UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
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SURFACE WATER
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Mr. Ron Curry
New Mexico Environment Department
PO Box 26110 - 1190 St. Francis Drive
Suite N4050
Santa Fe, New Mexico 87505

Subject: EPA Approval of Revisions to New Mexico's Standards for Interstate and Intrastate Surface Waters, 20.6.4 NMAC - Antidegradation Implementation

Dear Mr. Curry:

I am pleased to inform you that the Environmental Protection Agency (EPA) has completed our review of the State's antidegradation implementation procedures. I appreciate the efforts of the New Mexico Environment Department and the Water Quality Control Commission in the development and adoption of these procedures. We appreciate your patience with what proved to be a complicated review.

EPA's initial review was on amendments to the *Standards for Interstate and Intrastate Surface Waters* 20.6.4. NMAC. These revisions were adopted by the Commission December 8-9, 1999, and submitted to EPA on January 31, 2000. As explained in EPA's January 23, 2001, letter to former Secretary Maggiore, EPA disapproved a portion of the State's antidegradation implementation plan that referred to implementation procedures which were not yet complete. Once those implementation provisions were developed and adopted into the State's Continuing Planning Process (CPP) document, EPA was able to review those procedures as part of the State's water quality standards. In today's action, EPA is approving both the revised provision that was previously found in *1101. Antidegradation Policy and Implementation Plan, E. Implementation Plan* and the related implementation procedures found in the State's CPP. The enclosed detailed Record of Decision explains EPA's basis for the approval action taken.

If you have any questions concerning EPA's action, please call me at (214) 665-7101, or have the Environment Department staff contact Russell Nelson, Regional Water Quality Standards Coordinator, at (214) 665-6646.

Sincerely,

Miguel I. Flores, Director
for Water Quality Protection Division

Enclosure

cc: Denise Keehner, Director, SHPD
Amy Newman, Chief, RSTSSB
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EPA Record of Decision
New Mexico Antidegradation Implementation Procedures

Approval of New Provisions

Background:

In the State's January 2000 triennial submission, section *1101. Antidegradation Policy and Implementation Plan, E. Implementation Plan* was expanded to indicate that the implementation of the water quality standards and antidegradation policy will be carried out by the State through specific methods and procedures listed in the State's Continuing Planning Process (CPP). Although on its face the revised provision was consistent with the requirements in 40 CFR 131.12 to identify implementation methods, in fact, the 1998 New Mexico CPP document did not contain specific methods or procedures to guide antidegradation reviews.

In December 2004, the State adopted revisions to its CPP document. These revisions included antidegradation implementation methods that were referenced in the original provision. This enabled EPA to reconsider the referencing standard, and review the implementation methods in light of the provision. In addition, the State made other revisions to the standards document, to conform to New Mexico Administrative Code requirements and included some reordering and rewording of the antidegradation provisions that have been approved as part of the State's 2005 triennial revision.

What follows is a summary of the revised provision and EPA's rationale for action on the provision. See Appendix A of New Mexico's Continuing Planning Process for exact language of each provision.

20.6.4.8 Antidegradation Policy and Implementation Plan: B. Implementation Plan

Summary:
References detailed antidegradation review procedures in the State's Continuing Planning Process (CPP).

EPA Rationale:
EPA's antidegradation regulation requires that each State and authorized Tribe ("State") adopt an antidegradation policy that is consistent with 40 C.F.R. § 131.12. In addition, EPA's antidegradation regulation requires that each State identify methods for implementing its policy. EPA's regulation at 40 C.F.R. § 131.12 requires that each State's antidegradation policy provides three levels of water quality protection. The first level requires protection of existing uses. The second level of protection is for high quality waters. The third level of protection is for Outstanding Natural Resource Waters (ONRWs). Implementation methods are not required to be contained in State regulations,

but as they inform EPA's judgment regarding whether States' antidegradation policies are consistent with 40 C.F.R. § 131.12, the methods are generally subject to EPA review. "EPA's regulations at 40 C.F.R. 131.12 provide a great deal of discretion to States regarding the amount of specificity required in antidegradation implementation methods. The regulations do not specify minimum elements for such methods, but do require that such methods not undermine the intent of the antidegradation policy" (EPA's Proposed Antidegradation Implementation Methods for the State of Oregon, 68 FR 58775 (October 10, 2003)). See also EPA's Water Quality Standards Handbook, section 4.3.

EPA finds that this reference provision is consistent with and does not undermine the State's antidegradation policy at 20.6.4.8 NMAC. EPA also finds that this provision is consistent with 40 C.F.R. § 131.12. Thus EPA approves this provision. See below for detailed analysis regarding EPA's approval of each specific antidegradation implementation method identified by the State.

State of New Mexico Continuing Planning Process:

Antidegradation Policy and Implementation Plan
Appendix A
I. Introduction

Summary:
The Introduction explains the procedures that implement New Mexico's antidegradation policy, located at 20.6.4.8 NMAC, along with the 303(d)/305(b) List and Report and the statewide Water Quality Management Plan.

EPA Rationale:
This provision is simply an introduction to the following provisions and is within the discretion afforded by the regulation. See rationale for 20.6.4.8(E).
EPA finds that this provision does not undermine 20.6.4.8 NMAC. EPA finds that this provision is consistent with 40 C.F.R. §131.12. Thus EPA approves this provision.

II. Scope

Summary:
Procedures apply to proposals for new or increased discharges of a pollutant to a "surface water of the State," and to certain permit renewals for existing discharges. Procedures do not apply to nonpoint sources.

EPA Rationale:
While antidegradation requirements as water quality standards apply to the water body, EPA's antidegradation regulation requires only that antidegradation be applied to point sources. This is because the CWA only gives EPA authority to regulate point sources. *Appalachian Power Company v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976).

Whether antidegradation applies to nonpoint sources is solely a question of State law (EPA's Proposed Antidegradation Implementation Methods for the State of Oregon, 68 FR 58775-76 (October 10, 2003)). The CWA and EPA's regulations leave to the States the decision whether to regulate nonpoint sources by requiring that they undergo antidegradation review. *American Wildlands v. Browner*, 260 F. 3d 1192, 1198 (10th Cir. 2001). See also EPA's WQS Handbook, section 4.8.

Based on the above, EPA finds that this provision does not undermine 20.6.4.8 NMAC and that it is consistent with 40 C.F.R. §131.12. Thus EPA approves this provision.

III. Tier Definitions

Summary:
Introduction to three Tiers. Tier 1 and 2 designations are made on a parameter-by-parameter basis. Tier 3 designation is made based on the special nature of the water.

EPA Rationale:
This provision is simply an introduction to the following provisions and is within the discretion afforded by the regulation. See rationale for 20.6.4.8(E).
Under the parameter-by-parameter approach, states determine whether water quality is better than applicable criteria for specific pollutants that would be affected by the proposed activity. Thus, available assimilative capacity for any given pollutant is always subject to Tier 2 protection, regardless of whether the criteria for other pollutants are satisfied. Such determinations are made at the time of the antidegradation review. EPA interprets its regulation to authorize this approach. See EPA's Advance Notice of Proposed Rulemaking, 63 FR 36782-83, July 7, 1998). See also EPA's WQS Handbook, chapter 4.

As a result, EPA finds this provision does not undermine 20.6.4.8 NMAC and that it is consistent with 40 C.F.R. § 131.12. Thus EPA approves this provision.

III.A Tier 1

Summary:
Tier 1 defines the minimum level of protection afforded to all waters regardless of tier designation.

EPA Rationale:
EPA's antidegradation regulation at 40 C.F.R. §131.12(a)(1) states that "existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." This provision applies to waters that do not meet or meet but are not better than applicable water quality standards, and requires that existing uses and the level of water quality necessary to protect those existing uses shall be

maintained and protected. New Mexico identifies Tier 1 waters on a parameter-by-parameter basis. See EPA's Water Quality Standards Handbook, Section 4.4. This provision tracks EPA's regulation closely and does not undermine the level of protection provided for existing uses defined in 20.6.4.8(A)(1) NMAC. It is consistent with 40 C.F.R. § 131.12(a)(1) and, as a result, EPA approves this provision.

III.B Tier 2

Summary:
Tier 2 applies to waters whose quality is better than necessary to protect the CWA § 101(a)(2) goals (i.e., all classified waters not designated as Tier 1 on a parameter-by-parameter basis or as Tier 3).

EPA Rationale:
EPA's antidegradation regulation at 40 C.F.R. § 131.12(a)(2) states that "where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective best management practices for nonpoint source control."

New Mexico's provision tracks EPA's regulation closely and does not undermine the level of protection provided for Tier 2 (high quality) waters as defined in 20.6.4.8(A)(2) NMAC. See EPA's WQS Handbook, section 4.5, and EPA's Advance Notice of Proposed Rulemaking, 63 FR 36782-85 (July 7, 1998). EPA finds that this provision is consistent with 40 C.F.R. § 131.12(a)(2) and approves on that basis.

III.C Tier 3

Summary:
Tier 3 applies to waters designated as ONRWs by the Commission.

EPA Rationale:
EPA's antidegradation regulation at 40 C.F.R. § 131.12(a)(3) states that "where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected."

New Mexico's provision tracks EPA's regulation closely and does not undermine the level of protection provided for Tier 3 (ONRW) waters defined in 20.6.4.8(A)(3) NMAC. See EPA's WQS Handbook, section 4.7, and EPA's Advance Notice of Proposed Rulemaking, 63 FR 36785-87 (July 7, 1998). EPA finds that this provision is consistent with 40 C.F.R. § 131.12(a)(3) and approves on that basis.

IV.A Tier 1 Implementation

Summary:
Describes CWA Section 401 certification process and opportunities for public participation in CWA § 401, TMDL, NPDES and Dredge-or-Fill permit processes.

EPA Rationale:
This provision is within the discretion afforded by EPA's antidegradation regulation. See rationale for 20.6.4.8(E). This provision merely describes how New Mexico will employ the CWA § 401 certification process to ensure that water quality in Tier 1 waters is not degraded by a new or increased discharge or the renewal of a permit for an existing discharge. It describes how New Mexico will ensure through its CWA § 410 certification process that water quality standards are not violated, and it describes opportunities for public participation regarding any new or increased discharges into Tier 1 waters. EPA notes that New Mexico does not have NPDES authorization, that NPDES permits are written by EPA Region 6, and that, as a result, CWA section 401 applies to all NPDES permits.

EPA finds this provision does not undermine 20.6.4.8(A)(1) NMAC. EPA finds that this provision is consistent with 40 C.F.R. § 131.12(a)(1) and approves on that basis.

IV.B. Tier 2 Implementation
IV.B.1 Determination of Necessity

Summary:
Initial screening of new or increased discharges or permit renewals is of the magnitude of the effect on water quality. Evaluation of effect will be on a parameter-by-parameter basis using numeric criteria. There is a *de minimis* level below which Tier 2 review will not be conducted. Also says that Tier 2 evaluation would not be conducted where there are no applicable numeric criteria because of the impracticability of applying the Tier 2 process to narrative criteria.

EPA Rationale:
This provision is within the discretion afforded by EPA's antidegradation regulation. See rationale for 20.6.4.8(E).

See rationale for EPA's approval of New Mexico's parameter-by-parameter approach in III.B above.

Applying Tier 2 antidegradation review only to activities that will result in significant degradation is a useful approach that allows States and States to focus limited resources where they may result in the greatest environmental protection. See EPA's Advance Notice of Proposed Rulemaking, 63 FR 36783 (July 7, 1998)). See also the two cases cited in New Mexico's Response to Public Comments Document, page 17, recognizing the utility of *de minimis* exceptions in environmental law (*Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), and *Ohio Valley Environmental Coalition v. Horinko*, 279 F.Supp.2d 732 (S.D. W.Va. 2003)). Since New Mexico submitted its implementation methods to EPA, EPA Headquarters has issued additional guidance on *de minimis* exceptions from Tier 2 review. In the Ephraim King memo on "Tier 2 Antidegradation Reviews and Significance Thresholds" (August 8, 2005), EPA stated: "The intent of tier 2 protection is to maintain and protect high quality waters and not to allow for any degradation beyond a de minimis level without having made a demonstration, with opportunity for public input, that such a lowering is necessary and important." The memo recommends a significance threshold value of 10% of the available assimilative capacity, coupled with a cumulative cap on individual *de minimis* discharges.

EPA finds that New Mexico's provision does not undermine the level of protection for Tier 2 (high quality) waters defined in 20.6.4.8 (A)(2) NMAC. EPA finds that this provision is consistent with 40 C.F.R. § 131.12(a)(2) and approves on that basis.

IV.B.1.a Publicly Owned and Private Domestic Treatment Work Discharges

Summary:
Establishes a trigger for Tier 2 review when the discharge, taken together with all other activities allowed, would cause reduction in the assimilative capacity of 10% or more for the parameter of concern. Refers to Figure 2, but says that Figure 2 is presented for illustration only, and that in the event of omission, ambiguity or conflict, the written provisions of New Mexico's procedures will control.

EPA Rationale:
See rationale for *de minimis* exemptions in IV.B.1 above.

EPA finds that this provision does not undermine the level of protection for Tier 2 (high quality) waters defined in 20.6.4.8 (A)(2) NMAC. EPA finds that this provision is consistent with 40 C.F.R. § 131.12(a)(2) and approves on that basis.

EPA notes that it is not taking action on Figure 2 as EPA understands that Figure 2 is presented for illustration only, and is not controlling in the face of omissions, ambiguity or conflicting written procedures.

IV.B.1.b. Industrial Discharges

Summary:
Establishes a trigger for Tier 2 review when the discharge, taken together with all other activities allowed, would cause reduction in the assimilative capacity of 10% or more for the parameter of concern. Does not refer to Figure 2.

EPA Rationale:
See rationale for *de minimis* exemptions in IV.B.1 above.

EPA finds that this provision does not undermine the level of protection for Tier 2 (high quality) waters defined in 20.6.4.8 (A)(2) NMAC. EPA finds that this provision is consistent with 40 C.F.R. § 131.12(a)(2) and approves on that basis.

IV.B.1.c General Permits

Summary:
3 categories of NPDES General Permits have been issued in NM (No Discharge, Storm Water, and Aquifer Remediation) and several categories of Nationwide (Dredge-or-Fill) permits have been issued in NM. Department reserves the right to require that any new or increased discharge or permit renewal be subject to Tier 2 review or be required to obtain an individual permit.

EPA Rationale:
This provision is an introduction to the following provisions and is within the discretion afforded by EPA's antidegradation regulation. See rationale for 20.6.4.8(E).

See rationale for *de minimis* exemptions in IV.B.1 above.

EPA finds that this provision does not undermine the level of protection for Tier 2 (high quality) waters defined in 20.6.4.8 (A)(2) NMAC. EPA finds that this provision is consistent with 40 C.F.R. § 131.12(a)(2) and approves on that basis.

IV.B.1.c.i No Discharge General Permits

Summary:
Tier 2 review exclusion for Onshore Oil and Gas NPDES general permits and general permits for CAFOs.

EPA Rationale:
Onshore Oil and Gas NPDES general permits prohibited all discharges of pollutants to waters of the United States. Because discharges covered by this general permit were prohibited, it is unlikely that water quality would be lowered. CAFO general

permits prohibit all discharges unless caused by exceptional weather events out of the control of the CAFO, provided that the CAFO is properly designed and operated. As a result, long-term degradation of water quality is unlikely. In addition, Figure 2, "Tier 2 Review – Eligibility Flowchart," on page 15 of Appendix A, indicates that if a new or increased discharge to a Tier 2 water is not from a Privately Owned Treatment Works (POTW) or a Privately Owned Domestic Treatment Works (PODTW) but is regulated under a CAFO or Oil & Gas Extraction general permit, that discharge is *de minimis*, and may exit Tier 2 review. EPA notes, however, that New Mexico has reserved the right to require that any new or increased discharge or the renewal of a permit for an existing discharge (1) be subject to Tier 2 review if warranted by the circumstances, or (2) be required to obtain an individual permit (and thereby subject to Tier 2 review).

EPA concludes that this provision is consistent with 40 C.F.R. § 131.12(a)(2). (See rationale for *de minimis* exemptions in IV.B.1, above.) By providing that Tier 2 antidegradation review is not required for discharges covered under the State's "No Discharge" general permits, New Mexico has represented that those general permits will authorize only those new or increased discharges that will not cause significant lowering of water quality. Thus, EPA understands that any "No Discharge" general permits issued in the future by the permitting authority in New Mexico will allow new or increased discharges into Tier 2 waters only if they would not result in a significant lowering of water quality. Based on that understanding, EPA finds that this provision does not undermine the level of protection for Tier 2 (high quality) waters defined in 20.6.4.8 (A)(2) NMAC, that this provision is consistent with 40 C.F.R. § 131.12(a)(2), and EPA approves on that basis.

IV.B.1.c.ii Storm Water General Permits

Summary:
Tier 2 review exclusion for Storm Water General Permit Discharges from Construction Activities and Industrial Activities.

EPA Rationale:
This provision states that "storm water discharges that comply with general permits are not likely to cause significant degradation of water quality." In addition, Figure 2, "Tier 2 Review – Eligibility Flowchart," on page 15 of Appendix A, indicates that if a new or increased discharge to a Tier 2 water is not from a POTW or a PODTW but is regulated under a Storm Water general permit, that discharge is *de minimis*, and may exit Tier 2 review. EPA notes, however, that New Mexico has reserved the right to require that any new or increased discharge or the renewal of a permit for an existing discharge (1) be subject to Tier 2 review if warranted by the circumstances, or (2) be required to obtain an individual permit (and thereby subject to Tier 2 review).

EPA concludes that this provision is consistent with 40 C.F.R. § 131.12(a)(2). (See rationale for *de minimis* exemptions in IV.B.1, above.) By providing that Tier 2 antidegradation review is not required for discharges covered under the State's Storm

Water general permits, New Mexico has represented that those general permits will authorize only those new or increased discharges that will not cause significant lowering of water quality. Thus, EPA understands that any Storm Water general permits issued in the future by the permitting authority in New Mexico will allow new or increased discharges into Tier 2 waters only if they would not result in a significant lowering of water quality. This understanding is supported by New Mexico's provision as well as the following information:

(1) The State's CWA § 401 certification for the EPA's proposed Storm Water Multi-Sector General Permit, Permit Number NMR050000 (March 14, 2006), includes the following statement: "Compliance with the terms and conditions of the permit and this certification will provide reasonable assurance that the permitted activities will be conducted in a manner which will not violate applicable water quality standards and the water quality management plan and will be in compliance with the antidegradation policy."

(2) The draft EPA general permit states: "The SWPPP (Storm Water Pollution Prevention Plan) must include site-specific interim and permanent stabilization, managerial, and structural solids, erosion, and sediment control best management practices (BMPs) and/or other controls that are designed to prevent to the maximum extent practicable an increase in the sediment yield and flow velocity from pre-construction, pre-development conditions to assure that applicable standards in 20.6.4 NMAC, including the antidegradation policy, or WLAs are met. The operator(s) must demonstrate, and include documentation in the SWPPP, that implementation of the site-specific practices will assure that the applicable standards or WLAs are met, and will result in sediment yields and flow velocities that, to the maximum extent practicable, will not be greater than the sediment yield levels and flow velocities from pre-construction, pre-development conditions."

(3) The draft EPA general permit states: "Storm water discharges associated with construction activity that the State has determined to be or may reasonably be expected to be contributing to a violation of an applicable standard, including the antidegradation policy, are not authorized by this permit. Upon receipt of this determination, NMED anticipates that, within a reasonable period of time, EPA will notify the general permittee to apply for and obtain an individual NPDES permit for these discharges per 40 CFR Part 122.28(b)(3)."

Based on EPA's understanding and the supporting information provided above, including the stated requirements in New Mexico's 401 certification and the draft EPA permit (which EPA anticipates finalizing by June 2007), EPA finds that this provision does not undermine the level of protection for Tier 2 (high quality) waters defined in 20.6.4.8 (A)(2) NMAC. Thus EPA finds that this provision is consistent with 40 C.F.R. § 131.12(a)(2) and approves on that basis.

In addition, if the State determines that a discharge has contributed to a standards violation, EPA has the ability to require the permitee to obtain an individual permit.

IV.B.1.c.iii Aquifer Remediation General Permits

Summary:
Tier 2 review exclusion for Aquifer Remediation General Permits for Discharges Resulting from implementing Corrective Action Plans for Cleanup of Petroleum UST Systems.

EPA Rationale:
The provision states that "these kinds of discharges are not expected to cause degradation to water quality." In addition, Figure 2, "Tier 2 Review – Eligibility Flowchart," on page 15 of Appendix A, indicates that if a new or increased discharge to a Tier 2 water is not from a POTW or a PODTW but is regulated under an Aquifer Remediation general permit, that discharge is *de minimis*, and may exit Tier 2 review. EPA notes, however, that New Mexico has reserved the right to require that any new or increased discharge or the renewal of a permit for an existing discharge (1) be subject to Tier 2 review if warranted by the circumstances, or (2) be required to obtain an individual permit (and thereby subject to Tier 2 review).

EPA concludes that this provision is consistent with 40 C.F.R. § 131.12(a)(2). (See rationale for *de minimis* exemptions in IV.B.1, above.) By providing that Tier 2 antidegradation review is not required for discharges covered under the State's Aquifer Remediation general permits, New Mexico has represented that those general permits will authorize only those new or increased discharges that will not cause significant lowering of water quality. Thus, EPA understands that any Aquifer Remediation general permits issued in the future by the permitting authority in New Mexico will allow new or increased discharges into Tier 2 waters only if they would not result in a significant lowering of water quality. Based on this understanding, EPA finds that this provision does not undermine the level of protection for Tier 2 (high quality) waters defined in 20.6.4.8 (A)(2) NMAC. EPA finds that this provision is consistent with 40 C.F.R. § 131.12(a)(2) and approves on that basis.

IV.B.1.c.iv Dredge or Fill General Permits

Summary:
For CWA § 404 Dredge-or-Fill permits, the State will implement the antidegradation policy through CWA Section 401 certification review. If the Department determines a discharge will cause significant degradation, the Department will impose conditions or require Tier 2 Review.

EPA Rationale:
This provision states that a "discharge will be deemed to cause significant degradation of water quality if the load of pollutants is quantifiable [see foot note 12] and

(1) the new or increased discharge or the renewal of a permit for an existing discharge will consume 10 percent or more of the total assimilative capacity for the pollutant of concern, or (2) the new or increased discharge or the renewal of a permit for an existing 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."

In addition, Figure 2, "Tier 2 Review – Eligibility Flowchart," on page 15 of Appendix A, indicates that if a new or increased discharge to a Tier 2 water is not from a POTW or a PODTW but is regulated under a Dredge-or-Fill general permit, that discharge is *de minimis*, and may exit Tier 2 review. EPA notes, however, that New Mexico has reserved the right to require that any new or increased discharge or the renewal of a permit for an existing discharge (1) be subject to Tier 2 review if warranted by the circumstances, or (2) be required to obtain an individual permit (and thereby subject to Tier 2 review).

EPA concludes that this provision is consistent with 40 C.F.R. § 131.12(a)(2). New Mexico has provided that the State will implement Tier 2 of its antidegradation policy through the CWA § 401 certification process. The State has further provided limits on what it will consider significant degradation. (See rationale for *de minimis* exemptions in IV.B.1, above.) It is not clear whether Figure 2, which categorically exempts new or increased discharges pursuant to a Dredge-or-Fill General Permit from Tier 2 review, is consistent with this provision, which states that New Mexico will implement Tier 2 through its CWA § 401 certification process and delineates what does and does not constitute significant degradation. In any event, New Mexico's procedures states that Figure 2 is for illustration only and that in the event of omission, ambiguity or conflict, the written provisions of New Mexico's procedures will control. Thus, EPA is not taking action on Figure 2 as it pertains to CWA § 404 Dredge-or-Fill General Permits.

Based on the above discussion, EPA finds that this provision does not undermine the level of protection for Tier 2 (high quality) waters defined in 20.6.4.8 (A)(2) NMAC. EPA finds that this provision is consistent with 40 C.F.R. §131.12(a)(2) and approves on that basis.

IV.B.1.c.v Future General Permits

Summary:
The following may be considered *de minimis* impacts: No Discharge general permits, Storm Water general permits for industrial activities, Storm Water general permits for municipal or urban runoff, environmental remediation permits such as the Aquifer Remediation general permit, and Dredge-or-Fill (or Nationwide) general permits.

EPA Rationale:

As explained in the text of this provision, new or increased discharges authorized under these types of general permits may generally be considered to be *de minimis*. However, where such new or increased discharges are found to cause significant degradation, New Mexico has reserved the right to require that any new or increased discharge be subject to Tier 2 review or obtain an individual NPDES or Dredge-or-Fill permit (and thereby be subject to Tier 2 review). As explained above, the permitting authority will need to ensure that new or increased discharges will not significantly lower water quality to be covered under a general permit without undergoing Tier 2 review.

EPA finds that this provision does not undermine the level of protection for Tier 2 (high quality) waters defined in 20.6.4.8(A)(2) NMAC. EPA finds that this provision is consistent with 40 C.F.R. § 131.12(a)(2) and approves on that basis.

IV.B.2 Conducting Tier 2 Review

Summary:
Steps for reviewing whether a discharge may cause significant damage are: information gathering, preliminary decision-making, public-intergovernmental participation, and final decision-making.

EPA Rationale:
This provision is an introduction to the following provisions and is within the discretion afforded by EPA's antidegradation regulation. See rationale for 20.6.4.8(E). EPA finds that this provision does not undermine the level of protection for Tier 2 (high quality) waters defined in 20.6.4.8 (A)(2) NMAC. EPA finds that this provision is consistent with 40 C.F.R. § 131.12(a)(2) and approves on that basis.

IV.B.2.a Information Gathering

Summary:
Describes process for determining whether a permit application is complete. Describes the minimum information that an applicant must submit, including an analysis of beneficial and adverse impacts on social or economic activities and development in the area, as well as an alternatives analysis.

EPA Rationale
This provision is within the discretion afforded by EPA's antidegradation regulation. See rationale for 20.6.4.8(E). This provision is also consistent with EPA's March 1995 EPA Interim Economic Guidance for Water Quality Standards (EPA-823-B-95-002).

EPA finds that this provision does not undermine the level of protection for Tier 2 (high quality) waters defined in 20.6.4.8 (A)(2) NMAC. EPA finds that this provision is consistent with 40 C.F.R. § 131.12(a)(2) and approves on that basis.

IV.B.2.b Preliminary Decision-Making

Summary:
Describes information required as part of the Department's preliminary decision to deny or authorize the degradation.

EPA Rationale
This provision facilitates public participation and is within the discretion afforded by EPA's antidegradation regulation. See rationale for 20.6.4.8(E).

EPA finds that this provision does not undermine the level of protection for Tier 2 (high quality) waters defined in 20.6.4.8 (A)(2) NMAC. EPA finds that this provision is consistent with 40 C.F.R. § 131.12(a)(2) and approves on that basis.

IV.B.2.c Public Comment and Intergovernmental Coordination

Summary:
Describes procedures for public notice and comment period on preliminary decision and statement of basis.

EPA Rationale
This provision facilitates public participation and is within the discretion afforded by EPA's antidegradation regulation. See rationale for 20.6.4.8(E).

This provision is consistent with EPA's WQS Handbook, section 4.8.2, which states that the antidegradation public participation requirement may be satisfied in several ways, including providing public notice and the opportunity for the public to request a hearing, which is what New Mexico has done in this provision.

EPA finds that this provision does not undermine the level of protection for Tier 2 (high quality) waters defined in 20.6.4.8 (A)(2) NMAC. EPA finds that this provision is consistent with 40 C.F.R. § 131.12(a)(2) and approves on that basis.

IV.B.2.d Final Decision

Summary:
Describes information required in the Department's final decision and statement of basis.

EPA Rationale

This provision facilitates public participation and is within the discretion afforded by EPA's antidegradation regulation. See rationale for 20.6.4.8(E). See EPA's WQS Handbook, section 4.8.2.

EPA finds that this provision does not undermine the level of protection for Tier 2 (high quality) waters defined in 20.6.4.8 (A)(2) NMAC. EPA finds that this provision is consistent with 40 C.F.R. § 131.12(a)(2) and approves on that basis.

IV.C Tier 3 Implementation

Summary:
Tier 2 review will be applied where an applicant claims that a new or increased discharge into or permit renewal regarding a Tier 3 water will not cause degradation or will cause only temporary and short-term changes in water quality that do not impair existing uses.

EPA Rationale

States can allow some limited activities that result in temporary and short-term changes in the water quality of a Tier 3 water body (i.e., an Outstanding National Resource Water). See Preamble to EPA's Final Water Quality Standards Regulation, 48 FR 51402 (November 8, 1983), and EPA's WQS Handbook, section 4.7 . EPA guidance has not defined temporary or short-term changes in water quality specifically, but EPA views these terms as limiting water quality degradation to weeks or months, not years. See EPA's WQS Handbook, section 4.7 and EPA's Advance Notice of Proposed Rulemaking, 63 FR 36786 (July 7, 1998).

Based on the State's response to Amigos Bravos' comments on this section, EPA understands that the State intends to use the Tier 2 review process only to confirm that changes in water quality for Tier 3 waters would be temporary and short-term, and that no alternatives or socio-economic analyses would be conducted. (See pages 30-31 of Environment Department, Surface Water Quality Bureau, Response to Public Comments on the 11/12/03 Draft of Antidegradation Policy Implementation Procedures.) As New Mexico indicates in its Comment Response document, its proposal establishes the Tier 2 process as the basis for Tier 3 review in order to not limit discussion as the unique factors associated with Tier 3 waters are not predictable and should be determined on a case-by-case basis.

Based on the above discussion, EPA finds that this provision does not undermine the level of protection for Tier 3 (ONRW) waters defined in 20.6.4.8(A)(3) NMAC. EPA finds that this provision is consistent with 40 C.F.R. § 131.12(a)(3) and approves on that basis.

V Appeals

Summary:

Allows persons adversely affected by any final decision of the Department to appeal to the Commission.

EPA Rationale

This provision facilitates public participation and is within the discretion afforded by EPA's antidegradation regulation. See rationale for 20.6.4.8(E).

EPA finds that this provision does not undermine 20.6.4.8 NMAC. EPA finds that this provision is consistent with 40 C.F.R. § 131.12 and approves on that basis.

Appendix 1 – Tier 2 Review of a Public Facility

Summary:
Contains forms to be used in evaluating socio-economic factors for public facilities.

EPA Rationale

This provision is consistent with EPA's March 1995 EPA Interim Economic Guidance for Water Quality Standards (EPA-823-B-95-002).

EPA finds that this provision does not undermine the level of protection for Tier 2 (high quality) waters defined in 20.6.4.8 (A)(2) NMAC. EPA finds that this provision is consistent with 40 C.F.R. § 131.12(a)(2) and approves on that basis.

Appendix 2 – Tier 2 Review of a Private Facility

Summary:
Contains forms to be used in evaluating socio-economic factors for private facilities.

EPA Rationale

This provision is consistent with EPA's March 1995 EPA Interim Economic Guidance for Water Quality Standards (EPA-823-B-95-002).

EPA finds that this provision does not undermine the level of protection for Tier 2 (high quality) waters defined in 20.6.4.8 (A)(2) NMAC. EPA finds that this provision is consistent with 40 C.F.R. § 131.12(a)(2) and approves on that basis.

Appendix 3 – Assimilative Capacity Calculation Guideline

Summary:
Guidelines to provide a screening tool for estimating the impact of a discharge on the receiving water (i.e., whether or not the discharge is *de minimis*).

EPA Rationale

See rationale for *de minimis* exemptions in IV.B.1 above.

Providing guidance on the calculation of assimilative capacity is within the discretion afforded by EPA's antidegradation regulation. See rationale for 20.6.4.8(E). This guidance should assist the State in its antidegradation review and other persons conducting activities that have the potential to lower water quality.

EPA finds that this provision does not undermine 20.6.4.8 NMAC. EPA finds that this provision is consistent with 40 C.F.R. § 131.12 and approves on that basis.