANA

The following memo discusses the significance of navigable and non-navigable waterways in Indiana. It supports the discussion in **Section 3.11 – Wild and Scenic Rivers**



MEMO

To: Mid-States Corridor Project File
From: Leigh Montano, VS Engineering
Cc: Alan Ball, VS Engineering; Michael Grovak, Lochmueller Group
Date: March 23, 2021
Subject: Navigable and Non-Navigable Waterways in Indiana

The definition of “navigability” differs among state and federal agencies.

The State of Indiana determines whether a waterway is navigable by whether the river, “was available and susceptible for navigation according to the general rules of river transportation at the time [1816] that 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.” This definition is found in *State v. Kivett*, 228 IND 629, 95 N.E.2d 148 (1950). Navigability regarding artificial and man-made waterways that did not exist in 1816 is determined by whether or not the man-made waterway is used or capable or susceptible of being used as an interstate highway. This was determined in *Finneseth v. Carter*, 712 F.2d 1041, 1044 (6th Cir. 1983).

For federal designations of navigability, the US Coast Guard determines navigable waters as follows:

33 CFR § 2.36 Navigable waters of the United States, navigable waters, and territorial waters.

- a) Except as provided in paragraph (b) of this section, navigable waters of the United States, navigable waters, and territorial waters mean, except where Congress has designated them not to be navigable waters of the United States:
- 1) Territorial seas of the United States;
 - 2) Internal waters of the United States that are subject to tidal influence; and
 - 3) Internal waters of the United States not subject to tidal influence that:
 - i. Are or have been used, or are or have been susceptible for use, by themselves or in connection with other waters, as highways for substantial interstate or foreign commerce, notwithstanding natural or man-made obstructions that require portage, or
 - ii. A governmental or non-governmental body, having expertise in waterway improvement, determines to be capable of improvement at a reasonable cost (a favorable balance between cost and need) to provide, by themselves or in connection with other waters, as highways for substantial interstate or foreign commerce.

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- b) Navigable waters of the United States and navigable waters, as used in sections 311 and 312 of the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1321 and 1322, mean:
- 1) Navigable waters of the United States as defined in paragraph (a) of this section and all waters within the United States tributary thereto; and
 - 2) Other waters over which the Federal Government may exercise Constitutional authority.

This designation is separate from the State of Indiana's designation of "navigable waters." This federal designation is regulated by Section 10 of the Rivers and Harbors Act of 1899 and the General Bridge Act of 1946. Coordination with US Coast Guard will occur regarding its permitting oversight of federally-designated navigable waters. This is part of the Section 9 and Section 10 permitting process, which will occur after Tier 2 NEPA studies for the Mid-States Corridor.