



PO BOX 201706
Helena, MT 59620-1706
(406) 444-3064
FAX (406) 444-3036

Water Policy Interim Committee

61st Montana Legislature

SENATE MEMBERS

DAVID WANZENRIED--Vice Chair
DEBBY BARRETT
BRADLEY MAXON HAMLETT
TERRY MURPHY

HOUSE MEMBERS

WALTER MCNUTT--Chair
RUSSELL BEAN
BILL MCCHESENEY
JP POMNICHOWSKI

COMMITTEE STAFF

JOE KOLMAN, Research Analyst
TODD EVERTS, Staff Attorney
CYNTHIA PETERSON, Secretary

Sen. Max Baucus
511 Hart Senate Office Bldg.
Washington, D.C. 20510

Sen. Jon Tester
724 Hart Senate Office Building
Washington, DC 20510-2604

Rep. Denny Rehberg
2448 Rayburn HOB
Washington, DC, 20515

March 11, 2010

Sens. Baucus and Tester and Rep. Rehberg,

The Water Policy Interim Committee (WPIC) of the Montana Legislature is concerned about language contained in Senate Bill 787 that seeks to clarify which waters are subject to the jurisdiction of the United States under the Federal Water Pollution Control Act.

The WPIC is a bipartisan committee that studies water issues in Montana.

First and foremost, it is important for Congress to know and recognize that, as stated in the Montana Constitution, "All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law." Furthermore, it is the responsibility of the Legislature, not another entity, to provide for the administration, control, and regulation of water rights.

If adopted, S. 787 would amend the Federal Water Pollution Control Act by striking the words "navigable waters of the United States" and replacing the phrase with "waters of the United States." That term is defined as all waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters, including lakes, rivers, streams, mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all tributaries of any of the above waters.

In 1972, the Federal Water Pollution Control Act gave the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers the authority to regulate "navigable" waters of the U.S., such as lakes, rivers and oceans. By passing this common sense law, Congress ensured that

these bodies of water were protected environmentally and that they were able to help promote interstate-commerce. The original Act provides the federal government broad, but not unlimited, authority to regulate "navigable waters," with state governments responsible for regulating all other waters.

The proposed legislation moves to strip states of that right under the guise of "clarifying" jurisdictional questions raised by language within the Federal Water Pollution Control Act.

The WPIC is concerned that striking the word "navigable" would potentially expand the federal government's reach beyond what was intended in the Federal Water Pollution Control Act, blurring jurisdictional authority to manage and regulate water resources within state and local government jurisdictions. Given the ambiguity of the legislation's jurisdictional reach, the implementation of this proposal may lead to increased litigation and uncertainty among public and private stakeholders, including homeowners, farmers, water districts, and state and federal agencies. It would undoubtedly lead to more bureaucracy and undue burdens on the water right holders throughout the country.

The committee respectfully requests that the author and members of the United States Congress work to amend S. 787 to ensure that state authority over intrastate water resources is not preempted and engage with Western state legislators and stakeholders to address specific concerns related to the expansion of federal jurisdiction under the Federal Water Pollution Control Act.

Sincerely,

Representative Walter L McNutt

Senator Terry Murphy

Senator David E Wanzonried

Representative Russell S Bean

Senator Debby Barrett

Representative Bill McChesney

Senator Bradley Maxon Hamlett

Representative JP Pomnichowski

CI2255 0070jkxa.