



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

1 **Considerations in Designing Federal Permitting Programs**

2 **Committee on Regulation**

3 **Draft for Oct 22, 2015 Committee Meeting**

4

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

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

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

² 5 U.S.C. § 551(8).

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

⁴ *Id.* at 4.

21 applicant's situation.⁵ In their strictest form, specific permits can demand so much of the permit
22 applicant in terms of cost, information, and time, that they closely resemble prohibitions.⁶

23 In general permitting, an agency issues a permit that defines a broad category of activity
24 on its own initiative, and allows the entities engaging in that activity to take advantage of the
25 permit with little or no effort. Agency review of specific facts in any particular case is generally
26 limited unless the agency finds good cause to condition or withdraw the general approval.⁷ In
27 their most flexible form, a general permit can resemble an exemption in form and effect, with
28 few requirements on the regulated entity and relatively little agency oversight.⁸

29 Between general and specific permits lie many possible intermediate forms of permitting
30 that can exhibit traits of both general and specific permitting.⁹ These permits may call for
31 intermediate levels of agency review or intermediate requirements to be met by regulated
32 parties, or may contain a mix of features from both general and specific permitting.

33 This recommendation focuses on the distinction between general and specific permits,
34 and considers intermediate permits as well. It does not specify situations in which exemptions
35 are appropriate or evaluate the extent to which general permits may be preferable to
36 exemptions. Marketable permits, in which permits are bought and traded by regulated entities,
37 may prove beneficial to agencies in many circumstances, but marketable permits largely fall
38 outside the scope of this recommendation.¹⁰

39 General and specific permitting differ in both the system used to issue the permit and in
40 the way permits are issued under the system. In specific permitting, the agency issues a rule
41 outlining the process and standards for obtaining permits, after which regulated entities apply
42 for permits and the agency reviews the submissions, often with public input and judicial review.¹¹

⁵ *Id.* at 2.

⁶ *Id.* at 5.

⁷ *Id.*

⁸ *Id.* at 4-6.

⁹ *Id.* at 8-9 (discussing possible hybrid permitting and providing an example).

¹⁰ Permit marketability lies outside the continuum of general permits to specific permits, and general permits, specific permits, or intermediate permits may be marketable.

¹¹ Biber & Ruhl, *supra* note 1, at 8-9.

43 In general permitting, the agency usually promulgates a legislative rule outlining the conditions
44 under which regulated entities take advantage of the permit. This approach imposes significant
45 burdens on the agency upfront; however, once in place the process of permitting is relatively
46 streamlined. Regulated entities need only supply notice to the agency and, if the agency does not
47 object, may move forward with the action without public input or judicial review.¹² Although
48 agencies have relied primarily on specific permits in the past, general permits may offer agencies
49 advantages in efficiency or resource use.

50 While some statutes specify which type(s) of permitting system an agency may establish,
51 others delegate broad permitting power to an agency with few restrictions, giving agencies
52 considerable discretion regarding how to structure permitting systems.¹³ Whether an agency
53 adopts a general or specific permitting system, or an intermediate system, can have significant
54 impacts on the agency, the regulated entities, and third parties affected by the permitting action.

55 [In delegating permitting power to an agency, if Congress decides to specify which type
56 of permitting system an agency should adopt, Congress may want to consider the guidance
57 provided in this recommendation. If Congress provides an agency with the discretion to
58 determine which type of system to use, Congress may want to instruct the agency to make
59 specific findings about factors discussed in this recommendation, particularly recommendations
60 3-4, in order to ensure agencies use general or specific permitting authority appropriately.]

61 In recent years, there has been increasing impetus for reform of the federal permitting
62 and licensing regime. In 2012, President Obama issued Executive Order 13604, which established
63 a steering committee to “facilitate improvements in Federal permitting and review processes for
64 infrastructure projects.”¹⁴ The order also established an online permit-tracking tool, the Federal
65 Infrastructure Projects Dashboard. The Steering Committee and Dashboard serve to enhance

¹² *Id.* at 6-7.

¹³ 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.

¹⁴ 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).

66 inter-agency coordination and provide permit tracking to improve agency timeliness.¹⁵ Several
67 permit reform bills have also been introduced in the 114th Congress that similarly aim to improve
68 inter-agency coordination, establish deadlines for permit approval, and otherwise streamline the
69 permit approval process.¹⁶ In seeking to reform existing permitting systems or establish a new
70 permitting system, Congress and agencies should also be aware of the comparative advantages
71 of general and specific permits and design or modify such systems accordingly.

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

¹⁵ *Id.* at 18887-8. 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. 29938 (July 25, 1984). Specifically, Recommendation 1984-1 encouraged inter-agency coordination of permitting, the establishment of permitting deadlines, and timely processing of permit applications.

¹⁶ *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).

RECOMMENDATION

81

82 **Congressional Delegation of Permitting Power**

83 1. When Congress delegates permitting power to an agency, it should consider whether
84 to specify which type(s) of permitting system(s) an agency may adopt. In so doing, Congress
85 should remain aware of the distinction between general and specific permits, as well as possible
86 intermediate forms.

87 [2. If Congress decides to limit an agency’s permitting power to a certain type of permit,
88 it should consider the factors discussed in recommendations 3-4 when determining the
89 preferred type of permitting system to mandate. If Congress decides to give agencies
90 discretion on which system to adopt, Congress may want to require that agencies make specific
91 findings about factors discussed in recommendations 3-4 in order to ensure agencies use
92 general or specific permitting authority appropriately.]

93 **Agency Establishment of Permitting Systems**

94 3. When an agency designs a permitting system subject to its statutory authority, the
95 agency should be cognizant of the resources, both present and future, that are required to
96 develop and operate the system. In particular, the agency should consider that a general
97 permitting system will require significant resources during the design phase but relatively few
98 resources once the system is in place, whereas a specific permitting system will require fewer
99 resources upfront but significant resources in its application. The agency should balance
100 resource constraints with competing priorities and opportunity costs.

101 4. In addition to resource constraints, an agency should consider the following factors
102 when deciding which type of permitting system to adopt.

103 (a) An agency should consider adopting a general permitting system when:

104 i. The effects of the regulated activity are small in magnitude, both in
105 individual instances and from the cumulative impact of the activity.

- 106 ii. The variability of effects expected across instances of the regulated activity
- 107 is low.
- 108 iii. The agency has the necessary upfront resources to design the permitting
- 109 system, and can subsequently benefit from lower administration costs.
- 110 iv. The agency wishes to encourage the regulated activity or desires to keep
- 111 barriers to entry low.
- 112 v. The agency does not need to collect detailed information about the
- 113 regulated activity or regulated parties.
- 114 vi. The agency does not need to tailor permits to context-specific instances of
- 115 the activity.
- 116 vii. The agency wishes to reduce enforcement costs, and does not need to
- 117 monitor the regulated activity closely.
- 118 viii. The agency does not consider a high amount of discretion in enforcement
- 119 to be necessary.

120 (b) An agency should consider adopting a specific permitting system when:

- 121 i. The effects of the regulated activity are large in magnitude, both in
- 122 individual instances and from the cumulative impact of the activity.
- 123 ii. The variability of effects expected across instances of the regulated activity
- 124 is high.
- 125 iii. The agency is not able to expend the necessary resources upfront to design
- 126 a general permitting system, or if the agency has substantial resources that
- 127 can be used for enforcement of the permitting system.
- 128 iv. The agency wishes to discourage the regulated activity, or desires to keep
- 129 barriers to entry high.
- 130 v. The agency needs detailed information about the regulated activity or
- 131 regulated parties.
- 132 vi. The agency needs to tailor permits to context-specific instances of the
- 133 activity.

134 vii. The agency needs to monitor the regulated activity closely, even at high
135 enforcement cost.

136 viii. The agency needs to exercise a high amount of discretion in enforcement.

137 (c) An agency should consider implementing an intermediate permitting system if the
138 risk of harm or variability of effects of the regulated activity are intermediate, or
139 if the other factors described above cut against each other.

140 (d) In making decisions about permit structures, an agency should avoid reliance on
141 any one factor.

142 5. Subject to budgetary and other constraints, and considering burdens to the public,
143 agencies should incorporate data-collection into new and existing permitting systems to aid
144 analysis and review.

145 **Agency Review of Existing Permitting Structures**

146 6. Agencies should conduct periodic reviews of their existing permitting structures,
147 consistent with the Administrative Conference’s Recommendation 2014-5, *Retrospective*
148 *Review of Agency Rules*. In reviewing existing permitting structures, agencies should consider
149 the factors articulated in recommendations 3–4 and, where appropriate and consistent with
150 statutory mandates, consider reforming existing permitting systems to align more closely with
151 the goals the agency seeks to accomplish.