Allen v. Environmental Restoration, LLC—Point-source state's statute of limitations applies to state-law claims preserved under the CWA

The citizen-suit provision of the Clean Water Act, 33 U.S.C. § 1365(e), disclaims preemption of "any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)." The Supreme Court held in *International Paper Co. v. Quellette*, 479 U.S. 481 (1987), that New York law controlled in a nuisance suit brought by Vermont landowners in state court and removed on diversity-of-citizenship grounds to federal court because the point source of the involved pollution lay in the former State and "[n]othing in the Act gives each affected State th[e] power to regulate discharges. The CWA carefully defines the role of both the source and affected States, and specifically provides for a process whereby their interests will be considered and balanced by the source State and the EPA." *Id.* at 497. *International Paper*, however, did not address whether the procedural law of the point-source State also controlled in such diversity actions.

That unaddressed issue arose in an action filed in New Mexico federal district court resulting from a Colorado inactive gold mine's blowout that deposited a vast amount of contaminated water into creeks and then rivers that flowed into New Mexico. The suit was brought under 28 U.S.C. § 1332 by New Mexico farmers and livestock owners alleging negligence, negligence per se, and gross negligence against an Environmental Protection Agency contractor, Environmental Restoration, LLC. The defendant moved to dismiss on the basis that the complaint had not been filed within the two-year Colorado limitation period. The district court denied the motion, agreeing with the plaintiffs that New Mexico's three-year limitation statute applied. *In re: Gold King Mine Release in San Juan County, Colo., on Aug. 5, 2015*, No. 1:18-md-02824-WJ, 2019 WL 2330878, at *1 (D.N.M. May 31, 2019) ("Generally, the statute of limitations of the forum state applies to claims in federal court. ... While the Clean Water Act preempts the application of New Mexico tort law, the Clean Water Act does not preempt the application of New Mexico's statute of limitations because the application of New Mexico's statute of limitations will not frustrate the goals of the Clean Water Act."). The district court certified that limitation-period issue for permissive appeal. After granting Environmental Regulation's petition under 28 U.S.C. § 1292(b), the Tenth Circuit reversed. *Allen v. Envtl. Restoration, LLC*, No. 19-2197, 2022 WL 1310904 (10th Cir. May 3, 2022).

The panel agreed with the lower court as to the presumption that, in diversity actions, limitation periods are supplied by the forum state's law. "So here, we must determine whether the CWA modifies our general proposition." The panel, quoting extensively from *International Paper*, concluded that the Act did:

> The CWA "makes it clear that affected States"—those that share an interstate waterway with the point source states—"occupy a subordinate position to source States in the federal regulatory program." ... Congress did not intend to undermine their "carefully drawn statute through a general saving clause." ... Thus, "the preemptive scope of the CWA necessarily includes all laws that are inconsistent with the 'full purposes and objectives of Congress.'" ... The Supreme Court did not limit its language. "All" means all. [¶] Here, application of the forum state's statute of limitations is inconsistent with Congress's full purposes and objectives in passing the CWA—one being efficiency,

> predictability, and certainty in determining liability for discharging pollutants into an interstate body of water. ... Consistency and predictability in this context involve far more than just the substantive issue of differing standards of effluent control. A comprehensive regulatory scheme is no longer comprehensive when a defendant to an action cannot predict how long it may be subject to suit.

The panel also rejected the plaintiffs' alternative contention that the five-year limitation period in 28 U.S.C. § 2462 controlled, reasoning that the decisional authority they relied upon "applied the federal 'catch all' statute of limitations to a federal claim—a situation different from the state law claims at issue."

Decision link: https://www.ca10.uscourts.gov/sites/ca10/files/opinions/010110678978.pdf