MissouriCorn GrowersAssociation
PLANTING OPPORTUNITY

MISSOURI CORN GROWERS ASSOCIATION
3118 Emerald Lane • Jefferson City, MO 65109

November 14, 2014

Water Docket
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: Docket ID No. EPA-HQ-OW-2011-0880: Comments on the proposed rule to define "Waters of the United States" under the Clean Water Act

Dear Sir or Madam:

The Missouri Corn Growers Association (MCGA) submits the following comments on the above referenced "Waters of the United States" (WOTUS) proposed rule, a rule jointly proposed by the U.S. Army Corps of Engineers (USACE) and U.S. Environmental Protection Agency (EPA). In addition, we support the comments submitted by National Corn Growers Association. For over 30 years, MCGA has worked alongside generations of corn farmers to achieve monumental milestones and advances in Missouri's agriculture industry. As grassroots organizations, MCGA invests considerable time and resources in supporting and promoting advances in corn production, grower profitability and environmental stewardship.

Missouri corn farmers care deeply about our natural resources. Preserving their use and function for future generations is a deeply valued principle. Missouri corn growers have made tremendous strides in increasing production and improving environmental stewardship on farmland. Over the last several decades, corn growers have made substantial investments to increase the productive power of Missouri farmland including: installing and maintaining critical infrastructure that manages stormwater and drainage in fields; installing conservation practices to reduce in-field soil erosion and nutrient runoff; as well as striving to reduce stream and river bank erosion. All of which play a critical role in growing a healthy and productive crop.

Corn grower's livelihood relies on their ability to freely work and maintain their land. This means they must be able to do so with a high level of regulatory clarity and certainty and without overly burdensome interruption and cost from state and federal regulations. The WOTUS rule sets out to better define a term and principle that is foundational to nearly every federal and state regulatory program that involves water. Achieving greater clarity in the meaning of this regulatory term will benefit both regulators and landowners alike. However, we stand firm that it must do so without expanding the reach and jurisdiction beyond what is practicable and legally allowable under the Federal Clean Water Act.

As proposed, we believe Missouri corn growers will be directly and profoundly affected by this rulemaking. If features on their farms are made jurisdictional or could be considered possibly jurisdictional, farmers could be subject to new and unprecedented regulatory requirements or obligations under the CWA's Section 404 (the dredge and fill permitting program) and Section 402 (the

National Pollution Discharge Elimination System permitting program). This could include a significant increase in exposure to legal action by citizen activists involving both these programs as well as a host of uncertainties and liabilities that come with such consequences. All of these will have direct financial, practical and serious consequences for farmers. For these reasons and the reasons detailed below, we offer these comments on the proposal and ask they be given careful, serious and complete consideration.

General Concern #1: The public record and the public comment process has been a moving target resulting in further loss of public trust.

Connectivity Report

The proposed rule references EPA's draft scientific report entitled "*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence"* (ie Connectivity Report). EPA has stated the Connectivity Report, when finalized, will provide the scientific basis and support for the WOTUS rule. To date, the Connectivity Report is a draft report which has been undergoing an EPA Science Advisory Board (SAB) review. It is clear the Connectivity Report will not be completed and made final until after the WOTUS rule comment period has closed. Thus, the public will not be able to consider the final connectivity report in its WOTUS rule comments. We feel it is reasonable to expect the underlining science be final and settled before a proposed rule, particularly one of this magnitude, be developed and presented to the public for comment. This situation unfairly limits the public's ability to provide meaningful comments.

Guidance Documents

Throughout the public review period, the EPA has extensively relied upon its own hastily developed Q&A's, fact sheets and talking points to explain the intent behind the rule. This sort of information should have been prepared in advance of the start of the public review period for the proposed rule. Instead, a piecemeal approach by EPA has created an ever moving target for the public to review, understand and provide meaningful commentary. Furthermore, these types of informal documents do not constitute regulation, cannot be enforced, will not stand the test of time and are the very sort of things that drove and justified the need for the rule in the first place.

USACE Absent from Process

The proposed rule was a joint effort of the EPA and the U.S. Army Corp of Engineers (USACE). It is important to note USACE staff does the vast majority jurisdictional determinations under this rule. USACE is an integral part of this process. Of the meetings and outreach events conducted by the EPA, we are unaware of any event in which the USACE was present and engaged. They were certainly not present at any event involving Missouri agricultural stakeholders. It was often stated by the EPA that the Corps was invited, but clearly little attempt was made at bringing them to the table. USACE's absence is both puzzling and disappointing, especially considering most interactions between property owners and regulators will be with the USACE staff as they implement the federal 404 dredge and fill program. The USACE must play a more active and engaged role in the public participation process.

While the public and regulators may have honest disagreements on policy and even on science, the EPA must at all times provide the public with the information necessary to make meaningful and relevant comments on a proposed rule. As it stands, this basic public principle has not been respected or followed for the WOTUS rule and does not build public trust with the agencies or in the process.

General Concern #2: The proposed rule greatly expands the jurisdiction and reach of the federal government.

Rule Creates a Misleading WOTUS Term

The proposed rule would expand the authority of EPA to regulate thousands of new features through the use of broad, ambiguous language, making it a seemingly boundless expansion of authority. In fact, the proposed expanded scope of the term "Waters of the US" has left the nature of the term itself very misleading to the lay public. Under this rule, a jurisdictional WOTUS no longer must contain water at all. The EPA now proposes to essentially define WOTUS as any ecological landscape feature that could influence, impact or affect the nature or any characteristic of a water or its accompanying landscape. WOTUS is no longer simply a "water," but instead now includes what the public would consider land features and what landowners would consider their productive private property and areas that are actively farmed and utilized.

Significant Nexus Test

According to EPA officials, the primary objective of both the proposed rule and the draft connectivity report is to bring clarity to the Clean Water Act's jurisdiction of regulated waters. This is partly in response to Supreme Court rulings that addressed when such waters are jurisdictional. Specifically, in the Supreme Court's 2006 Rapanos v. United States ruling, the justices split over what test to use for determining jurisdiction. Justice Antonin Scalia ruled in the court's plurality decision only "relatively permanent waters" that hold a "continuous surface connection" to traditionally navigable water can be considered jurisdictional. While Justice Anthony Kennedy ruled in a concurring opinion that waters that share a "significant nexus" to navigable waters can be regulated under the law.

The proposed rule adopts the Kennedy test, defining "significant nexus" as a connection that "significantly affects the chemical, physical, or biological integrity" of a jurisdictional water body. In using this standard, the proposed rule asserts blanket default jurisdiction over virtually all tributaries as well as wetlands and waters located in floodplains and riparian areas.

Congress and the Supreme Court intended there to be a limit on the federal reach of waters subject to the Federal Clean Water Act. However, the EPA has chosen not to set limits on its reach nor define or quantify what a "significant" connection or nexus is thereby declaring all connected waters, by default, to be jurisdictional. This rationale does not follow the Supreme Court decision and we request EPA remove the "nexus" provision of the rule. With the inclusion of the nexus test in the proposed rule, EPA not only has expanded jurisdiction, but has done so relying only on the minority opinion of the Supreme Court in the Rapanos case. We believe the proposed WOTUS rule, through its use of the nexus test and the "Ordinary High Water Mark" criteria, will extend jurisdiction to waters well beyond what was contemplated under Justice Scalia's plurality opinion in Rapanos.

The fact is the proposed rule is written in such a way that it gives the EPA broad and unbridled authority not just over dry creeks, ditches, and streams - but to any wet or potentially wet area adjacent or even in the general vicinity of a stream, particularly in our growers prime river bottom farmland. This stands in remarkable contrast to where the law was originally written to protect navigable interstate waterways from pollution.

EPA claims the proposed rule will not expand its current jurisdiction. In fact, they have publicly stated many times the rule will cover "fewer" waters, not more. Contrary to EPA's assertion that no new waters will be included as a result of this proposed rule, isolated wetlands, farm ponds, and ditches

among other features have never been, by default, jurisdictional waters. Most farmers in Missouri would be stunned to learn, not to mention dispute, that EPA has supposedly "always" claimed federal jurisdiction over many, if not most, of our remote intermittent and dry streams, creeks and water features.

Tributary and Adjacency Definition

The definition of "tributary" under the proposed rule is overly broad. The rule has declared anything with a "bed, bank and high water mark" that contribute flows (presumably at any point in time) either directly or through another water to be jurisdictional water. This is without any regard to its actual impact downstream. But the tributary definition does not stop there. Instead, it goes on to state wetlands, lakes, and ponds are also tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water downstream. In Missouri, it is safe to say all water not absorbed into the ground will flow downhill and contribute flow at some point in time downstream and therefore will be considered connected.

The definition of "tributary" creates another boundless regulated category that has the potential to bring ponds, isolated wetlands, and dry ditches into federal jurisdiction. This definition of tributary will encompass an enormous number of isolated and predominately dry features that, for no other reason that practicability, should be far beyond EPA's authority. Appendix A provides images of several features that are common in fields across Missouri.

The proposed rule's definition of "adjacent" and "neighboring" has made a new category of "adjacent waters" perhaps even more boundless than the "tributary" definition. We believe the proposed rule's "adjacent waters" concept will include every inch of land in a floodplain and riparian area - no matter how isolated or whether it has any connection to downstream water. We believe this portion of the proposed rule will impact every single river bottom farming operation in the state. This farmland is our most productive cropland in the state. The enclosed Appendix B illustrates the vast amount of cropland that could be captured within the adjacent waters and floodplain terms. The GIS map shows the extent of the 1993 flood (highlighted in light blue-green) within Chariton County, Missouri.

General Concern #3: The proposed rule does not provide farmers any clarity or certainty.

EPA has routinely claimed their primary goal with this rule is to bring clarity to the regulatory process and reduce uncertainty on the farm. While this is a shared goal we support, this rule is far from hitting that mark. The proposed rule has delivered far more questions than answers creating uncertainties and real world questions on whether literally millions of features on farms are now under federal jurisdiction. In the rule, the EPA has left many important terms undefined as well as used ambiguous and subjective terminology and phrases. In addition, the rule overreaches by narrowing the intent of the exemptions to the point we are unsure how they would ever apply in a meaningful way, rendering them useless in the real world. It is our position the exemptions should apply broadly to agriculture, without exceptions or strings attached.

Lack of clarity and greater uncertainty exposes farmers to greater legal liability

Use of subjective terminology that requires interpretation through agency guidance or other means is scattered throughout the rule and must be addressed and made clear. Proving this point, EPA has themselves extensively relied on its own Q&A's, fact sheets, the rule Preamble and agency talking points to explain the intent behind the rule - much of which constitutes EPA interpretation. These types of informal documents do not constitute regulation, cannot be enforced, will not stand the test of time and

therefore cannot be used to justify understanding about a rule. This situation has painted an ever-frustrating moving target for farmers and other stakeholders in their review and has hampered their ability to comment. More importantly, this situation will have the same negative effect after the rule is finalized as farmers are left blindly navigating and making assumptions on its complex meaning. This results in farmers taking what would be otherwise avoidable risks that could jeopardize their operation and ultimately agriculture's public trust. The fact is this rule represents a definition and principles that are, at its very core, foundational to nearly every federal and state regulatory program involved in water - both now and into the foreseeable future. To that end, the actual text and phrases within the rule should be clear, concise and self-explanatory to the public.

The rule is poorly structured and organized

In general, the rule appears poorly structured and organized making it difficult to follow, interpret and understand. It overuses referenced words backwards and forward in the flow with some appearing circular in nature. The scope and extent of individual line items overlap as it relates to jurisdiction. Aside from being a confusing read, it also gives the impression the EPA is purposefully concealing hidden "backdoor" avenues and meanings only to be understood and fully known to the regulators. For example, using 40 CFR 230.3 as reference: line (s)(6) uses the words 'wetland' and 'adjacent' which are terms defined later in the rule, but also references prior lines (s)(1)-(s)(5) which itself contains several defined terms as well as referencing various previous lines in (s)(1)-(s)(4). Terms are defined in section (u) and they themselves contain their own references to other defined terms which also contain their own references. Even more confusing is several terms include references back to line (s)(1)-(s)(5), which is where we started this confusing journey at line (s)(6).

Undefined and subjective terms and phrases

The rule contains many undefined and subjective terms and phrases. The following is a partial list of examples of some of the areas that are poorly defined in the rule. The list below references a section of 40 CFR 230.3.

'*Dry land*' - undefined and used throughout rule.
'*Upland*' - undefined and used in significant context throughout the rule.
Line (s)(6) – the phrase '*all waters*' is vague and does not add any real meaning.
Line (t)(1) – the phrase '*designed to meet the requirements of the CWA'* does not specific if this includes voluntary measures or other systems that have a water treatment or control purpose but are not statutorily or administratively required. Does the phrase "waste treatment systems" include stormwater control, agricultural conservation practices, water treatment areas, constructed wetlands, as well as other voluntary measures?
Line (t)(2) – "*Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.*" This is an overly confusing sentence. Is this the equivalent to saying "EPA retains final authority for jurisdiction determinations for CWA purposes"?
Line (t)(3) – includes the phrase, '*excavated wholly in uplands*'. Should this instead say "excavated and located wholly in uplands"?
Line (t)(3) – the phrase uses the word "excavated," which presumably implies the ditch was manmade or altered. However, natural processes also "excavate" ditches by the act of erosion and other natural dynamics. Does EPA intend this to be manmade ditches only?
Line (t)(4) – included is the phrase "*do not contribute flow.*" The intent of this should be better defined and explained.
Line (t)(5)(i-iii) – included is the phrase "*Artificial.*" Is this term equivalent to "manmade"?

Line (t)(5)(iv) – included is the phrase "*Small ornamental waters….for primarily aesthetic reasons.*" The words 'small' and 'primarily' are subjective terms and 'ornamental" is an undefined term.
Line (t)(5)(vi) – its unclear as to what this provision will cover and must be clarified. Consider the following change as underlined. "Groundwater, including subsurface water and groundwater drained through and contained within subsurface tiles and drainage systems;
Line (t)(5)(vii) – The word "*gullies*" is used, however isn't this the same as a ditch? The rule needs to better differentiate the meaning between a gully and a ditch. Also explain what is meant by "*non-wetland swales.*"
Line (u)(2) – included is the phrase "…*within the riparian area or floodplain of a water… or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.*" The word "floodplain" should be removed. If left in, it will catch every inch of land in the floodplain. The phrase "*shallow subsurface hydrologic connection*" is used but it is unclear how this is different than groundwater and what is '*shallow'*? What is meant by '*confined'*?
Line (u)(4) – The definition of "*floodplain*" is too broad and leaves farmers and the public guessing the limits to its boundary.
Line (u)(4) – The term "*present climatic conditions.*" Why is this important and significant? Also the phrase "*moderate to high water flows*" is subjective and must be interpreted.
Line (u)(6) – included is the phrase "…*and that under normal circumstances do support.*" What are normal circumstances? The phrase "*a prevalence of vegetation*" is again a subjective term. How is the public to know what the prevalence is? Is this based on a percentage?

Extremely narrow exemptions
The rule overreaches by narrowing the intent of the exemptions to the point we are unsure how they would ever apply, rendering them useless in the real world. The exemptions should apply broadly, without exceptions or strings attached to them. Below is an example of some areas were the exemption should be clarified and/or broadened.

(t)(1) – Many waste and water treatment and control systems are not designed (or otherwise not constructed) to meet CWA requirements. Thus, the rule overreaches and brings into jurisdiction features constructed for treatment or control purposes but not for a regulatory requirement.
(t)(3) & t(4) – the scope of the exemption for ditches is so narrow its applicability is extremely limited. Frankly it is unclear what the EPA intended this to cover. The rule excludes two types of ditches: (1) those excavated wholly in uplands, drain only uplands and have less than perennial flow and (2) ditches that do not contribute flow to a downstream water. In the uplands, most ditches are not excavated by man, which severely limits its scope. We are unaware of any ditch that will not eventually contribute flow downstream at some point in time. Translating these two exemptions into the specifics of an individual ditch or farm is extremely difficult. This is incredibly confusing terminology.
(t)(5)(ii) - "Artificial lakes, ponds…used exclusively for such purposes as stock watering…" No lake or pond is exclusively used for any one purpose and it is next to impossible to prevent wildlife from purposefully using it. Thus, the rule overreaches by narrowing the exemption with the word 'exclusive' to an extent that it will have no applicability as no feature will ever meet this standard. The exemption should apply broadly, without exception or strings attached, to a number of non-natural purposes including agricultural, wastewater and stormwater control and treatment, ornamental waters, aesthetic purposes, swimming pools, and reflecting pools among many others.

General Concern #4: The proposed rule will impact state regulatory programs and no assessment on this impact was provided.

Impacts to state regulatory programs
The rule will expand jurisdiction of federal waters thus expanding the scope, breadth and extent of state agency water programs. In Missouri, the jurisdictional state waters are defined as "Waters of the State" in Missouri statute and regulation, incudes the federal term "Waters of the US". This rule will vastly expand the scope of the Missouri's "Waters of the State" and undoubtedly trigger an increased public and private cost of complying with state water quality programs - a cost never considered or quantified by EPA. In addition, in 2013, Missouri finalized a quantitative list of water bodies in the state water quality standards that would be subject to Clean Water Act designated uses. We believe this rule will ultimately jeopardize and undermine the painstaking work completed by Missouri stakeholders and the Missouri Department of Natural Resources.

Impacts at the state level do not stop there. It is believed the proposed rule will also impact state water pollution permitting as well as its 401 certification. It also presents the real possibility states will be left picking up the burden and costs of addressing and assessing the water quality in thousands of addition miles of streams, ditches and water bodies to determine whether they are impaired, listing them on the 303d list, and writing TMDLs.

Impacts on the application of pesticide, manure and fertilizer
The rule will bring into jurisdiction nearly every inch of land within a floodplain. Therefore, the rule will obligate farmers, industries and municipalities to obtain NPDES permits for pesticide use on active farmland and other areas as well as prevent (and potentially make unlawful) the land application of wastewater, biosolids and sludge, animal manure to the land. NPDES permits as well as other state-only no-discharge permits prohibit the application of wastewater and manure to "waters of the state." For Missouri, this includes "waters of the US". This fact alone will have enormous and immediate impacts on agriculture as land application of manure is the sole manure management method for animal feeding operations. We are also concerned about how this will impact and restrict the use of commercial fertilizer on river bottom farmland as no one would consider the placement of fertilizer in a jurisdictional Waters of the US as a sound "best management practice". Giving the lack of clarity in the rule, farmers may be forced to conduct jurisdictional determinations on cropland. It is expected most river bottom cropland will be jurisdictional. Therefore, farmers will need permits to legally conduct routine farming operations. Even if EPA "looks the other way," and uses some form of "enforcement discretion" for these circumstances, ultimately farmers are the ones left absorbing all the regulatory uncertainty and risk as well as exposing themselves to greater legal liability. This ambiguity is simply not acceptable to MCGA as it potentially places farmers in legal jeopardy.

General Concern #5: The proposed rule undermines private property rights.

Once a WOTUS, always a WOTUS
The expanded federal jurisdiction negatively impacts and encroaches on landowner property rights and their ability to make rightful and productive use of their land. Under the federal law, once a feature is deemed a WOTUS, it will forever legally be deemed as a WOTUS. Farm ponds, lakes, stormwater structures, BMPs, green infrastructure, constructed wetlands, and other structures that are or could be jurisdictional under WOTUS were all manmade and never designed or assumed by their owners to be legally and forever permanent.

In a 2014 visit to a Missouri farm, EPA officials were quoted as saying a pond on this Missouri farm was currently jurisdictional and would continue to be under the proposed rule. More specifically, EPA was quoted as saying, "unless you're really doing something that's disturbing this in a significant way, or

adding pollutants downstream, you'd never need to connect with EPA about it." What happens when the farmer wants to clean the pond out or remove the pond from the landscape altogether? Will this even be a legal option? Will a 404 permit be required? Will mitigation of the loss of a WOTUS be mandated?

Restricts farmers ability to farm

The most productive and rich farmland in the state is located within the floodplains of the Missouri, Mississippi and our other major rivers. Much of that prime cropland would be left unproductive and useless without the vast network of drainage ditches and infrastructure that drains excess water off and away from crop fields.

All crop fields in the river bottom have some sort of drainage ditch. Small ditches feed into larger branches that feed into larger trunks that exit into a major river, often times through important infrastructure like culverts, flood control gates and levees. If a crop field becomes submerged under water for any amount of time, crops drown. Managing and maintaining ditches so they are clean, properly sized and graded to drain water away effectively is a farmer's top priority every spring. How are farmers expected to stay competitive and productive if they are spending all their time contemplating what is and what isn't a WOTUS on their land and acquiring permits and approvals to conduct routine maintenance of their farming operation?

In Conclusion

The rulemaking as proposed in the EPA's 'Waters of the United States' represents an egregious overstep of the federal government. The poorly written and ambiguous proposal could effectively impact every piece of wet and dry land in the state. This proposal, as it stands, is an unreasonable, unworkable and unjust bureaucratic burden placed on the backs of America's corn farmers. It is an intrusion into the private land activities and private property rights on which our country was founded.

Thank you for considering these comments.

Sincerely,

Kevin L Hurst

Kevin Hurst, President
Missouri Corn Growers Association

Enclosures – Appendix A & B

Appendix A
Photographic Log

Photo #	Comments
1	View of a common Missouri roadside ditch. This ditch is connected to a larger ditch which flows downstream eventually into a named stream and river. Does this ditch meet the exemption in (t)(3)? Is this ditch considered "excavated" and does it drain only uplands?
2	View of a grassed waterway in a field. The waterway flows into a farm pond which will overflow in wet weather. The grass waterway is manmade, but it replaced a natural erosion feature, namely a ditch or gully. It is connected downstream to a named stream. Is this feature exempt under (t)(3) or (t)(5)(vii)?
3	View of a second grassed waterway in a crop field. The same question posed in photo #2 also applies here.
4	View of a small, naturally formed ditch that drains into a pond in the foreground. The pond overflows in wet weather and is connected to a named stream. The ditch is not excavated and it is most certainly connected to a downstream water. Is this feature a WOTUS?

Photo 1 – View of a common Missouri roadside ditch.

Photo 2 – View of a grassed waterway in a field.

Photo 3 – View of a grassed waterway in a field.

P**hoto 4** – View of a small farm field ditch which drains into a pond in the foreground.

Appendix B
Floodplain GIS Map

MCGA believes the proposed rule's "adjacent waters" concept will include every inch of land in a floodplain regardless how isolated a feature is or whether it has any connection to downstream water. Below are two GIS maps illustrating the extent of cropland that could be considered within a floodplain. The two maps depict an area along the Missouri River and the Grand River in Chariton County, Missouri. Figure 1 below includes the entire boundary of Chariton County and shows the area inundated by the 1993 Missouri River flood (an area that could be considered floodplain). The 1993 flood extent is highlighted in a light blue-green color. Figure 2 features a close up of Brunswick area with an aerial image to show the crop fields.

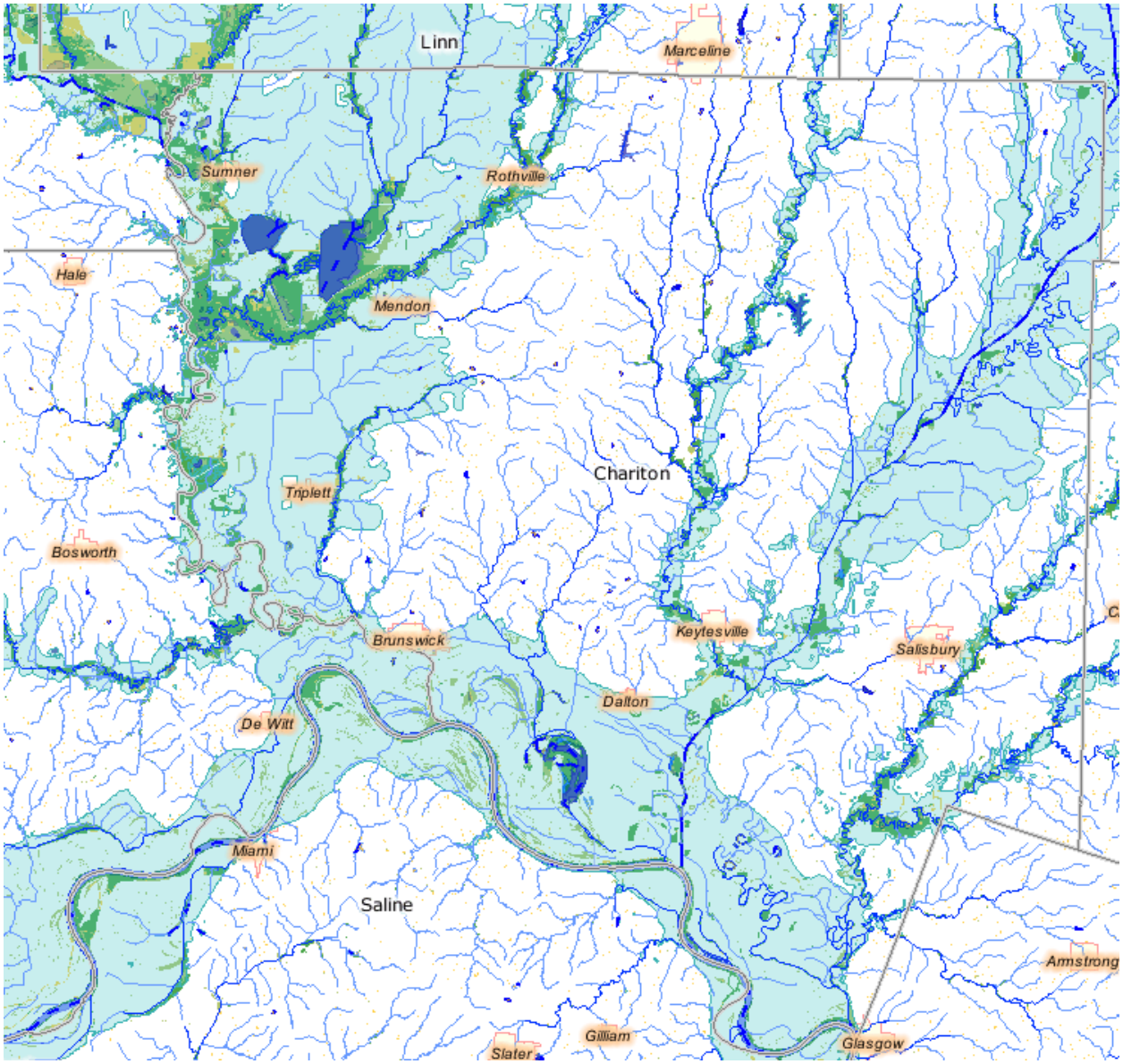

Figure 1 - Chariton County – the 1993 flood extent is highlight in blue-green.

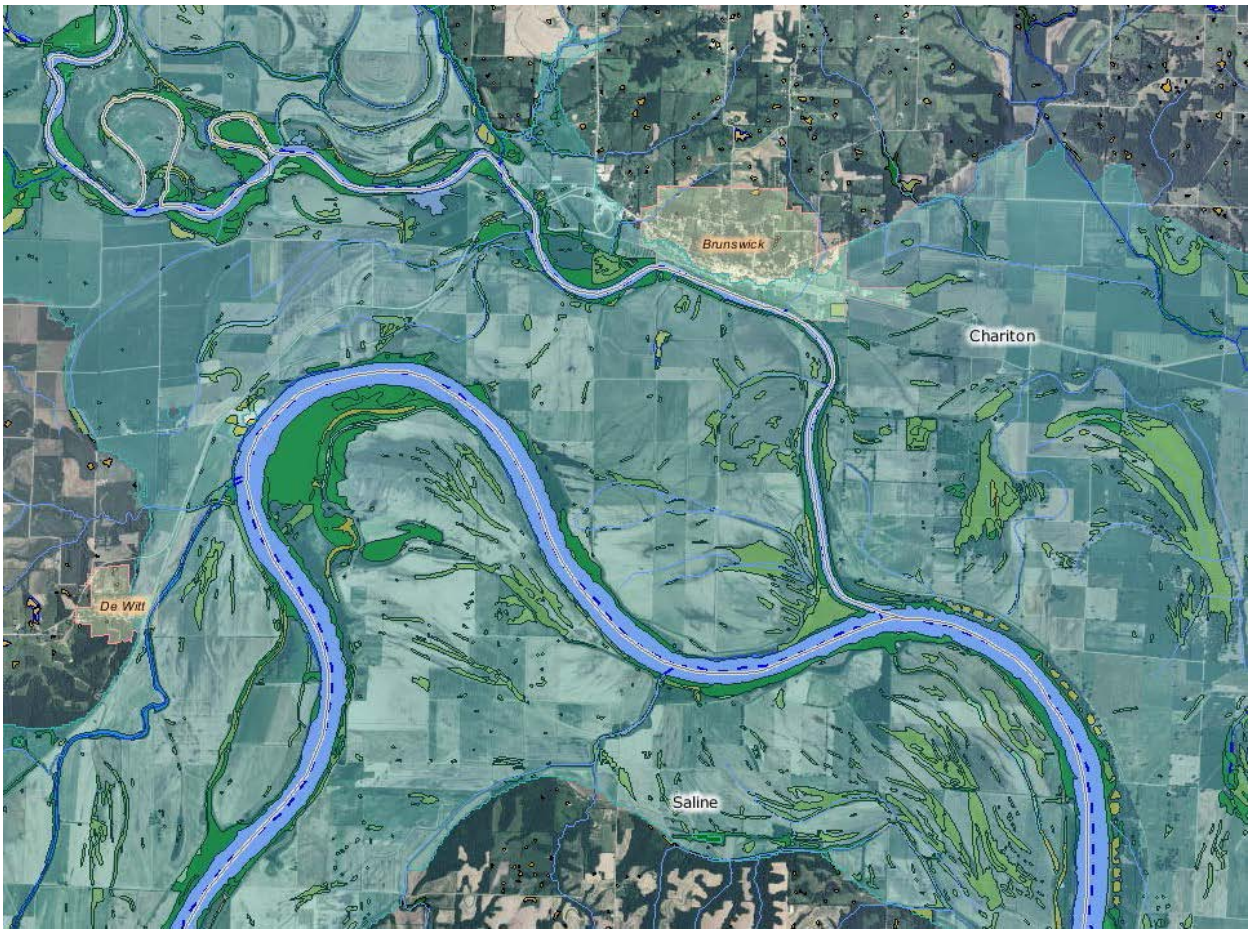

Figure 2 – Brunswick, Missouri area. The 1993 flood extent is highlighted in blue-green.