

# Notices

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This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### Adoption of Recommendations

**AGENCY:** Administrative Conference of the United States.

**ACTION:** Notice.

**SUMMARY:** The Administrative Conference of the United States adopted three recommendations at its Sixty-fourth Plenary Session. The appended recommendations address: Technical Assistance by Federal Agencies in the Legislative Process; Declaratory Orders; and Designing Federal Permitting Programs.

**FOR FURTHER INFORMATION CONTACT:** For Recommendation 2015–2, Alissa Ardito; for Recommendation 2015–3, Amber Williams; and for Recommendation 2015–4, Connie Vogelmann. For all three of these actions the address and telephone number are: Administrative Conference of the United States, Suite 706 South, 1120 20th Street NW., Washington, DC 20036; Telephone 202–480–2080.

**SUPPLEMENTARY INFORMATION:** The Administrative Conference Act, 5 U.S.C. 591–596, established the Administrative Conference of the United States. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies and makes recommendations to agencies, the President, Congress, and the Judicial Conference of the United States for procedural improvements (5 U.S.C. 594(1)). For further information about the Conference and its activities, see [www.acus.gov](http://www.acus.gov). At its Sixty-fourth Plenary Session, held December 4, 2015, the Assembly of the Conference adopted three recommendations.

Recommendation 2015–2, *Technical Assistance by Federal Agencies in the Legislative Process*. This recommendation offers best practices for agencies when providing Congress with

technical drafting assistance. It is intended to apply to situations in which Congress originates the draft legislation and asks an agency to review and provide expert technical feedback on the draft without necessarily taking an official substantive position. The recommendation urges agencies and Congress to engage proactively in mutually beneficial outreach and education. It highlights the practice of providing congressional requesters with redline drafts showing how proposed bills would affect existing law; suggests that agencies consider ways to involve appropriate agency experts in the process; and urges agencies to maintain a strong working relationship between legislative affairs and legislative counsel offices.

Recommendation 2015–3, *Declaratory Orders*. This recommendation identifies contexts in which agencies should consider the use of declaratory orders in administrative adjudications. It also highlights best practices relating to the use of declaratory orders, including explaining the agency's procedures for issuing declaratory orders, ensuring adequate opportunities for public participation in the proceedings, responding to petitions for declaratory orders in a timely manner, and making declaratory orders and other dispositions of petitions readily available to the public.

Recommendation 2015–4, *Designing Federal Permitting Programs*. This recommendation describes different types of permitting systems and provides factors for agencies to consider when designing or reviewing permitting programs. The recommendation discusses both “general” permits (which are granted so long as certain requirements are met) and “specific” permits (which involve fact-intensive, case-by-case determinations), as well as intermediate or hybrid permitting programs. It encourages agencies that adopt permitting systems to design them so as to minimize burdens on the agency and regulated entities while maintaining required regulatory protections.

The Appendix below sets forth the full texts of these three recommendations. The Conference will transmit them to affected agencies, Congress, and the Judicial Conference of the United States. The recommendations are not binding, so the entities to which they are addressed

will make decisions on their implementation.

The Conference based these recommendations on research reports that are posted at: <http://www.acus.gov/64th>. A video of the Plenary Session is available at: [new.livestream.com/ACUS/64thPlenarySession](http://new.livestream.com/ACUS/64thPlenarySession), and a transcript of the Plenary Session will be posted when it is available.

Dated: December 10, 2015.

**Shawne C. McGibbon,**  
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## APPENDIX—RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### Administrative Conference Recommendation 2015–2 Technical Assistance by Federal Agencies in the Legislative Process

*Adopted December 4, 2015*

Federal agencies play a significant role in the legislative process.<sup>1</sup> While agencies can be the primary drafters of the statutes they administer, it is more common for agencies to respond to Congressional requests to provide technical assistance in statutory drafting. Despite the extent of agency involvement in drafting legislation, the precise nature of the interactions between agencies and Congress in the drafting process remains obscure.

Generally speaking, federal agencies engage in two kinds of legislative drafting activities: substantive and technical. Legislative activities considered “substantive” are subject to the Office of Management and Budget (OMB) coordination and preclearance process governed by OMB Circular A–19, which does not explicitly define substantive legislative activities or technical legislative assistance.<sup>2</sup> Substantive legislative activities include the submission of agencies’ annual legislative programs, proposed legislation such as draft bills and supporting documents an agency may present to Congress, any endorsement of federal legislation, and the submission of agency views on pending bills before Congress as well as official agency testimony before a Congressional committee.<sup>3</sup>

Agencies also provide Congress with technical drafting assistance. Rather than originating with the agency or the Administration, in the case of technical assistance, Congress originates the draft

<sup>1</sup> See Christopher J. Walker, *Federal Agencies in the Legislative Process: Technical Assistance in Statutory Drafting 1–4* (November 2015), available at <https://www.acus.gov/report/technical-assistance-draft-report> [hereinafter Walker Report].

<sup>2</sup> Office of Management and Budget, Circular A–19 (revised Sept. 20, 1979), [https://www.whitehouse.gov/omb/circulars\\_a019/](https://www.whitehouse.gov/omb/circulars_a019/) [hereinafter OMB Circular A–19].

<sup>3</sup> *Id.* sections (6)(a) and (7)(a).

legislation and asks an agency to review and provide feedback on the draft. Circular A–19 advises agencies to keep OMB informed of their activities and to clarify that agency feedback does not reflect the views or policies of the agency or Administration.<sup>4</sup> No other standard procedures or requirements apply when agencies respond to Congressional requests—from committee staff, staff of individual Members of Congress, or Members themselves—for technical assistance. In consequence, agency procedures and practices appear multifarious.

Congress frequently requests technical assistance from agencies on proposed legislation. Congressional requests for technical assistance in statutory drafting can range from review of draft legislation to requests for the agency to draft legislation based on specifications provided by the Congressional requester. Despite the fact that technical assistance does not require OMB preclearance, there is some consistency in the assistance process across agencies. Agencies often provide technical drafting assistance on legislation that directly affects those agencies and respond to Congressional requests regardless of factors such as the likelihood of the legislation being enacted, its effect on the agency, or the party affiliation of the requesting Member. Agency actors involved in the process include the agency's legislative affairs office, program and policy experts, and legislative counsel.<sup>5</sup> In some agencies, regulatory counsel also participate routinely. Moreover, agency responses range from oral discussions of general feedback to written memoranda to suggested legislative language or redlined suggestions on the draft legislation.

A well-run program to provide Congress with technical assistance on draft legislation yields important benefits to the agency. Responding to such Congressional requests assists the agency in maintaining a healthy and productive relationship with Congress, ensures the proposed legislation is consonant with the existing statutory and regulatory scheme, helps educate Congressional staff about the agency's statutory and regulatory framework, and keeps the agency informed of potential legislative action that could affect the agency.

Although agencies, as a rule, strive to respond to all requests, they continue to face challenges in providing technical assistance. Congressional staff may be unfamiliar with an agency's enabling legislation and governing statutes. Technical assistance provided informally does not always involve the offices of legislative counsel or legislative affairs, although both offices should be kept informed and involved. The distinction between substantive and technical drafting assistance is not always self-evident, and Congressional requesters of technical drafting

assistance often are actually seeking substantive feedback from the agency experts on the proposed legislation. The provision of technical assistance on appropriations legislation presents unique demands on both agency legislative counsel and budget offices.

Various agencies have developed distinct practices and procedures to address the provision of technical assistance that the Conference believes should be considered best practices. For example, many agencies have established internal guidelines governing the agency procedures for providing technical assistance. Memorializing agency procedures ensures that the provision of technical assistance is consistent throughout the agency. By stating in written guidance that legislative counsel and legislative affairs offices must be involved, for instance, agencies can help diminish the prospect of substantive assistance being provided under the guise of technical assistance. Although agencies should have flexibility to adopt procedures that are tailored to their agency-specific structures, norms, and internal processes, memorializing their legislative drafting processes, as the Departments of Homeland Security, Interior, and Labor have done, can ensure that all agency officials involved understand the processes and can help educate personnel new to the agency.

Some agencies, the Department of Housing and Urban Development among them, utilize a practice of providing Congressional requesters with a Ramseyer/Cordon draft as part of the technical assistance response. A Ramseyer/Cordon draft is a redline of the existing law that shows how the proposed legislation would affect current law by underscoring proposed additions to existing law and bracketing the text of proposed deletions. Providing such drafts, when feasible, helps Congressional staffers unfamiliar with the agency's governing statutes to better comprehend the ramifications of the contemplated legislation.

Maintaining separate roles for legislative affairs and legislative counsel offices also has proven beneficial. Legislative affairs staff engage Congress directly and must often make politically sensitive decisions when communicating with Congress. By contrast, legislative counsel offices, by providing expert drafting assistance regardless of the Administration's official policy stance on the legislation, maintain the non-partisan status of the agency in the legislative process. These offices play important yet distinct roles in an agency's legislative activities that help maintain a healthy working relationship with Congress and enhance the recognition of the agency's expertise in legislative drafting and in the relevant subject matter. This division, especially when both offices communicate regularly, can help agencies monitor the line between legislative assistance that is purely technical and assistance that merges into an agency's official views on pending legislation.

Appropriations legislation presents agencies with potential coordination problems as substantive provisions or "riders" may require technical drafting assistance, but agency processes for reviewing appropriations legislation are

channeled through agency budget or finance offices. It is crucial for the budget office to communicate with an agency's legislative counsel office to anticipate and later address requests for technical assistance related to appropriations bills. Agencies have taken a variety of approaches to address this issue, ranging from tasking a staffer in an agency legislative counsel office with tracking appropriations bills; to holding weekly meetings with budget, legislative affairs, and legislative counsel staff; to emphasizing less informally that the offices establish a strong working relationship.

Educational outreach on the part of both agencies and Congress, by further developing expertise on both sides and by cultivating professional working relationships, has the potential to enhance the provision of technical assistance over time. In-person educational efforts may include briefings of Members and their staff on an agency's statutory and regulatory scheme as well as its programs and initiatives, face-to-face meetings with legislative counsel and Congressional staff, and training in statutory drafting for both Congressional staff and agency legislative counsel attorneys.

The following recommendations derive from the best practices that certain agencies have developed to navigate these challenges and focus on both external practices that may strengthen agencies' relationship with Congress in the legislative process and internal agency practices to improve the technical drafting assistance process and external practices that may strengthen agencies' relationship with Congress in the legislative process.

#### Recommendation

##### Congress–Agency Relationship in the Legislative Process

1. Congressional committees and individual Members should aim to reach out to agencies for technical assistance early in the legislative drafting process.
2. Federal agencies should endeavor to provide Congress with technical drafting assistance when asked. A specific Administration directive or policy may make the provision of technical assistance inappropriate in some instances. Agencies should recognize that they need not expend the same amount of time and resources on each request.
3. To improve the quality of proposed legislation and strengthen their relations with Congress, agencies should be actively engaged in educational efforts, including in-person briefings and interactions, to educate Congressional staff about the agencies' respective statutory and regulatory frameworks and agency technical drafting expertise.

##### Agency Technical Drafting Assistance

4. To improve intra-agency coordination and processing of Congressional requests for drafting assistance, agencies should consider memorializing their agency-specific procedures for responding to technical assistance requests. These procedures should provide that requests for technical assistance be referred to the agency's office with responsibility for legislative affairs.

<sup>4</sup> *Id.* section 7(i). Independent agencies routinely provide technical assistance, outside of the OMB Circular A–19 process, in line with their enabling statutes.

<sup>5</sup> While this recommendation uses the term "legislative affairs office," some agencies may have different offices or individuals responsible for legislative affairs, and this recommendation encompasses such arrangements.

5. Similarly, agencies should consider ways to better identify and involve the appropriate agency experts—in particular, the relevant agency policy and program personnel in addition to the legislative drafting experts—in the technical drafting assistance process. These efforts may involve, for example, establishing an internal agency distribution list for technical drafting assistance requests and maintaining an internal list of appropriate agency policy and program contacts.

6. When feasible and appropriate, agencies should provide the Congressional requester with a redline draft showing how the bill would modify existing law (known as a Ramseyer/Cordon draft) as part of the technical assistance response.

7. Agencies should maintain the distinct roles of, and strong working relationships among, their legislative affairs personnel, policy and program experts, and legislative counsel.

8. Agencies also should strive to ensure that the budget office and legislative counsel communicate so that legislative counsel will be able to provide appropriate advice on technical drafting of substantive provisions in appropriations legislation.

#### Administrative Conference Recommendation 2015-3

##### Declaratory Orders

*Adopted December 4, 2015*

Providing clarity and certainty is an enduring challenge of administrative governance, particularly in the regulatory context. Sometimes statutes and regulations fail to provide sufficient clarity with regard to their applicability to a particular project or transaction. In such instances, businesses and individuals may be unable or unwilling to act, and the consequences for the economy, society, and technological progress can be significant and harmful. The predominant way agencies address this problem is by providing guidance to regulated parties.<sup>1</sup> Although the many forms of agency guidance—such as interpretive rules and policy statements—do much to dispel regulatory uncertainty, they cannot eliminate it entirely. This is because they are generally informal and not legally binding on

the agency that issues them. Regulated parties may usually be able to rely upon them, but if an agency changes its position after a transaction is completed, the consequences for the affected party can be severe. As the potential costs of misplaced reliance rise, even a small chance that an agency will not adhere to a position offered in guidance can become intolerable.

When it enacted the Administrative Procedure Act (APA) in 1946, Congress included a provision designed to address this difficult problem. In 5 U.S.C. 554(e), it provided that an “agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.”<sup>2</sup> The declaratory order is a type of adjudication that serves an important advice-giving function. It may be issued in response to a petition filed with the agency<sup>3</sup> (as is usually the case) or on the agency’s own motion. It is well tailored to provide a level of certainty that may not be achievable using more informal kinds of guidance. This is because it is non-coercive and yet legally binds the agency and the named party, but only on the facts assumed in the order. The agency remains free to change its position with adequate explanation in a subsequent proceeding. It is a device that affords substantial administrative discretion—the agency may decline a request to institute a declaratory proceeding or to issue a declaratory order. An agency’s decision, be it a denial of a petition or the issuance of a declaratory order, is judicially reviewable. But the scope of review is limited, and the position an agency takes in a declaratory order is typically afforded deference,<sup>4</sup> both on judicial review and when relevant to matters at issue in subsequent or parallel litigation.

An agency may properly use a declaratory order for a wide variety of purposes, including to: (1) Interpret the agency’s governing statute or own regulations; (2) define terms of art; (3) clarify whether a matter falls within federal regulatory authority; or (4) address questions of preemption.<sup>5</sup> One occasion for doing so is in

response to a court’s request for a ruling when the court has found that the agency has primary jurisdiction over a matter being litigated. By presenting the agency’s views through a document of easily ascertainable legal effect, declaratory orders may reduce or eliminate litigation.<sup>6</sup> By using declaratory orders to address narrow questions raised by specific and uncontested facts, an agency can precisely define the legal issues it addresses and reserve related issues for future resolution, thereby facilitating an incremental approach to the provision of guidance. The resulting body of agency precedent will not only be useful to regulated and other interested parties, but may also prove invaluable to the agency when it later decides to conduct a rulemaking or other proceeding for formulating policy on a broader scale. Other uses may be possible as well. For example, an agency that conducts mass adjudication could use the declaratory order to promote uniformity by choosing to give practical and detailed guidance while also making decisional law binding on the parties to the proceeding regarding the proper application of the law to commonly encountered factual circumstances.

There are several benefits to an agency when it uses declaratory orders. First, declaratory orders promote voluntary compliance, which saves agency resources that would otherwise be spent on enforcement. Second, declaratory orders promote uniformity and fairness in treatment among the agency’s regulated parties. Third, declaratory orders facilitate communication between the agency and its regulated parties, which can help highlight issues before they become problems. Finally, declaratory orders help the agency stay current by allowing regulated parties to communicate how they are doing business so that agency officials can understand and address emerging issues.

Despite the apparent usefulness of the declaratory order as a tool of administrative governance, agencies have demonstrated a persistent reluctance to use it. Several developments may encourage agencies to overcome this traditional reluctance to use declaratory orders. First, it is now reasonably clear that agencies may issue declaratory orders in informal adjudication.<sup>7</sup> This development expands the availability of the device and also reduces the cost and procedural burden of using declaratory orders.<sup>8</sup> Second, courts today are often

<sup>1</sup> The Administrative Conference has adopted a number of recommendations on agency guidance. See Recommendation 2014-3, *Guidance in the Rulemaking Process*, 79 FR 35992 (June 25, 2014), available at <https://www.acus.gov/recommendation/guidance-rulemaking-process>; Recommendation 92-2, *Agency Policy Statements*, 57 FR 30103 (July 8, 1992), available at <https://www.acus.gov/recommendation/agency-policy-statements>; Recommendation 76-5, *Interpretive Rules of General Applicability and Statements of General Policy*, 41 FR 56769 (Dec. 30, 1976), available at <https://www.acus.gov/recommendation/interpretive-rules-general-applicability-and-statements-general-policy>; Recommendation 75-9, *Internal Revenue Service Procedures: Taxpayer Services and Complaints*, 41 FR 3986 (Jan. 27, 1976), available at <https://www.acus.gov/recommendation/internal-revenue-service-procedures-taxpayer-services-and-complaints>; Recommendation 71-3, *Articulation of Agency Policies*, 38 FR 19788 (July 23, 1973), available at <https://www.acus.gov/recommendation/articulation-agency-policies>.

<sup>2</sup> 5 U.S.C. 554(e) (2012); see generally Administrative Procedure in Government Agencies, Final Report of the Attorney General’s Committee on Administrative Procedure, S. Doc. No. 77-8, at 30-34 (1941) (urging Congress to include the declaratory order provision in the APA).

<sup>3</sup> An agency so authorized may assess a filing fee to help defray the cost of issuing declaratory orders in response to petitions.

<sup>4</sup> The level of deference may depend on the formality of the procedure used, see *United States v. Mead Corp.*, 553 U.S. 218 (2001), though “[c]ourts have afforded *Chevron* deference to declaratory orders issued through both formal and informal adjudication.” Emily S. Bremer, *Declaratory Orders* 25 (Oct. 30, 2015) available at <https://www.acus.gov/report/declaratory-orders-final-report> [hereinafter Bremer] (citing *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (giving *Chevron* deference to a declaratory ruling issued by the FCC through informal adjudication)).

<sup>5</sup> See generally *Ill. Terminal R.R. v. ICC*, 671 F.2d 1214 (8th Cir. 1992); *N.Y. State Comm’n on Cable Television v. FCC*, 669 F.2d 58 (2d Cir. 1982); *N.C. Utils. Comm’n v. FCC*, 537 F.2d 787 (4th Cir. 1976); *Ashland Oil & Ref. Co. v. FCC*, 421 F.2d 17 (6th Cir. 1970).

<sup>6</sup> Cf. Mitchell Rogovin & Donald L. Korb, *The Four R’s Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View from Within*, 46 Duq. L. Rev. 323,331 (2008).

<sup>7</sup> See *Am. Airlines, Inc. v. DOT*, 202 F.3d 788, 796-97 (5th Cir. 2000); *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 397 (9th Cir. 1996); *Texas v. United States*, 866 F.2d 1546, 1555-56 (5th Cir. 1989); Bremer, *supra* note 4 at 12-13, 32-33, 36-37. For example, courts have affirmed the sufficiency of basic notice-and-comment procedures when agencies issue a declaratory order in informal adjudication. See *City of Arlington v. FCC*, 668 F.3d 229, 243-45 (5th Cir. 2012), *aff’d* 133 S. Ct. 1863 (2013).

<sup>8</sup> Even if the matter is one subject by statute to formal adjudication under the APA, an agency may be able to streamline the process of issuing a declaratory order. Cf. Administrative Conference of

willing to review guidance documents and to question an agency's characterization of its action as non-binding. Agencies may be able to enhance their chances of prevailing in court by using declaratory orders—a binding, but targeted form of instruction—in lieu of non-binding, legislative guidance. Agencies may also be able to use declaratory orders to provide requisite notice to regulated parties of the agency's intention to enforce in the future a rule or principle that has previously been communicated only via non-binding guidance. Finally, new programs and new challenges facing old programs may create opportunities to beneficially expand the use of declaratory orders.

The Administrative Conference recognizes the declaratory order as a useful device to be used in appropriate circumstances. To that end, this recommendation provides guidance and best practices to agencies as they consider implementing or improving their use of declaratory orders.

#### Recommendation

1. Agencies should consider issuing declaratory orders as authorized by 5 U.S.C. 554(e), either *sua sponte* or by petition. A declaratory order can provide a legally binding decision to the parties to the proceeding, without imposing a penalty, sanction, or other liability, in order to terminate an actual or emerging controversy or to remove uncertainty in the application of existing legal requirements. With respect to entities other than the parties to the proceeding, it can provide non-binding guidance.

2. Any filing fees for issuing declaratory orders should be reasonable within the fee structure of the agency and contain appropriate exemptions and waivers.

#### Potential Uses of Declaratory Orders

3. An agency should consider issuing declaratory orders in several ways, including, but not limited, to:

(a) Communicating the agency's considered views regarding the meaning of its governing statute, regulations, or other legal documents (such as permits, licenses, certificates, or other authorizations the agency has issued);

(b) Explaining how existing legal requirements apply to proposed or contemplated transactions or other activities;

(c) Defining terms of art that are used within the agency's regulatory scheme;

(d) Clarifying whether a matter falls within the agency's regulatory authority;

(e) Clarifying a division of jurisdiction between or among federal agencies that operate in a shared regulatory space; and

(f) Addressing questions of preemption.

4. Agencies should look for opportunities to experiment with innovative uses of declaratory orders to improve regulatory programs.

#### Determining Minimal Procedural Requirements for Declaratory Orders

5. Each agency that uses declaratory orders should have written and publicly available

procedures explaining how the agency initiates, conducts, and terminates declaratory proceedings. An agency should also communicate in a written and publicly available way its preferred uses of declaratory orders.

6. When designing the procedures for its declaratory proceedings, an agency should begin by determining whether or not the matter is one that must be adjudicated according to the formal adjudication provisions of the APA. If the matter is not required by statute to be conducted under the APA's formal adjudication provisions, an agency has substantial procedural discretion, but at a minimum should provide a basic form of notice and opportunity for comment, although it need not be equivalent to the notice-and-comment process used in rulemaking.

7. Agency procedures should provide guidance regarding the information that petitioners should include in a petition for declaratory order.

#### Giving Notice and Collecting Information

8. Each agency should provide a way for petitioners and other interested parties to learn when the agency has received a petition for declaratory order or intends to issue a declaratory order on its own motion. The agency should tailor this communication according to the nature of the proceeding and the needs of potential commenters.

9. Each agency should provide a way for interested parties to participate in declaratory order proceedings.

(a) If the matter is one of broad interest or general policy, the agency should allow broad public participation.

(b) If the declaratory proceeding involves a narrow question of how existing regulations would apply to an individual party's proposed actions, the agency may choose to manage the submission of comments via an intervention process.

#### Timeliness and Availability of Declaratory Orders

10. Agencies that receive a petition for declaratory order should respond to that petition within a reasonable period of time. If an agency declines to act on the petition, it should give prompt notice of its decision, accompanied by a brief explanation of its reasons.

11. Agencies should make their declaratory orders and other dispositions on petitions available to the public in a centralized and easy-to-find location on their Web sites.

#### Administrative Conference Recommendation 2015-4

##### Designing Federal Permitting Programs

*Adopted December 4, 2015*

Regulatory permits are ubiquitous in modern society, and each year dozens of federal agencies administering their regulatory permit authority issue tens of thousands of permits covering a broad and diverse range of actions.<sup>1</sup> The APA includes

the term "permit" in its definition of "license." In addition to agency permits, the APA defines licenses to include "the whole or part of an agency . . . certificate, approval, registration, charter, membership, statutory exemption or other form of permission."<sup>2</sup> Otherwise, the APA provides little elaboration on the definition of a permit.<sup>3</sup> For purposes of this recommendation, a regulatory permit is defined as any administrative agency's statutorily authorized, discretionary, judicially reviewable granting of permission to do something that would otherwise be statutorily prohibited. This recommendation treats any agency action that meets this definition as a permit, regardless of how it is styled by the agency (*e.g.*, "license," "conditional exemption").

Permits exist on a continuum of agency regulation, falling between exemptions (in which an activity is not regulated at all) and prohibitions. Broadly speaking, there are two contrasting approaches to permitting.<sup>4</sup> In specific permitting, upon receiving an application, an agency engages in extensive fact gathering and deliberation particular to the individual circumstances of the applicant's proposed action, after which the agency issues a detailed permit tailored to the applicant's situation. In their strictest form, specific permits can demand so much of the permit applicant in terms of cost, information, and time that they closely resemble prohibitions. However, some specific permits can be lenient, with relatively few conditions placed on regulated entities.

In general permitting, an agency issues a permit that defines and approves a category of activity on its own initiative, and allows entities engaging in that activity to readily take advantage of the permit. Agency review of specific facts in any particular case is generally limited unless the agency finds good cause to condition or withdraw the general approval. In their most flexible form, general permits can resemble exemptions in form and effect, with few requirements on regulated entities and relatively little agency oversight. On the other hand, general permits may place requirements on regulated entities that aid agency oversight and enforcement. Some permits toward the more general end of the spectrum require the regulated entity to provide notice to the regulator and others do not.

Between general and specific permits lie many possible intermediate forms of permitting that can exhibit traits of both general and specific permitting.<sup>5</sup> These

and permitting systems, see 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).

<sup>2</sup> 5 U.S.C. 551(8).

<sup>3</sup> See Biber & Ruhl, *supra* note 1, at 3–4 (discussing lack of APA definition).

<sup>4</sup> *Id.* at 2–6.

<sup>5</sup> *Id.* at 8–10 (discussing possible hybrid permitting and providing an example). For instance, some of the nationwide permits utilized by the Army Corps of Engineers to regulate the fill of wetlands pursuant to Section 404 of the Clean Water Act require permittees to provide notice to the agency before proceeding with development

the United States, Recommendation 70–3, *Summary Decision in Agency Adjudication*, 38 FR 19785 (July 23, 1973). See generally Weinberger v. Hynson, Westcott & Dunning, 412 U.S. 625 (1973).

<sup>1</sup> Eric Biber & J.B. Ruhl, *Designing Regulatory Permits 2* (2015), <https://www.acus.gov/report/licensing-and-permitting-final-report>. For a more complete discussion of different types of permits

permits, referred to in this recommendation interchangeably as “intermediate” or “hybrid” permits, may call for intermediate levels of agency review or intermediate requirements to be met by regulated parties, or may contain a mix of features from both general and specific permitting. Intermediate permits provide agencies with significant flexibility, allowing them to tailor permitting to the regulated activity.

This recommendation focuses on the distinction between general and specific permits, and considers intermediate permits as well. It does not specify situations in which exemptions are appropriate or evaluate the extent to which general permits may be preferable to exemptions. Marketable permits, in which permits are bought and traded by regulated entities, may also prove beneficial to agencies, the regulated community, and the public in many circumstances.<sup>6</sup>

General and specific permitting differ in both the system used to issue the permit and in the way permits are issued under the system.<sup>7</sup> In specific permitting, the agency issues a rule outlining the process and standards for obtaining permits, after which regulated entities apply for permits and the agency reviews the submissions, often with public input and judicial review. In general permitting, the agency often promulgates a rule outlining the precise conditions under which regulated entities may take advantage of the permit. This approach imposes significant burdens on the agency upfront; however, once in place, the process of permitting is relatively streamlined and sometimes provides fewer opportunities for public input and judicial review. Although some agencies have traditionally relied primarily on specific permits, general permits may offer agencies advantages in efficiency or resource use.

Most statutes delegate considerable discretion to agencies to decide at what point on the spectrum from general to specific to implement a permitting system.<sup>8</sup> Whether an agency adopts a general or specific permitting system, or an intermediate system, can have significant impacts on the agency, the regulated entities, and third parties

activities. The notice may require substantial amounts of information (including detailed mitigation plans), and the permittee may not be able to proceed with development until directly authorized by the agency. These nationwide permits have elements of both a general permit (they apply to a category of activities, do not require the full range of applicant information that individual permits under Section 404, require and do not require the agency to do the full amount of environmental review associated with individual permits) and a specific permit (they still require substantial information to be submitted by the applicant and may require prior approval by the agency before permitted activities can be initiated).

<sup>6</sup> Permit marketability lies outside the continuum of general permits to specific permits.

<sup>7</sup> *Id.* at 6–7.

<sup>8</sup> For example, the Migratory Bird Treaty Act provides almost no guidance as to the use of general versus specific permits. See 16 U.S.C. 703 and 704. Section 404 of the Clean Water Act lays out specific factors that must be met in order to use general permits. See 33 U.S.C. 1344(e)(1) and (2). Both of these programs are described in case studies accompanying the report.

affected by the permitting action. If Congress decides to specify which type of permitting system an agency should adopt, Congress may want to consider the guidance provided in this recommendation.

In recent years, there has been increasing public concern over the extent to which inefficiencies in the permitting process delay necessary infrastructure reform.<sup>9</sup> As an initial step, in 2012, Executive Order 13604 established a steering committee to “facilitate improvements in Federal permitting and review processes for infrastructure projects.”<sup>10</sup> The order also established an online permit-tracking tool, the Federal Infrastructure Projects Dashboard. The Steering Committee and Dashboard serve to enhance interagency coordination and provide permit tracking to improve agency timeliness.<sup>11</sup> Congress has also been considering modifying the permitting process in various ways.<sup>12</sup> In seeking to reform existing permitting systems or establish a new permitting system, Congress and agencies should also be aware of the comparative advantages of general and specific permits and design or modify such systems accordingly.

Although each permitting system is different, and an agency must tailor its procedures to meet both its statutory mandate and the needs of the particular program at issue, agencies face a number of common considerations when designing or reviewing a permitting system. There are many circumstances in which general permits may save agencies time or resources over specific permits without compromising the goals and standards of the regulatory program, and this recommendation provides guidance on when an agency might benefit most from using a general permitting system. This recommendation identifies a number of elements that should be considered in determining whether an agency should adopt a general permitting system, a specific permitting system, or an intermediate or hybrid system somewhere between the two.

#### Recommendation

##### Congressional Delegation of Permitting Power

1. When Congress delegates permitting power to an agency, it should consider

<sup>9</sup> See, e.g., Philip K. Howard, Common Good, Two Years Not Ten Years: Redesigning Infrastructure Approvals (2015), [http://commongood.3cdn.net/c613b4cfda258a5fcb\\_e8m6b5t3x.pdf](http://commongood.3cdn.net/c613b4cfda258a5fcb_e8m6b5t3x.pdf).

<sup>10</sup> Performance of Federal Permitting and Review of Infrastructure Projects, 77 FR 18885, 18888 (Mar. 28, 2012) (to be codified at 3 CFR part 100).

<sup>11</sup> *Id.* at 18,887–8. The reforms promoted by E.O. 13604 are largely in accord with the Administrative Conference’s Recommendation 1984–1, *Public Regulation of Siting of Industrial Development Projects*, 49 FR 29938 (July 25, 1984). Specifically, Recommendation 1984–1 encouraged interagency coordination of permitting, the establishment of permitting deadlines, and timely processing of permit applications.

<sup>12</sup> See, e.g., H.R. 348, 114th Cong. (2015); H.R. 351, 114th Cong. (2015); H.R. 89, 114th Cong. (2015); S. 33, 114th Cong. (2015); H.R. 161, 114th Cong. (2015). These bills are cited merely as indications of Congressional interest in the permitting process, and the Conference has not reviewed and does not endorse any of their provisions.

whether to specify which type(s) of permitting system(s) on the spectrum from general to specific permitting systems an agency may adopt.

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 3–4 when determining the preferred type of permitting system to mandate. If Congress decides to give agencies discretion on which system to adopt, Congress should consider requiring that agencies make specific findings about the factors discussed in recommendations 3–4 in order to ensure agencies use general or specific permitting authority appropriately.

##### Agency Establishment of Permitting Systems

3. When an agency designs a permitting system, the agency should be cognizant of the resources, both present and future, that are required to develop and operate the system. In particular, the agency should consider that a general permitting system may require significant resources during the design phase (especially if system design triggers additional procedural or environmental review requirements), but relatively fewer resources once the system is in place. A specific permitting system may require fewer resources upfront but significant resources in its application. The agency should balance resource constraints with competing priorities and opportunity costs.

4. An agency should consider the following additional factors when deciding what type of permitting system, if any, to adopt.

(a) The following conditions weigh in favor of designing a permitting system toward the general end of the spectrum:

- i. The effects of the regulated activity are small in magnitude, both in individual instances and from the cumulative impact of the activity;
- ii. The variability of effects expected across instances of the regulated activity is low;
- iii. The agency is able to expend the upfront resources to design a general permitting system and can subsequently benefit from the reduced administration costs a general permitting system requires to enforce;
- iv. The agency wishes to encourage the regulated activity or desires to keep barriers to entry low;
- v. The agency does not need to collect detailed information about the regulated activity or regulated parties;
- vi. The agency does not need to tailor permits to context-specific instances of the activity;
- vii. The agency does not need to monitor the regulated activity closely and does not believe that the information that might be provided by specific permits is needed to facilitate enforcement; or
- viii. The agency does not need to exercise significant enforcement discretion to readily enforce the permitting system.

(b) The following conditions weigh in favor of designing a permitting system toward the specific end of the spectrum:

- i. The effects of the regulated activity are large in magnitude, either in individual instances or from the cumulative impact of the activity;

ii. The variability of effects expected across instances of the regulated activity is high;

iii. The agency is unable to expend the upfront resources necessary to design a general permitting system or the agency can absorb the higher administration costs necessary to enforce a specific permitting system;

iv. The agency believes that specific controls on particular regulated activities are desirable to reduce, control, or mitigate the negative effects of the regulated activity, or is less concerned about relatively high barriers to entry;

v. The agency needs detailed information about the regulated activity or regulated parties;

vi. The agency needs to tailor permits to context-specific instances of the activity;

vii. The agency needs to monitor the regulated activity closely, and concludes the information provided in specific permits will facilitate enforcement; or

viii. The agency needs to have discretion in enforcing the permitting system against individual entities.

(c) An agency should weigh all the factors and consider implementing a hybrid permitting system that has features of both general and specific permits if the factors described above do not weigh strongly in favor of either general or specific permits or cut against each other.

#### Agency Review of Existing Permitting Structures

5. Subject to budgetary constraints and other priorities, agencies are encouraged to conduct periodic reviews of their existing permitting structures, consistent with the Administrative Conference's Recommendation 2014-5, *Retrospective Review of Agency Rules*.

6. In reviewing existing permitting structures, agencies should consider the factors in recommendations 3-4 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.

7. Subject to budgetary and legal constraints, including the Paperwork Reduction Act and other statutory restrictions on data collection and dissemination, agencies should consider incorporating data-collection into new and existing permitting systems to aid analysis and review.

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## DEPARTMENT OF AGRICULTURE

### Food Safety and Inspection Service

[Docket No. FSIS-2014-0034]

#### Availability of FSIS Compliance Guideline for Controlling *Salmonella* and *Campylobacter* in Raw Poultry

AGENCY: Food Safety and Inspection Service, USDA.

**ACTION:** Notice of availability and opportunity for comment.

**SUMMARY:** The Food Safety and Inspection Service (FSIS) is announcing the availability of and requesting comment on the revised guideline to assist poultry establishments in controlling *Salmonella* and *Campylobacter* in raw poultry. The Agency has revised its guideline to provide updated information for establishments to use to control pathogens in raw poultry products with the goal of reducing human illnesses associated with consuming poultry contaminated with *Salmonella* and *Campylobacter*. The guideline represents the best practice recommendations of FSIS based on scientific and practical considerations. This document does not represent regulatory requirements. By following this guideline, poultry establishments should be able to produce raw poultry products that have less contamination with pathogens, including *Salmonella* and *Campylobacter*, than would otherwise be the case.

**DATES:** Submit comments on or before February 16, 2016.

**ADDRESSES:** A downloadable version of the compliance guideline is available to view and print at [http://www.fsis.usda.gov/Regulations\\_&Policies/Compliance\\_Guides\\_Index/index.asp](http://www.fsis.usda.gov/Regulations_&Policies/Compliance_Guides_Index/index.asp). No hard copies of the compliance guideline have been published.

FSIS invites interested persons to submit comments on this notice. Comments may be submitted by one of the following methods:

Federal eRulemaking Portal: This Web site provides the ability to type short comments directly into the comment field on this Web page or attach a file for lengthier comments. Go to <http://www.regulations.gov/>. Follow the on-line instructions at that site for submitting comments.

Mail, including CD-ROMs: Send to Docket Clerk, U.S. Department of Agriculture, Food Safety and Inspection Service, Patriots Plaza 3, 1400 Independence Avenue SW., Mailstop 3782, Room 8-163B, Washington, DC 20250-3700.

Hand- or courier-delivered submittals: Deliver to Patriots Plaza 3, 355 E Street SW., Room 8-163A, Washington, DC 20250-3700.

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS-2014-0034. Comments received in response to this docket will be made available for public inspection and posted without change, including any

personal information, to <http://www.regulations.gov>.

Docket: For access to background documents or to comments received, go to the FSIS Docket Room at Patriots Plaza 3, 355 E. Street SW., Room 164-A, Washington, DC 20250-3700 between 8:00 a.m. and 4:30 p.m., Monday through Friday.

**FOR FURTHER INFORMATION CONTACT:** Daniel L. Engeljohn, Ph.D., Assistant Administrator, Office of Policy and Program Development; Telephone: (202) 205-0495, or by Fax: (202) 720-2025.

#### SUPPLEMENTARY INFORMATION:

##### Background

FSIS is responsible for verifying that the nation's commercial supply of meat, poultry, and egg products is safe, wholesome, and properly labeled and packaged.

*Salmonella* and *Campylobacter* bacteria are among the most frequent causes of foodborne illness. These bacteria can reside in the intestinal tract of animals, including birds. *Salmonella* and *Campylobacter* contamination of raw poultry products occurs during slaughter operations as well as during the live-animal rearing process (e.g., on-farm contamination can coat the exterior of the bird and remain attached to the skin). Contamination with pathogens on poultry can be minimized through the use of preventative pre-harvest practices, with the use of proper sanitary dressing procedures, by maintaining sanitary conditions before and during production, and by the application of antimicrobial interventions during slaughter and thereafter during fabrication of the carcasses into parts and comminuted product.

In 2010, FSIS issued a guideline (third edition) for poultry establishments with recommendations on how to identify hazards of public health concern when conducting their hazard analysis and how to prevent and control these hazards through Hazard Analysis and Critical Control Plans (HACCP), Sanitation Standard Operating Procedures, or other prerequisite programs. FSIS has revised its guideline (fourth edition) to provide updated information for establishments to use to control pathogens in raw poultry products. FSIS has also revised the guideline to include recommendations for establishments regarding lotting and sanitary dressing procedures, pre-harvest interventions and management practices, antimicrobial interventions during slaughter and thereafter during fabrication, and the use of establishment sampling results to inform decision