

## **Title 19 – Environmental Protection**

### **Chapter 06 – Water Quality**

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## **Legislative History**

### **19-06.010 Title.**

This Chapter shall be known as the “Swinomish Water Quality Standards Code.”

### **19-06.020 Purpose.**

This Chapter establishes designated uses for Regulated Surface Waters, water quality criteria to protect such designated uses, and an antidegradation policy to prevent further degradation of Regulated Surface Waters to serve the following purposes of the Tribe and the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (“Clean Water Act” or “CWA”):

- (A) To promote, protect, and enhance the peace, safety, health, general welfare, economic security, and political and cultural integrity of the Tribe and its members, and the peace, safety, health, and general welfare of all those who live or work on or visit the Reservation from the harmful effects of surface water contamination;

- (B) To restore, maintain, and enhance the chemical, physical, biological, and radiological quality of Regulated Surface Waters in order to, wherever attainable, support protection and propagation of fish, shellfish, wildlife, recreation, and cultural uses in and on Regulated Surface Waters;
- (C) To prevent degradation of the quality of Regulated Surface Waters and restore impaired Regulated Surface Waters to a level of water quality that provides for all beneficial and designated uses, including public water supply, propagation of fish, shellfish, wildlife, and plant species, recreational purposes, navigation, and permissible out-of-stream purposes, by establishing standards for the quality of Regulated Surface Waters; and
- (D) To provide a regulatory basis for applying established water quality standards to prevent, reduce, or eliminate the discharge of pollutants into Regulated Surface Waters.

**19-06.030 Findings.**

The Senate makes the following findings:

- (A) The Swinomish Indian Tribal Community is an independent sovereign nation and is recognized as such by the United States of America.
- (B) Regulation of the conduct of persons and the use of property within the Swinomish Indian Reservation for the purpose of safeguarding and promoting the peace, safety, health, general welfare, economic security, and political and cultural integrity of the Tribe and its members are essential incidents of sovereignty.
- (C) The Treaty with the Duwamish, Suquamish, Etc., 12 Stat. 927 (1855) (“Treaty of Point Elliott”), established the Swinomish Indian Reservation as a permanent homeland for the Indian tribes and bands which now comprise the Swinomish Indian Tribal Community and reserved to the Tribe the right to use and occupy exclusively territory within the exterior boundaries of the Reservation. Treaty of Point Elliott, Art. 2.
- (D) The exterior boundaries of the Swinomish Indian Reservation include all tidelands adjacent to Reservation uplands and extend to the line of extreme low water. *State v. Edwards*, 188 Wash. 467, 62 P.2d 1094 (1936); *Corrigan v. Brown*, 169 F. 477 (W.D.Wash. 1907).
- (E) The Tribe’s jurisdiction extends to all territory within the exterior boundaries of the Reservation.
- (F) Various sources of law recognize or reaffirm the Tribe’s inherent sovereign authority to regulate environmental matters, including water quality, within its Reservation. *See, e.g.*, Treaty of Point Elliott, 12 Stat. 927; 33 U.S.C. § 377(e);

*United States v. Lara*, 541 U.S. 193 (2004); *Winters v. United States*, 207 U.S. 564 (1908); *Worcester v. Georgia*, 31 U.S. 515 (1832).

- (G) Pursuant to Section 518(e) of the Clean Water Act, on April 18, 2008, the United States Environmental Protection Agency (“EPA”) determined that the Tribe has inherent authority to regulate the quality of Reservation waters and approved the Tribe for Treatment in the Same Manner as a State for the purpose of adopting water quality standards and certifying that discharges comply with those water quality standards pursuant to Sections 303(c) and 401 of the CWA, respectively.
- (H) Since time immemorial, fishing, including shellfish harvesting, hunting, and gathering has been a central focus of the Tribe’s culture and of critical importance to the Tribe’s economy and the economic and general well-being of its members, many of whom are dependent upon fishing, hunting, and gathering for their livelihood, for their subsistence, and for ceremonial, cultural, and spiritual purposes.
- (I) The Tribe’s fishing right is exclusive within the exterior boundaries of the Reservation. *United States v. Winans*, 198 U.S. 371 (1905); *United States v. Washington*, 384 F.Supp. 312, 332 (W.D. Wash. 1974).
- (J) The Treaty of Point Elliott reserved to the Tribe the “right of taking fish at usual and accustomed grounds and stations . . . together with the privilege of hunting and gathering roots and berries on open and unclaimed lands.” Treaty of Point Elliott, Art. 5.
- (K) The Tribe’s adjudicated usual and accustomed fishing grounds and stations include, among other places, the Samish and Skagit Rivers and their tributaries and all marine waters surrounding the Swinomish Indian Reservation. *United States v. Washington*, 459 F.Supp. 1020, 1049 (W.D.Wash. 1978).
- (L) Reservation waters and other waters within the Tribe’s usual and accustomed fishing grounds and stations are critically important to the Tribe and its members.
- (M) The Tribe and its members use Reservation waters in myriad ways, including but not limited to subsistence, ceremonial, and commercial fishing, shellfishing, hunting, and gathering; fish, shellfish, wildlife, and plant habitat and habitat restoration; Tribal governmental, industrial, commercial, and domestic uses; public water and drinking water supply; ceremonial, cultural, and spiritual uses; navigation; and recreational and aesthetic uses.
- (N) The Tribe and its members use other waters within the Tribe’s usual and accustomed fishing grounds and stations in myriad ways, including but not limited to subsistence, ceremonial, and commercial fishing, shellfishing, hunting, and gathering; and fish, shellfish, wildlife, and plant habitat and habitat restoration.

- (O) Fish, shellfish, wildlife, and plant populations and the habitat and water resources upon which they depend for their existence and survival are highly vulnerable to damage from degraded water quality.
- (P) Protection and enhancement of fish, shellfish, wildlife, and plant populations and the habitat and water resources upon which they depend for their existence and survival are essential to the exercise of the Tribe's fishing, hunting, and gathering rights and to the Tribe's goal of preserving and increasing naturally-occurring fish, shellfish, wildlife, and plant populations.
- (Q) Harm to fish, shellfish, wildlife, and plant populations and the habitat and water resources upon which they depend caused by degradation of water quality seriously and substantially affects the political integrity, economic security, and health and welfare of the Tribe and its members by, among other things, decreasing the amount of revenue the Tribe and its members generate by fishing and shellfishing and by levying Tribal taxes upon those activities; undermining the effectiveness of substantial Tribal expenditures for the purpose of natural resource protection, habitat restoration, and fish, shellfish, wildlife, and plant population management; threatening and decreasing the safety of food sources historically and currently essential to the diets of a vast majority of Tribal members; and reducing the availability and safety of fish, shellfish, wildlife, and plant species for culturally and spiritually important ceremonial purposes.
- (R) Protection and enhancement of the quality of Reservation waters, and of the availability of Reservation waters of high quality, is essential to the Tribe's and Tribal members' use of Reservation waters for governmental, industrial, commercial, and domestic purposes, including public water and drinking water supply, and to realizing the Tribe's long-term goals with respect to the preservation and utilization of Reservation water resources.
- (S) Harm to the quality of Reservation waters or to the availability of Reservation waters of high quality seriously and substantially affects the political integrity, economic security, and health and welfare of the Tribe and its members by, among other things, interfering with the provision of water supply within the Reservation; decreasing the availability and safety of water available to satisfy Tribal members' daily needs, including drinking water supply; and increasing the risk to Tribal members of suffering illness or death by exposure to pollutants in Reservation waters.
- (T) Degradation of water quality harms or has the potential to harm the ceremonial, cultural, spiritual, recreational, navigational, and aesthetic values of Reservation waters.
- (U) Harm to the ceremonial, cultural, spiritual, recreational, navigational, and aesthetic values of Reservation waters caused by degradation of water quality seriously and substantially affects the political integrity, economic security, and health and welfare of the Tribe and its members by, among other things,

- decreasing the Tribe's ability to use Reservation lands and waters for economic advantage; threatening the health of Tribal members who have physical contact with contaminated water during the course of recreational or navigational activities on or in Reservation waters; and decreasing the ability of the Tribe and its members to participate safely in traditional ceremonial, cultural, spiritual, and recreational activities that require the use of Reservation waters.
- (V) The quality of Reservation waters and other waters within the Tribe's usual and accustomed fishing grounds, and the availability of waters of high quality within the Reservation or otherwise within the Tribe's usual and accustomed fishing grounds and stations, have been degraded by human activities.
- (W) There is a substantial likelihood that human activities, if unregulated by the Tribe, will continue to degrade the quality of Reservation waters or to adversely affect the availability of Reservation waters of high quality and therefore seriously and substantially threaten the political integrity, economic security, and health and welfare of the Tribe and its members.
- (X) There is a need to restore, maintain, and enhance the quality of Reservation waters and to regulate human activities so as to protect Reservation waters from further degradation.

**19-06.040 Authority.**

This Chapter is authorized pursuant to Art. VI, Sec. 1 (k), (l), (q), and (r), and Art. VI, Sec. 5 of the Constitution of the Swinomish Indian Tribal Community, as most recently amended, and Sections 303(c), 401, and 518(e) of the Clean Water Act.

Pursuant to Section 518(e) of the Clean Water Act, on April 18, 2008, the United States Environmental Protection Agency (EPA) determined that the Tribe has inherent authority to regulate the quality of Reservation waters and approved the Tribe for Treatment in the Same Manner as a State for the purpose of adopting water quality standards and certifying that discharges comply with those water quality standards pursuant to Sections 303(c) and 401 of the CWA, respectively.

**19-06.050 Jurisdiction.**

The provisions of this Chapter shall apply to all persons and property subject to the governing authority of the Swinomish Indian Tribal Community.

**19-06.060 Applicability and Use.**

- (A) This Chapter shall apply to all Regulated Surface Waters. For Regulated Surface Waters only partly within the Reservation, this Chapter shall apply to those portions within the Reservation and shall also apply to those portions outside the Reservation to the fullest extent allowable by law. However, this Chapter shall not apply to:

- (1) constructed wetlands;
  - (2) waters contained within approved and permitted wastewater ponds or lagoons; or
  - (3) parts of approved and permitted wastewater treatment systems which are lined or constructed in such a manner so as to prevent discharge to Regulated Surface Waters.
- (B) The water quality standards in this Chapter shall be used:
- (1) By the Regional Administrator when issuing any water quality-based National Pollutant Discharge Elimination System (“NPDES”) Permit for the discharge of any pollutant to Regulated Surface Waters pursuant to Section 402 of the Clean Water Act;
  - (2) By the Department when issuing water quality certifications pursuant to Subchapter III of this Chapter and Section 401 of the Clean Water Act; and
  - (3) By the Department in other manners as needed to fully implement the purposes of this Chapter.

**19-06.070 Construction.**

- (A) This Chapter is exempt from the rules of strict construction and shall be liberally construed to give full effect to the objectives and purposes for which it was enacted.
- (B) This Chapter shall be construed in concert with:
- (1) Titles 19 and 20 of the Swinomish Tribal Code;
  - (2) The Swinomish Comprehensive Plan; and
  - (3) The Swinomish Shorelines and Sensitive Areas Plan.
- (C) In the event that a provision of this Chapter should be determined to conflict with any other provision of Tribal law, the provision that better protects the environment, as determined by the Director, shall control.

**19-06.080 Definitions.**

- (A) For the purposes of this Chapter, the following words and phrases shall have the following definitions:
- (1) “**1-DADMax**” or “1-day maximum temperature” means the highest water temperature reached on any given day.

- (2) **“7-DADMax”** or “7-day average of daily maximum temperatures” means the arithmetic mean of seven consecutive measures of daily maximum temperatures.
- (3) **“Acute toxicity”** means a concentration of a pollutant sufficient to produce rapidly a lethal or otherwise severely debilitating response in an organism, usually within 96 hours or less.
- (4) **“AKART”** is an acronym for "all known, available, and reasonable methods of prevention, control and treatment" and means the most current methodology that can reasonably be required for preventing, controlling, or abating the pollutants associated with a discharge. “AKART” includes "best management practices." The AKART requirement may be applied to point sources of pollution regulated pursuant to this Chapter or to nonpoint sources of pollution regulated pursuant to other Titles or Chapters of the Swinomish Tribal Code.
- (5) **“Aquatic life uses”** means uses designated in water based on the presence of, or intent to provide protection for, an aquatic life community of animals and plants which live at least part of their life cycles in water. The aquatic life community includes but is not limited to populations of fish, shellfish, and other aquatic vertebrate and invertebrate organisms, plants, algae, and microorganisms, in health and diversity necessary to maintain ecological integrity in those waters.
- (6) **“Background conditions”** means the biological, chemical, and physical conditions of a water body outside the area of influence of the point source discharge, nonpoint source, or instream activity under consideration.
- (7) **“Best Available Science”** or **“BAS”** means the best information currently available that is derived from a valid scientific process or scientific sources that have been adopted by a majority of the scientific community at large. The characteristics of a valid scientific process include: peer reviewed and published information and methods, conclusions logically based on reasonable assumptions and placed in the proper context, use of quantitative analysis, and references to relevant peer reviewed and published literature. “Best available science” does not include non-scientific information such as legal, social, economic and political information.
- (8) **“Best management practices”** or **“BMP”** means the schedules of activities, prohibitions of practices, maintenance procedures, and structural and/or managerial practices that, when used singularly or in combination, prevent or reduce the release of pollutants and other adverse impacts to Regulated Surface Waters as necessary to meet water quality standards.



- (9) **"Brackish water"** means estuarine waters with salinities transitional between marine and fresh water, i.e. estuarine waters having salinities between 1 and 10 parts per thousand.
- (10) **"Carcinogen"** means any substance or agent that produces or tends to produce cancer in humans.
- (11) **"Chronic toxicity"** defines a stimulus that lingers or continues for a relatively long period of time, often one-tenth of the life span or more. Chronic should be considered a relative term depending on the life span of an organism. The measurement of a chronic effect can be reduced growth, reduced reproduction, etc., in addition to lethality.
- (12) **"Clean Water Act"** or **"CWA"** or **"Act"** means the Federal Water Pollution Control Act (33 U.S.C. § 1251 *et seq.*), as amended.
- (13) **"Constructed wetlands"** means those wetlands intentionally created from non-wetland sites for the sole purpose of wastewater or storm water treatment. "Constructed wetlands" does not include "created wetlands."
- (14) **"Created wetlands"** means those wetlands intentionally created from non-wetland sites to produce or replace natural wetland habitat for the purpose of restoration or mitigation.
- (15) **"Criteria"** means elements of the standards adopted pursuant to this Chapter expressed as numeric concentrations or levels or narrative statements that represent a quality of water that supports a particular use. When applicable criteria are met, water quality will generally protect designated uses in particular Regulated Surface Waters.
- (16) **"Department"** means the Swinomish Department of Environmental Protection.
- (17) **"Designated use"** means any use specified in this Chapter for a water body or water body segment, whether or not the designated use is currently being attained.
- (18) **"Director"** means the Director of the Swinomish Department of Environmental Protection, his or her designated representative or agent, or successor in responsibility.
- (19) **"Discharge"** means any addition of any pollutant to Regulated Surface Waters from any point source.
- (20) **"Enterococci"** are fecal indicator bacteria (FIB) used to identify potential illness resulting from engagement in recreational activities in surface waters that have fecal contamination. Enterococci are the subgroup of the fecal streptococci group which is differentiated from other streptococci by

its ability to grow in 6.5% sodium chloride at pH 9.6 and at 10°C and 45°C. "Enterococci" includes *S. faecalis*, *S. faecium*, *S. gallinarum*, and *S. avium*.

- (21) **"EPA"** means the United States Environmental Protection Agency.
- (22) **"Existing use"** means any use that was actually attained in a Regulated Surface Water on or after November 28, 1975, whether or not the use is explicitly specified as a designated use for that water body in this Chapter or is currently being attained.
- (23) **"Fecal coliform"** are indicator bacteria used to identify potential fecal contamination near shellfish beds. Fecal Coliform are the subgroup of the coliform group which is present in the intestinal tracts and feces of warm-blooded animals as detected by the product of acid or gas from lactose in a suitable culture medium within twenty-four hours at 44.5 °C plus or minus 0.2 °C.
- (24) **"Fish and shellfish harvesting use"** means the use of water for the commercial, recreational, ceremonial, or subsistence harvesting of fish and shellfish, including but not limited to salmonids and forage fish, bivalves, crabs, urchins, snails, and other aquatic species for human consumption.
- (25) **"Geometric mean"** means the nth root of a product of n factors.
- (26) **"Groundwater"** means subsurface water in a zone of saturation, including but not limited to water below the water table and water occupying cavities, pores, and openings in underlying rocks.
- (27) **"Hardness"** means the sum of polyvalent cations dissolved in water. Cations are primarily calcium and magnesium although other metals such as iron, strontium, manganese, may contribute to hardness.
- (28) **"Impair"** and its derivatives, e.g. **"impairment"** and **"impaired,"** means any detrimental effect on the physical, chemical, biological or radiological character of a water body which prevents attainment of water quality standards in that water body.
- (29) **"Mixing zone"** is an area where an effluent discharge undergoes initial dilution and is extended to cover the secondary mixing in the ambient water body. A mixing zone is an allocated impact zone where water quality criteria can be exceeded as long as acutely toxic conditions are prevented.
- (30) **"Natural conditions"** means the background water quality concentration due only to non-anthropogenic sources, as established in an appropriate reference water body as determined by the Department.

- (31) **“Nonpoint source”** means pollution that enters Regulated Surface Waters from any dispersed land- or water-based activity or occurrence, including but not limited to atmospheric deposition; surface water runoff from agricultural lands, urban or rural areas, or forest lands; subsurface or underground sources; or discharges from boats or marine vessels not otherwise regulated under the Clean Water Act.
  
- (32) **“National Pollutant Discharge Elimination System” or “NPDES”** means the Federal program for issuing, modifying, revoking, reissuing, terminating, monitoring, and enforcing permits for the discharge of pollutants, and imposing and enforcing pretreatment requirements, pursuant to Sections 307, 402, 318, and 405 of the CWA.
  
- (33) **“Permit or license”** means a document issued pursuant to Tribal or Federal law, including but not limited to this Chapter and the Clean Water Act, which specifies the treatment and control requirements and other conditions that apply to discharges to Regulated Surface Waters.
  
- (34) **“Person”** means any individual; corporation; trust; unincorporated association; general or limited partnership; limited liability company; local, state, or Federal government and any of their programs, agencies, or departments; Indian tribe, including the Swinomish Indian Tribal Community, and any of its programs, agencies, or departments; or any other legal entity.
  
- (35) **“Point source”** means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.
  
- (36) **“Pollutant”** means any substance or activity which causes or contributes to, or may cause or contribute to, pollution. “Pollutant” includes without limitation dredge spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water.
  
- (37) **“Pollution”** means the alteration of the physical, chemical, biological, or radiological properties of water caused or induced by human activity, including but not limited to changes in temperature, taste, color, turbidity, or odor, the natural flow regime or water levels, or the discharge of any liquid, gaseous, solid, radioactive, or other substance into water which will or is likely to create a nuisance or render such water harmful, detrimental, or injurious to the public health, safety, or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate

beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life.

- (38) **“Primary contact use”** means the use of water in (a) Native American religious, spiritual, and cultural practices or (b) recreational activities, including but not limited to skin or scuba diving, swimming, and water skiing, where a person may have direct contact with water to the point of total or partial immersion in water and intentional or incidental ingestion of water or inhalation of steam.
- (39) **“Puget Sound Protocols”** means *“Recommended Protocols for Measuring Selected Environmental Variables in Puget Sound”* (1986), prepared by Puget Sound Estuary Program for U.S. Environmental Protection Agency, Region 10, Seattle, WA, as amended.
- (40) **“Regulated Surface Waters”** means all surface waters located within the exterior boundaries of the Swinomish Indian Reservation, including without limitation Padilla Bay, Padilla Bay Lagoon, Similk Bay, Turner’s Bay, Kiket Bay, Lone Tree Lagoon, Lone Tree Creek, Skagit Bay, Skagit River—North Fork, Snee-Oosh Creek, Swinomish Channel, Munks Creek, Fornsby Creek, named and unnamed palustrine and marine wetlands, named and unnamed intermittent streams, springs and seeps, and all delineated, inventoried, undelineated, and uninventoried wetlands.
- (41) **“Receiving waters”** means any water body or water body segment into which treated or untreated pollutants are discharged.
- (42) **“Regional Administrator”** means the Regional Administrator of Region 10 of the United States Environmental Protection Agency.
- (43) **“Reservation”** means all lands and waters within the exterior boundaries of the Swinomish Indian Reservation.
- (44) **“Reservation waters”** means all surface water located within the exterior boundaries of the Swinomish Indian Reservation, including without limitation Regulated Surface Waters.
- (45) **“Senate”** means the Swinomish Indian Senate, the governing body of the Swinomish Indian Tribal Community.
- (46) **“Spiritual and cultural use”** means the use of water which is demonstrated to support and maintain the traditional way of life of the Tribe or its members including, but not limited to: contact uses; maintenance of sufficient instream flows to preserve, protect, and enhance fish populations significant to the values and culture of the Tribe or upon which the Tribe’s Treaty fisheries depend; preservation and/or restoration of habitat for fish, shellfish, and wildlife significant to the values and culture of the Tribe; preservation of habitat for berries, roots, medicines

and other vegetation significant to the values and culture of the Tribe; and preservation of the natural and traditional aesthetic quality and character of the Reservation.

- (47) **“Standards”** means the water quality standards of the Tribe as set forth in this Chapter.
- (48) **“Threatened or endangered species”** means any species of fish, wildlife, or plant which has been determined to be endangered or threatened under Section 4 of the Endangered Species Act, 16 U.S.C. § 1533.
- (49) **“Toxic pollutant”** means a pollutant, or a combination of pollutants, which after discharge will, on the basis of information available to the Department, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction), or physical deformations in any organism or its offspring upon exposure, ingestion, inhalation, or assimilation of such pollutant into the organism, either directly from the environment or indirectly by ingestion through food chains. “Toxic pollutant” includes but is not limited to those pollutants listed by the EPA under Section 307(a) of the Clean Water Act.
- (50) **“Toxicity test”** means a test using selected organisms to determine the acute or chronic toxicity of a chemical pollutant or whole effluent.
- (51) **“Tribe”** means the Swinomish Indian Tribal Community.
- (52) **“Turbidity”** means the clarity of water expressed as nephelometric turbidity units (NTU) and measured with a calibrated turbidimeter.
- (53) **“Water quality”** means the chemical, physical, biological and radiological characteristics of a water body.
- (54) **“Water supply uses”** means the out-of-stream use of water to satisfy human needs, provided such use complies with all applicable law.
- (55) **“Wetlands”** means any lands that fit the criteria established by the U.S. Army Corps of Engineers *Wetlands Delineation Manual* (1987). Generally, wetlands are those areas inundated or saturated by surface or ground water at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation.
- (56) **“Wildlife habitat use”** means the use of water-associated habitat elements, including vegetation and aquatic life, to directly or indirectly provide food support and/or refuge for waterfowl, shore birds, and other water-oriented wildlife as well as any other animal or plant species which may utilize or depend on these waters during any life history stage or activity.

- (57) **“Zone of Initial Dilution” or “ZID”** means an area within a Department-authorized mixing zone where acute criteria may be exceeded. This area shall be no larger than necessary and shall be sized to prevent lethality to swimming or drifting organisms by ensuring that organisms are not exposed to concentrations exceeding acute criteria for more than one (1) hour more frequently than once every three (3) years. The actual size of the ZID will be determined by the Department for a discharge on a case-by-case basis, taking into consideration mixing zone modeling and associated size recommendations and any other pertinent chemical, physical, and biological data available.

- (B) All other words and phrases shall have their ordinary and customary meanings.

*Subchapter I – Designated Uses and Water Quality Criteria*

**19-06.090 Basis for Uses and Criteria.**

The uses designated and criteria adopted for Regulated Surface Waters pursuant to this Chapter are established in conformance with historic, traditional, current, existing, and potential uses of Regulated Surface Waters and after consideration of the use and value of Regulated Surface Waters for propagation of fish, shellfish, and wildlife, recreation in and on the water, navigation, and permissible out-of-stream purposes. Wherever attainable, such uses and criteria provide water quality for the protection and propagation of fish, shellfish, and wildlife, and recreation in and on the water.

**19-06.100 General Conditions Applicable to All Regulated Surface Waters.**

The following general conditions shall apply to the designated uses and supplement the numeric water quality criteria set forth in this Chapter:

- (A) All Regulated Surface Waters shall be free from pollutants in concentrations or combinations that would preclude the most sensitive use of the water body, except as provided for within this Chapter.
- (B) Where multiple existing or designated uses for a given water body require differing levels of water quality, the water quality criteria that provide protection for the most sensitive use shall apply.
- (C) Upstream actions must be conducted in manners that meet downstream water body criteria. Except where and to the extent described otherwise in this Chapter, the criteria associated with the most upstream use designated for a water body are to be applied to headwaters to protect non-fish aquatic species and the designated downstream uses.
- (D) At the boundary between waters of different designated uses, the more stringent water quality criteria shall apply. If existing or designated uses of more than one

water body or water body segment are affected, the water quality criteria that provide protection for the most sensitive use shall apply.

- (E) The Regulated Surface Waters listed in Table 2 shall be classified as marine waters and marine water quality criteria shall apply to those waters as provided herein. All Regulated Surface Waters not specifically classified as marine waters, including without limitation those waters listed in Table 1, shall be classified as fresh waters and fresh water quality criteria shall apply to those waters as provided herein, provided, however, that in brackish water where the fresh and marine water quality criteria differ within the same use designation, the applicable water quality criteria will be determined on the basis of vertically averaged daily maximum salinity as follows:
  - (1) The fresh water criteria shall apply at any point where ninety-five percent of the salinity values are less than or equal to one part per thousand, except that the fresh water criteria for bacteria shall apply when the salinity is less than ten parts per thousand.
  - (2) The marine water criteria shall apply at all other locations where ninety-five percent of the salinity values are greater than ten parts per thousand.
  - (3) For salinities between 1 and 10 parts per thousand, the more stringent of the two criteria apply.

#### **19-06.110 General Use Designations.**

All Regulated Surface Waters which are tributaries to Salmon and Trout Fish Use waters are classified as Salmon and Trout Fish Use.

#### **19-06.120 Fresh Water Designated Uses and Water Quality Criteria.**

- (A) Designated uses of fresh Regulated Surface Waters are listed in Table 1.
- (B) The applicability of fresh water quality criteria to fresh water use designations is shown in Table 3.
  - (1) All indigenous fish and non-fish aquatic life species shall be protected in Regulated Surface waters in addition to the key species described below.
- (C) Aquatic Life Uses in fresh water.
  - (1) The category for aquatic life uses is:
    - (a) **Salmon and trout fish use**, which applies to water bodies that are protected for use by all life stages of native species of salmon and trout that occur or may occur year round. This use and the associated criteria are to be applied year round.

- (2) Aquatic Life Use Criteria in fresh water.
  - (a) Generally applicable water quality criteria, including but not limited to criteria described in Section 19-06.100 and Sections 19-06.140 through 19-06.150 of this Chapter, shall apply to all Regulated Surface Waters designated as aquatic life use in fresh water.
  - (b) Aquatic life temperature criteria in fresh water.
    - (i) Water temperature shall be measured by the 7-day average of the daily maximum temperatures (7-DADMax).
    - (ii) Table 4 lists temperature criteria for each of the fresh water aquatic life use categories.
    - (iii) Criteria apply to all Regulated Surface Waters, including at the lowest downstream extent of the use to ensure downstream temperatures are maintained.
  - (c) Aquatic life dissolved oxygen (“D.O.”) criteria in fresh water.
    - (i) D.O. shall be measured in milligrams per liter (mg/L).
    - (ii) Table 5 lists the 1-day minimum D.O. for each of the fresh water aquatic life use categories.
  - (d) Aquatic life pH criteria in fresh water. Table 6 lists the pH criteria for each of the fresh aquatic life use categories.
- (D) Fish and Shellfish Harvesting Use Criteria in fresh water.
  - (1) Generally applicable water quality criteria, including but not limited to criteria described in Section 19-06.100 and Sections 19-06.140 through 19-06.150 of this Chapter, shall apply to all Regulated Surface Waters designated as fish and shellfish harvesting use in fresh water.
  - (2) Fish and Shellfish Harvesting Use bacteria criteria in fresh water are listed in Table 7 and shall apply to all Regulated Surface Waters designated for fish and shellfish harvesting use in fresh water.
  - (3) The Department may establish more stringent Fish and Shellfish Harvesting Use bacteria criteria in fresh water for rivers, streams, and/or contributing waters that cause or significantly contribute to the degradation of shellfish harvesting areas if the Department determines such criteria are necessary to protect shellfish harvesting areas. Revised criteria will be adopted according to procedures described in Section 19-06.170.



- (4) These criteria provide extraordinary protection against waterborne disease in waters that serve as tributaries to shellfish harvesting areas of extraordinary quality.
- (E) Water contact uses in fresh water.
  - (1) The category for water contact use is:
    - (a) Primary contact use.
  - (2) Generally applicable water quality criteria, including but not limited to criteria described in Section 19-06.100 and Sections 19-06.140 through 19-06.150 of this Chapter, shall apply to all Regulated Surface Waters designated as water contact use in fresh water.
  - (3) Water contact bacteria criteria in fresh water.
    - (a) Table 8 lists the bacteria criteria for the water contact use category in fresh water.
    - (b) The Department may establish more stringent water contact bacteria criteria in fresh water for rivers, streams, and/or contributing waters that cause or significantly contribute to the degradation of shellfish harvesting areas if the Department determines such criteria are necessary to protect shellfish harvesting areas.
    - (c) The Department may establish alternative indicator criteria on a site-specific basis where information suggests that sample results are due primarily to sources other than warm-blooded animals (e.g. wood wastes).
    - (d) Revised criteria will be adopted according to procedures described in Section 19-06.170.
- (F) Water supply uses in fresh water.
  - (1) The category for out-of-stream consumptive fresh water supply uses is:
    - (a) Domestic water supply.
  - (2) Generally applicable water quality criteria, including but not limited to criteria described in Section 19-06.100 and Sections 19-06.140 through 19-06.150 of this Chapter, shall apply to all Regulated Surface Waters designated as water supply use in fresh water.
- (G) Miscellaneous uses in fresh water.

- (1) The categories for miscellaneous uses for fresh waters are:
  - (a) Aesthetic value;
  - (b) Spiritual and cultural uses;
  - (c) Wildlife habitat use; and
  - (d) Commerce, Navigation, and Boating.
- (2) Generally applicable water quality criteria, including but not limited to criteria described in Section 19-06.100 and Sections 19-06.140 through 19-06.150 of this Chapter, shall apply to all Regulated Surface Waters designated as miscellaneous use in fresh water.

**19-06.130 Marine Water Designated Uses and Criteria.**

- (A) Designated uses of marine Regulated Surface Waters are listed in Table 2.
- (B) The applicability of marine water quality criteria to marine water use designations is shown in Table 9.
  - (1) All indigenous fish and non-fish aquatic life species shall be protected in Regulated Surface waters in addition to the key species described below.
- (C) Aquatic life uses in marine water.
  - (1) The category for aquatic life uses in marine Regulated Surface Waters is:
    - (a) **Fish use**, which applies to water bodies that are protected for use by all life stages of native species of salmonids, other finfish, and shellfish, including but not limited to: salmonids and other finfish spawning, rearing, and migration; forage fish spawning and rearing; clam, oyster, and mussel spawning and rearing; and crustaceans and other shellfish (crabs, shrimp, crayfish, scallops, etc.) spawning and rearing. This use and the associated criteria are to be applied year round.
  - (2) Aquatic Life Use Criteria in Marine Water.
    - (a) Generally applicable water quality criteria, including but not limited to criteria described in Section 19-06.100 and Sections 19-06.140 through 19-06.150 of this Chapter, shall apply to all Regulated Surface Waters designated as aquatic life use in marine water.
    - (b) Aquatic life temperature criteria in marine water.
      - (i) Except where noted, temperature shall be measured as a 1-day

maximum temperature (1-DADMax).

- (ii) Table 10 lists the temperature criteria for each of the marine aquatic life use categories.
  - (c) Aquatic life dissolved oxygen (D.O.) criteria in marine water.
    - (i) Except where noted, D.O. concentrations shall be measured in milligrams per liter (mg/L).
    - (ii) Table 11 lists the 1-day minimum D. O. criteria for each of the marine aquatic life use categories.
  - (d) Aquatic life pH criteria in marine water. Table 12 lists the pH criteria for each of the aquatic life use categories in marine water.
- (D) Fish and Shellfish Harvesting Uses in marine water.
- (1) Generally applicable water quality criteria, including but not limited to criteria described in Section 19-06.100 and Sections 19-06.140 through 19-06.150 of this Chapter, shall apply to all Regulated Surface Waters designated as fish and shellfish harvest use in marine water.
  - (2) Fish and Shellfish Harvesting Use bacteria criteria in marine water is listed in Table 13 and shall apply to all Regulated Surface Waters designated fish and shellfish harvesting use in marine water.
  - (3) The Department may establish more stringent Fish and Shellfish Harvesting Uses bacteria criteria for contributing marine waters that cause or significantly contribute to the degradation of shellfish harvesting areas if the Department determines such criteria are necessary to protect shellfish harvesting areas. Revised criteria will be adopted according to procedures described in Section 19-06.170.
  - (4) These criteria protect humans who consume aquatic life from marine waters, including shellfish.
- (E) Water contact uses in marine water.
- (1) The category for marine water contact uses is:
    - (a) Primary contact use.
  - (2) Generally applicable water quality criteria, including but not limited to criteria described in Section 19-06.100 and Sections 19-06.140 through 19-06.150 of this Chapter, shall apply to all Regulated Surface Waters designated as water contact use in marine water.

- (3) Water contact bacteria criteria in marine water.
  - (a) Table 14 lists the bacteria criteria for each of the marine water contact use categories.
  - (b) The Department may establish more stringent water contact bacteria criteria for contributing marine waters that cause or significantly contribute to the degradation of shellfish harvesting areas if the Department determines such criteria are necessary to protect shellfish harvesting areas.
  - (c) The Department may establish alternative indicator criteria on a site-specific basis where information suggests that sample results are due primarily to sources other than warm-blooded animals (e.g. wood wastes).
  - (d) Revised criteria will be adopted according to procedures described in Section 19-06.170.
- (F) Miscellaneous uses in marine water.
  - (1) The categories for miscellaneous uses in marine waters are:
    - (a) Aesthetic value;
    - (b) Spiritual and cultural uses;
    - (c) Wildlife habitat use;
    - (d) Commerce, Navigation, and Boating; and
    - (e) Seafood processing: to protect the use of seafood processing from adverse water conditions.
  - (2) Generally applicable water quality criteria, including but not limited to criteria described in Section 19-06.100 and Sections 19-06.140 through 19-06.150 of this Chapter, shall apply to all Regulated Surface Waters designated as miscellaneous use in marine water.

**19-06.140 Criteria for Toxic Pollutants.**

- (A) The concentrations for toxic pollutants listed in Table 16 shall represent the numeric criteria for aquatic life or human health protection. Selecting values for regulatory purposes will be determined by the most sensitive beneficial use to be protected and the level of protection necessary for aquatic life and human health as specified within Table 16. All concentrations, except asbestos, are listed in micrograms per liter (ug/l), which is equivalent to parts per billion (ppb).

- (B) Toxic pollutants shall not be introduced into Regulated Surface Waters in concentrations which have the potential either singularly or cumulatively to adversely affect existing and designated water uses, cause acute or chronic toxicity to the most sensitive biota dependent upon those waters, or adversely affect public health, as determined by the Director based on best available science, except as provided for in this Chapter.
- (C) The Department shall employ or require chemical testing, acute and/or chronic toxicity testing, and biological assessments as appropriate, to evaluate compliance with this Section. Where necessary, the Department shall establish controls to ensure that aquatic life communities and the existing and designated beneficial uses of Regulated Surface Waters are fully protected.
- (D) Numeric criteria for toxic and other pollutants not listed in this Chapter shall be determined by the Department upon consideration of any current EPA water quality criteria and best available science as appropriate.
- (E) Risk-based numeric criteria for carcinogenic substances shall be applied such that the upper-bound excess cancer risk is less than or equal to one in one million people exposed which means that the probability of developing cancer does not exceed one cancer per one million people exposed.
- (F) The aquatic organism consumption rate for all finfish and shellfish utilized in determining the human health criteria listed in Table 16 is 384 grams per day. For determining human health criteria based on the ingestion of both water and organisms, the drinking water intake rate utilized is 3 liters per day.
- (G) Criteria for metals shall be applied as total recoverable values, unless otherwise noted.
- (H) Hardness-dependent metals criteria will be calculated using the ambient hardness, up to a maximum of 400 mg/L, measured as calcium carbonate (CaCO<sub>3</sub>). For ambient hardness values over 400 mg/L, the criteria will be calculated using a hardness of 400 mg/L in the hardness equation. There is no minimum ambient hardness value for calculation of the criteria.

**19-06.150 Narrative Criteria Applicable to All Regulated Surface Waters.**

- (A) *Aesthetic Quality.* Regulated Surface Waters shall be free from pollutants attributable to point source discharges, nonpoint sources, or instream activities in accordance with the following criteria:
  - (1) Floating Solids, Oil and Grease: Regulated Surface Waters, stream banks, and shorelines shall be free from visible oils, scum, foam, grease, and other floating materials and suspended substances of a persistent nature resulting from other than natural causes.

- (2) Color: True color-producing materials resulting from anthropogenic causes shall not create an aesthetically undesirable condition, nor should color inhibit photosynthesis.
  - (3) Odor and Taste: Pollutants resulting from anthropogenic causes shall not produce objectionable odor or taste in Regulated Surface Waters, aquatic life, or wildlife.
  - (4) Nuisance Conditions: Pollutants resulting from anthropogenic causes shall not be present in Regulated Surface Waters in concentrations which will produce objectionable algal densities or nuisance species which may impair ecological integrity.
  - (5) Turbidity:
    - (a) Turbidity resulting from anthropogenic causes in Regulated Surface Waters shall not be at a level that may have a deleterious effect on an aquatic life community present in those waters.
  - (6) Bottom Deposits: Regulated Surface Waters shall be free from pollutants resulting from anthropogenic causes (1) that may settle and have a deleterious effect on an aquatic life community present in those waters or (2) that will significantly alter the physical and chemical properties of the water or bottom sediments.
- (B) Biological Criteria.
- (1) Regulated Surface Waters shall be of sufficient quality to preserve, protect, and enhance all life stages of resident and/or anadromous finfish and any aquatic biotas or aquatic life communities present in those waters.
  - (2) Riparian cover along Regulated Surface Water streams shall provide sufficient shade cover to maintain or enhance water temperatures and shall contain vegetation of a species diversity, size, and density typical of a fully functioning natural riparian zone.
  - (3) Regulated Surface Waters shall be free from substances, whether attributable to point source discharges, nonpoint sources, or instream activities, in concentrations or combinations which may have a deleterious effect on an aquatic life community present in those waters or the ecological integrity of those waters.
  - (4) The structure and function of resident aquatic life communities shall be measured by biological assessment methods approved by the Department.
  - (5) Determination of an actual or potential deleterious effect on an aquatic life community or on ecological integrity shall be based on biological assessment and comparison with an appropriate reference site or region.

- (C) *Wetlands.* Water quality in wetlands within the exterior boundaries of the Reservation, including created wetlands which are not constructed wetlands, shall be protected by maintaining the hydrological conditions, hydrophilic vegetation, and substrate characteristics to support existing and designated uses. Generally applicable water quality criteria, including but not limited to criteria described in Section 19-06.100 and Sections 19-06.140 through 19-06.150 of this Chapter, shall apply to wetlands.
- (D) *Wildlife Criteria.* Regulated Surface Waters shall be of sufficient quality to preserve, protect, and enhance all life stages of resident and/or migratory wildlife species which live in, on, or near those waters.
- (E) *Instream Flow.* Instream flow necessary to maintain the physical, chemical, and biological integrity of Regulated Surface Waters shall not be modified if such modification will or may impair water quality or existing or designated uses.

**19-06.160 Site-Specific Criteria and Criteria Based on Natural Conditions.**

- (A) Where the attainable condition of existing and designated uses for the water body would be fully protected using an alternative criterion to those adopted pursuant to this Chapter, the Department, subject to Senate approval, may adopt site-specific criteria on a Reservation-wide or waterbody specific basis as needed to protect aquatic life and human health and other existing and designated uses and to increase the technical accuracy of the criteria being applied.
  - (1) Whenever the natural conditions of Regulated Surface Waters are of a lower quality than criteria assigned, the Department may determine that the natural conditions shall constitute the water quality criteria.
    - (a) If the natural condition varies with time, the natural condition will be determined as the prevailing highest quality natural condition measured during an annual, seasonal, or shorter period of time prior to human caused influence.
    - (b) The Department may, at its discretion, determine a natural condition for one or more seasonal or shorter time periods to reflect variable ambient conditions.
    - (c) Historical data or data from an appropriate reference site, that represent natural condition, may be used to determine the criterion.
  - (2) Site-specific criteria and natural conditions analyses for the development of a new water quality criterion will be conducted in a manner that is scientifically justifiable and consistent with the assumptions and rationale in “*Guidelines for Deriving National Water Quality Criteria for the Protection of Aquatic Organisms and their Uses*” (EPA 1985) and conducted in accordance with the procedures established in the “*Water Quality Standards Handbook*” (EPA 1994), as revised.

- (B) Any modifications to the criteria will be adopted pursuant to Section 19-06.170(B).

**19-06.170 Modifications of Use Designations and Water Quality Criteria.**

- (A) Subject to Senate approval, the Department may modify, add, or remove designated uses from Regulated Surface Waters as part of a review of this Chapter or at any other time when circumstances require such action if such modification, addition, or removal is consistent with the requirements of Section 303(c) of the Clean Water Act and the regulations implementing that Section.
- (1) The Department may revise water quality criteria on a Reservation-wide or water body-specific basis as needed to protect aquatic life, human health, and/or existing and designated uses, or to increase the technical accuracy of the criteria being applied; and
- (2) Notwithstanding subsection (A) of this Section, the Department may remove a designated use previously assigned to a Regulated Surface Water which is not an existing use in accordance with 40 CFR 131.10(g), (h), and (j) if the Department determines that the designated use is unattainable.
- (B) Prior to modifying, adding, removing, or revising use designations or water quality criteria pursuant to this Section, the Department shall conduct a public hearing pursuant to Section 19-06.330.
- (1) Revised criteria will be submitted to EPA, after adoption by the Senate, for review along with any information that will aid EPA to determine the adequacy of the scientific basis of the revised criteria.
- (2) Modified, including site-specific criteria, added, removed, or revised criteria are not in effect until they have been incorporated into this Chapter and approved by the EPA.

**19-06.180 Triennial Review.**

- (A) The Department shall from time to time, but at least once every three (3) years beginning on the date this Chapter is enacted, hold a public hearing pursuant to Section 19-06.330 for the purpose of reviewing water quality standards contained in this Chapter and, as appropriate, modifying and adopting such standards. Revisions to such standards proposed by the Department, if any, shall be made available to the public prior to the hearing.
- (B) The Department shall make the results of the triennial review available to the EPA in accordance with 40 C.F.R. § 131.20(c), as amended.



*Subchapter II – Antidegradation Policy***19-06.190 Purpose.**

The purpose of the antidegradation policy set forth in Sections 19-06.200 through 19-06.240 is to guide decisions that affect water quality such that unnecessary further degradation of water quality from new or increased point sources, nonpoint sources, or instream activities is prevented. Additionally, the antidegradation policy is intended to protect, maintain, and enhance existing surface water quality to ensure the full protection of all existing and designated uses. Procedures for implementing this antidegradation policy are included in Appendix A.

**19-06.200 Tier I – Protection of Existing and Designated Uses.**

- (A) Existing and designated uses and the level of water quality necessary to protect those uses shall be maintained and protected for all Regulated Surface Waters. No degradation, including degradation attributable in whole or part to altered instream flows, may be allowed that would interfere with, or become injurious to, existing or designated uses, except as provided for in this Chapter.
- (B) Whenever the natural conditions of a Regulated Surface Water or segment are of a lower quality than applicable water quality criteria and existing and designated uses are fully attained, the Department may determine that a site specific criterion is appropriate and follow site specific criteria procedures pursuant to Section 19-06.160.
- (C) Whenever the natural conditions of a Regulated Surface Water or segment are of a lower quality than applicable water quality criteria, human actions considered independently or cumulatively shall not further degrade water quality, except where explicitly allowed by this Chapter.

**19-06.210 Tier II— Protection of Waters of Higher Quality than the Standard.**

Where water quality in a Regulated Surface Water or segment exceeds applicable water quality criteria, as determined on a parameter-by- parameter basis, that quality shall be maintained and protected unless the Senate finds, after a recommendation from the Department and full satisfaction of applicable intergovernmental coordination and public participation provisions, that:

- (1) Allowing lower water quality is necessary to accommodate important habitat restoration or economic or social development in the area in which the waters are located, and such restoration or development is in the Tribe's best interest. The determination that a lowering of water quality is necessary must be based on an evaluation of a range of practicable alternatives that would prevent or lessen the proposed degradation. When the analysis of alternatives identifies one or more practicable alternatives as defined at 40 CFR 131.3 (n), the Tribe shall only find that a lowering of

water quality is necessary if one such alternative is selected for implementation;

- (2) Water quality adequate to support all existing and designated uses will be maintained;
- (3) Lowering water quality will not adversely affect threatened or endangered species, or species eligible for listing; and
- (4) All discharges will be treated and controlled to achieve:
  - (a) The highest statutory and regulatory requirements and AKART for all new and existing point sources; and
  - (b) All cost-effective and reasonable BMPs for non-point sources.

**19-06.220 Tier III – Protection of Outstanding Tribal Resource Waters.**

- (A) The Department, subject to Senate approval, may specially designate water bodies as Outstanding Tribal Resource Waters to protect the water quality parameters that affect the ecological integrity of Fish and Wildlife Sensitive Areas, cultural and spiritual areas of significance, or other special values that are vital to the unique character of those waters. In waters designated as Outstanding Tribal Resource Waters, the water quality shall be maintained and protected.
- (B) Regulated Surface Waters meeting one or more of the following criteria shall be considered for designation as an Outstanding Tribal Resource Water:
  - (1) The water body is of exceptional recreational or ecological significance because of its unique attributes, including but not limited to attributes related to the geology, flora, fauna, water quality, or aesthetic values of the surface water;
  - (2) The water body has unique aquatic habitat types, such as wetlands, that by conventional water quality parameters (such as dissolved oxygen, temperature, or sediment) are not considered high quality, but that are unique and regionally rare examples of their kind;
  - (3) The water body is associated with one or more threatened or endangered species and existing water quality is essential to the maintenance and propagation of those species, or the water body has been or is eligible to be designated a Fish and Wildlife Sensitive Area pursuant to STC 19-04.440; and/or
  - (4) The surface water is associated with a traditional cultural place or use identified by the Swinomish Cultural Committee subject to Senate approval.

- (C) To maintain and protect existing water quality, the Department, subject to Senate approval, may designate site-specific criteria in Outstanding Tribal Resource Waters.
- (D) The Department, subject to Senate approval, may require point and nonpoint water quality controls, maintenance of natural flow regimes, protection of instream habitats, and pursuit of land use practices protective of the watershed to maintain and protect the quality of Outstanding Tribal Resource Waters.

**19-06.230 Thermal Discharges.**

In those cases where potential water quality impairment associated with a thermal discharge is involved, the antidegradation policy and implementing methods shall be consistent with Section 316 of the Clean Water Act, as amended.

**19-06.240 Mixing Zones.**

- (A) In conjunction with the issuance of Section 402 or Section 404 permits, the Department may authorize mixing zones in the marine waters of the Regulated Surface Waters on a case-by-case basis. The size, configuration, and location of such mixing zones and the in-zone water quality in such mixing zones shall be consistent with the applicable procedures and guidelines in EPA's Water Quality Standards Handbook and the Technical Support Document for Water Quality Based Toxic Control and subsequent updates of the handbook and technical support documents.
- (B) In evaluating whether to authorize potential mixing zones, the Department shall ensure:
  - (1) The mixing zone will not impair existing or designated uses of the water body, result in ecosystem damage, or adversely affect public health, as determined by the Department based on BAS.
  - (2) Mixing zones shall be designed to avoid or minimize adverse effects to species and critical habitat listed under the Endangered Species Act.
  - (3) Pollutant concentrations within the mixing zone are not lethal to organisms passing through the mixing zone.
  - (4) Pollutant concentrations within the mixing zone do not cause significant human health risks considering likely pathways of exposure.
  - (5) Mixing zones do not endanger critical areas such as breeding or spawning grounds, areas with sensitive biota, shellfish beds, fisheries, drinking water intakes and sources, or recreational areas.

- (6) Mixing zones where a discharge contains pathogenic, persistent, carcinogenic, mutagenic, or teratogenic pollutants or where a discharge containing toxic pollutants may attract aquatic life should be prohibited when:
  - (a) Mixing zones may encroach on areas often used for fish harvesting, particularly for stationary species such as shellfish.
  - (b) There are uncertainties in the protectiveness of the water quality criteria or the assimilative capacity of the waterbody.
- (7) Mixing zones are not allowed for bioaccumulative pollutants.
- (C) In addition to the requirements pursuant to Section Subchapter I - 19-06.240(B), the Department shall ensure:
  - (1) Mixing zones are as small as practicable.
  - (2) Mixing zones do not occupy more than 25% of flow or width of a water body measured at the 7Q10 low flow, which is the lowest average seven consecutive day low flow with an average recurrence frequency of once in ten years determined hydrologically. The 7Q10 low flow shall be calculated using methods recommended by the United States Geological Survey.
  - (3) Water quality criteria are not violated outside of the mixing zone as a result of the discharge for which the mixing zone was authorized. Acute criteria shall be met at the point of discharge and chronic criteria shall be met at the edge of the mixing zone, provided, however, that a Zone of Initial Dilution may be authorized if it is in the best interest of the Tribe. If a ZID is authorized:
    - (a) Calculations for acute criteria exceedance shall use the 1Q10 low flow statistic; and
    - (b) Calculations for human health criteria exceedance shall use the harmonic mean.
  - (4) Generally applicable water quality criteria, including but not limited to criteria described in Section 19-06.100 and Sections 19-06.140 through 19-06.150 of this Chapter, shall apply to mixing zones.

*Subchapter III – Water Quality Certification*

**19-06.250 Certification Authority.**

The Department is the “certifying agency” authorized to review applications for water quality certification submitted in accordance with this Chapter, and may approve, approve subject to conditions, or deny water quality certification in accordance with this Chapter to ensure compliance with this Chapter and Section 401 of the Federal Clean Water Act, 33 U.S.C. § 1341.

**19-06.260 Certification and Permits Required.**

- (A) No person shall commence any activity, including but not limited to the construction or operation of facilities, which requires a Federal license or permit and which will or may result in any discharge into Regulated Surface Waters without first obtaining a certification or waiver from the Department and without first obtaining any required permits or licenses for the activity from the agency or agencies with permitting or licensing authority.
- (B) No license or permit for any activity for which certification is required pursuant to this Chapter shall be granted unless and until certification has been granted or waived.

**19-06.270 Certification Fees.**

- (A) The minimum application fee for water quality certification shall be \$200.
- (B) The Department may charge additional, reasonable fees based on the time and resources required to process the application, subject to Senate approval.
- (C) The Department shall publish the fees in a fee schedule, post the schedule in the Planning Department, and make copies available for public inspection during regular business hours.
- (D) The Department may amend the fee schedule from time to time, subject to Senate approval.

**19-06.280 Application for Certification.**

- (A) All applications, correspondence and notifications with regard to water quality certification applications shall be directed to the Water Resources Program, Swinomish Department of Environmental Protection, 11430 Moorage Way, La Conner, WA 98257.
- (B) An application for water quality certification shall include the following information:

- (1) The name, address, and phone number of the applicant, and, at the Department's discretion, the name, address, and phone number of other persons involved with the activity;
- (2) The names and addresses of immediately adjacent property owners or lessees;
- (3) A map showing the location of the proposed activity and the location of Regulated Surface Waters which will or may be affected by the activity;
- (4) An exhibit complying with 40 C.F.R. § 121.22, which contains:
  - (a) A description of the proposed activity and of any discharge into Regulated Surface Waters which will or may result from the conduct of the activity, including the biological, chemical, thermal, and other characteristics of the discharge, and the location or locations at which such discharge may enter Regulated Surface Waters;
  - (b) A description of the function and operation of equipment or facilities to treat pollutants which will or may be discharged as a result of the activity, including specification of the degree of treatment expected to be attained;
  - (c) The date or dates on which the activity will begin and end, if known, and the date or dates on which a discharge will or may take place;
  - (d) A description of the methods and means being used or proposed to monitor the quality and characteristics of the discharge and the operation of equipment or facilities employed in the treatment or control of pollutants;
- (5) The certification fee as set forth in the fee schedule;
- (6) A site plan and description of the basic design of the activity, and, if applicable, estimates of the cost of construction;
- (7) Copies of any environmental assessments, environmental impact statements, or other environmental review documents relating to the proposed activity;
- (8) Copies of any Federal, Tribal, or state or local permits issued, or permit applications submitted, in connection with the proposed activity;
- (9) Copies of any public notice, supporting information, or decisions issued by Federal, Tribal, or state or local licensing or permitting agency for the proposed activity; and

- (10) The signature of the applicant.

**19-06.290 Initial Review; Public Notice and Comment.**

- (A) The Department shall review the application and determine whether it is complete within ten (10) working days of the date the application is submitted.
  - (1) In its discretion, the Department may require the applicant to submit additional information reasonably necessary to determine the anticipated impacts of the proposed activity and ensure that the activity is constructed or conducted in compliance with the terms of this Chapter, the Clean Water Act, and other applicable provisions of Tribal or Federal law.
  - (2) Failure to complete an application, provide additional information reasonably requested by the Department, or pay an application fee reasonably required by the Department shall be grounds for denial of certification and notice shall be made pursuant to Section 19-01.310(C).
- (B) Within thirty (30) days of receipt of a complete application for water quality certification, the Department shall provide the public notice of and an opportunity to provide written comment on the application for water quality certification. The notice shall provide a brief description of the applicant, the proposed activity, the Regulated Surface Waters which will or may be affected, the anticipated water quality impacts of the proposed activity, and the Department's anticipated decision on the application. The notice shall also specify the person to whom and place to which written comments should be addressed and a thirty (30) day deadline from issuance of the notice for submitting written comment on the application. Notice shall be by mail addressed to adjacent property owners or lessees listed on application, or, if in the Department's discretion notice by mail is impracticable, notice shall be made using reasonably available outreach tools such as Tribal and/or local newspaper legal notices, and/or web-based media.

**19-06.300 Department Decision.**

- (A) Within a reasonable period of time after the public comment period has ended, which in no event shall exceed one-hundred eighty (180) days of receipt of a complete application for water quality certification, the Department shall:
  - (1) Approve, approve subject to conditions, or deny the water quality certification as necessary to ensure compliance with this Chapter, the Clean Water Act, and other applicable provisions of Tribal or Federal law, and notify the applicant of the decision by writing delivered via U.S. mail;
  - (2) If, in the Department's discretion, the number and nature of written public comments received on the application indicate that a public hearing on the application should be set, schedule a public hearing on the same pursuant to Section 19-06.330; or

- (3) After consultation with the Office of Tribal Attorney, notify the Regional Administrator in writing that the Department expressly waives its authority to act on the application.
- (B) A water quality certification made by the Department shall include the following:
  - (1) The name and address of the applicant;
  - (2) A statement that the Department has either:
    - (a) Examined the application made by the applicant to the licensing or permitting agency (specifically identifying the number or code affixed to such application) and bases its certification upon an evaluation of the information contained in such application which is relevant to water quality considerations; or
    - (b) Examined other information furnished by the applicant sufficient to permit the Department to make the statement described in subsection (B)(3) of this Section;
  - (3) A statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards;
  - (4) A statement of any conditions which the Department deems necessary with respect to the discharge associated with the activity, including but not limited to effluent or other limitations and monitoring or mitigation requirements with which the applicant must comply; and
  - (5) Such other information as the Department determines to be appropriate.
- (C) If, after considering a complete application and such other information the Department deems relevant, the Department finds that the project is likely to cause or contribute to a violation of the provisions of this Chapter, the Clean Water Act, or other applicable provisions of Tribal or Federal law, notwithstanding the implementation of all feasible measures designed to mitigate the impact of the facility, the Department shall deny the application. A denial of an application for water certification shall be made in writing and shall set forth the reasons for the denial. The notice shall be mailed to the applicant and to the federal licensing or permitting agency. The notice shall advise the applicant of the appeal rights and procedures provided for in this Chapter.

**19-06.310 Modification, Suspension, or Revocation of Certification.**

- (A) The Director may modify, suspend or revoke a water quality certification issued pursuant to this Chapter:



- (1) To conform to a modification, suspension or revocation of the pertinent Federal permit or license for the project;
  - (2) If the project is modified in a manner inconsistent with the certification;
  - (3) If the application contained material misrepresentations or omissions;
  - (4) If the conditions included in the certification have been violated; or
  - (5) If the project causes or contributes to a violation of Tribal water quality standards or other appropriate requirement of Tribal law relating to water quality.
- (B) A modification, suspension or revocation of a water quality certification shall be in writing and include the reasons for and findings in support of such action. The Department shall promptly mail a copy of the modification, suspension, or revocation to the applicant and to the Federal licensing or permitting agency.
- (C) An applicant whose certification is modified, suspended, or revoked may appeal the decision in accordance with Sections 19-06.420 through 19-06.480.

*Subchapter IV – Public Involvement, Implementation, and Enforcement*

**19-06.320 Public Information.**

The Department shall institute a program designed to provide the public with information regarding the development and implementation of this Chapter. The program shall meet the requirements of 40 C.F.R. § 25.4, as amended.

**19-06.330 Public Participation and Responsiveness.**

- (A) *Public Hearings.* Public hearings required or authorized to be conducted pursuant to this Chapter shall be conducted in accordance with 40 C.F.R. § 25.5, as amended. Without limitation, the Department shall:
- (1) Provide well-publicized notice of the hearing in accordance with 40 C.F.R. § 25.5(b) which sets forth the matters to be discussed at the hearing and the Department's tentative determination on any major issues to be discussed or resolved, information regarding relevant materials available for review, and procedures for obtaining additional information;
  - (2) Set the hearing at a time and place which, to the maximum extent feasible, facilitates attendance by the public;
  - (3) Schedule any presentations to be made at the hearing and reserve such time as is necessary to allow for unscheduled testimony;

- (4) At the hearing, inform the public of the issues involved in the decision, the Department's tentative determinations (if any), and the information which is particularly solicited from the public; and
  - (5) Prepare a transcript of the hearing.
- (B) *Rulemaking.* The Department shall invite and consider written comments on proposed and interim regulations promulgated pursuant to this Chapter. Notices of proposed, interim, and final regulations shall be distributed promptly after publication in accordance with 40 C.F.R. § 25.4(c), as amended. The Department may elect to hold a public hearing on proposed or interim regulations in addition to receiving written comments.
- (C) *Responsiveness Summaries.* The Department shall prepare a Responsiveness Summary describing the Department's response to any written or oral comments received pursuant to public hearings or other opportunities for public comment pursuant to this Chapter. The Responsiveness Summary shall be prepared in accordance with 40 C.F.R. § 25.8, as amended.

**19-06.340 Implementation.**

- (A) Permitting.
  - (1) No Federal or Tribal permit or license authorizing an activity that causes or contributes to a violation of water quality criteria shall be issued, except as provided in this Chapter.
  - (2) If the Department determines that a permitted activity is causing or contributing to a violation of water quality criteria, the permit shall be modified in order to comply with this Chapter, the Clean Water Act, and other applicable provisions of Tribal and Federal law. Major modification of permits is subject to review in the same manner as the original permit application.
- (B) Instream Activities and Nonpoint Source Pollution.
  - (1) Instream activities and activities which generate or contribute to nonpoint source pollution shall be conducted so as to comply with applicable water quality standards.
  - (2) Best management practices shall be applied such that when all appropriate combinations of individual best management practices are utilized, a violation of water quality criteria will not occur. If a person is applying all best management practices appropriate or required by the Department and a violation of water quality criteria occurs, the person shall modify existing practices or apply further water pollution control measures, selected or approved by the Department, to achieve compliance with water quality criteria. Best management practices established in certifications,

permits, orders, rules or directives shall be reviewed and modified by the Department, as appropriate, to achieve compliance with water quality criteria.

**19-06.350 Compliance Schedules and Interim Criteria for Existing Activities.**

- (A) Federal and Tribal permits, water quality certifications, orders and directives from the Department for existing activities may include a schedule for achieving compliance with this Chapter. Schedules for achieving compliance may not be issued for new activities.
- (B) Compliance schedules shall be developed to ensure compliance with this Chapter, the Clean Water Act, and other applicable provisions of Tribal or Federal law in the shortest practicable time and in no event shall exceed the shorter of the term of the permit(s) or five (5) years. By way of example and not limitation, compliance schedules may include deadlines for the following:
  - (1) Compliance with non-construction related conditions intended to reduce pollution, including but not limited to implementation of pollution prevention measures and changes in facility operation;
  - (2) Construction of treatment capability;
  - (3) Implementation of best management practices;
  - (4) Implementation of additional best management practices for sources determined not to meet water quality criteria following implementation of an initial set of best management practices; and
  - (5) Completion of necessary water quality studies.
- (C) The Department, based on best professional judgment, may establish interim water quality criteria to apply during the period of time during which a compliance schedule is in effect.

**19-06.360 Variances.**

- (A) The criteria established by this Chapter may be modified for individual facilities, or reaches of Regulated Surface Waters, though the use of a variance. Variances may be approved through the Department when:
  - (1) The modification is consistent with the requirements of Federal law, including but not limited to provisions at 40 CFR 131.10(g) and (h);
  - (2) The Regulated Surface Water is assigned variances for specific criteria and all other applicable criteria are met; and
  - (3) Reasonable progress is being made toward meeting the original criteria.

- (B) The decision to approve a variance for up to five years is subject to a public and intergovernmental review process. One renewal may be granted, provided that there is another opportunity for public and intergovernmental review.
- (C) Variances are not in effect until they have been incorporated into this Chapter and approved by the EPA.

**19-06.370 Analytic Methods.**

- (A) The Department shall design, revise, and implement a Swinomish Surface Water Quality Monitoring Plan that meets the following objectives:
  - (1) To characterize ambient chemical, physical, biological, and radiological water quality conditions and establish baseline water quality data for Regulated Surface Waters;
  - (2) To identify impaired Regulated Surface Waters in which applicable water quality standards are not being met and assess attainment of existing and designated uses;
  - (3) To determine the effectiveness of this Chapter, related Tribal law, and BMPs to protect, restore, and enhance water quality; and
  - (4) To provide water quality information to support specific Tribal projects and facilitate Reservation-wide and watershed-wide planning.
- (B) All methods of water testing and sample collection, preservation, and analysis used in determining water quality and compliance with this Chapter shall be in accordance with procedures prescribed by the latest EPA authoritative analytical reference; the Swinomish Surface Water Quality Monitoring Plan; 40 C.F.R Part 136- Guidelines for Establishing Test Procedures for Analysis of Pollutants; and Puget Sound Protocols, as updated.

**19-06.380 Enforcement.**

- (A) Inspections.
  - (1) Subject to subsection (B)(2) of this Section, the Department may inspect discharges and activities subject to this Chapter to ensure compliance with the terms and provisions of this Chapter and the Clean Water Act, and, if applicable, the conditions and requirements of a water quality certification. Department officials may enter the premises or location of discharges or activities subject to this Chapter at reasonable times to inspect such discharges or activities and otherwise perform the duties established pursuant to this Chapter. Department officials shall make a reasonable effort to locate the owner of or a person with authority over the premises to request entry. If entry is refused, the official shall have recourse to the remedies provided by law to secure entry.

- (2) The Department shall inspect activities for which certification is required or granted prior to initiation and upon completion of the activity in order to ensure that applicable water quality standards will not be or have not been violated. The person to whom certification is granted, or his or her agent, shall notify the Department at least twenty-four (24) hours in advance of a required inspection. Consent to entry by the person to whom certification is granted for inspection purposes shall be a condition of certification.
- (B) Orders.
  - (1) In the event of any violation of any provision of this Chapter or the Clean Water Act, or any violation of a certification condition or requirement pursuant to this Chapter, the Department may issue an enforcement order requiring the landowner or other responsible party to perform any or all of the following:
    - (a) Cease the discharge or activity causing the violation;
    - (b) Abate the discharge, activity, work, development, or structure in violation;
    - (c) Remediate, restore or mitigate for any adverse water quality effects of such discharge, activity, work, development or structure in violation pursuant to Section 19-06.400;
    - (d) Pay a civil fine or penalty pursuant to Section 19-06.390; and/or
    - (e) Pay damages pursuant to Section 19-06.410.
- (C) Any enforcement order issued by the Department pursuant to this Section shall cite the nature, time, date, and location of the violation; the Section(s) of this Chapter or the Clean Water Act, or certification condition or requirement applicable to the observed violation; the name and address of the responsible party; contact information for the Department; and any required action(s) that must be taken by the responsible party.

**19-06.390 Penalties.**

- (A) Penalties for violations of this Chapter or applicable certification conditions or requirements shall be a civil fine of not less than \$200.00 per violation and not more than \$5,000.00 per violation. The Department shall assess the fine based upon its consideration of the following factors:
  - (1) The severity of the violation, in terms of the effect of the violation on the water quality or existing or designated uses in the affected Regulated Surface Water;

- (2) Whether the responsible party has been determined to have committed past violations of this Chapter, applicable certification conditions or requirements, or other provisions of the Swinomish Tribal Code related to environmental protection or land use;
  - (3) The staff time required to correct the violation, which shall be assessed according to the fee schedule adopted by the Department pursuant to Section 19-06.270;
  - (4) Whether the responsible party has cooperated with the Tribe in addressing the violation, which may allow reduction of the fine by up to 50% based on all of the following:
  - (5) Whether the responsible party immediately complied with an enforcement order to cease the violation;
  - (6) Whether the responsible party took actions to correct the violation as quickly as feasible;
  - (7) Whether the responsible party fully cooperated with investigations related to the violation; and
  - (8) Whether the responsible party fully rectified the violation within thirty (30) days of notice of violation.
- (B) For the purpose of assessing a penalty, each day a discharge or activity is in violation of this Chapter or an applicable certification condition or requirement is a separate violation of this Chapter or the certification conditions and requirements.

**19-06.400 Remediation.**

The area of any Regulated Surface Water affected by a violation of this Chapter or applicable certification conditions or requirements shall be remediated, restored, and/or mitigated by the responsible party in accordance with the terms and provisions of this Chapter and a plan approved by the Department.

**19-06.410 Damages.**

In addition to any other remedies provided by this Chapter for violations of this Chapter or applicable certification conditions or requirements, including but not limited to penalties assessed pursuant to STC 19-06.390 and remediation pursuant to STC 19-06.400, the Department is authorized to assess and to recover by means of a civil suit filed in Swinomish Tribal Court, on behalf of the Tribe, damages in the following amounts:

- (1) Double the economic benefit the violator gained by non-compliance with this Chapter or applicable certification conditions or requirements, as determined by the Department;
- (2) Double the harm the Tribe sustained due to the person's violation of this Chapter or applicable certification conditions or requirements, as determined by the Department; and/or
- (3) Double the amount of money the Tribe expended in mitigating the environmental effects of the violation of this Chapter or applicable certification conditions or requirements, as determined by the Department.

*Subchapter V – Hearings, Appeals, Computation of Time, and Law Applicable*

**19-06.420 Request for Planning Commission Hearing.**

- (A) Any person aggrieved by a decision or action of the Department pursuant to this Chapter may request a hearing before the Planning Commission within thirty (30) calendar days from the date of notice of the challenged decision or within thirty (30) calendar days from the date of the challenged action, as applicable.
- (B) A request for a Planning Commission hearing shall be in writing and filed with the Department. The request shall state:
  - (1) The name and current mailing address of the person filing the request;
  - (2) The reasons for the request, specifically identifying any claimed errors involving any of the following in the challenged decision or action:
    - (a) Conclusions as to Swinomish law, plans or policies, as to Federal law, or in the application of such law, plans or policies;
    - (b) Any factual findings or statements of facts; or
    - (c) Any arbitrary or capricious action; and
  - (3) Any way in which the party requesting a hearing has been or will be substantially prejudiced by the challenged decision or action.

**19-06.430 Hearings before the Planning Commission.**

- (A) All Planning Commission hearings held pursuant to this Chapter shall be conducted in accordance with the provisions of this Section.
- (B) *Time for Hearing.* Planning Commission hearings shall be held within sixty (60) calendar days of the date on which the request for hearing was filed.
- (C) *Notice of Hearing.* At least fifteen (15) calendar days prior to the Planning Commission hearing, the Department shall:

- (1) Provide the party who requested the hearing notice of the Planning Commission hearing by U.S. mail delivered to the current mailing address listed on the request; and
  - (2) Provide public notice of the Planning Commission hearing by publication in Tribal and/or local newspaper legal notices, and/or web-based media.
- (D) *Public Hearing Procedures.* Planning Commission hearings shall proceed in the following manner:
- (1) The Department shall provide the Planning Commission:
    - (a) A copy of the request;
    - (b) A written statement prepared by the Department describing the challenged decision or action, the reasons the Department made or took the challenged decision or action, and the Department's recommendation with respect to the request; and
    - (c) Copies of any documents relating to the challenged decision or action, including but not limited to supporting documents.
  - (2) Planning Commission members may ask questions of Department staff.
  - (3) The party who requested the hearing may submit written documents or materials in response to the Department's submissions and recommendation.
  - (4) Planning Commission members may ask questions of the party who requested the hearing.
  - (5) Members of the public may offer comments for consideration by the Planning Commission. Questions or comments from the public shall be addressed to the Planning Commission and may, at the discretion of the Chair of the Commission, be directed by the Chair to Department staff or the party that requested the hearing.
  - (6) Department staff and the party who requested the hearing may, at the discretion of the Chair, respond to statements made by the other party or clarify their own statements.
  - (7) Closing of the evidentiary portion of the hearing and deliberation on the hearing by the Planning Commission.
- (E) *Public Record.* The Planning Commission shall make a written or audio record of all hearings.



- (F) *Basis of decision.* The Planning Commission shall review the record of the hearing and the documents submitted at the hearing, and shall base its decision upon such record, applying the relevant provisions of Tribal and Federal law and considering the best interests of the Tribe.
- (G) *Written Decision.* The Planning Commission shall issue its decision in writing. Copies shall be provided to the Department and the party requesting the hearing, and shall be available for public inspection and copying at reproduction cost. The decision shall be issued within thirty (30) calendar days of the date of the hearing.

**19-06.440 Appeals of Planning Commission Decisions.**

- (A) Any person aggrieved by a decision of the Planning Commission may appeal that decision to the Senate by filing a written notice of appeal within thirty (30) calendar days from the date of notice of the decision; provided, however, that this Section is not applicable to recommendations made by the Planning Commission to the Senate.
- (B) The Senate shall make a decision on appeal based on the administrative record of the proceedings before the Planning Commission. The Senate shall not receive or consider any additional evidence not contained in the administrative record of the proceedings before the Planning Commission, and shall not consider any issue that was not raised by the appealing party in the administrative proceedings before the Planning Commission. The Senate shall issue a decision within sixty (60) calendar days of the date on which the notice of appeal was filed.
- (C) The Senate shall affirm the decision of the Planning Commission unless the appealing party demonstrates to the Senate both (1) and (2) below:
  - (1) The decision of the Planning Commission is either:
    - (a) Contrary to Swinomish or Federal law; or
    - (b) Arbitrary or capricious; or
    - (c) Not supported by substantial evidence in the record of proceedings held before the Planning Commission; or
    - (d) Not in the best interests of the Tribe; and
  - (2) The appealing party has been or will be substantially prejudiced by the challenged action.
- (D) If the Senate determines that the appealing party has met the burden set forth in Subsection (C)(1) and (2), then the Senate, in its discretion, may issue a decision on the merits or may send the matter back to the Planning Commission for further proceedings in accordance with the Senate's ruling.

**19-06.450 Appeals of Senate Decisions.**

- (A) Any person aggrieved by a decision of the Senate pursuant to this Chapter may appeal such decision to Tribal Court within thirty (30) calendar days from the date of notice of the decision. Any appeal to the Tribal Court shall be in writing and shall identify the name of the party petitioning for review, the interest of the petitioning party in the decision appealed from, and shall name as respondent only the Department Director, in his or her official capacity.
- (B) The review by the Tribal Court shall be limited to the evidentiary record made in the administrative proceedings held before the Planning Commission. The Department may charge an appealing party the reasonable costs of preparing copies of the administrative record or of transcribing a recording of a hearing for the Tribal Court and for the appealing party.
- (C) The Tribal Court shall not receive or consider any additional evidence not contained in the administrative record of the proceedings before the Planning Commission. The Tribal Court shall not consider any issue that was not raised by the appealing party in the administrative proceedings before Planning Commission and before the Senate.
- (D) Tribal Court review shall be conducted by the Court, without a jury. The review shall be in accordance with those provisions of the Swinomish Rules of Civil Procedure that are determined to be applicable by the Tribal Court.
- (E) Any appeal from a decision of the Tribal Court shall be filed and adjudicated in accordance with the Swinomish Rules of Appellate Procedure.
- (F) The review by the Swinomish Tribal Court of Appeals shall be limited to the evidentiary record made in the administrative proceedings held before the Planning Commission. The Court of Appeals shall not consider any issue that was not raised by the appealing party in both the administrative proceedings before the Planning Commission and the Senate and in the record of proceedings before the Tribal Court.
- (G) The Tribal Court and the Court of Appeals shall affirm the decision of the Senate upon review unless the appealing party demonstrates to the Court both (G)(1) and (2):
  - (1) The decision of the Senate is either:
    - (a) Contrary to Swinomish or Federal law;
    - (b) Arbitrary or capricious; or
    - (c) Not supported by substantial evidence in the record of proceedings held before the Senate; and

- (2) The appealing party has been or will be substantially prejudiced by the challenged action.
- (H) If the Court determines that the appealing party has met the burden set forth in Subsection (G)(1) and (2), then the Court shall reverse the decision appealed from and shall remand the matter to the Senate for further proceedings in accordance with the Court's ruling. The Senate, in its discretion, may send the matter to the Planning Commission for further proceedings in accordance with the Court's ruling. The Tribal Court and the Court of Appeals shall not have authority to issue a permit, impose a penalty or to grant an exemption, exception or a variance under this Chapter, and shall not have authority to grant any relief other than an order reversing the decision appealed from and remanding the matter to the Senate for further proceedings.
- (I) The decision of the Court of Appeals shall be final, and is not subject to further review.

**19-06.460 Time, Notice of Decision, and Finality.**

- (A) The date of notice of any decision or action shall be the date on which the decision is mailed by the body making the decision to the last known address of the applicant. The date of notice shall be stated in the decision.
- (B) All time periods set forth in Sections 19-06.430 through 19-06.450 shall be calculated in accordance with STC 3-02.100 – “Computation and Extension of Time,” of the Swinomish Rules of Civil Procedure.
- (C) Any decision issued by any person or body under this Chapter shall inform the recipient of any right to request a hearing or to appeal that is provided by this Chapter, of the procedure for requesting a hearing or filing an appeal, and of the time period within which such a request for hearing or notice of appeal must be filed.
- (D) If a decision or action of the Department, Planning Commission, Senate, or Tribal Court is not appealed within the time period set forth in this Subchapter, then that decision is final and conclusive, and is not subject to further review.

**19-06.470 Tribal Administrative Remedies and Tribal Court.**

All cases or controversies arising under the terms and provisions of this Chapter shall be heard only in the Swinomish Tribal Court, and only as provided in this Subchapter. An aggrieved person must exhaust any and all administrative remedies provided in this Chapter before seeking review in Tribal Court.

**19-06.480 Sovereign Immunity.**

The sovereign immunity of the Tribe is not in any way waived or limited by this Chapter, or by any appeal commenced pursuant to this Chapter, and nothing in this Chapter shall

constitute or be construed as a waiver of the sovereign immunity of the Tribe. Such sovereign immunity shall extend to the Tribe, the Senate, the Planning Commission, the Department, the Department Director, all Tribal officials, employees, staff, and agents, as to all actions taken pursuant to this Chapter, or taken in, pursuant to, or concerning, the administration or enforcement of this Chapter, and as to all actions taken pursuant to any authority of any action, decision or order authorized by this Chapter.

*Subchapter VI – Effective Date, Repealer, and Severability*

**19-06.490 Effective Date.**

This Chapter shall become effective immediately upon approval of the Senate and the Regional Administrator or his or her designee.

**19-06.500 Repealer.**

This Chapter repeals and supersedes all prior inconsistent provisions of a Tribal ordinance or resolution, the Swinomish Tribal Code, or a part thereof, provided, however, that the repeal or amendment of any prior inconsistent provision of a Tribal ordinance or resolution, the Swinomish Tribal Code, or a part thereof by this Chapter shall not affect, release, or extinguish any civil or criminal liability, penalty, or forfeiture incurred, or any right to prosecute or recover based on the same accrued, under such provision prior to the repeal or amendment thereof, and such provision shall be treated as still remaining in force as to liabilities, penalties, forfeitures, and rights arising under such provision, and the repeal or amendment of such provision shall not affect any proper prosecution or action thereunder.

**19-06.510 Severability.**

If any provision of this Chapter or its application to any person or circumstances is held invalid, the remainder of the Chapter, or the application of the provision to other persons or circumstances is not affected and to this end the provisions of this Title are declared to be severable.

*Tables*

(1) Table 1 Use Designations for Fresh Water	Lone Tree Creek	SneeOosh Creek	Skagit River North Fork	Munks Creek	Fornsby Creek
<b>Aquatic life uses</b>					
Salmon and Trout Fish Use	✓	✓	✓	✓	✓
<b>Fish &amp; Shellfish Harvest</b>	✓	✓	✓	✓	✓
<b>Water Contact uses</b>					
Primary Contact	✓	✓	✓	✓	✓
<b>Water supply uses</b>					
Domestic Water					✓
<b>Miscellaneous uses</b>					
Aesthetic Quality	✓	✓	✓	✓	✓
Spiritual & Cultural	✓	✓	✓	✓	✓
Wildlife	✓	✓	✓	✓	✓
Commerce, Navigation, and Boating			✓		

(2) Table 2 Use Designations for Marine Water	Skagit Bay*	Swinomish Channel	Padilla Bay
<b>Aquatic life uses</b>			
Fish use	✓	✓	✓
<b>Fish &amp; Shellfish Harvest</b>	✓	✓	✓
<b>Water Contact uses</b>			
Primary Contact	✓	✓	✓
<b>Miscellaneous uses</b>			
Aesthetic Quality	✓	✓	✓
Spiritual & Cultural	✓	✓	✓
Wildlife	✓	✓	✓
Commerce, Navigation, and Boating	✓	✓	✓
Seafood Processing		✓	
(*) Includes Turners, Similk, and Kiket Bays			

(3) Table 3 Applicability of Criteria to Freshwater Designated Uses									
Criteria	Designated Use	Aquatic Life Use: Salmon and Trout Fish Use	Fish & Shellfish Harvesting Use	Water Contact Uses: Primary Contact	Domestic Water Supply Use	Misc. Uses			
						Aesthetic Value	Spiritual & Cultural	Wildlife	Commerce, Navigation, and Boating
Aquatic Life									
Temperature		✓							
Dissolved Oxygen		✓							
Turbidity		✓							
pH		✓							
Fish & Shellfish									
Bacteria (Fecal coliform)			✓						
Water Contact									
Bacteria (Enterococci)				✓			✓		
Narrative									
Aesthetic Quality.		✓	✓	✓	✓	✓	✓	✓	✓
Biological		✓	✓			✓	✓	✓	
Wetlands		✓	✓	✓	✓	✓	✓	✓	
Wildlife								✓	
Toxic Pollutants, Aquatic Life Criteria									
Acute		✓	✓		✓	✓	✓	✓	
Chronic		✓	✓		✓	✓	✓	✓	
Toxic Pollutants, Human Health Criteria									
Water & Organisms			✓		✓	✓	✓		
Organisms Only			✓		✓	✓	✓		

(4) Table 4 Aquatic life Temperature Criteria in Fresh Water	
Category	Highest 7-DADMax
Salmon and Trout Fish Use	16 °C (60.8 °F)

(5) Table 5 Aquatic life Dissolved Oxygen Criteria in Fresh Water	
Category	Lowest 1-Day Minimum
Salmon and Trout Fish Use	9.5 mg/L

(6) Table 6 Aquatic life pH Criteria in Fresh Water	
Category	pH units
Salmon and Trout Fish Use	May not be less than 6.5 or greater than 8.5, with a human-caused variation within the above range of less than 0.2 units.

(7) Table 7 Fish & Shellfish Harvesting Use Bacteria Criteria in Fresh Water	
Category	Bacteria Indicator
Fish & Shellfish Harvesting Use	Fecal coliform organism levels must not exceed a geometric mean value of 14 colonies/100mL, with not more than 10 percent of all samples (or any single sample when less than ten samples points exist) obtained for calculating the geometric mean value exceeding 43 colonies/100mL.

(8) Table 8 Water Contact Bacteria Criteria in Fresh Water	
Category	Bacteria Indicator
Primary Contact Use	Enterococci organism levels must not exceed a geometric mean (GM) value of 30 colonies/100mL over a 30 day rolling average period, with not more than 10 percent of all samples (or any single sample when less than ten samples points exist) obtained for calculating the geometric mean value exceeding the statistical threshold value (STV) of 110 colonies/100mL.

(9) Table 9 Applicability of Criteria to Marine Water Designated Uses									
Criteria	Designated Use	Aquatic Life Use: Fish use	Fish & Shellfish Harvesting Use	Water Contact Use : Primary Contact	Misc. Uses				
					Aesthetic Value	Spiritual & Cultural	Wildlife Habitat	Commerce, Navigation, and Boating	Seafood Processing
Aquatic Life									
Temperature		✓							
Dissolved Oxygen		✓							
Turbidity		✓							
Total Dissolved Gas		✓							
pH		✓							
Fish & Shellfish									
Bacteria (Fecal coliform)			✓						
Water Contact									
Bacteria (Enterococci)				✓		✓			
Narrative									
Aesthetic Quality.		✓	✓	✓	✓	✓	✓	✓	✓
Biological		✓	✓		✓	✓	✓		
Wetlands		✓	✓	✓	✓	✓	✓		
Wildlife							✓		
Toxic Pollutants, Aquatic Life Criteria									
Acute		✓	✓		✓	✓	✓	✓	
Chronic		✓	✓		✓	✓	✓	✓	
Toxic Pollutants, Human Health Criteria									
Water & Organisms			✓		✓	✓			✓
Organisms			✓		✓	✓			✓



(10) Table 10 Aquatic life Temperature Criteria in Marine Water	
Category	Highest 1-DADMax
Fish use	16 °C (55.4 °F)

(11) Table 11 Aquatic life Dissolved Oxygen Criteria in Marine Water	
Category	Lowest 1-day Minimum
Fish use	6.0 mg/L

(12) Table 12 Aquatic life pH Criteria in Marine Water	
Category	pH Units
Fish use	May not be less than 7.0 or greater than 8.5 with a human-caused variation within above range of 0.2 units.

(13) Table 13 Fish & Shellfish Harvesting Use Bacteria Criteria in Marine Water	
Category	Bacteria Indicator
Fish & Shellfish Harvesting Use	Fecal coliform organism levels shall neither exceed a geometric mean of 14 colonies/100 mL, nor have more than 10 percent of all samples (or any single sample when less than ten sample points exist) obtained for calculating the geometric mean value exceed 43 colonies/ 100 mL.

(14) Table 14 Water Contact Bacteria Criteria in Marine Water	
Category	Bacteria Indicator
Primary Contact Use	Enterococci organism levels must not exceed a geometric mean (GM) value of 30 colonies/100mL over a 30 day rolling average period, with not more than 10 percent of all samples (or any single sample when less than ten samples points exist) obtained for calculating the geometric mean value exceeding the statistical threshold value (STV) of 110 colonies/100mL.

(15) Table 15 Water Quality Criteria for Toxic Pollutants

The concentration for each compound listed in this table is a criterion for aquatic life or human health protection. Selecting values for regulatory purposes will depend on the most sensitive beneficial use to be protected and the level of protection necessary for aquatic life and human health as specified within this table. All concentrations, except ammonia, asbestos and methylmercury, are micrograms per liter ( $\mu\text{g/L}$ ).

Compound Name (or Class)	Fresh Water		Marine Water		Human Health Criteria	
	Acute <sup>a</sup> Criteria	Chronic <sup>b</sup> Criteria	Acute <sup>a</sup> Criteria	Chronic <sup>b</sup> Criteria	Water and <sup>c</sup> Organisms	Organisms Only <sup>d</sup>
Acenaphthene					5	5
Acrolein	3.0	3.0			2.4	21
Acrylonitrile					0.04	0.39
Aldrin	3.0 <sub>e</sub>		1.3 <sub>e</sub>		$3 \times 10^{-8}$	$3 \times 10^{-8}$
Ammonia, total	f	g	k	k		
Ammonia, unionized (mg/L)			0.233 <sub>k</sub>	0.035 <sub>k</sub>		
Anthracene					20.2	20.5
Antimony					1.89 <sub>t</sub>	16.7 <sub>t</sub>
Arsenic	340 <sub>h,l</sub>	150 <sub>h,l</sub>	69 <sub>h,l</sub>	36 <sub>h,l</sub>	0.0023 <sub>h</sub>	0.0027 <sub>h</sub>
Asbestos					7 MFL <sub>i</sub>	
Benzene					0.31	0.85
Benzidine					$9.6 \times 10^{-5}$	.0006
Benz(a)Anthracene					$7.3 \times 10^{-5}$	$7.32 \times 10^{-5}$
Benzo(a)Pyrene					$7.3 \times 10^{-6}$	$7.32 \times 10^{-6}$
Benzo(b)Fluoranthene,					$7.3 \times 10^{-5}$	$7.32 \times 10^{-5}$
Benzo(k)Fluoranthene					$7.3 \times 10^{-4}$	$7.32 \times 10^{-4}$
BHC-Alpha Lindane					$2.1 \times 10^{-5}$	$2.1 \times 10^{-5}$
BHC-Beta Lindane					$7.14 \times 10^{-4}$	$7.5 \times 10^{-4}$
BHC-Gamma Lindane	0.95		0.16 <sub>e</sub>		0.24	0.24
Bis-2-ethylhexyl phthalate					0.021	0.021
Bromoform					3.0	6.0
Butylbenzyl Phthalate					.0058	.0058
Cadmium	hardness-based <sub>i,l</sub>	hardness-based <sub>i,l</sub>	35 <sub>i</sub>	8.3 <sub>i</sub>		
Carbaryl	2.1	2.1	1.6			
Carbon Tetrachloride					0.15	0.24
Chlordane	2.4 <sub>e</sub>	0.0043 <sub>e</sub>	0.09 <sub>e</sub>	0.004 <sub>e</sub>	$1.5 \times 10^{-5}$	$1.5 \times 10^{-5}$
Chloride	860,000	230,000				
Chlorine	19	11	13	7.5		
Chlorobenzene					31	44
Chlorodibromomethane					0.39	1.03
Chloroform					37	122
Chloroisopropyl Ether (Bis 2)					74	113
Chloroethyl Ether (Bis 2)					0.02	0.119
Chloronaphthalene, 2-					62.2	64.5
Chlorophenol, 2-					17	43
Chlorpyrifos	0.083	0.041	0.011	0.0056		
Chromium (Hex)	16 <sub>i</sub>	11 <sub>i</sub>	1100 <sub>i</sub>	50 <sub>i</sub>		
Chromium (Tri)	hardness-based <sub>i,l</sub>	hardness-based <sub>i,l</sub>				
Chrysene					0.0073	0.0073
Copper	o	o	4.8 <sub>i</sub>	3.1 <sub>i</sub>	1,300	

Compound Name (or Class)	Fresh Water		Marine Water		Human Health Criteria	
	Acute <sup>a</sup> C riteria	Chronic <sup>b</sup> Criteria	Acute <sup>a</sup> Cri teria	Chronic <sup>b</sup> C riteria	Water and <sup>c</sup> Organisms	Organisms Only <sup>d</sup>
Cyanide	22	5.2	1.0	1.0	2.8	25
Diazinon	0.17	0.17	0.82	0.82		
DDT, 4,4'-	1.1 <sub>e,q</sub>	0.001 <sub>e,q</sub>	0.13 <sub>e,q</sub>	0.001 <sub>e,q</sub>	$9.0 \times 10^{-7}$	$9.0 \times 10^{-7}$
DDT Metabolite (DDE, 4,4'-)					$6.2 \times 10^{-7}$	$6.2 \times 10^{-7}$
DDT Metabolite (DDD, 4,4'-)					$5.4 \times 10^{-6}$	$5.4 \times 10^{-6}$
Demeton		0.1		0.1		
Dibenzo(a,h)Anthracene					$7.3 \times 10^{-6}$	$7.3 \times 10^{-6}$
Di-n-butyl Phthalate					1	1
Dichlorobenzene, 1,2- (o)					159	176
Dichlorobenzene, 1,3- (m)					0.6	0.64
Dichlorobenzene, 1,4- (p)					41	46
Dichlorobenzidine, 3,3-					0.0069	0.008
Dichlorobromomethane					0.51	1.43
Dichloroethane, 1,2-					0.24	1.28
Dichloroethylene, 1,2-trans-					69	199
Dichloroethylene, 1,1-					204	876
Dichlorophenol, 2,4-					2.5	3.0
Dichloropropane, 1,2-					0.51	1.64
Dichloropropylene, 1,3-					0.16	0.62
Dieldrin	0.24	0.056	0.71 <sub>e</sub>	0.0019 <sub>e</sub>	$5.0 \times 10^{-8}$	$5.0 \times 10^{-8}$
Diethyl Phthalate					36	36
Dimethyl Phenol, 2,4-					60	135
Dimethyl Phthalate					104	104
Dinitrophenol, 2,4-					6.8	19
Dinitrophenol, 2-, Methyl 4,6-					0.8	1.4
Dinitrotoluene, 2,4-					0.028	0.089
Dioxin (2,3,7,8-TCDD)					$2.67 \times 10^{-10}$ <sub>t</sub>	$2.67 \times 10^{-10}$ <sub>t</sub>
Diphenylhydrazine, 1,2-					0.0083	0.011
Endosulfan-Alpha					1.37	1.43
Endosulfan-Beta					2.1	2.25
Endosulfan Sulfate					1.95	2.07
Endosulfan-Alpha+Beta	0.22 <sub>e</sub>	0.056 <sub>e</sub>	0.034 <sub>e</sub>	0.0087 <sub>e</sub>		
Endrin	0.086	0.036	0.037 <sub>e</sub>	0.0023 <sub>e</sub>	$1.6 \times 10^{-3}$	$1.6 \times 10^{-3}$
Endrin Aldehyde					0.07	0.071
Ethylbenzene					6	7
Fluoranthene					1.1	1.1
Fluorene					3.1	3.2
Guthion		0.01		0.01		
Heptachlor	0.52 <sub>e</sub>	0.0038 <sub>e</sub>	0.053 <sub>e</sub>	0.0036 <sub>e</sub>	$2.4 \times 10^{-7}$	$2.4 \times 10^{-7}$
Heptachlor Epoxide	0.52 <sub>e</sub>	0.0038 <sub>e</sub>	0.053 <sub>e</sub>	0.0036 <sub>e</sub>	$1.6 \times 10^{-6}$	$1.6 \times 10^{-6}$
Hexachlorobenzene					$3.3 \times 10^{-6}$	$3.3 \times 10^{-6}$
Hexachlorobutadiene					$5.8 \times 10^{-4}$	$5.8 \times 10^{-4}$
Hexachlorocyclopentadiene					0.232	0.234
Hexachloroethane					0.0065	0.0065
Indeno (1,2,3-cd) Pyrene					$7.3 \times 10^{-5}$	$7.3 \times 10^{-5}$
Iron		1,000 <sub>p</sub>			300	
Isophorone					22	99
Lead	hardness- based <sub>i,l</sub>	hardness- based <sub>i,l</sub>	210 <sub>i</sub>	8.1 <sub>i</sub>		
Malathion		0.1		0.1		
Manganese					50	100
Mercury <sub>m</sub>	2.4 <sub>p</sub>	.012 <sub>p</sub>	2.1 <sub>p</sub>	.025 <sub>p</sub>	0.0054	0.0055
Methylmercury						0.018 mg/kg <sub>s</sub>

Compound Name (or Class)	Fresh Water		Marine Water		Human Health Criteria	
	Acute <sup>a</sup> C riteria	Chronic <sup>b</sup> Criteria	Acute <sup>a</sup> Cri teria	Chronic <sup>b</sup> C riteria	Water and <sup>c</sup> Organisms	Organisms Only <sup>d</sup>
Methoxychlor		0.03		0.03		
Methyl Bromide					91	629
Methylene Chloride					6.8	41
Mirex		0.001		0.001		
Nickel	hardness- based <sub>i,l</sub>	hardness- based <sub>i,l</sub>	74 <sub>i</sub>	8.2 <sub>i</sub>	15.2	18
Nitrates					10,000	
Nitrobenzene					7.9	30
Nitrosodimethylamine, N-					0.00052 <sub>t</sub>	0.16 <sub>t</sub>
Nitrosodi-n-Propylamine, N-					0.0033 <sub>t</sub>	0.026 <sub>t</sub>
Nitrosodiphenylamine, N-					0.3 <sub>t</sub>	0.31 <sub>t</sub>
Nonylphenol	2.8	6.6	7	1.7		
Parathion	0.065	0.013				
Total PCBs		0.014 <sub>r</sub>		0.03 <sub>r</sub>	3.3 x 10 <sup>-6</sup> <sub>t</sub>	3.3 x 10 <sup>-6</sup> <sub>t</sub>
Pentachlorophenol	19 <sub>n</sub>	15 <sub>n</sub>	13	7.9	0.0015	0.0015
Phenol					2,600	14,300
Phosphorus Elemental				0.1		
Pyrene					1.4	1.5
Selenium		5.0 <sub>p</sub>	290 <sub>p</sub>	71 <sub>p</sub>	16.5	43.4
Silver	hardness- based <sub>i,l</sub>		1.9 <sub>i</sub>			
Sulfide - Hydrogen Sulfide		2.0		2.0		
Tetrachloroethane, 1,1,2,2,-					0.068	0.14
Tetrachloroethylene					1.4	1.6
Thallium					0.02 <sub>t</sub>	0.02 <sub>t</sub>
Toluene					18	27
Toxaphene	0.73	0.0002	0.21	0.0002	4 x 10 <sup>-5</sup>	4 x 10 <sup>-5</sup>
Tributyltin (TBT)	0.46	.072	0.42	0.0074		
Trichlorobenzene, 1,2,4-					0.005	0.005
Trichloroethane, 1,1,2,-					0.23	0.47
Trichloroethylene					0.22	0.36
Trichlorophenol, 2,4,6-					0.14	0.15
Vinyl Chloride					0.015	0.087
Zinc	hardness- based <sub>i,l</sub>	hardness- based <sub>i,l</sub>	90 <sub>i</sub>	81 <sub>i</sub>	228 <sub>t</sub>	266 <sub>t</sub>

### Footnotes for Table 16:

- Acute criteria: The Criteria Maximum Concentration (CMC) is an estimate of the highest concentration of a material in surface water to which an aquatic community can be exposed briefly without resulting in an unacceptable effect. With the exception of those pollutants which cite to footnote e, the CMC concentration is expressed as a one hour average not to be exceeded more than once in a three year period.
- Chronic criteria: The Criterion Continuous Concentration (CCC) is an estimate of the highest concentration of a material in surface water to which an aquatic community can be exposed indefinitely without resulting in an unacceptable effect. With the exception of those pollutants which cite to footnote e, the CCC concentration is expressed as a four day average not to be exceeded more than once in a three year period.

- c. Water and Organisms: Values represent the maximum ambient water concentration for consumption of both water and fish or other aquatic organisms.
- d. Organisms Only: Values represent the maximum ambient water concentration for consumption of fish or other aquatic organisms.
- e. The acute values shown are expressed as maximum values not to be exceeded. The chronic values are expressed as a 24-hour average not to be exceeded.
- f. Acute Criterion: The one-hour average concentration of total ammonia nitrogen (in mg N/L) does not exceed, more than once every three years on the average, the CMC (acute criterion) calculated using the following equations.

Where salmonid fish are present:

$$CMC = MIN \left( \left( \frac{0.275}{1 + 10^{7.204 - pH}} + \frac{39.0}{1 + 10^{pH - 7.204}} \right), \right. \\ \left. \left( 0.7249 \times \left( \frac{0.0114}{1 + 10^{7.204 - pH}} + \frac{1.6181}{1 + 10^{pH - 7.204}} \right) \right. \right. \\ \left. \left. \times (23.12 \times 10^{0.036 \times (20 - T)}) \right) \right)$$

Or where salmonid fish are not present:

$$CMC = 0.7249 \times \frac{0.0114}{1 + 10^{7.204 - pH}} + \frac{1.6181}{1 + 10^{pH - 7.204}} \\ \times MIN(51.93, 23.12 \times 10^{0.036 \times (20 - T)})$$

Tables 5a (salmonids present) and 5b (salmonids absent) of the EPA ammonia criteria document, *Aquatic Life Ambient Water Quality Criteria for Ammonia – Freshwater, 2013* (EPA 822-R-13-001, April 2013) may be used to determine CMC values. When using these tables, measured temperature and pH values that fall between available table values should be rounded up to yield protective criteria.

- g. Chronic Criterion: The 30-day average concentration of total ammonia nitrogen (in mg N/L) does not exceed, more than once every three years on the average, the CCC (chronic criterion) calculated using the following equation.

$$CCC = 0.8876 \times \left( \frac{0.0278}{1 + 10^{7.688 - pH}} + \frac{1.1994}{1 + 10^{pH - 7.688}} \right) \times (2.126 \times 10^{0.028 \times (20 - MAX(T, 7))})$$

In addition, the highest four-day average within the 30-day period should not exceed 2.5 times the CCC more than once in three years on average.

Table 6 of the EPA ammonia criteria document, *Aquatic Life Ambient Water Quality Criteria for Ammonia – Freshwater, 2013* (EPA 822-R-13-001, April 2013) may be used to determine CCC values. When using this table, measured temperature and pH values that fall between available table values should be rounded up to yield protective criteria.

- h. The aquatic life criteria were derived from data for arsenic (III), but are applied as total arsenic. The human health criteria refer to the inorganic form only.
- i. MFL = Million fibers per liter, with fiber length >10 microns.
- j. Fresh water aquatic life criteria for these metals are expressed as a function of total hardness (expressed as mg/L CaCO<sub>3</sub>) according to the following equations. The factors for the equations are provided in the following matrix.

Acute criterion (dissolved) =  $\exp\{m_A[\ln(\text{hardness})]+b_A\}$  x conversion factor

Chronic criterion (dissolved) =  $\exp\{m_C[\ln(\text{hardness})]+b_C\}$  x conversion factor

Factors for Calculating Metals Criteria						
Metal	m <sub>A</sub>	b <sub>A</sub>	m <sub>C</sub>	b <sub>C</sub>	Conversion Factors	
					Acute	Chronic
Cadmium	0.8403	-3.572	0.7409	-4.719	*	*
Chromium (III)	0.8190	3.7256	0.8190	0.6848	0.316	0.860
Lead	1.273	-1.460	1.273	-4.705	*	*
Nickel	0.8460	2.255	0.8460	0.0584	0.998	0.997
Silver	1.72	-6.59	N/A	N/A	0.85	N/A
Zinc	0.8473	0.884	0.8473	0.884	0.978	0.986

Note to the table: The term “exp” represents the base e exponential function.

\* The conversion factors (CF) for cadmium and lead are hardness dependent. Conversion factors can be calculated for any hardness using the following equations:

Cadmium Acute CF =  $1.136672 - [(\ln \text{ hardness}) (0.041838)]$

Cadmium Chronic CF =  $1.101672 - [(\ln \text{ hardness}) (0.041838)]$

Lead (Acute and Chronic) CF =  $1.46203 - [(\ln \text{ hardness}) (0.145712)]$

- k. To develop total ammonia criteria use Ambient Water Quality Criteria for Ammonia (Saltwater) – 1989 (EPA 440/5-88-04). Ammonia criteria for saltwater are for unionized ammonia. Unionized ammonia is the most toxic form of ammonia to aquatic life. In saltwater, the fraction of the total ammonia that is unionized depends mainly on the pH, temperature and salinity of the water. For implementation purposes, the unionized ammonia criteria are generally converted to total ammonia to be consistent with standard water quality monitoring methods.
- l. These freshwater and marine criteria for metals are expressed in terms of the dissolved metal in the water column.
- m. If the ambient concentration of total mercury exceeds 0.012 µg/L more than once in a 3-year period in the ambient water, the edible portion of aquatic species of concern must be

analyzed to determine whether the concentration of methyl mercury exceeds the FDA action level (1.0 mg/kg). If the FDA action level is exceeded, the Tribe must notify the EPA Region 10 Regional Administrator, initiate a site-specific criterion or a revision of its mercury criterion so as to protect designated uses, and take other appropriate action, such as issuance of a fish consumption advisory for the affected area.

- n. Fresh water aquatic life criteria for pentachlorophenol are expressed as a function of pH, and are calculated as follows (values in the table correspond to a pH of 7.8):

Acute criterion =  $\exp(1.005(\text{pH}) - 4.869)$

Chronic criterion =  $\exp(1.005(\text{pH}) - 5.134)$

- o. The available toxicity data, when evaluated using the procedures described in the “Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses” indicate that freshwater aquatic life should be protected if the 24-hour average and four-day average concentrations do not respectively exceed the acute and chronic criteria concentrations calculated by the Biotic Ligand Model.

A return interval of 3 years between exceedances of the criterion continues to be EPA's general recommendation. However, the resilience of ecosystems and their ability to recover differ greatly. Therefore, scientific derivation of alternative frequencies for exceeding criteria may be appropriate. See Aquatic Life Ambient Freshwater Quality Criteria – Copper, 2007 Revision (February 2007, EPA-822-R-07-001).

Freshwater copper criteria shall be developed using EPA's current Biotic Ligand Model (BLM current criteria document: EPA-822-R-07-001). When criteria are developed such criteria must be protective of aquatic life for all expected water quality conditions. A minimum number of 24X samples over two years, reflecting intra-annual or seasonal flow and spatial variability related water quality variability must be collected. If inter-annual or spatial variability in water quality occurs regularly, the monitoring plan shall reflect these characteristics. In the absence of sufficient ambient data for any of the BLM input parameters, default values corresponding to the 10<sup>th</sup> percentile of the applicable ecoregional dataset for the relevant stream order for each missing parameter shall be used. Default values shall be found in EPA's Missing Parameters Technical Support Document (EPA 820-R-15-106), hereby incorporated by reference. All BLM criteria shall be made available on the Tribe's website.

- p. This criterion is expressed in terms of the total recoverable metal in the water column.
- q. This criterion applies to DDT and its metabolites (i.e., the total concentration of DDT and its metabolites should not exceed this value).
- r. This criterion applies to total PCBs (e.g., the sum of all congeners, isomers, homologs or Aroclors).

- s. For methylmercury implementation guidance see *Guidance for Implementing the January 2001 Methylmercury Water Quality Criterion*, EPA 823-R-10-001, April 2010. If fish tissue data is not available then the water column criteria for mercury should be used to protect for human health, until fish tissue data is gathered.
- t. No BAF is currently available for this chemical. The values were calculated using a BCF.

#### *Appendix A- Guidance for Antidegradation Implementation*

This Guidance provides detailed procedures and methods to be followed by the Swinomish Department of Environmental Protection (Department) in implementing the Tribe's Antidegradation Policy. The Department will conduct some level of antidegradation review for all regulated activities (e.g. activities subject to CWA section 402 permits, CWA section 404 permits, Federal Energy Regulatory Commission licenses, and certification in accordance with CWA section 401) involving a discharge to Regulated Surface Waters. The specifics of the review will depend upon the waterbody segment that would be affected, the Tier of antidegradation protection applicable to that waterbody segment, and the extent to which existing water quality would be degraded. Tier 1 review shall be performed for all new or reissued permits and licenses. Activity-specific reviews shall be conducted using these procedures and the Antidegradation Review Worksheet included as Appendix B.

#### (A) Tier 3 Outstanding Tribal Resource Waters

##### (1) Point Sources of Pollution to Outstanding Tribal Resource Waters (OTRWs)

- (a) Direct Point Sources: No new direct point sources of pollution shall be permitted for OTRWs except as provided in Section (A)(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 (A)(3) of this Appendix.
- (b) 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 (A)(3) of this Appendix. Such effect on water quality shall be determined by the Tribe. 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.

- (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 increase 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. 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.

- (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 Department of Environmental Protection, of ambient conditions and potential effects of the proposed activity. Temporary is generally considered to be weeks and months, not years. 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; and short-term and long-term effects on existing uses or water quality goals. Water quality may not be degraded below the water quality criteria to protect designated uses or below levels necessary to protect existing uses.

(B) Tier 2 High Quality Waters

- (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 High Quality Waters.
- (2) General Prohibition of Significant Degradation: Where a water body qualifies as a Tier 2 High Quality Water as described in 19-06.210, no significant water quality degradation will be allowed unless the Tribe finds, after public participation and intergovernmental coordination, that:
  - (a) Such degradation is necessary to provide for an important tribal socio-economic or spiritual/cultural value in the area where the waters are located.
  - (b) All new and existing point sources will meet the highest statutory and regulatory requirements and all cost-effective and reasonable best management practices shall be achieved for non-point source polluters.
  - (c) Water quality adequate to protect existing uses is fully protected.
- (3) Determination of Significant Degradation
  - (a) 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 Department to determine whether the proposed activity would cause significant degradation that

would warrant further review (such as consideration of alternatives and an evaluation of economic or social importance). The significant degradation review shall be performed using the factors outlined as follows:

- Percent change in ambient concentrations predicted at critical conditions (low-flow, storm event);
  - The difference between existing ambient quality and predicted ambient water quality during permitted loading from all point sources and the proposed activity;
  - Percent changes in pollutant loads, from existing loads to potentially permitted new loads;
  - Percent reduction in assimilative capacity;
  - Nature, extent, and persistence of specific pollutants, including their tendency to bioaccumulate;
  - Cumulative effects of pollution;
  - Impacts to aquatic biota;
  - Degree of confidence in any modeling techniques used by applicant or the Tribe;
  - Duration and quality of proposed pollutant effluent; and
  - Effects on Tribal culture and traditions.
- (b) 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 in pollutant loadings for any parameter, the Tribe shall find that the proposed activity causes significant degradation.
- (c) 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.
- (d) Where the Tribe, through its Department of Environmental Protection, 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.
- (e) 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.

- (f) Where the proposed lowering of water quality is below the thresholds at (3)(b) and (c), the Tribe may determine that the lowering of water quality is insignificant after considering the factors at (3)(a). If the Tribe, through its Department of Environmental Protection, 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.
- (4) Alternatives Analysis
  - (a) All entities that propose a degradation of Tier 2 protected waters must submit proposed alternatives to the water quality degradation.
  - (b) The Department shall evaluate whether the alternatives proposed by the applicant are comprehensive and reflect a range of practicable alternatives that would prevent or lessen the proposed degradation. If the Tribe determines that alternatives exist that would result in less water quality degradation, the Tribe 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. When the alternatives analysis identifies one or more practicable alternatives, the Tribe shall only find that a lowering of water quality is necessary if one such alternative is selected for implementation.
  - (c) Economic Reasonability of Alternatives: Alternatives that are determined by the 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.
  - (d) If the Department determines that reasonable alternatives that would prevent all degradation from the proposed activity do not exist, then Tier 2 review will continue.
- (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 socioeconomic value, then a permit may be granted for the proposed activity, with specifications to protect water quality at the most-achievable level.

- (6) Existing Uses Protected: Prior to authorizing any proposed activity on a Tier 2 water body, the Department shall ensure that water quality sufficient to protect existing uses will be achieved, consistent with the Tier 1 provisions at Section C of this Appendix.
- (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 or to protect high quality water in accordance with the alternatives analysis. 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 water quality criteria end-of-pipe or undertake non-point source controls upstream to mitigate those additional pollutants.
- (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. To achieve this, the Tribe shall identify point sources and non-point sources that discharge to, or otherwise impact, the receiving water and coordinate with tribal, state, and federal agencies as necessary.
- (9) Public Review and Intergovernmental Coordination:
  - (a) The Tribe shall conduct a public review of the application, proposed activities, and the Tribe's draft antidegradation review. Public notice shall be made using reasonably available outreach tools such as tribal and/or local newspaper legal notices, and/or web-based media. Comments shall be sought to guide a final review decision. Following an appropriate public review period as required by applicable law, the review period will close. Response to each comment shall occur prior to the approval or disapproval of a permit or license application to discharge, and these responses shall be documented with the final antidegradation review.
  - (b) In addition to providing the opportunity to comment during public review, the Tribe shall coordinate as needed with other tribal departments and governments, and federal agencies such as the National Marine

Fisheries Service, US Fish and Wildlife Service, and US Environmental Protection Agency.

(C) Tier 1 Protected Tribal Waters

- (1) Point sources and non-point sources of pollution shall be evaluated in a similar manner for Tier 1 protected waters. Tier 1 review shall be performed for all new or reissued permits and licenses.
- (2) Existing Uses Protected
  - (a) Prior to authorizing any proposed activity on a Tier 1 water body, the Department shall ensure that water quality sufficient to protect existing uses will be achieved. Identification of existing uses and the water quality necessary for their protection shall be based on all available use and water quality-related information, including any such information that may be requested of the applicant during the Tribe's review process and information submitted during the public comment period.
  - (b) Existing uses shall be protected whether or not they are included in the Tribes designated uses. The 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.
- (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 water quality criteria end-of-pipe or undertake non-point source controls upstream to mitigate those additional pollutants.
- (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, and that are consistent with the other requirements of the Tribe's water quality standards, will likely be permitted.

*Appendix B - Antidegradation Review Worksheet*

Name of Reviewer: \_\_\_\_\_

Name of Receiving Water: \_\_\_\_\_

Watershed: \_\_\_\_\_

Segment Location (Land Description): \_\_\_\_\_

Stream Designated Uses: \_\_\_\_\_

Other: \_\_\_\_\_

1. *Brief Description of Proposed Activity:*

ID Number if any: \_\_\_\_\_

2. *Which tier(s) of anti-degradation apply?*

\_\_\_\_\_ Tier 3 - go to question 3

\_\_\_\_\_ Tier 2 - go to question 7

\_\_\_\_\_ Tier 1- go to question 15

Tier 3 Questions

3. Will the proposed activity result in a permanent new or expanded direct point source of pollutants to an OTRW segment (*see Section (A)(1)(a) of the implementation procedure*)?

\_\_\_\_\_ yes - recommend denial of the proposed activity

\_\_\_\_\_ no—move on to next question

4. If the proposed activity will result in a permanent new or expanded direct point source of pollutants to a segment upstream from an OTRW segment, will the proposed activity affect OTRW water quality (*see Section (A)(1)(b) of the implementation procedures*).

\_\_\_\_\_ yes - recommend denial of proposed activity

\_\_\_\_\_ no – move on to next question

5. If the proposed activity will result in a permanent new or expanded non-point source of pollutants, will the proposed activity increase pollutant loads or increase levels in a manner that affects OTRW water quality (*see Section (A)(2) of the implementation procedures*)?

\_\_\_\_\_ yes - recommend denial of proposed activity

\_\_\_\_\_ no— move on to next question

6. *If the proposed activity will result in a non-permanent new or expanded source of pollutants to an OTRW segment or a segment upstream from an OTRW segment, will the proposed activity result in “temporary and limited” effects on OTRW water quality (see Section (A)(3) of the implementation procedure)?*

\_\_\_\_\_yes  
\_\_\_\_\_no - recommend denial of proposed activity

Tier 2 Questions

7. Does the segment qualify for Tier 2 protection based on the applicable criteria

\_\_\_\_\_yes  
\_\_\_\_\_no

8. Will the proposed activity result in significant degradation (*see Section (B)(3) of the implementation procedure*)?

\_\_\_\_\_yes  
\_\_\_\_\_no - recommend approval of the activity  
\_\_\_\_\_significance test by-passed due to availability of a reasonable less degrading alternative

9. Has the applicant completed an adequate evaluation of alternatives and demonstrated that there are not reasonable alternatives to allowing the degradation (*see Section (B)(4) of the implementation procedure*)?

\_\_\_\_\_yes  
\_\_\_\_\_no - recommend denial of the proposed activity

10. Has the applicant demonstrated that the proposed activity will provide important socio-economic development in the area in which the affected waters are located (*see Section (B)(5) of the implementation procedure*)?

\_\_\_\_\_yes  
\_\_\_\_\_no - recommend denial of the proposed activity

11. Will existing uses be fully protected consistent with the Tier 1 procedures outlined by questions 15-17 below (*see Section (B)(6) of the implementation procedure*)? Note: questions 15-17 must be completed.

\_\_\_\_\_Yes  
\_\_\_\_\_no- recommend denial of proposed activity

12. Has compliance with required controls on point and nonpoint sources in the zone

of influence been assured (*see Section (B)(8) of the implementation procedure*)?

\_\_\_\_\_ *Yes*  
\_\_\_\_\_ *no - recommend denial of the proposed activity*

13. Has response to all public comments been completed without significant issues that cannot be remedied (*see Section (B)(9) of the implementation procedure*)?

\_\_\_\_\_ *Yes*  
\_\_\_\_\_ *no - recommend denial of the proposed activity*

14. The basis for concluding that Tier 2 requirements do not apply is as follows: \_\_\_\_\_

#### Tier 1 Questions

15. Are there uses that exist or have existed since November 28, 1975 that have more stringent water quality protection requirements than the currently designated uses (*see Section (C)(2) of the implementation procedures*)?

\_\_\_\_\_ *yes*  
\_\_\_\_\_ *no*

16. If the answer to question 15 was yes, what water quality criteria requirements will ensure protection of such existing uses (*see Section (C)(2) of the implementation procedure*)? (Indicate parameters and applicable water quality criteria.)

17. Will existing uses be fully maintained and protected (*see Section (C)(2) of the implementation procedure*)?

\_\_\_\_\_ *yes*  
\_\_\_\_\_ *no - recommend denial of the proposed activity*

#### Preliminary Decision

18. *Based on the above, can the proposed activity be authorized pursuant to the Tribe's Anti-degradation Policy?*

\_\_\_\_\_ *yes*  
\_\_\_\_\_ *no*

*Signature:* \_\_\_\_\_

*Date:* \_\_\_\_\_