Power to the People: The Tenth Circuit and the Right of Citizens to Sue for Equitable Relief Under Section 309(g)(6)(A) of the Clean Water Act

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POWER TO THE PEOPLE: THE TENTH CIRCUIT AND THE RIGHT OF CITIZENS TO SUE FOR EQUITABLE RELIEF UNDER SECTION 309(G)(6)(A) OF THE CLEAN WATER ACT

LISA DONOVAN*

Abstract: The United States Court of Appeals for the Tenth Circuit recently determined that the jurisdictional bar contained in section 309(g)(6)(A) of the Clean Water Act does not preclude citizen plaintiffs from seeking equitable relief, but only bars those actions seeking civil penalties. However, this holding by the Tenth Circuit in Paper, Allied-Industrial, Chemical and Energy Workers International Union v. Continental Carbon Co. directly conflicts with prior decisions by the First and Eighth Circuits. The First and Eight Circuits have broadly interpreted the jurisdictional bar to preclude citizens from seeking civil penalties or equitable relief once an administrative enforcement action is underway. An examination of the relevant statutory language, legislative history, and policy rationale, however, reveals that section 309(g)(6)(A) was only intended to bar citizens actions for civil penalties, preserving citizens’ powerful role in the protection and restoration of the navigable waters of this country.

INTRODUCTION

On November 8, 2005, the United States Court of Appeals for the Tenth Circuit handed down a landmark decision in Clean Water Act (CWA) litigation, finding that the jurisdictional bar contained in section 309(g)(6)(A) of the CWA only precludes citizens from seeking civil penalties when an administrative enforcement action is under-

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1 To enhance clarity, the text of this Note will refer to CWA section numbers 309 and 505, as opposed to their codified section numbers in the United States Code (§ 1319 and § 1365, respectively). However, the footnotes will cite to the codified section numbers in the Code.
way.\textsuperscript{2} The Tenth Circuit’s holding in \textit{Paper, Allied-Industrial, Chemical and Energy Workers International Union v. Continental Carbon Co.} allows citizen plaintiffs to seek equitable relief even when claims for civil penalties are precluded under section 309(g) (6)(A).\textsuperscript{3} The \textit{Continental Carbon} decision has contributed to the growing divide among lower courts that have attempted to interpret the preclusive effect of section 309(g) (6)(A).\textsuperscript{4} While some lower courts have construed this jurisdictional bar broadly, and as a result have weakened the enforcement power of the CWA, others have interpreted the preclusion provision narrowly, preserving the critical role citizen suits play in the environmental protection scheme.\textsuperscript{5}

The Tenth Circuit’s recent decision has made the tension among the courts particularly evident, as its holding in \textit{Continental Carbon} directly conflicts with previous decisions by the First and Eighth Circuits.\textsuperscript{6} Specifically, the courts disagree as to which forms of relief are precluded from being sought by citizen plaintiffs when an administrative enforcement action is underway.\textsuperscript{7} The First and Eighth Circuits have construed section 309(g) (6)(A) to preclude citizen suits seeking civil penalties or equitable relief.\textsuperscript{8} By contrast, the Tenth Circuit held

\begin{itemize}
\item \textsuperscript{3} 428 F.3d at 1300.
\item \textsuperscript{4} See, e.g., id. (holding that section 309(g) (6)(A) bars only civil penalty claims and not claims seeking equitable relief); \textit{Ark. Wildlife Fed’n v. ICI Ams., Inc.}, 29 F.3d 376 (8th Cir. 1994) (holding that section 309(g) (6)(A) precludes actions for both civil penalties and equitable relief); \textit{N. & S. Rivers Watershed Ass’n, Inc. v. Town of Scituate}, 949 F.2d 552 (1st Cir. 1991) (holding that the section 309(g) (6)(A) ban extends to claims for injunctive relief and civil penalties); \textit{Coal. for a Liveable W. Side, Inc. v. New York City Dep’t of Env’t Prot.}, 830 F. Supp. 194 (S.D.N.Y. 1993) (holding that section 309(g) (6)(A) only applies to civil penalty actions).
\item \textsuperscript{6} Compare \textit{Cont’l Carbon}, 428 F.3d at 1300, with \textit{Ark. Wildlife Fed’n}, 29 F.3d at 383, and \textit{N. & S. Rivers}, 949 F.2d at 558. This Note will directly analyze this conflict.
\item \textsuperscript{7} Compare \textit{Cont’l Carbon}, 428 F.3d at 1300, with \textit{Ark. Wildlife Fed’n}, 29 F.3d at 383, and \textit{N. & S. Rivers}, 949 F.2d at 558.
\item \textsuperscript{8} \textit{Ark. Wildlife Fed’n}, 29 F.3d at 383; \textit{N. & S. Rivers}, 949 F.2d at 558.
\end{itemize}
that the section bars only citizen claims for civil penalties, permitting subsequent claims brought by citizens seeking equitable relief.\(^9\)

The Tenth Circuit’s decision in *Continental Carbon* comes at a time when United States citizens are questioning the government’s ability and desire to address a wide range of domestic environmental problems.\(^10\) Limited resources, state and local economic interests, and political agendas have led to relaxed federal and state enforcement of many environmental regulations, including the CWA.\(^11\) Fortunately, while the Environmental Protection Agency (EPA) and states hold the primary enforcement power under the CWA, private citizens have filled many of the gaps in enforcement by filing citizen actions to address environmental harms.\(^12\) Citizens are able to act as a check on the government by initiating federal and state enforcement efforts and acting as a supplemental enforcement authority when the government fails to act.\(^13\)

Unfortunately, despite the documented effectiveness of citizen suits, courts have recently narrowed the citizen’s role in enforcing the CWA.\(^14\) The First and Eighth Circuits have contributed to this erosive trend by finding that section 309(g)(6)(A) of the CWA precludes citizens from seeking any type of relief when an administrative enforcement action is underway.\(^15\) The Tenth Circuit’s recent decision in *Continental Carbon* both challenges the First and Eighth Circuit’s broad

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9 *Cont’l Carbon*, 428 F.3d at 1300.


13 Plater et al., *supra* note 11, at 1028, 1034; Hodas, *supra* note 12, at 1618–19. As one author articulates: “One of the important lessons citizen suits have taught is that ‘private industry, left to its own initiative, will procrastinate indefinitely, even at the expense of the environment, [and] the government agencies empowered with protecting the environment are far from diligent in that regard.’” Hodas, *supra* note 12, at 1621 (quoting PIRG v. Powell Duffryn Terminals, Inc., 720 F. Supp. 1158, 1163 (D.N.J. 1989)).


interpretation of the section 309(g)(6)(A) bar, and signifies powerful resistance to recent judicial activism that put effective enforcement of the CWA in jeopardy.\footnote{See Paper, Allied-Indus., Chem. and Energy Workers Int’l Union v. Cont’l Carbon Co., 428 F.3d 1285, 1300 (10th Cir. 2005).}

This Note will examine how the Tenth Circuit’s narrow interpretation of section 309(g)(6)(A) of the CWA preserves the public’s vital role in enforcing the laws that protect the navigable waters of the nation from polluters and government inaction. Part I explores the role that citizen suits have played in the CWA’s enforcement scheme and what restrictions have been placed on these suits since their emergence in 1972. Part II reviews the relevant case law regarding the type of relief citizens are barred from seeking under section 309(g)(6)(A) of the CWA. This section of the Note also highlights the current divide between the First, Eighth, and Tenth Circuits’ interpretation of the scope of the jurisdictional bar. Finally, Part III looks to why the statutory language, legislative history, and policy rationales of section 309(g)(6)(A) should persuade the Supreme Court to follow the Tenth Circuit’s reasoning and find that the statutory bar only applies to citizen claims for civil penalties, not equitable relief.

\section{I. The Role of Citizen Suits Under the CWA}

The Tenth Circuit recently preserved a citizen plaintiff’s right to sue for declaratory or injunctive relief when the government is engaged in an administrative enforcement action.\footnote{Id.} There are two types of administrative enforcement actions: Administrative compliance orders and administrative penalty assessments.\footnote{See Leonard, supra note 5, at 584.} Administrative compliance orders have been criticized as the weakest enforcement mechanism because they do not impose civil penalties, are only enforceable by a court order, are not subject to judicial review, and do not have to adhere to public participation requirements.\footnote{Id. at 585–86.} Alternatively, administrative penalty assessments recover civil penalties for past violations of the CWA, but cannot be used to impose penalties for violations of compliance orders or to impose injunctive relief.\footnote{Id. at 586–87. Currently, there is disagreement among courts regarding what types of administrative enforcement actions should preclude citizen suits. Id. at 583–93. While this debate is beyond the scope of this Note, it is important to state that the Tenth Circuit in Continental Carbon case,}
the Tenth Circuit construed the jurisdictional bar contained in section 309(g) (6) (A) to only preclude citizen suits seeking civil penalties when an administrative enforcement action is underway. However, if this case had been tried in the First or Eighth Circuit, a very different result would have ensued. Both the First and Eighth Circuits would have dismissed the entire citizen suit, as those jurisdictions have found that section 309(g) (6) (A) of the CWA precludes citizens from seeking both civil penalties and equitable relief.

A. The Emergence of Citizen Suits in Water Pollution Regulation

In 1972, Congress passed the Federal Water Pollution Control Act Amendments, dramatically altering the manner in which the federal government controlled the increasingly serious problem of water pollution. These amendments, most commonly referred to as the CWA, became a powerful tool in the preservation and restoration of the navigable waters of the United States by establishing efficient and effective enforcement methods that prior water pollution regulations lacked. Specifically, the CWA authorized EPA to monitor the emissions of effluents into navigable waters by the use of National Pollutant Discharge Elimination System (NPDES) permits, which “establish technology-based limits on the volume and concentration of pollutants that can be discharged into the nation’s waters . . . .” Each state was also given authority to establish its own permit and enforce-

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21 Cont’s Carbon, 428 F.3d at 1300.
22 Compare id., with Ark. Wildlife Fed’n v. ICI Ams., Inc., 29 F.3d 376, 383 (8th Cir. 1994), and N. & S. Rivers Watershed Ass’n, Inc. v. Town of Scituate, 949 F.2d 552, 558 (1st Cir. 1991).
26 See Hodas, supra note 12, at 1563–71; Fisch, supra note 5, at 212; Howard, supra note 25, at 44–45; Leonard, supra note 5, at 557–61.
ment program, provided that the scheme was deemed compatible with the CWA and approved by EPA.\textsuperscript{28}

To broaden and bolster enforcement of the CWA, enforcement power was allocated to the federal government, state governments and—for the first time in a water pollution control law—to private citizens of the United States.\textsuperscript{29} The CWA currently gives private citizens “attorney-general” status to act as enforcers of the Act, empowering them to seek both monetary penalties and equitable relief from alleged violators.\textsuperscript{30} Citizen suits thus enable the general public to act as enforcers of the CWA when the government has failed to do so, either as a result of limited enforcement resources, particular policy objectives, or its own laxity.\textsuperscript{31} For decades, these suits have been a powerful and critical enforcement mechanism, spurring and supplementing government actions and deterring violators from non-compliance.\textsuperscript{32}

1. Statutory Authority for Citizen Suits Under the CWA

The statutory authority for citizen suits was built into the 1972 amendments and lies in section 505 of the CWA.\textsuperscript{33} This provision allows private citizens to commence an action in federal district court against:

[A]ny person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary . . . .\textsuperscript{34}

\textsuperscript{28} Pub. L. No. 92-500, § 402(a)(5), 86 Stat. 850, 880 (1992) (“The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this Act, to issue permits for discharges into the navigable water within the jurisdiction of such State”); Hodas, \textit{supra} note 12, at 1569–70; Fisch, \textit{supra} note 5, at 212–13; Leonard, \textit{supra} note 5, at 558.
\textsuperscript{30} \textit{Plater et al.}, \textit{supra} note 11, at 1028, 1034; see Clean Water Act § 505(a), 33 U.S.C. § 1365(a) (2000).
\textsuperscript{31} \textit{See Plater et al.}, \textit{supra} note 11, at 1028, 1033; Hodas, \textit{supra} note 12, at 1618–23.
\textsuperscript{33} 33 U.S.C. § 1365(a).
\textsuperscript{34} \textit{Id.}
Thus, section 505(a) allows private citizens to bring actions not only against individual or corporate polluters violating the CWA, but also against the government when it is either unable to or has refused to use its resources to effectively enforce the Act.\textsuperscript{35} Specifically, this provision permits a federal district court to: (1) enforce the CWA effluent standards and limitations; (2) enforce orders regarding the effluent standards and limitations; (3) order the EPA Administrator to enforce the CWA standards and limitations; and (4) apply the proper civil penalties for a violation.\textsuperscript{36}

2. Limitations on Citizen Suits

Several limitations have been placed on these suits since their emergence in the CWA in 1972.\textsuperscript{37} For instance, a citizen cannot commence an action until a sixty day notice of the alleged violation has been given to the EPA Administrator, to the state where the supposed violation is taking place, and to the alleged violator of the Act.\textsuperscript{38} A citizen is also precluded from filing suit against a polluter if the federal or state government has begun “diligently prosecuting a civil or criminal action” against the polluter in court “to require compliance with the standard, limitation, or order . . . .”\textsuperscript{39} These limitations re-emphasize that Congress intended that the primary enforcement authority lies with the government under the CWA, and that citizen suits are supplementary.\textsuperscript{40}

B. Expanding the Bar on Citizen Suits

In 1987, Congress expanded the limitations on citizen suits through the passage of the Water Quality Act of 1987.\textsuperscript{41} Specifically, the restrictions arose from the addition of section 309(g) to the CWA, establishing a novel administrative procedure for the assessment of

\textsuperscript{35} See id.
\textsuperscript{36} Id.
\textsuperscript{37} See Hodas, supra note 12, at 1626–27; Leonard, supra note 5, at 555–56.
\textsuperscript{38} 33 U.S.C. § 1365(b)(1)(A) (“No action may be commenced . . . prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of standard, limitation, or order.”).
\textsuperscript{39} 33 U.S.C. § 1365(b)(1)(B).
\textsuperscript{40} See Hodas, supra note 12, at 1626–27.
Section 309(g) authorizes the government to seek civil penalties outside of the courtroom for past violations. Its addition to the Act provided a third alternative to the two existing civil enforcement mechanisms available under the CWA: (1) a compliance order issued under section 309(a); and (2) a judicial civil action seeking monetary penalties and injunctive relief issued under section 309(b). Thus, by authorizing the government to request civil penalties from polluters, section 309(g) gives government officials an opportunity for enforcement that “provide[s] greater deterrent value than an administrative order for a violation that does not warrant the more resource intensive aspects of judicial enforcement.”

To safeguard against the possibility that polluters would be subject to duplicative administrative civil penalties—first sought for by EPA and then again by a citizen enforcement suit—Congress established section 309(g)(6)(A), which limits citizen action against alleged violators when an administrative enforcement action has already commenced and is being diligently prosecuted. However, courts have been unable to agree on the scope of the section 309(g)(6)(A) bar on citizen suits. Some courts have found that the section significantly broadens the preclusion of citizen suits, while others have defined this bar more narrowly.

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42 See 33 U.S.C. § 1319(g); Hodas, supra note 12, at 1630; Leonard, supra note 5, at 565, 570–71.
43 See 33 U.S.C. § 1319(g); Leonard, supra note 5, at 514.
48 Compare Cont’l Carbon, 428 F.3d at 1299–300, and Coal. for a Liveable W. Side, Inc. v. New York City Dep’t of Envtl. Prot., 830 F. Supp. 194 (S.D.N.Y. 1993), with Ark. Wildlife Fed’n, 29 F.3d at 377, 382–83, and N. & S. Rivers, 949 F.2d at 557–58. The debate as to whether section 309(g)(6)(A) should be construed narrowly or broadly extends to the interpretation of other aspects of the section. Other issues raised in a typical section 309(g)(6)(A) analysis include: (1) what types of administrative enforcement actions bar citizen suits; (2) how to decide whether administrative enforcement actions defined under state law are comparable to the administrative penalty assessment provision under the CWA for the purpose of precluding citizen suits; and (3) how to decide whether a governmental agency is engaged in the diligent prosecution of the administrative enforcement action. See Leonard, supra note 5, for a substantive analysis of these issues.
1. Statutory Language of Section 309(g) (6) (A)

Section 309(g) (6) (A) underlines the restrictions an administrative enforcement action places on other sections of the CWA.49 Courts that narrowly interpret section 309(g) (6) (A) place substantial weight on the plain meaning of the statutory language to support only extending the bar to citizen claims for civil penalties.50 By contrast, courts that broadly interpret the bar disregard the statute’s plain language and dismiss citizen suits seeking either civil penalties or equitable relief.51 Under section 309(g) (6) (A), any CWA violation:

(i) with respect to which the [EPA] Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,
(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or
(iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law. . . . shall not be the subject of a civil penalty action under subsection . . . [505] of this title.52

2. Legislative History of Section 309(g)

Before passing section 309(g), Congress noted the importance of citizen actions, calling the suits “proven enforcement tool[s]” that have acted to “both spur and supplement . . . government enforcement actions . . . [and] have deterred violators and achieved significant compliance gains.”53 Congress intended for § 309(g) to “[strike] a balance between two competing concerns: The need to avoid placing obstacles in the path of such citizen suits and the desire to avoid subjecting violators of the law to dual enforcement actions or penalties for the same violation.”54 Furthermore, Congress was clear in its intent to apply the limita-

52 33 U.S.C. § 1319(g) (6) (A) (emphasis added).
54 Id.
tion contained in section 309(g) “only to an action for civil penalties for the same violations which [were already] the subject of the administrative civil penalties proceeding.” \(^{55}\) Congress explicitly pronounced that this bar did not apply to “an action seeking relief other than civil penalties (e.g., an injunction or declaratory judgment).” \(^{56}\) While the legislative history of section 309(g) suggests a congressional intent to preserve citizen claims for equitable relief under section 309(g) (6)(A), the First and Eighth Circuits have ignored the history’s significance in interpreting this section of the CWA. \(^{57}\)

II. THE SCOPE OF SECTION 309(G)(6)(A): DOES THE BAR ON CITIZEN SUITS EXTEND TO EQUITABLE RELIEF?

The Tenth Circuit recently held that the jurisdictional bar on citizen suits contained in section 309(g) (6)(A) applies only to those actions seeking civil penalties. \(^{58}\) This is contrary to decisions made over a decade ago by the First and Eighth Circuits, which found that section 309(g) (6)(A) precluded citizens from seeking both civil penalties and equitable relief once an administrative enforcement action had been commenced and diligently prosecuted. \(^{59}\) While several district court decisions refused to apply the First and Eighth Circuits’ broad jurisdictional bar to citizen suits, \(^{60}\) the Tenth Circuit is the first federal court of appeals to challenge the decisions of these courts. \(^{61}\)

A. Supreme Court Precedent: The Gwaltney Decision

While the United States Supreme Court has yet to rule on whether § 309(g) (6)(A) precludes private citizens from seeking equitable relief, lower courts have relied on the Court’s language in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.* to determine the intended scope of the bar. \(^{62}\) In *Gwaltney*, the Court held that section

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\(^{55}\) Id.


\(^{57}\) Ark. Wildlife Fed’n v. ICI Ams., Inc., 29 F.3d 376, 382–83 (8th Cir. 1994); N. & S. Rivers Watershed Ass’n, Inc. v. Town of Scituate, 949 F.2d 552, 557–58 (1st Cir. 1991).

\(^{58}\) Paper, Allied-Indus., Chem. and Energy Workers Int’l Union v. Cont’l Carbon Co., 428 F.3d 1285, 1300 (10th Cir. 2005).

\(^{59}\) Ark. Wildlife Fed’n, 29 F.3d at 383; N. & S. Rivers, 949 F.2d at 558.


\(^{61}\) See *Cont’l Carbon*, 428 F.3d at 1300.

\(^{62}\) See 484 U.S. 49 (1987); *Cont’l Carbon*, 428 F.3d at 1298–99; Ark. Wildlife Fed’n, 29 F.3d at 383; N. & S. Rivers, 949 F.2d at 555, 558.
505(a) of the CWA did not confer federal jurisdiction over citizen suits for wholly past violations of the Act.\(^{63}\) However, lower courts are divided in their interpretation of the Supreme Court’s language and holding in *Gwaltney*.\(^{64}\) Consequently, the decision has been used by courts to both extend and narrow the preclusive effect of section 309(g) (6) (A) on citizen suits.\(^{65}\)

Courts sympathetic to defendants and hostile to citizen suits have construed *Gwaltney* to support the view that once an administrative enforcement action has been commenced and diligently prosecuted, a citizen is precluded from seeking any type of relief for the same violation in court.\(^{66}\) The First and Eighth Circuits have used certain language from *Gwaltney* to maintain this argument.\(^{67}\) The First Circuit explained:

> The statutory language suggesting a link between civilian penalty and injunctive actions, considered in light of the *Gwaltney* opinion’s language outlining the supplemental role the citizen’s suit is intended to play in enforcement actions, leads us to believe that the section 309(g) bar extends to all citizen actions brought under section 505, not merely civil penalties.\(^{68}\)

By contrast, courts recognizing the critical role citizen suits play in the enforcement of the CWA use *Gwaltney* to narrowly construe the preclusive effect of section 309(g) (6) (A).\(^{69}\) In *Gwaltney*, the Court emphasized that “the starting point for interpreting a statute is the language of the statute itself.”\(^{70}\) The Tenth Circuit followed this directive, stressing that the plain meaning of the statutory language suggests that only citizen civil penalty claims should be dismissed when an adminis-

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\(^{63}\) *Gwaltney*, 484 U.S. at 59.

\(^{64}\) Compare *Cont’l Carbon*, 428 F.3d at 1298–99, with Ark. Wildlife Fed’n, 29 F.3d at 383, and *N. & S. Rivers*, 949 F.2d at 555, 558.

\(^{65}\) See *Cont’l Carbon*, 428 F.3d at 1298–99; Ark. Wildlife Fed’n, 29 F.3d at 383; *N. & S. Rivers*, 949 F.2d at 555, 558.

\(^{66}\) See Ark. Wildlife Fed’n, 29 F.3d at 383; *N. & S. Rivers*, 949 F.2d at 555, 558.

\(^{67}\) See, e.g., *N. & S. Rivers*, 949 F.2d at 555 (“It follows that ‘the citizen suit [under section 505] is meant to supplement rather than to supplant governmental [enforcement] action.’") (quoting *Gwaltney*, 484 U.S. at 60).

\(^{68}\) Id. at 558.


trative enforcement action is underway. In addition, legal scholars have noted that Gwaltney should not be an overriding source of authority in defining the scope of the bar since the Court “relied almost entirely on the legislative history of the 1972 amendments to support its suggestion regarding the supplementary role of citizen suits in the CWA enforcement scheme.” Because the administrative penalty assessment provisions are the product of the 1987 CWA amendments, scholars suggest that the “legislative history of the 1987 amendments is more germane to the interpretation of these provisions than the general precautionary statements regarding the role of citizen suits expressed in the legislative history of the 1972 amendments.”

B. The Beginning of the Debate: North and South Rivers Watershed Association, Inc. v. Town of Scituate

In 1989, the First Circuit defined the scope of the section 309(g)(6)(A) bar, holding in North & South Rivers Watershed Ass’n, Inc. v. Town of Scituate that a citizen plaintiff is precluded from seeking civil penalties or equitable relief when an administrative enforcement action is being pursued by the government for the same violation. In North & South Rivers, a citizen group filed suit against the town for violating the federal CWA and sought both civil penalties and equitable relief in district court. The citizen complaint specifically alleged that a sewage treatment center was illegally discharging pollutants into a coastal estuary. Two years earlier the Massachusetts Department of Environmental Protection (DEP) issued an administrative order to the town of Scituate in response to these violations, requesting that the town: (1) cease to establish any further connections to its sewage system; (2) take the necessary steps to create new wastewater treatment facilities; and (3) begin upgrading the current treatment center.

The DEP never assessed any civil or criminal penalties against the town, nor did they establish a timetable or deadline against which compliance could be measured. Thus, even though the state order

71 See Cont’l Carbon, 428 F.3d at 1298–1300.
72 Leonard, supra note 5, at 590.
73 Id.
74 949 F.2d 552, 558 (1st Cir. 1991).
75 Id. at 554.
76 Id. at 553.
77 Id. at 553–54.
78 See id. at 554, 554 n.1; Fisch, supra note 5, at 221.
attempted to address the noncompliance, the town was still in violation of the same state laws two years later.\textsuperscript{79} Despite the town’s disregard for the administrative order and its continuous violation of the CWA, the district court granted the town’s motion for summary judgment, dismissing the plaintiff’s claim.\textsuperscript{80} The court found that the appellants’ citizen suit (seeking both civil penalties and equitable relief) was barred under section 309(g)(6)(A)(ii) because the state had commenced and was in the process of diligently prosecuting the action under state law comparable to the CWA.\textsuperscript{81}

The First Circuit affirmed the district court’s grant of summary judgment.\textsuperscript{82} After finding that the Massachusetts state law was comparable to the CWA and was being diligently enforced by the state, the court applied the bar under section 309(g)(6)(A)(ii) to both the civil and equitable remedies sought by the plaintiff.\textsuperscript{83} The First Circuit found that “both the policy considerations regarding civilian actions under section 505 emphasized by both the Supreme Court and Congress and the fact that section 505 fails to differentiate civilian penalty actions from other forms of civilian relief,” supported the broad scope of the citizen suit preclusion.\textsuperscript{84}

Specifically, the First Circuit found that the citizen suit provision purposefully did not distinguish civil penalty actions from other citizen actions, such as those seeking declaratory or injunctive relief.\textsuperscript{85} The court referenced the Supreme Court’s acknowledgment in \textit{Gwaltney} that civil penalties and injunctive relief are referred to in the same sentence of the same section of the CWA.\textsuperscript{86} The First Circuit thus found that since most other sections of the CWA addressed distinct types of relief in separate subsections, the structure of section 505 suggests that citizen actions for civil penalties and equitable relief are intimately connected.\textsuperscript{87} Consequently, the court assumed that any limitation placed on one type of relief must also be placed on the other.\textsuperscript{88} Therefore, the court found that because section

\textsuperscript{79} See \textit{N. \& S. Rivers}, 949 F.2d at 554–55.
\textsuperscript{80} See id. at 555.
\textsuperscript{81} Id.
\textsuperscript{82} Id. at 558.
\textsuperscript{83} Id. at 553, 558.
\textsuperscript{84} Id. at 557.
\textsuperscript{85} \textit{N. \& S. Rivers}, 949 F.2d at 557–58.
\textsuperscript{86} Id. at 558.
\textsuperscript{87} See id.
\textsuperscript{88} See id.; Leonard, \textit{supra} note 5, at 612.
309(g)(6)(A) precludes citizens from seeking civil penalties, such preclusion must also extend to those suits seeking equitable relief.\footnote{89}

The First Circuit also relied on the Supreme Court’s discussion in Gwaltney concerning the supplemental role citizen suits should play in the CWA enforcement scheme.\footnote{90} The Supreme Court’s pronouncement that “the citizen suit is meant to supplement rather than to supplant governmental action”\footnote{91} was relied on by the First Circuit in support of the proposition that section 309(g)(6)(A) precludes all citizen suits, not just those seeking civil penalties.\footnote{92} The First Circuit stressed that:

Both the Congress and the Supreme Court have recognized: (1) that the primary responsibility for enforcement of Clean Water Acts rests with the government; (2) that citizen suits are intended to supplement rather than supplant this primary responsibility; and (3) that citizen suits are only proper if the government fails to exercise its enforcement responsibility.\footnote{93}

The court in North & South Rivers believed that once the government takes any action to ensure compliance, any subsequent action by citizens will not only fail, but will impede the process necessary to further the goals of the CWA.\footnote{94} In its final words, the First Circuit commented on the absurdity of applying the literal interpretation of the statute.\footnote{95} By construing section 309(g)(6)(A) broadly, the court “provide[d] an alternative meaning” of the section that it believed “avoid[ed] irrational consequences.”\footnote{96}

C. Following the First Circuit’s Lead: Arkansas Wildlife Federation v. ICI Americas, Inc.

A few years after the First Circuit decided North & South Rivers, the Eighth Circuit in Arkansas Wildlife Federation v. ICI Americas, Inc. was faced with the same legal issue: Are citizen suits seeking injunctive
or declaratory relief precluded under section 309(g)(6)(A). The district court granted summary judgment in favor of ICI Americas, Inc. (ICI), dismissing Arkansas Wildlife Federation’s claims for injunctive and declaratory relief sought pursuant to section 505(a) of the CWA. The Eighth Circuit, in affirming the district court’s opinion, held in part that the bar on citizen suits contained in section 309(g)(6)(A)(ii) applied to both civil penalty actions and equitable relief.

In Arkansas Wildlife Federation, ICI operated a herbicide manufacturing plant that violated the emissions limits of their NPDES permit. After an investigation, the Arkansas Department of Pollution Control and Ecology (PCE) entered a Consent Administrative Order with ICI requiring compliance with the issued NPDES permit. However, after the Order was continually ignored by both PCE and ICI, the Arkansas Wildlife Federation filed a citizen suit.

The Eighth Circuit followed the reasoning set forth by ICI (whose reliance centered on the North & South Rivers and Gwaltney decisions) in deciding that the district court properly dismissed the citizen plaintiff’s claims for injunctive and declaratory relief. However, the Eighth Circuit did distinguish itself from the First Circuit by stating that its decision “do[es] not go so far as to say that it would be ‘absurd’ to preclude citizens’ claims for civil penalties without also precluding claims for declaratory and injunctive relief under the same circumstances.” Yet, instead of straying further from the reasoning set forth in North & South Rivers, the Eighth Circuit voiced its agreement with the First Circuit’s decision that it would be “unreasonable” to bar citizens from seeking civil penalties and not also bar them from seeking equitable relief under section 309(g)(6)(A). The Eighth Circuit concluded that allowing citizens to seek equitable relief after a state has begun its diligent administrative enforcement efforts “could result in undue interference with, or unnecessary du-

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97 See Ark. Wildlife Fed’n v. ICI Ams., Inc., 29 F.3d 376, 377 (8th Cir. 1994).
98 Id. at 379.
99 Id. at 383.
100 Id. at 377.
101 Id. at 378.
102 Id.
105 Id.
plication of, the legitimate efforts of the state agency . . . [and] would undermine, rather than promote, the goals of the CWA . . . .”

**D. A Building Block for the Tenth Circuit: Coalition for a Liveable West Side, Inc. v. New York City Department of Environmental Protection**

While the Tenth Circuit was the first federal appellate court to diverge from the First and Eighth Circuits in defining the scope of the bar on citizen suits under section 309(g), several district courts challenged the two circuits long before the issue was addressed in *Continental Carbon.* In *Coalition for a Liveable West Side, Inc. v. New York City Department of Environmental Protection*, the Southern District of New York narrowly defined the scope of the jurisdictional bar on citizen suits under section 309(g)(6)(A). In that case, a citizen suit was filed by various environmental organizations against the New York City Department of Environmental Protection (NYC DEP) for violating permits for two wastewater treatment plants. The citizen suit sought to enjoin the NYC DEP from allowing any additional sewer connections or sewer flows to be made into either wastewater plant unless certain specified conditions were met.

In *Coalition for a Liveable West Side*, the NYC DEP relied on *North & South Rivers* to support its position that the citizen plaintiff was barred from bringing any type of enforcement action under section 309(g)(6)(A). However, the district court found that the language of the statute unquestionably applied the bar only to civil penalties. According to the court, the language of the section “ensures that an entity that has violated the CWA will not be subject to duplicative civil penalties for the same violations.” The court believed that by giving deference to the government action but not completely dismissing the citizen suit, a defendant could be certain that he or she would not

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106 Id.
108 830 F. Supp. at 197.
109 Id. at 195–96.
110 Id. at 196.
111 Id. at 196–97.
112 Id. (“The language of § 1319 is clear and unambiguous. Its bar applies only to civil penalty actions”).
113 Id. at 197.
be subjected to duplicative or inconsistent equitable remedies. The reasoning set forth in *Coalition for a Liveable West Side* continues to be used by those courts in favor of preserving the critical enforcement power of citizen suits.


The Tenth Circuit’s recent decision in *Continental Carbon* has brought the question of what form of relief citizens are barred from seeking under section 309(g)(6)(A) one step closer to being addressed by the United States Supreme Court. The Tenth Circuit preserved the citizen plaintiff’s right to seek equitable relief in the face of an administrative enforcement action by holding that the jurisdictional bar under section 309(g)(6)(A) precludes only civil penalty claims.

In this case, Continental Carbon Company (CCC) was a manufacturer of carbon black, a material used in making rubber and plastic products. The CCC plant was located in Ponca City, Oklahoma and produced wastewater that was subsequently discharged into “retention lagoons” in close proximity to the Arkansas River. In 1998, CCC successfully obtained a permit from the Oklahoma Department of Environmental Quality (ODEQ), allowing the plant to lawfully discharge its wastewater into the lagoons. However, in 2002, concerns arose regarding the manner in which wastewater from the plant was being disposed. CCC’s employee union, Paper, Allied-Industrial, Chemical and Energy Workers International Union (PACE), along with the Native American Ponca Tribe residing in the area, articulated concerns to the ODEQ that CCC’s discharge activities were exceeding the permitted area. The Ponca Tribe was particularly concerned be-

116 See *Cont’l Carbon*, 428 F.3d at 1285.
117 *Id.* at 1300.
118 *Id.* at 1289.
119 *Id.*
120 *Id.*
121 *Id.*
cause members of the tribe swam, fished, and hunted in the immediate area being contaminated by the illegal discharge from the plant.\textsuperscript{123} The Ponca Tribe also obtained their drinking water from a well system they owned in the polluted area.\textsuperscript{124} Their concern led to the eventual issuance of a citizen complaint by PACE and the Ponca Tribe, which alleged that CCC was discharging industrial wastewater unlawfully into marshland east of the lagoons in even closer proximity to the Arkansas River.\textsuperscript{125}

An investigation by ODEQ verified the complaint.\textsuperscript{126} ODEQ observed that the water in the marshland in question was black.\textsuperscript{127} Furthermore, oily substances were discovered on the surface of the marshland that had identical components to those chemicals found in the plant’s wastewater.\textsuperscript{128} After the ODEQ issued a Notice of Violation (NOV) informing the plant of its regulatory violations, the agency and CCC entered into a consent decree entailing a promise by CCC to take certain remedial measures.\textsuperscript{129} CCC agreed to: (1) conduct a permeability study; (2) submit a water balance report; (3) perform an approved Supplemental Environmental Project (SEP); and (4) monitor emissions from the plant.\textsuperscript{130} Several months after the agreement was finalized, a discrepancy in CCC’s 1998 discharge permit application was discovered by ODEQ.\textsuperscript{131} The discrepancy regarded the “depth-to-groundwater” measurement reported in CCC’s permit application.\textsuperscript{132} CCC had reported the depth between the wastewater impoundments and groundwater impoundments to be eighty feet.\textsuperscript{133} However, after examining data related to other water wells in the region, ODEQ believed the depth between the two impoundments was actually less than fifteen feet.\textsuperscript{134} Such a low level of depth between the wastewater and groundwater impoundments was a violation of Oklahoma law.\textsuperscript{135} Despite this violation of Oklahoma’s water pollution regulations, ODEQ and CCC agreed to settle the discrepancy through

\textsuperscript{123} Brief of Plaintiff–Appellant, supra note 122, at 4–5 n.1.
\textsuperscript{124} Id.
\textsuperscript{125} Cont’l Carbon, 428 F.3d at 1289.
\textsuperscript{126} See id.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{131} Cont’l Carbon, 428 F.3d at 1289.
\textsuperscript{132} Id.
\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} Id. at 1289–90.
the permit renewal process.\textsuperscript{136} In June, 2005, ODEQ renewed CCC’s discharge permit through May 31, 2010.\textsuperscript{137}

On June 19, 2002, after PACE and the Ponca Tribe were deprived of relevant information regarding the current state of CCC’s violations and turned away from meetings with both the company and ODEQ, the citizen plaintiffs served a notice of intent to sue upon the U.S. Attorney General, EPA, the State of Oklahoma, and CCC.\textsuperscript{138} On November 26, 2002, the plaintiffs filed a citizen suit against CCC under section 505(a) of the CWA.\textsuperscript{139} The complaint alleged three claims: “(1) unauthorized discharges of wastewater; (2) misrepresentation of facts in the 1998 permit application; and (3) failure to report unauthorized discharge in the lagoons, including but not limited to the discharges identified in Claim 1.”\textsuperscript{140} Plaintiffs sought both monetary and equitable damages from CCC.\textsuperscript{141} Specifically, the plaintiffs requested: (1) a declaratory judgment stating that the company violated both the CWA and Oklahoma statutes through the unsafe operation of its plant; (2) the maximum amount of civil penalties authorized by the CWA; and (3) an injunction imposing a compliance schedule on CCC and prohibiting all discharges not permitted under the CWA and Oklahoma law.\textsuperscript{142}

In response to the citizen suit, CCC filed a motion to dismiss for failure to state a claim and lack of jurisdiction.\textsuperscript{143} CCC’s motion to dismiss based on lack of jurisdiction triggered the district court’s analysis of the scope of section 309(g)(6)(A) of the CWA.\textsuperscript{144} The court first ruled that the section applied to the citizen action because the Oklahoma law was comparable to the CWA.\textsuperscript{145} Next, the district court held that section 309(g)(6)(A) precluded only civil penalties from being sought by citizens.\textsuperscript{146} Consequently, the court granted CCC’s motion to dismiss for the civil penalty claim, but left the citizens’ claims seeking

\textsuperscript{136} Id. at 1290.
\textsuperscript{137} \textit{Cont’l Carbon}, 428 F.3d at 1290.
\textsuperscript{138} Id. The citizen plaintiffs were also angered by the fact that the remedial measures called for in the consent decree ignored the fraction of CCC’s land where the discharge violations had taken place. Brief of Plaintiff–Appellant, \textit{supra} note 122, at 15–17.
\textsuperscript{139} \textit{Cont’l Carbon}, 428 F.3d at 1290.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} Id. at 1290.
\textsuperscript{144} Id. at 1290–91.
\textsuperscript{145} See \textit{Cont’l Carbon}, 428 F.3d at 1290–91.
\textsuperscript{146} Id. at 1291.
injunctive and declaratory relief intact.147 Because the district court realized its decision had “waded into uncharted waters” on several issues, it stayed its order and allowed CCC to petition for interlocutory appeal, which the Tenth Circuit subsequently granted.148

On interlocutory appeal, the Tenth Circuit affirmed the district court’s decision that the citizen plaintiffs were only precluded from seeking civil penalties because the jurisdictional bar under section 309(g)(6)(A) does not extend to claims for equitable relief.149 The court explained that “[d]espite the fact that two other circuit courts have considered and rejected the district court’s view [that the bar only applies to civil penalties and not equitable relief], our reading of the statutory language and relevant precedent persuades us that the district court’s conclusion is correct.”150 Because the lower court’s decision was grounded in the statutory language of the CWA, reflected the legislative history of the Act, and led to a rational outcome, the Tenth Circuit refused to rule in accordance with the First and Eighth Circuits’ broad interpretation of section 309(g)(6)(A).151

1. Supreme Court Precedent: Gwaltney from Another Angle

While the Tenth Circuit cited to the Supreme Court’s Gwaltney decision, it challenged the manner in which CCC and the First and Eighth Circuits used the case to broadly construe the section 309(g)(6)(A) bar on citizen suits.152 Furthermore, the Tenth Circuit disagreed with CCC’s view that Gwaltney stands for the proposition that civil penalties and injunctive remedies are “inextricably intertwined.”153 The Tenth Circuit explained that the Supreme Court’s ruling that citizens can only seek civil penalties for a CWA violation if they also seek injunctive relief was held to purposefully eliminate citizen recovery of penalties for wholly past violations.154 The court viewed the Gwaltney holding as the mirror image of the matter with which it was grappling: whether citizens can seek injunctive or other

147 Id.
148 Id.
149 Id. at 1297, 1300.
150 Id. at 1297.
151 Id. at 1297.
152 See id. at 1298–1300.
153 Id. at 1299.
154 Id. at 1298–99; see Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 58–59 (1987).
forms of equitable relief without seeking civil penalties. The Tenth Circuit found that the policy rationale motivating the *Gwaltney* decision was not relevant to the issue of whether citizens are barred from seeking civil penalties and equitable relief under section 309(g)(6)(A). The court found that civil penalties and equitable relief are not “inextricably intertwined” as CCC argued because a citizen action seeking injunctive relief is never based on a wholly past violation. Thus, the Tenth Circuit also found the First and Eighth Circuits’ reliance on *Gwaltney*’s holding and analysis in determining the scope of section 309(g)(6)(A) to be improper.

2. Statutory Language

The Tenth Circuit offered the statutory language of the CWA as powerful support that Congress did not intend for equitable remedies to be excluded under section 309(g)(6)(A). The court scrutinized both section 505(a) and section 309(g) of the CWA before coming to the conclusion that the jurisdictional bar on citizen suits contained in section 309(g)(6)(A) applies only to civil penalties, not equitable relief. The court first highlighted that section 505(a) gives citizens authorization to “commence a civil action” against a violator of the CWA and grants the district court jurisdiction “to enforce such an effluent standard or limitation . . . and to apply any appropriate civil penalties under § [309](d) . . . .” The court contrasted section 505(a) with section 309(g)(6)(A), which states that a violation “shall not be the subject of a civil penalty action under . . . section [505] of this title” if a state “has commenced and is diligently prosecuting an action” with respect to that same violation under the CWA or a comparable state law.

The Tenth Circuit emphasized a subtle but meaningful difference in word choice made by Congress in these two sections, noting the use of the term “civil action” in section 505(a) and the term “civil

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155 *Cont’l Carbon*, 428 F.3d at 1299; see *Gwaltney*, 484 U.S. at 58–59.
156 *See Cont’l Carbon*, 428 F.3d at 1298–99; Leonard, *supra* note 5, at 614 (arguing that “administrative penalty actions only address past violations, while citizen suits for injunctive relief seek to enjoin a defendant from violating the CWA again in the future”).
157 *Cont’l Carbon*, 428 F.3d at 1299.
158 *See id.* at 1299–300.
159 *Id.* at 1297–98, 1300.
160 *See id.* 1297–98.
161 *Id.* at 1297 (quoting Clean Water Act § 505, 33 U.S.C. § 1365 (2000)).
162 33 U.S.C. § 1319(g)(6)(A); *Cont’l Carbon*, 428 F.3d at 1297–98.
penalty action” in section 309(g)(6)(A). According to the court, “Congress chose to use the words ‘civil action’ in § [505] authorizing citizen suits but chose the narrower term ‘civil penalty action’ in the § [309] exclusion from the § [505] grant.” The Tenth Circuit found that this word choice purposefully clarified that civil penalties are distinct from other remedies available under the CWA. The Tenth Circuit stated:

Congress explicitly grants jurisdiction to “enforce” an effluent standard of limitation (by presumably issuing a declaratory judgment or an injunction) and to “apply any appropriate civil penalties” (by assessing the appropriate fine). A strict reading of the statute, then, indicates that while § [505] grants jurisdiction over all types of civil remedies, the limitation in § [309] only strips jurisdiction with regard to the district court’s ability to impose civil penalties.

To give additional support to this statutory interpretation, the Tenth Circuit pointed out that there is a wholly separate provision of the CWA used to bar injunctive remedies from being sought by citizens. The court noted that section 505(b)(1)(B) explicitly limits any private action from being filed by citizens when a “State has commenced and is diligently prosecuting a civil or criminal action in a court of . . . a State to require compliance with the standard.” The court in Continental Carbon referred to the resulting statutory effect as a “two-tiered claim preclusion scheme.” Accordingly, the “broadest preclusion exists when a state commences and diligently prosecutes a court action to enforce the standard.” The court found that when this occurs, section 505(b)(1)(B) is triggered, limiting all types of action commenced by a citizen. The second tier of preclusion, or what the court termed as “narrower preclusion,” exists when the state commences an action that is less than judicial enforcement, such as an administrative enforcement action. The court found that when

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163 *Cont’l Carbon*, 428 F.3d at 1298; see 33 U.S.C. §§ 1319(g)(6)(A), 1365(a).
164 *Cont’l Carbon*, 428 F.3d at 1298; see 33 U.S.C. §§ 1319(g)(6)(A), 1365(a).
165 *Cont’l Carbon*, 428 F.3d at 1298.
166 *Id.* at 1298.
167 *Id.* at 1298; 33 U.S.C. § 1365(b)(1)(B).
168 *Cont’l Carbon*, 428 F.3d at 1298 (quoting 33 U.S.C. § 1365(b)(1)(B)).
169 *Id.* at 1298.
170 *Id.*; see 33 U.S.C. § 1365(b)(1)(B).
171 See *Cont’l Carbon*, 428 F.3d at 1298.
172 *Id.*
an administrative enforcement action is commenced by citizens, section 309(g)(6)(A) “specifically excludes civil penalties from the scope of permissible private enforcement remedies, but does not preclude other equitable relief.”

3. Legislative History

The Tenth Circuit also found that when examined alongside the statutory language, the legislative history of the 1987 amendments demonstrates that Congress contemplated and intended precluding only civil penalties from being sought when a state has commenced and is diligently prosecuting the same violation under comparable state law. The court emphasized that the House Conference Committee Report states that:

No one may bring an action or recover civil penalties under section . . . [505] for any violation with respect to which the Administrator has commenced and is diligently prosecuting an administrative civil penalty action . . . . [T]his limitation would not apply to 1) an action seeking relief other than civil penalties (e.g., an injunction or declaratory judgment).

The Tenth Circuit found that this language evinces congressional intent that courts narrowly construe the section 309(g) (6) (A) bar.

4. Policy Rationale

Lastly, the Tenth Circuit articulated its disagreement with the North & South Rivers court’s reasoning that applying the literal statutory interpretation of section 309(g) would lead to an “inconceivable result.” The court determined that the rationale behind the section’s implementation—to avoid duplicative monetary penalties for the same violation—is satisfied without barring citizens from seeking equitable remedies. The court found that no duplicative civil penalties or equitable relief can be sought when a judicial proceeding was underway because section 505(b)(1)(B) precludes all private suits from being

\[\text{173 Id.; see 33 U.S.C. \S\ 1319(g)(6)(A).}\]
\[\text{174 See Cont’l Carbon, 428 F.3d at 1299–300.}\]
\[\text{176 Id. at 1299–300.}\]
\[\text{177 Id. at 1300 (quoting N. & S. Rivers Watershed Ass’n, Inc. v. Town of Scituate, 949 F.2d 552, 558 (1st Cir. 1991)).}\]
\[\text{178 Id.}\]
Similarly, no duplicative equitable or civil remedies will be issued under section 309(g)(6)(A) because the section explicitly bars citizens from seeking civil penalties and a court could stay a citizen action that it found to be duplicative of the administrative enforcement action. The Tenth Circuit thus found the result of applying the literal statutory interpretation of the section anything but "inconceivable." Rather, the inadequacy of certain state measures to prevent or stop pollution and the inability of pure monetary penalties to always ensure compliance led the Tenth Circuit to believe that its interpretation of section 309 would promote a rational and desirable result.

III. STATUTORY LANGUAGE, LEGISLATIVE HISTORY, AND POLICY RATIONALES: WHY CITIZENS ARE NOT PRECLUDED FROM SEEKING INJUNCTIVE RELIEF UNDER SECTION 309(g)(6)(A) OF THE CWA

Section 309(g)(6)(A) of the CWA has sparked controversy among the circuits on a host of questions: What types of enforcement actions preclude citizen suits; which is the proper test for “comparability;” how to define “diligent prosecution;” and, most recently, what forms of relief can be sought by citizen plaintiffs when an administrative enforcement action is underway. The current trend of the courts has been to restrict the citizen’s role in water pollution regulation with the hope of restoring greater enforcement authority to the government. While there are many reasons why this trend is perilous and unsound, there is only one way to put an end to it. The U.S. Supreme Court must take the opportunity to analyze, clarify, and apply section 309(g) of the CWA in the manner that the statutory language, legislative history, and policy rationales have directed. Even though the scope of section 309(g)(6)(A)’s bar on citizen suits may only be one of the many issues the Supreme Court rules on in a given

181 See Cont’l Carbon, 428 F.3d at 1300.
182 See id.
183 See generally Leonard, supra note 5. While many of these questions are beyond the scope of this Note, Arne R. Leonard’s comprehensive article discusses how section 309(g)(6)(A) should properly be interpreted, and addressed each of these remaining issues. Id.
184 Fisch, supra note 5, at 211, 225; see, e.g., Ark. Wildlife Fed’n v. ICI Ams., Inc., 29 F.3d 376, 383 (8th Cir. 1994); N. & S. Rivers Watershed Ass’n, Inc. v. Town of Scituate, 949 F.2d 552, 558 (1st Cir. 1991).
185 See Hodas, supra note 12, at 1651–55; Shermer, supra note 10, at 468–81.
case, the re-establishment of a liberal interpretation of citizen standing under the CWA is not only correct under the statute, but critical to preserve the health and well-being of the citizens of this country.\(^{186}\)

Several district court opinions and legal scholars have disputed the First and Eighth Circuits’ decisions to preclude citizens from filing suit for civil penalties or equitable relief when an administrative enforcement action is being pursued by a government agency.\(^{187}\) The Tenth Circuit, however, is the first federal court of appeals to voice its opinion on the issue, agreeing with many lower courts and scholars that section 309(g)(6)(A) only bars citizen claims for civil penalties.\(^{188}\) An examination of the relevant statutory language, legislative history, and policy rationales strongly suggests that section 309(g)(6)(A) was never intended to bar citizens from seeking equitable relief.\(^{189}\) Furthermore, in applying the First and Eighth Circuits’ analysis to the factual situation in \textit{Continental Carbon}, it becomes clear that barring citizens from seeking equitable relief under section 309(g)(6)(A) would lead to a large gap in CWA enforcement that could have devastating effects on communities across the country.\(^{190}\) With the Tenth Circuit’s clear deviation from the other two circuit courts, the issue is now ripe for Supreme Court adjudication.\(^{191}\) The Court should follow the lead of the Tenth Circuit and hold that when an administrative enforcement action is underway, section 309(g)(6)(A) only precludes citizen claims for civil penalties, leaving citizen plaintiffs free to seek equitable relief.\(^{192}\)

\textbf{A. Shooting Down Structural Variation in Favor of Statutory Language and Legislative History}

The Tenth Circuit’s view that section 309(g)(6)(A) only precludes citizens from seeking civil penalties in a subsequent action di-

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\(^{189}\) \textit{See Cont’l Carbon}, 428 F.3d at 1300; Leonard, \textit{supra} note 5, at 611–17.

\(^{190}\) \textit{See Fisch}, \textit{supra} note 5, at 225–27.


\(^{192}\) \textit{See Cont’l Carbon}, 428 F.3d at 1300; Fisch, \textit{supra} note 5, at 225–27.
rectly conflicts with the First and Eighth Circuits’ findings that the section bars citizen plaintiffs from seeking either civil penalties or equitable relief. While the First and Eighth Circuits mustered support for their position from the existing structural variations between the citizen suit provision of the CWA and other sections of the Act, the Tenth Circuit provided a compelling justification that the correct statutory analysis of section 309(g)(6)(A) should center on the plain language and legislative history of the statute.

The First and Eighth Circuits rested, in large part, on the fact that the Supreme Court in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.* explicitly acknowledged the citizen suit provision’s structural composition. In *Gwaltney*, the Court specifically noted that section 505 of the CWA does not differentiate between civil penalty actions and actions for injunctive relief, but “rather, the two forms of relief are referred to in the same section, even in the same sentence.” The First and Eighth Circuits argued that because injunctive relief and civil penalties are so intimately united in the citizen suit provision—unlike in most other provisions of the CWA—Congress must have intended that both forms of relief be barred from being sought by citizens under section 309(g)(6)(A). Thus, the two circuit courts extended the significance of section 505’s structural composition to any provision of the CWA that involves citizen suits. The circuit courts made this extension despite the fact that civil penalties and injunctive relief are addressed in an entirely separate section of the administrative penalties provision of the Act (i.e., section 309(g)).

While the First and Eighth Circuits’ statutory structural analysis was not entirely misguided, the courts plainly ignored the guidelines set forth in *Gwaltney* concerning the appropriate manner in which to interpret a statutory provision of the CWA. The Supreme Court emphasized in *Gwaltney* that “it is well settled that ‘the starting point for

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193 See *Cont’l Carbon*, 428 F.3d at 1300.
197 *Ark. Wildlife Fed’n*, 29 F.3d at 383; *N. & S. Rivers*, 949 F.2d at 558; see 33 U.S.C. §§ 1319(g)(6) (A), 1365(a); see Leonard, *supra* note 5, at 611–12.
interpreting a statute is the language of the statute itself.’”201 The two circuits even acknowledged their dismissal of the plain language of the statute in favor of an interpretation that sharply contrasted with the language’s literal meaning.202 The First Circuit attempted to rationalize its decision by stating that the literal interpretation of the section would lead the court to an “inconceivable result.”203 Similarly, the Eighth Circuit argued that applying the literal meaning would lead to an “unreasonable” outcome.204

The Tenth Circuit, on the other hand, properly focused on the plain language of the statute throughout its entire analysis.205 Section 309(g)(6)(A) of the CWA states that when an administrative enforcement action is commenced and diligently prosecuted under the Act, the violations “shall not be the subject of a civil penalty action under . . . section [505] of this title.”206 There is no reference in section 309(g)(6) to extending the bar to suits seeking injunctive, declaratory, or any other type of relief.207 If Congress intended the bar on citizen suits to extend to forms of equitable relief, it surely would have phrased the wording of the section differently.208 However, instead of replacing the words “civil penalty” with the term “civil action” or the phrase “civil penalty or equitable relief,” Congress purposefully barred citizens from seeking only a “civil penalty” under section 309(g)(6)(A) of the CWA.209 In finding that the bar extended to those suits seeking civil penalties or equitable relief, the North & South Rivers court thus impermissibly re-drafted an unambiguous statute.210

The Tenth Circuit also offered the legislative history of the 1987 amendments to provide additional support for its decision to narrowly construe the bar.211 The legislative history demonstrates that Congress

203 N. & S. Rivers, 949 F.2d at 558.
204 Ark. Wildlife Fed’n, 29 F.3d at 383.
209 See id.
211 Cont’l Carbon, 428 F.3d at 1299–300.
intended the section 309(g)(6)(A) bar on citizen suits to extend only to citizen claims for civil penalties, not equitable relief.\textsuperscript{212} In drafting the 1987 amendments, Congress emphasized the importance of citizen suits in the enforcement of the CWA, stating that citizen suits “are a proven enforcement tool” that “have deterred violators and achieved significant compliance gains.”\textsuperscript{213} Furthermore, in structuring section 309(g), Congress explicitly contemplated the “need to avoid placing obstacles in the path of such citizen suits.”\textsuperscript{214} Keeping this concern in mind, the Conference Committee directed that the “limitation would not apply to [a citizen] action seeking relief other than civil penalties (e.g., an injunction or declaratory judgment).”\textsuperscript{215} The statutory language, coupled with the legislative history, thus demonstrates Congress’s clear intent to define the bar narrowly, making it extremely difficult for the First and Eighth Circuits to judiciously reach the decisions they did.\textsuperscript{216} When given the opportunity, the Supreme Court should draw on the Tenth Circuit’s statutory analysis of section 309(g)(6)(A), weighing heavily the plain language and legislative history of the section to conclude that only citizen claims for civil penalties are subject to the bar.\textsuperscript{217}

**B. Policy Rationales Behind Section 309(g)(6)(A) Are Not Frustrated by Narrowly Construing the Bar on Citizen Suits**

The First Circuit in *North & South Rivers* avoided using the plain language and legislative history to construe section 309(g)(6)(A) by arguing that the “literal interpretation . . . would lead to an absurd result.”\textsuperscript{218} The First Circuit searched for an alternative interpretation of the section that would prevent “irrational consequence[s].”\textsuperscript{219} The court feared that a literal reading of the section would strip the government of its primary enforcement authority when a citizen suit sought relief beyond civil penalties.\textsuperscript{220} It stressed that the policy rationale designating the government as the primary enforcer of the

\textsuperscript{214} \textit{Id.}
\textsuperscript{216} See Clean Water Act §§ 309(g)(6)(A), 505(a), 33 U.S.C. §§ 1319(g)(6)(A), 1365(a) (2000); \textit{Cont’l Carbon}, 428 F.3d at 1298; \textit{id.}
\textsuperscript{217} \textit{Cont’l Carbon}, 428 F.3d at 1298–300.
\textsuperscript{218} N. & S. Rivers Watershed Ass’n, Inc. v. Town of Scituate, 949 F.2d 552, 558 (1st Cir. 1991).
\textsuperscript{219} \textit{Id.}
\textsuperscript{220} \textit{Id.}
CWA is not constrained to such limited circumstances.\textsuperscript{221} While the Eighth Circuit did not go as far as to say that applying the plain language of the statute would be “absurd,” it agreed that a literal interpretation would lead to an “unreasonable” outcome, as it would cause “undue interference with, or unnecessary duplication of, the legitimate efforts of the state agency.”\textsuperscript{222}

It is clear that citizen suits were designed to supplement government enforcement efforts.\textsuperscript{223} It is also clear that one of the underlying policy rationales for barring certain citizen actions under section 309(g)(6)(A) focuses on the prevention of unfairly burdening violators of the CWA with duplicative penalties for the same violation.\textsuperscript{224} However, the First and Eighth Circuits incorrectly used these policy rationales to excuse themselves from performing the proper statutory analysis of section 309(g)(6)(A).\textsuperscript{225}

First, the legislative history of the 1987 amendments shows that the government’s ability to assess administrative civil penalties under section 309(g) was “designed to address past, rather than continuing, violations of the Act.”\textsuperscript{226} However, the only instance in which a citizen plaintiff would seek injunctive relief is when there is an ongoing violation of the CWA that the citizen desires to stop from continuing in the future.\textsuperscript{227} Because a citizen suit seeking injunctive relief is not addressing a purely past violation, the Tenth Circuit was correct in finding that the section 309(g)(6) bar—purposefully designed to prevent duplicative penalties from being sought by citizens suing over past violations—only applies to civil penalty claims that can properly address past violations.\textsuperscript{228}

Furthermore, the First and Eighth Circuits’ argument that applying the literal meaning of the statute would improperly strip the government of its primary enforcement authority is flawed.\textsuperscript{229} The two courts emphasize that the government, not citizens, have the primary

\textsuperscript{221} Id.
\textsuperscript{222} Ark. Wildlife Fed’n v. ICI Ams., Inc., 29 F.3d 376, 383 (8th Cir. 1994).
\textsuperscript{223} See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60 (1987); Plater et al., supra note 11, at 1028, 1034; Hodas, supra note 12, at 1619.
\textsuperscript{227} Leonard, supra note 5, at 614.
\textsuperscript{228} See Paper, Allied-Indus., Chem. and Energy Workers Int’l Union v. Cont’l Carbon Co., 428 F.3d 1285, 1300 (10th Cir. 2005); Leonard, supra note 5, at 614.
responsibility to carry out Congress’s intent and to prevent duplicative penalties.\textsuperscript{230} The circuits are correct that citizen suits were designed by Congress to be a gap filler where the government was unable to carry out its enforcement duties.\textsuperscript{231} However, categorically banning all citizen suits when an administrative enforcement action is underway does not prevent the government from exercising its primary enforcement authority.\textsuperscript{232} This is because the government can remain the primary enforcer of the CWA even when a citizen suit for equitable relief is allowed to proceed in the face of an ongoing administrative enforcement action.\textsuperscript{233}

In applying the section 309(g)(6)(A) citizen suit bar only to civil penalty actions, the only instance in which the government may not have complete control over enforcement of the CWA occurs when a state is “pursuing something less than judicial enforcement” and the citizen plaintiff is “pursuing an injunction in federal court.”\textsuperscript{234} However, even in the rare instance when injunctive relief is sought by the state agency in an administrative compliance action and simultaneously by a citizen plaintiff in federal court, the government does not automatically lose its position as the “primary enforcer” of the CWA.\textsuperscript{235} As the district court in \textit{Coalition for a Liveable West Side, Inc. v. New York City Department of Environmental Protection} noted, a court has the ability to “manage the action so as to ensure the diligently pursued state enforcement action will dominate and the city will not be whipsawed by multiple actions.”\textsuperscript{236} For example, a court could decide to “stay the citizen action while [the agency] demonstrate[s] that the State is indeed diligently prosecuting its action and seeking adequate

\textsuperscript{230} See \textit{Ark. Wildlife Fed’n}, 29 F.3d at 383; \textit{N. & S. Rivers}, 949 F.2d at 558.

\textsuperscript{231} \textit{Plater et al.}, supra note 11, at 1028, 1034; \textit{Hodas, supra note 12, at 1626.}

\textsuperscript{232} \textit{Cont’l Carbon}, 428 F.3d at 1299–300; \textit{Coal. for a Liveable W. Side}, 830 F. Supp. at 197.

\textsuperscript{233} \textit{Cont’l Carbon}, 428 F.3d at 1299–300; \textit{Coal. for a Liveable W. Side}, 830 F. Supp. at 197.

\textsuperscript{234} \textit{Cont’l Carbon}, 428 F.3d at 1299. The Tenth Circuit in \textit{Continental Carbon} correctly pointed out that when the government is involved in judicial enforcement of a CWA violation, it can unquestionably prevent both duplicative civil penalties and duplicative issuances of equitable relief. \textit{Id.; See. Clean Water Act § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B) (2000). Under section 505(b)(1)(B), a citizen is precluded from seeking any type of relief against a violator of the CWA if the government has begun “diligently prosecuting a civil or criminal action . . . to require compliance with the standard, limitation, or order.” 33 U.S.C. § 1365 (b)(1)(B). Therefore, section 309(g)(6)(A) gives the government the primary authority to prevent duplicative civil penalties when the state is engaged in an administrative enforcement action, while section 505(b)(1)(B) restricts any type of duplicative action from ensuing when the government is engaged in a judicial enforcement action. 33 U.S.C. §§ 1319(g)(6)(A), 1365(b)(1)(B).

\textsuperscript{235} \textit{Cont’l Carbon}, 428 F.3d at 1299–300; \textit{Coal. for a Liveable W. Side}, 830 F. Supp. at 197.

\textsuperscript{236} 830 F. Supp. at 197.
relief.”\textsuperscript{237} If the state is found to be seeking and achieving adequate compliance gains, the government’s primary enforcement authority would be preserved and the citizen plaintiffs would be able to conserve their resources.\textsuperscript{238} On the other hand, if the government’s efforts are found to be inadequate to achieve proper compliance with the CWA or comparable state law, the citizen plaintiffs would be allowed to resume their suit for equitable relief, resting assured that their efforts would not usurp the authority of the government or be duplicative in nature.\textsuperscript{239}

Accordingly, the First and Eighth Circuits improperly ignored the plain language and the legislative history in interpreting the scope of section 309(g)(6)(A).\textsuperscript{240} Allowing citizens to seek equitable relief under section 309(g)(6)(A) does not force the government to give up its role as the primary enforcer of the CWA, nor does it take away the government’s ability to prevent duplicative penalties for past violations of the Act.\textsuperscript{241} Hence, when given the chance, the Supreme Court should cast aside the idea that using the legislative history and plain language of section 309(g)(6)(A) to define the scope of the section would lead to an “absurd” or “unreasonable” outcome, and instead apply the proper statutory construction that narrowly restricts citizen actions.\textsuperscript{242}

C. Continental Carbon from Another Angle: Why the First and Eighth Circuits’ View of the Section 309(g)(6)(A) Citizen Suit Preclusion Frustrates the Goals of the CWA

If the Tenth Circuit had followed the First and Eighth Circuits’ reasoning in \textit{Continental Carbon}, both the citizen plaintiffs’ civil penalty claim and claims for injunctive and declaratory relief would have been dismissed.\textsuperscript{243} Furthermore, a large gap in CWA enforcement would have been left unfilled.\textsuperscript{244} When the facts of \textit{Continental Carbon} are closely considered under the First and Eighth Circuits’ analysis of section 309(g)(6)(A), the CWA not only fails in its mission to restore

\begin{itemize}
  \item \textsuperscript{237} \textit{Id.}
  \item \textsuperscript{238} See \textit{Cont’l Carbon, 428 F.3d at 1300; Coal. for a Liveable W. Side, 830 F. Supp. at 197.}
  \item \textsuperscript{239} See \textit{Cont’l Carbon, 428 F.3d at 1300; Coal. for a Liveable W. Side, 830 F. Supp. at 197.}
  \item \textsuperscript{240} See discussion, supra Part III.A–B.
  \item \textsuperscript{241} See discussion, supra Part III.B.
  \item \textsuperscript{242} See \textit{Cont’l Carbon, 428 F.3d at 1300; Coal. for a Liveable W. Side, 830 F. Supp. at 197.}
  \item \textsuperscript{243} See \textit{Cont’l Carbon, 428 F.3d at 1300; Ark. Wildlife Fed’n v. ICI Ams., Inc., 29 F.3d 376, 383 (8th Cir. 1994); N. & S. Rivers Watershed Ass’n, Inc. v. Town of Scituate, 949 F.2d 552, 558 (1st Cir. 1991).}
  \item \textsuperscript{244} See \textit{Cont’l Carbon, 428 F.3d at 1299–300; Ark. Wildlife Fed’n, 29 F.3d at 383; N. & S. Rivers, 949 F.2d at 558.}
\end{itemize}
and preserve the navigable waters of this country, but innocent people fall victim to the economic and political choices of a state authority that overlooks the health and safety of an entire community.\textsuperscript{245}

In performing this analysis, it is important to remember that even though there were two citizen plaintiffs in \textit{Continental Carbon}—the employee union (PACE) and the Ponca Tribe—it was the Ponca Tribe that had the potential to be gravely affected by Continental Carbon Company’s (CCC) continued violations of the CWA.\textsuperscript{246} The Ponca Tribe swam, fished, and hunted in the contaminated area.\textsuperscript{247} The Tribe also received their drinking water from a well system in the polluted region.\textsuperscript{248} Complaints by the two citizen plaintiffs led to the Oklahoma Department of Environmental Quality’s (ODEQ) discovery of hazardous black water and oily substances on the surface of marshland outside CCC’s permitted discharge area.\textsuperscript{249} Once the contamination was confirmed to be a product of CCC’s wastewater discharge, ODEQ took several response measures.\textsuperscript{250} The state agency first issued a notice of violation (NOV) to CCC.\textsuperscript{251} The NOV cited three violations and also noted that monetary penalties could be assessed up to $10,000 per day per violation (even though no penalties were ever sought by the agency).\textsuperscript{252} Next, ODEQ entered into a consent decree with CCC, requiring the company to take several remedial measures.\textsuperscript{253} However, ODEQ did not require these remedial measures to be taken with respect to the retention lagoon largely responsible for the contamination, nor did it require CCC to pay any penalties.\textsuperscript{254}

A few months later, a misrepresentation in CCC’s discharge permit application was discovered.\textsuperscript{255} Specifically, the plant reported the depth between the wastewater impoundments and the groundwater underneath the impoundment at a level of eighty feet.\textsuperscript{256} Other data, however, suggested to ODEQ that the depth to ground water level was

\begin{itemize}
\item \textsuperscript{245} See \textit{Cont’l Carbon}, 428 F.3d at 1299–300; \textit{Ark. Wildlife Fed’n}, 29 F.3d at 383; \textit{N. & S. Rivers}, 949 F.2d at 558; Hodas, \textit{supra} note 12, at 1651–55.
\item \textsuperscript{246} See \textit{Cont’l Carbon}, 428 F.3d at 1289–90; Brief for Plaintiff–Appellant, \textit{supra} note 122, at 4–5.
\item \textsuperscript{247} Id.
\item \textsuperscript{248} Cont’l Carbon, 428 F.3d at 1289.
\item \textsuperscript{249} Id.
\item \textsuperscript{250} Id.
\item \textsuperscript{251} See \textit{id.}; Brief for Plaintiff–Appellant, \textit{supra} note 122, at 14.
\item \textsuperscript{252} See \textit{id.} at 1289; Brief for Plaintiff–Appellant, \textit{supra} note 122, at 6, 14.
\item \textsuperscript{253} \textit{Cont’l Carbon}, 428 F.3d at 1289.
\item \textsuperscript{254} \textit{Cont’l Carbon}, 428 F.3d at 1289–90.
\item \textsuperscript{255} Id.
\end{itemize}
at most fifteen feet: a direct violation of the state water pollution law.\footnote{Id.} Again, after sending CCC an NOV highlighting the violations, the agency only required the plant to modify its permit before extending it for another five years.\footnote{See id. at 1289–90; Brief for Plaintiff–Appellant, supra note 122, at 15–16.}

Had the Tenth Circuit followed the First and Eighth Circuits’ reasoning in the \textit{Continental Carbon} case, the citizen plaintiffs’ claims for declaratory and injunctive relief would have been precluded because ODEQ was found to be diligently prosecuting an administrative enforcement action under state law.\footnote{Compare \textit{Cont’l Carbon}, 428 F.3d at 1289, with \textit{Ark. Wildlife Fed’n v. ICI Ams., Inc.}, 29 F.3d 376, 383 (8th Cir. 1994), \textit{and N. & S. Rivers Watershed Ass’n, Inc. v. Town of Scituate}, 949 F.2d 552, 558 (1st Cir. 1991).} However, because ODEQ on its own did not order CCC to abide by a strict compliance schedule, did not assess civil penalties, and barely even addressed the discharge and groundwater violations, it may have been years before CCC took suitable action to resolve the contamination problem.\footnote{\textit{Cont’l Carbon}, 428 F.3d at 1289–90; Brief for Plaintiff–Appellant, supra note 122, at 4–6, 8, 14–16.} Because the government did not have the time, resources, or desire to bring an action into federal court, it resorted to weak administrative enforcement measures instead.\footnote{See \textit{Cont’l Carbon}, 428 F.3d at 1289–90. For further analysis of the inadequacies of state enforcement actions, see Hodas, supra note 12, at 1620–22.} If this case had been tried in the First or Eighth Circuits, the citizen plaintiffs would have been barred from seeking injunctive relief under section 309(g)(6)(A) and innocent people would have been forced to continue to suffer the long term effects of pollution.\footnote{See discussion, supra Part I.B–C.} Without citizen action, it appears that ODEQ would have allowed CCC to continue its unlawful and hazardous waste discharge practices indefinitely.\footnote{\textit{Cont’l Carbon}, 428 F.3d at 1289–90; Brief for Plaintiff–Appellant, supra note 122, at 4–6, 8, 14–16.} As a result, members of the Ponca Tribe would have continued to swim in industrial waste, would have eaten contaminated fish and animals, and would have cooked with and drank contaminated groundwater.\footnote{Brief for Plaintiff–Appellant, supra note 122, at 4–5 n.1.}

Utilizing the broad rule enunciated in \textit{North & South Rivers} and \textit{Arkansas Wildlife Federation} prevents courts from looking at the facts of a case to determine what measures may still need to be taken despite
a state’s administrative enforcement action. The Tenth Circuit, in *Continental Carbon*, recognized Congress’s concern over duplicative penalties and took that concern into consideration when dismissing the civil penalty claim and deciding not to dismiss the claims for equitable relief. The citizen plaintiffs in *Continental Carbon* did not think ODEQ’s steps to achieve compliance with the CWA and Oklahoma water pollution laws were enough to protect the health and safety of their community. The citizens wanted the contamination to cease and believed the measures ODEQ was taking would not achieve such a goal. While ODEQ’s enforcement efforts may have been similar to other state enforcement efforts under the CWA, this does not mean that citizens should be left to suffer at the hands of a government’s economic or political agenda. As one legal scholar discovered, state agencies regularly ignore discharge violations, treat reporting violations as insignificant and not worthy of enforcement efforts, and limit enforcement actions to sending violators letters of NOV or making phone calls. Citizen suits were included in the CWA to resolve this very issue: to achieve compliance with the statute when the government is unable to do so because of a lack or resources or concern. The Supreme Court should clarify that section 309(g)(6)(A) only prevents citizens from seeking civil penalties when an administrative enforcement action is being pursued. This should be done before more courts follow the flawed analysis of the First and Eight Circuits and frustrate the purposes of the CWA by leaving a gap in enforcement that endangers the environment and human lives.

**Conclusion**

The First and Eighth Circuits’ broad interpretation of the jurisdictional bar contained in section 309(g)(6)(A) precludes citizens from seeking civil penalties or equitable relief when an administrative

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265 See Ark. Wildlife Fed’n, 29 F.3d at 383; N. & S. Rivers, 949 F.2d at 558; Fisch, supra note 5, at 225.
266 See Cont’l Carbon, 428 F.3d at 1300.
267 See id.; Brief for Plaintiff–Appellant, supra note 122, at 5–8.
268 See Cont’l Carbon, 428 F.3d at 1289–90.
269 See Hodas, supra note 12, at 1620–23.
270 Id. at 1620.
271 Id. at 1618–23.
272 See discussion, supra Part III.
273 See Hodas, supra note 12, at 1618–23.
enforcement action is being pursued.\textsuperscript{274} However, these circuit courts improperly ignore the statutory language, legislative history, and policy rationales behind the section in reaching their decisions.\textsuperscript{275} Until the Tenth Circuit’s recent holding in \textit{Paper, Allied-Industrial, Chemical and Energy Workers International Union v. Continental Carbon Co.}, only district courts and legal scholars disputed the First and Eighth Circuits’ view that citizens are precluded from seeking equitable relief under section 309(g)(6)(A).\textsuperscript{276} The Tenth Circuit’s decision that an administrative enforcement action only bars citizens from seeking civil penalties under section 309(g)(6)(A) not only leaves citizens free to seek injunctive or declaratory relief in subsequent suits, but also reaffirms the critical role citizen suits play in the CWA enforcement scheme.\textsuperscript{277}

The Tenth Circuit’s recent decision in \textit{Continental Carbon} provides hope that the trend toward narrowing the private citizen’s role in water pollution regulation may be curbed, or at least addressed in the near future by the U.S. Supreme Court.\textsuperscript{278} Section 309(g)(6)(A) of the CWA was designed to protect alleged violators from being subject to duplicative penalties and to preserve the government’s primary enforcement authority under the Act.\textsuperscript{279} The section was not designed to frustrate the purposes of the CWA by forcing citizens to stand helplessly by while lax and ineffective administrative enforcement measures are pursued by the government.\textsuperscript{280} Since 1972, citizen suits have been an integral part of the CWA, and the Supreme Court should follow the Tenth Circuit’s lead to assure that citizens retain a powerful tool to preserve and restore the navigable waters of this nation.\textsuperscript{281}

\textsuperscript{274} See Ark. Wildlife Fed’n v. ICI Ams., Inc., 29 F.3d 376, 383 (8th Cir. 1994); N. & S. Rivers Watershed Ass’n, Inc. v. Town of Scituate, 949 F.2d 552, 558 (1st Cir. 1991).

\textsuperscript{275} See discussion, supra Part III.A–B.


\textsuperscript{277} See Plater et al., supra note 11, at 1028, 1034; Hodas, supra note 12, at 1620–23.


\textsuperscript{280} See id.

\textsuperscript{281} See Cont’l Carbon, 428 F.3d 1285.