A R T I C L E

The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State

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I. Introduction

Regulatory permits are ubiquitous in modern society, yet receive little attention in legal and policy commentary and law school curriculums. Broadly speaking, there are two contrasting approaches to permitting. "Specific permits" entail 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. "General permits" have the agency issue a permit, with no particular applicant before it, that defines a broad category of activity and allows entities engaging in that activity to take advantage of the permit with little or no effort on their part. General permits involve limited agency review of specific facts in any particular case unless the agency finds good cause to condition or withdraw the general approval.

The question of interest here is where on the spectrum of approaches from extreme specific-permit design to extreme general-permit design a particular permitting program should fall given its policy goals, practical implementation context, and background concerns regarding agency exercise of permitting authority. We answer that question in three stages. Part II outlines the nuts and bolts of permitting and describes the permitting program attributes that define the spectrum of general permits, specific permits, and intermediates, as well as hybrids. Part III examines the

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II. 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 understand what distinguishes permits from other government regulatory instruments, such as fines, inspections, and taxes. We first describe the nature of permits as a matter of administrative law. We then define the spectrum of permits and what differentiates general permits from specific permits. We close 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.

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)¹ refers to permits only once, in the definition of a "license."² All that can be extracted from the APA is from that 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.*"³

Administrative Procedure Act, 5 U.S.C. §§ 551–59, *available in* ELR STAT. ADMIN. PROC. 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.

^{2. 5} U.S.C. § 551(8).

^{3.} *Id.*

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The APA's structure of agency actions 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. Second, permits are a "form of permission,"⁴ though the APA does not specify how permits differ from the other forms of permission. Third, a permit must involve some process and standards for an agency to grant (or deny) permission to a regulated entity to engage in an otherwise statutorily restricted activity. Fourth, permits must fit into a broader range of agency and legislative regulatory measures spanning from unconditional exemption to unconditional prohibition. Finally, permits are subject to the APA's rules of judicial review.⁵

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 category itself. At one end of the broadened spectrum 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. At the other end of the spectrum lie prohibitions: the statutory prohibition is a legislativelyspecified 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. Permits occupy the middle ground, where permission is needed and can be granted. Permits thus 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 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 it is called, 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

At the extreme boundaries of permitting, permits do not look much different from either exemptions or prohibitions. Although exemptions and prohibitions are diametrically opposed, the permit power spans the territory between them as illustrated below. Hence, just as exemptions and prohibitions are opposites, so too are general permits and specific permits notwithstanding that both fit the definition of a permit. The key difference is that for general permits the default rule is that the activity is allowed unless approval is withdrawn, whereas for specific permits the activity is prohibited unless approved.

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, as illustrated in Table 1. The first focuses on the permitting system, namely the regulatory apparatus and process the agency constructs in order to issue the permit. The second level focuses on permit administration, which pertains to how a particular project avails itself of the permitting system to obtain permit approval. The third level of analysis concerns how the agency manages the transition along the spectrum between general and specific permitting as it searches for the appropriate balance among the permitting characteristics. There are two modes of transition-a "continuum mode," in which the agency can move incrementally between the two extremes, 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.

These levels of analysis, however, are not without distinction. First, 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. Second, 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 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 quasiexemption effect of general permits. However, the agency runs the risk that as more parameters move in the direction of specific permitting attributes, at some point the agency action will be so particularized that it will require specificpermitting procedures.

I. Permitting Systems

We propose five essential characteristics of permitting systems across which general and specific permitting differ. First 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

^{4.} *Id.*

^{5.} *Id.* §§ 701–06.

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General Permits	Transition	Specific Permits	
Permitting System			
Agency issues 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	

 Table 1: Permitting Systems, Permit Administration, and Transitions

permit available for all qualifying projects, whereas in specific permitting, applicants must approach the agency to request a permit.

The second is the substantive assessment burden the agency assumes when establishing the system. 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.

The reverse is true for the third characteristic—regulatory infrastructure. Once a general-permitting system is established, it requires relatively little procedural and substantive infrastructure to move to the permit-administration phase. 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 feature 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, establishing the system imposes far less of this 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 for issuing permits in the form of general promulgations. Specific-permitting systems 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

The manner in which general and specific permit *administrations* differ is fairly straightforward. With regard to general permits, 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 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.

3. Intermediates and Transitions

Flexibility exists 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. But this raises the question of transition. A general permit relying on extensive and burdensome requirements at some point simply would not be a general permit, given its increased case-specific requirements. Thus, there are trade offs as the agency moves across the permit-design spectrum.

Moreover, some permitting features, such as the availability of judicial review and public participation, are not on a continuum. For example, courts might perceive the agency action of substantially reviewing and approving use of a general permit 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,⁶ but its possibility imposes some drag on the ease with which an agency can craft intermediate solutions between pure general-permitting systems and pure specific-permitting systems.

^{6.} 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).

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III. Permit-Design Trade Offs: General Versus Specific

Assuming a statute leaves the full permitting spectrum open to the agency's choice of how to design permits for a particular regulatory program, why would a regulatory program use general or specific permits or some intermediate form? 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. We examine these two factors through the following permit design policy goals and attributes.

A. Permits as Barriers to Entry

Permits effectively act as barriers to entry for an activity. For example, 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. Once the first permit has been obtained, it is likely to be 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. Moreover, not all regulated parties will be equally able to bear permitting costs. The more permitting costs are fixed, the more they are a burden on small actors.⁷ The costs of determining what permits are required and how most effectively to secure them will often have a high fixed component, as will the difficulty of filling out forms and compiling the relevant information. To the extent 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.⁸ General permits can reduce information requirements (for example, by making permit applications simpler and shorter), and can eliminate the need for agency approval before the regulated activity commences (for instance, in the context of notices of intent).⁹ 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.¹⁰

B. Permits as Tools for Revealing or Developing Information

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 regulatory program, and of the activities the program regulates. Aggregation of data in this way can facilitate an understanding of how widespread particular impacts from permitted programs are and where those impacts are located. Aggregation can also give a sense of the net costs and benefits of an overall regulatory program.

General permits, on the other hand, require less information from the applicant. This can allow agencies to focus their energies, and energies of applicants, on the information that is most useful to the regulatory program, rather than waste energy on collecting unnecessary or redundant information. Alternatively, information may already have been collected and assessed under a different regulatory permit program, on which a general-permit program could piggyback.¹¹

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 individualized specific 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.¹² 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, administrative, transactional, and potentially even litigation related—therefore, tailoring will only be worthwhile if the costs of tailoring are outweighed by the benefits of tailoring.¹³

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).

^{8.} Id. at 72.

In a notice-of-intent system, 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.

^{10.} As we discussed earlier, this last situation is for practical purposes more or less the same as a complete exemption from regulation.

^{11.} 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).

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).

See C. Steven Bradford, *The Cost of Regulatory Exemptions*, 72 U. Mo. KAN-SAS CITY L. REV. 857 (2004) (noting that one cost of varying regulatory levels among different parties will be creating costs for regulated parties,

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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 benefits from an activity are relatively small, or the risks of harm or the potential benefits are invariant no matter what tailoring is undertaken. In both situations, tailoring will generally not be useful.

D. Permits as Political Tools

The way in which a permitting system is structured might help address political constraints or reduce resistance to a regulatory scheme.¹⁴ 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. 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.

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. Permitting's fixed costs might simply be politically impossible to impose on frequently pursued activities, especially if there is a general expectation that the activity should be allowed.¹⁵ General permits can allow for regulation with an especially light touch, even allowing ex post approval of projects and avoiding potential backlash against the regulatory system. This is how Clean Water Act Section 404 permits for surface coal mining activities 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.¹⁶ 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. However, there is a flipside to using general permits to address political resistance to regulation, as political resistance might result in the use of general permits to effectively reduce the substantive standards of the overall regulatory program.

E. Permits as Enforcement Tools

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. 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. A criticism of the broad use of general permits in the Section 404 program, for example, has been that it has made it too difficult for the agency to identify and prosecute violations of the law, and that more detailed specificpermitting 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.¹⁷

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 that authorize certain activities, and instead it may use its discretion to not prosecute violations of an otherwise applicable regulatory mandate. 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. The problem is that this sweeping use of prosecutorial discretion creates tremendous uncertainty for regulated parties.

F. Permits as Constraints on Administrative Discretion

Specific permits are more likely to have significant public-participation requirements and face more in-depth judicial review than 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. 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 it to individual actors. And, even if there is a theoretical system by which members of the public might be involved in the application, there is little reason to expect it will occur. For instance, Clean Water Act NPDES general permits allow for any "interested person" to request that the

agencies, and third parties to determine what level of regulation properly applies to a particular regulated party).

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).

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

See Thomas Addison & 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).

^{17.} See id. at 645-46.

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agency issue an individualized permit for a particular project.¹⁸ However, unless members of the public are regularly sifting through the notices of intent submitted to the EPA or state agencies, there is no way that they would be aware a project is occurring, let alone whether there are any permit applications pending.

Although general permits might reduce the ability of nonregulated parties to constrain agency discretion, they also may have the effect of constraining agency discretion with respect to regulated parties. General permits are, in effect, an agency invitation for regulated parties to undertake activities without legal liability so long as they meet the general permit conditions. Of course, agencies can revise or revoke general permits, either in general or specific applications.¹⁹ But, complete revocation of a general permit may require various administrative procedures, such as compliance with notice-and-comment rulemaking requirements.²⁰ 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

One of the reasons agencies most commonly cite when they develop general-permit programs is that once a general permit is issued, it serves to reduce administrative burdens on the agencies or regulated parties. 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 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), the analysis of those impacts can be done at a general level and spread across the entire program, rather than repeated for each permit application. This can create significant economies of scale in terms of a permitting system.

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.

IV. Conclusion and Recommendations

Based on our analysis we propose a set of default rules and exceptions based on a harm/variance continuum, as illustrated in Table 2.²¹ The continuum captures the essence of the Section 404 general-permit provision, 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. 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 can be used to respond to contexts between the extremes.

Table 2. The Harm/VarianceContinuum 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 trade off factors identified in Part III 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.

^{18. 40} C.F.R. § 122.28(b)(3)(i).

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).

^{20.} See, e.g., id. (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.

^{21.} These recommendations differ in some respects from those ACUS adopted for federal agencies as the product of its project on regulatory permits, for which we served as co-consultants. See ACUS, Recommendation 2015-4—Designing Federal Permitting Programs, available at https:// www.acus.gov/research-projects/federal-licensing-and-permitting.

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• When using the specific permit model would impose undue administrative burdens on the agency or regulated entities.

The more factors present, the more appropriate it would be to move toward a general permits approach. If only one factor leans in the direction of the use of a general permit, a specific permit is probably more appropriate. This might be especially true if the only factor 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 II, 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 trade off 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.
- 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.