Pennaco, et al. v. Board of Environmental Review, et al.
Cause No. DV 06-68, 22nd Judicial District, Big Horn County
Judge Jones
Decided 2008

The plaintiffs challenged both the water quality standards set for electrical conductivity (EC) and sodium adsorption ratio (SAR) set by the Board of Environmental Review (BER) in 2003, and the nondegradation threshold the BER established in 2006.

In Count I, they alleged that the standards lack sound scientific justification because they are lower than background during the irrigation season, because they are lower than necessary to protect uses due to the BER's use of inaccurate soils data, and because the tributary standards are higher than necessary to achieve compliance with the standards in the Tongue and Powder mainstems. In Count II, the plaintiffs alleged that adoption of the 2003 standards violates HB 521, which prohibits adoption of rules that are more stringent than federal regulations or guidelines unless certain findings are made. In Count III, they alleged that the 2006 adoption of the nondegradation threshold was arbitrary and capricious because the BER did not address its 2003 conclusion that the threshold for EC and SAR should not be set as the Board set it in 2006. In Count IV, they alleged that the 2006 adoption of the nondegradation threshold violated the authorizing statute, which requires that nondegradation thresholds equate significance with potential for harm. In Count V, the plaintiffs allege that the 2006 adoption of the nondegradation threshold violated HB 521. In Count VI, they alleged that the 2006 adoption of the nondegradation threshold is invalid because the Board did not prepare an EIS. On October 17, 2007, the District Court issued an order ruling on the parties' cross-motions for summary judgment. The District Court held in favor of the BER and DEQ on all counts. Plaintiffs filed an appeal. The Supreme Court affirmed the District Court's decision in an opinion filed on December 16, 2008. [347 MT 415]

DEQ staff summary
2009

ORDER

PENNACO ENERGY, INC., et. al., Plaintiff, FIDELITY EXPLORATION AND PRODUCTION COMPANY MONTANA BOARD OF OIL AND GAS CONSERVATION, Plaintiff-Intervenor, vs. MONTANA BOARD OF ENVIRONMENTAL REVIEW, et. al., Defendant, NORTHERN PLAINS RESOURCE COUNCIL, and TONGUE RIVER WATER USERS, Defendant-Intervenors

Cause No. DV 06-68

TWENTY-SECOND JUDICIAL DISTRICT COURT OF MONTANA, BIG HORN COUNTY

2007 Mont. Dist. LEXIS 513

October 17, 2007, Decided

SUBSEQUENT HISTORY: Related proceeding at *N. Cheyenne Tribe v. Tongue River Water Users' Assoc., 2008 Mont. Dist. LEXIS 647 (2008)*
Affirmed by *Pennaco Energy, Inc. v. Mont. Bd. of Envtl. Review, 2008 MT 425, 347 Mont. 415, 199 P.3d 191, 2008 Mont. LEXIS 664 (2008)*

JUDGES: [*1] BLAIR JONES, District Judge.

OPINION BY: BLAIR JONES

OPINION

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

P1. Before the Court are *Motions for Summary Judgment* filed by Defendants Montana Board of Environmental Review (BER) and Department of Environmental Quality (DEQ), together with Defendant-Intervenors Northern Plains Resource Council (NPRC) and Tongue River Water Users Association (TRWUA.) A cross *Motion for Summary Judgment* was filed by Plaintiffs Pennaco Energy, Inc. (Pennaco), Marathon Oil Company (Marathon), and PlaintiffIntervenor Fidelity Exploration and Production Company (Fidelity.) A hearing on the motions was held at the Stillwater County Courthouse, Columbus, Montana on July 2, 2007. John C. Martin and Duane A. Siler of Patton Boggs, LLP, Washington, D.C. and Lawrence B. Cozzens of Cozzens, Warren & Harris, Billings, Montana appeared on behalf of Pennaco. Jon Metropoulos of Gough, Shanahan, Johnson & Waterman, [*2] Helena, Montana appeared on behalf of Fidelity. Assistant Montana Attorneys-General Sarah A. Bond and Jennifer M. Anders appeared representing Defendant BER. Defendant DEQ was represented by Claudia L. Massman. NPRC and TRWUA were represented by Jack R. Tuholske and Brenda Lindlief-Hall, respectively.

STATEMENT OF THE CASE

P2. On June 30, 2006, Plaintiffs brought this action under the Montana Administrative Procedure Act (MAPA), *§ 2-4-506, MCA*, the Montana Declaratory Judgment Act, *§ 27-8-102, MCA et seq.*, the Montana Water Quality Act (WQA), *§ 75-5-101, MCA et seq.*, and the Montana Environmental Policy Act (MEPA), *§ 75-1-101, MCA et seq.*, seeking to invalidate water quality rules adopted by Defendant BER on April 14, 2003 and on May 18, 2006.

P3. Plaintiffs allege that the BER adopted the 2003 rules without the specific findings or the sound scientific basis Plaintiffs believe is mandated under the WQA and, indirectly, under MAPA. Plaintiffs further allege that the 2006 rules, which designated *Electrical Conductivity* (EC) and *Sodium Adsorption Ratio* (SAR) as "harmful" parameters, were unaccompanied by specific written findings and lacked an adequate scientific basis for the designation. [*3] Additionally, Plaintiffs contend that the BER and the DEQ were required to prepare an environmental impact statement (EIS) for the proposed rule under MEPA.

P4. On February 22, 2007 Defendants and Defendant-Intervenors (collectively Defendants) moved for summary judgment on all claims as set forth in the Plaintiffs' *Complaint*. On April 12, 2007, Plaintiffs and Plaintiff-Intervenors (collectively Plaintiffs) filed a cross-motion for summary judgment on all claims. The issues have been fully briefed. On June 30, 2007, the parties submitted an *Agreed Statement of Law and Facts* (Agreed Facts). The Court heard oral argument on July 2, 2007.

PROCEDURAL AND FACTUAL BACKGROUND

P5. This case involves the validity of certain administrative rules governing water quality promulgated by the BER in 2003 and 2006. The 2003 rules establish

numeric water quality standards for EC and SAR. The 2006 rules address nondegradation review of discharges into State waters that contribute to EC and SAR, including coal-bed methane effluents. The 2003 rules were motivated, at least in part, by projected coal bed methane (CBM) development in the Powder River Basin of southeastern Montana. (BER Rec. at 00694.) CBM [*4] produced water is known to contain high levels of sodium and salts. EC and SAR indicators occur naturally and are present in water extracted from coal seams during CBM production. *See* ***Northern Plains Res. Council v. Fidelity Exploration & Dev. Co.,*** *325 F.3d 1155, 1158 (9th Cir. 2003),* cert. denied, *540 U.S. 967, 124 S. Ct. 434, 157 L. Ed. 2d 312 (2003).* Scientific research indicates that at certain levels, EC can damage plants and SAR may negatively affect soils. (***Id***., see also, Agreed Facts, Nos. 17, 20.) Arguably, CBM produced water discharged into rivers and streams could potentially damage soils, crops, aquatic life and native plant communities.

P6. The production of CBM in the Powder River Basin requires the pumping and disposing of enormous amounts of waste water, which is released when hydrostatic pressures trapping the methane gas is relieved. The produced water diminishes once the gas begins to flow. Various methods are available to methane producers to dispose of the produced water. The least expensive method is to discharge the water directly into surface waters. However, the Ninth Circuit Court of Appeals has concluded that CBM produced water is a "harmful pollutant" necessitating a National [*5] Pollutant Discharge Elimination System (NPDES) permit before discharge into surface waters. *Northern Plains Res. Council , supra, 325 F.3d 1155 at 1162.*

P7. The administrative record shows that in 2000 and 2001, the DEQ was actively investigating the impact of CBM development and the effects of CBM produced water on soils, crop yields, and aquatic life in the Powder River Basin. (BER Rec. 02641, 02867-70, 00098107). This coincided with DEQ's participation in a statewide oil and gas environmental impact statement (EIS) being prepared in conjunction with the federal Bureau of Land Management. (BER Rec. 01061, 03947-60). Ultimately, the DEQ decided to adopt numeric water quality standards to protect irrigated agriculture and other designated uses of surface water in the Basin. Industry interests opposed this effort, contending that water quality was adequately protected under the narrative standard applicable to all parameters for which there are no numeric standards. (BER Rec. 00979, 01100, 01858-863).

P8. In 2002, following consultations with DEQ's expert consultant, Dr. Oster, a soil scientist from the USDA Salinity Lab in Riverside, California, DEQ staff developed two proposals for water [*6] quality standards for EC and SAR. These proposals were presented to the BER in July 2002. (Agreed Facts, No. 25; BER Rec. 02751-761; 02669, 02766, 00981-994). Both proposals were accompanied by technical support documents explaining the rationale and the scientific basis for the proposed rules. (BER Rec. 01061-74; 01082-95). Further, the record shows that BER received information that the rivers in the Powder River Basin have naturally fluctuating levels of EC and SAR, and that those natural variations may exceed the standards on occasion. (BER Tr., 1/31/03, at 186:17-18.) This may be due to the fact that the region was once a marine ecosystem and thus naturally high in salts and sodic compounds. (BER Rec. 00910.) Montana law exempts "naturally occurring" runoff from the permitting process. *See A.R.M. 17.30.602.*

P9. Contemporaneously, in June 2002, NPRC, TRWUA, and other irrigators in the Powder River Basin filed a citizens' petition to initiate rulemaking. The petition urged the BER to adopt numeric standards for EC and SAR on four rivers in the Basin and their tributaries. (Agreed Facts, No. 23; BER Rec. 00801-839).

P10. The BER voted to publish three different proposals and receive [*7] public comment. (Agreed Facts, No. 26; 7/26/02 Tr. at 181, 184). At BER's insistence, a collaborative committee of interested parties met five times in two months, but was unable to reach consensus. (Id. at 171, 183.) Members of the collaborative committee included CBM developers and their consultants, DEQ, EPA, irrigators, NPRC, and the Northern Cheyenne and Crow Tribes. The Northern Cheyenne Tribe was also in the process of developing numeric water quality standards for EC and SAR. (BER Rec. 00439-537; see also 01917-02075, 02461.)

P11. The BER held public hearings in Miles City on September 26, 2002, and in Helena on September 27, 2002. (Agreed Facts, No. 28.) BER and interested parties also participated in a public tour of CBM wells and agricultural sites in Wyoming and Montana on September 25, 2002. (BER Rec. 01265.) BER modified the proposed rules in response to comments received and held an additional public hearing in January 2003. (BER Rec. 02298-306, 1/31/03 Tr.) Before and during the public comment period, which extended from August 2002 to January 2003, the BER received extensive information and comment from soil scientists, DEQ technical staff, the federal Environmental [*8] Protection Agency (EPA), industry, environmental groups, and irrigators. (Agreed Facts, No. 28.) This information and comment is contained in the administrative record submitted to the Court.

P12. In March 2003, the BER adopted specific numeric standards for EC and SAR in the affected streams for both the irrigation season and the non-

irrigation season. (Agreed Facts, Nos. 34, 36.) The BER also addressed these parameters for purposes of Montana's nondegradation policy, but voted to retain a narrative nonsignificance criterion for high quality water (rather than imposing numeric thresholds) to determine whether nondegradation review is triggered. BER also incorporated a nonseverability clause and provisions for flow-based permitting. (Agreed Facts, No. 49; BER Rec. 02298-306; 3/28/03 Tr. at 129-156; 190.) The administrative record suggests that the narrative nonsignificance criteria, the nonseverability clause, and flow-based permitting were a compromise in favor of the CBM developers so that industry would support adoption of numeric standards. (BER Rec. 01205, 02273, 02298-306.)

P13. On April 14, 2003, the BER certified the new rules and amendments to the Secretary of State for publication [*9] in the Montana Administrative Register (MAR). The *Notice of Adoption and Amendment* included responses to comments submitted. The new rules and amendments became effective upon publication on April 25, 2003. (Agreed Facts, No. 54; BER Rec. 0255274.) The 2003 numeric water quality standards were codified at *ARM 17.30.670(1)*-(6). The Regional Administrator of EPA approved the standards set by the BER in August 2003. (Agreed Facts, No. 57; BER Rec. 06046-49.)

P14. Two years later, in May 2005, NPRC and a group of irrigators filed another petition for rulemaking, asking the BER to adopt rules to (1) require reinjection or treatment of CBM water, and (2) designate EC and SAR as "harmful" parameters so that those discharges would be subject to objective numeric nonsignificance criteria and would no longer qualify as nonsignficant under the subjective narrative criteria. (BER Rec. 03605-677.) On September 26, 2005, the BER certified to the Secretary of State for publication MAR Notice No. 17-231, a notice of public hearing on the proposed amendment. (Agreed Facts, No. 64.) Notice of public hearings was published on October 6, 2005. (BER Rec. 04331.)

P15. The BER held public hearings on November [*10] 9, 2005, in Lame Deer; November 10, 2005 in Miles City; and December 1, 2005 in Helena (Agreed Facts, No. 64; BER Rec. 04132-147). On March 23, 2006, the BER held a public meeting and voted to adopt the nondegradation component of the petition as submitted. (Agreed Facts, No. 66; 3/23/06 Tr. at 129-31.) The BER voted to reject the proposal to require reinjection or treatment of CBM water. (3/23/06 Tr. at 133; 157; 166.) On May 8, 2006, the BER certified to the Secretary of State a *Notice of Amendment*, which included responses to comments submitted. (Agreed Facts, No. 70.) Adoption of the nondegradation component resulted in the application of the same numeric nonsignificance criteria for EC and SAR in the four affected streams that apply to other parameters with numeric water quality standards. (Agreed Facts, No. 66; BER Rec. 06657, 06661; Agreed Facts, No. 66.) The rules adopted in 2006 have been submitted to the EPA, but have not yet been approved. (Agreed Facts, No. 71.)

P16. Plaintiff energy companies filed their *Amended Complaint for Declaratory Judgment* in July 2006, challenging the 2003 and 2006 rulemakings. Plaintiffs do not allege that they have been denied a permit under the [*11] challenged rules, nor do they allege that they have applied for and been denied an authorization to degrade high quality water in Montana. Fidelity filed its own *Complaint* in intervention in August 2006, which essentially mirrors Plaintiffs' *Amended Complaint*. Defendants answered those complaints, and submitted the certified administrative record of the 2003 and 2006 rulemakings to this Court in December 2006. Defendants and Defendant-Intervenors filed motions for summary judgment and accompanying briefs in February 2007. At a scheduling conference in March 2007, Plaintiffs indicated their intent to file a cross-motion for summary judgment. Thereafter, the Court set a briefing schedule for crossmotions and responsive pleadings, and requested an agreed statement of facts. The parties submitted an *Agreed Statement of Facts and Law* prior to the hearing, which the Court has considered along with the voluminous administrative record.

STANDARD OF REVIEW

P17. Summary judgment may be granted if there is no genuine issue of material fact and the movant is entitled to a judgment as a matter of law. *Rule 56(c), M.R.Civ.P*. A party requesting summary judgment first "must demonstrate that no genuine [*12] issues of material fact exist. Once the moving party has made this showing, "the burden shifts to the non-moving party to prove, by more than mere denial and speculation, that a genuine issue does exist." ***Cape-France Enterprise v. Estate of Peed***, *2001 MT 139, P13, 305 Mont. 513, 29 P.3d 1011*. Summary judgment is particularly appropriate in cases involving judicial review of final agency action. ***Friends of the Wild Swan v. Department of Natural Resources & Conservation***, *2005 MT 351, P28, 330 Mont. 186, 127 P.3d 394*, citing ***Chevron USA, Inc. v. NRDC***, *467 U.S. 837, 865, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)*; ***Winchell v. Montana Dep't of Natural Resources Conservation***, *1999 MT 11, 293 Mont. 89, 972 P.2d 1132*.

P18. Plaintiffs brought this declaratory judgment action pursuant to the Montana Administrative Procedure Act (MAPA) and the Montana Declaratory Judgment Act (MDJA). *Section 2-4-506(2), MCA* provides that a court may declare a rule invalid only if "the rule was adopted with an arbitrary or capricious disregard for the purpose

of the authorizing statute as evidenced by documented legislative intent." A rule comports with MAPA if it is (a) consistent and not in conflict with the applicable statute, [*13] and (b) reasonably necessary to effectuate the purpose of the statute. *See § 2-4-305(6), MCA.*

P19. The opinions of the Montana Supreme Court explain the brief statutory language providing the applicable standard of review for formal agency action. In ***Winchell***, *supra*, the Supreme Court noted that judicial review of agency rulemaking is limited to whether the agency erred in law, or whether its decision is wholly unsupported by evidence, or is clearly arbitrary or capricious. ***Winchell***, *supra, 1999 MT 11, P11*.

P20. When the agency decision is within its delegated area of expertise, as it is in this case, and when it is based on scientific or technical data, the Supreme Court has held that judicial review is even narrower. In ***Johansen v. State***, *1999 MT 187, P9, 295 Mont. 339, 983 P.2d 962 (Johansen II)*, the Supreme Court affirmed its earlier ruling in Johansen I that "district courts should defer to an agency's decision where substantial agency expertise is involved." ***Id.***, *P9, quoting* ***Johansen v. Dep't of Natural Resources & Conservation***, *1998 MT 51, P29, 288 Mont. 39, 955 P.2d 653 (Johansen I).* Moreover, "[n]either the district court nor the Supreme Court may substitute their discretion [*14] for the discretion reposed in boards and commissions by the legislative acts." ***Johansen I***, *P26, quoting* ***North Fork Preservation Ass'n v. Dep't of State Lands***, *238 Mont. 451, 778 P.2d 862, 866 (1989).*

P21. The U.S. Supreme Court has stated: "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified expert even if, as an original matter, a court might find contrary views more persuasive." ***Marsh v. Oregon Natural Resources Council***, *490 U.S. 360, 378, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989).* The Montana Supreme Court endorsed this deferential standard in ***North Fork***, *supra*, which involved judicial review of an agency decision to forego an EIS:

This decision necessarily involved expertise not possessed by courts and is part of a duty assigned to [the agency], not the courts. In light of this, and the cases cited above, we hold that the standard of review to be 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.*

P22. In reviewing whether the agency acted arbitrarily or capriciously, the Court must consider [*15] whether the decision "was based on a consideration of the relevant factors" and whether there has been a "clear error of judgment." ***Id.***, *238 Mont. at 465, 778 P.2d at 871, quoting* ***Citizens to Preserve Overton Park, Inc. v. Volpe***, *401 U.S. 402, 416, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971).* The Court may not substitute its judgment for that of the agency to which the legislature has assigned the role of expert and decision maker. ***Friends of the Wild Swan***, *supra.* For this reason, the party challenging the agency's action has the burden of proving error by the rulemaking agency. See ***Thornton v. Commissioner of Dep't of Labor & Indus.***, *190 Mont. 442, 445, 621 P.2d 1062, 1064 (1980).* The Court reviews the agency determination of law for correctness. ***Seven Up Pete Venture v. Montana***, *2005 MT 146, 58, 327 Mont. 306, 114 P.3d 1009.*

P23. NPRC and TRWUA submit that the Montana Constitution is relevant to the standard of review insofar as it guarantees to all citizens the right to a clean and healthful environment, *Mont. Const. art. II, §3*, and imposes a duty on the State and each person to maintain and improve a clean and healthful environment for present and future generations, *Mont. Const. art. IX, §1*. In light [*16] of these constitutional provisions, Defendant-Intervenors argue that the administrative rules cannot be invalidated based on Plaintiffs' argument that they are overly protective, and that if there is any question about the validity of the rules, this Court is obligated to recognize their validity in light of *Mont. Const. art. II, §3, and art. IX, §1*. Since the Court concludes that the BER's exercise of rulemaking authority was consistent with authorizing legislation, and that BER did not act arbitrarily or capriciously in the exercise of that discretion, the constitutional implications of BER's actions need not be considered.

ISSUES

P24. The Court restates the issues as follows:

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

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

3. Are the 2006 BER rules classifying EC and SAR as harmful parameters invalid because:

a) the BER acted with an arbitrary or capricious disregard for the purpose of the authorizing statute(s)?

and/or

b) BER did not comply with [*17] applicable statutory law?

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

5. Was the BER required to prepare an

environmental impact statement (EIS) at the time of the 2006 rulemaking?

DISCUSSION

P25. 1. Should the Court consider evidence submitted by Plaintiffs outside the certified administrative record

P26. Judicial review of formal agency actions, like the MAPA rulemakings at issue herein, is generally confined to the record before the agency unless the Plaintiff can show a clear and specific need for supplementation. *See § 2-4-704(1), MCA*; see, e.g., ***Public Power Council v. Johnson***, *674 F.2d 791, 793-94 (9th Cir. 1982)*. There are limited exceptions which may justify expansion of the record or permit discovery, i.e., where there is a need to explain the agency's action, where the record is incomplete, or where there is a need to explain technical terms or the subject matter involved. ***Id***.

P27. The parties generally agree on these standards, although they disagree on their application to this case. Plaintiffs claim that extra-record evidence is appropriate because witness deposition testimony [*18] establishes that the administrative record is inadequate on certain points. Defendants respond that Plaintiffs have made no real showing that the additional material is needed or relevant, or how the evidence offered demonstrates anything other than the same arguments repeated before the BER.

P28. The administrative record certified to this Court exceeds 6,000 pages. It includes all public comments received, notices of hearings, transcripts of BER proceedings, scientific data and reports - many of which are from Plaintiffs' experts and representatives _ relevant correspondence, and a wealth of other information. Plaintiffs' offered supplemental information was also available for the Court's consideration. The extra-record evidence offered by Plaintiffs is information that the rulemaking agency never considered. Plaintiffs offer this extra-record evidence in support of their contentions that the rules at issue are invalid. Defendants object to this Court's consideration of that evidence, noting that Defendants maintained, and Plaintiffs agreed, to a standing objection to the admissibility of any deposition testimony.

P29. Upon the Court's review of the administrative record, the Court [*19] concludes that the agency adequately considered all relevant information or evidence necessary for an informed decision. All indications are that the administrative record is complete and more than adequate to resolve the issues before the Court. Additional evidence is not required to explain the agency's action or the subject matter involved. The Court gives little weight to Plaintiffs' reliance on deposition testimony of DEQ personnel suggesting that the administrative record is silent or inadequate on certain points. It is unclear whether those witnesses actually reviewed the administrative record that was certified to this Court. More importantly, the administrative record speaks for itself.

P30. For the foregoing reasons, the Court declines to admit, as additional evidence, the supplemental material offered by Plaintiffs. Even if the Court were inclined to consider the supplemental material offered by the Plaintiffs, the record, in its entirety, would not support a finding of an abuse of discretion or error of law by the rulemaking body.

P31. 2. Are the 2003 BER rules setting numeric standards for EC and SAR invalid because the BER acted with an arbitrary or capricious disregard [*20] for the purpose of the authorizing statute(s)

P32. The authorizing statutes governing development of water quality standards are the *Clean Water Act (CWA)* and the *Montana Water Quality Act (WQA)*. The federal EPA is the congressionally delegated agency to administer and implement the CWA, and its administrative decisions are entitled to deference. ***Chevron USA, Inc. v. Natural Resources Defense Council, Inc.***, *supra, 467 U.S. at 844-45*; accord, ***Montana Power Co. v. Environmental Protection Agency***, *608 F.2d 334, 345 (9th Cir. 1979)*. The BER is the state agency delegated to set water quality standards in Montana in accordance with the WQA. *See §§ 75-5-201, -301, MCA*.

A. The Clean Water Act (CWA)

P33. The CWA is essentially a mandate to the states to protect water quality through permitting of pollutant discharges and through development of water quality standards. The overall purpose of the CWA is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters," with the ultimate goal being the complete elimination of pollution from the nation's waters. *See 33 U.S.C. § 1251(a)*; ***Public Utility District No. 1 v. Washington Dep't of Ecology***, *511 U.S. 700, 704, 114 S. Ct. 1900, 128 L. Ed. 2d 716 (1994)*. [*21] To achieve this goal, Congress has prohibited the point-source discharge of any pollutant into the waters of the United States unless that discharge is permitted. See *33 U.S.C. § 1311(a)*; *see also*, ***United States v. Earth Sciences***, *599 F.2d 368, 373 (10th Cir. 1979)*; ***Pronsolino v. Nastri***, *291 F.3d 1123, 1126-1127 (9th Cir. 2002)*; ***Natural Resources Def. Council v. Environmental Protection Agency***, *279 F.3d 1180, 1182 (9th Cir. 2002)*. The Ninth Circuit Court of Appeals has ruled that CBM water is a pollutant whose discharge must be permitted in accordance with the CWA. ***Northern Plains Resource Council v. Fidelity***, *325 F.3d 1155, 1165 (9th Cir. 2003), cert. denied, 540 U.S. 967,*

124 S. Ct. 434, 157 L. Ed. 2d 312 (2003) (Agreed Facts, No. 14).

P34. Under the CWA, the States have primary responsibility for developing and implementing water quality standards to "protect the public health or welfare, enhance the quality of water and serve the purposes of [the Act]." *See 33 U.S.C. § 1313(a) to (c), 40 CFR § 131.2(d)* (Agreed Facts, No. 2). All new or revised state water quality standards must be submitted to EPA for review and either approval or disapproval. *See 33 U.S.C. § 1313(c)(2)(A); 40 CFR § 131.21(a),* [*22] *§ 131.5* (Agreed Facts, No. 11). EPA provides specific minimum requirements for water quality standards: (1) first, each water body must be assigned "designated uses," such as recreation or the protection of aquatic life; (2) second, the standards must specify for each body of water the amounts of various pollutants or pollutant parameters that may be present without impairing the designated use; and (3) third, each state must adopt an antidegradation review policy which will allow the state to assess activities that may lower the water quality of the water body. ***Am. Wildlands v. Environmental Protection Agency****, 260 F.3d 1192, 1194 (10th Cir. 2001)*. The CWA requires a state's water pollution control agency to review water quality standards a minimum of once every three years. *See 33 U.S.C. § 1313(c); 40 C.F.R. § 131.21(a).*

B. The Montana Water Quality Act (WQA)

P35. In compliance with the CWA, the Montana Legislature has designated the DEQ as the state agency responsible for regulation of point-source discharges of pollutants in Montana. *See § 75-5-211, MCA*; (BER Rec. 00538; Agreed Facts, No. 4). Similarly, the BER is the designated rulemaking body for water quality regulations in Montana. [*23] *See § 75-5-201, -301, MCA.* (Agreed Facts, No. 3.)

P36. Consistent with the mandates of the CWA, the BER is statutorily required to (1) classify all state waters in accordance with their present and future most beneficial uses; (2) adopt water quality standards giving consideration to the economics of waste treatment and prevention; (3) periodically review and, if necessary, revise those classifications and standards; (4) adopt rules for mixing zones; (5) adopt rules implementing Montana's nondegradation policy; and (6) ensure that the rules for nondegradation establish objective and quantifiable criteria for various parameters. *See § 75-5-301, MCA.*

P37. Montana's public policy relative to water quality is found in *§ 75-5-101, MCA.* The stated policy is:

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

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

(3) to balance the inalienable rights to pursue life's basic necessities and possess and use property in lawful ways [*24] with the policy of preventing, abating and controlling water pollution. *Id.*

P38. The Legislature recognized its constitutional obligations under *Mont. Const. art. II, § 3*, and art. IX, by expressing its intent that "the requirements of this chapter provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources." *See § 75-5-102(1), MCA.* The Legislature has also expressly stated that "rules should be adopted only on the basis of sound, scientific justification and never on the basis of projections or conjecture," and that the BER should "seriously consider the impact of the proposed rules[.]" *1995 Statement of Intent, ch. 497, L. 1995* .

C. Consistency With Authorizing Statutes (2003 rules)

P39. Plaintiffs allege that the 2003 rulemaking was done with an arbitrary and capricious disregard for the purpose of the authorizing statutes above because: (1) there was no valid reason to adopt numeric water quality standards for EC and SAR in place of the long-standing narrative standard, as the narrative standard was thought to be historically protective; and [*25] (2) the 2003 numeric standards lack any sound scientific justification. Having reviewed the applicable statutes, the administrative record, and in light of state and federal mandates for water quality protection, the Court concludes otherwise.

P40. The waters in question are the Tongue River, the Powder River, the Little Powder River, Rosebud Creek, and the tributaries of those waterways. In accordance with the WQA, the BER has classified these waters as either Class B-2 or Class C-3 waters, both of which are to be maintained as suitable for, *inter alia*, agricultural water supply, e.g. irrigation. *See ARM 17.30.611, 17.30.624, 17.30.629*. The use of water for irrigated agriculture is a beneficial use. *See* ***State ex rel. Greely v. Confederated Salish & Kootenai Tribes****, 219 Mont. 76, 712 P.2d 754 (1985).*

P41. Until 2003, the beneficial use of these waters for irrigated agriculture was protected by a general "narrative" water quality standard. The "narrative" water quality standard was first promulgated in 1972, and generally prohibits any discharge which creates "concentrations or combinations of materials which are

toxic or harmful to human, animal, plant or aquatic life." *ARM 17.30.637* [*26] (Agreed Facts, No. 24). The narrative standard applies to all parameters not otherwise governed by numeric standards.

P42. In this case, the administrative record reflects that the EPA and the DEQ had concerns about the DEQ's ability to objectively and consistently translate the "narrative" standard into permit limits for discharges of CBM produced water. (BER Rec. 00982, 01062, 00339, 00995). This concern is also reflected in the BER's final decision document (BER Rec. 02555: "[n]umeric standards are necessary to clearly delineate an enforceable limit that is consistently applied by various permit writers; the Board does not agree that retaining the existing narrative standard is appropriate"). DEQ, BER and the public generally were aware that large-scale CBM development was predicted in the Powder River Basin over the next decade, and permitting discharges of CBM produced water was an issue. (BER Rec. 02637, 00694, 00098-107). For this reason, and with EPA's support, Montana began the process of developing numeric water quality standards for the two known constituents (EC and SAR) of CBM water that, in certain concentrations, are harmful to irrigated agriculture. Over a span of nearly [*27] two years, a public process took place which produced numerous public hearings, a collaborative effort among the different interest and governmental groups, copious amounts of scientific data and reports, revision of the numbers, and ultimately adoption of the numeric water quality standard at issue in this case.

P43. Federal law clearly mandates the protection of water quality for designated uses, including agriculture. ***Northern Plains Res. Council v. Fidelity****, supra, 325 F.3d at 1159*. In fact, federal regulations encourage states to establish numeric values based on scientifically defensible methods. *See 40 C.F.R. § 131.11* (narrative standards may be established if numeric standards cannot be set); ***Natural Resources Defense v. United States EPA****, 915 F.2d 1314, 1317-18 (1990)*. Narrative criteria are appropriate to supplement numeric criteria, or in the interim until numeric criteria can be established. *See 40 C.F.R. § 131.11(b)(2)*.

P44. State law requires similar protective measures, and contemplates a comprehensive program for pollution prevention. *See § 75-5-101(2), MCA*. Given these objectives, and the projections for widespread CBM development, the BER was warranted in taking proactive [*28] measures to protect water quality. The BER's decision to use numeric standards is within the agency's sound discretion under its rulemaking authority, to which this Court must defer. Theoretically, it is possible that a record so overwhelmingly establishes error regarding the agency's decision that a court should overrule it and remand to the agency, but such circumstances are not present here.

P45. Plaintiffs assert that the BER acted arbitrarily and capriciously because the numeric water quality standards ultimately adopted in 2003 are excessively strict, sometimes even lower than natural levels of EC and SAR in the receiving water. Plaintiffs suggest that absent some reliable data that the general "narrative" standard was inadequate to protect designated uses, there is no scientific basis to justify a change from the general "narrative" standard to a numeric water quality standard. The Court disagrees. Given the long term projection for massive CBM development, the rules were "reasonably necessary" to ensure consistency in permitting, and for promoting the overriding goal of protecting irrigated agriculture as a designated use. Nothing more is required to uphold the agency actions [*29] as consistent with the authorizing statutes.

P46. The Court understands that the BER focused on CBM discharges in light of the fact that "non-point source" discharges, such as agricultural runoff, are regulated differently from "pointsource" discharges under the CWA and under Montana law pursuant to the MPDES permitting process. *See e.g.* ***League of Wilderness Defenders v. Forsgren****, 309 F.3d 1181, 1183 (9th Cir. 2002)*; see also, ***Northern Plains****, supra, 325 F.3d 1155, 1161-1165 (9th Cir. 2003)*. Following the Ninth Circuit Court's ruling that CBM point discharges constitute a "pollutant," the BER was obliged to regulate it as such under the MPDES program. Given this rationale, such focus was proper and does not constitute unfair treatment toward industry.

P47. Plaintiffs also attack the scientific basis of the numbers that were ultimately chosen. On this record, the Court will not second-guess the BER's choice of numbers relative to what is required to protect beneficial uses, e.g., irrigated agriculture. The record is exhaustive and contains more than sufficient scientific justification for the numeric standards that were adopted. The fact that data in the administrative record is subject [*30] to scientific debate does not render the agency's conclusions unfounded, nor should the Court participate in that debate and substitute its judgment for that of the rulemaking agency. *See* ***American Petroleum Inst. v. United States EPA****, 858 F.2d 261, 264 (5th Cir. 1988)*; accord, ***Marsh v. Oregon****, supra, 490 U.S. at 378* ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.")

P48. Scientists agree that, at some levels, EC is damaging to plants and SAR is damaging to soils. (Agreed Facts, No. 29; BER Rec. 00011, 00085, 00113, 01532, 01533.) The parties agree that both parameters can affect the suitability of water for irrigation. (Agreed Facts, No. 20, citing BER Rec. 01174.) The record

demonstrates, and the parties acknowledge that the factors to consider include soil type, irrigation methods, and crops grown. (Agreed Facts, No. 29, citing BER Rec. 00082, 00109, 01534-37.) The law does not require the BER to set the standard at the least protective level (i.e., more favorable to industry), or to shift risk to beneficial [*31] users (the irrigators), or to wait for the damage to the resource to occur prior to acting. Moreover, when the matter under consideration is subject to scientific debate, substantial agency expertise is involved, and the agency must choose among differing scientifically supported conclusions, the Court will not consider a second round of scientific debate which infringes upon the executive branch decision-making function. ***Friends of the Wild Swan v. Department of Natural Resources & Conservation***, *supra, P28*. The Court's function is only to determine whether BER's decision was made in compliance with applicable law, supported by the evidence, and adopted through valid administrative procedures. ***Id.***, *see also* ***North Fork Preservation Assoc. v. Department of State Lands***, *supra, 238 Mont. at 458-59, 778 P.2d at 867.*

P49. The Court concludes that the BER, in the exercise of its discretion, was entitled to weigh the science, compare the veracity of the experts, and make a final determination based on the evidence presented. *See* ***Maine v. Norton***, *257 F. Supp. 2d 357 (D. Me. 2003).* Ultimately, the BER set numeric standards that fell within the range of science presented and determined that rain [*32] and other considerations required a conservative approach to protect irrigated agriculture and aquatic life. (BER Rec. 02669, 02562-64.) In response to comments, the BER specifically found that the adopted standards were based on a "sound rationale" designed to protect beneficial uses. (BER Rec. 02508.)

P50. Plaintiffs' essentially argue that the BER should set the standards based on the assimilative capacity of the river to absorb pollutants. However, this is impermissible under the CWA. ***Southeast Alaska Conservation Council v. United States Army Corps of Eng'rs***, *486 F.3d 638, 644 (9th Cir. 2007).* Adoption of Plaintiffs' argument would require this Court not only to impermissibly second-guess the BER, but also potentially authorize disposal of water effectively transforming the Powder River Basin into a waste water treatment system. Ultimately, the BER was not required to retain a narrative standard for EC and SAR simply because any prospective damage from full-scale CBM development had not yet occurred. When water quality is at stake, the BER and the DEQ are mandated to afford protection, and to the extent these agencies have done so consistent with supportive scientific data, there [*33] is no error.

P51. 3. Are the 2006 BER rules, classifying EC and SAR as harmful parameters invalid because (a) the BER acted with an arbitrary or capricious disregard for the purpose of the authorizing statute(s) and/or (b) BER did not comply with applicable statutory law

A. Applicable Law

P52. In addition to state and federal requirements to adopt protective water quality standards, the CWA requires states to adopt an anti-degradation policy to protect high quality water. *40 C.F.R. §§ 131.6(d), 131.12(a).* High quality water includes all surface waters in Montana except those waters that are not capable of supporting any one of the designated uses for their classification, and any water that is of higher quality than the applicable water quality standard. *See § 75-5-103(10), MCA.*

P53. Montana's anti-degradation policy is called a "nondegradation" policy and is found at *§ 75-5-303, MCA.* The statute provides: "[e]xisting uses of state waters and the level of water quality necessary to protect those uses must be maintained and protected." *See § 75-5-303(1), MCA.* DEQ may not authorize degradation of high quality water unless it has been affirmatively demonstrated by a preponderance of the evidence [*34] that (a) degradation is necessary because there are no economically, environmentally, and technologically feasible modifications to the proposed project that would result in no degradation; (b) the proposed project will result in important economic or social development and that the benefit of the development exceeds the costs to society of allowing degradation of high quality waters; (c) existing and anticipated use of state waters will be fully protected; and (d) the least degrading water quality protection practices determined by the department to be economically, environmentally, and technologically feasible will be fully implemented by the applicant prior to and during the proposed activity. *See § 75-5-303(3), MCA.*

P54. "Degradation" means a change in water quality that lowers the quality of high-quality waters for a parameter. The term does not include those changes in water quality determined to be nonsignificant. *See § 75-5-103(5), MCA.* If degradation is allowed, the CWA requires that "existing and anticipated uses of state waters must be fully protected." *See 33 U.S.C. § 303(3)(c).*

P55. The BER is responsible for adopting rules to implement Montana's nondegradation policy, including [*35] rules to determine whether a discharge qualifies as "nonsignficant." *See § 75-5-301(5), MCA.* Pursuant to that statute, the BER is directed to:

(a) provide a procedure for department review and authorization of degradation;

(b) establish criteria for the following:

(i) determining important economic or social

development; and

(ii) weighing the social and economic importance to the public of allowing the proposed project against the cost to society associated with a loss of water quality;

(c) establish criteria for determining whether a proposed activity or class of activities, in addition to those activities identified in *§75-5-317*, will result 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:

(i) equates significance with the potential for harm to human health, a beneficial use, or the environment;

(ii) considers both the quantity and the strength of the pollutant;

(iii) considers the length of time the degradation will occur;

(iv) considers the character of the pollutant so that greater significances associated with carcinogens and toxins [*36] that bioaccumulate or biomagnify and lesser significance is associated with substances that are less harmful or less persistent. *See §75-5-301(5)(a)-(c), MCA*.

P56. In accordance with *§ 75-5-301(5), MCA*, the BER has adopted rules governing nondegradation procedures in *ARM 17.30.707-716*. The procedure requires a discharger to undergo nondegradation review and thereby obtain an authorization to degrade high quality water, unless the proposed discharge qualifies as "nonsignificant" under *ARM 17.30.715*. The nonsignificance criteria are dependent on several factors, including the quantity, strength and character of the pollutant (e.g., carcinogens being most closely regulated, then toxins, and finally, pollutants that are deemed harmful). The discharge of any parameter for which numeric standards exist is significant if it will cause the receiving waters to meet or exceed the numeric standards. A discharge of any parameter that is governed by the narrative water quality standard qualifies as "nonsignificant" as long as the change "will not have a measurable effect on any existing or anticipated use or cause measurable changes in aquatic life or ecological integrity." *See ARM 17.30.715(1)(g)*. [*37] This is referred to as the "narrative nonsignificance rule" because it does not have numeric trigger values for nondegradation review, as there are for carcinogens, toxics, and other harmful parameters.

B. Consistency With Authorizing Statutes (2006 rules)

P57. Prior to the 2003 rulemaking, any discharges containing EC and SAR were subject to the "narrative nonsignficance rule" because EC and SAR were governed by the narrative water quality standards in *ARM 17.30.637*. In 2003, when numeric standards for EC and SAR were adopted, discharges of those parameters no longer qualified as "nonsignificant" under subsection (1)(g). Nonetheless, the BER voted to retain the narrative "nonsignificant" criteria for purposes of nondegradation review even though EC and SAR now had numeric standards. (BER Rec. 06659; 3/28/03 Tr. at 157, 160.) In practice, the narrative nonsignificance criterion meant that a discharge of EC and SAR would be deemed significant (and thus subject to formal nondegradation review) only if it caused concentrations of those parameters to be at or near the concentrations allowed by the 2003 numeric standards. (Agreed Facts, No. 52.) This allowed a discharger to degrade water [*38] quality effectively up to the water quality standard itself.

P58. In the 2006 rulemaking, the BER designated EC and SAR as "harmful" parameters for purposes of the nonsignificance determination, which means that numeric nonsignificance criteria apply (what the parties refer to as the "40/10" rule). (Agreed Facts, No. 59.) With this designation, as with other harmful parameters, a discharge containing EC and SAR qualifies as nonsignificant only if the change in water quality is "less than 10% of the applicable standard and the existing water quality level is less than 40% of the standard." *See ARM 17.30.715(1)(f)*. This change requires an authorization to degrade if a proposed discharge to high quality water exceeds these trigger levels (State's Exhibit B), so that dischargers may no longer degrade high quality water up to the standard itself. Plaintiffs challenge this action as arbitrary or capricious because they allege (1) there is no evidence that water quality was not adequately protected under the 2003 nondegradation criteria; (2) the BER failed to consider the factors in *§ 75-5-301(5), MCA*; and (3) the BER was illogically focused on CBM rather than irrigation as the true cause [*39] of degradation. Implicit in Plaintiffs' argument is the notion that the 2006 rulemaking effectively cut the numeric standards in half, so that an entirely new scientific justification for the rules was required.

P59. The Court is not persuaded by Plaintiffs' characterization of the 2006 rulemaking. In fact, what the BER did in 2006 was treat discharges of EC and SAR for purposes of nondegradation review in the same manner as all other constituents for which there are numeric standards. (BER Rec. 06657, 06661.) This was essentially a policy-based decision for which there is adequate scientific justification in the 2003 rulemaking record. The rules protect high quality water by requiring permit writers to stop short of allowing degradation right up to the standard.

P60. In a proper exercise of its discretion, the BER determined that its 2003 decision to retain a narrative nonsignificance rule for EC and SAR did not adequately

protect high quality water, and that it was more appropriate to treat EC and SAR consistently with all other parameters for which there are numeric standards. (BER Rec. 06654-06661.) There is nothing in the record to suggest that the BER's decision was based on anything [*40] but a careful consideration of relevant factors, or that the BER committed a "clear error of judgment." As in the 2003 rulemaking, the BER held numerous public hearings, received significant comment, and clearly articulated its reasons for changing from narrative nonsignificance criteria, to numeric criteria that were clear and identifiable. In this respect, the 2006 amendment is entirely consistent with the legislative directive to establish "objective and quantifiable criteria for various parameters," when adopting rules implementing Montana's nondegradation policy. *See § 75-5-301(6), MCA.*

P61. As noted, Montana's nondegradation policy forbids any change to high quality waters unless certain findings are made. *See § 75-5-303(3), MCA.* To the extent that discharges of EC and SAR qualified as nonsignificant under the 2003 rules, the potential existed for incremental degradation of high quality water without the required findings. In this respect, the 2006 rules simply brought the regulation of EC and SAR into better conformity with state and federal law. In sum, there is nothing arbitrary or capricious about the BER's classification of EC and SAR as harmful parameters, especially in [*41] view of ***NPRC v. Fidelity****, supra.*

P62. Finally, the effect of the new nondegradation criteria is simply to require CBM developers to obtain an authorization to degrade, which is not the equivalent of a moratorium on CBM development. Where high quality water is at stake, the law mandates this result and does not allow the DEQ or the BER to forego such review.

P63. After review of the administrative record of the 2003 and 2006 proceedings, the Court finds that the BER adequately considered the factors in *§ 75-5-301(5), MCA*, when amending its nonsignificance rule. The rule itself (*ARM 17.30.715*) includes the language of the statute:

(1) The following criteria will be used to determine whether certain activities or classes of activities will result in nonsignificant changes in existing water quality due to their 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.

P64. It may be inferred that, by amending the rule itself, the BER took these factors into account when it determined that EC and SAR should be classified as harmful parameters for [*42] purposes of determining nonsignificance. Therefore, the Court concludes that the BER did comply with statutory law when classifying EC and SAR as harmful parameters in 2006.

P65. 4. Was the BER required to make written findings in accordance with *§§ 75-5-203* and/or *75-5-309, MCA*, relative to the 2003 or 2006 rulemakings

P66. Montana law requires the BER to make written findings if it adopts rules that are more stringent than corresponding federal regulations. *See §§ 75-5-203, -309, MCA.* Specifically, *§ 75-5-203(1), MCA,* forbids the adoption of a rule that is "more stringent than the comparable federal regulations or guidelines that address the same circumstances." Subsection 2 allows adoption of such a rule if the BER makes certain findings based on evidence in the record. *Section 75-5309(1), MCA*, contains a similar requirement employing different language and authorizes adoption of rules that are "more stringent than corresponding draft or final federal regulations, guidelines, or criteria" if the requisite written findings are made. These statutory requirements were imposed by the Legislature in 1995. (See Chapters 471 and 497.)

P67. The parties acknowledge that the BER did not make [*43] written findings under *§§ 75-5-203* or *75-5-309, MCA*, for either the 2003 or the 2006 rulemakings. The DEQ provided a legal opinion to the BER that the 2003 numeric standards and the 2006 nonsignificance criteria for EC and SAR were not more stringent than comparable or corresponding federal regulations. (Agreed Facts, Nos. 56, 69.) Defendants argue that the BER was not required to make written findings because there are no "comparable" or "corresponding" federal regulations, guidelines, or criteria governing EC and SAR. Alternatively, citing *40 C.F.R. § 130.11*, Defendants argue that the rules governing EC and SAR are consistent with, and not more stringent than, federal regulations requiring states to adopt water quality standards to protect designated uses.

P68. Plaintiffs argue that when the EPA approved the general "narrative" water quality standard (presumably around 1972), it became the federal standard for purposes of *§§ 75-5-203* and *75-5-309, MCA*, so that any subsequent change to numeric standards triggered the necessity for written findings thereunder. Similarly, Plaintiffs contend that when EPA approved the nonsignificance nondegradation criteria in 2003, it became the federal [*44] nondegradation standard, so that any subsequent designation of EC and SAR as harmful parameters also triggered the requisite statutory findings.

P69. Plaintiffs cite no authority for the proposition that EPA approval "federalizes" the standard such that the BER is required to comply with *§§ 75-5-203* and/or *75-5-309, MCA*, whenever a water quality standard or the nonsignificance criteria are revised. This is a question of legislative intent, and there is nothing in the plain language of the statutes or their legislative history to

support Plaintiffs' interpretation. Written findings are required only when the adopted or revised state standards are more stringent than comparable or corresponding federal regulations or guidelines. *See §§ 75-5-203 and 75-5-309, MCA. Sections 75-5-203* and *75-5-309*, MCA, are triggered only when EPA has promulgated a federal regulation, guideline or criteria addressing the particular parameter involved (EC or SAR) or discharges of CBM water generally. *See 33 U.S.C. § 1314(a)* (authorizing EPA to promulgate numeric criteria that apply nationwide). The parties agree that there are no national numeric criteria for EC or SAR. (BER Rec. 00539; Agreed Facts, No. 22.) [*45] In the absence of specific corresponding or comparable federal regulations or guidelines governing EC or SAR, or CBM produced water generally, the Court concludes that the BER was not required to issue written findings under *§§ 75-5-203* or *75-5-309, MCA*. The Court also notes that the BER's adoption of numeric standards for EC and SAR and their classification as harmful parameters is consistent with the federal CWA insofar as the standards protect designated uses and high quality water. The statutes do not require the BER to issue written findings for rules that are consistent with, as opposed to more stringent than (or in conflict with), federal requirements.

P70. In view of the foregoing, the BER did not arbitrarily disregard the controlling statutes.

P71. 5. Was the BER required to prepare an environmental impact statement (EIS) at the time of the 2006 rulemaking

P72. The standard for judicial review of an agency's action subject to the Montana Environmental Policy Act (MEPA) is "whether the record establishes that the agency acted arbitrarily, capriciously, or unlawfully." ***North Fork Preservation Ass'n v. Department of State Lands***, *supra, 238 Mont at 458-59, 778 P.2d at 867*. To determine [*46] the lawfulness or unlawfulness of an agency decision, a court reviews an agency's action for compliance with its own procedural rules under MEPA. ***Id.***, *238 Mont. at 459, 778 P.2d at 867*. Plaintiffs contend that the 2006 rulemaking constituted a "major action of state government" that required preparation of an EIS pursuant to MEPA. The Court disagrees.

P73. When the BER adopted the rules classifying EC and SAR as "harmful" in 2006, the agency did not *authorize any activity* affecting the quality of the human environment. The Montana Supreme Court has affirmed that "[a]n EIS is required only when there is a substantial question as to whether [the action] may have a significant effect upon the human environment." *See § 75-1-201(1)(b)(iv), MCA*. ***Ravalli County Fish & Game Ass'n v. Montana Dep't of State Lands***, *273 Mont. 371, 382, 903 P.2d 1362, 1370 (1995).*

P74. In resolving the issue of whether a duty of environmental review exists, the Court is required to determine when MEPA analysis must be completed prior to a final agency decision. For guidance, this Court has reviewed case law which addresses the timing of an EIS in the decision-making process of state and federal agencies. Other courts [*47] have attempted to explain with precision at what point an EIS is required. The Court is persuaded that "[a]n EIS is required when the 'critical agency decision' is made which results in 'irreversible and irretrievable commitments of resources' to an action which will affect the environment." ***Sierra Club v. Peterson***, *230 U.S. App. D.C. 352, 717 F.2d 1409 (D.C. Cir., 1983)* (citing ***Mobil Oil Corp. v. F.T.C.***, *562 F.2d 170, 173 (2d Cir. 1977)).* This same rule has been adopted by the Ninth Circuit Court of Appeals. *See e.g.* ***Conner v. Burford***, *848 F.2d 1441, 1446 (9th Cir., 1988)* ["Our circuit has held that an EIS must be prepared before any irreversible and irretrievable commitment of resources."] Based upon the above authority, it is clear that promulgation of rules regulating water quality does not constitute an "irretrievable commitment of resources" and is not an action requiring an EIS. The regulations do not authorize nor permit surface disturbing activity independent of further governmental action. *See* ***Conner v. Burford,*** *supra*; *see also*, ***Lujan v. Nat'l Wildlife Fed'n***, *497 U.S. 871, 891-902, 110 S. Ct. 3177, 3190-3191, 111 L. Ed. 2d 695 (1990).* The promulgation or modification of environmental [*48] regulations, while certainly very significant, is not the type of "major action of state government" contemplated under MEPA. In contrast, a decision by DEQ to authorize degradation under *§75-5-303, MCA*, or to issue a MPDES permit, would require prior environmental review due to its potential effect upon the human environment. *See ARM 17.4.603(1).* No such circumstance is present in this case. Accordingly, the BER did not err in declining to prepare an EIS at the time of the 2006 rulemaking.

P75. **WHEREFORE**, for the reasons stated above,

P76. **IT IS ORDERED** as follows:

P77. 1. The *Motions for Summary Judgment* filed by Defendants, BER and DEQ, and Defendant-Intervenors, NPRC and TRWUA, are hereby **GRANTED**.

P78. 2. The Cross *Motion for Summary Judgment* filed by Plaintiffs and PlaintiffIntervenor Fidelity is hereby **DENIED**.

P79. Let judgment be prepared and entered accordingly.

DATED this 17th day of October, 2007.

BLAIR JONES, District Judge

OPINION AND DECISION

PENNACO ENERGY, INC., MARATHON OIL COMPANY, ST. MARY'S LAND & EXPLORATION COMPANY, and YATES PETROLEUM CORPORATION, Plaintiffs and Appellants, v. MONTANA BOARD OF ENVIRONMENTAL REVIEW, MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, NORTHERN PLAINS RESOURCE COUNCIL, and TONGUE RIVER WATER USERS' ASSOCIATION, Defendants and Appellees.

DA 07-0755

SUPREME COURT OF MONTANA

2008 MT 425*; *347 Mont. 415*; *199 P.3d 191*; *2008 Mont. LEXIS 664

October 16, 2008, Submitted on Briefs
December 16, 2008, Decided

PRIOR HISTORY:

APPEAL FROM: District Court of the Twenty-Second Judicial District, In and For the County of Big Horn, Cause No. DV 2006-068. Honorable Blair Jones, Presiding Judge.
Pennaco Energy v. Mont. Bd. of Envtl. Review, 2007 Mont. Dist. LEXIS 513 (2007)

COUNSEL: For Appellants: Ronald F. Waterman, Gough, Shanahan, Johnson & Waterman, Helena, Montana; L.B. Cozzens , Cozzens Law Office, Billings, Montana; John C. Martin, Duane A. Siler, Michele L. Walter, Patton Boggs, LLP, Washington, D.C.

For Appellees, Montana Board of Environmental Review and Montana Department of Environmental Quality: Hon. Mike McGrath, Montana Attorney General, Jennifer Anders, Sarah A. Bond, Assistant Attorneys General, Helena, Montana; Claudia Massman, Department of Environmental Quality, Helena, Montana.

For Appellee, Northern Plains Resource Council: Jack R. Tuholske , Tuholske Law Office, P.C., Missoula, Montana.

For Appellee, Tongue River Water Users Association: Brenda Lindlief Hall, Reynolds Motl & Sherwood, PLLP, Helena, Montana.

JUDGES: PATRICIA COTTER. We concur: W. WILLIAM LEAPHART, BRIAN MORRIS, JAMES C. NELSON, JIM RICE. Justice Patricia O. Cotter delivered the Opinion of the Court.

OPINION BY: Patricia O. Cotter

OPINION

[***193] Justice Patricia O. Cotter delivered the Opinion of the Court.

[**417] [*P1] The Plaintiffs and Appellants in this matter are Pennaco Energy, Marathon Oil, Nance Petroleum and Yates Petroleum (collectively Pennaco). The Defendants and Appellees are Montana Board of Environmental Review (BER or the Board) and Montana Department of Environmental Quality (DEQ). Defendant Intervenors are Northern Plains Resource Council (NPRC) and Tongue River Water Users' Association (TRWUA).

[*P2] This case arises from the regulation of the discharge into state waterways of salty water produced

from coal bed methane (CBM) production. This water is called "CBM produced water." CBM produced water, which contains naturally high levels of sodium and salts, is frequently discharged by industries to surface waters. As a result, the water quality of the receiving waters can be degraded. Additionally, when land is subsequently irrigated with surface water mixed with CBM produced water, there is a potential threat to the irrigated agriculture as the salt from the water may accumulate in the plants' root systems and impair plant growth. In recognition of this potential impact, the State regulates the discharge of two harmful components of CBM produced water--sodium adsorption ratio (SAR [1]) and electrical conductivity (EC [2]). The EPA is currently studying the coal bed methane sector to determine if federal effluent guidelines for these parameters are appropriate. *71 Fed. Reg. 76644, 76656 (Dec. 21, 2006)*.

1 SAR is the concentration of sodium relative to calcium and magnesium in water.

2 EC--electrical conductivity of water means the ability of water to conduct an electrical current at 25 degrees C. It is expressed as microSiemens per centimeter ([mu]S/cm) or micromhos/centimeter ([mu]mhos/cm) or equivalent units and is corrected to 25 degrees C. Admin. R. M. 17.30.602(9). Electrical conductivity of water samples is used as an indicator of how salt-free or impurity-free the sample is; the purer the water, the lower the conductivity.

[*P3] In both 2003 and 2006, BER revised its rules regulating EC and SAR. Pennaco challenged these revised rules in the Twenty-Second Judicial District Court. BER filed a motion for summary judgment and Pennaco filed a cross-motion for summary judgment. The District Court granted BER's motion and denied Pennaco's. On appeal, Pennaco challenges the standard of review applied by the District Court, as well as the court's conclusions that BER did not fail to comply with relevant rules in promulgating new standards for EC and SAR. We affirm.

[**418] **ISSUES**

[*P4] A restatement of the issues presented on appeal is:

[*P5] Did the District Court erroneously apply a standard of review that was too deferential and inapplicable to agency rulemakings?

[*P6] Did the District Court err in concluding that BER was authorized to designate EC and SAR harmful in 2006 when BER had refused to do so in 2003?

[*P7] Did the District Court err in concluding that BER's revised rule was not "more stringent" than federal law, and therefore BER was not statutorily required to issue written findings of fact?

FACTUAL AND PROCEDURAL BACKGROUND

[*P8] Marathon Oil Company, a Delaware corporation with headquarters in Houston, Texas, engages in worldwide exploration and production of crude oil and natural gas, as well as domestic refining, marketing, and transportation of petroleum products. Marathon holds leases for oil and gas production in Montana. Pennaco is a wholly owned subsidiary of Marathon and is actively pursuing coal bed natural gas development in the Powder River Basin (the Basin) in Wyoming. Nance Petroleum and Yates Petroleum are [***194] out-of-state corporations also pursuing coal bed natural gas development in the Basin in Montana and Wyoming.

[*P9] To produce coal bed natural gas, a well is drilled into the selected coal seam. On the surface of the coal are molecules of methane gas, held in place by water pressure from a coal seam aquifer. In order to release the natural gas, the water pressure must be released. This is accomplished by pumping water out of the coal seam which causes the methane to detach from the coal and rise to the surface. The regulations imposing restrictions on the discharge of this pumped water are the source of this dispute.

[*P10] The federal Clean Water Act, enacted in 1972 (the Act), delegates the responsibility for enforcing the Act to states that meet specific criteria. States are required to enact water protection laws consisting of three elements: establishment of a "designated use" for each water body--e.g., recreation, irrigation, etc.; establishment of numeric or narrative water quality standards for each water body designed to prevent impairing the water quality for that particular use; and adoption of a nondegradation policy to maintain and protect a state's water resources. *40 C.F.R. §§ 131.10, 131.11*, and *131.12*.

[*P11] Between 1972 and 2003, EC and SAR, among other parameters, were regulated in Montana

exclusively by narrative standards, as [**419] opposed to numeric standards. The Administrative Rules of Montana (ARMs) set forth a general prohibition against discharging substances that create concentrations or combinations of materials which are toxic or harmful to human, animal, plant or aquatic life, or that would produce undesirable aquatic life. Admin. R. M. 17.30.637(1)(d)-(e). The State also established a nondegradation policy for its water. Admin. R. M. 17.30.705. "Degradation" is "a change in water quality that lowers the quality of high-quality waters for a parameter. The term does not include those changes in water quality determined to be nonsignificant pursuant to *75-5-301(5)(c)*." *Section 75-5-103(5), MCA*. Additionally, the ARMs specify that "degradation" "is defined in *75-5-103, MCA*, and also means any increase of a discharge that exceeds the limits established under or determined from a permit or approval issued by the department prior to April 29, 1993." Admin. R. M. 17.30.702(3). "High-quality waters" are defined as "all state waters, except: . . . surface waters that: are not capable of supporting any one of the designated uses for their classification . . . ." *Section 75-5-103(10)(b)(i), MCA*. The State established specific criteria for determining whether an activity would result in nonsignificant changes in existing water quality. Admin. R. M. 17.30.715. With some exception for changes in the quality of water for any parameter for which there were only narrative water quality standards (i.e., EC and SAR before 2003), any changes that would not have a measurable effect on any existing or anticipated use or cause measurable changes in aquatic life or ecological integrity were viewed as insignificant and would not trigger a nondegradation review. Admin. R. M. 17.30.715(1)(g) and (2).

[*P12] In early 2000, at the behest of the Water Pollution Control Advisory Council, DEQ began investigating the effect of CBM produced water on soils and stream life to determine whether to implement numeric standards for this type of discharge. In May 2002, DEQ completed two alternative draft rules, both of which set a range of numeric water quality standards for EC and SAR on the rivers and streams in the Powder River Basin. Both proposals were accompanied by technical support documents explaining the rationale and scientific basis for the proposed rules.

[*P13] In early June 2002, NPRC, TRWUA and other Powder River Basin water rights holders filed a petition for rulemaking urging BER to adopt numeric standards for EC and SAR. BER put out three proposals for public comment and held two public meetings. Industry opposed the numeric standards arguing that the existing narrative standard was sufficient. While the public comment period was open, [**420] BER received extensive information from scientists and technical people, the EPA, environmental groups and irrigators.

[*P14] In 2003, BER adopted numeric standards for EC and SAR for three rivers and a creek making up the Powder River Basin. Admin. R. M. 17.30.670. These standards established specific levels for EC and SAR [***195] discharges into the waters of the Basin from November 1 through March 1 each year. They also established lower levels of allowable discharges from March 2 through October 31. In addition, the Board expressly provided that the nonsignificance criteria that were in place at that time and applied to parameters regulated by narrative standards *only*, would continue to apply to EC and SAR, despite the fact that EC and SAR would now have numeric standards. It rejected irrigators' requests to designate EC and SAR as "harmful" parameters at that time but agreed to explore a method of tracking natural EC to address nondegradation issues. The effect of employing numeric criteria for the discharge of EC and SAR but retaining the narrative "nonsignificant" criteria for nondegradation review of these parameters was to potentially allow discharges that could degrade water quality up to the numeric water quality standard.

[*P15] In 2005, NPRC and a group of irrigators filed another petition for rulemaking asking BER to adopt rules to require treatment of CBM produced water. They also requested again that BER designate EC and SAR as "harmful" parameters. BER put this out for public comment and held three hearings and a public meeting. In May 2006, BER rejected the proposal to require treatment but designated EC and SAR as "harmful."

[*P16] In June 2006, Pennaco challenged the validity of the EC and SAR water quality standards promulgated by BER in 2003 and 2006. It filed an action in the Twenty-Second Judicial District Court under Montana Administrative Procedure Act (MAPA), Montana Declaratory Judgment Act (MDJA), Montana Water Quality Act (WQA) and Montana Environmental Policy Act (MEPA) seeking to invalidate the 2003 and

2006 rules adopted by BER. Pennaco claimed the 2003 rules had no sound scientific basis. Pennaco also claimed BER and DEQ failed to prepare a MEPA-required environmental impact statement (EIS). In February 2007, BER moved for summary judgment asserting that no genuine issues of material fact existed and that the administrative record showed that it had validly exercised its authority to issue the challenged rulemakings. In April 2007, Pennaco filed a cross-motion for summary judgment arguing that BER had not validly exercised its authority because the rulemakings were not [**421] supported by the required sound, scientific justification. After briefing and joint submission of Agreed Facts, the court held oral argument in July 2007. In October 2007, the District Court granted BER's motion and denied Pennaco's cross-motion. Pennaco appeals.

STANDARDS OF REVIEW

[*P17] We review a district court's grant of summary judgment de novo, and apply the same criteria applied by the district court pursuant to M. R. Civ. P. 56(c). A district court properly grants summary judgment only when no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law. *Sampson v. National Farmers Union Property, 2006 MT 241, P 7, 333 Mont. 541, P 7, 144 P.3d 797, P 7* (citation omitted).

[*P18] An agency's conclusions of law are reviewed to determine if they are correct. This same standard of review is applicable to both the district court's review of the administrative decision and our subsequent review of the district court's decision. *Indian Health Board v. Mont. Dept. of Labor, 2008 MT 48, P 11, 341 Mont. 411, P 11, 177 P.3d 1029, P 11.*

DISCUSSION

[*P19] *Did the District Court erroneously apply a standard of review that was too deferential and inapplicable to agency rulemakings*

[*P20] In the District Court's 33-page decision, the court acknowledged that Pennaco brought this action under multiple statutes--MAPA, *§§ 2-4-101 to -711, MCA*, MDJA, *§§ 27-8-101 to -313, MCA*, the Montana WQA, *§§ 75-5-101 to -1126, MCA*, and MEPA, *§§ 75-1-101 to -1112, MCA*. The court cited *§ 2-4-506(2), MCA*, which is within the Judicial Notice and Declaratory Rulings section of MAPA, and provides that a court may declare an administrative rule invalid only if "the rule was adopted with an [***196] arbitrary or capricious disregard for the purpose of the authorizing statute." Citing *§ 2-4-305(6), MCA*, in the Adoption and Publication of Rules section of MAPA, the court explained that a rule comports with the administrative procedure act if it is *(a)* consistent and not in conflict with the applicable statute, and *(b)* reasonably necessary to effectuate the purpose of the statute.

[*P21] The District Court also determined that an agency decision involving "substantial agency expertise" must be reviewed to determine whether the agency acted arbitrarily, capriciously or unlawfully. Relying on *Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989)* and *North Fork Pres. v. Dept. of State Lands, 238 Mont. 451, 458-59, 778 P.2d 862, 867 (1989)*, [**422] the court noted that when we reviewed an agency's decision to forego an EIS, we applied an arbitrary, capricious or unlawful standard. The District Court also explained how to review an agency decision for arbitrariness or capriciousness, again relying on both U.S. Supreme Court and Montana Supreme Court authority. Applying these standards, the District Court held that, based on BER's underlying statutory authority (also analyzed by the court), the agency rulemakings were consistent with supportive scientific data and the authorizing statutes. The court found that the 2003 rules were motivated by BER's concerns of projected CBM development in the Powder River Basin [3] and the difficulty for DEQ staffers to objectively and consistently translate the existing narrative standards. The court determined that the protection mandated by both federal and state water laws warranted proactive measures by BER.

3 The record indicates that EPA predicted that 9,551 CBM wells will be operating in the Basin by 2010 resulting in the discharge of millions of gallons of CBM production water per day into the Basin's river system.

[*P22] On appeal, Pennaco claims the District Court mistakenly applied the standard of review in the declaratory judgment provisions of MAPA when it should have applied the standard set forth in the section of MAPA for the adoption and publication of rules. Additionally, Pennaco maintains that WQA requires that "rules should be adopted only on the basis of sound, scientific justification" and the Board should "seriously

consider the impact of the proposed rule." Pennaco summarizes the applicable rules and asserts that under MAPA and WQA, the District Court was required to consider whether the 2003 and 2006 rules were: (1) based on serious consideration of their impact; (2) adopted *only* on the basis of sound, scientific justification and *not* on the basis of projections and conjecture; (3) consistent with and not in conflict with the statute; and (4) reasonably necessary to effectuate the purposes of the WQA. It opines that failure to satisfy any of these substantive standards mandated that the District Court declare the rules invalid.

[*P23] Pennaco argues that the District Court should have first looked to the substantive standards in part 3 of MAPA, i.e., the Adoption and Publication of Rules section, to discern if the rules met the required substantive standards. It opines that the rules did not comply because they had no "sound scientific basis." Pennaco maintains that only after determining if the substantive standards are satisfied should the court [**423] then look to part 5 of MAPA and specifically to *§ 2-4-506(1)* and *(2), MCA*, to determine if either provision would allow a finding of invalidity. Pennaco maintains that by going first to *§ 2-4-506(2), MCA*, (and without consideration of *subsection (1)*), the District Court overlooked the actual and correct standard of review in part 3.

[*P24] Pennaco also posits that the court's determination of the standard of review was erroneously based on cases from this Court that did not involve either agency rulemakings or challenges under MAPA. It further claims that the court ignored applicable cases addressing agency rulemaking. Relying on *Bell v. Dept. of Licensing, 182 Mont. 21, 23, 594 P.2d 331, 333 (1979)*, and *Board of Barbers, Etc. v. Big Sky College, Etc., 192 Mont. 159, 161, 626 P.2d 1269, 1270 (1981)*, Pennaco argues that this Court has stated that the "MAPA test of 'reasonable necessity to effectuate the purposes of the statute' should be [***197] applied." Pennaco maintains that the application of the wrong standard of review requires this Court to vacate and remand for "the more searching review demanded by MAPA and the WQA."

[*P25] Pennaco also asserts that the District Court failed to heed our directive that it give less deference to agency interpretations that are inconsistent or recent, and that the Board's decision to "flip-flop" and reverse its consistent thirty-year-old narrative approach to regulating EC and SAR was not entitled to the critical deference given it by the District Court. Pennaco claims that BER's decision to classify EC and SAR as "harmful" parameters in 2006 was a direct reversal of its 2003 decision to not do so. It argues that the 2006 decision lacked scientific support and therefore is invalid.

[*P26] Pennaco proffers that application of the incorrect standard of review lowered the threshold for demonstrating the validity of the rules. It maintains that it provided the District Court with substantial evidence showing that BER had no sound scientific basis for its 2003 and 2006 rulings but by applying the wrong standard of review the court gave too much deference to BER's rulemaking decisions. It asserts that a numeric limit for EC and SAR was unnecessary because scientific studies showed that CBM-related discharges had not and would not adversely impact the state's water quality; therefore, the narrative standard was adequate to protect the state's water.

[*P27] Pennaco also argues that the District Court misinterpreted the standard it employed; the standard was not simply "arbitrary and capricious," but rather an "arbitrary and capricious disregard for the purpose of the authorizing statute."

[*P28] BER counters that Pennaco failed to identify any clear error by [**424] the District Court and therefore failed to meet the burden of establishing reversible error. Furthermore, the Board asserts that the adoption of the numerical standards for EC and SAR was timely, necessary, scientifically and EPA supported. BER claims that it "was inundated with science" during the 2003 public comment period and that the adopted numeric standards fell within the range of science presented.

[*P29] BER posits that *§ 2-4-302, MCA*, governs adoption of rules and *not* the review of those rules by the judicial branch. BER reiterates that the standard propounded by Pennaco--whether the rules: (1) were based on sound science (WQA); (2) were reasonably necessary (MAPA); and (3) not in conflict with the statute (MAPA)--was actually employed by the District Court when it considered the matter in the manner required by *§ 2-4-506(2), MCA*. While BER does not disagree with Pennaco's argument vis-a-vis recent or inconsistent rulings, it claims that it is inapplicable here as BER had sound reasons for reevaluating protections to

the Basin's water system from these parameters based on projected significant CBM development. BER opines that this Court should not expand judicial review of agency decisions to include reweighing the science, second-guessing BER and substituting our decision for that of the Board.

[*P30] Furthermore, BER defends the District Court's reliance on the standard of review applied in various administrative cases which Pennaco argued was inapposite. The Board avers that *Winchell v. DNR, 1999 MT 11, 293 Mont. 89, 972 P.2d 1132*, *Johansen v. State, 1999 MT 187, 295 Mont. 339, 983 P.2d 962* (*Johansen II*), *Johansen v. State, Dept. of Natural Resources, 1998 MT 51, 288 Mont. 39, 955 P.2d 653* (*Johansen I*), and *North Fork*, involve judicial review of a final agency decision where no review was specifically provided under MAPA. These cases, BER submits, illustrate that judicial review is limited, especially when the court is reviewing an agency decision that requires substantive agency expertise.

[*P31] Intervenors NPRC and TRWUA assert that MAPA does not contain an explicit standard of review for administrative rules as it does for contested cases; therefore, absent such an explicit standard, the District Court correctly drew guidance from *§ 2-4-506(2), MCA*, and from administrative law decisions issued by this Court. They argue that the District Court was correct because Pennaco failed to show how numeric standards are inconsistent with the protective purposes of [***198] state and federal water quality laws. Under the CWA, the Montana WQA and the Montana Constitution, establishment of water quality [**425] standards and nondegradation requirements is required pursuant to BER's duty to protect the environment. They maintain that under any standard of review adopted by this Court, the District Court correctly upheld BER's adoption of the 2003 and 2006 rules.

[*P32] Intervenors suggest that the 2003 rule adopting numeric criteria but retaining the narrative nonsignificant criterion for nondegradation review violated the nondegradation policy and was constitutionally suspect. As a consequence, they argue, BER's 2006 designation of these pollutants as "harmful" corrected this error by establishing a numeric nondegradation standard for EC and SAR which resulted in the similar treatment of all parameters for which numeric criteria had been established.

[*P33] Pennaco replies that MAPA gave rise to this cause of action, not the MDJA, and therefore MAPA's standard of review controls. It posits that the declaratory judgment provisions do not *give rise* to a cause of action; rather, they simply allow a court to declare the rights, liabilities, and remedies of the parties once a court resolves the dispute. Pennaco proffers that if the standard in the MDJA applied there would be no point to MAPA having a standard of review since parties challenging agency actions typically plead declaratory judgment as a basis for relief.

[*P34] Pennaco clarifies that it is not arguing that BER was precluded from switching to a numeric nondegradation criterion after retaining the narrative criteria in 2003; rather, it is arguing that before reversing its previous rejection of the numeric nondegradation criteria, the WQA required BER to provide a sound scientific justification for its action. Changing its position on "policy" grounds (to provide that EC and SAR not be treated differently from other parameters controlled by numeric criteria) does not satisfy the requirement for a "sound scientific justification." Nevertheless, argues Pennaco, even if BER could appropriately rely on a policy reason, its policy justifications are unpersuasive. Under the narrative standards in effect between 2003 and 2006, BER already had the authority to limit discharges of EC or SAR to levels that did not cause further degradation of the receiving waters.

[*P35] We conclude the District Court applied an appropriate standard of review to BER's 2003 and 2006 rulemakings. The court's decision specifically addressed the factors in *§ 2-4-305(6)(a)* and *(b), MCA*, in that the rules were consistent with the requirements of the CWA and the WQA, and were reasonably necessary to effectuate the purpose of the statute, i.e., the protection of the state's waters, [**426] particularly in light of the projected growth of the CBM sector in the Basin and DEQ's difficulty in issuing objective and consistent discharge permits. The court found that BER reviewed copious scientific data and relied on this data to draft rules that had sufficient scientific justification, thereby finding that WQA's mandate for "sound, scientific justification" was met. Additionally, based on consideration of all the circumstances, the court determined that BER had not adopted rules with an "arbitrary and capricious disregard for the purpose of the statutes." This determination satisfied the requirements of *§ 2-4-506, MCA*. Given the multiplicity of Acts under

which Pennaco sought review (see P 16), the standard of review assembled by the District Court from these different sources was not erroneous under the circumstances with which it was presented. For these reasons, we affirm the District Court's application of an appropriate standard of review.

[*P36] *Did the District Court err in concluding that BER was authorized to designate EC and SAR harmful in 2006 when BER had refused to do so in 2003*

[*P37] In response to Pennaco's complaints that BER had no scientific justification in 2006 to reverse its previous decision rejecting requests to classify EC and SAR as "harmful" parameters, the District Court determined that BER's classification of EC and SAR as "harmful" was consistent with the federal CWA in that it was designed to protect uses and high quality water. The court also concluded "what the BER did in 2006 was treat discharges of EC and SAR for [***199] purposes of nondegradation review in the same manner as all other constituents for which there are numeric standards." The court recognized that BER held public hearings, received significant comments, and clearly articulated its reasons for changing its position and that BER's ruling was "entirely consistent with the legislative directive to establish 'objective and quantifiable criteria for various parameters.'"

[*P38] On appeal, Pennaco maintains that the lack of scientific justification for the reversal in position renders the rule invalid. BER counters that it is charged with protecting the state's water under both the CWA and Montana's WQA. It maintains that it had sufficient scientific evidence to support imposition of numeric criteria in 2003 and that this same scientific data supported its 2006 decision to re-classify EC and SAR as "harmful." Moreover, it defends its decision on the ground that re-classification of the two parameters resulted in the uniform treatment of all parameters for which numeric criteria had been established, rather than the irregular regulation of EC and SAR [**427] that resulted from the 2003 ruling. BER asserts that this policy change was within its authority, was supported by scientific data, and was required to protect high quality waters in Montana from degradation. BER's rationale for its decision appears in its Notice of Amendment issued in May 2006:

> The board finds that EC and SAR should be categorized as "harmful" for the purpose of implementing Montana's nondegradation policy. The board notes that the intent of Montana's nondegradation policy is to protect the increment of "high quality" water that exists between ambient water quality and the numeric water quality standards. . . . Given that numeric standards have been adopted for EC and SAR, the board is uncomfortable with the inconsistency of the current "narrative" classification of EC and SAR, which is used solely for parameters for which no numeric standards have been adopted. Since all other parameters with numeric water quality standards are classified as either carcinogenic, toxic, or harmful, the board believes that EC and SAR should be treated in a similar manner.

[*P39] We are not persuaded by Pennaco's argument that BER's decision should be afforded decreased deference by virtue of the fact that it is a reversal of an earlier decision. Pennaco relies for this argument upon *National Wildlife Fed. v. Nat'l Marine Fish. Serv., 422 F.3d 782 (9th Cir. 2005)*, in which the U. S. Court of Appeals stated "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference,' than a consistently held agency view." *National Wildlife, 422 F.3d at 799*. However, we conclude that *National Wildlife* is inapposite. In that case, the district court found invalid two NMFS opinions issued over a period of four years. In its second opinion, according to the court, the agency had directly reversed its earlier opinion, but erroneously failed to take account of several significant factors in doing so. Here, by contrast, BER's decision to classify EC and SAR as "harmful" for purposes of nondegradation review was not as much a reversal of an earlier decision as it was a recognition that it had created an inconsistent regulatory scheme with its 2003 rules. Moreover, while rejecting a 2003 request to classify these parameters as harmful at the time, BER had expressly agreed to continue studying the effects of these pollutants. Upon learning that its 2003 rule potentially allowed dischargers to discharge a level up to the numeric standards regardless of the background level of these parameters in the receiving waters, BER

revised its rule to create consistency of regulation and [**428] protect the Basin's water.

[*P40] We conclude that BER was authorized to classify EC and SAR as "harmful" under its mandate to protect the waters of Montana and to achieve regulatory consistency with other parameters for which numeric standards had been adopted. While this may have been a policy-based decision, there appears to be adequate scientific justification in the rulemaking record. This rule protected high quality water by requiring permit writers to stop short of allowing degradation up to the standard; it was reasonably necessary to ensure consistency in permitting and protection of the receiving waters, and it was consistent with the authorizing statutes. [***200] The District Court did not err in so concluding.

[*P41] *Did the District Court err in concluding that BER's revised rule was not "more stringent" than federal law, and therefore BER was not statutorily required to issue written findings of fact*

[*P42] Finally, Pennaco argues that BER was statutorily required to issue written findings because it adopted rules that were more stringent than corresponding federal rules. The District Court rejected this argument, as do we.

[*P43] The District Court noted that DEQ issued two legal opinions to BER stating that neither the 2003 numeric water quality standard nor the 2006 nonsignificance criteria were more stringent than comparable or corresponding federal regulations. The court rejected Pennaco's argument that when EPA approved the earlier-promulgated "narrative" water quality standard (presumably around 1972), the narrative standard became the federal standard so that the adoption of numeric standards constituted a "more stringent" standard. The court similarly rejected Pennaco's argument that when EPA approved the narrative nonsignificance criteria in 2003, this became the federal standard. The District Court stated that Pennaco offered no legal authority for its proposition that EPA's *approval* of state narrative standards "federalizes" such standards in such a way as to trigger the "written justification" requirement in the Montana statutes. The District Court determined that neither the plain language of the statutes nor the legislative histories supported Pennaco's interpretation. It further concluded that *§§ 75-5-203* and *-309, MCA*, requiring such written findings, were triggered by EPA-promulgated regulations or criteria, not mere approval of a state standard. The court concluded that because there were no corresponding federal numeric standards for EC or SAR, BER's adoption of numeric standards was not "more stringent" than a federal standard. The court [**429] further opined that the classification of EC and SAR as "harmful" parameters was consistent with the federal CWA rather than "more stringent" or in conflict with federal requirements. Accordingly, because the 2006 classification was not more stringent than or in conflict with federal standards, no additional written findings were required.

[*P44] We find no fault with the District Court's analysis. We disagree with Pennaco's argument that EPA's approval of BER's revised rules in 2003 established federal criteria for EC and SAR, the subsequent revision of which would constitute a more stringent standard triggering written findings. Furthermore, we find no authority to support a conclusion that BER's classification of EC and SAR as "harmful" parameters and the consequential nondegradation review rule constitute a "more stringent" standard in light of the fact that EPA has not adopted a corresponding standard. The revised rule is consistent with *40 C.F.R. § 131.11(a)(1)* which requires states to adopt water quality standards to protect designated uses:

> *131.11(a)* Inclusion of pollutants: (1) States must adopt those water quality criteria that protect the designated use. Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use.

[*P45] In addition, BER's 2006 nondegradation rule appears to be consistent with EPA's antidegradation policy at *40 C.F.R. § 131.12*, which provides in relevant part:

> (a) The State shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy pursuant to this subpart. The antidegradation policy and implementation methods shall, at a minimum, be consistent with the following:

> (1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.
>
> (2) Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public [***201] participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate [**430] important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.

[*P46] Lastly, while not determinative of our decision here, we note that subsequent to the District Court proceedings in this matter, the EPA issued a letter on February 29, 2008, approving BER's revision to the nondegradation provision in *ARM 17.30.670(6)*, and stating that the revised rule was consistent with the requirements of the CWA and EPA's antidegradation provisions codified at *40 C.F.R. § 131.12*. EPA stated:

> The revised water quality standards amend Montana's nondegradation requirements applicable to [EC and SAR] for the . . . Powder River [Basin]. The revision to *ARM 17.30.670(6)* classifies EC and SAR as "harmful" parameters for the purposes of making nonsignificance determinations for high quality waters. Specifically, the revised rule now reads: "EC and SAR are harmful parameters for the purposes of the Montana Water Quality Act, Title 75, Chapter 5, MCA." EC and SAR, therefore, now will be subject to the nonsignificance criteria in *ARM 17.30.715(l)(f)*, which provides, in part, that changes in high quality waters will be considered nonsignificant where ". . . changes outside of a mixing zone designated by the department are less than 10% of the applicable standard and the existing water quality level is less than 40% of the standard."

Thus, EPA expressly approved BER's 2006 nondegradation rule as being consistent with its mandates.

[*P47] Based on the record, the District Court correctly concluded that BER's 2003 and 2006 rules have a scientific basis, are reasonably necessary to effectuate the purpose of the applicable statutes, are consistent and not in conflict with the relevant statutes, have not been adopted with an arbitrary and capricious disregard for the purpose of the authorizing statutes, and are consistent with and not more stringent than EPA's antidegradation policy.

[*P48] For the foregoing reasons, we affirm the District Court.

/s/ PATRICIA COTTER

We concur:

/s/ W. WILLIAM LEAPHART

/s/ BRIAN MORRIS

/s/ JAMES C. NELSON

/s/ JIM RICE