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Last week, the Supreme Court handed down its much-anticipated [decision](#) in the [United States Environmental Protection Agency](#) (EPA) greenhouse gas case. At issue in that case was the question of whether the EPA was required (or allowed) to regulate existing sources of greenhouse gas [emissions](#) under the [Clean Air Act](#) and, if it was required to regulate those sources, whether it could also exempt thousands of small sources of greenhouse gases from regulation under the so-called [Tailoring Rule](#). Lots of folks are analyzing the Court's decision for its implications for the proposed EPA rule regulating greenhouse gas emissions from new power plants. But the Tailoring Rule case is important for another reason.

The Tailoring Rule was an effort by the EPA to limit the scope of its statutory mandate to require permits for greenhouse gas emissions. The Clean Air Act requires permits for emissions of pollutants from sources that emit more than a certain threshold of those pollutants (often 100 tons/year). Those thresholds only swept in thousands of major sources such as refineries when the Clean Air Act regulated "traditional" air pollutants like sulfur dioxide. But many more business operations emit more than that threshold for greenhouse gases, primarily carbon dioxide. The EPA at one point estimated that six million individual sources for greenhouse gases might require permits under the Clean Air Act. So the EPA, through the Tailoring Rule, sought to defer permitting requirements under the Clean Air Act for the vast majority of sources emitting carbon dioxide, focusing initially only on the largest sources.

The Tailoring Rule is therefore all about permits – the paperwork and process that agencies use to determine whether actions that are otherwise prohibited by law should nonetheless be allowed to proceed. The Tailoring Rule is also an excellent example of how permits matter. Industry challenged the Tailoring Rule, in part, gambling that if they forced the EPA to regulate all of the millions of sources of greenhouse gas emissions that might be covered by the Clean Air Act, the system would break down and greenhouse gas regulation would not occur.

The EPA's focus in the Tailoring Rule on who needs to obtain permits is not unique. Millions of permits are issued all the time by local, state, and federal agencies to allow businesses to proceed with otherwise-prohibited actions. Yet despite the importance of permits to how the

modern administrative state operates and how administrative lawyers practice, they have received scant attention in the academic literature, or even in the casebooks that teach administrative law.

We think it is important to rectify that gap by developing a general theory of the permitting power, asking: What are the different ways permits and permit systems might be structured? Why might government choose one option or another?

In answering these questions, it helps to differentiate between two kinds of permits: general permits and specific permits. General permits are permits that impose minimal burdens on permit applicants to provide information, require minimal or no public participation requirements, and require minimal or no agency assessment of the permit application. A classic example is found in the range of general permits under Section 404 of the [Clean Water Act](#), which regulates the fill of wetlands. The [U.S. Army Corps of Engineers](#), which runs the program, has issued blanket general permits that allow all individuals to fill wetlands under certain circumstances without any paperwork being filed at all. General permits are uniform, with minimal discretion for the agency as to how they apply to individual activities.

Specific permits, on the other hand, impose substantial burdens on applicants to provide information, may require significant public participation in the permit approval process, and may require major assessment and review by the permitting agency. At the extreme, a specific permit may be the paradigmatic example of red tape, with thousands of pages of application material being submitted to an agency that takes months to review and allows for comments by the public on the permitting decision. Think of the approval process for the Keystone XL pipeline. Specific permits often give agencies great discretion in whether and how they approve the permitted activity.

General and specific permits lie on opposite ends of a spectrum, but can blur into each other in many ways. And it is important to keep in mind that general permits do not necessarily mean no work for the agency that sets them up. Instead, agencies generally must spend a fair amount of up-front effort setting up the general permit system. For instance, the Corps' Section 404 general permits must go through environmental review before they are finalized and available for the public to use.

Why might an agency choose to use a general versus a specific permit?

General permits impose minimal, or at least much lighter, burdens on regulated parties. This can have a range of advantages: It might reduce political opposition to a regulatory

program, making some regulation feasible where it might otherwise be fiercely opposed; it can make operation of a regulatory program less costly for regulated parties and an agency itself; and it can reduce the barriers to entry into a regulated field, particularly for small actors. This latter factor might be particularly important if decision makers are concerned that a regulatory system is being abused by entrenched interest groups to exclude competition.

On the other hand, sometimes policymakers might want the additional paperwork that specific permits provide. More paperwork means more information, which might be helpful to us in determining whether and how to improve a regulatory program in the future. More paperwork also might facilitate enforcement against those who are violating the law. Sometimes the burdens of paperwork may even provide a social benefit. For instance, burdensome paperwork can operate as a screen to prevent people from engaging in harmful activities that have minimal benefits. And there can be political benefits from making regulated actors “pay” through a burdensome permit program.

General permits may be much more useful where regulated activities cause relatively small harms individually, or are relatively uniform in the harm they cause. The additional information that specific permits might produce are not that useful in these situations because there is little need to tailor the regulatory approach to individual circumstances. But where the harms of activities are large and might vary across circumstances, the tailoring that specific permits allow might be quite useful.

Finally, the public participation requirements for specific permits might make it easier for the public to monitor and hold the agency to account in its application of the relevant law.

All of these factors need to be taken into account when “tailoring” a permit regime to a particular policy problem. Yet, while agencies have long used the full spectrum of general and specific permits in their regulatory arsenals, we believe that in the future agencies will be increasingly likely to draw heavily on general permits. That is because in a globalizing world, there will be more examples of activities that, even though they individually cause small social harms, are extremely widespread and therefore cumulatively can cause substantial social harm.

Greenhouse gas emissions are a classic example of widespread harms with cumulative impacts. As a result, they are the kind of problem for which general permits are best suited. It is no accident that the EPA had been considering general permits as a tool for addressing the challenges of greenhouse gas regulation under the Clean Air Act, in particular using general permits to manage the great expansion of sources that would have been covered

under the Title V permitting program of the Act. In many ways, we see general permits as the future of the regulatory state.

For the full version of our analysis, see our paper [here](#) (and forthcoming in the Duke Law Journal).