

The Place of Permits in the Quiver of Administrative Action

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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 (2014).

Those of us who write in administrative law often get stuck in the ruts created by the categories set out in the Administrative Procedures Act—especially rulemaking, adjudication and judicial review. Therefore, it is refreshing and often path breaking when an article appears that delves into an important aspect of administrative action that cuts across those ruts rather than following them. That is all the more true when the article is as well executed as *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State* by [Eric Biber](#) and [J.B. Ruhl](#).

Nominally, *The Permit Power Revisited* is a response to a piece Richard Epstein wrote, almost twenty years ago, lambasting administrative permitting as a “racket” rife with agency abuse.¹ But the article does not so much respond to that piece; rather it lays out what the permit power encompasses and how agencies use it to fill gaps that otherwise would exist in regulatory schemes. In doing so, *The Permit Power Revisited* categorizes permits along a continuum and demonstrates how judicious choice of permitting along that continuum can contribute to effective and responsive regulation.

Biber and Ruhl define a permit as administrative action allowing particular conduct that would otherwise be prohibited. Using this definition they begin their inquiry into the role of permits by placing them on a line between administrative exceptions (general administrative classifications of conduct that is permitted) and prohibitions (general administrative classifications of conduct that is prohibited). They then distinguish between two types of permits—general and specific. General permits are very close to exceptions—for example they may allow an entity to engage in conduct simply by registering its intent to do so with the agency. Specific permits focus on the precise situation of the actor, and grant permission after a detailed examination of the specific facts that ensure that permitting the specific conduct is warranted.

The authors are clear to recognize that actual permits fall somewhere on the continuum between the two archetypes they describe. In fact they provide five characteristics that distinguish between permit programs that are general and specific in nature. Most significantly, they note that the distinction between a permit program that is general in nature and one that is specific is usually of greater significance than the distinction between each archetype and the non-permit action with which it abuts. Having set out these ideal types of permits, the authors illustrate how various agencies use permits effectively to administer regulatory programs, paying special attention to the Army Corps of Engineers’s use of both general and specific permits under section 404 of the Clean Water Act to regulate dredging and filling of waters of the United States.

The guts of *The Permit Power Revisited* is its discussion of the potential benefits that permits can provide. Biber and Ruhl identify six such benefits: permits as barriers to entry; permits as tools for revealing or developing information; permits as tools for tailoring regulation to specific circumstances; permits as political tools, permits as enforcement tools, permits as constraints on administrative discretion, and permits as means of easing administrative burdens. They proceed to describe how

choices between permits that are more general or specific can further those benefits more effectively, while reducing opportunities for agency abuse. The final part of the article argues that, because general permits are better suited to distributed activity by many, when each person's activity causes limited social harm that nonetheless adds up to significant levels, we should look to increase the use of general permits in the future.

Biber and Ruhl understand that the theory of permits, and the application of that theory to suggest normative improvements in the structure of regulation, is a vast topic well beyond the purview of any article to cover comprehensively. *The Permit Power Revisited*, however, provides a good start. Its distinction between general and specific permits goes a long way toward providing the road for evaluating the promise of permit programs to improve regulation. I did not agree with all of its analysis of the benefits that can be provided by general and specific permit programs. In particular, I found its discussion of specific permits as a barrier to entry a bit off base. Rather than providing a signal of activities that generate sufficient private benefit to warrant incurring the costs of specific permitting, as Biber and Ruhl argue, I think those costs are better viewed as a tax on activity that generates external social costs. As a Pigouvian tax, the costs should be tied to the external social harm not to the level of private benefit generated. What is more, the costs would be better imposed as a tax, rather than as an increase in transaction costs, which creates social waste rather than a transfer of wealth. But I am picking nits here. The more important point is that Biber and Ruhl have pointed in the right direction by describing the breadth of permit programs and their promise to allow more efficient and responsive regulation. By doing so they have more than responded to Epstein's oversimplified excoriation of permit programs. They have shown not only that permits can provide sound means of regulating, they have suggested how to assess permit programs to try to get the most out of them with the least chance of inefficiency or abuse.

1. Richard A. Epstein, [The Permit Power Meets the Constitution](#), 81 **Iowa L. Rev.** 407 (1995).

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