



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## Federal Licensing and Permitting

### Committee on Regulation

#### Draft for Oct 2, 2015 Committee Meeting

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 that which would otherwise be statutorily prohibited.<sup>4</sup>

Broadly speaking, there are two contrasting approaches to permitting. In the first, upon receiving an application, an agency engages in extensive fact gathering and deliberation particular to the individual circumstances of the applicant’s proposed action, after which the agency issues a detailed permit tailored to the applicant’s situation. These are often referred to as “specific permits” or “individual permits.”<sup>5</sup> In the second approach, an agency issues a permit that defines a broad category of activity on its own initiative, and allows the entities engaging in that activity to take advantage of the permit with little or no effort. Agency review of specific

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<sup>1</sup> Eric Biben & J.B. Ruhl, *Designing Regulatory Permits*, ADMIN. CONF. OF THE U.S. REP. & CASE STUD. 2 (2015).

<sup>2</sup> 5 U.S.C. § 551(8).

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

<sup>4</sup> *Id.* at 4.

<sup>5</sup> *Id.* at 2.

facts in any particular case is generally limited unless the agency finds good cause to condition or withdraw the general approval. These are often referred to as “general permits.”<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. 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.<sup>7</sup> In general permitting, the agency usually promulgates a legislative rule outlining the conditions under which regulated entities 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. Regulated entities need only supply notice to the agency and, if the agency does not object, may move forward with the action without public input or judicial review.<sup>8</sup>

Permits exist on a spectrum. At one end of the spectrum, specific permits can demand so much of the permit applicant in terms of cost, information, and time, that they closely resemble prohibitions.<sup>9</sup> At the other end of the spectrum, a general permit can resemble an exemption in form and effect, with few requirements on the regulated entity and relatively little agency oversight.<sup>10</sup> Between these two extremes lie many possible intermediate forms of permitting that can exhibit traits of both general and specific permitting.<sup>11</sup>

While some statutes specify which type(s) of permitting system an agency may establish, others delegate broad permitting power to an agency with few restrictions, giving agencies considerable discretion regarding how to structure permitting systems.<sup>12</sup> Whether an agency

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 6-7.

<sup>9</sup> *Id.* at 5.

<sup>10</sup> *Id.* at 4-6.

<sup>11</sup> *Id.* at 8-9 (discussing possible hybrid permitting and providing an example).

<sup>12</sup> For instance, 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). On the other hand, 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. Both of these programs are described in case studies accompanying the report.

adopts a general or specific permitting system, or intermediate, can have significant impacts on the agency, the regulated entities, and third parties affected by the permitting action.

In recent years, there has been increasing impetus for reform of the federal permitting and licensing regime. In 2012, President Obama issued Executive Order 13604, which established a steering committee to “facilitate improvements in Federal permitting and review processes for infrastructure projects.”<sup>13</sup> The order also established an online permit-tracking tool, the Federal Infrastructure Projects Dashboard. The Steering Committee and Dashboard serve to enhance inter-agency coordination and provide permit tracking to improve agency timeliness.<sup>14</sup> Several permit reform bills have also been introduced in the 114<sup>th</sup> Congress that similarly aim to improve inter-agency coordination, establish deadlines for permit approval, and otherwise streamline the permit approval process.<sup>15</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 activity at issue, agencies face a number of common considerations when designing or reviewing a permitting system. This recommendation identifies a number of elements that should be considered in determining whether to adopt a general permitting system, a specific permitting system, or an intermediate system.

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<sup>13</sup> Performance of Federal Permitting and Review of Infrastructure Projects, 77 Fed. Reg. 18885, 18888 (Mar. 28, 2012) (to be codified at 3 C.F.R. pt. 100).

<sup>14</sup> *Id.* at 18887-8.

<sup>15</sup> See, 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). The reforms promoted by these bills, and EO 13604, are in accordance with the Administrative Conference’s Recommendation 1984-1, *Public Regulation of Siting of Industrial Development Projects*, 49 Fed. Reg. 29938 (July 25, 1984). Recommendation 1984-1 encouraged inter-agency coordination of permitting, the establishment of permitting deadlines, and timely processing of permit applications.

## **RECOMMENDATION**

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

1. When Congress delegates permitting power to an agency, it should decide whether it wants to specify which type(s) of permitting system(s) an agency may adopt. In so doing, Congress should remain aware of the distinction between general and specific permits, as well as possible intermediate forms.
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 3–6 as to the preferred type of permitting system to mandate. Congress may want to require the agency to make specific findings about the most important or relevant factors if it wishes to ensure agencies use general or specific permitting authority appropriately.

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

3. An agency should look to its statutory mandate from Congress to determine which type(s) of permitting system(s) it is able to adopt, and be careful to act only within this mandate.

4. If an agency has the freedom to choose which type of permitting system to adopt, it should consider both the risk of harm from a defined activity, and the variance from one instance of that activity to another.

- (a) If the risk of harm from a defined activity is low, both in individual instances and from the cumulative impact of the activity, and the variance expected across instances of the defined activity is low, then agencies should strongly consider adopting a general permitting system.
- (b) If the risk of harm from a defined activity is high, in individual instances or in cumulative impact, and the variance expected across instances of the defined activity is high, then agencies should strongly consider adopting a specific permitting system.

(c) If the risk of harm or the variance are intermediate, or if the two factors cut against one another, an agency should consider implementing an intermediate permitting system.

5. An agency should also be cognizant of available resources, both present and future, that will be required to develop and operate a permitting system. A general permitting system will require significant resources during the design phase, but relatively few resources once the system is in place. A specific permitting system will require fewer resources upfront, but will require significant resources in its application.

6. When an agency determines which type of permitting system to adopt, the agency should consider and weigh a number of additional factors. These factors include, but are not limited to:

(a) *Barriers to entry*: general permits impose lower barriers to entry than do specific permits.

(b) *Agency need for information*: general permits provide less opportunity for the agency to gather information than specific permits.

(c) *Tailoring*: general permits are more difficult to tailor to context-specific factors of the regulated activity.

(d) *Political obstacles*: general permits are more likely to respond to political concerns regarding the burden of regulations on regulated entities.

(e) *Enforcement and tracking*: general permits are more difficult to monitor for compliance, but they also require fewer agency resources to enforce.

(f) *Agency discretion*: after the initial rulemaking has taken place, general permits may not involve public participation or judicial review of uses of the permit by regulated actors.

- (g) In making decisions about permit structures, an agency should avoid reliance on any one factor, particularly politics.

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

7. Agencies should conduct periodic reviews of their existing permitting structures, consistent with the Administrative Conference's Recommendation 2014-5, *Retrospective Review of Agency Rules*. In reviewing existing permitting structures, agencies should consider the factors articulated in recommendations 3–6 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.