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Citizen Suits and the Deepwater Horizon Oil Spill: An Assessment of Multidistrict Litigation and the Fifth Circuit Court of Appeals' Decision in Center for Biological Diversity, Inc. v. BP America Production Co.

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CITIZEN SUITS AND THE DEEPWATER HORIZON OIL SPILL: AN ASSESSMENT OF MULTIDISTRICT LITIGATION AND THE FIFTH CIRCUIT COURT OF APPEALS' DECISION IN *CENTER FOR BIOLOGICAL DIVERSITY, INC. V. BP AMERICA PRODUCTION CO.*

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I. INTRODUCTION

The 2010 Deepwater Horizon oil spill shocked the nation. Every American along the shores of the Gulf of Mexico suddenly faced the real prospect of a future in which damaged ecosystems could ruin local economies. Plants and animals throughout the Gulf struggled to survive the oil spill's damaging effects. Environmental laws in the United States grant each citizen the right to seek redress in the wake of environmental disasters. Citizen suits give a voice to persons injured by environmental disasters and allows advocating for animals and plants harmed as a result of such major accidents. However, the litigation process can be extremely complex following a disaster of vast proportions. This Comment explores citizen suits, multidistrict litigation, and the Fifth Circuit Court of Appeals' decision in *Center for Biological Diversity, Inc. v. BP America Production Co.*[1]

The citizen suit plays a key role in protecting our most important ecosystems and those who depend on them for their livelihood. Discussion of recent developments in citizen suit litigation provides insight into challenges facing the public, practitioners, and judiciary after environmental disasters large and small. When major corporations—held unaccountable by government—create significant environmental problems, there must be a way for private citizens to voice their complaints. While citizen suits grant Americans the opportunity to compel action against polluters, multidistrict litigation presents unique challenges for advocates and judges in citizen suits. Multidistrict litigation is evolving. This Comment addresses a few important issues in preventing marginalization by a challenging litigation process.

Citizen suit plaintiffs stand for injured individuals and injured wildlife. Healthy ecosystems are vital in preserving a healthy society and advocacy is vital for preserving healthy ecosystems. The Deepwater Horizon oil spill generated myriad legal, social, and economic issues. Certainly, another disaster like the Deepwater Horizon oil spill will occur. Knowing how to navigate the litigation process in advocating for the voiceless members of our ecosystem will significantly impact future stewardship of natural resources vital to the health and welfare of the United States.

The citizen suit provision is integral in the aftermath of extreme and widespread damage to the environment, filling in gaps of failed govern-

1. Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co., 704 F.3d 413 (5th Cir. 2013).

ment enforcement by allowing direct action against violators. Part II frames this discussion by isolating key facts and explaining event chronology. In such unique circumstances, it is clear complex scenarios produce even more complex litigation. Part III discusses the seminal case *Center. v. BP*. Significantly, *Center v. BP* reveals many potential hazards of multidistrict litigation arising from major environmental disasters. The Fifth Circuit's standing and mootness analysis is also significant because it diametrically opposes recent Supreme Court precedent. The final section addresses subsequent developments in oil spill litigation and highlights the small, yet notable success of the sole surviving claim in the central case. Ultimately, this Comment reveals how using novel pretrial multidistrict litigation procedures led to preclusion of environmental advocates. This Comment explores the multidistrict litigation process in providing a better understanding of environmental advocacy after major natural disasters.

II. THE DEEPWATER HORIZON OIL SPILL

A. *Factual Background and Chronology*

Properly framing discussion surrounding the Fifth Circuit's decision first requires chronological appreciation of events and disputed data. Floating on the surface of 4,992 feet of water in the Gulf of Mexico, The Deepwater Horizon was a mobile offshore drilling platform leased from Transocean[2] by BP[3].[4] The Deepwater Horizon was constructed to tap

2. Transocean Ltd. is one of the world's largest offshore drilling contractors, boasting a strong presence in all major markets around the world. TRANSOCEAN, MAKE THE RIGHT MOVE 2 (2010) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*).

3. British Petroleum ("BP") is the oil company responsible for the Deepwater Horizon oil spill. *See generally* BRITISH PETROLEUM, ANNUAL REPORT AND FORM 20-F 2012: BUILDING A STRONGER, SAFER BP 4 (2012), *available at* http://www.bp.com/assets/bp_internet/globalbp/globalbp_uk_english/set_branch/STAGING/common_assets/bpin2012/downloads/BP_Annual_Report_and_Form_20F_2012.pdf (showing the BP business "at a glance" and outlining its basic business model—discovery of hydrocarbons, development of drilling sites, and extraction of oil and gas). BP's stated purpose is "to create value for shareholders by helping to meet growing demand for energy in a responsible way." *Id.*

4. NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING—REPORT TO THE PRESIDENT 3 (2011), *available at* http://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf [hereinafter OIL COMM'N REPORT]. BP contracted with Transocean to build the Deepwater Horizon rig and employ personnel to drill the Macondo well. TRANSOCEAN, MACONDO WELL INCIDENT: TRANSOCEAN INVESTIGATION REPORT 9 (2011), *available at* http://www.mdl2179trialdocs.com/releases/release201304041200022/TREX-04248.pdf. Drilling began on February 11, 2010, and ended April 9, 2010. *Id.* On April 20, 2010, the Macondo well blew out,

into hydrocarbon fields buried deep below the seabed.[5] Utilizing the Macondo well site,[6] the platform offered BP potentially lucrative extraction of oil and gas from a large oil reservoir resting in porous rock at temperatures of over 200 degrees and located two-and-a-half miles below the seabed.[7]

On April 14, 2010, BP drilling engineer Brian Morel, a member of the Macondo well design team, expressed unease to colleagues in an email, stating, "'This has been [a] nightmare well which has everyone all over the place.'"[8] Six days after Morel sent this e-mail, on April 20, 2010, BP and Deepwater Horizon workers were operating six weeks behind schedule and more than $58 million over budget.[9] At approximately 9:45 p.m. that night, the so-called "nightmare well" exploded as oil and gas spewed from deep below the surface, unchecked by a failed "blowout preventer."[10] Ironically, roughly thirty-six hours later on April 22—Earth Day—[11] the Deepwater Horizon descended to the bottom of the Gulf of Mexico.[12] Ultimately, the catastrophe killed eleven rig workers and injured over a dozen more.[13] The disaster left thousands out of work, killed animals on land and at sea, and damaged or destroyed fragile habitats.[14]

After the explosion, stopping the uncontrolled flow of oil was a major challenge. Throughout May 2010, BP struggled with public communications about their efforts to cap the well; both industry and government officials were "highly uncertain" about the success of the proposed "top-

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causing explosions and an uncontrollable fire on the Deepwater Horizon rig. *Id.* The Transocean investigation report stated:

> BP was responsible for developing detailed plans as to where and how the Macondo well was to be drilled, cased, cemented, and completed, and for obtaining approval of those plans from the Minerals Management Service (MMS). It retained full authority over drilling operations, casing and cementing, and temporary abandonment procedures, including approval of all work to be performed by contractors and subcontractors. Evidence indicates that BP failed to properly assess, manage, and communicate risk.

Id. at 10.

5. *Id.* at 3.

6. In 2008, BP leased the Mississippi Canyon Block 252 (MC252), also known as the "Macondo Prospect" or Macondo well, for oil and gas exploration. TRANSOCEAN, *supra* note 4, at 9, 16.

7. OIL COMM'N REPORT, *supra* note 4.

8. *Id.* at 2.

9. *Id.*

10. *Id.* at 114.

11. *Id.* at 18.

12. *Id.*

13. David Barstow et al., *Deepwater Horizon's Final Hours*, N.Y. TIMES, Dec. 25, 2010, http://www.nytimes.com/2010/12/26/us/26spill.html?pagewanted=all.

14. OIL COMM'N REPORT, *supra* note 4, at 198.

kill" operation, which ultimately failed.[15] Next, BP attempted an ill-fated "junk shot" to plug the leak.[16] Numerous failed attempts at controlling the leak drew mass frustration from the public.[17]

On July 9, 2010, Admiral Thad Allen[18] authorized deployment of a "capping stack," installing it on top of the blowout preventer, thereby enabling wellhead plugging.[19] Eighty-seven days after the explosion, the capping stack stopped the flow of oil into the Gulf of Mexico.[20] However, this was not a permanent solution. By closing the capping stack without any way to relieve the pressure, there was still the threat of an underground blowout.[21] In the worst-case scenario, an underground blowout could sustain another leak, causing further significant loss from the 110 million-barrel reservoir and more oil spilling into the Gulf of Mexico.[22]

After intense monitoring and testing, BP gained government approval on August 2, 2010 for the "static kill" procedure, creating a more reliable seal by injecting mud followed by cement into the well.[23] A relief well was finally completed and BP pumped in more cement, permanently sealing the reservoir.[24] Finally, 152 days after the blowout on September 19, 2010, Admiral Allen announced the Macondo well was effectively dead.[25]

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15. *Id.* at 150.

16. *See* Henry Fountain, *'Junk Shot' Is Next Step for Leaking Gulf of Mexico Well*, N.Y. TIMES, May 14, 2010, http://www.nytimes.com/2010/05/15/us/15junk.html?pagewanted=all&_r=0 (reporting on the planned "junk shot" method of capping the Macondo well, which involved pumping "plastic cubes, knotted rope, even golf balls . . . into the blowout preventer" and was a risky move at such an enormous depth); *see also* Matthew Weiner, *How Golf Balls Took on the Oil Spill and Lost*, CNN (May 31, 2010, 1:27 PM), http://www.cnn.com/2010/SPORT/golf/05/31/golf.oil.spill (reporting on the failure of the "junk shot" which had only been tested in much shallower water to fight oil fires in Kuwait).

17. *See PBS Newshour: Oil Leak Drama Draws Public Outrage, Outpouring of Ideas* (PBS television broadcast May 31, 2010), *available at* http://www.pbs.org/newshour/bb/environment/jan-june10/oil2_05-31.html (interviewing three panelists on the public response to the oil spill, including Bill Nye, popularly known as "Bill Nye the Science Guy," who noted that the response to the spill "shows you also, sort of, how to say, a level of scientific illiteracy[;] . . . it's 5,000 feet down, and the only way to get to it is with remotely operated submersible vehicles, it's way beyond [our] ordinary experience").

18. Admiral Thad Allen was selected by then-Secretary of the Department of Homeland Security Janet Napolitano to serve as National Incident Commander on May 1, 2010. *Thad Allen Named National Incident Commander for Deepwater Horizon Spill*, MARINELOG (May 1, 2010), http://www.marinelog.com/DOCS/NEWSMMIX/2010may00010.html.

19. OIL COMM'N REPORT, *supra* note 4, at 165–66.

20. *Id.* at 165.

21. *Id.*

22. *Id.*

23. *Id.* at 167.

24. *Id.* at 169.

25. OIL COMM'N REPORT, *supra* note 4, at 169.

On August 4, 2010—the same day the State announced the success of the static kill procedure—the federal government released an "Oil Budget" report, providing the public with the first estimated amount of the total volume of oil discharged during the disaster.[26] The government estimated nearly 5 million barrels inundated the Gulf.[27] The Oil Budget drew almost instant criticism. The National Oceanic and Atmospheric Administration (NOAA) Administrator, Jane Lubchenco, pointed out a substantial flaw in the estimate—incorrectly grouping dispersed oil with recovered oil in estimate formulation, because dispersed oil was still in the Gulf, affecting ecosystems.[28] Additionally, the Oil Budget did not go through a peer review process, and many scientists named as reviewers did not see the final report before it was released.[29] Since the disaster, BP has tried to shrink the estimated volume of oil discharged in the Gulf of Mexico, potentially reducing their liability under the Clean Water Act (CWA).[30]

B. *Corruption and Catastrophe*

The Deepwater Horizon oil spill still adversely affects the area's dynamic ecosystems and millions living and working along the Gulf Coast.[31] BP was largely unprepared in dealing with the array of major risk factors posed by mobile offshore drilling, and BP's disaster response created a

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26. *Id.* at 167.

27. NAT'L INCIDENT COMMAND, BP DEEPWATER HORIZON OIL BUDGET: WHAT HAPPENED TO THE OIL? 1 (2010), *available at* http://www.noaanews.noaa.gov/stories2010/PDFs/OilBudget_description_%2083final.pdf (estimating 4.9 million barrels of oil were spilled as a result of the Deepwater Horizon disaster).

28. *See* OIL COMM'N REPORT, *supra* note 4, at 168 (explaining the wrongful categorization of certain oil as not "remaining" skewed report results and indicated more oil was cleaned up or removed than actually was in reality).

29. *Id.*

30. Margaret Cronin Fisk & Allen Johnson Jr., *BP Fights to Shrink Gulf Spill Estimate to Cap Verdict*, BLOOMBERG BUSINESSWEEK (Sept. 30, 2013), http://www.businessweek.com/news/2013-09-29/bp-fights-to-shrink-gulf-spill-estimate-to-cap-potential-verdict (reporting on the wide variation between the government's spill estimate and BP's spill estimate and discussing the implications of the disagreement in the multi-district litigation process).

31. *See* OIL COMM'N REPORT, *supra* note 4, at 173 (describing the Deepwater Horizon oil spill as "[t]he worst environmental disaster America has ever faced"); *see also* CTR. FOR BIOLOGICAL DIVERSITY, A DEADLY TOLL: THE GULF OIL SPILL AND THE UNFOLDING WILDLIFE DISASTER 5 (2011) (assessing the likely impacts of the Gulf oil spill based on a thorough investigation of government figures, news reports, and scientific articles and concluding the spill will continue to harm the wildlife and people of the Gulf for generations to come).

number of new problems.[32] Moreover, a full year after the explosion the ultimate toll on humans and wildlife was not fully understood and much of the public remained sheltered from real problems affecting the community.[33]

Indeed, BP created confusion among government agencies, courts, and the public at large throughout its response effort. Some commentator allege BP repeatedly and knowingly lied about how much oil was actually polluting the Gulf of Mexico.[34] David Rainey, a former vice president at BP, and Kurt Mix, a former engineer, were indicted by a grand jury on charges of obstruction of Congress and making false statements to law enforcement officials.[35] Additionally, the director of the company BP contracted in managing Deepwater Horizon's cementing technologies pleaded guilty to destroying evidence in the aftermath of the disaster.[36]

By November 2012, the Department of Justice reached agreement with BP, resolving criminal charges against the company.[37] The Assistant Attorney General of the Justice Department's Criminal Division opined, "The explosion of the rig was a disaster that resulted from BP's culture of privileging profit over prudence."[38] Similarly, the director of the U.S.

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32. *See* OIL COMM'N REPORT, *supra* note 4, at 129–71 (describing the varied response efforts conducted by BP and the federal government in the wake of the Deepwater Horizon explosion, which included failed attempts to cap the well and the release of toxic oil dispersants).

33. *See* CTR. FOR BIOLOGICAL DIVERSITY, *supra* note 31, at 2 (assessing likely impacts of the Gulf oil spill based on a thorough investigation of government figures, news reports, and scientific articles). The Center for Biological Diversity sought to understand the damage more fully—to provide a more accurate estimate of the wildlife death toll, researchers used multiplication factors identified by scientists to estimate how many more animals were killed than were observed or collected. *Id.*

34. *See* Clifford Krauss, *At BP Trial, Amount of Oil Lost is at Issue*, N.Y. TIMES, Sept. 30, 2013, http://www.nytimes.com/2013/09/30/business/energy-environment/bp-trial-in-2nd-phase-to-set-amount-of-oil-spilled.html?_r=0 (emphasizing the Justice Department "asserted that BP was being deceitful . . . BP's low spill estimates depended on calculations 'that contradict those used by BP in making drilling decisions and during the response'").

35. Jonathan Stempel, *U.S. Accuses David Rainey, Kurt Mix of Obstruction*, REUTERS (Jun. 19, 2013, 6:38 PM), http://www.reuters.com/article/2013/06/19/bp-spill-idUSL2N0EV29620130619.

36. Kathy Finn & David Ingram, *Halliburton Manager Pleads Guilty to Destroying Gulf Spill Evidence*, REUTERS (Oct. 15, 2013, 8:22 PM), http://uk.reuters.com/article/2013/10/15/uk-halliburton-plea-idUKBRE99E0VQ20131015.

37. Press Release, U.S. Dep't of Justice, BP Exploration and Prod. Inc. Agrees to Plead Guilty to Felony Manslaughter, Envtl. Crimes & Obstruction of Cong. Surrounding Deepwater Horizon Incident (Nov. 15, 2012), *available at* http://www.justice.gov/opa/pr/2012/November/12-ag-1369.html; Clifford Krauss & Jason Schwartz, *BP Will Plead Guilty and Pay Over $4 Billion*, N.Y. TIMES, Nov. 15, 2012, http://www.nytimes.com/2012/11/16/business/global/16iht-bp16.html.

38. U.S. Dep't of Justice, *supra* note 37.

Securities and Exchange Commission's Division of Enforcement stated, "The oil spill was catastrophic for the environment, but by hiding its severity BP also harmed another constituency—its own shareholders and the investing public who are entitled to transparency, accuracy[,] and completeness of company information, particularly in times of crisis."[39]

In January 2013, the United States District Court for the Eastern District of Louisiana accepted BP's guilty plea and sentenced the company to a record $4 billion in fines and penalties.[40] In the guilty plea, BP admitted the "Well Site leaders,"—the two highest-ranking BP supervisors on the Deepwater Horizon rig—"negligently caused the deaths of [eleven] men and the resulting oil spill."[41] BP also admitted withholding documents, providing false and misleading information about the oil flow-rate to Congress, manipulating internal estimates in understating oil flow, and withholding data contradicting Bp's public statements claiming only 5,000 barrels escaped per day.[42] Additionally, Kurt Mix was convicted by a New Orleans federal court for intentionally destroying evidence "when he deleted voice and text communications between himself," a supervisor, and a BP contractor, suggesting company officials knew the "top kill" procedure would probably fail at stopping the leak.[43] Because of BP's efforts in concealing critical information from government officials and the public at large, the Deepwater Horizon disaster's true impact may never be known. Herein lies another reason citizen suits play a crucial role in responding to major disasters today. A presumption that federal government agencies can adequately represent non-profit interests is unjustified; the federal government may choose settle cases in ways that undermine non-profit environmental advocates who meaningfully represent members with localized and focused interests.[44]

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39. *Id.*

40. Press Release, U.S. Dep't of Justice, BP Exploration and Prod. Inc. Pleads Guilty, Is Sentenced to Pay Record $4 Billion for Crimes Surrounding Deepwater Horizon Incident (Jan. 29, 2013), *available at* http://www.justice.gov/opa/pr/2013/January/13-ag-123.html.

41. *Id.*

42. *Id.*

43. Clifford Krauss, *Ex-BP Worker Is Found Guilty of Obstruction in Gulf Spill*, N.Y. TIMES, Dec. 18, 2013, http://www.nytimes.com/2013/12/19/business/former-bp-employee-found-guilty-in-gulf-spill-case.html. Take note that the case may be reopened amid allegations of unfair jury prejudice stemming from claims that a juror overheard a conversation in a courthouse elevator which "made that juror feel more comfortable convicting Mix." *See* Michael Kunzelman, *Kurt Mix Claims Elevator Conversation Caused Unfair Verdict in Gulf Spill Trial*, HUFF POST (Jan. 3, 2014, 10:13 AM), http://www.huffingtonpost.com/2014/01/03/kurt-mix-biased-verdict-bp_n_4536712.html (reporting Kurt Mix's attorneys asked a federal district court judge to throw out the jury's verdict).

44. *See* Brief of Amicus Curiae Sierra Club In Support of Plaintiff–Appellant at 12–17, Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co., 704 F.3d 413 (5th Cir. 2013)

C. *Citizen Suits*

Fundamentally, how can injured Americans protect themselves and ensure vital resource sustainability of in the aftermath of such an overwhelming disaster? Non-profit groups such as the Center for Biological Diversity[45] are often the most influential public voices advocating for wildlife and ecosystem protections because of their abilities in in organizing massive grassroots networks in support of their actions. While such groups' environmental advocacy is critical, how can the public defend natural resources on which we all rely when the government falls woefully short in holding polluters accountable?

In the United States, individuals and organized citizens can fight such devastating degradation by filing "citizen suits" when private or public enterprises violate environmental laws such as the CWA.[46] 1960s civil rights legislation provided a framework for inclusion of citizen suits provisions in environmental law.[47] Recognizing without public help, the federal government simply did not possess adequate time or resources in sufficiently enforcing environmental laws, Congress created citizen suits in the 1970s as an alternative means of enforcement.[48]

"Every major federal environmental law passed since 1970," with only one exception,[49] "contain[s] a *citizen suit* provision."[50] Congress has authorized courts to order defendant reimbursement of litigation costs and

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(No. 12–30136) (arguing "the federal government return to business-as-usual offshore drilling approvals, its decisions in the events leading up to and in response to the disaster that exacerbated injuries to wildlife and ecosystems, and its willingness to settle with MOEX for a civil fine that is a small fraction of the potential maximum penalty overcomes any presumption that the federal government, in its own prosecution, can adequately represent CBD's [Center for Biological Diversity's] interest") [hereinafter Sierra Club Brief].

45. CTR. FOR BIOLOGICAL DIVERSITY, http://www.biologicaldiversity.org (last visited Feb. 22, 2014); *see also generally* CTR. FOR BIOLOGICAL DIVERSITY, TWENTY YEARS OF SAVING SPECIES (2009), *available at* http://www.biologicaldiversity.org/publications/reports/20YearBooklet_Web.pdf (outlining the Center for Biological Diversity's twenty years of success in advocacy for wildlife and environmental disputes).

46. Federal Water Pollution Control Act (Clean Water Act), § 505, 33 U.S.C. § 1365(a) (2006).

47. *See* Zygmunt J.B. Plater, *Facing a Time of Counter-Revolution—The Kepone Incident and a Review of First Principles*, 29 U. RICH. L. REV. 657, 701 (1995) (discussing the phenomenon of environmental citizen enforcement provisions and how they were "[m]odeled after provisions in the civil rights act . . .").

48. Tom Tietenberg, Environmental Economics and Policy 343 (4th ed. 2003).

49. *See generally* Federal Insecticide, Fungicide, and Rodenticide Act, § 2, 7 U.S.C. §§ 136–136y (2012) (regulating pesticide distribution, sale, and use, and requiring registration of all pesticides by the Environmental Protection Agency by showing use of the pesticide will not cause unreasonable adverse effects on the environment).

50. James Salzman & Barton H. Thompson, Jr., Environmental Law and Policy 77 (2nd ed. 2007).

"reasonable" attorney fees to prevailing plaintiffs.[51] Not only do citizens have the right to initiate injunction proceedings for injunctions to stop polluters, they are also empowered to "apply any appropriate civil penalties," which can vary between $10,000 and $25,000 per day, per violation under the CWA.[52]

Citizen suit provisions included in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[53] and the Emergency Planning and Community Right-to-Know Act (EPCRA),[54] among other important environmental laws,[55] are especially relevant in the aftermath of the Deepwater Horizon oil spill. Average American citizens are disadvantaged in federal district courts against companies with major financial resources.[56] Additionally, plaintiffs are easily marginalized by the litigation process' complexity.[57]

Any citizen with an interest adversely affected by pollution can exert legal action against polluters,[58] but it is an extremely difficult and often unsuccessful endeavor. Citizen suits face issues of "whether citizens, as private attorneys general, are fortifiers of the national enforcement of a national law to achieve national goals, or whether they are secondary en-

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51. Federal Water Pollution Control Act (Clean Water Act), § 505, 33 U.S.C. § 1365(d) (2006).

52. *Id.* § 4301(b), 33 U.S.C. § 1319(d).

53. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 310, 42 U.S.C. § 9659 (2006).

54. Emergency Planning and Community Right-to-Know Act of 1986, § 326, 42 U.S.C. § 11046 (2006).

55. *See* Endangered Species Act of 1973, § 11(g), 16 U.S.C. § 1540(g) (2012) (providing for citizen suits against private and public entities that unlawfully threaten those the government has determined to be endangered); *see also* Clean Air Act, § 304, 42 U.S.C. § 7604 (2006) (providing for citizen suits against private and public entities that violate statutes of the Clean Air Act).

56. *See* Lewis Robert Shreve, Comment, *Lessons Learned from Exxon-Valdez: Employing Market Forces to Minimize the Psychological Impact on Oil Spill Plaintiffs*, 35 LAW & PSYCHOL. REV. 239, 246 (2011) (analyzing the litigation arising out of the Exxon-Valdez oil spill and concluding the adversarial system causes much of the stress plaintiffs experience in disaster litigation and the stress is only exacerbated by years of drawn-out litigation). Shreve also asserts it is in the stockholders' best interest for large, multinational corporations like BP to extend litigation over lengthy periods of time. *Id.*

57. *See* L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 LA. L. REV. 157, 226–27 (2004) (noting critics of multidistrict litigation claim the Judicial Panel on Multidistrict Litigation "finds the existence of common factual questions and orders aggregation of mass torts too quickly, before evaluating whether the aggregation promotes justice").

58. *See* Federal Water Pollution Control Act (Clean Water Act), § 505, 33 U.S.C. § 1365(g) (2006) (authorizing the use of citizen suits in Clean Water Act enforcement).

forcers subservient to state enforcement policies."[59] Individuals and non-profit groups experience many challenges when facing off in federal district courts against powerful polluters in complex lawsuits.

D. *Citizen Suits Filed in the Aftermath of the Deepwater Horizon Oil Spill*

The Federal Water Pollution Control Act (Clean Water Act) authorizes civil penalties of $25,000 each day a spill occurs and $1,000 per barrel of oil discharged.[60] More than seven months after the Deepwater Horizon oil spill, the federal government filed a civil complaint against BP in a multi-district proceeding in a New Orleans federal district court, "seek[ing] a declaration of liability under OPA 90 and civil penalties under the Clean Water Act."[61] In light of aforementioned issues, there is legitimate inherent skepticism of BP's estimates of the volume of oil released during the spill.[62] By March 3, 2012, BP announced agreement with the Plaintiffs' Steering Committee "to settle the substantial majority of legitimate private economic and property damages claims and exposure-based medical claims stemming from the [Deepwater Horizon] incident . . . ."[63]

Concurrent with BP's federal prosecution, Americans filed citizen suits on behalf of a broad public interest encouraging full enforcement of "civil penalties and injunctive relief under the Clean Water Act and other environmental statutes."[64] Several years later on appeal, the Fifth Circuit slammed the courtroom door on environmentalists by affirming a lower court's ruling in favor of BP. The ruling denied relief to the Center for Biological Diversity on nearly every claim and only deviated on a single

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59. David R. Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three not Be a Crowd When Enforcement Authority is Shared by the United States, the States, and Their Citizens?*, 55 MD. L. REV. 1552, 1617–18 (1995).

60. Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1321(b)(7)(A) (2006).

61. BRITISH PETROLEUM, *supra* note 3, at 164.

62. *See* Fisk & Johnson, *supra* note 30 ("The U.S. government contends BP's well spewed 4.2 million barrels of oil into the Gulf before it was capped almost three months later. BP estimates the flow at 2.45 million barrels.") However, if Judge Barbier finds gross negligence, BP "faces a maximum penalty of $18 billion under the Clean Water Act, using the government estimate, and a maximum of $10.5 billion, using the BP assessment," if not "[t]he maximum fines . . . would be $2.7 billion under the BP assessment and $4.6 billion using the government numbers." *Id.*

63. BRITISH PETROLEUM, *supra* note 3, at 166.

64. *See id.* at 168 (summarizing actions taken against BP by citizen groups in response to the Deepwater Horizon oil spill).

issue.[65] The claim under the EPCRA was the only one remaining.[66] If citizen suit provisions are designed to supplement inadequate government enforcement of environmental laws, why did the Center for Biological Diversity fail on almost every claim? Was this citizen suit a waste of limited time and judicial resources?

The outcome begs such questioning because the Center for Biological Diversity rarely loses in court—ninety-three percent of their lawsuits result in favorable outcomes.[67] The Center has certainly been successful, but how should success be defined in environmental litigation? Critics argue although some citizen suits are genuinely motivated by pure intentions and produce tangible environmental gains, "it is not clear how much environmental benefit citizen-suit provisions actually provide."[68] Critics also note citizen suit litigation patterns do not necessarily correlate with the most vital environmental concerns.[69]

What can future litigants learn from the Center's failed attempt at enforcing the CWA through the citizen suit provision? Did the Center overlook trade-offs between BP and the federal government in rushing settlement of criminal and civil suits? Or were environmental advocates a victim of marginalization in the multi-district litigation process and dismissed by misinterpreted mootness doctrine regarding civil penalties?

E. *Litigation Challenges and the Effect on Plaintiffs*

Public pressure is a persistent issue in high-profile cases. It is well known that oil spills have serious long-term and on-going consequences. For example, pollution from a 1969 spill in Massachusetts still affects fiddler crabs today.[70] Oysters and Mangroves in Mexico are still affected by the 1979 Ixtoc I oil spill in the Gulf of Mexico.[71] Finally, Alaskan beaches are still reeling from the 1989 Exxon-Valdez oil spill.[72] This spill's aftermath also continues to threaten birds and fish.[73]

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65. Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co., 704 F.3d 413, 432 (5th Cir. 2013).

66. *Id.*

67. *Our Story*, CTR. FOR BIOLOGICAL DIVERSITY, http://www.biologicaldiversity.org/about/story/index.html (last visited Feb. 3, 2014).

68. Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39, 51 (2001).

69. *See id.* (recognizing national advocacy groups file most citizen suits, which are generally filed against the least significant sources of harm and most vulnerable plaintiffs, regardless of the actual benefits to the environment).

70. CTR. FOR BIOLOGICAL DIVERSITY, *supra* note 31, at 2.

71. *Id.*

72. *Id.*

73. *Id.*

Nine months after the Deepwater Horizon oil spill, hundreds of dead dolphins began washing ashore along the Gulf Coast, with one alarming element in common: most were pregnant mothers in their first term of pregnancy.[74] Scientists researching this anomaly found "(1) direct exposure to oil or (2) compromised food resources (which could [have been] related to extended colder weather or effects of the DWHOS [Deepwater Horizon Oil Spill])" contributed to the loss of wildlife.[75]

Since 1964, offshore drilling is responsible for more than 320 known spills in the Gulf of Mexico since 1964, presenting an ongoing threat to the ecosystems and wildlife.[76] The Deepwater Horizon spill is directly harming wildlife and causing vast societal and personal problems for people like Blake Sunseri,[77] a Louisiana oyster farmer whose livelihood depends on Gulf Coast ecosystem's richness.[78]

Americans have a statutory mandate to exert private influence in enforcing environmental laws and addressing ongoing threats posed by polluters, even years after a disaster occurs. Successfully advocating for voiceless groups with an essential role in our vital ecosystems, like injured wildlife, is essential for a sustainable future.

Environmental laws empower citizens "as private attorneys general," holding violators accountable for pollution through filing citizen suits. For citizen suits to be successful, advocates must present a strong connection between: (a) the inherent value of things in nature; and (b) the perceived resource value humans assign to things in nature. Removing the human element from the logic might seriously disadvantage a claim because judges and juries may have trouble understanding more abstract injury claims.

Although Americans harbor powerful tools in holding companies like BP and Transocean accountable for irreversible damage to the environ-

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74. Ruth H. Carmichael et al., *Were Multiple Stressors a 'Perfect Storm' for Northern Gulf of Mexico Bottlenose Dolphins* (Tursiops truncatus) *in 2011?*, 7 PLOS ONE 1, 1 (2012), *available at* http://www.plosone.org/article/fetchObject.action?uri=info%3Adoi%2F10.1371%2Fjournal.pone.0041155&representation=PDF.

75. *Id.* at 5–6.

76. CTR. FOR BIOLOGICAL DIVERSITY, *supra* note 31.

77. OIL COMM'N REPORT, *supra* note 4, at 163. Twenty-four-year-old Blake Sunseri has spent years learning everything about his family's 134-year-old oyster business and has committed himself to becoming the sixth family generation to run P&J Oyster Company in the French Quarter of New Orleans. *Id.* He was quoted in dismay saying, "This is a real devastating event for me, . . . it feels like I don't really have a say in what's going on around me." *Id.* Blake's story is the story of millions of Americans on the Gulf of Mexico who have found their worlds ruined by an "'unnatural catastrophe.'" *Id.*

78. CTR. FOR BIOLOGICAL DIVERSITY, *supra* note 31.

ment, the litigation process is daunting.[79] Data from the Exxon-Valdez oil spill shows pressure surrounding litigation was a "prominent source[ ] of perceived community damage and event-related psychological stress."[80] The litigation process is a critical part of disasters like the Deepwater Horizon, but the Exxon-Valdez disaster demonstrates complex litigation precludes timely community recovery and causes chronic social and psychological impacts.[81] Wealthy energy companies such as BP—an experienced polluter[82]—tip the balance of power by engaging in

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79. *See* Robert S. Redmount, *Psychological Discontinuities in the Litigation Process*, 1959 DUKE L.J. 571, 571 (1959) ("Litigant aims and needs, attorney analysis and tactics, and law's structural apparatus for producing litigation decisions—courts and trial procedure—each have disparate psychological characteristics[,]" and it is the litigants themselves who become injured when "[t]heir aims and needs are excluded or ignored . . . .").

80. J. Steven Picou, Brent K. Marshall, & Duane A. Gill, *Disaster, Litigation, and the Corrosive Community*, 82 SOC. FORCES 1493, 1493 (2004), *available at* http://www.jstor.org/stable/pdfplus/3598443.pdf?&acceptTC=true&jpdConfirm=true.

81. *See id.* at 1496 (reviewing data on the impact of litigation spawned by the Exxon-Valdez oil spill and concluding that "corrosive communities" emerge in the aftermath of an oil spill because of three factors: "(1) the mental and physical health of the victims . . . ; (2) 'recreancy,' or perceptions of governmental or organizational failure . . .; and (3) protracted litigation . . . .") (citations omitted).

82. Jad Mouawad, *For BP, a History of Spills and Safety Lapses*, N.Y. TIMES, May 8, 2010, http://www.nytimes.com/2010/05/09/business/09bp.html?pagewanted=all (quoting Jordan Barab, Deputy Assistant Secretary of Labor for the Occupational Safety and Health Administration (OSHA), who stated, "BP has systematic safety and health problems" after OSHA discovered more than 700 violations at a Texas City refinery in 2005). After BP flatly denied the allegations of problems at the Texas City refinery and maintained it was in full compliance, OSHA fined BP a record $87.4 million. *Id.* When BP acquired the Texas City refinery from Amoco, the roughly sixty-five year old facility was "poorly maintained and long starved of capital investment[,]" yet BP was "turning 460,000 barrels of crude oil into gasoline[,]" making it America's second-largest refinery. Sarah Lyall, *In BP's Record, a History of Boldness and Costly Blunders*, N.Y. TIMES, July 12, 2010, http://www.nytimes.com/2010/07/13/business/energy-environment/13bprisk.html?pagewanted=1. In 2005, overworked operators failed to notice and prevent a 170-foot tower from filling with liquid hydrocarbons, resulting in a 20-foot geyser of unstable chemicals shooting into the sky which then ignited when a fleeing worker jumped in his truck, turned the key, and sparked the ignition. *Id.* The explosions killed fifteen people, injured 180, forced 43,000 Texans to remain indoors, and damaged homes as far as three-quarters of a mile away from the site. U.S. CHEM. SAFETY & HAZARD INVESTIGATION BD., REPORT NO. 2005-04, INVESTIGATION REPORT: REFINERY EXPLOSION AND FIRE 17 (2007), *available at* http://www.csb.gov/assets/1/19/CSBFinalReportBP.pdf. The 2005 disaster was caused by "organizational and safety deficiencies at all levels of the BP Corporation." *Id.* at 18. Yet, after paying $21 million in fines for the 2005 explosion (one-fourth the amount BP was fined by OSHA in 2009), there were two additional accidents and Texans were ordered to remain indoors again until the threat of toxic exposure from the air was negated. *Id* at 18, 20.

protracted disputes through complex multidistrict litigation granting broad case management authority to federal district court judges.[83]

The issues surrounding the Exxon-Valdez oil spill litigation and the Fifth Circuit's decision in *Center for Biological Diversity, Inc. v. BP America Production Co.* provide insight into critical issues in citizen suits and multidistrict litigation.[84] Advocating for wildlife protection and preservation of key ecosystems is crucial for millions of Americans because strong biodiversity ensures longevity of all life on our planet.[85] Citizen suits represent a legislative mandate for public participation, but unfortunately, in this case, the Fifth Circuit ignored precedent and stymied the public's voice.

There will be another spill. Pollution will continue. Going forward, courts should decline to follow the Fifth Circuit. Federal court judges should avoid overstepping special powers granted to transferee judges in multidistrict litigation. Courts must allow private citizen to participation in tandem with the government, assessing penalties under settled mootness doctrine.[86] Judges should ignore generic assumptions about the state of the environment and acknowledge the reality of broad threats facing essential ecosystems and its concomitant effects upon the public welfare. Yet, on the other hand, future plaintiffs must be more prepared in navigating uncharted territory in multidistrict litigation and stay informed of

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83. *See* FED. R. CIV. P. 16(c)(2)(L) (providing that district courts may "adopt[ ] special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems"); *see also* FED. R. CIV. P. 42 (empowering district courts to consolidate actions before them if they "involve a common question of law or fact" or order separate trials of any "claims, cross-claims, counterclaims, or third-party claims" for efficiency purposes and to avoid prejudice).

84. *See* Shreve, *supra* note 56, at 249–50 (discussing the nineteen years of stress and uncertainty surrounding the Exxon-Valdez oil spill litigation, which caused significant damage to plaintiffs and communities); *see also* Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co., 704 F.3d 413, 432 (5th Cir. 2013) (concluding "the instant case presents an exceedingly complex matter . . . [and] [i]n the face of this daunting litigation" the transferee judge is given a "'broad grant of authority . . .'").

85. *See* CLIVE PONTING, A GREEN HISTORY OF THE WORLD 393 (1992) ("The foundations of human history lie in the way in which ecosystems operate. All living things on earth, including humans, form part of these complex webs of interdependence . . . .").

86. *See* Brief of Amici Curiae Law Professors in Support of Plaintiff–Appellant, at 14–15, Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co., 704 F.3d 413 (5th Cir. 2013) (No. 12–30136) [hereinafter Amicus Brief] (showing that the prevailing rule—a polluter's voluntary postcomplaint cessation of an alleged violation will not moot a citizen-suit claim for civil penalties even if it is sufficient to moot a related claim for injunctive or declaratory relief—was endorsed by Justice Stevens and cited ten different federal and district court cases adhering to the rule before and after *Laidlaw*).

the trade-offs occurring when the federal government desperately desires settling with large corporate polluters.

III. The Center for Biological Diversity, Inc. v. BP America Production Co.

A. *The Center for Biological Diversity*

The Center for Biological Diversity is a growing organization of environmental lawyers and scientists, "embod[ying] an important new form of environmental activism."[87] Rather than relying upon the strategy of other national environmental organizations which depend on privileged access influencing policymakers in protecting ecosystem diversity, the Center "files lawsuits against the government for its failure to enforce its own environmental laws in cases the national organizations avoided as potentially controversial."[88]

The Center has been active for nearly twenty-five years, establishing itself by recording unprecedented successes in New Mexico.[89] The Center expanded its fight throughout the Southwest and other key areas across the country through their "systematic[ ] and ambitious[ ] use of biological data, legal expertise, and the citizen [suit] provision of the [sic] Endangered Species Act,"[90] resulting in sweeping legal safeguards for animals, plants, and their habitats.[91]

In 2012, the Center safeguarded 40 million acres of protected wildlife habitats, won favorable decisions for 104 endangered animals and plants, and protected thirty-three endangered species under the Endangered Species Act.[92] Backed by the support of more than 500,000 members and activists as of December 2012, the Center and its seventy staff members received $6.3 million in revenue from grants and donations for nationwide wildlife defense campaigns.[93]

Responding to the 2010 Deepwater Horizon oil spill, the Center has initiated eleven lawsuits, "mak[ing] sure BP and the federal government are held accountable for the largest environmental disaster in U[nited] S[tates] history and to make sure such a disaster doesn't happen again."[94]

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87. Ctr. for Biological Diversity, *supra* note 45, at 2.

88. *Id.*

89. Ctr. for Biological Diversity, *supra* note 67.

90. *Id.*

91. *Id.*

92. Ctr. for Biological Diversity, 2012 Annual Report 1 (2012), *available at* http://www.biologicaldiversity.org/publications/reports/AnnualRpt2012_small.pdf.

93. *Id.* at 37.

94. *Center Actions*, Ctr. for Biological Diversity, http://www.biologicaldiversity.org/programs/public_lands/energy/dirty_energy_development/oil_and_gas/gulf_oil_spill/center_actions.html (last visited Feb. 3, 2014).

Among these eleven lawsuits was the largest citizen suit ever filed under the CWA, accusing BP and Transocean Ltd. of illegally spilling more than 100 million gallons of oil and other toxic chemicals into the Gulf of Mexico.[95] The Center sought the maximum possible penalty against BP—$4,300 per barrel of oil spilled—for the finding of gross negligence or willful misconduct.[96]

The Center's executive director explained their intentions in a 2010 press release, stating:

> The government has yet to take any criminal or civil actions against BP . . . . We filed this suit to ensure BP is held accountable for every drop of oil and pollution it has released into the Gulf of Mexico. We can't bring back dead sea turtles, dolphins and whales, but we can ensure BP is penalized to the full extent of the law for causing the worst environmental disaster in American history . . . Gulf residents, cleanup crews, wildlife officials and the American public have a right to know the magnitude and danger of this spill . . . The company hasn't been forthright even in the face of public outrage. A judge's order will change all that. Until then, we're flying blind when it comes to protecting human health and the environment.[97]

In another press release, the Center's oceans director stated:

> The oil spill clearly violates numerous laws, but government enforcement is lacking. This continues the government's tradition of lax oversight when it comes to the oil industry . . . The government probe is a start, but it has taken far too long to get rolling. The lawsuit announced today aims to drive a vigorous prosecution of BP for its environmental destruction.[98]

Was the government's enforcement of the CWA truly lacking? Or was the Center's final futile effort at enforcing environmental laws foreclosed by a *de facto* ban on Fifth Circuit citizen suits? Ultimately, both the U.S. District Court for the Eastern District of Louisiana and the Fifth Circuit assumed the leak was plugged and chose the latter.[99] This time, the pub-

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95. Press Release, Ctr. for Biological Diversity, Lawsuit Seeks $19 Billion in Clean Water Act Penalties From BP (June 18, 2010), *available at* http://www.biologicaldiversity.org/news/press_releases/2010/bp-clean-water-act-06-18-2010.html.

96. *Id.*

97. *Id.*

98. Press Release, Ctr. for Biological Diversity, BP Faces Lawsuit for Polluting Gulf Waters: Citizen Suit Steps in to Hold BP Accountable (June 3, 2010), *available at* http://www.biologicaldiversity.org/news/press_releases/2010/bp-clean-water-act-06-03-2010.html.

99. *See* In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on April 20, 2010, 792 F. Supp. 2d 926, 930 (E.D. La. 2011) (holding an injunction would be futile because the offshore facility no longer existed and there was no ongoing release from

lic's voice would be muffled in bringing large oil polluters to justice through civil penalties under U.S. environmental law.

B. *Procedural History*

i. The District Court's Ruling: In re *Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*[100]

The Center employed citizen suit provisions of the CWA,[101] the CERCLA,[102] and the EPCRA.[103] To consolidate common cases and claims, assigning a "Plaintiff's Steering Committee" to work with plaintiffs in devising master complaints.[104] Indeed, one commentator noted ongoing skepticism of the consolidation process, stating, "Lawyers who represent victims—but who are not on the steering committee—appear to be getting squeezed out of the litigation."[105] This appears to be an area for further examination beyond the scope of this comment.

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the well); *see also* Press Release, Ctr. for Biological Diversity, Appeals Court: Lower Court Wrongly Dismissed Claim Seeking Public Disclosure of BP Oil-spill Contaminants (Jan. 9, 2013), *available at* http://www.biologicaldiversity.org/news/press_releases/2013/gulf-oil-disaster-01-09-2013.html (reporting the district court wrongfully dismissed the Center's case on June 16, 2011, when the Fifth Circuit Court of Appeals reversed the court's dismissal of the Right to Know portion of the claim, but upheld the court's dismissal of the Center's and other's claims under the Clean Water Act for being moot).

100. *In re Oil Spill*, 792 F. Supp. 2d at 926. In this multi-district suit, the court combined litigation initiated by the Center for Biological Diversity, along with the claims of over 100,000 individuals, seeking injunctive relief against BP and other related companies for the April 20, 2010, explosion, fire, and resulting damage caused by millions of gallons of oil spilled into the Gulf of Mexico. *Id.* at 926, 928.

101. 33 U.S.C § 1365 (2006) (authorizing a citizen to commence a civil action where a government agency has failed to perform its duties under the CWA); *In re Oil Spill*, 792 F. Supp. 2d at 928, 930 (noting plaintiffs alleged and sought declaration of Defendants' violations of the CWA).

102. 42 U.S.C. § 9659 (2006) (declaring citizens may commence a civil action against a person, including a government agency, who fails to uphold CERCLA); *In re Oil Spill*, 792 F. Supp. 2d at 926–30 (stating Plaintiffs sought injunctive relief and declaration of Defendants' violations of CERCLA).

103. 42 U.S.C. § 11046 (2006) (giving a citizen the authority to file a civil action on his behalf against a person, company, or government agency violating the provisions of EPCRA); *In re Oil Spill*, 792 F. Supp. 2d at 929 (recounting citizen and organizational Plaintiffs' allegations of Defendants' EPCRA violations).

104. *See* In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on April 20, 2010, MDL No. 2179, at 1–4 (E.D. La. Oct. 8, 2010) (pretrial order No.8) (naming fifteen members to the committee and outlining their responsibilities).

105. Philip Thomas, *Plaintiffs' Steering Committee for BP Oil Spill MDL Dominated by Lawyers from Large Firms*, MS LITIG. REV. & COMMENT. (Oct. 11, 2010), http://www.mslitigationreview.com/2010/10/articles/gulf-oil-spill-litigation/plaintiffs-steering-committee-for-bp-oil-spill-mdl-dominated-by-lawyers-from-large-firms.

On June 16, 2011, the Center brought claims before the U.S. District Court for the Eastern District of Louisiana at a hearing on a motion to dismiss the D1 Master Complaint.[106] The judge held plaintiffs lacked standing for each claim, mooting each claim.[107] Holding this hearing was no small effort—numerous pretrial conferences, hearings, and motions were needed before Judge Barbier could rule on the Master Complaint.[108] With the help of the Plaintiff's Steering Committee, the plaintiffs in the D1 bundle ultimately brought ten claims, with the first five alleged violations filed pursuant to the CWA.[109] The Center sought injunctive relief in stopping the pollution, so the Center for Biological Diversity's complaint was assigned to the D1 bundle.[110] The Center also encouraged maximum civil penalties under the CWA.[111]

Failing to show their injuries would be redressed by a court-ordered injunction, the district court found the D1 plaintiffs lacked standing because there was "no viable offshore facility from which any release could possibly occur[, t]he Macondo well is dead, and what remains of the Deepwater Horizon vessel is on the ocean floor."[112] Moreover, each request for injunctive relief was mooted because the plaintiffs did not state

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106. *In re Oil Spill*, 792 F. Supp. 2d at 928–29.

107. *Id.* at 930–33.

108. *See generally* MDL-2179 Docket Project, http://mdl2179docket.com (last updated Oct. 4, 2013) (providing access to docket entries, filings, and attachments). The "Docket Project" provides comprehensive access to court documents and represents the broad scope of pretrial litigation faced by Judge Barbier and the District Court for the Eastern District of Louisiana.

109. *In re Oil Spill*, 792 F. Supp. 2d at 928–29 ("The First through Fifth Claims of the D-1 Master Complaint allege violations of the Clean Water Act ("CWA"), 33 U.S.C. § 1311 *et seq.*, with regard to discharge of pollutants into the Gulf of Mexico (First), discharge of oil and hazardous substances into the Gulf of Mexico (Second), discharge of toxic pollutants into the Gulf of Mexico (Third), discharge of pollutants in violation of National standards of Performance (Fourth), and gross negligence or willful misconduct (Fifth). Plaintiffs further seek injunctive relief in connection with violations of the Comprehensive Environmental Response Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9603 (Sixth), violations of Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"), 42 U.S.C. § 11004 (Seventh), and violations of Endangered Species Act ("ESA"), 16 U.S.C. § 1538 (Eighth). Additionally, Plaintiffs seek injunctive relief for trespass and nuisance under General Maritime and State Law (Ninth) and injunctive relief regarding removal to more stringent risk based standards under state law (Tenth).").

110. *See* In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on April 2012, MDL No. 2179, at 4 (E.D. La. Oct. 19, 2010) (pretrial order No. 11) (assigning claims for injunctive or regulatory claims against private parties to the D1 bundle).

111. *See* Press Release, *supra* note 95 (reporting the Center's lawsuit sought "a full and honest accounting from BP of how much oil is gushing into the Gulf each day and what toxic pollutants are mixed in with the oil . . ." to "ensure BP is penalized to the full extent of the law for causing the worst environmental disaster in American history").

112. In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on April 20, 2010, 792 F. Supp. 2d 926, 930 (E.D. La. 2011).

a claim for monetary relief.[113] The Macondo well was presumed dead, and the plaintiffs could not demonstrate ongoing violations of statutes on which the claims for relief were founded.[114]

ii. The Court of Appeals' Ruling: *Center for Biological Diversity, Inc. v. BP America Production Co.*[115]

The Center appealed the final judgment dismissing its D1 Master Complaint on four points.[116] First, the Center alleged the district court incorrectly applied legal standards in granting the motion to dismiss.[117] Second, the Center claimed a favorable district court ruling from transferee Judge Barbier would have, in fact, provided relief for claimed injuries.[118] Third, the Center argued the district court erred in holding its complaints moot.[119] Lastly, the Center argued Judge Barbier abused his discretion by imposing contradictory case management limitations.[120]

Fifth Circuit ultimately disagreed, holding most of the plaintiff's claims for relief were moot because the Macondo well was capped and sealed, and only the EPCRA claim remained viable.[121] This small success is critical because it was the result of "[t]he Center provid[ing] affidavits from its members averring that they had been exposed to substances emanating from the disaster . . . and want[ing] to know what types of substances were involved in the *Deepwater Horizon* release . . . [to] assess possible health effects of the exposure."[122]

However, the plaintiffs never received a ruling on their claim for civil penalties—it was simply "overlooked." The next section demonstrates continued importance of severed claims for civil penalties as Phase II of the multidistrict litigation assesses the amount of fines BP must pay under the CWA.[123] Unfortunately, the Center will not be heard in Phase II and

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113. *Id.* at 931.

114. *Id.* at 931–32.

115. Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co., 704 F.3d 413 (5th Cir. 2013).

116. Appellant's Opening Brief at 1–2, Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co., 704 F.3d 413 (5th Cir. 2013) (No. 12–30136).

117. *Id.* at 1, 7–8.

118. *Id.* at 1, 8.

119. *Id.* at 1, 8–9.

120. *Id.* at 2, 32–35.

121. Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co., 704 F.3d 413, 418 (5th Cir. 2013).

122. *Id.* at 429.

123. *See* Andreas Merkl, *Oil Disaster Trial Phase 2: BP vs. Reality*, HUFF POST—GREEN (Oct. 22, 2013), http://www.huffingtonpost.com/andreas-merkl/oil-disaster-trial-phase-_b_4138699.html?view=print&comm_ref=false (discussing Phase II of the trial and noting "the amount of money available for restoration of the Gulf of Mexico via the RE-

there is now Fifth Circuit precedent for future bans on citizen suits for judges with broad discretion in pretrial transfer proceedings.

C. *Lost in the Multidistrict Litigation Mix*

Pursuant to 28 U.S.C. § 1407, a panel of federal court judges, the U.S. Panel on Multidistrict Litigation, may transfer cases with "common questions of fact" to a single federal judge "for coordinated or consolidated pretrial proceedings."[124] After the BP spill, the Panel decided Judge Carl Barbier was the best transferee judge to assume this role.[125] The panel selected the Eastern District of Louisiana as the venue for this litigation because "if there is a geographic and psychological 'center of gravity' in this docket, then the Eastern District of Louisiana is closest to it."[126] The

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STORE Act comes down to two things: How much oil did BP discharge, and were they grossly negligent in the actions leading up to and during the disaster?").

124. 28 U.S.C. § 1407 (2006). The statute provides:

> (a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however*, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.
>
> (b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

Id.

125. In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on April 20, 2010, MDL No. 2179 at 3–4 (U.S. J.P.M.L. Aug. 10, 2010) (order granting transfer) (expressing "every confidence that [Judge Barbier] is well prepared to handle a litigation of this magnitude[,]" noting his distinguished career as an attorney and jurist, stating "during his twelve years on the bench, Judge Barbier has gained considerable MDL experience, and has been already actively managing dozens of cases in this docket").

126. *Id.* at 3 (order granting transfer).

Panel's transfer order encompassed seventy-seven actions[127] with many more "tag along" cases filed after the transfer order.[128]

At the first status conference on September 16, 2010, approximately two hundred attorneys from all over the country attended—in fact, they could not fit in a single room for the proceedings.[129] The Panel reasoned, "Centralization [of the actions] under Section 1407 will eliminate duplicative discovery, prevent inconsistent pretrial rulings . . . and conserve the resources of the parties, their counsel, and the judiciary."[130] Moreover, the Panel declined consideration of appointing multiple transferee judges because "[the Panel's] experience teaches that most, if not all, multidistrict proceedings do not require the oversight of more than one able and energetic jurist, provided that he or she has the time and resources to handle the assignment."[131]

Upon transfer, a variety of difficult issues and decisions challenged Judge Barbier.[132] One of Judge Barbier's most important tasks was creating "pleading bundles" partitioning various claims into manageable groupings.[133] As multidistrict litigation has developed over the years, transferee judges developed a powerful managerial role over litigation, making dispositive rulings on pretrial motions and encouraging settlement.[134] Yet, consolidation should not strip actions of their unique identities, merge suits into a single cause, change the rights of the parties, or make parties in one lawsuit parties in another.[135] Nonetheless, a trial

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127. *Id.* at 1 (order granting transfer). "[Thirty-one] actions in the Eastern District of Louisiana, [twenty-three] actions in the Southern District of Alabama, ten actions in the Northern District of Florida, eight actions in the Southern District of Mississippi, two actions in Western District of Louisiana, two actions in the Southern District of Texas, and one action in the Northern District of Alabama . . . ." *Id.*

128. *See* Edward F. Sherman, *The BP Oil Spill Litigation and Evolving Supervision of Multidistrict Litigation Judges*, 30 MISS. C. L. REV. 237, 239 (2011) (describing the judges process for organizing the hundreds of plaintiffs and thousands of cases resulting from the BP oil spill).

129. *Id.*

130. In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on April 20, 2010, MDL No. 2179, at 3 (U.S. J.P.M.L. Aug. 10, 2010) (order granting transfer).

131. *Id.* at 4.

132. *See* Sherman, *supra* note 128, at 253–54 (pointing out challenging issues and decisions facing Judge Barbier, including: 'the proper role of a transferee judge under MDL, case management techniques . . . , and the conduct of a claims process mandated by the Oil Pollution Act of 1990. . . . [Resolving these issues] involves applying a heady mix of statutory, environmental, maritime, and common law to one of the most serious environmental disasters in recent American history").

133. *See id.* at 240 (explaining "pleading bundles" are "an early central task for managing the litigation").

134. *Id.* at 237–3.

135. *See* FED. R. CIV. P. 16(c)(2)(L) (identifying administrative matters for consideration during pretrial conferences).

court's managerial power is especially strong and flexible in consolidation manners.[136]

To process the flood of litigation arising out of the spill "pleading bundles" were created to file master complaints on related claims.[137] On October 9, 2010, Judge Barbier issued Pretrial Order No. 11, defining the pleading bundles for all cases in MDL No. 2179.[138]

The case filed by the Center for Biological Diversity fell into the D1 bundle, leaving parts behind.[139] Constructed by the Plaintiffs' Steering Committee (PSC), the D1 Master Complaint represents claims for injunctive relief filed by private individuals and organizational plaintiffs against BP, Transocean, and related companies.[140] However, the Center argued in its opening brief on appeal, "Now that the Plaintiff's Steering Committee has tentatively resolved its claims through settlement, . . . the artificial constraints imposed by PTO 11 should disappear upon reinstatement and remand of the Center's case."[141] The Center was looking for more than injunctions. They sought civil penalties as well.

Unique use of pleading bundles was not necessarily abuse of discretion by Judge Barbier—the line was crossed when the Center's claims for civil penalties were severed from the rest of the case and never placed in any pleading bundle.[142] The Center clearly stated if the case were reinstated and remanded to the lower court, "[t]he Center would then be allowed to

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136. *See* Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co., 704 F.3d 413, 432 (5th Cir. 2013) (concluding "the instant case presents an exceedingly complex matter, . . . [and that] [i]n the face of this daunting litigation, and given the 'broad grant of authority' to the district court," the district court did not err in their management of the multidistrict litigation involved in the case).

137. In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on April 20, 2010, 792 F. Supp. 2d 926, 928 (E.D. La. 2011).

138. In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on April 2012, MDL No. 2179, at 2–5 (E.D. La. Oct. 19, 2010) (pretrial order No.11). The order set forth the following pleading bundles: Personal Injury and Death; Private Individuals and Business Loss Claims; Non-Governmental Economic Loss and Property Damages; RICO Claims; Post-Explosion Clean-Up Claims; Post-Explosion Emergency Responder Claims; Public Damage Claims; Injunctive and Regulatory Claims; Claims Against Private Parties; Claims Against the Government or any Government Official or Agency; and Subsequently-Added "Tag-Along" Cases to be assigned to one of the Pleading Bundles above. *Id.* at 2–5 (pretrial order No.11).

139. *See* Amicus Brief, *supra* note 86, at 2, 12 (arguing the district court severed the injunctive claims and bundled them into the D1 Master Complaint, leaving the Center's claims for civil penalties under the Clean Water Act unaccounted).

140. *In re Oil Spill*, 792 F. Supp. 2d at 928.

141. Appellant's Opening Brief, *supra* note 116, at 34–35.

142. *See id.* at 34 (discussing the "novel" use of pleading bundles, "unique to this MDL," and disagreeing with the lower court's case management strategy).

participate with the United States in the CWA enforcement actions to hold BP and Transocean accountable to the full extent of the law."[143]

Judge Barbier's ultimate conclusion on the degree of negligence in the CWA trial—without a jury—will determine the verdict's size.[144] Yet the Center will not be advocating for private citizens before the court and challenging highly controversial oil flow figures.[145] Now, the public is beholden to the efforts of government prosecutors with their own particular ideas about what happened in the Gulf of Mexico's murky waters.

D. *Stand Strong on Stare Decisis: Standing and Mootness Doctrine in Citizen Suits*

Views on standing in citizen suits varied. The 1990s marked one of the "least noted but most profound setbacks for the environmental movement in decades"[146] the U.S. Supreme Court sharply limited the use of citizen suits[147] in *Lujan v. Defenders of Wildlife*[148] and other cases.[149]

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143. *Id.* at 35.

144. Interview by Scott Simon with Debbie Elliot, *BP Oil Spill Trial to Begin Second Phase*, NPR (Sept. 28, 2013, 8:00 AM), http://www.npr.org/templates/story/story.php?storyId=227118011.

145. *See* Jeff Brady, *Phase 2 of BP Trial Focuses on Amount of Spilled Oil*, NPR (Oct. 08, 2013, 3:05 AM), http://www.npr.org/2013/10/08/230265573/phase-two-of-bp-trial-focuses-on-amount-of-spilled-oil ("Attorneys for both the U.S. government and BP told a federal judge in opening statements Monday that they have estimates for how much oil spilled into the Gulf after the accident . . . [t]he government says it was about 176 million gallons; BP says it was closer to 103 million."). The Center for Biological Diversity released a report in which it claimed that the 2010 "BP *Deepwater Horizon* catastrophe spilled 205.8 millions of gallons of oil and 225,000 tons of methane" and only twenty-five percent was recovered, leaving over 154 million gallons of oil in the water. CTR. FOR BIOLOGICAL DIVERSITY, supra note 31, at 2. Moreover, the Center maintains that BP added two million gallons of toxic dispersants, giving the appearance of a reduction yet merely breaking down the oil into smaller particles, potentially threatening ocean life and the underwater food chain. *Id.*

146. William Glaberson, *Novel Antipollution Tool Is Being Upset by Courts*, N.Y. TIMES, June 5, 1999, http://www.nytimes.com/1999/06/05/us/novel-antipollution-tool-is-being-upset-by-courts.html (discussing increasingly difficulty of getting a citizen suit into court).

147. *See id.* ("While neither the Supreme Court nor the lower Federal courts have invalidated the laws governing citizen suits, they have gradually raised the standard that suits must clear, most often by citing the constitutional requirement that the courts resolve only those suits involving 'cases' and 'controversies.'").

148. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 871–72 (1990) (ruling members of the National Wildlife Federation lacked standing to challenge regulations under the Endangered Species Act, rejecting an "ecosystem nexus" argument that sought to establish standing by showing that individuals connected to certain ecosystems have standing to protect the health of the ecosystem as a whole).

149. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 83–84 (1998) (holding standing, under Article III of the Constitution, requires a citizen suit seeking private en-

Some environmentalists claim Justice Scalia's 1986 law review Article "was a blueprint for erosion of the environmental laws," because it called for limiting the use of citizen suits.[150]

In 1999, despite a trend described by some environmental advocates describe as a "slash-and-burn expedition through the law of environmental standing,"[151] *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*[152] represented a major win for environmentalists, liberally shifting the mootness doctrine for citizen suits.[153] Today, the constitutional standing issue is still rooted in the conservative approach, requiring a concrete showing of "injury in fact."[154] However, *Laidlaw* opened the door to relief by permitting civil penalties and allowing more attenuated relationships between advocates and issues.[155] However,

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forcement of the Emergency Planning and Community Right-to-Know Act (EPCRA) to meet three requirements: "injury in fact to the plaintiff, causation of that injury by the defendant's complained-of-conduct, and a likelihood that the requested relief will redress that injury"); Bennett v. Spear, 520 U.S. 154, 167 (1997) (citing *Lujan* and holding standing for a citizen suit brought under the Endangered Species Act requires plaintiffs to meet the "irreducible constitutional minimum:" (1) 'injury in fact' which is both "concrete and particularized" and "actual or imminent;" (2) "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 not the result of the independent action of some third party not before the court;" and (3) a likelihood, not "merely speculative, that the injury will be redressed by a favorable decision").

150. Glaberson, *supra* note 146.

151. Donald Strong Higley II, *A Slash-and-Burn Expedition Through the Law of Environmental Standing*—Lujan v. Defenders of Wildlife, 15 CAMPBELL L. REV. 347, 375–76 (1993) (noting the requirements attached to the injury-in-fact requirement have raised the bar by subjecting "plaintiffs' attempts to meet the redressability prong of the test for standing" to increased scrutiny; thus, "[a] plaintiff frustrated by the newly intense pleading requirements . . . cannot temper them by arguing that, in drafting the citizen-suit provisions, Congress intended to grant standing to the general public" to enforce environmental laws).

152. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000).

153. Francisco Benzoni, *Environmental Standing: Who Determines the Value of Other Life?*, 18 DUKE ENVTL. L. & POL'Y F. 347, 365 (2008) ("*Laidlaw* . . . represents a victory for environmentalists insofar as standing requirements seem to have been relaxed.").

154. *See* Emily Longfellow, Friends of the Earth v. Laidlaw Environmental Services: *A New Look at Environmental Standing*, 24 ENVIRONS 3, 7–8 (2000), *available at* http://environs.law.ucdavis.edu/issues/24/1/articles/longfellow.pdf.

155. *See id.* at 3, 5 ("In [the *Laidlaw*] decision, the Court held that the proper inquiry for deciding injury in fact is injury to the plaintiff, not injury to the environment, and that penalties payable to the U.S. Treasury redress a plaintiff because they provide deterrence in the context of ongoing violations.").

plaintiffs must remain cognizant of lack of judicial support for a speculative "injury in fiction" approach.[156]

A hazardous waste incinerator facility owned by Laidlaw Environmental Services (TOC), Inc. discharged treated water into South Carolina's North Tyger River, polluting the river with various contaminants, including Mercury, in amounts exceeding limits provided by its permit.[157] Local groups and non-profits responded by banded together in filing a citizen suit under the CWA.[158] The *Laidlaw* plaintiffs consisted of three groups: Friends of the Earth, Citizens Local Environmental Action Network, Inc., and the Sierra Club.[159]

The Fourth Circuit Court of Appeals held the plaintiffs lacked standing[160] because "[c]ivil penalties payable to the government . . . would not redress any injury [the] Plaintiffs have suffered[,]" thus making the case moot.[161] The Supreme Court disagreed, stating the Fourth Circuit "misperceived the remedial potential of civil penalties[,] . . . [which] may serve, as an alternative to an injunction, to deter future violations."[162] Voluntarily stopping a CWA violation should not render a case moot altogether.[163]

The district court relied on the fact there was no proof Laidlaw's violation actually harmed the environment, but Justice Ginsberg pointed out "[t]he relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff."[164] *Laidlaw* marks departure from Scalia's strict, conservative standing and mootness interpretation in citizen suits like *Lujan*.[165] Rightly emphasizing the "injury in fact" standard,[166] the Supreme Court did not break precedent entirely.

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156. Benzoni, *supra* note 153, at 359 (noting the Supreme Court has moved away—albeit reluctantly,—from "the stringent application of the 'concrete injury' or 'injury-in-fact' requirement to the 'injury-in-fiction' requirement").

157. *Friends of the Earth*, 528 U.S. at 175–76.

158. *Id.* at 173, 176.

159. *Id.* at 176.

160. *Id.* at 169–70.

161. *Id.* at 173.

162. *Id.* at 174.

163. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 174 (2000) (emphasizing "a defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case").

164. *Id.* at 181.

165. *See id.* at 199 (Scalia, J., dissenting) ("[A] lack of demonstrable harm to the environment will translate, as it plainly does here, into a lack of demonstrable harm to citizen plaintiffs.").

166. *See id.* at 183 (noting this decision does not contradict the holding in *Lujan v. National Wildlife Federation*).

The duality of the standing issue—standing of the environment versus standing of the person when establishing "injury in fact"—mirrors two competing environmental philosophies: anthropocentrism and biocentrism.[167] Anthropocentrism, the human-centered approach to environmental issues, emphasizes the complex relationship between humans and environmental resources, which is more a more persuasive position to establish standing.[168] Biocentrism, the resource-based approach, downplays human relationships in advocating for a broader biosphere.[169] A resource-based approach to establishing standing would represent a very progressive inclusion of preservationist ideology in environmental litigation.[170] However, it is possible the importance of natural resources will not be addressed at all with a more liberal injury-in-fiction standard.[171]

Center for Biological Diversity, Inc. v. BP America Production Co. provides an example of plaintiffs failing to meet the "cases" and "controversies" requirement under Article III of the U.S. Constitution. The Center argued the district court was wrong in assuming the D1 plaintiff's injuries could not be redressed because cleanup activities were "under the control

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167. *See* Ann E. Carlson, *Standing for the Environment*, 45 UCLA L. REV. 931, 964 (1998) (describing the influence these philosophies have had on the issue of standing in citizen suits). Anthropocentrism is a human-centered ethic, developed among more conservative "conservationists," like Gifford Pinochet, the first head of the U.S. Forest Service. *Id.* at 964–66. The core philosophical belief under anthropocentrism is humans should protect and promote the well-being of humans by placing some constraints on the treatment of natural resources out of respect for everyone's natural human rights. *Id.* at 965–66. Biocentrism, is a resource-based ethic, developed among liberal "preservationists," like John Muir, founder of the Sierra Club, and members of the "deep ecology" movement. *Id.* The core philosophical belief under Biocentrism is that nature exists for its own sake and should be valued without reference to human needs or wants. *Id.* at 964–65.

168. *See id.* at 976 (arguing "highlighting the complex human relationship with an environmental resource in a way that is either explicitly human-centered or that embodies a more nuanced notion of the role environmental resources play in human existence seems more compelling and persuasive than ignoring or downplaying that human relationship"). Because "environmental litigators often fail to make the human relationship with an environmental resource an important part of their cases," some suggest "a tightened injury-in-fact standard" as "a useful doctrinal device for encouraging them to do so." *Id.* at 976.

169. *Id.* at 972 ("[F]ocusing on the resource for its own sake may downplay one of the basic motivating forces for environmental protection: the connection between humans and environmental resources.").

170. *See id.* at 973 (noting *TVA v. Hill*, a case in which an environmentalist group sought to shut down a dam project harming an endangered species of minnow and explaining the use of the resource-based approach would have protected the minnow's right to survive and surpassed the human need for the dam).

171. *See id.* at 976 ("Without the injury-in-fact focus, it is not entirely clear whether testimony about the importance of a natural resource—either human-centered or otherwise-will be introduced at all.").

of the National Incident Commander" and other agencies.[172] Judge Barbier's decision to grant standing on just a single claim seems to represent a strong pull toward the more conservative approach.[173]

Today, it seems the center of gravity in standing for environmental suits is proof of an "injury in fact" to a person.[174] Yet *Laidlaw* allows a more attenuated connection between the person and violation.[175] Aesthetic interests may be legally cognizable, with ruined plans to visit affected areas on vacation possibly creating a sufficient stake in establishing standing.[176] For example, in *Laidlaw*, standing was properly granted to Friends of the Earth member Kenneth Lee Curtis because he submitted affidavits explaining he lived half a mile away from the polluter, occasionally crossed the river which looked and smelled polluted, and missed swimming and fishing downstream as he could in his childhood days.[177] Here, this attenuated relationship was enough to establish standing for redress at the Supreme Court.

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172. Appellant's Opening Brief, *supra* note 116, at 18. The Center's argument is built on two levels: (1) the Center's "injuries did not arise from government regulation of third parties, but rather [BP's] direct actions and omissions in operating the well and cleaning up the spill;" and (2) "the Court misconstrued the contents of the Complaints[ ]"—the Center was not trying to interfere with the government response of cleaning up the Gulf, but rather seeking injunctive relief against BP and Transocean to stop polluting the Gulf and pay for the cost of environmental restoration deemed necessary by the Court. *Id.* at 19–20.

173. *Compare* Sierra Club Brief, *supra* note 44, at 10–11 (explaining the district court denied standing to an environmental group whose members could no longer "view [the] wildlife, enjoy the habitat of the [sea turtles], . . . photograph, . . . swim[ ], snorkel[ ], scuba div[e], kayak[ ][,] . . . take family trips," or eat seafood for the fear of being exposed to the toxins from the spill) *with* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181–82 (2000) (granting standing for an environmental group whose members could no longer "fish, camp, swim, [sic] picnic," or enjoy a river because of the pollution).

174. *See Friends of the Earth*, 528 U.S. at 183–84 ("We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity.") (citing Sierra Club v. Morton, 405 U.S. 727, 735 (1972)).

175. *See id.* at 201 (Scalia, J., dissenting) (arguing the majority defined the injury in fact standard in a "most casual fashion" and disagreeing with Majority's acceptance of Plaintiff's affidavit as sufficient proof of injury in fact without a finding of demonstrable harm to the environment).

176. *See id.* at 169 ("[S]tanding is not injury to the environment but injury to the plaintiff. . . . Here, injury in fact was adequately documented by the affidavits and testimony of FOE members asserting that Laidlaw's pollutant discharges, and the affiants' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests. . . . These submissions present dispositively more than the mere 'general averments' and 'conclusory allegations' found inadequate in *Lujan* . . .").

177. *Id.* at 181–82.

An Amici Curiae Brief filed on behalf of a large group of law professors argued the U.S. District Court for the Eastern District of Louisiana made two vital errors when considering these standards in *Center for Biological Diversity v. BP American Production Co.*[178] The law professors submitted their brief on this controversial issue because they "teach, research, and write in the field of environmental law . . . [and] have an interest in bringing to the Court's attention relevant legal principles concerning the proper application of the standing and mootness doctrines to citizen suits."[179]

First, when the Center filed suit, BP was violating environmental laws and there was reason to believe the pollution would continue. The case's commencement date is the measuring point a court must reference when determining whether the elements of standing exist.[180] The district court erred by incorrectly evaluating whether the plaintiffs lacked standing by taking judicial notice of the condition of the well's leak, when it stated:

> In fact, the injunction at this stage would be useless, as not only is there no ongoing release from the well, but there is also no viable offshore facility from which any release could possibly occur. The Macondo well is dead, and what remains of the Deepwater Horizon vessel is on the ocean floor, where it capsized and sank in 5,000 feet of water.[181]

Second, the law professors argued the district court failed to follow well-settled mootness doctrine.[182] *Laidlaw* has been recognized by a number of federal courts of appeals and dictates BP's post-commencement compliance should not render claims for civil penalties moot even

178. *See* Amicus Brief, *supra* note 86, at 1, 5–7 (stating "the District Court did not properly apply the doctrines of standing and mootness"). The two counsels of record, one from Tulane Law School and the other from Pace University School of Law, filed the brief on behalf of fifty-two professors from thirty-six different institutions across the United States, including Georgetown University Law Center, the University of Oregon School of Law, the University of Colorado Law School, Loyola Law School, the University of Nebraska College of Law, West Virginia University College of Law, Boston College Law School, CUNY School of Law, and the University of Alabama School of Law, to name a few. *Id.*

179. *See* Amicus Brief, *supra* note 86, at 1.

180. *Id.* at 6–7 (stating "even though the discharges [had] stopped . . . [the] case was filed before the cessation of the discharges, and expressly [sic] included claims for civil penalties under [the] CWA . . ."). The brief also cites *Laidlaw*, which held citizen suits are not prohibited nor subject to dismissal because injunctive relief becomes moot after filing. *Id.* at 1.

181. In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, 792 F. Supp. 2d 926, 930 (E.D. La. 2011) (holding there was no standing because an injury could no longer be addressed, since the well was dead).

182. *See* Amicus Brief, *supra* note 86, at 2–3.

when claims for equitable relief are rendered moot.[183] The law professors urge district court judges in "refrain[ing] from exercising their power to manage their dockets in ways that prejudice plaintiffs' claims for civil penalties."[184]

The "Plaintiff's original complaint [included] both claims for civil penalties and claims for injunctive relief"; however, Judge Barbier "severed the injunctive claims and bundled them into the D1 Master Complaint" in a pretrial order—this left the claims for civil penalties unaccounted for.[185] Under *Laidlaw*, if claims for civil penalties were present in the D1 Master Complaint, capping the well and ending all violations would not have mooted claims for civil penalties, even if the district court mooted claims for equitable relief.[186]

Another Amicus Brief filed by the Sierra Club[187] expressed similar disagreements. The "Sierra Club has an interest in bringing to the Court's attention the critical role of public participation in the federal government's Clean Water Act lawsuits, and in the right of environmental organizations [sic] to bring citizen suits under § 505 of the Clean Water Act, 33 U.S.C. § 1365."[188] One substantial issue for the Sierra Club in The Deepwater Horizon litigation was the public's role in enforcing the Clean Water Act.[189] The Sierra Club argued without the Center for Biological Diversity, not a single environmental organization would be party to the Clean Water Act suits against BP.[190] According to the Sierra Club, this could amount to a *de facto* ban on public interest participation through citizen suits in future environmental disaster litigation.[191] The Sierra Club echoed the law professors' argument, stating the district court's dismissal directly conflicted with the *Laidlaw* standard allowing claims for civil penalties to survive even if claims for injunctive relief become moot after filing.[192]

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183. *See id.* ("Post-commencement compliance will not moot claims for civil penalties even where it moots claims for equitable relief.").

184. *Id.* at 3.

185. *Id.*

186. *Id.* at 2–3.

187. Sierra Club Brief, *supra* note 44. The Sierra Club is one of the oldest grassroots environmental organizations. *Id.* at 1. It has over 700,000 members nationwide, including chapters whose interests have been adversely affected by the Deepwater Horizon oil spill in Louisiana, Mississippi, Alabama, Texas, and Florida. *Id.*

188. *Id.* at 2.

189. *See id.* ("Despite numerous attempts to initiate and intervene in legal actions, the environmental public interest voice has been shut out of the Deepwater Horizon litigation.").

190. *Id.* at 2–3.

191. *Id.* at 3.

192. *Id.* at 7.

Emphasizing the importance of citizen suits, the Sierra Club made three basic arguments: (1) the Center's impaired interests will not be completely redressed until the court reviews its claims; (2) the Center's extensive environmental knowledge and expertise can assist in resolving the complicated litigation; and (3) the United States can neither sufficiently represent the Center's interests, nor can it stand in the Center's position in ensuring the public's injuries are adequately redressed.[193] These arguments strike at the very essence of why citizen suits exist.

E. *The Role of Judicial Notice*

Judge Barbier's use of judicial notice was striking in this case. With coordinated discovery in multidistrict litigation and the Steering Committee's combined cooperation, Judge Barbier's made a strikingly independent assumption about the state of the well, considering the method of capping the well and attendant risks were seriously disputed topics at the time.[194] Federal Rule of Evidence 201(b) provides, "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[195] The Advisory Committee Notes point out, "A high degree of indisputability is the essential prerequisite."[196]

Ultimately, the record was in Judge Barbier's favor. No significant leaks were reported after July 15, 2010.[197] However, using judicial notice remains intriguing because there was room for thoughtful dispute—the capping stack did not guarantee success. The well was not effectively dead until September.[198] Was Judge Barbier's decision to set July 15 as the date the well was capped merely a gamble? There is an exception to the mootness doctrine for injuries capable of repetition and evading re-

193. Sierra Club Brief, *supra* note 44, at 7–18.

194. *See* Henry Fountain, *Amid Tests, BP Sees No Signs of Damage to Well*, N.Y. TIMES, July 17, 2010, http://www.nytimes.com/2010/07/18/us/18spill.html?_r=0 (reporting engineers, executives, and government officials could not agree on how to permanently seal the well once it was shut and oil stopped gushing); *see also* Henry Fountain, *BP Hopes to Keep Well Closed, but Seep Is Detected*, N.Y. TIMES, July 18, 2010, http://www.nytimes.com/2010/07/19/us/19oilspill.html?fta=y (reporting government officials were skeptical of BP being able "to keep the well closed until it could be permanently plugged" especially because BP wanted to implement a plan "sharply" different from the plan suggested by the government one day prior).

195. FED. R. EVID. 201(b).

196. FED. R. EVID. 201 advisory committee's note.

197. Campbell Robertson & Henry Fountain, *BP Says Oil Flow Has Stopped as Cap is Tested*, N.Y. TIMES, July 15, 2010, http://www.nytimes.com/2010/07/16/us/16spill.html.

198. OIL COMM'N REPORT, *supra* note 4, at 169.

view.[199] There was still potential for more violations and a major blowout.[200] Upon considering the facts on whole, it appears this information was not generally known within the territory, and accurately or readily determining the well's condition from legitimate sources was frustrated by the breach's ocean depth. Moreover, the well was not determined "effectively" dead until September 19, 2010.[201]

Offering no argument to the contrary, the plaintiffs surprisingly failed to respond at the hearing.[202] "The Center indicated that at some unspecified future time hearings could be held and 'experts' could educate the court, but it did not indicate a need for . . . immediate discovery on the well's status or continued discharge of pollutants from the site."[203] Successful environmental advocates must prepare in disputing foreseeable, shaky assumptions, especially assumptions about nuanced scientific facts. Failing to present any contrary evidence on appeal enabled Judge Barbier to easily remove standing and render the Center's claims moot.

F. *Commentary*

Surviving the consolidation process with every claim intact is clearly challenging in multidistrict litigation. Judge Barbier ignored the Center's claims for civil penalties. Future judges should exercise extreme caution when ruling on dispositive pretrial motions. Certainly, as a judge, Judge Barbier faces a variety of complex issues. Why did the Panel on Multidistrict Litigation seem so confident Judge Barbier could handle such a monumental mission alone? Should a team of judges work together in handling such an important duty?

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199. *See* In re Di Giorgio, 134 F.3d 971, 975 (9th Cir. 1998) (finding an exception to the mootness doctrine when injuries are capable of repetition but evade review, however to qualify for this exception, there must be "a reasonable expectation that the complaining party will [face] the same injury in the future . . . [and] the injury suffered must be so inherently limited in duration that the action will become moot before the completion of appellate review").

200. Fountain, *supra* note 194.

201. OIL COMM'N REPORT, *supra* note 4, at 169.

202. *See* Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co., 704 F.3d 413, 423–24 (5th Cir. 2013) (recalling during the hearing on the motion to dismiss in the district court, after being asked by the judge "what evidence it had that the well was not indeed dead[, t]he Center [failed to] indicate that it had . . . any evidence to refute that fact," nor did the Center request further discovery). According to the Court of Appeals, "the Center acted at its own peril," in District Court, when they moved for a final ruling on the injunctions to preserve error for appeal. This strategic move backfired because in order to obtain a final appealable judgment, in the eyes of the court, the Center effectively abandoned its claim for monetary relief. *Id.* at 427.

203. *Ctr. for Biological Diversity*, 704 F.3d at 424 n.2.

The timeline in aftermath of the disaster and the litigation that ensued is a broad and complex issue. Rushing to settle and constant pushing towards more efficiency can be both legally and scientifically counterproductive. Citizen suits may contribute to this counterproductive trend by increasing pressure to finalize cases. Environmental enforcement is incredibly data intensive, and determining the full scope of an event like the Deepwater Horizon oil spill clearly requires significant time and effort.

Similar to the Exxon-Valdez oil spill, the Deepwater Horizon oil spill will take years to clean. Instant gratification through speedy decisions and quick payouts provides a quick boost in opinion poll numbers, but adequately resolving this kind of environmental disaster is nearly impossible without considerable time for evaluating the full extent of the contributing factors and damages. Plaintiffs may have to be more deliberate in seeking civil penalties for their injuries after future oil spills, because collecting the necessary data is highly time-intensive. Determining ways to allocate money already obtained for restoration across multiple states is a slow process. Future plaintiffs must be aware of a transferee judge's broad powers in the aftermath of a man-made disaster. In some cases, taking a "wait-and-see" approach may be wise. To ensure none of the claims are lost in initial consolidation plaintiffs may consider, for example, waiting until after the transferee judge has organized the cases by common questions of fact and then filing a "tag-along" case once the lines have been drawn.

Based on the evidence presented in this Comment, successful citizen suits are best founded on well-documented, ongoing violations, presented to the court in a compelling manner—emphasizing strong connection between the violation and parties bringing suit. It is essential for citizens to take a stand on behalf of the voiceless members of the biotic community, even if the injury(s) might seem somewhat remote or abstract, because we must preserve biodiversity.

In reality, the injured biotic community members' cause of action must be connected to a human injury for standing in a court of law. The "injury in fact" standard is necessary because without such bar, the potential for citizen suit abuse would skyrocket, risking halting progress toward better enforcement. However, federal court judges must remain committed to mootness precedent and recognize claims for civil penalties have a truly tangible deterrent effect. A strong system of environmental enforcement involves participation from three points of view: the citizen's, the government's, and the violator's.[204] Effective and equitable enforce-

204. *See generally* Hodas, *supra* note 59, at 1657 (analyzing enforcement of the Clean Water Act and arguing that a triangular relationship between polluters, the government,

ment is questionable when the public's point of view is not afforded the weight it deserves.

IV. Subsequent Developments and Related Issues

A. *A Hasty Civil Settlement?*

On November 25, 2013, the New York Times reported, "Like a parent who's run out of patience with an obstreperous child, [Judge Barbier] lectured BP's lawyers for changing their story and trying to 'rewrite' the history of the landmark case."[205] In early November, BP argued for dismissal of the multi-billion dollar settlement of private claims against it for the April 2010 Deep Horizon oil spill.[206] BP alleged widespread fraud when the original $7.8 billion settlement began growing rapidly larger than the initial figure.[207] A BP attorney stated, "[T]he implementation of the settlement under rules approved by U.S. District Court [Judge] Carl Barbier resulted in a violation . . . because businesses didn't have to prove their losses were directly caused by the spill."[208] Judge James Dennis, a Clinton appointee serving on another appeals panel, expressed disagreement, stating, "BP agreed to the written formula in the settlement on which the claims office business loss rules were based."[209]

In making a successful business loss claim, businesses must pass an eligibility test determining whether they suffered losses related to the spill; settlement formulas calculate the amount of compensation.[210] BP contended that the court focused too heavily on the method of calculating

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and citizen enforcers "is a remarkably strong configuration, but without fully empowered citizens as private attorneys general, the strength of the CWA's triangular federalist enforcement system will not be achieved"). "Stronger citizen suit provisions will better enable citizens to monitor state enforcement and directly ensure enforcement of national requirements when state enforcement is weak." *Id.*

205. Paul M. Barrett, *Oil Spill Judge 'Deeply Disappointed' in BP*, Bloomberg Businessweek (Nov. 25, 2013), http://www.businessweek.com/articles/2013-11-25/bp-legal-actions-in-oil-spill-case-deeply-disappointing-says-judge.

206. Mark Schleifstein, *BP Tells 5th Circuit to Throw Out Private Oil Spill Settlement if Business Claims Rules Aren't Fixed*, NOLA.com (Nov. 4, 2013, 2:22 PM), http://www.nola.com/news/gulf-oil-spill/index.ssf/2013/11/bp_tells_5th_circuit_to_throw.html.

207. *See* Ed Crooks, *BP in Fresh Attempt to Curb Oil Spill Payouts*, Fin. Times (Nov. 10, 2013, 6:08 PM), http://www.ft.com/intl/cms/s/0/5024ebfa-4a25-11e3-9a21-00144feabdc0.html (reporting BP lawyers alleged compensation payments of $76 million were clearly not caused by the spill and claiming an additional $546 million were paid on claims a "reasonable observer" would find fraudulent and not related to the spill). Examples of fraudulent claims business have successfully claimed compensation for include: "[a] clinic where the main doctor had his license revoked, a mobile phone shop closed by a fire, and a car dealership that sold a discontinued marque." *Id.*

208. Schleifstein, *supra* note 206.

209. *Id.*

210. Crooks, *supra* note 207.

the size of the loss instead of the issue of causation.[211] At the end of November 2013, Judge Barbier denied the request to freeze payments.[212] In his opinion, Judge Barbier called the actions of BP's legal team "deeply disappointing" because "BP had already agreed to the terms of the settlement" without objecting to interpretation.[213] Did BP and the federal government hurriedly settle without ensuring adequate fairness on both sides? One of the negative trade-offs of encouraged enforcement through citizen suits might be hasty settlements.

B. *What about the EPCRA Claim?*

Although the Center lost on all the other claims, the seemingly slight success of the EPCRA claim bolsters plaintiffs' claims in other bundles. The EPCRA requires notice from an owner or operator of hazardous chemicals released "to inform the public about the presence of hazardous" substances and provide emergency response information in the event of a health-threatening release.[214] The Center established standing by emphasizing the human element rather than environmental harm.[215] Members submitted affidavits describing exposure to substances emanating from the disaster and concern about breathing air or ingesting water that was exposed to toxins from the Deepwater Horizon oil spill.[216] Plaintiffs in the B3 bundle asserted personal injury claims from exposure to toxic chemicals, alleging oil and/or dispersants caused "headaches, nausea, vomiting, respiratory problems, eye irritation, rashes, lesions, and bumps."[217] The effect of the Center's win on the EPCRA claim could provide the B3 plaintiffs with more crucial data in successfully obtaining relief from the polluters.

The use of chemical dispersants in dispersing oil on the water's surface is very controversial. According to BP, dispersants "'clean and control' ocean oil spills by putting the oil in a state where 'it becomes a feast for

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211. *Id.*

212. Olivia Pulsinelli, *BP, Judge Trade Barbs over Deepwater Horizon Oil Spill Settlement*, HOUSTON BUS. J. (Nov. 25, 2013, 7:11 PM), http://www.bizjournals.com/houston/morning_call/2013/11/bp-judge-trade-barbs-over-deepwater.html.

213. *Id.*

214. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 86 (1998); *see also* Emergency Planning and Community Right-to-Know Act of 1986, § 326, 42 U.S.C. § 11021–11040 (2006) (providing the reporting requirements for the owner or operator of a facility that releases hazardous chemicals).

215. Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co., 704 F.3d 413, 429 (5th Cir. 2013).

216. *Id.*

217. In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on April 20, 2010, MDL No. 2179, 2011 WL 4575696, at *1 (E. D. La. 2011).

the naturally-occurring microbes that inhabit the ocean.'"[218] In fact, it seems BP concealed damage by removing the visible oil from the surface of the ocean.[219]

Unfortunately, dispersants only break surface oil into microscopic droplets that sink into the ecosystem—hungry microbes do not remove the oil.[220] Soon after the spill, BP bought one-third of the world's dispersant supply.[221] Corexit—a widely used dispersant in the Deepwater Horizon oil spill response—was "removed from a list of approved dispersants in Great Britain a decade ago because one type of test used in that country found them to be unduly dangerous to animals."[222] Yet BP ignored known dangers and numerous Environmental Protection Agency requests for BP to switch to a less toxic dispersant.[223] There are many peculiarities surrounding the oil spill that BP does not want the public to know,[224] and that is why citizen suits are critical in environmental litigation.

V. CONCLUSION

Widespread inconsistencies in public communication and unreliable scientific data presented by BP and the government are just a few examples justifying citizen suits in environmental law. The 1970s brought much needed legislation, helping clean the United States during a time of relatively unchecked pollution. Including citizen suits demonstrated rec-

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218. Anne Landman, *Environmental & Health Effects of Oil Dispersants a Mystery to BP and the Government*, PRWATCH (July 13, 2010), http://www.prwatch.org/news/2010/07/9252/environmental-health-effects-oil-dispersants-mystery-bp-and-government?page=2.

219. *See id.* (explaining "dispersants do not clean the water, nor do they remove oil at all, but rather re-arrange where it exists, and change where it goes"); *see also* Paul Quinlan, *Less Toxic Dispersants Lose Out in BP Oil Spill Cleanup*, N.Y. TIMES, May 13, 2010, http://www.nytimes.com/2010/05/13/business/energy-environment/13greenwire-less-toxic-dispersants-lose-out-in-bp-oil-spil-81183.html?_r=0 (defining dispersants as "chemicals that break surface oil slicks into microscopic droplets that can sink into the sea . . . [noting] Scientists warn that the dispersed oil, as well as the dispersants, might cause long-term harm to marine life").

220. *See* Quinlan, *supra* note 219 (reporting on the use of dispersants in response to the Deepwater Horizon oil spill).

221. *Id.*

222. Elisabeth Rosenthal, *In Standoff with Environmental Officials, BP Stays with an Oil Spill Dispersant*, N.Y. TIMES, May 24, 2010, http://www.nytimes.com/2010/05/25/science/earth/25disperse.html?scp=1&sq=Corexit%20BP%20Oil%20Spill&st=cse.

223. *Id*

224. *See generally* Mark Herstgaard, *What BP Doesn't Want You to Know About the 2010 Gulf Spill*, NEWSWEEK (Apr. 22, 2013, 5:09 PM), http://www.newsweek.com/what-bp-doesnt-want-you-know-about-2010-gulf-spill-63015 (arguing that the worst environmental disaster in history has been whitewashed and listing the negative effects BP has tried to cover up).

ognition of a broader range of legal interests associated with the environment.

Although conservative courts have applied strict constitutional requirements in denying plaintiff standing in the past, the Supreme Court made room for more attenuated relationships between injured natural resources and human beings when it comes to civil penalties. This enables representation of a variety of interests as these penalties can be used for long-term wildlife protections and natural resource sustainability. To be sure, this Comment does not definitively answer problems presented herein. Better awareness of the major challenges in pre-trial litigation provides advocates and judges better insight in administering multidistrict litigation more effectively and efficiently.

Citizen suits will face a vast amount of competing claims arising from the next major disaster. Rushing to resolve cases and appease the public, future advocates in citizen suits should remain mindful of the risks of promoting a hasty settlement. Moreover, building data-intensive cases is time consuming. Our court system as a whole will benefit, along with the public, from redefined expectations of what constitutes "timely relief" in future oil spill disasters.

More importantly, transferee judges are crucial in responding to a disaster like the Deepwater Horizon. Judicial Panels on Multidistrict Litigation have an important duty to consider the full scope of potential litigation to avoid aggregating mass torts too quickly. Once the potential scope has been reasonably evaluated, panels must carefully balance need for judicial economy against issue complexity in assigning temporary transferee duties to circuit and district court judges. Although the sole transferee judge in this case, Judge Barbier, served honorably, one cannot be expected to handle such a broad swath of complex litigation without flaw. Future judges bestowed with transferee judge powers should recognize *Laidlaw* and the Supreme Court's mootness precedent regarding civil penalties. The Center for Biological Diversity was removed from the debate on civil penalties under the CWA and precluded from seeking full enforcement of the law and denied the recognition of conflicting interests. Transferee judges must not use procedural or administrative tactics in marginalizing any party's interests. Consolidation of litigation should group together common lawsuits rather than unrecognizably blend them. Environmental advocates rely on clear mandates expressly included in our federal laws and upheld by the Supreme Court in seeking remedies which protect not just humans but all living things directly harmed by pollution.