Policy Primer: Permit by Rule

May 2023

What is Permit by Rule?

Permit-by-rule is a process where a permit applicant ("source") merely has to certify that it has satisfied a pre-set criteria in order to get a permit to build, excavate, develop, or take some action that normally requires government approval. The source traditionally must submit a notice that it has met the criteria laid out by the relevant government agency or body. Under this system, the default position would be automatic approval and issuance of the permit unless specific claims are presented by the government demonstrating non-compliance with the pre-set criteria.

Streamlining the Process and Expediting Enforcement

Permit-by-rule makes permitting fast and predictable for most applications. Since the criteria for a permit is specified by law, the source is able to pre-determine whether it qualifies for a permit.

Once the source has satisfied all of the requisite standards, the source's self-certification puts the government on notice that it is in compliance and that it intends to begin its project. This reduces wait time, minimizes the potential for arbitrary decision-making, and focuses scarce taxpayer resources on the enforcement of the substantive standards promulgated by the government and certified by the source.

What Permit-by-Rule is Not:

Permit-by-rule is not a way to bypass the substantive requirements that normally constitute the public safety, health, environmental or other relevant criteria established by agencies and/or legislatures. Rather, compliance with the substantive criteria becomes the sole focus of the source and basis for issuance of the permit.

At any point the source's non-compliance with substantive standards may be accompanied by swift enforcement actions to revoke the permit, penalize the source if fraudulent statements have been made, and direct resources toward either curing the defect or preventing future approval unless all appropriate criteria are satisfied.

Introduction: The Problem, an Appetite for Change, and a Solution

Permit-by-rule is a modernized approach to permitting. The old approach to permitting, whereby a party applies to the government for a permit and has to wait for the government to review the application and approve it, has become a burden upon the government. The government is often not sufficiently staffed to quickly process permit applications. And the amount of time taken for the government to approve permits hinders efficiency and progress for those trying to produce and innovate.

In recent years, there has been an appetite for better solutions for federal permitting. In one of the House of Representatives' feature pieces of legislation in 2023, the House seeks to reform several permitting laws. In H.R. 1, the House would amend the Solid Waste Disposal Act to provide the owner/operator an interim permit until an administrative body has adjudicated the application. It would also require the EPA to amend its rules to authorize "flexible air permitting," which would allow existing facilities to make changes without further review or approval by the permitting authority.[1] Both proposals are motivated by enabling the permit applicant to have the flexibility to act quickly while waiting for government approval.

H.R.1. also has a "Permitting Streamlining" Title which would reform the National Environmental Policy Act ("NEPA"), which governs all federal permits. As it stands, the current permitting process under NEPA takes an average of 4-6 years, sometimes 10, to complete an environmental study.[2] Even after the study is complete, the process takes even more time while the agency decides whether the results of the study prevent a permit from being issued. Litigation can often still follow. This represents a significant problem.

Both Republican Representative Garret Graves[3] and Democrat Joe Manchin[4] have also recently tried to reform NEPA. There is at least somewhat of a bipartisan appetite to reform federal NEPA permitting.

While each of the efforts in H.R. 1 may be beneficial, a more modernized approach to permitting would be beneficial to both the source applicants and the government alike.

Permit-by-rule would create a pre-determined set of criteria, codified in law, for a permit to be issued. The source could review the law, take the necessary actions to satisfy all of the criteria, then send in a notice with necessary proofs and certifications that the criteria has been satisfied. Permit-by-rule would then allow the source to begin its project. The only way a government would prevent the permit would be for it to take a proactive action against the permit. This would eliminate case-by-case analysis that, in many cases, take months, years, or even decades to complete. It would also shift the federal government's focus to one of ensuring compliance (i.e., enforcement) with the important substantive standards promulgated to protect public health, safety and the environment.

Indeed, the current appetite for permitting reform, along with a commonsense solution, presents an opportunity for much needed bipartisan reform.

FACT:

At least 38 states and the EPA already use permit-by-rule.

[1] Operating Permit Programs; Flexible Air Permitting Rule, 74 Fed. Reg. 51417 (October 6, 2009).
[2] Executive Office of the President Council on Environmental Quality, "Environmental Impact Statement timelines (2010-2018), June 12, 2020, https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timeline_Report_2020-6-12.pdf, 1 (last accessed May 3, 2023).
[3] Graves, Sam, Committee on Transportation & Infrastructure, "Builder Act," https://transportation.house.gov/builder-act/default.aspx (last accessed May 3, 2023).
[4] Senate Committee on Energy & Natural Resources, "Manchin Releases Comprehensive Permitting Reform Text to be Included In Continuing Resolution, Sept. 21, 2022, https://www.energy.senate.gov/2022/9/manchin-releases-comprehensive-permitting-reform-text-to-be-included-in-continuing-resolution, (last accessed May 3, 2023).

The EPA has already adopted Permit-by-Rule for some activities at the federal level.

Permits by rule are already in effect nationwide for certain federal permits regulated by the EPA. The EPA issues permits by rule for ocean disposal barges or vessels accepting hazardous waste, injection wells, and publicly owned treatment works facilities.[5] Additionally, many activities at Native American reservations are regulated under permit-by-rule including auto body repairs and surface coating facilities, petroleum dry cleaning facilities, and gasoline dispensing facilities.[6]

"The purpose of a permit by rule is to simplify the permit issuance process for similar facilities so that a reviewing authority's limited resources need not be expended for case-by-case permit development for such facilities."[7]

For the source application, the process is, indeed, very simple. It self-determines whether it would qualify.[8] The source then submits the necessary documentation that shows it satisfies the various considerations that it would need to qualify for a permit.[9] "A source wishing to operate pursuant to a permit by rule must submit a Notification of Coverage Form to the reviewing authority prior to commencing construction or modification."[10] "Once a source submits the Notification of Coverage and the EPA posts it online, the source may commence construction or modification without further action by the reviewing authority."[11] For the EPA, this happens within 60 days.[12] A permit-by-rule must still comply with the standards set forth by the specific statute or regulation that applies to the facility.[13]

The EPA's permit-by-rule model simplifies the process and could serve as model for other federal permits, both in the energy sector and in other federally regulated industries.

States Demonstrate the Wide Variety of Applications

At least 38 states have permit-by-rule in some form. These permits apply to anything from hazardous waste,[14] to movement of rocks and vegetation,[15] to pharmaceutical take-back programs.[16]

The various states have their own permit-by-rule criteria. Some states use permit-by-rule for instances that involve relatively low risk. Ohio utilizes permit-by-rule for lower risk and more common projects like generators, auto body, gas stations, and printing facilities. The factors Ohio used to determine what qualifies for permit-by-rule are: 1) whether 300 sources exist within the state, 2) whether they were similar to one another, 3) that they are not heavily regulated, 4) low risk of emissions, 5) no or limited need for emissions testing, and other similar factors.[17] Texas, on the other hand, utilizes permit-by-rule for larger projects such as combined heat and power, which involves air emissions.[18] The common thread is finding permits that have a definable set of criteria that do not need a case-by-case/discretion-based review.

The processes are each similar, but also can vary in nuanced ways. Pennsylvania, for example, states that a source is not required to apply for a permit and only has to provide a notice that lists the name, address, phone number, the individual responsible for running the facility, and a brief description of the facility.[19] Kentucky does not require any written-authorization or application at all for reuse of solid.

[5] 40 CFR §270.60.
[6] This regulation is narrow and specifically applies to reservations and other areas of "Indian country." But the CFR itself contains a very good primer for how permit-by-rule works. 40 CFR § 49.156(f)(4)(iii).
[7] 40 CFR §49.156(f)(1).
[8] 40 CFR§49.156(f)(6)(i).
[9] 40 CFR§49.156(f)(6)(ii).
[10] Ibid.
[11] Ibid.
[12] 40 CFR§49.156(f)(6)(v).
[13] 40 CFR §49.156(f)(3)(ii), (f)(5), (f)(6)(vi); 40 CFR 270.60(a)(3), (b)(2), (c)(3).
[14] For example, Cal. Code Regs. title 22, §67450.11.
[15] Maine Department of Environmental Protection, "Issue Profile Permit-by Rule (NRPA)," October 2008, https://www.maine.gov/dep/land/nrpa/ip-pbr.html (last accessed April 28, 2023).
[16] N.M. Code R. §20.9.3.30.
[17] Ohio Environmental Protection Agency, "Permit-by-Rule for Air Pollution Sources," October 2018, https://epa.ohio.gov/static/Portals/41/sb/PBRfactsheet.pdf, 1 (accessed April 28, 2023).
[18] Texas Commission on Environmental Quality, "Texas Air Emissions Permit by Rule," https://chptap.ornl.gov/profile/228/TexasPermitByRule.pdf, 1 (last accessed May 3, 2023).
[19] 25 Pa. Code § 287.102.

In short, when a reviewing agency sees an opportunity to streamline permitting procedural hurdles due to consistent and definable criteria, states have successfully made permit-by-rule available. Federal policymakers would benefit greatly from studying these states' experiment with what appears to be a more efficient permitting system.

Promoting Efficiency...

By not having to develop a unique, case-specific permit process for each "source" that applies, the government can dramatically reduce application periods.[20] In turn, private parties will see reduced transaction or opportunity costs and increase development opportunities.[21] The process is often simple, with an uncomplicated document to file.[22] Tennessee reports that their permit-by-rule has no expiration date, no application fees, no specific limits, that it satisfies the permitting requirement and that processing time is reduced.[23] Permits-by-rule also allow for predictable project schedules and expedited completion of those projects or initiation of the intended economic activity.[24]

Without Sacrificing Standards

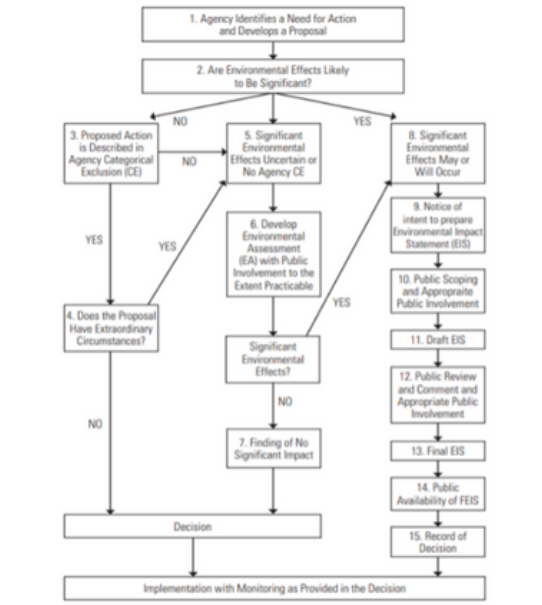
Regulatory standards, such as emissions, are not impacted or adjusted when lawmakers utilize permit-by-rule. Permit-by-rule only needs to have a definable set of criteria. These defined criteria can have strict, or lenient, criteria.

For example, in order to qualify for permit-by-rule in Texas for a combined heating and power permit, the air emissions for the project have maximum caps for carbon monoxide, nitrogen oxide, volatile organic compounds, sulfur dioxide, and inhalable particulate matter, among other contaminants.[25] These standards are developed toward the goal of reducing pollution and enhancing air quality while creating a simple and predictable process for the applicant.

NEPA: An Opportunity to Implement an Innovative Approach

Recent NEPA reform efforts have attempted to modify the process but maintain its core structure in place today. Permit-by-rule however, offers a more dramatic reform effort that is not cabined by the existing procedural infrastructure under the law.

The NEPA Process (Figure 1)



** Significant new circumstances or information relevant to environmental concerns or substantial changes in the proposed action that are relevant to environmental concerns may necessitate preparation of a supplemental EIS following either the draft or final EIS, or the Record of Decision. 40 CFR 1502.9(d).*

[20] Nebraska Department of Environment and Energy, "Permit-by-Rule," Sept. 19, 2022, http://dee.ne.gov/Publica.nsf/PubsForm.xsp?documentId=8EEACF6C66CB74BF86257090006182EC&action=openDocument, (last accessed April 28, 2023).
[21] Ohio EPA, 2.
[22] Ibid.
[23] Tennessee Department of Environment and Conservation, "Permit by Rule," https://www.tn.gov/environment/program-areas/sbeap-small-business-environmental-assistance/permit-by-rule.html (last accessed April 28, 2023).

24: EcoVapor, "Make 'Permit by Rule' Work for You in Texas, https://ecovaporrs.com/make-permit-by-rule-work-for-you-in-texas/ (last accessed April 28, 2023).
25: Texas Air Emissions Permit by Rule 1.

NEPA already allows for a less complicated process for categorical exclusions. Categorical exclusions are a category of actions subject to NEPA whose actions have a minimal, well understood and predictable impact on the environment and policymakers have determined can bypass some of the law's traditional procedural hurdles.[26] Examples are administrative decisions, minor facility renovations, and reconstruction of hiking trails on public lands.[27]

Yet the process is still more complicated than permit-by-rule. As it stands today, an agency must still make a finding that no extraordinary circumstances exist before the permit can be issued.[28] This flowchart[29] demonstrates how NEPA review for categorical exclusions currently works:

This process could be simplified even further. With permit-by-rule, categorical exclusions could be listed within a statute or regulation, with the necessary criteria to qualify. From there, the source would be able to determine if it qualifies, send in a notice, and begin its project within a defined period of time. The source would not need to wait upon the agency to make a finding of extraordinary circumstances in order for the source to begin its project. This may present a viable place to begin foundational reform of one of the nation's foremost process-oriented laws implicated in federal permitting.

Conclusion

The permit-by-rule concept offers a new approach to improve the inefficient, costly, and at times arbitrary permit application process plaguing administrative agencies today. The resulting predictability it could provide to sources who are able to meet a pre-set criterion could spur greater innovation, risk-taking and trust in government. Perhaps just as importantly, its successful implementation could re-focus regulatory resources on enforcement of the high public health, safety and environmental standards made possible by a thriving economy.

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26: 40 C.F.R. 1508.1(d).
27: Council on Environmental Quality, "A Citizen's Guide to NEPA, https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/01/Citizens-Guide-Updated-Draft-01.13.2021-FINAL.pdf, 10 (last accessed April 27 2023).
28: Ibid.
29: Ibid. 8.

Appendix

Permit by Rule Jurisdiction

STATE OR JURISDICTION	REGULATED CONDUCT	STATE REGULATION CITATION(S)
Federal (EPA)	• Ocean disposal of hazardous waste • Air quality permits on Indian reservations	• 40 CFR §270.60 • 40 CFR §49.163
ARKANSAS	• Surface facilities associated with a disposal well; • construction, operation, and closure of any pits associated with oil and gas wells	• 014-04-18 Ark. Code R. § 2, Reg. 1.302. • 118-01-21 Ark. Code R. §21, Rule 34.202
CALIFORNIA	• Hazardous waste treatment	• Cal. Code Regs. tit. 22 §§67450.2; 66270.60
COLORADO	• Injection wells • Publicly owned treatment works • Generator treatment	• 6 CCR 1007-3-100.2.21
CONNECTICUT	• Combined heat and power	• Conn. Agencies Regs. §22a-174-3d
DELAWARE	• Publicly owned treatment works • Ocean disposal barges and vessels	• 7 Del. Admin. Code §1302-122-A-122.1; 122.60

Permit by Rule Jurisdiction

STATE OR JURISDICTION	REGULATED CONDUCT	STATE REGULATION CITATION(S)
Florida	• Water management district • Emergency generators	• FAC 40C-2.042 • FAC 40E-2.0161 • FAC 62-210.310
Georgia	• Fuel-burning equipment burning natural gas/LPG and/or distillate oil • Fuel-burning equipment burning natural gas/LPG and/or residual oil • On-site power generation • Concrete and concrete products • New asphalt plants permitted to burn natural gas/LPG and/or distillate oil • Cotton ginning operations • Coating and/or gluing operations • Printing operations • Non-reactive mixing operations • Fiberglass molding and forming • Peanut/nut shelling	• GRR 391-3-1.03
Hawaii	• Waste disposal	• Haw. Code R. §11-264-1

Permit by Rule Jurisdiction

STATE OR JURISDICTION	REGULATED CONDUCT	STATE REGULATION CITATION(S)
Idaho	• Dairy Farms • Crop burning • nonmetallic mineral processing • propane flame burning	• IDAPA 58.0101.618; §§762-64; 794-97
Illinois	• Any facility subject to the Clean Air Act Permit Program	• Ill. Admin. Code tit. 35 §§201.500-540.
Indiana	• Any source that limits actual emissions to 20% of any regulated air pollutant or pollutant defined in the Clean Air Act	• 326 Ind. Admin. Code 2-10-3.1
Iowa	• Surface coating spray booths	• IAC 567-22.8
Kansas	• Reciprocating engines • Organic solvent evaporation • Hot mix asphalt facilities • Any source with emissions less than 50% of the major source threshold	• K.A.R. §§28-19-541-564

Permit by Rule Jurisdiction

STATE OR JURISDICTION	REGULATED CONDUCT	STATE REGULATION CITATION(S)
Kentucky	• Beneficial reuse of solid waste	• 401 KAR §§47:030-150
Maine	• Activities next to protected natural resources • Placement of permanent intake pipes and water monitoring • Movement of rocks and vegetation • Placement of outfall pipes • -Shoreline stabilization using vegetation or riprap • Construction of crossings (utility lines/pipes/cables) • State transportation facilities • Restoration of natural areas after human alteration • Fisheries and wildlife habitat creation • Boat ramps • Activities on coastal sand dunes • Transfers and renewals of permits • Renewals for dredging • Activity over vernal pool habitat • Activity in existing developed areas • Waterfowl & wading birds habitat	• 06-096-305 Me. Code R. §§1-20

Permit by Rule Jurisdiction

STATE OR JURISDICTION	REGULATED CONDUCT	STATE REGULATION CITATION(S)
Maryland	• Underground storage tank systems • Individual Oil Operations	• Md. Code Regs. 26.10.02.04 • Md. Code Regs. 26.10.01.09
Massachusetts	• Stormwater discharge	• Mich. Admin. Code R. 323.2190
Michigan	• Any source that limits actual emissions to 20% of any regulated air pollutant or pollutant defined in the Clean Air Act	• 326 Ind. Admin. Code 2-10-3.1
Minnesota	• Solid waste and recycling • Fertilizers	• Minn. Rules §§7001.2525; 3050 • Minn. Rules §1505.2200
Missouri	• Air construction and pollution	• 10 CSR 10-6.062
Nebraska	• Air quality • Hot mix asphalt plants • Small animal incinerators	• 129 Neb. Admin. Code, ch. 42, §011 • 129 Neb. Admin. Code, ch. 8, §010 • 129 Neb. Admin. Code, ch. 8, §011

Permit by Rule Jurisdiction

STATE OR JURISDICTION	REGULATED CONDUCT	STATE REGULATION CITATION(S)
New Hampshire	• Surface water border work for utilities and trails • Timber harvesting	• N.H. Code Admin. R. Evn-Wq 1503.03 • N.H. Code Admin. R. Evn-Wq 1503.04
New Jersey	• New flood hazard areas • Construction on homes and properties • Water construction • Shellfish • Pesticide on wetlands	• N.J.A.C. §§7:13-7.1-7.62 • N.J.A.C. §§7:7-4.1
New Mexico	• Pharmaceutical take-back programs by law enforcement • Smoke management	• NMAC 20.9.3.30
North Carolina	• Water disposal	• 15A NCAC 02T .0113
North Dakota	• Hazardous waste	• NDAC 33.1-20

Permit by Rule Jurisdiction

STATE OR JURISDICTION	REGULATED CONDUCT	STATE REGULATION CITATION(S)
Ohio	• Emergency electrical generators/pumps/compressors • Resin injection/compression molding • Small crushing and screening • Soil-vapor extraction • Soil-liquid extraction • Auto body refinishing • Gas stations • Natural gas boilers/heaters • Printing facilities • Roadways and parking	• OAC 3745-31-03
Oklahoma	• Cotton gins • Emergency engine facilities • Gasoline dispensing facilities • Grain elevators • Minor oil and natural gas facilities • Particulate matter emission • VOC storage and loading facilities	• OAC 252:100-7-60.1 • OAC 252:100-23-7 • OAC 252:100-7-60.6 • OAC 252:100-7-60.7 • OAC 252:100-7-60.2 • OAC 252:100-24-7 • OAC 252:100-7-60.5 • OAC 252:100-19-13 • OAC 252:100-37-9
Pennsylvania	• Storage and transportation of residual waste • Municipal waste processing	• 25 Pa. Code §287.102 • 25 Pa. Code §287.103

Permit by Rule Jurisdiction

STATE OR JURISDICTION	REGULATED CONDUCT	STATE REGULATION CITATION(S)
South Carolina	• Infectious waste generators	• S.C. Code Regs. §61-105.X
Tennessee	• Gasoline dispensing facilities • Stationary emergency engines/generators • Auto body shops	• Tenn. Comp. R. & Regs. 1200-03-09-.07
Texas	• Domestic heating and cooling • Bench scale lab equipment • Pilot plants • Sand/gravel/asphalt • Animal confinement • Combustion • Manufacturing • Food preparation and processing • Facility maintenance • Feed/fiber/fertilizer • Metal machinery and molding • Packaging • Oil and gas • Plant operations • Plastics and rubbers • Service industries • Surface coating/preparation • Tanks, storage, and loading • Thermal control devices • Turbines and engines • Waste processes and remediation	• 30 Tex. Admin. Code §§106.1-534

Permit by Rule Jurisdiction

STATE OR JURISDICTION	REGULATED CONDUCT	STATE REGULATION CITATION(S)
Utah	• Solid waste disposal • Disposal operations for oil, gas, and mining • Underground injection facilities for water quality • Disposal of radioactive waste	• Utah Admin. Code 315-318-2
Virginia	• Renewable energy	• 9 VAC 15-60-30
Washington	• Facilities managing dangerous waste	• WAC 173-303-802
West Virginia	• Solid waste facilities	• WAC 173-303-802
Wyoming	• Underground injection facilities • Single-well oil and gas production facilities within certain region • Compressor stations • Flare/enclosed combustion units • Alternative emission control devices • Greywater systems	• 020-27 Wyo. Code R. §27-11 • 020-8 Wyo. Code R. §8-6 • 020-11 Wyo. Code R. §25-17