

**Environment Department  
Surface Water Quality Bureau  
Response to Public Comments  
On The 11/12/03 Draft of  
Antidegradation Policy Implementation Procedures**

**Introduction**

On November 12, 2003, the New Mexico Environment Department Surface Water Quality Bureau (SWQB) formally requested public comment on a proposal to amend the [Continuing Planning Process](#) document to include procedures for implementation of the “Antidegradation Policy” in the New Mexico [Water Quality Standards for Interstate and Intrastate Surface Waters](#) found at 20.6.4.8 NMAC (Water Quality Standards). The SWQB’s proposal was entitled “Antidegradation Implementation Procedures” (Procedures).

The SWQB is documenting the public comment process on its Internet webpage at <http://www.nmenv.state.nm.us/swqb/cpp/index.html>. Copies of the public notice, the full text of public comments, and this response document are available at this address. This document summarizes each comment and provides the SWQB’s response. The reader is encouraged to view the full text of the comment through the hyperlink provided in blue underlined text. The SWQB greatly appreciates all comments received.

The SWQB received written comments from six parties: the United States Environmental Protection Agency (EPA Region 6), Amigos Bravos, City of Santa Fe, Dairy Producers of New Mexico, Los Alamos National Laboratory, and San Juan Water Commission. The comments on some topics ranged widely. For example, the SWQB’s proposal regarding *de minimis* discharges was both strongly supported (e.g., City of Santa Fe) and strongly opposed (e.g., Amigos Bravos). The SWQB adjusted its proposal in response to many comments as described in more detail below. In doing so, the SWQB was mindful of the balance between the level of protection afforded by the procedures and the SWQB’s ability to implement the policy without administrative burdens that would “bog” down the system and lead to unacceptable consequences such as permit issuance backlogs. Moreover, the latter consequence would be inconsistent with the antidegradation policy. EPA describes the antidegradation policy in the [Water Quality Standards Handbook](#) [EPA 823-B-94-005 Aug. 1994] (Section 4.5, page 4-7) as follows:

*[a]ntidegradation is not a “no growth” rule and was never designed or intended to be such. It is a policy that allows public decisions to be made on important environmental actions.*

Indeed, the NPDES program has been the subject of widespread criticism for its failure to issue permits in a timely manner. For instance, in 2000, Congress, EPA’s Inspector General, and Environmental Groups<sup>1</sup> expressed concern that the NPDES program was characterized by unacceptable numbers of outdated NPDES permits. In New Mexico, in the year 2000 only one quarter (26%) of NPDES permits were current (i.e., 5 years old or less). The situation has

---

<sup>1</sup> *Clean Water Report Card*, March 2000. Friends of the Earth and the Environmental Working Group. ([http://www.ewg.org/reports\\_content/reportcard/FailingGrades.pdf](http://www.ewg.org/reports_content/reportcard/FailingGrades.pdf)).

improved since then (in 2004, 93% of NPDES permits in New Mexico were current), but the risk of permit backlogs is increased by the addition of more procedures that might bottleneck the process. In sum, it is important to balance the antidegradation policy with the need to maintain functional process.

As described in more detail below, the SWQB amended the Procedures in response to comments. Most changes are readily apparent as the logical outgrowth of a direct comment. However, in some cases, the changes are not directly tied to specific comments, but rather in response to comments as a whole or to account for “ripple effects.” The SWQB has also made some non-substantive changes to improve readability, such as renumbering or restructuring the outline format of the document and adding a table of contents.

In the following response, comments are presented in the order of their discussion in the comments. Italicized material is directly quoted from the comments. Other material is paraphrased. The section numbers refer to the revised version of the Procedures.

### [Comments by EPA Region 6](#)

#### **EPA Comment #1 (Cover Letter, page 1, paragraph 1):**

*“I appreciate your efforts ... [t]he proposed implementation procedures are a solid basis for New Mexico to build on as the Surface Water Quality Bureau and the Environment Department as a whole gain experience in carrying out antidegradation reviews.”*

#### **SWQB Response:**

The SWQB highlights this comment because it emphasizes that the planning documents such as the Continuing Planning Process are “living” documents that must be periodically reviewed and updated.

#### **EPA Comment #2 (Cover Letter, page 1, paragraph 3):**

*“Any one or a combination of several activities may trigger an antidegradation analysis ... [including] water quality standards reviews, the establishment of new or revised wasteload allocations, issuance or reissuance of NPDES permits.... Lowering water quality in high quality waters would not be permissible unless the State conducts a review consistent with its policy and implementation.”*

#### **SWQB Response:**

The SWQB concurs and notes that EPA’s comment comes almost verbatim from the EPA’s [Water Quality Standards Handbook](#) [EPA 823-B-94-005 Aug. 1994] (Section 4.8, page 4-10). The Procedures explicitly address this issue in the introductory paragraph of Part III. The Procedures also focus on the details of issuance and reissuance of federal permits pursuant to CWA Sections 402 (National Pollutant Discharge Elimination System) and 404 (Dredge or Fill).

Finally, the Procedures state that: “other activities such as water quality standards reviews are subject to extensive requirements for review and public participation, as well as various limitations on degradation imposed by state and federal law.” Thus, the Procedures utilize existing public participation and review processes rather than creating duplicative or additional requirements. The SWQB believes that this approach is consistent with the applicable requirements and results in programmatic efficiency that reduces the burden on the Water Quality Control Commission, the SWQB, stakeholders, and the public.

**EPA Comment #2 (Cover Letter, page 2, paragraph 1):**

EPA notes that “*guidance to the States and Tribes on developing specific implementation is limited*”, and encourages the Bureau to rely on the Water Quality Standards Handbook.

**SWQB Response:**

The SWQB agrees and notes that the lack of National and EPA Region 6 guidance on antidegradation implementation has been problematic. The SWQB began work on this project in 2001 in order to address an issue identified by EPA in its January 2001 letter disapproving portions of the 1998 Triennial Review. The SWQB’s early effort relied heavily on the Handbook, as well as guidance from other EPA Regions, especially EPA Region 4. After sending a preliminary draft to EPA Region 6 in August 2001, the SWQB learned of a lawsuit<sup>2</sup> involving the State of West Virginia’s antidegradation implementation procedures. The West Virginia allegations concerned the SWQB because it was attempting to address some of the same issues. Therefore, the SWQB decided to table the matter until the EPA issued clear guidance or the Court decided the West Virginia case. EPA has not issued clear guidance, but on August 29, 2003, the Court issued its decision. The SWQB then reinitiated its effort, considering both the Water Quality Standards Handbook and the Court’s published opinion. As a result, the SWQB issued this proposal for public comment on November 12, 2003.

**EPA Comment #1 (Attachment):**

EPA expresses concern that Option 5 under Part III A.2.a is not clear whether pollutant load offsets by enforceable reductions by other point or nonpoint sources have to be in the same waterbody as the new discharge.

**SWQB Response:**

SWQB concurs that clarification is needed, and proposes to amend the section and flow chart to clarify that the offsets need to be within the same waterbody segment as the new discharge.

**EPA Comment #2 (Attachment):**

---

<sup>2</sup> *Ohio Valley Environmental Coalition v. Horinko*, 279 F.Supp.2d 732 (S.D.W.Va 2003).

Response to Public Comments  
11/12/03 Draft  
Antidegradation Policy Implementation Procedures

EPA states: *In the paragraph directly after 6), the document states “Notwithstanding these de minimus activities, the Department shall conduct Tier 2 review ... when the discharge, taken together with all other activities allowed after the baseline water quality is established, would cause a reduction in the available assimilative capacity of 10 percent or more for the parameter of concern.” Does this mean that if a proposed new/increased discharge could be considered de minimus by one of the six exemptions, but it is determined that cumulatively, it will cause a reduction in available assimilative capacity of 10% or more for the parameter of concern, that Tier 2 review will be conducted? As written, this paragraph could be essentially considered a catch-all provision that overrules any de minimus determination that could be made through the six exemptions.*

**SWQB Response:**

The cited paragraph is intended to act as a “safety net” to assure that cumulative impacts by multiple discharges are addressed. The safety net is not intended to be a “catch-all” that automatically negates a *de minimis* decision made based upon any of the preceding paragraphs. However, if cumulative impacts are identified, the cited paragraph overrules the *de minimis* decision.

**EPA Comment #3 (Attachment):**

EPA comments regarding industrial discharges in Part III.A.2.a.ii: “[i]n 1), the provision states that: ‘... at least 10 percent of the total assimilative capacity for the pollutant of concern will remain unused after the discharge.’ Taken literally, if the new/increased discharge will consume less than or equal to 10% of the total assimilative capacity, then it would leave at least 90% of the total assimilative capacity, not 10%. Although it’s unclear, the passage may mean that at least 10% of the waterbody’s capacity for the pollutant of concern (i.e., the criterion) must remain unused after the discharge. Or, if referring to cumulative effects, i.e., that at least 10% of the total assimilative capacity for the pollutant of concern will remain unused after the discharge, taken together with all other activities allowed after the baseline water quality is established. The intent of the passage should be clarified.

**SWQB Response:**

The SWQB agrees the paragraph was confusing regarding the amount of capacity used and remaining. The SWQB has simplified the statement by eliminating the phrase regarding remaining capacity. If only 10% of the assimilative capacity can be used, it is obvious how much capacity remains.

**EPA Comment # 4 (Attachment):**

EPA expresses concern that Option 2 under Part III A.2.a.ii is not clear whether pollutant load offsets by enforceable reductions by other point or nonpoint sources have to be in the same waterbody as the new discharge.

**SWQB Response:**

Please see the response to EPA Comment #1 (Attachment).

**[Comments by Amigos Bravos](#)**

**Amigos Bravos Comment:**

*Amigos Bravos was pleased with a number of general aspects of the proposed Antidegradation Implementation Procedures.*

- *Parameter by Parameter Approach:*

*We strongly support the Departments approach of implementing antidegradation procedures on a parameter-by-parameter basis. It is of the highest importance that the antidegradation review occurs on a parameter-by-parameter basis, or else high quality of entire water bodies will be written off simply with one impairment.*

**SWQB Response:**

Thank you for your comment.

**Amigos Bravos Comment:**

*Amigos Bravos also supports the Department in requiring antidegradation review during renewals of existing permits in certain circumstances. It is, however, important to clarify when those “certain circumstances” are. Amigos Bravos believes that certain circumstances in this instance should be defined as when the discharge has never previously undergone an adequate antidegradation review. That may include all existing discharges. While it won’t necessarily result in withdrawing the permit if the activity is entrenched in the economy, it should require a review of impact on existing uses (perhaps a plan to prevent such impacts) and it should require alternatives be reviewed and it should require that the most stringent regulatory and statutory requirements be put in place before degradation is allowed to continue.*

**SWQB Response:**

The phrase “certain circumstances” refers to situations where an existing discharge may be degrading water quality, including discharges causing degradation over time, discharges contributing to cumulative degradation, or sources with a history of permit noncompliance. The SWQB intends to evaluate each existing discharge during the renewal process to ensure that an antidegradation review is conducted when necessary to prevent the degradation of water quality.

The comment is unclear regarding the timing of reviews for existing permits. To the extent that Amigos Bravos suggests a wholesale review of permits, without regard to their renewal dates, the SWQB disagrees for a number of reasons.

- 1) It would not be possible to review all previously issued permits with the current administrative resources. The permit issuance process would become so bogged down new permits and permit renewals would be unreasonably delayed. For the first time in years, the majority of permits in New Mexico are current (i.e., less than or equal to 5 years old) and the NPDES permit backlog is consistent with EPA's permit backlog reduction policy (i.e., >90% of permits should be current). At this time, 93% of New Mexico's NPDES permits are current, in contrast to the year 2000, when only 26% of these permits were current. Nonetheless, any degradation by existing sources will be examined in the near future. Currently, NPDES permits are reviewed every five years, which means that all existing permits will be examined within five years following adoption of the Procedures to determine whether antidegradation review is required at renewal. The SWQB will conduct full review if one of the triggering circumstances is indicated. This procedure provides for an orderly sequence of reviews as each permit comes up for renewal, and preserves a streamlined and functioning permitting process.
- 2) The SWQB has been conducting antidegradation reviews, albeit not under the Procedures proposed here. The antidegradation policy has been a component of the Water Quality Standards for many years. As NPDES permits have been issued or reissued through time, the SWQB has conducted Section 401 certification and antidegradation reviews. Since January 2000, the SWQB has reviewed for purpose of state certification under section 401 of the Clean Water Act 134 NPDES permit actions (renewals, modifications, issuances). State review of NPDES permits ensure proposed permits are compatible with appropriate state law, protect New Mexico's water quality standards and implement the New Mexico water quality management plan. In numerous instances, state 401 certifications have included as condition of certification additional requirements to meet the aforementioned objectives.
- 3) Permittees are entitled to rely on lawfully issued permits until their scheduled renewal dates. Permit issuance and renewals are subject to public review and specific timelines for appeal. Existing permits were issued based upon the facts and regulations existing at the time the permitting decisions were made. Like all other administrative decisions, those permitting decisions were subject to appeal for a specified time, and became final upon expiration of that time. The permittees are entitled to rely upon the finality of their permits during the lifetime of the permits, and reopening those permits before their scheduled renewal dates would be unreasonable and inequitable.
- 4) The SWQB disagrees with Amigos Bravos' assertion that some discharges have never undergone "adequate" antidegradation review. Most permit actions in recent years have been renewals of existing discharges, and the majority of those renewals have not increased their discharge of pollutants above the previously permitted levels. Thus, these renewed discharges have not proposed to further degrade the receiving waters. In some cases, permittees have voluntarily retained existing effluent limitations that were more stringent than current law required (e.g., Jemez Springs WWTP). In a few cases, permittees have been denied the authority to increase their discharges (e.g., Santa Rosa

WWTP). Indeed, in the case of the Santa Rosa WWTP, the decision was based on the SWQB's antidegradation review conducted as a test case for these Procedures.

**Amigos Bravos Comment:**

*Amigos Bravos is pleased that the Department is placing the burden of proof (collecting the data to prove no degradation will occur or that the limited degradation is necessary) the entity proposing degradation. The success of the antidegradation policy and procedures depends on placing the burden of proof on these entities and making it clear to them that is the case. This has been stated within the policy on page 13. Placing the burden of proof on the entity proposing the discharge the Department is protecting limited state resources.*

**SWQB Response:**

Thank you for your comment.

**Amigos Bravos Comment:**

*By requiring that the applicant provide information on the adverse impacts (including economic, social and environmental impacts) of the new or increased discharge the Department is ensuring that a balanced analysis of the proposed discharge is conducted. This information will have to be reviewed very carefully by the Department as not reporting fully on these impacts provides an obvious benefit to the applying entity.*

**SWQB Response:**

The SWQB understands Amigos Bravos' concern. The SWQB carefully considers all information. The public comment and intergovernmental coordination provide a safety net to help catch any underestimation of impacts.

**Amigos Bravos Comment:**

*It would also be worthwhile to evaluate the social and economic benefits of not permitting the activity.*

**SWQB Response:**

SWQB agrees and proposes to include an analysis of the "no discharge" option in Section III.A.2.b.i.

**Amigos Bravos Comment:**

*The De minimus exemptions for point sources and dredge and fill permits are too broad and in most cases inappropriate. Given what is presented here the Department might as well say that this implementation plan is unnecessary because Amigos Bravos doubts that many, if any,*

Response to Public Comments  
11/12/03 Draft  
Antidegradation Policy Implementation Procedures

*dischargers or permittees will be outside all the de minimus exemptions. We have provided detailed comments on the de minus exemptions below.*

**SWQB Response:**

The SWQB has carefully considered the *de minimis* exclusions. Amigos Bravos' concern that no discharge will fall within the review process is unfounded. The SWQB has been testing the implementation of the Procedures for proposed permits for more than one year. Two facilities, the Santa Rosa and Jemez Springs WWTPs, were both reviewed under Tier 2. In the Santa Rosa case, the SWQB denied an increased discharge of pollutant load based on the antidegradation review. In the Jemez Springs case, the Village voluntarily agreed to no-net increase in its pollutant load based on the antidegradation review even though it was increasing the overall capacity of its treatment plant and would have been entitled to a higher, less stringent limit. In addition, it should be noted that the SWQB proposed a parameter-by-parameter approach for Tier designation and implementation. This proposal ensures broad application of the Procedures. As EPA states in the *Water Quality Standards Handbook*, "EPA believes that it is best to apply antidegradation on a parameter-by-parameter basis. Otherwise there is potential for a large number of waters not to receive antidegradation protection."

**Amigos Bravos Comment:**

*Evaluation of alternatives to proposed activities that might degrade high quality waters is the cornerstone of the Tier 2 review. Without the identification and evaluation of alternatives, it would not be possible to determine whether an activity is "necessary to accommodate important economic or social development in the area." Unfortunately, most of this document is focused on how to avoid the antidegradation review rather than how to use it to protect the health of our watersheds.*

**SWQB Response:**

Identification of alternatives, including the no discharge alternative, is addressed in Section III.A.2.b.i.4). Regarding the amount of detail on *de minimis* exemptions, it is clear from our discussions with EPA, as well as EPA guidance and court decisions, that *de minimis* exemptions are allowed, but must be carefully described.

**Amigos Bravos Comment:**

*Public participation, especially in Tier 1 review, is not adequately described and accounted for. The language surrounding public participation opportunities is confusing at times seems to contradict itself [sic].*

**SWQB Response:**

The SWQB disagrees with the comment. The public participation requirements are set forth in the Procedures in sufficient detail to inform a reasonable person how he can participate in the antidegradation review process.

**Amigos Bravos Comment:**

*Page 1*

*Line 8: change “~~construed~~” to “taken”*

*Line 10: add “but not limited to” after including*

**SWQB Response:**

The SWQB believes the word “construed” is more appropriate in the context of the paragraph.

After some research, the SWQB believes that the additional phrase is redundant. *See*, Martineau, Robert J., *Drafting Legislation and Rules in Plain English* (University of Cincinnati, 1991), pp.106-107 (“[i]f the definition is intended to be only partial and permit the word to be applied to things not included in the definition, use “includes.” Do not say “includes but is not limited to.””).

After review these guidelines SWQB found and corrected a few occurrences of the offending phrase that it had originally proposed elsewhere in the document.

**Amigos Bravos Comment:**

*II. TIER DEFINITIONS*

*Lines 17-19 are good, although it would be even better to change the language to: “a water may require a Tier 1 review for one parameter and Tier 2 review for a different one.” This gets away from designating tier 1 or 2 waters when in fact they all require both Tier I and Tier II review in some way.*

*A. Tier 1*

*We recommend the following in consistency with our comments on the above point:*

*Line 25: “Tier 1 ~~waters~~ review applies...”*

*Line 26: “Waters that require Tier 1 review will be identified...”*

*Line 32: “...basis before proposed activity occurs.”*

**SWQB Response:**

SWQB’s intent in this section is to define three categories of water established by the Policy. Much of AB’s suggested language subtly changes the SWQB’s intent from defining the category of water to the category of review. SWQB believes its approach is clearer. AB’s proposal for line 26 is helpful and is incorporated with a slight modification.

**Amigos Bravos Comment:**

Response to Public Comments  
11/12/03 Draft  
Antidegradation Policy Implementation Procedures

Page 2

Line 4: remove “~~regardless of tier designation.~~”

Line 11: remove “~~that are not designated as Tier 1 or Tier 3~~”

Line 12: replace “~~may apply~~” with “applies”.

Line 13: add a comma after basis “basis,”

Line 14: “information, until it can be proven that it doesn’t apply.”; change “~~waters~~” after Tier 1 to “review”; change “~~Tier 2 waters~~” to “the applicability of Tier 2 review”

**SWQB Response:**

SWQB believes current language is clear.

**Amigos Bravos Comment:**

Page 3

Line 5: change “2) the balance of the need to accommodate important economic and social development in the area in which the water is located and economic and the social impacts of the discharge: and” This language is consistent with the Tier 2 implementation outlined on page 13 line 25-45.

**SWQB Response:**

The language as proposed by SWQB is verbatim extracted from the WQCC’s antidegradation policy (20.6.4.8 NMAC). The phrase in the policy is: “... necessary to accommodate important economic and social development in the area in which the water is located.” AB’s additions of “balance” and “social impacts of the discharge” would expand the WQCC’s adopted policy. Further it is unclear what “social impacts of the discharge” means. Such ambiguity would only serve to create delay and controversy.

**Amigos Bravos Comment:**

Lines: 12-20: Great paragraph if the clause starting on line 14 after unless is removed. “~~uses, unless the designated uses are modified through a use attainability analysis, 40 CFR 131.10(j) and 20.6.4.14 NMAC, or adequately protected by segment-specific water quality standards.~~” Reference to UAA and segment-specific standards is inappropriate and unnecessary: protection of designated (and existing) uses must be ensured, if the UAA process is followed to remove a designated use (which cannot be done if it is existing) this implementation policy would not apply because the designated uses would be changed; there is no need to single out segment-specific standards as a particular way to protect uses because it is sufficient to say that uses are protected by maintaining water quality.

**SWQB Response:**

There is no reason to eliminate the references to UAAs or segment specific standards. These tools are legitimate means of addressing water quality concerns and adjusting water quality standards where appropriate. These actions are decisions made by the WQCC only after public notice and participation through the hearing process for water quality standards changes. Identification of these options helps everyone to better understand the water quality standards. Further, if removal of a use through the UAA process or establishment of segment specific standards is appropriate, then it is more efficient and more reasonable to do the antidegradation analysis based upon the appropriate standards than to do the antidegradation analysis based on an inappropriate standard and then possibly have to repeat the analysis based upon the new standards.

**Amigos Bravos Comment:**

*C. Tier 3*

*Line 31-33: Tier 1 and Tier 3 processes are intended to be black and white - prevent harm and degradation. It is only Tier 2 process where the review can lead to a determination that a limited amount of degradation is allowed. This language seems to be implying that any limited discharge into an ONRW should be sufficiently scrutinized, which is appropriate. Although an argument can be made that the regulations explicitly say no discharge.*

**SWQB Response:**

The terms “discharge” and “degradation” should not be read to be synonymous. The EPA *Water Quality Standards Handbook* (Section 4.7) states in part:

The policy provides for protection of water quality in high-quality waters that constitute an ONRW by prohibiting the lowering of water quality. ... EPA interprets this provision to mean no new or increased discharges to ONRWs and no new or increased discharge to tributaries to ONRWs that would result in lower water quality in the ONRW. The only exception to this prohibition, as discussed in the preamble to the Water Quality Standards Regulation (48 F.R. 51402), permits States to allow some limited activities that result in temporary and short term changes in water quality of ONRW. Such activities must not permanently degrade water quality or result in water quality lower than that necessary to protect the existing uses in the ONRW. (Emphasis added)

Therefore, Tier 2 is not the only process where review can lead to a determination that a limited amount of degradation is allowed. As stated above the prohibition is that activities must not permanently degrade. Therefore, temporary degradation may be allowed in Tier 3 waters. Further, with regard to discharges, the statement about no discharge is qualified to limit only those discharges that would result in lower water quality.

Examples of discharges that might be allowable could be a temporary discharge associated with the installation of a BMP intended to preserve or protect water quality or the introduction of a

piscicide (in accordance with applicable water quality standards provisions) intended to restore a native fishery. Both activities would clearly be consistent with the objective of the Clean Water Act to restore and maintain the ... integrity of the Nation's waters.

**Amigos Bravos Comment:**

*Line 33: "~~Such special circumstances must undergo antidegradation review. Such special circumstances must be subject to public and outside agency review, the specific goal and the environmental impact of these activities must be specifically defined, and the intensity and duration of those impacts must be defined and minimized.~~"*

**SWQB Response:**

Amigos Bravos' suggestion here is misplaced. This section of the Procedures is intended to define and explain what Tier 3 means. AB's suggestion addresses how the review will be conducted. How Tier 3 reviews will be conducted is addressed later in the Procedures document under Part III.A.3. The language of Part III.A.3 states that the Tier 3 review would consist of applying the Tier 2 review process (Part III.A.2) which would automatically include: 1) information gathering; 2) preliminary decision making; public comment and intergovernmental coordination; and 4) final decision making processes. SWQB proposes to incorporate the additional elements of ABs' comment into Part III.A.3.

**Amigos Bravos Comment:**

*Page 4*

*Flowchart: We found this flowchart helpful as long as it is clear that the pollutants associated with a particular discharge may undergo both Tier 1 and 2 reviews.*

**SWQB Response:**

The flow chart is a part of Part II Tier definitions; therefore, it is only intended to illustrate part of the procedure. What reviews occur are addressed in Part III Implementation.

**Amigos Bravos Comment:**

*Page 5*

**III. IMPLEMENTATION**

*Line 3: "~~The Procedures apply to every proposal a new or increased discharge to~~ activity that has the potential to degrade" The Procedures should apply to every activity on the water body and should not be limited to 402 and 404 authority, and should include development/revision of plans, TMDLs or even changes to water quality standards that may degrade water quality.*

**SWQB Response:**

The suggested phrase “activity that has the potential to degrade” is overbroad. For example, this phrase would include activities over which the Commission’s powers are limited under § 74-6-12 NMSA. The explanatory phrase “development/revision of plans” is vague, and the intended scope of the phrase is unclear. Application of antidegradation review to TMDLs or changes to water quality standards is inappropriate. The purpose of the antidegradation review is to require an analysis and public input to justify a reduction in water quality. Public input and review are part of the TMDL process and the purpose of a TMDL is to improve, not lessen, water quality. Adoption of changes to water quality standards in New Mexico, unlike many other states, involves a full public hearing where concerns over degradation issues may be raised, making antidegradation review duplicative. Further, many amendments to the standards do not implicate changes to water quality, and the requirement for the additional review would not be productive.

**Amigos Bravos Comment:**

*Line 5 and 6: Move “pursuant” down one row - “pursuant to CWA Section 402”*

**SWQB Response:**

Thank you for your comment. This correction has been made.

**Amigos Bravos Comment:**

*Line 9: “including, but not limited to”*

**SWQB Response:**

The SWQB believes that the additional phrase is redundant. *See*, Martineau, Robert J., *Drafting Legislation and Rules in Plain English* (University of Cincinnati, 1991), pp.106-107 (“[i]f the definition is intended to be only partial and permit the word to be applied to things not included in the definition, use “includes.” Do not say “includes but is not limited to.”).

**Amigos Bravos Comment:**

*Page 5*

*Line 12-18: Amigos Bravos does not agree that development or changes to all these particular documents do not require antidegradation review.*

*The CPP and the Water Quality Management Plan are constantly being revised and it is possible that procedures that are likely to allow degradation could be added and adopted to these plans. These changes should be subject to antidegradation review.*

**SWQB Response:**

As stated earlier, these types of water quality-related actions already are subject to extensive public review and participation, and would not benefit by yet another review that is geared toward impacts on specific waters.

**Amigos Bravos Comment:**

*POINT AND REGULATED SOURCES*

*1. Tier 1*

*Again, we are glad to see that the Department will require antidegradation review, in certain circumstances, for the renewal of existing discharges.*

**SWQB Response:**

Thank you for your comment.

**Amigos Bravos Comment:**

*Page 5*

*Line 30: "are consistent with state law, ~~protect~~ water quality standards ~~and implement the state water quality management plan~~ and TMDLs in place or pending."*

**SWQB Response:**

The Commission adopts TMDLs as part of the WQMP (Work Element 1). Therefore, the suggested change improperly narrows the description of Section 401 certification, which must ensure implementation of the entire WQMP. Moreover, there is no legal basis for implementing a "pending" TMDL, which has not been adopted by the Commission. However, if an NPDES permit is proposed by EPA during the pendency of a TMDL, the SWQB works with EPA to ensure that the permit contains a reopener clause to allow incorporation of the TMDL after final approval.

**Amigos Bravos Comment:**

*Line 36: This section implies that Tier 1 review does not need a separate public participation process. This is only true if the TMDL, 402 and 404 processes included a public identification and evaluation of impacts of existing uses. Amigos Bravos urges the Department to ensure that there is adequate public participation for Tier 1 review.*

**SWQB Response:**

TMDLs satisfy the concern raised by this comment because they are plans for improving water quality to protect existing and designated uses, and are subject to the public participation process. Similarly, the permit and certification processes under Sections 402 and 404 also evaluate impacts on existing and designated uses, and include public participation requirements.

**Amigos Bravos Comment:**

*Line 37: Public participation for TMDLs does not necessarily allow for public participation in the antidegradation process. In fact, in Line 15 above, it seems like the Department is trying to say that antidegradation procedures don't apply to TMDLs (although Amigos Bravos holds that they should). Whatever antidegradation review is carried out, there should be a specific public participation, comment and notification of determination. Documents involved in the determination should be available for public review.*

*This paragraph needs to be revised so that it is absolutely clear how the public is involved in and has opportunity to submit comments to the Department's process for determining existing uses and evaluating potential harm to them, under all scenarios.*

**SWQB Response:**

The antidegradation process is designed to prevent the degradation of water quality by new or increased discharges. TMDLs are designed to develop a plan of budgeting and reducing pollutant loads to improve water quality that is already degraded. As a result, it is inappropriate to apply antidegradation review to TMDLs. Further, TMDLs are subject to public review and comment. These requirements are summarized in the WQMP (Work Element 11). Repeating these requirements in the Procedures is not necessary to implementation of the antidegradation policy, and would unnecessarily complicate the document.

**Amigos Bravos Comment:**

*Page 6*

*Lines 1-2: What happens if the Department waives the 401 certification? Amigos Bravos is not aware of any way to challenge a waiver because it is not a mandatory certification. If that is the case, it should be stated explicitly within the implementation guidance and alternatives for public participation in antidegradation review should be outlined for these cases.*

**SWQB Response:**

If EPA issues a permit following waiver of certification by the SWQB, EPA must still conduct the antidegradation review. As the permitting authority, EPA must ensure that permits protect all water quality standards, including the antidegradation policy. The public is entitled to participate in the permitting process. Finally, it is important to remember that the SWQB has not waived a certification in more than twenty years (the current limit of institutional memory).

**Amigos Bravos Comment:**

*Page 6*

*Line 5: Add "The cornerstone of the Tier 2 review is the alternatives analysis. The applicant must discuss alternatives to the proposed activity, and the Department must weigh the environmental impacts and social and economic importance of each alternative in order to*

*determine whether a lowering of high quality water is “necessary.” Once a determination has been made to allow degradation, the alternatives analysis is also instrumental in minimizing the degradation.”*

**SWQB Response:**

The comment is misplaced. The intent of this section is to identify the facilities being reviewed. The comment concerns how the review will be conducted. This topic is discussed in the next section (III.A.2.b). In that context, the SWQB has proposed to add discharge options to the list of information that an applicant must submit to the SWQB. See Section III.A.2.b.i, ¶4. The SWQB's obligation to weigh environmental impacts and social and economic importance is already addressed in Section II.A.2.b.ii of the Procedures.

**Amigos Bravos Comment:**

*2. Tier 2*

*Line 6. a. ~~Determination of Necessity~~ Exemptions*

*This section seems to mislabeled. This section is really 5 + pages of exemptions and should be labeled as such. The phrase “determination of necessity” should apply once Tier 2 review is already underway, when the Department determines if the proposed action is really necessary. The determination of necessity is intended to address whether the proposed activity is necessary and can only be determined by conducting an alternatives analysis at the start. A discussion of alternatives is required on page 14, but it is too narrow, and it needs to be first in the list of information gathering (see below for exact language suggestions). The determination of the applicability of Tier 2 review should focus on what was illustrated in the flowchart and discussed on page 2.*

**SWQB Response:**

The intent of this section is to determine the need for an antidegradation review and is titled accordingly.

**Amigos Bravos Comment:**

*Page \_6\_*

*Line 12-14: There should not be any specific level (de minimis level) of degradation that is allowable without Tier 2 review. ANY degradation should have to go through the tier 2 review. Given the way that it is proposed here, any assimilative capacity can be completely eroded by point sources.*

*Amigos Bravos is strongly opposed to the de minimis language found throughout this section of the procedures. If the Department insists on the de minimis language, it needs to be more clearly defined, and a particular cap established. There has a cap established for the 401 certification associated with the dredge and fill permits (see page 10) although Amigos Bravos believes that this cap is too high.*

**SWQB Response:**

EPA has stated that “applying antidegradation requirements only to activities that will result in significant degradation is a useful approach that allows States...to focus limited resources where they may result in the greatest environmental protection.” 63 Fed. Reg. 36742, 36783. The courts have recognized the utility of *de minimis* exceptions in environmental law, *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), and specifically for antidegradation implementation. *Ohio Valley Environmental Coalition v. Horinko*, 279 F.Supp. 2d 732 (S.D. W.Va. 2003). See also Cass R. Sunstein, Cost-Benefit Default Principles, 99 *Mich. L. Rev.* 1651, 1668 (2001).

**Amigos Bravos Comment:**

Page 6

Line 13: “specified level either individually or cumulatively with all other activities”

**SWQB Response:**

Additional language is not necessary. Cumulative impacts have been addressed throughout the Procedures, and the suggested language is redundant and unnecessary.

**Amigos Bravos Comment:**

Page 6

Line 15: Addressing the reference to limited state resources; the Department has established the burden of proof starting on page 13. Any entity proposing degradation is required to collect the necessary information to identify the existing uses, evaluate the potential harm to them, identify alternatives, and determine social and economic necessity. If this burden of proof is enforced than[sic] state resources will not be substantially taxed even without the *de minimus* exemptions.

**SWQB Response:**

Although the Procedures require the applicant to provide information, the SWQB must still examine the information for completeness and independently review and evaluate that information. The SWQB also must issue a preliminary written decision and statement of basis, publish legal notice, and provide an opportunity for public comment and a hearing, conduct a hearing if necessary, respond to public comment, and issue a written final decision. The burden on state resources is substantial.

**Amigos Bravos Comment:**

Page 6

Line 20-26: REMOVE WHOLE PARAGRAPH starting with “~~The evaluation...~~”

Response to Public Comments  
11/12/03 Draft  
Antidegradation Policy Implementation Procedures

*Using only numeric criteria in the de minimus determination, does not address degradation related to metrics for which New Mexico does not have numeric criteria such as habitat impacts, biocriteria, flow impacts. Protection of the Tier 2 (high quality) aspects of a water body is not achieved by “overlapping designated and existing uses” and NPDES and Dredge-or-Fill Permits because they only protect to the minimum of the standard itself. Tier 2 is intended to protect the assimilative capacity, the water quality better than the standard.*

**SWQB Response:**

The SWQB believes that the application of the antidegradation review process to narrative criteria is impractical because of their subjective nature. The SWQB is working toward the development of numeric biocriteria. However, until numeric criteria are developed to use as a “yardstick” there is no feasible way to establish the assimilative capacity to conduct the analysis.

**Amigos Bravos Comment:**

*The specific de minimus references on pages 6 are not consistent and not sufficiently protective of the assimilative capacity of the receiving waters. Again, Amigos Bravos strongly urges the Department to eliminate all references to de minimus.*

**SWQB Response:**

The SWQB believes that full-scale antidegradation review of *de minimis* discharges is unnecessarily burdensome on applicants, the state, and the public. Such reviews would “bog down the system”, create permit backlogs, improperly extend outdated and less protective permits, and delay antidegradation reviews for more significant and harmful discharges. In sum, the demand for antidegradation review on every discharge would have the counterproductive effect of harming the environment, rather than protecting it.

**Amigos Bravos Comment:**

*Page 6*

*Line 40-42: REMOVE WHOLE PARAGRAPH. This is an inappropriate exemption. The impact of a small POTW could be big on a small stream. It does not limit how many of these exemptions would be allowed and it does not offer an overall cap for erosion of assimilative capacity.*

**SWQB Response:**

A stream’s assimilative capacity is related to its flow. By using a percentage of assimilative capacity, the size of the stream is factored into the *de minimis* determination. The proposed language does establish a “cap” by requiring full Tier 2 review whenever the cumulative impact of discharges to a stream would cause a reduction in available assimilative capacity of ten percent or more.

**Amigos Bravos Comment:**

Page 7

*Line 2-5: REMOVE WHOLE PARAGRAPH. This is an inappropriate exemption. It does not make any reference to the existing pollutant load (could already be large); it does not make any reference to the assimilative capacity of the water body. Not allowing it to be used for more than two consecutive permits makes no sense. What happens on the third one? Is the original increase finally evaluated?*

**SWQB Response:**

The provision is not an open-ended exemption, as suggested by the comment. It addresses existing discharges that are already permitted, and is expressed in terms of a percentage of the current load. Further, it is limited by the paragraph following the exemption list, which states that, notwithstanding the *de minimis* finding, full Tier 2 review is required whenever the cumulative impact of discharges to a stream would cause a reduction in available assimilative capacity of ten percent or more. Full Tier 2 review also would be required on the third application, including a full review of cumulative impacts.

**Amigos Bravos Comment:**

*Line 7-13: REMOVE WHOLE PARAGRAPH. This is an inappropriate exemption. It does not make any reference to the existing pollutant load (could already be large); it does not make any reference to the assimilative capacity of the water body. The water conservation or wastewater reuse or diversion program could be helpful with flow problems, but it may have nothing to do with the degradation caused to the water body by the discharge. Not allowing it to be used for more than two consecutive permits makes no sense. What happens on the third one? Is the original increase finally evaluated?*

**SWQB Response:**

See discussion above.

**Amigos Bravos Comment:**

*Line 15-17: REMOVE WHOLE PARAGRAPH. This is an inappropriate exemption. How often does the stream hit the critical low flow? Even if the flow is small compared to the stream, it could be incredibly toxic. Again, this makes no reference to the assimilative capacity of the stream.*

**SWQB Response:**

The critical low flow, as defined in the Water Quality Standards, Section 20.6.4.10, is a statistically derived value that represents the minimum four consecutive day flow that recurs at a frequency of once in three years (4Q3) or, for priority toxic pollutants, as the harmonic mean flow. The critical low flow is unique to each stream. Moreover, the models used to develop

permit requirements are already conservative because they are use worst-case scenarios (i.e., critical low flow of the receiving water, the design or maximum capacity of the facility, whichever is higher, and the maximum allowed pollutant concentration or load). Seldom, if ever, are all three of these conditions in the worst-case mode simultaneously present during routine operations.

**Amigos Bravos Comment:**

*Line 19-21: REMOVE WHOLE PARAGRAPH. This is an inappropriate exemption. The department's process for evaluating offsets needs to be explicit and subject to public and other agency review. Point source offsets need to be evaluated for their local erosion of assimilative capacity and nonpoint source offsets need to have a greater than 1:1 ratio and delayed time frame (discharge not allowed until BMP is working) due to uncertainty of nonpoint BMPs. Any offsets should be subject to antidegradation review.*

**SWQB Response:**

The protection of assimilative capacity at a 1:1 ratio or greater is implicit in the term "offset." The proposed provision requires that the offset reductions be enforceable.

**Amigos Bravos Comment:**

*Page 7*

*Line 23-29: REMOVE WHOLE PARAGRAPH. This is an inappropriate exemption. The NEPA process is different from antidegradation. An EA doesn't require alternatives and even though an EIS does require analysis of alternatives, it is not driven by the same ultimate protection of existing uses and high water quality, nor in avoiding or minimizing degradation. Although the evaluation in a FONSI could be very useful in the antidegradation analysis and entities proposing the discharge should be directed to look to see if an FONSI has been issued to help them when gathering the necessary data.*

**SWQB Response:**

The SWQB believes this exemption is appropriate. The EIS or EA can be used only if it "considered water quality impacts and the social and economic development in the area in which the water is located and that was conducted in accordance with federal regulations." If this test is not met, the exemption is not allowed. If the test is met, a duplication of effort is avoided. Moreover, the intent of antidegradation review is achieved while streamlining the process. The SWQB believes that it is counterproductive and burdensome to conduct multiple reviews when one suffices.

**Amigos Bravos Comment:**

*Page 7*

Response to Public Comments  
11/12/03 Draft  
Antidegradation Policy Implementation Procedures

*Line 34-36: The establishment of a cumulative cap associated with the assimilative capacity for the de minimus calculation applied to the discharges not exempted above is appropriate. However, 10% is too large. Change 10% to 5%.*

**SWQB Response:**

The cumulative impact provision ensures the protection of water quality notwithstanding the availability of a *de minimis* exception. Thus, the provision applies even though one of the preceding exceptions might otherwise be available. The SWQB believes that ten percent is appropriate.

**Amigos Bravos Comment:**

*Page 8*

*Line 10: "less than or equal to ~~10 percent~~ 5 percent" the cumulative de minimus should also be changed to 5 percent (line 23).*

**SWQB Response:**

See discussion above.

**Amigos Bravos Comment:**

*Page 8*

*Line 12-13: This is confusing- why wouldn't 90% remain if this was followed? Cumulative permitting can only erode the amount stated in line 23 total.*

**SWQB Response:**

The confusing language has been deleted.

**Amigos Bravos Comment:**

*Line 15-17: REMOVE WHOLE PARAGRAPH. This is an inappropriate exemption. The department's process for evaluating offsets needs to be explicit and subject to public and other agency review. Point source offsets need to be evaluated for their local erosion of assimilative capacity and nonpoint source offsets need to have a greater than 1:1 ratio and delayed time frame (discharge not allowed until BMP is working) due to uncertainty of nonpoint BMPs. Any offsets should be subject to antidegradation review.*

**SWQB Response:**

See discussion above.

**Amigos Bravos Comment:**

Response to Public Comments  
11/12/03 Draft  
Antidegradation Policy Implementation Procedures

*Page 8*

*Line 23: As stated above and with the POTW, the cumulative cap on erosion of assimilative capacity needs to be set at 5 percent. Ten percent allows too much erosion of the quality that we are trying to protect.*

**SWQB Response:**

See discussion above.

**Amigos Bravos Comment:**

*Page 8*

*Line 44: (1) Amigos Bravos strongly supports this clause.*

**SWQB Response:**

Thank you for your comment.

**Amigos Bravos Comment:**

*Page 9*

*Line 1: (2) is good, Amigos Bravos supports this clause as well. Some states require individual permits for storm water or all general categories when discharging into high quality or outstanding waters or waters with threatened and endangered species or when there have been compliance problems.*

**SWQB Response:**

Thank you for your comment.

**Amigos Bravos Comment:**

*Page 9*

*Line 6-16: Given the many problems with water quality associated with CAFOs line 13-14 seems to be bold an/or [sic] naïve. Given the circumstances listed in lines 18-28, there should be a process for applying antidegradation review on the CAFO potential discharges in order to determine the potential harm to existing uses and the degradation of high water quality. Perhaps the risks of discharge could be balanced against the social/economic importance of the dairy and cattle operations overall, or the need for them to be near a stream.*

**SWQB Response:**

Thank you for your comment.

**Amigos Bravos Comment:**

Page 9

Line 36: add language about municipal phase II permits (MS4s)

**SWQB Response:**

This comment actually caused the SWQB to rewrite the way general permits are addressed in the Procedure. It indirectly brought to the SWQB's attention that the Procedure had listed two general permits<sup>3</sup> that had expired and that since the first writing of the procedure EPA had decided not to reissue. The phase II MS4 general permit has been proposed by EPA and certified by the State but has yet to be issued due to other concerns. This brought to our attention that the proposed procedure did not deal well with future issuance of general permits. Therefore adjustments were made throughout the Section III.A.2.a.iii including the addition of a new section III.A.2.a.iii.e to address future general permits.

**Amigos Bravos Comment:**

Page 9

Line 37-39: *"~~Storm water discharges from construction activities are even more transient because they occur only during construction itself~~" This statement understates the potential degradation that can be caused by runoff from a construction site. Construction can last a long time and degradation can be severe in a very short time, due to even one storm, without adequate protections in place.*

**SWQB Response:**

The SWQB disagrees that it understates the potential impact of construction activities covered by the storm water general permit. Compared to more permanent discharges, such as wastewater treatment facilities that have design lives of 20-30 years, construction activities are transient. Moreover, during construction there are continuing requirements to implement pollution reduction controls (i.e., BMPs). A permittee cannot terminate permit coverage simply because it is not actively working at a site. In addition, construction storm water permits have built-in protections requiring post construction storm water management controls. A permittee can terminate coverage - and the obligation to implement BMPs - only after the site is stabilized (e.g., the vegetation has been restored to a set level coverage).

**Amigos Bravos Comment:**

Page 10

Line 1-3: *"~~As a result, storm water discharges that comply with the general permits are not likely to cause significant degradation of water quality~~". Simply because the general permit*

---

<sup>3</sup> The Oil & Gas General Permit and the Aquifer Remediation Permit.

*requires of all storm water permittees that pollutants be identified and controls be put in place, it does not automatically mean that individual activities will not degrade any high quality waters.*

**SWQB Response:**

The comment concerns enforcement, not permitting. It is true that some permittees may not comply with their permits, but it is not appropriate to presume noncompliance by all permittees, nor to address general enforcement issues through permit processes.

**Amigos Bravos Comment:**

*Page 10*

*Line 3-5: “~~Finally, industrial and construction activities generally are considered to have social and economic importance to New Mexico~~” If degradation is proposed, the social and economic importance should be balanced with the environmental impact (as is described on page 13). The whole point of Tier II review is to determine if this is the case.*

**SWQB Response:**

The SWQB believes that this general statement correctly reflects that industrial and construction activities provide jobs and contribute to the economic infrastructure of the state. In the case of road construction, these projects are often funded through appropriations by the Legislature because of their social and economic importance as determined by our elected representatives.

**Amigos Bravos Comment:**

*Language should be added about antidegradation of general permits when they are reviewed every 5 years and clarify when municipal, construction or industrial storm water discharges will require individual permits and then get an activity-specific antidegradation analysis. The 9<sup>th</sup> Circuit determined that the municipal general permits will not suffice without specific public review. That would open the door to and antidegradation review as well.*

**SWQB Response:**

The SWQB believes that its approach to general permits is consistent with the applicable law and is designed to protect water quality without overburdening administrative resources. There is no need for individualized review when the general permit contains sufficient controls to avoid most or all water quality impacts. When the general permit does not contain such controls, such as the Dredge-or-Fill permit, the SWQB has proposed individualized review. As new general permits are approved, the SWQB will evaluate whether individualized review is necessary and propose revisions to the Procedures as necessary.

**Amigos Bravos Comment:**

*Page 10*

Response to Public Comments  
11/12/03 Draft  
Antidegradation Policy Implementation Procedures

*Line 14-16: “The general permit imposes stringent effluent limitations on these discharges, even though they are considered to be relatively clean.” Again, simply because the general permit imposes stringent effluent limitations on this activity does not mean that there are no circumstances where alternatives to this erosion of high water quality, impacts on existing uses, and minimization of degradation (if it is necessary) should be evaluated and presented to the public. This language should be replaced with a process for applying antidegradation to the general permit every 5 years and identifying situations where aquifer remediation discharges will require an individual permit and antidegradation analysis.*

**SWQB Response:**

See discussion above. Mere speculation about water quality degradation from these activities is not sufficient to justify the administrative burden urged by the commenter.

**Amigos Bravos Comment:**

*Page 10*

*Line 18-21: The social and economic importance to New Mexico of ground water for drinking together with the documentation of the hydrologic connection between the surface and ground water is precisely why antidegradation review and public involvement is necessary. Add language reflecting this connection and the importance of a public antidegradation review.*

**SWQB Response:**

Antidegradation review applies to surface water, not ground water. The general permit applies to discharges to surface water, not ground water. If the general permit contains sufficient conditions to prevent water quality degradation, there is no reason to impose an additional process. To the extent that the commenter is concerned about ground water contamination, the Groundwater Bureau of Department regulates discharges to ground water under separate regulations to protect this resource, and it is prohibited from authorizing a ground water discharge that would violate surface water quality standards (ref. §74-6-5 NMSA 1978).

**Amigos Bravos Comment:**

*Page 10*

*Line 32: add “401” between “to” and “review”*

**SWQB Response:**

This clarification has been made.

**Amigos Bravos Comment:**

*Page 10*

*Line 36: Why is significant degradation defined here for the first time? It appears to apply to every de minimis calculation. At least, all de minimis approaches should be the same.*

**SWQB Response:**

The definition is appropriate here because it relates to this section. The SWQB proposes other ways to reach a *de minimis* conclusion. These ways are illustrated in the Figure 2 flow chart.

**Amigos Bravos Comment:**

*Page 10*

*Line 39: change “will” to “might”; change ~~10%~~ to 5%; can’t let one discharger take up to 10%*

**SWQB Response:**

There is no reason why one discharger could not use the ten percent. It simply means that future dischargers would have to undergo the Tier 2 review.

**Amigos Bravos Comment:**

*Page 10*

*Line 44: change 10 to 5; overall cap; one discharger could take it all, and none would get more, or each individual discharger could be restricted to smaller amounts, say 2%; should have overall goal across entire policy of protecting 95% of the assimilative capacity for each pollutant in each water body*

**SWQB Response:**

The SWQB believes that ten percent is the appropriate amount. If one discharger uses the available ten percent, additional dischargers would have to undergo Tier 2 review.

**Amigos Bravos Comment:**

*Page 11*

*Line 5: “If the Department determines that a discharger will cause significant degradation, the Department will ~~either~~ (1)...”*

**SWQB Response:**

This clarification has been added.

**Amigos Bravos Comment:**

*Page 11*

Response to Public Comments  
11/12/03 Draft  
Antidegradation Policy Implementation Procedures

*Line 6: Replace (1) with (2) “require Tier 2 review” and replace (2) with (1) (switch the order of the alternatives) change “~~or~~” to “and”; add “impose conditions to avoid significant degradation by that discharger and other contributors to cumulative degradation.”*

*Tier 2 is the appropriate process to evaluate the proposed degradation (it may allow some degradation but not significant degradation) and to avoid it if possible through alternatives analysis.*

**SWQB Response:**

The SWQB believes its proposal is appropriate. Tier 2 review is required only for significant new or increased discharges. When more stringent effluent limits will prevent the increased or new discharge of a pollutant, there is no reason to perform a review. Tier 2 review will require a significant commitment of resources by the SWQB, discharger, and public, and should not be triggered arbitrarily.

**Amigos Bravos Comment:**

*Page 12  
Figure 2: Tier 2 Review – Eligibility Flowchart*

*As has been detailed above, all the boxes from design capacity through EA/EIS should be removed.*

**SWQB Response:**

See discussion above. The SWQB NMED believes that the exemptions are proper.

**Amigos Bravos Comment:**

*According to the text, there should be an assimilative capacity de minimus test box for POTW/PODTWs. The text calls for Tier II analysis when the discharge, taken together with all other activities, would cause a reduction in the available assimilative capacity of 10 percent or more.*

**SWQB Response:**

The flow chart has been corrected.

**Amigos Bravos Comment:**

*According to the text, there should be an assimilative capacity de minimus test box for the dredge or fill permits. As mentioned in the text some dredge and fill permits do require antidegradation analysis.*

**SWQB Response:**

SWQB has proposed a revision to the flow chart to address this concern.

**Amigos Bravos Comment:**

*All the de minimus assimilative capacity tests should be <5%*

**SWQB Response:**

See discussion above.

**Amigos Bravos Comment:**

*Page 13*

*Line 3-6: good*

*Line 14-21: sets up good predictable process.*

*Line 25: Step one should be alternatives analysis, bring 4) to 1), broaden language beyond discharge, “An analysis of alternative activities, including any options that would minimize degradation.”; 1) becomes 2).*

*Line 30: 2) becomes 3); this is GREAT.*

**SWQB Response:**

Regarding the comment on line 25, Amigos Bravos misreads the Procedures. Line 25 is the first of several items that the SWQ will request from the applicant; it is not a list of steps that must be performed sequentially.

**Amigos Bravos Comment:**

*Page 14*

*Line 1: “any other relevant information, such as the local area economic dependence on quality of resource (drinking water, wastewater treatment, tribal subsistence or ceremonial uses, commercial/sport fishing and businesses that support them, tour operators, vacation companies/resorts)”*

**SWQB Response:**

Thank you for your comment.

**Amigos Bravos Comment:**

*Page 14*

*Line 28: Add “Description of alternatives” as f)*

**SWQB Response:**

Language has been added to item “e” to describe the alternative disposal options evaluated.

**Amigos Bravos Comment:**

*Page 14  
Line 29-32: change letters accordingly*

**SWQB Response:**

See discussion above. Relettering is not necessary.

**Amigos Bravos Comment:**

*Page 14  
Line 32: add “ Analysis of balance of economic or social importance and whether and what magnitude of degradation is necessary to accommodate it*

**SWQB Response:**

See discussion above. The SWQB does not believe this change is appropriate.

**Amigos Bravos Comment:**

*Page 14  
Line 34: add “Present Department’s antidegradation determination and basis for it; make all information and analysis available to the public” as i)*

**SWQB Response:**

This section is a list of items to be included in the SWQB’s statement of basis, not the public notice. The following section describes the public notice requirements, including information where the public can obtain a copy of the preliminary decision and statement of basis.

**Amigos Bravos Comment:**

*Page 14  
Line 35-37: change letters accordingly*

**SWQB Response:**

See discussion above.

**Amigos Bravos Comment:**

Page 14

Line 35: “ *Description of condition to be imposed upon discharge or justification of denial*”

**SWQB Response:**

The SWQB has added the requirement to discuss conditions that may be imposed.

**Amigos Bravos Comment:**

Page 15

Line 17: “*at Department website, at the site, and at public places in closest communities (town hall, post office)*”

**SWQB Response:**

The SWQB believes its proposed notification is adequate but not overly burdensome. The public notice must be published in a newspaper of general circulation in the affected area, on the Department’s website, and through direct mailing to individuals who have requested notification.

**Amigos Bravos Comment:**

Page 15

Line 38: “*..to be imposed on discharge or the basis for denial ....*”

**SWQB Response:**

The SWQB believes its proposed language adequately addresses all situations.

**Amigos Bravos Comment:**

Page 16

Line 16 “~~*applying the Tier 2 review process as modified by the Department to reflect unique factors associated with Tier 3 water*~~ *allowing the public and other agencies to review alternatives, and assuring the nature and extent of short term impact (duration and distance) is minimized.*” *It is a good idea to formalize a review of the proposed temporary and short-term activities on a Tier 3 water, but it is not appropriate to allow a social and economic analysis to justify the degradation.*

**SWQB Response:**

SWQB believes that the proposed language would preclude consideration of values central to the antidegradation process (i.e., social and economic importance) from Tier 3 review. Simply put, it is bad policy to limit discussion. The SWQB's proposal establishes the Tier 2 process as the basis of Tier 3 review, specifically providing that the process be modified to account for the

unique factors associated with Tier 3 waters. These factors are not predictable, and must be determined on a case-by-case basis.

**Amigos Bravos Comment:**

*Line 29-36: good language.*

**SWQB Response:**

Thank you for your comment.

**Amigos Bravos Comment:**

*Line 41: How can a 401 waiver be appealed?*

**SWQB Response:**

See discussion above.

**[Comments by City of Santa Fe](#)**

**City of Santa Fe Comment:**

*Section III.A.2.a. Tier 2, Determination of Necessity – The City strongly supports the concept of off-ramps from the Tier 2 review process for discharges which can be considered de minimus. The six de minimus elements identified for “Publicly Owned and Private Domestic Treatment Work Discharges” (POTW and PODTW, respectively) are appropriate measures for making a finding that the new or expanded discharge will have a de minimus impact on water quality. However, it is unclear why these same criteria are not also applied to “Industrial Discharges,” especially element 6 - “the new or increased discharge...was reviewed in an Environmental Assessment or Environmental Impact Statement...and the responsible federal agency made a Finding of No Significant Impact.” For POTW/PODTW and industrial discharges, the Department has included the statement, “Notwithstanding these de minimus activities, the Department shall conduct Tier 2 review for any new or increased discharge...in certain circumstances...when the discharge, taken together with all other activities...” This statement grants the Department flexibility to look at a discharge in a watershed context and make a final decision whether a de minimus finding is appropriate. Accordingly, the City requests and recommends that the Department establish the same de minimus elements for POTW, PODTW and industrial discharges.*

**SWQB Response:**

The SWQB believes that different criteria are appropriate for municipal and industrial discharges. Municipal discharges are relatively consistent in nature, as compared to the wide variety of industrial discharges permitted in New Mexico. As the Procedures state in the

Response to Public Comments  
11/12/03 Draft  
Antidegradation Policy Implementation Procedures

footnote under section III.A.2.a.i, EPA studied minor POTWs and PODTWs and found that they pose an extremely low probability of violating water quality standards. Since this class of discharge (i.e., treated sanitary sewage <0.1 MGD design) had been studied, the SWQB believes that it is appropriate to provide an “off-ramp” for that category. On the other hand, industrial discharges at similar flows were not studied, and the SWQB believes that, depending on the nature of the activity, such discharges may not be *de minimis* and should not be automatically off-ramped on the same basis. Nonetheless, the SWQB agrees that the sixth *de minimis* element for POTW/PODTWs (i.e., new or increased discharges previously reviewed in an EA or EIS) should be applicable to the industrial category, and it has revised the policy accordingly.

**City of Santa Fe Comment:**

*Section III.A.2.a. Tier 2, Determination of Necessity – De minimus element 6 includes the phrase “in certain circumstances” (“the new or increased discharge or the renewal of a permit for an existing discharge in certain circumstances...”). Does this phrase apply to both permits for existing discharges and permits for new or increased discharge, or does it only apply to the former? As written, the applicability of the phrase “in certain circumstances” is unclear. In addition, no information is provided with regards to what “circumstances” this phrase references. The City recommends that the Department include information in the procedures regarding in what circumstances element 6 would not be an applicable basis for a de minimus finding.*

**SWQB Response:**

See discussion above. The phrase applies only to permit renewals, and has been deleted in the place referenced in the comment to avoid confusion. The SWQB intends to review permit renewals whenever it appears that degradation is occurring, regardless whether one or more of the *de minimis* criteria are triggered.

**[Comments of Dairy Producers of New Mexico](#)**

**Dairy Producers Comment:**

*Glorieta Geoscience, Inc. (GGI) has reviewed NMED’s proposed Antidegradation Implementation Procedures (20.6.4.8 NMAC) on behalf of the Dairy Producers of New Mexico (DPNM). DPNM is in favor of the proposed Antidegradation Implementation Procedures.*

**SWQB Response:**

The SWQB appreciates the Dairy Producers’ participation in this process.

**[Comments of Los Alamos National Laboratory](#)**

**LANL Comment:**

Response to Public Comments  
11/12/03 Draft  
Antidegradation Policy Implementation Procedures

*Los Alamos National Laboratory is pleased to have the opportunity to comment on the Proposed Revision to the New Mexico Continuing Planning Process (CPP) Document to Establish Implementation Procedures for the Antidegradation Policy in the New Mexico Water Quality Standards (20.6.4.8,NMAC). Overall, the proposed antidegradation implementation closely follows Environmental Protection Agency guidance and appears to take careful notice of recent court decisions on this subject. The Laboratory offers the following comments for your consideration in finalizing the revision to the CPP document.*

**SWQB Response:**

Thank you for your comment.

**LANL Comment:**

*1. Section II.A: The proposed procedures apply to both existing and designated uses. The inclusion of designated uses is not required by federal policy and has been adopted by few, if any, states. The antidegradation policy was first articulated by the Secretary of the Department of the Interior in 1968 and was referred to as the "nondegradation policy" [sic]. The policy was developed in response to criticism that water quality standards were a license for water to be polluted up to those levels, in contradiction to the Clean Water Act goal of restoring and maintaining the integrity of the nation's waters. ("Compendium of Department of Interior Statements on Non-degradation of Interstate Waters", Federal Water Pollution Control Administration, August, 1968.) Since the promulgation of the antidegradation policy in 1975, it has only addressed existing uses. The water quality necessary to protect existing uses was considered to be the baseline and water quality should not degrade below that baseline. The inclusion of designated uses sets the baseline at a level that is potentially above the existing use. It would be impossible to maintain a use that is not yet been attained. (Attainment of designated uses is addressed elsewhere in Clean Water Act regulations and policies). While the establishment of existing uses is fairly straightforward and generally cannot be changed, the assignment of designated uses is often subject to change as new information becomes available. As an example, in the "NMED's proposed revisions to the water quality standards for the upcoming Triennial Review, the designated uses of three water bodies are changed because they were "erroneously" designated. We recommend that the antidegradation procedures apply only to existing uses.*

**SWQB Response:**

SWQB disagrees with LANL's comment. In most cases, the designated uses in state classified waters are "existing uses." In those few cases where a designated use has not been attained and is not attainable, the use should be removed<sup>4</sup> or adjusted. However, if the Commission designates a use as attainable, and it can be attained, that water quality must be protected under

---

<sup>4</sup> The ability to remove a designated use may be affected by whether it is a Clean Water Act §101(a)(2) use or not. Section 101(a)(2) states "it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983." This goal is sometimes referred to as the "fishable/swimmable" goal.

the antidegradation policy. Failure to protect designated uses under the antidegradation policy would subvert the CWA's goal to *restore* water quality. Once the use has been "restored", it will be "attained" and "existing", and therefore can be "maintained." LANL's comment ignores this goal and the process of restoration. Stated differently, by protecting designated uses under the antidegradation policy, the Commission ensures that they can be attained. If they were not protected, water quality could be degraded, and the opportunity to attain the use would be lost. Designated uses are goals established by the Commission; excluding designated uses from the antidegradation policy would undermine this goal by discouraging attainment of uses that are not currently attained.

Federal policy does not require the protection of designated uses under the antidegradation policy, but by the same token, it is not prohibited. Moreover, the CWA allows the states to adopt standards more stringent than the federal requirements. The SWQB believes that it is both irrelevant and inappropriate to consider whether other states protect designated uses in their antidegradation policies. Nothing in the CWA and WQA requires New Mexico to join a "race to the bottom". The federal policy setting a baseline below which water cannot be degraded should not be a goal, but a warning against low expectations and tolerance of a degraded environment. The SWQB believes that it is an appropriate goal of the antidegradation policy to restore uses that have been lost to degradation. Existing uses must be protected, but protecting existing degradation is not and should not be a goal.

Finally, while "existing" and "designated" uses are defined differently, there is no practical difference regarding the protection afforded to either use; both uses must be protected. For example in determining impairment under Section 303(d), the Commission does not distinguish between existing and designated uses. In fact, the classified segments in the water quality standards do not distinguish between existing and designated uses. Simply, whether a designated use is attained is not relevant to the level of protection. LANL's hypothetical situation misses the mark. If a water is not attaining a designated use, it would be considered impaired and would require both Section 303(d) listing and TMDL development. As such, the water would be listed under Tier 1, and would not be subject to further degradation. All this would occur despite the fact that the use is not existing. Legally, there would be no "cushion" to accommodate further degradation. (The only exception would be a reclassification following a use attainability analysis and hearing.)

**LANL Comment:**

*2. Section III.A.2.a.1: It is not clear why there are different de minimus exceptions for publicly-owned and private domestic treatment works and industrial discharges. If these de minimus conditions are deemed to have insignificant impacts on water quality, then the insignificance of the impact should be the same regardless of the source of the discharge. We recommend that de minimus exceptions for industrial discharges be identical to those for publicly owned and private domestic treatment works.*

**SWQB Response:**

See discussion above.

**LANL Comment:**

*3. Section III.A.2.a.i: The proposed revision places an emphasis on predicting used and remaining assimilative capacity for a discharge. Therefore, the calculation of assimilative capacity is a critical element of antidegradation implementation. Assimilative capacity is defined in this document, but there is no reference to the methodology for estimating assimilative capacity. The calculation of assimilative capacity is usually not simple, as is shown by a look at the methodology from other states, e.g. Colorado (<http://www.cdphe.state.co.us/op/wqcc/Other/wqguiddoc.html>), New York ([http://www.dec.state.ny.us/website/dow/togs/tog\\_cont.htm](http://www.dec.state.ny.us/website/dow/togs/tog_cont.htm) - 5.0), and Ohio (<http://www.epa.state.oh.us/dsw/guidance/model5.pdf>). We recommend that the method for doing these calculations be included in this section of the CPP or in a protocol referenced in this section.*

**SWQB Response:**

The SWQB was not able to access two of the websites, but did review the third. In response, the SWQB proposes to add Appendix C, which describes a method for calculating assimilative capacity.

SWQB also amended Section III.A.2.a.iii.d to address concerns about quantifying pollutant loads where Dredge or Fill permits are involved.

**LANL Comment:**

*4. Figure 2: Showing the Tier 2 review eligibility process on a figure is very helpful. However, there are items missing from the figure that are stated in the text. We recommend that a symbol and note be added so the reader can refer to the text for additional information.*

*For example:*

- The first box refers only to "new or increased" discharge, whereas in the text, permits that are up for renewal are potentially eligible.*
- The box that says "Is the volume increase <10% of the 4Q3" is referring to the critical low flow. However, for some pollutants, the critical low flow is defined as the harmonic mean flow. The table should match the text in saying "as defined in the water quality standards"-*
- The text (page 7 of 24) indicates an additional decision step after the de minimus tests, where the proposed discharge, taken together with all other activities, would cause a reduction in the available assimilative capacity. This decision step is not shown or referenced on Figure 2.*
- If the de minimus tests are the same for all discharges, Figure 2 could be simplified.*

**SWQB Response:**

The flow chart is intended for illustration only. It is not intended to address all possibilities. The reader should refer to the text regarding apparent gaps in the flow chart. To this end, the SWQB has added a note to Figures 1 and 2 indicating that they are summaries, and that the reader should refer to the text for additional details. In addition, the SWQB has clarified the flow chart and added another step.

**LANL Comment:**

*5. Section III.b.3: This section is titled "Public Comment and Intergovernmental Coordination", but it only addresses public comment. There is no description of intergovernmental coordination. If other governmental organizations are expected to coordinate using the same process as the public, that should be stated. We recommend that the process for intergovernmental coordination be described in this section.*

**SWQB Response:**

Governmental organizations are expected to coordinate using the same process as the public. In addition to publishing the legal notice, the SWQB will mail the legal notices to persons on the Commission mailing list. Numerous governmental organizations already are listed, and the SWQB encourages all interested governmental organizations to add their names to the list.

The SWQB notes that the Commission itself represents a form of "intergovernmental coordination". The Commission consists of representatives from several state agencies, as well as public members who represent large organizations.

**LANL Comment:**

*6. Section III.b.4: The process for Tier 2 review, as described, takes a minimum of 240 days from the day an application for a new, increased, or renewed permit is submitted to the NMED Surface Water Quality Bureau. The time required for this review appears to be excessive. We recommend that this process be examined for potential streamlining opportunities.*

**SWQB Response:**

The Procedures reflect an effort to balance the interest of the regulated community in timely review with the SWQB's administrative resources and the public's interest in having adequate time to review and comment. A process exceeding two hundred days may seem excessive, but projects undergoing review often involve substantially greater lead time for planning, design, and other approvals. The SWQB believes that the regulated community should be able to build the antidegradation review time frame into its project development process without significant difficulty.

**LANL Comment (Addendum):**

*Los Alamos National Laboratory is providing one additional comment for your consideration on the Proposed Revision, to the New Mexico Continuing Planning Process (CPP) Document to Establish Implementation Procedures for the Antidegradation Policy in the New Mexico Water Quality Standards (20.6.4.8.NMAC). Our additional comment concerns the proposed application of the antidegradation policy to both existing and designated uses. 20.6.4.8.A( 1) NMAC provides that "[e]xisting instream water uses and the level of water quality to protect the existing uses shall be maintained and protected in all surface waters of the state," We believe the express language of that section limits its application to "existing uses" and does not allow the extension of the policy to designated uses.*

**SWQB Response:**

See discussion above.

**[Comments by San Juan Water Commission](#)**

**SWJC Comment:**

*First, let me state that SJWC commends NMED's efforts to safeguard water quality throughout the state and appreciates all of the hard work NMED has put into developing the proposed antidegradation policy implementation procedures. SJWC has no significant opposition to any of NMED's proposals, and the comments below are submitted in an effort to identify areas where SJWC believes certain changes or clarifications will enhance both the efficacy of, and the public's understanding of, the implementation procedures.*

**SWQB Response:**

Thank you for your comment.

**SJWC Comment:**

**1. Tier Definitions—Tier 1 (Page 1)**

*a. The definition of "Tier 1" should be revised to remove the uncertainty caused by the use of the term "exceed." That term can be interpreted to mean either "violate" or "be better than."*

*b. This section references "Figure 1." According to Figure 1, Tier 1 applies only to those waters on the section 303(d) list of impaired waters or on the section 305(b) monitoring and assessment report. This appears to conflict with the definition of "Tier 1" because that definition includes waters that "meet but do not exceed the water quality standards for existing or designated uses." This conflict should be resolved.*

*b.[sic] Tier 1 states that "existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." SJWC recommends that language be added to this section regarding whether or not water quality can be lowered in Tier 1 streams, and if so, under what circumstances. (See comment below at paragraph no. 3.)*

**SWQB Response:**

The SWQB has clarified the term “exceed.” Figure 1 is intended to be illustrative only, and a statement to that effect has been added to each figure in the Procedures. In most instances, a water that does not meet standards or meets but is not better than the standards will be a Section 303(d) or 305(b) water. To the extent that there are information gaps in the figure, the reader should refer to the text for clarification rather than relying on the figure, which is provided for illustration only.

Regarding water quality in Tier 1 waters, SWQB notes that different tools protect Tier 1 waters. Tier 1 waters are listed as impaired on New Mexico's CWA Section 303(d) list. Upon listing, the TMDL process is initiated. TMDLs are designed to restore water quality. As a result, further degradation is not allowed. This design is consistent with federal regulations that prohibit the issuance of NPDES permits in impaired waters unless the discharge conforms with a TMDL waste load allocation; i.e., the discharge restores, rather than worsens, water quality.<sup>5</sup> SWQB appreciates the comment, but believes that it would burden and confuse the Procedures to explain the TMDL process.

**SJWC Comment:**

*2. Tier Definitions—Tier 2 (Page 2)*

*The second full paragraph of this section states: “In Tier 2 waters, limited degradation may be allowed after consideration of several factors, including but not limited to . . .” (Emphasis added.) The word “limited” should be deleted, as it is not consistent with the policy cited in the paragraph above (20.6.4.8(A)(2) NMAC), which states that “allowing lower water quality is necessary to accommodate important economic and social development . . .” (Emphasis added.) Because this policy does not state that “limited degradation” (or “limited lower water quality”) may be allowed, the use of the word “limited” conflicts with the policy set out in 20.6.4.8(A)(2) NMAC.*

**SWQB Response:**

The SWQB retains the reference because it reflects the full text of the paragraph.

**SJWC Comment:**

*3. Implementation—Point and Regulated Sources—Tier 1 (Page 5)*

*a. The first paragraph of this section clearly states that Tier 1 waters are not to be “degraded by a new or increased discharge or the renewal of a permit for an existing discharge in certain circumstances.” The intent of this statement is not clear. The unanswered questions are: (i) Is degradation allowed in Tier 1 waters? and (ii) If so, under what circumstances? If NMED is proposing that no degradation be allowed in*

---

<sup>5</sup> For specific detail see 40 CFR 122.4(i) and 40 CFR 122.44(d)(vii)(B)(6)

*Tier 1 waters, even though existing uses can be protected, then that policy should be stated in the definition of Tier 1. Revision of the Tier 1 definition would eliminate the questions raised above.*

*b. That said, SJWC questions whether or not it is appropriate to apply a “no degradation” policy to Tier 1 waters if existing uses can be maintained. Finally, this section appears to indicate that the means for protecting Tier 1 waters are the 401 certification process and TMDLs, but not antidegradation review. If this is NMED’s intent, such intent should be clearly stated.*

**SWQB Response:**

Tier 1 waters already do not meet or meet but are not better than the water quality standards. Therefore, no further degradation is allowed by any discharge. To clarify this intent, the confusing phrase "in certain circumstances" is deleted. As stated above, Tier 1 waters are protected by TMDLs (as implemented through the NPDES program and Section 401 certification), not antidegradation review.

**SJWC Comment:**

*4. Implementation—Point and Regulated Sources—Tier 2—Determination of Necessity—Publicly Owned and Private Domestic Treatment Work Discharges (Page 6)*

*a. Several very specific criteria are listed in this section. If the criteria are met, the works would not be subject to Tier 2 review. What are the sources of the criteria for de minimus impacts?*

*b. SJWC supports the provision that allows dischargers to demonstrate to NMED’s satisfaction that pollutant loads can be “offset by enforceable reductions by other point or nonpoint sources.” This is a progressive and potentially beneficial approach to solving water quality problems.*

*c. NMED’s clarification regarding the application of the antidegradation rule to general permits is helpful, and it should remain in the implementation document.*

**SWQB Response:**

The *de minimis* impact criteria are derived from EPA's Water Quality Standards Handbook, EPA Regional guidance, and other states' antidegradation procedures. The concept of *de minimis* impact criteria, and some of the specific criteria in the Procedures, were upheld by the *Ohio Valley* court. (There is no national guidance on this issue.) The SWQB believes these criteria are consistent with general principles of water conservation and pollutant reduction.

**SJWC Comment:**

*5. Implementation—Point and Regulated Sources—Tier 2—Conducting Tier 2 Review (Pages 13-15)*

*a. NMED’s deadlines regarding the processing of permit applications are helpful, but they should be shortened. The total processing time is a minimum of 240 days, or almost eight months, which is a long time for a municipality or industry to await such a decision. The proposed timeline can be shortened by cutting the 60-day durations for various activities to 30 days.*

*b. Please see the comments in paragraph no. 7 below regarding the Antidegradation Data Worksheet found in Appendix A.*

**SWQB Response:**

See discussion above.

**SJWC Comment:**

*6. Implementation—Point and Regulated Sources—Tier 2—Conducting Tier 2 Review—Public Comment and Intergovernmental Coordination (Page 15)*

*a. The public comment period should be set at 30 days, rather than having an open-ended requirement of “no less than 30 days.”*

*b. This section should state that a public hearing will be held within 30 days of the close of the public comment period.*

**SWQB Response:**

The provision establishes a minimum time period for public comment. The flexible language accommodates more complex or controversial proposals that may require a longer comment period.

**SJWC Comment:**

*7. Appendix A (Pages 17-24)*

*a. Appendix A contains an elaborate calculation procedure for determining whether or not economic impacts of wastewater treatment alternatives are significant, when applied to a municipality. These include “calculating the municipal affordability screener” and “applying the secondary affordability test,” culminating in an “assessment of substantial impacts matrix” under which certain criteria are applied to determine whether or not the pollution control is affordable. This proposal raises the following questions: (i) What is the source of this assessment procedure? and (2) Has this procedure been applied to New Mexico communities on a test basis to determine whether it is workable here?*

**SWQB Response:**

The assessment procedure is derived from EPA's Water Quality Standards Academy Participant Manual Update-4 2000<sup>6</sup>. The procedure has been applied in the Santa Rosa NPDES permit renewal test case.

**SJWC Comment:**

*b. NMED should provide some sample calculations using different costs of treatment and actual data from New Mexico communities to demonstrate the applicability of this approach in our state, as well as to identify potential thresholds. These sample calculations should be included in Appendix A.*

*c. On page 24, there is a loosely defined procedure for determining “widespread impacts—evaluates the social costs of pollution control requirements.” This procedure identifies the information to be considered, but provides no criteria for evaluating that information. The procedure does not allow a party to determine whether “widespread impacts” are a factor, and it does not inform the public about how such impacts will be evaluated. NMED should specify how widespread social costs are to be evaluated.*

**SWQB Response:**

The protocol for gathering and analyzing information is described in Sections III.A.2.b.i and ii. Section 2.b.i contains a list of information that the SWQB must obtain to conduct the analysis. The SWQB then may ask the applicant complete the worksheets in Appendix A. The SWQB provided EPA's sample forms as an alternative or supplemental means for the applicant to gather and organize information. In response to this comment, the SWQB reworked the explanations to some items in the forms, guided by the same EPA source information.

Although Appendix A provides a potential tool for applicants, antidegradation decisions will be based on the Procedures, in particular, Section III.A.2.b.ii (which does not reference Appendix A). The SWQB anticipates that it will assist applicants during antidegradation reviews, including the analysis required by Section III.A.2.b.ii. The SWQB anticipates significant case-by-case variability in applications. As the SWQB gains experience with the Procedures, it will be able to evaluate whether Appendix A, or a variant thereof, provides a useful tool to applicants. Further, as more dischargers navigate the antidegradation process, that information will become available as part of the public record.

---

<sup>6</sup> This document is not available electronically. According to the EPA's website the document is assigned EPA Library Call Number EPA 823-B-00-005. Interested persons may review a copy at the SWQB's offices.