



U. S. Department of Justice

Office of the Solicitor General

Solicitor General

Washington, D.C. 20530

February 16, 2018

The Honorable Charles E. Schumer
Minority Leader
United States Senate
Washington, DC 20510

Re: *NJ Work Environment Council v. State Emergency Response Commission*, No. 17-cv-2916 (D.N.J. filed Apr. 28, 2017)

Dear Mr. Leader:

Consistent with 28 U.S.C. 530D, I write to advise you concerning the above-referenced matter pending before the United States District Court for the District of New Jersey.

The case is a private lawsuit under the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. 11001 *et seq.* EPCRA was enacted in 1986 and addresses local planning and preparedness for potential releases of hazardous chemicals by private facilities. Within six months after the enactment of EPCRA, the Governor of every State was required to appoint a state emergency response commission. 42 U.S.C. 11001(a). Each state emergency response commission was, in turn, required to appoint local emergency planning committees throughout its respective State. 42 U.S.C. 11001(b)-(c). EPCRA requires certain private facilities to disclose the manufacture, processing, or use of a list of hazardous chemicals regulated by the Environmental Protection Agency (EPA). 42 U.S.C. 11023. And each local emergency planning committee is required to create and maintain an emergency response plan, identifying, *inter alia*, facilities that could potentially emit hazardous substances, procedures to be followed in the event of a release, and training programs for emergency response personnel. 42 U.S.C. 11003.

EPCRA provides that each emergency response plan “shall be made available to the general public.” 42 U.S.C. 11044(a). A citizen-suit provision authorizes “any person” to bring a civil action against “[t]he Administrator [of EPA], a State Governor, or a State emergency response commission, for failure to provide a mechanism for public availability of information in accordance with [S]ection 11044(a).” 42 U.S.C. 11046(a)(1)(C).

The complaint in this case named as defendants New Jersey’s State Emergency Response Commission, the City of Linden, and the City’s local emergency planning committee. The plaintiffs allege that the City of Linden and its local emergency planning committee have not

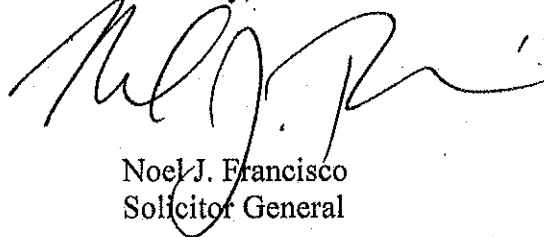
provided the general public access to its emergency response plan, and that the State Emergency Response Commission has breached its own EPCRA duties by failing to redress deficiencies in performance by Linden's local emergency planning committee and by other local emergency planning committees within the State. The State Emergency Response Commission has filed a motion to dismiss in which it argues that it is an arm of the State and that 42 U.S.C. 11046(a)(1)(C) is unconstitutional insofar as it abrogates state sovereign immunity under the Eleventh Amendment.

On February 16, 2018, the Department informed the district court that the plaintiffs' claims against the State Emergency Response Commission are barred by the Eleventh Amendment. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 71-73 (1996), the Supreme Court held that, although Congress may abrogate a State's sovereign immunity in legislation passed pursuant to the Fourteenth Amendment, it may not do so in legislation passed pursuant to its Article I powers, including the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3. Because there is no indication that EPCRA was enacted pursuant to the Fourteenth Amendment or any authority other than the Commerce Clause, the Department informed the district court that EPCRA's provision authorizing a private citizen to bring suit against an arm of an unconsenting State is unconstitutional.

The Supreme Court explained in *Seminole Tribe*, however, that Congress may explicitly or implicitly authorize individuals to bring suits for prospective injunctive relief against state officials, rather than States or state agencies, to enforce federal law. 517 U.S. at 73-75 & n.17 (citing *Ex parte Young*, 209 U.S. 123 (1908)). Accordingly, the Department also informed the district court in this case that 42 U.S.C. 1046(a)(1)(C) permissibly authorizes individuals to bring suit against the Governor of a State for prospective injunctive relief under *Ex parte Young* and that, in the appropriate case, the provision might also be construed to authorize such a claim, where properly pleaded, against individual state emergency response commission members.

A copy of the Department's brief is enclosed. Please let the Department know if we can be of further assistance in this matter.

Sincerely,



Noel J. Francisco
Solicitor General

Enclosure

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NJ WORK ENVIRONMENT COUNCIL, and
LOCAL 877, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,

Plaintiffs,

vs.

STATE EMERGENCY RESPONSE
COMMISSION,

Defendant,

CITY OF LINDEN AND ITS LOCAL
EMERGENCY PLANNING COMMITTEE,

Rule 19 Defendant.

Case No. 2:17-cv-02916

UNITED STATES' BRIEF
ADDRESSING THE
CONSTITUTIONAL ISSUE
RAISED BY THE STATE OF NEW
JERSEY

Of Counsel:
ERIK SWENSON
Office of General Counsel
United States Environmental
Protection Agency

JEFFREY H. WOOD
Acting Assistant Attorney General

MATTHEW R. OAKES
U.S. Department of Justice
Environment and Natural Resources
Division
Law and Policy Section
P.O. Box 7415
Washington, D.C. 20044-7415

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Congress, in the Emergency Planning and Community Right-to-Know Act (EPCRA), created a citizen suit cause of action against “a State Governor, or a State emergency response commission.” Subsequent to the enactment of EPCRA, the Supreme Court held in *Seminole Tribe v. Florida*, 517 U.S. 44, 59-69 (1996), that Congress cannot abrogate a state’s Eleventh Amendment immunity pursuant to commerce clause authority. However, under *Ex Parte Young*, 209 U.S. 123 (1908), a plaintiff may seek prospective injunctive relief against officials acting on behalf of a state. *Seminole Tribe*, 517 U.S. at 75 n.17. The United States files this brief for the limited purpose of addressing the issue, raised by the State of New Jersey, as to how the *Seminole Tribe* decision applies. Plaintiffs have failed to plead a cognizable claim against a state official here, and even if adequately pled Plaintiffs’ allegations may be insufficient to support a claim.

II. STATUTORY BACKGROUND

EPCRA, 42 U.S.C. §§ 11001-11050, was enacted as Title III of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613, 1629, and requires facilities to disclose possession of chemicals listed on the Toxics Release Inventory by the Environmental Protection Agency (EPA). 42 U.S.C. § 11023. State and local commissions then use the disclosed information to develop emergency response plans for potential releases of hazardous substances.

EPCRA provides for the Governor of each State to appoint a State emergency response commission (SERC). 42 U.S.C. § 11001(a). That commission, in turn, designates emergency planning districts “in order to facilitate preparation and implementation of emergency plans.” 42

U.S.C. § 11001(b). A state may designate existing political subdivisions as its emergency planning district. *Id.*

EPCRA also provides for the State to appoint a local emergency planning committee (LEPC) for each emergency planning district. 42 U.S.C. § 11001(c). These local emergency planning committees are tasked with preparing an emergency plan that, *inter alia*, identifies facilities that could potentially emit hazardous substances, routes used to transport such substances, methods to be followed by facility owners and operators, procedures to be followed in the event of a release, and training programs for emergency response personnel. 42 U.S.C. § 11003.

Section 11044(a) provides for a range of information, including emergency response plans, to be “made available to the general public” by the “appropriate” entity. 42 U.S.C. § 11044(a). The EPCRA citizen suit provision creates a cause of action allowing any person to file a civil claim against a range of potential defendants. Of particular relevance to this action, EPCRA allows for a claim against “a State emergency response commission, for failure to provide a mechanism for public availability of information in accordance with section 11044(a) of this title.” 42 U.S.C. § 11046(a)(1)(C).

III. FACTUAL BACKGROUND

In 1987 New Jersey issued Executive Order 161, which fulfilled EPCRA’s requirement for New Jersey to create a State Emergency Response Commission.¹ Complaint ¶¶ 8, 17. Under that same executive order, each of New Jersey’s municipalities is required to create and maintain a Local Emergency Planning Committee. Complaint ¶ 17. Recently the New Jersey SERC has

¹ Because this court is reviewing New Jersey’s motion to dismiss, for purposes of this brief the United States will accept, as true, the factual allegations of Plaintiffs’ Complaint.

engaged New Jersey Local Emergency Planning Committees in a training program centered on a powerpoint presentation and a model emergency response plan. Complaint ¶ 32. In that presentation the New Jersey SERC specifies that, in New Jersey, local emergency planning committees must maintain public access to emergency response plans, and specifies the terms of such access. SERC Power Point at 10-14 (attached to Complaint as Exhibit 1-2).

In spite of this training, Plaintiffs' have alleged that the City of Linden has failed to provide them access to its emergency response plan, has not provided a notice that the public has access to its emergency response plan, and has failed to provide provisions for public meetings to discuss the emergency response plan and related topics. In short, Plaintiffs have alleged that in spite of some effort by New Jersey to notify its LEPC's of their EPCRA-based requirements, the City of Linden has failed to meet those requirements.

IV. STANDARD OF REVIEW

A complaint must be dismissed under Federal Rule of Civil Procedure 12(b)(6), if it does not allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

IV. ARGUMENT

EPCRA establishes a citizen suit claim against "a State governor, or a State emergency response commission for failure to provide a mechanism for public availability of information" in accordance with section 11044(a). 42 U.S.C. § 11046(a)(1)(C). This language unambiguously authorizes a private suit against the State's Emergency Response Commission and that is the type of claim that Plaintiffs assert here. As New Jersey points out, the Supreme Court, in *Seminole Tribe v. Florida*, 517 U.S. 44, 59-69 (1996), held that Congress cannot abrogate state sovereign immunity when legislating pursuant to commerce clause authority.

There is no indication that Congress, when passing EPCRA, relied on any other authority sufficient to abrogate the States' Eleventh Amendment immunity. New Jersey presents arguments regarding why its SERC is properly considered an arm of the state. *See* New Jersey MTD at 5-7. The United States is not aware of any reason those arguments are incorrect. Thus, to the extent that 42 U.S.C. § 11046(a)(1)(C) authorizes private suits against an unconsenting state emergency response commission, that authorization exceeds Congress' constitutional authority.

Though the Eleventh Amendment prevents Congress from relying on commerce clause authority to create a claim against a state or state instrumentality, EPCRA's citizen suit provision should be construed through the lens of *Ex parte Young*, 209 U.S. 123 (1908). *Ex parte Young* allows suits for prospective injunctive relief in federal courts against officials acting on behalf of a state. The Supreme Court referred to the EPCRA citizen suit provision in a footnote in *Seminole Tribe*, in which the Court responded to a dissenting opinion and explained that Congress could authorize an *Ex parte Young* action against an appropriate state official. That footnote explained that the Indian Gaming Regulatory Act (IGRA), the statute at issue in *Seminole Tribe*, contained language that appeared to preclude such a remedy, and that this language "stands in contrast to the statutes cited by the dissent as examples where lower courts have found that Congress impliedly authorized suit under *Ex parte Young*." 517 U.S. at 75 n.17. One of the statutes that the Court cited as "stand[ing] in contrast" to IGRA was EPCRA; the Court cited § 42 U.S.C. 11001(a), EPCRA's provision on establishment of State emergency response commissions, and characterized that language as "requiring 'the Governor' of a State to perform certain actions and holding 'the Governor' responsible for nonperformance." *Id.*

Based on the Supreme Court's reasoning in *Seminole Tribe*, 42 U.S.C. 1046(a)(1)(C) permissibly authorizes individuals to bring suit against the Governor of a State for prospective injunctive relief under *Ex parte Young*. In an appropriate case, that provision might also be construed to authorize such a claim, if properly pleaded, against individual SERC members. Plaintiffs have not pled such a claim against the Governor or any individual SERC member. EPCRA's public availability provision, however, only requires the "appropriate" entity to make an emergency response plan available to the public. 42 U.S.C. § 11044(a). It is not clear that the New Jersey SERC or its individual members are such an appropriate entity. Compare 42 U.S.C. § 11001(c) (LEPC must establish provisions regarding emergency response plan distribution) and 42 U.S.C. § 11003(a)-(b) (LEPC must recommend resources needed for emergency response plan distribution) with 42 U.S.C. § 11001(a) (requiring SERC to designate an official to serve as an information coordinator) and 42 U.S.C. § 11003(e) (allowing SERC review of emergency response plans). If the LEPC, and not the SERC, is the "appropriate" entity required to make an emergency response plan available to the general public, as required by 42 U.S.C. section 11044(a), it is unclear that Plaintiffs have alleged facts to support their claim against New Jersey pursuant to 42 U.S.C. § 11046(a)(1)(C).

CONCLUSION

New Jersey is correct that EPCRA has not waived the State's sovereign immunity and the claim should be dismissed.

DATED: February 16, 2018

Respectfully submitted,
Jeffrey H. Wood
Acting Assistant Attorney General

/s/ Matthew R. Oakes

MATTHEW R. OAKES
U.S. Department of Justice
Environment & Nat'l Resources Div.
Law and Policy Section
P.O. Box 7415
Ben Franklin Station
Washington, D.C. 20044-7415
(202) 514-2686

CERTIFICATE OF SERVICE

I hereby certify that the foregoing UNITED STATES' BRIEF ADDRESSING THE CONSTITUTIONAL ISSUE RAISED BY NEW JERSEY was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of said filing to the attorneys of record, who are required to have registered with the Court's CM/ECF system.

Date: February 16, 2018

/s/ Matthew R. Oakes
MATTHEW R. OAKES
Counsel for the United States of America