September 10, 2018

The Honorable Edmund G. Brown, Jr.
Governor of California
State Capitol
Sacramento, CA 95814

RE: SB 1215 (Hertzberg) – VETO REQUEST

Dear Governor Brown:

The California Association of Sanitation Agencies (CASA) must regrettably request your veto of SB 1215 (Hertzberg), which authorizes the State Water Resources Control Board and Regional Water Quality Control Boards to order the provision of sewer service to certain residences in disadvantaged communities who are currently served by septic systems. Unfortunately, although the motivation behind the bill is worthy, the legislation does not reflect a practical solution to the problem it is attempting to solve, and lacks clarity on key issues for public agencies subject to this new proposed program.

CASA has been participating in stakeholder conversations and meetings with Senator Hertzberg’s staff throughout the 2018 legislative session, and we have provided significant feedback and suggestions for amendments to the bill throughout the process. Unfortunately, amendments taken in the Assembly Appropriations Committee required us to move to an “oppose” position late in the Session, after it was clear we could not come to an agreement on several key implementation issues for the wastewater community.

Initially, it is important to note that there are state programs and local government entities that already exist to address failing septic systems and consider the appropriate provision of utility services. The California Water Code already contains extensive existing statutes relating to nuisance abatement of onsite water treatment or septic systems. Those two statutes, Article 5 within Chapter 4, and Chapter 4.5, both within Division 7 of the Water Code, specifically provide remedial authority to the Regional Water Boards for dealing with failing septic systems that jeopardize water quality. It is unclear as to why these existing statutes are insufficient to address water quality concerns from failing septic systems, and how this new program is anticipated to work in conjunction with these existing statutes. Furthermore, the Cortese-Knox-Hertzberg Act specifically authorizes Local Agency Formation Commissions (LAFCOs) to analyze appropriate and reasonable utility service extensions based on myriad local factors that are not considered under the provisions of SB 1215.

As amended, SB 1215 grants new authority to the Regional Water Quality Control Boards to order the provision of sewer service to disadvantaged communities with septic systems under certain circumstances. While the aim is to address failing septic systems, the new authority also grants the Boards the power to compel residences with properly operating septic systems, which pose no threat to water quality, to connect to the sewer system. This is a major expansion of the Water Boards’ duties and oversight authority, which currently and appropriately is focused on water quality control. Moreover, this proposal also is a major expansion of the Boards’ jurisdiction, which would be extended...
to include governance and oversight relative to the provision of utility services, and involves the Boards in matters of private property rights, local government boundaries and responsibilities, and rate and fee setting. For addressing the issue of failing septic systems in disadvantaged communities, we do not believe this would be an appropriate or advisable approach.

Beyond these concerns, the bill also creates a complicated “opt-out” option for property owners in the disadvantaged community subject to the sewer service order. Part of the “opt-out” provision, however, requires property owners to pay a mandatory “standby charge” to the receiving sewer system, even when no connection exists, and no service is being provided. The bill language appears to give no discretion to local agencies as to whether or not this standby charge is levied on properties that “opt out” of receiving service. This scenario is particularly troubling for public agencies that could face significant legal liability for levying a charge for a property related service that is not actually being delivered. We are aware of no other scenarios in which sewer service providers are required to collect a fee for the future privilege of potentially connecting to the system. We have serious concerns about the legal ramifications our agencies could face under Proposition 218 and Proposition 26 relative to the imposition of fair fees under these provisions.

Further, our members are concerned that the bill provides no guarantee of due process rights for a public agency ordered to provide the proposed service extensions. Other processes at the State and Regional Water Boards provide appropriate due process protections for local agencies outlined in statute and regulation, but unfortunately these explicit statutory protections are not provided to local agencies under the program proposed in SB 1215.

Additionally, the nature of the service orders outlined in the bill are vague as to the statutory basis for issuing these orders, and the legislation does not define the specific type of order these would be. Our members are concerned that these orders could be issued under the Water Board’s existing authority (which could include Time Schedule Orders, Cleanup & Abatement Orders, or Cease & Desist Orders) or as violations, even though the public agency itself has done nothing wrong. We believe that any enforcement order of this nature would be inappropriate given that in the circumstances contemplated by the bill, the agency has not violated any laws. Rather, the role of the public agency in these circumstances is better viewed as a good Samaritan, acting to extend service and remedy a water quality issue created by a failing private residential septic system or systems. To these points, SB 1215 also lacks critical definitions relative to the nature and parameters of the proposed service orders, and we are concerned with how that lack of clarity in the bill could negatively impact a public agency.

Furthermore, we are seriously concerned about the lack of clarity in the bill on several issues that we believe are essential for the proposed program to operate fairly and effectively. For example, the bill fails to recognize the complicated and complex nature of local wastewater collection and treatment systems, which often are operated by multiple public agencies, and which may even include multiple collections systems that feed in to one larger regional treatment agency. The bill does not account for how a sewer service order would apply in circumstances that involve multiple public agencies, each with a different, but essential role in the collection and treatment processes, nor does it provide for proper notice to and opportunity for comment by all agencies that would be impacted by the order. This specificity is important since the different agencies involved typically control different components of a new hookup and/or ongoing service. For example, the collection system might be in the best position to provide an estimate of maintenance costs pertinent for ongoing rates, and the regional
treatment entity would be in the best position to determine capacity for providing treatment services for the new connections and then calculate appropriate connection fees. Attempting to arrange for service by only engaging with one entity of a succession of entities would necessarily be problematic.

Finally, as we have stressed throughout the year, it is important to specifically identify what types of costs should be covered in the funding package that is required to be secured by the Regional Board upon the issuance of a service extension order. It is critical that all costs, including but not limited to connection fees and capacity charges, capital outlay, planning, private residential property improvements, septic tank abatement, and ongoing rate assistance all be considered in all funding packages. Without these critical costs being incorporated into the necessary funding for service extensions, our agencies could be required to absorb some of these liabilities. Subsidization of these costs at the expense of other ratepayers is illegal, and could subject local public agencies to successful legal challenges under Proposition 218 or Proposition 26.

We have great sympathy for the disadvantaged communities affected by failing septic systems, and do not object to providing sewer service to those communities under the appropriate circumstances. However, we do not believe that SB 1215 proposes a practical or workable solution for the communities in question. While we don’t agree with the approach outlined in SB 1215, we would be willing to continue engaging with the author, sponsors, and the Administration to come up with a workable program for addressing sewer service extensions in future legislation.

For all of these reasons, we respectfully request your veto on SB 1215. Thank you for your consideration of our concerns.

Sincerely,

Jessica Gauger
Director of Legislative Advocacy

CC:  Mr. Rob Egel, Legislative Director, State Water Resources Control Board