

# Un-muddy the Regulatory Waters

Overview of Local, State and Federal Regulation of  
Indiana waterways



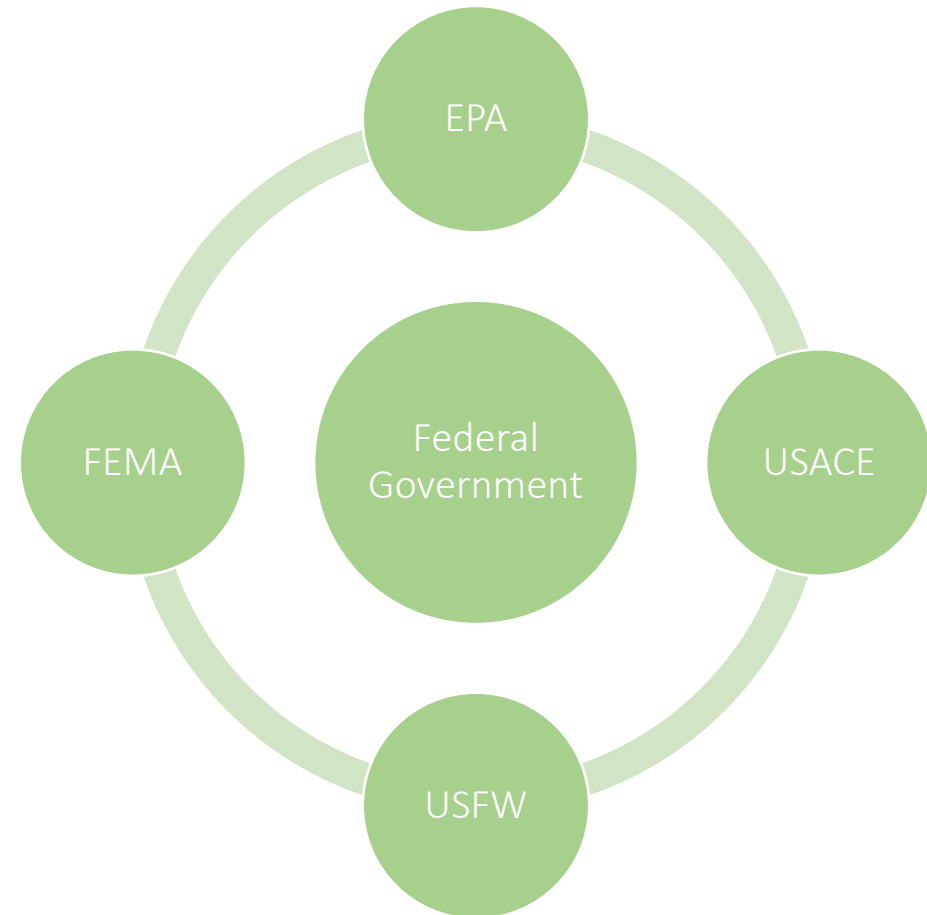
David Bausman, General Counsel

# Overview

- Types of Waterways
- Jurisdictional Landscape of DNR
- Other State Jurisdictions
- Case Study –Wells and Adams Counties and the Wabash River
- Best Practices

# Federal Jurisdictional Landscape

- United States Environmental Protection Agency
  - Clean Water Act
- United States Army Corps of Engineers
  - Navigability
  - Clean Water Act
  - Flood Control
- Federal Emergency Management Agency
  - Flood Control and Protection
- United States Fish and Wildlife
  - Endangered Species Act

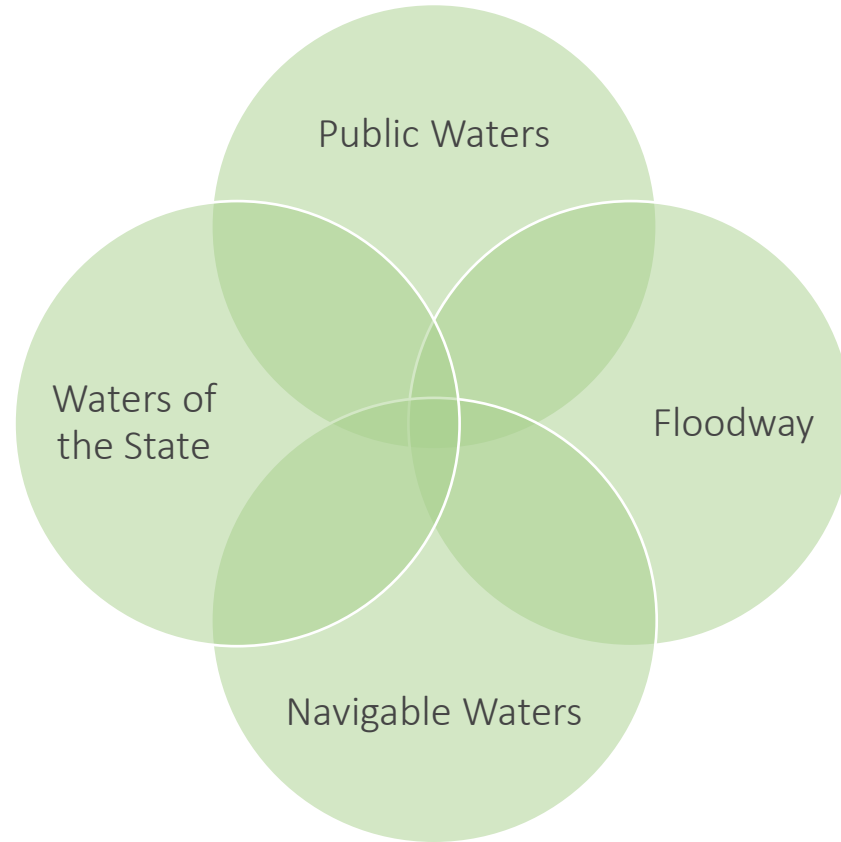


# State Jurisdictional Landscape

- DNR (Title 14) – Quantity
  - Water resources
  - Fish, wildlife, and botanical resources
  - Recreational use
  - Public safety
  - Public trust
- IDEM (Title 13) – Quality
  - Water quality
    - Wastewater
    - Stormwater
    - Pollution
  - Watershed Protection
  - Wetlands



# Types of Waterways under Title 14



## Public Waters

- IC 14-8-2-226
- “Public Waters” means “every lake, river, stream, canal, ditch, and body of water that is:
  1. Subject to the jurisdiction of the state; or
  2. Owned or controlled by a public utility.
- Application
  - Regulation of Water Recreation (IC 14-15)
    - Personal Flotation Devices (#1 Violation)
    - Lighting Requirements
    - Speed Restrictions



## Waters of the State

- IC 14-8-2-307
- “Waters of the State” means “a lake, reservoir, marsh, waterway, or other water:
  1. Under public:
    - A. Ownership;
    - B. Jurisdiction; or
    - C. Lease; or
  2. That has been used by the public with acquiescence of any or all riparian owners.
- Application
  - Fish and Wildlife (IC 14-22)
    - Hunting and Fishing regulations
    - <https://www.eregulations.com/indiana/fishing>



# Navigable Waterways

- No statutory definition in IC 14-8
- *State v. Kivett*, 228 Ind. 629, 95 N.E.2d 148 (1950)
- Indiana Supreme Court stated 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.”*
- Application
  - State ownership and therefore public access
  - Navigable Waterways Article (IC 14-29-1 )





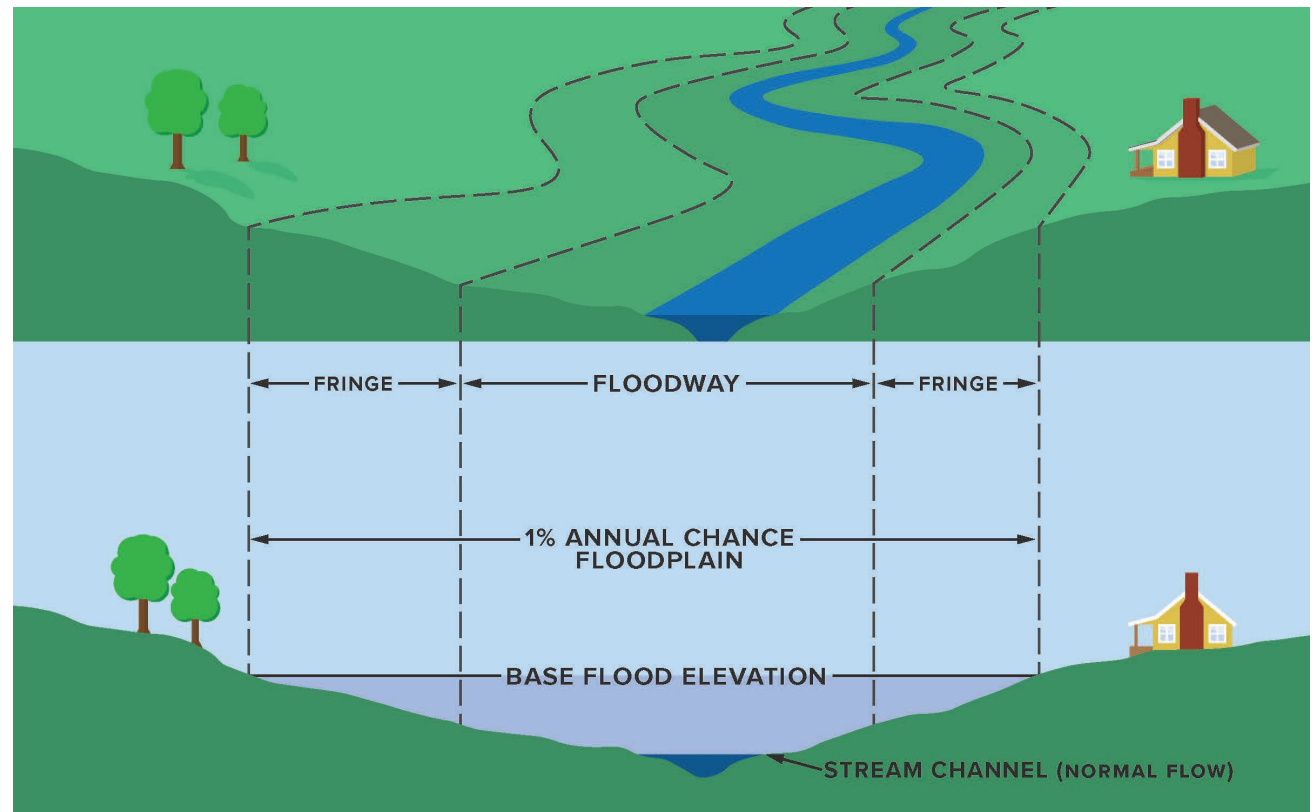
# Navigable Waterways

- Ways to Declare Navigability
  - Court cases
  - Indiana Statute
    - County Commissioners (IC 14-29-1-1)
    - Specific Identification
      - Kankakee River (IC-14-29-2-1)
  - Act of Congress
- Unless declared as navigable, a waterway is non-navigable.
- Roster of Navigable Waterways
  - Information Bulletin #3



# Floodway

- IC 14-8-2-102
- “Floodway” means:
  1. The channel of a river or stream; and
  2. The parts of the flood plain adjoining the channel that are reasonably required to efficiently carry and discharge the flood water or flood flow of a river or stream.
- Application
  - DNR’s jurisdiction under the Flood Control Act (IC 14-28).
  - DNR’s authority is limited to sites with upstream drainage areas that are greater than 1 square mile.



# DNR Jurisdiction



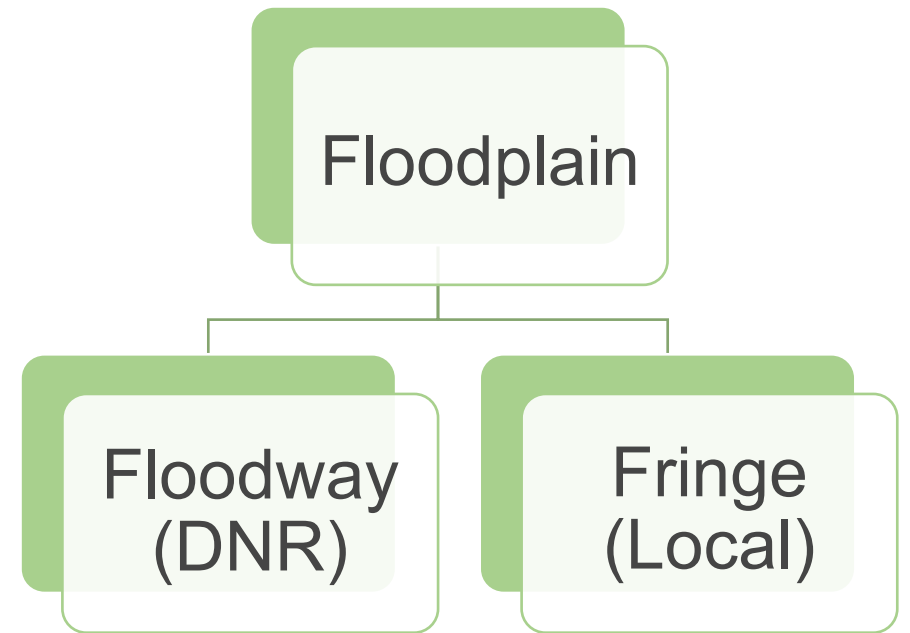
# Division of Water

- Dams (IC 14-27)
  - structures in, on, or along the rivers, streams, and lakes of Indiana
  - Regulation of dams (IC 14-27-7.5)
    - High, significant, and low hazard
  - Low head dams (IC 14-27-7.3)
  - Federal jurisdiction = DHS and USACE; local = emergency response
- Navigable waterways (IC 14-29)
  - Development: think seawalls + piers
















# Division of Water

- Flood Control Act (IC 14-28 + 312 IAC 10)
  - Prohibits residence or abode in floodway and
  - Structure, obstruction, deposit, or excavation cannot
    - adversely effect or unduly restrict the efficiency or capacity
    - result in unreasonable hazard to life or property
    - result in unreasonable detriment to fish, wildlife, or botanical resources
- Federal = FEMA + NFIP
- Local = floodplain ordinances + administrator



# Floodplain map

-  FEMA Zone AE Floodway; FEMA Administrative Floodway
-  DNR Detailed Floodway
-  DNR Approximate Floodway
-  FEMA Zone A
-  FEMA Zone AE
-  FEMA Coastal Floodplain
-  DNR Detailed Fringe
-  DNR Approximate Fringe
-  Additional Floodplain Area; DNR .2 Percent Flood Hazard
-  FEMA Protected by Levee
-  FEMA Floodplain - Ponding (Depth)
-  FEMA Floodplain - Sheet Flow (Depth)
-  Not Mapped



# Additional Jurisdictions Created by Statute

## Conservancy Districts (IC 14-33)

- Purpose – IC 14-33-1-1
- Formation Process – IC 14-33-2
- Plan – IC 14-33-6
- Board Powers – IC 14-33-6-13

## River Basin Commissions (IC 14-30)

Maumee River Basin Commission

St. Joseph River Basin Commission

Upper Wabash River Basin Commission

- Purpose
  - Planning and management
- Powers
  - Non-regulatory

# Additional Jurisdictions Created by Statute

## Kankakee River Basin and Yellow River Basin Development Commission

### (IC 14-13)

Maumee River Basin Commission  
St. Joseph River Basin Commission  
Upper Wabash River Basin Commission

- Purpose
  - Planning and management of flood control and drainage for the Kankakee and Yellow Rivers
- Powers
  - Exclusive Authority – IC 14-13-9-8

## Watershed Development Commissions (IC 14-30.5)

- Framework created in 2023.
  - No commission has been created yet; however, DNR has received an application for one.
- Purpose – IC 30.5-3-1
- Formation Process – IC 14-30.5-2



# Why Definitions/Classifications Matter!

- Navigability and Floodway
  - Project cannot impede navigability
  - Certain permit exemptions only apply to nonnavigable waterways
- Floodway v. Fringe
  - Local vs. state control
- Waters of the State v. Waters of the United States
  - Fishing license v. Clean Water Act

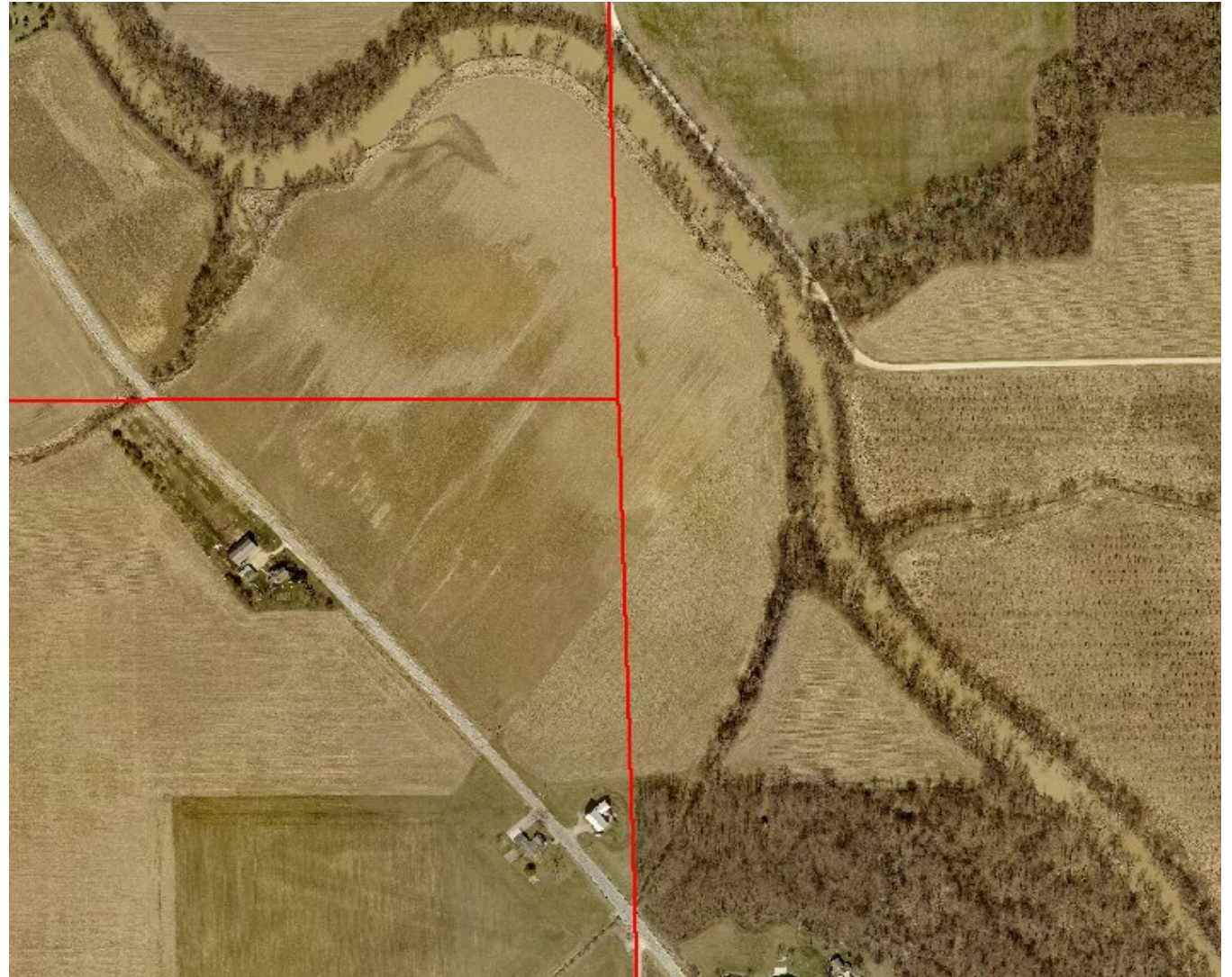


# Wells and Adams Counties – the Wabash River



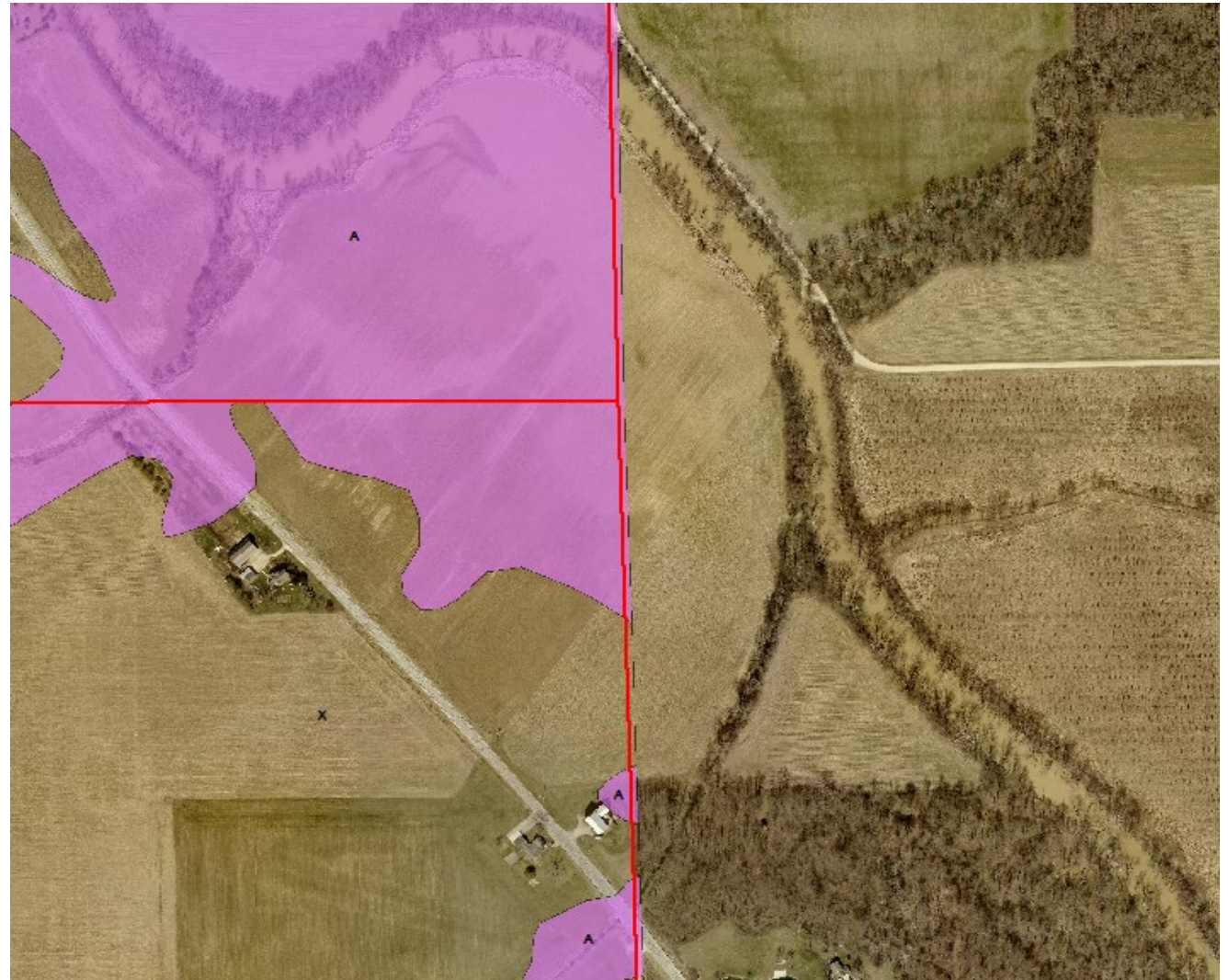
## Wells and Adams Counties – the Wabash River

- **Red** horizontal line is the county line.
- Wabash River navigability terminates at the Wells and Adams county line.



## Wells and Adams Counties – the Wabash River

- **Pink** overlay is the mapped floodplain for the area.



## Wells and Adams Counties – the Wabash River

- Solid pink is the flood fringe – local jurisdiction
- Striped pink is the floodway – state jurisdiction



# Best Practices to Navigate these Muddy Waters

# Know Your Location

- Location of the project could determine whether it is a local, state, federal jurisdiction.
- Whether the waterway is navigable or nonnavigable.
- Tributary v. main channel of a river

# Provide Project Details

- The more details the better to help understand what you are trying to achieve.
- Right answer v. the answer you want.
- More information can provide opportunities for staff to figure out if permit exemptions apply.



# Ask (the right) Questions

- Use the right definition
- Don't just contact one level of government.
  - Local
  - State
  - Federal

# Use the Indiana Waterways Portal

- [www.in.gov/waterways](http://www.in.gov/waterways)
- Coordination between DNR and IDEM
- Valid email address required
- Decisions will take up to 14 days