July 14, 2015

The Honorable Duncan Hunter
U.S. House of Representatives
Washington D.C.

SUBJECT: CASA SUPPORT FOR CLEAN WATER ACT CITIZEN SUIT REFORM LEGISLATION

Dear Representative Hunter:

The California Association of Sanitation Agencies (CASA) is pleased to support your bill, which would address abuses of the Clean Water Act (CWA) citizen suit provisions by: (1) ensuring attorneys’ fees awards are appropriate to local markets and commensurate with the proportion of successful claims in each case; (2) clarifying which circumstances constitute “diligent prosecution” of alleged violations, thereby allowing state and federal authorities to exercise their primacy in enforcement; and (3) providing for normally accepted criminal and standard defenses to the Clean Water Act, similar to those provided in other federal environmental statutes. These are tailored amendments that maintain the vitality of the CWA citizen suit provision as it was originally intended while preventing abuses that are costing local agencies millions of dollars in settlements and legal fees.

CASA is a statewide nonprofit association representing 115 local agencies that provide wastewater collection, treatment, renewable energy and recycled water services for millions of Californians. Many CASA members have been targets of CWA citizen suits in recent years.

CWA citizen suits serve an important purpose in protection of the environment. However, the existing framework lends itself to abuses. A prime example is citizen suit actions based on sanitary sewer overflows (SSOs) at local wastewater agencies. Under the CWA, SSOs are strictly prohibited, and thus every SSO that reaches waters is automatically a violation of the CWA. SSOs can be reduced, but not completely prevented, and therefore all sewer systems inherently have exposure to citizen suits. Local public agencies that are good actors doing everything within their power to operate and maintain their collection systems can still be sued, and the costs of the defense must be borne by the ratepayers.

The availability of substantial and disproportionate attorneys’ fees is a significant motivation for third party plaintiffs to bring or threaten these lawsuits. Under the CWA, a “prevailing” citizen plaintiff is entitled to attorneys’ fees and costs, regardless of how many claims the plaintiff ultimately proves. Thus, there is very little downside to pursuing litigation for a citizen plaintiff, whereas local agencies that choose to defend against these suits may find themselves responsible for the payment of not only their own attorneys’ fees and costs, but also similar costs and fees incurred by the plaintiff.

This legislation appropriately restricts an award of attorneys’ fees to the proportion of the claims included in the complaint on which the plaintiff prevails. This language will guard against trial
attorneys reaping large windfalls by filing CWA citizen suits when only a small number of underlying claims have merit. The bill also ensures that attorneys’ fees are based upon the prevailing market rates in the area in which the violation occurred, to protect local communities from having to pay exorbitant rates claimed by attorneys located in larger, more expensive markets as part of a settlement or litigation.

The CWA was designed to enable states and federal regulatory authorities to serve in the primary role of enforcement, with citizen suits as a supplement or augmentation where needed. Unfortunately, some citizen plaintiffs have filed suit while local agencies are on the process of working with their state enforcement authorities to resolve issues, or when the state enforcement authority has already decided upon an appropriate course of enforcement that may or may not include a monetary penalty. By clarifying the circumstances that constitute “diligent prosecution” by an appropriate enforcement authority, the bill reaffirms the original intent of the CWA and allows enforcement authorities to determine the most appropriate action to address any alleged violations.

Finally, the bill provides for normally accepted criminal and standard defenses to the Clean Water Act as provided in other federal environmental statutes. These limited defenses are available in other similar environmental statutes (for example, the Clean Air Act), and should be equally available to entities being sued under the CWA.

Reasonable and measured CWA citizen suit reform is needed to prevent continued misuse of an important environmental law. Without such reform, local agencies and other entities will continue to pay millions of dollars in settlements and legal fees that do not yield a corresponding environmental benefit. For these reasons, CASA is pleased to support your citizen suit reform legislation. Thank you for your leadership on this important issue. If we can be of assistance in advancing this measure, please do not hesitate to contact CASA’s federal advocate, Eric Sapirstien, at (202) 466-3755 or me.

Sincerely,

Roberta L. Larson
Executive Director, California Association of Sanitation Agencies