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Administrative Law:
The Importance of Regional Administration to Federalism

Dave Owen¹

Federalism generates many of the seminal debates of American politics and law. Two recurrent premises underlie these debates: first, that federal governance means centralized governance, and, second, that decentralization means empowering state or local governments. From those premises flows a series of pluses and minuses of federal power. On the plus side, the federal government can minimize interstate externalities, establish nationally consistent regulatory programs, and draw on greater expertise and institutional economies of scale. On the minus side, the federal government is less likely to take innovative approaches or understand or respond to local conditions, while states and municipalities are the classic “laboratories of democracy” where experimentation reigns and local preferences receive more nuanced understanding and response.

This conventional wisdom is undermined by the U.S. Army Corps of Engineers’s implementation of section 404 of the Clean Water Act, which regulates the filling of “waters of the United States.”² An investigation of the 404 program leads to several key conclusions. *First*, it demonstrates that federal governance sometimes is quite decentralized. *Second*, it shows that regional federal offices can provide many of the benefits—and some of the problems—that federalism rhetoric traditionally associates with state and local governments. *Third*, it shows that regional federal offices often interact symbiotically with states, thus helping our federalist system succeed. *Fourth*, and finally, it reveals the need for more inquiry into the intersections between regional offices and administrative law.

The Structure and Approach of the Army Corps

The Army Corps’s regulatory branch holds primary responsibility for implementing section 404 of the Clean Water Act.

1. Summarized and excerpted from Dave Owen, *Regional Federal Administration*, 63 UCLA L. REV. 58 (2016).

2. 33 U.S.C. § 1344 (2012).

Other than the roughly eight Corps regulatory staff members who work full-time in Washington, D.C., regulatory-program staff members are dispersed among eight division offices, thirty-eight “district” offices, and many field offices across the country. Some of those field offices are heavily staffed, while other offices are simply individual employees working out of their homes. Decisions about office placement are themselves partly decentralized. Subject to the D.C. office’s budgetary control, district commanders may choose whether and where to open field offices and how to staff them.

This geographic dispersion affects agency operations in several ways, one of which is to facilitate decentralization of communications and professional relationships. State agency partners, for example, will generally work with Corps offices in, or at least close to, their own state. Similarly, people seeking (or opposing) permits from the Corps will generally work with a Corps office close to their activities. Often, they will be talking to a Corps staffer who has worked for years in that particular geographic area. Those geographic connections and familiarities lead to close understanding of local culture and priorities and to an empathy for the people and their concerns. According to one district chief, this continuity of closeness could lead to more sensitivity to local needs than comparable state bureaucracies.

This geographic dispersion of staff and authority has consequences for both the objects and beneficiaries of the Corps’s regulatory program. The agency routinely adjusts its regulatory program to local conditions, much like a judge applying national law to a geographically distinct set of facts. And it also adjusts the law itself by allowing, and sometimes encouraging, regional variation in regulatory approaches.

For example, the Corps takes a region-influenced approach to deciding which aquatic features are subject to federal regulatory oversight. It has developed, upon a recommendation from the National Academy of Sciences, regional supplements to the national wetland delineation handbook. The supplements do not change the law but instead allow the Corps to apply a consistent set of principles to distinctive regional facts.³

3. See, e.g., U.S. ARMY CORPS ENG’RS, REGIONAL SUPPLEMENT TO THE CORPS OF ENGINEERS WETLAND DELINEATION MANUAL: ATLANTIC AND GULF COASTAL PLAIN REGION (VERSION 2.0) 1 (2010).

The Army Corps also makes regional adjustments to the tens of thousands of permits it issues each year. Tailoring occurs with all permits, but the most readily apparent example involves general permits, which established standardized permitting requirements for large classes of similar projects. Even nationwide general permits are written by teams of regional staffers (though the teams also include a leader from the D.C. office), and those teams receive substantial feedback from other field-office staff. Once the permits are completed, individual districts can add “regional conditions” to the nationwide permits. Regional tailoring has become so prevalent that some regulated entities complain that there is too much of it.

These regionalized permitting processes also authorize substantial and consequential involvement from states. Section 401 allows states to veto or condition federal “discharge” permits, and this authority extends to general permits as well. States often use their section 401 authority to negotiate state-specific changes to nationwide permits and sometimes have used it to reject nationwide permits that the state deems insufficiently protective. That legal leverage, along with the Corps’s desire to expedite regulatory processes, leads to significant state input. In addition, district offices also work with some states to develop “state programmatic general permits.” These are state-specific federal permits, sometimes managed and issued by state offices, designed to simultaneously fulfill federal and state permitting requirements.⁴

Some Implications of Federal Decentralization

This federal decentralization, and productive federal-state cooperation, upends traditional federalism debates. Current federalism doctrine proceeds on the premise that federal governance represents non-local governance. That premise is wrong, at least in the specific context of the Army Corps. Additionally, regional offices have important implications for the many spheres in which regulatory roles overlap and power is shared. In these realms, regional federal offices play a key—albeit unappreciated—role in helping a federalist system succeed.

4. See, e.g., Philadelphia Dist., Marine Design Center, *State Programmatic General Permits*, U.S. ARMY CORPS ENG’RS, <http://www.nap.usace.army.mil/Missions/Regulatory/Permits/SPGP.aspx>.

Conventional federalist thought has not explained how officials from a variety of different federal, state, and local agencies will actually go about talking through their agreements and differences. Will they use phone calls, emails, or in-person meetings? If they will talk face to face, where will they meet, and who will be in the room? These may sound like mundane questions, but they are crucially important. Coordination within complex regulatory terrains can succeed or go very badly, and communication systems help determine when cooperation thrives, and whether conflicts produce constructive outcomes or spiral out of control.⁵

Regional federal offices make that kind of communication possible. Sometimes they provide a physical space where federalism can be sorted out, in person, across a conference table—or over a cubicle wall. Sometimes they provide a base from which federal officials can reach their meeting locations or field sites with just a short drive. They also let federal and state regulators get to know each other, and the resulting familiarity can build trust and social capital. That won't always happen, of course, but for many Corps staff, talking with other state agencies, local governments, and regional offices from other federal agencies is a daily responsibility. And the resulting relationships hold professional, and sometimes personal, value.

Conclusion

Justice Brandeis once referred to the states as “laboratories of democracy.” That description, though accurate, is underinclusive. Some of the most effective laboratories may be conference tables surrounded by staff from local and state governments and federal regional offices. By making those meetings possible and meaningful, regional federal offices can serve as the vectors of functional federalism.

5. See Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1147–48, 1150–51 (2012).