

Ute Mountain Ute Tribe

Water Quality Standards for Surface Waters of the Ute Mountain Ute Reservation

Appendix C

Anti-Degradation Implementation Policy

1. INTRODUCTION

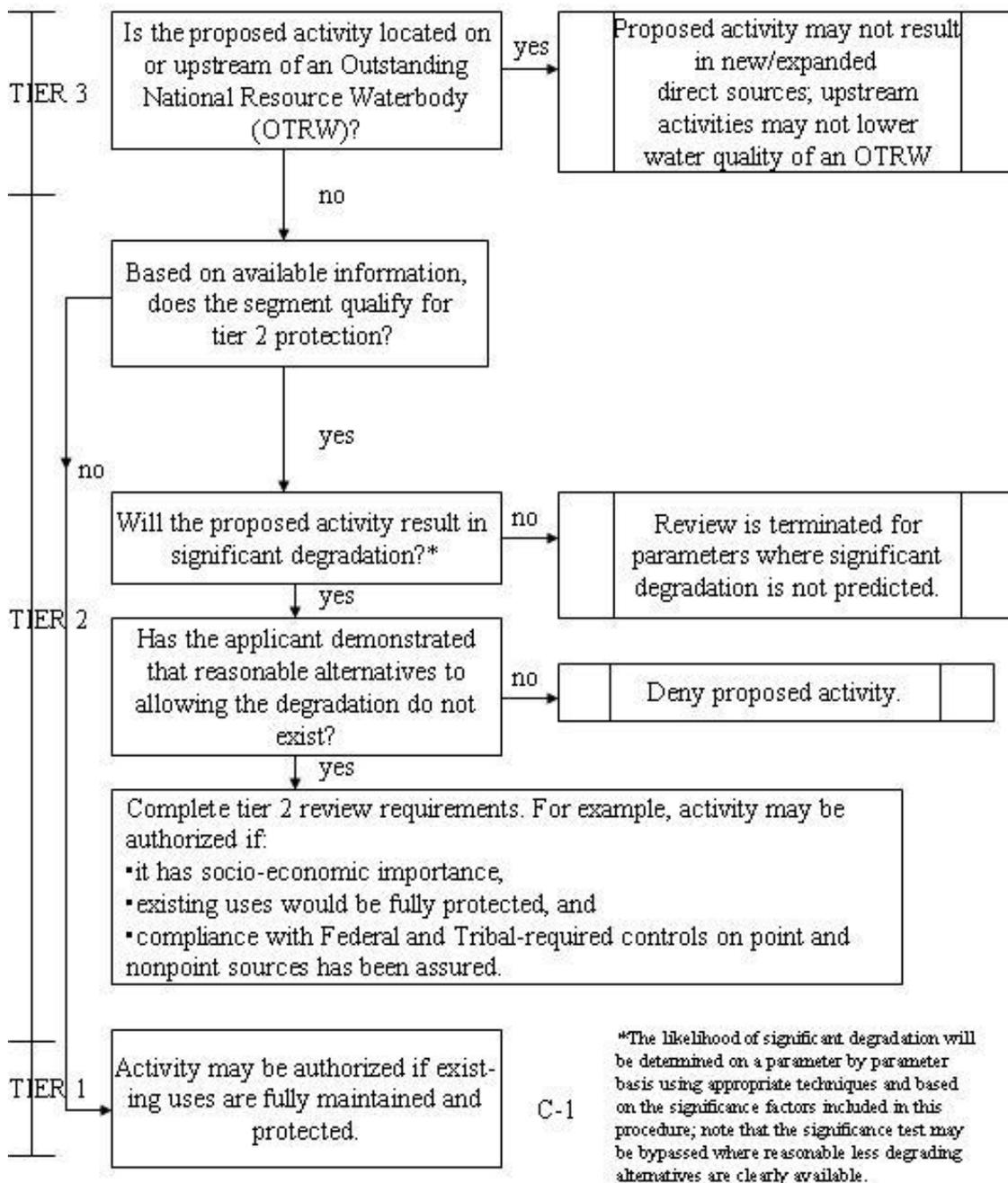
Section 301 of the Clean Water Act and subsequent Federal Register publications outline a National Pollutant Discharge Elimination System (NPDES) that regulates the amount of each pollutant that can be legally discharged into “Waters of the United States.” These standards seek to limit water pollutants by requiring those activities that are likely to cause the release or discharge of pollutants into Tribal Waters to occur within a permitted and controlled system. This Appendix contains the Tribe’s Anti-degradation Policy, which implements a permitting process for any business or entity that may discharge pollutants into tribal waters. This anti-degradation policy assures Tribal assessment of any activity that involves a point source or non-point source discharge of regulated pollutants into tribal waters, and also provides mechanism for polluters to assess the lawfulness of their activities. This Anti-Degradation Policy authorizes the Tribe’s Water Quality Specialist, in correspondence with the Environmental Programs Director and other Tribal staff, to review and permit proposed activities that may degrade the quality of Tribal Waters. The process for reviewing proposed activities is summarized in the *Review Sheets* in Appendix D. These *Review Sheets* reflect the three-tiered anti-degradation policy described in Sections V-VI of this Appendix and Section 4 of the main body of the Standards.

The Tribe shall employ best professional judgment in its review process. The Tribe may heed economic and other implications of the Anti-Degradation policy on the Tribe, its contractors, lessees, and other entities.

Completed review sheets and all records and documentation under this process shall be retained at the Environmental Programs Department of the Ute Mountain Ute Tribe, at 520 Sunset Boulevard, Towaoc, CO 81334.

The flow chart below in Figure C-1 is a schematic of the process for reviewing activities that have the potential to pollute Tribal Waters or watersheds and for granting **Water Pollution Prevention Permits**. It shall be the responsibility of the potentially regulated entity to apply for the permit, to conduct appropriate monitoring if necessary, to develop management plans, to implement management plans, to conduct inspections of the effectiveness of implementation procedures, to provide inspection reports, and to meet other requirements of the Ute Mountain Ute Tribe and its Environmental Programs Department.

Figure C-1
 Antidegradation Implementation Flow Chart
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2. DEFINITIONS

2.1 Point Source pollutants means pollutants discharged in a finite quantity at a specific location such as a pipe or other conveyance.

2.2 Non-Point Source pollutants means pollutants discharged or released into a watershed by dispersed activities or activities that release pollutants without a specific conveyance.

2.3 Emergency, for the purposes of this Appendix, means an imminent risk to public health and safety, impending environmental disaster, impending crop failure, or other such event that the Environmental Programs Department deems to be an emergency.

2.4 Water Pollution Prevention Permit means a permit issued by the Ute Mountain Ute Tribe, through its Environmental Programs Department, allowing potentially polluting activities to be carried out by a permittee in a manner specified by the Tribe.

3. RESPONSIBILITIES FOR OBTAINING PERMITS IN COMPLIANCE WITH THIS APPENDIX

3.1 Responsibility

It is the responsibility of any individual or business that has the potential to degrade water quality from either a point source or a non-point source to contact the Tribe's Environmental Programs Department and to apply for a Water Pollution Prevention Permit pursuant to this Appendix.

3.2 Potentially Regulated Activities

3.2.1 *Point Source Pollution*

Point source pollution activities likely to require a Water Pollution Prevention Permit include, but are not limited to: wastewater discharges; industrial discharges; urban storm water containment discharges; and other discharges from pipes or other discreet conveyances. Coverage under the Nationwide permit for storm water discharges from construction activities shall not remove any activity from compliance with this Appendix.

3.2.2 *Non-Point Source Pollution*

Non-point source pollution activities likely to require a non-point source permit include, but are not limited to: construction activities larger than one (1) acre (as required currently by the EPA); oil field development, including pads, roads and pipelines; road construction; forestry activities; storm water management system design; wastewater management system design; and solid waste management system design.

4. GENERAL PROCEDURES FOR WATER POLLUTION PREVENTION PERMITTING

4.1 General Procedures Applicable to All Water Pollution Prevention Permitting Pursuant to this Appendix

4.1.1 *Information Requests*

At any time during the permit review process, the Tribe may request information regarding the proposed activities, potential effluent constituents and quality, ambient water quality data, modeling, load calculations, best management practices, economic analyses, environmental benefits, mitigation of pollutants, treatment technologies, or other information not listed here from the applicant. All costs relating to this information shall be the responsibility of the applicant with the exception of telephone, email and facsimile costs at Tribal offices and staff time of Tribal employees.

4.1.2 *Public Review and Response*

The Tribe, through its Environmental Programs Department, shall conduct a public review of the application and proposed activities. Public notice shall be made using reasonably available outreach tools such as newspaper legal notices, television, radio, and web-based media. Comments shall be sought to guide a final decision. Following an appropriate public review period of not less than 15 days, the review period will close. Response to each comment shall occur prior to the granting or denial of a permit, and these responses shall be documented with the final decision.

4.1.3 *Emergency Decision-Making*

In the event that an emergency occurs, an activity may be authorized on a temporary basis by the Environmental Programs Department Director, the Tribal Chairman, or another authorized representative for the mitigation of such emergency circumstances. Following the approval of such an emergency activity, the Environmental Programs Department shall work with the entity conducting or contracting for such activities to document the activity, water pollution, appropriate absent permits, and any mitigation measures that the Tribe requires subsequent to the activity. Failure to obtain emergency authorization or failure to assist the Environmental Programs Department in its post-emergency review process shall render the entity subject to Section 7 of this Appendix.

4.1.4 *Permitting Authority and Process*

A Water Pollution Prevention Permit must be authorized by the Ute Mountain Tribe's Water Quality Specialist and Environmental Programs Director and also signed by the Chairman of the Tribe or other authorized representative, as authorized by the Resolution adopting these revised water quality standards. Any permit issued under this Appendix shall have the force of law. The permittee shall meet any and all specifications described in the permit. Failure to comply with any specifications of the permit may result in the revocation of the permit and the penalties described in Section 7 of this Appendix.

4.1.5 *Permit Location*

Signed copies of a permit will be held at the following locations: The Ute Mountain Ute Environmental Programs Department, the office of the permittee, and the office of the Tribal Chairman. Further copies may be distributed to those who request them, without limitation. Water Pollution Prevention Permits may also be made publicly available using web-based technology.

4.1.6 *Permit Fee*

A \$200, non-refundable fee shall be paid to the Ute Mountain Ute Tribe to initiate processing of a "Water Pollution Prevention Permit" application. Permit applicants must address checks to "Ute Mountain Ute Tribe" and send them to: Ute Mountain Environmental Programs Dept., P.O. Box 448, Towaoc, CO 81334. Payment of this permit fee does not obligate the Tribe to any specific outcome at the end of the permit review process, nor does it relieve the applicant of further financial obligation related to the Water Pollution Prevention Permit application process. This permit fee may be increased or decreased by the Tribal Council at any time.

To minimize the burden of cost on the Ute Mountain Ute Tribe, no permit fees shall be required of the Tribe, its enterprises, government, or membership, provided that these entities are still required to obtain and adhere to permits under this Appendix.

4.2 Procedures Relevant Only to Point Source Pollutants

4.2.1 *Permitting Agency*

Point source pollutants are permitted by the EPA under the National Pollutant Discharge Elimination System (NPDES), which limits discharges based on the concentration, frequency and duration of the discharge of pollutants. When reviewing such permits, the EPA and the Tribe shall assure the attainment of the Ute Mountain Ute Tribe Water Quality Standards for Surface Waters to protect public health and environment and downstream regulatory requirements. Tribal certification of such an EPA permit shall be required, as specified in Section 401 of the Clean Water Act.

4.2.3 *Contact Information*

For activities that require a point-source NPDES permit from EPA, applicants should contact: Water Permits Unit (8P-W-WW) US Environmental Protection Agency - Region 8, 1595 Wynkoop Street, Denver, CO 80202-1129 (1-800-227-8917); copies should also be sent to the Tribe's Water Quality Specialist at the address below (*see* Section 4.3.2).

4.3 Procedures Relevant Only to Non-Point Source Pollutants

4.3.1 *Requirement of a Non-Point Source Permit*

When a proposed activity might pollute a Tribal Water because of non-point source pollution, an application to the Tribe for a permit shall be written with specifications for how that activity will be undertaken to minimize the pollution of Tribal Waters. Those specifications shall be in the form of a 'management plan,' prepared by the applicant and reviewed by the Tribe for potential approval. The Tribe shall provide comments to the applicant in a timely manner. If approved and permitted by the Tribe, the management plan shall be a legally-binding requirement for the management of pollutants in a specific manner. If a permittee fails to meet any provision specified in the management plan and permit, the permittee shall be the subject of enforcement action under Section 7 of this anti-degradation implementation policy.

4.3.2 *Contact Information*

Applications for permits relating to non-point source water pollution, or activities that have the potential to cause non-point source pollution, shall be sent to: Water Quality Specialist, Ute Mountain Ute Tribe, PO Box 448, Towaoc, CO 81334; FedEx and UPS delivery to: 520 Sunset Boulevard, Towaoc, CO 81334. Telephone contact: 970-564-5431.

5. ANTIDEGRADATION LEVEL QUALIFICATION

5.1 Tier 3 Protected Tribal Waters

5.1.1 *General Designation*

A Tier 3 Tribal Water is a Tribally-designated "Outstanding Tribal Resource Water" or OTRW. The Tribe shall designate these water bodies in triennial revisions of the water quality standards. Factors that may be considered in such a designation include: location, other designations, ecological significance, existing water quality, recreational or aesthetic value, cultural value, and other factors. *See* Section 11b. of the main body of these standards for a description of Tier 3 Outstanding Tribal Resource Waters and a list of the Tribal Waters designated as such.

5.1.2 *Water Quality*

No minimum level of water quality shall be required for designation as an OTRW.

5.1.3 *Public Nomination*

Any member of the public may at any time nominate a Tribal Water for OTRW designation. Consideration of nominations will occur at the triennial review of the Tribe's water quality standards. Nominations should be sent to: "OTRW Nomination, ATTN: Water Quality Specialist" Ute Mountain Ute Tribe, Environmental Programs Department, PO Box 448, Towaoc, CO 81334.

5.2 Tier 2 Protected Tribal Waters

5.2.1 *General Designation*

Environmental Programs Department staff shall determine whether the Tribal Water receives Tier 2 protection. Factors for this determination include: ambient water quality conditions and concentrations; attainment of designated uses and existing uses; ecological value; assimilative capacity; data and information supplied by the applicant; new research regarding pollutants; Tribal cultural concerns; and other site-specific information.

5.2.2 *Water Quality*

At a minimum, a Tier 2 water body must be of quality that exceeds the requirements of "fishable and swimmable" of Section 101(a)(2) of the Clean Water Act and that meets the criteria for protection of existing uses and designated uses.

5.2.2.1 Existing quality shall be evaluated using data collected by the Environmental Programs Department, data and information provided by the applicant, and data collected by other agencies of surrounding states, Tribes, and the federal government. Ambient conditions for water bodies shall be evaluated for critical conditions such as low-flow or storm events, depending on the activity being proposed. Spatial and temporal variability shall also be considered.

5.2.2.2 Requests for data relating to ambient conditions can be made to, "Water Quality Specialist, Ute Mountain Ute Tribe, PO Box 448, Towaoc, CO 81334," or by calling 970-564-5431.

5.2.3 *Default Applicability*

Most Tribal Waters will qualify as Tier 2 waters. Unless the water body is not attaining the Clean Water Act Section 101(a)(2) goals, the water body has received an OTRW designation, or there is no assimilative capacity for pollutants to protect existing and designated uses, it is likely that the water body will receive Tier 2 protection.

5.2.4 *Applicability in Instances of Water Quality Standards Violations*

The violation of water quality standards criteria will likely preclude Tier 2 protection. The Tribe shall, following review of information provided by the applicant and the public, provide a judgment on whether the exceedences will be exacerbated by the proposed activity and whether any assimilative capacity exists.

5.3 Tier 1 Protected Tribal Waters

5.3.1 *Minimum Protection*

All Tribal Waters receive at a minimum Tier 1 protection.

5.3.2 *Water Quality*

Waters that do not meet the “fishable/swimmable” goals of the Clean Water Act or that do not have any assimilative capacity to dilute pollutant loads without exceeding the criteria in these standards shall only be evaluated under Tier 1 protection.

6. **ANTIDegradation Protections**

6.1 Tier 3 Protected Tribal Waters

6.1.1 *Point Sources of Pollution to OTRWs*

6.1.1.1 Direct Point Sources

No new direct point sources of pollution shall be permitted for OTRWs except as provided in Section 6.1.3 of this Appendix. Expansion of existing sources, including discharges that maintain current pollutant loads and current treatment of pollutants, shall also be prohibited except as provided in Section 6.1.3 of this Appendix.

6.1.1.2 Upstream Point Sources

No new upstream point sources of pollution shall be permitted for OTRWs except where such source would have no effect on the existing quality of the downstream OTRW and except as provided in Section 6.1.3 of this Appendix. Such effect on water quality shall be determined by the Tribe and its Environmental Programs Department staff. Factors to be considered include: percent change in ambient concentrations during critical conditions, percent change in pollutant loads, reduction in assimilative capacity, persistent or toxic effects of pollutant constituents, cumulative effects, and confidence in modeling by applicant.

6.1.2 *Non-Point Sources of Pollution to OTRWs*

Water quality shall be maintained at or above current levels for all parameters in an OTRW. Proposed non-point source pollution activities that will increase pollutant loads, and/or create and/or expand pollutant levels shall be prohibited, except where those pollutants would have no effect on existing water quality. Such effects on water quality shall be determined by the Tribe and its Environmental Programs Department staff. Factors to be considered include: percent change in ambient concentrations during critical conditions, percent change in pollutant loads, reduction in assimilative capacity, persistent or toxic effects of pollutant constituents, cumulative effects, and confidence in modeling by applicant.

6.1.3 *Temporary and Limited Effects Exception*

In cases where the Tribe determines that the effects of a proposed activity on an OTRW are deemed to be only temporary and limited in nature, the Tribe may permit the activity. Determination of “temporary and limited effects” will entail a case-by-case evaluation by the Tribe, through its Environmental Programs Department, of ambient conditions and potential effects of the proposed activity. A change of greater than five percent (5%) of any water quality parameter in an OTRW will generally result in a denial of the proposed activity. Factors that may influence such decisions include: duration of lowering of water quality; percent change in ambient concentrations; specific parameters affected; potential for long-term benefits to the OTRW; effect on water quality standards violations; short-term and long-term effects on existing uses or water quality goals.

6.2 Tier 2 Protected Tribal Waters

6.2.1 *Point Source and Non-Point Source Regulation*

Point sources and non-point sources of pollution shall be evaluated in the same manner for Tier 2 protected waters.

6.2.2 *General Prohibition of Significant Degradation*

Where a water body qualifies as a Tier 2 Protected Tribal Water, no significant water quality degradation will be allowed unless the Environmental Programs Department finds, after public participation, that:

- 6.2.2.1 Such degradation is necessary to provide for an important tribal socio-economic value in an area where the waters are located.
- 6.2.2.2 Water quality adequate to protect existing uses is fully protected and all new and existing point sources will meet the highest statutory and regulatory requirements.
- 6.2.2.3 All cost-effective and reasonable best management practices shall be achieved for non-point source polluters.

6.2.3 *Determination of Significant Degradation*

6.2.3.1 Once it is determined that Tier 2 protection applies to a water body, the next step in the Tribe's review process is for the Environmental Programs Department to determine whether the proposed activity would cause significant degradation that would warrant further review (such as consideration of alternatives, permit limits, and specifications for a non-point source pollution management plan). The significant degradation review shall be performed using the factors outlined as follows:

- 6.2.3.1.1 Parameter by parameter analyses of the potential effects of activity on ambient concentrations;
- 6.2.3.1.2 Percent change in ambient concentrations predicted at critical conditions (low-flow, storm event);
- 6.2.3.1.3 The difference between existing ambient quality and predicted ambient water quality during permitted loading from all point sources and the proposed activity;
- 6.2.3.1.4 Percent changes in pollutant loads, from existing loads to potentially permitted new loads;
- 6.2.3.1.5 Percent reduction in assimilative capacity;
- 6.2.3.1.6 Nature, extent, and persistence of specific pollutants;
- 6.2.3.1.7 Cumulative effects of pollutants;
- 6.2.3.1.8 Impacts to aquatic biota;

6.2.3.1.9 Degree of confidence in any modeling techniques used by applicant or the Tribe;

6.2.3.1.10 Duration and quality of proposed pollutant effluent; and

6.2.3.1.11 Effects on Tribal culture and traditions.

6.2.3.2 Five Percent (5%) Significance Threshold

If the proposed activity will cause more than a five percent (5%) degradation in ambient water quality or assimilative capacity for any parameter or a five percent (5%) increase pollutant loadings for any parameter, the Tribe shall find that the proposed activity causes significant degradation.

6.2.3.3 Ten Percent (10%) Cumulative Cap

If the cumulative degradation in ambient water quality or assimilative capacity from all sources (including the proposed activity) for any parameter exceeds ten percent (10%) or if the cumulative pollutant loading of all sources (including the proposed activity) for any parameter increases more than ten percent (10%), the Tribe shall find that the proposed activity causes significant degradation.

6.2.3.4 Where the Tribe, through its Environmental Programs Department, determines that non-degrading or less polluting alternatives to the proposed activity exist and are reasonable, a test of significance may be delayed or by-passed. The applicant in such a case shall be directed to demonstrate why the proposed degradation is necessary.

6.2.3.5 Because there is a low threshold for determination of significance, these procedures are not intended to cause an undue burden on the applicant to collect or research applicable water quality data. Data that is of critical importance to the appropriate significance determination may be requested of the applicant.

6.2.3.6 If the Tribe, through its Environmental Programs Department, determines that the proposed activity will not result in “significant degradation” pursuant to this Appendix, and all technology-based and water quality-based controls are to be implemented in accordance with the Tribe’s specifications, then no further Tier 2 review is required.

6.2.4 *Alternatives Analysis*

6.2.4.1 All entities that propose a degradation of Tier 2 protected waters must submit proposed alternatives to the water quality degradation.

6.2.4.2 The Tribe's Environmental Programs Department shall evaluate whether the alternatives proposed by the applicant are comprehensive. If the Department determines that alternatives exist that would result in less water quality degradation, the Environmental Programs Department will assist the applicant in its own alternatives assessment to promote the broadest understanding of alternatives to be submitted in the permit application. Further alternatives may include, but are not limited to, additional pollution prevention measures; reduction in scale of project; water reuse or recycle; industrial process changes; various treatment technology; seasonal stipulations; operational or maintenance changes; or alternative discharge locations.

6.2.4.3 Economic Reasonability of Alternatives

Alternatives that are determined by the Tribe's Environmental Programs Department to incur an additional cost of less than 120 percent of the proposed alternative shall be considered reasonable. Alternatives that incur costs greater than 120 percent of the proposed alternative may also be required by the Tribe, but shall be determined on a case-by-case basis.

6.2.4.4 If the Tribe's Environmental Programs Department determines that reasonable alternatives to the proposed activity do not exist, then Tier 2 review will continue.

6.2.5 *Determination of Socio-Economic Importance*

An evaluation of the socio-economic consequences of the proposed activity shall be performed during the permitting process. The applicant shall provide such information in its application. The Tribe shall consider at least the following factors, but may consider others: employment opportunities; increased production for greater Tribal economic gain; housing; and correction of environmental or public health concern. If no socio-economic value can be attributed to the proposed activity, it shall not be permitted. If the Tribe deems that the socio-economic value is not of sufficient value to warrant a degradation of water quality, it shall not be permitted. If, after review and response to public comments regarding the proposed activity, the level of degradation of water quality is not considered significant enough to the Tribe to overrule the proposed activity's socio-economic value, then a permit may be granted for the proposed activity, with specifications to protect water quality at the most-achievable level.

6.2.6 *Existing Uses Protected*

Prior to authorizing any proposed activity on a Tier 2 water body, the Environmental Programs Department shall ensure that water quality sufficient to protect existing uses will be achieved. A "designated use" does not preclude an existing use, and the Tribe's Environmental Programs Department will assess the assigned designated uses and determine whether those designations and relative criteria associated with them are protective of existing uses. If designated uses and their relative criteria are not protective of existing uses, then those use designations must be revised promptly. Some activities

may impair the existing use or uses without degrading water quality. These activities may be denied a permit; these activities may be conditionally permitted; or the water quality standards may need to be revised to protect for uses and provide for appropriate water quality conditions for activities not recognized at the time of the approval of the standards.

6.2.7 Permit Conditions

Permit conditions under Tier 2 protection may require compliance with more stringent criteria and appropriate maximum pollutant loads than specified for the designated uses in order to protect the existing uses.

If a Total Maximum Daily Load has been calculated for specific pollutants for a water body, and the applicant is proposing to discharge those pollutants, the applicant may be required to meet end-of-pipe concentrations of pollutants or undertake non-point source controls upstream to mitigate those additional pollutants.

6.2.8 Ensure Implementation of Required Point and Non-Point Source Controls

Prior to authorizing any proposed activity, the Environmental Programs Department shall determine that compliance with applicable controls on all point sources and non-point sources has been assured.

6.3 Tier 1 Protected Tribal Waters

6.3.1 Point sources and non-point sources of pollution shall be evaluated in a similar manner for Tier 1 protected waters.

6.3.2 Existing Uses Protected

Prior to authorizing any proposed activity on a Tier 1 water body, the Environmental Programs Department shall ensure that water quality sufficient to protect existing uses will be achieved. A “designated use” does not preclude an existing use, and the Tribe’s Environmental Programs Department will assess the assigned designated uses and determine whether those designations and relative criteria associated with them are protective of existing uses. If designated uses and their relative criteria are not protective of existing uses, then those use designations must be revised promptly. Some activities may impair the existing use or uses without degrading water quality. These activities may be denied a permit; these activities may be conditionally permitted; or the water quality standards may need to be revised to protect for uses and provide for appropriate water quality conditions for activities not recognized at the time of the approval of the standards.

6.3.3 *Permit Conditions*

Permit conditions under Tier 1 protection may require compliance with more stringent criteria and appropriate maximum pollutant loads than specified for the designated uses in order to protect the existing uses.

If a Total Maximum Daily Load has been calculated for specific pollutants for a water body, and the applicant is proposing to discharge those pollutants, the applicant may be required to meet end-of-pipe concentrations of pollutants or undertake non-point source controls upstream to mitigate those additional pollutants.

6.3.4 *Likelihood of Obtaining Permits Where Existing Uses are Protected*

Activities affecting Tier 1 Tribal waters that would not preclude the quality and conditions necessary to maintain existing uses will likely be permitted.

7. PENALTIES

7.1 Enforcement

Enforcement activities for: (a) violations of the anti-degradation policy and permitting program; and (b) violations of water quality standards as defined in Section 3 of the main body shall be determined by the Tribe through its Environmental Programs Department on a case-by-case basis, as approved by the Tribal Council through Resolution signed by the Tribal Chairman.

7.2 Goals

The primary goal of requirements under this Policy will be the restoration and clean up of pollutants. Ramifications of pollution of Tribal Waters or watersheds may include: fines, mitigation projects, remediation projects, termination of leases or contracts with the Tribe, and other penalties.

7.3 Failure to Meet Permit Requirement

Failure to obtain or adhere to a Water Pollution Prevention Permit shall be considered to be willful negligence and breach of contract.