



Maryland

Department of the Environment

Larry Hogan, Governor
Boyd K. Rutherford, Lt. Governor

Ben Crumbles, Secretary
Horacio Tablada, Deputy Secretary

October 28, 2020

Ms. Beth E. Bachur
USACE, Baltimore District
Regulatory Branch
2 Hopkins Plaza
Baltimore, MD 21201
via electronic mail: beth.bachur@usace.army.mil

Re: Proposed Nationwide Permits Reissuance, Water Quality Certification Request, AI # 168223,
20-WQC-0050

Dear Ms. Bachur:

This is in response to the U.S. Army Corps of Engineers (ACOE), Baltimore and Philadelphia District, requests for water quality certification (WQC) pursuant to Section 401 of the Clean Water Act for the reissuance of the Nationwide Permits (NWP), including five newly proposed Nationwide Permits. Your request was submitted to the Maryland Department of Environment (MDE) on October 15, 2020, and indicated a sixty (60) day decision deadline (December 15, 2020). MDE requires additional time to review the proposed activities in order to make a decision regarding whether the activities authorized by the NWPs will meet Maryland water quality standards and requirements. MDE values the issuance of the Nationwide Permits for qualifying projects in Maryland and will make its best effort to make the relevant decisions as soon as practicable. Maryland must review the Nationwide Permits as proposed, regardless of whether there will be future regionally proposed conditions or proposed suspensions in Maryland. We believe that this extension request is reasonable and justifiable in accordance with 40 CFR Section 121.6.

In order to complete the relevant reviews in accordance with State regulation MDE requests an extension until January 29, 2021 to make its final decision for reasons that are outlined in this letter, as discussed below:

- 1) ACOE recently requested on September 25 and 30, 2020 that Maryland issue a coastal consistency determination under the Coastal Zone Management Act (CZMA) for the Nationwide Permits. On October 8, 2020, Maryland identified missing information in the ACOE CZMA submission, as well as requested an agreement that Maryland's CZMA decision date will be January 29, 2021 under 15 C.F.R. Section 930.41(b). It would be beneficial to the State and to the ACOE for Maryland to synchronize its WQC and CZMA reviews of the proposed Nationwide Permits and be able to issue a decision on both WQC and CZMA requirements within the same timeframe. At a minimum, MDE's proposed timeframe will allow for proper review and legally binding State administrative procedures to be met as well as federal process-related requirements and bring both the Philadelphia District and Baltimore

Districts to a single WQC and CZMA decision date.

- 2) Maryland regulations at COMAR 26.08.02.10 specify requirements for soliciting comments on proposed requests for water quality certification. MDE regulations require public notice of applications for WQC and allow the public the opportunity to request a Hearing, and, if a Hearing is requested, the Hearing Notice must by regulation be published in the Maryland Register no sooner than 45 days from the date of the Hearing. MDE is willing and has decided to combine normally separate administrative procedure requirements surrounding public comment and hearing requests to help streamline the process; however, there is only so much MDE can do and still meet regulatory process requirements. MDE has taken the unusual step of submitting the hearing notice on October 9, 2020, for Maryland Register publication on October 23, 2020, prior to receiving the formal request for certification from the ACOE. These efforts demonstrate MDE's good faith intentions of making a certification decision as soon as possible in compliance with State law and regulations. Due to the necessity of potentially holding a public hearing, if one is formally requested, and logistics of scheduling and operating a virtual hearing due to on-going restraints associated with COVID-19, the earliest date on which MDE can hold a hearing is December 15, 2020. This public hearing date has also been discussed and concurred for participation by the ACOE Philadelphia and Baltimore Districts. This date coincides with the 60-day deadline given to MDE by the ACOE. Due to the nature of the virtual hearing platform and in accordance with normal practice after public hearings held for permitting actions, MDE will keep the record open for an additional 14 days for comment submission post-hearing date to ensure adequate opportunity for public review and comment. Requiring a decision before a public hearing can be held and the public comment period closing is unreasonable as it leaves no time to consider any comments made at the hearing or submitted within a reasonable time after the hearing upon the close of the public comment period.
- 3) MDE believes that the 60-day time period is not reasonable under 40 CFR 121.6(d), due to:
 - a) The complexity of the project. As stated, Maryland has the obligation and duty to review each Nationwide Permit for a water quality certification. Additionally, Maryland will review the regional conditions for the potential for discharges which may violate water quality standards; and
 - b) The need for potential additional study and evaluation of water quality effects under the long, and modified, list of Nationwide Permits. The evaluation must include consideration of information provided by the public as provided after notice and opportunity to request and hold a hearing and include the development of relevant conditions for a certification based on the analysis.

The Corps has authority, as stated under 40 CFR 121.6, to extend the time for a certifying agency to a decision, for a period of up to one year. MDE is requesting the minimal amount of additional time

to meet regulatory requirements for issuing, denying, waiving, or conditioning the Water Quality Certification. Again, for the reasons set forth above MDE requests an extension until January 29, 2021 to make a final decision regarding the WQC. Please confirm acceptance of the extension request within the next ten (10) days. Please contact me if you have any questions or need additional information to review our request. I can be reached at 410-537-3528 or by email at hnelson@maryland.gov.

Sincerely,

A handwritten signature in cursive script that reads "Heather L. Nelson".

Heather L. Nelson, Acting Manager
Wetlands and Waterways Program
Water and Science Administration

cc: (via electronic mail)
Dan Swenson, Chief, Regulatory Branch, USACOE Baltimore District
Todd Schaible, Chief, Regulatory Branch USACOE, Philadelphia District
Michael Yost, Regulatory Branch, USACOE, Philadelphia District
Joseph Abe, DNR