House Bill 1437: Testimony of Eric Larson February 4, 2021: House Agriculture Committee

Dear Chairman Johnson & House Agriculture Committee:

Thank you for the opportunity to testify today in support of House Bill 1437. My name is Eric Larson. I farm in LaMoure and Dickey County. Our farm uses subsurface drainage systems.

I support maintaining a permitting exclusion for tile systems that comprise less than 80 acres. These projects do not require the attention to project design by the water board that larger projects require.

I support House Bill 1437 removing from the water board administrative process disputes between neighboring landowners over the management of water. The rights of upstream landowners to make a reasonable use of their property, and the rights of downstream landowners to be protected from unreasonable flooding, are sensitive topics that require the weighing of technical, expert evidence and the analysis of several factors. Other states leave the weighing of evidence and application of "reasonable use" factors to the judicial system. House Bill 1437 brings North Dakota in line with other neighboring states.

I support the timelines laid out in House Bill 1437 for water boards to determine that an application is complete and to decide which permit conditions to attach to the permit. The timelines laid out in House Bill 1437 are reasonable and should allow water boards enough time to review and address permit concerns.

While I support passage of House Bill 1437, I would like to see the bill amended to remove the permit conditions found in subparagraphs (h) and (i) of Paragraph 4 in Section 1 (pages 6-7). These permit conditions appear to allow water boards to require the permit holder to remove silt and vegetation and repair damages within one mile downstream of the system. My concern is that "damages" is not well defined in the bill. What kind of damages will permit holders be responsible for? The law protects downstream landowners from "unreasonable" damages, and I believe substantial technical evidence is best left to the judicial system to resolve. I take some comfort in House Bill 1437 requiring that "substantial evidence" be presented to the water board, but as I have learned from my own experiences, the administrative complaint process with water boards can be expensive to defend, even when the administrative process results in the water board ruling in your favor.

An example of this would be a disgruntled downstream landowner filing numerous frivolous damage complaints to a water board that they (water board), their attorney, their engineering firm, the party accused and the accused party's attorney all have to study, evaluate, and respond to. The expense on the water board's attorney and engineering firm is the burden of the taxpayer. The time and expense for the accused is a burden they bear whether guilty or not. The cost to the party lodging the frivolous complaints is nothing. Lack of clear definition of "damages" leaves the door wide open for this sort of abuse of the system. It happened to us.

I believe these types of disputes should be addressed through the judicial branch where the parties are required to know the laws regarding drainage and participate in proving their claims. They should have "skin in the game" to lodge complaints. I would like to see subparagraphs (h) and (i) removed from House Bill 1437.

I support the passage of House Bill 1437 and would stand for questions from the Committee.