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Burnette v. Carothers, Nos. 98-7835(L), 98-9003(CON), 1999 WL 710624 (2d Cir. Sept. 13, 1999)

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COURT REPORTS

FEDERAL COURTS

UNITED STATES CIRCUIT COURTS

SECOND CIRCUIT

Burnette v. Carothers, Nos. 98-7835(L), 98-9003(CON), 1999 WL 710624 (2d Cir. Sept. 13, 1999) (holding homeowners' suit for injunctive and monetary relief under the CWA, RCRA, and CERCLA citizen suit provisions brought against state officers in their official capacity was barred for lack of subject matter jurisdiction due to Eleventh Amendment sovereign immunity).

The Burnettes filed suit against various state officers in their official capacities claiming the Connecticut Correctional Institute ("CCI") had emanated toxic substances onto their property that polluted and continued to pollute their wells in violation of the Clean Water Act ("CWA"); the Resource Conservation and Recovery Act ("RCRA"); and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). The Burnettes sought an injunction, monetary relief, and reimbursement for past and future response costs.

At the trial court, the state officers successfully argued that the case was barred for lack of subject matter jurisdiction under the sovereign immunity clause of the Eleventh Amendment of the United States Constitution. The court granted the state officers' motion for summary judgment on the claims for response costs because recovery would violate the state's sovereign immunity. The Burnettes appealed.

The Second Circuit Court of Appeals affirmed based on congressional intent explicitly stated in each of the statutes under which the Burnettes sued, acknowledging that citizen suits against governmental entities were allowed only to the extent permitted by the Eleventh Amendment.

The court rejected the Burnettes' argument that the case represented *qui tam* action, brought by the Burnettes on behalf of the United States, and held that citizen suit provisions granted citizens the right to sue on their own behalf, not on behalf of the United States.

Next, the Burnettes argued that the claims for prospective relief were valid under *Ex Parte Young*. The court waived this claim because

the Burnettes had not raised the claim in the original case, and no miscarriage of justice resulted by not recognizing the exception.

Through summary judgment, the court denied both claims that sought response costs. The court denied the CERCLA § 113(f) claim, because the provision was only available to parties potentially responsible for contribution costs which the Burnettes were not. The court also denied the CERCLA § 107(a) claim, because although Congress did express its intention that the Eleventh Amendment would not bar a suit under the section, Congress did not have valid power to abrogate the Eleventh Amendment. The United States Supreme Court ruled Congress acted within its authority when it abrogated the Eleventh Amendment only once; the Court ruled Congress could abrogate the Eleventh Amendment only when enacting legislation under § 5 of the Fourteenth Amendment. CERCLA, enacted under the Commerce Clause, did not fall into this category.

The court also ruled Connecticut did not constructively waive its Eleventh Amendment sovereign immunity by engaging in an activity regulated by Congress or by accepting federal funds.

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United States v. TGR Corp., 171 F.3d 762 (2d Cir. 1999) (finding that brook where defendant discharged waste slurry from asbestos removal project qualified as “waters of the United States” under the Clean Water Act).

Employees of the defendant, TGR Corp. (“TGR”), performed asbestos removal services for a Connecticut middle school. In the process, the employees poured a waste slurry (comprised of mastic, chemical mastic remover, water, and pieces of floor tile that contained asbestos) into a drain in the school basement. From the drain, the slurry traveled into a storm water discharge system, and then into a waterway known as “Grasmere Brook.”

The government charged TGR with knowingly discharging a pollutant into the waters of the United States without a permit in violation of 33 U.S.C. §§ 1311, 1319(c)(2), and 18 U.S.C. § 2; and knowingly disposing and storing of a hazardous waste without a permit in violation of 42 U.S.C. § 6928(d)(2)(A) and 18 U.S.C. § 2. The court dismissed the latter two violations. The parties entered into a stipulation agreement and the only issue remaining concerned whether Grasmere Brook qualified as part of the “waters of United States” under the Clean Water Act (“CWA”).

The district court held that Grasmere Brook was a tributary of Ash Creek, a navigable water of the United States, and therefore fell under the CWA. The court ordered TGR to pay a fine of \$50,000 and remain on probation for five years. TGR appealed.