



## Designing Federal Permitting Programs

### Committee on Regulation

#### Proposed Recommendation | December 4, 2015

1 Regulatory permits are ubiquitous in modern society, and each year dozens of federal  
2 agencies administering their regulatory permit authority issue tens of thousands of permits  
3 covering a broad and diverse range of actions.<sup>1</sup> The APA includes the term “permit” in its  
4 definition of “license.” In addition to agency permits, the APA defines licenses to include “the  
5 whole or part of an agency...certificate, approval, registration, charter, membership, statutory  
6 exemption or other form of permission.”<sup>2</sup> Otherwise, the APA provides little elaboration on the  
7 definition of a permit.<sup>3</sup> For purposes of this recommendation, a regulatory permit is defined as  
8 any administrative agency’s statutorily authorized, discretionary, judicially reviewable granting  
9 of permission to do something which would otherwise be statutorily prohibited.<sup>4</sup> This  
10 recommendation treats any agency action that meets this definition as a permit, regardless of  
11 how it is styled by the agency (e.g., “license,” “conditional exemption”).

12 Permits exist on a continuum of agency regulation, falling between exemptions (in which  
13 an activity is not regulated at all) and prohibitions. Broadly speaking, there are two contrasting  
14 approaches to permitting. In specific permitting, upon receiving an application, an agency  
15 engages in extensive fact gathering and deliberation particular to the individual circumstances of  
16 the applicant’s proposed action, after which the agency issues a detailed permit tailored to the

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<sup>1</sup> Eric Biber & J.B. Ruhl, *Designing Regulatory Permits 2* (2015),  
<https://www.acus.gov/sites/default/files/documents/Licensing%20and%20Permitting%20Draft%20Report.pdf>.

<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 4.



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17 applicant's situation.<sup>5</sup> In their strictest form, specific permits can demand so much of the permit  
18 applicant in terms of cost, information, and time that they closely resemble prohibitions.<sup>6</sup>  
19 However, some specific permits can be lenient with relatively few conditions placed on regulated  
20 entities.

21 In general permitting, an agency issues a permit that defines and approves a category of  
22 activity on its own initiative, and allows entities engaging in that activity to readily take advantage  
23 of the permit. Agency review of specific facts in any particular case is generally limited unless the  
24 agency finds good cause to condition or withdraw the general approval.<sup>7</sup> In their most flexible  
25 form, general permits can resemble exemptions in form and effect, with few requirements on  
26 regulated entities and relatively little agency oversight.<sup>8</sup> On the other hand, general permits may  
27 place requirements on regulated entities that aid agency oversight and enforcement. Some  
28 permits toward the more general end of the spectrum require the regulated entity to provide  
29 notice to the regulator and others do not.

30 Between general and specific permits lie many possible intermediate forms of permitting  
31 that can exhibit traits of both general and specific permitting.<sup>9</sup> These permits, referred to in this

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

<sup>6</sup> *Id.* at 5.

<sup>7</sup> *Id.* at 2.

<sup>8</sup> *Id.* at 4-6.

<sup>9</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).



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32 recommendation interchangeably as “intermediate” or “hybrid” permits, may call for  
33 intermediate levels of agency review or intermediate requirements to be met by regulated  
34 parties, or may contain a mix of features from both general and specific permitting. Intermediate  
35 permits provide agencies with significant flexibility, allowing them to tailor permitting to the  
36 regulated activity.

37 This recommendation focuses on the distinction between general and specific permits,  
38 and considers intermediate permits as well. It does not specify situations in which exemptions  
39 are appropriate or evaluate the extent to which general permits may be preferable to  
40 exemptions. Marketable permits, in which permits are bought and traded by regulated entities,  
41 may also prove beneficial to agencies, the regulated community, and the public in many  
42 circumstances.<sup>10</sup>

43 General and specific permitting differ in both the system used to issue the permit and in  
44 the way permits are issued under the system. In specific permitting, the agency issues a rule  
45 outlining the process and standards for obtaining permits, after which regulated entities apply  
46 for permits and the agency reviews the submissions, often with public input and judicial review.<sup>11</sup>  
47 In general permitting, the agency often promulgates a rule outlining the precise conditions under  
48 which regulated entities may take advantage of the permit. This approach imposes significant  
49 burdens on the agency upfront; however, once in place the process of permitting is relatively  
50 streamlined and sometimes provides fewer opportunities for public input and judicial review.<sup>12</sup>  
51 Although some agencies have traditionally relied primarily on specific permits, general permits  
52 may offer agencies advantages in efficiency or resource use.

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<sup>10</sup> Permit marketability lies outside the continuum of general permits to specific permits.

<sup>11</sup> *Id.* at 6-7.

<sup>12</sup> *Id.*



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53 Most statutes delegate considerable discretion to agencies to decide at what point on the  
54 spectrum from general to specific to implement a permitting system.<sup>13</sup> Whether an agency  
55 adopts a general or specific permitting system, or an intermediate system, can have significant  
56 impacts on the agency, the regulated entities, and third parties affected by the permitting action.  
57 If Congress decides to specify which type of permitting system an agency should adopt, Congress  
58 may want to consider the guidance provided in this recommendation.

59 In recent years, there has been increasing public concern over the extent to which  
60 inefficiencies in the permitting process delay necessary infrastructure reform.<sup>14</sup> As an initial step,  
61 in 2012, Executive Order 13604 established a steering committee to “facilitate improvements in  
62 Federal permitting and review processes for infrastructure projects.”<sup>15</sup> The order also established  
63 an online permit-tracking tool, the Federal Infrastructure Projects Dashboard. The Steering  
64 Committee and Dashboard serve to enhance interagency coordination and provide permit  
65 tracking to improve agency timeliness.<sup>16</sup> Congress has also been considering modifying the  
66 permitting process in various ways.<sup>17</sup> In seeking to reform existing permitting systems or establish

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<sup>13</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.

<sup>14</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>15</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>16</sup> *Id.* at 18,887-8. The reforms promoted by EO 13604 are largely in accordance 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>17</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.



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67 a new permitting system, Congress and agencies should also be aware of the comparative  
68 advantages of general and specific permits and design or modify such systems accordingly.

69 Although each permitting system is different, and an agency must tailor its procedures to  
70 meet both its statutory mandate and the needs of the particular program at issue, agencies face  
71 a number of common considerations when designing or reviewing a permitting system. There  
72 are many circumstances in which general permits may save agencies time or resources over  
73 specific permits without compromising the goals and standards of the regulatory program, and  
74 this recommendation provides guidance on when an agency might benefit most from using a  
75 general permitting system. This recommendation identifies a number of elements that should be  
76 considered in determining whether an agency should adopt a general permitting system, a  
77 specific permitting system, or an intermediate or hybrid system somewhere between the two.

### RECOMMENDATION

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

79 1. When Congress delegates permitting power to an agency, it should consider whether  
80 permitting is necessary, and if so, whether to specify which type(s) of permitting system(s) an  
81 agency may adopt. In so doing, Congress should be aware of the continuum from general to  
82 specific permits, as well as possible intermediate or hybrid forms that combine features of both  
83 general and specific permits.<sup>18</sup>

84 2. If Congress decides to limit an agency's permitting power to a certain type of permit,  
85 it should consider the factors discussed in recommendations 3-4 when determining the

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<sup>18</sup> For a more complete discussion of the continuum between general permits and specific permits, see Eric Biber & J.B. Ruhl, *Designing Regulatory Permits* 5-6, 8-9 (2015), <https://www.acus.gov/sites/default/files/documents/Licensing%20and%20Permitting%20Draft%20Report.pdf>; 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, 155-69 (2014).



86 preferred type of permitting system to mandate. If Congress decides to give agencies  
87 discretion on which system to adopt, Congress may want to require that agencies make specific  
88 findings about factors discussed in recommendations 3-4 in order to ensure agencies use  
89 general or specific permitting authority appropriately.

90 **Agency Establishment of Permitting Systems**

91 3. When an agency designs a permitting system, the agency should be cognizant of the  
92 resources, both present and future, that are required to develop and operate the system. In  
93 particular, the agency should consider that a general permitting system may require significant  
94 resources during the design phase (especially if system design triggers additional procedural or  
95 environmental review requirements) but relatively fewer resources once the system is in place.  
96 A specific permitting system may require fewer resources upfront but significant resources in  
97 its application. The agency should balance resource constraints with competing priorities and  
98 opportunity costs.

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

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

- 103 i. The effects of the regulated activity are small in magnitude, both in  
104 individual instances and from the cumulative impact of the activity;
- 105 ii. The variability of effects expected across instances of the regulated activity  
106 is low;
- 107 iii. The agency has the necessary upfront resources to design the permitting  
108 system, and can subsequently benefit from lower administration costs;
- 109 iv. The agency wishes to encourage the regulated activity or desires to keep  
110 barriers to entry low;



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- 111 v. The agency does not need to collect detailed information about the  
112 regulated activity or regulated parties;
- 113 vi. The agency does not need to tailor permits to context-specific instances of  
114 the activity;
- 115 vii. The agency does not need to monitor the regulated activity closely and  
116 does not believe that the information that might be provided by specific  
117 permits is needed to facilitate enforcement; or
- 118 viii. The agency does not need to exercise significant enforcement discretion  
119 to readily enforce the permitting system.
- 120 (b) The following conditions weigh in favor of designing a permitting system toward  
121 the more specific end of the spectrum:
- 122 i. The effects of the regulated activity are large in magnitude, both in  
123 individual instances and from the cumulative impact of the activity;
- 124 ii. The variability of effects expected across instances of the regulated activity  
125 is high;
- 126 iii. The agency is not able to expend the necessary resources upfront to design  
127 a general permitting system, or the agency has substantial resources that  
128 can be used for enforcement of the permitting system;
- 129 iv. The agency wishes to discourage the regulated activity, or desires to keep  
130 barriers to entry high;
- 131 v. The agency needs detailed information about the regulated activity or  
132 regulated parties;
- 133 vi. The agency needs to tailor permits to context-specific instances of the  
134 activity;
- 135 vii. The agency needs to monitor the regulated activity closely, and concludes  
136 the information provided in specific permits will facilitate enforcement; or



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137                   viii.    The agency needs to have discretion in enforcing the permitting system  
138                                            against individual entities.

139                   (c) An agency should weigh all the factors and consider implementing a hybrid  
140                                            permitting system that has features of both general and specific permits if the  
141                                            factors described above do not weigh strongly in favor of either general or specific  
142                                            permits or cut against each other.

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

144                   5. Agencies should conduct periodic reviews of their existing permitting structures,  
145                   consistent with the Administrative Conference's Recommendation 2014-5, *Retrospective*  
146                   *Review of Agency Rules*.

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

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