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**Adam Krantz**

August 6, 2015

The Honorable Duncan Hunter  
U.S. House of Representatives  
2429 Rayburn House Office Building  
Washington, D.C. 20515

**SUBJECT: NACWA SUPPORT FOR CLEAN WATER ACT CITIZEN SUIT REFORM  
LEGISLATION**

Dear Representative Hunter:

On behalf of The National Association of Clean Water Agencies (NACWA), I am writing in support of your recent legislation, H.R. 3353, that aims to reform citizen suit provisions under the Clean Water Act by: (1) establishing a maximum for awarded attorneys' fees based off of local markets and the proportion of successful claims in each case; (2) clarifying the definition of the Administrator or the Secretary's "diligent prosecution" of alleged violations, so that federal and state governments are able to exercise their enforcement authority; and (3) allowing for standard affirmative defenses to the Clean Water Act that are similar to those provided in other federal environmental statutes. These narrowly tailored amendments will help prevent nuisance litigation that cost communities millions of dollars in legal fees and settlements, while leaving intact the intended purpose of the CWA citizen suit provision.

NACWA is a dynamic non-profit environmental organization advocating for clean water and a sustainable environment on behalf of the nation's publicly owned wastewater and stormwater utilities, with a membership of nearly 300 clean water agencies across the United States. The organization supports environmentally sound national water quality and environmental policies and engages on environmental issues in the legal, legislative, and regulatory arenas. Many NACWA members have been targets of CWA citizen suits in recent years.

Citizen suits play an important role in ensuring compliance with environmental laws. However, the current structure of CWA citizen suits is vulnerable to abuse. An example of such abuse are citizen suit actions against local wastewater agencies for unavoidable sanitary sewer overflows (SSOs). Although EPA and many states take the position that SSOs are illegal under the CWA, regulators often use discretion when finding SSO violations based on the nature of the specific violation. An SSO can be

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unavoidable even if the wastewater agency is operating lawfully, especially after an uncommonly large storm or vandalism. SSOs can be reduced through good operation and maintenance practices and planning, but they can never be completely prevented, making wastewater agencies across the country inherently vulnerable to citizen suits. Agencies acting in good faith and using all possible resources to maintain and operate their collection systems can still be sued. The costs of their defense is then unavoidably absorbed by ratepayers.

The existing framework of CWA citizen suits allows for substantial and disproportionate attorneys' fees to be awarded to a "prevailing" citizen plaintiff, regardless of how many claims the plaintiff ultimately proves. This provides motivation for third party plaintiffs to sue since there is little downside to pursuing litigation for a citizen plaintiff. The proposed legislation would help prevent trial attorneys from being awarded disproportionate attorneys' fees by filing multiple CWA citizen suits when only a small fraction of the claims have merit. The bill would also protect smaller-market, local communities from paying fee rates that are based on a much more expensive market than that in which the attorney is located.

The original intention of the CWA was to grant primary enforcement authority to state and federal entities, with the allowance of citizen suits to supplement this enforcement. The proposed legislation clarifies the phrase "diligent prosecution" of a federal or state enforcement entity—allowing citizen suits to go forward only in cases where state or federal authority is not working with a local agency to resolve issues and/or has not undertaken an enforcement action. NACWA believes this approach is consistent with the original intent of the citizen suit provision.

Lastly, the legislation allows for accepted criminal and standard, affirmative defenses under the Clean Water Act. These limited affirmative defenses exist under other federal environmental statutes, including the Clean Air Act and should be equally available to parties being sued under the CWA. This would increase litigation/settlement efficiency and decrease costs.

Congress deliberately chose to allow for CWA citizen suits in order to provide citizens with the opportunity to push and encourage appropriate enforcement of environmental laws through our judicial process. These proposed reforms preserve this system while protecting ratepayers from paying for litigation that isn't warranted. For these reasons, NACWA is pleased to support your citizen suit reform legislation. Thank you for creating a sensitive, carefully tailored bill on this important issue.

Sincerely,

A handwritten signature in black ink, appearing to read "A. Krantz", with a large, sweeping underline.

Adam Krantz  
NACWA CEO