Written Statement of
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Regarding the
Clean Water Restoration Act of 2007 (H.R. 2421)

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Committee on Transportation and Infrastructure
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Mr. Chairman and members of the Committee, I am Tim Recker, President of the Iowa Corn Growers Association. I am from Arlington, Iowa where I grow corn and soybeans, and operate a wean-to-finish hog operation. In addition to farming with my brother, Jim, for 21 years, I own Recker Excavating.

On behalf of the Iowa Corn Growers Association as well as the National Corn Growers Association, I appreciate the opportunity to testify at this legislative hearing on H.R. 2421, the Clean Water Restoration Act (CWRA). Before addressing the issue at hand, I must first sincerely thank this Committee for your hard work and devotion to completion of a Water Resources Development Act (WRDA).

In the seven years since the Congress passed the last WRDA bill, a significant number of needs have arisen for our nation's inland waterways. WRDA 2007 addresses many of those issues by authorizing critical projects on the inland waterways, including the modernization of seven locks along the Upper Mississippi and Illinois River, a project that will dramatically improve our ability to deliver crops to the global marketplace. Your diligence was key in successfully obtaining WRDA's enactment.

Last year marked the largest corn crop in history. However, it's not just about growing more corn; it's about how we grow it. We are mindful of the need to balance environmental stewardship with the maintenance of a long-term, dependable food, feed and fuel supply. Through proactive agricultural practices and technologies, we have made significant efficiency gains and improvements in our environmental footprint.

We are dependent upon the integrity of our soil and other natural resources for our livelihood. We work tirelessly to protect and improve the land. In the case of corn production, farmers understand that satisfying the demands of a growing world population must not come at the expense of ecological health, human safety or economic viability. Accordingly, for decades corn growers have adhered to a principle of continuous improvement and an incessant pursuit of greater efficiency. As a result, significant benefits to society have been achieved by modern agriculture and improvements in production efficiency will continue to lessen the environmental impacts of food production.

The Federal Water Pollution Control Act of 1972, more popularly referred to as the Clean Water Act (CWA), has made astonishing progress in restoring the chemical, physical and biological integrity of our nation's waters. Not only have we reversed the historic trend of wetlands losses, but we have restored streams and rivers degraded by pollution.

Additionally, corn farmers are involved in numerous state, local and national programs that complement the goals of the CWA by protecting environmentally sensitive land from crop production and encouraging other on-farm conservation measures. For example, farm bill conservation programs have recognized the unique abilities and limitations of farmers. As a result, we are making important environmental gains using voluntary, locally led incentive-based programs to reduce soil erosion, improve water quality and increase wildlife habitat.

In Iowa, the Conservation Reserve Enhancement Program (CREP) is available in 37 Soil and Water Conservation Districts in the tile-drained region of North Central Iowa. The program is designed to remove excess nitrogen to protect water quality. Financial incentives are provided to private landowners to develop and restore wetlands that intercept tile drainage from agricultural watersheds. Water quality monitoring completed by researchers at Iowa State University has confirmed that CREP wetlands remove 40-90% of the nitrate and 90+% of the herbicide in tile drainage water from upper-lying croplands. Today, Iowa CREP includes 27 implemented sites with 36,430 watershed acres protected and 19,576 tons of nitrogen removed.

However, the regulatory landscape has been, and remains, very confusing despite what we believe to be Congress' clear intent in its use of the term "navigable" in the statue. Jurisdiction as defined through the regulatory program has been a moving target over the 35-year history of the CWA, leading to and sparked by litigation and ever-broadening implementation by federal agencies. But there is no question in our minds about whether the term navigable in the statute was intended by Congress, and what was meant.

The term "navigable waters" has been around since the early 1800s to describe those waters that are clearly subject to federal control. It has been well-settled in law that the federal regulatory authority over "navigable waters" is based on Congress' power to regulate navigation under the Commerce Clause. It is clear that Congress intended to use the term "navigable waters" when it passed the CWA in 1972. The conference report specifically states that "Congress intends the term 'navigable waters' be given its broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." In making the statement in the conference report about regulating navigable waters, Congress

was exercising its authority under the Commerce Clause. Maintaining the term "navigable waters" makes it clear that, while Congress has asserted its broad authority under the Commerce Clause, this jurisdiction is not limitless. Moreover, there are decades of cases that define the term which is why the CWA and many other statutes use that term as a fundamental basis for identifying federal waters in contrast to state waters.

Despite these implicit Commerce Clause limitations, the regulatory program has intended to drift beyond these boundaries and it has taken the courts to bring us back. In 1986, for example, the agencies asserted jurisdiction based on a waterbody's potential use for migratory birds. Consequently, all water everywhere that could be used by birds was subject to federal jurisdiction. During this time, no set level of jurisdiction existed and jurisdictional determinations were inconsistent at best. The Supreme Court decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, et al. (SWANCC),* 531 U.S. 159 (2001) found that there were significant constitutional questions raised by the breadth of jurisdiction under this standard in addition to ruling that this standard went far beyond the jurisdiction established by Congress in the CWA. The Supreme Court once again examined the extent of federal jurisdiction under the CWA in its decision on the consolidated cases of *Rapanos v. the United States* (*Rapanos*) and *Carabell v. U.S. Army Corps of Engineers (Carabell), Rapanos v. United States*, 126 S.Ct. 2208 (2006). The Rapanos decision rejected the agencies' "any hydrological connection" theory of jurisdiction because it raised significant constitutional concerns.

The Supreme Court decisions in *SWANCC* and *Rapanos* did not confuse the jurisdiction of the Corps, but they were the direct response to ambiguous and undefined terms in use by the regulatory program such as "adjacency" and "isolated waters." Both *SWANCC* and *Rapanos* prevented the Corps from using the regulatory uncertainty it had fostered over the years as an excuse to expand jurisdiction beyond acceptable constitutional levels.

H.R. 2421 would face similar constitutional challenges and prolonged, costly litigation, because it would go beyond the geographic scope and original intent, erasing the very framework of the CWA. Unfortunately, H.R. 2421 would not achieve the objective of clarity but instead have the opposite effect. Our specific concerns with H.R. 2421 are described below:

Navigable Waters

As stated above, Congress knew what it was doing by including the term "navigable" in the original definition of jurisdictional waters under the CWA, and the policy effect of this intention was and remains critically important. H.R. 2421 deletes the term "navigable waters" from the CWA. It is our understanding that the purpose of the deletion is to eliminate the requirement that Federal jurisdiction over U.S. waters is based upon the Commerce Clause under the Constitution. However, deleting the term "navigable waters" from the statute also calls into question section 101(b) of the CWA declaring Congress' intent for States to have the primary responsibility for land and water decisions. Therefore, if all waters are subject to federal control, then what if any would be controlled by the State?

The bill's omission of current regulatory language providing for a connection to the Commerce Clause and the proposed statutory language extending federal jurisdiction to the fullest extent empowered under the Constitution will clearly expand current authorities and obliterate the Federal-State partnership embodied in the CWA. The term "navigable waters" preserves a balance with the States.

Deleting the term from the statute does not clarify the original intent of the CWA; it changes it. The term "navigable waters" should not be deleted from the CWA.

All Instrastate Waters

The proposed definition of "waters of the United States" provided by H.R. 2421 states that "all interstate and intrastate waters and their tributaries" are subject to CWA regulation, "including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, lakes natural ponds..." In my book, all means all. The language is quite clear; all waters will be federal waters and this is most certainly an expansion of current federal jurisdiction.

H.R. 2421 would grant the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) federal regulatory authority over all "intrastate waters," erasing any distinction between federal waters and state waters. This would move the CWA beyond protecting wetlands and waterways and transform it into a vehicle for regulating virtually every wet area in the nation – from irrigation ditches to man-made lagoons to possibly even groundwater which has always been regulated at the state level. H.R. 2421 does not give any limitation on what should or should not be considered as a "water of the United States," and therefore all waters of any kind located within any state could be swept into jurisdiction.

Furthermore, the new definition would nullify existing regulations that interpret the current definition, thus wiping out various regulatory exclusions.

Activities Affecting Waters

The proposed definition first broadly defines "waters of the United States" subject to the law, and then authorizes regulation "to the fullest extent that these waters, or *activities affecting these waters*, are subject to the legislative power of Congress under the Constitution." A reference to "activities" in the definition of "waters" diverges from the format of the CWA, which prohibits the "discharge of any pollutant" (section 301) and authorizes permits for discharges of pollutants from point sources (section 402) and discharges of dredged and fill material (section 404), not "activities." This language is unprecedented in current law or existing regulations and is extremely ambiguous.

For example, this language could be read broadly to allow the regulation of all activities that "affect" waters. In other words, regardless of whether an activity is occurring in or near water, the fact that an activity may impact a "water of the United States" would allow the activity to be regulated under the CWA. Federal permits would be required for daily or routine land management activities that are traditionally reserved for state or local consideration such as

pumping irrigation water from one area to another or the use of farm drainage features. The introduction of undefined terminology such as "activities" and "affecting" provides federal agencies and courts with considerable room for expansive interpretation, placing an incredible burden beyond what was envisioned by the 1972 Act.

Currently, general maintenance jobs performed by Recker Excavating, including creating tile outlets, stream diversions, stabilizing stream banks, and others, simply require notification to the local Natural Resources Conservation Service office and the Iowa Department of Natural Resources. Proposed changes would require me to obtain a federal permit prior to starting my work which could delay my work and that of my customer.

Congress' Constitutional Authority

H.R. 2421 proposes to extend federal jurisdiction and regulate activities affecting waters of the United States "to the fullest extent" of Congress' authority under the Constitution. This is clearly an expansion of the existing CWA and its regulations, which link coverage under the Act to Congress' authority under the Commerce Clause. Under H.R. 2421, anything subject to the Treaty Power or reachable through the Property Clause and the Necessary and Proper Clause or other parts of the Constitution could provide a basis for jurisdiction. The reach of such power is far from clear. The Supreme Court and constitutional scholars have been debating the scope of each of these constitutional clauses since 1789.

Should H.R. 2421 become law, litigation inevitably will involve not just the scope of the statute but the scope of Congress' constitutional authority, because that is the only limit this legislative proposal clearly acknowledges (but does not define). We are concerned that this legislative approach will place critical regulatory decisions in the hands of constitutional lawyers and result in costly litigation to resolve the constitutional reach of federal jurisdiction into "intrastate waters." In effect, Congress would abdicate its legislative responsibilities, leaving it to the court system to determine what waters are subject to regulation.

Regulatory Exemptions

Existing regulations, although very broad, create several important exemptions and specifically tie the jurisdictional status of waters to the Commerce Clause of the Constitution. The proposed statutory definition does neither.

Proponents of the bill claim that following revisions to the statutory definition, H.R. 2421 will preserve the regulations regarding the scope of the waters of the U.S. that pre-date *SWANCC*. We believe this to be a fundamentally incorrect reading of the legislative and policy effects of H.R. 2421. The broad statutory changes in H.R. 2421 would trigger a new rulemaking under the Administrative Procedures Act in order to implement the new definition. As a result, every existing regulatory provision would be open to reconsideration, re-proposal and, for those who disagreed with the outcome, litigation. This also could open up the regulatory equivalent of Pandora's Box with a re-write of the Total Maximum Daily Loads (TMDL), Confined Animal Feeding Operation (CAFO), or Spill Prevention, Control and Countermeasure (SPCC) rules (to name a few) and impact stormwater exemptions or even interstate water compacts.

The enactment by Congress of a broad statutory definition of the term "waters of the United States" without acknowledgement of any specific limitations or of the agencies' authority to create such limitations will make it difficult, if not impossible, for the agencies to maintain existing or carve out future regulatory limitations. For those in production agriculture, we are specifically concerned that H.R. 2421 would eliminate the agencies' ability to continue the common sense regulatory exemptions for prior converted cropland and waste treatment systems, including treatment ponds or lagoons. Without either a statutory or regulatory exemption, in many cases, prior converted croplands would be classified as wetlands. If the area is declared a wetland, a federal permit is required. The elimination of this exclusion would affect 55 million acres of farmland in the U.S.

To suggest that the protection of prior converted croplands and waste treatment systems are not affected by the text of H.R. 2421 is a fundamental misreading of the bill.

The Savings Clause

While H.R. 2421 contains some paraphrases of the language used in the existing CWA exemptions for a very narrow set of discharges, the impact of this section is far-reaching – not for what it does but for what it does not do. Simply put, H.R. 2421 does not protect the referenced exemptions; the only thing that is protected by this section of the bill is the authority of the Administrator. The "savings clause" does not state that the enumerated exemptions, or any other exemption in existing law or regulation, "shall" be exempted from federal jurisdiction under the CWA. Should H.R. 2421 become law, the exemptions themselves are left wholly unprotected when new regulations are mandated.

Furthermore, the "savings clause" does not exempt anything from the broad definition of "waters of the United States." It exempts only certain activities from being considered "discharges." For example, maintenance of an irrigation ditch would not be considered a "discharge," but the ditch itself would still be subject to CWA jurisdiction and all other activities affecting the ditch would be regulated. The "savings clause" also fails to adopt the important regulatory exclusions for prior converted cropland and water treatment systems.

Additionally, H.R. 2421 does not incorporate exemptions found in statutory definitions, such as the agricultural stormwater exemption. However, not all agricultural activities enjoy the benefit of an explicit statutory exemption. For example, pesticide use is not covered by an explicit statutory exemption. Crop protection is an extremely important agricultural production activity, however, it may involve the deposit or drift of pesticides into areas deemed "waters of the United States." In effect, H.R. 2421 would ignore the authority of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) which requires rigorous scientific tests on crop protection products to ensure that the products can be used without unreasonable adverse water quality risks. Similarly, the application of fertilizer and other vital farming activities that may incidentally add material to "waters of the United States" are not exempted by statute or addressed in the "savings clause" of H.R. 2421.

The confusion created by the "savings clause" is one of many opportunities created by this legislation for third party activist lawsuits which do little to actually improve the quality of our nation's waters and put this country's food production at risk.

In conclusion, we believe that H.R. 2421 would fundamentally alter the longstanding, appropriate and beneficial use of the term "navigable" to help delineate the scope and reach of the CWA. This use of the term "navigable" was understood and intended by Congress when the CWA was passed. H.R. 2421 would also wipe away decades-worth of jurisprudence alongside CWA federal regulations. Likewise, H.R. 2421 would create significant new administrative responsibilities without fully analyzing the implementation and funding imposition of such requirements. The backlog of permits has been estimated to be between 15,000 – 20,000 with an average time lapse of up to several years from submission to approval/denial of any individual permit. How does the Committee plan to address the needs of the regulated community when the already significant delays of today turn into the massive delays of tomorrow?

Mr. Chairman and members of the Committee, corn growers urge that you recognize the significant problems that H.R. 2421 would create if enacted and thoroughly analyze and discuss all consequences of this legislation before moving forward. As it is currently written, we have no choice but to oppose H.R. 2421.

Despite our opposition to H.R. 2421, we do agree that regulatory clarity must be achieved. The Supreme Court recommended that regulatory action consistent with its decision in *Rapanos* be conducted. While Congress can always change laws, we note that the Supreme Court did not cite in *Rapanos* a need for a new legislative meaning be given to CWA jurisdictional waters in order for such regulatory action to be successful. In our view, the job of Congress now should be to force the Corps and EPA to follow through on the Supreme Court recommendation to conduct a formal rulemaking. This would allow all affected parties to contribute to a process which would have the goal of establishing a workable, clear concept of federal jurisdiction under the CWA.

Soil, water, sunlight and nature's other resources are the most important tools a farmer has. Agriculture producers use these resources with care so that future generations can continue to work the land as producers of food, feed, fiber and fuel. Environmental stewardship begins on private lands, and corn growers are committed to leaving our environment in better shape than we found it. Once again, I appreciate the opportunity to provide you with these comments and would be happy to respond to any questions.