

The Margate Dune Project, Cooperative Federalism, and Problems of Litigation Procedure

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The current federal administration has expressed a desire to defer largely to states through principles of cooperative federalism. A recent case involving the dune construction in Margate, New Jersey, offers some insight into the procedural complexities this approach presents for those affected. Where a state oversees a federally funded project, it is unlikely that one court can hear all of the issues. Margate demonstrates parties may need to seek to enjoin the state actor in state court while proceeding against the federal actor in federal court. Other less publicized examples include instances where a party has entered into a consent decree with a federal agency, but then a state agency issues a permit.

The U.S. Army Corps of Engineers (“Corps”) has been constructing dunes to protect Absecon Island, where Margate is located, from storm damage, a project motivated by Superstorm Sandy. Storm water from Margate streets has been reported to have ponded behind the dunes and does not percolate into the sand promptly. The City has sued to halt the project.

To have jurisdiction over the New Jersey Department of Environmental Protection (“NJDEP”), which had gained an easement to construct the federally funded project, Margate had to bring its suit in state court. *City of Margate v. N.J. Dep’t of Env’tl. Protection*, No. ATL-C-52-17 (N.J. Super. Ct. Ch. Div., Atlantic Cnty.). After an initial hearing, the New Jersey Superior Court issued an order temporarily enjoining NJDEP and the contractor hired by the Corps from completing further construction. The Corps was not yet a party and did not participate in the hearing. The state court ordered the Corps joined as an indispensable party, and the Corps, in turn, removed the action to federal court.

The Corps asked the District of New Jersey to dissolve the temporary restraints, in part, on the basis that the state court did not have jurisdiction to enjoin the Corps. *City of Margate v. N.J. Dep’t of Env’tl. Protection*, No. 17-cv-5766 (D.N.J. Aug. 10, 2017). At the same time, NJDEP asserted sovereign immunity under the Eleventh Amendment and has not consented to federal court jurisdiction. The district court noted that to the extent the Corps consents to be sued, the “federal courts have exclusive jurisdiction,” which means, the Corps cannot consent to jurisdiction before the state court. While NJDEP’s sovereign immunity is a “personal privilege” that can be waived voluntarily “at pleasure,” NJDEP has declined to waive its sovereign immunity. That means, the

federal court has jurisdiction over the Corps, but not NJDEP, and the state court has jurisdiction over NJDEP, but not the Corps. As a result, Margate has filed another action against NJDEP in state court.

On Tuesday, the Third Circuit denied the City of Margate's motion to stay the district court's order denying the City's request for an injunction and dissolving temporary restraints on the Corps' dune project. *City of Margate v. N.J. Dep't of Env'tl. Protection*, No. 17-2752 (3d Cir. Aug. 15, 2017). The Third Circuit referred the question of whether the district court's order is immediately appealable to a full motions panel. That leaves the two sovereigns in separate lawsuits in separate courts at least for the rest of this summer season and suggests that those affected by state-federal "cooperatively federalist" projects may face a similar procedural problem.

Coincidentally, section 6 of the August 15 Presidential Executive Order on environmental review of infrastructure projects, available [here](#), revokes President Obama's Executive Order 13690, which called for evaluations of flood resiliency of infrastructure projects taking climate change into account.

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National Law Review, Volume VII, Number 229

Source URL: <https://natlawreview.com/article/margate-dune-project-cooperative-federalism-and-problems-litigation-procedure>