OCT 16 2000

WT-15J

Erv Soulier, Natural Resources Manager
Bad River Band of Lake Superior Chippewa Indians
P.O. Box 39
Odanah, WI 54861

Subject: EPA decision on the potential promulgation of individualized tribal water quality standards

Dear Mr. Soulier:

I wanted to follow up with you after my telephone call on August 1, 2000 regarding the U.S. Environmental Protection Agency's (EPA) decision on whether it would be feasible to include your individualized water quality standards along with the national core water quality standards proposed rule. As you are aware, Region 5 worked intensively with your water resources specialist over the last several months to prepare existing draft Tribal water quality standards for Federal promulgation as part of EPA's promulgation of core water quality standards for Indian Tribes. Tracey Ledder is to be commended for accomplishing, on a very tight schedule, the significant amount of work that this endeavor required. Unfortunately, despite the best efforts of our staff, EPA believes that it will not be possible to proceed with proposing individualized water quality standards at the same time that we are proposing the national core water quality standards rule, for the reasons outlined below.

We have consulted with EPA Headquarters staff and have concluded that there is work yet to be done to resolve some national-level policy issues contained in the draft individualized standards that were not anticipated when we began working with you. In addition, EPA will likely need to expand and refine the description, rationale, and economic analysis we have drafted for publication in the preamble to the individualized standards rule. The result is that we will need more time than originally planned to propose individualized standards for your Reservation. The following are some of the national-level issues that have been raised.

- **Revision process and site-specific actions** (Bad River and Oneida): The process described in the individualized water quality standards, for revising the standards and taking site-specific actions needs to be reviewed to ensure that the roles of the Tribe and EPA conform with the structure of the Clean Water Act. In addition, several provisions that appear to restrict the discretion of the Regional Administrator need to be evaluated and revised if necessary.

KM 10/12/00

- **Tribal-specific designated uses** (all three Tribes): We would like to discuss with the Tribe the choice of Tribal-specific designated uses for the Tribe's waters. We understand and support the need to reflect cultural and traditional values in the designated uses, and are prepared to work with you to ensure that the use designations to be proposed as Federal standards are protective and defensible.

- **Water quantity** (Oneida) **and habitat** (all three Tribes): We understand the Tribe's interest in addressing water quantity and habitat issues, sufficient to ensure that designated uses are attained. However, we need to do further research on the legal and programmatic issues associated with including criteria/requirements related to water quantity and habitat in a Federal water quality standards rule-making and would like to work with you as we do so.

- **Tier 3 antidegradation classifications** (Bad River and Keweenaw Bay): The draft individualized standards include antidegradation classifications equivalent to EPA's Tier 3 (outstanding national resource waters, or ONRW) classification. Since this classification strictly prohibits a lowering of water quality, EPA wants to be certain that the Tribe is fully aware of how this classification could affect future economic and social development. If EPA were to propose to list certain waters as Tier 3 waters, we would also likely need to undertake some form of economic analysis of the potential impact in that geographic area. We should note that in the Federal core water quality standards rule, EPA will likely not be proposing to classify any water body in Indian country as an ONRW. However, EPA may consider classifying water bodies as ONRWs in the future if EPA undertakes subsequent phases of establishing water quality standards for Indian country. Since to date EPA has never promulgated a Tier 3 classification for a specific water in a Federal rule, there may also be further policy and technical issues that need further discussion within EPA before we can do so for waters in your Reservation.

- **Antidegradation to improve water quality** (Bad River): The use of antidegradation to improve degraded water bodies would be a new usage that EPA has not interpreted nor applied to improve water quality. This would require further discussion.

In addition to the major issues mentioned above, EPA had several comments related to each specific set of individualized standards. We have discussed those comments verbally with your staff. In general, we discussed the following:

✓ For all three Tribes, issues regarding additional documentation of which waters would be covered by the individualized standards.

✓ The lack of variance procedures within all three sets of individualized standards.

- ✓ Why primary contact recreation is not a designated use for some of the water bodies. The preamble or Administrative Record needs to include a use attainability analyses to demonstrate why a non-"swimmmable" use is appropriate (Oneida and Keweenaw Bay).

- ✓ Clarify antidegradation language to be consistent with 131.12 and to be specific on wetlands.

- ✓ Clarify that less-stringent modifications can also be made.

If you would like to discuss some of these comments in more detail, please contact us at any time.

We understand that interaction between your environmental staff and Tribal council or business committee must occur in order for the Tribe to decide what action[s] to pursue next. To assist with your decision-making on these matters, we propose the following options for your consideration:

> **Option 1:** Proceed with work on the potential promulgation of the individualized water quality standards, but on a separate track from the national core standards promulgation. This work may proceed slowly since all issues noted above must be thoroughly discussed and resolved.
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> **Option 2:** Proceed with work on the potential promulgation of a "narrowed" set of individualized water quality standards which would remove some or all of the major policy issues. Though this option is less desirable than option 1, in terms of the comprehensive scope of the standards, work toward potential promulgation of the standards could proceed at a faster pace.
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> **Option 3:** Cease work on the individualized water quality standards. Focus Tribal resources on potentially obtaining 303 program eligibility, and development of a set of EPA-approved water quality standards that fully meets the needs of the Tribe.
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> **Option 4:** Accept the national core water quality standards which will likely be proposed in December, 2000 and continue to consider the above three options. Accepting the national core water quality standards will not preclude the Tribe from pursuing option 1, 2, or 3 at a later time.

We would be pleased to work with you in evaluating these options, and to meet with you to discuss the issues related to the individualized standards. When considering your options, particularly options 1 and 2, please be aware that EPA cannot make any specific commitments for individualized water quality standards outcomes. For example, as previously discussed with your staff during conference calls, we cannot guarantee what would be included in the final content of a set of individualized standards. The content of the standards will remain an unknown until after public comment. Also, though both Region 5 and Headquarters EPA remain committed to the individualized standards promulgation, the time it will take to do so is somewhat of an unknown factor depending on the outcome of discussions on the issues identified above, as well as other

EPA workload in the next year that we cannot predict at this time. As a result, EPA cannot make a time commitment for when a set of individualized standards could potentially be promulgated. We understand your decision may take some time, since you have indicated you may want to review the national core water quality standards rule when it is proposed in December before making a decision, as well as to interact with your environmental staff and Tribal council or business committee. Please contact us when you have made a decision.

If you have any questions about EPA's decision and comments on the individualized water quality standards, or if you would like to discuss the four options proposed above, please call me at (312) 886-0126, or your environmental staff may contact Kathy Mayo at (312) 353-5592. Your patience and hard work on these matters is very much appreciated.

Sincerely,

JoLynn Traub
Director, Water Division

cc: Tracey Ledder, Bad River Tribe
Shannon Swanstrom, Bad River Tribe
Fred Leutner, EPA Headquarters

10/6/00

K. Mayo 10/12/00
See attached email concurrence from ORC, STPB