

TRIBAL CODE

CHAPTER 28

LAC DU FLAMBEAU WATER QUALITY STANDARDS CODE
AND
WELLHEAD PROTECTION ORDINANCE

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HISTORY NOTE:

Current Ordinance:

Water Quality Standards Code: Adopted October 25, 1999, Resolution No. 568(99). Effective October 25, 1999 to members. Effective as to non-members upon Secretarial approval.

Wellhead Protection Ordinance: Adopted July 26, 2001, Resolution No. 372(01). Secretarial approval, August 31, 2001.

TRIBAL CODE

CHAPTER 28

LAC DU FLAMBEAU WATER QUALITY STANDARDS CODE

CHAPTER I

28.100 Purpose and Need.

- A. The purpose of these water quality standards is to protect, conserve, and enhance the water resources of the Lac du Flambeau Reservation for present and future generations. In order to accomplish this, the Lac du Flambeau Band of Lake Superior Chippewa Indians must prescribe minimum water quality requirements for waters located within the exterior boundaries of the Lac du Flambeau Indian Reservation which will, among other things, ensure compliance with sections 303 and 518 of the Clean Water Act.
- B. The Lac du Flambeau Indian Reservation represents only a small portion of the ancestral homeland of the Lac du Flambeau Band and was established and defined pursuant to the *Treaty of 1854 between the United States and the Chippewa Indians of Lake Superior and the Mississippi*, dated September 30, 1854 (10 Stat. 1109). The water resources of the Lac du Flambeau Reservation represent a unique resource which can best be managed by the Lac du Flambeau Band. This code is necessary in order to define those uses which are both specific to the Lac du Flambeau Band's cultural heritage and specific to the uniqueness of the Reservation area itself.

28.101 Background.

The Lac du Flambeau Water Quality Standards Code has been enacted into Tribal Law by the Lac du Flambeau Tribal Council via Resolution No. 568(99).

28.102 Territory Covered.

The provisions of this water quality standards code shall apply to all surface waters within the exterior boundaries of the Lac du Flambeau Indian Reservation as established and defined pursuant to the *Treaty of 1854 between the United States and the Chippewa Indians of Lake Superior and the Mississippi*, dated September 30, 1854 (10 Stat. 1109), and to such other lands and waters that have been added or may hereafter be added thereto under the law of the United States. The land description

is as follows: Beginning at the section corner common to sections 4 & 5, T. 41 N., R. 6 E., & sections 32 & 33, T. 42 N. R. 6 E. 4th P.M.; thence west on the township a distance of twelve miles to the NW corner of section 4, T. 41 N., R. 4 E., thence south one mile; thence east one mile; thence south one mile; thence west one mile; thence south four miles to the SW corner of section 33, T. 41 N., R. 4 E.; thence east on the township line to the NW corner of section 3, T. 40 N., R. 4 E.; thence six miles more or less to the SW corner of section 34, T. 40 N., R. 4 E.; thence east on the township line nine miles to the NW corner of section 6, T. 39 N., R. 6 E.; thence south to the SW corner of said section 6; thence east two miles to the SE corner of section 5, T. 39 N., R. 6 E.; thence north to the SE corner of section 32, T. 40 N., R. 6 E.; thence continuing north a distance of six miles more or less to the township line; thence west one quarter mile more or less to the SE corner of section 32, T. 41 N., R. 6 E.; thence due north to the point of beginning.

28.103 *Applicability, Administration, and Amendment of Water Quality Standards.*

- A. The Lac du Flambeau Water Quality Standards Code is applicable to all waters within the exterior boundaries of the Lac du Flambeau Indian Reservation, located in the counties of Vilas, Iron, and Oneida, State of Wisconsin.
- B. The water quality standards portion of this code represent water quality goals and, among other things, shall be used for establishing any water quality based effluent limitations for point sources on the Lac du Flambeau Indian Reservation.
- C. In conjunction with the issuance of section 402 permits, mixing zones in the waters of the United States on the reservation will be determined on a case-by-case basis. The size of such mixing zones and the in-zone water quality in such mixing zones shall be consistent with Section 28.109 of this code as well as the applicable procedures and guidelines in EPA's *Water Quality Standards Handbook* and the *Technical Support Document for Water Quality Based Toxics Control*.
- D. Amendments to these standards shall proceed in the following manner:
 - (1) Review to these standards shall, at a minimum, be conducted once every three years.

- (2) Proposed modifications shall be made public and a public hearing shall be conducted.
- (3) The proposed modifications, after public review and hearings, must be approved via resolution by the Lac du Flambeau Tribal Council.
- (4) The modification(s), once approved by Tribal Council, will be submitted to the U.S. EPA.

28.104 Definitions.

- A. "Acute Criterion" means the highest water concentration of a toxicant to which organisms can be exposed to without causing acute toxicity.
- B. "Acute toxicity" means a deleterious response (e.g., mortality, disorientation, immobilization) to a stimulus usually observed in 96 hours or less.
- C. "Best management practices or BMP's" means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of surface waters.
- D. "Carcinogenic" means a substance which causes an increased incidence of benign or malignant neoplasms, or substantially decreases the time to develop neoplasms, in animals or humans.
- E. "Chronic Criterion (CC)" means the highest water concentration of a toxicant to which organisms can be exposed indefinitely without causing chronic toxicity.
- F. "Chronic toxicity" means the lowest concentration of a constituent, whole effluent, or mixture causing adverse effects (i.e., considering lethality, growth, reduced reproduction, etc.) over a relatively long period of time.
- G. "Council" or "Tribal Council" means the Lac du Flambeau Tribal Council.
- H. "Criteria" are elements of the tribe's water quality standards which define or describe the quality or quantity of water necessary to support a particular use.
- I. "Department or Tribal Natural Resource Department" means the Lac du Flambeau Tribal Natural Resource Department.

- J. "Designated uses" are those uses specified in this water quality standards code for each water body or segment whether or not they are being attained.
- K. "EC₅₀" means a concentration of a toxic substance which causes an adverse effect including mortality in 50% of the exposed organisms in a given time period.
- L. "Effluent limitation" means any restriction imposed by the department or other permitting agency on quantities, discharge rates, and concentrations of "pollutants" as a condition for permitting a discharge to a surface water.
- M. "Epilimnetic" means that which occurs in or pertains to the epilimnion (or surface layer) of a body of water.
- N. "Epilimnion" means that region of a body of water that extends from the surface to the thermocline and that does not have a permanent temperature stratification. In a body of water which does not exhibit stratification, epilimnetic conditions may be present throughout the entire water column.
- O. "Existing source" means any source which is not definable as a "new source".
- P. "Existing uses" are those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards.
- Q. "Geometric mean" means the nth root of a product of nth factors.
- R. "Hypolimnion" means the deepest zone in a thermally stratified body of water. It is fairly uniform in temperature.
- S. "LC₅₀" means a concentration of a toxic substance, when present in surface waters, which may be lethal to 50% of the exposed organisms in a given time period.
- T. "LD₅₀" means a dose of a toxic substance, when present in surface waters, which may be lethal to 50% of the exposed organisms in a given time period.
- U. "Lowest observed effect level or LOEL" means the lowest tested concentration that caused an adverse effect in comparison with a control when all higher test concentrations caused the same effect.

- V. "Mixing zone" means a limited area or volume of water where initial dilution of a discharge takes place; and where chronic numeric water quality criteria (determined from a suitable reference site) can be exceeded but acutely toxic conditions are prevented from occurring.
- W. "Natural conditions" means the biological, chemical, and physical conditions of a water body, upstream from the point or non-point source, or, in the case of a lake, water quality conditions present outside of the mixing zone which are naturally present.
- X. "New source" means any source discharging a pollutant, the construction of which is commenced after adoption of this water quality standards code.
- Y. "NH₃-N" or "Ammonia" means total Ammonia (ionized and un-ionized forms). If Ammonia value is entirely ionized or entirely un-ionized, it will be specified as such.
- Z. "Non-point source pollution" means the mixture of pollutants which may be dissolved or suspended in water applied to or incident to a geographical area. Sources for such pollutants include, but are not limited to, septic tank disposal fields, lawn fertilizers, construction sites, forestry practices, agriculture, and the illegal disposal of pollutants on land or in subsurface excavations.
- AA. "TU's or Nephlemetric Turbidity Units" means the units in which Turbidity is measured for use in these standards.
- AB. "pH" means the negative logarithm of the hydrogen ion concentration.
- AC. "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, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term include the channels, ditches, culvert pipes, and all other discharges associated with commercial cranberry operations.
- AD. "Ordinary High Water Mark" means the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic.

- AE. "Pollutant" means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, commercial cranberry discharges, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This includes toxic pollutants.
- AF. "Primary contact recreation" means activities where a person would have direct contact with water to the point of complete submergence, including but not limited to skin diving, swimming, and water skiing.
- AG. "Reservation" means all land within the exterior boundaries of the Lac du Flambeau Indian Reservation and all lands held in trust for the Lac du Flambeau Band of Lake Superior Chippewa Indians.
- AH. "Secondary contact recreation" means activities where a person's water contact would be limited to the extent that bacterial infections of eyes, ears, respiratory, or digestive systems or urogenital areas would normally be avoided (such as wading or fishing), generally considered incidental contact without complete submergence.
- AI. "Source" means any building, structure, facility, agricultural operation, or installation from which there is or may be the discharge of pollutants.
- AJ. "Surface water" means all water above the surface of the ground including but not limited to lakes, ponds, streams, rivers, springs, and wetlands.
- AK. "Temperature" means water temperature expressed in degrees Centigrade.
- AL. "Thermal Discharge" means any discharge which varies in temperature from the natural temperature conditions found in the waterbody at the time said waterbody is receiving the discharge.
- AM. "Thermocline or mesolimnion" means that region in a thermally stratified body of water which the drop in temperature equals or exceeds 1° C per meter.
- AN. "Total Phosphorus as P" means total amount of phosphorus in solution (reactive) and in particulate form.
- AO. "Toxicity" means acute and/or chronic toxicity.

- AP. "Toxic pollutants" are those pollutants listed in Section 28.106 E. of this code and any additional pollutants which may be added to Section 28.106 E. upon amendment to this code.
- AQ. "Tribal Council" means Lac du Flambeau Tribal Council.
- AR. "Tribal rights" means reserved water rights, treaty fishing, hunting, and gathering rights.
- AS. "Tribal waters, Reservation Waters, or Waters of the Reservation" means all waters within the exterior boundaries of the Lac du Flambeau Indian Reservation and as well as lands held in trust for the Lac du Flambeau Tribe including but not limited to lakes, ponds, bogs, streams, rivers, springs, and wetlands.
- AT. "Tribe" means the Lac du Flambeau Band of Lake Superior Chippewa Indians.
- AU. "Turbidity" means the clarity of water expressed as Nephlemetric turbidity units (NTU) and measured with a calibrated turbidimeter.
- AV. "U.S. EPA Regional Administrator or Administrator" means the Administrator of U.S. EPA Region V.
- AW. "Wetlands or tribally defined wetland" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include, but are not limited to, swamps, marshes, and bogs.

28.105 Designated Uses.

The following are designated uses which apply to the various surface waters on the Lac du Flambeau Indian Reservation (Section 28.108 A. lists waterbodies and specific uses):

- A. *Designated Uses which may apply to all waters of the reservation excluding wetlands:*

- (1) *Cultural* (a) Gathering of aquatic resources for food or medicinal uses and/or; (b) water-borne based activities important to maintaining the tribe's cultural heritage.
- (2) *Wildlife Habitat* (a) Water quality necessary to support the propagation and maintenance of wildlife that utilize aquatic resources as a food source.
- (3) *Wild Rice* (a) Supporting wild rice habitat for sustainable growth and consumption.
- (4) *Fish and Aquatic Life* (a) Conditions that support a balanced aquatic life community.
- (5) *Recreational* (a) At a minimum supports primary contact recreation and secondary contact recreation.
- (6) *Water Supply* (a) Supports a use of water for domestic, industrial, agricultural, or aquacultural purposes.
- (7) *Cold Water Fishery* (a) Supports the existence of cold water fishery communities. Such waters must maintain a Dissolved Oxygen content of 6.0 mg/L or greater (except in the mesolimnion and hypolimnion during stratification) and may not receive a thermal discharge.

Note: At the boundary between surface waters of different designated uses, the water quality criteria necessary to protect the more sensitive use or uses shall apply.

(2) *Designated Uses which apply to wetlands:*

- (1) *Cultural* (a) Gathering of aquatic resources for food or medicinal uses and/or; (b) Water-borne based activities important to maintaining the tribe's cultural heritage.
- (2) *Wildlife Habitat* (a) Water quality necessary to support the propagation and maintenance of aquatic wildlife that utilize aquatic resources as a food source.
- (3) *Wild Rice* (a) Supporting wild rice habitat for sustainable growth and consumption.

- (4) Fish and Aquatic Life (a) Conditions that support a balanced aquatic life community.
- (5) *Recreational* (a) At a minimum supports primary contact recreation and secondary contact recreation.
- (6) Water Supply (a) Supports a use of water for domestic, industrial, agricultural, or aquacultural purposes.

Note: At the boundary between surface waters of different designated uses, the water quality criteria necessary to protect the more sensitive use or uses shall apply.

28.106 Criteria.

The following are narrative and numeric criteria which apply to the various surface waters on the Lac du Flambeau Indian Reservation:

- A. *Criteria Applicable To All Waters.* All tribal waters (including wetlands), except as otherwise noted, shall be free from pollutants that cause or contribute to the conditions described below:
- (1) Substances that will cause objectionable deposits, on the shore or in the bed of a body of water in such amounts as to interfere with designated uses or existing uses on waters of the reservation.
 - (2) Floating or submerged debris, oil, scum or other material in such amounts as to interfere with designated uses and existing uses on waters of the reservation.
 - (3) Materials producing color, odor, taste or unsightliness in such amounts as to interfere with designated uses and existing uses on waters of the reservation.
 - (4) Substances in concentrations (or combinations of substances) which are toxic or harmful to humans found to be of public health significance, nor in amounts scientifically demonstrated to be chronically toxic or acutely toxic to animal, plant (including wild rice) or aquatic life. Toxic substances shall not be present in concentrations which are toxic or harmful to human, animal, plant or aquatic life, or in quantities that interfere with the normal propagation, growth and survival of the sensitive indigenous aquatic

biota (limited exceptions may be granted to these prohibited conditions but then only within designated mixing zones). For toxic substances lacking published criteria, Bioassay data for sensitive indigenous test species/life stages may be used to determine compliance with this narrative standard. Water Quality values will be generated consistent with 40 CFR Part 132, *Water Quality Guidance for the Great Lakes System*. Whole effluent toxicity shall also be controlled to prevent acute and chronic toxicity to fish and aquatic life consistent with 40 CFR Part 132.

- (5) Water levels, quantity and quality necessary for the growth and propagation of wild rice, shall be maintained.
- (6) Toxic, radioactive, nonconventional, or deleterious material concentrations shall be less than those of public health significance, or which may cause acute or chronic toxic conditions to the aquatic biota, or which may adversely affect designated uses.
- (7) Hydrological conditions necessary to support the biological and physical characteristics naturally present in wetlands shall be protected to prevent significant adverse impacts on: water currents, erosion or sedimentation patterns; natural water temperature variations; the chemical nutrient and dissolved oxygen regime of the wetland; the normal movement of aquatic fauna; the pH of the wetland; and normal water levels or elevations.

B. *General Water Quality Criteria, excluding Wetlands.*

- (1) Bacteriological Criteria - *E. coli*.¹ Not to exceed 18 organisms per 100 ml or background conditions, whichever is lower. None attributable to the discharge of wastes.
- (2) Dissolved oxygen--Dissolved oxygen shall not be less than 5.0 mg/L. Waters exhibiting stratification may have oxygen levels below 5.0 mg/L in the mesolimnion and hypolimnion. Except in waters which have been determined to have a Cold Water Fishery Use, in which case the dissolved oxygen shall not be less than 6.0 mg/L. (Same stratification conditions apply).

¹Taken from Vermont Water Quality Standards Regulation, page 24 (1996).

- (3) Temperature--No measurable variation from natural conditions--except within a mixing zone.
- (4) pH--Will not change greater than 0.5 units outside the estimated natural seasonal maximum and minimum. The change, or rate of change, either upward or downward shall not result in an undue adverse effect on aquatic biota, fish or wildlife.
- (5) Turbidity--Shall not exceed 5 NTU over natural conditions.
- (6) Total Phosphorus as P
 - (a) Lakes - Shall not exceed a May - September mean concentration of 0.030 mg/L in a 0-2 meter composite surface (epilimnetic) sample--except within a mixing zone. Sample sites would be any location within a waterbody which is greater than two meters in depth--except within a mixing zone. A minimum of five (one per month) sampling dates must be used.²
 - (b) *Creeks, Rivers, and Streams* - Shall not exceed natural conditions -- except within a mixing zone.

C. *Biological Criteria.*

- (1) All waters of the reservation shall maintain a natural diverse biological community, therefore aquatic life shall be as it naturally occurs.
- (2) The overall biological community may not be adversely affected by the intake or discharge of water for industrial, municipal, or agricultural purposes, or by the discharge of pollutants to the water.
- (3) The biological community may not be adversely affected by non-point source pollution.
- (4) Water quality criteria included in these water quality standards shall be modified as necessary to protect Federally listed threatened and endangered species.

²This is the method which was used by the Department to assess lakes with potential eutrophication problems. The value of 0.030 mg/L is derived from Department data which indicates that current water quality conditions in terms of Carlson's Trophic Index (1977) are quite good. Data which support this criterion can be obtained from the Department.

D. *Water Quality Criteria for the protection of Wildlife.*³

- (1) Pollutants shall not be found in reservation waters at or exceeding concentrations which result in adverse effects to the reservation's wildlife populations.
- (2) The following numeric wildlife criteria shall not be exceeded in reservation waters:

<u>Substance</u>	<u>Criteria</u>
DDT & Metabolites	1.1 x 10 ⁻⁵ ug/L
Mercury	1.3 x 10 ⁻³ ug/L
Polychlorinated Biphenyls	7.4 x 10 ⁻⁵ ug/L
2,3,7,8 TCDD	3.1 x 10 ⁻⁹ ug/L

E. *Toxic Pollutant Criteria.* The following numeric criteria and conditions shall apply to all waters of the reservation:

- (1) Numeric Criteria : Table 1, pp. 1-7.
- (2) General. Where necessary to protect an existing or a designated use, the waters of the reservation shall be managed to prevent the discharge of toxic substances in concentrations, quantities or combinations that based on the uses associated with the classification of the receiving waters, exceed:
 - (a) For toxic substances that are carcinogenic, a maximum individual lifetime risk to human health greater than 10⁻⁶, or
 - (b) For toxic substances that are noncarcinogenic, a maximum individual lifetime risk of no adverse effect to human health, or
 - (c) Acute or chronic toxicity to aquatic biota, fish or wildlife
- (3) Other Toxic Substances. Where numeric criteria for a toxic substance are not established by this code, the Department may establish such criteria consistent with the general policy in subsection (2) above. In establishing such limits, the Department shall give consideration to the potential for bioaccumulation as well as any

³Numeric criteria taken from 40 CFR 132, Table 4.

antagonistic or synergistic relationship that may exist between the constituents being discharged and the concentration of other constituents in the receiving waters or their associated underlying sediment.

F. *Modification of Criteria.*

- (1) The department may promulgate revised or site-specific criteria as necessary to reflect new scientific data or conditions specific to a given site or water body. Such modifications to water quality criteria shall assure that all designated and existing uses are protected and that water quality standards continue to be attained and shall be consistent with those procedures found in Chapter 3 of the U.S. EPA *Water Quality Standards Handbook (Revised, 1994)* and 40 CFR 132, *Water Quality Guidance for the Great Lakes System*.
- (2) The department may promulgate a site-specific criteria to protect Federally listed threatened or endangered species which may be more stringent than the specific use or toxic pollutant table indicates (This procedure will also be consistent with 40 CFR 132).

28.107 *Antidegradation.*

A. *Policy.*

- (1) Water quality sufficient to support all existing and designated uses shall be maintained and protected at all times; degradation of water quality attributable to regulated human activities that would adversely impact existing and/or designated uses is not permissible or consistent with the intent of these Water Quality Standards.
- (2) Where ambient water quality for a particular parameter exceeds the minimum specified in the water quality criteria as necessary to support the fish and other aquatic life and recreation in and on the water, that water body is considered a high quality water. High quality waters not otherwise designated are classified as Tribal Resource Waters (or TRW's). Water quality in Tribal Resource Waters shall be maintained and protected unless a lowering of water quality is determined by the Tribe to be necessary and no practicable alternative exists.

- (3) For waters classified in the Water Quality Standards (in Table 2) as Exceptional Tribal Resource Waters (or ETRW's) and Outstanding Tribal Resource Waters (or OTRW's), in no case may existing ambient water quality be lowered as a result of an action attributable to human activities.
- (4) For waters identified in the Water Quality Standards (Section 28.108 A.) as having a *Cold Water Fishery Use*, no measurable temperature difference may be observed which is attributable to human activities.

B. *Implementation.*

- (1) Under no circumstances is it permissible to lower water quality below the level necessary to support existing and designated uses for any water at any time as a result of actions attributable to human activities.
- (2) Water quality may be lowered in a TRW if the person or persons responsible for the activity expected to result in the lowering of water quality receive approval from the Tribe to do so. To receive approval, the person or persons responsible must demonstrate to the satisfaction of the Tribe that:
 - (a) Cost-effective pollution prevention methods that would eliminate or reduce the need to lower water quality do not exist,
 - (b) Cost effective methods of improved wastewater treatment that would reduce or eliminate the need to lower water quality do not exist, and;
 - (c) The proposed lowering of water quality will result in important social and economic development on the Lac du Flambeau Reservation.
- (3) Existing ambient water quality in ETRW's may not be lowered. New or increased discharges may be permitted provided that the new or increased discharge does not result in a change in existing ambient water quality. Mixing zones are not permitted.
- (4) Existing ambient water quality in OTRW's may not be lowered. New or increased discharges to OTRW's are not permitted.

Note: There is an additional implementation policy associated waters classified as OTRW's (Please see Addendum 1, *Lac du Flambeau Band of Lake Superior Chippewa Indians Implementation Policy for Outstanding Tribal Resource Waters*).

28.108 *Specific Water Body Classifications.*

Specific classifications for surface waters of the Lac du Flambeau Indian Reservation (including Designated Uses and Antidegradation Classifications) are as follows:

- A. See Table 2, pp. 1-4.

- B. *General Provisions.* General provisions applying to various surface water bodies not specifically classified under Table 2 are as follows:
 - (1) All waters not specifically specified under an Antidegradation classification are classified as a *Tribal Resource Water*. An Antidegradation classification may be upgraded (An example of this would be upgrading an ETRW to OTRW) but may not be downgraded (Example, ETRW to TRW)

 - (2) All unnamed or unmentioned waterbodies, at a minimum, are assigned the following designated uses (until such a time that additional uses are identified): Cultural, Wildlife Habitat, Wild Rice, Recreational (including primary contact recreation), Fish and Aquatic life, and Water Supply.

 - (3) For the purposes of this code, ponds which have been created for the purpose of wastewater management or aquaculture production are not considered to be “waters of the tribe”. Any discharge associated with these created ponds to a water of the tribe must comply with all applicable provisions of this code.

28.109 *Mixing Zones.*

Shall consist of non-thermal and thermal mixing zones.

- A. Non-Thermal
 - (1) It is the goal of this water quality standards code that, where ever possible, all Tribal surface waters shall be protected and designated

uses attained at all points in all surface waters within the reservation. Exceptions to this goal may be granted on a case-by-case basis for certain, limited areas if, after implementing all cost effective and feasible pollution controls, it is still not possible for a regulated facility to comply with the applicable water quality criteria without allowing for a limited area of mixing of the effluent with the receiving water. In all such cases, mixing zones shall be as small as possible, and in no case may a mixing zone be established that will:

- (a) Substantially interfere with the migratory routes, natural movements, survival, reproduction, or growth, or increase the vulnerability to predation, of any representative aquatic species;
 - (b) Include critical spawning or nursery areas of any representative aquatic species;
 - (c) Include a public water supply intake;
 - (d) Include a recognizable public swimming area;
 - (e) Constitute a distance more than one-hundred meters from the point of discharge unless a mixing zone study is conducted consistent with A(2).
 - (f) Encompass more than one quarter of the cross-sectional area of the receiving water at design flow;
 - (g) Result in a dilution of more than 10 times for a discharge into a pond or lake;
 - (h) adversely affect the biological integrity of the receiving water as a whole.
- (2) A mixing zone study may be conducted by the discharger but must contain the following information in order to receive a waiver of (A)(1)(e):
- (a) Information defining the actual boundaries (where the water quality standards are met) of the mixing zone in question; and

- (b) Information and data providing no violation of paragraphs (A)(1)(a),(A)(1)(b), (A)(1)(c), and (A)(1)(d) of this rule by the mixing zone in question.
- (3) When establishing a mixing zone, the Tribal Natural Resources Department shall require that the concentration of pollutants in the zone beyond the area of initial mixing not exceed at any time the acute criterion for any representative aquatic species.
- (4) For all waters defined as Outstanding or Exceptional Tribal Resource Waters, no mixing zone shall be permitted.

B. Thermal

- (1) The Tribal Natural Resource Department may establish a mixing zone applicable to the thermal component of the point source discharge authorized by such permit. A thermal mixing zone to permit dilution and cooling of a waste heat discharge shall be considered a region in which organism response to temperature is time-dependent. Exposure to temperatures in a thermal mixing zone shall not cause an irreversible response which results in deleterious effects to the wildlife and aquatic life representative of the receiving waters. The daily average temperature in a thermal mixing zone at the point nearest to the discharge that is accessible to the resident aquatic organisms shall not exceed the temperature established by the Tribal Natural Resource Department on a case-by-case basis.
- (2) Thermal mixing zone size limitations shall be established by the Tribal Natural Resource Department pursuant to paragraph (B) (1) of this rule on a case-by-case basis for all point source discharges subject to permit. The analytical methods for determining mixing zones are those set forth in paragraph (A) (3) of the preceding rule.
- (3) No thermal mixing zone shall:
 - (a) Substantially interfere with the migratory routes, natural movements, survival, reproduction, or growth, or increase the vulnerability to predation, of any representative aquatic species;

- (b) Interfere with or prevent the recovery of an aquatic community or species population that could reasonably be expected as previously limiting water quality conditions improve;
 - (c) Include a public water supply intake; or
 - (d) Include a recognizable public swimming area.
- (4) For all waters classified as having a *Cold Water Fishery Use*, thermal mixing zones will not be permitted.
 - (5) For all waters defined as Outstanding or Exceptional Tribal Resource Waters, no mixing zone shall be permitted.

28.110 401 Certification.

- A. For any activity which requires the issuance of a Federal Permit and subsequent Water Quality Certification by the tribe, the following rules shall apply:
 - (1) In no instance has the tribe or will the tribe waive Water Quality Certification for a Federally Permitted Activity. Every permitted activity will be individually reviewed by the Department subject to the final approval of the Tribal Council.
 - (2) For all waters classified as Outstanding Tribal Resource Waters (or OTRW's), no new or increased discharges will be allowed nor any activity which will require the issuance of a Federal Permit.
 - (3) For all waters classified as Exceptional Tribal Resource Waters (or ETRW's), no new or increased discharges will be allowed unless the water quality characteristics of the proposed discharge meets natural conditions at the point of discharge.
 - (4) For all waters which are **not** classified as OTRW's or ETRW's, all additional sections of this code must be complied with before Certification is granted.
 - (5) Due to the fixed land base which the tribe has been assigned, all wetland fill or alteration activities which require a Federal Permit to

proceed will be denied Certification. Wetlands are essential to maintaining the quality of the waters of the reservation. However, a wetland fill or alteration would be allowed provided that the activity would satisfy all other sections of this code and: (a) The permit applicant must agree to mitigate for the lost wetland area by a factor of two (Example--0.5 acre fill or alteration permittee must create 1.0 acres of wetland in an upland area. This mitigation must occur within the exterior boundaries of the reservation and be conducted under the supervision of the Department. Since the value of a created wetland is significantly lower than that of a natural wetland, the factor of two requirement is necessary. Areas which are used for commercial agriculture are **not** considered wetlands for the purposes of this mitigation requirement. The mitigation requirement must be incorporated as a Special Condition of the final permit or, (b) The proposed activity is a necessary natural resource management activity and is supported as such by the Department and is approved by the Tribal Council. The mitigation requirement would be waived under these circumstances. Commercial agriculture is **not** considered to be a natural resource management activity.

- (6) For all activities which are required to seek Water Quality Certification for the purpose of obtaining a 402 or a 404 permit, the flowchart process outlined in Figure 1 will be followed. In addition, all decisions regarding water quality standards compliance must be approved by the Department or Certification will be denied. The department will take no more than sixty days to issue a Water Quality Certification decision regarding proposed projects. A decision will be issued via a letter from the Department's Natural Resource Director and will either indicate reasons for Denial or will outline the proper procedures to follow if Water Quality Certification is to be granted.

28.111 Enforcement and Civil Penalties.

Upon the determination of any violation of a provision of this code, the Tribal Natural Resource Department shall issue a NOTICE OF VIOLATION to the party or parties responsible for the violation. The NOTICE OF VIOLATION shall direct said parties to cease and desist from specific activities or may direct the violator(s) to take corrective actions. In addition, a NOTICE OF VIOLATION may provide for civil fines not to exceed \$1,000 per day the violation has occurred. Any fine issued under this code does in no way exclude said parties from additional fines which they

may incur due to a violation of the *Lac du Flambeau Band of Lake Superior Chippewa Indians Implementation Policy for Outstanding Tribal Resource Waters*.

An enforcement action may be commenced in a court of law in the event that:

- A. Conditions of the NOTICE OF VIOLATION have not been complied with:
and/or
- B. The civil fine, if any, is not paid within the time period stated in the NOTICE OF VIOLATION.

28.112 *Compliance Schedules and Variances.*

- A. Compliance Schedules - Procedures for the development of compliance schedules shall be consistent with 40 CFR 132, Appendix F, Procedure 9, Compliance Schedules.

Note: For the purposes of this section, any reference to *Great Lakes* shall be assumed to be equivalent to *Reservation Waters*.

- B. Variances - Variance procedures shall be consistent with 40 CFR 132, Appendix F, Procedure 2, *Variances from Water Quality Standards for Point Sources*.

Note: For the purposes of this section, any reference to *Great Lakes* shall be assumed to be equivalent to *Reservation Waters*.

WELLHEAD PROTECTION ORDINANCE
of the
LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS

CHAPTER II

LAC DU FLAMBEAU TRIBAL CODE

28.200 *Title, Findings, and Purpose.*

Title. This Ordinance shall be known as the Lac du Flambeau Wellhead Protection Ordinance.

A. *Findings.* The Tribal Council hereby finds that wellhead protection is a proactive approach to managing public groundwater supplies focusing on preventing contaminants from entering critical recharge areas to public water supply wells. Protecting wellheads involves: knowing the location and boundaries of these critical recharge areas; identifying any potential sources of contamination in the critical recharge areas; controlling those potential sources to prevent the release of contaminants; and, controlling future land uses in the critical recharge areas to prevent activities which are known to threaten groundwater quality.

B. *Purpose.* The purpose of this Ordinance is:

- (1) To promote the health, safety, and general welfare of the community by ensuring an adequate quality and quantity of drinking water for the residents, institutions, and businesses of the Lac du Flambeau Indian Reservation;
- (2) To preserve and protect existing and potential sources of drinking water supplies;
- (3) To conserve the natural resources of the Lac du Flambeau Reservation; and,
- (4) To prevent temporary and permanent contamination of the environment.

28.201 *Scope.*

The provisions of this Ordinance shall apply to all designated wellhead protection areas within the exterior boundaries of the Reservation, to all persons and businesses on the Lac du Flambeau Indian Reservation, to all land, trust or fee, and to all activities in areas with the potential to affect water quality, public health and safety, and other fundamental interests of the Tribe.

28.202 Definitions.

- A. Aquifer means any geologic formation capable of yielding a significant amount of potentially recoverable water.
- B. Impervious Barrier means any material or structure on, above, or below the ground that does not allow precipitation or surface water to penetrate directly into the underlying surface.
- C. Mining means any activities designed for the extraction of minerals or rock.
- D. Recharge Area means areas that collect precipitation or surface water and carry it to aquifers. Recharge areas may include areas designated as Wellhead Protection Areas.
- E. Toxic or Hazardous Material means any substance or mixture of physical, chemical, biological, or radiological characteristics posing a significant threat to water supplies or other hazards to human health if such substance or mixture were discharged to land or water on the Lac du Flambeau Indian Reservation. Toxic or hazardous materials include, without limitation, synthetic organic chemicals, petroleum products, heavy metals, radioactive or infectious wastes, acids and alkalis, and all substances defined as toxic or hazardous by the Environmental Protection Agency's federal regulations, and is to also include such products as solvents and thinners in quantities greater than those associated with normal household use.
- F. Wellhead Protection Area means an area which represents a ten-year time of travel surrounding any and all groundwater supply systems which the tribe may designate.

28.203 Establishment and Delineation of Wellhead Protection Areas.

For the purpose of this Ordinance, there are hereby established within the exterior boundaries of the Lac du Flambeau Indian Reservation certain groundwater protection areas, consisting of aquifers and/or recharge areas which are delineated on

a map. This map (or maps) is entitled "Wellhead Protection Area" . This map (or maps) is hereby made a part of the Lac du Flambeau Wellhead Protection Ordinance (bylaw) and is on file at the Lac du Flambeau Planning Department and the Lac du Flambeau Natural Resource Department. Additional maps may be added to this ordinance as the Tribal Council designates.

28.204 Wellhead Protection Boundary Disputes.

If the location of the Wellhead Protection Area in relation to a particular parcel is in doubt, resolution of boundary disputes shall be through the Lac du Flambeau GIS Mapping Department in conjunction with the Lac du Flambeau Planning Department.

Disputants shall be afforded notice and an opportunity to be heard after prima facie showing by the Tribe as to the prohibited activities occurring in the Wellhead Protection Area(s), the burden of proof shall be upon the owner(s) of the land in question to show where the boundary should properly be located. At the request of the owner(s), the Lac du Flambeau Tribe may engage a professional engineer (civil or sanitary), hydrologist, geologist, or surveyor to determine more accurately the boundaries of the Wellhead Protection Area with respect to individual parcels of land, and may charge the owner(s) for all or part of the cost of the investigation.

28.205 Use Regulations.

In the Wellhead Protection Area (s) the following regulations shall apply:

- A. Permitted Uses. The following uses are allowed within the Wellhead Protection Area (s), provided that all necessary special permits, orders, or approvals required by the Lac du Flambeau Tribe are obtained:
- (1) Conservation of soil, water, plants, and wildlife;
 - (2) Outdoor recreation, nature study, boating, fishing, and hunting where otherwise legally allowed;
 - (3) Roads, Foot, bicycle and/or snowmobile paths, and bridges;
 - (4) Normal operation of water control, supply, and conservation devices;

- (5) Maintenance, repair, and enlargement of any existing structure, subject to Section B (prohibited uses) and Section C (special permitted uses);
- (6) Residential and commercial development, subject to Section B (prohibited uses) and Section C (special permitted uses);
- (7) Home gardening, conservation, forestry, and harvesting, subject to Section B (prohibited uses) and Section C (special permitted uses);
- (8) Construction, maintenance, repair, and enlargement of drinking water supply related facilities such as, but not limited to, wells, pipelines, aqueducts, and tunnels.

B. Prohibited Uses. The following uses are prohibited within the Wellhead Protection Area(s):

- (1) Landfills and open dumps;
- (2) Storage of liquid petroleum products, except the following:
Normal household use, previously installed underground home heating oil tanks, above-ground home heating oil tanks, propane tanks for heating, gas cans for lawn or yard equipment, gas cans for recreational equipment (i.e., boat motors, snowmobiles, etc.), automobile maintenance products, small quantities of paint and thinner, and other such similar items;
- (3) Landfilling of sludge or septic system waste;
- (4) Storage of chemicals (including waste oil, anti-freeze, Freon) unless such storage, including loading areas, is within a structure designated to fully contain any accidental spills;
- (5) Storage of animal manure unless covered or contained in accordance with tribal regulations, as may be from time to time adopted, or, in the absence of tribal regulations, the specifications of the United States Natural Resource Conservation Service, found in volume 7 of the Code of Federal Regulation;

- (6) Salvage Yards which may contain, automobiles, ATV's, batteries, engine parts, white goods, or any item containing hazardous materials;
- (7) Installation of new private or public cess pools or septic tanks. However, the following activities are allowed:
 - (a) The replacement or repair of an existing treatment works that will not result in a design capacity greater than the design capacity of the existing treatment works;
 - (b) The replacement of existing subsurface sewage disposal system(s) with wastewater treatment works that will not result in a design capacity greater than the design capacity of the existing system(s);
- (8) Industrial and commercial uses which discharge processed wastewater directly to septic tanks;
- (9) Storage of commercial fertilizers unless such storage is within a structure designed to fully contain any accidental spills;
- (10) The use of septic system cleaners which contain toxic or hazardous chemicals, as defined by EPA guidelines;
- (11) The application of pesticides, including herbicides, insecticides, fertilizers, fungicides, and rodenticides;
- (12) Mining.

C. Uses and Activities Requiring a Special Permit.

The following uses and activities are permitted only upon the issuance of a special permit by the Lac du Flambeau Tribal Council:

- (1) Enlargement or alteration of existing uses that do not conform to the Wellhead Protection Ordinance;
- (2) The application of fertilizers for domestic or non-agricultural uses. Such applications shall be made in a manner so as to minimize

adverse impacts on groundwater, to the satisfaction of the Tribal Council, due to nutrient transport, deposition, and sedimentation;

- (3) Those activities that involve the handling of toxic or hazardous materials in quantities greater than those associated with normal household use, permitted in the Wellhead Protection Area(except as prohibited under Section B) such activities shall require a special permit to prevent contamination of groundwater;
- (4) The construction of dams or other water control devices, ponds, pools or other changes in waterbodies or courses, created for swimming, fishing, or other recreational uses, or drainage improvements, none of these activities may adversely affect water quality or quantity.

28.206 Procedures for Issuance of Special Permits.

- A. A special permit shall be granted if the Tribal Council determines, that the intent of this Ordinance, as well as its specific criteria, are met. The Tribal Council will not grant a special permit under this section unless the petitioner's application materials include, sufficiently detailed, information to support positive findings in relation to the standards given in this section.
- B. One copy of the application shall be furnished by the applicant to each of the following: Tribal Council, Lac du Flambeau Planning Department, Lac du Flambeau Natural Resource Department, and the Lac du Flambeau Land Management Department. Failure by any Tribal Department to respond in writing to the Tribal Council within 45 calendar days of receipt of the proposal request shall indicate no desire to comment by said department.
- C. The Tribal Council will grant the required special permit only upon finding that the proposed use meets the following standards, those specified in Section 6 of this Ordinance, and any regulations or guidelines adopted by the Tribal Council. The proposal must:
 - (1) In no way, during construction or thereafter, adversely affect the existing or potential quality of water that is available in the Wellhead Protection Area, and;

- (2) Be designed to avoid substantial disturbance of the soils, topography, drainage, vegetation, and other water-related natural characteristics of the site to be developed.
- D. The Tribal Council may adopt regulations to govern design features of projects.
- E. The applicant shall file a sufficient number of copies of a site plan and attachments with the Tribal Council. A site plan shall at a minimum include the following information where pertinent:
 - (1) A complete list of chemicals, pesticides, herbicides, fertilizers, fuels, and other potentially hazardous materials to be used or stored on the premises in quantities greater than those associated with normal household use;
 - (2) For those activities using or storing such hazardous materials, a hazardous materials management plan shall be prepared and filed with the hazardous materials coordinator of the Lac du Flambeau Natural Resource Department and must also coordinate with the Lac du Flambeau Fire Department. The plan shall include:
 - (a) Provisions to protect against the discharge of hazardous materials or wastes to the environment due to spillage, accidental damage, corrosion, leakage, or vandalism, including spill containment and clean up procedures;
 - (b) Provisions for indoor, secured storage of hazardous materials and wastes with impervious floor surfaces.
 - (3) Proposed down-gradient location(s) for ground-water monitoring well(s), should the Tribal Council deem the activity a potential groundwater threat.
- F. No special permit shall be issued except after a 45-day public comment period.

28.207 Enforcement.

Written notice of any violations of this Wellhead Protection Ordinance shall be served by the Lac du Flambeau Conservation Law Department or the Lac du

Flambeau Police Department (or any department so designated by the Tribal Council) on the responsible person after detection of a violation. Notice to the assessed owner and/or operator of the property shall be deemed notice to the responsible person. Such notice shall specify the requirement or restriction violated and the nature of the violation, and may also identify the actions necessary to remove or remedy the violations, preventive measures required for avoiding future violations, and a schedule of compliance. The cost of containment, clean-up, or other action of compliance shall be borne by the owner and/or operator of the premises. For situations that require remedial action to prevent adverse impact to the water sources within the Lac du Flambeau Indian Reservation, the Lac du Flambeau Tribal Court may order the owner and/or operator of the premises to remedy the violation.

If said owner and/or operator does not comply with said order, the Tribal Police Officers or Tribal Conservation Law Officers, will be authorized to enter upon such premises under the terms of the special permit or otherwise, may act to remedy the violation. The remediation cost shall be the responsibility of the owner and/or operator of the premises.

A. Procedure.

The Tribal Court shall hear matters pertaining to the violations of this code. Proceedings for violation of this code shall be governed by Chapters III and IV of the Tribal Court Code, Tribal Code Ch. 80, provided that citations for violations of this code may be served by mail.

B. Enforcement and Penalties.

- (1) The provisions of this code shall be enforced by tribal law enforcement officers.
- (2) Violations of the provisions of this code shall be punishable by a civil remedial money penalty of no more than \$500, plus \$20 court costs.
- (3) Any vehicle or other equipment used in the violation of this code may be seized and sold in accordance with Chapter VI, Part Two of the Tribal Court Code, Tribal Code Ch. 80.
- (4) In addition to seeking a civil money penalty and/or seizure of and sale of equipment, the Tribe may bring an action to recover damages from the violator in an amount not to exceed three times the value of the resource injured or destroyed.

28.208 Authority to Enter and Inspect Premises and Records.

In order to carry out the purposes of this Ordinance, any duly authorized representative of the Tribe has the authority to enter and inspect any property, premises, or facility involved in any wellhead protection or violation of this Ordinance on any lands within the exterior boundaries of the Reservation. Such inspection may include:

- A. Obtaining samples of soil, rock, vegetation, air, water, or other substances deemed necessary;
- B. Setting up and maintaining monitoring equipment for the purpose of assessing compliance with applicable regulations, or health or safety hazards.
- C. Photographing any equipment, sample, activity, or environmental condition.

28.209 Severability.

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

28.210 Sovereign Immunity Preserved.

Nothing in this Ordinance shall be interpreted as a waiver of the Tribe's sovereign immunity from lawsuit, or as authorization for a claim for monetary damages from the Tribe.