DESIGNING REGULATORY PERMITS

REPORT AND CASE STUDIES

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INTRODUCTION

Regulatory permits are ubiquitous in modern society. Thousands of local, state, and federal agencies have a hand in administering a vast system of permits ranging from mundane building permits to permits covering the operation of sprawling industrial facilities. Yet there has been little attention given in legal and policy commentary to regulatory permit design.

This report is a substantially condensed version of a comprehensive study of regulatory permitting we published in 2014.[1] We have retained and edited what we consider to be the practical dimensions of our study to concisely describe the core attributes, design options, and tradeoffs inherent in any permitting program. Our objective is to give legislatures and agencies a framework for thinking about how to approach permitting for defined classes of regulated actions.

Broadly speaking, there are two contrasting approaches to permitting. Some permitting programs are designed around the agency engaging in extensive fact gathering and deliberation particular to the individual circumstances of an applicant's proposed action, after which the agency issues a detailed permit tailored just to that applicant's situation. These are referred to herein as "specific permits" and are also known in agency practice as "individual permits." Other programs have the agency issue a permit on its own initiative, with no particular applicant before it, that defines a broad category of activity and allows the entities engaging in that activity to take advantage of the permit with little or no effort on their part and limited agency review of specific facts in any particular case unless the agency finds good cause to condition or withdraw the general approval. These are referred to herein, and widely throughout agency practice, as "general permits."

Across the hundreds of permitting programs in federal, state, and local regulatory authorities, we would expect to find a spectrum of approaches from extreme specific-permit design to extreme general-permit design. The question of interest is where on this spectrum a particular permitting program should fall given its policy goals, practical implementation context, and background concerns with agency exercise of permitting authority. This report takes on that question in two stages. Part I outlines the nuts and bolts of permitting as a matter of administrative law and describes the permitting program attributes that define the spectrum of general permits, specific permits, and intermediates, as well as hybrids. Part II examines the tradeoffs inherent in shifting the design of a permitting program along the spectrum between general permits and specific permits. The report closes with a summary of permitting design choices and a set of recommendations for agencies to use when designing a permitting program.

To demonstrate the utility of our permitting design framework, we have supplemented the report with four case studies of established and emerging federal agency permitting programs. The primary case study applies our framework to the general permitting program the U.S. Army Corps of Engineers has for several decades administered under Section 404 of the Clean Water Act. The second case study of an established permitting program covers the Federal Communications Commission's radio spectrum licensing program. Our case study of an emerging permitting program examines the Federal Aviation Administration's recent proposed rule for small unmanned aircraft systems. Finally, we provide a case study of permitting under the Migratory Bird Treaty Act, which the U.S. Fish and Wildlife Service recently announced it is considering overhauling and for which it has sought public input on several broadly described design options.

[1] *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).

I. THE PRACTICAL DIMENSIONS OF REGULATORY PERMITS

To reach an informed assessment of the nature, scope, and impact of the use of permits as a regulatory instrument, one should have a robust account of what distinguishes permits from other government regulatory instruments, such as fines, inspections, and taxes. In this Part we first describe the nature of permits as a matter of administrative law. The discussion then turns to defining the "spectrum" of permits and what differentiates general permits from specific permits. This Part closes with a deeper examination of design attributes essential to any permitting system and a discussion of the administrative law consequences of adjusting these attributes between their general and specific settings to achieve strongly general permitting, strongly specific permitting, and intermediates.

A. What Are Permits?

Exactly what constitutes a regulatory permit in the administrative state is not self-evident. For example, the Administrative Procedure Act (APA)[2] refers to permits only once—including the term "permit" in the definition of a "license."[3] A license is just one form of "agency action," which is defined as "the whole or a part of any agency rule, order, license, sanction, [or] relief."[4] But what is a *permit*? All that can be extracted from the APA on that score is from the definition of license, which, in addition to agency permits, includes "the whole or part of an agency . . . certificate, approval, registration, charter, membership, statutory exemption *or other form of permission*."[5]

The APA's structure of agency actions, although convoluted, thus provides several core concepts for further articulation of regulatory permits consistent with this catch-all "form of permission" concept. First, permits are a type of statutorily authorized discretionary agency action. Which type of agency action they are is not entirely clear from the APA—it seems that permits can take several forms. But there is no room for doubt that, however issued, permits are administrative actions rather than actions of legislatures or courts, and that there is some degree of discretion involved in how the agency acts. Second, permits are a "form of permission."[6] The APA does not specify how permits differ from the other forms of permission included in the definition of license. It is clear, however, that a permit must involve some process and standards for an agency

[2] Administrative Procedure Act, 5 U.S.C. §§ 551–559 (2012). Our focus is on federal agency permitting and administrative law; however, most of the analysis herein is directly applicable to state administrative law and practice.

[3] 5 U.S.C. § 551(8).

[4] *Id.* § 551(13). One might reasonably conclude that because permits are included only under the definition of licenses, they are thus not a part of or the result of a rule, order, sanction, or relief. But this conclusion turns out not to be accurate, as the term "order" is defined in the APA to include the act of licensing, *id.* § 551(6); the term "sanction" includes the "requirement, revocation, or suspension of a license, *id.* § 551(10)(F); the term "relief" includes the "grant of…[a] license," *id.* § 551(11)(A); and the term "rule" includes certain kinds of "approval." *Id.* § 551(4). Agencies issue orders through "adjudication," *id.* § 551(7), and issue rules through "rule making." *Id.* § 551(5). Hence, given that permits are one form of licenses, in theory an agency could engage in adjudication to issue an order to grant a permit, issue a sanction to revoke or suspend a permit, or grant relief to issue a permit; or an agency could engage in a rule making to issue a rule establishing an approval of a permit. All of these actions could be described as acts of permitting.

[5] *Id.* § 551(8).

[6] *Id.*

to grant (or deny) permission to a regulated entity to engage in what would otherwise be a statutorily restricted activity. Third, permits must fit into a broader range of agency and legislative regulatory measures spanning from unconditional exemption from regulation, in which case no permission is needed, to unconditional prohibition of approval, in which case no permission can be obtained. Finally, permits, as a form of administrative rule making or adjudication under the APA, are subject to the APA's rules of judicial review.[7]

These four features allow us to situate permits in a broader spectrum of form of permission models represented in the following table comparing five combinations of: the baseline rules regarding whether permission is needed and available, the institutional modes for implementing the baseline rules, the forms the permission (or nonpermission) can take, and the availability of judicial review.

Table 1: Permits as a Form of Permission

Rule	No Permission Needed		Permission Required	No Permission Allowed	
Mode	Legislative	Administrative			Legislative
Form	Statutory Exemption	Regulatory Exemption	**PERMITS**	Regulatory Prohibition	Statutory Prohibition
Review	Non-APA	APA	APA	APA	Non-APA

The entire category of form of permission regulatory instruments fits within a larger universe of regulatory options including fines, taxes, standards, subsidies, inspections, monitoring, reporting, and a host of others. Many times a combination of instruments, including or not including one of the forms of permission, is deployed. Hence there is something to be learned about permits by comparing them to, say, taxes. But an appropriate starting point for learning about permits comes from first comparing them to their closest cousins, exemptions and prohibitions, and then comparing the variations that fit within the permits sub-category itself.

Taking the form of permissions comparison first, at one end of the spectrum shown in Table 1 is the statutory exemption: a legislatively-specified activity that is excluded from the need to obtain permission from the agency under the statutory regime. A statutory exemption could be explicit or implied, and its scope could be subject to agency and judicial interpretation. Once defined, a statutory exemption serves as the form of permission and thus removes the specified activity from the need to take any additional steps to establish compliance with the law. A regulatory exemption accomplishes the same outcome, but it is specified by the agency pursuant to a legislative delegation of authority. At the other end of the spectrum lie prohibitions: the statutory prohibition is a legislatively-specified activity not eligible for permission, and a regulatory prohibition is an activity the agency has, pursuant to legislatively-delegated authority, excluded from eligibility for permission. This leaves permits occupying the middle ground, where a statute authorizes an agency to grant permission to a proposed activity—an activity that would otherwise be prohibited—and some degree of discretion over the process and standards used to grant that form of permission.

Distilled to its essence, therefore, a permit can be defined as: an administrative agency's statutorily authorized, discretionary, judicially reviewable, granting of permission to do that which would otherwise be statutorily prohibited. The definition demands that the act of permitting (1) be

[7] *Id.* §§ 701–706 (2012).

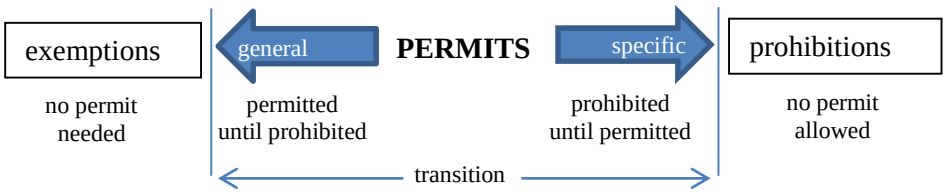
explicitly delegated or implied by statute, (2) administrative, (3) discretionary, and (4) judicially reviewable, and that (5) it provide an affirmative grant of permission (6) allowing an act that would be otherwise statutorily prohibited. Regardless of what a form of permission is called—permit, license, certificate, exemption, or something similar—all six elements must be satisfied for it to be a permit, and if all six elements are satisfied, it is a permit.

B. Types of Permits–From General to Specific

In our typology of forms of permission, permits are situated between regulatory exemptions and regulatory prohibitions. As such, the universe of possible configurations of permits defines a continuum that stretches between those two opposing models. At the extreme boundaries of permitting, permits do not look much different from either exemptions on one end or prohibitions on the other. The permit power's differences from exemptions and prohibitions at its edges, however, are significant nonetheless.

The differences between exemptions and general permits at the one end of the permit spectrum, and between prohibitions and specific permits at the other end, are by no means inconsequential. Ironically, however, they are dwarfed by the differences between general permits and specific permits. General permits at the far end of the spectrum look like exemptions, and special permits at the other end look like prohibitions. Thus, the distance between general permits and specific permits is almost the same as the distance between exemptions and prohibitions. In other words, just as exemptions and prohibitions are diametric opposites, so too are general permits and specific permits. Yet both are permits that represent agency exercise of the permit power.

Figure 1. The Spectrum of Permits



C. Design Options

There are three levels of analysis across which to compare general and specific permits as alternative design options. The first level focuses on the permitting *system*, which consists of the regulatory apparatus and process the agency constructs in order to issue the permit. The second level of analysis focuses on permit *administration*, which pertains to how a particular project, subject to the regulatory prohibition, avails itself of the permitting system to obtain permit approval. At a macro scale, from the agency's perspective the fundamental distinction between general permitting and specific permitting is that general permits are issued at the permitting-system stage, whereas specific permits are issued at the permit-administration stage. That is, most of an agency's work in general permitting is in establishing the permitting system, whereas in specific permitting, most of the agency's work is in permit administration.

The third level of analysis concerns how the agency manages the *transition* between general

and specific permitting as it searches for the appropriate balance among the general and specific permitting characteristics. There are two modes of transition—a "continuum mode," in which the agency can more or less move incrementally between the two extremes as it chooses, and a "discontinuity mode," in which moving between the extremes at some point triggers sharp thresholds regarding the features of one or more of the characteristics of the permitting system or permit administration.

Table 2 shows how these three levels of analysis fit together, detailing each of the key features of permitting systems and permit administration, describing how they vary between the extremes, and showing the transition mode for each. As explained above, at the extreme, a general permit is kept distinct from an exemption by its regulatory orientation and the discretion an agency retains under the terms of the permit to build more into the process for issuing a permit on a case-specific basis. For the first distinction, a general permit, even if minimally burdensome, communicates that the action is subject to the agency's active regulatory supervision, whereas the point of a legislative or regulatory exemption is to convey the opposite. For the second distinction, in the case of permits, but not exemptions, the agency might include in the permit's terms demands for information, closer scrutiny of the proposed project, and performance conditions, among other things. Exemptions thus are better thought of as safe harbors—the agency cannot identify a specific project or action that meets an exemption and pull it back into the regulatory program on a case-specific basis—whereas general permits can expand in regulatory scope.

Because general permits have the flexibility of being more or less general, an agency can adjust many parameters along a continuum to move away from the quasi-exemption effect of general permits at the extreme. In doing so, however, the agency runs the risk that as more parameters move in the direction of specific permitting attributes, at some point there will be sufficiently particularized agency action such that some features of the permitting system and permit administration must flip into what are distinctly specific-permitting procedures.

1. Permitting Systems

We propose five essential characteristics of permitting systems across which general and specific permitting differ. The first characteristic is the determination of which party initiates the permitting-approval process—agency or applicant. In general permitting at its extreme, the agency issues a general permit available for all qualifying projects, whereas in specific permitting, applicants must approach the agency to request a permit.

A second factor is the substantive assessment burden the agency assumes when establishing the system. In general-permitting systems, to issue a general permit, the agency usually must make substantive findings about the merits of a general permit it intends to issue, such as whether the permitted activities are likely to cause significant harm to protected interests. Setting up a specific-permitting system, by contrast, involves no agency substantive findings at the extreme—those are all saved for later during permit administration.

On the other hand, the reverse is true for the third factor—regulatory infrastructure. Once a general-permitting system is established, it requires relatively little procedural and substantive infrastructure to move to the permit-administration phase. Once the general permit is issued, minimal additional agency involvement is required for permit administration. Again, the opposite is true of specific permitting—which backloads the substantive work to the permit-administration phase, and thus mostly involves erecting an extensive regulatory infrastructure to support permit administration.

The fourth differing characteristic involves promulgation requirements of the two permit types. Given all that is bundled into a general permit, the general-permitting system must incorporate extensive promulgation requirements, such as environmental and other impact-assessment steps, public notice and comment, and judicial review. Because specific-permitting systems are principally focused on setting up procedures and standards for later permit administration, they impose far less of this promulgation burden.

The fifth characteristic is the administrative action by which the permits are issued. Because general permitting packages much of the agency's work at the permitting-system stage, the prototypical general-permitting system relies on agency rulemaking. In other words, general permitting involves establishing a rulemaking system for issuing permits in the form of general promulgations. Specific-permitting systems, because they defer the heavy lifting of permit issuance to the permit-administration stage, use particularized agency orders as the permit-delivery mechanism. The point of the specific-permitting system, therefore, is to set up the procedures and standards for running permit administration to issue permits.

2. Permit Administration

Once one grasps the differences between general and specific permitting *systems*, the manner in which general permit and specific permit *administrations* differ is fairly straightforward. Ideally, administration of a general permit in its purest form should (1) not require submissions from the regulated entity seeking the permit authorization; (2) not require further substantive assessment by the agency; (3) not involve further negotiation between a regulated entity and the agency; (4) not involve further exercise of discretion by the agency; (5) not involve further public participation; (6) not require an agency order; and (7) not be subject to further judicial review. In essence, the permit has already been issued as part of the permitting system, with assessment, negotiation, discretion, public participation, and judicial review applied at the macro level, so all that is left is for the regulated entity to use the permit at the micro level. Administration of specific permits, by contrast, is the opposite: the regulated entity submits a voluminous set of application materials, the agency engages in a rigorous assessment, the parties negotiate toward mutually acceptable terms, the agency makes discretionary decisions about what is acceptable under the statutory regime, the agency seeks public input at various stages, the agency issues an order setting out its final decision, and the order may be the subject of judicial review. In essence, all that the specific permitting system accomplishes is setting the administration process in motion with governing procedures and standards, so that all the work is in the permit-administration stage.[8]

[8] Permit administration might also vary with respect to the need for periodic renewal or revision of the permits. Permit issuance might be a one-time decision by the agency, permanently authorizing the relevant activity. Alternatively, a permit might only be for a limited period of time, requiring renewal by the permit holder and possible revisions by the agency. The nature of the regulated activity might also, in practice, determine whether a permit is perpetual or temporary. For instance, wetland permits under Section 404 authorize the disposal of dredge or fill material in wetland areas. Once the disposal has occurred, the area may no longer be considered a wetland and no further Section 404 regulation applies. The permit is therefore only needed once by the regulated party. On the other hand, emissions of wastes into waters from a point source are often an ongoing activity. So long as the emitter wishes to continue the regulated activity, it needs a permit on an ongoing basis, and renewals or revisions may be required. The distinction between one-time and ongoing permits might make a difference in whether parties face barriers to enter into a regulated activity and how significant those barriers are. *See infra* Part II.A.

3. Intermediates and Transitions

A pure general permitting program frontloads all substantive decisions to the permitting system stage, whereas a pure specific permitting system backloads them to the permit administration stage. Flexibility exists, however, for agencies to move across the permits spectrum by increasing information and other parameters required for a general permit, but not so far as to impose the rigors of a specific permit. For example, as detailed in our Clean Water Act case study (Appendix A), the Corps has built intermediate mechanisms into its permitting program for Section 404. Under that program, the Corps requires parties seeking to use certain general permits to provide pre-construction notice of their activities and wait a certain amount of time for an agency response before proceeding. This allows the agency to collect substantial information and make case-by-case decisions about whether certain activities are better covered by individual permits. The practical effect of doing so is to shift more of the general-permitting process from the permitting-system phase to the permit-administration phase, creating something of a hybrid between pure-general and pure-specific permitting.

This raises the question of transition. For example, if the amount of information required, the intensity of agency review, and the opportunity for negotiation between the parties can be tweaked incrementally in either direction, one can easily see how a general permit could begin to blur into a specific-permitting system. To put it another way, a general permit relying on extensive and burdensome requirements at some point simply would not be a general permit, given its onerous case-specific requirements. As a practical matter, users of the general permit would not know their status until after an extensive submittal process and intensive agency review process, possibly with extensive negotiation between the parties over conditions. The agency would likely want to establish more extensive procedural and substantive regulations for review and require reviewing officers to issue decisions with extensive findings and justifications. There are tradeoffs, in other words, as the agency moves across the permit-design spectrum.[9]

Moreover, as a matter of law, at some points such a process might cross a threshold from general to specific permitting for other permitting features not amenable to a smooth continuum, such as the availability of judicial review and public participation. For example, courts might perceive the agency action as an agency *order* under the APA, and thus require the process to undergo adjudicatory processes not required of rulemakings. Precisely where that discontinuity would occur is difficult to say,[10] but its possibility does impose some drag on the ease with which an agency can craft intermediate solutions between pure general-permitting systems and pure specific-permitting systems. Table 2 below summarizes our permitting system and administration characteristics and their transition regimes.

[9] We discuss this effect in more detail in the Section 404 case study with respect to Nationwide Permit 21.

[10] *See* Jennifer Seidenberg, Texas Independent Producers & Royalty Owners Ass'n v. Environmental Protection Agency: *Redefining the Role of Public Participation in the Clean Water Act*, 33 ECOLOGY L.Q. 699, 718 (2006) (discussing a split among the courts as to when public notice and comment is required for project-specific use of a CWA pollution general permit the EPA issued for certain oil- and gas-operation activities).

Table 2: Permitting Systems, Permit Administration, and Transitions

General Permits	Transition	Specific Permits
Permitting System		
Agency initiates permit	discontinuities	Applicant requests permit
High agency assessment burden	continuum	No agency assessment burden
Low regulatory infrastructure	continuum	High regulatory infrastructure
High promulgation requirements	discontinuities	Low promulgation requirements
Permit by regulation	discontinuities	Permit by order
Permit Administration		
No factual-submission burden	continuum	High factual-submission burden
No agency-assessment burden	continuum	High agency-assessment burden
No negotiation of terms	continuum	High negotiation of terms
Low agency discretion	continuum	High agency discretion
No public participation	continuum	High public participation
No agency order	discontinuities	Requires agency order
No judicial review	discontinuities	Judicial review available

D. Hybrids and other Variations

Some agencies have experimented with innovative ways of configuring permits that do not neatly fit onto the permit spectrum described above. Perhaps the best example of how important innovative permitting design can be to the success of a regulatory program is the Endangered Species Act (ESA) permitting program administered by the U.S. Fish & Wildlife Service (FWS).[11] Through the use of regional permits, beginning in the 1990s large metropolitan areas and states began to solve their ESA compliance problems through large-scale permits, some of which covered up to hundreds of thousands of acres.[12] The nature of these regional permits is often hybrid-like, in that the FWS uses the specific permitting model to issue a permit to the state or local entity, but the terms of the specific permit include provisions establishing a general-permitting regime authorizing the state or local government to administer a general permit under which public and private entities can receive permission to engage in otherwise prohibited land uses in some cases simply by filing a form and paying a fee.[13] The FWS has continued to develop innovative hybrids of general and specific permitting, including a permit that would authorize a variety of activities along Florida's beaches,[14] a permit to facilitate utility-scale wind-power

[11] Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012).

[12] *See* Robert D. Thornton, *Searching for Consensus and Predictability: Habitat Conservation Planning under the Endangered Species Act of 1973,* 21 ENVTL. L. 605 (1991).

[13] J. B. Ruhl, *Regional Habitat Conservation Planning under the Endangered Species Act: Pushing the Legal and Practical Limits of Species Protection,* 44 SW. L. J. 1393 (1991).

[14] *See Florida Beaches Habitat Conservation Plan*, FLA. DEP'T ENVTL. PROT., http://www.flbeacheshcp.com (last visited Sept. 24, 2014).

generation across large regions of the nation,[15] and guidance on the design of large-scale hybrid "master permits."[16]

Examples like the FWS's permit innovations demonstrate that there is considerable space for moving between the extremes of general and specific permits and inventing new combinations of permit attributes.[17] The question thus becomes how to navigate this space in a way that most effectively achieves the goals of the relevant statute and other public policy objectives.

II. PERMIT-DESIGN TRADEOFFS: GENERAL VERSUS SPECIFIC

Why would a regulatory program use general or specific permits, or grant a complete exemption from permit requirements? At heart, these questions come down to two factors: the risk of harm the permitted activity poses, and the level of burden the transaction costs of a general- or specific-permit program imposes on the regulated parties and the agency. Higher risk of harm generally justifies more specific-permit requirements. Conversely, more burdensome transaction costs generally support more general permit requirements. General permits are perhaps most useful when they allow for reduced burdens on regulated parties or for reduced political resistance for a regulatory program, without changing the underlying substantive regulatory standards, and when the harm posed by the actions covered by the general permit is minimal.

We examine these two factors through the following specific permit design policy goals and attributes: permits as barriers to entry into economic or other activity; permits as tools to gather information for the regulatory agency; permits as tools to tailor regulation to the specific circumstances of the permitted activity; permits as enforcement tools; and the political constraints on permitting and regulatory systems.

A. Permits as Barriers to Entry

Permits are generally pre-conditions to undertaking a regulated activity. As such, they effectively act as barriers to entry for that activity. These barriers to entry can be significant. Permitting can impose substantial costs in the form of paperwork, information gathering, legal fees, and administrative charges.

Permitting costs often provide a substantial advantage to incumbents in an economic field. There will often be substantial fixed costs and investments in a permitting system. For instance, there will be a learning curve as an organization determines what aspects of its operations require permitting, as it confronts how it needs to adjust its existing or planned operations to comply with the relevant regulatory standards, and as it collects information to complete the permit applications and fills out and submits the permits.[18] Once the first permit has been obtained, it is likely to be

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[15] *See* Draft Environmental Impact Statement and Habitat Conservation Plan for Commercial Wind Energy Developments Within Nine States, 76 Fed. Reg. 41,510, 42,512 (July 14, 2011).

[16] *See* U.S. FISH & WILDLIFE SERV., GUIDANCE FOR INCIDENTAL TAKE PERMITS COVERING MULTIPLE PROJECTS OR PROJECT OWNERS (Apr. 30, 2013) (on file with authors).

[17] *See also* David Markell, *States as Innovators: It's Time for a New Look to Our "Laboratories of Democracy" in the Effort to Improve Our Approach to Environmental Regulation*, 58 ALB. L. REV. 347, 376–80, 393–401 (1994) (discussing efforts by state agencies to improve permitting through design innovations).

[18] *See* Thomas J. Dean & Robert L. Brown, *Environmental Regulation as a Barrier to the Formation of Small Manufacturing Establishments: A Longitudinal Examination*, 40 J. ENVTL. ECON. & MGMT. 56, 71 (2000) (finding that firms in industrial areas with higher regulatory burdens on average had larger size, and noting importance of "firm learning, past experience in solving environmental problems" in determining costs of regulatory compliance).

much simpler and easier to renew a permit because most of the information has already been collected and developed, and the organization has learned how to manage the permitting process. At the extreme, if a permit is only required to enter into an economic activity, but then has an indefinite duration, existing participants will never need to apply for a new permit, and the permitting system will operate as a significant barrier to entry.

Not all regulated parties will be equally able to bear permitting costs. The more that permitting costs are fixed, the more they are a burden on small actors. This is often the case, for the reasons indicated above: the costs of determining what permits are required and how most effectively to secure them will often have a high fixed component, and the difficulty of filling out forms and compiling the relevant information will also often have a high fixed component. These fixed costs may impose a significant economic burden on small firms.[19] To the extent that we are concerned about deterring or reducing economic activity by small businesses, this is a significant concern.

General permits are a way of reducing the fixed costs of permitting by making those costs less significant without necessarily relaxing the underlying substantive regulatory standards.[20] They can do that directly by reducing information requirements (for example, by making permit applications simpler and shorter). They can also do that indirectly by eliminating the need for agency approval before the regulated activity commences (for instance, in the context of notices of intent).[21] General permits can even eliminate any need for a permit application—such as when the regulated party may proceed without any application or notice to the regulatory agency so long as its activities do not exceed certain thresholds.[22] Reducing barriers to entry was cited by both the FCC and the Army Corps as the basis for using general permits in our case studies.

B. Permits as a Tool for Revealing or Developing Information

Essential to the concept of specific permits is the detailed level of applicant-specific information required for the completion of the permit application. This allows for the tailoring of the permit to the circumstances of the particular applicant—either in determining whether the permit should be issued, or in determining the scope and parameters of the permit itself. Specific permits allow the agency to obtain information about the activities being permitted, the parties seeking permits, and the harms and benefits that the permitted activities might be producing. The regulator might be able to cumulate the information collected from the full universe of permit applications to get a sense of the overall shape of the regulatory program, and of the activities the program regulates. Aggregation of data in this way can allow for an understanding of how widespread particular impacts from permitted programs are (for example, how many wetlands have been developed in a geographic area over the past ten years) and where those impacts are located (for example, a map of where the development of wetlands has occurred and whether

[19] *See* Dean & Brown, *supra* note 18, at 56 (finding that firms in industrial areas with higher regulatory burdens on average had larger size).

[20] *Id.* at 72 ("Efforts to streamline environmental requirements at the federal, state and local level would . . . reduce unit cost disparities created by administrative economies of scale that appear to be inherent in environmental regulation.").

[21] In a notice-of-intent system, such as the PCN system described in our case study for Section 404 general permits, a general-permit applicant need only provide notice to the agency of the proposed activity, and can proceed with the activity unless the agency moves to halt it.

[22] As we discussed earlier, this last situation is for practical purposes more or less the same as a complete exemption from regulation.

certain watersheds are particularly impacted by the development). Aggregation can give a sense of the net costs and benefits of an overall regulatory program. Data aggregation can also allow regulators to get a sense of which parties are seeking permits and which parties are being granted or denied permits. This might allow for an understanding of the distributional impacts of a regulatory program on regulated parties (for example, are small permit applicants disproportionately having their permits denied). As noted above, distributional impacts may be a significant issue for a regulatory program.

General permits, on the other hand, by definition require less information from the applicant than specific permits. On average then, general permits will provide less information to the agency than a specific permit. However, general permits can allow agencies to focus their energies, and the energies of permit applicants, on the information that is most useful to the regulatory program, rather than waste energy on collecting information that is unnecessary or redundant. For instance, generic drugs have a streamlined permitting process; unlike new drugs, which must provide clinical data on the drug's safety and efficacy, generic drug applications must only demonstrate that the generic is "bioequivalent (i.e., performs in the same manner as the innovator drug)."[23] Because the original name-brand drug has already shown its safety and efficacy, requiring that information would be redundant and would impose needless obstacles on the provision of cheaper generic drugs. Alternatively, information may already have been collected and assessed under a different regulatory permit program, on which a general-permit program could piggyback.[24]

Another reason we may not need as much information is if the harm from the regulated activity is relatively fungible – i.e., its location in time and space is not particularly important. In that case, we do not need information about the location or timing of the proposed action, which reduces the need for individual permits.

C. Permits as Tools to Tailor Regulation to Specific Circumstances

By definition, more specific permits allow for more tailoring of the permit to the specific circumstances of the applicant, the particular activity being approved, or the particular location of the regulated activity.[25] Tailoring might involve: specific findings about the applicant or the activity before an approval is granted; constraints on the activity as conditions of the granted permit; or requirements for mitigation of the harms caused by the activity, among others.

The question thus becomes at what point does the ability to tailor a specific permit make a specific permit more useful than a general permit. Tailoring through specific permits necessarily imposes costs—informational costs, administrative costs, transaction costs, and potentially even litigation costs—and, therefore, tailoring will only be worthwhile if the costs of tailoring are outweighed by the benefits of tailoring.[26]

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[23] *See* 21 C.F.R. § 314.94(a)(7) (2013) (requiring a showing of bioequivalence in abbreviated new drug applications (ANDAs)); 21 C.F.R. § 320 (bioavailability and bioequivalence requirements).

[24] Many of the Section 404 general permits are justified by the Corps as avoiding duplication with other regulatory programs that have already assessed the environmental harms of a regulated action. *See, e.g.*, U.S. ARMY CORPS OF ENG'RS, Decision Document: Nationwide Permit 8, at 2 (2012), *available at* http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP_08_2012.pdf (oil and gas structures on the Outer Continental Shelf, justified on the basis that the Bureau of Ocean Energy Management already regulates environmental impacts).

[25] This is one of the more important benefits of adjudication in general. *See, e.g.*, NLRB v. Wyman-Gordon Co., 394 U.S. 759, 774–75 (1969) (Black, J., concurring); SEC v. Chenery (Chenery II), 332 U.S. 194, 202–03 (1947);

[26] *See* C. Steven Bradford, *The Cost of Regulatory Exemptions*, 72 U. MO. KANSAS CITY L. REV. 857 (2004)

The benefits of tailoring stem from being able to reduce harms and increase benefits by carefully deciding whether an activity should proceed and, if so, under what terms. This means that the risks of harms must be high and can be decreased through tailoring, or the potential of benefits from a proposed activity must be high, and those benefits can be increased through tailoring. In those circumstances, decreasing risks or increasing benefits through careful permit design can be socially worthwhile. On the other hand, if activities will individually have relatively small risks of harm or potential for benefits, the impacts on those risks or benefits through careful tailoring will be relatively small. Thus, general permits make a lot more sense when either the risks of harm or the potential benefit from an activity are relatively small; or the risks of harm or the potential benefit are invariant no matter what tailoring is undertaken. In both situations, tailoring will generally not be beneficial.[27]

The FCC license-by-rule system is an example where the risks of interference from many of the regulated transmissions were relatively small, and could be managed through uniform technology or operating rules. Many of the transmissions in that system – such as citizens band radios or wireless transmissions for medical devices—involve low-power devices that are unlikely to cause the kinds of widescale interference that (for instance) a television broadcast can cause. Instead, any interference or conflict is managed by rules about how transmitters should operate (e.g., rules about how citizens band operators transmit) or requirements that the transmission technology be constructed and used in ways that minimize interference. Thus, case-by-case permitting was unnecessary.

D. Permits as Political Tools

The way in which a permitting system is structured might help to address political constraints or reduce resistance to a regulatory scheme.[28] General permits might provoke less political resistance from regulated parties because they are less burdensome in terms of paperwork and transaction costs. Indeed, some permits that do not even require notice to the agency might impose essentially no costs on the regulated party—and from that party's perspective, the permits might equal a full-blown exemption from regulation. Avoiding regulatory burdens might be important even if the use of the permits is not limited to situations in which reduced regulatory burdens are economically justified, such as for small parties or when tailoring is not appropriate. To the extent that particular interest groups have substantial political power or influence, reducing regulatory burdens on those groups might make the regulatory system politically possible.

An important source of political resistance due to regulatory burdens is the regulation of widespread, common activities pursued by many individual members of the public. The fixed costs of permitting might simply be politically impossible to impose on frequently pursued activities,

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(noting that one cost of varying regulatory levels among different parties will be creating costs for regulated parties, agencies, and third parties to determine what level of regulation properly applies to a particular regulated party).

[27] Rulemaking is generally identified as more efficient relative to adjudication when the issues that are in common for most regulatory decisions dominate over the issues that vary across decisions. *See* E. Donald Elliott, *Re-inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992) (rulemaking better for addressing issues that will be raised repeatedly and are similar).

[28] *See* Peter H. Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process*, 1984 DUKE L.J. 163, 284-85 (1984) (noting the importance of exemptions from rules that can mollify powerful political interests).

especially if there is a general expectation that the activity should be allowed.[29] General permits can allow for regulation with an especially light touch, even allowing ex post approval of projects under the permitting system and avoiding potential backlash against the regulatory system. This is how Section 404 permits have been used on occasion, allowing developers who might not have even been aware that their activities were covered by the regulatory program to receive after-the-fact permits.[30] In so doing, the regulators may avoid a major political fight over applying a regulatory program to "everyday activities"—albeit at a potentially high cost to the deterrent effect of the regulatory program.

There is a flip-side to using general permits to address political resistance to regulation. Political resistance might result in the use of general permits to effectively reduce the substantive standards of the overall regulatory program. Arguably, this has been the outcome with the use of the Section 404 general permit program for surface coal mining activities. These activities in general would not appear suitable for general permits, given the nature of the harms they cause, the specific nature of regulatory review of the projects, and the size of the entities that conduct mining projects. The primary reason for using general permits in this context may well have been because of political pressure, which raises a warning that the ultimate outcome has been the use of political pressure to reduce a substantive regulatory standard in an indirect way.[31]

E. Permits as Enforcement Tools

Permits are, of course, an important component of the enforcement of regulatory standards. Permits can allow a regulatory agency to know who might be violating the law, what standards regulated parties need to be complying with, and where regulated activities are supposed to be occurring. The value of increased enforcement would be determined, at least in part, by the level of harms or benefits that the regulatory program is trying to prevent or provide; higher harms or benefits mean more payoff from enforcement. Compared to a complete exemption, general permits on average should make agency enforcement easier—though general permits may not facilitate enforcement as much as an individualized specific permit. One of the criticisms of the broad use of general permits in the Section 404 program, for example, has been that the use of general permits has made it too difficult for the agency to identify and prosecute violations of the law, and that more detailed specific-permitting requirements would allow the agency to keep better tabs on who is engaging in regulated activities and whether those parties are complying with the law.[32]

There is another enforcement alternative for an agency with a broad regulatory mandate besides general or specific permits—it can choose not to issue any permits (or it may not be empowered to issue permits) that authorize certain activities, and instead it may use its discretion to not prosecute violations of an otherwise applicable regulatory mandate. In some circumstances, large numbers of people might be violating the law, but the agency prosecutes only a tiny fraction of violators. These kinds of overbroad statutes might allow for relatively simple prosecution of otherwise hard-to-detect regulatory violations, as regulatory agencies can use the frequent but small violations as proxies for more serious, but more difficult-to-prove, violations.

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[29] *See* Eric Biber, *Climate Change and Backlash*, 17 N.Y.U. ENVTL. L.J. 1295, 1317–28 (2009).

[30] *See* Thomas Addison and Timothy Burns, *The Army Corps of Engineers and Nationwide Permit 26: Wetlands Protection or Swamp Reclamation?* 18 ECOLOGY L.Q. 619, 621, 647–49 (1991).

[31] We note that recent changes to the relevant general permit appear to reduce these concerns substantially, at least for future projects.

[32] *See id*. at 645–46.

As discussed in our Migratory Bird Treaty Act case study, the problem is that this sweeping use of prosecutorial discretion creates tremendous uncertainty for regulated parties. Especially if the regulated activity requires significant investment, that uncertainty might be undesirable. A general permit might balance the need for having broad underlying statutory authority to allow for enforcement with the need to provide some assurance to regulated parties.

F. Permits as Constraints on Administrative Discretion

Specific permits are also more likely to have significant public-participation requirements and to face more in-depth judicial review than are general permits. Public-participation requirements tend to be greater for specific permits in part because many general permits do not have a structure that allows for notice to the public and an opportunity to be heard: if a general permit does not require notice to the agency, members of the public will not receive notice either. Agencies might apply the statutory mandates for public participation in permitting only during the stage at which they create the general permit, not when applying the permit to individual actors. And, even if there is a theoretical system by which members of the public might be involved in the permit's actual application, there is little reason to expect it will actually occur. For instance, Clean Water Act NPDES general permits allow for any "interested person" to request that the agency issue an individualized permit for a particular project.[33] However, unless members of the public are regularly sifting through the notices of intent that are submitted to the EPA or to state agencies, there is no way that they would be aware of whether a project is even occurring, let alone whether there are any permit applications pending. Of course, the relative lack of public participation does reduce the burdens on regulated parties, which might be desirable for economic or political reasons.

Although general permits might reduce the ability of nonregulated parties to control or constrain agency discretion, they also may have the effect of constraining or reducing agency discretion with respect to regulated parties. General permits are, in effect, an open invitation by the agency for regulated parties to undertake their activities without legal liability. Of course, agencies can revise or revoke general permits, either in general or in specific applications.[34] Complete revocation of a general permit may require various administrative procedures, such as compliance with notice-and-comment-rulemaking requirements.[35] If the agency singles out individual regulated parties for revision or revocation of their general permits, it can avoid or reduce the political problem. At the extreme, a general permit without any reporting or notice requirements leaves the agency with no information about who is engaging in the regulated activity, and therefore who can be singled out for enforcement.

G. Permits as Easing Administrative Burdens for Agencies and Regulated Parties

[33] 40 C.F.R. § 122.28(b)(3)(i).

[34] *See, e.g.*, 33 U.S.C. § 1344(e)(2) (stating that general permits under the Section 404 program must be revocable by the agency). For instance, there are general permits that require certification by the agency that the proposed activity would comply with the terms of the general permit. The agency can refuse to grant certification. And there are general permits that require notice to the agency of the regulated activity, in which the agency retains the right to step in and require a specific-permit application.

[35] *See, e.g.*, 33 U.S.C. § 1344(e)(2) (stating that a general permit revocation requires a public hearing). If the general permit has a sunset provision, such as the five-year limit for CWA permits, then no procedures need be followed by the agency to let the permit expire.

One of the reasons agencies most commonly cite when they develop general-permit programs is that once a general permit is issued—which is not necessarily a small feat in the administrative state—it serves to reduce administrative burdens on the agencies themselves, for all regulated parties, or for both.

These cost savings may be particularly important in three circumstances. First, where the regulated activity is undertaken by a large number of entities, reducing compliance burdens will have a major impact on both the agency and the public, as demonstrated by the case study of FCC's license-by-rule system, and by a number of the Section 404 general permits that applied to very widespread activities.

Second, where the impacts of the regulated activity are relatively fungible and invariant (i.e., where tailoring is not very important), then the analysis of those impacts can be done at a general level and spread across the entire program, rather than being repeated for each permit application. This can create significant economies of scale in terms of a permitting system. Again, this was evident in the case study of the FCC's license-by-rule and for Section 404 general permits that covered activities with minimal adverse impacts.

Finally, where there is an overlap between multiple regulatory systems, it may make sense for one regulatory system to "piggy-back" on the other by using a general permit system – for instance, if most or all of the harmful impacts of the regulated activity can be managed through permits issued under one regulatory system, the other regulatory system can take a very general approach, authorizing all activities that have already been permitted. A number of examples of this situation existed in the Section 404 general permit program.

CONCLUSION & RECOMMENDATIONS

As Table 3 summarizes below, general and specific permits each have their advantages and

disadvantages.

Table 3: Factors Relevant to Deciding Between General and Specific Permits

Factor	General Permits	Specific Permits
Barriers To Entry	Reduce barriers to entry to perform regulated activities, encourage entry by new actors into economic activity, and reduce fixed costs that burden small business actors.	Impose barriers to entry that might deter new entrants in economic activity or harm small business actors. Can provide screens that deter activities with low social benefits and high social costs.
Information	Relative to exemptions, provide more information about regulated activities and actors.	Relative to general permits, provide more information about regulated activities and actors.
Tailoring	More appropriate when regulating low-harm or low-benefit activities, or when harms and benefits are relatively uniform across regulated activities or actors.	More appropriate when harms and benefits are highly variable across regulated activities or actors.
Politics	May allow for regulation that is socially desirable but specific permits are politically infeasible (such as for regulating politically powerful actors or everyday activities). Relative to exemptions, may allow more flexible and increased regulation over time. May also allow for the collection of mitigation fees.	May satisfy public demand to punish bad actors through punitive regulatory burdens.
Enforcement	Relative to exemptions, provides more information that allows for effective enforcement. Relative to overbroad prohibitions that are sporadically enforced, may be fairer and more predictable.	Relative to general permits, provides more information that allows for effective enforcement.
Constraint on Agency Discretion	Relative to specific permits, harder for public to monitor permitting and hold agency and regulated parties accountable. Relative to specific permits, may be harder for agency to control regulated parties' activity.	Relative to general permits, easier for public to monitor permitting and hold agency and regulated parties accountable.
Administrative Burdens	Fewer administrative burdens compared to specific permits.	Greater administrative burdens compared to general permits.

Based on our analysis we also propose a set of default rules and exceptions based on a harm-variance continuum. The continuum captures the essence of the Section 404 general-permit provision discussed in our case study, which conditions that general permits be used only when (1) the risk of harm from a defined activity, both in individual instances and from the cumulative impact of many instances, is low, and (2) the variance expected across instances of the defined

activity is low. As Table 4 below shows, the strongest case for general permits exists when both factors are very low, and the strongest case for specific permits exists when both factors are very high. Intermediate models, such as the Corps' PCN mechanism described in more detail in our case study, can be used to respond to contexts between the extremes.

Table 4. The Harm/Variance Continuum Default Rules

	Low Variance	**High Variance**
Low Risk Profile	General Permits	Intermediates
High Risk Profile	Intermediates	Specific Permits

Exceptions to these default rules may be justified, however, when any or a combination of the design tradeoff factors identified in Part II point against using them. For example, if the harm-variance analysis pointed toward using specific permitting as the default rule, any of the following conditions would counsel toward using more of the general permit characteristics than the default rule otherwise suggests:

- When using the specific permit model would place undesirably disproportionate entry barriers on small businesses and other interests deemed worthy of protection.
- When there is no substantial need for new information about instances of the activity.
- When tailoring to specific circumstances of different instances of the activity is not necessary or practicable.
- When using the specific permit model for the class of activity presents political obstacles that could undermine implementation of any regulatory response.
- When the enforcement advantages of specific permitting are either unnecessary or too costly.
- When public participation and other mechanisms for constraining agency discretion are either unnecessary or impracticable.
- When using the specific permit model would impose undue administrative burdens on the agency or regulated entities.

The more of these factors that are present, the more appropriate it would be to move further toward a general permits approach. If only one factor leans in the direction of the use of a general permit, but other factors lean in the other direction, a specific permit is probably more appropriate. This might be especially true if the only factor that leans in favor of a general permit is political resistance.

Once these factors have been assessed, the agency can select from the permitting system and permitting administration attributes discussed in Part I, within the extent of its discretion under the applicable statutory authorities, to design the permitting program to achieve whatever balance between general and specific provides the best fit to the class of regulated actions.

To summarize, we recommend the following protocol as a step-wise process for an agency to explore where on the general-to-specific spectrum provides the best platform for a particular permitting context.

1. Conduct the harm/variance analysis for the class of regulated actions in question and determine the default position within the broad categories of general, intermediate, and specific permitting. This defines the starting point for permit design.
2. Evaluate whether any of the seven design tradeoff factors warrants adjusting from the default position determined in Step 1 towards general or specific permitting. The presence of multiple factors in favor of general permitting is a stronger indication that general permits are appropriate. Reliance on only one factor should be avoided, especially if that factor is politics. This defines the optimal permitting program design goal.
3. Design the permitting system and permitting administration attributes to achieve the optimal design goal. This defines the optimal permitting program design.
4. Determine the latitude the relevant statutory authority provides for implementing the optimal permitting program and adjust any attribute as needed to conform to the statute. This defines the permitting program that is within the agency's statutory authority to implement and which best balances general and specific permitting for the class of actions in question.

For a legislature creating a new regulatory system, we recommend considering whether general permits are a useful option to allow the implementing agency to use. In particular if the regulatory program might sweep in a range of high-volume, low-harm activities, general permits may be essential. However, we also recommend that the legislature provide specific criteria for the use of general permits by the agency to reduce the risk that general permits might be overused in response to political pressure (as may be the case with some of the Section 404 general permits). For instance, the legislature might want to consider requiring the agency to make formal findings as to the factors we have identified in this report.