IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOE C. ALLEN, JR., et al., Plaintiffs/Appellees, v. ENVIRONMENTAL RESTORATION, LLC, Defendant/Appellant; and UNITED STATES OF AMERICA; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; GOLD KING MINES CORPORATION; SUNNYSIDE GOLD CORPORATION; KINROSS GOLD CORPORATION; KINROSS GOLD U.S.A., INC.; and WESTON SOLUTIONS, INC., Defendants	) CASE NO. 19-2197

On Appeal from the United States District Court,
District of New Mexico
Cause No.: 1:18-cv-00744-WJ-KK
The Honorable William P. Johnson, Presiding

BRIEF OF AMICUS CURIAE SUNNYSIDE GOLD CORPORATION IN SUPPORT OF ENVIRONMENTAL RESTORATION, LLC'S REQUEST FOR REVERSAL OF THE DISTRICT COURT

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CORPORATE DISCLOSURE STATEMENT

Sunnyside Gold Corporation (SGC) is a wholly-owned subsidiary of Echo Bay Inc., which is a wholly-owned subsidiary of Kinross Gold U.S.A., Inc. Kinross Gold U.S.A., Inc., is a wholly-owned subsidiary of Bema Gold (U.S.) Inc., which is a wholly-owned subsidiary of Kinross Gold Corporation, a publicly traded company. No other company has 10% or greater ownership interest in SGC.

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

This amicus brief is submitted on behalf of Sunnyside Gold Corporation ("SGC"). SGC is a Delaware corporation with its principal place of business in Colorado. The underlying *Allen* Complaint, which was filed on August 3, 2018, arises from the August 5, 2015 Blowout at the Gold King Mine, when EPA and its contractors released over three million gallons of mine-impacted water into a tributary of the Animas River above Silverton, Colorado. SGC finds itself as a named defendant in the underlying lawsuit not because it had anything to do with the EPA Blowout or the Gold King Mine, but because SGC, acting pursuant to Colorado law, successfully reclaimed the nearby Sunnyside Mine.

SGC acquired the Sunnyside Mine out of the Standard Metals bankruptcy in 1985. SGC brought the mine into environmental compliance and received the Mined Land Reclamation Award from the Colorado Department of Natural Resources for its efforts. SGC operated the Sunnyside Mine from 1986 until 1991, all under the modern era of environmental regulation and permitting.

SGC was the holder of two National Pollution Discharge Elimination System (NPDES) permits authorizing discharges from the Sunnyside Mine and issued by the State of Colorado's Department of Public Health and Environment, Water Quality Control Division (CDPHE-WQCD). These permits were issued under delegated authority bestowed upon Colorado by EPA pursuant to the Federal

Water Pollution Control Act (FWPCA, aka the Clean Water Act or CWA, 33 U.S.C. §§ 1251 to 1387). Specifically, SGC held discharge permits for the American Tunnel (Colorado Discharge Permit System [CDPS] Permit No. CO-0027529, the Mine's main access portal) and the Terry Tunnel (CDPS Permit No. CO-0036056, the Mine's secondary access portal). *See* Doc. 71-1;[1] *see also* FWPCA § 402(b) (33 U.S.C. §1342, NPDES – State Permit Programs); U.S. EPA and State of Colorado, *Memorandum of Understanding* (Dec. 24, 1974) (transferring the CWA's NPDES discharge permit program from EPA to Colorado); and the Colorado Water Quality Control Act, Colo. Rev. Stat. Ann. § 25-8-501.[2]

SGC successfully reclaimed its property in Colorado pursuant to a Consent Decree issued by a Colorado court and agreed to by Colorado regulators. *See* Doc. 71-11 (Consent Decree and Order, as amended, *Sunnyside Gold Corporation v. Colorado Water Quality Control Division of the Colorado Department of Public Health and Environment (SGC v. CDPHE-WQCD)*, Case No. 94 CV 5459

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[1] Document numbers and page numbers refer to those assigned through CM/ECF in the underling docket, 1:18-cv-744-WJ-KK.

[2] Under the Colorado Water Quality Control Act, "The division [CDPHE-WQCD] shall examine applications for and may issue, suspend, revoke, modify, deny, and otherwise administer permits for the discharge of pollutants into state waters …. Such administration shall be in accordance with the provisions of this article and regulations promulgated by the commission." *Id*.

(D. Colo., original consent decree entered by court and accepted by parties May 8, 1996) (hereinafter the "Consent Decree")). Consistent with the negotiated terms and conditions of the Consent Decree, SGC ultimately transferred its discharge permit for the American Tunnel to a third party in a transaction reviewed and approved by the State of Colorado. *See* Doc. 71-1 at 49–50; 53–54. This transfer was noticed and submitted in accordance with all applicable EPA and Colorado regulations. *See* 40 C.F.R. § 122.6, *Transfer of [NPDES] permits* (applicable to State programs, *see* § 123.25); 5 Colo. Code Regs. § 1002-61:61.8.

SGC closed the Sunnyside Mine in 1991 in accordance with its permits and the dictates of the regulatory agencies overseeing its conduct. SGC's closure of the Sunnyside Mine was designed and engineered to capture and retain mine-impacted water in Colorado and thereby improve water quality. In 1994, SGC again received the Mined Land Reclamation Award from the Colorado Mined Land Reclamation Board and the Colorado Mining Association as recognition for its remedial actions in Colorado. SGC's efforts were successful in improving water quality and SGC recently received the Environmental Excellence Award from the American Exploration and Mining Association in which the AEMA noted that SGC's reclamation "has stood the test of time" and "continues to be effective" with "comprehensive analysis of new data show[ing] that there has been dramatic improvement in Animas River water quality, confirming the success of SGC's

bulkheading and remediation." *See* http://www.sgcreclamation.com/news/Silverton_Standard_DEC_12.pdf.

SGC has spent more than $30 million on reclamation and remediation to successfully improve water quality in the Animas River. SGC conducted cleanup work on its own property and on other property in the basin where it had never mined and had no ownership interest. In 2003, SGC was released from all further obligations under the Consent Decree. At that time, the Colorado Water Quality Control Division and the Colorado Attorney General's office recognized "that there has been a successful permit termination assessment, pursuant to paragraph 14 of the Consent Decree, as well as termination of permits and Agreement Completion." Notice of Termination of Court's Jurisdiction, *Sunnyside Gold Corporation v. Colorado WQCD* (D. Colo. July 8, 2003) (Case No. 94-cv-5459).

As a permitted discharger and heavily regulated mine owner/operator, SGC has a strong interest and legitimate expectation in seeing Colorado law uniformly applied to all aspects of SGC's operations and reclamation. This expectation includes seeing Colorado's statute of limitations applied to any claims arising under Colorado law and out of SGC's state-permitted water discharges and SGC's state-approved final reclamation activities at the Sunnyside Mine. Since all of SGC's activities took place in Colorado and were governed by Colorado pursuant to Colorado's delegated powers under the CWA, SGC has a unique interest in the

question of whether the CWA preempts not only the application of New Mexico tort law, but also New Mexico's statute of limitations.

II. FRAP 29(a)(4)(E) STATEMENT

Pursuant to Rule 29(a)(4)(E), Fed. R. App. P., Amicus states that (i) no party's counsel authored this brief in whole or in part; (ii) no party or party's counsel contributed money to fund preparing or submitting this brief; and (iii) no person – other than this Amicus, its members, or its counsel – contributed money to fund preparing or submitting this brief.

III. ARGUMENT

A. Background Allegations and Facts

This litigation arises out of EPA's August 5, 2015 Gold King Blowout. According to the *Allen* Plaintiffs' Complaint:

> On the morning of August 5, 2015, the Defendant United States Environmental Protection Agency ("EPA") and its contractors caused a blowout of the Gold King Mine while excavating it….EPA has conceded it is responsible for the spill and its impacts.

Compl. at ¶¶ 2, 4. The *Allen* Plaintiffs continue, "The intentional actions of EPA and the Contractor Defendants caused a breach in the adit, resulting in the blowout." *Id*. at ¶ 351.

The *Allen* Plaintiffs do not allege that SGC had anything to do with the events of August 5, 2015. Instead, they allege that SGC "is a Delaware corporation with its principle office" in Denver, Colorado and that SGC "owns the

Sunnyside Mine and other properties near Silverton." *Id*. at ¶ 306. They acknowledge that SGC closed and reclaimed the Sunnyside Mine years before the Blowout and did so in accordance with the Colorado Consent Decree:

> "In 1991, Defendant Sunnyside Gold owned the Sunnyside Mine and closed it, operating a treatment facility for its contaminated wastewater."
>
> In 1996, SGC "signed a consent decree with the Colorado Department of [Public] Health and Environment purportedly allowing it to cease treating contaminated wastewater if it would undertake reclamation of other acid sources in the area."
>
> As part of the Consent Decree, SGC "installed hydraulic bulkheads in the American Tunnel and other locations" and "the bulkheads blocked the drainage from the American Tunnel and reduced the discharge there, but caused acid drainage to flood the Sunnyside Mine."

Id. at ¶¶ 310-311.

SGC is a Delaware corporation with its principal place of business in Colorado. SGC does not do business in New Mexico, is not licensed to do business in New Mexico, does not have a registered agent in New Mexico, and does not own, lease, or maintain any property in New Mexico. SGC has no employees in New Mexico.[3] SGC has never availed itself of the privilege of doing business in New Mexico. This suit does not arise out of or relate to SGC activities in New Mexico because there have been none.

[3] Decl. of Kevin Roach, Doc. 42-2 at ¶¶ 6-8; 1:18-md-02824-WJ.

Instead, SGC's activities were all undertaken in Colorado, pursuant to Colorado law and in accordance with specific Colorado directives issued through Colorado courts and Colorado regulatory agencies. SGC acted in compliance with its permits and the Consent Decree, which was entered and approved by a Colorado state District Court. The Colorado Mined Land Reclamation Board adopted and approved a reclamation plan that required SGC to construct several engineered, concrete bulkheads, including the specific bulkheads about which the *Allen* Plaintiffs now complain. Consent Decree at 4. The Colorado Division of Minerals and Geology, as part of SGC's reclamation plan, concluded that "[H]ydraulic seals [bulkheads] offer the best alternative for final mine site reclamation" and "the physical setting of the Sunnyside Mine appeared to be ideal for a hydraulic sealing scheme." *Id.* at 5.

The parties specifically agreed that "this Consent Decree will be governed by the laws of the State of Colorado and will be interpreted consistently therewith." *Id.* at 33. The Colorado Court ultimately "ordered, adjudged and decreed . . . that the settlement embodied in this Consent Decree is lawful under the Act, is consistent with the purposes of the Act, and is intended to protect the waters of the State of Colorado." *Id*. at 8. SGC timely performed all of its obligations under the Consent Decree, and in 2003 the Colorado Water Control Division notified the Court that there had been "a successful permit termination

assessment, pursuant to paragraph 14 of the Consent Decree, as well as termination of permits and Agreement Completion." *Id.* at 54.

The *Allen* Plaintiffs elected to wait until August of 2018, almost three years after the August 5, 2015 Blowout, to file suit. Doc. 1. They have contended that their claims are governed by New Mexico's statute of limitations because the *Allen* Plaintiffs were allegedly injured in New Mexico. New Mexico federal district court Judge William P. Johnson agreed, concluding that "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." *In re Gold King Mine Release in San Juan County, Colorado*, 2019 WL 2330878, at *1 (D.N.M. May 31, 2019).

Judge Johnson quoted from the Supreme Court's pronouncement that in questions of interstate waters, the law of the source state should control. "[W]e note that the preemptive scope of the CWA necessarily includes *all* laws that are inconsistent with the 'full purposes and objectives of Congress' …the application of affected-state law would frustrate the carefully prescribed CWA regulatory system." *Id*., (quoting *International Paper Co. v. Ouellette*, 479 U.S. 481, 497-499 n.20 (1987)). Judge Johnson, upon ER's request, eventually certified the applicability of his conclusion regarding the statute of limitations to this Court.

Colorado law, including Colorado's statute of limitations, as the law of the source state and the State that regulated, permitted, and controlled SGC's conduct, must be applied if the CWA's interest in uniformity and predictability are truly to be achieved.

B. <u>The Clean Water Act requires application of Colorado law, including Colorado's Statute of Limitations, to all claims arising out of SGC's permitted discharges in Colorado.</u>

Applying the law of the source state to interstate discharges has been a hallmark of Supreme Court jurisprudence for decades. The Supreme Court undertook an exhaustive examination of the Clean Water Act and its preemptive effect on interstate waters in *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304 (1981) (*Milwaukee II*). There, the Court was faced with a nuisance suit filed against permitted discharges in Wisconsin. The Court concluded that in cases of interstate waters, Congress and the Clean Water Act completely occupy the field.

> We conclude that, at least so far as concerns the claims of respondents, Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency.

Milwaukee II, 451 U.S. at 317. The Court specifically applauded the Clean Water Act's efforts to avoid "sporadic" and "ad hoc" approaches to water quality. *Id*. at 324. The Court also overruled its previous decision in *Ohio v. Wyandotte*

Chemicals Corp., 401 U.S. 493 (1971), where it had concluded that the law of the state in which pollution allegedly caused a nuisance controlled. *Milwaukee II*, 451 U.S. at 327 n.19.

Upon remand, the 7th Circuit Court of Appeals, in *People of State of Ill. v. City of Milwaukee*, 731 F.2d 403 (7th Cir. 1984) (*Milwaukee III*), reaffirmed and expanded upon the concept that in the interstate water arena, federal law required application of the source state's laws. "The issue in all of these cases is whether there is a body of federal law in the area of interstate water pollution which precludes the application of one state's common or statutory law to determine and afford a remedy for discharges, in particular by a municipality, within another state." *Milwaukee III*, 731 F.2d at 406. The court specifically noted the strong "federal interest in a uniform rule of decision in interstate pollution disputes…." *Id*. at 407.

The court ultimately concluded that, given the unique nature of an interstate water resource, and the pervasive regulatory scheme set forth by the Clean Water Act, there was simply no room for *any* downstream state law.

> The very reasons the Court gave for resorting to federal common law in *Milwaukee I* are the same reasons why the state claiming injury cannot apply its own state law to out-of-state discharges now. *Milwaukee II* did nothing to undermine that result. The claimed pollution of interstate waters is a problem of uniquely federal dimensions requiring the application of uniform federal standards both to guard states against encroachment by out-of-state polluters and

> equitably to apportion the use of interstate waters among competing states.

Milwaukee III, at 410-411. The Court analyzed the "savings clauses" found in the CWA and reached the same conclusion—the law of the source state controlled:

> This provision may well preserve a right under statutes or the common law of the state within which a discharge occurs (State I) to obtain enforcement of prescribed standards or limitations, and we see no reason why such a right could not be asserted by an out-of-state plaintiff injured as a result of the violation. However, *it seems implausible that Congress meant to preserve or confer any right of the state claiming injury (State II) or its citizens to seek enforcement of limitations on discharges in State I by applying the statutes or common law of State II*. Such a complex scheme of interstate regulation would undermine the uniformity and state cooperation envisioned by the Act.

Milwaukee III, at 414 (emphasis added). Accordingly, the "citizens" of a downstream State, like the *Allen* plaintiffs as citizens of New Mexico, cannot apply "the statutes or common law" of New Mexico to an upstream, Colorado-permitted discharger like SGC. The court made no exception for statutes of limitations, and the policies of predictability and uniformity the CWA seeks to foster would be diminished if upstream, permitted discharges were subject to indeterminate statutes of limitations based on the various laws of different downstream states.

The *Milwaukee III* court specifically considered the "typical" case where an action in one state causes injury in another and the injured state may apply its own laws in such a circumstance.

> We recognize that in the ordinary interstate tort the Constitution does not preclude the application of one state's law to determine liability and afford a remedy for acts done in another state and producing injury within the forum state….These cases are consistent with the general common law characterization of actions for damages to real property as local and therefore maintainable only in the state wherein the damaged land lies….Nonetheless, we think it evident from *Milwaukee I*, that this doctrine is not applicable to the determination of liability and remedy for discharges within one state by its municipalities into an interstate body of water, which by their nature implicate uniquely federal concerns. In addition, the conflict and confusion which would arise from the imposition by the second state of a more restrictive effluent standard than would be applicable under FWPCA counsels rejection of this doctrine in the present circumstances.

Milwaukee III, at 411 n3. Again, it is the "conflict and confusion" of applying different downstream state's law to an upstream discharge that the Clean Water Act preemptively avoids by requiring the application of the source state's law alone.

The concept of the law of the source state controlling was ultimately reaffirmed in *Ouellette*. The Supreme Court initially described the evolution of its jurisprudence in the *Milwaukee* decisions and endorsed *Milwaukee III's* conclusion that "the CWA precluded the application of one State's law against a pollution source located in a different State" because "the application of different state laws to a single 'point source' would interfere with the carefully devised regulatory system established by the CWA." *Ouellette*, 479 U.S. at 485.

Ouellette broadly concluded that the law of the source state controlled. "We hold that when a court considers a state-law claim concerning interstate water pollution that is subject to the CWA, the court must apply the law of the State in which the point source is located." *Id*. at 487. Significantly, the Court said nothing about the "procedural" or "substantive" law of either forum. Rather, the Court spoke in broad terms of applying the law of the source state, period.

A key reason for requiring the uniform application of the source state's law was the desire for predictability and uniformity. The CWA creates "an all-encompassing program of water pollution regulation" and "views on the comprehensive nature of the legislation were practically universal." *Id.* at 492 (citations omitted). The *Ouellette* court continued, "Application of an affected State's law to an out-of-state source also would undermine the important goals of efficiency and predictability in the permit system." *Id.* at 496. Applying different state statutes of limitations, like different state's water quality standards, "would only exacerbate the vagueness and uncertainty." *Id*. A permitted discharger like SGC should not be subject to indeterminate statutes of limitation for regulated conduct in Colorado based on whatever legislative judgments various downstream states might have enacted in their respective limitation statutes. To be sure, "[N]othing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State." *Id.* at 497 (emphasis in original). But

source state law includes source state statutes of limitations to ensure the uniformity and predictability Congress desired in passing the Clean Water Act in the first place. The Supreme Court expansively concluded that only the laws of the source state applied:

> The application of affected-state laws would be incompatible with the Act's delegation of authority and its comprehensive regulation of water pollution. The act preempts state law to the extent that the state law is applied to an out-of-state point source.

Id. at 500.

The Supreme Court reiterated these findings in *Arkansas v. Oklahoma*, 503 US. 91 (1992). In the interstate water context, federal law controls. "[W]e have long recognized that interstate water pollution is controlled by *federal* law." *Arkansas v. Oklahoma*, 503 U.S. at 110. Applying federal law furthers the CWA's purpose "to create and manage a *uniform* system of interstate water pollution regulation." *Id.* (emphasis added). Downstream states like New Mexico occupy a "subordinate position to source States in the federal regulatory program." *Arkansas v. Oklahoma*, 503 U.S. at 100 (quoting from *Ouellette*, 479 U.S. at 490-491).

Various federal courts in the ensuing years have reached identical conclusions. In *North Carolina, ex rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291 (4th Cir. 2010), the Fourth Circuit applied the *Ouellette* concepts in the Clean Air Context and applauded the application of the source state's law to

interstate air quality issues. Any other approach, "would be a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike." *Tennessee Valley Authority*, 615 F.3d at 296 (citations omitted). Just as SGC was entitled to rely on the regulatory dictates of Colorado agencies and a Colorado court, SGC's reasonable expectations should not be upset by the application of *any* New Mexico law, including that downstream state's statute of limitations.

Colorado regulators, operating pursuant to delegated EPA authority under the Clean Water Act, permitted SGC's conduct. SGC's actions were then blessed by a Colorado court. Now, SGC finds itself sued in New Mexico and Utah, subject to Colorado law, but with claims potentially being allowed or barred based on whichever state's statute of limitations happens to apply. Such a result is inconsistent with Congress' objective of a comprehensive regulatory scheme in which regulated discharges like SGC would know where they might be subject to suit, for what, and for how long.

In such a context, the need for predictability is clear:

> Without a single system of permitting, '[i]t would be virtually impossible to predict the standard' for lawful emissions, and '[a]ny permit issued …would be rendered meaningless.' This is because '*for an uncertain length of time after the agency issues the permit, the permit-holder would face the very real threat that the inquiry into the validity of its permit might be reopened in an altogether different forum*.' A company, no matter how well-meaning, would be simply unable to determine its obligations ex ante under such a system, for

> any judge in any nuisance suit could modify them dramatically….The prospects of forum shopping and races to the courthouse, the chances of reversals on appeal, the need to revisit and modify equitable decrees in light of changing technologies or subsequent enactments, would most assuredly keep matters unsettled….In the words of *Ouellette* addressing the similarly comprehensive Clean Water Act, the statute 'carefully defines the roles 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.' It is not open to this court to ignore the words of the Supreme Court, overturn the judgment of Congress, supplant the conclusions of agencies, and upset the reliance interests of states and permit holders in favor of the nebulous rules of public nuisance.

Tennessee Valley Authority, 615 F.2d at 306 (citations omitted) (emphasis added).

These precise concerns apply to a permitted entity like SGC. To vary the liability based on the differing statutes of limitations in every state through which a permitted discharge might flow would be to destroy the predictability the CWA was designed to create. In the context of interstate pollution, the source state's laws, and only the source state's laws, apply.

> In addition to the problems noted above, the district court's decision compromised principles of federalism by applying North Carolina law extraterritorially to TVA plants located in Alabama and Tennessee. There is no question that the law of the states where emission sources are located, in this case Alabama and Tennessee, applies in an interstate nuisance dispute. The Supreme Court's decision in *Ouellette* is explicit: a 'court must apply the law of the State in which the point source is located.' While *Ouellette* involved a nuisance suit against a source regulated under the Clean Water Act, all parties agree its holding is equally applicable to the Clean Air Act.

Tennessee Valley Authority, 615 F.3d at 306. The policies of the Clean Water Act require application of source state law. A source state's statute of limitations is an

integral part of its statutory structure. To apply New Mexico's statute of limitations would contravene these important federal policies.

In litigation arising out of the Deepwater Horizon disaster, the Fifth Circuit reached conclusions identical to those reached in *Tennessee Valley Authority*. *See In re Deepwater Horizon*, 745 F.3d 157 (5th Cir. 2014). The *Deepwater Horizon* court emphasized the principles behind the Clean Water Act and its extensive preemption of downstream state law. "Congress could and did supplant federal common law with an overarching regulatory framework to protect the nation's waters. To effectuate the full purposes of the regulations, *Ouellette* held that the states' ability to apply local law to out-of-state point sources of alleged water pollution was in conflict with the CWA." *Id.* at 169.

In considering the breadth of the Supreme Court's holding in *Ouellette*, the Fifth Circuit remarked that the Supreme Court had spoken "plainly" and there was "no mincing about the precise preemptive provisions of the federal CWA." *Id.* at 170.

> Allowing up to five states along the Gulf Coast to apply their individual laws to discharges arising on the Shelf would foster the legal chaos described by *Ouellette*….Moreover, just as with entities operating in point-source states, if entities engaged in developing the OCS were subjected to a multiplicity of state laws in addition to federal regulations, they could be forced to adopt entirely different operational plans or in the worst case be deterred by the redundancy and lack of regulatory clarity from even pursuing their OCS plans…Federal law, the law of the point source, exclusively applies to the claims generated by the oil spill in any affected state or locality.

Deepwater Horizon, at 170-171.

The reasonable expectation of an entity like SGC is that Colorado law will control, including Colorado's statute of limitations. The alternative is that SGC would potentially be subject to various suits over various periods of time—all in accordance with Colorado law--but filed and then allowed or barred based on the vagaries of which statute of limitations happened to apply in which downstream state. Such an approach is contrary to the Clean Water Act's policy of consistent, predictable results.

Judge Armijo, Judge Johnson's predecessor assigned to the underlying action, previously held that because Colorado is the source state, Colorado law applies. In her February 12, 2018 ruling on Environmental Restoration's Motion to Dismiss, Judge Armijo held, "When a court considers a state-law claim concerning interstate water pollution that is subject to the [Clean Water Act (CWA)] the court must apply the law of the State in which the point source is located." Doc. 203[4] at 60 (citing *Ouellette*, 479 U.S. at 487).

Quoting *Ouellette*, she concluded:

> [I]f affected States [or individuals] were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement of the full

[4] "Doc. 203" refers to Document 203 in the original docket, the Memorandum Opinion and Order, *State of New Mexico v. US EPA et al.*, No. 1:16-cv-00465-MCA-LF (D. N.M. Feb. 12, 2018), ECF No. 203.

> purposes and objectives of Congress…Because we do not believe Congress intended to undermine this carefully drawn statute through a general savings clause, we conclude that the CWA precludes a court from applying the law of an affected State against an out-of-state source.

Doc. 203 at 65 (quoting *Ouellette*, 479 U.S. at 493-494). Applying these principles to this case, the District Court held, "[T]he CWA preempts application of New Mexico law to a discharge with a point source in Colorado." Doc. 203 at 65-66. Notably, Jude Armijo did not distinguish between procedural and substantive law—the CWA simply preempts application of New Mexico law to an upstream, permitted source like SGC.

In his subsequent decision, Judge Johnson went on to note that, "[g]enerally, the statute of limitations of the forum state applies to claims in federal court." In the case of interstate pollution and the Clean Water Act, however, this "general" choice-of-law rule simply has no application. The Supreme Court in *Ouellette* expressly rejected the application of *any* choice-of-law analysis in the context of interstate pollution and the Clean Water Act. Vermont had argued that applying New York's choice of law rules might lead to the application of Vermont nuisance law. The Supreme Court disagreed, concluding that the purposes and objectives of Congress as set forth in the Clean Water Act could be satisfied only if *all* source state laws were applied.

> Although we conclude that New York law generally controls this suit, we note that the preemptive scope of the CWA necessarily includes

> *all* laws that are inconsistent with the 'full purposes and objectives of Congress.' (citations omitted). We therefore do not agree with the dissent that Vermont nuisance law still may apply if the New York *choice-of-law* doctrine dictates such a result. As we have discussed, *supra*, the application of affected-state law would frustrate the carefully prescribed CWA regulatory system. This interference would occur, of course, whether affected-state law applies as an original matter, or whether it applies pursuant to the source State's choice-of-law principles. Therefore if, and to the extent, the law of a source State requires the application of affected-state substantive law on this particular issue, it would be pre-empted as well.

Ouellette, 479 U.S. at 500 n.20 (citations omitted) (emphasis in original).

Judge Johnson ultimately concluded that the New Mexico statute of limitations should apply even though the cause of action would be governed by Colorado law. "A federal court sitting in diversity applies the substantive law of the state where it is located, including the state's statutes of limitations." *Elm Ridge Exploration Co., LLC v. Engle*, 721 F.3d 1199, 1210 (10th Cir. 2013). The reason for this general rule is so that a litigant filing suit in either State or Federal court in a place like New Mexico will have his or her claims subject to the same limitations period. The Supreme Court held as much decades ago:

> *Erie R. Co. v. Tompkins* was premised on the theory that in diversity cases the rights enjoyed under local law should not vary because enforcement of those rights was sought in the federal court rather than in the state court. If recovery could not be had in the state court, it should be denied in the federal court. Otherwise, those authorized to invoke the diversity jurisdiction would gain advantages over those confined to state courts. *Guaranty Trust Co. v. York* applied that principle to statutes of limitations on the theory that, where one is barred from recovery in the state court, he should likewise be barred in the federal court.

Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 531 (1949). This concept of uniform treatment in state or federal court has no application in the instant circumstances. The question here is whether a permitted discharge in Colorado will be subject to New Mexico's statute of limitations, not whether a litigant filing in New Mexico state or federal court will be subject to the same limitations period.

The general rule is that "Federal courts sitting in diversity must apply state substantive law in order to discourage forum shopping and to avoid inequitable administration of the respective state and federal laws." *Racher v. Westlake Nursing Home Limited Partnership*, 871 F.3d 1152, 1164 (10th Cir. 2017). This distinction is typically between applying state and federal laws, not a choice between the limitations periods of affected and source states in an area completely occupied by Congress. Congress and the Supreme Court have concluded that in this context Colorado law exclusively applies to an entity like SGC. Colorado law includes Colorado's statute of limitations. "[W]hen state law creates a cause of action, it also defines the scope of that cause of action. This includes the applicable burdens, defenses, and limitations. Failing to enforce such attendant attributes of a state law would lead to different measures of the substantive rights enforced in state and federal courts, contrary to *Erie*'s command." *Racher*, 871

F.3d at 1164-65 (citations omitted). The "burdens, defenses, and limitations" governing any SGC liability must be those set forth by Colorado law alone.

When the Clean Water Act was first enacted, various courts considered the need for a uniform statute of limitations for citizen suit enforcement actions. Courts rejected the borrowing of each state's statute of limitations because of the lack of uniformity such an approach would create. The Supreme Court made this point clear in *Occidental Life Insurance Co. v. Equal Employment Opportunity Commission*, 432 U.S. 355, 367 (1977):

> [T]he Court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute. State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies.

Occidental Life, 432 U.S. at 367; *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1521 (9th Cir. 1987). Here, New Mexico did not devise its tort statute of limitations with national interests in mind. The CWA, on the other hand, requires the application of Colorado law—all Colorado law—to further the Act's national interests in uniformity and predictability.

These policies, inherent in the CWA, have caused courts to not mechanically apply state statutes of limitations to citizen suits because to do so would defeat the Clean Water Act's national objectives:

> The application of a one-year statute of limitations in the instant case would frustrate several policies of the Act. The application of a state statute of limitations would produce non-uniform citizen suit enforcement from state to state. In the context of the Clean Water Act, it could not have been the intent of Congress to have the federal courts borrow state statutes of limitations and certainly not statutes as short as one year. If courts were to borrow state statutes of limitations, the enforcement of the Act would vary from state to state. Some states could choose to have a very brief statute of limitations, and thus be very hospitable to industries that violate the Act, while others could adjust their limitations period to provide a more hostile attitude towards possible polluters. By simply adjusting their statutes of limitations, states could frustrate the aims of the NPDES program.

Chesapeake Bay Foundation v. Bethlehem Steel Corp., 608 F.Supp. 440, 447 (D. Md. 1985). Here, Congress, the Supreme Court, and the District Court have all established that the *Allen* Plaintiffs' claims are exclusively governed by *Colorado* law. There is no New Mexico law to apply and there is no risk of a plaintiff receiving different treatment in New Mexico State or Federal court. The Clean Water Act's goals of predictability and uniformity can only be achieved if *all* source state law is applied, including Colorado's statute of limitations, which is an integral part of Colorado's statutory structure.

IV. CONCLUSION

Based on the foregoing, this Court should reverse the district court's Order denying Environmental Restoration's motion to dismiss the *Allen* Plaintiffs' claims on statute of limitations grounds.

DATED this 24th day of January, 2020.

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I hereby certify that the foregoing document was served electronically upon all counsel of record, via the U.S. Court of Appeals for the Tenth Circuit's CM/ECF electronic filing system, this 24th day of January, 2020.

/s/ Neil G. Westesen
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