407 Citizen Enforcement of Environmental Laws: Devil in a Green Dress?

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

PAPER, ALLIED-INDUSTRIAL, CHEMICAL AND ENERGY WORKERS INTERNATIONAL UNION ("PACE") AND THE PONCA TRIBE ("TRIBE"),	§	
Plaintiffs,	§	Cause No. CIV-02-1677-R
v.	§	
CONTINENTAL CARBON COMPANY,	§	
Defendant	§	

FIRST AMENDEND COMPLAINT

I. STATEMENT OF THE CASE

1. This is a citizen's suit, brought under Section 505 of the Clean Water Act ("CWA"), 33 U.S.C. § 1365. Plaintiff alleges that Defendant has violated and continues to violate the CWA through the unsafe, improper and unauthorized operation of its Ponca City carbon black plant in Kay County, Oklahoma. More particularly, Plaintiff alleges Defendant discharges from waste retention lagoons to, ultimately, the Arkansas River without a required CWA § 402 permit, that Defendant's permit for discharges to those lagoons was obtained by misrepresentation and is hence subject to equitable voiding and that Defendant's lagoon discharges have been and are being made without either required reporting or monitoring. Plaintiff seeks a declaratory judgment, injunctive relief, the imposition of civil penalties and the award of costs, including attorneys' and expert witnesses' fees, for Defendant's violations.

II. JURISDICTION AND VENUE

2. This court has subject matter jurisdiction under Section 505 of the CWA, 33 U.S.C. § 1365. Violations of a federally-delegated or federally-approved state pollution-control program arise under federal law. See, Glazer v. American Ecology Env'l Ser., 894 F.Supp. 1029, 1040 (N.D.Tex. 1995).

3. The violations complained of took and are taking place in the Western District of Oklahoma. Venue, thus, is appropriate in the Western District of Oklahoma, pursuant to § 505(c), Clean Water Act, 33 USC § 1365(c).

4. A copy of this Complaint, pursuant to 33 U.S.C. § 1365(b)(3) (CWA), is being served simultaneously upon the Attorney General of the United States and the EPA Administrator.

III. PARTIES

5. One Plaintiff in this action is the Paper, Allied-Industrial Chemical and Energy Workers International Union ("PACE").

6. PACE is an international union with over 320,000 members representing paper and industrial workers in both the US and Canada. PACE represents approximately 86 plant workers and 9 lab workers at the Continental Carbon Company plant in Ponca City, Oklahoma. These workers are members of PACE. PACE has as one of its goals and roles in representing, as it does here, its members, the protection of the members' health and safety. PACE is also dedicated to assisting its members to protect their rights in the workplace, and PACE negotiates and enforces collective bargaining agreements for its workers. Were PACE to forego litigation to enforce environmental safeguards, when as

here, violations of those safeguards appear evident and appear to increase the risks to which its members are exposed, PACE's credence with its members would be undermined and its membership, ultimately, would decline. PACE brings this action on its own behalf and on the behalf of its adversely affected members.

7. PACE members are adversely affected by Continental Carbon's unpermitted discharges from its wastewater retention lagoons to, ultimately, the Arkansas River and by the misrepresentations and reporting and monitoring failures associated with those impoundments or their discharges. The interests of PACE members have been and will be adversely affected by the discharges and other violations, alleged below, that are a result of actions by Continental Carbon at the site of its facility that is the subject of this action and by the resulting impacts on the Arkansas River. Their interests and injuries include the following:

   A. PACE members engage in recreational activities in and around the Arkansas River in the area of and downstream of Continental Carbon Company's facility. Members fish, hunt, search for arrowheads, and canoe in the Arkansas River or along the shoreline. The members are concerned about the discharges of polluted waters that are reaching the Arkansas River. Members believe the pollutants in these discharges reach the Arkansas River through various means, including through drainage features and/or during rain events. Members believe the pollutants in the discharges are caused by the holding ponds located at Continental Carbon's facility. Members also believe that the pollutants contained in the discharges, and then in the Arkansas River, either alone or in combination with other pollutants in the River can be hazardous to their health and to the environment and resources upon which they rely for their recreational activities. They believe that they are directly injured and that future releases threaten to impair their interests, including their desire to fish in, to eat the fish from, or to come in contact with the River.

   B. Additionally, many members of PACE are employed, but currently locked out, at the Continental Carbon Company's carbon black facility in Ponca City, Oklahoma. A number of members are concerned that, when they return to work, they will have to work around these ponds and that they could be exposed to the pollutants that are unlawfully discharged, either as a result of an emergency situation or routine work.

8. The Ponca Tribe is the other Plaintiff. It is an Indian nation. Members of the Ponca Tribe enjoy a unique ancestral relationship with their lands and the Arkansas River. Lands of the Tribal members used to include the site on which the Continental Carbon facility sits and currently includes much of the land nearby. The interests of the Tribe and its members have been and will be adversely affected by the discharges and other violations, alleged below, that are a result of actions by Continental Carbon at the site of its facility that is the subject of this action and by the resulting impacts on the Arkansas River. Their interests and injuries include:

   A. A number of members of the Ponca Tribe depend on the Arkansas River downstream from the Continental Carbon facility. Some members have annual incomes in the range of $5000, and some of them rely on the fish they catch in the River for food. Some such Tribal members are now reluctant to fish and eat the fish because of the increase in pollution in the River and their

belief that the fish have become contaminated from the pollution, including by the pollutants discharged from the Continental Carbon facility. The members have reduced their consumption of fish from the River and have had to obtain other sources of food;

B. Some Tribal members pick mushrooms from the riverbanks that are maintained damp and moist by the River below the Continental Carbon facility. They eat these mushrooms. The members concerned with the increased pollution including discharges by Continental Carbon in the River, reduce their dependence on the mushrooms as a source of food;

C. Members of the Ponca Tribe, some of whom own land along the Arkansas River, will no longer swim or participate in recreational activities in the river to the extent they have in the past because of their belief that the River has been polluted by the discharges from the Continental Carbon facility as well as by other sources of contaminants;

D. Some Tribe members have shallow water wells. They historically have relied upon these wells as sources of drinking water and other uses. They believe this water they obtained from their wells has become contaminated as a result of the activities of Continental Carbon, including contamination of ground water by Continental Carbon and the discharges of contaminated water to the Arkansas River and drainages to the river which they believe are hydrologically connected to the ground water. As a result, they have had to spend time and money to obtain alternative sources of drinking water, and these burdens could be lessened or eliminated, if the defendant's discharges were eliminated.

The Tribe seeks to safeguard the health and welfare of its members and to safeguard the natural environment to which its members have their unique relationship.

9. Continental Carbon Company is a subsidiary of CSRC and Taiwan Cement Corporation and incorporated in the state of Delaware.

IV. STATEMENT OF FACTS

10. Continental Carbon owns and operates a carbon black plant located in Ponca City, Kay County, Oklahoma. The plant has been in operation since 1954 and manufactures carbon black, a component of tires and other rubber and plastic products. The process uses distillation bottoms and other by-products obtained from nearby refineries. The process also uses similar by-products from non-refinery sources. These "residuals" or "wastes" typically consist of long-chain (16 carbon atoms or more) hydrocarbons that remain at the end of the crude oil distillation process, after the lighter crude oil and other petrochemical products and co-products have been extracted. The plant processes the residuals in four reactor units, which units are supported by various pumps, filters, boilers, catalyst injectors, quenching systems, tanks and waste water management systems.

11. Continental Carbon discharges wastewater from a range of plant sources to retention lagoons along the plant's eastern side near the Arkansas River. These discharges to the lagoons (but not discharges from the lagoons) were once permitted by the State of Oklahoma Department of Environmental Quality. However, this permit lapsed August

12, 1996. Continental Carbon, nonetheless, operated its industrial wastewater treatment and disposal system for almost two and one-half years without a permit.

12. In 1998, Continental Carbon applied for a new or renewal waste water permit, but, in its permit application, the company misrepresented the depth beneath the retention lagoons to the first appearance of groundwater; this misrepresentation was discovered by PACE and, later, confirmed by Oklahoma DEQ, but the misrepresentation was not corrected by Defendant. Had the true depth to groundwater been reflected in Continental Carbon's belated wastewater permit application, the permit application would presumably have been denied, inasmuch as Oklahoma DEQ regulations prohibit disposal lagoons bottomed in proximity to groundwater as close as that of Continental Carbon's lagoons.

13. Based on the records available to Plaintiffs and the results of inspections conducted by the Oklahoma DEQ and the Petitioners, it appears clear that Continental Carbon has discharged, and is discharging, pollutants to waters of the United States from the lagoons. This is not a permitted activity. In January 2002, for example, Oklahoma DEQ investigated a compliant made by the Ponca Tribe Office of Environmental Management and confirmed "several small streams of black water" coming out of Continental Carbon's wastewater lagoons. The contaminated water flowed toward the Arkansas River and collected in a marshy area that the DEQ found to contain black water, hydrocarbons, and "floating oil." This marshy area discharges to the Arkansas River and is occasionally flooded by the Arkansas River. The black water from the marsh contained diesel-range hydrocarbons, traceable to those in Continental Carbon's wastewater lagoons. Defendant is also known to have pumped waste waters between lagoons through badly leaking hoses, which leaking hoses have discharged pollutants that drain toward the river. Defendant's berm or dike on one its retention lagoons has also been breached, with resulting offsite discharges of the same character.

14. Plaintiffs also incorporate into this Complaint, as if fully set forth, their letter dated June 19, 2002 (Exhibit A), which letter was the required notice for this action, as additional claims and as additional bases for claims, below.

V. CLAIMS

15. The Federal Clean Water Act (CWA), 33 U.S.C. §1251 *et seq.*, establishes standards for discharges of pollution to public waters. The National Pollutant Discharge Elimination System ("NPDES") prohibits discharges of pollutants from a pipe, ditch or other point source into Waters of the U.S. without first obtaining an NPDES permit from the EPA or from a state that has an EPA-approved permit program. Oklahoma has been delegated the authority to administer an NPDES program pursuant to 33 U.S.C. §1342(b).

16. One. Oklahoma DEQ has recently documented "several small streams of black water" emerging from Continental Carbon's wastewater lagoons to a marshy area that the DEQ found to contain black water, hydrocarbons, and "floating oil" traceable to Continental Carbon's lagoons. This marshy area discharges into the Arkansas River. These discharges from Continental Carbon's wastewater impoundments require a permit, under both federal law (CWA §§ 301(a) and 402) and Oklahoma law (§27A-2-6-205, Okla. Rev. Civ. Stat.), but Continental Carbon does not have a permit for this discharge.

17. Continental Carbon has failed to apply for or obtain a permit or other authorization for discharges or releases of wastewater and contaminated storm water from its lagoons and other areas of its facilities in violation of Federal and State law. Every day of discharge,

since the start up of operations at the facilities, constitutes a separate violation. Penalties should be assessed for every day of discharge.

18. Two. Continental Carbon misrepresented facts in its 1998 wastewater permit application and has not corrected those misrepresentations, despite its knowledge of the errors. The application incorrectly represented that the depth of the groundwater at the facility was 80 feet. Based on Continental Carbon's own records, the actual depth appears to be about 20 feet. The misrepresentation of groundwater depth is a serious matter, given the risk and probable reality of contamination of groundwater and surface water from the lagoons. Continental Carbon's failure correct its depth-to-groundwater misrepresentation has worked, whether intentionally or recklessly, a fraud on the Oklahoma DEQ, which fraud equitably voided Continental Carbon's wastewater discharge permit. Every day since the filing of the permit application or since Continental Carbon discovered the fact of its misrepresentation, whichever is the more recent, constitutes a separate violation for misrepresentations and failure to correct the errors in the application and for operation without a valid permit. Penalties should be assessed for every day since the filing of the application or since Continental Carbon discovered the fact of its misrepresentation, whichever is the more recent date.

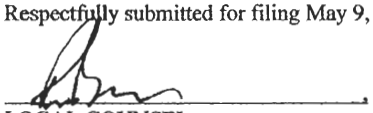
19. Three. Continental Carbon has allowed and continues to allow discharges of contaminated waters from its lagoons without monitoring or reporting the discharges to Oklahoma DEQ or EPA. This absence of monitoring and reporting, among other disservices, prevents Plaintiffs' members from understanding as well as they are entitled the risks to which they are exposed and from modifying their behaviors as that knowledge might dictate. Every day of discharge, since the start up of operations at the facilities, constitutes a separate violation of failure to monitor and report discharges. Penalties should be assessed for every day of discharge.

V. PRAYER

WHEREFORE, Plaintiffs respectfully request this Court to grant the following relief:

1. Issue a declaratory judgment that Defendant violated CWA and Oklahoma's solid waste and water quality statutes and regulations through the unsafe, improper and unauthorized operation of its Ponca City plant;
2. Order Defendant to pay penalties from $50 to $25,000 per day per violation and for each day of violation;
3. Enjoin all unpermitted discharges and set a compliance schedule for correction of all activities that result in any violation of CWA or of Oklahoma law or regulations authorized under CWA;
4. Award Plaintiffs their costs, including reasonable attorneys' and expert witness fees, as authorized by 33 U.S.C. § 1365 (d); and
5. Grant such other relief as the Court deems appropriate.

Respectfully submitted for filing May 9, 2003,



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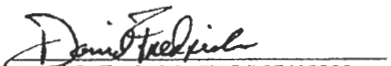

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IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-02-1677-R

PAPER, ALLIED-INDUSTRIAL CHEMICAL AND ENERGY WORKERS INTERNATIONAL UNION ("PACE") and PONCA TRIBE,

Plaintiffs,

v.

CONTINENTAL CARBON COMPANY,

Defendant.

DEFENDANT CONTINENTAL CARBON COMPANY'S MOTION TO DISMISS AND BRIEF IN SUPPORT

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April 14, 2003

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Fed. R. Civ. P. 12(b)(6)
Fed. R. Civ. P. 56
Fed. R. Evid. 201
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IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

(1) PAPER, ALLIED-INDUSTRIAL, CHEMICAL AND ENERGY WORKERS INTERNATIONAL UNION ("PACE"), and (2) PONCA TRIBE, Plaintiffs. v. (1) CONTINENTAL CARBON COMPANY, Defendant.	Case No. CIV-02-1677-R

DEFENDANT CONTINENTAL CARBON COMPANY'S MOTION TO DISMISS AND BRIEF IN SUPPORT

Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), Defendant, Continental Carbon Company ("Continental Carbon" or "Defendant"), moves this Court for an Order dismissing all claims against Continental Carbon because:

(1) This Court lacks jurisdiction over Plaintiffs' citizen suit under 33 U.S.C. § 1365(a) of the Clean Water Act ("CWA") because such suit is barred by 33 U.S.C. § 1319(g)(6)(A)(ii); and

(2) Plaintiffs lack standing to maintain a citizen suit against Defendant.

Because Plaintiffs' citizen suit is barred pursuant to 33 U.S.C. § 1319(g)(6) and Plaintiffs lack standing to sue, all of Plaintiffs' claims against Defendant, including claims for civil penalties, injunctive relief, and declaratory relief, should be dismissed. In support of this Motion, Defendant respectfully submits the incorporated Brief.

BRIEF IN SUPPORT

Defendant Continental Carbon Company owns and operates a manufacturing facility located in Ponca City, Oklahoma, which produces carbon black, a product used in the manufacture of tires and other rubber and plastic products. Plaintiffs are the Paper, Allied-Industrial, Chemical and Energy Workers International Union ("PACE" or the "Union"), an international workers union that represents workers at Defendant's Ponca City plant, and the Ponca Tribe, an Indian Nation whose members live in Ponca City, Oklahoma.

In recent months, the Union and Continental Carbon have been locked in a hotly contested labor dispute and have engaged in protracted labor negotiations seeking to resolve the dispute. Concurrently, the Union and its membership have embarked on a campaign to pressure Continental Carbon into labor concessions by, among many things, filing environmental lawsuits against the Company. An action was filed here in the Western District of Oklahoma, *P.A.C.E. v Cont'l Carbon Co.*, Case No. CIV-02-1022-M, as well as a similar action filed in the Northern District of Texas, Amarillo Division, *P.A.C.E. v. Cont'l Carbon Co.*, Civil Action No. 2-02CV-0175J, involving meritless allegations of violations of environmental laws. Those two lawsuits were recently dismissed by Joint Stipulation.

In addition, Plaintiffs have brought this lawsuit as a citizen suit under 33 U.S.C. § 1365(a) of the Clean Water Act. Essentially, Plaintiffs are contending that Continental Carbon discharged pollutants from its Ponca City plant without proper permits. This Motion to Dismiss is filed because Plaintiffs' citizen suit is barred by 33 U.S.C. § 1319(g)(6)(A)(ii), which prohibits duplicative citizen suits when, as here, a State is diligently prosecuting an enforcement action under comparable State law. Plaintiffs also lack standing to sue, as they have failed to allege a concrete injury in fact fairly traceable to Defendant's alleged conduct.

I. RELEVANT FACTS

1. Plaintiffs bring three causes of action in their Complaint: (1) discharges to waters of the United States and waters of the State without a permit, (2) discharges to lagoons pursuant to a permit which should not have been granted due to issues as to the depth to

groundwater below Defendant's lagoons, and (3) monitoring and reporting violations associated with the alleged improper discharges. (Complaint, ¶¶ 16-19.)

2. Plaintiffs allege Defendant has failed to apply for a permit that authorizes discharges beyond its facility boundary, pursuant to the National Pollutant Discharge Elimination System ("NPDES") and/or Oklahoma Pollutant Discharge Elimination System ("OPDES") programs. (Complaint, ¶ 17.)

3. Oklahoma has been delegated full authority to implement and enforce its OPDES program in lieu of the federal NPDES program. (Complaint, ¶ 15.)

4. Plaintiffs seek civil penalties, injunctive relief, and declaratory relief. (Complaint, ¶ 1.)

5. The Ponca Tribe submitted a complaint to the Oklahoma Department of Environmental Quality ("ODEQ") in January 2002. (Complaint, ¶ 13.) PACE became involved shortly thereafter, at least by February 2002.

6. The ODEQ conducted an investigation of Defendant's facility in January 2002. (Complaint, ¶ 13.)

7. Based on its investigation, the ODEQ issued Notice of Violation ("NOV") No. I-36000130-02-1 to Defendant on February 12, 2002, for alleged violations of the CWA and State law, including discharges into the waters of the State without a permit. (Exhibit A.)

8. The ODEQ and Defendant entered into a Consent Order, Case No. 02-116, on May 6, 2002, to resolve issues of alleged noncompliance under the CWA and State law. (Exhibit B.)

9. Plaintiffs filed a 60-day notice of Intent to Sue letter on June 19, 2002. (Attached to Complaint as Exhibit A.)

10. The ODEQ suspended the requirements of the Consent Order by a June 20, 2002 letter, citing a need to resolve issues regarding depth to groundwater below Defendant's lagoons. (Exhibit C.)

11. Plaintiffs filed this action on November 26, 2002.

12. The ODEQ and Defendant entered an Addendum to the Consent Order, Case No. 02-116, on April 11, 2003, lifting the suspension on the requirements of the Consent Order and agreeing to resolve issues relating to previous permit applications and depth to groundwater in the upcoming permit renewal process. (Exhibit D.)

II. ARGUMENT AND AUTHORITIES

A. Standard Of Review

The bar against a citizen suit under § 1319(g)(6)(A) is a matter of subject matter jurisdiction. The Tenth Circuit has previously held that jurisdictional challenges which "arise out of the same statute creating the cause of action" are "necessarily intertwined with the merits of the case." *U.S. ex. rel. King v. Hillcrest Health Ctr., Inc.*, 264 F.3d 1271, 1278 (10th Cir. 2001), *cert. denied*, 535 U.S. 905 (2002). Thus, the Court should treat this motion as one to dismiss under Rule 12(b)(6).[1] *Id.*

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[1] The Tenth Circuit held that such issues should be resolved under either Rule 12(b)(6) or Rule 56. Here, conversion to a motion for summary judgment is unnecessary. The only matters outside the pleadings introduced by Defendant are matters of public record. Defendant respectfully requests this Court take judicial notice of the facts contained in the attached documents from the ODEQ record pursuant to Fed. R. Evid. 201. *See Davis v. United Student Aid Funds, Inc.*, 45 F. Supp.2d 1104, 1106 (D. Kan. 1998) ("As for the records, reports, and other materials from administrative agencies, the court may take judicial notice of any facts provided in such materials without converting the Rule 12(b)(6) motion into a Rule 56 motion."). Plaintiffs have implicitly incorporated these same documents into their Complaint and relied upon them, as they form part of the basis of Plaintiffs' claims. *See, e.g.,* Complaint, ¶ 12 ("Based on the **records available to Plaintiffs and the results of inspections conducted by the Oklahoma DEQ** and the Petitioners, it appears" that Defendant has committed the alleged violations).

The basic test for dismissal under Rule 12(b)(6) is whether "it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). When a defendant moves to dismiss on grounds of lack of subject matter jurisdiction, "the plaintiff has the burden of proving jurisdiction in order to survive the motion." *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir.1990). With respect to both federal jurisdiction and standing, "the party invoking federal jurisdiction bears the burden of establishing its existence." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998). The Court is not required to presume the truthfulness of legal conclusions or deductions that are alleged or drawn from pleaded facts. *See e.g., Witt v. Roadway Express*, 136 F.3d 1424, 1431 (10th Cir. 1998), *cert. denied*, 525 U.S. 881 (in applying the Rule 12(b)(6) analysis, the court is to accept as true all well-pleaded facts, as distinguished from conclusory allegations); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (conclusory allegations without supporting factual averments are insufficient to State a claim on which relief can be granted); *Bryson v. City of Edmond*, 905 F.2d 1386, 1390 (10th Cir. 1990) (while reasonable inferences can be drawn from pleaded facts, mere conclusions are not permitted, nor are unwarranted inferences or footless conclusions of law predicated on such facts). In order to avoid dismissal, therefore, Plaintiffs must allege enough facts in the Complaint to support a valid claim against Continental Carbon which would entitle them to relief.

B. Jurisdiction Over Plaintiffs' Citizen Suit Is Barred Under The Clean Water Act, 33 U.S.C. § 1319(g)(6)(A)(ii).

In § 1365(a), the CWA authorizes any citizen to initiate a civil action on his own behalf "against any 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," **except as provided under subsection (b) or § 1319(g)(6) of the CWA.** 33 U.S.C. § 1365(a). The CWA originally only precluded citizen suits where the United States Environmental Protection Agency ("EPA") or a State had previously brought an action in court against the defendant. 33 U.S.C. § 1365(b).

Recognizing the potential for duplicative and unnecessary proceedings when the EPA or a State had already commenced administrative action, Congress added the exception under § 1319(g)(6) with its 1987 Amendments to the CWA. **Section 1319(g)(6) of the Clean Water Act provides that citizen suits are barred where the EPA or a State has already begun or taken enforcement action.** 33 U.S.C. § 1319(g)(6). This bar on duplicative citizen actions is based upon the general policy behind CWA citizen suits, *i.e.*, that "the citizen suit is meant to ***supplement*** *rather than to* ***supplant*** governmental [enforcement] action." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987) (emphasis added).

1. The ODEQ Has "Commenced" And Is "Diligently Prosecuting" An Action Against Continental Carbon Under "Comparable State Law."

The jurisdictional bar in § 1319 provides that any violation "with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection" shall not be the subject of a civil penalty action under § 1365. 33 U.S.C. § 1319(g)(6)(A)(ii). Dismissal is proper in this matter because each of these three requirements have been met:

(1) The ODEQ has **commenced** an action against Continental Carbon;

(2) The ODEQ is **diligently prosecuting** the action; and

(3) The action is being conducted pursuant to Oklahoma law which is **comparable** to the federal Clean Water Act.

Therefore, this Court lacks subject matter jurisdiction over Plaintiffs' citizen suit, and each of Plaintiffs' claims should be dismissed.

a. Commencement

It is clear from a review of the Undisputed Facts that the Oklahoma Department of Environmental Quality has commenced an action against Continental Carbon with respect to the same issues raised in the Complaint. For this reason, the first of the three requirements for dismissal is firmly established.

The CWA does not define "commencement" for the purposes of determining whether a State has commenced enforcement proceedings under the § 1319(g)(6)(A) analysis. *Sierra Club v. Colo. Ref. Co.*, 852 F. Supp. 1476, 1484 (D. Colo. 1994). Therefore, courts have considered the procedures for the institution of administrative enforcement proceedings under the relevant State law for guidance as to the meaning of commencement. *Id.* at 1485. *See also Williams Pipeline Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1320 (S.D. Iowa 1997); *Pub. Interest Research Group of N.J., Inc. v. Elf Atochem N. Am., Inc.*, 817 F. Supp. 1164, 1172 (D.N.J. 1993). When determining whether a State has "commenced an action" within the meaning of § 1319(g)(6), "states are afforded some latitude in selecting the specific mechanisms of their enforcement program." *Ark. Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376, 380 (8th Cir. 1994), *cert. denied*, 513 U.S. 1147 (1995). In fact, a district court in Iowa has held that the State need not conduct any formal procedure at all. *Williams*, 964 F. Supp. at 1320-23.[2]

Under Oklahoma law, whenever the ODEQ has determined that any person is in violation of the environmental statutes or regulations of the State, or any permit or license issued pursuant thereto, the ODEQ "may give written notice to the alleged violator of the specific violation and of the alleged violator's duty to correct such violation immediately or within a set time period or both and that the failure to do so will result in the issuance of a compliance order." OKLA. STAT. tit. 27A, § 2-3-502(A) (Supp. 2002). Further, the ODEQ regulations require that "[u]nless otherwise provided by the particular enabling legislation, administrative enforcement proceedings shall begin with a written notice of violation ("NOV") being served upon the Respondent." OKLA. ADMIN. CODE § 252:4-9-1 (2002).[3] Since an NOV was issued in this case, it is clear that the ODEQ has commenced an action against Continental Carbon, thus satisfying the first prong of the analysis.

The ODEQ issued NOV No. I-36000130-02-1 to Continental Carbon pursuant to its authority under § 2-3-502(A) of the Environmental Quality Code on February 12, 2002 (Exhibit A). Specifically, the NOV alleges that "water from a large pond on a marshy piece of land [on the] east side of the Continental Carbon plant was black;" that although there were no visible discharges from the impoundments to the marsh, black water was discharging into the marsh from under the ground; and that "[s]amples taken at [the] site had chemical components identical to samples taken from [the] impoundment," in violation of OKLA. ADMIN. CODE § 252:605-1-5(b)(3)(P) and OKLA. STAT. tit. 27A, § 2-6-205(A), which prohibit discharges of any pollutant to waters of the State without a permit.

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2 In *Williams*, the court noted that because defendant had come into compliance with directives of the Iowa Department of Natural Resources ("Iowa DNR"), there was no need to file an administrative order or a notice of violation to begin administrative proceedings - compliance was at hand. Thus, the Iowa DNR "commenced an action" when it "issue[d] directives and reach[ed] an informal settlement that involved a remediation plan, an NPDES permit, monitoring, status reports, and site investigations." *Williams*, 964 F.Supp. at 1323.

3 As in Arkansas and Iowa, Oklahoma law gives the ODEQ considerable discretion under the Water Quality Act to issue an order, commence appropriate administrative enforcement proceedings, or bring a civil action. OKLA. STAT. tit. 27A, § 2-6-206(C) (Supp. 2002).

The ODEQ subsequently sent a letter to Continental Carbon on June 20, 2002 (Exhibit C), alleging that the depth to groundwater below Continental Carbon's surface impoundment lagoons was less than 15 feet, in violation of OKLA. ADMIN. CODE § 252:616-7-1-(4). This letter suspended the remaining issues from the Consent Order pending resolution of this alleged violation. The ODEQ ultimately determined that the depth-to-groundwater issue and issues relating to the accuracy of information provided by Continental Carbon in previous permit applications were more properly addressed in the permitting process. (Addendum to Consent Order, ¶ 7iii.)

The allegations in the NOV and the June 20th letter form the basis for Plaintiffs' citizen suit claims.[4] Plaintiffs allege that "Continental Carbon has discharged, and is discharging, pollutants to the waters of the United States from the lagoons" without a permit under federal law (CWA §§ 301(a) and 402) and Oklahoma law (OKLA. STAT. tit. 27A, § 2-6-205(A)).[5] Complaint, ¶¶ 13, 16. This is the precise issue addressed by the ODEQ in the NOV:

> Except as otherwise provided in subsection B of this section, it shall be unlawful for any facility, activity or entity regulated by the Department pursuant to the Oklahoma Pollutant Discharge Elimination System Act to discharge any pollutant into waters of the state or elsewhere without first obtaining a permit from the Executive Director.

OKLA. STAT. tit. 27A, § 2-6-205(A) (Supp. 2002).

Further, Plaintiffs allege that Continental Carbon has misstated depth to groundwater below its lagoons in previous permit applications and violated Oklahoma's depth-to-groundwater requirement. The ODEQ has determined that these issues should be resolved through the permitting process, as confirmed in the Addendum. (Addendum to Consent Order, ¶ 7iii.)

Unquestionably, then, the ODEQ "commenced" administrative enforcement proceedings with the issuance of the NOV regarding CWA issues on February 12, 2002.

b. Diligent Prosecution

The plaintiff in a citizen suit bears the burden of proving that a State agency's prosecution was not diligent, and the "burden is heavy, because the agency's diligence is presumed." *Williams*, 964 F. Supp. at 1324. According to the First Circuit, "[w]here [a State] agency has specifically addressed the concerns of an analogous citizen's suit, deference to the agency's plan of attack should be particularly favored." *N. & S. Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552, 557 (1st Cir. 1992).

Further, the diligence of the State's prosecution is determined by the procedures of the State and is not limited to ordering compliance with the CWA by a date certain, according to a timetable, and providing civil penalties.

> The government agency is **not required to succeed by the private party's definition of success**. Merely because a state may not be taking the precise action a private party wants it to, or moving with the speed the plaintiff desires, does not entitle the private plaintiff to injunctive relief.

Williams, 964 F. Supp. at 1324 (emphasis added). The Eighth Circuit has similarly held that "[i]t would be unreasonable and inappropriate to find failure to diligently prosecute simply because

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4 Plaintiffs state in the Complaint that their allegations are based on ODEQ records available to them and the results of inspections conducted by the ODEQ and themselves. (Complaint, ¶ 13.)

5 The alleged federal CWA violations that Plaintiffs identify in their Complaint are essentially identical and consumed within Oklahoma's statutory scheme, since Defendant operates pursuant to Oklahoma permits. Section 301(a) of the CWA prohibits discharges of any pollutant except in compliance with law. 33 U.S.C. § 1311(a). Section 402 requires permits for discharges of pollutants. 33 U.S.C. § 1342(a)(1). The EPA has delegated its authority to issue NPDES permits under § 402 to the State of Oklahoma. (Complaint, ¶ 15.) *See also* Final Approval of the Oklahoma Discharge Elimination System under the Clean Water Act, 61 Fed. Reg. 65,047 (1996).

[the alleged violator] prevailed in some fashion or because a compromise was reached." *Ark. Wildlife Fed'n*, 29 F.3d at 380.

There can be no serious allegation, and there is no proof, that ODEQ has not diligently prosecuted administrative enforcement against Continental Carbon. Subsequent to the issuance of the February 12, 2002 NOV, the ODEQ entered a Consent Order with Continental Carbon on May 6, 2002 (Exhibit B), pursuant to the ODEQ's authority under OKLA. STAT. tit. 27, §§ 2-6-206(E) and 2-6-105. (Consent Order, ¶ 12.) These provisions allow the ODEQ to issue orders for violations related to the OPDES Act and for pollution of the air, land, or waters of the State, respectively. OKLA. STAT. tit. 27, §§ 2-6-206(E) and 2-6-105(B). The Consent Order was designed to resolve potential issues of noncompliance between the ODEQ and Continental Carbon. (Consent Order, ¶ 9.)

The Consent Order required Continental Carbon to conduct certain studies on the facility to determine whether discharges were in fact occurring and to conduct a Supplemental Environmental Project ("SEP"). (Consent Order, ¶¶ 17-18.) Continental Carbon completed the SEP and Tasks A and B(a) of the Consent Order to the ODEQ's satisfaction and submitted a Lagoon Study in fulfillment of Task B(b). (Addendum to Consent Order, ¶¶ 7ii, 7iii, 7iv, 32.) However, the ODEQ suspended the requirements of Task B(b) in the June 20, 2002 letter (Exhibit C) pending resolution of other issues involving the depth to groundwater below the lagoons. (Addendum to Consent Order, ¶ 7iii.) The ODEQ agreed to an Addendum to the Consent Order on April 11, 2003 (Exhibit D), which lifted the suspension and confirmed that issues involving depth-to-groundwater and the accuracy of information submitted in previous permit applications would be addressed through the facility's upcoming permitting process.[6]

Since the ODEQ commenced an enforcement action against Continental Carbon on February 12, 2002, it has diligently prosecuted that action. The ODEQ has negotiated a Consent Order and an Addendum to the Consent Order and required Continental Carbon to conduct an SEP and various studies to determine whether the allegations in the NOV are supported. Thus, Plaintiffs cannot meet the heavy burden of showing that the ODEQ has not been diligent in its prosecution of its enforcement action.

c. Comparable State Law

The third requirement under § 1319(g)(6)(A) is that the action commenced by a State agency must be prosecuted under **State law which is comparable to the CWA**. 33 U.S.C. § 1319(g)(6)(A)(ii). Section 1319(g) contains three relevant categories of provisions: (1) penalty provisions, whereby the EPA can access administrative penalties not to exceed $10,000 per day, with a $25,000 cap for Class I violations and a $125,000 cap for Class II violations; (2) notice and public participation provisions, whereby the EPA must publish notice and accept comments from interested parties prior to entering an administrative order and

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[6] An amendment or addendum to a consent order relates back to the original consent order and does not "commence" a new action for purposes of § 1319(g)(6). *Ark. Wildlife Fed'n*, 29 F.3d at 380. In *Arkansas Wildlife Fed'n*, the Arkansas Department of Pollution Control & Environment ("ADPC&E") and defendant entered a consent administrative order ("CAO") on April 16, 1991, without the need for a formal NOV. The ADPC&E and defendant agreed to a corrected CAO on September 9, 1991, and an amended CAO on April 30, 1992. Plaintiff argued that if the initial CAO "commenced" a state enforcement action, each subsequent corrected or amended CAO "commenced" a new and separate enforcement action. The Court disagreed, holding that "the corrected and amended CAOs were all part of **a single ongoing enforcement action**." *Id.* at 382 (emphasis added). Likewise, in the instant matter, the Consent Order and the Addendum were all part of the ODEQ's ongoing enforcement action against Continental Carbon arising from the initial February 12, 2002, NOV.

may - but is not required to - hold a hearing at the request of interested parties; and (3) judicial review provisions, whereby any person who commented on the proposed penalty assessment can request judicial review within 30 days.

Comparability of the State law has not been addressed by the Tenth Circuit; however, several other Federal Circuits have considered whether actions were prosecuted under State laws comparable to the federal CWA. As explained by the First Circuit, the standard for comparability is simply a question of whether

> **the [State] statutory scheme**, under which the State is diligently proceeding, contains penalty assessment provisions comparable to the Federal Act, that the State is authorized to assess those penalties, and that the overall scheme of the two acts is aimed at correcting the same violations, thereby achieving the same goals.

Scituate, 949 F.2d at 556 (emphasis added). Thus, the First Circuit adopted a standard which considers the **overall State statutory scheme** to determine whether it has the same goals as the enforcement procedures of the CWA.

In *Scituate*, the Massachusetts Department of Environmental Protection ("MDEP") issued an administrative order to defendant for discharges without an NPDES permit in 1987. The MDEP **did not assess any penalties** against defendant for agreement of the order. In 1989, the plaintiff citizen group brought a CWA citizen suit based on the same discharge violations. The district court granted defendant's motion for summary judgment, and the First Circuit affirmed. The First Circuit rejected a formalistic approach to the specific provisions of the State law, holding that "[t]he focus of the statutory bar to citizen's suits is not on state statutory construction, but on whether corrective action already taken and diligently pursued by the government seeks to remedy the same violations as duplicative civilian action." Because the Massachusetts scheme was aimed at correcting the same violations and achieving the same goals as the federal CWA, the First Circuit held that Massachusetts law was comparable for purposes of § 1319(g)(6).

Since *Scituate* was decided, the Eighth, Sixth, and Fifth Circuits have generally adopted the First Circuit's standard for comparability:

> [T]he comparability requirement may be satisfied so long as the state law contains comparable penalty provisions which the state is authorized to enforce, has the same overall enforcement goals as the federal CWA, provides interested citizens a meaningful opportunity to participate at significant stages of the decision-making process, and adequately safeguards their legitimate substantive interests.

Ark. Wildlife Fed'n, 29 F.3d at 381. *See also Lockett v. EPA*, 319 F.3d 678 (5th Cir. 2003); *Jones v. City of Lakeland*, 224 F.3d 518 (6th Cir. 2000). In *Arkansas Wildlife Fed'n*, plaintiff filed a citizen suit alleging that defendant had violated its NPDES permit for three point source discharges to the Arkansas River, discharge violations for which the ADPC&E had previously issued a compliance order. The district court granted defendant's motion for summary judgment based on § 1319(g)(6)(A)(ii), holding that Arkansas law was sufficiently comparable to § 1319(g) and that civil penalties, injunctive relief, and declaratory relief were each barred. *Ark. Wildlife Fed'n v. ICI Americas, Inc.*, 842 F. Supp. 1140 (E.D. Ark. 1993), *aff'd.*, 29 F.3d 376. The Eighth Circuit affirmed, holding that Arkansas law was comparable because the overall regulatory scheme provides significant opportunities for public participation, despite the fact that Arkansas law was not identical to the CWA as to its public notice and comment provisions. *Ark. Wildlife Fed'n*, 29 F.3d at 381.

The "overall scheme" approach of the First Circuit was taken by the only court within the Tenth Circuit which has specifically addressed the issue of comparability of State law. *Sierra Club v. Colo. Ref. Co.*, 838 F. Supp. 1428, 1435 (D. Colo. 1993). In *Sierra Club*, the court looked closely at the public notice provisions of Colorado law. Colorado law does not

require prior public notice of a State penalty assessment. However, any party "directly affected" by a final order can apply for a hearing or reconsideration of a final order. COLO. REV. STAT. § 25-8-403. Additionally, any person "adversely affected or aggrieved" by any "final order" can seek judicial review. COLO. REV. STAT. § 25-8-404(1). Therefore, the court held that "although the Colorado regulatory scheme does not mandate prior public notice of enforcement proceedings, **overall, the scheme adequately protects the public interest in enforcement actions**." *Sierra Club*, 838 F. Supp. at 1435 (emphasis added).

Oklahoma law is substantially similar to Colorado law and is comparable to the CWA § 1319(g) under the standard adopted by the majority of Federal Circuits that have addressed the issue. First, the EPA has delegated authority to the State of Oklahoma "to administer and enforce" the NPDES program for regulating discharges of pollutants into waters of the State. 61 Fed. Reg. 65,047. This delegation represents an acknowledgment by the EPA that Oklahoma's program is a comparable program sufficient to operate "in lieu of the EPA administered NPDES program pursuant to § 402 of the CWA." *Id.*

Second, the Oklahoma Water Quality Code, OKLA. STAT. tit. 27A, § 2-6-101 *et seq.*, contains penalty provisions which the State is authorized to enforce, has the same overall enforcement goals as the federal CWA, and provides interested citizens a meaningful opportunity to participate at significant stages of the decision-making process. The ODEQ is authorized to assess civil penalties not to exceed $10,000 per day of violation, and not to exceed a total penalty of $125,000 per violation. OKLA. STAT. tit. 27A, § 2-6-206(E).[7] The "overall scheme" of Oklahoma's Water Quality Code is designed, *inter alia*, to "provide for the prevention, abatement and control of new or existing water pollution; and to cooperate with other agencies of this state, agencies of other states and the federal government in carrying out these objectives." OKLA. STAT. tit. 27A, § 2-6-102.[8] Although Oklahoma has no requirement of public notice or participation prior to entering a consent order,[9] the Oklahoma scheme is designed to "provide[] interested citizens a meaningful opportunity to participate at significant stages of the decision-making process."[10] *Ark. Wildlife Fed'n*, 29 F.3d at 381 (public notice and comment requirements need not be identical to the CWA). Specifically, Oklahoma law provides that any interested party may intervene in any administrative proceeding before the ODEQ or in any civil proceeding related to violations of the OPDES Act. OKLA. STAT. tit. 27A, § 2-6-206(B). Any party aggrieved by a final order of the ODEQ may petition for judicial review. OKLA. STAT. tit. 27A, § 2-3-502(I).[11]

Congress and the Supreme Court have each expressed an intent that citizen suits should not be allowed to duplicate and supplant State enforcement action conducted under law comparable to the CWA. Comparability does not require that Oklahoma law be identical to the CWA. Under the standard of the majority of Federal Circuits, Oklahoma's Water Quality Code is comparable to § 1319 of the federal CWA. As such, since the ODEQ has commenced and is

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7 The EPA is authorized to assess administrative penalties up to $10,000 per day, with a maximum penalty of $25,000 for Class I violations and $125,000 for Class II violations. 33 U.S.C. § 1319(g)(2).

8 This corresponds to Congress' goal behind implementation of the Clean Water Act to restore and protect the quality of the Nation's waters. 33 U.S.C. § 1251(a).

9 The EPA is required to give public notice and opportunity for comment prior to issuing a civil penalty order, and those presenting comments are entitled to participate in a public hearing, if one is held. 33 U.S.C. § 1319(g)(4)(A), (B).

10 In fact, Plaintiffs have reviewed the ODEQ files and commented to the ODEQ record on numerous occasions during the ongoing enforcement action. (Exhibit E.) Such participation indicates that Plaintiffs had actual notice of the NOV and Consent Order and meaningful opportunities to participate in the enforcement process. *See Ark. Wildlife Fed'n*, 29 F.3d at 382 (noting that plaintiff had actual notice of the issuance of the CAO and had reviewed the ADPC&E's files five months before filing a lawsuit).

11 Any person who commented on the proposed civil penalty order may seek judicial review under the CWA. 33 U.S.C. § 1319(g)(8).

diligently prosecuting an action under comparable law against Continental Carbon, Plaintiffs' citizen suit is barred and should be dismissed.

2. Plaintiffs' Citizen Suit Is Not Saved Under Either Of The Exceptions In § 1319(g)(6)(B).

Neither exception found in 33 U.S.C. § 1319(g)(6)(B) allows Plaintiffs to maintain this citizen suit. Under § 1319(g)(6)(B)(i), this civil action must have been filed **prior to the commencement of an action** under § 1319 or comparable State law in order to survive. Such is not the case, as Plaintiffs filed this action on November 26, 2002, **after the ODEQ had commenced administrative action** against Continental Carbon on February 12, 2002, with the issuance of an NOV.

The second exception in § 1319(g)(6)(B)(ii) is likewise inapplicable here. Subsection (ii) provides that the plaintiff must have sent its notice to sue letter prior to commencement of the action under § 1319 or comparable State law and then filed suit within 120 days. In this case, Plaintiffs sent two notice letters to Continental Carbon. The first, dated February 25, 2002, referred only to claims under the Resource, Conservation and Recovery Act ("RCRA"). The second, dated June 19, 2002, specifically identified CWA claims in addition to the RCRA claims for the first time and was attached to the Complaint in this action by the Plaintiffs. Notice of the alleged CWA § 1365(a)(1) violation, therefore, did not reach Continental Carbon until after the ODEQ had "commenced" an action under comparable State law on February 12, 2002. In any event, the Plaintiffs' citizen suit **was not filed within 120 days of *either* notice letter, and 33 U.S.C. § 1319(g)(6)(B)(ii) is, therefore, inapplicable.**

The Fifth Circuit has recently faced a similar factual scenario. *See Lockett*, 319 F.3d at 687-89. Plaintiffs in *Lockett* sent a 60-day notice letter on August 12, 1999, to the City of Folsom. The Louisiana Department of Environmental Quality ("LDEQ") issued a compliance order to Folsom on November 4, 1999, which resulted in a $466,450 penalty assessment. Plaintiffs sent a second notice letter on December 7, 1999, and filed a citizen suit on March 31, 2000, within 120 days of the second notice letter, but not within 120 days of the first notice. According to the Court, if the first notice was not sufficient, then plaintiffs must rely on the second notice, which was filed **after** the LDEQ "commenced" action. On the other hand, if the first notice was sufficient, the suit was not filed within 120 days of the notice. The Court did not determine whether the notice was in fact sufficient because, **in *either* event, the exception in § 1319(g)(6)(B)(ii) was inapplicable**. *Id.* at 688-89.

The exceptions contained in § 1319(g)(6)(B) do not operate to save Plaintiffs' citizen suit herein. Plaintiffs failed to file suit or send their 60-day notice letter prior to the time when the ODEQ commenced enforcement action under comparable State law. In addition, Plaintiffs did not file suit within 120 days of their notice letter.

3. The Bar In § 1319(g)(6) Is Jurisdictional And Precludes Plaintiffs' Claims For Civil Penalties As Well As Injunctive And Declaratory Relief.

Both the First and Eighth Circuits, and several lower courts, have determined that when applied, the jurisdictional bar precludes claims for civil penalties, injunctive relief, and declaratory relief. *See Scituate*, 949 F.2d at 557-58 (to allow claims for injunctive and declaratory relief to continue after a claim for civil penalties has been barred would be "absurd"); *Ark. Wildlife Fed'n*, 29 F.3d at 382-83 (although not "absurd," such a result would be undesirable); *Lockett v. EPA*, 176 F. Supp.2d 628, 636 (E.D. La. 2001), *aff'd*, 319 F.3d 678 (2003); *Williams*, 964 F. Supp. at 1333 (because the bar is jurisdictional, the court is without jurisdiction over claim for declaratory relief).

Because Plaintiffs' citizen suit is brought in violation of the bar in 33 U.S.C. § 1319(g)(6)(A)(ii), this Court lacks jurisdiction over Plaintiffs' claims. Therefore, Plaintiffs'

citizen suit should be dismissed, including their claims for civil penalties, injunctive relief, and declaratory relief.

C. Plaintiffs Lack Standing To Maintain A Citizen Suit Lawsuit Against Defendant.

Under Article III, § 2, of the United States Constitution, a court's jurisdiction is limited to a "case or controversy," and thus a plaintiff is required to have standing to sue. *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167, 180 (2000). In order for an organization or association to have standing to bring a suit on behalf of its members, the organization must show that: (1) its members would otherwise have standing to sue in their own right; (2) the interests at stake are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Id.* at 181.

In order to satisfy the organizational standing requirements in a CWA suit, individual members of the organization must show that they have a right to sue in their own right. Thus, the court will look to the fundamental standing requirements: (1) the plaintiff must have suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent," not "conjectural or hypothetical;" (2) the injury must be fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Friends of the Earth*, 528 U.S. at 180-81. Plaintiffs have failed to allege an "injury in fact" which is "fairly traceable" to the challenged action.

The "injury in fact" prong requires a showing of injury *to the plaintiff*, **not** injury *to the environment*. *Friends of the Earth*, 528 U.S. at 181. In *Friends of the Earth*, members of the plaintiff organization had standing to sue when they made **specific** allegations as to their **reluctance** to fish, hike, picnic, bird watch, wade, or walk in or near the allegedly polluted water. According to the Court, "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreation values of the area **will be lessened**' by the challenged activity." *Id.* at 183 (emphasis added). However, "general averments" and "conclusory allegations" that unnamed members use unspecified portions of large tracts of territory have been held insufficient to satisfy the "injury in fact" prong. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

Further, mere "knowledge of pollution" or "threat of injury" is not sufficient to establish standing. *Pub. Interest Research Group of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 120-22 (3d Cir. 1997). In *Magnesium Elektron*, the Third Circuit held that plaintiffs' allegation that they "knew" that defendant polluted the river by exceeding effluent limits in its NPDES permits was insufficient to show an "injury in fact." According to the court, such an assertion of pollution, without a corresponding allegation of concrete injury, is the equivalent of a "generalized grievance," which the Supreme Court has specifically held does not provide an individual plaintiff with standing. *See Valley Forge Christian Coll. v Americans United for Separation of Church & State*, 454 U.S. 464, 475 (1982).

In the present case, Plaintiffs have merely alleged "conjectural or hypothetical" injury. Plaintiffs allege that PACE members "hunt wildlife along the shores of the Arkansas River." (Complaint, ¶ 7.) However, there is no allegation that PACE members **have suffered a concrete injury** as a result of Continental Carbon's alleged discharges. Plaintiffs do not allege that PACE members' enjoyment of these recreational activities **have been lessened** by the alleged discharges. Nor is there any allegation in Plaintiffs' Complaint that PACE members have been **reluctant or forced to curtail** their hunting along the Arkansas River in response to

the alleged discharges. Such an allegation could not be credibly made in light of Rule 11 standards.

Likewise, Plaintiffs have not alleged an "injury in fact" with respect to the Ponca Tribe members. The Complaint states that Ponca Tribe members own land along the Arkansas River downstream of Continental Carbon's plant and operate shallow water wells there. (Complaint, ¶ 8.) However, there is no allegation that Ponca Tribe members' land or water wells **have been actually impacted** by alleged discharges from Continental Carbon's plant.

In fact, what Plaintiffs essentially allege is that the ODEQ has identified potential discharges from Continental Carbon's plant, and Plaintiffs recognize some general injury to the "natural environment" as a result. (Complaint, ¶ 8.) The United States Supreme Court has directly rejected the notion that these "general averments" of injury to the environment or "generalized grievances" would create standing to sue. *See Lujan*, 497 U.S. at 888-89.

In order for an injury to be "fairly traceable" to a defendant's conduct, courts have generally required plaintiffs to show that a defendant discharges a pollutant that "causes or contributes to the kinds of injuries alleged by the plaintiffs." *Natural Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992). Since Plaintiffs have not alleged a direct injury, this prong of the standing analysis must also fail. However, even if Plaintiffs had alleged specific, concrete injuries that lessened their aesthetic or recreational enjoyment (which they have not), they have not alleged that their injury is a direct result of Defendant's conduct.

Plaintiffs make several vague allegations in the Complaint as to waters from Defendant's lagoons reaching the Arkansas River. However, this Court is not required to accept as true Plaintiffs' "conclusory" allegations that "Defendant discharges from waste retention lagoons to, **ultimately**, the Arkansas River" or that pollutants have drained "**toward** the river." (Complaint, ¶¶ 1, 13.) (Emphasis added.) Nor should this Court recognize the patently inaccurate allegation that the ODEQ "confirmed 'several small streams of black water' coming out of Continental Carbon's wastewater lagoons." (Complaint, ¶ 13.) The ODEQ actually observed that black water came from underground seeps on the side of a hill near the Continental Carbon plant. (Exhibit A.)

If discharges are confined solely to the property owned by the defendant, then Plaintiffs cannot meet the "fairly traceable" requirement for standing. *NRDC*, 964 F.2d at 980. Without a substantial allegation that discharges from Continental Carbon's plant actually reach the Arkansas River through some actual continuous physical connection or pathway, Plaintiffs have failed to satisfy the "fairly traceable" prong. It is not enough that Ponca Tribe members' wells are "believed to be hydrologically connected to the river." (Complaint, ¶ 8.) Plaintiffs must also allege that discharges from Continental Carbon's plant are into waters which are physically connected to the river through some identifiable pathway.[12]

Plaintiffs have failed to allege an "injury in fact" that is neither "conjectural" nor "hypothetical." Assuming they had alleged an injury in fact - which they have not - Plaintiffs have also failed to show that such injury would be "fairly traceable" to Continental Carbon's discharges because they have made only "conclusory" allegations of a connection between Continental Carbon's lagoons and the Arkansas River. Therefore, Plaintiffs lack standing to maintain their citizen suit against Continental Carbon, and their Complaint should be dismissed.

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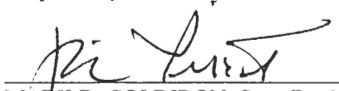
12 It is also unclear how Plaintiffs' injury could be fairly traceable to Defendant's alleged failure to properly obtain a permit for its lagoons. Defendant's wastewater discharge permit does not authorize discharges **from** the lagoons. (Complaint, ¶ 12.) Therefore, even if Defendant had improperly obtained the permit, such violation would only affect Defendant's activities **on its own property**. Any injury which Plaintiffs could allege - and indeed they have not alleged any "injury in fact" - could not be fairly traceable to Defendant's alleged violation of **on-site requirements for its lagoons**.

CONCLUSION

For the reasons noted above, this Court is respectfully urged to grant Defendant Continental Carbon's Motion to Dismiss. There is no subject matter jurisdiction because the ODEQ commenced and diligently prosecuted Continental Carbon under comparable State law. This "citizen suit" seeks to supplant, not supplement, the actions of the ODEQ and is therefore unauthorized. Further, neither of the Plaintiffs have standing to bring this type of action since neither one can meet the standard set forth in the Supreme Court's *Friends of the Earth* case. Accordingly, this case should be dismissed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served on all counsel of record in accordance with the Federal Rules of Civil Procedure by certified mail, return receipt requested:

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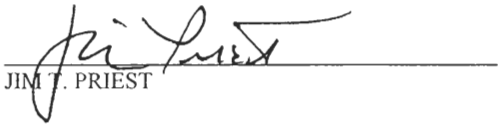

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03-6243
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PAPER, ALLIED-INDUSTRIAL, CHEMICAL AND ENERGY WORKERS INTERNATIONAL UNION ("PACE"), and PONCA TRIBE,

Plaintiffs/Appellees,

v.

CONTINENTAL CARBON COMPANY,

Defendant/Appellant.

On Appeal from the United States District Court
for the Western District of Oklahoma

Honorable David L. Russell, District Judge

Case No. 02-1677-R

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested.

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Webster's Third New Int'l Dictionary 461 (1976) (cited at Aplt. App. 223) ...

SCOPE OF THIS REPLY

Appellant Continental Carbon Company filed, and this Court granted, a petition for interlocutory review presenting one question: the scope of the jurisdictional bar in 33 U.S.C. section 1319(g)(6)(A)(ii) as applied to demands for declaratory and injunctive relief. (*See* Aplt. App. at 241.) Plaintiffs filed a "conditional cross-petition" asking this Court to consider additional issues (*id.* at 249-58), and the Court denied it (*id.* at 279).

Based on that denial, Continental Carbon inferred that the Court had exercised its discretion to rule that the additional issues in Plaintiffs' cross-petition were not to be addressed on this appeal. Accordingly, Continental Carbon's opening brief addressed only the one question posed in its petition for interlocutory review granted by the Court.

Despite the denial of their cross-petition, Plaintiffs' response brief argues all of the issues the cross-petition sought leave to address. Out of an abundance of caution, those issues are addressed in sections II and III of this reply.[1]

STATEMENT OF FACTS

Plaintiffs' brief makes two factual misstatements that should be corrected.

First, Plaintiffs contend that Continental Carbon's opening brief improperly mingled together as one claimed violation of the Clean Water Act ("CWA") the alleged wastewater discharge violations (Claim One) and the alleged failure to monitor and report those discharges (Claim Three). (Pls.' Br. at 5-6.) That is untrue. Neither Continental Carbon nor the district court classified the alleged violations as one and the same. Rather, the district court recognized that the alleged violations were sufficiently interrelated that ODEQ's investigation and remedial action relating to the former necessarily addressed and remedied the latter. Specifically, because the discharges addressed in Claim Three were the same discharges addressed in Claim One, both claims were addressed by "ODEQ's enforcement action regarding the first claim."[2] (Aplt. App. at 229 n.2.)

Second, Continental Carbon did not, as Plaintiffs suggest, state that its "permit amendment application was compelled by ODEQ." (*Id.* at 5.) Rather, Continental Carbon showed that, in evaluating Plaintiffs' contentions regarding CWA violations, ODEQ concluded that "issues regarding depth to ground water and ... the accuracy of the information provided in previous permit actions are more properly addressed in the permitting process."[3] (Aplt. App. at 57-58.) The district court cited that same ODEQ

[1] Continental Carbon filed a motion for clarification as to whether it should address the additional issues in its reply brief. On March 19, 2004, the Court ordered that "the scope of the issues on appeal is reserved for the panel of judges who will hear the case on the merits."

[2] Plaintiffs argue that Claim Three complained not only of the wastewater and other discharges identified in Claim One, but also of additional, unspecified discharges. (Pls.' Br. at 7 ("Claim 3: Continental Carbon failed to report unauthorized discharges from its lagoons, including, but not limited to the discharges identified in Claim 1." (emphasis in original)).) That characterization is not supported by the complaint, which identifies no specific discharge other than those alleged in Claim One. (*Compare* Aplt. App. at 114 ("Three. Continental Carbon has allowed and continues to allow discharges of contaminated waters from its lagoons without monitoring or reporting the discharges to [ODEQ] or EPA." (emphasis added)), *with id.* at 113 ("One. [ODEQ] has recently documented 'several small streams of black water' emerging from Continental Carbon's wastewater lagoons ...." (emphasis added)).)

[3] ODEQ's conclusion is appropriate because Continental Carbon's permit was issued under regulations that, (i) when Continental Carbon filed its original permit application, contained an ambiguity that materially affected Continental Carbon's depth-to-groundwater disclosures on the application, and (ii) were later amended to resolve the

determination in concluding that "ODEQ's enforcement action bars each of Plaintiffs' three claims for civil penalties." (*Id.* at 229 n.2.) Because ODEQ considered Plaintiffs' permit-related allegations (*see id.* at 43-45, 167-68) and determined that it could better address them in the permit renewal process, Plaintiffs are wrong in asserting that "ODEQ was not prosecuting [those allegations] at all" (Pls.' Br. at 8).[4]

ARGUMENT

I. 33 U.S.C. § 1319(g)(6)(A)(ii) BARS PLAINTIFFS' ADJUNCT CLAIMS FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiffs' brief fails to undermine Continental Carbon's showing that the district court erred in concluding that Plaintiffs' adjunct claims for declaratory judgment and injunctive relief were not barred.

A. Section 1319(g)(6)(A)(ii) Must Be Construed in Context

Like the district court, Plaintiffs have failed to heed the rule that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). Analyzing section 1319(g)(6)(A)(ii) in the context of the entire CWA and the roles Congress established for the federal government, the States, and private plaintiffs makes clear that the statute precludes Plaintiffs' adjunct claims for declaratory and injunctive relief.

Congress intended the States to play the primary role in enforeing the CWA, including ensuring regulatory compliance and punishing failure to comply, using their expertise and discretion to make decisions about how best to protect public health and safety. 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution."). Government takes the lead because "[t]he government, representing society as a whole, is usually in the best position to vindicate societal rights and interests." *Williams Pipeline Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1318 (S.D. Iowa 1997).

In contrast, private actions under the CWA are secondary, allowed only when the government fails to act: "In the absence of federal or state enforcement, private citizens may commence civil actions." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 53 (1987). "The bar on citizens suits when governmental enforcement action is underway suggests that the citizen suit is meant to supplement, rather than to supplant governmental action." *Id.* at 60.

B. Plaintiffs' Interpretation of Section 1319(g)(6)(A)(ii) Would Disrupt the Regulatory Scheme Established by Congress and Frustrate Effective State Enforcement of the CWA

Plaintiffs urge a statutory interpretation that would significantly alter the clearly defined roles of the States and private plaintiffs. Under Plaintiffs' theory, even when a State diligently prosecutes an administrative action for compliance and penalties, private plaintiffs still can sue for different, even conflicting, injunctive relief addressing the same alleged violations. Such a scheme would prevent States from asserting their role as

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ambiguity. (*See* Aplt. App. at 57, ¶ 7iii.) Plaintiffs' claims in Count Two are valid, if at all, only under the amended regulations that are now in force, but that were not in force when Continental Carbon filed its original application.

[4] The thoroughness of ODEQ's ongoing consideration of the depth-to-groundwater issue is apparent in the agency's letter dated June 20, 2002, (Aplt. App. at 43-46), and in the addendum to the May 6, 2002, consent order (*id.* at 57-58).

primary enforcers of the CWA using administrative remedies, because they would always be subject to competing litigation by private plaintiffs. A State could not apply its expertise and judgment in the public interest; rather, the State would be only one of multiple players—State, alleged violator, private plaintiffs, and one or more judges—in multiple forums, with multiple proceedings and possible conflicting outcomes.

Congress did not intend such a structure, nor did Congress intend that the States' "discretion to enforce the Act in the public interest would be curtailed considerably." *Gwaltney*, 484 U.S. at 61; *accord Ark. Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376, 380 (8th Cir. 1994). Plaintiffs' "interpretation of the scope of the citizen suit would change the nature of the citizens' role from interstitial to potentially intrusive." *Gwaltney*, 484 U.S. at 61. Subjecting investigated entities to further injunctive and declaratory relief when civil penalties have been barred by diligent enforcement by the States "would undermine, rather than promote, the goals of the CWA, and is not the intent of Congress." *ICI*, 29 F.3d at 393.

Furthermore, Congress established the jurisdictional bar in section 1319(g)(6) to avoid subjecting CWA violators to "dual enforcement actions or penalties for the same violation." S. Rep. No. 99-50 at 28 (1985) (emphasis added). This policy recognizes that administrative penalty actions frequently address compliance issues as a part of the administrative action because both can best be resolved together. Plaintiffs' interpretation would ignore reality and undermine that policy.

Plaintiffs' interpretation also would limit a State's ability to obtain what it considers the optimum enforcement method for a given situation. After selecting what it believes to be the best solution, a State would face competing ones in court. Moreover, investigated entities would be discouraged from settling with States, because the entities would have no assurance that they would not be subjected to conflicting injunctive requirements in private actions based on the same alleged violations.

The Supreme Court recognized these concerns in *Gwaltney*, explaining how environmental improvements could be undermined by citizen suits based on alleged violations that an agency has addressed through remediation requirements, rather than through monetary penalties:

> Suppose that the Administrator identified a violator of the Act and issued a compliance order under section 309(a). Suppose further that the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take. If citizens could file suit ... in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably. The same might be said of the discretion of state enforcement authorities. Respondents' interpretation of the scope of the citizen suit would change the nature of the citizens' role from interstitial to potentially intrusive. We cannot agree that Congress intended such a result.

484 U.S. at 60-61. That reasoning applies equally here. If a State diligently prosecutes an administrative penalty and compliance action and decides on what it considers to be the optimum resolution, a citizen suit for injunctive relief can hinder, not help, the ultimate goal of protecting the public interest. *North & South Rivers Watershed Ass'n, Inc. v. Town of Scituate,* 949 F.2d 552, 556 (1st Cir. 1991) (duplicative actions "are ... impediments to environmental remedy efforts").

C. Plaintiffs' Reliance on Legislative History Is Misplaced

Because Plaintiffs' interpretation of this provision of section 1319(g)(6)(A)(ii) conflicts with the statutory context and scheme of the CWA, they seek support in legislative history. As Continental Carbon explained in its opening brief, however, the legislative history is far from clear. But, this much is certain: the Senate Report states that a primary goal of section 1319(g)(6) is "to avoid subjecting violators of the law to dual enforcement actions or penalties for the same violation." S. Rep. No. 99-50 at 28 (1985) (emphasis added). Plaintiffs ignore that declaration, but they cannot deny that allowing a citizen suit seeking injunctive relief as applied to the same matters addressed by a State's penalty and enforcement action would allow exactly what the Senate said was to be avoided.

D. Congress Provided for Appropriate Private Participation in an Action That a State Has Commenced and Is Diligently Prosecuting

Congress established the appropriate role for private participation, when a State "has commenced and is diligently prosecuting an action under a State law comparable to [section 1319(g)]," by requiring that the public be provided "a meaningful opportunity to participate at significant stages of the decision-making process." *ICI*, 29 F.3d at 377, 379. Citizen suits are appropriate "[i]n the absence of federal or state enforcement." *Gwaltney*, 484 U.S. at 53. There is no such absence here.

II. THE DISTRICT COURT PROPERLY CONSIDERED MATERIALS OUTSIDE THE COMPLAINT

Plaintiffs argue that, in ruling on Continental Carbon's motion to dismiss, the district court erred by considering materials outside Plaintiffs' complaint. (Pls.' Br. at 3, 7-14.) Plaintiffs fail to recognize, however, that Continental Carbon moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) (lack of jurisdiction) and 12(b)(6)(failure to state a claim), that the district court granted the Rule 12(b)(1) motion, and that materials outside the complaint may be considered on a 12(b)(1) motion. Furthermore, because the documents considered by the district court were government documents appropriate for judicial notice, they could have been properly considered on the Rule 12(b)(6) motion as well.

The district court ruled that it lacked jurisdiction over Plaintiffs' claims. (Aplt. App. at 231 ("The Court concludes that Plaintiffs' claims for civil penalties are barred by 33 U.S.C. § 1319(g)(6)(A)(ii) and 33 U.S.C. § 1365(a) and this Court has no jurisdiction over them." (Emphasis added.)).) It then ruled that "Defendant's motion to dismiss Plaintiffs' civil penalties claims pursuant to Rule 12(b)(1) … is granted." (*Id.* at 232 (emphasis added)).

The court did not err in considering materials outside the complaint in ruling on the jurisdictional motion. It is well settled that "a motion under Rule 12(b)(1) may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends." *Davis ex rel. Davis v. United States*, 343 F.3d 1282, 1295 (10th Cir. 2003), *petition for cert. filed* (Mar. 15, 2004) (internal quotation marks and citation omitted).

> When a party challenges the allegations supporting subject-matter jurisdiction, the court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts. In such instances, a court's reference to evidence

> outside the pleadings does not convert the motion to dismiss to a Rule 56 motion for summary judgment.

Id. at 1296 (internal citations and quotation marks omitted); *accord Sizova v. Nat'l Inst. of Standards & Tech.*, 282 F.3d 1320, 1324 (10th Cir. 2002).

Davis makes clear that the existence of alternative bases for dismissal does not preclude the district court from properly considering evidence outside the complaint in resolving the jurisdictional issue. In *Davis*, as here, the defendant moved for dismissal under Rules 12(b)(1) and 12(b)(6), and the trial court dismissed under Rule 12(b)(1). *See* 343 F.3d at 1295. There, as here, the plaintiff appealed, arguing that the motion should have been converted into one for summary judgment because the district court had relied on evidence outside the complaint. This Court affirmed, noting that the evidence was properly considered for jurisdictional purposes. *Id.* at 1296.

Because Continental Carbon's motion asserted both lack of subject-matter jurisdiction and the factual insufficiency of Plaintiffs' allegations, and because the district court explicitly concluded that it lacked jurisdiction and cited Rule 12(b)(1) as the basis for its decision, the court's consideration of outside materials to resolve disputed jurisdictional facts was appropriate. *See, e.g.*, *Davis*, 343 F.3d at 1296.

Finally, even if it had based its ruling solely on Rule 12(b)(6), the district court properly could have considered the government materials in the record because they were appropriate for judicial notice. The rule against considering materials outside the pleadings for Rule 12(b)(6) motions "does not pertain when the additional facts considered by the court are contained in materials of which the court may take judicial notice. Records and reports of administrative bodies . . . clearly constitute such materials." *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994) (citation omitted).

III. THE JURISDICTIONAL BAR OF SECTION 1319(g)(6)(A)(ii) APPLIES BECAUSE ODEQ HAS COMMENCED AND IS DILIGENTLY PROSECUTING AN ACTION UNDER OKLAHOMA LAW COMPARABLE TO SECTION 1319(g) OF THE CWA

Although section 1365 of the CWA provides for citizen lawsuits, section 1319(g)(6)(A)(ii) prohibits such suits where "a State has commenced and is diligently prosecuting an action under a State law comparable to [section 1319(g)]." Here, the district court concluded that ODEQ had commenced and was diligently prosecuting an administrative action under Oklahoma laws comparable to section 1319(g). The district court's factual findings relating to the commencement, scope, and diligence of ODEQ's prosecution, as well its findings regarding the similarities between the CWA and the Oklahoma statutory scheme under which ODEQ brought its administrative action, are amply supported by the record and not clearly erroneous. Moreover, relevant Oklahoma statutory law is "comparable" to section 1319(g) of the CWA within the meaning of section 1319(g)(6)(A)(ii). Accordingly, section 1319(g)(6)(A)(ii)'s jurisdictional bar precludes Plaintiffs' citizen suit.

A. The District Court Correctly Determined That ODEQ Had Commenced and Diligently Prosecuted an Action Against Continental Carbon

For the jurisdictional bar to apply, section 1319(g)(6)(A)(ii) requires the commencement and diligent prosecution of an action by the EPA or a state agency with EPA-delegated authority. As Plaintiffs concede, the district court found that ODEQ had

commenced such an action. (Pls.' Br. at 16-18 .) Plaintiffs further acknowledge that the district court found that the prosecution was, in fact, "diligent" within the meaning of section 1319(g)(6)(A)(ii). (*Id.* at 16 .) These findings of jurisdictional fact are reviewed only for clear error. *See, e.g., Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995).

1. ODEQ commenced its action on February 12, 2002

The CWA does not define "commenced" for the purpose of determining whether a State "has commenced . . . an action" within the meaning of section 1319(g)(6)(A)(ii). *Sierra Club v. Colo. Refining Co.*, 852 F. Supp. 1476, 1484 (D. Colo. 1994). Accordingly, such a determination requires an analysis of the pertinent state-law procedures for instituting agency proceedings. *See id.* at 1485; *Williams*, 964 F. Supp. at 1333. When determining whether a State has "commenced an action" within the meaning of section 1319(g)(6)(A)(ii), "states are afforded some latitude in selecting the specific mechanisms of their enforcement program." *ICI*, 29 F.3d at 382-83.

Oklahoma's Water Quality Act gives ODEQ discretion to issue an order, commence appropriate administrative enforcement proceedings, or bring a civil action. *See* 27A Okla. Stat. § 2-6-206(C). Pursuant to that authority and 27A Oklahoma Statutes section 2-6-205(A) (Supp. 2000), ODEQ issued a notice of violation ("NOV") on February 12, 2002, in this case. (Aplt. App. 39-41.) ODEQ thereby "commenced... an action" against Continental Carbon. *See Sierra Club*, 852 F. Supp. at 1485.

Plaintiffs have not denied that ODEQ commenced an administrative action against Continental Carbon. Instead, they seek to avoid the consequences of that fact by contending that ODEQ never sought a penalty against Continental Carbon and that a state agency "must at least be seeking a penalty" in order to have "commenced ... an action" within the meaning of section 1319(g)(6)(A)(ii). (Pls.' Br. at 18.) Plaintiffs are wrong both on the facts and on the law.

First, when it served Continental Carbon with the NOV on February 12, 2002, ODEQ explicitly indicated that it was seeking an administrative penalty as one form of relief. The notice stated, "State statutes provide that the Executive Director of the Department of Environmental Quality may issue an Administrative Compliance Order that can assess fines for up to $10,000.00 per day per violation." (Aplt. App. 41.) In addition, the consent order executed by ODEQ and Continental Carbon on May 6, 2002, stated, "The agreement of the parties for [Continental Carbon] to complete the environmental Enhancement Project listed above is designed to comply with the NPDES penalty requirement for the specific violations listed in this Order. The federal program calls for a significant increase in monetary penalties should this Consent Order be violated or future violations occur." (*Id.* at 50-51.)

Second, the better and widely followed line of authority, led by the First Circuit in *Scituate,* holds that, as long as the other requirements of section 1319(g)(6)(A)(ii) have been satisfied and the state agency has the power to seek penalties, but has exercised its regulatory discretion not to do so, section 1319(g)(6)(A)(ii) bars a citizen suit based on the polluter's same conduct. *See* 949 F.2d at 558. This is true even when the State ultimately chooses not to assess a penalty, because

> [d]uplicative actions aimed at exacting financial penalties in the name of environmental protection at a time when remedial measures are well underway do not further th[e] goal [of the CWA to restore and maintain the

> chemical, physical, and biological integrity of the nation's waters]. They are, in fact, impediments to environmental remedy efforts."

Id. at 556.

The court in *Scituate*, rejecting the plaintiffs' argument that a citizen suit should be available every time a State "has not specifically demanded a financial penalty," *id.* at 555, held that "[s]uch an interpretation of section [1319(g)] would enable citizen's suits to undermine the supplemental role envisioned for section 505 citizen's suits, 'changing the nature of the citizen's role from interstitial to potentially intrusive,'" *id.* at 555-56 (quoting *Gwaltney,* 484 U.S. at 61).[5] Several district courts, including one in the Tenth Circuit, have embraced this reasoning. *See, e.g., Sierra Club,* 852 F. Supp. at 1484; *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.,* 777 F. Supp. 173, 180 (D. Conn. 1991), *rev'd in part on other grounds,* 989 F.2d 1305 (2d Cir. 1993); *N.Y. Coastal Fishermen's Ass'n v. N.Y. City Dep't of Sanitation,* 772 F. Supp. 162, 165 (S.D.N.Y. 1991); *cf. Ark. Wildlife Fed. v. Bekaert Corp.,* 791 F. Supp. 769, 774-75 (W.D. Ark. 1992) (noting that assessment of monetary penalties is not required to preclude citizen suits under section 1319(g)(6)(A)(ii)); *EPA v. City of Green Forest*, 921 F.2d 1394 (8th Cir. 1990) (finding citizen suit precluded by section 1319(g)(6)(A)(i) where no penalties were assessed, but consent decree had been negotiated).[6]

[5] The Supreme Court, in *Gwaltney*, stated, "The great volume of enforcement actions [is] intended to] be brought by the States." 484 U.S. at 60 (quoting S. Rep. No. 92-414 at 64 (1971).

[6] Assessment of a minimal monetary fine also has been found to satisfy the requirement that a state commence and diligently prosecute an administrative penalty action *See ICI*, 29 F.3d at 380 (finding administrative assessment of $1500 penalty for noncompliance, coupled with required remedial actions, constituted diligent prosecution).

Plaintiffs ask this Court to ignore the foregoing line of authorities and to follow *Washington Public Interest Research Group v. Pendleton Woolen Mills*, 11 F.3d 883, 886-887 (9th Cir. 1993). That case, however, involved an interpretation of a different CWA provision, section 1319(g)(6)(A)(i), and a compliance action by the federal EPA, not, as here, a state agency. Plaintiffs also cite another Ninth Circuit case, *Citizens for a Better Environment-California v. Union Oil Co.*, 83 F.3d 1111 (9th Cir. 1996). That case does hold that that a state agency must be seeking a penalty in order for its action to fall within the ambit of section 1319(g)(6)(A)(ii) and preclude a citizen suit. With due respect to the Ninth Circuit, however, these cases conflict with the better and more widely followed line of authority discussed above, were incorrectly decided, and have not been followed by any other federal appellate court.[7]

Finally, should this Court conclude that a penalty must be assessed in order for a state's enforcement action to fall within the purview of section 1319(g)(6)(A)(ii), the expenditures required to perform the actions ordered by ODEQ on May 6, 2002, constitute a penalty for that purpose. As noted above, ODEQ expressly stated that those requirements were "designed to comply with the NPDES penalty requirement." (Aplt. App. 50-5; *see also id.* at 170 ("The cost of the SEP to Continental Carbon was $25,680.90.").)[8]

[7] It has been adopted by a few federal district courts. *See Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1347 (D.N.M. 1995); *Public Interest Research Group v. N.J. Expressway Auth.*, 822 F. Supp. 174, 184 (D.N.J. 1992).

[8] Plaintiffs' suggestion that the SEP cannot be considered because it "did not even relate to the discharge and groundwater contamination violations," (Pls.'Br. at 21), is untrue.

2. ODEQ's prosecution was diligent

Courts are deferential toward the States with respect to the "diligent prosecution" requirement. First, the plaintiff in a citizen suit bears the burden of proving that a state agency's prosecution was not diligent, and the "burden is heavy, because the agency's diligence is presumed." *Williams*, 964 F. Supp. at 1324. Second, "[w]here [a State] agency has specifically addressed the concerns of an analogous citizen's suit, deference to the agency's plan of attack should be particularly favored." *Scituate*, 949 F.2d at 557; *Sierra Club*, 852 F. Supp. at 1483. Third, the diligence of the State's prosecution is determined by the State's procedures and is not limited to ordering compliance by a specific date or assessing civil penalties. Fourth,

> [t]he government agency is not required to succeed by the private party's definition of success. Merely because a state may not be taking the precise action a private party wants it to, or moving with the speed the plaintiff desires, does not entitle the private plaintiff to injunctive relief.

Williams, 964 F. Supp. at 1324 (citation omitted); *ICI*, 29 F.3d at 380 ("It would be unreasonable and inappropriate to find failure to diligently prosecute simply because [the alleged violator] prevailed in some fashion or because a compromise was reached."); *see also Supporters to Oppose Pollution, Inc. v. Heritage Group*, 973 F.2d 1320, 1324 (7th Cir. 1992) ("To say, as [plaintiff] would, that the EPA is not 'diligently prosecuting' the action [under RCRA] if it does not sue the persons, or use the theories, the private plaintiff prefers would strip EPA of the control the statute provides").

Here, the district court based its conclusion that ODEQ was diligently prosecuting an administrative action on the court's findings that ODEQ (i) investigated, and conducted at least four on-site inspections and testing protocols; (ii) negotiated a consent order in May 2002 and an addendum to the consent order in April 2003 requiring Continental Carbon to submit to ODEQ both an approvable engineering report related to the relevant impoundments and a proposal for a permeability study pursuant to a work plan approved by ODEQ; (iii) required Continental Carbon to submit, obtain ODEQ approval of, and complete a Plan and a Supplemental Environmental Project; (iv) required prospective monitoring and reporting of groundwater emissions from the facility; and (v) determined that Plaintiffs' permit-related allegations would best be addressed, and would be addressed, when Continental Carbon's permit was evaluated for renewal in 2003-2004. (*See* Aplt. App. at 39, 48-50, 56-59, 88 n.6, 229 n.2.) The district court also analyzed the actual NOV issued by ODEQ, which "listed several Oklahoma Administrative Code provisions and [Oklahoma Statute] 27A, § 2-6-205(A) which Defendant had been determined to be in violation of" (*id.* at 225), and the consent orders negotiated between ODEQ and Continental Carbon (*id.*).[9] Based on this review and analysis, the district court concluded that ODEQ's proceedings constituted "diligent

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ODEQ has recognized Continental Carbon's contention that roadside trash that was near the seep location and that ODEQ ordered Continental Carbon to clean up in the SEP could be the source of the diesel-range organics that appeared in the seep-water samples. (Aplt. App. 56.)

[9] Plaintiffs argue that they "do not agree that the NOV accurately reflects the underlying inspections" and that they "disagree" with factual statements made in the May 2002 consent order. (Pls.' Br. at 14.) Not only have these arguments been waived by Plaintiffs' failure to assert them below, *see United States v. Mora*, 293 F.3d 1213, 1216 (10th Cir. 2002), but Plaintiffs' disagreement with the language used by ODEQ in two documents relied on by the district court is insufficient to render the district court's ultimate factual findings invalid under a clearly-erroneous standard of review.

enforcement action" with respect to the matters complained of by Plaintiffs. (*Id.* at 229 n.2.) That ruling was correct. *See Scituate*, 949 F.2d at 557 (finding State's action to be "diligent" where agency monitored entity's progress in complying with administrative order and reserved right to impose penalties).[10]

B. The District Court Correctly Determined That Relevant Oklahoma Law Is "Comparable" to 33 U.S.C. Section 1319(g)

Application of section 1319(g)(6)(A)(ii)'s bar also requires that the Oklahoma law enforced by ODEQ be "comparable to" CWA section 1319(g)(6). After comparing CWA's provisions to the pertinent Oklahoma statutes, the district court found that "the state law(s) under which the ODEQ is prosecuting an action against [Continental Carbon] are comparable to 33 U.S.C. § 1319(g)." (Aplt. App. at 229.)

Plaintiffs challenge two aspects of that finding: the scope of Oklahoma's public-notice provisions and the opportunity for judicial review. (Pls.' Br. at 8.) In fact, however, the district court's factual findings on those aspects are supported by the record.

[10] ODEQ's diligence is further reflected by EPA's statements after EPA staff had met with ODEQ, examined ODEQ's file on Continental Carbon, and inspected Continental Carbon's Ponca City facility: "The ODEQ has responded to complaints about Continental Carbon by performing inspections and reevaluating the condition of the lagoons.... It appears that appropriate and timely actions have been taken by the ODEQ to address the public's concerns regarding Continental Carbon and other environmental issues in the area." (Aplt. App. 194.)

1. Factual findings and standard of review

The district court analyzed pertinent provisions of Oklahoma law and found the statutory scheme comparable to CWA section 1319(g). Specifically, the court found that Oklahoma law required ODEQ to (i) provide the Secretary of State notices of ODEQ meetings, which notices were available for public inspection; (ii) post in its offices public notices of its meetings and each meeting's agenda; and (iii) make all records of "all matters considered and actions taken by it" available for public inspection. (Aplt. App. at 224.) The court also found that "any person having an interest" may intervene in an ODEQ administrative proceeding and,

> [i]f a party intervenes in a proceeding before the ODEQ, that party has the full panoply of rights provided in Oklahoma's Administrative Procedures Act, . . . including the right to respond and present evidence and argument on all issues involved, . . . and to file exceptions and present briefs and oral argument to the administrative head concerning a proposed final agency order.

(Aplt. App. at 226.) The court further found judicial review available to "any party aggrieved by a final order." (*Id.* at 229.) Finally, the court found that EPA had delegated its enforcement authority to Oklahoma and that EPA could not have done so unless the Oklahoma statutory scheme "'provide[d] for public participation in the State enforcement process' in one of two ways, including 'intervention as of right.'" (*Id.* at 227 (quoting 40 C.F.R. § 123.27(d)).)

Based on these findings, the district court concluded that Oklahoma's equivalent to the CWA, coupled with the requirements of the state administrative procedures and Open Meeting/Open Records Act, "provides for public participation roughly comparable

to that afforded under the CWA, i.e., public notice and a right to a hearing for aggrieved members of the public." (Aplt. App. at 228-29.) The findings of jurisdictional fact are reviewed for clear error, *Holt*, 46 F.3d at 1003, while the ultimate legal conclusion of comparability is reviewed de novo, *see Oxy USA, Inc. v. Babbitt*, 268 F.3d 1001, 1005 n.6 (10th Cir. 2001) (en banc).

2. The standard for comparability

This Court has not decided when a state law is "comparable" within the meaning of section 1319(g)(6)(A)(ii). Although the federal courts of appeals that have addressed the issue all agree that "comparable" means that the state law need be only roughly comparable, not identical, to the federal law, they disagree whether the overall state scheme must be roughly comparable to the federal law or whether each class of State law provisions—penalty, notice and public participation, and judicial review—must be roughly comparable to the corresponding federal provision.

The most widely accepted conception of comparability was articulated by the Eighth Circuit as follows:

> The comparability requirement may be satisfied so long as the state law contains comparable penalty provisions which the state is authorized to enforce, has the same overall enforcement goals as the federal CWA, provides interested citizens a meaningful opportunity to participate at significant stages of the decision-making process, and adequately safeguards their substantive interests.

ICI, 29 F.3d at 379. This standard was adopted by the First Circuit in *Scituate*, 949 F.2d at 556 (holding comparability requirement met when the state statutory scheme "contains penalty assessment provisions comparable to the Federal Act, that the State is authorized to assess those penalties, and that the overall scheme of the two acts is aimed at correcting the same violations, thereby achieving the same goals," and stating that the "State's decision not to utilize the penalty provisions does not alter the comparability"); the Fifth Circuit in *Lockett v. EPA*, 319 F.3d 678, 683-87 (5th Cir. 2003) (stating that the test for comparability asks whether the state statutory scheme "affords significant citizen participation" and "provides interested citizens a meaningful opportunity to participate at significant stages of the decision-making process"); the Sixth Circuit in *Jones v. City of Lakeland*, 224 F.3d 518, 523 (6th Cir. 2000) (en banc) ("[T]he court, in the instant case, must decide if the overall State regulatory scheme affords interested and/or adversely affected citizens the safeguard of a meaningful opportunity to participate in the administrative enforcement process."); and the only federal district court in the Tenth Circuit to have considered the issue, in *Sierra Club v. Colo. Refining Co.*, 838 F. Supp. 1428, 1435 (D. Colo. 1993).

The Ninth Circuit rejected the majority view and adopted a much narrower view of comparability, holding that comparability exists only if the state agency seeks a penalty "according to the particular provision of state law that is comparable to § 1319(g)." *Union Oil*, 83 F.3d at 1118 (concluding that, although California Water Code contained penalty provision comparable to section 1319(g), a payment levied by the State was not assessed under "comparable State law" because the payment "was not levied pursuant to" that specific California Water Code provision, "but, instead, under the aegis of a related provision of the California statutory scheme").

The Eleventh Circuit has adopted an approach between that adopted by the First, Fifth, Sixth, and Eighth Circuits, on the one hand, and by the Ninth Circuit, on the other. *See McAbee v. City of Fort Payne,* 318 F.3d 1248 (11th Cir. 2003). The court in *McAbee* held that, for state law to be comparable to the CWA, each class of state-law provisions must be "roughly comparable" to the corresponding class of federal provisions. *See* 318 F.3d at 1255. The court relied on the following statement of Senator Chaffee, the principal author and sponsor of the 1987 CWA amendments:

> [I]n order to be comparable, a State law must provide for a right to a hearing and for public notice and participation procedures similar to those set forth in section 309(g); it must include analogous penalty assessment factors and judicial review standards; and it must include provisions that are analogous to the other elements of section 309(g).

318 F.3d at 1256 (quoting 133 Cong. Rec. S737 (daily ed. Jan. 14, 1987)).

The district court adopted the Eleventh Circuit's approach and determined that applicable Oklahoma law was comparable to CWA section 1319(g). (*See* Aplt. App. at 222 ("The Court agrees with the Eleventh Circuit that a state's public participation provisions must be 'roughly comparable' to those set forth in Section 1319(g).").) Continental Carbon argued for the approach adopted by the First, Fifth, Sixth, and Eighth Circuit Courts of Appeals, and, for the reasons summarized above and stated in detail by those courts, believes that approach to be most consistent with the purpose and language of section 1319(g)(6)(A)(ii). But regardless of which of those two approaches is more consistent with that statute's purpose and language, one thing is clear: considering the Supreme Court's statements in *Gwaltney* that citizen suits are "meant to supplement rather than to supplant governmental action," 484 U.S. at 60, and that Congress "intend[ed] the great volume of enforcement actions [to] be brought by the State," rather than by private citizens, *id.* (quoting S. Rep. No. 92-414, p. 64 (1971)), Plaintiffs' request that this Court ignore the holdings of the First, Fifth, Sixth, Eighth, and Eleventh Circuits and adopt the restrictive interpretation of "comparable" adopted only by the Ninth Circuit should be rejected. As the district court noted, the primary dictionary definition of "comparable," far from being so restrictive, is "having enough like characteristics or qualities to make comparison appropriate." Webster's Third New Int'l Dictionary 461 (1976) (cited at Aplt. App. 223). And the primary definition of "analogous," the word used by Senator Chaffee in explaining the comparability requirement, is "susceptible of comparison either in general or in some specific detail." *Id.* at 77.

3. The Oklahoma law under which ODEQ proceeded is comparable to the CWA's section 1319(g)

a. Oklahoma law provides comparable opportunity for public participation

Under Oklahoma law, as the district court noted, "any person having an interest … which interest is or may be adversely affected" may intervene in an ODEQ administrative proceeding and, after intervening, may present evidence and argument, file exceptions and briefs, and make oral argument to the administrator. (Aplt. App. at 226 (citing 27A Okla. Stat. §§ 2-6-206(A)-(B), 75 Okla. Stat. §§ 309(c), 311).)[11] Moreover, Oklahoma

[11] Section 2-6-206(B) states:

> Any person having any interest connected with the geographic area or waters or water system affected, including but not limited to any aesthetic, recreational, health, environmental, pecuniary or property interest, which interest is or may be adversely affected, shall have the right to intervene as a party in any administrative proceeding

law requires ODEQ to provide, both to the Secretary of State and to the general public, notice of ODEQ meetings and make available for public inspection records of "all matters considered and actions taken by it." (Aplt. App. at 224 (citing 75 Okla. Stat. §§ 311(2), (7), (9), (10), (11) & 312).) These statutory protections of private citizens' interests are consistent with Senator Chaffee's concern that "State law must provide for a right to a hearing and for public notice and participation procedures similar to those set forth in section [1319(g)]," which requires only that (i) the public receive notice before the assessment of a civil penalty; (ii) persons who comment on a proposed penalty assessment get notice of any hearing and of an order assessing such penalty, as well as a "reasonable opportunity" to be heard and present evidence at any hearing; and (iii) persons who commented on a proposed assessment of a civil penalty may petition for a penalty hearing, if a hearing is not held. *Cf. Lockett*, 319 F.3d at 685 (finding Louisiana's public participation opportunities comparable to the CWA where (i) there was "periodic" notice of all violations, compliance orders, and penalty assessments issued in the preceding three months to persons who requested to be on the mailing list; (ii) public notice was provided for each proposed settlement or compromise; (iii) an aggrieved party could intervene in, or petition for, an adjudicative hearing; (iv) the public could comment on the matter prior to the adjudicative hearing; and (v) the public could participate in any public hearing)).

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before the Department, or in any civil proceeding, relating to violations of the Oklahoma Pollutant Discharge Elimination System Act or rules, permits or orders issued hereunder.

Plaintiffs' own extensive participation in the ODEQ enforcement proceedings proves the adequacy of Oklahoma's notice provisions and of the broad opportunity for public participation in ODEQ's enforcement proceedings. As the district court observed:

> Plaintiff Union and/or Plaintiff Tribe actually participated in proceedings before the ODEQ by filing a citizen complaint with the ODEQ in January of 2002, resulting in an ODEQ investigation and on-site inspection of Defendant's facility, see Exhibit "A" to Defendant's Reply Brief; submitted letters to the ODEQ beginning in February of 2002 alleging violations of Defendant's permit and misrepresentations of the depth of groundwater in Defendant's permit application, see Exhibits "E" & "F" to Defendant's Reply Brief; reviewed ODEQ files and commented on the ODEQ's investigation and sampling, see id.; and submitted an expert report, see Exhibit "F" to Defendant's Reply Brief.

(Aplt. App. at 228-29;. *see also id.* at 173, 178, 184-88, 198-205.)

b. Oklahoma law provides comparable judicial review

As the district court found (Aplt. App. at 229), and as Plaintiffs acknowledge (Pls.' Br. at 29-30 n.25), Oklahoma law permits any person aggrieved by an ODEQ final order to seek judicial review. 27A Okla. Stat. § 2-3-502(I). Oklahoma law also permits Oklahoma law further provides that "[a]ny person having any interest connected with the geographic area or waters or water system affect, including but not limited to any aesthetic, recreational, health, environmental, pecuniary or property interest, which interest is or may be adversely affected," may intervene in any ODEQ administrative or civil proceeding related to violations of the state equivalent to the CWA. 27A Okla. Stat. § 2-6-206(B). Given these provisions, there is no basis for Plaintiffs' unsupported assertion that "[i]n Oklahoma, it is likely that the 'aggrieved' requirements are different

and stricter than federal standing requirements[,]... [which] would leave commenters in Oklahoma without a right to seek judicial review." (Pls.' Br. at 29-30 n.25.)

Oklahoma's opportunities for judicial review are substantially similar to Colorado's, which have been held to be comparable to those of the CWA. *See Sierra Club*, 838 F. Supp. at 1435. Colorado law permits any person "directly affected" by a final order to apply for a hearing or reconsideration of a final order, Colo. Rev. Stat. § 25-8-403, and any person in Colorado "adversely affected or aggrieved" by any "final order" can seek judicial review, Colo. Rev. Stat. § 25-8-404(1). Based on these provisions, the court in *Sierra Club* held: "A review of the administrative enforcement procedures under Colorado law and federal law reveals that, although the Colorado regulatory scheme does not mandate prior public notice of enforcement proceedings, overall, the scheme adequately protects the public interest in enforcement actions." *Sierra Club*, 838 F. Supp. at 1435 (citing *Scituate,* 949 F.2d at 556 n. 7). The same is true here.

CONCLUSION

The district court's order denying Continental Carbon's motion to dismiss the portion of Plaintiffs' complaint seeking injunctive and declaratory relief should be reversed. The case should be remanded to the district court with instructions to dismiss Plaintiffs' complaint in its entirety.

Dated: April 5, 2004

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 6962 words.

☒ I relied on my word processor to obtain the count and it is Microsoft Word 2000.

☐ I counted five characters per word counting all characters including citations and numerals.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

4/5/04
Date

Signature of Attorney

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Appellant's Reply Brief were furnished by United States mail, first-class postage pre-paid, to the following on this 5 day of April, 2004.

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

PAPER, ALLIED-INDUSTRIAL, CHEMICAL & ENERGY WORKERS INTERNATIONAL UNION, LOCAL 8-593; PONCA TRIBE OF OKLAHOMA,

Plaintiffs-Appellees,

v.

CONTINENTAL CARBON COMPANY,

Defendant-Appellant.

No. 03-6243

OKLAHOMA DEPARTMENT OF ENVIRONMENTAL QUALITY; ENVIRONMENT COLORADO; NEW MEXICO PUBLIC INTEREST RESEARCH GROUP; UNITED STATES PUBLIC INTEREST RESEARCH GROUP; THE SIERRA CLUB,

Amici Curiae.

ORDER

Filed March 19, 2004

Before **MURPHY** and **O'BRIEN**, Circuit Judges.

This matter is before the court on the "Amended Motion of Continental Carbon Co. For Clarification of the Court's Order Granting Continental Carbon's Petition for Interlocutory Review and Denying Plaintiff's Cross-Petition For Interlocutory Review and Motion To Stay Briefing Pending Resolution Of Motion and Conditional Motion For Page Limit Extension." We also have appellees' response. The ultimate issue of the scope of the issues on appeal is reserved for the panel of judges who will hear this case on the merits. With regard to briefing, however, we grant Continental Carbon's motion to the extent it seeks permission to respond to appellees' arguments in the reply brief. We deny the request to expand the page limitation. Continental Carbon may file a reply brief addressing issues raised in the response brief on or before April 5, 2004. That will be the last brief filed in this appeal. The reply should comply in all other respects with Federal Rule of Appellate Procedure 32.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: Elisabeth A. Shumaker
Elisabeth A. Shumaker
Counsel to the Court

DRAFT: 12/14/2004
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

PAPER, ALLIED-INDUSTRIAL, CHEMICAL AND ENERGY WORKERS INTERNATIONAL UNION ("PACE"), PACE LOCAL 5-857, THE PONCA TRIBE ("TRIBE"), WALLIS SCHATZ, ALGEAN L. VANCE, JOHN L. HOUGH, FRANCIS COLE, AND JEFF LIEB Plaintiffs, v. CONTINENTAL CARBON COMPANY Defendant.	Case No.CIV-04-0438-F **ANSWER TO PLAINTIFFS' FIRST AMENDED COMPLAINT**

Defendant Continental Carbon Company ("Continental Carbon"), by its attorneys, Ryan, Whaley & Coldiron, PC and Sidley Austin Brown & Wood, LLP, answers Plaintiffs' First Amended Complaint ("Amended Complaint") of Paper, Allied-Industrial, Chemical and Energy Workers International Union ("Pace"), Pace Local 5-857, The Ponca Tribe ("Tribe"), Wallis Schatz, Algean L. Vance, John L. Hough, Francis Cole, and Jeff Lieb (collectively, "Plaintiffs"), dated December 1, 2004, as follows:

1. Continental Carbon admits that Plaintiffs allege that their suit is a "citizen suit" brought under the Federal Clean Air Act ("CAA"), 42 U.S.C. § 7604. Continental Carbon admits that the Amended Complaint contains the allegations described in Paragraph 1 of the Amended Complaint, but Continental Carbon denies those allegations. Continental Carbon admits that the Complaint seeks the relief described in Paragraph 1 of the Amended Complaint but denies that Plaintiffs are entitled to such relief.

2. Continental Carbon denies that this Court has jurisdiction pursuant to the CAA over the allegations in the Complaint. The basis for Continental Carbon's denial is set forth in Continental Carbon's Motion to Dismiss Plaintiffs' First Amended Complaint, filed concurrently with this Answer. To the extent that this Court has any jurisdiction over the Amended Complaint, Continental Carbon admits that the appropriate venue is in the Western District of Oklahoma where its Ponca City facility is located. Notwithstanding this admission, Continental Carbon denies that the allegations in the Amended Complaint constitute "violations."

3. Continental Carbon is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 3 of the Amended Complaint but admits that it received a copy of the Amended Complaint.

4. Continental Carbon admits that PACE is an international union. Continental Carbon also admits that PACE represents nine employees in Continental Carbon's Ponca City laboratory; the remaining individuals alleged to be represented by PACE at the Ponca City facility, however, do not currently work in or at the facility **[what is current status of this?]**. Continental Carbon is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 4 of the Amended Complaint.

5. Continental Carbon denies that the actions alleged in the Amended Complaint constitute "violations," that such actions adversely affect or affected PACE and its members or that PACE members have been exposed or are being exposed to levels of air pollutants greater than they should have been. Continental Carbon admits that nine members of PACE Local 5-

857 currently work at Continental Carbon's Ponca City facility. **[current status?]** Continental Carbon is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 5 of the Amended Complaint.

6. Continental Carbon is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 6 of the Amended Complaint. Continental Carbon denies that the actions alleged in the Amended Complaint constitute "violations" or that such actions have adversely affected or will continue to adversely affect the interests of the Tribe and its members.

7. Continental Carbon admits that the individuals listed in Paragraph 7 of the Complaint have residences near Continental Carbon's Ponca City facility. Continental Carbon denies the remaining allegations in Paragraph 7 of the Amended Complaint.

8. Continental Carbon admits the allegations in Paragraph 8 of the Amended Complaint.

9. Continental Carbon admits that it owns and operates a carbon black plant located in Ponca City, Kay County, Oklahoma. Continental Carbon admits that the plant has been in operation since 1954 and that carbon black is a component of tires and other rubber and plastic products. Continental Carbon admits that carbon black is stored, processed, packaged, and shipped from the facility. Continental Carbon Continental Carbon denies the remaining allegations in Paragraph 9 of the Amended Complaint.

10. Continental Carbon admits that it emits air pollutants from its Ponca City facility. Continental Carbon admits that it is permitted to emit these air pollutants by the State of Oklahoma (but denies that only some of the emissions are permitted). Continental Carbon denies the remaining allegations in Paragraph 10 of the Amended Complaint.

11. Continental Carbon denies the allegations in Paragraph 11 of the Amended Complaint.

12. Continental Carbon admits that Oklahoma has an approved SIP, which includes requirements with which Continental Carbon's Ponca City facility must comply. The remainder of Paragraph 12 of the Amended Complaint contains a description of statutory and regulatory provisions to which no responsive pleading is required.

13. Paragraph 13 of the Amended Complaint contains statements which are conclusions of law regarding the relief plaintiffs allege is available to them under the Clean Air Act to which no responsive pleading is required. Nevertheless, Continental Carbon admits that plaintiffs are not entitled to recover penalties for alleged violations which are barred by the applicable statute of limitations. Continental Carbon further asserts that plaintiffs may not recover penalties. To the extent that penalties are imposed, they are payable to the United States Treasury. Continental Carbon denies the remainder the of the allegations in Paragraph 13 of the Amended Complaint.

14. To the extent that Paragraph 14 of the Amended Complaint contain statements which describe statutory and regulatory provisions or otherwise are conclusions of law, no responsive pleading is required. Continental Carbon denies that the alleged violations listed in this Paragraph are also violations of Continental Carbon's Federal Operating Permit. With respect to the subparts of Paragraph 14:

a. Creation of Nuisance Conditions – Particulates – Continental Carbon denies each and every allegation in Paragraph 14(a) of the Amended Complaint. Continental Carbon further denies each and every one of the claims 1 through 105 contained within Paragraph 14(a). Given that claim 106 is hypothetical and based on facts allegedly not available to plaintiffs, Continental Carbon can neither admit nor deny claim 106. Nevertheless, Continental Carbon denies that there are "continuing violations" of the cited provisions. Continental Carbon further denies that the circumstances and/or facts alleged in claims 1 through 106, if proven, would be sufficient to constitute violations of the Oklahoma State Implementation Plan (SIP) or Okla. Admin. Code 252:100-25-2.

b. Creation of Nuisance Conditions – Odors - Continental Carbon denies each and every allegation in Paragraph 14(b) of the Amended Complaint. Continental Carbon denies each and every one of the claims 107 through 111 contained within Paragraph 14(b). Given that claim 112 is hypothetical and based on facts allegedly not available to plaintiffs, Continental Carbon can neither admit nor deny claim 112. Nevertheless, Continental Carbon denies that there are "continuing violations" of the cited provisions. Continental Carbon further denies that the circumstances and/or facts alleged in claims 107 through 112, if proven, would be sufficient to constitute violations of the Oklahoma State Implementation Plan (SIP) or Okla. Admin. Code 252:100-25-2.

c. Failure to Comply with Oklahoma Laws and Regulations - Continental Carbon denies each and every allegation in Paragraph 14(c) of the Amended Complaint. Continental Carbon denies that the facts alleged in claims 113 through 117 constitute violations of the Oklahoma State Implementation Plan (SIP) or Okla. Admin. Code 252:100-25-3. Further, to the extent that plaintiffs are alleging that claims 1 through 112 also constitute violations of Okla. Admin Code 252:100-25-3, Continental Carbon denies such allegations. Continental Carbon also denies that the circumstances and/or facts alleged in claims 118 through 220, if proven, would be sufficient to constitute violations of the Oklahoma State Implementation Plan (SIP) or Okla. Admin. Code 252:100-29-2(a) or 252:100-29-2(b). Continental Carbon further denies each and every one of the claims 113 through 220 contained within Paragraph 14(c).

d. Failure to Comply with Oklahoma State Permits, Orders and Authorizations - To the extent that Paragraph 14(d) of the Amended Complaint contains any claims, such claims are denied. All the allegations in Paragraph 14(d) are barred by the applicable statute of limitations.

15. To the extent Paragraph 15 of the Amended Complaint contains statements which summarize statutory or regulatory provisions or otherwise are conclusions of law, no responsive pleading is required. Continental Carbon admits that it some of its emissions have been identified and reported as excess emissions resulting from start-up, shut-down or malfunction in accordance with the terms of its permits and the Oklahoma SIP. Continental Carbon denies that "[a]ll of the exceedances in the last 5 years claimed by Continental Carbon" are violations or are due to poor maintenance or other preventable circumstances. Continental Carbon further denies each and every one of the claims 221 through 284 contained within Paragraph 15. Continental Carbon also denies that the circumstances and/or facts alleged in claims 221 through 284, if proven, would be sufficient to constitute violations of any provision of its Federal Operating Permit or PSD permit.

16. To the extent Paragraph 16 of the Amended Complaint contains statements which summarize statutory or regulatory provisions or otherwise are conclusions of law, no responsive

pleading is required. Continental Carbon admits that ODEQ issued a Federal Operating Permit to Continental Carbon in ----- and that the permit number for this permit was Permit No. 98-176-TV (PSD). This permit was first modified in ----- (Permit No. 98-176-TV (PSD) (M-1)). A second amendment was issued in November 2000, effective on February 28, 2002 (Permit No. 98-176-TV (PSD) (M-2). Continental Carbon denies it has repeatedly violated the terms and condition of this permit. With respect to the subparts of Paragraph 16:

a. Continental Carbon denies that it has violated Standard Condition § 1(C) of its Federal Operating Permit. Continental Carbon also denies that this Condition Okla. Admin. Code 252:100-8-1.3 imposes a separate basis for liability imposes a separate basis for liability.

b. To the extent Paragraph 16(b) of the Amended Complaint contains statements which summarize statutory or regulatory provisions or otherwise are conclusions of law, no responsive pleading is required. Continental Carbon also denies that Okla. Admin. Code 252:100-8-6(a)(3)(C)(iii) and (iv) impose a separate basis for liability as it simply states required terms for Federal Operating Permits to be issued by ODEQ. Continental Carbon further denies each and every one of the claims 285 through 292 contained within Paragraph 16(b). Given that claim 308 is hypothetical and based on facts allegedly not available to plaintiffs, Continental Carbon can neither admit nor deny claim 293. Nevertheless, Continental Carbon denies that there are "continuing violations" of the cited provisions.

c. To the extent Paragraph 16(c) of the Amended Complaint contains statements which summarize statutory or regulatory provisions or otherwise are conclusions of law, no responsive pleading is required. Continental Carbon further denies each and every one of the claims 294 through 307 contained within Paragraph 16(c). **[Note/Question – the complaint cites "late reports" based on a review of DEQ logbooks, but does not specify why these are late. Were the alleged late reports in fact late?].** Given that claim 308 is hypothetical and based on facts allegedly not available to plaintiffs, Continental Carbon can neither admit nor deny claim 308. Nevertheless, Continental Carbon denies that there are "continuing violations" of the cited provisions.

d. To the extent Paragraph 16(d) of the Amended Complaint contains statements which summarize statutory or regulatory provisions or otherwise are conclusions of law, no responsive pleading is required. Continental Carbon admits that the June 5, 2003 states what plaintiffs allege, but denies the substance of claim 309 contained within Paragraph 16(d). **[note that complaint quotes from a June 5, 2003 ODEQ report on lack of detail in excess emission reports – what is CCC's position with respect to this assertion? Note that one possible legal argument is that the detailed reporting requirements contained in the revised 100-9-3.1 are not applicable to CCC because they were adopted after the effective date of the Title V permit]**

e. To the extent Paragraph 16(e) of the Amended Complaint contains statements which summarize statutory or regulatory provisions or otherwise are conclusions of law, no responsive pleading is required. Continental Carbon admits that the ODEQ June 5, 2003 Full Compliance Evaluation identified a violation of Standard Condition § III (C) of Continental Carbon's Federal Operating Permit (requiring results of monitoring to be reported at 6 month intervals). The Full Compliance Evaluation speaks for itself and no responsive pleading is required thereto. Continental Carbon also notes that the June 5, 2003 ODEQ Full Compliance Evaluation states that "[n]o violations were observed during the inspection." Given that some or

all of claim 310 is hypothetical and based on facts allegedly not available to plaintiffs, Continental Carbon can neither admit nor deny such hypothetical portions of claim 310. Nevertheless, Continental Carbon denies that there are "continuing violations" of the cited provisions.

f. To the extent Paragraph 16(f) of the Amended Complaint contains statements which summarize statutory or regulatory provisions or otherwise are conclusions of law, no responsive pleading is required. Continental Carbon admits that in November 2002, one **[or more?]** of its thermal oxidizers was found to be damaged. **[was it in risk of collapse?]** Continental Carbon denies that the discovered condition was "an emergency and/or an exceedance" that posed an imminent and substantial danger to public health, safety or the environment or that this condition was subject to the reporting requirements contained in Standard Condition § XIV of Continental Carbon's Federal Operating Permit. Continental Carbon therefore denies claim 311 contained within Paragraph 16(f) of the Amended Complaint. **[Do we have the documents cited in this paragraph?]**

g. To the extent Paragraph 16(g) of the Amended Complaint contains statements which summarize statutory or regulatory provisions or otherwise are conclusions of law, no responsive pleading is required. Continental Carbon denies the claim 312 contained within Paragraph 16(g) of the Amended Complaint. **[Do we have the documents cited in this paragraph?]**

h. To the extent Paragraph 16(h) of the Amended Complaint contains statements which summarize statutory or regulatory provisions or otherwise are conclusions of law, no responsive pleading is required. Continental Carbon denies claim 313 contained within Paragraph 16(h) of the Amended Complaint.

i. To the extent Paragraph 16(i) of the Amended Complaint contains statements which summarize statutory or regulatory provisions or otherwise are conclusions of law, no responsive pleading is required. Continental Carbon denies claim 314 contained within Paragraph 16(i) of the Amended Complaint.

j. To the extent Paragraph 16(j) of the Amended Complaint contains statements which summarize statutory or regulatory provisions or otherwise are conclusions of law, no responsive pleading is required. Continental Carbon further denies each and every one of the claims 315 through 380 contained within Paragraph 16(j). Continental Carbon also denies that the circumstances and/or facts alleged in claims 315 through 380, if proven, would be sufficient to constitute a violation Specific Condition No. 10 of Continental Carbon's Federal Operating Permit.

k. To the extent Paragraph 16(k) of the Amended Complaint contains statements which summarize statutory or regulatory provisions or otherwise are conclusions of law, no responsive pleading is required. Continental Carbon further denies each and every one of the claims 381 through 416 contained within Paragraph 16(k).

l. To the extent Paragraph 16(k) of the Amended Complaint contains statements which summarize statutory or regulatory provisions or otherwise are conclusions of law, no responsive pleading is required. With respect to claim 417, Continental Carbon denies that it operated its reactors while the thermal oxidizers were not operating. Continental Continental Carbon further denies the allegation in claim 417 that it opened compartments at

night and increased the reactor loads or otherwise violated Specific Condition No. 14 of its Federal Operating Permit.

m. To the extent Paragraph 16(m) of the Amended Complaint contains statements which summarize statutory or regulatory provisions or otherwise are conclusions of law, no responsive pleading is required. The June 5, 2003 ODEQ Full Compliance Evaluation speaks for itself, and no responsive pleading is required thereto. Continental Carbon denies the remainder of claim 418 or that it violated Specific Condition No. 12 of its Federal Operating Permit. Continental Carbon notes that the June 5, 2003 ODEQ Full Compliance Evaluation states that "[n]o violations were observed during the inspection."

n. To the extent Paragraph 16(n) of the Amended Complaint contains statements which summarize statutory or regulatory provisions or otherwise are conclusions of law, no responsive pleading is required. Continental Carbon further denies each and every one of the claims 419 through 527 contained within Paragraph 16(n). Continental Carbon also denies that the circumstances and/or facts alleged in claims 419 through 527, if proven, would be sufficient to constitute a violation Specific Condition No. 14 of Continental Carbon's Federal Operating Permit. Continental Carbon also denies that it has violated Specific Condition No. 14 every day of operation since the issuance of its Federal Operating Permit or that it has failed to take reasonable precautions as required by the Permit.

o. To the extent Paragraph 16(o) of the Amended Complaint contains statements which summarize statutory or regulatory provisions or otherwise are conclusions of law, no responsive pleading is required. The July 18, 2003 Full Compliance Evaluation speaks for itself, and no responsive pleading is required thereto. Continental Carbon denies claim 528 and asserts that the statement in July 18, 2003 Full Compliance Evaluation quoted by plaintiffs does not constitute evidence of a claim of violation of Specific Condition No. 17 of its Federal Operating Permit.

p. To the extent Paragraph 16(p) of the Amended Complaint contains statements which summarize statutory or regulatory provisions or otherwise are conclusions of law, no responsive pleading is required. Continental Carbon denies each and every one of the claims 529 through 552 contained within Paragraph 16(p). Continental Carbon also denies that the circumstances and/or facts alleged in claims 529 through 552, if proven, would be sufficient to constitute a violation Specific Condition No. 18(a) of Continental Carbon's Federal Operating Permit or 40 C.F.R. § 64.7.

q. To the extent Paragraph 16(q) of the Amended Complaint contains statements which summarize statutory or regulatory provisions or otherwise are conclusions of law, no responsive pleading is required. Continental Carbon denies claim 553 contained within Paragraph 16(q). **[did CCC prepare a QIP?]**

r. To the extent Paragraph 16(r) of the Amended Complaint contains statements which summarize statutory or regulatory provisions or otherwise are conclusions of law, no responsive pleading is required. Continental Carbon denies claims 554 and 555 contained within Paragraph 16(r). The July 22, 2003 ODEQ memorandum concerning an Air Quality Full Compliance Evaluation speaks for itself, and no responsive pleading is required thereto. **[Need to determine sufficiency of compliance certification]**

17. With respect to the subparts of Paragraph 17 of the Amended Complaint:

a. To the extent Paragraph 17(a) of the Amended Complaint contains statements which summarize statutory or regulatory provisions or otherwise are conclusions of law, no responsive pleading is required. Continental Carbon admits that it was issued Permit No. 92-092-C (PSD) (M-1) on August 28, 1997 ("PSD Permit"). Continental Carbon denies claim 556 contained within Paragraph 17(a). Continental Carbon denies specifically that it uses feedstock oil which exceeds 4% sulfur in content. Continental Carbon further denies each and every one of claims 557 through 674 **[need to review 7/26/2000 ODEQ RFI and 1/18/2000 ODEQ memo from Pam Dizikes to Doyle McWhirter]**. Continental Carbon further denies each and every one of the claims 676 through 697. **[need to review 7/26/2000 ODEQ RFI and 1/18/2000 ODEQ memo from Pam Dizikes to Doyle McWhirter]** Continental Carbon further denies each and every one of the claims 698 through 801. Continental Carbon also denies that the circumstances and/or facts alleged in claims 698 through 801, if proven, would be sufficient to constitute a violation Specific Condition No. 11 of its PSD Permit. Continental Carbon further denies claim 803. **[Need to review ODEQ memo 7/17/01 regarding complaint # 300-00-00-22108]** Given that some or all of claims 675, 698, 802 and 804 are hypothetical and based on facts allegedly not available to plaintiffs, Continental Carbon can neither admit nor deny such hypothetical portions of claim 675, 698, 802 and 804. Nevertheless, Continental Carbon denies that there are "continuing violations" of the cited provisions.

b. Continental Carbon denies claim 805. Continental Carbon also denies that the circumstances and/or facts alleged in claim 805, if proven, would be sufficient to constitute a violation of Part C of the Clean Air Act. Continental Carbon further denies that there are continuing violations of Part C of the Clean Air Act.

FIRST AFFIRMATIVE DEFENSE

The Court does not have subject matter jurisdiction over some or all of the claims alleged in the Amended Complaint.

SECOND AFFIRMATIVE DEFENSE

Some or all Plaintiffs' claims are not actionable under 42 U.S.C. § 7604(a).

THIRD AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred in whole or part by the applicable statute of limitations.

FOURTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred in whole or in part by 42 U.S.C. § 7604(b) because the Oklahoma Department of Environmental Quality has commenced and is diligently prosecuting an action to require Continental Carbon to comply with those emission standards or limitations which form the basis of Plaintiffs' claims.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are moot or otherwise not actionable in light of actions taken and being taken by the Oklahoma Department of Environmental Quality and Continental Carbon.

SIXTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred in whole or in part by the "permit shield" in Okla. Stat., tit. 252, § 100-8-6(d) and/or 42 U.S.C. § 7661c(f).

SEVENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred in whole or in part by prior settlement agreements between some or all of the Plaintiffs and Continental Carbon or Continental Carbon's predecessors.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred in whole or in part because they fail to state a claim upon which relief can be granted.

NINTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred in whole or in part because Plaintiffs' Amended Complaint provides inadequate notice of the alleged violations for which they are suing.

TENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred in whole or in part because Plaintiffs failed to provide adequate pre-suit notice in compliance with 42 U.S.C. § 7604(b) and 40 C.F.R. Part 54.

ELEVENTH AFFIRMATIVE DEFENSE

The citizen suit provisions of the Clean Air Act, 42 U.S.C. § 7604, are unconstitutional, as they violate the separation of powers and the appointments clause.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred in whole or in part because the statutory or regulatory provisions upon which they are based are unconstitutionally void for vagueness or otherwise violate due process.

WHEREFORE, Continental Carbon requests an Order entering judgment in its favor, awarding costs and disbursements, and granting such other and further relief as the Court may deem just and proper.

Dated: December --, 2004

RYAN, WHALEY & COLDIRON, PC

By:_____
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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

PAPER, ALLIED-INDUSTRIAL, CHEMICAL AND ENERGY WORKERS INTERNATIONAL UNION ("PACE"), PACE LOCAL 5-857, THE PONCA TRIBE ("TRIBE"), WALLIS SCHATZ, ALGEAN L. VANCE, JOHN L. HOUGH, FRANCIS COLE, AND JEFF LIEB

Plaintiffs,

v.

CONTINENTAL CARBON COMPANY

Defendant.

Case No. CIV-04-0438-F

MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED ORIGINAL COMPLAINT

Pursuant to FED. R. CIV. P. 12(b)(1) and 12(b)(6), Defendant Continental Carbon Company ("Continental Carbon") hereby moves to dismiss the Amended Complaint of Plaintiffs Paper, Allied-Industrial, Chemical and Energy Workers International Union ("PACE"), PACE Local 5-857, the Ponca Tribe ("Tribe"), Wallis Schatz, Algean L. Vance, John L. Hough, Francis Cole, and Jeff Lieb (collectively, "Plaintiffs"). The Amended Complaint should be dismissed for the reasons set forth in the attached memorandum of law. In addition, the Tribe lacks authority to bring a private suit under the Clean Air Act and should be dismissed as a plaintiff in this matter.

Dated: December 22, 2004

RYAN, WHALEY, COLDIRON & SHANDY, PC

By:_____

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

PAPER, ALLIED-INDUSTRIAL, CHEMICAL AND ENERGY WORKERS INTERNATIONAL UNION ("PACE"), PACE LOCAL 5-857, THE PONCA TRIBE ("TRIBE"), WALLIS SCHATZ, ALGEAN L. VANCE, JOHN L. HOUGH, FRANCIS COLE, AND JEFF LIEB Plaintiffs, v. CONTINENTAL CARBON COMPANY Defendant.	Case No.CIV-04-0438-F

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED ORIGINAL COMPLAINT

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INTRODUCTION

Plaintiffs style their case as a "citizen suit" under subsections 304(a)(1) and (a)(3) of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7604(a)(1) and (a)(3). This is the third in a succession of "citizen suits" brought by the Paper, Allied-Industrial, Chemical and Energy Workers International Union ("PACE") against Continental Carbon Company's ("Continental Carbon" or "the Company") Ponca City, Oklahoma, facility.[1] The first two suits, filed under other federal environmental statutes, were dismissed—one voluntarily, the other, at least in part, by this Court.[2] This lawsuit should suffer a similar fate.

The confusion surrounding Plaintiffs' claims continues. Whereas their first Complaint identified only ten claims, and Plaintiffs' counsel recently informed this Court that they were pursuing 180 claims, the Amended Complaint has now ballooned to 805 distinct claims. This exponential growth in claims does not cure the fundamental deficiencies of Plaintiffs' case. Rather than set forth clearly understandable claims of alleged violations that are adequately supported with factual averments, Plaintiffs have instead filled the Amended Complaint with a haphazard list of events culled from their Notice Letter. In doing so, they failed to craft "a pleading that could reliably and confidently be analyzed under Rule 12(b)(6) at the threshold." Transcript of Motion to Reconsider, Nov. 4, 2004, at 17:20-21. Plaintiffs

[1] Continental Carbon is a separately-incorporated subsidiary of CSRC, which is, in turn, a separately-incorporated subsidiary of Taiwan Cement Corporation, both of which are based in Taiwan.

[2] *See PACE v. Continental Carbon Co.*, No. 02-1022-M (W.D. Okla. April 1, 2003) (order granting Plaintiff's motion to dismiss its citizen suit under the Resource Conservation and Recovery Act); *PACE v. Continental Carbon Co.*, No. 02-1677-R (W.D. Okla. June 23, 2003)

apparently believe that their shotgun approach will allow a few of their claims will "sneak through." This Court should not permit that to happen.

As an initial matter, the Court lacks subject matter jurisdiction over the Amended Complaint because Plaintiffs' statutorily-mandated pre-suit "Notice Letter" failed to provide sufficient notice of all of the claims that Plaintiffs intended to pursue. Adequate notice is a prerequisite for subject matter jurisdiction over a CAA citizen suit. 42 U.S.C. § 7604(b)(1)(A); *see Hallstrom v. Tillamook County*, 493 U.S. 20, 31 (1989); *Gwaltney of Smithfield, Ltd. v. Cheseapeake Bay Fund., Inc.*, 484 U.S. 49, 60 (1987); *Nat'l Parks Conservation Ass'n v. TVA*, 175 F. Supp. 2d 1071, 1077 (E.D. Tenn. 2001). The notice must identify with specificity the standard(s) alleged to be violated, the activity alleged to be in violation and the date or dates of such violation. 40 C.F.R. § 54.3(b). Where the Notice Letter identifies a standard that Continental Carbon is alleged to have violated, it fails to identify the activities which form the basis for that claim or the specific dates on which the standard was allegedly violated. And, even where dates and events are provided (as in the Appendix to the Notice Letter), the Notice Letter fails to identify the standard alleged to be violated. Plaintiffs' attempt to remedy this deficiency in the Amended Complaint comes too late.

The Court also lacks jurisdiction over several categories of claims in the Amended Complaint. These types of claims, which allege the creation of nuisance conditions or conditions of air pollution, involve legal provisions that are not "emission standards or limitations" "in effect" under the CAA or the Oklahoma State Implementation Plan ("SIP"), as would be required for a valid CAA citizen suit. *See* 42 U.S.C. §§ 7604(a)(1), 7604(f). These provisions are too subjective to form the basis of a citizen suit. Furthermore, several claims involve violations that are alleged to have occurred in the distant past but not to have been "repeated." This Court has jurisdiction only over past violations for which there is evidence they have been repeated. 42 U.S.C. §§ 7604(a)(1), 7604(a)(3).

Other claims fall for different reasons. For many claims, the Amended Complaint fails to assert material facts required to prove the alleged violations. In addition, many of the alleged violations occurred more than five years ago and thus are barred by the applicable statute of limitations, 28 U.S.C. § 2462. Finally, Congress did not authorize Indian Tribes, such as the Ponca, to bring citizen suits under the CAA.

Given the unusual length of the Amended Complaint, we include for the Court's convenience a chart which identifies, in summary, the claims subject to dismissal under the legal theories set out above and in more detail below.

Argument	**Claims Subject to Dismissal**
1. Deficiency of Notice Letter	Claims 1-804
2. Claims concerning provisions not enforceable in a CAA citizen suit	Claims 1-112, 419-525, 699-801, 118-220, 285-308
3. Claims involving alleged past violations which are not repeated	Claims 552, 418
4. Claims lacking allegations of material facts needed to prove alleged violation	Claims 112, 220, 292-93, 308, 675, 698, 802-03; 1-112, 419-525, 699-801; 113-17; 221-84; 285-308; 311, 528, 553; 805
5. Claims barred by the five-year statute of	Claims 82-105, 111, 117, 200-23, 275-84, 369-

(order dismissing Plaintiffs' civil penalty claims in a Clean Water Act citizen suit), *appeal pending*, No. 03-6243 (10th Cir.) (argued Sept. 28, 2004).

limitations	78, 501-24, 547-51[?], 560-674[?], 676-697, and 781-800

BACKGROUND

Continental Carbon operates a "carbon black" manufacturing facility located in Kay County near Ponca City, Oklahoma. *See* Amended Complaint ¶ 9. Carbon black is a component of tires and other rubber and plastic products. *Id.* Although Continental Carbon only acquired the Ponca City facility in 1995, the facility has been in operation and producing carbon black since 1954. *Id.*

Continental Carbon's Ponca City facility is subject to a host of complex requirements under the federal CAA, the Oklahoma State Implementation Plan ("SIP"), and the facility's "Title V" air quality operating permit. The CAA, like most other environmental statutes, is based upon a federal-state partnership. *See Sierra Club v. U.S. Environmental Protection Agency*, 99 F.3d 1551, 1553 (10th Cir. 1996). SIPs, the regulatory programs for air emissions from specific stationary sources, are developed and administered by states under Section 110 of the Act, 42 U.S.C. § 7410, to meet the requirements of federal law. States submit their SIPs to the United States Environmental Protection Agency ("EPA"), which reviews and ultimately approves or denies them. *See* 42 U.S.C. § 7410(a); *Espinosa v. Roswell Tower, Inc.*, 32 F.3d 491, 492 (10th Cir. 1994) ("The state implementation plan has the force and effect of federal law, thereby permitting the Administrator [and citizens] to enforce it in federal court"). Oklahoma has an EPA-approved SIP. *See* 40 C.F.R. §§ 52.1920-.1935 (codifying Oklahoma SIP).[3]

The CAA has several permit programs applicable to "major" sourcesthat Plaintiffs invoke. Part C of Title I of the CAA, 42 U.S.C. §§ 7470-7492, establishes a "prevention of significant deterioration" ("PSD") preconstruction permit program (implemented by States upon EPA approval) for new and modified "major sources" in "attainment" areas.[4] Oklahoma has received EPA approval to implement the PSD *preconstruction permit* program.[5] Title V of the CAA, 42 U.S.C. §§ 7661-7661f, establishes a federal "*operating permit*" program whose requirements are also implemented by States upon EPA approval. Oklahoma has received EPA approval to implement the operating permit program.[6] Under this program, each "major" source must apply for and obtain a permit to operate a major source of air pollutant emissions, which includes all emission and other requirements applicable to the source. *See* OKLA. ADMIN. CODE § 252:100-8-3 (listing sources required to obtain Title V permits); OKLA. ADMIN. CODE § 252:100-8-6 (requiring permits to include all "applicable requirements").

In accordance with the CAA and the Oklahoma SIP, Continental Carbon's Ponca City facility has applied for and obtained both PSD preconstruction permits and a Title V operating permit from the Oklahoma Department of Environmental Quality ("DEQ"). Under these permits, the Company employs an array of pollution control devices and equipment to limit

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[3] The contents of the current Oklahoma SIP are found on the internet at EPA REGION 6, AIR REGULATIONS: STATE IMPLEMENTATION PLANS, http://yosemite1.epa.gov/r6/Sip0304.nsf/home?Openview&Start=1&Count=30&Expand=5 (March 3, 2000).

[4] Under the CAA, EPA establishes national ambient air quality standards ("NAAQS") for various air pollutants. 42 U.S.C. § 7409. Regions of the country are divided into "air quality regions," *id.* § 7407, which are deemed to be either in "attainment" or "nonattainment" with the NAAQS. Oklahoma's air quality designations are all currently in attainment. 40 C.F.R. § 81.337.

[5] *See* 40 C.F.R. § 52.1920; *see also* 48 Fed. Reg. 38635 (Aug. 25, 1983); 56 Fed. Reg. 33715 (July 23, 1991), and 64 Fed. Reg. 60683 (Nov. 8, 1999).

[6] *See* 61 Fed. Reg. 4220 (Feb. 6, 1996) (interim partial approval); 66 Fed. Reg. 63170 (Dec. 5, 2001) (final full approval); OKLA. ADMIN. CODE § 252:100-8 (Oklahoma's Title V operating permit program regulations).

air emissions. This equipment includes bag houses and filters to capture fine particulate matter and high temperature thermal oxidizers which are designed to destroy virtually all of the waste gasses generated during the production process. *See* Exhibit __ (copy of Continental Carbon's operating permit), at Specific Condition 1 (listing control equipment) (cited in the Amended Complaint at ¶ 16). In addition, the facility is required to, and in fact does, employ other measures to minimize the inadvertent release of carbon black and other particulate matter from the facility. *See id.* at Specific Condition 14; *see also* Exhibit __ (copy of Continental Carbon's PSD permit (cited in Amended Complaint at ¶ 17).

CAA § 304(a)(1)[7] allows "persons" to sue a company which allegedly violates an "emission standard or limitation" under the Act or a related order issued by EPA or a State. 42 U.S.C. § 7604(a)(1). Similarly, CAA § 304(a)(3) allows such persons to sue a company which modifies a "major source" without obtaining a PSD preconstruction permit. *Id.* § 7604(a)(3).

[7] Section 304(a) provides in relevant part:

> Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf —
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission 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 . . .
>
> (3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties.

Congress, however, placed several important restrictions on § 304(a)(1) suits. First, § 304(b)(1)(A) obligates a would-be plaintiff to notify the putative defendant and federal and state enforcement authorities of any proposed lawsuit at least 60 days in advance.[8] *See* 42 U.S.C. § 7604(b)(1)(A) ("No action may be commenced . . . prior to 60 days after the [private] plaintiff has given notice"). In addition, § 304(b)(1)(B) generally prevents citizens from pursuing separate actions once EPA or a State "has commenced and is diligently prosecuting" an enforcement action. 42 U.S.C. § 7604(b)(1)(B). This is because environmental citizen suits are intended "to supplement rather than to supplant governmental action." *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987). Finally, in order to pursue an action under § 304(a)(1) (alleging a violation of an emission standard or limitation) or § 304(a)(3) (alleging a violation of a condition of a PSD preconstruction permit), plaintiffs must show that defendant is either currently "in violation" of the specific requirement or repeatedly violated that requirement in the past. 42 U.S.C. § 7604(a)(1), (3).

ARGUMENT

I. **Legal Standard**

A motion to dismiss for failure to state a claim pursuant to FED. R. CIV. P. 12(b)(6) should be granted if the plaintiff "can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Hall v. Bellmon*, 935 F.2d 1106, 1109 (10th Cir. 1991). And a facial challenge to subject matter jurisdiction under FED. R. CIV. P. 12(b)(1) should be granted if the plaintiff fails to establish "the court's subject matter jurisdiction by a preponderance of the evidence." *Southway v. Central Bank of Nigeria*,

[8] This notice provision does not apply to claims related to the PSD preconstruction permits. *See* 42 U.S.C. § 7604(a)(3); 7604(b)(1)(A).

328 F.3d 1267, 1274 (10th Cir. 2003). Although courts must presume that "all of plaintiff's factual allegations are true" when considering a 12(b)(1) or a 12(b)(6) motion, "conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based." *Hall*, 935 F.2d at 1109, 1110. A "court need accept as true only the plaintiff's well-pleaded factual contentions, not his conclusory allegations." *Id.* at 1110. "[C]laims which are supported only by vague and conclusory allegations" should be dismissed. *Northington v. Jackson*, 973 F.2d 1518, 1521 (10th Cir. 1992). Similarly, claims that are time-barred by a statute of limitations are subject to dismissal under Rule 12(b)(6). *See United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1202 n.5 (10th Cir. 2001) (characterizing dismissal sought on statute of limitations grounds as being brought pursuant to Rule 12(b)(6)).

II. The Amended Complaint Should Be Dismissed Because Plaintiffs Did Not Comply With The Mandatory Notice Requirements Applicable to Citizen Suits.

Before bringing a citizen suit under the Clean Air Act, a plaintiff must give the potential defendant prior notice, by letter, of the alleged violations that will be the subject of the suit. 42 U.S.C. § 7604(b)(1)(A). The notice letter, which is sent to the Department of Justice, EPA, state authorities, and the prospective defendant, must be served at least sixty days before filing the lawsuit. *Id.* "[T]he purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit." *Gwaltney of Smithfield, Inc.*, 484 U.S. at 60. As directed by Congress, EPA has promulgated regulations establishing minimum requirements for the notice letter. *See* 42 U.S.C. § 7604(b)(1)(A); 40 C.F.R. Part 54. Under these regulations, the notice letter must "include sufficient information to permit the recipient to identify [1] the specific standard, limitation, or order which has allegedly been violated, [2] the activity alleged to be in violation, [3] the person or persons responsible for the alleged violation, [4] the location of the alleged violation [5] the date or dates of such violation, and [6] the full name and address of the person giving notice." 40 C.F.R. § 54.3(b). These notice requirements are "mandatory conditions precedent to commencing suit."[9]

Plaintiffs' Notice Letter fails to satisfy the CAA's notice requirements. The Notice Letter suffers from both an impermissibly vague description of the alleged violations and a confusing structure that makes it impossible to identify "the specific standard[s], limitation[s], or order[s] which" Plaintiffs allege have "been violated." In many instances, it also fails to identify the "alleged activities" that support the contentions of violations. This kind of "general notice letter that merely informs a recipient of what a plaintiff *may* allege is patently insufficient." *Atwell v. KW Plastics Recycling Div.*, 173 F. Supp. 2d 1213, 1224 (M.D. Ala. 2001).

The Notice Letter (copy at Exh. __ hereto) has two parts: a letter setting forth summary assertions of violations (with virtually no supporting facts) and an Appendix which purports to identify "additional" alleged violations and to contain a "Summary of Alleged

[9] *Hallstrom v. Tillamook County*, 493 U.S. 20, 31 (1989) (construing parallel notice requirement of the Resource Conservation and Recovery Act); *see also New Mexico Citizens for Clean Air and Water v. Espanola Mercantile Co.*, 72 F.3d 830, 833 (10th Cir. 1996) (following other circuits in a Clean Water Act case holding "that compliance with the sixty-day notice requirements . . . is also a mandatory precondition to suit"); *Nat'l Parks Conservation Ass'n v. TVA*, 175 F. Supp. 2d 1071, 1077 (E.D. Tenn. 2001) (noting that "[s]trict compliance with the statutory notice requirements is a mandatory jurisdictional prerequisite to maintaining a suit under the CAA and similar environmental laws"). Case law interpreting other environmental laws' notice provisions, like those in the Clean Water Act and the Resource Conservation and Recovery Act, is applicable in the CAA context. *See Hallstrom v. Tillamook County*, 493 U.S. 20, 23-25 (1989) (recognizing that environmental statutes' notice provisions are functionally equivalent); *see also Washington Trout v. McCain Foods, Inc.*, 45 F.3d 1351, 1353 n.3 & 1354 (9th Cir. 1995).

Violations." The first part – the Notice Letter – is replete with blanket, unsupported assertions. For example, it alleges that Continental Carbon is "[r]eleasing visible emissions in violation of OAC 252:100-25-3," or that Continental Carbon is "[r]eleasing fugitive dust emissions in violation of OAC 252:100-29-2 (a)." Notice Letter at 4-5. The Notice Letter does not, however, identify either "the activity alleged to be in violation" or the "dates or dates of such violation." 40 C.F.R. § 54.3. The Notice Letter does not explain how the items listed in the Appendix relate to or are intended to support the generalized allegations of violations in the body of the Letter. Indeed, the Letter is careful to distinguish the "allegations of violations" in the first part from the "[a]dditional allegations of violations [] included in Appendix A," Notice Letter at 4, 5. As for when the alleged violations took place, Plaintiffs only reveal that "these types of violations have occurred frequently for many years" before baldly asserting that "[e]very day of operation, since the start up of operations at Continental Carbon, apparently has resulted in violations." *Id.* at 5.

The failure to identify any specific facts (beyond conclusory legal assertions) or any dates on which the alleged violations in the letter occurred renders Plaintiffs notice deficient. *See California Sportfishing Alliance v. City of West Sacramento*, 905 F. Supp. 792, 799 (E.D. Cal. 1995) ("plaintiffs should give a range of dates that is reasonably limited"). Indeed, the same sort of generalized allegations made by Plaintiffs here were found to be inadequate in *TVA*, where the plaintiff's notice letter alleged that the defendant "has regularly violated for at least the last five years, and continues at the present time to violate" the pertinent opacity requirements. 175 F. Supp. 2d at 1076. The *TVA* court found this inadequate, explaining that the notice letter "does not specify the dates of the alleged violations or identify at which sites the violations occurred. Rather, the notice only states that TVA has 'regularly violated' the standard 'for at least the last give years. . . .' Plaintiff has simply not provided the specificity in its notice which would be required for TVA to determine when its alleged unlawful exceedances had occurred." *Id.*; *see also Sierra Club Ohio Chapter v. City of Columbus*, 282 F. Supp. 2d 756, 769 (S.D. Ohio 2003) (reaffirming the rule that a "notice alleging that particular violations occurred 'continuously' or 'nearly daily' was insufficient to satisfy the statutory notice requirements because such language did not help the defendant identify any specific date or dates on which the alleged violations might have occurred").

The second part of the Notice Letter – the Appendix – suffers from a different problem. Though most of the listed events include either a "date or dates," 40 C.F.R. § 54.3, the Appendix is devoid of any description of "the specific standard, limitation, or order which has allegedly been violated." 40 C.F.R. § 54.3(b). The Appendix contains statements like "carbon black is in the air," but these fail to indicate what legal significance this "fact" has or how this "fact" constitutes a violation of some legal requirement. App. A at 8; 40 C.F.R. § 54.3. It is not sufficient simply to give "minimal, generalized notice" that only provides "enough information for the recipient to investigate and thereby determine what the plaintiff *may* allege." *Atwell v. KW Plastics Recycling Div.*, 173 F. Supp. 2d 1213, 1223 (M.D. Ala. 2001). Rather, the notice must contain "enough information to enable both the alleged violator and the appropriate agencies to identify the pertinent aspects of the alleged violations without undertaking an extensive investigation of their own." *Id.* at 1222. Simply put, this "Summary of Alleged Violations" is deficient because it fails to provide Continental Carbon notice of the emissions standards, limitations or orders plaintiffs allege the company has violated.[10]

[10] *See, e.g.*, *ONRC Action v. Columbia Plywood, Inc.*, 286 F.3d 1137, 1144 (9th Cir. 2002) (dismissing claims in a CWA citizen suit because the specific legal standards were not identified in the notice letter); *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273

The omissions and inadequacies of the Notice Letter are fatal to Plaintiffs' Amended Complaint. The increased specificity in the Amended Complaint, moreover, cannot save Plaintiffs' suit. At the hearing, Plaintiffs counsel noted that "at some point we do need to identify which specific laws and rules or permit terms [Continental Carbon] violated." Tr. at 11:24 to 12:1. But as the CAA's regulations make clear, that time passed more than ten months ago, when Plaintiffs sent their Notice Letter. Plaintiffs should not be permitted to shoehorn an ever-growing number of claims into this case. Whereas the Original Complaint identified ten alleged violations, at the hearing Plaintiffs counsel asserted that "[w]e have a petition with 180 specific claims set out of violation." Tr. at 8:16-20. As the Court recognized, the revelation that Plaintiffs "had many more claims than were explicitly set forth in your original complaint was rather eye-catching." Tr. at 10:19-21. Now, in their Amended Complaint, Plaintiffs have returned with *805* separate claims. This bait-and-switch tactic, where "the notice given by the plaintiff states one thing, . . . and the lawsuit filed by plaintiff states another," is impermissible under the CAA. *National Parks Conservation Association, Inc. v. TVA*, 175 F. Supp. 2d 1071, 1077-78 (E.D. Tenn. 2001). Plaintiffs' Notice Letter thus fails to meet the "strict notice requirements of the CAA," and the Amended Complaint should be dismissed.[11] *Id.* at 1077-78.

III. The Court Lacks Jurisdiction Over Many Of Plaintiffs' Claims.

The CAA does not grant unbounded enforcement authority to citizens. Rather, the court has jurisdiction over only certain types of claims. First, the Act only allows suits involving a specific and narrowly-defined category of Federal statutory and/or SIP requirements. Section 304(a)(1) of the Act, on which the vast majority of Plaintiffs' claims are based, permits citizens to bring suit only if they allege violations of: (1) an "emission standard or limitation" (as defined in the Act) or (2) an EPA or State order concerning such a standard or limitation. 42 U.S.C. § 7604(a)(1). *See* 42 U.S.C. § 7604(f) (quoted *infra* at p. __); *Conservation Law Foundation, Inc. v. Busey*, 79 F.3d 1250, 1258-59 (1st Cir. 1996) (explaining the types of "emission standards or limitations" for which private parties may sue); *Cate v. Transcontinental Gas Pipe Line Corp.*, 904 F. Supp. 526, 528-29 (W.D. Va. 1995) (same). Second, a citizen suit may not be brought over single instances of violations of a particular rule that occurred only in the past. Under section 304(a)(1) and (a)(3), the court has jurisdiction over past violations only to the extent that there "is evidence that the alleged violation has been repeated." *See* 42 U.S.C. § 7604(a)(1); *City of Yakima v. Surface Transp. Bd.*, 46 F. Supp. 2d 1092, 1099 (E.D. Wash. 1999) (barring CAA suit because, *inter alia*, the "alleged violation was not ongoing"). Numerous claims in the Amended Complaint should be dismissed, because they concern either non-enforceable standards or non-repeated alleged violations.

A. Many of Plaintiffs' Claim Concern Subjective and Vague Regulatory Provisions Which Are Not "Emission Standards or Limitations."

Numerous claims in the Amended Complaint concern requirements for which the Act does not permit a citizen to sue. The requirements cited in Claims 1-112, 419-525, and 699-801 (alleged creation of nuisance conditions or conditions of air pollution), Claims 118-220 (alleged release of fugitive dust), and Claims 285-308 (incorrectly reporting excess emissions)

F.3d 481, 488 (2d Cir. 2001) (dismissing claims that failed to "identify with reasonable specificity each pollutant that the defendant is alleged to have discharged unlawfully"); *Sierra Club Ohio Chapter v. City of Columbus*, 282 F. Supp. 2d 756 (S.D. Ohio 2003) (dismissing numerous claims for failure to identify the specific standard, limitation, or order that was allegedly been violated).

[11] Claim 805, Plaintiffs' PSD-related claim, is not subject to dismissal on these grounds because that claim is not subject to the CAA's notice requirements. *See supra* note 8. However, the entire Amended Complaint should still be dismissed because Claim 805 is deficient, *inter alia*, because it fails to allege material facts necessary to support claim. *See infra* at p. __.

are not the sort of clear, objective, quantitative standards that courts have found to be enforceable as "emission standards or limitations." *See Helter v. AK Steel Corp.*, 1997 U.S. Dist. LEXIS 9852 at *50-51 (W.D. Ohio 1997) (vague state nuisance standard not enforceable); *Satterfield v. J.M. Huber Corp.*, 888 F. Supp. 1561 (N.D. Ga. 1994) (subjective state nuisance standard not enforceable). Accordingly, all of these claims should be dismissed.[12]

1. The CAA Permits Suit Only for Emission Standards or Limitations.

Under the Act, a plaintiff may only sue to enforce those requirements that fall within one of four specific categories of "emission standards or limitations" found in section 304(f), *see* 42 U.S.C. § 7604(f)(1)-(4),[13] or an EPA or State order that enforces such a "standard or limitation." Of the four categories of "emission standards or limitations" set forth in section 304(f)(1), only three are potentially relevant here.[14]

The first lists three types of requirements: (1) "a schedule or timetable of compliance," (2) an "emission limitation" or "emission standard," and (3) a "standard of performance." *See* 42 U.S.C. § 7604(f)(1). These terms, which are further defined under the Act, clearly establish objective, quantifiable standards. For instance, section 302(p) of the CAA defines a "schedule and timetable of compliance" to mean a "schedule of required measures including an enforceable sequence of actions or operations leading to compliance with an emission limitation" or standard. Notably, any such schedule must contain specified dates by which a source must take specific actions to achieve compliance. *See* 42 U.S.C. § 7602(p); *Conservation Law Foundation*, 79 F.3d at 1260. Similarly, an "emission limitation" or "emission standard" is a requirement that "limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis." 42 U.S.C. § 7602(k); *Conservation Law Foundation*, 79 F.3d at 1258. And section 302(*l*) of the CAA defines "standard of performance" as "a

[12] In addition, although not styled as "claims," the allegations in paragraphs 14(d)(2) and (3) of the Amended Complaint are subject to dismissal for the related reason that they concern "state only" requirements not enforceable in a citizen suit. Citizens may only bring suit to enforce requirements "in effect under" the Act or an EPA-approved State or Federal Implementation Plan. *See* 42 U.S.C. § 7604(f). If the requirement or order is not incorporated into an approved SIP, it cannot be the subject of a citizen suit. *See Cate v. Transcontinental Gas Pipe Line Corp.*, 904 F. Supp. 526, 533-34 (dismissing claims of non-compliance with a state agency order, which was not included in the Virginia SIP, because "approval by EPA or inclusion in a state SIP are the outer boundaries of the meaning of 'in effect under' the Act"). Paragraph 14(d)(2) (concerning a 1993 Consent Order between Continental Carbon and the DEQ) and Paragraph 14(d)(3) (concerning a 1995 "Memorandum of Understanding" between Continental Carbon and the DEQ) both involve similar "state-only" requirements, not part of the EPA-approved Oklahoma SIP and not enforceable under CAA § 304(a)(1).

[13] Section 304(f) provides (emphasis added):

For purposes of this section, the term "emission standard or limitation under this chapter" means –

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard,

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive, or

(3) any condition or requirement of a permit under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment), section 7419 of this title (relating to primary non- ferrous smelter orders), any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans, vehicle inspection and maintenance programs or vapor recovery requirements, section 7545(e) and (f) of this title (relating to fuels and fuel additives), section 7491 of this title (relating to visibility protection) any condition or requirement under subchapter VI of this chapter (relating to ozone protection), or any requirement under section 7411 or 7412 of this title (without regard to whether such requirement is expressed as an emission standard or otherwise); or

(4) any other standard, limitation, or schedule established under any permit issued pursuant to subchapter V of this chapter or any applicable State implementation plan approved by the Administrator, any permit term or condition, and any requirement to obtain a permit as a condition of operations.

which is *in effect* under this chapter (including a requirement applicable by reason of section 7418 of this title) or under any applicable implementation plan.

[14] Subsection 304(f)(2) (concerning fuels and fuel additives) describes provisions not at issue in this suit.

requirement of continuous emission reduction." 42 U.S.C. § 7602(*l*). This first category of "emission standards or limitations" thus encompasses only those Federal or SIP requirements which specify schedules of compliance or emission reductions or which set out specific, *numerical* limits on the "amount" or "rate" of emissions.

The second category encompasses "any condition or requirement" of a PSD-related permit. 42 U.S.C. § 7604(f)(3). The third category lists three types of requirements, each related to the terms or conditions of a Title V operating permit or the requirement to obtain a permit. *See* 42 U.S.C. § 7604(f)(4). First, it includes "any other standard, limitation, or schedule" established under any Title V operating permit or a permit issued under an approved SIP. Second, it includes permit terms or conditions. Third, it includes any requirement "to obtain a permit as a condition of operations."

The provisions captured by these categories of "emission standards or limitations" share a significant common characteristic – each imposes *specific, objective requirements*, compliance with which can be relatively easily assessed and measured (and therefore readily enforced). The requirements must be set out in an applicable federal regulation, SIP, or permit, and such requirements must limit the quantity or concentrations of pollutants to be emitted or impose a schedule with specific steps or a mandate to achieve a reduction in emissions or the obligation to obtain a permit as a condition of operations. "The thrust of all these provisions … is that a violation is to be assessed against objective standards, namely the … failure to comply with specific quantifiable air quality standards or restrictions on emission levels."[15] This is in keeping with Congress' intent to require "an objective evidentiary standard [that] would have to be met by the citizen who brings an action under" section 304(a)(1) and thereby eliminate the need for "reanalysis of technological or other considerations at the enforcement stage." *See* S. Rep. No. 91-1196 at 36 (1970), *reprinted in* Cong. Res. Ser., 1 A Legislative History of the Clean Air Act Amendments of 1970, at 436 (1974). Thus, "Congress did not fling the courts' door wide open. … [The citizen suit provision] was hedged by limitations – the confinement to clear cut violations by polluters." *NRDC v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1974). Even those subjective standards that are mentioned in a Title V operating permit or PSD permit are not enforceable in a citizen suit. *Satterfield*, 888 F. Supp. at 1566 ("[c]itizens cannot sue for alleged violations of a non-objective standard . . . even where such a standard is incorporated into a permit").

In sum, to withstand dismissal, citizen suits must allege violations of specific, objective standards, typically expressed in numerical terms, of the type set out in section 304(f) of the Act. Subjective and vague standards, which would require the court to make complex, *de novo*, technical assessments to determine compliance, cannot form the basis of a citizen suit under section 304(a) of the Act. *See, e.g., Helter*, 1997 U.S. Dist. LEXIS at *50-51; *Satterfield*, 888 F. Supp. at 1561.

2. Many of the Claims in the Amended Complaint Do Not Involve Objective and Enforceable Requirements.

Claims 1-112, 419-525, and 699-801 allege the creation of nuisance conditions. *See* Amended Complaint at ¶¶ 14(a)-(b), 16(n), 17(a). The Amended Complaint identifies two

[15] *United States v. Solar Turbines, Inc.*, 732 F. Supp. 535, 539 (M.D. Pa. 1989); *see Wilder v. Thomas*, 854 F.2d 605, 613-14 (2d Cir. 1988) (citizens may bring suit only for violations of specific, objective standards); *Satterfield*, 888 F. Supp. at 1566-67 ("emission limitations are designed to achieve general air quality standards and are objective, numerical standards of the type susceptible to citizen enforcement").

statutory requirements which prohibit "air pollution," OKLA. STAT. tit. 27A, § 2-5-104(3),[16] or the creation of "nuisance conditions," and OKLA. STAT. tit. 50, § 1 (2003),[17] as well as regulatory or permit requirements instructing defendant to take "necessary" or "reasonable" precautions to prevent "air pollution" (OKLA. ADMIN. CODE § 252:100-25-2;[18] Permit 98-176-TV, Specific Condition 14[19]). *See* Amended Complaint ¶¶ 14(a), 16(n). These allegations are not justiciable here.

Each of these regulatory and permit provisions are purely subjective and thus entirely too vague to form the basis of a citizen suit. These provisions require Continental Carbon to take "reasonable" or "necessary" "precautions" to prevent emissions which result in "nuisance" "air pollution" conditions. These are precisely the type of general nuisance-type requirements which other courts have held to be unenforceable in a citizen suit. *See, e.g., Helter*, 1997 U.S. Dist. LEXIS at *50-51 (dismissing claims alleging violations of state regulation prohibiting emissions which result in a nuisance); *Satterfield*, 888 F. Supp. at 1561 (same). Congress did not intend for district courts, in the context of CAA citizen suits, to assess whether "nuisance" conditions exist or whether a source has taken "reasonable precautions" to prevent air pollution. Such vague requirements, which are obviously subject to varying interpretations, do not constitute "emission standards or limitations," because they do not limit "the quantity, rate, or concentration of emissions of air pollutants on a continuous basis." *See* 42 U.S.C. § 7602(k).

Nor is the result different for Claims 419-525 and 699-801 simply because these subjective standards were incorporated into the PSD and Title V operating permits. "Citizens cannot sue for alleged violations of a non-objective standard . . . even where such a standard is incorporated into a permit." *Satterfield*, 888 F. Supp. at 1566. As the *Satterfield* court noted, "[i]t would not comport with the intent of Congress to allow a citizen suit to proceed based on alleged violations of a vague, non-objective standard where the permit holder is in compliance with the specific emission limitations of its permit which were set to meet national ambient air quality standards [NAAQS]." *Id.* at 1567; *see also Bayview Hunters Point Community Advocates v. Metro. Transp. Comm'n*, 366 F.3d 692, 703 (9th Cir. 2004) (noting that "[c]itizen suits may only be brought to enforce specific measures, strategies, or commitments *designed* to ensure compliance with the NAAQS.") (internal quotations omitted).

Claims 118-220 are similarly deficient. These claims assert that Continental Carbon has violated OKLA. ADMIN. CODE § 252:100-29-2(a), which generally prohibits a source from undertaking activities "without taking reasonable precautions or measures to minimize

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[16] OKLA. STAT. tit. 27A, § 2-5-104(3) provides that "'Air pollution' means the presence in the outdoor atmosphere of one or more air contaminants in sufficient quantities and of such characteristics and duration as tend to be or may be injurious to human, plant or animal life or to property, or which interfere with the comfortable enjoyment of life and property, excluding, however, all conditions pertaining to employer-employee relations."

[17] OKLA. STAT. tit. 50, § 1 provides that a "nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either: First. Annoys, injures or endangers the comfort, repose, health, or safety of others; or Second. Offends decency; or Third. Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake or navigable river, stream, canal or basin, or any public park, square, street or highway; or Fourth. In any way renders other persons insecure in life, or in the use of property, provided, this section shall not apply to preexisting agricultural activities."

[18] As alleged by Plaintiff, the version of OKLA. ADMIN. CODE § 252:100-25-2 that is part of the Oklahoma SIP provides that "No person owning, leasing or controlling the operation of any air contaminant source shall willfully, negligently, or through failure to provide necessary equipment or facilities or to take necessary precautions, permit the emission from said air contaminant source of such quantities of air contamination as will cause a condition of air pollution."

[19] This provision requires Continental Carbon to "take all reasonable precautions to prevent fugitive emissions and prevent visible fugitive dust emissions from crossing the boundary of the property on which those emissions originated." *See* Exhibit __ at Specific Condition 14.

atmospheric pollution" which would result in particle emissions that would be "classified as air pollution."[20] *See* Amended Complaint at ¶ 15. These claims further assert that Continental Carbon has violated OKLA. ADMIN. CODE § 252:100-29-2(b), which limits fugitive emissions that damage or interfere with use of adjacent properties or attainment or maintenance of air quality standards.[21] *See id.* Both of these legal requirements are variations of the subjective, vague, non-quantified nuisance standard contained in Continental Carbon's operating permit. Like that permit requirement, these environmental regulatory provisions, though contained in the SIP, are not quantifiable and thus not enforceable in a citizen suit.

Finally, in Claims 221-84 and 285-308, Plaintiffs allege that Continental Carbon has improperly reported its excess emissions.[22] In the Amended Complaint, Plaintiffs assert that "[a]ll of the exceedances in the last 5 years claimed by Continental Carbon to be the result of upsets, emergencies, or malfunctions appear to be actual violations due to poor maintenance and other preventable circumstances." Amended Complaint ¶ 15. Under OKLA. ADMIN. CODE § 252:100-9-3.3(a), "[e]xcess emissions caused by malfunctions are exempt from compliance with air emission limitations established in permits, rules, and orders of the DEQ" if certain requirements are met.

Although Continental Carbon has, in fact, reported its excess emissions to DEQ as being caused by malfunctions,[23] Plaintiffs appear to assert that "poor maintenance" or "careless operation" disqualifies Continental Carbon from the exemption provided by the regulations. *See* Amended Complaint ¶ 15; OKLA. ADMIN. CODE §§ 252:100-8-2, 252:100-9-2. Whether Continental Carbon's operation or maintenance was so "poor" or "careless" as to cause the exemption to be lost is a subjective determination.

In any event, the determination of whether excess emissions are the result of careless or improper operation and maintenance is committed to the discretion of DEQ. *See* OKLA. ADMIN. CODE § 252:100-9-3.3(e)(2) ("Excess emissions occurring more than 1.5 percent of the time that a process is operated in a calendar quarter *may* be indicative of inadequate design, operation, or maintenance, and [DEQ] *may* initiate further investigation.").[24] And DEQ

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[20] As alleged by Plaintiffs, the version of OKLA. ADMIN. CODE § 252:100-29-2(a) that is part of the Oklahoma SIP provides that "No person shall cause or permit the handling, transporting, or disposition of any substance or material which is likely to be scattered by the air or wind, or is susceptible to being air-borne or wind-borne, or to operate or maintain or cause to be operated or maintained, any premise, open area, right-of-way, storage pile of materials, vehicle, or construction, alteration, demolition or wrecking operation, or any other enterprise, which involves any material or substance likely to be scattered by the wind or air, or susceptible to being wind-borne or air-borne that would be classified as air pollution without taking reasonable precautions or measures to minimize atmospheric pollution."

[21] As alleged by Plaintiffs, the version of OKLA. ADMIN. CODE § 252:100-29-2(b) that is part of the Oklahoma SIP provides that "No person shall cause or permit the discharge of any visible fugitive dust emissions beyond the property line on which the emissions originate in such a manner as to damage or to interfere with the use of adjacent properties or cause air quality standards to be exceeded, or to interfere with the maintenance of air quality standards."

[22] Specifically, Plaintiffs allege "Violations for Exceedances of Permitted Releases and Incorrectly Reporting the Exceedances as Upsets, Emergencies or Malfunctions." *See* Complaint at __.

[23] Each of the alleged "violations" in Plaintiffs' summary is an actual excess emission report filed by Continental Carbon. *See* OKLA. ADMIN. CODE § 252:100-9-3.1 (describing excess emission reporting requirements).

[24] Even if Claims 221-84 and 285-314 were otherwise justiciable, they would still be subject to dismissal under the doctrine of primary jurisdiction, which provides that "where the law vests in an administrative agency the power to decide a controversy or treat an issue, the courts will refrain from entertaining the case until the agency has fulfilled its statutory obligation." *Marshall v. El Paso Natural Gas Co.*, 874 F.2d 1373, 1376-77 (10th Cir. 1989); *see also Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333 (D.N.M. 1995) (applying the primary jurisdiction doctrine to a citizen suit brought under the Clean Water Act and Resource Conservation and Recovery Act ("RCRA")); *Davies v. Nat'l Coop. Refinery Ass'n*, 963 F. Supp. 990 (D. Kan. 1997) (applying the doctrine of primary jurisdiction to a RCRA citizen suit). Applying the doctrine is particularly appropriate in this case, where "it is likely that the case will require resolution of issues which, under a regulatory scheme, have been placed in the hands of

has already "determined that the percentage of excess emission time per quarter and point source [from 1999 to March 2003] are well below the 1.5% limit." *See* Off-Site Inspection Report (cited and relied upon in Notice Letter at 12) (Exhibit 2).[25]

Because all of these claims are "based on alleged violations of a vague, non-objective standard," *Satterfield*, 888 F. Supp. at 1567, Claims 1-112, 419-525, and 699-801 should be dismissed.

B. Some Claims Should Be Dismissed Because They Allege A Single Event That Was Not Repeated.

Two claims are subject to dismissal because they allege isolated incidents of wrongdoing that were not repeated and are not the proper subject of a citizen suit. The CAA requires that a plaintiff's allegations of wholly past violations can be pursued only if there is "evidence that the alleged violation has been repeated." 42 U.S.C. § 7604 (a)(1). *See also City of Yakima v. Surface Transp. Bd.*, 46 F. Supp. 2d 1092, 1099 (E.D. Wash. 1999) (barring citizen suit because, *inter alia*, the "alleged violation was not ongoing"). Importantly, a plaintiff may not rely on different types of past violations to sustain a claim under the Clean Air Act's "repeated" violations exception to the general rule that violations must be ongoing. Rather, the Act requires that "the alleged violation which must be repeated is the *same* violation occurring more than once." *Satterfield*, 888 F. Supp. at 1565 (emphasis in the original). Allegations "that one type of violation and then another different type of violation" have occurred do not satisfy the statutory requirement. *Id.*

Several claims in the Amended Complaint fail to meet that burden. For instance, Plaintiffs allege, based on the failure to locate certain records during a single inspection on July 12, 2001, that "there was at least one violation of Specific Condition 18." Amended Complaint ¶ 16(p) (Claim 552). Because this alleged violation occurred more than three years ago, and there is no allegation that it was repeated, Plaintiffs cannot sustain a claim based on Specific Condition 18. Similarly, Plaintiffs allege that Continental Carbon was not in compliance with Specific Condition 12 of it Title V operating permit on March 6, 2003, and that it resolved the problem less than three weeks later. Amended Complaint ¶ 16(*l*) (Claim 418). Plaintiffs have made no allegation that Continental Carbon was similarly out of compliance for any other period of time, nor that the alleged violation was ongoing. As *Satterfield* noted, the CAA's "requirement that the violation be repeated indicates that the courts will not allow citizens to file suits based on violations that have been corrected." 888 F. Supp. at 1565. Accordingly, Claim 418 should be dismissed.

IV. Many of Plaintiffs' Claims Are Unsupported by Allegations of Material Facts.

Many categories of "claims" asserted in the Amended Complaint should be dismissed because Plaintiffs have failed to plead the material facts necessary to prove each required element of these claims. This "Court need not accept as true those allegations that are

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an administrative body." *Id*. at 1376. Because these subjective determinations have been committed to the discretion of DEQ, Claims 221-84 and 285-308 should be dismissed.

[25] Although Continental Carbon has attached certain documents outside the pleadings, this Motion should not be converted to one for summary judgment. All the documents are matters of public record, and the Court can take judicial notice of the facts contained in them. *See Davis v. United Student Aid Funds, Inc.*, 45 F. Supp. 2d 1104, 1106 (D. Kan. 1998) ("As for the records, reports, and other materials from administrative agencies, the court may take judicial notice of any facts provided in such materials without converting the Rule 12(b)(6) motion into a Rule 56 motion."). Moreover, Plaintiffs have implicitly incorporated these same documents into their Amended Complaint and relied upon them, as they form part of the basis of Plaintiffs' claims. *See, e.g.*, Amended Complaint at ¶ __ ("Based on the *records available to Plaintiffs and the results of inspections conducted by the Oklahoma DEQ* and the Plaintiffs, it appears" that Continental Carbon has committed the alleged CAA violations) (emphasis added).

conclusory in nature," which merely "state legal conclusions rather than factual assertions." *White v. Oklahoma ex rel. Tulsa County Office of District Attorney*, 250 F. Supp. 2d 1319, 1321 (N.D. Okla. 2002). Though a court must accept the facts pleaded in a complaint, it "will not supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on plaintiff's behalf." *Whitney v. State of New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir. 1997). Accordingly, the Court should dismiss any claim that fails to include factual allegations supporting predicate elements to show that there has been a violation. *Id.* at 1175.[26] Because Plaintiffs have failed to plead crucial elements necessary to support several categories of claims, those claims should be dismissed.

A. Many Of Plaintiffs' Claims Contain No Factual Allegations At All.

Plaintiffs assert several "claims" without *any* factual support at all. Throughout the Amended Complaint, Plaintiffs have sprinkled a series of alleged violations that they assert will eventually be identified through discovery, even though they can identify no current facts to support these allegations. For example, in Claim 106 Plaintiffs have "alleged continuing violations for such nuisance conditions . . . which Plaintiffs may prove occurred based on documents obtained through discovery." Amended Complaint ¶ 14(a); *see also id.* ¶¶ 14(b)-(c), 16(b)-(c), 17(a) (Claims 112, 220, 292-93, 308, 675, 698, 802, 803). All of these claims are patently deficient because they contain no supporting factual allegations. *Northington*, 973 F.2d at 1521. Moreover, even if Plaintiffs could somehow develop a new claim through the discovery process, that new claim would not satisfy the CAA's notice requirement. Simply put, a plaintiff may not "file a conclusory complaint not well-grounded in fact, conduct a fishing expedition for discovery, and only then amend its complaint in order finally to set forth well-pleaded allegations." *Oreman Sales, Inc. v. Matushita Elec. Corp. of America*, 768 F. Supp. 1174, 1180 (E.D. La. 1991). Accordingly, these "to be identified" claims should be dismissed.

B. Plaintiffs Have Failed To Plead Sufficient Facts to Support Their Nuisance-Related Claims.

Plaintiffs' nuisance-related claims should be dismissed because the Amended Complaint fails to allege facts regarding the key elements of such a claim. *See* Amended Complaint ¶¶ 14(a)-(b), 16(b), 17(a) (claims 1-112, 419-525, 699-801). These "claims" allege violations of the Oklahoma SIP and permit requirements that prohibit Continental Carbon from "willfully, negligently, or through failure to provide necessary equipment or facilities or to take necessary precautions, permitting the emission . . . of such quantities of air contamination as will cause a condition of air pollution." OKLA. ADMIN. CODE § 252:100-25-2(a). To properly allege a violation of this standard, Plaintiffs must show that (1) Continental Carbon was willful, negligent, or failed to provide necessary equipment or take necessary precautions in its operations and (2) Continental Carbon's malfeasance caused the emission of air contaminants "of such quantities" that it resulted in "a condition of air pollution." Plaintiffs have failed to plead facts to support either of these elements. By pressing these claims without any allegations of malfeasance, Plaintiffs would have this Court strike the negligence element from the regulation, thereby creating a strict liability standard.

Nor are there facts showing "emissions" of such quantities of air contaminants sufficient to cause "air pollution." To establish a condition of "air pollution" under Oklahoma

[26] *See also Cosco v. Uphoff*, 195 F.3d 1221, 1224 (10th Cir. 1999) (dismissing claim for denial of access to the courts where the plaintiffs failed to plead actual injury, having instead "merely set forth conclusory allegations of injury"); *Fugate v. Unified Gov't of Wyandotte County*, 161 F. Supp. 2d 1261, 1264 (D. Kan. 2001) ("Although plaintiff need not precisely state each element of his claims, he must plead minimal factual allegations on those material elements that must be proved").

law, a plaintiff must show that the emitted air contaminants (1) were present in the outdoor atmosphere, (2) in sufficient quantities, *and* (3) with such characteristics *and* duration, that those contaminants either: (a) tended to cause injury to human, plant, or animal life or to property, or (b) interfered with the comfortable enjoyment of life and property. *See* OKLA. STAT. tit. 27A, § 2-5-104(3).[27] Plaintiffs, who bear "the burden of proving all essential elements of the type of air-pollution violation charged" in these claims, have failed to do so. *Incinerators, Inc. v. Pollution Control Bd.*, 319 N.E.2d 794, 799 (Ill. 1974).

Likewise, Plaintiffs' claims that Continental Carbon violated Specific Condition No. 14 of its Title V operating permit fail to plead the necessary elements. *See* Amended Complaint ¶ 16(n) (Claims 419-525). These claims contain no factual allegations demonstrating that Continental Carbon failed to take "reasonable precautions to minimize emissions." Instead, Plaintiffs make a sweeping – and unsupported – allegation: that "every day of operation . . . appears to have resulted in violations by Continental Carbon." *Id.* This type of vague, conclusory allegation is insufficient for purposes of Rule 12(b)(6). *Northington*, 973 F.2d at 1521.

This Court cannot "not supply additional factual allegations to round out a plaintiff's complaint," *Whitney*, 113 F.3d at 1173-74. Accordingly, the claims included in paragraphs 14(a)-(b), 16(n), and 17(a) should be dismissed.

[27] "'Air pollution' means the presence in the outdoor atmosphere of one or more air contaminants in sufficient quantities and of such characteristics and duration as tend to be or may be injurious to human, plant or animal life or to property, or which interfere with the comfortable enjoyment of life and property, excluding, however, all conditions pertaining to employer-employee relations." OKLA. STAT. tit. 27A, § 2-5-104(3).

C. Plaintiffs Have Failed to Plead the Material Facts Necessary to Support Their Claims in Paragraph 14(c)(1).

Plaintiffs next assert that Continental Carbon's "visible emissions in excess of opacity standards violate OAC 252:100-25-3."[28] Complaint ¶ 14(c)(1). That provision regulates the allowable "opacity"[29] of certain visible emissions that continue for longer than a five-minute period. *See* OKLA. ADMIN. CODE § 252:100-25-3. To establish a violation of this provision, Plaintiffs will need to demonstrate the following elements: (1) that the alleged visible emission exhibited greater than 20% equivalent opacity, as measured by a Ringelmann Smoke Chart and (2) that the alleged visible emission of greater than 20% opacity continued for more than five minutes. *Id.* §§ 252:100-25-3(a); 252:100-1-3; 252:100-25-3(b)(1); *cf. TVA*, 175 F. Supp. 2d at 1078 (dismissing alleged violations based on opacity standards because, *inter alia*, "it is undisputed that every exceedance of the 20% standard does not violate the Tennessee SIP," since the SIP "allows at least one six-minute period of exceedance each hour"). Plaintiffs have failed to plead sufficient facts to support either of these elements. *See, e.g.*, Amended Complaint ¶ 14(c)(1), claim no. 113 (asserting that "[b]lack smoke" was being emitted "from top of stack"). Such vague factual assertions contain no information showing the percent opacity, the duration of the emission, or whether the opacity was measured using the required methods. Thus, these

[28] The visible emissions regulation, OKLA. ADMIN. CODE § 252:100-25-3, was amended on June 1, 1999, but the EPA-approved Oklahoma SIP continues to enforce the previous regulation. *See* Oklahoma SIP, *at* http://yosemite1.epa.gov/r6/Sip0304.nsf/home!OpenView&Start=1&Count=30&Expand=5#5. All references in this section are to the previous version that remains in effect under Oklahoma's federally-approved SIP. That regulation provides that "[n]o person shall cause, suffer, allow, or permit discharge of any fumes, aerosol, mist, gas, smoke, vapor, particulate matter, or any combination thereof of a shade or density greater than twenty (20) percent equivalent opacity." Oklahoma SIP, OKLA. ADMIN. CODE § 252:100-25-3.

[29] "Opacity" is "the degree to which emissions reduce transmission of light and obscure the view of an object in the background." OKLA. ADMIN. CODE § 252:100-1-3.

claims are patently deficient. Accordingly, the claims included in paragraph 14(c)(1) should be dismissed because Plaintiffs have failed to allege facts for the elements needed to sustain a claim for excess visible emissions. *See Whitney*, 113 F.3d at 1175.

D. Plaintiffs Have Not Alleged the Necessary Facts to Support The Claims Included in Paragraph 15.

Plaintiffs also challenge Continental Carbon's reporting of excess emissions that "were the result of upsets, emergencies or malfunctions." Amended Complaint ¶ 15 (claims 221-84).[30] Plaintiffs have pled no material facts to support their conclusory allegation that "[a]ll of the exceedances in the last 5 years . . . appear to be due to poor maintenance and other preventable circumstances." Amended Complaint ¶ 15. None of the sixty-three "claims" purportedly identified in this section contain any factual allegations that Continental Carbon poorly maintained its facility, or that its poor maintenance proximately caused the events identified in paragraph 15. Because these claims are "supported only by vague and conclusory allegations," *Northington*, 973 F.2d at 1521, they should be dismissed.

E. Plaintiffs Have Failed to Plead the Material Facts Necessary to Support The Claims in Paragraph 16(b)-(c).

Another category of claims warranting dismissal are those alleging that Continental Carbon breached its reporting obligations under the Oklahoma SIP and its Title V operating permit. *See* Amended Complaint ¶ 16(b)-(c) (Claims 285-308). Plaintiffs assert that Continental Carbon failed "to timely report deviations and failures to report in sufficient detail as required by the permit." *Id.* ¶ 16(b). Plaintiffs, however, fail to present any factual allegations to support these claims. To support their claim that Continental Carbon improperly reported excess emissions, Plaintiffs must allege facts showing that the emissions for which reporting allegedly did not occur were, in fact, "excess emissions." Continental Carbon cannot be held liable for failing to report excess emissions that were not above permitted levels. Yet, for each of the alleged reporting failures, Plaintiffs have not identified any emission standard that was violated. Thus, these claims should be dismissed.

F. Several Claims Regarding the Title V Operating Permit Should Be Dismissed For Failure to Plead Material Facts.

Many of Plaintiffs' claims for the operating permit are subject to dismissal because they omit one or more elements that are necessary to properly allege a CAA violation. First, paragraph 16(f) claims that Continental Carbon's alleged failure to report oxidizer damage to DEQ violated Standard Condition XIV of the FOP. *See* Amended Complaint ¶ 16(f) (Claim 311). That condition requires prompt reporting to DEQ of "[a]ny emergency and/or exceedance that poses an imminent and substantial danger to public health, safety, or the environment." FOP, Standard Condition XIV. Not surprisingly, this requirement is only triggered by an event posing "an imminent and substantial danger to public health, safety, or the environment." Plaintiffs' claim fails to allege any such "imminent and substantial danger." At best, this claim alleges a failure "to properly maintain the thermal oxidizers." That bare allegation, without more, cannot trigger the reporting requirement. Accordingly, Claim 311 should be dismissed.

Equally problematic is the claim that Continental Carbon is in violation of Specific Condition No. 17 of the FOP, which requires performance testing within 180 days of constructing thermal oximidizers. *See* Amended Complaint ¶ 16(o) (Claim 528). Plaintiffs

[30] "Excess emissions caused by malfunctions are exempt from compliance with air emission limitations established in permits, rules, and orders of the DEQ" if certain requirements are met, but they are not exempt if "caused entirely or partially by poor maintenance, careless operation or any other preventable upset condition or preventable equipment failure." OKLA. ADMIN. CODE §§ 252:100-9-3.3(a), -2.

claims contain no facts showing that Continental Carbon failed to conduct performance testing within 180 days of the construction of a unit.

Finally, dismissal is appropriate for the claim that Continental Carbon violated its Title V operating permit by failing to develop a quality improvement plan. *See* Amended Complaint ¶ 16(q) (Claim 553). This claim concerns Specific Condition 18(b) of the operating permit, which mandates that "a quality improvement plan (QIP) shall be developed and implemented for each thermal oxidizer if there are six excursions, within a six month period, from the established temperature range . . . or from the established opacity limitation of twenty (20) percent." The claim fails because it does not identify which six "excursions," nor the six-month period within which these events occurred, triggered the need to develop such a plan.

G. Claim 805 Should Be Dismissed.

In paragraph 17(b) of the Amended Complaint, Plaintiffs allege that Continental Carbon failed to obtain a PSD permit for two boilers that were improperly grandfathered from permit requirements. *See* Amended Complaint ¶ 17(b). This claim is plainly deficient, because Plaintiffs have failed to allege any facts to show that the alleged modifications resulted in a "significant increase" in emissions which would trigger the PSD permitting requirement.

The CAA's PSD program applies to new and "modified" major sources of emissions in air quality regions in attainment with the NAAQS. 42 U.S.C. §§ 7409(b)(1); 7479(2)(C). Despite the breadth of the statute, Congress "did not intend to make every activity at a source subject to new source requirements." 57 Fed. Reg. 32,314, 32,316 (July 21, 1996). Pursuant to EPA regulations, the PSD requirements are triggered only if there is a "major modification," which is defined as "any physical change in or change in the method of operation of a major stationary source *that would result in a significant net emissions increase*" for the source on a annual basis. 40 C.F.R. § 52.21(b)(2)(i) (emphasis added); OKLA. ADMIN. CODE 252:100-8-31. Thus, to trigger the PSD's requirements the physical or operational change must cause a "significant net emissions increase." To qualify as "significant," the emissions increase must exceed specified quantitative regulatory thresholds for specific pollutants. [Explain what thresholds were in effect in 1976 & 1980]

If a proposed construction project is a "major modification," the owner or operator must obtain a preconstruction permit. 42 U.S.C. § 7475(a)(1); 40 C.F.R. § 52.21(a)(2)(iii). Plaintiffs' allegations of a PSD permit violation with respect to the replacement of two boilers in 1976 and 1980 are deficient, because they include no facts to show that such replacement, if true, resulted in any net increase in emissions, much less a "significant increase." Further, these claims are for purely past violations that far pre-date the 1990 Amendments of the CAA, when Congress amended the citizen suit provision to allow for suits over "repeated" past violations. Since there is no allegation that Continental Carbon is currently failing to get PSD permits, this claims also fails.

V. **Many of Plaintiffs' Claims are Barred by the Statute of Limitations.**

Many of Plaintiffs' claims are barred by the general five-year statute of limitations applicable to federal actions for fines, penalties, or forfeitures. 28 U.S.C. § 2462. Because the CAA itself has no specific statute of limitations for enforcement actions, this general statute of limitations applies here. *See United States v. Walsh*, 8 F.3d 659, 662 (9th Cir. 1993) (applying § 2462 to EPA civil penalty claims under the CAA); *United States v. Telluride Co.*, 146 F.3d 1241, 1243-44 (10th Cir. 1998) (noting the federal government's concession that § 2462 applied to its Clean Water Act civil penalty claims); *United States v. Am. Elec. Power Serv.*

Co., 137 F. Supp. 2d 1060, 1067 (S.D. Ohio 2001) (applying § 2462 to bar civil enforcement penalty claims brought in CAA citizen suit).

Section 2462 provides that "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within *five years* from the date when the claim first accrued." 28 U.S.C. § 2462 (emphasis added). For purposes of the CAA, a claim accrues "on the date that a violation first occurs." *United States v. Westvaco Corp.*, 144 F. Supp. 2d 439, 442 (D. Md. 2001), *citing 3M Co. v. Browner*, 17 F.3d 1453, 1462 (D.C. Cir. 1994). Accordingly, this Court may only consider Plaintiffs' claims to the extent that they accrued less than five years before April 7, 2004, the date on which the Original Complaint was filed. Any alleged violations dating from before April 7, 1999, must be dismissed. For this reason, claims 82-105, 111, 117, 200-23, 275-84, 369-78, 501-24, 547-51[?], 560-674[?], 676-697, and 781-800 should be dismissed.[31]

VI. The Ponca Tribe Should Be Dismissed Because Tribes are not Authorized to Bring Citizen Suits Under the Clean Air Act.

Section 304(a) provides that any "person" may bring a citizen suit action under the Act. 42 U.S.C. § 7604(a) ("Except as provided in subsection (b) of this section, any *person* may commence a civil action on his own behalf…") (emphasis added). The term "person" is defined in the Act, but the definition does not include Indian Tribes.[32] *See* 42 U.S.C. § 7602(e). And the specification of several distinct actors that meet the definition of "person" compels the "inference that [actors] not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (applying the interpretative maxim *expressio unius est exclusio alterius*); *see also Youren v. Tintic Sch. Dist.*, 343 F.3d 1296, 1308 (10th Cir. 2003) ("the enumeration of certain things in a statute suggests that the legislature had no intent of including things not listed or embraced.") (citation omitted).

This conclusion is strengthened by the CAA's separate definition of "Indian Tribes" and section 301(d), which specifies the rights and authority of Tribes.[33] When "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted); *Colo. Gas Compression, Inc. v. Comm'r*, 366 F.3d 863, 867 (10th Cir. 2004) (same). The fact that Congress did not include "Indian tribes" in the definition of "person," combined with the other statutory references to "Indian Tribes" in the Act, is compelling evidence that Congress did not authorize Tribes, such as Plaintiff Ponca Tribe, to bring citizen suits under the Act. *See Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) ("private rights of action to enforce

[31] Plaintiffs effectively concede that many of its claims are barred by the statute of limitations. *See* Amended Complaint ¶ 14(d). They list in paragraph 14(d) three such alleged violations but assert that "claims for these violations are not made here" because they occurred more than five years ago. Whether or not, as plaintiffs claim, such allegations support injunctive relief, they should be stricken as improper. *See* Transcript of Motion to Reconsider, Nov. 4, 2004, at 27:12-16; *see also, e.g., Kashins v. Keystone Lamp Mfg. Corp.*, 135 F. Supp. 681, 681 (S.D.N.Y. 1955) (holding that Rule 8 "should be observed and the unnecessary allegations should be eliminated from the amended complaint").

[32] The CAA defines "person" as "an individual, corporation, partnership, association, State, municipality, political subdivision of a state, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof." 42 U.S.C. § 7602(e). None of those entities are themselves defined to include Indian tribes. *See id.* § 7602(d), (f) (further defining the terms "State" and "municipality").

[33] *See* 42 U.S.C. § 7602(r) (defining "Indian tribe" to mean "any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village, which is Federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians"); 7601(d) (requiring EPA to promulgate regulations

federal law must be created by Congress"); *Boswell v. Skywest Airlines, Inc.*, 361 F.3d 1263, 1267 (10th Cir. 2004) (same); *cf. Osage Tribal Council v. U.S. Dept. of Labor*, 187 F.3d 1174, 1181 (10th Cir. 1999) (concluding that the explicit inclusion of "Indian tribe" in the Safe Drinking Water Act's definition of "person" demonstrated Congress' intent to waive tribal immunity).[34] The Tribes' claims must be dismissed.

Osage Tribal Council also suggests why Congress chose to define "persons" to not include Indian tribes. Defining "persons" to include Indian tribes would have exposed tribes to suits under the CAA, thereby infringing upon their sovereign immunity. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (Tribes entitled to sovereign immunity unless explicit waiver by Congress). Just as "persons" are entitled to bring citizen suits under the CAA, "persons" are subject to such suits. *See* 42 U.S.C. § 7604(a)(1) (citizen suits may be brought "against any person"). Thus, by excluding Indian Tribes from the definition of "person," Congress ensured that there would be no waiver of tribal immunity.

Indeed, it was for this reason that EPA, in promulgating a rule to implement section 301(d) of the CAA, and at the urging of several tribes, concluded that Congress did not clearly intend to make tribes subject to citizen suits. *See* 63 Fed. Reg. 7254, 7260-61 (Feb. 12, 1998). EPA noted that "because [the citizen suit provisions] (and the applicable definitions…) do not expressly refer to tribes, EPA has been concerned that the action it proposed to take may have subjected tribes to citizen suit liability." *Id.* at 7262.

In sum, the Ponca Tribe does not fall within the category of "persons" authorized by Congress to bring a citizen suit under the CAA. Accordingly, the Tribe's claims must be dismissed.

CONCLUSION

For the foregoing reasons, alleged violations 1-8 and 10 and the Ponca Tribe's claims should be dismissed.

Dated: August 17, 2004

RYAN, WHALEY, COLDIRON & SHANDY, PC

By:_____
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specifying tribal authority under the CAA).

[34] Applying *Osage Tribal Council*'s reasoning to the CAA, the omission of "Indian tribe" from the CAA's definition of "person" dispositively demonstrates that Tribes may not bring citizen suits. Indeed, the inclusion of Indian tribes in the definition of "person" under the SDWA and several other federal environmental statutes demonstrates that when Congress wanted to allow suits by or against tribes, it knew how to do so. *See* 42 U.S.C. §§ 6903(13), 6903(15), 6972(a) (defining "person" under the Resource Conservation and Recovery Act ("RCRA") to expressly include Indian Tribe and authorizing citizen suits by "persons"); 33 U.S.C. §§ 1362(4)-(5), 1365(a) (same under the Clean Water Act). *See Blue Legs v. Bureau of Indian Affairs*, 867 F.2d 1094, 1097 (8th Cir. 1989) (Indian Tribes included in definition of "person" under RCRA).

Case No. 03-6243

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PAPER, ALLIED-INDUSTRIAL, CHEMICAL AND ENERGY WORKERS INTERNATIONAL UNION ("PACE") AND THE PONCA TRIBE ("TRIBE"),

Plaintiffs/Appellees,
v.

CONTINENTAL CARBON COMPANY,

Defendant/Appellant

On Appeal from a Decision
of the United States District Court
for the Western District of Oklahoma,
Cause No. CIV-02-1677R
Honorable David R. Russell, Judge Presiding

Principal Brief of Appellees

Mr. David Frederick
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Mr. Richard W. Lowerre
Lowerre & Kelly

Mr. Rick W. Bisher
Ryan, Bisher and Ryan

Corporate Disclosure Statement

The Ponca Tribe is a sovereign nation. Paper, Allied-Industrial, Chemical and Energy Workers International Union (i.e., P.A.C.E.) is a labor union registered with the U.S. Department of Labor and the National Labor Relations Board; it is not a corporation.

There are several threshold non-procedural issues. They are:

- can diligent prosecution of a penalty action be conclusively found, when the state neither sought nor assessed a monetary penalty and when the sanction exacted by the state as to Claim One allowed the spoliation of Claim One evidence and directed Continental Carbon to undertake a self-serving project, when the enforcement action initiated by the state as to Claim Two was explicitly abandoned, and when no enforcement action was ever initiated by the state as to Claim Three; and
- can a state law be comparable to § 1319(g), if the state law:
    - does not afford the public notice of the proposed administrative penalty and of significant stages of the enforcement action; and
    - does not afford the public a meaningful opportunity to participate in the development or issuance of a proposed penalty and
    - does not provide appellate rights for commenters related to the penalty decision.

If the foregoing threshold hurdles were cleared, the remaining issue is whether there was any error in the District Court's decision to allow Plaintiffs to pursue injunctive and declaratory relief, given that the plain language of the § 1319(g)(6)(A) "bar" applies only to civil penalty actions?

3. Statement of the Case

Continental Carbon's statement of the nature of the case, the course of proceedings, and disposition below is satisfactory, except in three respects.

First, the statement obscures the fact that the order being reviewed by this Court is an order on a motion to dismiss. Continental Carbon and its *amici* ply the Court with purported facts, but there are no facts in the case, yet. No answer has been filed; no initial disclosures have been made; no Rule 26(f) conference has occurred; and no pretrial scheduling order has been entered. Continental Carbon moved to dismiss under Rule 12(b)(1) and Rule 12(b)(6). Continental Carbon did not ask that its motion be considered as one for summary judgment, and such consideration at this juncture of the case would have been far premature, in any case.. The District Court did not notice an intent to convert the motion to one under Rule 56. Plaintiffs' Amended Complaint (Aplt. App. 106-116) sets out the presumptive facts.

Second, the statement's characterization of Plaintiffs' claims for declaratory and injunctive relief as "adjunct" is simply prejudicial linguistics. It is not anything supported by the District Court's opinion or by the Plaintiffs' pleadings. Both Plaintiffs' initial and amended complaints explicitly sought declaratory and injunctive relief in their "statements of the case" and in their "prayers." Aplt. App.

1, 7, 106 and 115.

Third, Continental Carbon's statement of the case does not apprize this Court that the District Court initially denied Appellant's motion to dismiss. The District Court initially held: "because the state law(s) under which the Oklahoma Department of Environmental Quality ("ODEQ") is prosecuting an action against Continental Carbon is not comparable to 33 U.S.C. § 1319(g), the bar to this citizen's suit under Section 1319(g)(6)(A)(ii) does not apply ...." Aplt. App. 123. The District Court subsequently abated its order, pending consideration of more briefing, and entered the order from which this interlocutory appeal has been taken. Aplt. App. 131.

4. Statement of Facts

Continental Carbon's statement of facts draws – often with a fair amount of advocate's license – on documents that have no relevance to review of an order on a motion to dismiss. Continental Carbon's statement is particularly misleading in the following respects.[1]

1 Of less moment is Continental Carbon's characterization of the labor dispute as "hotly contested." This is a subjective characterization quoted from Continental Carbon's own pleadings, below, and does not find support in any evidence in the case or in the opinion, below. Aplt. App. 15. Continental Carbon and, more blatantly, its non-profit *amicus*, EFO, hope to prejudice this Court to believe that environmental values are not actually at issue in this case, that this case is just an arm of the PACE-Continental Carbon labor dispute. This view completely ignores the independent concerns of Plaintiff Ponca Tribe, which is not involved in the labor dispute. Members of the tribe hunt, fish, swim, and have water wells in the immediate area of the contamination. Aplt. App. 109-111.

(1) It is not true that the Ponca Tribe is a less active plaintiff than is PACE. Very little has yet happened in the District Court, and Plaintiffs Ponca Tribe and PACE have both participated in anything that has happened. Both Plaintiffs sponsored the "notice letter" that initially raised the claims now in litigation. Aple. Add. 26. Appellant chose to include as exhibits to its motion to dismiss briefing, below, more extra-litigation agency documents mentioning PACE than mentioning the Ponca Tribe, but that does not prove anything.

(2) There is no evidence Continental Carbon's permit amendment application was compelled by ODEQ. The addendum to the ODEQ Consent Order – the only scent of "evidence" for such a fact -- simply states that the prosecution of an enforcement action on the misrepresentation issue was abandoned, because "the DEQ decided that issues regarding depth to ground water and to the accuracy of the information provided in previous permit actions are more properly addressed in the permitting process." Aplt. App. 58 and 168. From ODEQ's *amicus* brief (pp. 3 and 4), it is evident Continental Carbon actually filed a permit amendment application because its existing permit was about to expire.

(3) The failure to monitor and report waste water discharges are permit violations and violations of the Clean Water Act separate and apart from a

violation for failure to have obtained a permit that authorized discharges. See, 252 OAC § 605-1-12(a)(spill and discharge reporting required) and see 252 OAC § 605-1-5(b)(federal regulations incorporated to state law) and 40 CFR§ 122.41(l)(6)(permit non-compliance reporting is a permit condition).

ODEQ's *amicus* brief (p. 4) recounts as fact its water-sampling efforts preceding the February 12, 2002, notice of violation. What this recitation obscures is that the lagoon (i.e., pond #1) nearest the marsh area where ODEQ found contamination, which is the pond that appeared to ODEQ to have leaked, was not sampled; other lagoons (i.e., the single pond #3-4 and pond 5) were sampled. Aplt. App. 48, paras. 4 and 5. ODEQ's brief (pp. 5 and 6), next, recounts that the consent order directed Continental Carbon to conduct a permeability study of certain lagoons, which lagoons are unspecified in the brief, and that, following a renewed directive in the addendum to the consent order, the permeability study was completed and showed no leakage problem at the lagoons studied. What this recitation obscures is that the permeability study was conducted on ponds #5 and #6, not on pond #1, the pond that most obviously appeared to be leaking. Aplt. App. 50 and 57-58. (The physical layout of the ponds is reflected in a schematic at Aplt. App. 44 and in an aerial photograph from a filing in this Court at Appellees'. Addendum, Tab 27).

Neither Continental Carbon nor either *amicus* describes clearly Plaintiffs' claims. There are three:

a) Claim 1: Discharges of wastewaters from Continental Carbon's lagoons (i.e., from waste water ponds ## 1, 3-4, 5 and 6) occur without authorization,

b) Claim 2: Continental Carbon knowingly misrepresented facts and/or failed to correct them in the 1998 permit application filed with ODEQ, and

c) Claim 3: Continental Carbon failed to report unauthorized discharges from its lagoons, including, but not limited to the discharges identified in Claim 1.

Aplt. App. 113-114. The facts of these claims had been described in some detail in the "notice letter" Plaintiffs served on Continental Carbon, ODEQ and EPA. 33 U.S.C. 1365(b)(1). The notice letter was incorporated to Plaintiffs' complaint, and is reproduced at Appelees' Addendum, Tab 26.

5. Summary of the Argument

The District Court apparently relied on facts, beyond those set forth in the Plaintiffs' Complaint, in entering its order on Continental Carbon's motion to dismiss. Inasmuch as the District Court did not convert Continental Carbon's motion to one for summary judgment, this was error.

For state administrative action to bar any citizen suit remedies, the action must be a diligently prosecuted one for penalties, it must be for the same violations

the citizen is pursuing, and it must be prosecuted under state law comparable to the Clean Water Act's administrative penalty provision. In the case at hand, ODEQ had not commenced an administrative penalty action, inasmuch as it was not seeking monetary penalties, did not assess monetary penalties and entered a consent order that did not find liability on Continental Carbon's part with which to support penalties for past violations. ODEQ was not diligently prosecuting an action for the claims asserted by Plaintiffs, inasmuch as ODEQ was not prosecuting Plaintiffs' 2nd and 3rd claims at all, and inasmuch as its prosecution of Plaintiffs' first claim resulted in no finding of "discharge" and resulted in an order allowing Continental Carbon to obscure evidence of the discharge. Furthermore, the law under which ODEQ was prosecuting its action was not comparable to 33 USC § 1319(g), inasmuch as Oklahoma law does not provide for public notice of or comment on the NOVs, and it provides no clear appellate right for members of the public (as opposed to for the violator) from the ODEQ's penalty decision.

For all these reasons, the District Court's order, which was predicated on the court's having resolved the § 1319(g)(6)(A)(ii) threshold issues against Plaintiffs, was in error.

The District Court, given that it reached the question at all, reached the correct decision on the question of what remedies could be barred by § 1319(g)(6)(A)(ii). The plain language of the statute provides that only actions for penalty relief – not actions for injunctive or declaratory relief – may be barred.

6. The argument

a. Failure to address a threshold issue and the "evidence" in the record.

There is an important threshold issue, a mixed issue of fact and law, the District Court had to resolve, prior to addressing whether any form of relief could be barred under § 1319(g)(6)(A)(ii): had a penalty action been commenced and diligently prosecuted? Since the order that brings the parties to this Court arose in the context of a motion to dismiss, there were no facts, beyond those in Plaintiffs' complaint, to which the District Court could turn.

The District Court could have converted the motion into one for summary judgment, but the Court did not do this, in any explicit way., It could not lawfully have done this without notice to the parties.

The District Court initially (May 14th order) and properly denied Continental Carbon's motion to dismiss. The District Court found that, as a matter of law, the state laws under which ODEQ was allegedly prosecuting Continental Carbon were not comparable to § 1319(g). The District Court explicitly did not reach any of Plaintiff's fact-based arguments. Aplt. App. 123.

In the order (June 23rd order) before this Court, however, the District Court

reached a different conclusion on the "comparability" question. Aplt. App. 229. The District Court addressed the mixed fact and law questions of whether an administrative penalty action had been commenced and diligently prosecuted as to each of Plaintiffs' claims.

The District Court apparently relied on various attachments to Continental Carbon's motion to dismiss as sources for facts. See, for example, footnote 2 on page 12 of the Order. Aplt. App. 11. Plaintiffs dispute, *infra*, that the facts conveyed in those attachments, even it they were properly before the court, provide a complete or true picture of the facts or support the findings the court apparently made. Initially, though, the error is that the District Court did not convert the motion to dismiss to a motion for summary judgment, yet the court clearly relied on non-pleading facts.[2]

The Tenth Circuit has long supported the proposition that notice to the parties is required, prior to the court's treating a motion to dismiss as a motion for summary judgment. In cases where the district court intends to convert the motion, the court must "give the parties notice of the changed status of the motion and thereby provide the parties to the proceeding the opportunity to present to the court all material made pertinent to such motion by Rule 56." *Whitesel v. Sengenberger*, 222 F. 3d 861, 865 (10th Cir. 2000) (citing *Brown v. Zavaras*, 63 F.3d 967, 969 (10th Cir. 1995)). *State of Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 585 F.2d 454, 457 (10th Cir. 1978), *cert.* den., 454 U.S. 895 (1981) ("[T]o treat a motion to dismiss as a motion for summary judgment without permitting the adverse party an opportunity to present pertinent material is error," citing *Adams v. Campbell*

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2 The District Court opinion says Plaintiffs did not dispute that ODEQ had commenced and was diligently prosecuting an "administrative action" under state law. Aplt. App. 219. This statement is not a fair summary of Plaintiffs' position as to an administrative penalty action, which is the action of relevance.

In briefing, below, Plaintiffs argued the case was not sufficiently factually developed on the "diligent prosecution" issue to allow the District Court to grant any portion of Continental Carbon's motion to dismiss. Plaintiffs wrote:

> Also, solid evaluation of Continental Carbon's arguments under § 1319(g)(6)(A) requires discovery. (The Court may readily see, for example, that whether Oklahoma's prosecution of Continental Carbon's discharges has been "diligent" is a fact-laden inquiry.)

Plaintiffs' response, Aplt. App. 86. Similarly, on the "penalty action" issue, they wrote:

> It is not at all clear, under Oklahoma law, that Continental Carbon has been assessed a penalty, at all, and, under the *Unocal* line of cases, penalty assessment is an absolute requisite to a citizen suit bar under § 1319(g)(6)(A)(ii or iii).

Id., at Aplt. App. 100 (relevant footnote omitted).

In their sur-response, Plaintiffs re-iterated their view that ODEQ had dealt with Continental Carbon's violations in a timid way, had completely dropped one issue from any pretense of enforcement, had sought and collected no penalty and had authorized the spoliation of evidence of discharge. " A meaningful role for the interested public and diligent ODEQ prosecution are hard to find in this view of the world." Aplt. App. 213-214. Slightly later (Aplt. App. 215), the Plaintiffs argued:

> The "diligent" prosecution issue is incompletely joined and turns on facts not yet developed. The same is true of the issue of whether there has been or has not been a "penalty" sought and/or assessed by Oklahoma.

County School District, 483 F.2d 1351, 1353 (10th Cir. 1973)). See also, *Nichols v. United States*, 796 F.2d 361, 364 (10th Cir. 1986) (quoting *State of Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 585 F.2d 454 (10th Cir. 1978)). Wright, Miller and Kane are in accord: "When a court converts a 12(c) motion, however, it must give the parties notice an opportunity to be heard on the summary judgment question; if a motion is granted without sufficient attention to this, the resulting judgment will be reversed on appeal." Wright, Miller and Kane, *Federal Practice and Procedure*, § 1371, p. 544 (West Pub., 3rd Ed. 1998).

Plaintiffs objected to the documents Continental Carbon offered in support of its motion to dismiss. In Plaintiffs' response to Continental Carbon's motion to dismiss, Plaintiffs argued that the attachments to Continental Carbon's motion were not certified copies (thus, Plaintiffs could not fully confirm their authenticity), and the attachments were offered with no predicate, so one did not know to what extent the conditions of Rule 8, Fed. R. Evid., or some other rule of "hearsay" exception were met. Additionally, Plaintiffs urged that the attachments should not be judicially noticed, because many of the facts stated within those documents were reasonably subject to a dispute, and, in fact, a number were disputed by Plaintiffs. R. 201, Fed. R. Evid. *See*, Response Brief, Aplt. App. 87, footnote 3. When Continental Carbon, in its reply brief, attempted to come forward with certified copies of its attachments, Plaintiffs again contested the propriety of extra-pleading facts. Aplt. App. 213.

Continental Carbon's motion to dismiss challenged Plaintiffs' standing credentials, also. Thus, Plaintiffs did file affidavits in response to that challenge. Aplt. App. 102-105. Tthose affidavits, however, did not join the factual debate on the § 1319(g)(6)(A)(ii) challenge, and, properly, they should not have. Continental Carbon had explicitly advised the District Court its § 1319(g)(6)(A)(ii) challenge lay under Rule 12(b)(6), and Continental Carbon had explicitly advised the District Court conversion of the motion to dismiss on that ground into a summary judgment motion was unnecessary. Aplt. App. 17, note 1.

Continental Carbon had characterized its standing challenge as one to the court's jurisdiction. Aplt. App. 32, first full para.. Continental Carbon had pled Rule 12(b)(1)(lack of jurisdiction) as one of its grounds for dismissal. Aplt. App. 14. Plaintiffs, therefore, needed to offer a factual rebuttal to the standing challenge, but doing so did not convert even the standing challenge into a summary judgment proceeding, and it certainly did not effect such a conversion as to the §1319(g)(6)(A)(ii) challenge. *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995).

b. ODEQ's prosecution was neither of a penalty action nor was it diligent.

The attachments to Continental Carbon's motion to dismiss and to its reply to Plaintiffs' response to that motion are not properly before a court addressing, as the District Court did, a motion to dismiss. If consideration of those attachments were allowed, however, the following is what this Court should understand about the two ODEQ notices of violation and the ODEQ consent order and its addendum.

Notice of Violation ("NOV") of February 2002[3]: Plaintiffs do not agree that the NOV accurately reflects the underlying inspections. That dispute aside, it is clear the NOV assesses no penalties. The NOV advised Continental Carbon that it violated:

1) the prohibition on discharging without authorization,

2) the requirement that it post a sign to help restrict public access to the area, and

3) the requirements for maintenance of the dikes for the wastewater lagoons.

Only the first of these violations was covered by Plaintiffs' claims. Although the NOV noted that the ODEQ could assess fines up to $10,000 per day per violation, no penalty was sought.

Consent Order of May 2002[4]: This is another document that makes factual representations with which Plaintiffs disagree. However, the document, if it may be considered, shows that no penalties were assessed for any of the violations alleged in Plaintiffs' complaint. The Order identifies the same violations as had the NOV. It, then, required Continental Carbon to take several steps: (1) submit an approvable engineering report with a water balance for the wastewater lagoons, (2) submit an approvable permeability study on Ponds 5 and 6, and (3) submit an approvable Supplemental Environmental Project (SEP) for ODEQ's review and approval. Thus, Continental Carbon was ordered to take steps to correct the violations; it was not ordered to pay penalties for its violations.

June 2002 letter from ODEQ to Continental Carbon[5]: This is the second NOV. It advises Continental Carbon that the misrepresentation alleged in Plaintiffs' second claim has been discovered. It seeks no penalties.

Consent order addendum.[6] Instead of seeking penalties or any other enforcement action for the misrepresentation, ODEQ directed Continental Carbon to correct the erroneous data -- but only for its 2003 application for renewal of the permit. No enforcement was taken for the past violation. No penalty was assessed

3 See Aplt. App. pp. 39-41.

4 See Aplt. App. pp. 47-54.

5 See Aplt. App. pp. 43-45.

6 Aplt. App. 56-90.

for it. ODEQ simply ignored the violation, deciding only to not allow it to continue.[7]

The District Court's order. After initially denying Continental Carbon's motion to dismiss, the District Court reconsidered, granted the motion in part (but as to all three claims) and certified the order that did so for interlocutory appeal. The partial grant was in error.

The District Court's order states at one point, apparently in reference to all Plaintiffs' claims, that Plaintiffs do not contest the fact of diligent prosecution.[8] As already noted, that is not an accurate representation of Plaintiffs' position, below. Please see note 2, *supra*. In another part of the order, the District Court seems to recognize that Plaintiffs do contest whether the enforcement action qualified under as diligent prosecution of claims two and three.[9] To be clear: Plaintiffs argue ODEQ neither sought nor assessed penalties for any violation, so there was no diligent prosecution of a penalty action as to any claim.

Regarding Claim 2, the District Court's order states, " ODEQ has investigated the depth-of-groundwater issue and has agreed to resolve this issue in the upcoming permit renewal process."[10] Thus, the order does not claim that there were any penalties sought or assessed or that any other type of enforcement action was taken for the associated violation.

Regarding Claim 3, the order states, "this claim is related to and covered by the ODEQ enforcement action regarding the first claim."[11] The order then cites a requirement for reporting if the discharge is authorized by a permit. Here the discharge was not authorized.

Plaintiffs' third claim seeks penalties and other relief for Continental Carbon's repeated failure to comply with reporting requirements in its permit and in state and federal rules for unauthorized discharges. The claim involves the unauthorized discharges identified in the first claim but, as is clear from the notice letter, it also includes other unauthorized discharges, such as when the dikes on the lagoons are breached or cut and the waste water runs out of the lagoons. In any event, as already noted at page 5, *supra*, failure to report unauthorized discharges is a violation, separate and apart from the fact of unauthorized discharges, itself.

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7 That approach creates no incentive for anyone to comply with federal or state laws. It does not recover the economic benefit of the violation. It does not even address the ground water contamination that likely resulted because the ground water is not protected by the requisite layer of soil or clay.

8 See Order at footnote 2, in Appendix 11 to Appellant's opening brief.

9 See Aplt. App. p. 229, footnote 2.

10 See Aplt. App. p. 229, footnote 2.

11 See Aplt. App. p. 229, footnote 2.

The District Court must necessarily have found that ODEQ had commenced and was diligently prosecuting an administrative penalty proceeding against Continental Carbon. Otherwise, none of the prerequisites for invoking the bar to penalties in §1319(g)(6)(A)(ii) would have been met. This finding was an error, especially, given the near evidence-free state of the record before the District Court.

Sec. 1319(g)(6)(A) undeniably requires that a state administrative action must be an action comparable to the action described by subsec. 1319(g). The action described in subsec. 1319(g) is a penalty action. § 1319(g)(1). The state regulator must at least be seeking a penalty. That did not happen, in the Continental Carbon case, as to any of Plaintiffs' claims.[12]

There is at least one appellate court that has justified disregarding the plain text of § 1319(g), based on apprehensions – factually, unfounded apprehensions, Plaintiffs would say – that not to do so would allow citizen suits to escape their "interstitial" place in the grand scheme of Clean Water Act enforcement, thus, violating congressional intent. *Scituate, infra.* To do such a thing, however, undervalues the important role citizen suits play in enforcement:

> "[C]itizen suits are an important supplement to government enforcement of the Clean Water Act, given that the government has only limited resources to bring its own enforcement actions." Indeed, "[b]oth the Congress and the courts of the United States have regarded citizen suits under the Act to be an integral part of its overall enforcement scheme." *Atlantic States Legal Foundation v. Tyson Foods*, 897 F.2d 1128, 1136 (11th Cir. 1990); "[C]itizens should be unconstrained to bring [Clean Water Act] actions" and "citizen suits to be handled liberally, because they perform an important public function. *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1525 (9th Cir. 1987).

Additionally, to do such a think also pays insufficient heed to the obvious truth Justice Scalia has colorfully extolled, "The law is what the law says, and we should content ourselves with reading it rather than psychoanalyzing those who enacted it." *Bank One Chicago v. Midwest Bank & Trust Co.*, 516 U.S. 264, 116 S.Ct. 637, 645, 133 L. Ed. 2d 635 (1996) (Scalia, J., concurring).

Sentiments like the preceding have led numerous courts to reject the thinking of *Scituate* that a state non-penalty administrative enforcement action (i.e., a "compliance action") may trigger the § 1319(g)(6)(A) bars.[13] The analysis of the Ninth Circuit in *Pendleton Woolen Mills* is representative:

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12 The issue of whether an action that is not a penalty serves as a penalty under § 1319(g) has been addressed by a number of courts. A $700,000 payment by the defendant involved in one citizen suit was ruled not to be penalty, and thus no bar was allowed to a court's assessing penalties for the violation. *Citizens for a Better Environment, et al., v. Union Oil Co.*, 83 F.3d 1111 (9th Cir. 1996), *cert.* den. 519 U.S. 1101.

13 Note that *Arkansas Wildlife Federation v. ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994), *cert.* den. 513 U.S. 1147 (1997), a case often cited in tandem with *Scituate*, is actually a case in which penalties were assessed by the regulator, though plaintiffs, there, protested the adequacy of the penalties.

> [G]eneral arguments about congressional intent and the EPA's need for discretion cannot persuade us to abandon the clear language that Congress used when it drafted the statute. 'The most persuasive evidence of . . . [congressional] intent is the words selected by Congress,' *Turner v. McMahon,* 830 F.2d 1003, 1007 (9th Cir. 1987) (citations and internal quotation marks omitted), *cert. denied,* 488 U.S. 818, 102 L. Ed. 2d 37, 109 S.Ct. 59 (1988), not a court's sense of the general role of citizen suits in the enforcement of the Act. *Gwaltney* itself stresses that 'the language of the statute itself' should be the first place we turn to in our analysis. 484 U.S. at 56.
>
> Our reading of the statute's clear language is underscored by evidence that if Congress had intended to preclude citizen suits in the face of an administrative compliance order, it could easily have done so, as it has done in certain other environmental statutes. *See, e.g.,* Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972(b)(2)(B)(iv) (barring citizen suit when the EPA has issued an abatement order); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9659(d)(2) (barring citizen suit when the EPA is "diligently prosecuting an action . . . to require compliance"). Congress did not draft the Act to bar citizen suits when EPA is pursuing an administrative compliance order, and we may not disregard the clear language of the statute.

Washington Public Interest Research Group v. Pendleton Woolen Mills, 11 F.3d 883, 886-887 (9th Cir. 1993). Other thoughtful cases to similar effect are: *Citizens for a Better Environment v. Union Oil Co.*, 83 F.3d 1111 (1996), *cert.* den., 519 U.S. 1101 (1997) and *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F.Supp. 1333 (D.N.M. 1995), at 1345-1347.

Continental Carbon presumably contends the Supplemental Environmental Project ("SEP") it undertook was a burden to it and, thus, was a penalty. The SEP and the extent of Continental Carbon's responsibilities that existed independently of the ODEQ enforcement effort is a factual and legal quagmire. That said, as Plaintiffs are able to make out the likely facts, the SEP that Continental Carbon undertook cannot qualify as a penalty that bars further pursuit of penalties for the three claims[14].

The SEP provided that Continental Carbon would take two actions: 1) clean up a dumpsite on adjacent property, and 2) build a fence on its property to impede further dumping. Those may be appropriate steps for violations under the federal and state solid waste laws, but not under water pollution laws.[15] The SEP did not even relate to the discharge and groundwater contamination violations under federal and state water pollution programs.

Thus, this SEP could never substitute for a Clean Water Act penalty for several reasons. First, there is no "nexus" to Clean Water Act violations, as is

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14 The role and limitations for SEPs as valid substitutes for civil or administrative penalties are explained in detail in EPA's SEP policy guidelines, found in Appellees' Addendum, Tab 24.

15 Plaintiffs, in their notice letter, had notified ODEQ that the dump violated solid waste laws. Aple. Add. Tab 26, p. 9. The fence issue also related to the isolation of the dump area or Continental Carbon's failure to limit access to its property. See Aplt. App., at 39-41.

required by EPA for a Clean Water Act SEP.[16] EPA views the nexus issue as jurisdictional and requires that the SEP be related to the violation in one of three ways:

1. by reducing the likelihood of similar violations,

2. by reducing the adverse impacts to public health on the environment to which the violation contributed, or

3. by reducing the overall risk to public health or the environment potentially affected by the violation.

Thus, the validity of a SEP as a qualifying penalty under federal law is a factual issue. There is no evidence that the SEP in question qualifies. Moreover, to the extent that Continental Carbon's attachments to its motion may be considered, they tend to show that the SEP does not qualify. There was no explanation, at the time of the SEP or thereafter, by ODEQ or Continental Carbon of the nexus. Clearly, the SEP has nothing to do with any of the three claims of Plaintiffs or with the two NOVs issued by ODEQ.

Moreover, even if there were a nexus, the ODEQ SEP is not a valid element of a citizen suit bar, because there were no penalties sought or assessed. A SEP cannot totally replace all civil penalties.[17] At a minimum, some penalty must be recovered to eliminate the economic benefits gained through the violation. In fact, EPA's penalty policy states that there cannot be diligent prosecution for administrative penalties, unless the enforcement action assesses penalties to recover the economic benefits of the violation. *EPA, "Supplemental Guidance on Section 309(g)(6)(A) of the Clean Water Act,"* Office of Enforcement (March 5, 1993), at n. 4, Aple. Add. 23.

Further, federal law[18] and EPA's penalty policy require an assessment of penalties for economic benefit and for other factors. *Id.* Oklahoma law also requires assessment of penalties for economic benefit. 252 O.A.C. § 4-9-4 and 27A O.S. § 2-3-502(I0)(2). ODEQ agreed to use EPA's penalty policy when Oklahoma was delegated the federal waste water permitting program.[19] In fact, in its agreement controlling the delegation, ODEQ committed to 1) pursue timely and appropriate enforcement, 2) seek civil penalties, and 3) "calculate, document and collect penalties that remove any economic benefit derived by a facility for violations of the law, regulations or permit, plus some appropriate amount for gravity and recalcitrance." *Memorandum of Agreement Between [ODEQ]and*

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16 *Id.* page 5.

17 *Id.* pages 11-12. EPA affirmed that position in April 2000, stating that SEPs do not replace penalties, and dollar-for-dollar credit in most cases is not consistent with the SEP policy. Generally, the value of a SEP is at most 80% of its cost. Aple. Add. 21.

18 33 U.S.C. § 1319(g)

19 Memorandum of Agreement between [ODEQ and EPA]...(Aug. 4, 1997) at 38. Aple. Add. 20

[EPA]. . . (Aug. 4, 1997), at 38, Aple. Add. 20. ODEQ never even calculated a penalty, much less determined that penalty amount was needed to recover the economic benefit gained by Continental Carbon.

Finally, the SEP fails a fourth EPA test, one that limits the role of SEPs. A SEP may not be a project that the violator is legally required to perform or is likely to be required to perform, anyway. EPA, "EPA Supplemental Environmental Projects Policy" (May 1998), at 4 ("Key Characteristics of a SEP"), Aple. Add. 24 Under ODEQ's SEP, Continental Carbon avoids further penalties and costs associated with an enforcement action under thea separate federal and state solid waste laws.[20]

The proverbial "bottom line" is that §1319(g)(6)(A) is not ambiguous as to what type of action – a penalty action – an agency must be diligently undertaking, if bar to penalties in court is to be triggered. Congress spoke clearly, so there is no justification for psychoanalyzing the collective intent of Congressmen and women. The bar would apply to EPA's enforcement actions, as well as to citizens' suits.

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20 Plaintiffs have lamented before in this brief the lack of factual development. Note, however, Plaintiffs alleged in their notice letter and they believe the fact to be that Continental Carbon had earlier been directed by ODEQ to clean up the dump pursuant to a solid waste enforcement action. At least part of the dump was apparently on land Continental Carbon had previously owned. The dump apparently included wastes from Continental Carbon's facility. Continental Carbon also improved its own property by installing the SEP fence. Aple. Add. Tab 26.

Continental Carbon's fall-back position, if it asserts it, that the SEP should be treated as though it were a penalty has to fail, because SEPs do not occupy the same office as do penalties, and this particular SEP did not have the characteristics necessary even to qualify as a SEP in regulatory eyes.

c. Oklahoma administrative penalty law is not comparable to § 1319(g).

The "comparability" of the state administrative penalty law to §1319(g) is the another threshold issue that must be addressed before a court may decide whether any forms of relief are barred by §1319(g)(6)(A)(ii). The District Court fairly surveyed the range of disagreement among the circuits on this point. Unfortunately, that Court over-emphasized some *dictum* from *Gwaltney*,[21] which led that court to interpret comparability broadly, applying it, as the court said,"in an undemanding manner." Aplt. App. 223. That Court, then, made several unwarranted assumptions about the public-participation protections of Oklahoma law.

The District Court relied on *Gwaltney* for the tenet that Congress intended the citizen suit provision of the Clean Water Act to supplement, rather to supplant, governmental action. *Gwaltney* was not concerned with the § 1319(g)(6)(A) bars, and *Gwaltney* analyzed congressional intent regarding the Clean Water Act as the

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21 *Gwaltney of Smithfield, Ltd., v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 108 S.Ct. 376 (1987).

Act stood in 1984. Sec. 1319(g) was not adopted until 1987.[22] Pub. L. No. 100-4, Title III, § 314(a), 101 Stat. 46 (1987). Further, *Gwaltney* was concerned with whether wholly past violations were actionable under the citizens suit provision. It did not analyze or even mention in *dicta* anything about the degree of similarity Congress intended that "comparable" state administrative penalty provisions have. The court's only reference (at note 4) to the congressional history of the 1987 amendments was to note that that history was not relevant to the intent of the 1972 Congress.

There is congressional history on the 1987 amendments that is relevant to the appropriate meaning of "comparable," the relevant inquiry.

The 1987 amendments were first passed in 1986, but were vetoed by the President. The amendments were passed again, vetoed, and the veto overridden in February 1987. The amendments originated in the House as H.R. 8, 99th Cong., 1st Sess. (1985), and in the Senate as S. 1128, 99th Cong., 1st Sess. (1985). H.R. 8 went to the Committee on Public Works and Transportation, which duly issued a report. H.R. Rep. No. 99-189 (1985). The Senate bill went to the Committee on Environment and Public Works, and that committee, likewise, issued a report. S. Rep. 99-50 (1985). The House Conference Report from 1986 is the merger of the two bills and is the law that was ultimately enacted. H.R. Conf. Rep. No. 99-1004 (1986). Excerpts from these reports are at Tabs 23-25 of Continental Carbon's addendum volume. The foregoing recitation of events may be quickly confirmed at *California Sportfishing Protection Alliance v. City of W. Sacramento*, 905 F. Supp. 792, 803 and n. 11 (E.D. Ca. 1995).

Congress, in developing the 1987 amendments, took extensive testimony on the history of the citizen suit experience under the Clean Water Act. The Senate committee found:

> Citizen suits are a proven enforcement tool. They operate as Congress intended – both to spur and to supplement government enforcement actions. They have deterred violators and achieved significant compliance gains.

S. Rep. 99-50, at 28 (1985). Citizen suits not only supplement government action, they also spur it. The committee, therefore, explained the need for the new language on administrative penalties to balance (1) "the need to avoid placing obstacles in the path of such citizen suits" and (2) "the desire to avoid subjecting violators of law to dual enforcement actions." *Id.*

In light of this congressional history, it is difficult accept the District Court's view that only "rough comparability" with § 1319(g) is required of a state's

22 Prior to 1987, the only non-judicial enforcement option available to EPA or a state was the issuance of a compliance order under § 1319(a).

administrative penalty process.[23] EPA's 1987 guidance on the then-new § 1319(g) is more credible. That guidance understood § 1319(g) to require the state process, among other things, be "analogous" to that of §1319(g)(4) and accord the public an appellate right "analogous" to that of § 1319(g)(8).[24] The guidance concluded state administrative penalty actions would not be comparable to §1319(g), "unless the states begin to implement legislation specifically patterned on Section [1319(g)]." EPA, "Guidance on State Action Preempting Civil Penalty Actions Under the Clean Water Act," Office of Enforcement (August 28, 1987), at 7; Aple. Add. 19.

23 The fear that Clean Water Act citizen suits could supplant governmental action, were the law not interpreted so to create additional barriers to those suits, is not reasonable. The plain language of the citizen suit provision requires a would-be citizen plaintiff to give both the state regulator and EPA 60 days' notice before filing suit. 33 U.S.C. § 1365(b)(1)(A). If government prosecutors want to block the citizen's suit *en toto*, they need only launch their own suit in the 60-day window. 33 U.S.C. §1365(b)(1)(B). EPA or a state with a comparable administrative penalty law may use an administrative penalty action to block the penalty aspect of a citizen's effort. 33 U.S.C. § 1319(g)(6)(A). EPA may always intervene in a citizen's suit. 33 U.S.C. § 1365(c)(2). Even after a citizen's suit has been filed, the government prosecutors may initiate their own administrative or judicial actions. This panoply of government options belies a real-world risk of citizens supplanting government regulators, if the regulators don't want to be supplanted.

24 "Analogous" was the word Sen. Chafee, the amendment's principal author, used to further explain the definition of "comparable." District Court Opinion, at 4, Aplt. App. 221. "Analogous" is derived from the Greek *analogus*, meaning "according to a due ratio, proportionate." *Websters Third New International Dictionary*, Unabridged (Merriam-Webster 2002, http://unabridged.merriam-webster.com/home.htm). This understanding of the relationship between a state's administrative penalty process and § 1319(g) connotes a similarity of pattern between the two that is clearly greater than that the District Court required here.

EPA updated this guidance in 1993 following the *Scituate* decision, which EPA decried. In the updated guidance, EPA insisted: "Such an administrative penalty provision found in a state law must essentially mimic the substance of the federal provision in order to be comparable ...." EPA, "Supplemental Guidance on Section 309(g)(6)(A) of the Clean Water Act," Office of Enforcement (March 5, 1993), at 4; Aple. Add. 23.

A number of courts have examined the issue of comparability and all agree that one of the tests of state laws is whether the law provide "interested citizens a meaningful opportunity to participate at the significant stages of the decision-making process. See for example, *Lockett, et al., v. EPA, et al.*, 319 F.3d 678, 684 (5th Cir. 2003), citing *Arkansas Wildlife Federation v. ICI Americas, Inc.*, 29 F.3d 376,381 (8th Cir. 1994) and *N. & S. Rivers Watershed Assn, Inc. v. Town of Scituate*, 949 F.2d 552, 556 & n. 7 (1st Cir. 1992). The Lockett case applies the test to the laws of the State of Louisiana, a state like Oklahoma that is in EPA's Region 6 and has been delegated the federal clean water program.

The Fifth Circuit looked as at the federal requirements in §1319(g)(4), which included[25]:

25 The Fifth Circuit also noted a fourth right, i.e., that any commenter has a right to appeal an EPA penalty to a federal court under 1319(g)(8). Under 1319(g)(8) "a person who commented on the proposed assessment" of a civil penalty may seek judicial review of the penalty assessment. However,

1. "**public notice** of and a reasonable opportunity to comment on" the proposed order under 1319(g)(4)(A),

2. **notice** to any person who commented of any hearing on the proposed assessment and a **reasonable opportunity** to be heard and to present evidence, under 1319(g)(4)(B), and

3. **the right to petition for a hearing,** if the assessed party does not request a hearing, and either have the order set aside **or get personal notice (and notice in the federal register)** of the reasons for denial of any such petition under 1319(g)(4)(C).

The District Court, in the present case, found Oklahoma law, in the aggregate, to be comparable to these rights of the public under federal law. It based its decision on the fact that ODEQ is subject to the state's open meeting act and its open records act. Aplt. App. 226.

Oklahoma law does not incorporate the language from 1319(g)(8). Rather, Oklahoma law provides that a person must be 'aggrieved' by the penalty assessment in order to seek judicial review. This raises a serious issue of whether 'aggrieved' status is a comparable hurdle to standing requirements in federal court. Under 1319(g)(8), if a commenter meets federal standing requirements, he or she may seek judicial review. Under Oklahoma's law, one must be aggrieved *and* meet state standing requirements. The Fifth Circuit never addressed the issue, and, in its silence, perhaps decided that submitting comments grants 'aggrieved' status. Clearly, an alleged violator would be aggrieved by any assessment. Without explanation from the courts or some statutory elaboration, however, it is not clear that any commenter would be aggrieved, even if he or she did have standing. Would a commenter be aggrieved, for example, if seeking judicial review over whether the state properly calculated economic benefit? In Oklahoma, it is likely that the 'aggrieved' requirements are different and stricter than federal standing requirements. This would leave commenters in Oklahoma without a right to seek judicial review.

There are several problems with this rationale, but the first and most basic is that "public availability" of penalty assessment information as an open record is far different from "public notice" or personal notice of that information. Moreover, if the fact that a proposed penalty or a hearing opportunity is public information were comparable to actual public or personal notice, there would have been no need for Congress to add the public notice provision of 1319(g)(4)(A). Penalty assessments, for example, are clearly public information under federal law, at least whenever the agency advises the alleged violators of them. A violator is not required to use open records laws to determine if a penalty has been assessed. Affected citizens should not be, either.

Congress did not intend that members of the public would have to file open records requests under federal or state law to know even if there were any penalty process ongoing. In fact, the public would have to file such requests every few weeks or risk missing an opportunity to learn of and participate in the agency's decisions on enforcement. In contrast to such a system (the Oklahoma system), the Fifth Circuit noted that the Louisiana laws provide for publication in an official state journal and direct notice by the agency to any person who has requested notice.

The entire enforcement process in Oklahoma assures that there will rarely be

effective notice. The Executive Director of ODEQ is the official that assesses administrative penalties for waste water permit violations. 252 O.A.C. §§ 4-9-2 and 4-9-4. (The board of the ODEQ only meets quarterly. 252 O.A.C. § 4-3-1.) By regulation, the Executive Director assesses administrative penalties pursuant to 27A O.S. § 2-3-502, not pursuant to 27A O.S.§ 2-6-206, as the District Court thought most likely.[26] 252 O.A.C. § 4-9-4(a) and Aplt. App. 226. The assessment process begins with the service of a notice of violation on the alleged violator, and there is no provision for conveying the notice to an audience of potential commenters (i.e., to the public) before or after the alleged violator is advised of a proposed assessment. 252 O.A.C.§ 4-9-1. There is absolutely no mention in 27A O.S. § 2-3-502 or in any of the ODEQ regulations of anyone, other than the alleged violator, having any right to comment on the proposed assessment. There is no requirement that the Executive Director or anyone else respond to or even consider comments from the public.

This would be true, even if the Executive Director brought an administrative penalty action under 27A O.S. § 2-6-206. There is, there, no public notice requirement and no requirement that anyone other than the alleged violator get notice of the action. 27A O.S. § 2-6-206(D) and (E). There is no provision for public comment on a proposed penalty assessment. There is no requirement for the Executive Director or others at ODEQ to respond to any comments a member of the public might make.

Sec. 1319(g)(4)(B) provides appellate rights for members of the public who comment on proposed administrative penalty assessments. There is nothing of that nature in Oklahoma law.

There is no notice in Oklahoma to any commenter that a hearing will be held. Thus, if a member of the public discovered the fact of an administrative penalty action and commented, he or she would still have to watch the process carefully to even learn that a hearing would be held at the request of the alleged violator.

It certainly appears that a commenter would have no appellate rights, and that appellate rights are reserved for the alleged violator under Oklahoma laws. 27A O.S. §§ 2-6-206(B) and (I)(1).

The Fifth Circuit addressed a different situation with Louisiana, since the aggrieved person limitation does not apply to the appeal from a hearing. It appears that all that is required of a participant to the hearing is standing to appeal from a hearing.

26 The District Court is correct that it "is not entirely clear" from the "evidence" submitted to the District Court the provision under which the Executive Director acted. Aplt. App. 225. The ODEQ enforcement regulations, cited above, however, specify the statute under which the Executive Director acts.

Overall, however, notice is the critical issue at any stage of the process from commenting to appealing,. Without notice, any provision to comment, intervene or appeal is almost meaningless.

Finally, note that the *Oklahoma Register*, the Oklahoma parallel to the *Federal Register*, is published twice a month and its content is specified by regulation. 655 O.A.C. § 10-15-1 and § 10-15-5(a). The Oklahoma regulations do not provide for notice of or periods of comment on ODEQ's administrative penalty assessments (proposed or final). In contrast, in the *Lockett* case, the Fifth Circuit noted that notice of the opportunity to comment and seek to participate in any hearing on an administrative penalty is published in the official journal of the parish. *Lockett,* at 686. Again, that is in addition to sending notice directly to any person who as asked to be on the agency's mailing lists.

A separate argument was raised, below, to the effect that EPA had delegated to Oklahoma the authorization to implement the National Pollution Discharge Elimination Permit program in Oklahoma, so, it must follow that Oklahoma's administrative penalty program is comparable to § 1319(g). That is not what Congress required as a requisite to program delegation, however. The requirement is merely that the state program have adequate authority "to abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement." 33 U.S.C. § 1342(b)(7). EPA could not deny program delegation to a state because of the state's failure to have an administrative penalty policy comparable to § 1319(g). *American Forest and Paper Association v. EPA*, 137 F.3d 291 (5th Cir. 1998). Finally, the entire "comparability" requirement of §1319(g) would be surplusage, if the fact of program delegation established comparability as a matter of law. The §1319(g)(6)(A)(ii and iii) bars apply only to state enforcement actions in states with delegated programs. EPA, "Guidance on State Action Preempting Civil Penalty Actions Under the Clean Water Act," Office of Enforcement (August 28, 1987), at 3, and 133 Cong. Rec. S737 (Jan. 14, 1987). Aple. Add. 19. No courts have held state laws "comparable" based on the fact that the state was delegated the federal program.

Several circuits courts have found state laws not to be comparable for purposes of 1319(g). The Sixth[27] and Ninth[28] Circuit did so under Tennessee and California laws, respectively, but focused mainly on the lack of any penalty. The Eleventh Circuit made a more direct evaluation, similar to that of the Fifth Circuit.

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27 *Jones, et al. v. City of Lakeland*, 224 F.3d 518 (6th Cir. 2000)(*en banc*).

28 *Citizens for a Better Environment v. Union Oil Co.* 83 F.3d 1111 (9th Cir. 1996).

In *McAbee v. City of Fort Payne*, 318 F.3d 1248 (11th Cir. 2003), reh'g *en banc* den., 65 Fed.Appx. 716, that Court held that Alabama public participation provisions do not satisfy the standard for comparability. *McAbee*, at 1257.

In its analysis of public participation, the court focused on the issue of inadequate public notice. The court explained that the federal provisions ensure public notice *before* issuance of final penalty orders, and the Alabama laws require only *ex post facto* notice or notice after completion of enforcement actions. The Court stated that this approach is "markedly different" from the federal approach. *McAbee*, at 1256, 57. The Eleventh Circuit explained that "in pre-order proceedings, an agency has not hardened its position, and interested persons are not subject to the same technical pleading requirements or burdens of proof that are imposed once the state has issued an order." *Id*. Thus, the Court found that meaningful public participation at the significant stages of the process in must not only include public notice, it must be notice at a proper time. Oklahoma does not provide any notice at all.

The Eleventh Circuit also disagreed with the comparability standard set forth in the First[29] and Eighth[30] Circuits. The Eleventh Circuit held that each of the following elements must be comparable: (1) penalty assessment provisions, (2) public participation, and (3) judicial review. *McAbee*, at 1252, 1254. The First and Eighth Circuits used an 'overall' comparability test.

The Eleventh Circuit correctly rejects the 'overall' comparability test, because it creates the following problems: (1) "it forces judges to weigh incommensurable values -- for example, the positive value of identical penalty provisions against the negative value of starkly dissimilar public participation provisions," (2) it creates "uncertainty not only for the courts, but also for potential litigants, state administrative agencies, and state legislatures," and 3) the "legislative history supports requiring rough comparability of each class of provisions." (See, 133 Cong. Rec. S737 (daily ed., Jan. 14, 1987), Aple. Add. 19). *McAbee* at 1255, 56.

In conclusion, the District Court "got it right" the first time. Its May 14, 2003, blanket denial of Continental Carbon's motion to dismiss was correct. The legislative history of §1319(g) does not support an expansive reading of bars to citizen suits, and it does not support application of the "comparability" requirement in quite as "undemanding" a manner as that used by the District Court. There is quite a range of case law that parses the "comparability" requirement in a number of different ways. However, very little of that law, even the law that leans to

29 *N. and S. Rivers Watershed Ass'n, Inc., v. Town of Scituate*, 949 F.2d 552 (1st Cir. 1992), reh'g *en banc* den., 949 F.2d 552 (1st Cir 1992).

30 Arkansas Wildlife Fed'n v. ICI Americas, Inc., 29 F.3d 376 (8th Cir. 1994).

Scituate, that can support a system as unclear as is the system in Oklahoma, with as little notice and comment process as Oklahoma's system accords, and in which appellate rights for the public are as problematic as they are in Oklahoma.

This circuit should not support such a system, either.

d. Citizen penalty actions, only, are barred by § 1319(g)(6)(A)(ii).

The text of § 1319(g)(6)(A) is not at all ambiguous. If any aspect of a citizen suit action is barred by diligent state prosecution of an administrative penalty action under a law comparable to § 1319(g), it is only a civil penalty aspect of the suit that may be barred: "[E]xcept that any violation -- . . . shall not be the subject of a civil penalty action under . . . section 1365 of this title." In subparagraph (B) of § 1319(g)(6), the statute explicitly refers to the bar as a limit on "civil penalty actions."

As the District Court found, here, there is simply no license for a court to look behind this unambiguous language. This Court recently re-iterated this most basic of statutory construction principles in the clearest of terms:

> Courts should not resort to legislative history in order to ascertain Congress's intent when the plain language of the statute is unambiguous. See *United States v. Gonzales*, 520 U.S. 1, 117 S. Ct. 1032, 1035, 137 L. Ed. 2d 132 (1997) ("Given [a] straightforward statutory command, there is no reason to resort to legislative history."); see also *Bank One Chicago v. Midwest Bank & Trust Co.*, 516 U.S. 264, 116 S. Ct. 637, 645, 133 L. Ed. 2d 635 (1996) (Scalia, J., concurring) ("The law is what the law says, and we should content ourselves with reading it rather than psychoanalyzing those who enacted it.").

Public Lands Council v. Babbitt, 167 F.3d 1287,1305 (10th Cir. 1999), affirmed, *Public Lands Council v. Babbitt*, 529 U.S. 728, 120 S.Ct. 1815, 146 L.Ed.2d 753 (2000).

If, nonetheless, this Court felt compelled to venture beyond the text of the statute, it should acknowledge straight away that Scituate's hyperbole, that "it is inconceivable" that §1319(g) was intended to ban only citizen penalty actions, is not logically defensible. Administrative penalty actions seek money for past actions. §1319(g)(1). In citizen suits, on the other hand, it is "plain that the interest of the citizen-plaintiff is primarily forward-looking." *Gwaltney*, 484 U.S. 49, at 59.[31] The citizen suit provision clearly contemplates injunctive relief. 33 U.S.C. § 1365(d). It is just not logically inconceivable that Congress would intentionally treat differently claims for money for past actions from claims for equitable relief from continued future actions.

In this vein, there is actually evidence that well-regarded congressmen, e.g., Senators Bob Dole and John Chafee, conceived policy distinctions between enforcement options for past and future violations. S. Rep. 99-50 (1985), at 26, Aplt. Add. 23, text quoted, *infra*. In its brief, Continental Carbon fuses a lot of toner

attempting to divine intent from the congressional give and take that led to the1987 amendments. Plaintiffs are mindful of Justice Scalia's insight, quoted above, and they are loathe to go too far down that road, themselves. That said, the report of the Senate Committee on Environment and Public Works quite plainly evidences a congressional understanding of reasons for distinguishing between penalties, on the one hand, and declaratory and injunctive relief, on the other.

The House and Senate bills both added administrative penalties to EPA's arsenal of enforcement tools. The Senate committee report addressed fears that administrative penalty-assessment power might dampen EPA's ardor for judicial enforcement. In the course of justifying the new administrative power, the committee explained:

> [T]his new authority is designed to address past, rather than continuing, violations of the Act. Continuing violations are more appropriately addressed by abatement orders or injunctive actions and, if EPA seeks both penalties and injunctive relief, one judicial action should be filed.

S. Rep. 99-50 (1985), at 26, Aplt. Add. 23.

The House-Senate conferees on the 1987 amendments that added §1319(g) certainly understood Congressional intent to be that injunctive and declaratory relief were not barred by § 1319(g)(6)(A). The Senate had explained, as set out in the conference committee report:

> No one may bring an action to recover civil penalties under sections 309(b) and (d), 311(b), or 505 of this Act for any violation with respect to which the Administrator has commenced and is diligently prosecuting an administrative civil penalty action, or for which the Administrator has issued a final order not subject to further judicial review (and for which the violator has paid the penalty). This limitation applies only to an action for civil penalties for the same violations which are the subject of the administrative civil penalty proceeding. . . . *This limitation would not apply to: 1) an action seeking relief other than civil penalties (e.g., an injunction or declaratory judgment)* . . ..

H.R. Conf. Rep. No. 99-1004, at 133 (1986) , Aplt. Add. 25.

This is the language on which Judge Lucero relied, in part, in *Old Timer v. Blackhawk-Central City Sanitation District*, 51 F.Supp.2d 1109, 1114 (D. Colo. 1999). It is the language on which the District Court in this case relied, in part. Continental Carbon's brief argues this reliance wrong, because the language appeared first in the Senate committee's report. However, it is not seriously debatable that the House-Senate conferees accepted the Senate version of the conflicting bill texts on preclusion of citizen suits:

> From the Senate bill, language on collection procedures and court authority to impose additional penalties is included in the conference substitute, as is the language on preclusion of citizen suits.

H.R. Rep. 99-1004 (1986), at 139, Aplt. Add. 25. It is hard to see why the Senate

31 Note the Supreme Court's analysis of the citizen suit provision as it stood pre-1987 is appropriate, since the 1987 amendments made few changes to that section, and the changes made did not go to the basic concepts of the section.

explanation would not be the authoritative explanation, under the circumstances, and why reliance on it could be subject to criticism.

Continental Carbon is correct, as the District Court was explicitly aware, that two appellate courts have found that a diligently prosecuted administrative penalty under comparable law bars all citizen suit relief. However, that fact does not make the conclusion inassailable. Numerous lower courts in other circuits have held otherwise. They have chosen to follow the language Congress actually used in the statute. See, *Sierra Club v. Hyundai Aimerica*, 23 F.Supp.2d 1177, 1179 (D. Ore. 1997)("regardless of the applicability of the limitations on civil penalties . . . plaintiffs' rights to seek injunctive or declaratory relief appears to be unimpaired); *Coalition for a Livable West Side v. New York Department of Environmental Protection*, 830 F.Supp. 194, 196 (S.D.N.Y. 1993)(the section "precludes only citizen suits seeking civil penalties") and *New York Coastal Fishermen's Association v. New York Department of Sanitation*, 772 F.Supp. 162, 169 (S.D.N.Y. 1993)("the limitation of citizen suits . . . relates only to actions for civil penalties, not injunctive or declaratory relief").

Plaintiffs, of course, think the District Court erred to ever reach the question of the relief that could be barred by § 1319(g)(6)(A)(ii). Having made that mistake, though, the District Court was clearly correct to hew to the principled high ground regarding non-penalty relief. There just is not any ground in the statute to justify striking declaratory or injunctive relief. There are no overwhelming policy reasons, either, that might justify second-guessing the text on this point. This Court, if it reaches this point, should affirm the District Court's decision.

7. Conclusion and Prayer

This is a case that should be wending its way through the final stages of trial court discovery at this time. The motion to dismiss should have failed on the law, as it initially did, because Oklahoma's administrative penalty law falls too far short of §1319(g)'s requirements to be treated as "comparable" to those provisions; Oklahoma's law makes almost no concessions to public notice, and public notice was clearly of central importance to both the House and Senate conferees. Even if the District Court had disagreed with Plaintiffs on comparability, the motion should have failed because of the factual issues entwined with the diligent prosecution/penalty action question. Even accepting Continental Carbon's attachment "evidence," there was plainly no administrative penalty prosecution that had commenced.

Plaintiffs believe the best course of action for this Court would be to return the case to the District Court with a notation that the interlocutory appeal was

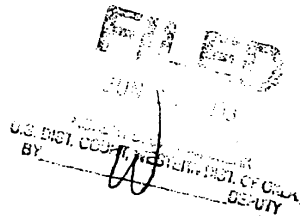
improvidently granted. The parties could proceed with the declaratory and injunctive relief case, and, as facts are established, the District Court would be in a position to reconsider his decision on penalties or, failing that, ultimately to enter a judgment that conditionally recommends a penalty, should he be proved wrong on appeal regarding the availability of the penalty relief. Too, Plaintiffs might not appeal a favorable declaratory and injunctive relief judgment, even though they thought themselves (i.e., thought the U.S. Treasury) legally entitled to penalties.

Failing this course of action, Plaintiffs pray the Court affirm the District Court's order.

Respectfully submitted,

David Frederick
Frederick-Law

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA



PAPER, ALLIED-INDUSTRIAL, CHEMICAL AND ENERGY WORKERS INTERNATIONAL UNION ("PACE") AND THE PONCA TRIBE ("TRIBE"),	)	
Plaintiffs,	)	
v.	)	**CIV-02-1677-R**
CONTINENTAL CARBON COMPANY,	)	
Defendant.	)	

ORDER

Before the Court is Defendant Continental Carbon Company's reply brief in support of its motion to dismiss. On May 14, 2003, the Court entered an Order denying Defendant's motion to dismiss. However, on that same day, the Court entered an Order granting Defendant's application for leave to file a reply brief. Thus, in response to Defendant's motion to vacate the Order denying Defendant's motion to dismiss, the Court entered an Order on May 21, 2003, holding in abeyance the May 14, 2003, Order pending receipt and consideration of Defendant's reply brief.

The Court now treats Defendant's reply brief as a motion to reconsider the May 14, 2003, Order denying Defendant's motion to dismiss and grants the motion in part and denies it in part.

Plaintiffs do not dispute that the Oklahoma Department of Environmental Quality (ODEQ) has commenced and is diligently prosecuting an administrative action under state law against Defendant. Plaintiffs, however, dispute that the action being conducted pursuant to Oklahoma law is comparable to an action brought pursuant to the federal Clean Water Act for a civil penalty. In particular, Plaintiffs assert that Oklahoma's "public participation" and "judicial review" provisions are not comparable to those under the Clean Water Act, 33 U.S.C. § 1319(g). Plaintiffs further argue that even if Plaintiffs' claims for civil penalties are barred by Section 1319(g)(6)(A)(ii), Plaintiffs' claims for declaratory and injunctive relief are not so barred, citing, *inter alia*, *Old Timer, Inc. v. Blackhawk-Central City Sanitation District*, 51 F.Supp.2d 1109, 1114 (D. Colo. 1999); *Sierra Club v. Hyundai America, Inc.*, 23 F.Supp.2d 1177, 1179 (D. Or. 1997); *Coalition for a Liveable West Side, Inc. v. New York City Department of Environmental Protection*, 830 F.Supp. 194, 196 (S.D.N.Y. 1993).

The Tenth Circuit has not addressed the issue of when a state law is "comparable" to 33 U.S.C. § 1319(g) within the meaning of 33 U.S.C. § 1319(g)(6)(A)(ii). Hence, this Court looks to guidance from other circuits as well as from legislative history. The Eighth Circuit has adopted the following standard of comparability:

> The comparability requirement may be satisfied so long as the state law contains comparable penalty provisions which the state is authorized to enforce, has the same overall enforcement goals as the federal CWA, provides interested citizens a meaningful opportunity to participate at significant stages of the decision-making process, and adequately safeguards their substantive interests.
>
> *Arkansas Wildlife Federation v. ICI Americas, Inc.*, 29 F.3d 376, 379 (8th Cir. 1994), *cert. denied*, 513 U.S. 1147, 115 S.Ct. 1094, 130 L.Ed.2d 1062 (1995).

The First Circuit has held that the comparability requirement is met if three criteria are satisfied: 1) the state statutory scheme under which the state is proceeding contains penalty assessment provisions comparable to the Clean Water Act (CWA); 2) the state is authorized to assess those penalties; and 3) the overall scheme of the state and federal acts is aimed at correcting the same violations. *North and South Rivers Watershed Association, Inc. v. Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1991). In *Citizens for a Better Environment-California v. Union Oil Co. of California*, 83 F.3d 1111 (9th Cir. 1996), *cert. denied*, 519 U.S. 1101, 117 S.Ct. 789, 136 L.Ed.2d 731 (1997), the Ninth Circuit rejected the approach of the First Circuit of looking at the entire state statutory scheme to see if there are penalty provisions comparable to those in the CWA. It held that the particular statutory provision under which the state proceeded must contain a penalty provision comparable to that in the CWA and that a penalty must have actually been assessed for the bar on citizen suits set forth in § 1319(g)(6)(A)(ii) and 33 U.S.C. § 1365 to apply.

Like the First and Eighth Circuits, the Sixth Circuit in *Jones v. City of Lakeland, Tennessee*, 224 F.3d 518 (6th Cir. 2000) (*en banc*), looked at the overall statutory scheme to determine whether state public-participation provisions were comparable to those of the CWA. Like the Eighth Circuit, the Sixth Circuit in *Jones v. City of Lakeland* stressed the importance of giving citizens a "meaningful opportunity to participate at significant stages

of the administrative decision-making process . . . ." *Id.* at 524. However, unlike the Eighth Circuit which in *Arkansas Wildlife Federation v. ICI Americas, Inc.* held that the Arkansas public participation provisions were comparable to the CWA even though they contained no provision for public notice and only provided an *ex post facto* right to intervene, the Sixth Circuit concluded that Tennessee's statutory scheme was not comparable to the federal CWA with respect to provisions for public participation because it did not require public notice of hearings or provide third parties with an opportunity to initiate or join enforcement proceedings and consent orders. *Jones*, 224 F.3d at 523.

The Eleventh Circuit addressed the comparability of Alabama laws to the CWA in *McAbee v. City of Fort Payne*, 318 F.3d 1248 (11th Cir. 2003). It held that for state law to be comparable, each class of state-law provisions, that is, those for penalties, public participation and judicial review, must be "roughly comparable" to the corresponding class of federal provisions. 318 F.3d at 1255. That standard, it concluded, was supported by legislative history, to wit, the following statement by Senator John Chaffee, the principal author and sponsor of the 1987 amendments to the CWA, quoted in the Eleventh Circuit's opinion:

> [T]he limitation of 309(g) applies only where a State is proceeding under a State law that is comparable to Section 309(g). For example, in order to be comparable, a State law must provide for a right to a hearing and for public notice and participation procedures similar to those set forth in section 309(g); it must include analogous penalty assessment factors and judicial review standards; and it must include provisions that are analogous to the other elements of section 309(g). 133 Cong. Rec. S737 (daily ed., Jan. 14, 1987) (emphasis added).

Applying this standard, the Eleventh Circuit held that Alabama's public participation provisions were not comparable to the CWA because the Alabama statutes did not provide for public notice before issuance of a penalty order, and members of the public could not intervene in pre-order proceedings and could not submit comments, present evidence or request a hearing on a proposed assessment.

Finally, the Fifth Circuit in *Lockett v. Environmental Protection Agency*, 319 F.3d 678 (5th Cir. 2003), considered the comparability of Louisiana statutes to the CWA. In assessing comparability of public participation provisions, it adopted the Eighth Circuit's standard of comparability set forth in *Arkansas Wildlife Federation v. ICI Americas, Inc.*, 29 F.3d at 381. It found that Louisiana law public participation provisions were comparable to those in the CWA because

> under Louisiana law there is "periodic" notice to persons who request to be on the mailing list of all violations, compliance orders and penalty assessments issued in the preceding three months, and public notice is required in the case of a proposed settlement or compromise. An aggrieved party may intervene in an adjudicatory hearing, or petition for an adjudicatory hearing if none is held. The public may comment on the matter prior to the adjudicatory hearing, but may not participate in the hearing. If a public hearing is held, the public may participate fully.
>
> *Lockett v. Environmental Protection Agency*, 319 F.3d at 685.

The Court agrees with the Eleventh Circuit that a state's public participation provisions must be "roughly comparable" to those set forth in Section 1319(g). In so holding, the Court is persuaded by the language of the statute and the legislative history

quoted by the Eleventh Circuit in *McAbee, supra*. For state law to have comparable public participation provisions to that of the CWA, it need only have enough like characteristics or qualities to make comparison appropriate. *See Webster's Third New International Dictionary* 461 (1967) (defining comparable at 1a). Legislative history indicates that for a state law's public participation provisions to be comparable to those under the CWA, the law must provide for a right to a hearing and for public notice and participation procedures similar to those set forth in Section 1319(g). *See* 133 Cong. Rec. S737.

In applying the standard of "rough comparability" the Court is mindful that citizen suits are "meant to supplement rather than to supplant governmental action." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60, 108 S.Ct. 376, 383, 98 L.Ed.2d 306 (1987). The Court is also mindful that legislative history indicates that it was intended that the great volume of enforcement actions would be brought by the state. *See id.*, quoting S. Rep. No. 92-414, p. 64 (1971), reprinted in 2A Legislative History of the Water Pollution Control Act Amendments of 1972, p. 1482 (1973). In light thereof, the Court agrees with the Fifth Circuit in *Lockett* that "the requirement that a state law be 'comparable' to the federal statute should be read broadly . . . ." *Lockett v. Environmental Protection Agency*, 319 F.3d at 684. Thus, in determining whether Oklahoma's public participation provisions are roughly comparable to those in Section 1319(g), the Court interprets rough comparability broadly, applying it in an undemanding manner.

The public participation provisions under the CWA provide for public notice before the assessment of a civil penalty, 33 U.S.C. § 1319(g)(4)(A); that persons who comment on proposed assessment of a penalty get notice of any hearing and of an order assessing such penalty, 33 U.S.C. § 1319(g)(4)(B), and a "reasonable opportunity" to be heard and present evidence at any hearing, *id.*; and that persons who commented on a proposed assessment of a civil penalty may petition for a penalty hearing, if a hearing is not held, 33 U.S.C. § 1319(g)(4)(C).

The Oklahoma Department of Environmental Quality is the official agency of the State of Oklahoma to cooperate with federal agencies for point source pollution and other environmental concerns. *See* Okla. Stat. tit. 27A, § 2-3-101(a)(2). The Oklahoma Department of Environmental Quality is subject to both the State Open Meeting/Open Records Act. *See* Okla. Stat. tit. 25, § 304(1). Thus, it is required to give notice of its meetings to the Secretary of State, Okla. Stat. tit. 25, § 311(2), who is required to keep a record of the notices in a register open for public inspection. *See* Okla. Stat. tit. 25, §311(7). In addition, it is required to display public notice of its meetings, including its agenda, in prominent public view at its principal office. Okla. Stat. tit. 25, § 311(9). It is also required to give public notice of the continuation of any meeting, Okla. Stat. tit. 25, § 311(10), and of any special meetings. Okla. Stat. tit. 25, § 311(11). Records of proceedings of the Oklahoma Department of Environmental Quality, including all matters considered and actions taken by it, are open for public inspection. Okla. Stat. tit. 25, § 312.

In the case before the Court, the Notice of Violation issued to Defendant stated in part as follows:

> This is to provide you with a notice of finding, by the Oklahoma Department of Environmental Quality (DEQ), of an alleged violation of the Department's rules pursuant to 27A O.S. § 2-3-502(A)(Supp. 2000) and the Oklahoma Administrative Code (OAC).
>
> Notice of Violation (Exhibit "A") to Defendant's Motion to Dismiss).

The Notice of Violation listed several Oklahoma Administrative Code provisions and Okla. Stat. tit. 27A, § 2-6-205(A) which Defendant had been determined to be in violation of. On May 6, 2002, the ODEQ and Defendant entered into a Consent Order regarding the alleged violations "pursuant to 27 O.S. (Supp. 2000), § 1-3-101, §§ 2-6-201 *et seq.*, & 2-6-105." Consent Order (Exhibit "B" to Defendant's Motion to Dismiss). Sections 2-6-201, *et seq.* are the "Oklahoma Pollutant Discharge Elimination System Act." The Consent Order references Okla. Stat. tit. 27A, §§ 2-6-206 and 2-6-105 as its authority for prescribing compliance, entering into settlement agreements and assessing and enforcing penalties. *Id.* The Addendum to the Consent Order entered into on April 11, 2003, contains a finding that Defendant was in violation of the Oklahoma Pollutant Discharge Elimination System Act by discharging pollutants into the waters of the state or elsewhere without first obtaining a permit from the Executive Director, Okla. Stat. tit. 27A, § 2-6-205(A).

As should be obvious from the foregoing, it is not entirely clear whether the ODEQ's Notice of Violation was issued and its proceedings were conducted pursuant to Okla. Stat. tit. 27A, § 2-3-502 or Okla. Stat. tit. 27A, § 2-6-206 but it appears most likely that the ODEQ's Notice of Violation was issued and its proceedings conducted pursuant to Okla. Stat. tit. 27A, § 2-6-206. However, because the ODEQ is subject to the Open Meeting/Open Records Act, public notice of the Notice of Violation and Consent Order was afforded regardless of which statutory provision the ODEQ was proceeding under.

Under Okla. Stat. tit. 27A, § 2-6-206, there is no specific provision for public comment at any stage of the process. *See* Okla. Stat. tit. 27A, § 2-6-206. However, that section provides as follows:

> Any person having any interest connected with the geographic area or waters or water system affected, including but not limited to any aesthetic, recreational, health, environmental, pecuniary or property interest, which interest is or may be adversely affected, shall have the right to intervene as a party in any administrative proceeding before the Department, or in any civil proceeding, relating to violations of the Oklahoma Pollutant Discharge Elimination System Act or rules, permits or orders issued hereunder.
>
> Okla. Stat. tit. 27A, § 2-6-206(B).

If a party intervenes in a proceeding before the ODEQ, that party has the full panoply of rights provided in Oklahoma's Administrative Procedures Act, *see* Okla. Stat. tit. 27A, § 2-6-206(A) (Executive Director of the ODEQ has authority to proceed as specified in the Administrative Procedures Act unless otherwise provided in Section 2-6-206), including the right to respond and present evidence and argument on all issues involved, Okla. Stat. tit. 75, § 309(c), and to file exceptions and present briefs and oral argument to the administrative head concerning a proposed final agency order. Okla. Stat. tit. 75, § 311.

Although the "public participation" provisions under Okla. Stat. tit. 27A, § 2-6-206, considered in conjunction with the Open Meeting/Open Records Act and Oklahoma's Administrative Procedures Act, are not identical to those provided in the CWA, they are roughly comparable to them. Moreover, it is observed that the Environmental Protection Agency has delegated its enforcement authority under the Clean Water Act through the National Pollutant Discharge Elimination System ("NPDES") to Oklahoma. In order for a state to receive delegated authority from the EPA to implement the NPDES program, the state program is required to "provide for public participation in the State enforcement process" in one of two ways, including "intervention as of right." 40 C.F.R. § 123.27(d). Implementation of either of the two options in 40 C.F.R. § 123.27(d) is sufficient to "provide meaningful and adequate opportunity for public participation consistent with the statutory mandate" of the CWA. *Natural Resources Defense Council, Inc. v. U.S.E.P.A.*, 859 F.2d 156, 178 (D.C. Cir. 1988). Indeed, the United States District Court for the Eastern District of Arkansas held that Arkansas law which provides a right to intervention to anyone who has an interest which is or may be adversely affected by the outcome of state enforcement proceedings provided for "public participation" comparable to that afforded under 33 U.S.C. § 1319(g), "especially in view of 40 C.F.R. § 123.27(d)." *Arkansas Wildlife Federation v. ICI Americas, Inc.*, 842 F.Supp. 1140, 1147 (E.D. Ark. 1993), *aff'd* 29 F.3d 376 (8th Cir. 1994), *cert. denied*, 513 U.S. 1147, 115 S.Ct. 1094, 130 L.Ed.2d 1062 (1995). In *Citizens Legal Environmental Action Network, Inc. v. Premium Standard Farms, Inc.*, 2000 WL 220464 (W.D. Mo. Feb. 23, 2000) (No. 97-6073-CV-SJ-6), the United States District Court for the Western District of Missouri recognized that the "minimum guidelines" for public participation in any state enforcement action under an EPA-delegated program for enforcement of the CWA are those set out in 40 C.F.R. § 123.27(d), and that they are not very onerous. 2000 WL 220464 at *6. If a state law permits intervention as of right by a citizen having an interest which is or may be adversely affected, the minimum standard for public participation in the enforcement of any program established by a state under the CWA is met. *Id.*, citing 33 U.S.C. § 125(e) & 40 C.F.R. § 123.27(d).

Under Section 2-3-503, there is no provision for public intervention before issuance of a final order. However, that section provides that "[a]ny party aggrieved by a final order may petition the Department for rehearing, reopening or reconsideration . . . ." Okla. Stat. tit. 27A, § 2-3-503(I). Thus, although there is no specific provision for public comment, intervention or request for a penalty hearing prior to entry of a final order, a member of the public aggrieved by a final order may request rehearing, reopening or reconsideration of a final agency order. Thus, this law when considered in conjunction with the Open Meeting/Open Records Act, provides for public participation[1] roughly comparable to that

[1] Regardless of under which state law the ODEQ was proceeding, it is observed that Plaintiff Union and/or Plaintiff Tribe actually participated in proceedings before the ODEQ by filing a citizen complaint with the ODEQ in January of 2002, resulting in an ODEQ investigation and on-site inspection of Defendant's facility, see Exhibit "A" to Defendant's Reply Brief; submitted letters to the ODEQ beginning in February of 2002 alleging violations of Defendant's permit and misrepresentation of the depth of groundwater in Defendant's permit application, see Exhibits "E" & "F" to Defendant's Reply Brief; reviewed ODEQ files and commented on the ODEQ's investigation and sampling, see id.; and submitted an expert report, see Exhibit "F" to Defendant's

afforded under the CWA, i.e., public notice and a right to a hearing for aggrieved members of the public.

Plaintiffs argue that the judicial review provisions under state law are not comparable to those under the CWA, specifically § 1319(g). Under § 1319(g)(8), a person against whom a civil penalty is assessed may appeal the penalty order. Under Okla. Stat. tit. 27A, § 2-6-206, a person against whom a compliance or penalty order is issued may obtain review of the order in district court. Okla. Stat. tit. 27A, § 2-6-206(I)(1). Similarly, under Okla. Stat. tit. 27A, § 2-3-502, any party aggrieved by a final order may petition for judicial review. Thus, the provision for judicial review under either Oklahoma law is roughly comparable to that under Section 1319(g).

In accordance with the foregoing, because the state law(s) under which the ODEQ is prosecuting an action against Defendant are comparable to 33 U.S.C. § 1319(g), the bar to a citizens suit under Section 1319(g)(6)(A)(ii) applies.[2] An issue raised by the parties' briefs remains, however, as to whether § 1319(g)(6)(A)(ii) bars only Plaintiffs' claims for civil penalties or whether it also bars Plaintiffs' claims for injunctive and declaratory relief. Plaintiffs contend that § 1319(g)(6)A) bars only their civil penalty claims. Defendant, naturally, asserts that all of Plaintiffs' claims are barred by that provision.

To answer the question, the Court begins by looking at the plain language of the statute:

> Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation--
>
> * * *
>
> (ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, . . .
>
> * * *
>
> shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.
>
> 33 U.S.C. § 1319(g)(6).

Section 1365 of Title 33 of the United States Code provides that any citizen may commence a civil action on its own behalf against a person alleged to be in violation of an effluent standard or an order issued by a state with respect to such standard "[e]xcept as provided in . . . section 1319(g)(6) of this title . . . ." 33 U.S.C. § 1365. The plain language of Section 1319(g)(6) indicates that only civil penalty actions are precluded when the conditions set

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Reply Brief.

[2] Contrary to Plaintiffs' argument, the ODEQ's enforcement action bars each of Plaintiffs' three claims for civil penalties. Plaintiffs do not contest that their first claim - for unpermitted discharge of wastewater and contaminated storm water from the lagoons and other areas of Defendant's facility into the Arkansas River - was the subject of ODEQ's diligent enforcement action. In their second claim, Plaintiffs allege Defendant misrepresented the depth of groundwater at its facility in its 1998 wastewater permit application. The ODEQ has investigated the depth-of-groundwater issue and has agreed to resolve this issue in the upcoming permit renewal process, see Exhibit "D" to Defendant's Reply Brief, Addendum at ¶ 7vii. Plaintiffs allege in their third claim that the discharges which are the subject of their first claim occurred "without monitoring or reporting the discharges to Oklahoma DEQ or EPA." Complaint at ¶ 19. Thus, this claim is related to and covered by the ODEQ's enforcement action regarding the first claim. If the ODEQ's continued diligent enforcement identifies discharges to the waters of the State or the United States, Defendant would be required to obtain an NPDES permit and conduct appropriate monitoring and reporting. See Okla. Admin. Code ¶ 252:605-1-5(b)(3)(DD).

forth in § 1319(g)(6)(A)(ii) are satisfied. Any doubt as to the plain meaning of the statute may be resolved by reference to the legislative history, specifically the 1984 House Conference Report, which was unanimously approved by both the House and the Senate:

> No one may bring an action to recover civil penalties under sections 309(b) and (d), 311(b), or 505 [citizen suits] of this Act for any violation with respect to which the Administrator has commenced and is diligently prosecuting an administrative civil penalty action, or for which the Administrator has issued a final order not subject to further judicial review (and for which the violator has paid the penalty). This limitation applies only to an action for civil penalties for the same violations which are the subject of the administrative civil penalty proceeding. It would not. . . apply to: 1) an action seeking relief other than civil penalties (e.g., an injunction or declaratory judgment); . . .
>
> H.R.Conf. Rep. No. 99-1004, at 133 (1986) (quoted in *Old Timer, Inc. v. Blackhawk-Central City Sanitation District*, 51 F.Supp.2d 1109, 1114 (D. Colo. 1999).

The Court recognizes that the First, Eighth and Fifth Circuits have held that § 1319(g)(6) bars all civil actions under § 1365, *see Scituate*, *supra*, 949 F.2d at 558, *Arkansas Wildlife Federation*, *supra*, 29 F.3d at 382-83; *Lockett v. EPA*, 176 F.Supp.2d 628, 636 (E.D. La. 2001), *aff'd*, 319 F.3d 678 (5th Cir. 2003), and that the approach of those courts has some appeal, but the Court has no choice but to follow the plain language of the statute.

In accordance with the foregoing, upon reconsideration of the Court's Order of May 14, 2003, in light of Defendant's Reply Brief and Plaintiffs' Sur-Response, the Court concludes that Plaintiffs' claims for civil penalties are barred by 33 U.S.C. § 1319(g)(6)(A)(ii) and 33 U.S.C. § 1365(a) and this Court has no jurisdiction over them. Plaintiffs' claims for declaratory and injunctive relief are not so barred. Accordingly, the Order entered on May 14, 2003, is VACATED except to the extent it addresses the issue of Plaintiffs' standing at pp. 8-10. Defendant's motion to dismiss Plaintiffs' civil penalties claims pursuant to Rule 12(b)(1), F. R. Civ. P., is GRANTED and Defendant's motion to dismiss Plaintiffs' claims for declaratory and injunctive relief pursuant to Rule 12(b)(1) and (6), F. R. Civ. P., is DENIED.

The Court is of the opinion that this Order involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this Order may materially advance the ultimate termination of this litigation. 28 U.S.C. § 1292(b). To permit the parties to seek leave to pursue an interlocutory appeal(s), and in the interest of controlling the progress of the litigation and avoiding waste of the parties' time and money and judicial resources, this action is STAYED until such time as the parties notify the Court that they do not intend to seek leave to file interlocutory appeals, the Tenth Circuit Court of Appeals has denied the application(s) for an interlocutory appeal under 28 U.S.C. § 1292(b) or the Tenth Circuit has issued an Order deciding the interlocutory appeal(s).

IT IS SO ORDERED this 23rd day of June, 2003.

DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-02-1677-R

PAPER, ALLIED-INDUSTRIAL CHEMICAL AND ENERGY WORKERS INTERNATIONAL UNION ("PACE") and PONCA TRIBE,

Plaintiffs,

v.

CONTINENTAL CARBON COMPANY,

Defendant.

DEFENDANT CONTINENTAL CARBON COMPANY'S MOTION TO DISMISS AND BRIEF IN SUPPORT

MARK D. COLDIRON, OBA #1774
JIM T. PRIEST, OBA #7310
McKINNEY & STRINGER, P.C.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

(1) PAPER, ALLIED-INDUSTRIAL, CHEMICAL AND ENERGY WORKERS INTERNATIONAL UNION ("PACE"), and
(2) PONCA TRIBE,

Plaintiffs.

v.

(1) CONTINENTAL CARBON COMPANY,

Defendant.

Case No. CIV-02-1677-R

DEFENDANT CONTINENTAL CARBON COMPANY'S MOTION TO DISMISS AND BRIEF IN SUPPORT

Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), Defendant, Continental Carbon Company ("Continental Carbon" or "Defendant"), moves this Court for an Order dismissing all claims against Continental Carbon because:

(1) This Court lacks jurisdiction over Plaintiffs' citizen suit under 33 U.S.C. § 1365(a) of the Clean Water Act ("CWA") because such suit is barred by 33 U.S.C. § 1319(g)(6)(A)(ii); and

(2) Plaintiffs lack standing to maintain a citizen suit against Defendant.

Because Plaintiffs' citizen suit is barred pursuant to 33 U.S.C. § 1319(g)(6) and Plaintiffs lack standing to sue, all of Plaintiffs' claims against Defendant, including claims for civil penalties, injunctive relief, and declaratory relief, should be dismissed. In support of this Motion, Defendant respectfully submits the incorporated Brief.

BRIEF IN SUPPORT

Defendant Continental Carbon Company owns and operates a manufacturing facility located in Ponca City, Oklahoma, which produces carbon black, a product used in the

manufacture of tires and other rubber and plastic products. Plaintiffs are the Paper, Allied-Industrial, Chemical and Energy Workers International Union ("PACE" or the "Union"), an international workers union that represents workers at Defendant's Ponca City plant, and the Ponca Tribe, an Indian Nation whose members live in Ponca City, Oklahoma.

In recent months, the Union and Continental Carbon have been locked in a hotly contested labor dispute and have engaged in protracted labor negotiations seeking to resolve the dispute. Concurrently, the Union and its membership have embarked on a campaign to pressure Continental Carbon into labor concessions by, among many things, filing environmental lawsuits against the Company. An action was filed here in the Western District of Oklahoma, *P.A.C.E. v Cont'l Carbon Co.*, Case No. CIV-02-1022-M, as well as a similar action filed in the Northern District of Texas, Amarillo Division, *P.A.C.E. v. Cont'l Carbon Co.*, Civil Action No. 2-02CV-0175J, involving meritless allegations of violations of environmental laws. Those two lawsuits were recently dismissed by Joint Stipulation.

In addition, Plaintiffs have brought this lawsuit as a citizen suit under 33 U.S.C. § 1365(a) of the Clean Water Act. Essentially, Plaintiffs are contending that Continental Carbon discharged pollutants from its Ponca City plant without proper permits. This Motion to Dismiss is filed because Plaintiffs' citizen suit is barred by 33 U.S.C. § 1319(g)(6)(A)(ii), which prohibits duplicative citizen suits when, as here, a State is diligently prosecuting an enforcement action under comparable State law. Plaintiffs also lack standing to sue, as they have failed to allege a concrete injury in fact fairly traceable to Defendant's alleged conduct.

I. RELEVANT FACTS

1. Plaintiffs bring three causes of action in their Complaint: (1) discharges to waters of the United States and waters of the State without a permit, (2) discharges to lagoons pursuant to a permit which should not have been granted due to issues as to the depth to groundwater below Defendant's lagoons, and (3) monitoring and reporting violations associated with the alleged improper discharges. (Complaint, ¶¶ 16-19.)

2. Plaintiffs allege Defendant has failed to apply for a permit that authorizes discharges beyond its facility boundary, pursuant to the National Pollutant Discharge Elimination System ("NPDES") and/or Oklahoma Pollutant Discharge Elimination System ("OPDES") programs. (Complaint, ¶ 17.)

3. Oklahoma has been delegated full authority to implement and enforce its OPDES program in lieu of the federal NPDES program. (Complaint, ¶ 15.)

4. Plaintiffs seek civil penalties, injunctive relief, and declaratory relief. (Complaint, ¶ 1.)

5. The Ponca Tribe submitted a complaint to the Oklahoma Department of Environmental Quality ("ODEQ") in January 2002. (Complaint, ¶ 13.) PACE became involved shortly thereafter, at least by February 2002.

6. The ODEQ conducted an investigation of Defendant's facility in January 2002. (Complaint, ¶ 13.)

7. Based on its investigation, the ODEQ issued Notice of Violation ("NOV") No. I-36000130-02-1 to Defendant on February 12, 2002, for alleged violations of the CWA and State law, including discharges into the waters of the State without a permit. (Exhibit A.)

8. The ODEQ and Defendant entered into a Consent Order, Case No. 02-116, on May 6, 2002, to resolve issues of alleged noncompliance under the CWA and State law. (Exhibit B.)

9. Plaintiffs filed a 60-day notice of Intent to Sue letter on June 19, 2002. (Attached to Complaint as Exhibit A.)

10. The ODEQ suspended the requirements of the Consent Order by a June 20, 2002 letter, citing a need to resolve issues regarding depth to groundwater below Defendant's lagoons. (Exhibit C.)

11. Plaintiffs filed this action on November 26, 2002.

12. The ODEQ and Defendant entered an Addendum to the Consent Order, Case No. 02-116, on April 11, 2003, lifting the suspension on the requirements of the Consent Order and agreeing to resolve issues relating to previous permit applications and depth to groundwater in the upcoming permit renewal process. (Exhibit D.)

II. ARGUMENT AND AUTHORITIES

A. Standard Of Review

The bar against a citizen suit under § 1319(g)(6)(A) is a matter of subject matter jurisdiction. The Tenth Circuit has previously held that jurisdictional challenges which "arise out of the same statute creating the cause of action" are "necessarily intertwined with the merits of the case." *U.S. ex. rel. King v. Hillcrest Health Ctr., Inc.*, 264 F.3d 1271, 1278 (10th Cir. 2001), *cert. denied*, 535 U.S. 905 (2002). Thus, the Court should treat this motion as one to dismiss under Rule 12(b)(6).[1] *Id.*

[1] The Tenth Circuit held that such issues should be resolved under either Rule 12(b)(6) or Rule 56. Here, conversion to a motion for summary judgment is unnecessary. The only matters outside the pleadings introduced by Defendant are matters of public record. Defendant respectfully requests this Court take judicial notice of the facts contained in the attached documents from the ODEQ record pursuant to Fed. R. Evid. 201. *See Davis v. United Student Aid Funds, Inc.*, 45 F. Supp.2d 1104, 1106 (D. Kan. 1998) ("As for the records, reports, and other materials from administrative agencies, the court may take judicial notice of any facts provided in such materials without converting the Rule 12(b)(6) motion into a Rule 56 motion."). Plaintiffs have implicitly incorporated these same documents into their Complaint and relied upon them, as they form part of the basis of Plaintiffs' claims. *See, e.g.*, Complaint, ¶ 12 ("Based on the **records available to Plaintiffs and the results of inspections conducted by the Oklahoma DEQ** and the Petitioners, it appears" that Defendant has committed the alleged violations).

The basic test for dismissal under Rule 12(b)(6) is whether "it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). When a defendant moves to dismiss on grounds of lack of subject matter jurisdiction, "the plaintiff has the burden of proving jurisdiction in order to survive the motion." *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir.1990). With respect to both federal jurisdiction and standing, "the party invoking federal jurisdiction bears the burden of establishing its existence." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998). The Court is not required to presume the truthfulness of legal conclusions or deductions that are alleged or drawn from pleaded facts. *See e.g., Witt v. Roadway Express*, 136 F.3d 1424, 1431 (10th Cir. 1998), *cert. denied*, 525 U.S. 881 (in applying the Rule 12(b)(6) analysis, the court is to accept as true all well-pleaded facts, as distinguished from conclusory allegations); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (conclusory allegations without supporting factual averments are insufficient to State a claim on which relief can be granted); *Bryson v. City of Edmond*, 905 F.2d 1386, 1390 (10th Cir. 1990) (while reasonable inferences can be drawn from pleaded facts, mere conclusions are not permitted, nor are unwarranted inferences or footless conclusions of law predicated on such facts). In order to avoid dismissal, therefore, Plaintiffs must allege enough facts in the Complaint to support a valid claim against Continental Carbon which would entitle them to relief.

B. Jurisdiction Over Plaintiffs' Citizen Suit Is Barred Under The Clean Water Act, 33 U.S.C. § 1319(g)(6)(A)(ii).

In § 1365(a), the CWA authorizes any citizen to initiate a civil action on his own behalf "against any 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," **except as provided under subsection (b) or § 1319(g)(6) of the CWA.** 33 U.S.C. § 1365(a). The CWA originally only precluded citizen suits where the United States Environmental Protection Agency ("EPA") or a State had previously brought an action in court against the defendant. 33 U.S.C. § 1365(b).

Recognizing the potential for duplicative and unnecessary proceedings when the EPA or a State had already commenced administrative action, Congress added the exception under § 1319(g)(6) with its 1987 Amendments to the CWA. **Section 1319(g)(6) of the Clean Water Act provides that citizen suits are barred where the EPA or a State has already begun or taken enforcement action.** 33 U.S.C. § 1319(g)(6). This bar on duplicative citizen actions is based upon the general policy behind CWA citizen suits, *i.e.*, that "the citizen suit is meant to ***supplement*** *rather than to* ***supplant*** governmental [enforcement] action." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987) (emphasis added).

1. The ODEQ Has "Commenced" And Is "Diligently Prosecuting" An Action Against Continental Carbon Under "Comparable State Law."

The jurisdictional bar in § 1319 provides that any violation "with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection" shall not be the subject of a civil penalty action under § 1365. 33 U.S.C. § 1319(g)(6)(A)(ii). Dismissal is proper in this matter because each of these three requirements have been met:

(1) The ODEQ has **commenced** an action against Continental Carbon;

(2) The ODEQ is **diligently prosecuting** the action; and

(3) The action is being conducted pursuant to Oklahoma law which is **comparable** to the federal Clean Water Act.

Therefore, this Court lacks subject matter jurisdiction over Plaintiffs' citizen suit, and each of Plaintiffs' claims should be dismissed.

a. Commencement

It is clear from a review of the Undisputed Facts that the Oklahoma Department of Environmental Quality has commenced an action against Continental Carbon with respect to the same issues raised in the Complaint. For this reason, the first of the three requirements for dismissal is firmly established.

The CWA does not define "commencement" for the purposes of determining whether a State has commenced enforcement proceedings under the § 1319(g)(6)(A) analysis. *Sierra Club v. Colo. Ref. Co.*, 852 F. Supp. 1476, 1484 (D. Colo. 1994). Therefore, courts have considered the procedures for the institution of administrative enforcement proceedings under the relevant State law for guidance as to the meaning of commencement. *Id.* at 1485. *See also Williams Pipeline Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1320 (S.D. Iowa 1997); *Pub. Interest Research Group of N.J., Inc. v. Elf Atochem N. Am., Inc.*, 817 F. Supp. 1164, 1172 (D.N.J. 1993). When determining whether a State has "commenced an action" within the meaning of § 1319(g)(6), "states are afforded some latitude in selecting the specific mechanisms of their enforcement program." *Ark. Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376, 380 (8th Cir. 1994), *cert. denied*, 513 U.S. 1147 (1995). In fact, a district court in Iowa has held that the State need not conduct any formal procedure at all. *Williams*, 964 F. Supp. at 1320-23.[2]

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[2] In *Williams*, the court noted that because defendant had come into compliance with directives of the Iowa Department of Natural Resources ("Iowa DNR"), there was no need to file an administrative order or a notice of violation to begin administrative proceedings - compliance was at hand. Thus, the Iowa DNR "commenced an action" when it "issue[d] directives and reach[ed] an informal settlement that involved a remediation plan, an NPDES permit, monitoring, status reports, and site investigations." *Williams*, 964 F.Supp. at 1323.

Under Oklahoma law, whenever the ODEQ has determined that any person is in violation of the environmental statutes or regulations of the State, or any permit or license issued pursuant thereto, the ODEQ "may give written notice to the alleged violator of the specific violation and of the alleged violator's duty to correct such violation immediately or within a set time period or both and that the failure to do so will result in the issuance of a compliance order." OKLA. STAT. tit. 27A, § 2-3-502(A) (Supp. 2002). Further, the ODEQ regulations require that "[u]nless otherwise provided by the particular enabling legislation, administrative enforcement proceedings shall begin with a written notice of violation ("NOV") being served upon the Respondent." OKLA. ADMIN. CODE § 252:4-9-1 (2002).[3] Since an NOV was issued in this case, it is clear that the ODEQ has commenced an action against Continental Carbon, thus satisfying the first prong of the analysis.

The ODEQ issued NOV No. I-36000130-02-1 to Continental Carbon pursuant to its authority under § 2-3-502(A) of the Environmental Quality Code on February 12, 2002 (Exhibit A). Specifically, the NOV alleges that "water from a large pond on a marshy piece of land [on the] east side of the Continental Carbon plant was black;" that although there were no visible discharges from the impoundments to the marsh, black water was discharging into the marsh from under the ground; and that "[s]amples taken at [the] site had chemical components identical to samples taken from [the] impoundment," in violation of OKLA. ADMIN. CODE § 252:605-1-5(b)(3)(P) and OKLA. STAT. tit. 27A, § 2-6-205(A), which prohibit discharges of any pollutant to waters of the State without a permit.

The ODEQ subsequently sent a letter to Continental Carbon on June 20, 2002 (Exhibit C), alleging that the depth to groundwater below Continental Carbon's surface impoundment lagoons was less than 15 feet, in violation of OKLA. ADMIN. CODE § 252:616-7-1-(4). This letter suspended the remaining issues from the Consent Order pending resolution of this alleged violation. The ODEQ ultimately determined that the depth-to-groundwater issue and issues relating to the accuracy of information provided by Continental Carbon in previous permit applications were more properly addressed in the permitting process. (Addendum to Consent Order, ¶ 7iii.)

The allegations in the NOV and the June 20th letter form the basis for Plaintiffs' citizen suit claims.[4] Plaintiffs allege that "Continental Carbon has discharged, and is discharging, pollutants to the waters of the United States from the lagoons" without a permit under federal law (CWA §§ 301(a) and 402) and Oklahoma law (OKLA. STAT. tit. 27A, § 2-6-205(A)).[5] Complaint, ¶¶ 13, 16. This is the precise issue addressed by the ODEQ in the NOV:

> Except as otherwise provided in subsection B of this section, it shall be unlawful for any facility, activity or entity regulated by the Department pursuant to the Oklahoma Pollutant Discharge Elimination System Act to discharge any pollutant into waters of the state or elsewhere without first obtaining a permit from the Executive Director.

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3 As in Arkansas and Iowa, Oklahoma law gives the ODEQ considerable discretion under the Water Quality Act to issue an order, commence appropriate administrative enforcement proceedings, or bring a civil action. OKLA. STAT. tit. 27A, § 2-6-206(C) (Supp. 2002).

4 Plaintiffs state in the Complaint that their allegations are based on ODEQ records available to them and the results of inspections conducted by the ODEQ and themselves. (Complaint, ¶ 13.)

5 The alleged federal CWA violations that Plaintiffs identify in their Complaint are essentially identical and consumed within Oklahoma's statutory scheme, since Defendant operates pursuant to Oklahoma permits. Section 301(a) of the CWA prohibits discharges of any pollutant except in compliance with law. 33 U.S.C. § 1311(a). Section 402 requires permits for discharges of pollutants. 33 U.S.C. § 1342(a)(1). The EPA has delegated its authority to issue NPDES permits under § 402 to the State of Oklahoma. (Complaint, ¶ 15.) *See also* Final Approval of the Oklahoma Discharge Elimination System under the Clean Water Act, 61 Fed. Reg. 65,047 (1996).

OKLA. STAT. tit. 27A, § 2-6-205(A) (Supp. 2002).

Further, Plaintiffs allege that Continental Carbon has misstated depth to groundwater below its lagoons in previous permit applications and violated Oklahoma's depth-to-groundwater requirement. The ODEQ has determined that these issues should be resolved through the permitting process, as confirmed in the Addendum. (Addendum to Consent Order, ¶ 7iii.)

Unquestionably, then, the ODEQ "commenced" administrative enforcement proceedings with the issuance of the NOV regarding CWA issues on February 12, 2002.

b. Diligent Prosecution

The plaintiff in a citizen suit bears the burden of proving that a State agency's prosecution was not diligent, and the "burden is heavy, because the agency's diligence is presumed." *Williams*, 964 F. Supp. at 1324. According to the First Circuit, "[w]here [a State] agency has specifically addressed the concerns of an analogous citizen's suit, deference to the agency's plan of attack should be particularly favored." *N. & S. Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552, 557 (1st Cir. 1992).

Further, the diligence of the State's prosecution is determined by the procedures of the State and is not limited to ordering compliance with the CWA by a date certain, according to a timetable, and providing civil penalties.

> The government agency is **not required to succeed by the private party's definition of success**. Merely because a state may not be taking the precise action a private party wants it to, or moving with the speed the plaintiff desires, does not entitle the private plaintiff to injunctive relief.

Williams, 964 F. Supp. at 1324 (emphasis added). The Eighth Circuit has similarly held that "[i]t would be unreasonable and inappropriate to find failure to diligently prosecute simply because [the alleged violator] prevailed in some fashion or because a compromise was reached." *Ark. Wildlife Fed'n*, 29 F.3d at 380.

There can be no serious allegation, and there is no proof, that ODEQ has not diligently prosecuted administrative enforcement against Continental Carbon. Subsequent to the issuance of the February 12, 2002 NOV, the ODEQ entered a Consent Order with Continental Carbon on May 6, 2002 (Exhibit B), pursuant to the ODEQ's authority under OKLA. STAT. tit. 27, §§ 2-6-206(E) and 2-6-105. (Consent Order, ¶ 12.) These provisions allow the ODEQ to issue orders for violations related to the OPDES Act and for pollution of the air, land, or waters of the State, respectively. OKLA. STAT. tit. 27, §§ 2-6-206(E) and 2-6-105(B). The Consent Order was designed to resolve potential issues of noncompliance between the ODEQ and Continental Carbon. (Consent Order, ¶ 9.)

The Consent Order required Continental Carbon to conduct certain studies on the facility to determine whether discharges were in fact occurring and to conduct a Supplemental Environmental Project ("SEP"). (Consent Order, ¶¶ 17-18.) Continental Carbon completed the SEP and Tasks A and B(a) of the Consent Order to the ODEQ's satisfaction and submitted a Lagoon Study in fulfillment of Task B(b). (Addendum to Consent Order, ¶¶ 7ii, 7iii, 7iv, 32.) However, the ODEQ suspended the requirements of Task B(b) in the June 20, 2002 letter (Exhibit C) pending resolution of other issues involving the depth to groundwater below the lagoons. (Addendum to Consent Order, ¶ 7iii.) The ODEQ agreed to an Addendum to the Consent Order on April 11, 2003 (Exhibit D), which lifted the suspension and confirmed that

issues involving depth-to-groundwater and the accuracy of information submitted in previous permit applications would be addressed through the facility's upcoming permitting process.[6]

Since the ODEQ commenced an enforcement action against Continental Carbon on February 12, 2002, it has diligently prosecuted that action. The ODEQ has negotiated a Consent Order and an Addendum to the Consent Order and required Continental Carbon to conduct an SEP and various studies to determine whether the allegations in the NOV are supported. Thus, Plaintiffs cannot meet the heavy burden of showing that the ODEQ has not been diligent in its prosecution of its enforcement action.

c. Comparable State Law

The third requirement under § 1319(g)(6)(A) is that the action commenced by a State agency must be prosecuted under **State law which is comparable to the CWA**. 33 U.S.C. § 1319(g)(6)(A)(ii). Section 1319(g) contains three relevant categories of provisions: (1) penalty provisions, whereby the EPA can access administrative penalties not to exceed $10,000 per day, with a $25,000 cap for Class I violations and a $125,000 cap for Class II violations; (2) notice and public participation provisions, whereby the EPA must publish notice and accept comments from interested parties prior to entering an administrative order and may - but is not required to - hold a hearing at the request of interested parties; and (3) judicial review provisions, whereby any person who commented on the proposed penalty assessment can request judicial review within 30 days.

Comparability of the State law has not been addressed by the Tenth Circuit; however, several other Federal Circuits have considered whether actions were prosecuted under State laws comparable to the federal CWA. As explained by the First Circuit, the standard for comparability is simply a question of whether

> **the [State] statutory scheme**, under which the State is diligently proceeding, contains penalty assessment provisions comparable to the Federal Act, that the State is authorized to assess those penalties, and that the overall scheme of the two acts is aimed at correcting the same violations, thereby achieving the same goals.

Scituate, 949 F.2d at 556 (emphasis added). Thus, the First Circuit adopted a standard which considers the **overall State statutory scheme** to determine whether it has the same goals as the enforcement procedures of the CWA.

In *Scituate*, the Massachusetts Department of Environmental Protection ("MDEP") issued an administrative order to defendant for discharges without an NPDES permit in 1987. The MDEP **did not assess any penalties** against defendant for agreement of the order. In 1989, the plaintiff citizen group brought a CWA citizen suit based on the same discharge violations. The district court granted defendant's motion for summary judgment, and the First Circuit affirmed. The First Circuit rejected a formalistic approach to the specific provisions of the State law, holding that "[t]he focus of the statutory bar to citizen's suits is not on state statutory construction, but on whether corrective action already taken and diligently pursued by the government seeks to remedy the same violations as duplicative civilian action." Because the Massachusetts scheme was aimed at correcting the same violations and achieving the same goals

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[6] An amendment or addendum to a consent order relates back to the original consent order and does not "commence" a new action for purposes of § 1319(g)(6). *Ark. Wildlife Fed'n*, 29 F.3d at 380. In *Arkansas Wildlife Fed'n*, the Arkansas Department of Pollution Control & Environment ("ADPC&E") and defendant entered a consent administrative order ("CAO") on April 16, 1991, without the need for a formal NOV. The ADPC&E and defendant agreed to a corrected CAO on September 9, 1991, and an amended CAO on April 30, 1992. Plaintiff argued that if the initial CAO "commenced" a state enforcement action, each subsequent corrected or amended CAO "commenced" a new and separate enforcement action. The Court disagreed, holding that "the corrected and amended CAOs were all part of **a single ongoing enforcement action**." *Id.* at 382 (emphasis added). Likewise, in the instant matter, the Consent Order and the Addendum were all part of the ODEQ's ongoing enforcement action against Continental Carbon arising from the initial February 12, 2002, NOV.

as the federal CWA, the First Circuit held that Massachusetts law was comparable for purposes of § 1319(g)(6).

Since *Scituate* was decided, the Eighth, Sixth, and Fifth Circuits have generally adopted the First Circuit's standard for comparability:

> [T]he comparability requirement may be satisfied so long as the state law contains comparable penalty provisions which the state is authorized to enforce, has the same overall enforcement goals as the federal CWA, provides interested citizens a meaningful opportunity to participate at significant stages of the decision-making process, and adequately safeguards their legitimate substantive interests.

Ark. Wildlife Fed'n, 29 F.3d at 381. *See also Lockett v. EPA*, 319 F.3d 678 (5th Cir. 2003); *Jones v. City of Lakeland*, 224 F.3d 518 (6th Cir. 2000). In *Arkansas Wildlife Fed'n*, plaintiff filed a citizen suit alleging that defendant had violated its NPDES permit for three point source discharges to the Arkansas River, discharge violations for which the ADPC&E had previously issued a compliance order. The district court granted defendant's motion for summary judgment based on § 1319(g)(6)(A)(ii), holding that Arkansas law was sufficiently comparable to § 1319(g) and that civil penalties, injunctive relief, and declaratory relief were each barred. *Ark. Wildlife Fed'n v. ICI Americas, Inc.*, 842 F. Supp. 1140 (E.D. Ark. 1993), *aff'd.*, 29 F.3d 376. The Eighth Circuit affirmed, holding that Arkansas law was comparable because the overall regulatory scheme provides significant opportunities for public participation, despite the fact that Arkansas law was not identical to the CWA as to its public notice and comment provisions. *Ark. Wildlife Fed'n*, 29 F.3d at 381.

The "overall scheme" approach of the First Circuit was taken by the only court within the Tenth Circuit which has specifically addressed the issue of comparability of State law. *Sierra Club v. Colo. Ref. Co.*, 838 F. Supp. 1428, 1435 (D. Colo. 1993). In *Sierra Club*, the court looked closely at the public notice provisions of Colorado law. Colorado law does not require prior public notice of a State penalty assessment. However, any party "directly affected" by a final order can apply for a hearing or reconsideration of a final order. COLO. REV. STAT. § 25-8-403. Additionally, any person "adversely affected or aggrieved" by any "final order" can seek judicial review. COLO. REV. STAT. § 25-8-404(1). Therefore, the court held that "although the Colorado regulatory scheme does not mandate prior public notice of enforcement proceedings, **overall, the scheme adequately protects the public interest in enforcement actions**." *Sierra Club*, 838 F. Supp. at 1435 (emphasis added).

Oklahoma law is substantially similar to Colorado law and is comparable to the CWA § 1319(g) under the standard adopted by the majority of Federal Circuits that have addressed the issue. First, the EPA has delegated authority to the State of Oklahoma "to administer and enforce" the NPDES program for regulating discharges of pollutants into waters of the State. 61 Fed. Reg. 65,047. This delegation represents an acknowledgment by the EPA that Oklahoma's program is a comparable program sufficient to operate "in lieu of the EPA administered NPDES program pursuant to § 402 of the CWA." *Id.*

Second, the Oklahoma Water Quality Code, OKLA. STAT. tit. 27A, § 2-6-101 *et seq.*, contains penalty provisions which the State is authorized to enforce, has the same overall enforcement goals as the federal CWA, and provides interested citizens a meaningful opportunity to participate at significant stages of the decision-making process. The ODEQ is authorized to assess civil penalties not to exceed $10,000 per day of violation, and not to exceed a total penalty of $125,000 per violation. OKLA. STAT. tit. 27A, § 2-6-206(E).[7] The "overall scheme" of Oklahoma's Water Quality Code is designed, *inter alia*, to "provide for the

[7] The EPA is authorized to assess administrative penalties up to $10,000 per day, with a maximum penalty of $25,000 for Class I violations and $125,000 for Class II violations. 33 U.S.C. § 1319(g)(2).

prevention, abatement and control of new or existing water pollution; and to cooperate with other agencies of this state, agencies of other states and the federal government in carrying out these objectives." OKLA. STAT. tit. 27A, § 2-6-102.[8] Although Oklahoma has no requirement of public notice or participation prior to entering a consent order,[9] the Oklahoma scheme is designed to "provide[] interested citizens a meaningful opportunity to participate at significant stages of the decision-making process."[10] *Ark. Wildlife Fed'n*, 29 F.3d at 381 (public notice and comment requirements need not be identical to the CWA). Specifically, Oklahoma law provides that any interested party may intervene in any administrative proceeding before the ODEQ or in any civil proceeding related to violations of the OPDES Act. OKLA. STAT. tit. 27A, § 2-6-206(B). Any party aggrieved by a final order of the ODEQ may petition for judicial review. OKLA. STAT. tit. 27A, § 2-3-502(I).[11]

Congress and the Supreme Court have each expressed an intent that citizen suits should not be allowed to duplicate and supplant State enforcement action conducted under law comparable to the CWA. Comparability does not require that Oklahoma law be identical to the CWA. Under the standard of the majority of Federal Circuits, Oklahoma's Water Quality Code is comparable to § 1319 of the federal CWA. As such, since the ODEQ has commenced and is diligently prosecuting an action under comparable law against Continental Carbon, Plaintiffs' citizen suit is barred and should be dismissed.

2. Plaintiffs' Citizen Suit Is Not Saved Under Either Of The Exceptions In § 1319(g)(6)(B).

Neither exception found in 33 U.S.C. § 1319(g)(6)(B) allows Plaintiffs to maintain this citizen suit. Under § 1319(g)(6)(B)(i), this civil action must have been filed **prior to the commencement of an action** under § 1319 or comparable State law in order to survive. Such is not the case, as Plaintiffs filed this action on November 26, 2002, **after the ODEQ had commenced administrative action** against Continental Carbon on February 12, 2002, with the issuance of an NOV.

The second exception in § 1319(g)(6)(B)(ii) is likewise inapplicable here. Subsection (ii) provides that the plaintiff must have sent its notice to sue letter prior to commencement of the action under § 1319 or comparable State law and then filed suit within 120 days. In this case, Plaintiffs sent two notice letters to Continental Carbon. The first, dated February 25, 2002, referred only to claims under the Resource, Conservation and Recovery Act ("RCRA"). The second, dated June 19, 2002, specifically identified CWA claims in addition to the RCRA claims for the first time and was attached to the Complaint in this action by the Plaintiffs. Notice of the alleged CWA § 1365(a)(1) violation, therefore, did not reach Continental Carbon until after the ODEQ had "commenced" an action under comparable State law on February 12, 2002. In any event, the Plaintiffs' citizen suit **was not filed within 120 days of *either* notice letter, and 33 U.S.C. § 1319(g)(6)(B)(ii) is, therefore, inapplicable.**

The Fifth Circuit has recently faced a similar factual scenario. *See Lockett*, 319 F.3d at 687-89. Plaintiffs in *Lockett* sent a 60-day notice letter on August 12, 1999, to the City of Folsom. The Louisiana Department of Environmental Quality ("LDEQ") issued a

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8 This corresponds to Congress' goal behind implementation of the Clean Water Act to restore and protect the quality of the Nation's waters. 33 U.S.C. § 1251(a).

9 The EPA is required to give public notice and opportunity for comment prior to issuing a civil penalty order, and those presenting comments are entitled to participate in a public hearing, if one is held. 33 U.S.C. § 1319(g)(4)(A), (B).

10 In fact, Plaintiffs have reviewed the ODEQ files and commented to the ODEQ record on numerous occasions during the ongoing enforcement action. (Exhibit E.) Such participation indicates that Plaintiffs had actual notice of the NOV and Consent Order and meaningful opportunities to participate in the enforcement process. *See Ark. Wildlife Fed'n*, 29 F.3d at 382 (noting that plaintiff had actual notice of the issuance of the CAO and had reviewed the ADPC&E's files five months before filing a lawsuit).

11 Any person who commented on the proposed civil penalty order may seek judicial review under the CWA. 33 U.S.C. § 1319(g)(8).

compliance order to Folsom on November 4, 1999, which resulted in a $466,450 penalty assessment. Plaintiffs sent a second notice letter on December 7, 1999, and filed a citizen suit on March 31, 2000, within 120 days of the second notice letter, but not within 120 days of the first notice. According to the Court, if the first notice was not sufficient, then plaintiffs must rely on the second notice, which was filed **after** the LDEQ "commenced" action. On the other hand, if the first notice was sufficient, the suit was not filed within 120 days of the notice. The Court did not determine whether the notice was in fact sufficient because, **in *either* event, the exception in § 1319(g)(6)(B)(ii) was inapplicable**. *Id.* at 688-89.

The exceptions contained in § 1319(g)(6)(B) do not operate to save Plaintiffs' citizen suit herein. Plaintiffs failed to file suit or send their 60-day notice letter prior to the time when the ODEQ commenced enforcement action under comparable State law. In addition, Plaintiffs did not file suit within 120 days of their notice letter.

3. The Bar In § 1319(g)(6) Is Jurisdictional And Precludes Plaintiffs' Claims For Civil Penalties As Well As Injunctive And Declaratory Relief.

Both the First and Eighth Circuits, and several lower courts, have determined that when applied, the jurisdictional bar precludes claims for civil penalties, injunctive relief, and declaratory relief. *See Scituate*, 949 F.2d at 557-58 (to allow claims for injunctive and declaratory relief to continue after a claim for civil penalties has been barred would be "absurd"); *Ark. Wildlife Fed'n*, 29 F.3d at 382-83 (although not "absurd," such a result would be undesirable); *Lockett v. EPA*, 176 F. Supp.2d 628, 636 (E.D. La. 2001), *aff'd*, 319 F.3d 678 (2003); *Williams*, 964 F. Supp. at 1333 (because the bar is jurisdictional, the court is without jurisdiction over claim for declaratory relief).

Because Plaintiffs' citizen suit is brought in violation of the bar in 33 U.S.C. § 1319(g)(6)(A)(ii), this Court lacks jurisdiction over Plaintiffs' claims. Therefore, Plaintiffs' citizen suit should be dismissed, including their claims for civil penalties, injunctive relief, and declaratory relief.

C. Plaintiffs Lack Standing To Maintain A Citizen Suit Lawsuit Against Defendant.

Under Article III, § 2, of the United States Constitution, a court's jurisdiction is limited to a "case or controversy," and thus a plaintiff is required to have standing to sue. *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167, 180 (2000). In order for an organization or association to have standing to bring a suit on behalf of its members, the organization must show that: (1) its members would otherwise have standing to sue in their own right; (2) the interests at stake are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Id.* at 181.

In order to satisfy the organizational standing requirements in a CWA suit, individual members of the organization must show that they have a right to sue in their own right. Thus, the court will look to the fundamental standing requirements: (1) the plaintiff must have suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent," not "conjectural or hypothetical;" (2) the injury must be fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Friends of the Earth*, 528 U.S. at 180-81. Plaintiffs have failed to allege an "injury in fact" which is "fairly traceable" to the challenged action.

The "injury in fact" prong requires a showing of injury *to the plaintiff*, **not** injury *to the environment*. *Friends of the Earth*, 528 U.S. at 181. In *Friends of the Earth*, members of the plaintiff organization had standing to sue when they made **specific** allegations as to their **reluctance** to fish, hike, picnic, bird watch, wade, or walk in or near the allegedly polluted water.

According to the Court, "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreation values of the area **will be lessened**' by the challenged activity." *Id.* at 183 (emphasis added). However, "general averments" and "conclusory allegations" that unnamed members use unspecified portions of large tracts of territory have been held insufficient to satisfy the "injury in fact" prong. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

Further, mere "knowledge of pollution" or "threat of injury" is not sufficient to establish standing. *Pub. Interest Research Group of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 120-22 (3d Cir. 1997). In *Magnesium Elektron*, the Third Circuit held that plaintiffs' allegation that they "knew" that defendant polluted the river by exceeding effluent limits in its NPDES permits was insufficient to show an "injury in fact." According to the court, such an assertion of pollution, without a corresponding allegation of concrete injury, is the equivalent of a "generalized grievance," which the Supreme Court has specifically held does not provide an individual plaintiff with standing. *See Valley Forge Christian Coll. v Americans United for Separation of Church & State*, 454 U.S. 464, 475 (1982).

In the present case, Plaintiffs have merely alleged "conjectural or hypothetical" injury. Plaintiffs allege that PACE members "hunt wildlife along the shores of the Arkansas River." (Complaint, ¶ 7.) However, there is no allegation that PACE members **have suffered a concrete injury** as a result of Continental Carbon's alleged discharges. Plaintiffs do not allege that PACE members' enjoyment of these recreational activities **have been lessened** by the alleged discharges. Nor is there any allegation in Plaintiffs' Complaint that PACE members have been **reluctant or forced to curtail** their hunting along the Arkansas River in response to the alleged discharges. Such an allegation could not be credibly made in light of Rule 11 standards.

Likewise, Plaintiffs have not alleged an "injury in fact" with respect to the Ponca Tribe members. The Complaint states that Ponca Tribe members own land along the Arkansas River downstream of Continental Carbon's plant and operate shallow water wells there. (Complaint, ¶ 8.) However, there is no allegation that Ponca Tribe members' land or water wells **have been actually impacted** by alleged discharges from Continental Carbon's plant.

In fact, what Plaintiffs essentially allege is that the ODEQ has identified potential discharges from Continental Carbon's plant, and Plaintiffs recognize some general injury to the "natural environment" as a result. (Complaint, ¶ 8.) The United States Supreme Court has directly rejected the notion that these "general averments" of injury to the environment or "generalized grievances" would create standing to sue. *See Lujan*, 497 U.S. at 888-89.

In order for an injury to be "fairly traceable" to a defendant's conduct, courts have generally required plaintiffs to show that a defendant discharges a pollutant that "causes or contributes to the kinds of injuries alleged by the plaintiffs." *Natural Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992). Since Plaintiffs have not alleged a direct injury, this prong of the standing analysis must also fail. However, even if Plaintiffs had alleged specific, concrete injuries that lessened their aesthetic or recreational enjoyment (which they have not), they have not alleged that their injury is a direct result of Defendant's conduct.

Plaintiffs make several vague allegations in the Complaint as to waters from Defendant's lagoons reaching the Arkansas River. However, this Court is not required to accept as true Plaintiffs' "conclusory" allegations that "Defendant discharges from waste retention lagoons to, **ultimately**, the Arkansas River" or that pollutants have drained "**toward** the river."

(Complaint, ¶¶ 1, 13.) (Emphasis added.) Nor should this Court recognize the patently inaccurate allegation that the ODEQ "confirmed 'several small streams of black water' coming out of Continental Carbon's wastewater lagoons." (Complaint, ¶ 13.) The ODEQ actually observed that black water came from underground seeps on the side of a hill near the Continental Carbon plant. (Exhibit A.)

If discharges are confined solely to the property owned by the defendant, then Plaintiffs cannot meet the "fairly traceable" requirement for standing. *NRDC*, 964 F.2d at 980. Without a substantial allegation that discharges from Continental Carbon's plant actually reach the Arkansas River through some actual continuous physical connection or pathway, Plaintiffs have failed to satisfy the "fairly traceable" prong. It is not enough that Ponca Tribe members' wells are "believed to be hydrologically connected to the river." (Complaint, ¶ 8.) Plaintiffs must also allege that discharges from Continental Carbon's plant are into waters which are physically connected to the river through some identifiable pathway.[12]

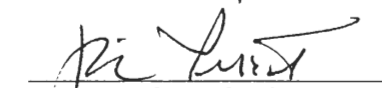
Plaintiffs have failed to allege an "injury in fact" that is neither "conjectural" nor "hypothetical." Assuming they had alleged an injury in fact - which they have not - Plaintiffs have also failed to show that such injury would be "fairly traceable" to Continental Carbon's discharges because they have made only "conclusory" allegations of a connection between Continental Carbon's lagoons and the Arkansas River. Therefore, Plaintiffs lack standing to maintain their citizen suit against Continental Carbon, and their Complaint should be dismissed.

[12] It is also unclear how Plaintiffs' injury could be fairly traceable to Defendant's alleged failure to properly obtain a permit for its lagoons. Defendant's wastewater discharge permit does not authorize discharges **from** the lagoons. (Complaint, ¶ 12.) Therefore, even if Defendant had improperly obtained the permit, such violation would only affect Defendant's activities **on its own property**. Any injury which Plaintiffs could allege - and indeed they have not alleged any "injury in fact" - could not be fairly traceable to Defendant's alleged violation of **on-site requirements for its lagoons**.

CONCLUSION

For the reasons noted above, this Court is respectfully urged to grant Defendant Continental Carbon's Motion to Dismiss. There is no subject matter jurisdiction because the ODEQ commenced and diligently prosecuted Continental Carbon under comparable State law. This "citizen suit" seeks to supplant, not supplement, the actions of the ODEQ and is therefore unauthorized. Further, neither of the Plaintiffs have standing to bring this type of action since neither one can meet the standard set forth in the Supreme Court's *Friends of the Earth* case. Accordingly, this case should be dismissed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served on all counsel of record in accordance with the Federal Rules of Civil Procedure by certified mail, return receipt requested:

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on April 14, 2003.

JIM T. PRIEST

30849-006/512908_1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Cause No. CIV-02-1677R

PAPER, ALLIED-INDUSTRIAL, CHEMICAL AND ENERGY WORKERS INTERNATIONAL UNION ("PACE") AND THE PONCA TRIBE ("TRIBE"),

Plaintiffs,

v.

CONTINENTAL CARBON COMPANY,

Defendant

PLAINTIFF'S RESPONSE TO DEFENDANT CONTINENTAL CARBON'S MOTION TO DISMISS AND BRIEF IN SUPPORT

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May 9, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

PAPER, ALLIED-INDUSTRIAL, CHEMICAL AND ENERGY WORKERS INTERNATIONAL UNION ("PACE") AND THE PONCA TRIBE ("TRIBE"),	§	
Plaintiffs,	§	Cause No. CIV-02-1677R
v.	§	
CONTINENTAL CARBON COMPANY,	§	
Defendant	§	

Plaintiffs' Response to Defendant Continental Carbon's Motion to Dismiss and Brief in Support

I. Introduction

This response demonstrates that Defendant has not approached the showing it must make to prevail on a Rule 12(b)(1) or Rule 12 (b)(6) motion. It further demonstrates Plaintiffs clearly have standing to litigate and that none of their claims or remedies are barred by putative Oklahoma enforcement actions against Defendant. This response addresses, in this order, the following issues raised by Defendant's Motion to Dismiss and Brief in Support ("Motion"): the legal standards for Rule 12(b)(1) and 12(b)(6) motions; various facts that Plaintiffs feel Defendant did not convey in a balanced manner in its Motion or omitted to mention; Defendant's standing challenge to Plaintiffs and Defendant's allegation that Plaintiffs' suit is barred by already-commenced Oklahoma administrative enforcement actions.

II. Standards for Rule 12(b)(1) and 12(b)(6) motions

Defendant cites two procedural mechanisms for its motion to dismiss: Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6). Defendant argues two grounds for dismissal: a § 1319(g)(6)(A)(ii) bar to Plaintiffs' suit and a failure of Plaintiffs' standing allegations. However, Defendant's motion is not at all clear as which of the two procedural rules' principles is being argued, at any particular point, to support the dismissal Defendant seeks. Though Rule 12(b)(1) is the conventional mechanism for dismissal for want of subject matter jurisdiction, it is on the principles of Rule 12(b)(6) that Defendant almost exclusively relies.[1]

A court must address a Rule 12(b)(1) motion before addressing a Rule 12(b)(6) motion, because a court cannot address anything, unless and until the court determines it has subject matter jurisdiction.

A. Rule 12(b)(1) Motion to Dismiss

There are two types of 12(b)(1) motions. A moving party may make a facial attack on the complaint's allegations. In reviewing a facial attack, the court must accept the allegations in the complaint as true. *Ruiz v. Colorado Dept. of Human Services*, 299 F.3d 1173, 1180 (10th Cir. 2002). A moving party may also make a factual attack, going beyond the allegations contained in the complaint, and challenging the facts upon which subject matter jurisdiction is based. In reviewing a factual attack, a court does not presume the truthfulness of the complaint's factual allegations, but has "wide discretion to allow affidavits, other documents and a limited evidentiary hearing to resolve disputed jurisdictional facts." *Sizova v. National Institute of Standards & Technology*, 282 F.3d 1320,

[1] See e.g., Defendant's Motion to Dismiss, pp. 4:

> The bar against a citizen suit under §1319(g)(6)(A) is a matter of subject matter jurisdiction. . . . Thus, the Court should treat this matter as one to dismiss under Rule 12(b)(6).

1324 (10th Cir. 2002) (quoting *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995)).

Defendant's motion is not clear as whether it is a facial or factual attack, because Defendant fails to adequately and clearly brief its arguments. While Defendant has attached unverified extra-pleading documents to its motion, it also states that the documents are "implicitly incorporated" into Plaintiffs' Complaint.[2] Thus, it appears Defendant is making a facial attack, but the extra-pleading documents – their casual manner of presentation notwithstanding – also suggest a factual attack. Regardless of whether the motion is a facial or factual attack, Defendant's motion should be denied.

The threshold to withstand a Rule 12(b)(1) dismissal motion is extremely low. Dismissal is only proper if the right claimed is "so insubstantial, implausible, foreclosed by prior decisions of [the] court, or otherwise completely devoid of merit as not to involve a federal controversy." *Steel Co. v. Citizens for a Better Env't*, 118 S.Ct. 1003, 1010 (1998)(quoting *Oneida Indian Nation of New York v. County of Oneida, New York*, 414 U.S. 661, 666 (1974)). As will be discussed in greater detail below, Plaintiffs' pleading, with or without the additional facts provided in the attached affidavits to this response, overcomes this low subject-matter jurisdiction pleading threshold.

Defendant's Rule 12(b)(1) motion is plainly premature. In any event, a motion of this nature should have been made, despite Defendant's argument to the contrary, as a motion for summary judgment. Generally, reliance on extra-pleading evidence does not necessitate conversion of a Rule 12(b)(1) motion to a Rule 56 motion for summary judgment, unless the jurisdictional question is considered intertwined with the merits of the case (e.g., when the subject matter jurisdiction is dependent upon the same statute which provides the substantive claim of the case). *Sizova*, 46 F.3d at 1324 (stating that the underlying issue is whether resolution of the jurisdictional question requires resolution of an aspect of the substantive claim). Here, Defendant moves for dismissal under the same statute on which Plaintiffs also rely for their cause of action; Defendant's arguments require resolution of aspects of Plaintiff's claims. Thus, this is a situation in which the jurisdictional dismissal motion and the merits of the case are intertwined.

Also, solid evaluation of Defendant's arguments under § 1319(g)(6)(A) requires discovery. (The Court may readily see, for example, that whether Oklahoma's prosecution of Defendant's discharges has been "diligent" is a fact-laden inquiry.) The 10th Circuit position is that "[w]hen a defendant moves to dismiss for lack of jurisdiction, either party should be allowed discovery on the factual issues raised by that motion." *Sizova*, 46 F.3d at 1326. Discovery should be completed and, possibly, even, an evidentiary hearing conducted prior to the Court's deciding Defendant's Rule 12(b)(1) motion.

B. Rule 12(b)(6) Motion to Dismiss

Unlike a subject matter jurisdiction motion, a Rule 12(b)(6) motion argues that the complaint fails to state a claim upon which relief can be granted. The motion must be decided solely on the text of the complaint. A Rule 12(b)(6) motion cannot be used to resolve factual issues. Such a motion admits facts alleged in the complaint, but challenges Plaintiffs' right to any relief based upon those facts. *Davis v. Monroe Cty. Bd. Of Educ.*, 526 U.S. 629, 633, 119 S.Ct.

[2] See, Defendant's Motion to Dismiss, pp. 4, fn.1. Defendant may infer that some, at least, of the documents are incorporated in Plaintiffs' Complaint, but Plaintiffs certainly never implied or said that.

1661, 1666 (1999). If additional evidence is considered, then the motion should convert to a Rule 56 motion for summary judgment.[3]

Moreover, a Rule 12(b)(6) motion must not be granted, unless the pleadings on their face show, beyond doubt, that Plaintiffs cannot prove any set of facts that would entitle them to relief. The court should indulge all inferences in favor of Plaintiffs. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir. 2000). The standard of review is strict and 12(b)(6) motions are viewed with disfavor and are seldom granted. *Id.*

I. **Relevant facts**

Defendant opens its Motion with unsupported and unsupportable allegations that Plaintiff PACE has filed two lawsuits involving meritless allegations as part of a PACE campaign to pressure Defendant into granting labor concessions. Motion, p. 2. As the Court may imagine, Plaintiff PACE disputes the characterization of the suits and the characterization of the motivation for the suits. The suits were settled by separate agreements and have been dismissed. The Court, should it care to explore which party's motivations are more probably pure, would find helpful a review of pleadings in an environmental suit being litigated against Defendant in Alabama by the City of Columbus, a large home builder and various others. *Action Marine, et al., v. Continental Carbon, Inc, et al.*, Cause No. CV-01-F994-E (Middle Dist. Ala.).

[3] Plaintiffs concede that the documents Defendant submitted with its motion appear to be records from the Oklahoma Department of Environmental Quality. Since Defendant failed to provide certified copies, Plaintiffs are not able to completely verify that the documents are in fact complete and accurate records. More importantly, Defendant offered no predicate for the records, so one does not know to what extent the conditions of Rule 8, Fed. R. Evid., or some other rule of "hearsay" exception are met. Finally, those documents contain facts that should not be judicially noticed, because many of the facts stated within those documents are reasonably subject to dispute and, in fact, a number are disputed by Plaintiffs. R. 201, Fed. R. Evid. (The documents include some party admissions by Plaintiff PACE, but none by Plaintiff Tribe.)

Defendant's recitation of "relevant facts" (Motion, pp. 2 through 4) is correct insofar as it recites the allegations in Plaintiffs' Complaint and the date this suit was filed. Paragraphs 7, 8, 10 and 12, however, recite facts that are mostly true but incomplete and, thus, potentially misleading. In particular, the Court should understand that: the third of Plaintiffs' claims (i.e., the failure-to-monitor and failure-to-report claim) has never been noticed or prosecuted by Oklahoma Department of Environmental Quality ("ODEQ"); the second of Plaintiffs' claims (i.e., the equitable invalidity of Defendant's discharge permit) has not been directly noticed or prosecuted by ODEQ, though its underlying violation (i.e., misrepresentation of groundwater depth) was noticed and not prosecuted by ODEQ,[4] and only the first of Plaintiff's claims (i.e., unpermitted discharges from Defendant's detention ponds) has arguably been noticed and "prosecuted" by ODEQ.[5] Although Defendant was directed to complete a supplemental environmental project, it not been assessed an administrative penalty.[6]

I. **Standing**

Defendant claims that Plaintiffs have failed to allege a concrete injury in fact fairly traceable to Defendant's alleged conduct. This is not correct. Environmental plaintiffs adequately allege injury in fact when they aver that they

[4] It is noteworthy from an equitable perspective that ODEQ's present plan for dealing with the misrepresentation of the depth to groundwater is to address that issue at the time of Defendant's permit renewal. Lamentably, the public is not allowed to participate in permit renewals in Oklahoma.

[5] As developed in more detail, *infra*, this prosecution, however, was not under a state law comparable to 33 U.S.C. § 1319(g).

[6] Defendant presumably contends that its alleged cleanup of a nearby illegal solid waste landfill, i.e., its alleged completion of a "SEP," was an assessed civil penalty. The consent order by which ODEQ purported to supersede the initial notice of violation to Defendant characterized the SEP as "designed to comply with the NPDES penalty requirement," but Oklahoma statutes require "penalties" be deposited to the DEQ Revolving Fund, which the SEP, of course, was not. 27A-2-3-504(G), Okla. Stat.

use the affected area and are persons "for whom the aesthetic and recreational values of the area will be lessened" by the challenged activity. *Friends of Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 181-183 (2000)(quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)). It is sufficient if plaintiffs show that members regularly use the threatened area and would derive less enjoyment from their activities because of the discharge. See, *Sierra Club v. Tri-State Generation and Transmission Asso., Inc.*, 173 F.R.D. 275, 280 (D.Colo. 1997)(citing *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 556-57 (5th Cir. 1996, cert. den. in 519 U.S. 811 (1996)).

Traceability, at this pleading stage of a case, does not mean that a plaintiff must show to a scientific certainty that the Defendant's actions caused the precise harm alleged. A plaintiff must merely allege that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged in the specific geographic area of concern, thereby demonstrating that defendant's discharge has affected or has the potential to affect plaintiffs' interests. See, *Friends of the Earth, Inc., v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000)(referring to *Natural Res. Def. Council v. Watkins*, 954 F2d 974 (4th Cir. 1992)); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., supra.*

Additionally, Defendant incorrectly claims that Plaintiffs need a substantial allegation that discharges actually reach the Arkansas River through some actual "continuous physical connection or pathway." This is not the law. Plaintiffs need only allege, to defeat dismissal at this early stage, circumstances from which a reasonable person could infer a causal connection to waters of the U.S.. See for example, *Quivera Mining Co. v. United States Environmental Protection Agency*, 765, F.2d 126, 129 (10th Cir. 1985) (finding a causal connection when the discharge is to an arroyo that has an intermittent flow that reaches a river only during heavy rainfall events); *Sierra Club v. Colorado Refining Co.*, 838 F.Supp. 1428, 1434 (D.Colo 1993) (finding a causal connection when the discharge reaches navigable waters through groundwater).

Defendant's authorities apply to facts not before the Court. Plaintiffs, here, have gone beyond the general averment struck down in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990) and the "someday intention" to visit an area half-way around the world struck down in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) . Plaintiffs' complaint specifies the area that Plaintiffs have in the past used and continue to use.[7] Plaintiffs have also attached to this response affidavits detailing additional facts about the aesthetic, recreational or economic injuries or threatened injuries that meet the standing threshold. See for example, *Friends of Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 181-183 (2000), and, *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000) (stating that courts have left no doubt that threats or increased risks constitute injury in fact).

Plaintiffs' Complaint avers the requisite injury in fact that is fairly traceable to Defendant's actions. The complaint, coupled with the attached affidavits, certainly withstands Defendant's motion to dismiss at this stage of the case in which no discovery has occurred. See, *Glover River Org. v. United Stated Dept. of Interior*, 675 F2d 251, 253 n.3 (10th Cir. 1982) (stating that for cases "reviewing

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[7] See for example, Complaint paragraphs 7 & 8 stating that:

> Members of PACE hunt wildlife along the shores of the Arkansas River at and downstream of Defendant's discharges and come into contact (as, when involved in recreation) with the waters of the Arkansas River **immediately downstream of the discharges.** (Emphasis added)
>
> Some members of the tribe use the Arkansas River **in the immediate downstream area of Continental Carbon discharges** for recreation, fishing and watering livestock. (Emphasis added).

the grant or denial of a motion to dismiss for lack of standing, it is sufficient for standing purposes that the plaintiff merely allege a concrete injury").

Having said all this, however, Plaintiffs are filing simultaneously with the filing of this response their First Amended Complaint, which elaborates in considerable detail on the injuries of which Plaintiffs complain and on the connections of those injuries to Defendant's discharges and monitoring and reporting violations. The hope is that the First Amended Complaint will foreshorten skirmishes that precede litigation of the merits of this suit.

V. 33 U.S.C. § 1319(g)(6)(A)(ii)

A. Claims barred, if any

Defendant argues all Plaintiffs' claims (apparently) are barred and all forms of relief Plaintiffs seek are barred by the following provision of the Clean Water Act:

> [A]ny violation – * * * (ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection * * * shall not be the subject of a civil penalty action under subsection (d) of this section or section 311(b) or section 505 of this Act.

33 U.S.C. § 1319(g)(6)(A)(ii). Section 505 of the Act is 33 U.S.C. § 1365, the citizens' suit provision.

Defendant's Motion is actually not too clear that Defendant thinks Plaintiffs' third claim (i.e., the claim on monitoring and reporting) is barred. It is difficult to see how it could be barred, inasmuch as it has never been the subject of notice or of prosecution by ODEQ. Plaintiffs' second claim (i.e., that the permit Defendant holds is equitably invalid, in light of misrepresentations regarding groundwater depth) has not been directly noticed or prosecuted by ODEQ, though the misrepresentation that underlies Plaintiffs' claim has been at least noticed by ODEQ.

So, the crux of the situation is that, at worst, only Plaintiffs' first claim is at any realistic risk of being barred by ODEQ enforcement efforts.

B. Relief barred, if any

On the point of whether the quoted language bars the non-penalty relief Plaintiffs seek, even assuming penalty relief were barred on one or more claims, Defendant's brief fails to inform the Court of the breadth of disagreement on this point among courts in the country.

Basically, there are the courts that perceive a Congressional policy regarding barring citizens' suits that may exist but that is not stated in §1319(g)(6)(A)(ii), and they interpret the section as they perceive Congress would want it interpreted. Defendant presented those cases at page 18 of its Motion. Other courts are "strict constructionists," and read the bar to be only a bar – as the text says – to citizen suit penalty relief, leaving untouched citizen suit injunctive or declaratory relief, for example. These courts hold the higher ground, and it is these courts with which this Court should align itself.

Judge Hansen has quoted the following language with approval on a related aspect of § 1319(g)(6)(A)(ii), and the wisdom of it is hard to refute:

> The most persuasive evidence of ... [Congressional] intent is the words selected by Congress, not a court's sense of the general role of citizens suits in the enforcement of the Act.

Friends of Santa Fe County, et al., v. LAC Minerals, et al., 892 F.Supp. 1333, 1346 (D.N.M. 1995), quoting *Washington Public Interest Research Group v. Pendelton Woolen Mills*, 11 F.3d 883, 886 (9th Cir. 1993).

Judge Lucero, sitting by designation on a Colorado trial bench, has quoted with favor language of Congressional intent regarding §1319(g)(6)(A)(ii) that very strongly suggests Congress, in fact, expressed its intent in the text it used in this

section. He quoted the language of the House Conference Report, which was approved by both houses, elaborating on the language of § 1319(g)(6)(A)(ii):

> No one may bring an action to recover civil penalties under sections 309(b) and (d), 311(b), or 505 of this Act for any violation with respect to which the Administrator has commenced and is diligently prosecuting an administrative civil penalty action, or for which the Administrator has issued a final order not subject to further judicial review (and for which the violator has paid the penalty). *This limitation applies only to an action for civil penalties for the same violations which are the subject of the administrative civil penalty proceeding. It would not . . . . apply to:* 1) an action seeking relief other than civil penalties (e.g., an injunction or declaratory judgment) * * *.

H.R. Conf. Rep. No. 99-1004, at 133 (1986), emphasis added by Judge Lucero at *Old Timer v. Blackhawk-Central City Sanitation District*, 51 F.Supp.2d 1109, 1114 (D. Colo. 1999).

As noted earlier, there are numerous courts that have chosen to follow the language Congress actually used in the statute. See, *Sierra Club v. Hyundai America*, 23 F.Supp.2d 1177, 1179 (D. Ore. 1997)("regardless of the applicability of the limitations on civil penalties . . . plaintiffs' rights to seek injunctive or declaratory relief appears to be unimpaired); *Coalition for a Livable West Side v. New York Department of Environmental Protection*, 830 F.Supp. 194, 196 (S.D.N.Y. 1993)(the section "precludes only citizen suits seeking civil penalties") and *New York Coastal Fishermen's Association v. New York Department of Sanitation*, 772 F.Supp. 162, 169 (S.D.N.Y. 1993)("the limitation of citizen suits . . . relates only to actions for civil penalties, not injunctive or declaratory relief").

Again, at worst, only one relief Plaintiffs seek (i.e., penalties) may realistically be said to be at any risk.

C. Comparability of the Oklahoma law

the proper magnitude will be assessed and (3) the *Scituate* interpretation leads to the anomalous result that state administrative enforcement actions would be more preclusive of citizen suits than would be EPA enforcement actions.

To these three reasons, Plaintiffs would add a fourth: examining all of a state's laws that arguably bear on the administrative-penalty-assessment process invites a federal court to resolve conflicts among the state's various laws. In the case at hand, for example, the law cited by ODEQ to support its consent order and addendum to that order only provides a right of judicial review to the person against whom the administrative penalty is assessed. § 27A-2-6-206(I), Okla. Stat. The statute cited by Defendant, however, provides any aggrieved party may appeal an administrative penalty decision. § 27A-2-3-502(h), Okla. Stat. (emphasis added). What is the justification for the specific grant to the violator of an appellate right in the first administrative penalty law, if the right exists, anyway, for "aggrieved parties," under the second administrative penalty law? How is the apparently more broad appellate grant of the second law squared with the limited right (i.e., the violator's right) accord by the first law? In order to have an appellate right under the second law, a member of the public would first have to have intervened (i.e., become a "party") in the administrative penalty proceeding, but the second law provides no right of intervention. If there is an implied right of intervention under the second law, what is the standard by which to judge which members of the public may intervene? The first law limits that right to persons whose interests are tied to the geographic area of the alleged violation. § 27A-2-6-206. How would an implied right of intervention and, hence, of appeal be balanced against the state's interest in other arenas (e.g., contractor debarment or disciplining professionals) in preserving enforcement discretion that is fettered only by the rights of the person who is disciplined?

Sec. 1319(g)(6)(A)(ii) plainly requires that the state law under which prosecution was commenced be comparable to § 1319(g). If the Oklahoma law is not comparable to § 1319(g), then none of the claims Plaintiffs have brought and none of the forms of relief they seek could be barred.

Defendant's Motion leaves the misleading impression that, in making the comparability determination, all courts have interpreted the language of § 1319(g)(6)(A)(ii) to allow a general review of a state's laws to determine if they, collectively, are comparable to § 1319(g). There are certainly courts that have done that, and Defendant has emphasized the decisions of those courts. Motion, pp. 12-14.

However, again, the plain language of the statute ("State has commenced and is diligently prosecuting an action under a State law comparable to this subsection") does not condone that interpretation. The statute certainly indicates the state's administrative penalty law, the state law that serves the office served by §1319(g) at the federal level, is what needs to be comparable to § 1319(g). This is the interpretation, the literal textual interpretation, the Ninth Circuit has chosen to honor.

In *Unocal*, the court reviewed the policy-based interpretation that is based on the case on which Defendant mostly relies, the First Circuit's *Scituate* opinion. *Citizens for a Better Environment v. Union Oil Company of California*, 83 F.39 1111 (9th Cir. 1996), *cert.* denied 519 U.S. 1101 (1997), and *North and South Rivers Watershed Assoc. v. Scituate*, 949 F.2d 552 (1st Cir. 1991). The court, however, rejected the broad examination of state laws authorized by *Scituate* and its progeny, for three reasons: (1) the "plainest" read of §1319(g)(6)(A)(ii) directs a court to review only the state law that serves the administrative penalty office served by § 1319(g); (2) looking broadly at state laws removes the guarantee the public will be given the requisite opportunity to participate and that a penalty of

For this additional reason, the literal interpretation of §1319(g)(6)(A)(ii) adopted by the *Unocal* court is the more sound approach. Under that approach, the federal courts may simply look to the state statute under which administrative penalties are imposed and see if it is comparable to §1319(g).

As is turns out, the difference between this Court's consideration of all of Oklahoma's law that is arguably relevant to administrative penalty assessment and consideration of only the law on which ODEQ actually relied in determining not to assess penalties is a small difference. ODEQ relied on § 2-6-206 of the Oklahoma Pollution Discharge Elimination System Act, § 27A-2-6-201, *et seq.*, Okla. Stat. See, Consent Order, para. 12. It is the more narrow – the more program-specific – of two administrative penalty statutes in Oklahoma, the other being found at § 27A-2-3-501, *et seq.*, Okla. Stat. The following chart compares the relevant portions of the two laws to 33 U.S.C. § 1319(g), the federal Clean Water Act administrative penalties provision. The differences between Oklahoma law and federal law are large, but the differences between the Oklahoma laws are not.

Comparability of § 1319(g) and Oklahoma State Law			
	33 U.S.C. §1319(g)	§ 27A-2-6-206, Okla. Stat.	§§27A-2-3-503, 503 & 504, Okla. Stat.
Penalty Amount	$10,000/violation/day, subject to $125,000 Cap §1319(g)(2)	$10,000/violation/day subject to $125,000 Cap subsec. (E)	$10,000/violation/day subject to no Cap §504(A)

Public Participation	Public notice before assessing penalty (g)(4)(A) Commentors get notice of penalty assessment and hearing (g)(4)(B) Accept public comment before assessing penalty (g)(4)(A) If hearing is held, a commentor gets "reasonable opportunity" to present evidence. (g) (4)(B) Commentor may petition for penalty hearing, if hearing not held otherwise (30-day period) (g)(4)(C)	No public notice at any time of NOV, penalty assessment, hearing or order No public comment right at any stage of the process Persons in geographic area may intervene in "proceeding before the department." subsec (B) No mechanism for public to request or invoke a penalty hearing	No public notice at any time of NOV, penalty assessment, hearing or order. Only complainant gets mailed notice of "enforcement action" §503 No public comment right at any stage of the process No provision for public intervention; no provision for public presentation of evidence in a hearing No mechanism for public to request or invoke a penalty hearing
Judicial Review	Person against whom penalty is assessed and commentors may appeal penalty order (g)(8)	Person against whom administrative order is assessed may appeal compliance or penalty order subsec. (I)	"Aggrieved party" may appeal penalty order §502(H)

Defendant's Motion leaves the impression the comparability analysis is some loose, almost criteria-less analysis. Motion, pp. 13-16. A more balanced discussion of the process and of the divergences among the circuits[8] is found in the 11th Circuit's recent opinion in *McAbee v. Fort Payne*, 318 F.3d 1248 (11th Cir. 2003). The court there found Alabama's administrative penalty laws, viewed in the aggregate, were not comparable to §1319(g). Before reaching this conclusion, it thoughtfully reviewed the various techniques courts have employed to conduct the comparability analysis. The *McAbee* court ultimately decided it made little difference what technique was used in the Alabama situation, since Alabama did not offer public participation rights that were sufficiently comparable to the federal standard.

The *McAbee* court stressed the importance of public participation rights in the comparability analysis, in part, because it found persuasive Congressional history to support the importance in Congress's eyes of public participation rights. Sen. John Chafee was the principal author if the 1987 amendments to the Clean Water Act that added § 1319(g), and he had this to say about comparability:

> The limitation of 309(g) applies only where a State is proceeding under a State law that is comparable to Section 309(g). For example, in order to be comparable, *a State law must provide for a right to a hearing and for public notice and participation procedures similar to those set forth in section 309(g)*; it must include analogous penalty assessment factors and judicial review standards; and it must include provisions that are analogous to the other elements of section 309(g).

133 Cong. Rec. S737 (daily ed., Jan. 14, 1987) (emphasis added at *McAbee*, 318 F.3d at 1255-1256).

The *McAbee* court found the Alabama administrative penalty public participation procedures not comparable to those of § 1319(g), because Alabama did not provide for public notice of penalty orders before they are issued, did not provide for public participation prior to the issuance of a penalty order, did not provide a public comment or evidence presentation process, did not provide a method by which the public might request a hearing on proposed penalty orders and limited appellate rights to the violator and "aggrieved" parties. *McAbee*, at 1256-1257.

[8] Defendant correctly notes the 10th Circuit Court of Appeals has not addressed the issue.

The 6th Circuit Court of Appeals engaged in a similar analysis and reached a similar conclusion as to the Tennessee administrative penalty process in *Jones v. City of Lakeland*, 224 F.3d 518, 523 (6th Cir. 2000)(*en banc*).

An examination of the preceding chart (or of the underlying Oklahoma statutes, if one prefers) shows the Oklahoma administrative penalty program, even viewed in the aggregate, suffers from the same and worse public participation short-comings. In Oklahoma, there is no notice to the general public at any stage of the penalty-assessment process; there is no comment or evidence-production process for the public at large; there is no mechanism by which the public may initiate a hearing on the penalty assessment decision; the public's right to intervene in a hearing, if a hearing is had, is limited geographically; and the appellate rights of the public and, even, of members of the public who learn of a hearing and successfully intervene, are unclear.

The Oklahoma administrative penalty process is just so far short of the public-participation standards of the federal law that enforcement actions in Oklahoma cannot bar citizen suits brought to correct and prevent in the future violations that are the subject of or are related to ODEQ enforcement actions. The Oklahoma laws are not comparable to § 1319(g).[9]

VI. Conclusion

Defendant's Motion to Dismiss fails on multiple fronts. It should not be granted.

[9] Defendant argues, Motion p. 15, without reference to legal standards, that the fact of EPA's delegation to Oklahoma of the federal NPDES program shows the administrative penalty provisions of the Oklahoma program are comparable to the same provisions of federal law. To the contrary, all the fact of delegation shows is that the entire Oklahoma wastewater permitting program was in 1996 comparable to the federal NPDES program. What Oklahoma lacks in administrative penalty rigor, it may make up elsewhere, such as in speed of permitting or in number of inspections or in technical expertise in permit writing.

The R. 12(b)(1) portion of the Motion, whether viewed a facial or as a factual challenge to Plaintiffs' suit, does not begin to establish that Plaintiffs' claims are "so insubstantial, implausible, foreclosed by prior decisions of [the] court, or otherwise completely devoid of merit as not to involve a federal controversy." *Steel Co. v. Citizens for a Better Env't*, 118 S.Ct. 1003, 1010 (1998). The R. 12(b)(6) portion of the Motion does not begin to explain how the pleadings on their face show, beyond doubt and after indulging all inferences in favor of Plaintiffs, that Plaintiffs cannot prove any set of facts that would entitle them to relief. The Rule 12 motions, to the extent they are directed at Plaintiffs' standing credentials, have been further rendered unsuccessful by Plaintiffs' First Amended Complaint, filed simultaneously with this response.

It is not at all clear, under Oklahoma law, that Defendant has been assessed a penalty, at all, and, under the *Unocal* line of cases, penalty assessment is an absolute requisite to a citizen suit bar under § 1319(g)(6)(A)(ii or iii).[10] Less technical and, therefore, perhaps more appealing, however, is the fact that the Oklahoma administrative penalty statutes, in the aggregate, simply are not comparable to the federal standard set by §1319(g); they do not foster enough public participation in the penalty decision making process to pass federal muster. Thus, ODEQ's NOVs and consent order cannot operate to bar Plaintiffs' citizens' suit. Finally, at the risk of being tedious, Plaintiffs' third claim has never arguably been the object of ODEQ enforcement and the second claim has barely arguably been the object of such an action, so neither of these claims can be touched by § 1319(g)(6)(A)(ii), which, in any event, does not touch remedies other than civil penalties.

[10] See, also, two 10th Circuit District Court cases that shed light on this "commencement of action" issue. *Old Timer*, 51 F.Supp.2d at 1113-1115, and *Friends of Santa Fe*, 892 F.Supp. at 1345-1347.

Respectfully submitted,

David Frederick
State Bar No. 07412300

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

(1) PAPER, ALLIED-INDUSTRIAL	§	
CHEMICAL AND ENERGY	§	
WORKERS INTERNATIONAL UNION	§	
("PACE") AND	§	
(2) THE PONCA TRIBE (TRIBE)	§	
Plaintiffs	§	CIVIL ACTION NO. CIV-02-1677R
v.	§	
	§	
CONTINENTAL CARBON COMPANY	§	
Defendant	§	

AFFIDAVIT OF TODD CARLSON

Before me, the undersigned notary, on this day personally appeared Todd Carlson, a person whose identity is known to me. After I administered an oath to him, upon his oath he said:

1. "My name is Todd Carlson. I am fully capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

2. I am the Chairman of the Continental Carbon Bargaining unit for Local Chapter No. 5857 of the Paper Allied-Industrial, Chemical and Energy Workers International Union (PACE).

3. Continental Carbon's facility consists of several holding/retention ponds that contain diesel-range hydrocarbons and other pollutants. PACE members believe that these ponds have been in the past and continue to be sources of illegal discharges of pollutants. For example, Continental Carbon has been known to pump waters between the ponds through badly leaking hoses causing an unpermitted discharge of polluted water. Other examples are provided in Plaintiffs' Complaint.

4. Many members of PACE are employed, but currently locked out, at the Continental Carbon Company's carbon black facility in Ponca City, Oklahoma. Members have expressed concern that when they return to work, they may have to work around these ponds and that they could be exposed to the pollutants that are unlawfully discharged, either as a result of an emergency situation or routine work.

5. PACE members also engage in recreational activities in and around the Arkansas River in the area of and downstream of Continental Carbon Company's facility. Members fish, hunt, search for arrowheads, and canoe in the Arkansas River or along the shoreline. The members are concerned about the discharges of polluted waters that are reaching the Arkansas River. Members believe the pollutants in these discharges reach the Arkansas

River through various means, including through drainage features and/or during rain events. Members believe the pollutants in the discharges are caused by the holding ponds located at Continental Carbon's facility. Members also believe that the pollutants contained in the discharges, and then in the Arkansas River, either alone or in combination with other pollutants in the River can be hazardous to their health and to the environment and resources upon which they rely for their recreational activities. They believe that they are directly injured and that future releases threaten to impair their interests, including their desire to fish in, to eat the fish from, or to come in contact with the River."

Further the Affiant sayeth not.

Todd Carlson

Subscribed and sworn to before me the undersigned notary public on this the 8th day of May, 2003 ti certify which witness my hand and official seal of acknowledgment.

MYRA L. PICKERING NOTARY PUBLIC COMM.# 02000230 EXPIRES 01/07/06 IN AND FOR STATE OF OKLAHOMA KAY COUNTY

Myra L. Pickering (signature)

Myra L. Pickering (print name)

Notary Public in and for Kay, County of the State of Oklahoma.

Commission expires: 1-7-06.

Comm# 02000230

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

(1)PAPER, ALLIED-INDUSTRIAL CHEMICAL AND ENERGY WORKERS INTERNATIONAL UNION ("PACE") AND (2)THE PONCA TRIBE (TRIBE)	)	
Plaintiff	)	CIVIL ACTION NO. CIV-02-1677R
v.	)	
CONTINENTAL CARBON COMPANY	)	

AFFIDAVIT OF RON SHERRON

Before me, the undersigned notary, on this day personally appeared Ron Sherron, a person whose identity is known to me. After I administered an oath to him, upon his oath he said:

1. My name is Ron Sherron. I am fully capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

2. I am the Director of the Office of Environmental Management for the Ponca Indian Tribe in Ponca City, Oklahoma.

3. A number of members of the Ponca Tribe depend on the Arkansas River downstream from the Continental Carbon facility. Some members have annual incomes in the range of $5000.00, and some of them rely on the fish they catch in the River for food. Some, such Tribal members are now reluctant to fish and eat the fish because of the increase in pollution in the River and their belief that the fish have become contaminated from the pollution including the pollutants discharged from the Continental Carbon facility. The members have reduced their consumption of fish from the River and have had to obtain other sources of food.

4. As well, some Tribal members pick mushrooms from the Riverbanks that are maintained damp and moist by the River below the Continental Carbon facility. The mushrooms also serve as a source of food. The members concern with the increased pollution in the River including discharges by continental Carbon, however, like fishing, causes some Tribal members to reduce their dependence on the mushrooms as a source of food.

5. Members of the Ponca Tribe, some of whom own land along the Arkansas River, will no longer swim or participate in recreational activities in the River to the extent they have in the past because of their belief that the River has been polluted by the discharges from the Continental Carbon facility as well as other sources of contaminants;

6. Some Tribe members have shallow water wells. They historically have relied upon these wells as sources of drinking water and water for other uses. They believe this water they obtained from their wells has become contaminated as a result of the activities of Continental Carbon including contamination of ground water by Continental Carbon and the discharges of contaminated water to the Arkansas River and drainages to the River which they believe are hydrologically connected to the ground water. As a result, they have had to spend time and money to obtain alternative sources of drinking water.

Further the Affiant sayeth not.

Ron Sherron

Subscribed and sworn to before me the undersigned notary public on this the 9th day of May, 2003 to certify which witness my hand and official seal of acknowledgment.

Myra L. Pickering (signature)

Myra L. Pickering (print name)

Notary Public in and for Kay, County of the State of Oklahoma.

Commission expires: 1-7-06.

MYRA L. PICKERING NOTARY PUBLIC COMM.# 02000230 EXPIRES 01/07/06 IN AND FOR STATE OF OKLAHOMA KAY COUNTY

MYRA L. PICKERING NOTARY PUBLIC COMM.# 02000230 EXPIRES 01/07/06 IN AND FOR STATE OF OKLAHOMA KAY COUNTY

PRIMER ON CITIZEN SUIT PROVISIONS

BY
MICHAEL E. MCMAHON
SENIOR VICE PRESIDENT AND GENERAL COUNSEL
GULF SOUTH PIPELINE COMPANY, LP

TOPICS TO BE ADDRESSED

GULF SOUTH PIPELINE

- **Overview**
  - What are citizen suits?
- **Notice**
  - What must a Plaintiff do prior to filing suit?
- **Standing**
  - Can Plaintiffs bring an action for an alleged violation that does not directly affect them?
- **Class Actions**
  - Can a Plaintiff bring a citizen suit as a class action?
- **Lessons learned**

WHAT ARE CITIZEN SUITS?

GULF SOUTH PIPELINE

"The Congressional purpose in enacting the Clean Air Act citizen suit provision was to authorize citizens to act as "private attorney generals."

Alaska Center for the Environment v. Browner, 840 F.Supp. 171, 174 (D. Mass,1993).

"Senator Muskie stated, during Senate Debate:

I think it is too much to presume that, however well staffed or well intentioned these enforcement agencies, they will be able to monitor the potential violations of the requirements contained in all the implementation plans that will be filed under this act, all the other requirements of the act, and the responses of the enforcement officers or their duties. Citizens can be a useful instrument for detecting violations and bringing them to the attention of the enforcement agencies and the courts alike."

Browner, 840 F.Supp at 174.

SAMPLE NOTICE PROVISIONS

GULF SOUTH PIPELINE

49 USCA § 60121
(Pipeline Safety Act)

(a)(1) A person may bring a civil action in an appropriate district court of the United States for an injunction against another person . . . the person
(A) may bring the action after 60 days after the person has given notice of the violation to the Secretary of Transportation . . . and the person alleged to have committed the violation.

42 USCA § 7604
(Clean Air Act)

(a)(1) a person may bring an action only after 60 days after the person has give notice to the Administrator . . the State in which the violation occurs . . . and to any alleged violator of the standard, limitation or order.

33 USCA §1365
(Clean Water Act)

(b) No action may be commenced
(1)(A) prior to 60 days after the plaintiff has given notice of the alleged violation to . . . the Administrator . . . the State in which the alleged violation occurs . . . and to any alleged violator of the standard, limitation, or order.

SIMILARITIES BETWEEN PROVISIONS

GULF SOUTH PIPELINE

A plaintiff must take at least the following steps:

- Provide written notice a specific number of days (typically 60) prior to filing suit to
  - appropriate Federal agency
  - the alleged violator
  - perhaps an appropriate State agency
- Identify the statute, regulations, permit, standard or order allegedly violated

WHAT THE COURTS HAVE SAID

GULF SOUTH PIPELINE

- Notice under the Resource Conservation and Recovery Act's citizen suit provision was a mandatory condition precedent to commencing suit under the provision, and failure to meet that requirement required dismissal without prejudice. *Hallstrom, et ux. v. Tillamook County*, 493 U.S. 20 (1989).
- Notice under the Clean Water Act was found inadequate when it did not provide "sufficient information to permit the recipient to identify . . . the date or dates of the alleged violations." *Hudson River Keeper Fund, Inc. v. Putnam Hospital Center, Inc.*, 891 F. Supp 152 (S.D.N.Y. 1995).
- Notice under the Clean Water Act requires the Plaintiff to provide "enough information to enable the recipient . . . to identify the specific effluent discharge limitation which has been violated, including the parameter violated, the date of violation, the outfall at which it occurred, and the person or persons involved." The Court also held that a "general notice letter" is insufficient. *Public Interest Group of NJ, Inc. v. Hercules, Inc.*, 50 F.3d 1239, 1246 (3rd Cir. 1995).
- Notice under the Endangered Species Act must provide sufficient information of a "violation" so that the Secretary or Reclamation could identify and attempt to abate the violation. *Southwest Center for Biological Diversity v. US Bureau of Reclamation*, 143 F.3d 515, 522 (9th Cir. 1988).

EXCERPTS OF NOTICE LETTER PROVIDED BY TO MR. NORMAN Y. MINETA, U.S. SECRETARY OF TRANSPORTATION, DATED APRIL 26, 2002

GULF SOUTH PIPELINE

- Joseph Wyble owns property in Trinity county, Texas. Gulf South's interstate pipeline crosses the Wyble property and transports natural gas. The Wyble property consists of approximately 37 acres and is used by Joseph Wyble and his family for their home, timber and recreation.
- The pipeline crossing the Wyble property has been and is continuing to be operated in violation of 49 C.F.R. § 192.703(b) providing that when a pipeline becomes unsafe it must be replaced, repaired or removed from service.
- Gulf South has failed to maintain, control corrosion, inspect and repair this pipeline constituting violations of 49 C.F.R. §§ 192.457, 192.459, 192.461, 192.463, 192.465, 192.479, 192.481, 192.485, 192.491, 192.605, 192.617, 192.703 and 192.711.
- Gulf South has also violated and is continuing to violate 49 C.F.R. § 192.616 in failing to provide Joseph Wyble with appropriate public education. Joseph Wyble has not received necessary information from Gulf South regarding the pipeline and/or any emergency resulting from the pipeline.

STANDING IS A KEY ISSUE UNDER A CITIZEN SUIT PROVISION

GULF SOUTH PIPELINE

"A private plaintiff, under separation of powers principles, must first establish that he satisfies the standing requirements imposed by the "case" or "controversy" provision of Article III of the United States Constitution . . . This "irreducible constitutional minimum" of standing requires a showing (1) that the plaintiff have suffered an "injury in fact;" (2) that there be a causal connection between the injury and the conduct complained of – the injury must be fairly traceable to the challenged action of the defendant; and (3) that the injury will be redressed by a favorable decision. . . Thus, while at the pleading stage, general factual allegations of injury resulting from the defendants' conduct may suffice, a plaintiff must set forth by affidavit or other admissible evidence "specific facts" in order to survive summary judgment."

Wyble, et al. v. Gulf South Pipeline Company, et al., 308 F.Supp.2d 733 at 741 (E.D.Texas, 2004).

ELEMENTS OF STANDING

GULF SOUTH PIPELINE

A Plaintiff must prove all three elements to establish standing.

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 179 (2000).

1. **Injury in fact**

   An injury in fact, for standing purposes, is an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual and imminent, and not conjectural or hypothetical. . . Accordingly, allegations of possible future injury do not satisfy the requirement of Article III; a threatened injury must be "certainly impending" to constitute an injury in fact.

   Wyble, 308 F.Supp.2d at 741; *see also, Whitmore v. Arkansas*, 495 US 149, 150 (1990).

2. **Traceability**

   The second element of standing requires proof of a causal connection between the injury in fact and the conduct complained of. . . In this regard, Defendants correctly argue that each plaintiff must show that he had suffered injury in fact caused by Defendants' violation of each regulation listed in each claim set forth.

   Wyble, 308 F.Supp.2d at 742; *see also*, *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 US 26, 41 (1976).

3. **Redressability**

   Under the third element of standing, it must be "likely," as opposed to merely "speculative," that the injury will be redressed by a favorable decision.

   Wyble, 308 F.Supp.2d at 742.

"These requirements together constitute the "irreducible constitutional minimum" of standing."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); *see also*, *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 179 (2000).

APPLICATION OF THIS STANDARD

GULF SOUTH PIPELINE

Conservation Law Found. of New England, Inc. v. Reily, 743 F.2d 38, 42 (1st Cir. 1991)

" . . . none of the individual members of the plaintiffs here have showed that they suffered an injury directly traceable to the alleged illegal conduct, namely, defendants' failure to assess and evaluate federal hazardous waste sites throughout the United States. To illustrate, regarding the failure of the Administrator to assess and evaluate the hazardous waste problem at the Naval Station in Pearl Harbor, Hawaii, the ten members of plaintiffs who have presented affidavits, all residents of New England, have shown merely the claim of a "concerned bystander."

***Alaska Center for the Environment v. Browner*, 20 F.3d 981, 986 (9th Cir. 1994)**

"By contrast, the relief ordered in this case involves the action of a single EPA office and the performance of a precise duty - - to establish TMDLs for the State of Alaska - - mandated by statute. Unlike the plaintiffs in *Conservation Law*, plaintiffs in this case have also demonstrated representation and injury throughout the entire area for which they seek relief."

REJECTION OF A PLAINTIFF'S ATTEMPT TO OBTAIN RELIEF ON REMOTE VIOLATIONS

GULF SOUTH PIPELINE

"This Court declines to step beyond the constitutional mandates of Article III to grant Plaintiffs standing as to remote violations for which they have no direct injury. Plaintiffs demonstrate sufficient injury in fact, traceable to Defendants, which harm could be redressed, as to the alleged violations running through their property for standing purposes. The Court confers standing to Plaintiffs only to that extent . . . In this case Plaintiffs, on a variety of theories, have sought unprecedented and extraordinary relief against Defendants ultimately asking the Court to appoint a Special Master to evaluate, oversee, and in a sense run the business of Defendants' pipeline. The Court declines to make such an extraordinary use of its judicial power which would require a disregard of the long established constitutional principles of standing . . . It is not the judiciary's role to remedy every problem imaginable as to Defendants' pipeline. Those broad regulatory issues are better left to the province of the legislative branch and the agency which oversees this particular industry."

Wyble, et al. v. Gulf South Pipeline Company, et al., 308 F.Supp.2d at 753, 754 (E.D.Texas, 2004).

CAN A CITIZEN SUIT BE BROUGHT AS A CLASS ACTION?

GULF SOUTH PIPELINE

Clean Air Act, 42 USCA § 7604

(a) Authority to bring civil action; jurisdiction
(1) . . . Any person may commence a civil action on his own behalf - -

Clean Water Act, 33 USCA § 1365

(a) Authorization; jurisdiction
. . . Any citizen may commence a civil action on his own behalf - -

Pipeline Safety Act, 49 USCA § 60121

(a) General authority
(1) A person may bring a civil action . . . against another person . . .

WHAT THE COURTS HAVE SAID

GULF SOUTH PIPELINE

- Courts have with virtual unanimity found that class actions are prohibited under environmental citizen suits provision.

  Alaska Center for the Environment v. Browner, 840 F.Supp. 171, 176 (D. Mass, 1993).

- "Congress [has] clearly stated . . . the citizen suit provision of the Clean Air Act . . . Does not authorize a class action."

  Browner, 840 F. Supp. at 174-175.

- "Because of the obvious danger that unlimited public actions might disrupt the implementation of the Act and overburden the courts, Congress restricted citizen suits to actions seeking to enforce specific requirement of the Act and conditioned their commencement on the provision of a 60-day notice to the Administrator . . . The notice requirement was intended to 'further encourage and provide for agency enforcement' that might obviate the need to resort to the courts . . . Congress did not fling the courts' door wide open. As we have already seen, the new provision for citizen suits, section 304(a), was hedged by limitations - - confinement to clearcut violations by polluters or defaults by the Administrator; and the accompaniment . . . Of a condition of notice."

  Natural Resources Council v. Train, 510 F.2d 692, 724-725.

- No similar guidance is found under the Pipeline Safety Act.

LESSONS LEARNED

GULF SOUTH PIPELINE

- Cases are very expensive to defend
- Settlement is very difficult
  - Res Judicata concerns
  - Attorney Fees
  - Stigma of such a suit
- Consider enlisting the agencies' help
  - Especially if suit is a strike suit