CONSERVATION DEPARTMENT: Whether men who dig mussels in a canal owned by Indianapolis Water Company are required to procure a license for that purpose.

June 10, 1933.

Mr. Kenneth M. Kunkel,
Superintendent, Division of
Fish and Game,
Department of Conservation,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter of June 9, 1933, in which you ask an official opinion from this office on the question of whether men who dig mussels in a canal "owned by the Indianapolis Water Company" are required to procure a license for that purpose. Your letter contains the statement that this canal derives its water from White River, and is situated between Broad Ripple and Indianapolis.

Section 11307.1 Burns Revised Statutes, Supplement 1929, provides in part as follows:

"It shall be unlawful for any person to take or attempt to take mussels or mussel shells for commercial purposes from the waters of this state without first procuring a license therefor. * * *" (Acts 1927, p. 737.) (Our italics.)

The question presented for consideration, then, is whether or not the canal "owned" by the Indianapolis Water Company is a part of "the waters of this state" within the meaning of the statute above referred to.

In the case of State v. Lowder, 198 Ind. 234, the Supreme Court of Indiana, in construing a statute prohibiting the taking of fish "in the waters of this state" by means of certain devices and substances, held that if at times of high water, a pond was "so connected with public waters as to permit the emigration of fish to and from it, the owner of the land on which the pond was situated did not have such an exclusive interest in the fish therein as to be immune from prosecution for taking fish therefrom with a seine."

The court also construed the term "private pond" as used in the act of 1905 (pp. 733, 735) and as distinguished from the expression "waters of this state," as meaning "a body of
water wholly upon the lands of a single owner or of a single group of joint owners or tenants in common, *which did not have such connection with any public waters that fish could pass from one to the other.*" (Our italics.)

It seems clear to the writer that the court meant the converse of this rule to be equally true: That all waters within the state are "waters of this state" except such waters as come within the definition of "a body of water wholly upon the lands of a single owner, or of a single group of joint owners or tenants in common" which does "not have such connection with any public waters that fish could pass from one to the other." And the rule would apply with equal force to the act under consideration as to the act then before the court where the same expression, "waters of this state," was to be construed.

The fact that the act interpreted by the court in the case cited related to the regulation by the state of the taking of fish from such waters, whereas the act now under consideration relates to mussels, or a species of mollusk, is immaterial. The right of the state to regulate the taking of all game *forae naturae*, or in the natural or wild state, within its borders, on land, in water, or in air is well settled. This question is thoroughly and ably discussed in Smith v. State, 155 Ind. 611, and in Gerr v. Connecticut, 161 U. S. 519. The authorities in support of this rule are numerous.

In reply to your question, I would say that under the law, any and all persons gathering mussels in the canal mentioned, for commercial purposes, are required to procure a license for that purpose, if the waters of such canal have such connection with the waters of White river that the mussels or their spawn can pass from one to the other. The fact that mussels are found in such canal would seem to indicate their ability to pass from the one body of water to the other.