

Comments from Paul Bangser

RECOMMENDATION

Congressional Delegation of Permitting Power

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

Agency Establishment of Permitting Systems

3. An agency should look to its statutory ~~mandate~~ authority 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~~ authority.
4. If an agency has the freedom to choose which type of permitting system to adopt, it should consider both the risk of harm from a defined activity, and the variance from one instance of that activity to another.
 - (a) If the risk of harm from a defined activity is low, both in individual instances and from the cumulative impact of the activity, and the variance expected across instances of the defined activity is low, then agencies should strongly consider adopting a general permitting system.
 - (b) If the risk of harm from a defined activity is high, in individual instances or in cumulative impact, and the variance expected across instances of the defined activity is high, then agencies should strongly consider adopting a specific permitting system.
5.
 - (c) If the risk of harm or the variance are intermediate, or if the two factors cut against one another, an agency should consider implementing an intermediate permitting system.
5. An agency should also be cognizant of available resources, both present and future, that will be required to develop and operate a permitting system. A general permitting system will require significant resources during the design phase, but relatively few resources once the system is in place. A specific permitting system will require fewer resources upfront, but will require significant resources in its application.
6. When an agency determines which type of permitting system to adopt, the agency should consider and weigh a number of additional factors. These factors include, but are not limited to:
 - (a) Barriers to entry: general permits may impose lower barriers to entry than do specific permits.
 - (b) Agency need for information: general permits may provide less opportunity for the agency to gather information than specific permits.

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Commented [A1]: It would seem helpful to better define the term or concept of "variance," as used here. Does it mean variance in the type of regulated activity within the overall category? variance in the risk of harm presented among the regulated entities in the category? variance in the types of permitting conditions that may be appropriate across those entities, due to differences in their type/construction/operation? etc.

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

(d) Political obstacles: general permits ~~are~~ may be (or “are generally”) more likely to respond to political concerns regarding the burden of regulations on regulated entities.

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

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

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

Agency Review of Existing Permitting Structures

7. Agencies should conduct periodic reviews of their existing permitting structures, consistent with the Administrative Conference’s Recommendation 2014-5, Retrospective Review of Agency Rules, and consistent with their budgets and priorities. 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.