



## **Administrative Conference Recommendation 2015-4**

### **Designing Federal Permitting Programs**

**Adopted December 4, 2015**

Regulatory permits are ubiquitous in modern society, and each year dozens of federal agencies administering their regulatory permit authority issue tens of thousands of permits covering a broad and diverse range of actions.<sup>1</sup> The APA includes the term “permit” in its definition of “license.” In addition to agency permits, the APA defines licenses to include “the whole or part of an agency...certificate, approval, registration, charter, membership, statutory exemption or other form of permission.”<sup>2</sup> Otherwise, the APA provides little elaboration on the definition of a permit.<sup>3</sup> For purposes of this recommendation, a regulatory permit is defined as any administrative agency’s statutorily authorized, discretionary, judicially reviewable granting of permission to do something that would otherwise be statutorily prohibited. This recommendation treats any agency action that meets this definition as a permit, regardless of how it is styled by the agency (e.g., “license,” “conditional exemption”).

Permits exist on a continuum of agency regulation, falling between exemptions (in which an activity is not regulated at all) and prohibitions. Broadly speaking, there are two contrasting approaches to permitting.<sup>4</sup> In specific permitting, upon receiving an application, an agency engages in extensive fact gathering and deliberation particular to the individual circumstances of

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<sup>1</sup> Eric Biber & J.B. Ruhl, *Designing Regulatory Permits 2* (2015), <https://www.acus.gov/report/licensing-and-permitting-final-report>. For a more complete discussion of different types of permits and permitting systems, see Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 DUKE L.J. 133 (2014).

<sup>2</sup> 5 U.S.C. § 551(8).

<sup>3</sup> See Biber & Ruhl, *supra* note 1, at 3–4 (discussing lack of APA definition).

<sup>4</sup> *Id.* at 2-6.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

the applicant's proposed action, after which the agency issues a detailed permit tailored to the applicant's situation. In their strictest form, specific permits can demand so much of the permit applicant in terms of cost, information, and time that they closely resemble prohibitions. However, some specific permits can be lenient, with relatively few conditions placed on regulated entities.

In general permitting, an agency issues a permit that defines and approves a category of activity on its own initiative, and allows entities engaging in that activity to readily take advantage of the permit. Agency review of specific facts in any particular case is generally limited unless the agency finds good cause to condition or withdraw the general approval. In their most flexible form, general permits can resemble exemptions in form and effect, with few requirements on regulated entities and relatively little agency oversight. On the other hand, general permits may place requirements on regulated entities that aid agency oversight and enforcement. Some permits toward the more general end of the spectrum require the regulated entity to provide notice to the regulator and others do not.

Between general and specific permits lie many possible intermediate forms of permitting that can exhibit traits of both general and specific permitting.<sup>5</sup> These permits, referred to in this recommendation interchangeably as "intermediate" or "hybrid" permits, may call for intermediate levels of agency review or intermediate requirements to be met by regulated parties, or may contain a mix of features from both general and specific permitting. Intermediate

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<sup>5</sup> *Id.* at 8-10 (discussing possible hybrid permitting and providing an example). For instance, some of the nationwide permits utilized by the Army Corps of Engineers to regulate the fill of wetlands pursuant to Section 404 of the Clean Water Act require permittees to provide notice to the agency before proceeding with development activities. The notice may require substantial amounts of information (including detailed mitigation plans), and the permittee may not be able to proceed with development until directly authorized by the agency. These nationwide permits have elements of both a general permit (they apply to a category of activities, do not require the full range of applicant information that individual permits under Section 404, require and do not require the agency to do the full amount of environmental review associated with individual permits) and a specific permit (they still require substantial information to be submitted by the applicant and may require prior approval by the agency before permitted activities can be initiated).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

permits provide agencies with significant flexibility, allowing them to tailor permitting to the regulated activity.

This recommendation focuses on the distinction between general and specific permits, and considers intermediate permits as well. It does not specify situations in which exemptions are appropriate or evaluate the extent to which general permits may be preferable to exemptions. Marketable permits, in which permits are bought and traded by regulated entities, may also prove beneficial to agencies, the regulated community, and the public in many circumstances.<sup>6</sup>

General and specific permitting differ in both the system used to issue the permit and in the way permits are issued under the system.<sup>7</sup> In specific permitting, the agency issues a rule outlining the process and standards for obtaining permits, after which regulated entities apply for permits and the agency reviews the submissions, often with public input and judicial review. In general permitting, the agency often promulgates a rule outlining the precise conditions under which regulated entities may take advantage of the permit. This approach imposes significant burdens on the agency upfront; however, once in place, the process of permitting is relatively streamlined and sometimes provides fewer opportunities for public input and judicial review. Although some agencies have traditionally relied primarily on specific permits, general permits may offer agencies advantages in efficiency or resource use.

Most statutes delegate considerable discretion to agencies to decide at what point on the spectrum from general to specific to implement a permitting system.<sup>8</sup> Whether an agency adopts

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<sup>6</sup> Permit marketability lies outside the continuum of general permits to specific permits.

<sup>7</sup> *Id.* at 6-7.

<sup>8</sup> For example, the Migratory Bird Treaty Act provides almost no guidance as to the use of general versus specific permits. *See* 16 U.S.C. §§ 703-704. Section 404 of the Clean Water Act lays out specific factors that must be met in order to use general permits. *See* 33 U.S.C. § 1344(e)(1)-(2). Both of these programs are described in case studies accompanying the report.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

a general or specific permitting system, or an intermediate system, can have significant impacts on the agency, the regulated entities, and third parties affected by the permitting action. If Congress decides to specify which type of permitting system an agency should adopt, Congress may want to consider the guidance provided in this recommendation.

In recent years, there has been increasing public concern over the extent to which inefficiencies in the permitting process delay necessary infrastructure reform.<sup>9</sup> As an initial step, in 2012, Executive Order 13604 established a steering committee to “facilitate improvements in Federal permitting and review processes for infrastructure projects.”<sup>10</sup> The order also established an online permit-tracking tool, the Federal Infrastructure Projects Dashboard. The Steering Committee and Dashboard serve to enhance interagency coordination and provide permit tracking to improve agency timeliness.<sup>11</sup> Congress has also been considering modifying the permitting process in various ways.<sup>12</sup> In seeking to reform existing permitting systems or establish a new permitting system, Congress and agencies should also be aware of the comparative advantages of general and specific permits and design or modify such systems accordingly.

Although each permitting system is different, and an agency must tailor its procedures to meet both its statutory mandate and the needs of the particular program at issue, agencies face a number of common considerations when designing or reviewing a permitting system. There

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<sup>9</sup> See, e.g., Philip K. Howard, Common Good, Two Years Not Ten Years: Redesigning Infrastructure Approvals (2015), [http://commongood.3cdn.net/c613b4cfda258a5fcb\\_e8m6b5t3x.pdf](http://commongood.3cdn.net/c613b4cfda258a5fcb_e8m6b5t3x.pdf).

<sup>10</sup> Performance of Federal Permitting and Review of Infrastructure Projects, 77 Fed. Reg. 18,885, 18,888 (Mar. 28, 2012) (to be codified at 3 C.F.R. pt. 100).

<sup>11</sup> *Id.* at 18,887-8. The reforms promoted by EO 13604 are largely in accord with the Administrative Conference’s Recommendation 1984-1, *Public Regulation of Siting of Industrial Development Projects*, 49 Fed. Reg. 29,938 (July 25, 1984). Specifically, Recommendation 1984-1 encouraged interagency coordination of permitting, the establishment of permitting deadlines, and timely processing of permit applications.

<sup>12</sup> See, e.g., H.R. 348, 114th Cong. (2015); H.R. 351, 114th Cong. (2015); H.R. 89, 114th Cong. (2015); S. 33, 114th Cong. (2015); H.R. 161, 114th Cong. (2015). These bills are cited merely as indications of Congressional interest in the permitting process, and the Conference has not reviewed and does not endorse any of their provisions.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

are many circumstances in which general permits may save agencies time or resources over specific permits without compromising the goals and standards of the regulatory program, and this recommendation provides guidance on when an agency might benefit most from using a general permitting system. This recommendation identifies a number of elements that should be considered in determining whether an agency should adopt a general permitting system, a specific permitting system, or an intermediate or hybrid system somewhere between the two.

### **RECOMMENDATION**

#### **Congressional Delegation of Permitting Power**

1. When Congress delegates permitting power to an agency, it should consider whether to specify which type(s) of permitting system(s) on the spectrum from general to specific permitting systems an agency may adopt.

2. If Congress decides to limit an agency's permitting power to a certain type of permit, it should consider the factors discussed in recommendations 3-4 when determining the preferred type of permitting system to mandate. If Congress decides to give agencies discretion on which system to adopt, Congress should consider requiring that agencies make specific findings about the factors discussed in recommendations 3-4 in order to ensure agencies use general or specific permitting authority appropriately.

#### **Agency Establishment of Permitting Systems**

3. When an agency designs a permitting system, the agency should be cognizant of the resources, both present and future, that are required to develop and operate the system. In particular, the agency should consider that a general permitting system may require significant resources during the design phase (especially if system design triggers additional procedural or environmental review requirements), but relatively fewer resources once the system is in place. A specific permitting system may require fewer resources upfront but significant resources in



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

its application. The agency should balance resource constraints with competing priorities and opportunity costs.

4. An agency should consider the following additional factors when deciding what type of permitting system, if any, to adopt.

(a) The following conditions weigh in favor of designing a permitting system toward the general end of the spectrum:

- i. The effects of the regulated activity are small in magnitude, both in individual instances and from the cumulative impact of the activity;
- ii. The variability of effects expected across instances of the regulated activity is low;
- iii. The agency is able to expend the upfront resources to design a general permitting system and can subsequently benefit from the reduced administration costs a general permitting system requires to enforce;
- iv. The agency wishes to encourage the regulated activity or desires to keep barriers to entry low;
- v. The agency does not need to collect detailed information about the regulated activity or regulated parties;
- vi. The agency does not need to tailor permits to context-specific instances of the activity;
- vii. The agency does not need to monitor the regulated activity closely and does not believe that the information that might be provided by specific permits is needed to facilitate enforcement; or
- viii. The agency does not need to exercise significant enforcement discretion to readily enforce the permitting system.

(b) The following conditions weigh in favor of designing a permitting system toward the specific end of the spectrum:



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- i. The effects of the regulated activity are large in magnitude, either in individual instances or from the cumulative impact of the activity;
  - ii. The variability of effects expected across instances of the regulated activity is high;
  - iii. The agency is unable to expend the upfront resources necessary to design a general permitting system or the agency can absorb the higher administration costs necessary to enforce a specific permitting system;
  - iv. The agency believes that specific controls on particular regulated activities are desirable to reduce, control, or mitigate the negative effects of the regulated activity, or is less concerned about relatively high barriers to entry;
  - v. The agency needs detailed information about the regulated activity or regulated parties;
  - vi. The agency needs to tailor permits to context-specific instances of the activity;
  - vii. The agency needs to monitor the regulated activity closely, and concludes the information provided in specific permits will facilitate enforcement; or
  - viii. The agency needs to have discretion in enforcing the permitting system against individual entities.
- (c) An agency should weigh all the factors and consider implementing a hybrid permitting system that has features of both general and specific permits if the factors described above do not weigh strongly in favor of either general or specific permits or cut against each other.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### **Agency Review of Existing Permitting Structures**

5. Subject to budgetary constraints and other priorities, agencies are encouraged to conduct periodic reviews of their existing permitting structures, consistent with the Administrative Conference's Recommendation 2014-5, *Retrospective Review of Agency Rules*.

6. In reviewing existing permitting structures, agencies should consider the factors in recommendations 3-4 and, where appropriate and consistent with statutory mandates, consider reforming existing permitting systems to align more closely with the goals the agency seeks to accomplish.

7. Subject to budgetary and legal constraints, including the Paperwork Reduction Act and other statutory restrictions on data collection and dissemination, agencies should consider incorporating data-collection into new and existing permitting systems to aid analysis and review.