



Institute for Policy Integrity

NEW YORK UNIVERSITY SCHOOL OF LAW

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To: ACUS Committee on Regulation

Subject: Draft Recommendations on Federal Licensing and Permitting (released Sept. 9, 2015)

The Institute for Policy Integrity at NYU School of Law¹ is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. Policy Integrity supports ACUS's draft recommendation that Congress should consider the comparative advantages of general and specific permits and legislate accordingly. Policy Integrity also supports the draft recommendations that agencies should consider their statutory mandate in light of the activity at issue and devise appropriate permitting standards. Policy Integrity has supported previous ACUS recommendations on coordination, transparency, and the effective use of data. With all of this in mind, Policy Integrity makes the following additional recommendations:

- ACUS should emphasize the applicability of marketable permits as an alternative to general and specific permits.
- ACUS should recommend agencies use flexible, cost-effective marketable permits when doing so would best advance policy goals; marketable permits may be particularly desirable when compliance costs vary significantly among the regulated entities but the variance of the harm across regulated entities is low.
- ACUS should recommend agencies institutionalize best practices for enhancing international, Federal, and local government coordination on permitting and review processes.
- ACUS should emphasize collecting and publishing data necessary to assist in reviews of permitting structures.
- ACUS should recommend agencies consider using general permits in lieu of exemptions.

I. Marketable Permits as a Flexible, Cost-Effective Alternative

Proposed Changes to Draft Recommendations

Amend draft recommendation #1 to read:

1. When Congress delegates permitting power to an agency, it should decide whether it wants to specify which type(s) of permitting system(s) an agency may adopt. In so doing, Congress should remain aware of the distinction between general and specific permits, as well as possible intermediate forms, **including, when applicable, marketable permits.**

¹ No part of this document purports to present NYU's views, if any.

Amend draft recommendation #4(c) to read:

4(c) If the risk of harm or the variance are intermediate, or if the two factors cut against one another, an agency should consider implementing an intermediate permitting system. **One notable intermediate system is the marketable permit, which may be particularly desirable when the variance of the harm expected, the need for tailoring, and the need for information-gathering across instances of the activity are all low, but the variance of compliance costs is high.**

Rationale

The draft recommendations do not mention an important alternative regulatory device: marketable permits. Marketable permits are simply government-issued permits that can be bought and sold. The tradability of permits allows market forces to identify the highest-value use of the right and the lowest-cost opportunities for compliance. Under the right conditions, marketable permits can dramatically lower compliance costs, incentivize innovation, and ease administrative burdens.² Executive Orders on regulatory planning direct all federal agencies to consider the advantages of marketable permits over more traditional regulatory tools.³

Marketable permits already have a long and successful history in emissions controls, helping to achieve ambitious environmental goals at greatly reduced costs. EPA's acid rain trading program, for example, under the 1990 Amendments to the Clean Air Act, is "widely acknowledged as a model air pollution control program because it provides significant and measurable environmental and human health benefits with low implementation costs."⁴ Economists have specifically credited the marketable permit structure for making possible dramatic reductions of acid rain pollution.⁵

Marketable permits work well for emissions control because often it does not matter who uses the right to pollute, since some pollutants, like greenhouse gases, impose the same risk of harm regardless of their source (i.e., the variance of the harm is low across instances of the activity). By limiting the total number of permits available, an emissions trading system triggers the market to identify which sources can eliminate their pollution most cheaply (and so not need to purchase permits) and which sources value the scarce permits most highly (because they cannot abate their emissions as cheaply). In short, "marketable permits are more appropriate when the regulator is concerned more with the overall amount of an activity than with the identity of the user or the final purposes of the activity."⁶

² See, e.g., A. Denny Ellerman et. al., *Emissions Trading in the U.S.: Experience, Lessons, and Considerations for Greenhouse Gases*, PEW CTR ON GLOBAL CLIMATE CHANGE, iii (2013), http://www.c2es.org/docUploads/emissions_trading.pdf; Policy Integrity Comments to EPA on Proposed 2014 Standards for the Renewable Fuel Standard Program, 2 (Jan. 28, 2014), http://policyintegrity.org/documents/2014_01_28_Policy_Integrity_Comments_2014_RFS_Standards.pdf ("Economists nearly all agree that the most efficient method to reduce GHG pollution is to give individual polluters maximum flexibility while still creating incentives for economy-wide emissions reductions.").

³ Exec. Order No. 12,866 §1(b)(3) (1993) ("Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public."); see also Exec. Order No. 13,563 (reaffirming Exec. Order. 12,866).

⁴ 69 Fed. Reg. 4652, 4701 (Jan. 30, 2004).

⁵ Dallas Burtraw & Erin Mansur, *The Effects of Trading and Banking in the SO₂ Allowance Market* 20 (Res. for the Future, Disc. Paper 99-25, 1999), <http://www.rff.org/documents/RFF-DP-99-25.pdf> ("[O]verall emission reductions might not otherwise have been achieved, absent the opportunity to bank and to trade allowances. The flexibility in compliance that is afforded by these aspects of the program led to significant decreases in the cost of the program and made the program economically affordable and politically acceptable.").

⁶ Project on Alternative Regulatory Approaches, *Marketable Rights: A Practical Guide to the Use of Marketable Rights as a Regulatory Alternatives* 9 (1981).

Beyond air and water emissions trading,⁷ marketable permit systems (including permit auctions) have been proposed or implemented in numerous other contexts, including: natural resource permits, such as fishing quotas; building permits and land development rights; airport landing slots; electromagnetic spectrum licenses; liquor licenses; and taxi medallions, among others.⁸

Marketable permits do not neatly fit the categories and factors outlined by the Committee's draft recommendations and the consultants' report. On the harm/variance continuum discussed in draft recommendation 4, marketable permits are most appropriate when the variance expected across instances of the activity is low, as explained above, while marketable permits can theoretically work for any risk of harm, low or high. For the other factors listed in draft recommendation 6, marketable permits are typically closer to resembling general permits, though some features track specific permits. For example: (A) Marketable permits can reduce barriers of entry by shifting costs of compliance onto those businesses that can most easily bear those costs. (B) Information-gathering needs can be designed to be minimal.⁹ (C) Individual tailoring is unnecessary because the harms across activities and actors will be effectively uniform. (D) In the past, marketable permits have received bipartisan support, and many regulated entities prefer the flexibility of a market-based structure.¹⁰ (E) Marketable permits can "create incentives for self-regulation since parties who have received new property rights now have a financial stake in a well-run programme."¹¹ (F) The public is able to monitor transactions if data is made accessible to the public.

After considering such factors, Congress should explicitly authorize agencies to use marketable permits when appropriate. Agencies, in turn, should use marketable permits when appropriate and when not precluded by statute.

II. Agency Coordination and Transparency

Proposed Changes

Add, following draft recommendation #6:

7. Agencies should institutionalize best practices for: enhancing international, Federal (inter-agency and intra-agency), State, local, and tribal government coordination on permitting and review processes; and using digital tools to reduce compliance and administrative burdens and to increase engagement with stakeholders and the public.

Rationale

It is important that similar or related permitting functions across agencies—and within multiple entities of a single agency—are well coordinated.¹² Many projects often require multiple permits

⁷ See Jonathan Remy Nash & Richard L. Revesz, *Markets and Geography: Designing Marketable Permit Schemes to Control Local and Regional Pollutants*, 28 *Ecology L.Q.* 569, 582, 610 (2001); see also Letter from Policy Integrity to EPA, "Water Quality Trading under the Clean Water Act," Oct. 1, 2012, http://policyintegrity.org/documents/Policy_Integrity_Final_Water_Quality_Trading_Letter.pdf ("EPA has long embraced water quality trading as a tool to lower the cost of enforcing water quality standards under the Clean Water Act.").

⁸ *Marketable Rights*, *supra* note 6; Org. for Economic Cooperation & Development (OECD), *Putting Markets to Work: The Design and Use of Marketable Permits and Obligations* (OECD Public Mgmt. Occasional Papers 19, 1997), <http://www.oecd.org/gov/regulatory-policy/1910849.pdf>.

⁹ See, e.g., Nash & Revesz, *supra* note 7, at 624-28 (outlining a proposal for a website that tracks emissions in order to ensure that "hot spots" do not create an additional environmental problem).

¹⁰ See Michael A. Livermore & Richard L. Revesz, *Interest Groups and Environmental Policy: Inconsistent Positions and Missed Opportunities*, 45 *Env'tl. L.* 1, 5 (2015), available at <http://law.lclark.edu/live/files/19117-45-1revesz>.

¹¹ *Putting Markets to Work*, *supra* note 8, at 11.

¹² See ADMIN. CONF. OF THE UNITED STATES, RECOMMENDATION 2012-5, IMPROVING COORDINATION OF RELATED AGENCY RESPONSIBILITY (2012). This discusses recommendations for agency coordination that include development of agency policies on coordination, sharing of best practices, adopting protocols for joint rulemaking and memoranda of understanding, ex post evaluation of at least a subset of coordination processes, tracking of outcomes and costs, and

from different agencies¹³ and from multiple levels of government.¹⁴ Previous efforts to increase coordination have led to greater transparency and efficiency. Executive Order 13,604, for example, encourages greater coordination by “institutionalizing best practices for: enhancing Federal, State, local, and tribal government coordination on permitting and review processes (such as conducting reviews concurrently rather than sequentially to the extent practicable); [and] avoiding duplicative reviews.”¹⁵ A steering committee on infrastructure permitting was created with members from multiple federal agencies to develop and implement a uniform federal plan for infrastructure permitting;¹⁶ a plan has since been released to institutionalize these best practices.¹⁷ Similarly, Executive Order 13,609 calls for international regulatory cooperation (mirroring much of ACUS’s recommendation on international regulatory cooperation).¹⁸ The proposed additional recommendation suggested above would further codify such best practices on cooperation.

One of the earliest outcomes of Executive Order 13,604 was the creation of www.permits.performance.gov, an online dashboard that lists various agencies responsible in the permitting process under the corresponding projects.¹⁹ The online dashboard is a useful digital tool that provides “transparency and accountability to the federal permitting process.”²⁰ The use of more digital tools in the permitting process will allow for greater transparency and open communication for entities participating in the permitting application process, as well as the interested public.²¹ The proposed recommendation above on digital tools in permitting would further codify such best practices, and is consistent with previous ACUS recommendations on E-Rulemaking, which called for increased access to agency websites, increasing the visibility of rulemaking digitally, and the use of social media to raise visibility of upcoming rules.²² Increasing digital tools in the permitting process is in line with these goals.

making coordination tools more transparent. Increasing intra-agency coordination on permitting would also be consistent with these goals.

¹³ <http://www.permits.performance.gov/projects/active-projects> displays active infrastructure permitting projects and denotes how various agencies may require permits for a single infrastructure project.

¹⁴ See, e.g., <http://www.epa.gov/region9/air/permit/pmfaq.html#faq1> which explains that it can be a combination of Federal, State, or Local entities that issues an air permit in EPA’s Region 9.

¹⁵ Improving Performance of Federal Permitting and Review of Infrastructure Projects, 77 Fed. Reg. 18887 (Mar. 22, 2012). This also built on the interagency coordination from a previous Executive Order, Interagency Working Group on Coordination of Domestic Energy Development and Permitting in Alaska, 76 Fed. Reg. 41987 (July 12, 2011), .

¹⁶ Improving Performance of Federal Permitting and Review of Infrastructure Projects, 77 Fed. Reg. 18887 (Mar. 22, 2012). Steering committee members include representatives from the Department of Defense, the Department of the Interior, the Department Agriculture, the Department of Commerce, the Department of Transportation, the Department of Energy, the Department of Homeland Security, the Environmental Protection Agency, the Advisory Council on Historic Preservation, and the Army at the Deputy Secretary or equivalent level.

¹⁷ STEERING COMMITTEE ON FEDERAL INFRASTRUCTURE PERMITTING AND REVIEW PROCESS IMPROVEMENT, IMPLEMENTATION PLAN FOR THE PRESIDENTIAL MEMORANDUM ON MODERNIZING INFRASTRUCTURE PERMITTING (2014), <http://www.troutmansandersenergyreport.com/wp-content/uploads/2014/05/Permitting-Implementation-Plan.pdf> . One of the goals of the plan is to “institutionalize Interagency Coordination and Transparency.”

¹⁸ See Exec. Order No. 13,609, 77 Fed. Reg. 26,413 (2012); ADMIN. CONF. OF THE UNITED STATES, RECOMMENDATION 2011-6, INTERNATIONAL REGULATORY COOPERATION (2011).

¹⁹ See, e.g., <http://www.permits.performance.gov/projects/dredge-sailors-haven-talisman-barrett-beach-and-watch-hill-channels-and-marinas> (delineating the title of each permit, and what agency is responsible for the permit)

²⁰ See <http://www.permits.performance.gov/projects/active-projects>.

²¹ This is consistent with previous recommendations have called for increased transparency. See, e.g., ADMIN. CONF. OF THE UNITED STATES, RECOMMENDATION 2015-1, PROMOTING ACCURACY AND TRANSPARENCY IN THE UNIFIED AGENDA (2015). The Administrative Conference often recommends best practices for agency communication with the public. See, e.g., Admin. Conf. of the United States, Ex Parte Communications in Informal Rulemaking (June 10, 2014), <https://www.acus.gov/recommendation/ex-parte-communications-informal-rulemaking>.

²² See ADMIN. CONF. OF THE UNITED STATES, RECOMMENDATION 2011-8, AGENCY INNOVATIONS IN E-RULEMAKING (2011); ADMIN. CONF. OF THE UNITED STATES, RECOMMENDATION 2013-5, SOCIAL MEDIA IN RULEMAKING (2013).

III. Retrospective Review of Agency Permits

Proposed Changes

Amend draft recommendation #7 to read:

7. Agencies should conduct periodic reviews of their existing permitting structures, consistent with the Administrative Conference's Recommendation 2014-5, *Retrospective Review of Agency Rules*. In reviewing existing permitting structures, agencies should consider the factors articulated in recommendations 3–6 and, where appropriate and consistent with statutory mandates, consider reforming existing permitting systems to align more closely with the goals the agency seeks to accomplish. **Retrospective analysis should include collecting data necessary to assist in reviews of permitting structures.**

Rationale

Recommendation #7 already addresses the need for agencies to conduct periodic reviews of their existing permitting structures, consistent with ACUS Recommendation 2014-5, *Retrospective Review of Agency Rules*. However, collecting data on issued permits will help an agency determine whether the permits are “accomplishing their intended purpose or whether they might, to the extent permitted by law, be modified, strengthened, or eliminated in order to achieve statutory goals more faithfully, minimize compliance burdens on regulated entities, or more effectively confer regulatory benefits.”²³ As agencies develop new plans and priorities, and as technology and scientific knowledge advance, the costs and benefits of the permit may change and it would be useful to re-evaluate the permit under the new framework.²⁴

Collecting this data will assist the agency in reviewing new permits.²⁵ It will also help an applicant better understand what factors will be considered when they must reapply for the permit, and help them to better prepare for making adjustments to their projects (such as changes in technology)²⁶ in order to meet any differing requirements under the new framework. When possible, this data should be made publicly available, consistent with Executive Order 13,563, stating that “such retrospective analyses, including supporting data, should be released online whenever possible.”²⁷ Overall, this will continue to promote the Administrative Conference's goal of nurturing a culture that embraces retrospective review and ongoing improvement within agencies.²⁸

IV. Weighing Permits versus Exemptions

Proposed Changes

Amend draft recommendation #3 to read:

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

²³ See Recommendation 7, ADMIN. CONF. OF THE UNITED STATES, RECOMMENDATION 2014-5, RETROSPECTIVE ANALYSIS OF AGENCY RULES (2014).

²⁴ See, e.g., <http://www.epa.gov/region9/ej/permitting.html> (describing a new EPA plan to promote environmental justice in the permitting process).

²⁵ This would be consistent with previous recommendations on “Integrating Retrospective Review Into New Regulations,” within ADMIN. CONF. OF THE UNITED STATES, RECOMMENDATION 2014-5, RETROSPECTIVE ANALYSIS OF AGENCY RULES (2014).

²⁶ See, e.g., <http://www2.epa.gov/nsr>; <http://www2.epa.gov/eg/learn-about-effluent-guidelines>

²⁷ Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 18, 2011).

²⁸ ADMIN. CONF. OF THE UNITED STATES, RECOMMENDATION 2014-5, RETROSPECTIVE ANALYSIS OF AGENCY RULES (discussing a goal to create a culture of retrospective review).

should consider its authority to use general or marketable permits as a more desirable alternative to a small entity exemption.

Rationale

As the consultants explain in their report, permits exist on a continuum with regulatory exemptions.²⁹ When faced with the prospect of regulating numerous small actors, some agencies may reflexively reach for a small entity exemption, perhaps without fully considering the public costs of allowing small entities to continue their risky activities completely unchecked.³⁰ Exemptions are also politically challenging to undo, even if future technological advances or other changed circumstances make regulation of those small entities more worthwhile someday. A general permit (or, as appropriate, a marketable permit) may be a more desirable alternative to an outright exemption.

For example, as the consultants have explained elsewhere,³¹ EPA recently failed to fully consider the use of general permits for certain greenhouse gas regulation, instead opting to grant small polluters a temporary regulatory exemption. Even as the Supreme Court faulted EPA's for its statutory interpretation and partly struck down the rule, the Court noted that "general" or "electronic" permits may have had the ability to "reduce the administrability problems identified above"—yet EPA had "[not] given any information" to the Court about such tools.³² Though the Court may have ruled the same way regardless, the consultants and other legal experts have speculated that if EPA had used general permits instead of a small business exemption, such a "light touch" might have reduced the Court's "concerns about red tape, potentially arbitrary agency decisionmaking, and regulatory overreach."³³

Sincerely,

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²⁹ See Eric Biber & J.B. Ruhl, *Designing Regulatory Permits*, 4 (2015).

³⁰ See Letter from Policy Integrity to Small Business Administration, Feb. 24, 2014, http://policyintegrity.org/documents/Policy_Integrity_Letter_to_SBA_on_RFA.pdf.

³¹ See Eric Biber & J.B. Ruhl, *General Permits and the Regulation of Greenhouse Gases*, LEGAL PLANET (July 26, 2014), <http://legal-planet.org/2014/07/26/general-permits-and-the-regulation-of-greenhouse-gases>.

³² Util. Air Regulatory Group v. EPA, 12-1146 (2014) at n.7.

³³ See Biber & Ruhl, *General Permits and the Regulation of Greenhouse Gases*, *supra* note 31.