TITLE 17
LUMMI NATION CODE OF LAWS
WATER RESOURCES PROTECTION CODE

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Table of Contents

Chapter 17.01 General Provisions

17.01.010 Findings....1
17.01.020 Purposes....1
17.01.030 Applicability....2

Chapter 17.02 Water Resources Manager

17.02.010 Water Resources Manager; Appointment; Removal....2
17.02.020 Water Resources Manager Qualifications....2
17.02.030 Powers and Duties of the Water Resources Manager....2
17.02.040 Powers and Duties of the Executive Director....3
17.02.050 Disqualification: Conflict of Interest....3
17.02.060 Powers and Duties of the Lummi Natural Resources Commission....4
17.02.070 Promulgation of Regulations....4
17.02.080 Public Records....5

Chapter 17.03 Permit System for Water Use on Lummi Nation Lands

17.03.010 Water Use By Permit....5
17.03.020 The Permit System....6
17.03.030 Relinquishment, Loss, and Transfer of Water Rights....8
17.03.040 Permit Application Procedure....9
17.03.050 Approval and Denial of Permit Applications....10
17.03.060 Revocation and Suspension of Permits....10
17.03.070 Appeals from Final Decisions of the Executive Director....10

Chapter 17.04 Wellhead Protection

17.04.010 Findings and Purpose....11
17.04.020 Establishment of Wellhead Protection Areas....11
17.04.030 Establishment of Sanitary Control Area....11
17.04.040 Permit for Use Required....12
17.04.050 Prohibited Uses and/or Activities in Wellhead Protection Areas....12
17.04.060 Conditional Uses or Activities....12
17.04.070 Approval of Permits for Conditional Uses or Activities....12
17.04.080 Requirements for Wells....12
17.04.090 Abandoned Wells....13
17.04.100 Existing Nonconforming Uses....13

Chapter 17.05 Storm Water Management

17.05.010 Findings and Purpose....13
17.05.020 Approval of Regulated Activity Required....14
17.05.030 Small Projects....14
17.05.040 Requirements for Small Projects....14
17.05.050 Large Projects....15

17.05.060 Requirements for Large Projects 15
17.05.070 Exceptions to the Large Project Requirements 16

Chapter 17.06 Stream and Wetland Management

17.06.010 Findings and Purpose 16
17.06.020 Permit Required for Activities in Streams, Wetlands, and Their Buffers 17
17.06.025 General Standards 17
17.06.030 Regulated Activities 17
17.06.040 Exempt Activities 18
17.06.045 Wetland Classification System 18
17.06.050 Non-Regulated Wetlands 18
17.06.060 Determination of Wetland Boundaries 19
17.06.070 Wetland Buffer Requirements 19
17.06.080 Stream Categories 20
17.06.090 Stream Buffers 20
17.06.100 Adjustment of Standard Buffers 20
17.06.110 Wetland Mitigation 20
17.06.120 Stream Mitigation 21

Chapter 17.07 Water Quality Standards

17.07.010 Findings and Purpose 21
17.07.020 Rule-Making Authority 21

Chapter 17.08 Prohibited Acts, Enforcement, Review, and Appeals

17.08.010 Prohibited Acts 22
17.08.020 Judicial Enforcement 22
17.08.030 Non-Judicial Enforcement by the Executive Director 23
17.08.040 Appeal to the Commission from a Final Decision the Executive Director 24
17.08.050 Finality of Commission Actions 25
17.08.060 Appeals from the Commission's Decisions 25
17.08.070 Limited Waiver of Sovereign Immunity 26
17.08.080 Severability 26

Chapter 17.09 Definitions

17.09.010 Definitions 26

Attachment 1 ....Map 1

TITLE 17
LUMMI NATION CODE OF LAWS
WATER RESOURCES PROTECTION CODE

Chapter 17.01 General Provisions

17.01.010 Findings

The Lummi Nation finds as follows:

(a) All Lummi Nation tribal reserved water rights are held by it in trust to fulfill the purposes of the Lummi Reservation as a permanent, economically productive homeland for the Lummi people and for certain inalienable public and cultural uses.

(b) The rights of the Lummi Nation to water reserved pursuant to the Treaty of Point Elliott, 12 Stat. 927, which established the Lummi Reservation, and under the reserved water rights doctrine of Winters v. United States, 207 U.S. 563 (1908), and to water for which the Lummi Nation claims a right since time immemorial, shall be protected and preserved, and nothing in this Code shall be deemed to be a waiver or limitation on these rights.

(c) The reserved water rights of the Lummi Nation apply as a matter of law to both surface and ground water to the extent needed to accomplish the purposes of the Lummi Reservation.

(d) The ground water resources of the Lummi Reservation are insufficient to fulfill the present and future homeland purposes of the Reservation.

(e) The power to determine, control, and manage the proper uses of all Lummi Nation Water, including all tribal reserved water rights, is an essential attribute of sovereignty and belongs to the Lummi Nation alone.

(f) Adequate supplies of clean water are vital to the health and welfare of the Lummi Nation and its members, other Reservation residents, and to the vitality of the Reservation economy.

(g) Protection of the public interest in surface and ground water resources of adequate quantity and quality requires the development and effective implementation of integrated land and water resource management programs and coordination of this Water Resources Protection Code with other environmental and resource protection laws, including, but not limited to, the Lummi Sewer and Water Code, the Lummi Natural Resources Ordinance, Lummi land use and zoning codes, the Clean Water Act, the Safe Drinking Water Act, the National Environmental Policy Act, the Endangered Species Act, and other applicable tribal and federal laws.

17.01.020 Purposes

The purposes of the Lummi Nation Water Resources Protection Code are:

(a) to protect the health and welfare of all members of the Lummi Nation and other residents of the Reservation and trust lands;

(b) to support and help achieve the Lummi Nation's spiritual, cultural, and economic goals through the protection, enhancement, and restoration of fish and shellfish resources throughout all usual and accustomed fishing areas;

(c) to protect the political integrity and economic security of the Lummi Nation through an effective, orderly system for the administration, use, conservation, and management of all Lummi Nation Water, including all tribal reserved water rights;

(d) to protect Lummi Nation Water from over-appropriation, degradation, contamination, and any acts injurious to the quantity, quality, or integrity of the water;

(e) to promote optimal use, recharge, and protection of aquifers to supply beneficial uses;

(f) to ensure that the Lummi people have sufficient water quantity and quality for cultural, domestic, fisheries, economic development, navigation, agricultural, stock, ecological flow, municipal, industrial, and other uses; to ensure that the Lummi Nation has sufficient water quantity and quality for Reservation and trust land uses now and for generations to come; and to ensure equitable and culturally appropriate water allocation in a

time of water shortage;

(g) to encourage planned development and multiple use of the Reservation and trust land water resources, promote stability of investment in water use and delivery systems, and permit all reasonable beneficial uses;

(h) to ensure ecological flows that provide sufficient habitat for fish population levels that will meet the cultural and spiritual needs of the Lummi Nation and support sustainable economically viable harvests for Lummi Nation fishermen;

(i) to provide for the orderly resolution of disputes over the management, administration, and permitting of Lummi Nation Water under this Code;

(j) to coordinate the administration and environmental protection of Lummi Nation Water with other governmental agencies or bodies performing related duties and responsibilities affecting Lummi Nation Water, such as the Lummi Planning Department, the Lummi Natural Resources Department, the Lummi Tribal Sewer and Water Districts, the U.S. Environmental Protection Agency, the U.S. Army Corps of Engineers, Environment Canada, the Washington Department of Ecology, the Washington Department of Health, and local governmental agencies.

17.01.030 Applicability

(a) This Code applies to all persons using or desiring to use Lummi Nation Water or undertaking activities or desiring to undertake activities that affect Lummi Nation Water, including, but not limited to, fresh and marine waters in, on, or underlying all lands within the external boundaries of the Lummi Reservation and within the external boundaries of all lands held in trust for the Lummi Nation by the United States regardless of location.

(b) Nothing in this Code shall be construed as restricting the treaty hunting and fishing rights of members of the Lummi Nation, including the right to fish in all usual and accustomed areas and to hunt on all Reservation lands and all open lands off the Reservation. Furthermore, nothing in this Code shall be construed as restricting the rights of the Lummi Nation to access and use culturally and spiritually significant areas necessary for the cultural and spiritual life of the Lummi people.

(c) No person may make private agreements regarding uses of Lummi Nation Water that are inconsistent with the provisions of this Code.

Chapter 17.02 Water Resources Manager

17.02.010 Water Resources Manager; Appointment; Removal

There is hereby created the position of Water Resources Manager who shall be subject to the direction and supervision of the Executive Director of the Lummi Natural Resources Department. The Water Resources Manager may be an employee of the Lummi Nation, subject to the personnel policies of the Lummi Indian Business Council (LIBC), and may be removed for good cause as documented in evaluations performed by the Executive Director.

17.02.020 Water Resources Manager Qualifications

To be eligible for appointment as Water Resources Manager, a person:

(a) must be at least twenty-one years of age;

(b) be of high moral character and integrity;

(c) never have been convicted in the Lummi Tribal Court or other court of a misdemeanor involving dishonesty or of a felony; and

(d) must possess, at a minimum, a bachelor of sciences degree in natural resources management or related field and have at least seven years of professional experience in water-related business management, water resource management, hydrology, water rights administration, or water development.

17.02.030 Powers and Duties of the Water Resources Manager

The Water Resources Manager shall manage and regulate Lummi Nation Water in accordance with this Code. The Water Resources Manager shall

(a) supervise and manage the Water Resources Division of the Department;

(b) develop the administrative, managerial, and technical capabilities of the Water Resources Division to promote the effective implementation and enforcement of this Code;

(c) develop criteria, standards, forms, and a fee structure for permits; administer the permitting processes required to implement this Code; and, when necessary, coordinate permit review in cooperation with other departments and agencies of the Lummi Nation;

(d) develop, for adoption by the Commission and approval by the LIBC, such regulations as may be necessary to administer and enforce this Code;

(e) conduct data collection activities, water sampling and monitoring, surveys, research, and investigations of all aspects of water resources, including, but not limited to, water supply, use, quantity, and quality;

(f) prepare plans and develop programs for the development, management, conservation, protection, and use of Lummi Nation Water, including, but not limited to, the management of water quantity and quality;

(g) act in an emergency to protect water quantity and/or quality, including, but not limited to, removing, rendering inoperative, shutting down, closing, sealing, capping, modifying, or otherwise controlling methods of diversion and withdrawal, obstructions to the flow of water, and activities affecting water quality and quantity;

(h) inspect books; records; meters; gauges; well logs; works of appropriation, diversion, impoundment, withdrawal, or control; and other relevant information;

(i) enter, or designate other Department staff members to enter, upon lands and other property within the external boundaries of the Lummi Reservation and trust lands, at all reasonable times or after obtaining an order from the Tribal Court if the owner, lessee, sublessee, assignee, or permittee refuses to consent to entry, for the purpose of conducting investigations and studies, monitoring activities, ascertaining methods of diversion and withdrawal, installing measuring devices, and ensuring compliance with permits, this Code, and any regulations promulgated hereunder;

(j) recommend to the Executive Director the imposition of fines and issuance of such orders, including emergency restraining orders and cease and desist orders, as may be necessary to enforce the provisions of this Code; of any regulations promulgated hereunder; or of any permit, order, plan, determination, policy, guideline, or rule developed in accordance with this Code;

(k) initiate enforcement proceedings before the Tribal Court or in other courts of competent jurisdiction for violations of this Code, including injunctive relief, and appear in proceedings before the Commission, Tribal Court, Tribal Court of Appeals, and any other court of competent jurisdiction;

(l) conduct conferences and, by subpoena, compel the attendance and testimony of persons and the production of any books, records, and papers of any person, and examine under oath, either orally or in writing, any person or agent, or any other witness; and

(m)exercise all other authority delegated by law or as may reasonably be necessary in the administration or enforcement of this Code and the regulations promulgated hereunder.

17.02.040 Powers and Duties of the Executive Director

The Executive Director shall have full authority to regulate Lummi Nation Water in accordance with this Code. Upon the recommendation of the Water Resources Manager, the Executive Director shall have the authority to approve, deny, transfer, revoke, and suspend permits; impose fines; and issue emergency restraining orders and cease and desist orders.

17.02.050 Disqualification: Conflict of Interest

The Executive Director and the Water Resources Manager shall each disqualify himself or herself from making any decision or recommendation in which he or she has a direct economic interest or when an applicant or permittee in the proceeding is a relative of the Executive Director or the Water Resources Manager by marriage or blood in the first or

second degree; provided that the Executive Director and the Water Resources Manager shall not be required to disqualify himself or herself from making any decision by reason of the fact that he or she is in any way interested if such interest is fully disclosed and the Executive Director's or Water Resources Manager's decision or recommendation is authorized, ratified, or approved by the Commission. If the Executive Director or the Water Resources Manager disqualifies himself or herself, the Commission shall designate an employee of the Water Resources Division or such other qualified person to act in the place of the Executive Director or the Water Resources Manager for the purpose of making the decision wherein the conflict arose.

17.02.060 Powers and Duties of the Lummi Natural Resources Commission

The Lummi Natural Resources Commission is charged with the power and authority to:

(a) adopt regulations to administer and enforce this Code, including requirements for issuing permits and establishing a schedule of civil fines for violations of this Code or of a permit issued pursuant to this Code, subject to approval by the LIBC;

(b) prepare and present for LIBC approval a Master Water Allocation Plan that defines the quantity of water available for permitting under this Water Resources Protection Code based upon the best research and data available concerning the Nation's water resources;

(c) designate a Special Water Management Area, after appropriate study and hearings, and make such orders as are necessary to protect the quantity and quality of Lummi Nation Water, including, but not limited to, orders to close such an area to any further appropriations, expansion of existing rights, or other development of the water resources in such an area;

(d) administer oaths; conduct hearings to resolve appeals by persons affected by decisions and actions of the Executive Director and/or the Water Resources Manager; make decisions, determinations, and judgments permitted or required by this Code; issue subpoenas to compel the attendance and testimony of persons and the production of books, records, and papers of any applicant or permittee; and examine under oath, orally or in writing, any affected person or their agent or any other witness;

(e) recommend to the LIBC proposed amendments to this Code;

(f) consult with the Executive Director and the Water Resources Manager on the preparation of a proposed budget for the administration of this Code; such budget shall be approved annually according to the requirements of Title 28 of the Lummi Code of Laws;

(g) exercise all other authority delegated by law or as may be reasonably necessary in the administration of this Code; and

(h) provide coordination between the activities and duties of the Commission, the Lummi Planning Commission, the Lummi Tribal Water and Lummi Tribal Sewer Boards, and other commissions, committees, and boards as appropriate.

17.02.070 Promulgation of Regulations

(a) Notice. Before final adoption of a regulation by the LIBC, the Water Resources Manager shall post notice of the proposed regulation for public review and comment in at least three public places, inviting written comments and stating a deadline for their submission of not less than thirty (30) days after the posting of notice. The notice shall inform the public where copies of the proposed regulations may be obtained. The Water Resources Manager may, but is not obligated to, hold a public hearing; in that event, he or she will announce the time and place at which oral testimony will be heard.

(b) Adoption. After the closure of the public notice and comment period, or closure of the public hearing if one is held, the proposed regulations and all comments received shall be presented to the Commission for its review. The Commission may approve, amend, or disapprove of the proposed regulations, or the Commission may direct the Water Resources Manager to prepare revisions to the proposed regulations and/or provide for further public review and comment. Proposed regulations approved by the Commission shall be

submitted in a timely manner to the LIBC for review and adoption by the Council.

(c) Effective Date. Upon approval by resolution of the LIBC, a regulation shall become effective on the date specified in the resolution. If no date is specified, the effective date shall be the date the resolution is approved by the LIBC.

(d) Available for Inspection. A copy of all regulations will be filed and made available for public inspection at the Water Resources Division.

(e) Emergency Regulations. If the Commission finds that immediate adoption of a regulation is necessary for the protection of the public health, safety, or welfare and that complying with the notice and comment requirements of this Code would threaten the health or the public interest of the Lummi Nation, the Commission may dispense with such requirements and adopt immediately a regulation as an emergency regulation. An emergency regulation shall be effective upon the date of its adoption by the Commission. Notice of the emergency regulation may be posted in a public place, but such posting is solely to inform the public of its adoption, and nothing in this Code shall be construed to prevent the implementation of the emergency regulation upon its adoption by the Commission in accordance with this Section. An emergency regulation shall expire one hundred and eighty (180) days after its adoption, unless approved as a permanent regulation by the LIBC.

17.02.080 Public Records

All records required or allowed to be maintained by the Water Resources Manager or the Commission shall be public records, provided that, unless otherwise required by applicable law, the Water Resources Manager shall deny the right of public inspection of the following records on the grounds that disclosure would be contrary to the public interest:

(a) investigatory files compiled for any law enforcement or prosecution purposes;

(b) interagency or intra-agency memoranda or letters that would not be available by law to a private party in litigation;

(c) medical, psychological, or sociological data on individual persons;

(d) records protected from disclosure by court order or federal, state, or tribal law;

(e) personnel files and letters of reference, provided that those files shall be available to the duly elected and appointed officials who supervise the work of the person in interest; provided further that, in all cases, disclosure of personnel records shall be consistent with all applicable Lummi Nation personnel policies;

(f) trade secrets, privileged information, other proprietary information furnished by or obtained from any person, including, but not limited to, commercial, financial, geological, geophysical, or other technical data; or

(g) proprietary, commercial, financial, geological, geophysical, hydrological, or other information of the Lummi Nation, the disclosure of which likely would cause substantial injury to the interest of the Lummi Nation.

Chapter 17.03 Permit System for Water Use on Lummi Nation Lands

17.03.010 Water Use By Permit

(a) Purpose of Permit System. The purpose of the permit system for water is to conserve and protect the public interest in Lummi Nation Water, to prevent the waste and degradation of Lummi Nation Water, and to provide an orderly permitting system for applicants desiring to use or to engage in activities affecting or involving Lummi Nation Water.

(b) Permits Required. Except in emergency situations, no person may divert, withdraw, or reserve for a non-consumptive use Lummi Nation Water without a permit; permits are subject to adjustments that may be imposed during declared water shortages or emergencies.

(c) Beneficial Use. Use of Lummi Nation Water may be permitted only from supplies of water designated as available for allocation in the Lummi Master Water Allocation Plan and only for beneficial and reasonable uses subject to the requirements of this Code. The Master Allocation Plan may allocate quantities of

water for consumptive and non-consumptive purposes that include, but are not limited to:

(1) preserving the integrity of the Nation's water;

(2) protection of riparian habitats;

(3) protection and maintenance of ecological flow regimes;

(4) promotion of the economic well-being of the Nation; and

(5) other purposes that protect the health, safety, and/or welfare of the Nation.

(d) Water Allocation in Times of Water Shortage. All permits issued under this Code are subject to restriction in times of water shortage according to allocation criteria proposed by the Water Resources Manager and approved in the same manner as regulations adopted pursuant to this Code. Water allocated for cultural uses (including fisheries) shall have the highest priority. Water allocated for domestic use shall have the second priority, followed in priority by water for municipal, commercial, agricultural, and industrial purposes. Restricted use for specified periods of time may be adopted for any or all priority categories without eliminating all uses in lower priority categories, providing the restrictions are equitable and culturally appropriate.

17.03.020 The Permit System

(a) Nature of Permit Rights. All permits issued under this Code are provisional and shall not be construed to create an entitlement in the permittee beyond the provisional period specified in the permit nor to allow reliance thereon by any other person. A permit issued by the Executive Director does not replace any permits required by other agencies of the Lummi Nation for an activity, and is strictly limited to the activity described in the permit. All permittees must comply with all applicable federal and Lummi Nation laws and regulations as a mandatory condition of their permits.

(b) Registry of Permits. The Water Resources Manager shall create and maintain a registry of permits. Permits shall be subject to periodic review by the Water Resources Manager for their effect on trust and natural resources and may be modified to protect such resources when appropriate.

(c) Findings for Approving Water Permits. The Water Resources Manager shall recommend and the Executive Director shall approve a permit application only upon a finding that:

(1) the proposed use of water is beneficial and reasonable and conforms to any water management plan;

(2) the proposed means of diversion, withdrawal, or construction is adequate;

(3) The applicant has a schedule and plan for water use monitoring;

(4) The applicant consents to water quality monitoring, sampling, and testing;

(5) The applicant is authorized to use the land on which the water will be withdrawn or diverted and the land on which the water will be applied for the purpose or purposes stated in the application;

(6) The applicant has the intent, ability, and authority to use the water;

(7) The proposed use will not significantly impair water quantity or quality;

(8) The proposed use will not significantly threaten wildlife or other natural resources or interfere with public recreational opportunities;

(9) To the greatest extent practical, the proposed use will not interfere with or significantly impair other authorized water uses having an equal or greater priority under this Code;

(10) The proposed use will not endanger public health;

(11) The proposed use is hydrologically feasible;

(12) The proposed use is in the public interest of the Lummi Nation;

(13) Water is available to satisfy the proposed use, consistent with the Nation's present and future water needs.

(d) Permit Conditions. Every permit issued pursuant to this Code shall contain whatever conditions are necessary to ensure adequate

quality and quantity of water; to otherwise further the purposes, policies, and guidelines contained within this Code and regulations adopted pursuant to this Code; and to assist in the effective administration of this Code. Permits shall specify:

(1) points of withdrawal;

(2) maximum instantaneous withdrawal;

(3) maximum annual quantity of withdrawal;

(4) water quality monitoring frequency; and

(5) metering requirements; and

(6) the conditions under which water withdrawals may be curtailed or limited.

(e) Types of Permits. The Executive Director may issue the following types of general and special permits, consistent with the requirements of this Code and regulations adopted pursuant to this Code. Any two (2) or more permits may be combined into a single permit:

(1) General Water Permits.

(A) Tribal Water Use Permit. Such a permit grants a right to the Nation, or Nation entities, enterprises, or subdivisions, or to a Nation member, to use a portion of Lummi Nation Water. All permits of this type shall state the priority date therefore, but in any event, the priority date shall be not later than 1855 and may date from time immemorial. Such a permit issued to a Nation member shall be for a water use placed in service from and after the effective date of this Water Resources Protection Code. Such a permit is personal to the Nation member or entity and may not be transferred to any other person or entity without the prior written consent of the Executive Director. Consent to a transfer shall not be unreasonably withheld if the transferee is another Nation member or the surviving spouse or child of the Nation member permittee. Such a permit shall expire when the Water Resources Manager determines that the Lummi Water District is able to deliver water to the property that is using water subject to the permit. At such time, the permittee shall be entitled and obligated to connect to the Lummi Water District upon compliance with the District's application and fees.

(B) Water Lease Permit. Such a permit grants a right to use a portion of the Lummi Nation's water, upon execution of a water lease and payment to the Nation of rates to be established by the Commission and approved by the LIBC.

(C) Existing Residential Water Use Permit. Such a permit grants a right to use a portion of Lummi Nation Water to a person or entity, and their successors in interest, for the sole purpose of providing water for domestic use only to one single family residence located on the property where the permitted water is to be used. Such permits may be issued only for a water use that existed on or before the effective date of this Water Resources Protection Code. Such a permit shall expire when the Water Resources Manager determines that the Lummi Water District is able to deliver water to the property that is using water subject to the permit. At such time, the permittee shall be entitled and obligated to connect to the Lummi Water District upon compliance with the District's application and fees.

(D) Municipal Water Use Permit. Such a permit shall be issued to the Lummi Water District for the purpose of delivering water to District customers and meeting the requirements of the District's water system plan, including fire flow. The District shall use water for the following purposes:

(i) to supply water to the Nation and its entities for domestic, commercial, municipal, and industrial purposes;

(ii) to supply water to Nation members for domestic use and any other uses authorized by the LIBC;

(iii) to supply water to persons and property that the District is obligated to serve for the uses and services in effect on the effective date of this

Code; and

(iv)to supply water to any person, entity, or property which, by settlement, contract, or other agreement with the Lummi Nation, becomes eligible and entitled to receive water service from the District.

(2) Special Permits.

(A) Permit to Change Point of Diversion or Place or Method of Application. Such a permit grants the right to change the use, point of diversion, place of use, or method of diversion or application of Lummi Nation Water under an existing general permit.

(B) Water Storage Permit. Such a permit grants the right to store or impound for a beneficial use a portion of Lummi Nation Water or other water within the Lummi Reservation and trust lands, including storage in both natural and artificial storage facilities located in the ground or on the surface.

(C) Instream Flow Permit. Such a permit grants the right to maintain specified stream flows and/or lake levels in reaches of or for the entire streams or water bodies within the Reservation and trust lands.

(D) Watershed Transfer Permit. Such a permit grants the right to transfer Lummi Nation Water derived from Lummi Nation tribal reserved water rights to an entity or person outside the watershed of origin.

(E) Well Drilling Permit. Such a permit grants the right to construct a new or modify an existing well to persons meeting requirements for licensure, technical capability, and bonding as defined in and subject to the requirements of this Code and regulations adopted pursuant to this Code. Such a permit requires the submission of specific technical data, including, but not limited to, construction plans, effects on aquifer level and water quality, and other pertinent data as required by the Water Resources Manager. The issuance of a Well Drilling permit is contingent upon the applicant providing a satisfactory description of its technical competence and financial stability, including a description of relevant training and experience, procedures and equipment, current financial condition, and disclosure of prior or existing claims; upon the posting of a bond in favor of the Lummi Nation in an amount established under the regulations, conditioned upon the faithful performance and completion of all conditions and stipulations of the permit; and upon the applicant's written undertaking to comply with all applicable tribal laws and regulations, including those regarding record keeping, logging, reporting, and inspection by the Water Resources Manager.

17.03.030 Relinquishment, Loss, and Transfer of Water Rights

(a) Voluntary Relinquishment of Claims or Rights. Any holder or claimant of any right in or to Lummi Nation Water may voluntarily relinquish all or a portion of such right to the Lummi Nation by any affirmative action indicating an intent to relinquish.

(b) Adverse Possession. No right to use or otherwise affect the quantity, level, flow, pressure, quality, aesthetics, or temperature of Lummi Nation Water may be acquired by adverse possession, prescription, estoppel, or acquiescence.

(c) Assignment, Lease, or Transfer of Permits. No permit granted under this Code may be transferred, exchanged, sold, assigned, devised, inherited, or otherwise conveyed except as provided in this Code and on the terms and conditions of the applicable permit. Any assignment, lease, or transfer of a permit shall require the prior written consent of the Water Resources Manager.

(d) Loss by Non-Use or Waste. Any permit to use or otherwise affect in any way Lummi Nation Water, regardless of the water's origin, shall become void, and the water and the right to use it shall revert automatically, to the extent of non-use or waste, to the Lummi

Nation when the holder of such permit wholly or partially abandons the same; voluntarily fails without sufficient cause to use all or a portion of the water available under such use right for a period of five (5) consecutive years; or commits waste of such water; provided that loss by non-use, abandonment, or waste shall not apply to the tribal reserved water rights held by the Lummi Nation. "Sufficient cause" includes but is not limited to:

(1) drought or other unavailability of water;

(2) the holder's active service in the armed forces of the United States;

(3) the operation of legal proceedings;

(4) the application of any laws restricting water use or water-related activities;

(5) incarceration in a penal institution;

(6) the holder's confinement in a mental institution, whether voluntary or involuntary;

(7) the holder's incompetence by reason of illness, age, or mental incapacity;

(8) provisions for future use as provided in this Code or regulations adopted pursuant to this Code; or

(9) other causes of non-use or waste beyond the control of the holder of the use right claimed.

Before such rights to use water may be deemed lost by non-use, abandonment, or waste, the Water Resources Manager shall serve notice on the holder of such a permit to appear at a hearing before the Commission not less than thirty (30) days after the mailing or personal service of such notice and show cause why the permit should not be deemed void. Such notice and hearing shall be made and conducted in accordance with the procedures for hearings before the Commission set forth in this Code.

17.03.040 Permit Application Procedure

(a) Permit Application. Permit applications shall be made on forms developed by the Water Resources Manager, containing such information and facts that, in the judgment of the Water Resources Manager, are required for the proper processing of such applications, including appropriate technical information and analysis regarding potential impacts of the proposed use or activity. A fee schedule for permit applications shall be established by regulation, and such fees shall be paid in advance to the Lummi Accounting Department.

(b) Receipt of Application. Upon receipt of a permit application, the Water Resources Manager shall endorse on the application the date of receipt and keep a record of the application. Within thirty (30) days after receipt of the application, the Water Resources Manager shall determine whether the application is complete and correct. If the Water Resources Manager determines that the application is incomplete or incorrect, the Water Resources Manager shall reject and return the application as incomplete and request additional information from the applicant.

(c) Written Notice. The applicant shall mail written notice of the filing of his or her completed application to all landowners within five hundred (500) feet of the property lines of the property where the proposed use or activity is to occur.

(d) Public Notice. Within fifteen (15) days after a water supply well application is determined to be complete and correct, the Water Resources Manager shall require that notice of the application be posted in the tribal offices and such other locations as may be deemed appropriate by the Water Resources Manager. The Water Resources Manager shall provide the applicant the appropriate notice to be posted. If it appears to the Water Resources Manager that neighbors of the applicant may be affected adversely, the Water Resources Manager also may require the applicant to post public notice at the site of the applicant's proposed activity or water use and other locations within two thousand five hundred (2,500) feet of such site. The notice shall state that written objections to the issuance of a permit may be filed with the Water Resources Manager within fifteen (15) days after the posting of the notice, which date shall be stated in the notice.

17.03.050 Approval and Denial of Permit Applications

(a) General Considerations. Upon receipt of an application, the Water Resources Manager shall review the permit application; shall perform investigations to determine whether the proposed use or activity adversely affects tribal resources or other tribal interests, whether the proposed use or activity is technically feasible, and whether the proposed use or activity is consistent with tribal water and land use laws and policies, purposes, and procedures prescribed by this Code and regulations adopted pursuant to this Code; and shall prepare a written report containing his or her recommendation on the application. The Executive Director may approve, approve with conditions, or deny the permit and must include factual justifications for the decision.

(b) Time Period for Approving and Denying Permit Applications. The Executive Director shall rule on applications within forty-five (45) days after the last day on which objections may be filed, unless good cause exists to extend this time period. If no ruling is made on the application within the prescribed time periods, absent an extension, the permit shall be deemed denied.

(c) Approval of Permits. If the permit is approved, the Executive Director shall issue the permit subject to appropriate terms, conditions, restrictions, and limitations. The permit shall be accompanied by a written decision, including the factual findings that justify the decision and grounds for revoking or suspending the permit.

(d) Denial of Permits. If the permit is denied, the Executive Director shall so notify the applicant, stating in writing the reasons for the denial, including the factual findings that justify the decision.

17.03.060 Revocation and Suspension of Permits

(a) Grounds for Revocation and Suspension of Permits. The Executive Director may revoke or suspend a permit, in whole or in part, permanently or temporarily, as follows:

(1) for any material false statement in an application to obtain or modify a permit;

(2) for violation of this Code, any regulation promulgated hereunder, or any condition of a permit;

(3) for material damage to water quality, quantity, or the integrity of an aquifer;

(4) for committing or permitting waste of water; or

(5) upon the written consent of the permittee.

(b) Notice. The Executive Director shall provide written notice of intent to revoke or suspend a permit by certified mail, return receipt requested, to the permittee at the last known address contained in the Water Resource Division's records. If the permittee cannot be so served with notice, the permittee may be served by publication in a newspaper of general circulation once each week for three (3) consecutive weeks.

(c) Decision. The permittee shall have ten (10) days from the day the notice was delivered, or from the date of last publication, to show cause in writing why the permit should not be revoked or suspended. The Executive Director shall issue a decision whether to revoke or suspend the permit within thirty (30) days of receipt of the permittee's written statement.

(d) Emergency Revocation or Suspension of Permits. In the event of an emergency, the Executive Director may temporarily revoke or suspend a permit without prior notice for a period not to exceed thirty (30) days.

17.03.070 Appeals from Final Decisions of the Executive Director

Any person who qualifies as an affected person as defined in this Code and who is aggrieved by a final decision of the Executive Director may appeal such final decision in accordance with the appeals procedures set forth in this Code.

Chapter 17.04 Wellhead Protection

17.04.010 Findings and Purpose

(a) Contamination of wellhead areas and ground water resources of the Lummi Nation has a direct, serious, and substantial detrimental effect on the cultural, political, and economic integrity of the Lummi Nation and on the health and welfare of its members and all persons present on the Reservation and trust lands.

(b) The Reservation and trust land ground water resources are vulnerable to contamination, which could lead to the loss of the primary water supply source of the Lummi Nation.

(c) Alternate water sources to serve the needs of the Reservation and trust lands are expensive and may not be available in amounts sufficient to replace existing supplies and to provide for future anticipated tribal economic and residential growth. Moreover, alternative water sources would require substantial amounts of capital expenditure for the infrastructure upgrades that would be necessary to import larger volumes of water onto the Reservation or trust lands. Finally, alternative water sources may be subject to service interruptions over the long term due to natural or human generated disasters.

(d) This Chapter provides guidelines to determine appropriate conditions to be included in permits issued by the Water Resources Manager and/or the Lummi Planning Department for the protection of wellhead areas and ground water resources of the Lummi Nation.

17.04.020 Establishment of Wellhead Protection Areas

(a) A Wellhead Protection Area is a geographic area delineated around wells and/or wellfields within which land uses are regulated to protect the quality and quantity of the ground water resource. A Wellhead Protection Area is an overlay of a zoning area that imposes additional requirements and restrictions to those of the underlying zoning area. In all cases, the most restrictive requirements apply.

(b) A wellhead is a physical structure, facility, or device at the land surface from or through which ground water flows or is pumped from water-bearing formations. A wellhead can be a developed spring or ground water well that was hand dug or constructed by a machine.

(c) There is hereby established a Lummi Wellhead Protection Areas map, which is shown on the attached map entitled “Map 1 Lummi Wellhead Protection Areas”. The attached map is hereby adopted as part of the Lummi Nation’s official zoning map. The Lummi Wellhead Protection Areas map shall be reviewed and up-dated at least every five (5) years, or more frequently, as additional information is received and evaluated by the Water Resources Division. Changes to the Lummi Wellhead Protection Areas map shall be approved and adopted in the same manner as regulations pursuant to this Water Resources Protection Code.

17.04.030 Establishment of Sanitary Control Area

A Sanitary Control Area is an area within a Wellhead Protection Area that is required to protect a well or spring from existing and potential contamination sources. A Sanitary Control Area shall be maintained around all wells and springs for the purpose of protecting them from existing and potential contamination sources. The following are the requirements for a Sanitary Control Area.

(a) Size of the area:

(1) Unless engineering justification supports a smaller area, the minimum sanitary control area around a public water supply well shall be a radius of one hundred (100) feet and the minimum sanitary control area around a spring shall be a radius of two hundred (200) feet. Any engineering justification in support of a smaller area must address geological and hydrological data, well construction details, and other relevant factors necessary to ensure adequate sanitary control;

(2) The minimum sanitary control area around a single-family, domestic water supply well shall be determined on a case-by-case basis but shall not be less than fifty (50) feet unless engineering justification supports a smaller area; and

(3) The Water Resources Manager may require a larger sanitary control area than that specified in Subsections (1) and (2) if geological and hydrological data support such a decision.

(b) No source of contamination may be constructed, stored, disposed of, or applied within the sanitary control area without the approval of the Water Resources Manager.

(c) Water purveyors shall demonstrate that they have the legal right to exercise complete sanitary control of the land within the sanitary control area applicable to their water source.

17.04.040 Permit for Use Required

No person may engage in any use or activity that is within a Wellhead Protection Area on the Lummi Reservation or trust lands without obtaining a land use permit from the Lummi Planning Department as provided in Title 15 of the Lummi Code of Laws and regulations adopted thereunder.

17.04.050 Prohibited Uses and/or Activities in Wellhead Protection Areas

The following uses, development, and/or activities are prohibited in a Wellhead Protection Area:

(a) landfills containing either solid or hazardous waste;

(b) salvage yards, junk yards, stockyards, feedlots, or similar sites containing discarded material having the potential to adversely affect ground water.

17.04.060 Conditional Uses or Activities

The following uses or activities may be conditionally allowed in a designated Wellhead Protection Area pursuant to a land use permit issued by the Lummi Planning Department:

(a) agriculture;

(b) horticulture;

(c) parks, greenways, or recreation areas;

(d) timber harvesting;

(e) necessary public utilities or facilities designed so as to prevent contamination of ground water;

(f) industrial and commercial land uses not otherwise prohibited by the Lummi Code of Laws;

(g) single family residential housing;

(h) multiple family residential development; and

(i) sand and gravel excavation.

17.04.070 Approval of Permits for Conditional Uses or Activities

The Lummi Planning Department will grant approval for conditional uses in Wellhead Protection Areas only after the Water Resources Manager has certified that:

(a) the proposed use complies with all other applicable water quality standards; and

(b) the applicant has prepared and submitted for approval an acceptable pollution prevention and spill response plan for the facility or activity for the monitoring, prevention, and cleanup of ground water contamination due to flood, fire, natural catastrophes, equipment failure, and/or human error.

All permits shall contain a condition that the permitee agrees to be subject to inspection by the Water Resources Manager or other designated agent of the Lummi Nation. The purpose of the inspection is to ensure continued compliance with the conditions under which the permit approval was granted.

17.04.080 Requirements for Wells

Any person proposing a new well or expansion of an existing well must obtain a permit from the Water Resources Manager, pursuant to Chapter 17.03 of this Code. The Water Resources Manager must be satisfied that the following requirements are met:

(a) Every well contractor must be duly licensed and bonded under the laws of the Lummi Nation and/or the State of Washington.

(b) The permit application must contain, at a minimum, the well owner's name, the well driller's license and bonding information, well location, land status, proposed use, and approximate start and completion dates.

(c) Every well driller must submit a complete

record on the construction or alteration of the well to the Water Resources Manager within thirty (30) days of completion of the well. Such record will include: i) well location, ii) method of drilling and stratum information including depth, thickness, and type; iii) water information including static water level, chloride levels, the tested capacity of the well, and any other water quality information; and, iv) type and length of well casing and screen.

(d) The contractor shall meet all requirements for design required by the Water Resources Manager to ensure ground water quantity and quality. In constructing, developing, redeveloping, or conditioning a well, care shall be taken to preserve the natural barriers to ground water movement between aquifers and to seal aquifers or strata penetrated during drilling operations which might impair water quality.

(e) The contractor shall take all precautions to prevent undesirable physical or chemical contaminants from entering the well.

(f) Monitoring wells shall be fitted with a locking cap and permanent monument.

17.04.090 Abandoned Wells

(a) An abandoned well is a well that

(1) other than a monitoring well, has been out of service continuously for one (1) year or more;

(2) is a monitoring well from which no measurement or sample has been taken for a period of three (3) years;

(3) is in such a state of disrepair that it cannot be made operational for its intended purpose;

(4) is a test hole or exploratory boring twenty-four (24) hours after construction and testing work has been completed;

(5) is a cathodic protection well that is no longer functional for its original purpose; or

(6) is any boring that cannot be satisfactorily completed as a well.

(b) Any landowner who has drilled a well that has been closed or is abandoned must ensure proper closure to prevent contamination of the Wellhead Protection Area. The following information must be submitted to the Water Resources Manager for all well closures:

(1) proof of a plan identifying that the well was or will be sealed using appropriate methods within thirty (30) days of abandonment; and

(2) a map identifying the location of the closed or abandoned well.

(c) Abandoned wells that have not been properly closed may be closed and sealed by the Water Resources Manager, with the cost of such closure or sealing to be paid by the property owner.

17.04.100 Existing Nonconforming Uses

Any use that is lawfully existing on the effective date of this Code and that does not conform with all the provisions of this Code may remain in use under the following conditions:

(a) no prohibited use in a Wellhead Protection Area may be expanded if it increases the non-conformity of the activity; and

(b) abandonment of a use or a permit will result in the loss of the non-conforming use status.

(c) Notwithstanding Subsections (a) and (b) of this Section, where the non-conforming use is deemed a substantial threat to public health, the Water Resources Manager may require an appropriate modification to the activity or use to conform to the requirements for wellhead protection.

Chapter 17.05 Storm Water Management

17.05.010 Findings and Purpose

(a) Contamination of surface waters, tidelands, estuaries, wellhead protection areas, and ground water of the Lummi Nation has a direct, serious, and substantial effect on the political integrity, economic security, and the health and welfare of the Lummi Nation, its members, and all persons present on the Reservation and trust lands. The Reservation and trust land water supplies including ground water, are vulnerable to contamination from storm water, as are the resource-rich tidelands and estuaries.

(b) All water that falls onto or passes through the Lummi Reservation discharges to the resource-rich tidelands and estuaries that surround the Reservation uplands, except those waters discharged from the two wastewater treatment plants into Washington State aquatic lands that are part of the Lummi Nation's usual and accustomed fishing grounds. The tidelands are an economically and culturally critical resource that includes salmon habitat, shellfish, extensive eel grass beds, herring spawning grounds, surf smelt, sand lance, wildlife, and water supply intakes for salmon and shellfish hatcheries.

(c) Because of the small percentage of Reservation and trust land that has been developed in comparison to population projections and the planned economic and institutional growth, portions of existing forested and agricultural lands will be converted to residential, commercial, or community uses in the coming years. These conversions can be expected to affect storm water quantity and quality.

(d) Residential, commercial, and industrial development impacts vegetation and soil properties in a manner resulting in greater storm water volumes, higher peak discharges, and lower water quality. Minimizing these adverse impacts from development and maximizing the protection of sensitive and important natural resources is necessary to protect the political integrity, economic security, and the health and welfare of the Lummi Nation, its members, and all persons present on the Reservation.

(e) Storm water is an important source of ground water recharge and a potentially significant source of ground water contamination. Ground water is critical to the Reservation drinking water supply and salmon hatchery program and is essential to serve the purpose of the Reservation as the permanent homeland of the Lummi Nation and its members.

(f) This Chapter provides guidelines to determine appropriate conditions to be included in permits issued by the Water Resources Manager and/or the Lummi Planning Department for the control of storm water and protection of the surface and ground waters, tidelands, estuaries, and wellhead protection areas of the Lummi Nation.

17.05.020 Approval of Regulated Activity Required

(a) No person may engage in any use or activity regulated by this Chapter that affects or has the potential to affect the quality or quantity of storm water as listed in this Chapter without obtaining a land use permit from the Lummi Planning Department, as provided in Title 15 of the Lummi Code of Laws and regulations adopted thereunder, and developing a storm water pollution prevention plan approved by the Water Resources Manager.

(b) Regulated activities include all:

(1) new developments; and

(2) re-developments.

(c) Obtaining a permit from the Lummi Planning Department does not waive the necessity of obtaining the appropriate permits from the U.S. Army Corps of Engineers and/or the U.S. Environmental Protection Agency or other appropriate permits as required.

17.05.030 Small Projects

The following types of new development or redevelopment are required to comply with all the requirements for small projects:

(a) Individual, detached, single family residences, duplexes and mobile homes;

(b) Creation or addition of less than five thousand (5,000) square feet of impervious surface area; and

(c) Land-disturbing activities of less than one acre.

17.05.040 Requirements for Small Projects

A Lummi land use permit issued under Title 15 of the Lummi Code of Laws must contain conditions providing for the following:

(a) Construction access route. Construction vehicles shall, whenever possible, limit access to the parcel to one route. Access points will be stabilized to minimize the tracking of sediment onto public roads or other paved roads. If sediment is transported onto a road surface, creating a hazard, the road(s) shall be

cleaned immediately.

(b) Stabilization of soils. All exposed and unworked soils with erosion potential shall be stabilized by suitable application of Best Management Practices (BMPs), including, but not limited to, sod or other vegetation, plastic covering, mulching, or application of ground base on areas to be paved. All BMPs shall be selected, designed, and maintained in accordance with an approved plan.

(c) Protection of adjacent properties. Adjacent properties shall be protected from sediment deposition by appropriate use of vegetative buffer strips, sediment barriers or filters, dikes or mulching, or by a combination of these measures and other appropriate BMPs.

(d) Maintenance. All erosion and sediment control BMPs shall be regularly inspected and maintained by the owner or authorized agent to ensure continued performance of intended functions.

(e) Other BMPs. Other appropriate BMPs to mitigate the effects of increased runoff as required.

17.05.050 Large Projects

The following types of new development or redevelopment are required to comply with the applicable requirements for large projects:

(a) New development exceeding five thousand (5,000) square feet of impermeable surfacing and/or land disturbing activities of one acre or more;

(b) Redevelopment of greater than five thousand (5,000) square feet of impermeable surfacing and/or land disturbing activities of one acre or more;

(c) Redevelopment of less than five thousand (5,000) square feet where:

(1) the existing site is greater than one (1) acre in size with fifty percent (50%) or more of impervious surface; or

(2) the site discharges to receiving water that has a documented water quality problem. A documented water quality problem includes, but is not limited to:

(A) the receiving water is listed in reports required under Section 305(b) of the Clean Water Act, and designated as not supporting beneficial uses;

(B) the receiving water is listed under Section 303(d) of the Clean Water Act and not expected to meet water quality standards or water quality goals; or

(C) there is documented evidence that the receiving water body is adversely impacted by storm water and without additional action to control nonpoint sources of pollution, it cannot reasonably be expected to attain or maintain water quality standards.

17.05.060 Requirements for Large Projects

All large projects must prepare and submit a large project plan and a permanent Storm Water Pollution Prevention Plan prepared by a licensed professional engineer. In addition, the following requirements must be met for all large projects and must be addressed in conditions of a Lummi land use permit issued under Title 15 of the Lummi Code of Laws:

(a) Erosion and sediment control. All new development and redevelopment shall comply with erosion and sediment control requirements through the implementation of an approved Large Project Erosion and Sediment Control Plan.

(b) Natural drainage patterns will be maintained and discharges from the site will occur at the natural location to the maximum extent practicable.

(c) Source control BMPs shall be applied to all projects to the maximum extent practicable and will be selected, designed, and maintained according to methods approved pursuant to 17.05.

(d) Runoff treatment BMPs will be provided for the treatment of all storm water. Direct discharge of untreated storm water to surface water is prohibited. All treatment BMPs will be selected, designed, and maintained according to methods approved pursuant to 17.05.

(e) Streambank erosion control is required where storm water runoff is discharged directly or indirectly to a stream. As the first

priority, streambank erosion control BMPs shall utilize infiltration only when, to the fullest extent practicable, the site conditions are appropriate and ground water quality is protected. Streambank protection will be selected, designed, and maintained according to methods approved pursuant to 17.05.

(f) When storm water discharges directly or indirectly through a conveyance system into a wetland, the following additional requirements must be met:

(1) Storm water discharges to wetlands must be controlled and treated to the extent necessary to meet appropriate water quality standards.

(2) Discharges to wetlands shall maintain the hydroperiod and flows of existing site conditions to the extent necessary to protect the characteristic functions of the wetland.

(3) Created wetlands that are intended to mitigate for loss of wetland acreage, function, and value shall not be designed to also treat storm water.

(g) All large development projects will conduct an analysis of off-site water quality impacts resulting from the project and shall mitigate these impacts. The analysis will extend a minimum of one-fourth mile downstream from the project. The existing or potential impacts to be evaluated and mitigated include, but are not limited to, excessive sedimentation, streambank erosion, discharges to ground water or recharge areas, violations of water quality standards, and spills and discharges of priority pollutants identified under Section 307(a) of the Federal Clean Water Act.

(h) An operation and maintenance schedule shall be provided for all proposed storm water facilities and BMPs; the party responsible for maintenance and operation shall be identified.

(i) If it is determined by the Water Resources Manager that the minimum requirements of this Code do not provide adequate protection of water quality or of sensitive areas (e.g., high value wetlands, aquifer recharge areas, tidelands, and estuaries) either on-site or within a designated area or basin, more stringent controls shall be required to protect water quality or the sensitive area.

17.05.070 Exceptions to the Large Project Requirements

Exceptions to the requirements contained in this Chapter for Large Projects may be granted by the Lummi Planning Department before permit approval and construction. An exception may be granted following a public hearing, provided that a written finding of fact is prepared by the Water Resources Manager that addresses each of the following:

(a) The exception provides equivalent environmental protection, is in the overriding public interest, and the objectives of safety, function, environmental protection, and facility maintenance, based upon sound engineering, are fully met; or

(b) There are special physical circumstances or conditions affecting the property such that the strict application of these provisions would deprive the applicant of all reasonable use of the parcel of land in question, and all feasible efforts to find creative ways to meet the intent of the minimum standards has been made; and

(c) The granting of the exception will not be detrimental to the public health and welfare, nor injurious to other properties in the vicinity and/or downstream, and to the quality of waters of the Reservation and trust lands; and

(d) The exception is the least possible exception that could be granted to comply with the intent of the minimum requirements.

Chapter 17.06 Stream and Wetland Management

17.06.010 Findings and Purpose

(a) Streams and wetlands provide a number of benefits to the Lummi Nation, including fish habitat; habitat for migratory birds, amphibians such as frogs and salamanders, and other wildlife; cultural plants and other cultural practices and properties; providing recharge water to ground-water aquifers; preventing saltwater intrusion; improving water quality; providing water to streams during summer low flows; holding flood and storm waters; and recreational and educational opportunities.

(b) It is the intent of the Lummi Nation to achieve no net loss of streams, wetlands, and their functions and, in the long term, to achieve

a net gain of stream and wetland functions within the boundaries of the Reservation and trust lands. These goals will be achieved by measures such as requiring site planning to avoid or minimize damage to streams and wetlands wherever possible and by requiring restoration or enhancement of degraded streams and wetlands to offset losses that are unavoidable. It is also the intent of the Lummi Nation to pursue a policy of actively encouraging the restoration or enhancement of streams and wetlands with a high potential to provide cultural, fisheries, water-quality, or aquifer-recharge functions.

(c) The purposes of the Lummi Nation Stream and Wetland Management Code are:

(1) To protect the functions and values of streams and wetlands of the Reservation and trust lands from the impacts of development activities and other land uses;

(2) To encourage appropriate residential development and land-use practices by and for tribal members as well as commercial and business growth on the Reservation and trust lands for tribal employment opportunities by providing defined stream- and wetland-management standards, requirements, and mitigation alternatives for effective project planning;

(3) To protect and enhance finfish and shellfish resources, wildlife resources, cultural resources, and the quantity and quality of ground water of the Reservation and trust lands; and

(4) To protect surface-water quality and enhance storm-water management.

17.06.020 Permit Required for Activities in Streams, Wetlands, and Their Buffers

(a) No activity or development shall be allowed on streams, wetlands, or their buffers within the Lummi Reservation and trust lands without a permit issued by the Lummi Planning Department unless the activity is specifically exempted or allowed in this Chapter. Permits may be issued with conditions or may require mitigation for activities affecting streams or wetlands within the Lummi Reservation or trust lands.

(b) All lands lying within the boundaries of the Lummi Reservation and trust lands fall under the jurisdiction of the Lummi Nation and the requirements of this Chapter, including lands owned by the LIBC, lands held in trust, fee lands owned by tribal members, and fee lands owned by non-tribal members.

(c) Obtaining a permit from the Lummi Planning Department does not waive the necessity of obtaining the appropriate permits from the U.S. Army Corps of Engineers and/or the U.S. Environmental Protection Agency or other appropriate permits as required.

17.06.025 General Standards

Stream and wetland permit applications shall be based upon an enhancement/mitigation plan approved by the Water Resources Manager according to criteria and requirements established in regulations adopted pursuant to this Code, and shall satisfy the following general requirements:

(a) The proposed activity shall not cause substantial alteration of hydroperiod, flows, ground-water or surface-water quality, or fish and wildlife habitat;

(b) The proposed activity shall comply with all federal and Lummi Nation laws, including those related to sediment control, pollution control, floodplain restrictions, storm-water management, and on-site wastewater disposal;

(c) Stream, wetland, and buffer impacts shall be minimized.

17.06.030 Regulated Activities

A permit shall be obtained from the Lummi Planning Department before undertaking any of the following (or similar) activities in a stream, stream bank, or wetland:

(a) the removal, excavation, grading, or dredging of soil, sand, organic matter, or material of any kind;

(b) the dumping, discharging, or filling with any material;

(c) the draining, flooding, or disturbing of the water level or water table;

(d) the placing of obstructions;

(e) the removal or alteration of beaver dams;

(f) the construction, reconstruction, expansion, or demolition of any structure, road, or utility;

(g) the destruction or alteration of vegetation (e.g., through clearing, harvesting, shading, intentional burning, or planting of vegetation that would alter the character of a wetland) which substantially changes the vegetation, topography, or hydrology; or

(h) activities that would result in the introduction of sediment, excess nutrients, or pollutants or in a change in the physical or chemical characteristics of wetland water, including quantity.

17.06.040 Exempt Activities

The following activities within streams, wetlands, and buffers are exempt from the requirements of this Ordinance:

(a) fishing;

(b) hunting;

(c) shellfish gathering;

(d) harvesting of wild plants, as long as harvesting does not harm the reproductive capacity of the plant population or change the existing topography or hydrology;

(e) cultural or spiritual activities, as long as these activities do not substantially change the vegetation, topography, or hydrology of the stream, wetland, or buffer;

(f) low-impact use of existing trails;

(g) low-impact scientific or educational use;

(h) conservation activities for fish or wildlife habitat improvement;

(i) as regulated under the Food Security Act and Section 404 of the Clean Water Act, existing and ongoing agricultural and aquaculture activities, including grazing, planting, tilling, and maintenance of drainage facilities, not including changes that will increase drainage or degradation of a wetland beyond its current condition;

(j) normal maintenance of lawfully located existing facilities and structures, such as roads, buildings, and utilities, which does not include construction of maintenance roads or modification that changes the character or size of the original structure; and

(k) any other activity upon issuance of an approved permit, as required under this Code, that specifically exempts the activity in question from the requirements of this Code.

The Lummi Nation reserves the right to inspect the above activities to determine their exemption from this ordinance and to require a permit if the activity appears to be causing degradation to an existing stream, wetland, or buffer.

17.06.045 Wetland Classification System

The Lummi Nation recognizes that different types of wetlands, which vary in their quality and importance, occur within the Reservation and trust lands. To establish appropriate levels of protection, wetlands on the Reservation and trust lands shall be categorized in the following classification system according to criteria established in regulations adopted pursuant to this Code. A wetland complex should be evaluated and administered as a whole, rather than as individual wetlands within the complex.

(a) Critical Value Wetlands (Category 1): Wetlands that are identified by the Lummi Nation as having a high and irreplaceable level of importance for fisheries, Lummi culture, and/or water quality on the Reservation or trust lands.

(b) High Value Wetlands (Category 2): Wetlands that perform important ecological or hydrological functions.

(c) Moderate Value Wetlands (Category 3): Wetlands that satisfy no Category 1 or Category 2 criteria, or Category 2 non-riparian wetlands that are less than 0.1 acre (4,356 ft^2), are not part of a wetland complex, and are not contiguous with a stream, an estuary, or a designated open space.

(d) Low Value Wetlands (Category 4): Wetlands that satisfy no Category 1, Category 2, or Category 3 criteria, are of minimum habitat value, and are suitable for restoration or enhancement efforts.

17.06.050 Non-Regulated Wetlands

The following wetlands on the Reservation or trust lands are not regulated:

(a) Artificial wetlands intentionally created

from non-wetland sites (except as noted below), including, but not limited to, irrigation and drainage ditches, grass-lined swales, canals, detention facilities, wastewater-treatment facilities, farm ponds, and landscape amenities. The applicant shall bear the burden of proving that the site was not previously a wetland. Non-regulated wetlands do not include wetlands created as mitigation and wetlands modified for approved land-use activities.

(b) Category 2 wetlands less than 2,500 ft^2 (0.0574 acre) that do not contain documented habitat for sensitive or priority species and that are not adjacent to navigable waters, streams, estuaries, or open space.

(c) Category 3 wetlands less than 2,500 ft^2 that are not adjacent to navigable waters, streams, estuaries, or open space.

(d) Category 4 wetlands less than 10,000 ft^2 (0.23 acre).

17.06.060 Determination of Wetland Boundaries

(a) When regulated wetlands or their buffer areas may be affected by a proposed development, a determination of the wetland boundary shall be made.

(b) Determination of wetland boundaries shall be made in accordance with the delineation methodology specified in the currently and federally accepted edition of the "Federal Manual for Identifying and Delineating Jurisdictional Wetlands." Evidence documenting the results of the boundary survey shall be retained by the Water Resources Manager.

(c) Determination of wetland boundaries shall be the responsibility of the applicant and shall be determined from a field survey by a qualified wetland specialist. At the request of the applicant, the Water Resources Manager may waive the requirements for delineation when sufficient information exists to reasonably determine the boundaries of a wetland and its buffer without delineation.

17.06.070 Wetland Buffer Requirements

(a) The critical functions of a buffer include, but are not limited to, shading; protection of streams and wetlands from disturbance by humans and domestic animals; erosion control; interception of pollutants and excess nutrients; storage of overflow during flood events; attenuation of storm-water runoff; and preservation of stream-channel morphology and wildlife, fish, and plant habitat. Ideally, buffers should be naturally vegetated with native species. In some instances, vegetation management may be necessary to reduce the presence of noxious weeds or invasive species that would otherwise be detrimental to the buffer area. In addition, it may be desirable to increase the diversity within the buffer by planting additional species. A list of appropriate native species and planting density will be developed and maintained by the Water Resources Manager or his/her designee.

(b) The following buffer widths shall be established to protect wetland functions:

(1) Category 1: 100 feet;

(2) Category 2: 75 feet;

(3) Category 3: 50 feet;

(4) Category 4: 25 feet.

(c) All buffer widths shall be measured on a horizontal plane from, and perpendicular to, the wetland boundary.

(d) Buffers shall remain naturally vegetated, except where the buffer can be enhanced to improve the functional attributes of the wetland. Buffer enhancement may include, but is not limited to, planting of appropriate multi-layered (forb/grassy, shrub, and tree) native vegetation, restriction of approved uses within the buffer, and use of appropriated best management practices to minimize impacts to water quality and resource values. When a Category 4 wetland does not provide an important habitat function, all or part of the buffer may include managed landscaping as opposed to strictly natural vegetation.

17.06.080 Stream Categories

All streams shall be categorized as follows:

(a) Category 1: all streams that flow year-round during years of normal rainfall or are used by juvenile or adult salmonids.

(b) Category 2: all streams that are intermittent or ephemeral during years of normal rainfall and are not used by juvenile or adult salmonids.

17.06.090 Stream Buffers

Buffers shall be established around all streams as follows:

(a) Category 1: all streams shall have a minimum of a one hundred (100) foot buffer of natural vegetation on both sides of the channel. The buffer width shall be a horizontal distance measured from the ordinary high water mark of the stream channel. No septic systems shall be placed within two hundred (200) feet of a Category 1 stream.

(b) Category 2: all streams shall have a minimum of a twenty-five (25) foot buffer of natural vegetation on both sides of the channel. The buffer width shall be a horizontal distance measured from the ordinary high water mark of the stream channel. No septic systems shall be placed within one hundred (100) feet of a Category 2 stream.

(c) All stream stretches constrained by riparian wetlands shall have the appropriate wetland-buffer width applied within such a stretch unless the stream-buffer width is greater.

17.06.100 Adjustment of Standard Buffers

An alteration of stream or wetland buffer requirements may be approved based on a review of the proposed activity and, if deemed necessary by the Water Resources Manager, a functional assessment of the wetland according to regulations adopted pursuant to this Code. The Water Resources Manager may adjust standard stream or wetland buffers on a site-specific basis using methods provided in regulations adopted pursuant to this Code.

17.06.110 Wetland Mitigation

(a) Sequential Mitigation. Impacts to wetlands and their buffers shall be mitigated through sequential mitigation (i.e., avoiding impacts, minimizing impacts, rectifying impacts, reducing impacts over time, and compensating for impacts). The goal of sequential mitigation is no net loss of wetland functions, values, or acreage. Approved wetland-mitigation projects shall meet replacement ratios established in regulations adopted pursuant to this Code.

(b) Mitigation Plans. Preliminary and final mitigation plans are required for regulated activities that produce impacts in a buffer or wetland, according to requirements established in regulations adopted pursuant to this Code.

(c) Mitigation Banking. Creation, enhancement, or restoration of wetlands to use as mitigation for future wetland impacts resulting from regulated activities is permitted, subject to the following:

(1) A land use permit shall be obtained before development of any mitigation project or mitigation bank. If a land use permit is not obtained before mitigation development, mitigation credit will not be awarded;

(2) On projects proposing off-site wetland banking in addition to on-site mitigation, a separate land use permit will be required for each activity;

(3) The Water Resources Manager will determine the mitigation credit to be allowed for each mitigation project or bank, based on the wetland category, condition, and the mitigation ratios specified in regulations adopted pursuant to this Code. Before mitigation credit is granted, wetland-mitigation banks must be fully functioning; and

(4) Purchase of mitigation-bank credits is permitted to mitigate for wetland impacts in the same watershed, provided the applicant has minimized wetland impacts, where reasonably possible, and met the following requirements:

(A) Documentation adequate to verify the transfer of wetland credit shall be submitted; and

(B) A plat note along with information on the title shall be recorded as adequate to give notice of the requirements of this Section being met by the purchase of banked wetland credits.

17.06.120 Stream Mitigation

Impacts to streams and their buffers shall be mitigated through sequential mitigation (i.e., avoiding impacts, minimizing impacts, rectifying impacts, reducing impacts over time, and compensating for impacts). The goal of compensatory mitigation is no net loss of stream functions and values.

Compensatory mitigation should occur at the same location or in the same watershed as the stream impacts. If this is not possible, mitigation should occur in the same geographic area. Mitigation before a stream impact occurs is preferable to post-impact mitigation. Mitigation plans shall meet the requirements established in regulations adopted pursuant to this Code.

Chapter 17.07 Water Quality Standards

17.07.010 Findings and Purpose

(a) All water that flows through or falls onto the Reservation discharges to resource-rich tidelands and estuaries of the Reservation and/or contributes to aquifer recharge on the Reservation. The estuaries and tidelands of the Reservation (including the overlying waters) support a diverse assemblage of flora, fauna, and habitats such as eelgrass, shellfish, and salmonid rearing areas. The quality of the resources associated with the estuaries and tidelands affects the political integrity, economic security, health, and welfare of the Lummi Nation as well as subsistence, cultural, commercial, and other uses by tribal members.

(b) Over 95% of the residential water supply for the Reservation is currently pumped from ground water wells on the Reservation. Recharge of the aquifers is primarily from local precipitation (i.e., that which falls on or near the Reservation). Where surface waters contribute to aquifer recharge, ground water is susceptible to contamination.

(c) Activities occurring on all lands within the Lummi Reservation and trust lands have the potential to impair the quality of Reservation waters; impairment of the quality of waters of the Reservation threatens the economic security, health, and welfare of the Lummi Nation.

(d) The purpose of the water quality standards program is to protect Reservation surface waters from contaminants which may (1) have an adverse effect on the health of all persons present on the Reservation and/or (2) degrade the integrity of the surface water resources of the Lummi Nation.

(e) The purposes of this Chapter are to establish water quality standards for surface waters of the Lummi Reservation consistent with all beneficial uses, including public health and public enjoyment; the propagation, protection, and restoration of fish, shellfish, wildlife, and their habitats; and the protection of Reservation waters as cultural, economic and spiritual resources of the Lummi people.

17.07.020 Rule-Making Authority

The Commission shall have the authority to, and shall promulgate, amend, or rescind regulations relating to standards of quality for waters of the Reservation and for substances discharged therein in order to maintain the highest possible standards in accordance with the public policy of the Lummi Nation as declared in LCL §17.07.010. The regulations, which shall not be effective until approved by the LIBC, shall be structured according to requirements under the federal Clean Water Act, 33 U.S.C.A. §§ 1251-1387 (CWA) as amended from time to time, and shall specifically include:

(a) use designations consistent with the requirements of the Clean Water Act**;**

(b) methods used and analyses conducted to support the water quality standards;

(c) water quality criteria sufficient to protect the designated uses, including criteria for priority toxic pollutants and biological criteria;

(d) an antidegradation policy and implementation methods consistent with Federal Water Quality Standards Regulations;

(e) general information supporting the adequacy of the scientific basis of the standards, as well as information on general policies applicable to Lummi Nation standards that may affect their application and implementation; and

(f) certification that the regulations for water quality standards have been adopted pursuant to the requirements of this Code.

Chapter 17.08 Prohibited Acts, Enforcement, Review, and Appeals

17.08.010 Prohibited Acts

It is civilly prohibited for any person to:

(a) forcibly, or by bribery, attempted bribery, threat, or other corrupt practice, obstruct or impede the administration of this Code;

(b) commit fraud, or knowingly assist another in the commission of fraud, with the intent to evade or defeat the lawful administration of this Code;

(c) falsify or make any material misrepresentation in any permit application or other document, or intentionally withhold data required to be submitted under this Code;

(d) violate the provisions of this Code, any regulations promulgated hereunder, the conditions or stipulations of permits issued hereunder, or any order of the Water Resources Manager or Commission issued hereunder;

(e) engage knowingly in any act that obstructs or otherwise interferes with the performance by Lummi Nation employees of their lawful duties under this Code; or

(f) take, store, or alter water, or discharge into Lummi Nation Water, or affect the quality or quantity of Lummi Nation Water without a permit authorizing such taking, altering, or discharging or without an exemption issued pursuant to this Code.

17.08.020 Judicial Enforcement

(a) Tribal Court Jurisdiction. Except as otherwise provided in this Code, the Lummi Nation Tribal Court shall have exclusive jurisdiction over all matters concerning the administration and enforcement of this Code; provided, however, that nothing in this Code is intended nor shall it be interpreted to preclude prosecution, or enforcement of Tribal Court judgments, in state or federal court pursuant to any applicable state or federal law.

(b) Civil Enforcement and Remedies. The Executive Director is authorized to enforce the provisions of this Code by filing a civil action in the Tribal Court in the name of the Lummi Nation against any person engaged in an activity or activities prohibited by this Code or the regulations promulgated thereunder, and may recover monetary damages, civil penalties, restitution, injunctive or declaratory relief, affirmative remedial action, court costs, investigatory and enforcement costs, attorney's fees, and/or any other relief that is just and equitable under the circumstances, including, but not limited to, orders for the person:

(1) to perform community service and to become informed about the need for compliance with this Code;

(2) to pay a civil penalty not exceeding Five Thousand Dollars ($5,000) per day for each prohibited act for failing to comply with any order of the Water Resources Manager or the Tribal Court issued pursuant to this Code;

(3) to make restitution to the Lummi Nation and to affected persons for the cost of damages and restoration of a water or other resource; or

(4) to pay the Lummi Nation any monetary benefit derived from the violation of this Code.

(c) Preliminary or Permanent Injunctions. Upon the filing of a motion for a preliminary or permanent injunction by the Executive Director or any other person designated by the LIBC, or upon its own initiative, the Tribal Court shall issue a preliminary or permanent injunction on the following grounds:

(1) when an emergency restraining order has been issued by the Water Resources Manager under this Code, the Water Resources Manager has moved for a preliminary or permanent injunction, and it appears by the pleadings or affidavits on file that the Water Resources Manager is entitled to the relief requested;

(2) when it appears by the pleadings or affidavits on file that the commission or continuance of some act would produce great or irreparable injury to the public health, safety, or welfare or to the environment;

(3) when it appears that the person sought to be restrained is doing, threatening to do, or is about to do, or is procuring or suffering to be done some act in violation of this Code or a federal or Lummi Nation law, regulation, ordinance, order, or permit; or

(4) in all cases where an injunction would be proper in equity.

The Tribal Court's rules of civil procedure shall otherwise govern the procedures for issuing preliminary or permanent injunctions.

(d) Exclusion. For good and sufficient cause found, the Tribal Court may exclude from the Reservation and trust lands any person who engages in an activity or activities prohibited by this Code or the regulations promulgated hereunder to the extent such exclusion is not inconsistent with applicable federal and Lummi Nation laws.

17.08.030 Non-Judicial Enforcement by the Executive Director

(a) Cease and Desist Orders. If the Executive Director has denied, revoked, or suspended a permit under this Code, the Executive Director may issue an order for the person whose permit has been denied, revoked, or suspended to cease and desist his or her unauthorized activities or water use. The order shall be in writing, describe the unauthorized activity or water use, and advise the person of his or her right to appeal the Executive Director's decision denying, revoking, or suspending the permit as provided for in this Code and to show cause why the person should not be ordered to cease and desist from the activity or water use. If the person continues the violation after the Executive Director issues a cease and desist order, the Executive Director may issue an emergency restraining order and/or apply to the Tribal Court for a temporary restraining order or preliminary injunction.

(b) Emergency Restraining Orders.

(1) Upon receiving evidence that a person is engaging in any activity regulated by this Code and that the activity may endanger or cause damage to the public health, safety, or welfare, Lummi Nation Water, or the environment, the Executive Director may issue an emergency restraining order and/or apply to the Tribal Court for a temporary restraining order or preliminary injunction. Every emergency or temporary restraining order or preliminary injunction order shall:

(A) be in writing, endorsed with the date and hour of issuance, and filed with and entered on the records of the Commission and Tribal Court within three (3) days of its issuance;

(B) define the injury; and

(C) expire within such time as is specified therein, not to exceed ten (10) days, unless within that time the Executive Director requests from the Tribal Court and is granted a preliminary or permanent injunction. For good cause shown, the Commission may extend the emergency restraining order until the Tribal Court rules on the Executive Director's request for a temporary or permanent injunction.

(2) With at least two (2) days' written notice to the Executive Director, the person whose activities are subject to the emergency restraining order may appeal the Executive Director's action to the Commission and seek the dissolution or modification of the emergency restraining order. In that event, the Commission shall hear the appeal in accordance with the procedures set forth in this Code and as expeditiously as the ends of justice require.

(c) Civil Fines. The system of civil fines for violations of this Code, the regulations promulgated hereunder, and the permits issued hereunder, may be established by the Commission, subject to approval by the LIBC; provided that no fine shall exceed five thousand dollars ($5,000.00) per day per violation and that the imposition of a fine shall constitute a final decision by the Executive Director and be subject to the appeal procedures set forth in this Code.

17.08.040 Appeal to the Commission from a Final Decision of the Executive Director

(a) Notice of Appeal. An affected person or entity ("Appellant") aggrieved by a final decision of the Executive Director may file a written Notice of Appeal with the Commission, through the office of the Executive Director, within twenty (20) days of the Appellant's receipt of the Executive Director's decision or within twenty (20) days of publication of the decision, if applicable. Such notice shall identify itself as a Notice of Appeal and state with particularity the basis of the Appellant's claim that an action of the Executive Director is erroneous. The Appellant also shall file a copy of the Notice of Appeal with the Executive Director.

(b) Filing of Materials to Substantiate or Rebut Claim. An Appellant shall, within thirty (30) days from the date of receipt or publication of the Executive Director's decision, file with the Commission, through the Office of the Executive Director, a brief addressing the Appellant's points on appeal and any other materials, information, or evidence relevant to his, her, or its claim. A copy of the appeal materials shall be served on the Executive Director, who shall have twenty (20) days from such service to file with the Commission a responsive brief and any materials, information, or evidence supporting his or her final decision. An Appellant shall have ten (10) days from the receipt of the Executive Director's brief and materials to file a reply.

(c) Hearing and Notice. Following the time period for submission of materials provided for in this Section, the Commission shall schedule a hearing and give the Appellant and the Executive Director not less than five (5) days' prior written notice of the hearing. Where more than one person files an appeal from the same final decision of the Executive Director, the Commission may conduct a single hearing on all appeals, provided that each individual Appellant has the right to appear and participate in full.

(d) Hearing Procedures.

(1) At the hearing, an Appellant will be afforded the opportunity to present testimony and evidence and to examine witnesses. Appellants may appear at the hearing for themselves or, at their own expense, be represented by an attorney, certified or registered public accountant, or other person authorized by the Appellants.

(2) The Executive Director shall have the same rights to participate in the hearing as an Appellant.

(3) Hearings shall not be open to the public, except upon the request of an Appellant, and may be postponed or continued at the discretion of the Commission.

(4) All hearing testimony shall be given under oath. The Commission shall conduct the proceedings so that both complaints and defenses are amply and fairly presented. The Commission shall have the authority to administer oaths; issue subpoenas to compel the attendance and testimony of persons and the production of any books, records, and papers of an Appellant or any other affected person or party; and examine under oath, either orally or in writing, any Appellant or agent, or any other witness. The Commission may permit discovery, entertain and dispose of motions, and require written expositions of the case as the circumstances justify. Formal rules of evidence shall not apply; the Commission may accept such evidence as it finds relevant and credible. The Commission may require reasonable substantiation of statements or records.

(5) A permanent record of the hearing shall be made by tape recorder and/or stenographic means. The Commission shall, at the Appellant's request and sole expense, make and preserve a complete written record of the proceedings.

(6) Without undue delay, the Commission shall render a written decision in accordance with the law and evidence presented and shall state the basis for its decision. If the Commission finds that there was substantial compliance with procedural requirements and that the decision of the Executive Director was supported by substantial evidence in the record and justified by applicable policies,

rules, laws, and regulations, it shall affirm the Executive Director's decision. If it finds to the contrary, the Commission may overturn the Executive Director's decision or any part thereof and/or remand the matter to the Executive Director with directions for further review. All decisions shall be signed by the Chairman of the Commission or an authorized Commission Member. A copy of the decision shall be mailed to the Appellant via certified mail, return receipt requested, and shall inform the Appellant of the right to appeal the decision to the Tribal Court and of the consequences of a failure to appeal. A copy of the decision also shall be served on the Executive Director.

17.08.050 Finality of Commission Actions

Any decision by the Commission on an appeal from a final decision of the Executive Director shall be final. If a timely appeal is not made to the Lummi Tribal Court, such decision will be final, binding, and enforceable, and will not be subject to any further appeal to the Commission or to any court.

17.08.060 Appeals from the Commission's Decisions

(a) Appeals to the Lummi Tribal Court; Exhaustion of Administrative Procedure. The Lummi Tribal Court shall have exclusive jurisdiction to hear all appeals from final decisions of the Commission and, except as otherwise provided for in the Code, the procedural rules of that court, as set forth in the Lummi Code of Laws and applicable court rules for the Tribal Court, shall apply. No final decision of the Executive Director may be appealed to the Lummi Tribal Court unless an appeal therefrom has first been timely taken to and decided by the Commission.

(b) Filing a Notice of Appeal to the Lummi Tribal Court. Within twenty (20) days after receipt of a final decision of the Commission, if the Appellant is dissatisfied with the decision of the Commission, he or she may file an appeal to the Lummi Tribal Court. The procedure for perfecting an appeal to the Tribal Court shall be as provided by the rules of that court. The party appealing the decision must serve a copy of the Notice of Appeal on any other party and on the Commission. Service shall be made in accordance with the Lummi Nation's Rules of Civil Procedure governing service of process. The Lummi Nation may intervene in a proceeding for review, and, in its discretion, the Tribal Court may allow other affected parties to intervene in the proceedings. Thereafter, the Commission and Executive Director shall certify and transmit to the Clerk of the Court (a) the administrative record, including all documents, , transcripts, and other information that formed the basis for the decision or ruling being appealed or (b) such portions thereof as the Commission, Executive Director, and the other parties may stipulate.

(c) Stay. The filing of a notice of appeal to the Lummi Tribal Court shall not operate as a stay of enforcement of the Commission's decision, but the Tribal Court may order a stay upon such terms as it considers proper.

(d) De Novo Review Not Permitted. The Tribal Court shall consider the appeal only upon the same theories and evidence as were asserted before the Commission. All such appeals shall be upon the administrative record presented to the Commission and shall not be de novo except as otherwise provided in this Section. The Court shall give due weight to the experience, technical competence, and specialized knowledge of the Executive Director, as well as the discretionary authority conferred upon the Executive Director.

(e) Leave to Present Additional Evidence. If application is made to the Court for leave to present additional evidence, and if it is shown to the satisfaction of the Court that the additional evidence is material to the issues in the case, and that there were extraordinary circumstances and good reason for a party's failure to present it to the Executive Director, the Court may order that such additional evidence be presented to the Executive Director upon such conditions as the Court deems proper. The Executive Director may modify his/her findings and decision by reason of such additional evidence and shall file with the reviewing court, to become part of the record, the additional evidence, together with any modified or new findings or decision.

(f) Standard of Review. Upon appeal to the Lummi Tribal Court, the Court shall set aside a decision of the Commission only if it finds the decision to be:

(1) arbitrary, capricious, or an abuse of discretion;

(2) not supported by substantial evidence in the record; or

(3) otherwise not in accordance with applicable law.

(g) Decisions of the Lummi Tribal Court. The Tribal Court shall issue a written decision on all appeals, which decision shall be final, unless a timely appeal is filed with the Lummi Tribal Court of Appeals. Appeals to the Tribal Court of Appeals shall be filed and served according to the civil rules for appeals in the Lummi Code of Laws and applicable court rules. The decision of the Lummi Tribal Court shall not be stayed pending an appeal to the Tribal Court of Appeals unless a request for stay is made to and approved by the Tribal Court of Appeals according to the civil rules for a stay and upon such terms as the Court of Appeals deems proper. The decision of the Tribal Court of Appeals on the merits of the appeal shall be final, binding, and enforceable.

17.08.070 Limited Waiver of Sovereign Immunity

The LIBC hereby waives the sovereign immunity from suit of the Executive Director and the Commission for the express and sole purpose of allowing review by the Commission of the Executive Director's actions and of allowing review by the Lummi Tribal Court and the Tribal Court of Appeals of the Commission's actions under this Code, provided that any such appeal must be timely and properly filed and provided further, that such waiver is made only to the extent necessary to subject the Executive Director and Commission to suit for the sole purpose of declaring and adjudging rights and obligations under this Code and the regulations promulgated hereunder and does not waive immunity with respect to suits for monetary damages. This waiver is strictly limited and specifically does not waive the sovereign immunity from suit of the LIBC, the Lummi Nation, or any officer, employee, or agent thereof.

17.08.080 Severability

If any provision of this Code is found invalid, or application thereof to any situation or person shall be held invalid or unenforceable by the court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision of this Code or the application of the invalid provision to other situations or persons differently situated.

Chapter 17.09 Definitions

17.09.010 Definitions

The following terms have the following meanings in this Code:

"Acre-foot" means the quantity of water required to cover one acre to a depth of one foot; one acre-foot of water equals 43,560 cubic feet or 325,851 gallons of water.

"Adjacent Wetlands" means wetlands bordering, contiguous, or neighboring "waters of the United States" as defined by 33 C.F.R. part 328, as amended from time to time.

"Affected person" means any person directly affected by a final decision, order, or action issued or taken by the Executive Director or Natural Resources Commission under this Code.

"Agriculture" means activity related to the production of horticultural, silvicultural, viticultural, foricultural, dairy, apiary, vegetable, or animal products; or of berries, grain, hay, straw, turf, seed, Christmas trees, hybrid poplar trees, or livestock.

"Aquaculture" means the production of finfish, shellfish, or other aquatic plant or animal species in water for commercial or other purposes.

"Aquifer" means an underground geological formation, or group of formations, containing usable amounts of ground water that can supply wells and springs.

"Aquifer storage volume" means a quantitative estimate of the volume of ground water in an aquifer based on the best available technical information and sound scientific principles.

"Beneficial use" means the use of water for purposes that include, but are not limited to, the following: aesthetics; agricultural use; aquaculture and fish propagation; commercial use; cultural, religious and spiritual uses; domestic use; fire protection; ground water recharge; hydropower generation; industrial use; ecological flow uses; mineral resource development; municipal use; navigation; pollution control; recreational use; resource development; stock water use; storage, transfer, and marketing; water quality; and wildlife habitat.

"Best Management Practices (BMPs)" means the state of the art, recommended physical, structural, and/or managerial actions that, when used singly or in combination, prevent or reduce degradation or contamination of the environment.

"Buffer" means the area around a stream or wetland that is required to protect and maintain the functions and stability of the stream and/or wetland, generally between twenty-five (25) and one hundred (100) feet wide.

"Code" means this Lummi Nation Water Resources Protection Code, as amended from time to time.

"Commission" means the Natural Resources Commission of the Lummi Nation.

"Contaminant" means any chemical, physical, biological, thermal, or radiological substance or matter that has an adverse effect on air, water, or soil.

"Contamination" means the presence of any harmful or deleterious substance that may pose a threat to the quality, purity, or safety of a water supply.

"Contiguous Wetlands" means wetlands that are connected to waters of the Reservation or trust lands or other geographic features (e.g., open space) by any of the following criteria:

(1) all or part of the wetland lies within the 100-year floodplain of waters of the Reservation or trust lands;

(2) hydric soil and hydrophytic vegetation extend continuously to waters of the Reservation or trust lands or other pertinent geographic features; or

(3) sufficient evidence exists to conclude the wetland is hydrologically connected and is immediately adjacent to waters of the Reservation or trust lands or other pertinent geographic features.

"Cultural instream uses" means use of water in a stream to fulfill cultural, traditional, spiritual, or religious needs of the Lummi Nation, as approved by the Lummi Nation Cultural Committee.

"Cumulative impact" means the impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

"Degradation" means the lowering of, or threat of lowering, water quality or the quality of the natural environment by an increase in contaminants or pollution or by a decrease in the ecological quality of the environment (e.g. vegetative community changes via harvest activity or invasion of non-native plants).

"Delineation" means a formal, on-site process to identify the boundary between a wetland and the surrounding upland. The delineation shall be based on the methodology in the currently and federally accepted edition of the "Federal Manual for Identifying and Delineating Jurisdictional Wetlands," as amended from time to time.

"Department" means the Lummi Natural Resources Department.

"Discharge" means the volume of water that passes a point per a given unit of time and is commonly expressed in units of cubic feet per second, cubic meters per second, gallons per minute, gallons per day, or millions of gallons per day.

"District" means the Lummi Water District.

"Drainage" means the collection, conveyance, containment, and/or discharge of surface or ground water, including storm water runoff.

"Drainage facility" means a system of collecting, conveying, containing, storing, and/or discharging surface water, ground water, or storm water runoff, including, but

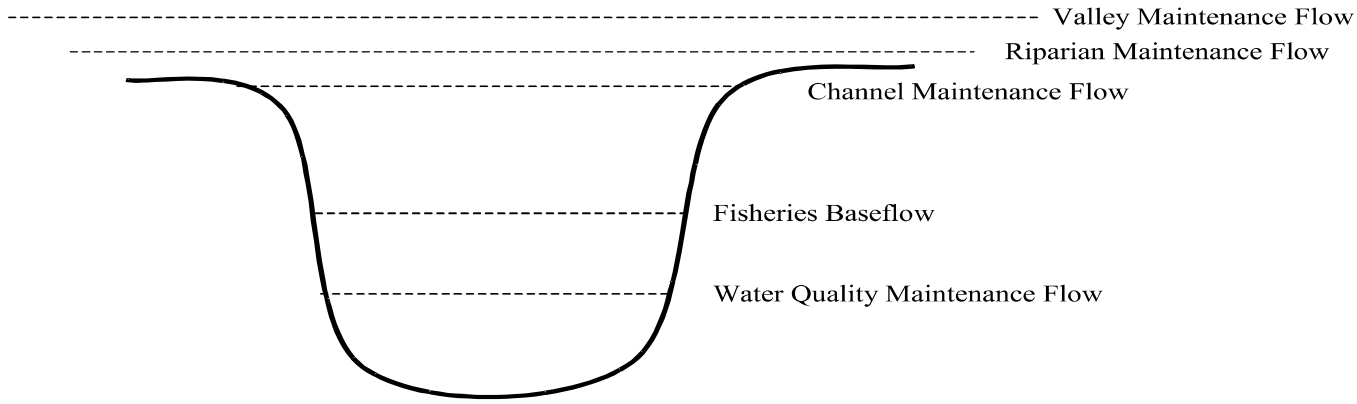
not limited to, all conveyance and containment facilities such as streams, pipelines, channels, ditches, swamps, lakes, wetlands, closed depressions, infiltration facilities, retention/detention facilities, erosion/sedimentation control facilities, and other similar structures and appurtenances, both natural and man-made.

"Draining" means artificially changing ground or surface water wetland hydrology by constructing or enhancing drainage (i.e., making the site/area less wet), including widening streams, constructing or widening ditches, or installing drains (e.g., tiles).

"Ecological flow regime" means the combination of instream flow levels needed over various time periods to preserve, protect, and restore the physical, biological, and chemical aspects of water. As shown in Figure 1, the ecological flow regime can be divided into five functional categories: 1) Water Quality Maintenance, 2) Fisheries Baseflow, 3) Channel Maintenance, 4) Riparian Maintenance, and 5) Valley Maintenance.

The Water Quality Maintenance flow is the quantity of water needed to assimilate wastewater and still achieve compliance with applicable water quality standards. The Fisheries Baseflow is the minimum instream flow needed to support fish populations during different life stages. The Channel Maintenance flow is the minimum amount of water needed to perform processes such as sediment transport. Channel Maintenance flows impact the long-term characteristics of aquatic habitat such as the quantity and quality of pools and riffles. Riparian Maintenance flows are the flows needed to maintain a productive plant and animal community along the stream corridor. Valley Maintenance flows are catastrophic flood events and are generally not quantified.

Figure 1. Flow components essential for maintaining the ecological health of the stream system



"Emergency" means an occurrence or condition calling for immediate action to avert imminent danger or harm to life, health, or property.

"Enhancement**"** means actions performed to improve the condition of existing degraded or naturally impaired streams, wetlands, or buffers so that they provide more functions and/or functions of higher quality.

"Estuary" means the area where fresh water meets salt water and where the tide meets the river current (e.g., bays, mouths of rivers, salt marshes, and lagoons). If properly functioning, estuaries serve as nurseries and spawning and feeding grounds for large groups of marine and freshwater life forms and that provide shelter and food for fish, birds, and wildlife.

"Executive Director" means the Executive Director of the Lummi Natural Resources Department.

"Filling**"** means the depositing of any material

on a site that raises the surface level of the land or the bed of a body of water above its prior or natural elevation.

"Functions" means the roles that a natural area performs within the ecosystem. Stream, wetland, and/or buffer functions are attributes that contribute to the ecological, hydrological, social, cultural, and/or economic systems that surround and include the natural area. Stream, wetland, and/or buffer functions include, but are not limited to, the following features:

(1) erosion control, soil conservation, and shoreline stabilization, especially along shorelines and streambanks where wetland vegetation reduces water velocity;

(2) surface- and ground-water storage and recharge, storm-water management, flood and tidal surge storage, and stream base-flow contribution;

(3) water-quality improvement via filtration and settling of sediment, turbidity reduction, re-oxygenation, chemical and biological nutrient-cycling, contaminant reduction, control of saltwater intrusion, and moderation of water temperature;

(4) micro-climatic influence on temperature and moisture;

(5) flora and fauna habitat for numerous species, including plants of cultural importance, fish, shellfish, frogs and other amphibians, songbirds, waterfowl, raptors, and various mammals, many of which are directly dependent on wetlands and streams for survival during at least part of their life cycle;

(6) tribal cultural uses;

(7) recreational opportunities, such as swimming, boating, fishing, nature-watching, walking along interpretive trails, and enjoying view overlooks; and

(8) open space, backdrops, and natural borders, which help separate various land uses and provide buffers from incompatible uses. Open space relieves overcrowding and often is aesthetically pleasing.

"Ground water" means all water that exists beneath the earth surface or beneath any surface water body, regardless of the geological formation or structure in which such water stands, flows, percolates, or otherwise moves.

"Ground water recharge area" means the land surface area where precipitation infiltrates through surface soil materials and into the ground. Recharge may also occur from surface waters, including lakes, streams, and wetlands. Ground water recharge areas are called "aquifer recharge areas" when the ground water contributes to an aquifer.

"Habitat" means the specific area or environment in which specified plants or animals live.

"Hazardous Material" is material which has one or more of the following characteristics:

(1) Ignitable: a gas, liquid, or solid that may cause fires through friction, absorption of moisture, or that has a low flash point.

(2) Carcinogenic: a gas, liquid, or solid that is normally considered to be cancer-causing or mutagenic.

(3) Explosive: a reactive gas, liquid, or solid that will vigorously and energetically react uncontrollably if exposed to heat, shock, pressure, or combinations thereof.

(4) Toxic: a gas, liquid, or solid so dangerous as to afford an unusual hazard to life or that through repeated exposure or in a single large dose can be hazardous to human health.

(5) Corrosive: any material, whether acid or alkaline, that will cause severe damage to human tissue, or in case of leakage might damage or destroy other containers of hazardous materials and cause the release of their contents.

"Hydraulic head" means the height of water above any plane of reference; "hydraulic head" also means the energy, either kinetic or potential, possessed by each unit weight of a liquid, expressed as the vertical height through which a unit weight would have to fall to release the average energy possessed.

"Hydric soil" means a soil that, if in an undrained condition, is saturated, flooded, or ponded long enough during the growing season to develop anaerobic (oxygen-lacking) conditions that favor the growth and regeneration of wetland (hydrophytic)

vegetation. Identification of hydric soils shall be based on the methodology in the current and federally accepted edition of the "Federal Manual for Identifying and Delineating Jurisdictional Wetlands."

“Hydrologist” means a person professionally qualified by education and experience in the science of hydrology, or the science of water that is concerned with the orgin, circulation, distribution, and properties of waters of the earth.

“Hydroperiod” means the seasonal timing, frequency, and duration of the water level in a wetland.

“Hydrophytic vegetation” means plants that are adapted to growth in water or in a substrate that is at least periodically lacking in oxygen as a result of excessive water content. Identification of hydrophytic vegetation shall be based on the methodology in the current and federally accepted edition of the "Federal Manual for Identifying and Delineating Jurisdictional Wetlands."

“Illicit discharges” mean any non-storm water discharges to storm water drainage systems that could cause or contribute to a degradation of water quality, sediment quality, or ground water quality, including, but not limited to, sanitary sewer connections, industrial process water, interior floor drains, car washing, and iron grate systems.

“Impervious surface” means a hard surface area that either prevents or retards the entry of water into the soil compared to conditions before development, and/or a hard surface area that causes water to run off the surface in greater quantities or at an increased rate of flow relative to conditions before development. Common impervious surfaces include, but are not limited to, roof tops, walkways, patios, driveways, parking lots or storage areas, concrete or asphalt paving, gravel roads, packed earthen materials, and oiled, macadam, or other surfaces which similarly impede the infiltration of storm water. Open, uncovered retention/detention facilities shall not be considered impervious surfaces.

“Isolated Wetlands” means non-tidal wetlands not part of a surface tributary system to intrastate or navigable waters of the United States and are no adjacent to such tributary waterbodies.

“Land-disturbing activity” means any activity resulting in a change in the existing soil cover (both vegetative and nonvegetative) and/or the existing soil topography. Land-disturbing activities include, but are not limited to, demolition, construction, clearing, grading, filling, and excavation.

“Lummi Indian Business Council (LIBC)” means the governing body of the Lummi Nation.

“Lummi Nation Water” means all fresh and marine waters that originate or flow in, into, or through the Reservation or trust lands, or that are stored on the Reservation or trust lands, whether found on the surface of the earth or underground, and all Lummi Nation tribal reserved water rights.

“Lummi Natural Resources Commission” means the commission established pursuant to Title 10 of the Lummi Code of Laws to protect and preserve the natural resources of the Lummi Nation.

“Lummi Natural Resources Department” means the administrative department established by the LIBC to protect and manage the natural resources of the Lummi Nation.

“Mitigation” means, in the following order of preference:

(1) avoiding adverse impacts on the environment and Lummi Nation Water altogether by not acting or failing to act;

(2) minimizing adverse impacts on the environment and Lummi Nation Water by limiting the degree or magnitude of the action and its implementation, by using appropriate technology or by taking affirmative steps to avoid or reduce adverse impacts;

(3) rectifying the adverse impacts on the environment or Lummi Nation Water by repairing, rehabilitating, or restoring the affected environment or water resource;

(4) reducing or eliminating the adverse impacts on the environment or Lummi Nation Water over time by preservation and maintenance operations during the action;

and

(5) compensating for the adverse impacts on the environment and Lummi Nation Water by replacing, enhancing, or providing substitute water resources or environments.

“Mitigation bank” means a system or arrangement in which a property or properties are protected in perpetuity and approved by appropriate tribal and federal agencies expressly for the purpose of providing compensatory mitigation in advance of authorized impacts to other areas through restoration, creation, and/or enhancement of wetlands and, in exceptional circumstances, through preservation of wetlands, wetland buffers, and/or other aquatic resources.

“Native vegetation” means plant species, other than noxious weeds, that are indigenous to similar environments within the Pacific Northwest (i.e., plants that occur (or occurred) naturally in the area and that reasonably could have been expected to naturally occur on the site).

“Natural fish propagation” means all stages of the salmonid life cycle necessary to sustain fish populations at levels allowing sustainable harvests for commercial, cultural, and spiritual needs of the Lummi people, including;

(1) adult river entry, upriver migration, holding, and spawning;

(2) egg incubation;

(3) fry intergravel development, emergence, and rearing;

(4) juvenile summer rearing;

(5) juvenile overwinter rearing; and

(6) smolt outmigration and estuary rearing.

“New development” means the following activities: land-disturbing activities, structural development (including construction, installation, or expansion of a building or other structure), creation of impervious surfaces, general forest practices that are conversions from timber land to other uses, and subdivision and short subdivision of land. All other forest practices and commercial agriculture are not considered new development.

“Nonpoint-source pollution” means pollution that, in response to precipitation, enters the surface water, ground water, or other elements of the natural environment from diffuse (e.g. automobiles, pesticides, applications, construction sites, animal waste, and habitat alteration) sources and not from a specific point source.

“Ongoing agricultural activity” means agricultural activities (including grazing, tilling, planting, aquaculture, and other activities) that are ongoing as long as the area on which they are conducted has not been converted to another use or has lain idle so long that modifications to the hydrology are necessary to resume operation. Any lands that have been idle for five years or longer will no longer be considered as lands with "ongoing" agricultural activities. This definition should be interpreted in line with that of the U.S. Department of Agriculture.

“Ordinary high water mark” means the mark on the shores of all surface waters that is found by examining the bed and banks and ascertaining where the presence and action of waters are so common and usual, and so long continued in all ordinary years, as to mark upon the soil a character distinct from that of the abutting upland in respect to vegetation (i.e., the vegetation line), provided that, in any area where the ordinary high water mark cannot be found, the ordinary high water mark adjoining salt water shall be the elevation of the vegetation line determined from a sample of nearby sites where the vegetation line can be ascertained.

“Person” means any person or entity, natural or artificial, including, but not limited to, any tribal member, assignee, individual, firm, association, organization, partnership, business trust, corporation, company, the United States of America and all agencies thereof, the State of Washington and all political subdivisions, municipal corporations, organizations, and public agencies thereof, and the Lummi Nation and all political subdivisions, organizations, and public agencies thereof.

“Point-source pollution” means pollution that enters the surface water, ground water, or

other elements of the natural environment from a stationary location or single identifiable source (e.g., the end of a pipe).

“Pollution” means the presence of matter, energy, contamination, or other alteration of the physical, chemical, or biological properties of water or land whose nature, location, or quantity produces undesired environmental effects, including, but not limited to, changes in aesthetics, temperature, taste, color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters as will or threatens to render such waters harmful, detrimental, or injurious to the public health, safety, or welfare, or to cultural, spiritual, domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wildlife, birds, fish, or other aquatic life.

“Precipitation” means water that falls from the atmosphere and reaches the earth in the form of fog, drizzle, rain, sleet, snow, or hail.

“Preservation” means to provide legal protection to natural areas that would otherwise be lost to lawful activities.

“Public water-supply well” means a well that supplies two or more separate residential connections.

“Reconnaissance” means an examination of a project area by qualified LIBC staff and/or by a qualified wetland specialist to determine the presence, approximate boundaries, and probable functions of wetlands and/or streams. A reconnaissance is not a legal wetland delineation, but may be substituted for a delineation at the discretion of the Lummi Nation for the purposes of this Code.

"Re-development" means the following activities: substantial additional development on an already developed site; the creation or addition of impervious surfaces; additional structural development, including construction, installation, or expansion of a building or other structure; replacement of impervious surface that is not part of routine maintenance activity; and land-disturbing activities associated with structural or impervious redevelopment.

“Regulations” shall mean the regulations adopted pursuant to the requirements of this Code.

“Reservation” means all lands within the boundaries of the Lummi Reservation, including, but not limited to:

(1) all lands within the territorial boundaries of the Lummi Reservation as established by the Treaty of Point Elliott of January 22, 1855 and by the Executive Order of November 11, 1873, and such other lands as may thereafter be added thereto or made a part thereof;

(2) all other trust, restricted, or tribally-owned lands, regardless of whether they have been formally added to or made part of the Reservation; and

(3) all tidelands landward of the extreme lower low water line.

“Restoration” means actions performed to reestablish a stream, wetland, or buffer and its functions within an area that no longer meets the definition of a stream, wetland, or buffer because of alterations, activities, or catastrophic events, and actions performed to return an existing stream, wetland, or buffer to a state in which its functions and values approach the state that existed before disturbance or degradation.

“Runoff” means water originating from precipitation or ground water that is found in overland flow or in features, including, but not limited to, drainage facilities, rivers, streams, springs, seeps, ponds, lakes, and wetlands.

“Source-control BMP” means a Best Management Practice (BMP) that is intended to prevent pollutants from entering storm water. A few examples of source control BMPs are erosion control practices, maintenance of storm water facilities, constructing roads over storage and working areas, and directing wash water and similar discharges to a sanitary sewer or an appropriately designed dead-end sump.

“Storm water” means that portion of precipitation that does not percolate into the ground or evaporate, but moves via overland flow, interflow, channels, or pipes into a defined surface water channel or a constructed drainage facility.

"Stream" means those areas where surface water flows sufficiently to produce a defined channel or bed, indicated by hydraulically sorted sediments or the removal of vegetative litter or loosely rooted vegetation by the action of moving water, provided that a channel or bed need not contain water year-round; provided further that "stream" does not include irrigation ditches, canals, storm water runoff facilities, or other entirely artificial watercourses unless they are used to convey streams naturally occurring before construction.

"Stream bank" means that portion of the land surface extending from the stream water surface to the ordinary high water mark recognized by the Water Resources Manager and thence to fifty (50) feet upland of the ordinary high water mark.

"Successors in Interest" means successors in interest to Existing Residential Water Use Permittees.

"Surface water" means any or all water originating from precipitation or ground water discharge that is found at the surface of the earth, primarily in rivers, streams, springs, seeps, ponds, wetlands, lakes, and storm water drainage facilities.

"Treatment BMP" means a Best Management Practice (BMP) that is intended to remove pollutants from storm water. A few examples of treatment BMPs are detention ponds, oil/water separators, biofiltration swales, and constructed wetlands.

"Tribal Court" means the Lummi Nation Tribal Court.

"Tribal Court of Appeals" means the Lummi Nation Tribal Court of Appeals.

"Tribal reserved water rights" means those rights to use, divert, or affect Lummi Nation water reserved by or for the Lummi Nation under federal law, including, but not limited to, treaty, executive order, aboriginal doctrine, or case law, and any and all other water rights derived from the foregoing.

"Trust Land" means all lands held in trust for the Lummi Nation by the United States regardless of location.

"Values" means the intangible benefits a natural area provides to the society/culture; some of these benefits overlap with or are included in those listed above in the definition of functions.

"Water" means Lummi Nation ground water and surface water.

"Water body" means surface waters, including, but not limited to, rivers, streams, lakes, marine waters, estuaries, wetlands, and reservoirs.

"Water Resources Division" shall mean the administrative division under the direction of the Water Resources Manager that is responsible for the administration and enforcement of this Water Resources Protection Code.

"Water Resources Manager" means the administrator designated in Chapter 17.02 of this Code to administer and enforce this Code.

"Water quality" means the chemical, physical, and biological characteristics of water, usually in respect to its suitability for a particular purpose or other designated beneficial use.

"Water quality standards" means numeric standards adopted by the Lummi Nation for Lummi Nation Water that prescribe the use of a water body and establish the water quality criteria that must be met to protect designated uses.

"Watershed" means a topographically delineated area that is drained by a stream system, that is, total land area above some point on a stream or river that drains past that point.

"Wetland classification" means descriptive categories of the taxonomic classification system for wetlands developed by the U.S. Fish and Wildlife Service in the document classification of wetlands and deepwater habitats of the United States.

"Wetland complex" means areas where wetlands and uplands form a highly interspersed mosaic, often with a number of small, hydrologically interconnected (either through ground water or surface water) wetlands as commonly found in hummock and swale topography.

"Wetland creation" means a human activity to bring a wetland or portion of a wetland into

existence where one previously did not exist (e.g., in an upland or shallow aquatic environment).

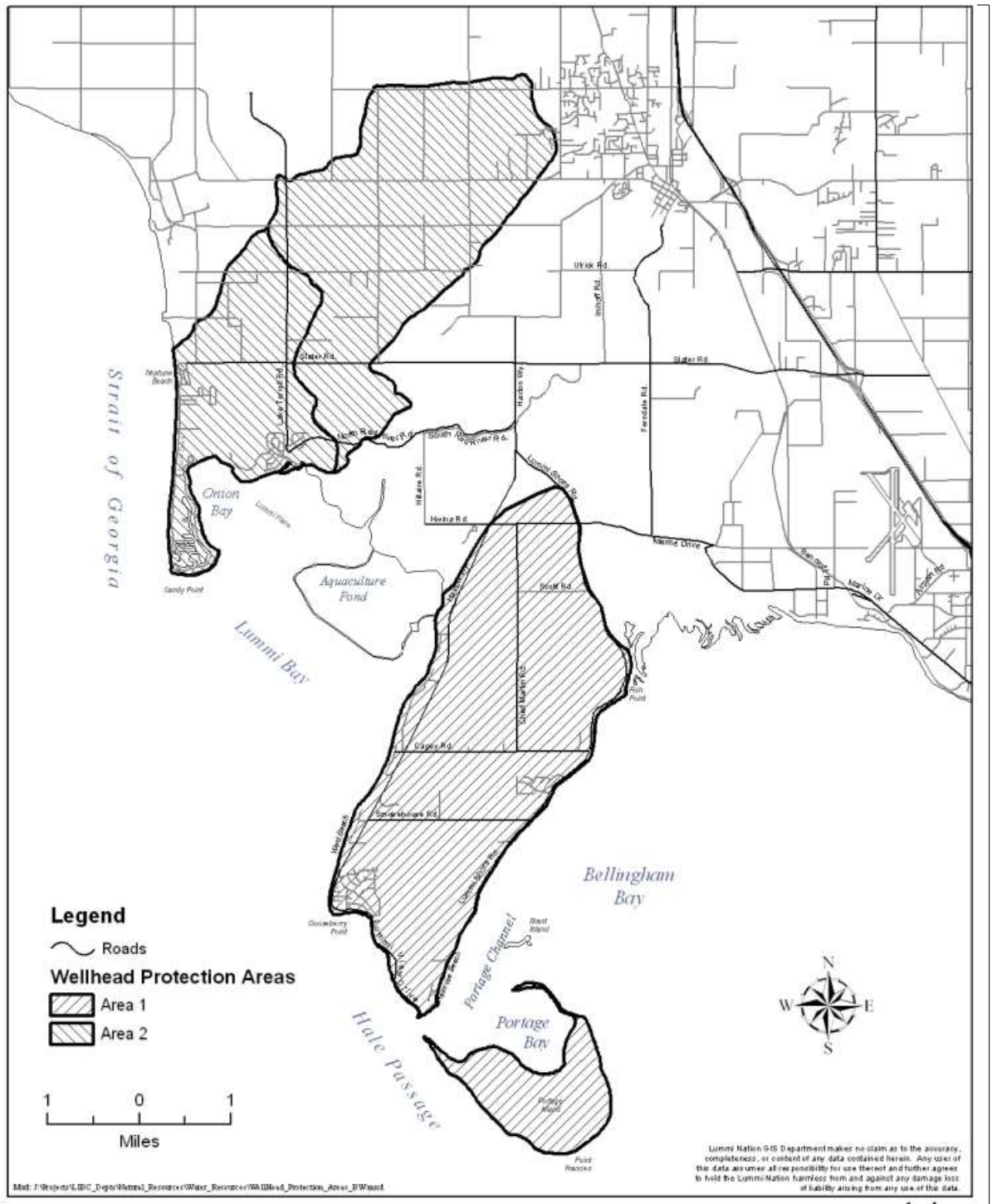
“Wetland edge” means the boundary of a wetland as identified using the methodology in the current and federally accepted edition of the "Federal Manual for Identifying and Delineating Jurisdictional Wetlands."

“Wetland hydrology” means to have the substrate saturated to the surface or inundated at some point in time during an average rainfall year, sufficient to meet the criteria in the current and federally accepted edition of the "Federal Manual for Identifying and Delineating Jurisdictional Wetlands."

“Wetlands” means those areas that are inundated or saturated by surface water or ground water 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 swamps, marshes, bogs, and similar areas.

Title17.Res2016-014

ATTACHMENT 1



Lummi Nation Wellhead Protection Areas