

1 Quality (DEQ), together with Defendant-Intervenors Northern Plains Resource Council
2 (NPRC) and Tongue River Water Users Association (TRWUA.) A cross *MOTION FOR*
3 *SUMMARY JUDGMENT* was filed by Plaintiffs Pennaco Energy, Inc. (Pennaco), Marathon
4 Oil Company (Marathon), and Plaintiff-Intervenor Fidelity Exploration and Production
5 Company (Fidelity.) A hearing on the motions was held at the Stillwater County
6 Courthouse, Columbus, Montana on July 2, 2007. John C. Martin and Duane A. Siler
7 of Patton Boggs, LLP, Washington, D.C. and Lawrence B. Cozzens of Cozzens,
8 Warren & Harris, Billings, Montana appeared on behalf of Pennaco. Jon Metropoulos
9 of Gough, Shanahan, Johnson & Waterman, Helena, Montana appeared on behalf of
10 Fidelity. Assistant Montana Attorneys-General Sarah A. Bond and Jennifer M. Anders
11 appeared representing Defendant BER. Defendant DEQ was represented by Claudia
12 L. Massman. NPRC and TRWUA were represented by Jack R. Tuholske and Brenda
13 Lindlief-Hall, respectively.

14 STATEMENT OF THE CASE

15
16 On June 30, 2006, Plaintiffs brought this action under the Montana
17 Administrative Procedure Act (MAPA), §2-4-506, MCA, the Montana Declaratory
18 Judgment Act, §27-8-102, MCA *et seq.*, the Montana Water Quality Act (WQA), §75-5-
19 101, MCA *et seq.*, and the Montana Environmental Policy Act (MEPA), §75-1-101,
20 MCA *et seq.*, seeking to invalidate water quality rules adopted by Defendant BER on
21 April 14, 2003 and on May 18, 2006.

22
23 Plaintiffs allege that the BER adopted the 2003 rules without the specific
24 findings or the sound scientific basis Plaintiffs believe is mandated under the WQA
25 and, indirectly, under MAPA. Plaintiffs further allege that the 2006 rules, which

1 designated *Electrical Conductivity* (EC) and *Sodium Adsorption Ratio* (SAR) as
2 "harmful" parameters, were unaccompanied by specific written findings and lacked an
3 adequate scientific basis for the designation. Additionally, Plaintiffs contend that the
4 BER and the DEQ were required to prepare an environmental impact statement (EIS)
5 for the proposed rule under MEPA.

6 On February 22, 2007 Defendants and Defendant-Intervenors (collectively
7 Defendants) moved for summary judgment on all claims as set forth in the Plaintiffs'
8 *COMPLAINT*. On April 12, 2007, Plaintiffs and Plaintiff-Intervenors (collectively Plaintiffs)
9 filed a cross-motion for summary judgment on all claims. The issues have been fully
10 briefed. On June 30, 2007, the parties submitted an *AGREED STATEMENT OF LAW AND*
11 *FACTS* (Agreed Facts). The Court heard oral argument on July 2, 2007.

12 PROCEDURAL AND FACTUAL BACKGROUND

13
14 This case involves the validity of certain administrative rules governing water
15 quality promulgated by the BER in 2003 and 2006. The 2003 rules establish numeric
16 water quality standards for EC and SAR. The 2006 rules address nondegradation
17 review of discharges into State waters that contribute to EC and SAR, including coal-
18 bed methane effluents. The 2003 rules were motivated, at least in part, by projected
19 coal bed methane (CBM) development in the Powder River Basin of southeastern
20 Montana. (BER Rec. at 00694.) CBM produced water is known to contain high levels
21 of sodium and salts. EC and SAR indicators occur naturally and are present in water
22 extracted from coal seams during CBM production. See *Northern Plains Res.*
23 *Council v. Fidelity Exploration & Dev. Co.*, 325 F.3d 1155, 1158 (9th Cir. 2003), cert.
24 *denied*, 540 U.S. 967 (2003). Scientific research indicates that at certain levels, EC
25

1 can damage plants and SAR may negatively affect soils. (*Id.*, see also, Agreed Facts,
2 Nos. 17, 20.) Arguably, CBM produced water discharged into rivers and streams could
3 potentially damage soils, crops, aquatic life and native plant communities.

4 The production of CBM in the Powder River Basin requires the pumping and
5 disposing of enormous amounts of waste water, which is released when hydrostatic
6 pressures trapping the methane gas is relieved. The produced water diminishes once
7 the gas begins to flow. Various methods are available to methane producers to
8 dispose of the produced water. The least expensive method is to discharge the water
9 directly into surface waters. However, the Ninth Circuit Court of Appeals has
10 concluded that CBM produced water is a "harmful pollutant" necessitating a National
11 Pollutant Discharge Elimination System (NPDES) permit before discharge into surface
12 waters. ***Northern Plains Res. Council, supra, 325 F.3d 1155 at 1162.***

14 The administrative record shows that in 2000 and 2001, the DEQ was actively
15 investigating the impact of CBM development and the effects of CBM produced water
16 on soils, crop yields, and aquatic life in the Powder River Basin. (BER Rec. 02641,
17 02867-70, 00098-107). This coincided with DEQ's participation in a statewide oil and
18 gas environmental impact statement (EIS) being prepared in conjunction with the
19 federal Bureau of Land Management. (BER Rec. 01061, 03947-60). Ultimately, the
20 DEQ decided to adopt numeric water quality standards to protect irrigated agriculture
21 and other designated uses of surface water in the Basin. Industry interests opposed
22 this effort, contending that water quality was adequately protected under the narrative
23 standard applicable to all parameters for which there are no numeric standards. (BER
24 Rec. 00979, 01100, 01858-863).

1 In 2002, following consultations with DEQ's expert consultant, Dr. Oster, a soil
2 scientist from the USDA Salinity Lab in Riverside, California, DEQ staff developed two
3 proposals for water quality standards for EC and SAR. These proposals were
4 presented to the BER in July 2002. (Agreed Facts, No. 25; BER Rec. 02751-761;
5 02669, 02766, 00981-994). Both proposals were accompanied by technical support
6 documents explaining the rationale and the scientific basis for the proposed rules.
7 (BER Rec. 01061-74; 01082-95). Further, the record shows that BER received
8 information that the rivers in the Powder River Basin have naturally fluctuating levels of
9 EC and SAR, and that those natural variations may exceed the standards on occasion.
10 (BER Tr., 1/31/03, at 186:17-18.) This may be due to the fact that the region was once
11 a marine ecosystem and thus naturally high in salts and sodic compounds. (BER Rec.
12 00910.) Montana law exempts "naturally occurring" runoff from the permitting process.
13 See *A.R.M. 17.30.602*.

15 Contemporaneously, in June 2002, NPRC, TRWUA, and other irrigators in the
16 Powder River Basin filed a citizens' petition to initiate rulemaking. The petition urged
17 the BER to adopt numeric standards for EC and SAR on four rivers in the Basin and
18 their tributaries. (Agreed Facts, No. 23; BER Rec. 00801-839).

19 The BER voted to publish three different proposals and receive public comment.
20 (Agreed Facts, No. 26; 7/26/02 Tr. at 181, 184). At BER's insistence, a collaborative
21 committee of interested parties met five times in two months, but was unable to reach
22 consensus. (Id. at 171, 183.) Members of the collaborative committee included CBM
23 developers and their consultants, DEQ, EPA, irrigators, NPRC, and the Northern
24 Cheyenne and Crow Tribes. The Northern Cheyenne Tribe was also in the process of
25

1 developing numeric water quality standards for EC and SAR. (BER Rec. 00439-537;
2 see also 01917-02075, 02461.)

3 The BER held public hearings in Miles City on September 26, 2002, and in
4 Helena on September 27, 2002. (Agreed Facts, No. 28.) BER and interested parties
5 also participated in a public tour of CBM wells and agricultural sites in Wyoming and
6 Montana on September 25, 2002. (BER Rec. 01265.) BER modified the proposed
7 rules in response to comments received and held an additional public hearing in
8 January 2003. (BER Rec. 02298-306, 1/31/03 Tr.) Before and during the public
9 comment period, which extended from August 2002 to January 2003, the BER
10 received extensive information and comment from soil scientists, DEQ technical staff,
11 the federal Environmental Protection Agency (EPA), industry, environmental groups,
12 and irrigators. (Agreed Facts, No. 28.) This information and comment is contained in
13 the administrative record submitted to the Court.
14

15 In March 2003, the BER adopted specific numeric standards for EC and SAR in
16 the affected streams for both the irrigation season and the non-irrigation season.
17 (Agreed Facts, Nos. 34, 36.) The BER also addressed these parameters for purposes
18 of Montana's nondegradation policy, but voted to retain a narrative nonsignificance
19 criterion for high quality water (rather than imposing numeric thresholds) to determine
20 whether nondegradation review is triggered. BER also incorporated a nonseverability
21 clause and provisions for flow-based permitting. (Agreed Facts, No. 49; BER Rec.
22 02298-306; 3/28/03 Tr. at 129-156; 190.) The administrative record suggests that the
23 narrative nonsignificance criteria, the nonseverability clause, and flow-based permitting
24 were a compromise in favor of the CBM developers so that industry would support
25

1 adoption of numeric standards. (BER Rec. 01205, 02273, 02298-306.)

2 On April 14, 2003, the BER certified the new rules and amendments to the
3 Secretary of State for publication in the Montana Administrative Register (MAR). The
4 *NOTICE OF ADOPTION AND AMENDMENT* included responses to comments submitted. The
5 new rules and amendments became effective upon publication on April 25, 2003.
6 (Agreed Facts, No. 54; BER Rec. 02552-74.) The 2003 numeric water quality
7 standards were codified at ARM 17.30.670(1)-(6). The Regional Administrator of EPA
8 approved the standards set by the BER in August 2003. (Agreed Facts, No. 57; BER
9 Rec. 06046-49.)
10

11 Two years later, in May 2005, NPRC and a group of irrigators filed another
12 petition for rulemaking, asking the BER to adopt rules to (1) require reinjection or
13 treatment of CBM water, and (2) designate EC and SAR as "harmful" parameters so
14 that those discharges would be subject to objective numeric nonsignificance criteria
15 and would no longer qualify as nonsignificant under the subjective narrative criteria.
16 (BER Rec. 03605-677.) On September 26, 2005, the BER certified to the Secretary of
17 State for publication MAR Notice No. 17-231, a notice of public hearing on the
18 proposed amendment. (Agreed Facts, No. 64.) Notice of public hearings was
19 published on October 6, 2005. (BER Rec. 04331.)
20

21 The BER held public hearings on November 9, 2005, in Lame Deer; November
22 10, 2005 in Miles City; and December 1, 2005 in Helena (Agreed Facts, No. 64; BER
23 Rec. 04132-147). On March 23, 2006, the BER held a public meeting and voted to
24 adopt the nondegradation component of the petition as submitted. (Agreed Facts, No.
25 66; 3/23/06 Tr. at 129-31.) The BER voted to reject the proposal to require reinjection

1 or treatment of CBM water. (3/23/06 Tr. at 133; 157; 166.) On May 8, 2006, the BER
2 certified to the Secretary of State a *NOTICE OF AMENDMENT*, which included responses
3 to comments submitted. (Agreed Facts, No. 70.) Adoption of the nondegradation
4 component resulted in the application of the same numeric nonsignificance criteria for
5 EC and SAR in the four affected streams that apply to other parameters with numeric
6 water quality standards. (Agreed Facts, No. 66; BER Rec. 06657, 06661; Agreed
7 Facts, No. 66.) The rules adopted in 2006 have been submitted to the EPA, but have
8 not yet been approved. (Agreed Facts, No. 71.)

9
10 Plaintiff energy companies filed their *AMENDED COMPLAINT FOR DECLARATORY*
11 *JUDGMENT* in July 2006, challenging the 2003 and 2006 rulemakings. Plaintiffs do not
12 allege that they have been denied a permit under the challenged rules, nor do they
13 allege that they have applied for and been denied an authorization to degrade high
14 quality water in Montana. Fidelity filed its own *COMPLAINT* in intervention in August
15 2006, which essentially mirrors Plaintiffs' *AMENDED COMPLAINT*. Defendants answered
16 those complaints, and submitted the certified administrative record of the 2003 and
17 2006 rulemakings to this Court in December 2006. Defendants and Defendant-
18 Intervenors filed motions for summary judgment and accompanying briefs in February
19 2007. At a scheduling conference in March 2007, Plaintiffs indicated their intent to file
20 a cross-motion for summary judgment. Thereafter, the Court set a briefing schedule
21 for cross-motions and responsive pleadings, and requested an agreed statement of
22 facts. The parties submitted an *AGREED STATEMENT OF FACTS AND LAW* prior to the
23 hearing, which the Court has considered along with the voluminous administrative
24 record.
25

1 whether the agency erred in law, or whether its decision is wholly unsupported by
2 evidence, or is clearly arbitrary or capricious. *Winchell, supra*, 1999 MT 11, ¶11.

3 When the agency decision is within its delegated area of expertise, as it is in this
4 case, and when it is based on scientific or technical data, the Supreme Court has held
5 that judicial review is even narrower. In *Johansen v. State*, 1999 MT 187, ¶9, 295
6 *Mont.* 339, 983 P.2d 962 (*Johansen II*), the Supreme Court affirmed its earlier ruling in
7 *Johansen I* that “district courts should defer to an agency’s decision where substantial
8 agency expertise is involved.” *Id.*, ¶9, quoting *Johansen v. Dep’t of Natural*
9 *Resources & Conservation*, 1998 MT 51, ¶29, 288 *Mont.* 39, 955 P.2d 653
10 (*Johansen I*). Moreover, “[n]either the district court nor the Supreme Court may
11 substitute their discretion for the discretion reposed in boards and commissions by the
12 legislative acts.” *Johansen I*, ¶26, quoting *North Fork Preservation Ass’n v. Dep’t*
13 *of State Lands*, 238 *Mont.* 451, 778 P.2d 862, 866 (1989).

14 The U.S. Supreme Court has stated: “When specialists express conflicting
15 views, an agency must have discretion to rely on the reasonable opinions of its own
16 qualified expert even if, as an original matter, a court might find contrary views more
17 persuasive.” *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378
18 (1989). The Montana Supreme Court endorsed this deferential standard in *North*
19 *Fork, supra*, which involved judicial review of an agency decision to forego an EIS:
20
21

22 This decision necessarily involved expertise not possessed by courts and
23 is part of a duty assigned to [the agency], not the courts. In light of this,
24 and the cases cited above, we hold that the standard of review to be
25 applied by the trial court and this Court is whether the record establishes
that the agency acted arbitrarily, capriciously, or unlawfully. *Id.*, 238
Mont. at 458-59, 778 P.2d at 867.

1 In reviewing whether the agency acted arbitrarily or capriciously, the Court must
2 consider whether the decision "was based on a consideration of the relevant factors"
3 and whether there has been a "clear error of judgment." *Id.*, 238 Mont. at 465, 778
4 P.2d at 871, quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402,
5 416 (1971). The Court may not substitute its judgment for that of the agency to which
6 the legislature has assigned the role of expert and decision maker. *Friends of the*
7 *Wild Swan*, *supra*. For this reason, the party challenging the agency's action has the
8 burden of proving error by the rulemaking agency. See *Thornton v. Commissioner*
9 *of Dep't of Labor & Indus.*, 190 Mont. 442, 445, 621 P.2d 1062, 1064 (1980). The
10 Court reviews the agency determination of law for correctness. *Seven Up Pete*
11 *Venture v. Montana*, 2005 MT 146, 58, 327 Mont. 306, 114 P.3d 1009.

13 NPRC and TRWUA submit that the Montana Constitution is relevant to the
14 standard of review insofar as it guarantees to all citizens the right to a clean and
15 healthful environment, *Mont. Const. art. II, §3*, and imposes a duty on the State and
16 each person to maintain and improve a clean and healthful environment for present
17 and future generations, *Mont. Const. art. IX, §1*. In light of these constitutional
18 provisions, Defendant-Intervenors argue that the administrative rules cannot be
19 invalidated based on Plaintiffs' argument that they are overly protective, and that if
20 there is any question about the validity of the rules, this Court is obligated to recognize
21 their validity in light of *Mont. Const. art. II, §3, and art. IX, §1*. Since the Court
22 concludes that the BER's exercise of rulemaking authority was consistent with
23 authorizing legislation, and that BER did not act arbitrarily or capriciously in the
24 exercise of that discretion, the constitutional implications of BER's actions need not be
25

1 considered.

2 **ISSUES**

3 The Court restates the issues as follows:

- 4 1. Should the Court consider evidence submitted by Plaintiffs outside the
5 certified administrative record?
- 6 2. Are the 2003 BER rules setting numeric standards for EC and SAR
7 invalid because the BER acted with an arbitrary or capricious disregard
8 for the purpose of the authorizing statute(s)?
- 9 3. Are the 2006 BER rules classifying EC and SAR as harmful parameters
10 invalid because:
- 11 a) the BER acted with an arbitrary or capricious disregard for the
12 purpose of the authorizing statute(s)?
- 13 and/or
- 14 b) BER did not comply with applicable statutory law?
- 15 4. Was the BER required to make written findings in accordance with §§75-
16 5-203 and/or 75-5-309, MCA, relative to the 2003 or 2006 rulemakings?
- 17 5. Was the BER required to prepare an environmental impact statement
18 (EIS) at the time of the 2006 rulemaking?

17 **DISCUSSION**

18 1. Should the Court consider evidence submitted by Plaintiffs outside the
19 certified administrative record?

20 Judicial review of formal agency actions, like the MAPA rulemakings at issue
21 herein, is generally confined to the record before the agency unless the Plaintiff can
22 show a clear and specific need for supplementation. See §2-4-704(1), MCA; see, e.g.,
23 ***Public Power Council v. Johnson***, 674 F.2d 791, 793-94 (9th Cir. 1982). There are
24 limited exceptions which may justify expansion of the record or permit discovery, i.e.,
25 where there is a need to explain the agency's action, where the record is incomplete,

1 or where there is a need to explain technical terms or the subject matter involved. *Id.*

2 The parties generally agree on these standards, although they disagree on their
3 application to this case. Plaintiffs claim that extra-record evidence is appropriate
4 because witness deposition testimony establishes that the administrative record is
5 inadequate on certain points. Defendants respond that Plaintiffs have made no real
6 showing that the additional material is needed or relevant, or how the evidence offered
7 demonstrates anything other than the same arguments repeated before the BER.
8

9 The administrative record certified to this Court exceeds 6,000 pages. It
10 includes all public comments received, notices of hearings, transcripts of BER
11 proceedings, scientific data and reports - many of which are from Plaintiffs' experts and
12 representatives - relevant correspondence, and a wealth of other information.
13 Plaintiffs' offered supplemental information was also available for the Court's
14 consideration. The extra-record evidence offered by Plaintiffs is information that the
15 rulemaking agency never considered. Plaintiffs offer this extra-record evidence in
16 support of their contentions that the rules at issue are invalid. Defendants object to this
17 Court's consideration of that evidence, noting that Defendants maintained, and
18 Plaintiffs agreed, to a standing objection to the admissibility of any deposition
19 testimony.
20

21 Upon the Court's review of the administrative record, the Court concludes that
22 the agency adequately considered all relevant information or evidence necessary for
23 an informed decision. All indications are that the administrative record is complete and
24 more than adequate to resolve the issues before the Court. Additional evidence is not
25 required to explain the agency's action or the subject matter involved. The Court gives

1 little weight to Plaintiffs' reliance on deposition testimony of DEQ personnel suggesting
2 that the administrative record is silent or inadequate on certain points. It is unclear
3 whether those witnesses actually reviewed the administrative record that was certified
4 to this Court. More importantly, the administrative record speaks for itself.

5 For the foregoing reasons, the Court declines to admit, as additional evidence,
6 the supplemental material offered by Plaintiffs. Even if the Court were inclined to
7 consider the supplemental material offered by the Plaintiffs, the record, in its entirety,
8 would not support a finding of an abuse of discretion or error of law by the rulemaking
9 body.
10

11 2. Are the 2003 BER rules setting numeric standards for EC and SAR
12 invalid because the BER acted with an arbitrary or capricious disregard for the purpose
13 of the authorizing statute(s)?

14 The authorizing statutes governing development of water quality standards are
15 the *Clean Water Act (CWA)* and the *Montana Water Quality Act (WQA)*. The federal
16 EPA is the congressionally delegated agency to administer and implement the CWA,
17 and its administrative decisions are entitled to deference. *Chevron USA, Inc. v.*
18 *Natural Resources Defense Council, Inc.*, *supra*, 467 U.S. at 844-45; accord,
19 *Montana Power Co. v. Environmental Protection Agency*, 608 F.2d 334, 345 (9th
20 Cir. 1979). The BER is the state agency delegated to set water quality standards in
21 Montana in accordance with the WQA. See §§75-5-201, -301, MCA.

22 **A. The Clean Water Act (CWA)**

23 The CWA is essentially a mandate to the states to protect water quality through
24 permitting of pollutant discharges and through development of water quality standards.
25 The overall purpose of the CWA is to "restore and maintain the chemical, physical and

1 biological integrity of the Nation's waters," with the ultimate goal being the complete
2 elimination of pollution from the nation's waters. See 33 U.S.C. §1251(a); **Public**
3 **Utility District No. 1 v. Washington Dep't of Ecology**, 511 U.S. 700, 704 (1994). To
4 achieve this goal, Congress has prohibited the point-source discharge of any pollutant
5 into the waters of the United States unless that discharge is permitted. See 33 U.S.C.
6 §1311(a); see also, **United States v. Earth Sciences**, 599 F.2d 368, 373 (10th Cir.
7 1979); **Pronsolino V. Nastri**, 291 F.3d 1123, 1126-1127 (9th Cir. 2002); **Natural**
8 **Resources Def. Council v. Environmental Protection Agency**, 279 F.3d 1180, 1182
9 (9th Cir. 2002). The Ninth Circuit Court of Appeals has ruled that CBM water is a
10 pollutant whose discharge must be permitted in accordance with the CWA. **Northern**
11 **Plains Resource Council v. Fidelity**, 325 F.3d 1155, 1165 (9th Cir. 2003), cert.
12 denied, 540 U.S. 967 (2003) (Agreed Facts, No. 14).

14 Under the CWA, the States have primary responsibility for developing and
15 implementing water quality standards to "protect the public health or welfare, enhance
16 the quality of water and serve the purposes of [the Act]." See 33 U.S.C. §1313(a) to
17 (c), 40 CFR §131.2(d) (Agreed Facts, No. 2). All new or revised state water quality
18 standards must be submitted to EPA for review and either approval or disapproval.
19 See 33 U.S.C. §1313(c)(2)(A); 40 CFR §131.21(a), §131.5 (Agreed Facts, No. 11).
20 EPA provides specific minimum requirements for water quality standards: (1) first, each
21 water body must be assigned "designated uses," such as recreation or the protection of
22 aquatic life; (2) second, the standards must specify for each body of water the amounts
23 of various pollutants or pollutant parameters that may be present without impairing the
24 designated use; and (3) third, each state must adopt an antidegradation review policy
25

1 which will allow the state to assess activities that may lower the water quality of the
2 water body. *Am. Wildlands v. Environmental Protection Agency*, 260 F.3d 1192,
3 1194 (10th Cir. 2001). The CWA requires a state's water pollution control agency to
4 review water quality standards a minimum of once every three years. See 33 U.S.C.
5 §1313(c); 40 C.F.R. §131.21(a).

6 **B. The Montana Water Quality Act (WQA)**

7
8 In compliance with the CWA, the Montana Legislature has designated the DEQ
9 as the state agency responsible for regulation of point-source discharges of pollutants
10 in Montana. See §75-5-211, MCA; (BER Rec. 00538; Agreed Facts, No. 4). Similarly,
11 the BER is the designated rulemaking body for water quality regulations in Montana.
12 See §75-5-201, -301, MCA. (Agreed Facts, No. 3.)

13 Consistent with the mandates of the CWA, the BER is statutorily required to (1)
14 classify all state waters in accordance with their present and future most beneficial
15 uses; (2) adopt water quality standards giving consideration to the economics of waste
16 treatment and prevention; (3) periodically review and, if necessary, revise those
17 classifications and standards; (4) adopt rules for mixing zones; (5) adopt rules
18 implementing Montana's nondegradation policy; and (6) ensure that the rules for
19 nondegradation establish objective and quantifiable criteria for various parameters.
20 See §75-5-301, MCA.

21
22 Montana's public policy relative to water quality is found in §75-5-101, MCA.

23 The stated policy is:

24 (1) to conserve water by protecting, maintaining and improving the quality
25 and potability of water for public water supplies, wildlife, fish and aquatic
life, agriculture, industry, recreation and other beneficial uses;

1 (2) to provide a comprehensive program for the prevention, abatement,
2 and control of water pollution; and

3 (3) to balance the inalienable rights to pursue life's basic necessities and
4 possess and use property in lawful ways with the policy of preventing,
abating and controlling water pollution. *Id.*

5 The Legislature recognized its constitutional obligations under Mont. Const. art. II, §3,
6 and art. IX, by expressing its intent that "the requirements of this chapter provide
7 adequate remedies for the protection of the environmental life support system from
8 degradation and provide adequate remedies to prevent unreasonable depletion and
9 degradation of natural resources." See §75-5-102(1), MCA. The Legislature has also
10 expressly stated that "rules should be adopted only on the basis of sound, scientific
11 justification and never on the basis of projections or conjecture," and that the BER
12 should "seriously consider the impact of the proposed rules[.]" *1995 Statement of*
13 *Intent, ch. 497, L. 1995.*

14
15 **C. Consistency With Authorizing Statutes (2003 rules)**

16 Plaintiffs allege that the 2003 rulemaking was done with an arbitrary and
17 capricious disregard for the purpose of the authorizing statutes above because: (1)
18 there was no valid reason to adopt numeric water quality standards for EC and SAR in
19 place of the long-standing narrative standard, as the narrative standard was thought to
20 be historically protective; and (2) the 2003 numeric standards lack any sound scientific
21 justification. Having reviewed the applicable statutes, the administrative record, and in
22 light of state and federal mandates for water quality protection, the Court concludes
23 otherwise.

24 The waters in question are the Tongue River, the Powder River, the Little
25 Powder River, Rosebud Creek, and the tributaries of those waterways. In accordance

1 with the WQA, the BER has classified these waters as either Class B-2 or Class C-3
2 waters, both of which are to be maintained as suitable for, *inter alia*, agricultural water
3 supply, e.g. irrigation. See ARM 17.30.611, 17.30.624, 17.30.629. The use of water
4 for irrigated agriculture is a beneficial use. See *State ex rel. Greely v. Confederated*
5 *Salish & Kootenai Tribes*, 219 Mont. 76, 712 P.2d 754 (1985).

6
7 Until 2003, the beneficial use of these waters for irrigated agriculture was
8 protected by a general "narrative" water quality standard. The "narrative" water quality
9 standard was first promulgated in 1972, and generally prohibits any discharge which
10 creates "concentrations or combinations of materials which are toxic or harmful to
11 human, animal, plant or aquatic life." ARM 17.30.637 (Agreed Facts, No. 24). The
12 narrative standard applies to all parameters not otherwise governed by numeric
13 standards.

14 In this case, the administrative record reflects that the EPA and the DEQ had
15 concerns about the DEQ's ability to objectively and consistently translate the
16 "narrative" standard into permit limits for discharges of CBM produced water. (BER
17 Rec. 00982, 01062, 00339, 00995). This concern is also reflected in the BER's final
18 decision document (BER Rec. 02555: "[n]umeric standards are necessary to clearly
19 delineate an enforceable limit that is consistently applied by various permit writers; the
20 Board does not agree that retaining the existing narrative standard is appropriate").
21 DEQ, BER and the public generally were aware that large-scale CBM development
22 was predicted in the Powder River Basin over the next decade, and permitting
23 discharges of CBM produced water was an issue. (BER Rec. 02637, 00694, 00098-
24 107). For this reason, and with EPA's support, Montana began the process of
25

1 developing numeric water quality standards for the two known constituents (EC and
2 SAR) of CBM water that, in certain concentrations, are harmful to irrigated agriculture.
3 Over a span of nearly two years, a public process took place which produced
4 numerous public hearings, a collaborative effort among the different interest and
5 governmental groups, copious amounts of scientific data and reports, revision of the
6 numbers, and ultimately adoption of the numeric water quality standard at issue in this
7 case.

8
9 Federal law clearly mandates the protection of water quality for designated
10 uses, including agriculture. *Northern Plains Res. Council v. Fidelity, supra*, 325
11 *F.3d at 1159*. In fact, federal regulations encourage states to establish numeric values
12 based on scientifically defensible methods. See 40 C.F.R. §131.11 (narrative
13 standards may be established if numeric standards cannot be set); *Natural Resources*
14 *Defense v. United States EPA*, 915 F.2d 1314, 1317-18 (1990). Narrative criteria are
15 appropriate to supplement numeric criteria, or in the interim until numeric criteria can
16 be established. See 40 C.F.R. §131.11(b)(2).

17 State law requires similar protective measures, and contemplates a
18 comprehensive program for pollution prevention. See §75-5-101(2), MCA. Given
19 these objectives, and the projections for widespread CBM development, the BER was
20 warranted in taking proactive measures to protect water quality. The BER's decision to
21 use numeric standards is within the agency's sound discretion under its rulemaking
22 authority, to which this Court must defer. Theoretically, it is possible that a record so
23 overwhelmingly establishes error regarding the agency's decision that a court should
24 overrule it and remand to the agency, but such circumstances are not present here.
25

1 Plaintiffs assert that the BER acted arbitrarily and capriciously because the
2 numeric water quality standards ultimately adopted in 2003 are excessively strict,
3 sometimes even lower than natural levels of EC and SAR in the receiving water.
4 Plaintiffs suggest that absent some reliable data that the general "narrative" standard
5 was inadequate to protect designated uses, there is no scientific basis to justify a
6 change from the general "narrative" standard to a numeric water quality standard. The
7 Court disagrees. Given the long term projection for massive CBM development, the
8 rules were "reasonably necessary" to ensure consistency in permitting, and for
9 promoting the overriding goal of protecting irrigated agriculture as a designated use.
10 Nothing more is required to uphold the agency actions as consistent with the
11 authorizing statutes.
12

13 The Court understands that the BER focused on CBM discharges in light of the
14 fact that "non-point source" discharges, such as agricultural runoff, are regulated
15 differently from "point-source" discharges under the CWA and under Montana law
16 pursuant to the MPDES permitting process. See e.g. *League of Wilderness*
17 *Defenders v. Forsgren*, 309 F.3d 1181, 1183 (9th Cir. 2002); see also, *Northern*
18 *Plains*, supra, 325 F.3d 1155, 1161-1165 (9th Cir. 2003). Following the Ninth Circuit
19 Court's ruling that CBM point discharges constitute a "pollutant," the BER was obliged
20 to regulate it as such under the MPDES program. Given this rationale, such focus was
21 proper and does not constitute unfair treatment toward industry.
22

23 Plaintiffs also attack the scientific basis of the numbers that were ultimately
24 chosen. On this record, the Court will not second-guess the BER's choice of numbers
25 relative to what is required to protect beneficial uses, e.g., irrigated agriculture. The

1 record is exhaustive and contains more than sufficient scientific justification for the
2 numeric standards that were adopted. The fact that data in the administrative record is
3 subject to scientific debate does not render the agency's conclusions unfounded, nor
4 should the Court participate in that debate and substitute its judgment for that of the
5 rulemaking agency. See *American Petroleum Inst. v. United States EPA*, 858 F.2d
6 261, 264 (5th Cir. 1988); accord, *Marsh v. Oregon*, supra, 490 U.S. at 378 ("When
7 specialists express conflicting views, an agency must have discretion to rely on the
8 reasonable opinions of its own qualified experts even if, as an original matter, a court
9 might find contrary views more persuasive.")

10
11 Scientists agree that, at some levels, EC is damaging to plants and SAR is
12 damaging to soils. (Agreed Facts, No. 29; BER Rec. 00011, 00085, 00113, 01532,
13 01533.) The parties agree that both parameters can affect the suitability of water for
14 irrigation. (Agreed Facts, No. 20, citing BER Rec. 01174.) The record demonstrates,
15 and the parties acknowledge that the factors to consider include soil type, irrigation
16 methods, and crops grown. (Agreed Facts, No. 29, citing BER Rec. 00082, 00109,
17 01534-37.) The law does not require the BER to set the standard at the least
18 protective level (i.e., more favorable to industry), or to shift risk to beneficial users (the
19 irrigators), or to wait for the damage to the resource to occur prior to acting. Moreover,
20 when the matter under consideration is subject to scientific debate, substantial agency
21 expertise is involved, and the agency must choose among differing scientifically
22 supported conclusions, the Court will not consider a second round of scientific debate
23 which infringes upon the executive branch decision-making function. *Friends of the*
24 *Wild Swan v. Department of Natural Resources & Conservation*, supra, ¶128. The
25

1 Court's function is only to determine whether BER's decision was made in compliance
2 with applicable law, supported by the evidence, and adopted through valid
3 administrative procedures. *Id.*, see also ***North Fork Preservation Assoc. v.***
4 ***Department of State Lands***, *supra*, 238 Mont. at 458-59, 778 P.2d at 867.

5 The Court concludes that the BER, in the exercise of its discretion, was entitled
6 to weigh the science, compare the veracity of the experts, and make a final
7 determination based on the evidence presented. See ***Maine v. Norton***, 257 F. Supp.
8 2d 357 (D. Me. 2003). Ultimately, the BER set numeric standards that fell within the
9 range of science presented and determined that rain and other considerations required
10 a conservative approach to protect irrigated agriculture and aquatic life. (BER Rec.
11 02669, 02562-64.) In response to comments, the BER specifically found that the
12 adopted standards were based on a "sound rationale" designed to protect beneficial
13 uses. (BER Rec. 02508.)

14
15 Plaintiffs' essentially argue that the BER should set the standards based on the
16 assimilative capacity of the river to absorb pollutants. However, this is impermissible
17 under the CWA. ***Southeast Alaska Conservation Council v. United States Army***
18 ***Corps of Eng'rs***, 486 F.3d 638, 644 (9th Cir. 2007). Adoption of Plaintiffs' argument
19 would require this Court not only to impermissibly second-guess the BER, but also
20 potentially authorize disposal of water effectively transforming the Powder River Basin
21 into a waste water treatment system. Ultimately, the BER was not required to retain a
22 narrative standard for EC and SAR simply because any prospective damage from full-
23 scale CBM development had not yet occurred. When water quality is at stake, the
24 BER and the DEQ are mandated to afford protection, and to the extent these agencies
25

1 have done so consistent with supportive scientific data, there is no error.

2 3. Are the 2006 BER rules, classifying EC and SAR as harmful parameters
3 invalid because (a) the BER acted with an arbitrary or capricious disregard for the
4 purpose of the authorizing statute(s) and/or (b) BER did not comply with applicable
5 statutory law?

6 **A. Applicable Law**

7 In addition to state and federal requirements to adopt protective water quality
8 standards, the CWA requires states to adopt an anti-degradation policy to protect high
9 quality water. *40 C.F.R. §§131.6(d), 131.12(a)*. High quality water includes all surface
10 waters in Montana except those waters that are not capable of supporting any one of
11 the designated uses for their classification, and any water that is of higher quality than
12 the applicable water quality standard. *See §75-5-103(10), MCA.*

13 Montana's anti-degradation policy is called a "nondegradation" policy and is
14 found at §75-5-303, MCA. The statute provides: "[e]xisting uses of state waters and
15 the level of water quality necessary to protect those uses must be maintained and
16 protected." *See §75-5-303(1), MCA.* DEQ may not authorize degradation of high
17 quality water unless it has been affirmatively demonstrated by a preponderance of the
18 evidence that (a) degradation is necessary because there are no economically,
19 environmentally, and technologically feasible modifications to the proposed project that
20 would result in no degradation; (b) the proposed project will result in important
21 economic or social development and that the benefit of the development exceeds the
22 costs to society of allowing degradation of high quality waters; (c) existing and
23 anticipated use of state waters will be fully protected; and (d) the least degrading water
24 quality protection practices determined by the department to be economically,
25

1 environmentally, and technologically feasible will be fully implemented by the applicant
2 prior to and during the proposed activity. See §75-5-303(3), MCA.

3 "Degradation" means a change in water quality that lowers the quality of high-
4 quality waters for a parameter. The term does not include those changes in water
5 quality determined to be nonsignificant. See §75-5-103(5), MCA. If degradation is
6 allowed, the CWA requires that "existing and anticipated uses of state waters must be
7 fully protected." See 33 U.S.C. §303(3)(c).

8
9 The BER is responsible for adopting rules to implement Montana's
10 nondegradation policy, including rules to determine whether a discharge qualifies as
11 "nonsignificant." See §75-5-301(5), MCA. Pursuant to that statute, the BER is directed
12 to:

- 13 (a) provide a procedure for department review and authorization of
14 degradation;
- 15 (b) establish criteria for the following:
- 16 (i) determining important economic or social development; and
- 17 (ii) weighing the social and economic importance to the public of
18 allowing the proposed project against the cost to society
associated with a loss of water quality;
- 19 (c) establish criteria for determining whether a proposed activity or class of
20 activities, in addition to those activities identified in §75-5-317, will result
21 in nonsignificant changes in water quality for any parameter in order that
those activities are not required to undergo review under §75-5-303(3).
These criteria must be established in a manner that generally:
- 22 (i) equates significance with the potential for harm to human health, a
23 beneficial use, or the environment;
- 24 (ii) considers both the quantity and the strength of the pollutant;
- 25 (iii) considers the length of time the degradation will occur;

1 (iv) considers the character of the pollutant so that greater
2 significances associated with carcinogens and toxins that
3 bioaccumulate or biomagnify and lesser significance is associated
4 with substances that are less harmful or less persistent. See §75-
5-301(5)(a)-(c), MCA.

5 In accordance with §75-5-301(5), MCA, the BER has adopted rules governing
6 nondegradation procedures in ARM 17.30.707-716. The procedure requires a
7 discharger to undergo nondegradation review and thereby obtain an authorization to
8 degrade high quality water, unless the proposed discharge qualifies as "nonsignificant"
9 under ARM 17.30.715. The nonsignificance criteria are dependent on several factors,
10 including the quantity, strength and character of the pollutant (e.g., carcinogens being
11 most closely regulated, then toxins, and finally, pollutants that are deemed harmful).
12 The discharge of any parameter for which numeric standards exist is significant if it will
13 cause the receiving waters to meet or exceed the numeric standards. A discharge of
14 any parameter that is governed by the narrative water quality standard qualifies as
15 "nonsignificant" as long as the change "will not have a measurable effect on any
16 existing or anticipated use or cause measurable changes in aquatic life or ecological
17 integrity." See *ARM 17.30.715(1)(g)*. This is referred to as the "narrative
18 nonsignificance rule" because it does not have numeric trigger values for
19 nondegradation review, as there are for carcinogens, toxics, and other harmful
20 parameters.

21
22 **B. Consistency With Authorizing Statutes (2006 rules)**

23 Prior to the 2003 rulemaking, any discharges containing EC and SAR were
24 subject to the "narrative nonsignificance rule" because EC and SAR were governed by
25 the narrative water quality standards in ARM 17.30.637. In 2003, when numeric

1 standards for EC and SAR were adopted, discharges of those parameters no longer
2 qualified as "nonsignificant" under subsection (1)(g). Nonetheless, the BER voted to
3 retain the narrative "nonsignificant" criteria for purposes of nondegradation review even
4 though EC and SAR now had numeric standards. (BER Rec. 06659; 3/28/03 Tr. at
5 157, 160.) In practice, the narrative nonsignificance criterion meant that a discharge of
6 EC and SAR would be deemed significant (and thus subject to formal nondegradation
7 review) only if it caused concentrations of those parameters to be at or near the
8 concentrations allowed by the 2003 numeric standards. (Agreed Facts, No. 52.) This
9 allowed a discharger to degrade water quality effectively up to the water quality
10 standard itself.
11

12 In the 2006 rulemaking, the BER designated EC and SAR as "harmful"
13 parameters for purposes of the nonsignificance determination, which means that
14 numeric nonsignificance criteria apply (what the parties refer to as the "40/10" rule).
15 (Agreed Facts, No. 59.) With this designation, as with other harmful parameters, a
16 discharge containing EC and SAR qualifies as nonsignificant only if the change in
17 water quality is "less than 10% of the applicable standard and the existing water quality
18 level is less than 40% of the standard." See *ARM 17.30.715(1)(f)*. This change
19 requires an authorization to degrade if a proposed discharge to high quality water
20 exceeds these trigger levels (State's Exhibit B), so that dischargers may no longer
21 degrade high quality water up to the standard itself. Plaintiffs challenge this action as
22 arbitrary or capricious because they allege (1) there is no evidence that water quality
23 was not adequately protected under the 2003 nondegradation criteria; (2) the BER
24 failed to consider the factors in §75-5-301(5), MCA; and (3) the BER was illogically
25

1 focused on CBM rather than irrigation as the true cause of degradation. Implicit in
2 Plaintiffs' argument is the notion that the 2006 rulemaking effectively cut the numeric
3 standards in half, so that an entirely new scientific justification for the rules was
4 required.

5 The Court is not persuaded by Plaintiffs' characterization of the 2006
6 rulemaking. In fact, what the BER did in 2006 was treat discharges of EC and SAR for
7 purposes of nondegradation review in the same manner as all other constituents for
8 which there are numeric standards. (BER Rec. 06657, 06661.) This was essentially a
9 policy-based decision for which there is adequate scientific justification in the 2003
10 rulemaking record. The rules protect high quality water by requiring permit writers to
11 stop short of allowing degradation right up to the standard.

12 In a proper exercise of its discretion, the BER determined that its 2003 decision
13 to retain a narrative nonsignificance rule for EC and SAR did not adequately protect
14 high quality water, and that it was more appropriate to treat EC and SAR consistently
15 with all other parameters for which there are numeric standards. (BER Rec. 06654-
16 06661.) There is nothing in the record to suggest that the BER's decision was based
17 on anything but a careful consideration of relevant factors, or that the BER committed a
18 "clear error of judgment." As in the 2003 rulemaking, the BER held numerous public
19 hearings, received significant comment, and clearly articulated its reasons for changing
20 from narrative nonsignificance criteria, to numeric criteria that were clear and
21 identifiable. In this respect, the 2006 amendment is entirely consistent with the
22 legislative directive to establish "objective and quantifiable criteria for various
23 parameters," when adopting rules implementing Montana's nondegradation policy.
24
25

1 See §75-5-301(6), MCA.

2 As noted, Montana's nondegradation policy forbids any change to high quality
3 waters unless certain findings are made. See §75-5-303(3), MCA. To the extent that
4 discharges of EC and SAR qualified as nonsignificant under the 2003 rules, the
5 potential existed for incremental degradation of high quality water without the required
6 findings. In this respect, the 2006 rules simply brought the regulation of EC and SAR
7 into better conformity with state and federal law. In sum, there is nothing arbitrary or
8 capricious about the BER's classification of EC and SAR as harmful parameters,
9 especially in view of *NPRC v. Fidelity, supra*.

10
11 Finally, the effect of the new nondegradation criteria is simply to require CBM
12 developers to obtain an authorization to degrade, which is not the equivalent of a
13 moratorium on CBM development. Where high quality water is at stake, the law
14 mandates this result and does not allow the DEQ or the BER to forego such review.

15 After review of the administrative record of the 2003 and 2006 proceedings, the
16 Court finds that the BER adequately considered the factors in §75-5-301(5), MCA,
17 when amending its nonsignificance rule. The rule itself (ARM 17.30.715) includes the
18 language of the statute:

- 19
20 (1) The following criteria will be used to determine whether
21 certain activities or classes of activities will result in
22 nonsignificant changes in existing water quality due to their
23 low potential to affect human health or the environment.
These criteria consider the quantity and strength of the
pollutant, the length of time the changes will occur, and the
character of the pollutant.

24 It may be inferred that, by amending the rule itself, the BER took these factors
25 into account when it determined that EC and SAR should be classified as harmful

1 parameters for purposes of determining nonsignificance. Therefore, the Court
2 concludes that the BER did comply with statutory law when classifying EC and SAR as
3 harmful parameters in 2006.

4 4. Was the BER required to make written findings in accordance with §§75-
5 5-203 and/or 75-5-309, MCA, relative to the 2003 or 2006 rulemakings?

6 Montana law requires the BER to make written findings if it adopts rules that are
7 more stringent than corresponding federal regulations. See §§75-5-203, -309, MCA.
8 Specifically, §75-5-203(1), MCA, forbids the adoption of a rule that is “more stringent
9 than the comparable federal regulations or guidelines that address the same
10 circumstances.” Subsection 2 allows adoption of such a rule if the BER makes certain
11 findings based on evidence in the record. Section 75-5-309(1), MCA, contains a
12 similar requirement employing different language and authorizes adoption of rules that
13 are “more stringent than corresponding draft or final federal regulations, guidelines, or
14 criteria” if the requisite written findings are made. These statutory requirements were
15 imposed by the Legislature in 1995. (See Chapters 471 and 497.)
16

17 The parties acknowledge that the BER did not make written findings under
18 §§75-5-203 or 75-5-309, MCA, for either the 2003 or the 2006 rulemakings. The DEQ
19 provided a legal opinion to the BER that the 2003 numeric standards and the 2006
20 nonsignificance criteria for EC and SAR were not more stringent than comparable or
21 corresponding federal regulations. (Agreed Facts, Nos. 56, 69.) Defendants argue
22 that the BER was not required to make written findings because there are no
23 “comparable” or “corresponding” federal regulations, guidelines, or criteria governing
24 EC and SAR. Alternatively, citing 40 C.F.R. §130.11, Defendants argue that the rules
25 governing EC and SAR are consistent with, and not more stringent than, federal

1 regulations requiring states to adopt water quality standards to protect designated
2 uses.

3 Plaintiffs argue that when the EPA approved the general "narrative" water
4 quality standard (presumably around 1972), it became the federal standard for
5 purposes of §§75-5-203 and 75-5-309, MCA, so that any subsequent change to
6 numeric standards triggered the necessity for written findings thereunder. Similarly,
7 Plaintiffs contend that when EPA approved the nonsignificance nondegradation criteria
8 in 2003, it became the federal nondegradation standard, so that any subsequent
9 designation of EC and SAR as harmful parameters also triggered the requisite
10 statutory findings.
11

12 Plaintiffs cite no authority for the proposition that EPA approval "federalizes" the
13 standard such that the BER is required to comply with §§75-5-203 and/or 75-5-309,
14 MCA, whenever a water quality standard or the nonsignificance criteria are revised.
15 This is a question of legislative intent, and there is nothing in the plain language of the
16 statutes or their legislative history to support Plaintiffs' interpretation. Written findings
17 are required only when the adopted or revised state standards are more stringent than
18 comparable or corresponding federal regulations or guidelines. See §§75-5-203 and
19 75-5-309, MCA.
20

21 Sections 75-5-203 and 75-5-309, MCA, are triggered only when EPA has
22 promulgated a federal regulation, guideline or criteria addressing the particular
23 parameter involved (EC or SAR) or discharges of CBM water generally. See 33 U.S.C.
24 §1314(a) (authorizing EPA to promulgate numeric criteria that apply nationwide). The
25 parties agree that there are no national numeric criteria for EC or SAR. (BER Rec.

1 00539; Agreed Facts, No. 22.) In the absence of specific corresponding or comparable
2 federal regulations or guidelines governing EC or SAR, or CBM produced water
3 generally, the Court concludes that the BER was not required to issue written findings
4 under §§75-5-203 or 75-5-309, MCA. The Court also notes that the BER's adoption of
5 numeric standards for EC and SAR and their classification as harmful parameters is
6 consistent with the federal CWA insofar as the standards protect designated uses and
7 high quality water. The statutes do not require the BER to issue written findings for
8 rules that are consistent with, as opposed to more stringent than (or in conflict with),
9 federal requirements.
10

11 In view of the foregoing, the BER did not arbitrarily disregard the controlling
12 statutes.

13 5. Was the BER required to prepare an environmental impact statement
14 (EIS) at the time of the 2006 rulemaking?

15 The standard for judicial review of an agency's action subject to the Montana
16 Environmental Policy Act (MEPA) is "whether the record establishes that the agency
17 acted arbitrarily, capriciously, or unlawfully." *North Fork Preservation Ass'n v.*
18 *Department of State Lands, supra, 238 Mont at 458-59, 778 P.2d at 867.* To
19 determine the lawfulness or unlawfulness of an agency decision, a court reviews an
20 agency's action for compliance with its own procedural rules under MEPA. *Id., 238*
21 *Mont. at 459, 778 P.2d at 867.* Plaintiffs contend that the 2006 rulemaking constituted
22 a "major action of state government" that required preparation of an EIS pursuant to
23 MEPA. The Court disagrees.

24 When the BER adopted the rules classifying EC and SAR as "harmful" in 2006,
25 the agency did not *authorize any activity* affecting the quality of the human

1 environment. The Montana Supreme Court has affirmed that “[a]n EIS is required only
2 when there is a substantial question as to whether [the action] may have a significant
3 effect upon the human environment.” See §75-1-201(1)(b)(iv), MCA. **Ravalli County**
4 **Fish & Game Ass’n v. Montana Dep’t of State Lands**, 273 Mont. 371, 382, 903 P.2d
5 1362, 1370 (1995).

6 In resolving the issue of whether a duty of environmental review exists, the
7 Court is required to determine when MEPA analysis must be completed prior to a final
8 agency decision. For guidance, this Court has reviewed case law which addresses the
9 timing of an EIS in the decision-making process of state and federal agencies. Other
10 courts have attempted to explain with precision at what point an EIS is required. The
11 Court is persuaded that “[a]n EIS is required when the ‘critical agency decision’ is
12 made which results in ‘irreversible and irretrievable commitments of resources’ to an
13 action which will affect the environment.” **Sierra Club v. Peterson**, 230 U.S. App. D.C.
14 352 (D.C. Cir., 1983) (citing **Mobil Oil Corp. v. F.T.C.**, 562 F.2d 170, 173 (2d Cir.
15 1977)). This same rule has been adopted by the Ninth Circuit Court of Appeals. See
16 e.g. **Conner v. Burford**, 848 F.2d 1441, 1446 (9th Cir., 1988) [“Our circuit has held
17 that an EIS must be prepared before any irreversible and irretrievable commitment of
18 resources.”]
19

20 Based upon the above authority, it is clear that promulgation of rules regulating
21 water quality does not constitute an “irretrievable commitment of resources” and is not
22 an action requiring an EIS. The regulations do not authorize nor permit surface
23 disturbing activity independent of further governmental action. See **Conner v.**
24 **Burford**, *supra*; see also, **Lujan v. Nat’l Wildlife Fed’n**, 497 U.S. 871, 891-802, 110
25

1 S. Ct. 3177, 3190-3191 (1990). The promulgation or modification of environmental
2 regulations, while certainly very significant, is not the type of "major action of state
3 government" contemplated under MEPA. In contrast, a decision by DEQ to authorize
4 degradation under §75-5-303, MCA, or to issue a MPDES permit, would require prior
5 environmental review due to its potential effect upon the human environment. See
6 ARM 17.4.603(1). No such circumstance is present in this case. Accordingly, the BER
7 did not err in declining to prepare an EIS at the time of the 2006 rulemaking.
8

9 **WHEREFORE**, for the reasons stated above,

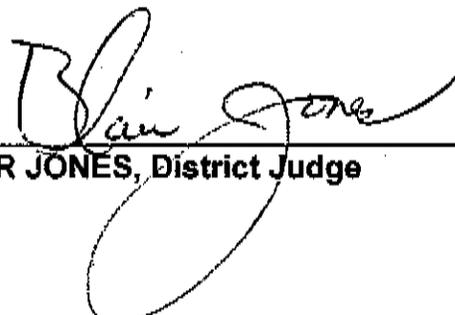
10 **IT IS ORDERED** as follows:

11 1. The *MOTIONS FOR SUMMARY JUDGMENT* filed by Defendants, BER and
12 DEQ, and Defendant-Intervenors, NPRC and TRWUA, are hereby **GRANTED**.

13 2. The Cross *MOTION FOR SUMMARY JUDGMENT* filed by Plaintiffs and
14 Plaintiff-Intervenor Fidelity is hereby **DENIED**.

15 Let judgment be prepared and entered accordingly.

16 **DATED** this 17th day of October, 2007.

17
18 
19 _____
20 **BLAIR JONES, District Judge**

21 cc: Lawrence B. Cozzens
22 John C. Martin
23 Duane A. Siler
24 Jack Tuholske
25 Sarah A. Bond
Claudia L. Massman
Jon Metropoulos
Dana Hupp
Brenda Lindlief-Hall

CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by mail or fax upon
the parties or their attorneys of record at their last known address
this 17th day of October, 2007
By Heather B. Haldy
Court Administrator for HON. BLAIR JONES