

C O M M E N T

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

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In “The Permit Power Revisited,” Professors Biber and Ruhl make a well-articulated and easy to follow argument for a regulatory shift along the “spectrum of [permitting] approaches” from “specific permits” to the more favored “general permits.” In fact, the article might just as easily be called “The Case for General Permits.” After offering a thoughtful definition of what constitutes a permit (which turns out to be ill-defined under the Administrative Procedure Act) and laying out the six vital elements of “permitness,”¹ the authors make an important contribution to the literature by proposing five essential characteristics of permitting systems and a rubric for choosing the best system for a particular application using a “harm/variance” analysis.

Biber and Ruhl outline the theoretical benefits and costs of differing permitting approaches and argue that “[t]ailoring through specific permits necessarily imposes costs—informational, administrative, transactional, and potentially even litigation-related.” Reducing the argument to its simplest form, general permits are found to be a more cost-effective approach to reducing certain forms of pollution. The authors argue that “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.” How one goes about deciding

which of the permit approaches to deploy is a central part of their analysis.

Among other things, the authors posit that, at least when the risk of harm is low and the “variance expected across instances of the defined activity” are low, general permits are to be preferred. They further argue that general permits reduce the fixed costs for the permittee (thereby equalizing the regulatory playing field for small businesses) and administrative costs to the regulator. Herein, by requiring less information from the applicant, the regulator can “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.”

We can agree with the theory . . . in theory. But within one of the regulatory regimes that we know best, that of the Federal Water Pollution Control Act, better known as the Clean Water Act (CWA) (33 U.S.C. Sections 1251 *et seq.*), there are clearly exceptions to the rule.² In that context, permitting (or non-permitting) schemes should be chosen based on their effectiveness in protecting water quality. Hence regulators should always ask which of the permitting approaches (or non-permitting approaches), as influenced by economic, social, and political considerations, will best enable the restoration of our degraded watersheds.

Today, too many of our nation’s waters remain impaired and unable to meet state water quality standards. Although our rivers no longer catch on fire, increasingly they are impacted by pollutants such as pharmaceuticals, excess

1. It turns out that Justice Potter Stewart might not have just known one when he saw one—according to Biber and Ruhl 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.”

2. Biber and Ruhl present their thesis largely in the context of the CWA 404 program, but the proposition of a permitting approach based on a harm/variance logic has strong appeal across a wider number of CWA programs including, especially, the National Pollutant Discharge and Elimination Systems (NPDES) program, which is the focus of this Comment.

nutrients causing hypoxia and toxic algal blooms (with increasing impacts on drinking water supplies), and sediment from stormwater that is devastating so many of our lakes, rivers, and estuarine waters.

I. Congress Established a High Bar With Lofty Goals

The CWA was born in 1972 with an awesome objective—to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.”³ To achieve that objective, Congress established two national goals: (1) to achieve a level of water quality which “provides for the protection and propagation of fish, shellfish and wildlife and provides for recreation in and on the water” by July 1, 1983 and (2) the elimination of discharges of pollutants into United States waters by 1985.⁴ Much progress was made on these goals in the first twenty years of the Act but have stagnated significantly over the two decades due, in large part, to the scope and nature of the pollution sources. We have largely moved from end-of-pipe discharges to decentralized ones.

To achieve the Act’s lofty goals, the U.S. Environmental Protection Agency (EPA) has taken the mandate from Congress and grown the Act into a massive regulatory program founded on, you guessed it, permitting. Although, to be fair to the Agency, much of the growth has been compelled through third-party litigation and judicial fiat that has pushed EPA into areas where the Agency had previously declined to extend the program. For example, water transfers have historically been viewed by the Agency as beyond the purview of the CWA permitting program. However, protracted litigation by environmental groups have now subjected water transfers to individual National Pollutant Discharge and Elimination Systems (NPDES) permits.⁵ These developments continue to place enormous strains on both EPA and the states, who are responsible for administering the CWA permitting program, not to mention the regulated communities who must bear the costs of complying with NPDES permits. Yet the ultimate question remains—does expanding the universe of NPDES permits improve and protect the quality of our nation’s waters? If so, which permit approaches are most suited for the essential goal of maximizing protection?

Within EPA, the Office of Water’s reach, which controls “point sources” of pollution through the NPDES, includes the permitting of animal feeding operations, aquaculture, biosolids, industrial wastewater, municipal wastewater, industrial discharges to publicly operated treatment works (POTWs) through the national pretreatment program,

pesticide applications, and stormwater and vessel discharges.⁶ The NPDES program has grown from 60,000 permits in the early 1970s to well over 700,000 today. According to EPA figures, the breakdown between individual and general permits is as follows:⁷

Individual Permits (IPs): In total, approximately 46,700 permits.

- Majors: 6,700
 - POTWs: 4,200
 - Non-POTWs: 2,500
- Minors: 39,000
 - POTWs: 10,000
 - Non-POTWs: 29,000
- Stormwater Phase I MS4: 1,000

General Permits (GPs): In total, approximately 775 general permits cover around 684,500 permittees.

Broken down by large topic area estimates:

- Vessels: 69,000
- Pesticide applications: 365,000
- Stormwater: 180,500
 - Phase II MS4: 6,000
 - Industrial Stormwater: 90,000
 - Large Construction Activity: 36,500 per year
 - Small Construction Activity: 48,000
- Other non-stormwater: 70,000

Once an individual application is submitted, it typically takes six months or longer to gain coverage. Such permits are only valid for five years and holders must apply for renewal 180 days before the permit’s expiration date. However, the sheer number of these documents has overwhelmed state and federal capacity and many have been administratively continued indefinitely, creating the much lamented “NPDES permit backlog,” which has been a continuing challenge since the 1980s as the volume of IPs has grown.⁸ In some cases, it can take up to five years to reissue an individual permit for a major discharger.⁹ EPA has worked closely with the States over the last decade to reduce the permitting backlog under the Permitting for Environmental Results initiative, but the complexity and

3. 33 U.S.C. § 101(a).

4. See 33 U.S.C. § 101(a)(1) and (2).

5. See FORESTER DAILY NEWS, *What’s All the Fuss?* (May 2, 2007), available at <http://foresternetwork.com/daily/water/whats-all-the-fuss/>.

6. EPA’s reach is significantly magnified through state-delegated NPDES authority, which has been granted to all but four states and territories. Only Idaho, Massachusetts, New Hampshire, and New Mexico are not delegated programs. See http://www.ecos.org/section/states/enviro_actlist, for a list of delegated environmental programs.

7. U.S. EPA NPDES Permit Writer’s Course, EPA Office of Water, communication with D. Nagle, March 23, 2016; see also NPDES Permit Status Reports, available at <https://www.epa.gov/npdes/npdes-permit-status-reports>.

8. See EPA Office of Inspector General Report, *Efforts to Manage Backlog of Water Discharge Permits Need to Be Accompanied by Greater Program Integration*, June 13, 2005, Report No. 2005-P-00018, available at <https://www.epa.gov/office-inspector-general/report-efforts-manage-backlog-water-discharge-permits-need-be-accompanied>.

9. *Id.* at 14.

resource demands of managing the IP program will continue to be a major program challenge.

Conversely, EPA's "General Permit Inventory" covers a lot of activity—as noted above, the pesticide general permits alone cover 365,000 applicators—and, as Biber and Ruhl suggest, they are significantly easier and less expensive to apply for and obtain than IPs and are simpler to renew and administer.¹⁰ Their appeal is obvious.

II. Misconceptions Regarding Enforcement and Liability Should Not Favor Individual or General Permits

One countervailing argument to GPs, according to Biber and Ruhl, is that they "are, in effect, an agency invitation for regulated parties to undertake activities without legal liability," a criticism often voiced by those opposed to general permits. The authors of this paper disagree, however, with the characterization that general permit holders are without liability. While it is certainly true that a GP holder is more likely to evade enforcement than an IP holder, simply based on the sheer number of GPs and odds of getting caught, GP holders are legally subject to the same civil and criminal penalties as IP holders.

The Biber/Ruhl harm/variance lens is also consonant with the types of harms that a permit is intended to regulate and manage. Toward this end, since GPs cover discharges with significantly less harm to the environment, traditional enforcement is less of an issue than major discharges covered under IPs. But the assumption that traditional enforcement is less effective or impactful for GPs versus IPs is incorrect as recent enforcement actions involving general permits have resulted in multi-million dollar fines and settlements.¹¹ In addition, the notion that traditional enforcement approaches that might "shield" GP holders will remain static, or should remain static, is also incorrect. For example, EPA's Next Generation Compliance initiative is developing more powerful tools, including sensors with more sensitive detection limits, and more of those tools are being deployed at the micro-landscape level. In addition, new pollution detection and initial response tools will further empower enforcement by local communities and the general public.¹² This development is inevitable and important as the future of pollution control continues to focus on the myriads of diffuse sources, which can only be effectively regulated through an integrated, holistic approach that lends itself to a GP-type permitting approach.

III. General Permits Are Effective Tools to Address 21st Century Pollution Problems

In 2010, the National Academy of Public Administration published a report titled *Taking Environmental Protection to the Next Level*,¹³ wherein NAPA argued:

When we fertilize our lawns, drive our cars, wash our dishes, or go about our other daily routines, we contribute to making our streams, rivers, bays, and oceans unswimmable and toxic to marine life. The same potential arises as farmers grow the food we eat, when businesses dispose of the byproducts of their work, and when builders create new communities. In short, the necessities of life and pollution of our environment are inextricably linked.

We simply cannot expect twentieth century tools to effectively solve twenty-first century environmental problems, and must use a more holistic, watershed-based approach, based on targeted geographic responses, in order to deal with these diffuse pollution problems. Some have discussed this in terms of regulating for sustainability:

Such approaches do not change applicable regulations; rather they offer flexibility in the implementation and associated timing of regulatory requirements. EPA's support of integrated watershed approaches, such as the use of watershed-based Total Maximum Daily Loads (TMDLs) and watershed-based permitting, are examples of more holistic approaches to geographic areas. These approaches also demonstrate how EPA can play a role as a "civic enabler" in implementing its regulatory programs, advancing community based approaches that support collaborative place-based work.¹⁴

The use of GPs in the case of stormwater and vessel discharges, for example, was an appropriate use of the general permitting scheme for a very large number of regulated but mostly minor discharges. As the authors suggest, we believe there is a need and opportunity to use more GPs on a watershed-based approach where, for example, a TMDL has been established, along with load and waste load allocations, to restore impaired waters. This approach has been used effectively, for example, in the Commonwealth of Virginia, where the state's general NPDES permit allows the flexibility for regulated entities to engage in nutrient trading and offsets to reduce pollution from existing and future sources.¹⁵

We also agree with the authors that the greater up-front investment in developing robust general permits can lead to better regulatory programs and environmental out-

10. See also <https://cfpub.epa.gov/npdes/permitissuance/genpermits.cfm>.

11. In 2008, EPA and DOJ brought an enforcement action against four of the nation's largest home builders for \$4.3M to resolve alleged violations involving the Construction General Permit. See *United States v. KB Home, Centex Homes, Pulte Homes, and Richmond American Homes*. Copies of the complaints and consent decrees available at <https://www.epa.gov/enforcement/home-builders-clean-water-settlement>.

12. See Kat Austen, *Environmental Science: Pollution Patrol*, 517 NATURE 136 (Jan. 7, 2015), available at <http://www.nature.com/news/environmental-science-pollution-patrol-1.16654>.

13. NAPA report, available at <http://www.napawash.org/wp-content/uploads/2007/07-07.pdf>.

14. See George Wyeth & Beth Termini, *Regulating for Sustainability*, 45 ENVTL. L. 663 (2015), available at <https://law.lclark.edu/live/files/20064-45-3-wyethpdf>.

15. See VPDES Watershed General Permit for Nutrient Discharges to the Chesapeake Bay, available at <http://www.deq.virginia.gov/Programs/Water/PermittingCompliance/PollutionDischargeElimination/NutrientTrading.aspx>.

comes. Drawing upon the experience of other countries, such as Australia, where the approach to protecting water quality is a more flexible bottom-up approach spearheaded by local governments, we believe that a general permitting scheme would encourage more flexible and collaborative efforts at the local and regional levels to address complex and intractable water quality problems.¹⁶

IV. Individual Permits Will Continue to Serve as an Integral Tool for Discharges at the End of the Harm/Variance Spectrum

While there is doubtless some “waste[d] energy . . . collecting unnecessary or redundant information” in specific permits, we agree with the authors that they can provide “a substantial advantage to incumbents in an economic field,” and they have played a critical role in the effort to meet the CWA’s lofty objectives. Generally speaking, an individual permit is written to reflect the unique site-specific conditions of a discharger (based on information submitted by that discharger) and to meet the over-riding mandate to protect the receiving water.

In general, we have found that most individual permit holders (particularly municipal or investor-owned municipal utilities) make every effort to meet their discharge limits and can be considered true “environmentalists” in that they are the first line of defense in protecting our nation’s rivers, lakes, and oceans. Where those permit holders have been lax, many non-governmental organizations, motivated by a passion for “their” waterbody, have scrutinized discharge monitoring reports, literally measuring molecules at the end of pipes, and held them to account. It is the specificity of the “specific” permits that makes this pas-de-deux possible, and it has led directly to great improvements in the nation’s water quality.

Some would argue the opposite, that enforcement actions based on NPDES permits typically focus on relatively small impacts to the environment that drain already cash-strapped municipalities and fail to focus on the overall health of the waterbody. For example, the last two decades,

the EPA and DOJ have focused on wet weather consent decrees, forcing some communities to spend billions of dollars on underground tunnels in order to reduce the number of wet weather overflows that violate a municipality’s individual permit provisions. While the objective of reducing raw sewage from entering our rivers is a laudable goal, inflexible approaches based on the construct of an “individual permit” have been costly and, in some cases, failed to generate meaningful environmental improvements or benefits to public health. Such failures have led to a call for greater permitting flexibility through, for example, EPA’s integrated planning approach.¹⁷

We also strongly agree with the authors in their cautionary advice to the regulators to avoid loading up general permits with too many requirements, as the consequent loss of flexibility “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 specific-permitting procedures.” We would also extend that argument to the erosion of the economic benefits associated with general permits. For example, there is a strong push by environmental groups and some states to impose numeric limits and extensive monitoring within general permits, thus significantly increasing the burden and costs of administering the GPs.

V. Conclusion

At least in the context of the CWA, the Biber/Ruhl article is timely and adds great value to the continuing legal and policy debate on alternatives to tackling some of the intractable environmental problems that continue to elude our aging regulatory programs. While individual permits will continue to be the most effective tool for regulating individualized pollution sources with greater potential for environmental harm, despite the intensive resources required, shifting toward general permits that are cheaper to enter, easier to renew and create less administrative burdens on agencies and the regulated community is the wave of the future. Herein, Biber and Ruhl have provided a useful rationale and roadmap for making that transition.

16. *Review of Urban Water Quality Regulation in Australia*, Australian National Water Commission, Waterlines Report Series No. 47, May 2011, available at http://archive.nwc.gov.au/_data/assets/pdf_file/0003/8265/47_review_of_urban_water.pdf.

17. See Memo from Nancy Stoner titled “Integrated Municipal Stormwater and Wastewater Planning Approach Framework,” June 5, 2012, https://www3.epa.gov/npdes/pubs/integrated_planning_framework.pdf.