



Changes to the Final Federal Nationwide Permits and the Pending Section 401 Certifications of Virginia

On March 19, 2017, the US Army Corps of Engineers reissued the existing 50 Nationwide Permits (NWP) and issued an additional two new NWP. Most of the reissued nationwide permits have no major changes from the 2012 NWP, however a handful of modifications have been made in the 2017 NWP reissuance.

In addition, the Virginia Department of Environmental Quality (DEQ) is currently preparing to reissue their Section 401 Water Quality Certifications for the new NWP. Section 401 of the Clean Water Act gives states the right to approve, apply conditions to, or deny any Federal permits or licenses that may result in a discharge to waters of the United States within their borders. DEQ posted their preliminary decisions on Section 401 Certifications for the new NWP on February 15, 2017 which was followed by a 30-day public comment period ending on March 17, 2017. Most of the preliminary decisions are similar to the previous NWP 401 Certifications, however some previously Unconditional Certifications are now Conditional. These changes are noted in the sections below.

DEQ has not yet to finalize their 401 Certification decisions, but they are expected in the coming weeks. As such, no new NWP can be issued in Virginia until DEQ issues their new NWP Section 401 Certifications.

The following sections are a summary of some of the changes relevant to infrastructure and land-use projects in the final federal NWP and the proposed changes associated with the Virginia Section 401 Certifications. (*see pg. 2*)

Rusty Patch Bumble Bee Listed as Endangered Species

On March 21, 2017, the Rusty Patch Bumblebee (RPBB) (*Bombus affinis*) was listed under the Endangered Species Act as the first federally endangered bee in the continental United States. This species is known to occur in Virginia. However, the only sightings in Virginia since 2000 have been in the vicinity of Sky Meadows State Park, south of Winchester (*see map below*). The U.S. Fish and Wildlife Service (FWS) has not designated Critical Habitat for this species, but general habitat requirements include grassland and parries. In addition, the RPBB is a ground-nesting bee so sites that are mowed or tilled typically are not suitable for this species. More specific habitat information is provided below. (*see pg. 4*)



Figure 1. Illustrations of a rusty patched bumble bee queen (left), worker (center), and male (right) by Elaine Evans, The Xerces Society.

Changes to the Final Federal Nationwide Permits....(continued)

FEDERAL CHANGES TO NWPS:

Changes to Preexisting NWPS:

NWP 3 – Maintenance

Authorizes the removal of previously authorized structures and fills and use of temporary mats, but first requires Department of the Army authorization.

Removes the provision authorizing the placement of new or additional riprap to protect the structure (riprap may be authorized by NWP 13 – Bank Stabilization).

NWP 12 – Utility Line Activities

Authorizes the use of temporary mats. Also, refers to Corps regulations for required minimum clearances of overhead electric power transmission lines over navigable waters.

Only authorizes crossings of waters of the United States associated with the construction, maintenance, and repair of utility lines. In cases where Department of the Army authorization is required, the NWP authorizes inadvertent returns of drilling muds through sub-soil fractures (frac-outs that might occur during directional drilling operations to install utility lines). Also authorizes utility line maintenance and repair activities that do not qualify for the CWA Section 404(f) exemption for maintenance.

NWP 13 – Bank Stabilization

Authorizes a variety of bank stabilization techniques, not just bulkheads and revetments. Cubic yard limits are to be measured along the bank, to address in-stream fills for bank stabilization. Also requires proper maintenance, and authorizes repair and maintenance of bank stabilization activities. Native plants appropriate for the site must be used for bioengineering or vegetative stabilization.

NWP 19 – Minor Dredging Requires that dredged material be deposited in an area that has no jurisdictional waters or wetlands, unless authorized by the Corps by a separate authorization.

NWP 27 – Aquatic Habitat Restoration, Enhancement, and Establishment Activities

Adds a requirement to use an ecological reference to plan, design, and implement the activity.

NWP 33 – Temporary Construction, Access, and Dewatering

A Pre-Construction Notifications (PCNs) is now only required for activities in navigable (Section 10) waters.

NWP 35 – Maintenance Dredging of Existing Basins

Now requires that dredged material be deposited in an area with no waters of the United States, unless authorized by the Corps by a separate permit.

NWP 40 – Agricultural Activities

Clarifies that any losses of stream bed are applied to the 1/2-acre limit.

NWP 41 - Reshaping Existing Drainage Ditches

Removes the PCN requirement for this NWP.

NWP 42 – Recreational Facilities

Clarifies that any losses of stream bed are applied to the 1/2-acre limit.

NWP 43 – Stormwater Management Facilities

Clarifies that stormwater or wastewater management facilities that are created in dry land (33 CFR 328.3(b)(6)) are not waters of the United States, and maintenance does not require a section 404 permit. Any losses of stream bed are applied to the 1/2-acre limit.

NWP 48 – Existing Commercial Shellfish Aquaculture Activities

Specifies that project areas include lands where other legally binding agreements establish enforceable property interests. Defines “new commercial shellfish aquaculture operation” as operating in an area where such activities have not occurred during the past 100 years. Removes the PCN threshold for dredge harvesting, tilling, or harrowing in areas inhabited by submerged aquatic vegetation. Does not authorize activities that directly affect more than 1/2-acre of submerged aquatic vegetation beds in an area that has not been used for commercial shellfish aquaculture during the past 100 years. PCN should include all species that are planned to be cultivated during the period the NWP is in effect. PCN must specify whether suspended cultivation techniques will be used and indicate the general water depths in the project area.

New NWPS:

NWP 53 – Removal of Low- Head Dams

Applicability: All waters of the U.S. (Section 10/404 waters).

Purpose: Authorizes the removal of low-head dams for stream restoration and public safety. “Low-head dam” is defined as a dam built to pass upstream flows over the entire width of the dam crest on a continual and uncontrolled basis. As a rule, compensatory mitigation is not required for these activities because they result in net increases in stream ecological functions and services. NWP does not authorize regulated activities for restoration of stream in vicinity of former impoundment (these activities may be authorized by NWP 27), or bank stabilization activities (these activities may be authorized by NWP 13).

NWP 54 – Living Shorelines

Applicability: All waters of the U.S. (Section 10/404 waters).

Purpose: Authorizes construction and maintenance of living shorelines for shore erosion control. Living shorelines consist of natural and man-made materials. May include stone or reef structures to protect the shoreline from low to moderate energy waves. Living shorelines must have a substantial biological component, either tidal or lacustrine fringe wetlands or oyster or mussel reef structures. Does not authorize beach nourishment or land reclamation activities. Discharges of dredged or fill material into waters of the United States, including the construction of fill structures such as sills or breakwaters, must be the minimum necessary for the establishment and maintenance of the living shoreline.

Limitations: 30 feet from mean high water (unless waived by District Engineer (DE)); 500 feet along the bank (unless waived by DE)

VIRGINIA SECTION 401 CERTIFICATION PROPOSED CHANGES:

Please note: The following information is based on the DEQ’s Notice of Intent to issue their 401 Certifications and these decisions have not yet been finalized.

Changes to Multiple NWPs

Single family dwelling and locality projects located within the VA Beach Oceanfront HUC (02040303) and the Eastern Shore HUC (02040304) can use mitigation credits from any of 4 other specific HUCs on the Chesapeake Bay if there are no “same river watershed alternatives” available for mitigation. This applies only to specific NWPs with 401 Conditional Certifications (NWPs 3, 7, 12, 13, 14, 18, 19, 23, 25, 29,32, 41, 43, 51, & 52)

NWP 3 - Maintenance

Proposes a **Conditional** Certification. Major provisions include:

- a. Deviations from the original configurations cannot change the “character, scope or size of the original design” or the DEQ can approve an alteration plan.
- b. Maintenance activities cannot change the volume of water intake or water withdraws, increase the capacity of an impoundment, or alter streamflow.

NWP 13 - Bank Stabilization

Proposes a **Conditional** Certification. Major provisions include:

- a. Stabilization activities cannot permanently impact > 1,500 lf of non-tidal stream regardless of USACE waivers.

NWP 23 - Approved Categorical Exclusions

Proposes a **Conditional** Certification. Major provisions include:

- Discharge cannot include water withdrawals (i.e. intake structure, weir, or water diversion structures)

NWP 27 – Aquatic Habitat Restoration, Enhancement, and Establishment Activities

Remains a **Conditional** Certification but has additional provisions:

- a. Updated language so projects must use “natural stream channel design” vs pervious language which required “natural stream design”
- b. Monitoring requirements for projects are now much more specific
 - i. Reports must be submitted at a “frequency and duration adequate to observe performance according to project objectives. If there is no monitoring schedule otherwise specified, then an as built and a minimum of five years of postconstruction monitoring will be required.”
 - ii. Specific details are required for each report including topographic survey, planting locations, photos, comparisons of as-built conditions to current monitoring year, regular vegetation surveys, and discussions of monitoring period performance.

Please contact Eli Wright (ewright@kerrenv.com), Curtis Hickman (chickman@kerrenv.com), Troy Savage (tsavage@kerrenv.com), Jeff Flood (jflood@kerrenv.com) or Bob Kerr (bkerr@kerrenv.com) at (757) 963-2008 to answer any questions you may have regarding these finalized regulations.

To view the 2017 Nationwide Permit Information, visit: <http://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/>

The 2017 Nationwide Permit Virginia specific conditions will be posted here when finalized: <http://www.nao.usace.army.mil/Missions/Regulatory/Nationwide-Permit-Conditions/>

Rusty Patch Bumble Bee Listed as Endangered Species (continued)

The FWS has posted Interagency (Section 7) coordination guidance for the RPBB, which recommends Interagency Coordination on this species only if a proposed project falls within a “High Potential Zone” (red dots on Figure 1 below). Therefore, we do not suspect this species will affect development plans in Virginia unless a proposed project is located near the Sky Meadows State Park or in close proximity to a native grassland and/or meadow habitat west of I-95.

The following excerpts are from the FWS Website regarding the RPBB Range and Habitat:

“Rusty patched bumble bees once occupied grasslands and tallgrass prairies of the Upper Midwest and Northeast, but most grasslands and prairies have been lost, degraded, or fragmented by conversion to other uses. Bumble bees need areas that provide nectar and pollen from flowers, nesting sites (underground and abandoned rodent cavities or clumps of grasses), and overwintering sites for hibernating queens (undisturbed soil).”

“Areas that meet the following descriptions are not suitable for the rusty patched bumble bee for nesting, overwintering, or foraging:

- permanently flooded areas/open water;
- paved areas;
- areas planted to annual row crops, such as corn and soybeans;
- forest where invasive shrubs are dominant and spring ephemeral flowers are absent; and,
- areas mowed too frequently to allow development of diverse wildflower resources (e.g., road shoulders).

In addition to the above, wetlands, where standing water may be absent but near the ground surface, are unsuitable for nesting or overwintering. Some wetland areas, however, could function as important

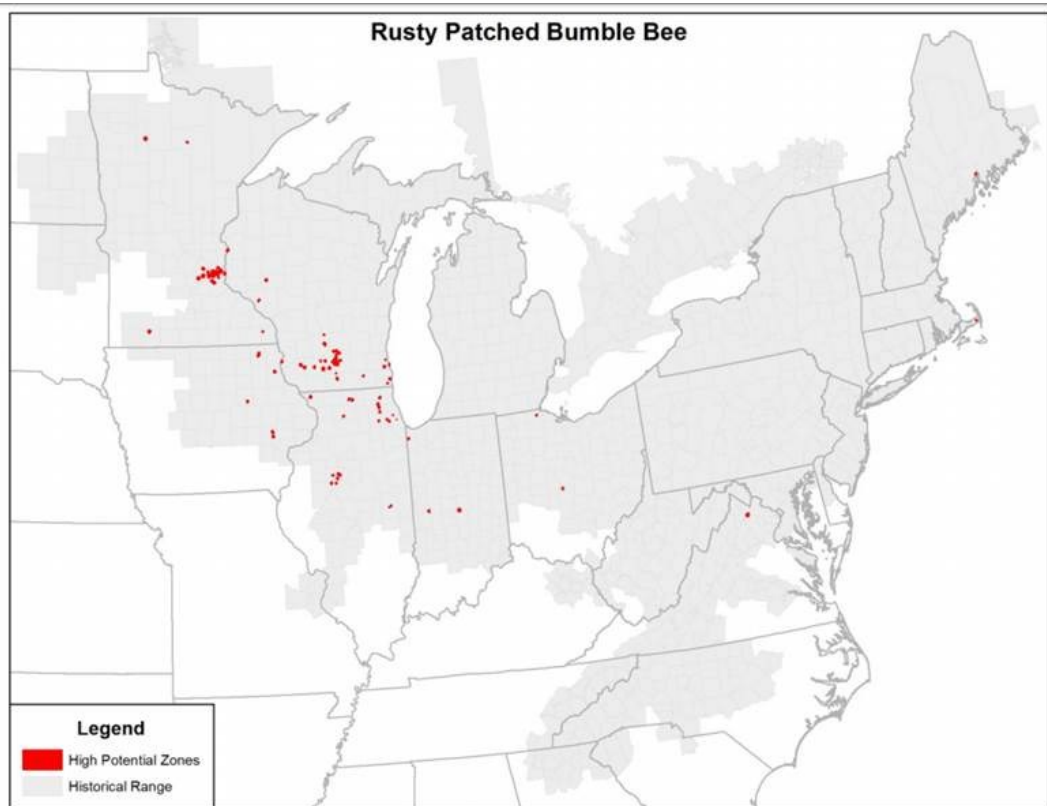


Figure 1. Areas where there is evidence for the likely persistence of the rusty patched bumble bee in the United States (highlighted in red to increase visibility), based on the habitat model (described below) and on species survey data compiled from 2007 through 2016 (U.S. Fish and Wildlife Service Rusty Patched Bumble Bee Unpublished Geodatabase). The approximate historical range of the species is shown in light gray.

Feel free to contact Eli Wright (ewright@kerrenv.com) at (757) 963-2008 to answer any questions you may have regarding this newly listed protected species or visit the FWS RPBB website for additional information: <https://www.fws.gov/midwest/endangered/insects/rpbb/guidance.html>

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