**No. 12-30136**

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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**CENTER FOR BIOLOGICAL DIVERSITY, INCORPORATED,**
***Plaintiff-Appellant,***

**v.**

**BP AMERICA PRODUCTION CO; BP EXPLORATION & PRODUCTION, INC.; BP, P.L.C.; TRANSOCEAN OFFSHORE DEEPWATER DRILLING INC; TRANSOCEAN HOLDINGS, L.L.C.; TRANSOCEAN DEEPWATER, INC.,**
***Defendants-Appellees*.**

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On Appeal from the United States District Court
For the Eastern District of Louisiana
Honorable Carl Barbier

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# BRIEF OF AMICI CURIAE LAW PROFESSORS IN SUPPORT OF PLAINTIFF–APPELLANT

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May 14, 2012

## CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and entities, as described in Local Rule 28.2.1, have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualifications or recusals.

**A. Parties:**

| | |
|---|---|
| Plaintiff-Appellant: | Center for Biological Diversity, Inc. |
| Defendants-Appellees: | BP America Production Co.<br>BP Exploration & Production, Inc.<br>BP, P.L.C.<br>Transocean Offshore Deepwater Drilling, Inc.<br>Transocean Holdings, LLC<br>Transocean Deepwater, Inc. |

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## IDENTITY, INTERESTS, AND AUTHORITY OF THE AMICI CURIAE

Amici curiae are law professors and scholars (listed on the signature page) who teach, research, and write in the field of environmental law. Amici 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. Amici submit that the law is well-settled that post-commencement compliance by a defendant does not affect a plaintiff's standing nor does it moot a complaint containing claims for civil penalties. Amici are concerned with the potential precedential effect of this resolution of a citizen suit in a case of environmental damage unparalleled by any in this nation's history. Amici curiae law professors file this brief with leave of the Court pursuant to Federal Rule of Appellate Procedure 29(b). Amici file this brief solely as individuals and not on behalf of the institutions with which they are affiliated.[1]

## ARGUMENT

The Court should reverse the judgment below in *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010*, 792 F. Supp. 2d 926 (E.D. La. 2011), wherein the district court dismissed the complaint on standing and mootness grounds. In considering D1 Bundle defendants'

[1] Regarding Fed. R. App. P. 29(c)(5): Amici state that (A) no party's counsel authored the brief in whole or in part; (B) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and (C) no person – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief.

("Defendants") Motion to Dismiss the D1 Master Complaint, the district court erred in two respects. First, it ruled that the D1 Bundle Plaintiffs, including the Center for Biological Diversity ("Plaintiff"), did not have standing to bring their citizen suit, finding the claims were not redressable, in large part because the violations were no longer ongoing at the time the motion to dismiss was decided. However, it is the date the case was commenced to which the court must refer when measuring whether the elements required for standing were present. At that time, the violations were ongoing and there was reason to believe that the violations would continue. The district court then erred in its mootness analysis. Plaintiff's original complaint contained both claims for civil penalties and claims for injunctive relief, but the district court severed the injunctive claims and bundled them into the D1 Master Complaint. Pretrial Order No. 11 (Case Management Order No. 1) (hereinafter "CMO No. 1"). This left Plaintiff's claims for civil penalties unaccounted for. But for CMO No. 1, the claims for civil penalties would be present in the D1 Master Complaint, which Defendants moved to dismiss as moot as a result of post-commencement compliance. However, well-settled mootness doctrine, as discussed in Justice Stevens' concurrence in *Friends of the Earth v. Laidlaw Environmental Services (TOC)*, 528 U.S. 167 (2000) and recognized by multiple federal courts of appeals, dictates that a defendant's post-commencement compliance will not moot claims for civil penalties even where it

moots claims for equitable relief. District courts should refrain from exercising their power to manage their dockets in ways that prejudice plaintiffs' claims for civil penalties in contravention of this generally accepted rule. Therefore, even if the district court correctly held that Plaintiff's injunctive claims are moot, under *Laidlaw* the claims for civil penalties would survive and the D1 Master Complaint should not have been dismissed.

## I. CITIZEN SUITS ARE CRUCIAL TOOLS IN ENVIRONMENTAL ENFORCEMENT.

Congress created citizen suits to be an essential component of the enforcement of environmental laws and has authorized them in nearly every major federal environmental statute, including the Clean Water Act ("CWA"), the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), and the Emergency Planning and Community Right-to-Know Act ("EPCRA"). 33 U.S.C. § 1365; 42 U.S.C. § 9659; 42 U.S.C. § 11046; s*ee* 33 U.S.C. § 1251(e) (stating that public participation in the enforcement of regulations "shall be provided for, encouraged, and assisted by" the EPA and the States); James R. May, *Foreword: Environmental Citizen Suits at Thirty-something: A Celebration & Summit Part 1*, 10 Widener L. Rev. i, i (2003) (more than a dozen environmental statutes utilize citizen suits to enforce public laws and more than three quarters of reported environmental opinions derive from them); *see generally* Jeffrey G. Miller, *Citizen Suits: Private Enforcement of Federal Pollution Control*

*Laws* (1987). The CWA contains one of the earliest environmental citizen suit provisions was that of the Clean Water Act. 33 U.S.C. § 1365; *see* Lisa Jorgenson & Jeffrey J. Kimmel, Bureau of National Affairs, *Environmental Citizen Suits: Confronting the Corporations* 19 (1988) (showing a large proportion of environmental citizen suits have been based on the CWA). In enacting section 505 of the CWA, Congress acknowledged that government resources are limited and the government might not always have the will to prosecute a violator. S. Rep. No. 414, at 5 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3672); *see Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519, 526 (5th Cir. 2008) (describing the citizen suit as "a critical component of the CWA's enforcement scheme, as it 'permit[s] citizens to abate pollution when the government cannot or will not command compliance'" (quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found. Inc.*, 484 U.S. 49, 62 (1987))).

Citizen suits are intended to supplement and to encourage government enforcement efforts. *Envtl. Conservation Org.*, 529 F.3d at 526. While federal agencies and the states are primarily responsible for the enforcement of environmental laws, the citizen suit has proven a crucial tool in abating pollution and attaining environmental compliance. *See* Jeffrey G. Miller, *Theme & Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA & Citizens: Part One: Statutory Bars in Citizen Suit*

*Provisions*, 28 Harv. Envtl. L. Rev. 401, 403-04 (2004) (noting state and federal enforcers' support for the maintenance of citizen suits). Citizen enforcement of environmental statutes and regulations has also been key in shaping environmental law. James R. May, *supra*, at i (observing that citizen suits have shaped environmental law); Jeffrey G. Miller, *A Generational History of Environmental Law and Its Grand Themes: A Near Decade of Garrison Lectures*, 19 Pace Envtl. L. Rev. 501, 506-07 (2002) (describing citizen suits as critical to the development of environmental law). Especially in this instance, where both government and citizen enforcers are faced with an unprecedented occurrence of environmental pollution affecting a multitude of interests, courts should be wary of limiting a mechanism that Congress deemed essential and that has played such an important role in protecting the environment.

## II. THE DISTRICT COURT DID NOT PROPERLY APPLY THE DOCTRINES OF STANDING AND MOOTNESS.

Environmental citizen suits – in particular those brought under the CWA after *Gwaltney* – present complex jurisdictional issues for litigants and the courts. They may involve a confusing mixture of legal analyses where the same set of facts is required to determine the outcome of simultaneous challenges to the citizen suit based on standing, mootness, and subject matter jurisdiction. Ann Powers, *Gwaltney of Smithfield Revisited*, 23 Wm. & Mary Envtl. L. & Pol'y Rev. 557, 591 (1999); 570-71 (discussing the lack of analytical clarity that this peculiar situation

engendered in *Gwaltney*). Avoiding the pitfalls of this confluence of judicial doctrines and relevant facts is particularly challenging in this case, which involves a motion to dismiss based on Defendants' purported post-complaint compliance. Both standing and mootness arise from Article III's case-or-controversy requirement and involve similar analyses of facts and allegations. *See* U.S. Const. art. III, § 2, cl. 1; *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006) ("The [doctrine] of mootness . . . originate[s] in Article III' s 'case' or 'controversy' language, no less than standing does."); *Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975) ("The standing question thus bears close affinity to questions of . . . mootness – whether the occasion for judicial intervention persists."). However, while standing and mootness are related, they are not the same; they entail the analysis of facts set in different time frames and under different burdens of proof. *See Warth*, 422 U.S. at 499, n.10. The clear delineation of each legal doctrine, the application of the appropriate burdens of proof, and the identification of facts relevant to each subdivision are key to the proper resolution of these motions to dismiss.

For subject matter jurisdiction to attach under section 505 of the CWA, a plaintiff need only make a good faith allegation of an ongoing violation in its complaint. *Gwaltney*, 484 U.S. at 64-67; 33 U.S.C. 1365(a)(1); *see also Natural Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 997 (9th Cir. 2000)

(defendant's post-commencement changes "may affect . . . the question of ongoing violations or remedies . . . or mootness . . . [b]ut such changes do not retroactively divest a district court of jurisdiction under [section 505 of the CWA]" (citations omitted)). To meet its burden to show Article III standing at the pleading stage, a plaintiff must make general allegations of fact within its complaint that meet the required three prong test and the court must analyze these allegations based on the circumstances in existence at the time the complaint was filed. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In order to moot Plaintiff's injunctive claims in the present case due to post-complaint cessation of violations – necessarily entailing the consideration of circumstances *after* the time relevant to the standing analysis – Defendants must show that it is absolutely clear that the discontinued violations cannot reasonably be expected to recur and the standard is stringent. *Laidlaw*, 528 U.S. at 189. Moreover, Defendants' post-complaint compliance cannot moot Plaintiff's claims for civil penalties, and a court should not exercise its inherent power to manage its docket in a manner that results in substantive prejudice to Plaintiff's viable civil penalty claims.

### A. In Determining Whether the Plaintiff Has Standing to Sue, the Court Must Examine Circumstances Only as They Existed at the Time the Complaint Was Filed.

In its June 16, 2011 opinion granting Defendants' Motion to Dismiss the D1 Master Complaint, the district court found that Plaintiff lacked standing to bring its

CWA and CERCLA[2] claims because it failed the third prong of *Lujan* – redressability. Order & Reasons as to D1 Master Compl. 5, June 16, 2011, Doc. No. 2784. The court stated that, for Plaintiff's injuries to be redressable, the relief sought "must provide some benefit or reduction in pollution." *Id.* at 5. It reasoned that equitable relief "*at this stage* would be useless" because there is no longer an ongoing release of pollutants from the oil well in question. *Id.* at 6 (emphasis added). The district court also found that Plaintiff lacked standing to bring its EPCRA claim for want of redressability "in light of the fact that there *is* no on-going release of oil and that data regarding the spill and its cleanup *are* easily accessible." *Id.* at 8 (emphasis added). This analysis of Plaintiff's standing "incorrectly conflated . . . case law on initial standing . . . with . . . case law on post-commencement mootness . . . ." *Laidlaw*, 528 U.S. at 174 (citations omitted).

In order to show standing, a plaintiff bears the burden of proving (1) that it "suffered an injury in fact," (2) a causal connection between the injury and the conduct complained of, and (3) that the injury is likely to be redressed by a favorable decision. *Laidlaw*, 528 U.S. at 180-81 (citing *Lujan*, 504 U.S. at 560-61). In determining whether a plaintiff has standing, the court should be conscious of the "manner and degree of evidence required at the successive stages of litigation." *Lujan*, 504 U.S. at 561. In the early stages of litigation, "general factual

[2] The district court also found that Plaintiff did not have standing as to its ESA claims. *See* Order 12, Doc. No. 2784. However, this finding is not being challenged on appeal.

allegations . . . suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Id.*

"Standing is to be determined as of the commencement of suit." *Id.* at 571 n.5; *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998) (standing is a "threshold jurisdictional question"); *Laidlaw*, 528 U.S. at 170, 180 (declaring an obligation to determine whether the plaintiff had standing "at the outset of the litigation" and describing standing as an "initial" analysis); *Okpalobi v. Foster*, 244 F.3d 405, 430 (5th Cir. 2001) (referring to issues of standing and redressability as a "threshold inquiry" to be addressed at the "outset of the suit"). Put another way, standing is "'[t]he requisite personal interest that must exist *at the commencement of the litigation*.'" *Laidlaw*, 528 U.S. at 170 (quoting *Arizonians for Official English v. Arizona*, 520 U.S. 43, 68, n.22 (1997)) (emphasis added). As such, courts must assess standing in light of the circumstances in existence at the time the complaint was filed – not in light of events subsequent to the commencement of the lawsuit. *Payne v. Travenol Labs.*, 565 F.2d 895, 898 (5th Cir. 1978) (noting that the time "when the complaint was filed" is the "time crucial to the issue of standing"); *see, e.g.*, *Steel Co.*, 523 U.S. at 102 ("turn[ing] to the *particulars of respondent's complaint* to see how it measures up to Article III's requirements" (emphasis added)); *Lujan*, 504 U.S. 569, n.4 (focusing its standing analysis on the

circumstances "when this suit was filed" and noting that "[t]he existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed*" (emphasis in original)); *Warth*, 422 U.S. at 517 (focusing on whether a plaintiff had standing "when this complaint was filed").

The district court's analysis "incorrectly conflated . . . case law on initial standing . . . with . . . case law on post-commencement mootness . . . ." *Laidlaw*, 528 U.S. at 174 (citations omitted) when it determined Plaintiff's standing based on facts that did not exist when the complaint was filed. Plaintiff filed its initial complaint on June 18, 2010 – the time period relevant to standing – when there was an ongoing release of pollutants from the oil well, and Plaintiff pleaded facts sufficient to satisfy each of *Lujan*'s three standing requirements. *See* Order 6, n.1, Doc. No. 2784 (stating that the oil well was not successfully capped until July 15, 2010 and was not permanently sealed until September 2010).[3] Thus, Plaintiff alleged and pleaded facts showing that it had suffered an injury in fact. Compl. 5, 12, June 18, 2010, Doc. No. 1, 2:10-cv-01768 ("[Defendants'] discharges are continuing, and will likely continue for many months," which "adversely affected and continue[d] to adversely affect" Plaintiff at that time); D1 Master Compl. 4-8, Dec. 15, 2010, Doc. No. 880. Plaintiff pleaded facts showing a causal connection

[3] In addition to the pollution that occurred and was ongoing at the time of the June 18th complaint, Defendants also discharged oil to the Gulf on August 23, 2010, when they removed thousands of feet of drill pipe from the well. *See* Resp. Mem. 42, Doc. No. 1819. This occurred subsequent to both the original complaint as well as the amended complaint filed on August 4, 2010. *See id.*

between Defendants' conduct and the injury. Compl. 2, 6-12, Doc. No. 1, 2:10-cv-01768 (stating that Defendants owned and operated the well that was then discharging pollutants and had failed to properly report releases under EPCRA); *id.* at 5 (stating that Defendants' conduct adversely affected Plaintiff); D1 Master Compl., 4, Doc. No. 880. Lastly, Plaintiff pleaded facts showing that its injury was redressable by a favorable court decision. Compl. 5, Doc. No. 1, 2:10-cv-01768 ("enforcement . . . will provide protection of the use and enjoyment of the area by the [Plaintiff's] members."); Compl. 5, Aug. 4, 2010, Doc. No. 439 ("Enforcement . . . will help restore and preserve water quality and provide critical information to which the public is entitled, thereby . . . provid[ing] protection of the use and enjoyment of the area by Center members"); D1 Master Compl. 5, Doc. No. 880. Plaintiff thereby satisfied the three prongs of *Lujan* at the time the complaint was filed because the violations complained of were "continuing, and [were] reasonably likely to continue" and the injuries they caused were clearly redressable by the court at that time. Compl. 3, Doc. No. 1, 2:10-cv-01768; D1 Master Compl. 3, Doc. No. 880. Whether Defendants ceased violating the CWA, CERCLA, or EPCRA after Plaintiff filed its complaint is irrelevant to the Article III standing analysis.

### B. Defendants' Post-Commencement Compliance Should Not Moot Plaintiff's Complaint in Its Entirety Because the Complaint Originally Contained Claims for Civil Penalties.

In its original complaint, Plaintiff sought the imposition of civil penalties for violations of the CWA, CERCLA, and EPCRA. Compl. 14, Doc. No. 1, 2:10-cv-01768. The district court later placed Plaintiff's claims in the D1 Master Complaint[4] with those of the parties "challenging regulatory action or activity and/or claims for injunctive relief." D1 Master Compl. 2, Doc. No. 880. This effectively set aside Plaintiff's civil penalty claims, which have yet to be addressed by the district court or to be included in Bundle C with other claims for civil penalties. CMO No. 1; Omnibus Resp. Mem. to Mot. to Dismiss Bundle D1 Master Compl. 46, n.46, 49, n.51, 51, Mar. 30, 2011, Doc. 1819. After segregating Plaintiff's claims for injunctive relief from its claims for civil penalties, the district court apparently lost track of the civil penalty claims, stating erroneously that the "D1 bundle Plaintiffs are not seeking the type of civil monetary penalties that saved the *Laidlaw* case from mootness. . . . Thus, the citizen suit claims brought by the Plaintiffs are moot." Order 10, Doc. No. 2784.

Generally, "any set of circumstances that eliminates actual controversy *after the commencement of a lawsuit* renders that action moot." *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 661 (5th Cir 2006) (emphasis added); *see Gwaltney*, 484 U.S. at 66 ("Longstanding principles of mootness . . . prevent the maintenance of suit when there is no reasonable expectation that the wrong will be

[4] The D1 Master Complaint mentions civil penalties in its claims for relief. D1 Master Compl. 37, Doc. No. 880.

repeated" (internal quotations omitted)); *La. Envtl. Action Network v. City of Baton Rouge*, No.11-30549, 2012 WL 1301164, at *6 (5th Cir. Apr. 17, 2012) (stating that where a case becomes moot, the court loses "constitutional authority to resolve the issues it presents" (quotations omitted)). In contrast to a standing analysis, therefore, in a mootness analysis, the court may consider circumstances that occur after the plaintiff files the complaint. *See Laidlaw*, 528 U.S. at 189 (describing mootness as "'[t]he requisite personal interest that must exist at the commencement of the litigation . . .[and] must continue throughout its existence'" (quoting *Arizonians*, 520 U.S. at 68 n.22)). A "defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *Id.* at 174, 189. Thus, the Supreme Court has set out a "stringent" standard for a defendant to meet in determining mootness in the particular instance of a defendant's voluntary, post-commencement compliance. *Id.* Unlike in a standing analysis where the plaintiff bears the burden of proof, the mootness standard places on the defendant the "heavy burden of persuading the court that the [violation] cannot reasonably be expected to start up again." *Id.* at 189 (quotations omitted).

Significant to this case, where a complaint contains valid claims for civil penalties, a defendant's post-commencement cessation of violations will not moot those claims. *See, e.g.*, *Bldg. & Constr. Trades Council of Buffalo v. Downtown Dev., Inc.*, 448 F.3d 138, 152 (2d Cir. 2006) (holding that "even if it had been

established that acquisition of a permit mooted [a] Clean Water Act claim, dismissal of the cause of action would not follow because the claim for civil penalties would still remain"). In *Laidlaw*, the Supreme Court held that claims for civil penalties in a citizen suit need not be dismissed as moot due to a defendant's post-complaint compliance. 528 U.S. at 173-74, 180 ("The . . . court erred in concluding that a citizen suitor's claim for civil penalties must be dismissed as moot when the defendant, albeit after commencement of the litigation, has come into compliance"). In his concurrence, Justice Stevens set out the prevailing rule regarding the effect of a defendant's post-complaint compliance on claims for civil penalties: "[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." *Id.* at 196 (Stevens, J., concurring). While the Supreme Court has yet to address this rule directly,[5] federal circuit and district courts have adhered to it both before and after *Laidlaw*. *See Bldg. & Constr. Trades Council*, 448 F.3d at 152; *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1153 (9th Cir. 2000); *Comfort Lake Ass'n v. Dresel Contracting, Inc.*, 138 F.3d 351, 356 (8th Cir. 1998); *Atl. States Legal Found. v. Stroh Die Casting Co.*, 116 F.3d 814, 820 (7th Cir. 1997); *Natural Res. Def.*

[5] In *Laidlaw*, the Supreme Court did not rule on whether the plaintiff's claims were moot but remanded to the lower court in order to address open factual matters relating to the effect of the defendant's post-complaint compliance on the citizen suit. *See Laidlaw*, 528 U.S. at 193.

*Council v. Texaco Ref. & Mktg. Inc.*, 2 F.3d 493, 503-04 (3d Cir. 1993); *Atl. States Legal Found., Inc. v. Pan Am. Tanning Corp.*, 993 F.2d 1017, 1020-21 (2d Cir. 1993); *Atl. States Legal Found. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1135-36 (11th Cir. 1990); *Riverkeeper, Inc. v. Mirant Lovett, Inc.*, 675 F. Supp. 2d 337, 348 (S.D.N.Y. 2009); *Natural Res. Council of Me. v. Int'l Paper Co.*, 424 F. Supp. 2d 235, 256-57 (D. Me. 2006); *see also* John D. Echeverria, *Critiquing Laidlaw: Congressional Power to Confer Standing and the Irrelevance of Mootness Doctrine to Civil Penalties*, 11 Duke Envtl. L. & Pol'y F. 287, 301 (2001) (describing this as the established rule pre-*Laidlaw* and asserting that it remains unchanged post-*Laidlaw*). Civil penalties continue to have a deterrent effect even after a defendant comes into compliance with the law, thereby redressing a plaintiff's injury even in the absence of an ongoing violation. *Laidlaw*, 528 U.S. at 174; *see St. Bernard Citizens for Envtl. Quality, Inc. v. Chalmette Ref., L.L.C.*, 399 F. Supp. 2d 726, 740 (E.D. La. 2005). Consistent with the language of the statute and the nature of civil penalties (similar to punitive damages), claims for civil penalties must survive a motion to dismiss for mootness due to post-complaint compliance, otherwise a defendant could escape *all* liability for violations by complying with the law at any time before a court entered final judgment. *See* 33 U.S.C. § 1319(d) (stating that "[a]ny person who violates [the CWA] . . . *shall* be subject to a civil penalty" (emphasis added)); *Laidlaw*, 528 U.S. at 196-97

(Stevens, J., concurring); *see also Pan Am. Tanning*, 993 F.2d at 1020. Therefore, assuming, *arguendo*, that Defendants have both met the "heavy burden" of showing that all violations have ceased and that it is "absolutely clear" they are not likely to recur, Plaintiff's claims for civil penalties *still* are not moot.[6]

Moreover, this case presents a unique challenge for the application of this established rule, which warrants special consideration.[7] The district court segregated Plaintiff's claims for equitable relief from its claims for civil penalties by placing the former in the D1 Bundle and then failed to give Plaintiff's claims for civil penalties another place within this complex litigation. Due to this segregation, Defendants' post-complaint compliance has been found by the district court to have mooted Plaintiff's entire citizen suit and allowed Defendants to escape all citizen suit liability in contravention of the aforementioned established case law.

Although courts have "inherent power to control their dockets" in complex litigation, *see In re Phenylpropanalamine (PPA) Prod. Liab. Litig.*, 460 F.3d 1217, 1227 (9th Cir. 2006) (citing Fed. R. Civ. P. 16(c)), they must exercise such power to "manage their own affairs" with "restraint and discretion." *Woodson v. Surgitek*,

[6] Note that Plaintiff alleges that there is an ongoing violation of EPCRA and that Defendants cannot show that CERCLA and CWA violations will not recur because Defendants still hold leases and permits for the well in question. Resp. Mem. 49, n.50, Doc. No. 1819.

[7] The "pleading bundles," a phrase coined in this litigation, created by CMO No. 1 are unique to this case. Scant precedent exists as to the proper management of dockets in complex litigation apart from the imposition of sanctions for disobeying court management orders.

57 F.3d 1406, 1417 (5th Cir. 1995) (citing *Link v. Wabash R. Co.*, 370 U.S. 626, 630 (1962) and discussing sanctions and dismissal). Additionally, the Federal Rules of Civil Procedure are limited in that they may not "abridge, enlarge or modify any substantive right." Rules Enabling Act, 28 U.S.C. § 2072(b); *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, U.S. , 130 S. Ct. 1431, 1442 (2010) (the Federal Rules of Civil Procedure may only incidentally affect litigants' substantive rights). But for the district court's segregation of claims for injunctive relief and civil penalties, Plaintiff's civil penalties claims in its citizen suit would not be mooted and Plaintiff's substantive rights would not be extinguished. Therefore, this Court should find that the D1 Master Complaint should not be dismissed as moot.

## CONCLUSION

Under the standing doctrine, a plaintiff has standing where it shows that it has satisfied the constitutional and statutory requirements in light of the facts in existence at the time the complaint was filed. Under the mootness doctrine, a defendant's voluntary, post-complaint cessation of violations will not moot claims for civil penalties even where it may be sufficient to moot claims for equitable relief. In the case at bar, Plaintiff had standing to bring its claims and Plaintiff's claim for civil penalties are not moot. In light of the foregoing, the Court should reverse the decision of the district court.

DATED: MAY 14, 2012 Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing brief:

1. Complies with the type-volume limitation of Fed. R. App. P. 29 because it contains 5,196 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. Complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2008, 14 point, Times New Roman Font.

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## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May 14, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system, which will send notification of such filing to the following counsel of record, as reflected in the Notice of Electronic Filing:

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I further certify that — to the best of my knowledge — some of the participants in the case are not registered CM/ECF users. I will cause true and correct copies of the foregoing document to be mailed on this day, by First-Class Mail, postage prepaid, to the following:

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