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# Environmental Litigation and Rule 11

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## ENVIRONMENTAL LITIGATION AND RULE 11

CARL TOBIAS\*

The 1983 amendment to Federal Rule of Civil Procedure 11 has been the most controversial revision in the half-century history of the Federal Rules. Judges have applied amended Rule 11, which requires them to sanction lawyers and parties who do not conduct reasonable inquiries before filing papers, in over 1000 reported opinions, considerably more unreported determinations, and numerous informal contexts.<sup>1</sup> The Rule has engendered much unnecessary satellite litigation and has been implemented inconsistently, while attorneys' fees remain the "sanction of choice" for violations.<sup>2</sup> Rule 11 activity has especially disadvantaged civil rights plaintiffs and lawyers, whose lack of resources can make them risk averse. The judiciary has sanctioned civil rights plaintiffs more than any other category of civil litigant; in numerous districts, they were nearly three times more likely to be sanctioned than other litigants.<sup>3</sup> Considerable evidence suggests that these developments have chilled the enthusiasm of civil rights plaintiffs and attorneys.<sup>4</sup>

Some observers of the Rule's implementation have wondered whether this detrimental Rule 11 activity occurs in other forms of public law litigation, such as environmental cases or products liability actions, or extends across the law. When soliciting public comment on the provision's revision, the Judicial Conference Ad-

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1. See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, CALL FOR WRITTEN COMMENTS ON RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND RELATED RULES, *reprinted in* 131 F.R.D. 335, 344 (1990) [hereinafter CALL FOR COMMENTS]. For a discussion of the 1983 amendment and its effects, see *infra* notes 11-20 and accompanying text.

2. See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE, *reprinted in* 137 F.R.D. 53 (1991) [hereinafter PRELIMINARY DRAFT]; Attachment to letter from Hon. Sam C. Pointer, Jr., Chairman, Advisory Committee on Civil Rules, to Hon. Robert E. Keeton, Chairman, Committee on Rules of Practice and Procedure 1-2 (1991).

3. See FEDERAL JUDICIAL CENTER, FINAL REPORT ON RULE 11, § 1C, at 3 (1991) [hereinafter FINAL REPORT]; Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 234-41 (1988).

4. See, e.g., Carl Tobias, *Rule 11 Recalibrated in Civil Rights Cases*, 36 VILL. L. REV. 105, 107-09 (1991); Vairo, *supra* note 3, at 200-01.

visory Committee on the Civil Rules recently inquired whether Rule 11 has "been administered unfairly to any particular group of lawyers or parties."<sup>5</sup> The Advisory Committee also asked whether Rule 11 has adversely affected attorneys or litigants with limited resources, even if judges have been applying the Rule "with unexceptionable even-handedness."<sup>6</sup> Indeed, Professor Melissa Nelken, in a 1990 study of Rule 11, determined that the provision's dampening "effect on lawyers' willingness to seek changes in the law is not limited to certain types of practice, but is widespread, a finding that has important implications for future developments in all areas of law."<sup>7</sup>

Evaluators have analyzed very little formal, and virtually no informal,<sup>8</sup> Rule 11 activity in public law litigation apart from civil rights cases. Because environmental lawsuits are a paradigmatic type of public law litigation that contributes substantially to environmental protection and to the development of public law in other fields, it is important to scrutinize Rule 11 activity in environmental cases. This Article undertakes that effort and is one of the first attempts to study informal Rule 11 activity.

Part I of this Article briefly describes the developments that led to the significant amendment of Rule 11 during 1983 and explains what the revised Rule requires of attorneys, parties, and the federal judiciary. The second Part evaluates the provision's implementation in environmental litigation since August 1983. This examination finds a low incidence of formal Rule 11 activity in environmental cases and shows that the few courts that have formally applied the Rule were solicitous of the needs of plaintiffs. Indeed, the study reveals striking discontinuities between environmental lawsuits and civil rights actions. Most important, judges have issued only four-

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5. CALL FOR COMMENTS, *supra* note 1, 131 F.R.D. at 347.

6. *See id.* In August, 1991, the Judicial Conference Advisory Committee on the Civil Rules proposed that Rule 11 be amended. *See* PRELIMINARY DRAFT, *supra* note 2, at xv, 137 F.R.D. at 63. The proposal remains nascent, is likely to be modified substantially, and, even if left unchanged, would become effective in December, 1993, at the earliest. Moreover, the focus of this Article is the implications of Rule 11 for federal court legal culture, not the particulars of the current Rule or the proposal. The proposal, therefore, is not comprehensively analyzed here, although it is mentioned when relevant to issues that are treated. *See generally* Carl Tobias, *Reconsidering Rule 11*, 46 U. MIAMI L. REV. (forthcoming 1992).

7. Melissa L. Nelken, *The Impact of Federal Rule 11 on Lawyers and Judges in the Northern District of California*, 74 JUDICATURE 147, 152 (1990).

8. Formal Rule 11 activity involves invocation of the Rule that leads to published opinions, while informal activity is more subtle, typically involving hints or threats to use the Rule.

teen published opinions in environmental cases<sup>9</sup> which contrasts markedly with the approximately 500 published decisions in civil rights suits.<sup>10</sup>

Because assessors have evaluated a small amount of informal Rule 11 activity and because informal activity has seriously disadvantaged civil rights plaintiffs, this Article analyzes informal Rule 11 activity. The study indicates that judges and environmental defendants have invoked the provision somewhat more frequently in informal, than in formal, situations but that environmental plaintiffs have been disadvantaged substantially less than civil rights plaintiffs. Moreover, this Rule 11 activity has neither dissuaded potential litigants from initiating environmental suits nor prevented parties who filed cases from vigorously pursuing the actions.

Part III of this Article affords explanations for these findings, particularly the dearth of Rule 11 activity, and explores how that paucity informs understanding of the contemporary legal culture in the federal courts. The segment specifically examines the perspectives on environmental litigation of judges, attorneys, and parties who actively participate in such litigation. By refracting Rule 11 through the prism of environmental lawsuits and comparing that experience with Rule 11 activity in civil rights cases, the study enhances comprehension of modern civil litigation.

## I. 1983 AMENDMENT OF RULE 11

The considerations that prompted the Supreme Court and Congress to revise Rule 11—which was one of the original Federal Rules promulgated in 1938 and had remained unchanged until 1983—warrant only cursory examination here, as they have been competently chronicled elsewhere.<sup>11</sup> The reluctance of lawyers to

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9. See *infra* note 26 and accompanying text.

10. This is a conservative estimate that is premised on several considerations. I began with Professor Vairo's claim that the federal courts issued 191 reported Rule 11 opinions involving civil rights between the August 1983 effective date of the amendment and December 15, 1987. See *id.* I then extrapolated from that figure for reported opinions—widely considered to be the “tip of the iceberg”—to published opinions that judges have issued since August 1983. STEPHEN B. BURBANK, *RULE 11 IN TRANSITION THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11*, at 56 n.205, 56-59 (1989). Elizabeth Wiggins and Thomas Willging, who had substantial responsibility for producing the Final Report, *supra* note 3, have estimated that “one to ten percent of the judiciary's application of the Rule to sanctions motions appears in reported determinations.” Tobias, *supra* note 6, at 9 n.52.

11. See, e.g., Stephen B. Burbank, *The Transformation of American Civil Procedure: The*

invoke the Rule and of courts to impose sanctions led to its disuse.<sup>12</sup>

During the mid-1970's, however, numerous judges, including Chief Justice Warren Burger, and some writers began to perceive that the federal courts were experiencing a "litigation explosion."<sup>13</sup> They suggested that lawyers and parties were filing a growing number of civil lawsuits, too few of which had merit.<sup>14</sup> The judges and commentators asserted that the Federal Rules, especially by providing for flexible pleading and open-ended discovery, permitted attorneys and parties to misuse, overuse, and abuse the litigation process.<sup>15</sup>

Notwithstanding the controversial character of these propositions and the lack of data underlying the concepts,<sup>16</sup> the Advisory Committee and the Supreme Court proposed that Rules 11, 16, and 26 be fundamentally modified as one response to the difficulties perceived.<sup>17</sup> Congress did not reject the recommendations, and the amendments became effective in August, 1983.<sup>18</sup>

Revised Rule 11 imposes substantially greater responsibilities on lawyers and litigants and increases judicial control over civil law-

*Example of Rule 11*, 137 U. PA. L. REV. 1925, 1927-29 (1989); Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1314-17 (1986). See generally D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 35-42 (1976) (discussing pre-1976 history of Rule 11).

12. See FED. R. CIV. P. 11 advisory committee's note, reprinted in 97 F.R.D. 165, 198-201 (1983). See generally ARTHUR MILLER, *THE 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY* 12-15 (1984); Risinger, *supra* note 11, at 34-37.

13. See, e.g., *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-41 (1975); Warren E. Burger, *Agenda for 2000 A.D.—A Need For Systematic Anticipation*, in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 23 (A. Leo Levin & Russell R. Wheeler eds., 1979). See generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (questioning judicial management techniques as a means to control increasing caseloads); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 287-96 (1989) (discussing increasing civil caseloads and attendant abuse).

14. See, e.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344-45 (1979). See generally Thomas B. Marvell, *Caseload Growth—Past and Future Trends*, 71 JUDICATURE 151 (1987) (discussing continuing rise of civil lawsuits in the 1980's).

15. See *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643 (1976) (per curiam); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 440-43 (1986); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 14-15 (1984).

16. See MILLER, *supra* note 12, at 10; Burbank, *supra* note 11, at 1927-28; Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2198-202 (1989).

17. Rosenberg, *supra* note 16, at 2203.

18. See *Order Amending Federal Rules of Civil Procedure*, 461 U.S. 1097 (1983). See generally MILLER, *supra* note 12.

suits. It requires that practitioners and parties perform reasonable factual investigations and legal inquiries before filing papers while commanding that courts sanction them for not doing so.<sup>19</sup> The Advisory Committee Note that accompanies the Rule also admonishes federal judges that Rule 11 is "not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."<sup>20</sup>

## II. RULE 11 ACTIVITY IN ENVIRONMENTAL LITIGATION

### A. *A Word About Methodology*

"Environmental litigation," as used in this Article, comprises civil lawsuits that involve some "institutional" litigant, such as the government, or a public interest organization, such as the Sierra Club, and are filed under federal pollution control, public lands, or natural resource protection and preservation legislation, such as the Clean Water Act or the National Environmental Policy Act (NEPA).<sup>21</sup> It

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19. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

FED. R. CIV. P. 11.

Numerous courts deemphasize the reasonableness of inquiries that preceded the filing of papers (conduct) and stress the merits of the litigation or the quality of the papers submitted (product). *See, e.g.,* Davis v. Carl, 906 F.2d 533, 538 (11th Cir. 1990) (holding that "creative claims, coupled even with ambiguous or inconsequential facts, may merit dismissal but not punishment"); Romero v. City of Pomona, 883 F.2d 1418, 1429 (9th Cir. 1989) (emphasizing frivolousness of claims). *But see* Gutierrez v. City of Hialeah, 723 F. Supp. 1494, 1500-01 (S.D. Fla. 1989) (emphasizing conduct over product). The courts that emphasize product typically speak of "frivolous" papers. I have followed that practice here as shorthand to describe a paper that is not "well grounded in fact" nor "warranted legally," although I have criticized the product approach. *See* Carl Tobias, *Certification and Civil Rights*, 136 F.R.D. 223, 226 nn.20-21 (1991). *See generally* Burbank, *supra* note 11, at 1933-34, 1941-42 (discussing conduct and product approaches and proposing that judges look to prefiling conduct as a way of achieving uniformity in Rule 11 determinations).

20. FED. R. CIV. P. 11 advisory committee's note, *reprinted in* 97 F.R.D. 165, 199 (1983).

21. *See* Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. §§ 1251-1387 (1988); National Environmental Policy Act, 42 U.S.C. §§ 4321, 4331-35 (1988); *cf.* NAN ARON, *LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND* (1989) (analyzing public interest litigants as institutional litigants); PETER H. SCHUCK, *SUING GOVERNMENT* (1983) (discussing government as institutional litigant).

includes, therefore, civil cases that the government pursues to secure compliance with applicable statutes.

Although environmental litigation could encompass suits that litigants bring under common law theories, such as nuisance or trespass, which typically involve private parties and private property, these cases are not included because they experienced practically no formal Rule 11 activity.<sup>22</sup> I also exclude litigation seeking to allocate responsibility for the disposal and cleanup of hazardous or toxic substances between private entities, principally corporations and insurers, primarily pursuant to legislation such as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>23</sup> Those suits should not be characterized as "public law litigation," even though the potential for cleaning up the wastes certainly implicates "public interests."<sup>24</sup>

## B. *Formal Rule 11 Activity in Environmental Litigation*

### 1. *Data*

The most important aspects of Rule 11's implementation in environmental litigation since its August 1983 effective date are the dearth of formal Rule 11 activity and the solicitude that federal judges have exhibited for the needs of environmental plaintiffs when formally enforcing the provision.<sup>25</sup> These consid-

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22. The closest analogy that I found was litigation pursued by homeowners' associations. See, e.g., *Westlake N. Property Owners Ass'n v. City of Thousand Oaks*, 915 F.2d 1301 (9th Cir. 1990) (holding that although the district court had jurisdiction to impose sanctions, the actions of the homeowners' association were not so frivolous as to warrant Rule 11 sanctions); *Collin County v. H.A.V.E.N.*, 654 F. Supp. 943 (N.D. Tex. 1987) (ruling that Rule 11 enforcement is a "method for preventing meritless suits against public officials" but that in the instant case the homeowners' association would be given an extension to file an amended counterclaim); see also *Petit v. County of Essex*, No. 91-CV-404, 1991 U.S. Dist. LEXIS 9942, at \*8-14 (N.D.N.Y. July 15, 1991) (imposing Rule 11 sanctions on landowners' attorney for frivolous complaint seeking declaratory judgment to halt landfill construction); *Westfield Partners, Ltd. v. Hogan*, 744 F. Supp. 189, 192-94 (N.D. Ill. 1990) (imposing Rule 11 sanctions against developer's attorney for frivolous action against homeowners); cf. *Boone v. United States*, 743 F. Supp. 1367, 1378 (D. Haw. 1990) (ruling that government counsel's motion to amend or alter judgment for owner of artificial lagoon in suit to secure owner's right to deny public access was insufficiently egregious to warrant sanctions).

23. 42 U.S.C. §§ 9601-9675 (1988).

24. For discussion of "public interest litigation," see Tobias, *supra* note 13, at 282-83; cf. GLENDON A. SCHUBERT, *THE PUBLIC INTEREST* (1960) (discussing the public interest); Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 *YALE L.J.* 359, 360 (1972) (same). Although hazardous and toxic substances litigation is excluded from the data compilation, some of the cases are employed for illustrative purposes. See, e.g., *infra* notes 57, 67 and accompanying text.

25. Their lack of resources can make public interest litigants and environmental plaintiffs

erations contrast markedly with Rule 11 activity in civil rights litigation. Since August 1983, federal courts have rendered fourteen *published* opinions applying Rule 11 in environmental lawsuits, while the federal judiciary issued 191 *reported* Rule 11 decisions involving civil rights between that date and December 15, 1987, alone.<sup>26</sup>

District judges found that environmental plaintiffs contravened the Rule in five cases, but appellate courts reversed two of these determinations.<sup>27</sup> One trial judge decided that an environmental defendant apparently had contravened Rule 11.<sup>28</sup> Even when courts held that environmental litigants had violated the provision, no parties suffered substantial monetary sanctions.<sup>29</sup>

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risk averse. See Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 495-98 (1988-89) (discussing these concepts in civil rights litigation). I recognize that all of these litigants may not suffer resource deficiencies. Indeed, some environmental public interest litigants, such as the National Wildlife Federation, have several million members and comparatively large annual budgets. "Environmental plaintiffs" are public interest litigants, or other litigants, such as the government, that purport to represent the public interest. See ARON, *supra* note 21, at 34. They do not include entities that represent regulated interests. See Oliver A. Houck, *With Charity for All*, 93 YALE L.J. 1415, 1465-68, 1544 (1984) (questioning whether business-sponsored public interest law firms are truly "public interest" or charitable for tax purposes).

26. This Article analyzes or cites 12 of the environmental cases. The other two cases, which seem insufficiently important to warrant treatment, are *Polger v. Republic National Bank*, 709 F. Supp. 204 (D. Colo. 1989) and *United States v. Alexander*, No. G-86-267, 1988 U.S. Dist. LEXIS 9307 (S.D. Tex. Feb. 16, 1988). See also *United States v. Alexander*, 771 F. Supp. 830 (S.D. Tex. 1991) (discussing subsequent Rule 11 developments); *Vairo, supra* note 3, at 200 (describing study that located 191 reported civil rights cases). "Published" opinions are those available on computerized reporting systems; "reported" opinions are those published in the federal reporter system.

27. See *Westlake N. Property Owners Ass'n v. City of Thousand Oaks*, 915 F.2d 1301, 1302 (9th Cir. 1990); *United States v. Stringfellow*, 911 F.2d 225, 226 (9th Cir. 1990); see also *Maine Audubon Soc'y v. Purslow*, 907 F.2d 265, 266 (1st Cir. 1990); *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 395-96 (1st Cir. 1990); cf. *Glaser v. Cincinnati Milacron, Inc.*, 808 F.2d 285, 286, 291 (3d Cir. 1986) (reversing trial court's \$165,000 attorney fee award under pre-1983 version of Rule 11 to defendant benzene manufacturers); *Atlantic States Legal Found., Inc. v. Avtex Fibers, Inc.*, Civ. Act. No. 87-39E (W.D. Pa. Dec. 16, 1988) (unpublished opinion imposing \$5000 sanction on environmental plaintiff whose attorneys alleged "current and continuing" violations of the Clean Water Act even though defendants' plant had closed four months before).

28. See *United States v. City of Menominee*, 727 F. Supp. 1110, 1118 (W.D. Mich. 1989) (implying a violation by environmental defendant occurred, but delaying decision until defendant had been heard on the issue). This is one of the few cases in which environmental plaintiffs sought sanctions. See also *Westfield Partners, Ltd. v. Hogan*, 744 F. Supp. 189, 192-94 (N.D. Ill. 1990) (granting plaintiff homeowners' motion for sanctions against developer).

29. See, e.g., *Westlake*, 915 F.2d at 1302 (reversing sanction order); *Stringfellow*, 911 F.2d at 226 (no sanction ordered); *Purslow*, 907 F.2d at 266 (joint sanction of \$250 imposed upon two attorneys); *Anderson*, 900 F.2d at 395 (Rule 11 violation by plaintiff and Rule 37 violation by defendant offset each other, no monetary sanction imposed); *City of Menominee*, 727 F. Supp. at 1118 (no sanction ordered); *Avtex Fibers*, slip op. at 5 (\$5000 sanction imposed on environmental plaintiff).

## 2. Case Law

### a. *Judicial Application Solicitous of Environmental Plaintiffs*

#### (1). *Rule 11 Violations*

Few of the federal judges who considered sanctioning environmental plaintiffs found that the litigants contravened Rule 11. Courts have determined that only a minuscule number of environmental plaintiffs failed to perform reasonable prefiling investigations of the facts or had filed papers that were not factually well grounded.<sup>30</sup>

The judges seemed to appreciate that factual issues are undisputed or are of limited consequence in some environmental cases. The courts appeared to comprehend that, in numerous other lawsuits involving contested facts, plaintiffs had assembled and assessed pertinent data or that the parties lacked access to, or resources for collecting, complex information relevant to Rule 11 compliance.

For example, in complicated water pollution litigation, one district court rejected the defendant's argument that most of the "allegations in plaintiffs' complaint [were] 'not well grounded in fact.'" <sup>31</sup> The judge found that the "issues and allegations concerned in this case are very complex, and that there is no showing of bad faith or failure to conduct a reasonable inquiry by plaintiffs."<sup>32</sup>

Courts also have been reluctant to conclude that environmental plaintiffs neglected to undertake reasonable prefiling inquiries into the law or submitted papers that were not warranted by existing law or by good faith arguments for the extension, modification, or reversal of that law. Some judges apparently believed or understood that environmental litigation involves complicated issues of law and complex legal theories and that environmental law is a dynamic, evolving field, primarily because of the massive, convoluted statutory schemes that underlie many environmental suits.<sup>33</sup>

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30. See *supra* notes 26-29 and accompanying text.

31. See *Northwest Env'tl. Defense Ctr. v. Unified Sewerage Agency*, Civ. No. 88-1128-FR, 1989 U.S. Dist. LEXIS 8311, at \*33 (D. Or. July 7, 1989).

32. *Id.* at \*33-34.

33. Many judges, members of Congress, and commentators agree that CERCLA and the Clean Air and Clean Water legislation are complex. Indeed, the 1990 amendments to the air legislation are several hundred pages long. Cf. *Vairo*, *supra* note 3, at 202 (making assertions similar to those in text regarding Rule 11's application in securities/Racketeering Influenced Corrupt Organizations (RICO)/trade regulation cases).

Illustrative are two recent Ninth Circuit opinions in which the court found that the trial courts had abused their discretion in holding that environmental plaintiffs were asserting frivolous legal theories.<sup>34</sup> The circuit court reversals are telling because the abuse of discretion standard of appellate review, which the Supreme Court articulated last year for all Rule 11 determinations, is extremely deferential.<sup>35</sup>

In one of these cases, the Ninth Circuit first observed that an attorney's failure to inform the judge of pertinent statutory or case authority would not alone support the imposition of sanctions.<sup>36</sup> The panel characterized certain case law interpreting CERCLA that the plaintiff did not cite as "relevant but distinguishable" and remarked that even the holding of a district court in the Northern District of Illinois that was directly on point would not make the plaintiff's motion to a trial judge in the Ninth Circuit frivolous.<sup>37</sup> The appellate court generously read the ambiguous provision of the complicated CERCLA legislation at issue and employed the lenient standard of whether the disputed statutory terminology "plausibly supported" the plaintiff's legal contention.<sup>38</sup>

A different panel of the court applied an equally flexible standard, asking whether "at least an arguable question" existed as to the complex legal issue of whether local residents are "bound as privies to judgments" entered in environmental litigation against municipalities in which they live.<sup>39</sup> The Ninth Circuit invoked recent Supreme Court precedent that "cast doubt on whether non-party suits were to be treated as impermissible collateral attacks on previous federal court judgments" and concluded that plaintiffs could make a reasonable, good faith argument for their legal position.<sup>40</sup>

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34. See *Westlake N. Property Owners' Ass'n v. City of Thousand Oaks*, 915 F.2d 1301, 1307 (9th Cir. 1990); *United States v. Stringfellow*, 911 F.2d 225, 227 (9th Cir. 1990).

35. See *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2461 (1990) (specifying that a district court abuses its discretion if its Rule 11 determination is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence).

36. See *Stringfellow*, 911 F.2d at 226.

37. See *id.* at 227; see also *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 685 F. Supp. 651 (N.D. Ill. 1988) (underlying case that plaintiff in *Stringfellow* failed to cite).

38. See *Stringfellow*, 911 F.2d at 226-27; see also *United States v. Environmental Waste Control, Inc.*, No. S87-55 (RLM), 1991 U.S. Dist. LEXIS 11,710, at \*41 (N.D. Ind. Aug. 6, 1991) (holding that a novel, yet rational, approach to a complex motion for proceedings supplemental is not sanctionable).

39. *Westlake N. Property Owners Ass'n v. City of Thousand Oaks*, 915 F.2d 1301, 1307 (9th Cir. 1990).

40. *Id.* (citing *Martin v. Wilks*, 490 U.S. 755 (1989)). Congress modified *Wilks* in the Civil

Some courts closely scrutinized the Rule 11 motions filed against environmental plaintiffs. One district judge characterized a defendant's request for sanctions as frivolous and refused to "waste the court's time addressing it."<sup>41</sup> A second trial judge denied a motion by defense counsel, remarking that the provision should be reserved for exceptional circumstances.<sup>42</sup>

A district court's determination in another case demonstrates how unwilling some judges have been to find that environmental plaintiffs contravened Rule 11. The trial court dismissed the plaintiffs' complaint, although the judge observed that the plaintiffs had failed to show that their opponents "violated a single law" and stated that one of the plaintiffs' claims was "difficult at best to grasp, and once understood borders precariously on frivolity."<sup>43</sup> The court rejected the defendant's motion for sanctions and granted the plaintiffs leave to replead but issued stern warnings that their pleadings had "already evinced unacceptable carelessness," that any revised papers would be evaluated "through Rule 11-colored glasses," and that "one method for preventing meritless suits against public officials is rigid enforcement of Rule 11."<sup>44</sup>

One district court implied that the request of an environmental plaintiff for the judge to impose Rule 11 sanctions against a corporate defendant was justified.<sup>45</sup> The judge found that the

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Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, § 108. See generally Susan S. Grover, *The Silenced Majority: Martin v. Wilks and the Legislative Response*, 1991 U. ILL. L. REV. (forthcoming 1991) (examining *Wilks* and Congress' 1990 effort to enact § 6 of the 1990 Civil Rights Act, which would have barred collateral challenges to consent decrees); George M. Strickler, Jr., *Martin v. Wilks*, 64 TUL. L. REV. 1557 (1990).

41. *Student Pub. Interest Research Group, Inc. v. P.D. Oil & Chem. Storage*, 627 F. Supp. 1074, 1085 (D.N.J. 1986).

42. *International Union, UAW v. Amerace Corp.*, 30 Env't Rep. Cas. (BNA) 1353, 1358-59 (D.N.J. 1989); see also *Environmental Waste Control*, 1991 U.S. Dist. LEXIS 11,710, at \*42 (plaintiff's motion failed to evidence the total disregard of existing law that warrants sanctions). See generally *infra* note 162 and accompanying text (discussing federal agencies' invocation of Rule 11 only in exceptional circumstances).

43. *Collin County v. H.A.V.E.N.*, 654 F. Supp. 943, 952-53 (N.D. Tex. 1987). The "plaintiff" homeowners' association actually was a "counterplaintiff." See *id.* at 945.

44. See *id.* at 954. Several additional judges, *sua sponte*, have cautioned environmental parties to be alert to the possible future application of Rule 11. See, e.g., *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 398 (1988) (stating that Rule 11 would be the appropriate remedy if plaintiff's criticisms of defendant's arguments in opposition to a takings claim based on the denial of a wetlands fill permit were well grounded); *Corren v. New York Univ.* No. 86 Civ. 7199 (CSH), 1987 U.S. Dist. LEXIS 11,456, at \*5 (S.D.N.Y. Dec. 8, 1987) (cautioning that if a plaintiff repleads seeking federal question jurisdiction under the Clean Air Act for his wrongful termination claim, he and counsel should keep Rule 11 in mind).

45. See *United States v. City of Menominee*, 727 F. Supp. 1110, 1118 (W.D. Mich. 1989).

company's behavior "was not warranted by existing Eleventh Amendment law" and that its reply brief included no "argument for the extension, modification or reversal of the governing authorities cited by the court."<sup>46</sup>

(2). *Imposition of Mandatory Sanctions*

Those few judges who determined that environmental plaintiffs had contravened Rule 11 appeared solicitous of the litigants' needs when effectuating the mandatory duty to levy appropriate sanctions.<sup>47</sup> The courts seemed to recognize, for instance, that significant resource disparities can exist between many environmental plaintiffs and their adversaries and that the imposition of large financial assessments can chill the plaintiffs' enthusiasm.<sup>48</sup>

The judges apparently have attempted to levy the "least severe sanction necessary" or to tailor sanctions to Rule 11's primary purpose of deterrence, and courts have employed nonmonetary alternatives or have consulted numerous equitable factors, such as the ability of violators to pay, in imposing financial sanctions.<sup>49</sup> No judge has held an environmental plaintiff responsible for the attorneys' fees that its opponents incurred.

Two recent First Circuit cases are illustrative. In *Maine Audubon Society v. Purslow*,<sup>50</sup> the First Circuit sustained the district court ruling which ordered that two attorneys for the Maine Audubon Society who were "respected members of the Maine bar jointly pay a small monetary sanction (\$250.00)" for violating Rule 11.<sup>51</sup>

The "plaintiff" was a state governmental agency. The court delayed a final decision on sanctions because the defendant had a right to be heard on the issue and to raise any pertinent defense. *See also* *Westfield Partners, Ltd. v. Hogan*, 744 F. Supp. 189, 192-93 (N.D. Ill. 1990) (involving a private property dispute in which the court imposed Rule 11 sanctions on a plaintiff developer at the instigation of the individual landowner defendants).

46. *City of Menominee*, 727 F. Supp. at 1118.

47. Rule 11 requires that judges impose appropriate sanctions which may encompass reasonable expenses such as attorneys' fees. *See* FED. R. CIV. P. 11, *supra* note 19.

48. *See supra* note 25 and accompanying text.

49. The courts deciding environmental cases do not specifically state what is said in the text, although judges treating sanctions in civil rights cases have. *See, e.g.*, *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 196-97 (3d Cir. 1988) (involving equitable factors and nonmonetary alternatives); *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 876-78 (5th Cir. 1988) (imposing least severe sanction and considering nonmonetary alternatives); *Donaldson v. Clark*, 819 F.2d 1551, 1556-57 (11th Cir. 1987) (tailoring sanctions to deterrence).

50. 907 F.2d 265 (1st Cir. 1990).

51. *Id.* at 266, *affg* No. 87-0297 (D. Me. Dec. 14, 1989) (order fixing sanctions).

In the second case, *Anderson v. Beatrice Foods*,<sup>52</sup> the trial court determined that the decision of plaintiff's counsel to continue the prosecution of a claim, which the attorneys knew by the conclusion of investigation and discovery lacked any factual basis, clearly contravened the Rule.<sup>53</sup> Nonetheless, the trial judge decided, and the First Circuit affirmed, that the magnitude of the sanction warranted by the plaintiff's Rule 11 violation approximated that attributable to defendant's contravention of Rule 37 discovery requirements, so that the sanctions offset each other and should be imposed on neither party.<sup>54</sup>

(3). *Concern About Chilling Effects*

In considering whether environmental plaintiffs violated the Rule or in choosing appropriate sanctions when plaintiffs were in contravention, a small number of courts have expressed concern about possible chilling effects.<sup>55</sup> For instance, when the First Circuit upheld a small financial assessment that the trial court imposed on lawyers representing an environmental plaintiff, the appellate court observed that it had "no inclination to transform Rule 11 into a refrigeration device designed to chill reasonable creativity on counsel's part."<sup>56</sup> District judges resolving several environmental cases involving corporations or insurers have similarly warned that Rule 11 was not meant to discourage the zealous pursuit of legal or factual theories in developing fields of law, such as CERCLA.<sup>57</sup>

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52. 129 F.R.D. 394 (D. Mass. 1989).

53. *See id.* at 403-04.

54. *See Anderson v. Beatrice Foods Co.*, 129 F.R.D. 394, 403-04 (D. Mass. 1989); *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 395 (1st. Cir. 1990).

55. This treatment mirrors the substantial concern evinced recently about Rule 11's chilling effects in civil rights cases. *See, e.g.*, *Mareno v. Rowe*, 910 F.2d 1043, 1047 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991); *Davis v. Carl*, 906 F.2d 533, 538 (11th Cir. 1990); *Jones v. Westside-Urban Health Ctr.*, 760 F. Supp. 1575, 1581 (S.D. Ga. 1991); *see also Tobias, supra note 4*, at 110-16 (discussing recent federal appellate opinions solicitous of the needs of civil rights plaintiffs and their counsel).

56. *Maine Audubon Soc'y v. Purslow*, 907 F.2d 265, 268; *see also United States v. Environmental Waste Control, Inc.*, 131 B.R. 410, 426 (N.D. Ind. 1991) (stating that "[T]he application of Rule 11 to legal arguments requires a balance between the need to penalize those who pursue frivolous litigation and the danger of deterring litigants or attorneys from arguing for a change in the law").

57. *See, e.g.*, *Edward Hines Lumber Co. v. Vulcan Materials Co.*, No. 85 C 1142, 1989 U.S. Dist. LEXIS 4194, at \*17 (N.D. Ill. Apr. 11, 1989); *South Shore Bank v. Stewart Title Guar. Co.*, 688 F. Supp. 803, 806 (D. Mass.), *aff'd mem.*, 867 F.2d 607 (1st Cir. 1988); *New York v. Shore Realty Corp.*, 648 F. Supp. 255, 267 (E.D.N.Y. 1986).

b. *Judicial Application Less Solicitous of Environmental Plaintiffs*

This solicitous formal judicial application of Rule 11 does not necessarily mean that the provision's enforcement was without difficulty for environmental plaintiffs and their counsel. Indeed, some courts have been or at least have seemed relatively unresponsive to the needs of these parties and attorneys.

Judges have found that environmental plaintiffs violated the Rule in several situations that can fairly be characterized as "close." The two First Circuit cases are illustrative.<sup>58</sup> Different panels of the court sustained decisions of district judges in Maine and Massachusetts that environmental plaintiffs had violated Rule 11, stating that litigants found in violation bear a "heavy burden of demonstrating that the trial judge was clearly not justified in entering [the] order."<sup>59</sup>

The panel that considered the determination of the Maine district court, even while imposing this onerous requirement and applying the Supreme Court's new deferential standard of appellate review, described the case as close: "[W]e are left shy of a definite and firm conviction that a serious mistake was made."<sup>60</sup> The First Circuit upheld the trial judge's decision, observing that the "duty of reasonable inquiry includes, as we see it, a duty of reasonable disclosure [of the relevant law]," especially when lawyers proceed *ex parte*.<sup>61</sup> The appellate panel ruled that the sixty day notice requirement of the Endangered Species Act,<sup>62</sup> with which plaintiff argued it had substantially complied, must be strictly construed, thus rejecting plaintiff's legal theory.<sup>63</sup>

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58. See *Purslow*, 907 F.2d 265; *Anderson*, 900 F.2d 388.

59. *Purslow*, 907 F.2d at 268 (quoting *Anderson*, 900 F.2d at 393 (citation omitted)); *Anderson*, 900 F.2d at 393 (quoting *Spiller v. U.S.V. Labs., Inc.*, 842 F.2d 535, 537 (1st Cir. 1988)).

60. *Purslow*, 907 F.2d at 266, 269.

61. *Id.* at 268-69. *But see* *United States v. Stringfellow*, 911 F.2d 225, 226 (9th Cir. 1990) (holding that failure to inform judge of pertinent authority would not alone support the imposition of sanctions). The attorney in *Purslow* was seeking a temporary restraining order, and the court recognized that time restraints may have hampered counsel.

62. 16 U.S.C. §§ 1531-1544 (1988).

63. *Purslow*, 907 F.2d at 268; *cf.* *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989) (holding that 60 day notice requirement of Resource Conservation and Recovery Act's citizen suit provision is a mandatory condition precedent to commencing suit); *Garcia v. Cecos Int'l, Inc.*, 761 F.2d 76, 78-82 (1st Cir. 1985) (holding that plaintiff must give actual notice of intent to sue at least 60 days before filing a complaint under the Resource Conservation and Recovery Act); *City of Highland Park v. Train*, 519 F.2d 681 (7th Cir. 1975) (enforcing a strict 60 day notice requirement), *cert. denied*, 424 U.S. 927 (1976).

The other First Circuit panel affirmed the finding of the Massachusetts district judge that attorneys for environmental plaintiffs violated Rule 11 by pursuing certain claims after investigation and discovery had revealed that they lacked an objective basis in fact.<sup>64</sup> The First Circuit stated that Rule 11 imposes a continuing duty on parties and lawyers, although a substantial majority of the appellate courts addressing the issue have clearly rejected that interpretation.<sup>65</sup>

When environmental plaintiffs contravene the Rule, some judges seem insufficiently appreciative of the litigants' needs in choosing proper sanctions. For instance, certain courts apparently have not tried to impose the least severe sanction, while other judges have failed to consider nonmonetary options or several important equitable factors, such as ability to pay or the gravity of the violation, in calculating the financial sanctions that they assessed.<sup>66</sup> Moreover, a few courts have levied large awards in cases involving corporations and insurers.<sup>67</sup>

Numerous judges have not mentioned in their opinions the potential for dampening the enthusiasm of environmental plain-

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64. See *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 393-96 (1st Cir. 1990), *aff'g* 129 F.R.D. 394, 403-04 (D. Mass. 1989).

65. See *id.* at 393; *cf.* *Business Guides, Inc. v. Chromatic Communications Enters.*, 111 S. Ct. 922, 943 n.5 (1991) (Kennedy, J., dissenting) (refusing to recognize continuing duty when issue not briefed). See *Dahne v. Teamsters Local 695*, 906 F.2d 1192, 1200 (7th Cir. 1990) (holding that Rule 11 imposes no continuing duty); *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Associated Contractors, Inc.*, 877 F.2d 938, 943 (11th Cir. 1989) (same), *cert. denied*, 493 U.S. 1079 (1990); *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 874-75 (5th Cir. 1988) (en banc) (same); *Oliveri v. Thompson*, 803 F.2d 1265, 1273-74 (2d Cir. 1986) (same), *cert. denied*, 480 U.S. 918 (1987); *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 484 (3d Cir. 1987) (same). One panel of the Sixth Circuit, in *Jackson v. Law Firm of O'Hara, Ruberg, Osborne & Taylor*, 875 F.2d 1224, 1229 (6th Cir. 1989), cast doubt on the idea of a continuing duty that another panel of the court apparently articulated in *Herron v. Jupiter Transportation Co.*, 858 F.2d 332, 336 (6th Cir. 1988) (holding that continuing duty exists). A similar situation obtains in the Fourth Circuit. One panel of the court, in *Brubaker v. City of Richmond*, 943 F.2d 1363, 1382 (4th Cir. 1991), cast doubt on the idea of a continuing duty that another panel of the court apparently articulated in *Blue v. United States Department of the Army*, 914 F.2d 525, 544-46 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1580 (1991). See also PRELIMINARY DRAFT, *supra* note 2, at 2 (setting forth proposed Rule 11(b), which would impose a continuing duty). In a recent case finding that plaintiffs violated Rule 11, the plaintiffs' counsel apparently did not deserve much solicitude. See *Petit v. County of Essex*, No. 91-CV-404, 1991 U.S. Dist. LEXIS 9942 (N.D.N.Y. July 15, 1991).

66. Most of the cases discussed above did not specifically discuss what sanction might be the least severe or expressly consult equitable factors. See *supra* note 49 and accompanying text.

67. See, e.g., *Teleconferencing Sys., Inc. v. Databeam Corp.*, Civ. Act. No. 88-470-A, 1989 U.S. Dist. LEXIS 10733, at \*50 (E.D. Va. Apr. 27, 1989); *Can Am Indus. v. Firestone Tire & Rubber Co.*, 631 F. Supp. 1180, 1188 (C.D. Ill. 1986). *But see* *Arco Indus. v. Travelers Ins. Co.*, 730 F. Supp. 59, 70 (W.D. Mich. 1989) (imposing modest monetary sanction).

tiffs, and a small number of courts have appeared relatively unconcerned about chilling effects.<sup>68</sup> The strict warnings, which seem like threats that Rule 11 sanctions might be imposed, levelled by a few judges against environmental plaintiffs and their counsel, could discourage these parties and lawyers.<sup>69</sup>

A New Jersey district court also issued an opinion—although not for publication in the federal reporter system—that detrimentally affects some environmental plaintiffs.<sup>70</sup> The plaintiff, a public interest litigant that had prevailed on the merits, sought to recover attorneys' fees for time spent in drafting a notice of intent to sue,<sup>71</sup> a requirement included in numerous environmental statutes.<sup>72</sup> The plaintiff argued that Rule 11 made "absolutely indispensable" the rather extensive prefiling investigation into the facts that it had conducted.<sup>73</sup> The judge rejected this contention, observing that "[p]re-notice of intent to sue activity is analogous to investigative work and as such, is not compensable."<sup>74</sup>

The 1990 Supreme Court case *Cooter & Gell v. Hartmarx Corp.*<sup>75</sup> and the Court's 1991 decision in *Business Guides, Inc. v. Chromatic Communications Enterprises*<sup>76</sup> also could have deleterious consequences for environmental plaintiffs. Application of the very deferential abuse of discretion standard of appellate review that the Supreme Court enunciated in *Cooter* will make it more difficult for environmental plaintiffs to convince appellate courts to reverse the adverse Rule 11 determinations of district judges.<sup>77</sup>

The Supreme Court majority in *Business Guides* held that represented parties who sign papers have "an affirmative duty to conduct a reasonable inquiry into the facts and the law before

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68. See *supra* notes 65-66 and accompanying text.

69. See *supra* note 44.

70. Student Pub. Interest Research Group, Inc. v. Anchor Thread Co., Civ. No. 84-320(GEB), 1988 U.S. Dist. LEXIS 4348 (D.N.J. May 1, 1988).

71. *Id.*

72. See, e.g., 33 U.S.C. § 1365(b) (1988) (Clean Water Act notice of intent to sue requirement); 42 U.S.C. § 7604(b) (1988) (same requirement in the Clean Air Act).

73. *Anchor Thread*, 1988 U.S. Dist. LEXIS 4348, at \*5.

74. *Id.*; accord *Student Pub. Interest Research Group, Inc. v. Monsanto Co.*, 721 F. Supp. 604, 615 (D.N.J.), *aff'd mem.*, 870 F.2d 652 (3d Cir.), and *modified on reconsideration*, 727 F. Supp. 876 (D.N.J. 1989); *Proffitt v. Municipal Auth.*, 716 F. Supp. 845, 851 (E.D. Pa. 1989), *aff'd mem.*, 897 F.2d 523 (1990). *But cf.* *Golden Gate Audubon Soc'y v. United States Army Corps of Eng'rs*, 732 F. Supp. 1014, 1017-19 (N.D. Cal. 1989) (holding activity in preparation for filing of notice of intent to sue is compensable under Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A)(1988)).

75. 110 S. Ct. 2447 (1990).

76. 111 S. Ct. 922 (1991).

77. "[A]n appellate court should apply an abuse-of-discretion standard in reviewing all

filing, and that the applicable standard is one of reasonableness under the circumstances."<sup>78</sup> The case may disadvantage environmental plaintiffs in several ways. Individual litigants may lack access to factual data located on private property owned by environmental defendants. They may also have limited resources for gathering information that is available and, thus, may appear to violate Rule 11's mandates governing pre-filing factual investigations. Because a number of lawyers apparently encounter problems understanding the complex statutory schemes that underlie most environmental cases, lay persons could well experience difficulty complying with the Court's prescription regarding legal inquiry.

Moreover, Federal Rule of Civil Procedure 65 requires that litigants sign applications for Temporary Restraining Orders (TROs),<sup>79</sup> orders that many environmental plaintiffs seek, for example, to halt imminent activity that they believe will irretrievably harm the environment.<sup>80</sup> Dissenting in *Business Guides*, Justice Kennedy cogently observed that "one may expect reticence to seek temporary restraining orders since the time pressures inherent in such situations create an acute risk of sanctions for unreasonable pre-filing inquiry."<sup>81</sup> Furthermore, the majority, by expanding plaintiffs' exposure to liability for attorneys' fees, could effectively frustrate congressional intent expressed in fee-shifting provisions of most environmental statutes: prevailing plaintiffs are ordinarily entitled to attorneys' fees and defendants normally are not.<sup>82</sup>

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aspects of a district court's Rule 11 determination." *Cooter*, 110 S. Ct. at 2461; see also PRELIMINARY DRAFT, *supra* note 2, at 7 (setting forth proposed advisory committee's note, which retains identical standard).

78. *Business Guides*, 111 S. Ct. at 933; see also PRELIMINARY DRAFT, *supra* note 2, at 4 (setting forth proposed Rule 11(c)(2), which would provide that monetary sanctions may be awarded against represented party only for violating improper purpose clause).

79. FED. R. CIV. P. 65(b).

80. See, e.g., *Maine Audubon Soc'y v. Purslow*, 907 F.2d 265, 266 (1st Cir. 1990); *Stein v. Barton*, 740 F. Supp. 743, 746 (D. Alaska 1990). See generally VICTOR J. YANNAcone ET AL., ENVIRONMENTAL RIGHTS AND REMEDIES § 6:13 (1972 & Supp. 1988) (discussing TROs).

81. *Business Guides*, 111 S. Ct. at 941 (Kennedy, J., dissenting).

82. See, e.g., *National Wildlife Fed'n v. Consumers Power Co.*, 729 F. Supp. 62, 64-65 (W.D. Mich. 1989) (prevailing defendants are entitled to attorneys' fees only when they can demonstrate that plaintiff's claim was frivolous or meritless); *Consolidated Edison Co. v. Realty Invs. Assocs.*, 524 F. Supp. 150, 152-53 (S.D.N.Y. 1981) (denying attorneys' fees to defendant absent frivolous claim by plaintiff); see also 33 U.S.C. § 1365(d) (1988) (Clean Water Act fee-shifting provision); 42 U.S.C. § 7604(d) (1988) (Clean Air Act fee-shifting provision); Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 TEX. L. REV. 291 (1990) (comprehensive analysis of Supreme

In short, the assessment of formal Rule 11 activity in environmental litigation reveals that judges and defendants have invoked the provision infrequently against plaintiffs. Moreover, few courts have found that plaintiffs contravened the Rule, and most that did have been solicitous of the litigants' needs when selecting appropriate sanctions. The dearth of formal Rule 11 activity that has disadvantaged the plaintiffs makes analyzing informal activity even more important.

### C. *Informal Rule 11 Activity*

Ascertaining whether informal Rule 11 activity has negatively affected environmental plaintiffs is problematic, primarily because it is difficult to detect and document, especially in ways that support defensible conclusions. For example, it is impossible to identify the number of individuals and groups that might have pursued environmental litigation, had the threat of Rule 11 sanctions not dampened their enthusiasm.<sup>83</sup> Correspondingly, attorneys may justifiably be reluctant to challenge or to reveal publicly informal judicial application that has disadvantaged them, lest the lawyers jeopardize relationships with judges before whom they must appear in the future.<sup>84</sup>

Some evidence, which is principally anecdotal, indicates that considerable Rule 11 activity that has disadvantaged civil rights plaintiffs and attorneys the most has been informal.<sup>85</sup> Troubling examples have been judicial threats in chambers to sanction litigants and lawyers who wish to pursue claims that the judges find marginal and the imposition of large assessments in unpublished opinions.<sup>86</sup> At the outset of this study, the idea that analogous activity might be similarly affecting environmental plaintiffs and practitioners seemed plausible.

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Court's fee-shifting jurisprudence). See generally 3 FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 14.02 (1991) (discussing recovery of attorneys' fees under citizen suit provisions); 2 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER § 4.5, at 81-82 (1986) (pointing out that a change in the dual standard for defendants and plaintiffs would "dry up all but the open and shut litigation"); Tobias, *supra* note 13, at 312 & n.252 (discussing dual standard for shifting fees in civil rights cases).

83. See Alex Elson & Edwin A. Rothschild, *Rule 11: Objectivity and Competence*, 123 F.R.D. 361, 365 (1988); Tobias, *supra* note 25, at 501-02; Vairo, *supra* note 3, at 200-01.

84. See Tobias, *supra* note 4, at 117 n.59.

85. See Tobias, *supra* note 25, at 502-03 & n.60; Tobias, *supra* note 4, at 117 n.59.

86. See Tobias, *supra* note 4, at 117 n.60 (discussing threats to sanction); Charles Presto, Esq., statement at the Rule 11 Conference, School of Law, New York University (Nov. 2, 1990) (marking that \$63,000 sanction was levied in a case for which no opinion was published).

These hypotheses, therefore, were tested by interviewing many attorneys for the plaintiffs and some defense counsel, who primarily represent institutional litigants, such as the National Wildlife Federation and the federal government. I interviewed directly more than twenty-five lawyers who stated that they could speak for several hundred additional attorneys with whom they work.<sup>87</sup>

The lawyers reported a low incidence of informal Rule 11 activity in environmental cases. Attorneys for environmental defendants and judges seem to have employed the Rule somewhat more frequently in informal contexts but to no worse effect for the plaintiffs. These findings contrast sharply with the experience of civil rights plaintiffs. Substantial formal and informal activity has disadvantaged the plaintiffs, and informal activity may have affected them more significantly.<sup>88</sup>

Lawyers who represent institutional plaintiffs stated that the parties have encountered minimal informal Rule 11 activity, little of which has detrimentally affected them.<sup>89</sup> The attorneys reported that defense counsel only occasionally have threatened orally to invoke Rule 11 or in the text or footnotes of motions or briefs as a crude form of "finger-pointing."<sup>90</sup> The director of a law school environmental law clinic remembered being "threatened one time by a Justice Department attorney" in nine years of litigating environmental cases.<sup>91</sup> One lawyer associated with a similar organization had experienced "no Rule 11 activity at all" during the same period, while a professor who worked in a third law school clinical setting over six semesters had "not seen

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87. The reason that the lawyers with whom I spoke could speak for many others was that they worked in rather large legal offices, such as the Department of Justice or the Sierra Club Legal Defense Fund. I called the attorneys, identified myself, asked them about their experiences with Rule 11 and those of any other environmental plaintiffs of which they were aware, sought their views on why there was so little formal Rule 11 activity in environmental (as opposed to civil rights) cases, and inquired whether they had experienced any informal Rule 11 activity. The lawyers are identified only by numbers, because it seemed appropriate to maintain confidentiality and to help preserve the attorneys' ongoing relations with judges and lawyers with whom they will be involved in future litigation. See *supra* note 84 and accompanying text. Most of the information reported below pertains to informal Rule 11 activity, although some relates to formal activity.

88. See *supra* note 26 and accompanying text (indicating substantial quantity of formal activity); Tobias, *supra* note 25, at 502-03 (discussing substantial quantity of informal activity that disadvantages civil rights plaintiffs); Tobias, *supra* note 4, at 117-18 (same).

89. This statement is premised on telephone conversations with numerous attorneys representing institutional plaintiffs (Mar.-Apr. 1991). The reasons for the lack of negative activity are reported in Part III of this Article.

90. This statement is premised on telephone conversations with numerous attorneys who represent institutional plaintiffs (Mar.-Apr. 1991).

91. Telephone Interview with Attorney Number 1 (Mar. 14, 1991).

anything in the Rule 11 area."<sup>92</sup> An attorney who has administered an external clinic for eight years observed that lawyers for defendants had "not threatened me with Rule 11 sanctions."<sup>93</sup>

Attorneys responsible for two of the largest legal offices maintained by institutional environmental plaintiffs afforded similar observations. Both of these lawyers stated that judges had never granted Rule 11 sanctions against their organizations.<sup>94</sup> One attorney could recall only a single instance in which a motion had been filed against the group and thought that Rule 11 was "not being used very extensively informally" in environmental lawsuits.<sup>95</sup>

The lawyer for the other entity, which conducts more environmental litigation than any of the national organizations, said that the public interest litigant had "been the subject of some Rule 11 motions."<sup>96</sup> He also circulated a memorandum to the other twenty attorneys who work for the group seeking their perspectives on Rule 11 activity.<sup>97</sup>

The results of that survey confirmed many of the propositions stated above.<sup>98</sup> The attorneys reported three instances in which opposing lawyers had filed sanctions motions against the entity, all of which were denied, and said that there was a low incidence of informal Rule 11 activity in their cases, with defense counsel often levelling informal threats to invoke the provision.<sup>99</sup>

Attorneys who administer three other sizable offices, which participate in somewhat less litigation, offered similar thoughts.<sup>100</sup> One of the lawyers stated that sanctions had never been sought against the organization and believed that "strikingly little" Rule 11 activity of any kind was present in environmental cases.<sup>101</sup> The second attorney remembered a "single Rule 11 motion" that was filed against the litigant and that was "defeated pretty

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92. Telephone Interview with Attorney Number 2 (Mar. 14, 1991).

93. Telephone Interview with Attorney Number 3 (Mar. 14, 1991).

94. Telephone Interview with Attorney Number 4 (Mar. 14, 1991).

95. Telephone Interviews with Attorneys Number 5 and Number 6 (Mar. 14, 1991).

96. Telephone Interview with Attorney Number 5, *supra* note 95.

97. Telephone Interview with Attorney Number 6, *supra* note 95.

98. Survey of lawyers conducted by Attorney Number 6 (copy on file with author) [hereinafter Survey].

99. *Id.*; Telephone Interview with Attorney Number 6, *supra* note 95. One of the motions filed by an opposing lawyer was a response to the Rule 11 motion that the organization filed against an environmental defendant and was one of a tiny number of motions that plaintiffs filed. *See infra* note 108 and accompanying text.

100. Telephone Interviews with Attorneys Number 7 (Apr. 4, 1991) and Number 8 (Apr. 2, 1991).

101. Telephone Interview with Attorney Number 7, *supra* note 100.

handily,"<sup>102</sup> while the other lawyer had "not seen much Rule 11 activity" in the group's lawsuits.<sup>103</sup>

Several other attorneys who are or were associated with institutional environmental plaintiffs and a few lawyers who are in private practice provided similar information. For instance, most of the attorneys recalled one or a very small number of cases in which defense counsel moved for sanctions or suggested informally that they might invoke the Rule.<sup>104</sup> Attorneys for plaintiffs correspondingly could remember virtually no circumstances in which judges determined that environmental plaintiffs contravened Rule 11.<sup>105</sup>

The perceptions of lawyers who have been involved in rather controversial environmental litigation were not substantially different.<sup>106</sup> One attorney, who enjoys a reputation as a tough, savvy litigator and has participated in numerous suits over old growth timber and the spotted owl in the Pacific Northwest, experienced little informal Rule 11 activity in those cases.<sup>107</sup> The lawyer could recall only one instance in which defendants invoked the Rule against his client, and that situation involved a cross-motion filed in response to the organization's request for Rule 11 sanctions.<sup>108</sup>

An attorney who has brought a number of toxic tort suits remarked that there had "not been much Rule 11 activity in my cases."<sup>109</sup> Another lawyer who has pursued numerous toxic tort actions had "not seen that many suits where plaintiffs have gotten hit with Rule 11 sanctions" and observed that defense counsel do "not even bring up Rule 11 formally in my cases."<sup>110</sup> The attorney added, however, that the "threat of Rule 11 is very pervasive" and that he "never had been in a case where lawyers don't talk about Rule 11" or invoke some form of counter-suit.<sup>111</sup> A third attorney observed that he had "rarely seen any use of

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102. Telephone Interview with Attorney Number 8, *supra* note 100.

103. Telephone Interview with Attorney Number 9 (Apr. 9, 1991).

104. Telephone Interviews with Attorneys Number 10 (Mar. 14, 1991), Number 11 (Mar. 14, 1991), and Number 12 (Apr. 4, 1991).

105. Telephone Interviews, *supra* note 104.

106. Telephone Interviews with Attorneys Number 13 (Apr. 2, 1991), Number 14 (Apr. 9, 1991), Number 15 (Apr. 9, 1991), Number 16 (Apr. 9, 1991), and Number 17 (Apr. 9, 1991).

107. Telephone Interview with Attorney Number 13, *supra* note 106.

108. *Id.*; see also *infra* note 124 and accompanying text.

109. Telephone Interview with Attorney Number 14, *supra* note 106. For helpful analysis of toxic tort litigation, see Allan Kanner, *The Evolving Jurisprudence of Toxic Torts: The Prognosis for Corporations*, 12 CARDOZO L. REV. 1265 (1991).

110. Telephone Interview with Attorney Number 15, *supra* note 106.

111. *Id.*; see *infra* notes 244-47 and accompanying text (discussing use of countersuits as an alternative to use of Rule 11).

the Rule" in the litigation that he pursues.<sup>112</sup> The lawyer made this statement even though he has participated in all kinds of environmental suits, including toxics cases, for fifteen years—as counsel for local and national environmental groups and for parties in the Exxon Valdez dispute—and has practiced primarily in a federal district that generally experiences much Rule 11 activity.<sup>113</sup>

An attorney who represents industry members in considerable toxic tort and CERCLA litigation believed that Rule 11 has been employed more frequently in these than other environmental cases, even though CERCLA actions "almost always settle and it is very likely that a lot of Rule 11 motions come out in the wash."<sup>114</sup> The lawyer added that in-house counsel for one large company, which plaintiffs often sue in asbestos cases, routinely responds to "complaints by sending Rule 11 letters [which] result in most actions being dropped or withdrawn."<sup>115</sup>

One attorney who has brought numerous citizen suits seeking enforcement under the Clean Water Act could recall several situations in which defendants resorted to the Rule but was "not aware of any case where a Rule 11 motion was granted."<sup>116</sup> A second lawyer who has litigated many similar actions stated that there was "finger-pointing by defendants in briefs filed in a number of cases but the parties never formally pursued Rule 11 with the courts."<sup>117</sup> The attorney remembered one instance in which defendants argued to the judge that the plaintiff's "pre-complaint activity violated Rule 11"; however, the court found the contention so "frivolous that it merited no attention."<sup>118</sup>

A lawyer who has filed more than fifty citizen suits under the Clean Water Act observed that defense counsel frequently raise Rule 11 but that reliance on the provision is "more tactical than substantive."<sup>119</sup> The attorney stated that *Gwaltney of Smithfield*,

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112. Telephone Interview with Attorney Number 16, *supra* note 106.

113. *Id.*

114. Telephone Interview with Attorney Number 17, *supra* note 106.

115. *Id.*

116. Telephone Interview with Attorney Number 18 (Apr. 2, 1991). For a comprehensive analysis of citizen suits, see Barry Boyer and Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 *BUFF. L. REV.* 833 (1985).

117. Telephone Interview with Attorney Number 19 (Apr. 5, 1991).

118. *Id.*

119. Telephone Interview with Attorney Number 20 (Apr. 5, 1991).

*Ltd. v. Chesapeake Bay Foundation*<sup>120</sup> "generated enormous practice on pretrial issues" in Water Act enforcement litigation and that defense counsel regularly allude to Rule 11 when filing pretrial motions.<sup>121</sup> The lawyer recalled one citizen suit in which a district court imposed a \$5000 sanction on a public interest litigant for "failing to perform sufficient legal inquiry," because the group pursued an action that the judge believed that *Gwaltney* barred.<sup>122</sup>

Few attorneys who represent environmental plaintiffs mentioned invoking Rule 11 against environmental defendants,<sup>123</sup> and a small number of practitioners expressly stated that it is not a provision that the plaintiffs use.<sup>124</sup> Several of the lawyers did say, however, that they would not hesitate to file motions if defense counsel "crossed the line."<sup>125</sup> Moreover, one attorney actually sought Rule 11 sanctions in controversial litigation involving timber practices in the Northwest, when the opposition requested that the court modify an injunction for the third time and tendered "demonstrably false information."<sup>126</sup>

The incidence of informal judicial activity involving Rule 11 appears to be considerably smaller. The lawyers reported that a minuscule number of courts had threatened to sanction plaintiffs if they continued the pursuit of counts that the judges thought lacked merit, although virtually no courts levied awards against the parties in unpublished decisions.<sup>127</sup> Typical was the observation of one lawyer who stated that no judge has "threatened me

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120. 484 U.S. 49 (1987). The *Gwaltney* opinion alludes to the possibility that Rule 11 justified the Court's disposition, but the opinion does not speak directly to the Rule's application. *Id.* at 65.

121. Telephone Interview with Attorney Number 20, *supra* note 119. The majority in *Gwaltney* prohibited citizen suits for past violations, thus triggering considerable litigation over the timing of violations. See Beverly McQueary Smith, *The Viability of Citizens' Suits Under the Clean Water Act After Gwaltney* of *Smithfield v. Chesapeake Bay Foundation*, 40 CASE W. RES. L. REV. 1 (1989-90).

122. Telephone Interview with Attorney Number 20, *supra* note 119. The case was *Atlantic States Legal Found., Inc. v. Avtex Fibers, Inc.*, Civ. Act. No. 87-39E (W.D. Pa. Dec. 16, 1988). See *supra* note 27.

123. This conclusion is based on telephone conversations with numerous environmental attorneys (Mar.-Apr., 1991).

124. Telephone Interviews with Attorneys Number 9, *supra* note 103, and Number 12, *supra* note 104.

125. Telephone Interview with Attorney Number 13, *supra* note 106; Survey, *supra* note 98.

126. Telephone Interview with Attorney Number 13, *supra* note 106.

127. This conclusion is premised on telephone conversations with numerous attorneys (Mar.-Apr., 1991). The only unpublished opinion of which I am aware is mentioned above at notes 27, 122 and the accompanying text. The incidence was much lower than in civil rights cases. See *supra* note 85 and accompanying text.

with Rule 11 sanctions" in eight years of litigating environmental cases.<sup>128</sup>

In short, there has been a clear paucity of formal, and an apparent dearth of informal, Rule 11 activity in environmental lawsuits. Although this relative inactivity makes it difficult to draw definitive conclusions or to make generalizations that apply to different contexts, analysis of Rule 11's implementation in environmental cases yields instructive insights on modern civil litigation. For instance, it shows why judges and parties eschew reliance on the provision and invoke alternatives in environmental suits, even as they vigorously employ the Rule in certain forms of modern litigation. Moreover, the Rule 11 activity that has occurred supports credible hypotheses that warrant comparison with those derived from studying other forms of civil litigation. The propositions can also be tested by collecting, assessing, and synthesizing the type of information, such as that on informal Rule 11 activity, which I have previously suggested should be assembled and analyzed.<sup>129</sup> The third Part of this Article, therefore, examines the consequences of Rule 11 activity in environmental cases.

### III. IMPLICATIONS AND LESSONS

#### A. *Why Has There Been So Little Rule 11 Activity?*

Many plausible reasons explain the dearth of Rule 11 activity in environmental litigation. These explanations enhance appreciation of environmental plaintiffs and defendants, of those lawyers who pursue the cases and of judges who hear the suits, and of the litigation itself, while informing understanding of the contemporary legal culture in the federal courts.

##### 1. *Environmental Litigants and Attorneys*

Numerous apparent reasons exist for the limited amount of Rule 11 activity in environmental lawsuits. One important cluster of explanations relates to the identities of the parties and attorneys who are involved in much environmental litigation and their respective resources for participating. Many plaintiffs, typically governmental or public interest entities, and a number of defen-

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128. Telephone Interview with Attorney Number 3, *supra* note 93.

129. See Tobias, *supra* note 25, at 522-23; Tobias, *supra* note 4, at 125.

dants, generally governmental or regulated interests, are "institutional litigants"; most of them have considerable time and energy as well as some specialized expertise and enjoy favorable ongoing relations with the judiciary.<sup>130</sup>

*a. Institutional Environmental Plaintiffs and Attorneys*

*(1). The Government as Environmental Plaintiff*

The federal government, when determining whether to file papers and preparing the relevant documents once it decides to file, relies on elaborate review procedures and draws on substantial policy, legal, and technical expertise.<sup>131</sup> The government usually employs a multitiered, interdisciplinary decisionmaking process, especially when considering a complaint, the document that courts sanction most frequently.

Policymakers, technical experts, and lawyers in an agency contemplating suit—such as the Environmental Protection Agency (EPA); attorneys from the Environment and Natural Resources Division of the Department of Justice (DOJ), which possesses primary governmental responsibility for litigating environmental cases; and the United States Attorneys' Offices, which have local litigating authority—thoroughly review the relevant public policy, technical, and legal factors, including the prospects for success. If those decisionmakers conclude that papers should be filed, numerous individuals help prepare the documents.

Lawyers in the DOJ and in the United States Attorneys' Offices work closely with their counterparts in the responsible agency, such as the EPA's Office of General Counsel, and with the agency's technical experts, such as wildlife biologists and engineers. The attorneys carefully research and develop the legal theories that underlie the papers, while the policy and technical personnel collect, analyze, and synthesize supporting factual in-

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130. That is, in comparison with individual civil rights plaintiffs and attorneys. See generally ARON, *supra* note 21 (discussing public interest litigants as institutional litigants); SCHUCK, *supra* note 21 (discussing government as institutional litigant); Boyer & Meidinger, *supra* note 116 (discussing continuing relations); Tobias, *supra* note 25, at 495-98 (discussing resources of civil rights plaintiffs and attorneys); Symposium, *Law, Private Governance and Continuing Relationships*, 1985 WIS. L. REV. 461-757 (same).

131. I rely substantially in this Part of the Article on my experience as a legal consultant for the Food and Drug Administration Office of General Counsel and as a lawyer in private practice working with the Environmental Protection Agency in several proceedings and pieces of litigation, on telephone conversations with a number of government attorneys (Nov. 14, 1990), and on in-person conversations with several government attorneys (Nov. 3, 1990). See generally Robert L. Stern, "Inconsistency" in *Government Litigation*, 64 HARV. L. REV. 759 (1951) (exploring government attorneys' representation of the government).

formation. All of these individuals help to write drafts, which are circulated to persons in the various offices having policy, legal, and technical expertise for criticisms and suggestions, especially regarding legal and factual accuracy. The ideas secured are assimilated in revising the documents and in developing final drafts of the papers for filing.

Many attorneys in the DOJ, the United States Attorneys' Offices, and the client agencies have accumulated extensive experience in the environmental law field or in litigating environmental cases, and a number of the lawyers are very familiar with the applicable substantive statutes or even have participated in drafting or implementing the measures. Numerous technical personnel possess analogous specialized knowledge in their particular areas of expertise and have significant time and money to gather, assess, and synthesize the requisite information for completing reasonable pre-filing investigations of the facts. If they do not satisfactorily finish this task, the attorneys have sufficient expertise and resources to insure that the work is properly concluded, to research and formulate defensible legal theories, and to conduct reasonable pre-filing inquiries into the law.

A lawyer who is now in private practice but once served as a high-level official in the Environment and Natural Resources Division, offered an example that aptly summarizes the propositions examined above.<sup>132</sup> He stated that in "environmental tort-type litigation, the Justice Department employed storybook, not notice, pleading and filed complaints that were premised on a lot of research, included lots of allegations, were very substantial, and were never vulnerable to motions to dismiss."<sup>133</sup> The lawyer added that the government "spends much money on waste reporting and investigations" and that the major environmental statutes impose "significant monitoring and reporting requirements" on regulated interests, so that the DOJ can secure considerable factual data before filing.<sup>134</sup>

(2). *The Public Interest Litigant as Environmental Plaintiff*

Most of these ideas apply, perhaps somewhat less pervasively, together with numerous additional propositions, to public interest

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132. Telephone Interview with Attorney Number 21 (Apr. 9, 1991).

133. *Id.*

134. *Id.*

litigants.<sup>135</sup> For instance, entities such as Defenders of Wildlife and the Natural Resources Defense Council (NRDC) rely on multilayered, interdisciplinary procedures in determining whether to file papers and in preparing the documents that they ultimately submit.<sup>136</sup>

The organizations employ numerous staff attorneys who possess much relevant specialized expertise, having practiced environmental law exclusively for many years.<sup>137</sup> Indeed one former assistant administrator of the EPA stated that the "environmental bar that brings suit for the national litigants is very sophisticated legally and [is] not likely to make big legal or factual mistakes or errors in judgment."<sup>138</sup> A former high-level lawyer in the agency similarly remarked that attorneys for the "groups are much too good to advance legal theories that would get them into Rule 11 trouble."<sup>139</sup>

The lawyers, as staff attorneys, identify closely with the public interest litigants. The lawyers are acutely aware that the need to resist Rule 11 motions and to pay any sanctions assessed can have potentially damaging impacts on organizational morale and finances, so they exercise great care in deciding to tender papers and in preparing them. For instance, a lawyer who represents one of the major groups said, "frankly, we don't have the resources to bring questionable or frivolous litigation."<sup>140</sup> Correspondingly, environmental public interest entities, such as the Environmental Defense Fund, have rather large in-house staffs including engineers and scientists with substantial particularized knowledge in technical fields that are crucial to environmental litigation.<sup>141</sup>

Although most of these organizations possess more resources than a number of private individuals, the public interest litigants have considerably fewer funds than the government,<sup>142</sup> which

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135. I rely substantially in this part of the Article on my experience as a lawyer working for and against public interest litigants and on the telephone interviews, *supra* notes 87-128. See generally ARON, *supra* note 21 (providing background description of public interest law and lawyers).

136. This assertion is premised principally on my knowledge of the legal staffs of the National Wildlife Federation, the NRDC, and the Sierra Club, gleaned from working for the Federation in one of its law school clinics and against NRDC in a number of proceedings, and from the telephone interviews. See *supra* notes 87, 89-97, 99-119, 121, 123-128.

137. *Id.*

138. Telephone Interview with Attorney Number 22 (Apr. 5, 1991).

139. Telephone Interview with Attorney Number 17, *supra* note 106.

140. Telephone Interview with Attorney Number 9, *supra* note 103.

141. Cindy Vreeland, Comment, *Public Interest Groups, Public Law Litigation and Federal Rule 24(a)*, 57 U. CHI. L. REV. 279, 295-303 (1990).

142. See *supra* note 25.

means that the groups must maximize the benefit derived from the time and effort spent on litigation. This relative dearth of resources and other factors, such as the large quantity of environmental lawsuits that could be brought, make the entities extremely selective about the cases that they file.

The organizations carefully choose the litigation that the groups are most likely to win, that will have the greatest impact, and in which they will be able to recover attorneys' fees. One lawyer in private practice observed that the entities "know that they are not playing with someone else's money and that if the organizations are going to be paid they must win," while the groups "will not waste the time if they will not get paid."<sup>143</sup> A former EPA assistant administrator claimed that the national entities may even refuse to "take hard cases where the proof is difficult, because there are so many easy ones in which they will be sure to get attorneys' fees awards."<sup>144</sup>

Institutional public interest litigants have successfully settled or won much of the litigation that they have filed, at least in the lower federal courts.<sup>145</sup> Indeed, numerous attorneys who represent the organizations and other lawyers recited in mock seriousness the following litany: the lack of Rule 11 activity in environmental cases is attributable to the careful pre-filing work of plaintiffs' attorneys, as demonstrated by their success on the merits.<sup>146</sup>

### (3). *Similar Characteristics of Institutional Environmental Plaintiffs*

Many institutional plaintiffs and their lawyers seem to enjoy relatively congenial, ongoing relations with judges—rapport that

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143. Telephone Interview with Attorney Number 16, *supra* note 106.

144. Telephone Interview with Attorney Number 22, *supra* note 138; cf. John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986) (discussing attorneys' financial incentives and disincentives for litigation).

145. The high success rate in the major category of environmental litigation that challenges agency regulatory action or inaction is substantially attributable to the unrealistic temporal deadlines that Congress imposes on the agencies. See, e.g., *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692 (D.C. Cir. 1975); *Citizens for a Better Env't v. Costle*, 610 F. Supp. 106 (N.D. Ill. 1985). *But cf.* RODGERS, *supra* note 82, § 4.6, at 88 (observing that environmental plaintiffs usually lose in the Supreme Court). See generally GAIL BINGHAM, *RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE* (1985) (analyzing resolution of environmental controversies, especially through alternative dispute resolution).

146. Telephone Interviews with Attorneys Number 2, *supra* note 92, Number 5, *supra* note 95, Number 7, *supra* note 100, Number 9, *supra* note 103, and Number 13, *supra* note 106.

can be ascribed principally to the status of the parties and attorneys as repeat players who apparently have earned judges' respect for the quality of their work.<sup>147</sup> For example, in numerous federal districts, one Assistant United States Attorney is responsible for handling all environmental cases.<sup>148</sup> The United States Attorneys' Offices must also cultivate and retain good relations with judges before whom their lawyers appear daily. Moreover, many federal judges actually are former United States Attorneys or worked in the Offices as assistant prosecutors and, thus, should be intimately familiar with the high professional standards that prevail in most Offices.<sup>149</sup> Correspondingly, a single NRDC lawyer, who monitors EPA implementation of the Clean Water Act and attempts to secure agency compliance with statutory commands, may pursue numerous lawsuits against the EPA in the identical court or make multiple appearances before the same judge.<sup>150</sup>

Analogous elements are at work when public interest organizations intervene on behalf of the government—as the groups do in much litigation that regulated industries bring and in a number of cases that the government files—and even when public interest litigants sue the government.<sup>151</sup> Public interest entities, the gov-

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147. See Symposium, *supra* note 130 (discussing effects of continuing relations); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97 (1974) (classifying parties as "repeat players").

148. Similarly, lawyers in DOJ's Environment and Natural Resources Division may be responsible for certain substantive categories of litigation, such as that involving air quality or public lands, or for litigation arising from specific regions of the country, such as the Ninth Circuit.

149. Of the 774 federal district judges currently on the bench, 175 have worked as United States Attorneys or Assistant United States Attorneys. Search of Westlaw, AFJ (Almanac of the Federal Judiciary) file (Sept. 26, 1991); see JEROME R. COVSI, JUDICIAL POLITICS—AN INTRODUCTION 140 (1984) (administrations other than Carter's turned heavily toward United States Attorneys for district court appointees); see also ALAN NEFF, THE UNITED STATES DISTRICT JUDGE NOMINATING COMMISSIONS: THEIR MEMBERS, PROCEDURES AND CANDIDATES 122 (1981) (citing survey of Carter administration nominees for district judgeships that revealed that many had prosecution experience in federal courts).

150. This situation obtained, for example, in the 1970's when NRDC was monitoring EPA implementation of the Federal Water Pollution Control Act Amendments of 1972 and successfully challenged much EPA action or inaction in the District of Columbia District Court. See, e.g., *Natural Resources Defense Council, Inc. v. Train*, 396 F. Supp. 1386 (D.D.C.) (J.G. Speth, attorney), *aff'd sub nom. Natural Resources Defense Council, Inc. v. Costle*, 564 F.2d 573 (D.C. Cir. 1975) (same); *Natural Resources Defense Council, Inc. v. Train*, 396 F. Supp. 1393 (D.D.C. 1975), *aff'd*, 568 F.2d 1369 (D.C. Cir. 1977) (same).

151. Environmental litigation, especially challenges to agency regulatory action, has increasingly assumed a tripolar party structure, involving the government, public interest litigants, and regulated interests. See, e.g., *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987); *United States v. South Fla. Water Management Dist.*, 922 F.2d 704

ernment, and the attorneys who work for these institutions have, and recognize the need to maintain, comparatively cordial relations with one another. Both sides, therefore, are loath to seek Rule 11 sanctions, lest the Rule's invocation raise the stakes in specific controversies and jeopardize relationships involving organizations with which they must litigate many future environmental disputes.<sup>152</sup>

These factors significantly increase the likelihood that the papers that government and public interest litigants, as plaintiffs, submit in environmental cases actually are, or appear to be, preceded by reasonable legal inquiries and reasonable factual investigations, well considered, fully tested for accuracy, properly grounded in fact, and legally warranted. The considerations have limited the amount of Rule 11 activity in environmental litigation and plaintiffs' concomitant vulnerability to sanctions.

#### (4). *Civil Rights Plaintiffs and Attorneys Contrasted*

Most of the circumstances above appear attributable primarily to the institutional character of environmental plaintiffs and to the ways that their lawyers represent the entities. Indeed, courts have sanctioned relatively few institutional plaintiffs, such as the National Association for the Advancement of Colored People (NAACP) and the American Civil Liberties Union (ACLU), or their counsel in civil rights cases,<sup>153</sup> despite the high incidence of

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(11th Cir. 1991); *Portland Audubon Soc'y v. Hodel*, 866 F.2d 302 (9th Cir. 1989). See generally Carl Tobias, *Standing to Intervene*, 1991 Wis. L. Rev. 415 (discussing intervention of right under Rule 24(a)(2) and party structure in public law litigation).

152. One lawyer for a public interest litigant observed that the "organization litigates against the government across the country and that both sides are concerned about maintaining their ongoing relationships and would be reluctant to disrupt them with Rule 11." Telephone Interview with Attorney Number 13, *supra* note 106.

Certain considerations similar to those discussed in the text also may obtain when "noninstitutional" plaintiffs, such as victims of exposure to toxic chemicals, pursue toxic tort litigation. I spoke to relatively few attorneys who participate in such litigation. One of the lawyers did say, however, that the plaintiffs he represents "conduct well tests and soil samples before anyone is willing to file suit" and collect the "information that they need to prove their cases up front." See also *supra* notes 132-34 and accompanying text (attorney's observations as to DOJ apply equally to his clients); *supra* notes 110-11 and accompanying text (views of another lawyer who pursues toxic tort litigation).

153. See, e.g., *NAACP-Special Contribution Fund v. Atkins*, 908 F.2d 336 (8th Cir. 1990); cf. *Blue v. United States Dept of the Army*, 914 F.2d 525, 549-50 (4th Cir. 1990) (vacating trial judge's order prohibiting NAACP Legal Defense Fund from paying sanctions imposed on Julius Chambers for participation in litigation that preceded his assumption of post as NAACP Executive Director), *cert. denied*, 111 S. Ct. 1580 (1991). Of course, the imposition of one large sanction on a public interest litigant can chill the enthusiasm of these litigants.

Rule 11 activity in those lawsuits mentioned throughout this Article.

The conditions that exist for a number of civil rights plaintiffs, particularly individuals or "noninstitutional" litigants, contrast markedly with those of many environmental plaintiffs.<sup>154</sup> Most compelling may be the significant resource disparities that exist between numerous civil rights attorneys and plaintiffs on the one hand and environmental lawyers and plaintiffs, as well as corporate or governmental counsel and litigants, on the other.

The civil rights bar consists principally of solo practitioners, a number of whom may possess rather limited time, money, and experience. The lawyers have difficulty absorbing the "front-end" costs of litigation and depend substantially on fee shifting for their compensation.<sup>155</sup> Most of the attorneys have few resources for performing extensive legal research, developing creative legal theories, and conducting comprehensive factual investigations in the unusual instances when they have access to pertinent material.<sup>156</sup> Certain lawyers might possess somewhat narrow expertise, because civil rights cases constitute an insignificant component of their practices.

Recent Supreme Court opinions implicating much civil rights law, whose effects are now being manifested in the lower federal courts, may have diminished additionally the rather small pool of civil rights attorneys with substantial experience. For instance, during the mid-1980's, the Court interpreted two Federal Rules of Civil Procedure together with the Civil Rights Attorney's Fees Awards Act of 1976 (Fees Act)<sup>157</sup> in ways that apparently have complicated the efforts of civil rights lawyers to recover attorneys' fees.<sup>158</sup>

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*See Avirgan v. Hull*, 705 F. Supp. 1544 (S.D. Fla. 1989) (imposing a \$1,034,381.36 sanction on public interest litigant), *aff'd*, 932 F.2d 1572 (11th Cir. 1991), *cert. denied*, 60 U.S.L.W. 3467 (U.S. Jan. 14, 1992). To detect exactly how much sanctioning involves institutional litigants is difficult. For instance, the ACLU, the NAACP, and the Sierra Club may be representing local affiliates or individuals, and their representation rarely can be discerned from the captions and text of cases.

154. This part of the subsection relies substantially on Tobias, *supra* note 25, at 495-98.

155. *Id.* at 496 n.41.

156. *Id.* at 497.

157. 42 U.S.C. § 1988 (1988).

158. *See Evans v. Jeff D.*, 475 U.S. 717 (1986) (Rule 23(e)); *Marek v. Chesny*, 473 U.S. 1 (1985) (Rule 68); *Spencer v. General Elec. Co.*, 894 F.2d 651, 661-64 (4th Cir. 1990) (example of problematic application of Rule 68 by lower federal court); *Phillips v. Allegheny County*, 869 F.2d 234, 235-40 (3d Cir. 1989) (same as to Rule 23(e)); *see also Brand*, *supra* note 82 (providing comprehensive analysis of Supreme Court's fee-shifting jurisprudence); *infra*

Numerous civil rights lawyers have reputations as vigorous, and frequently contentious, advocates for the individuals whom they represent. A number of the attorneys view civil rights actions in federal court as the only realistic recourse available to persons who, for example, have no jobs because they were victims of employment discrimination, or have been languishing in prisons, because they were deprived of constitutional rights. Some of the lawyers may zealously take on their clients' cases as "causes" or to vindicate what they believe are significant political, social, moral, or economic principles.

Few potential civil rights plaintiffs, especially those who would pursue cases individually, rather than as members of institutional litigants or as participants in class actions, can offset these circumstances, particularly the financial difficulties. Most persons who could sue have little access to, and minimal resources for collecting and evaluating, data that are significant to completing pre-filing factual investigations that appear reasonable.<sup>159</sup> Numerous potential litigants may not know what facts or legal elements they must allege to make out a civil rights claim. They may even be unaware that their constitutional or statutory rights were violated. Several of these considerations mean that practically no civil rights plaintiffs and comparatively few civil rights attorneys have continuing or harmonious relations with federal judges, particularly in contrast with institutional litigants and lawyers who participate in civil rights and environmental litigation.

These factors can make the papers that civil rights plaintiffs and their counsel file look as if they were preceded by deficient legal inquiries or factual investigations or were not well-grounded factually or warranted legally. These considerations also help to explain the substantial quantity of Rule 11 activity in civil rights cases and the corresponding susceptibility of plaintiffs to being sanctioned.

*b. Institutional Environmental Defendants and Attorneys*

The institutional nature of many environmental defendants and the perspectives of the lawyers who represent them also help to

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notes 206-10 and accompanying text (discussing how Supreme Court and lower federal court narrowing of much doctrinal civil rights law has exacerbated these developments in litigation financing). See generally Thomas D. Rowe, Jr. & Neil Vidmar, *Empirical Research on Offers of Settlement: A Preliminary Report*, 51 LAW & CONTEMP. PROBS., Autumn 1988, at 13 (examining offers of settlement under Rule 68); Tobias, *supra* note 13, at 310-17 (discussing the significance of judicial application of federal rules relevant to litigation financing for public interest litigants).

159. Tobias, *supra* note 13, at 309.

explain the rather low incidence of formal and informal Rule 11 activity in environmental lawsuits. Quite a few factors that are relevant to this relative inactivity have been mentioned or alluded to earlier in the Article.<sup>160</sup>

(1). *The Government as Defendant*

When an agency of the federal government is the defendant, as happens in much environmental litigation that public interest groups pursue, several important considerations substantially limit the amount of Rule 11 activity. One significant element is the governmental practice of seeking sanctions only in egregious cases. Although this is not a formal, written policy of the DOJ or of federal agencies, numerous lawyers who work for the Justice Department, for the agencies, and for public interest organizations have stated that the government is very "conservative" about filing Rule 11 motions and does so only when its opponents have seriously abused the litigation process.<sup>161</sup> The practice may reflect concern of the government and its attorneys about restricting federal court access and the view that Rule 11 should be reserved for special circumstances.<sup>162</sup>

Numerous attorneys in the DOJ's Environment and Natural Resources Division have considerable experience litigating environmental cases, are comparatively insulated from political pres-

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160. See, e.g., *supra* note 130 and accompanying text. Here I rely substantially on the considerations mentioned *supra* notes 147-52 and accompanying text.

161. See Telephone and in-person conversations, *supra* note 131; Telephone Interviews with Attorneys Number 7, *supra* note 100, and Number 10, *supra* note 104. This may soon change, however, with the issuance by President Bush of an Executive Order that instructs litigation counsel for the federal government to "take steps to seek sanctions against opposing counsel and opposing parties where appropriate." Exec. Order No. 12,778 § 1(f), 56 Fed. Reg. 55,195, 55,197 (1991).

162. The assertion regarding federal court access is controversial. For example, during certain presidential administrations, lawyers in DOJ's Environment and Natural Resources Division apparently asserted procedural technicalities, such as standing, to avoid reaching the merits of a case. See, e.g., *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177 (1990); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973); *Sierra Club v. Morton*, 405 U.S. 727 (1972); see also Marianne Lavelle, *Out of Bounds?*, NAT'L L.J., Dec. 9, 1991, at 1 (analysis of *Defenders of Wildlife v. Lujan*, 911 F.2d 117 (8th Cir. 1990), *cert. granted*, 111 S. Ct. 2008 (1991), in which DOJ urged the Supreme Court to impose unprecedented limitations on citizen standing to sue in environmental cases). See generally Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986) (increased use of procedural technicalities to avoid adjudicating civil disputes). For case law suggesting that Rule 11 be reserved for special circumstances, see *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 483 (3d Cir. 1987); *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1085-86 (7th Cir. 1987) (Cudahy, J., dissenting), *cert. dismissed*, 485 U.S. 901 (1988).

sure, are accustomed to defending the government against suit by public interest litigants, and treat the agencies that they represent as clients from which they maintain a healthy detachment.<sup>163</sup> These lawyers, the DOJ, and the agencies have and appreciate the necessity of perpetuating good relations with many environmental plaintiffs who will participate in future cases involving the government. Moreover, governmental defendants are not threatened personally or institutionally by most environmental litigation, which frequently includes relatively bland assertions that an agency failed to comply with a congressionally imposed deadline or misinterpreted a statute, and which seeks rather mundane relief, such as promulgation of regulations by a specific date.<sup>164</sup>

DOJ attorneys and the agencies that they represent thus have few reasons for seeking sanctions from, and a number of disincentives to invoking Rule 11 against, environmental plaintiffs. An attorney for environmental plaintiffs, whom the government had not threatened with Rule 11 sanctions in eight years of litigating, observed that there is "fairly high cordiality of government lawyers on natural resource issues," while Justice Department attorneys are very business-like and are often more "sympathetic to plaintiffs' cases than their own."<sup>165</sup>

## (2). *The Private Entity as Defendant*

Even private environmental defendants, such as corporations, are rather unlikely to file Rule 11 motions against environmental plaintiffs. When the federal government or public interest litigants, purportedly representing the public, have sued companies over environmental degradation, the defendants may already be worried about harm to their reputations. The corporations, therefore, may hesitate to seek sanctions, lest invocation of Rule 11 be perceived as a counterattack on these plaintiffs and generate additional adverse publicity.

Institutions, not individuals, typically are the target of accusations that their actions have damaged the environment. These assertions currently carry less social stigma than allegations of

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163. See Beth Nolan, *Removing Conflicts from the Administration of Justice: Conflicts of Interest and Independent Counsels Under the Ethics in Government Act*, 79 GEO. L.J. 1, 41-42 (1990) (categorizing government lawyers' employment agency as a client).

164. See, e.g., *National Resources Defense Council, Inc. v. Train*, 510 F.2d 692 (D.C. Cir. 1975); *Citizens for a Better Env't v. Costle*, 610 F. Supp. 106 (N.D. Ill. 1985).

165. Telephone Interview with Attorney Number 3, *supra* note 93.

discrimination. Numerous corporations may feel that they have certain responsibilities to cooperate with government agencies which generally attempt to implement complex environmental statutes in good faith, and other companies could believe that cooperation will be preferable for their reputations or their balance sheets. Some of these concerns may lead a number of corporations to "internalize" litigation costs—which could be rather small, especially for companies with in-house counsel or that can absorb the expense as a "cost of doing business"—rather than rely on Rule 11 to recover the expenditures.<sup>166</sup>

Even when environmental defendants retain outside counsel, as many corporations do, similar circumstances may pertain. Numerous large law firms that represent a number of companies have been reluctant to invoke Rule 11, requiring, for instance, that attorneys or clients who wish to pursue sanctions secure the approval of firm management committees.<sup>167</sup> This reticence partly reflects certain norms prevalent in the "legal cultures" of many substantial firms. These norms include a desire to resolve litigation on the merits and the wish to maintain harmonious, continuing relations with federal judges as well as a distaste for the unseemly appearance that might attend the filing of Rule 11 motions and the concomitant loss of credibility that could accompany the denial of sanctions requests.<sup>168</sup> Some corporations and certain of their counsel, either in-house or external, may prefer to secure and maintain cordial relations with environmental plaintiffs who will participate in future environmental controversies involving the companies.<sup>169</sup>

Finally, numerous governmental and private environmental defendants might not seek Rule 11 sanctions because they think

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166. Several attorneys for environmental plaintiffs observed that large consumer-oriented corporate entities, such as Fortune 500 firms, probably consider the risk of adverse publicity accompanying the filing of a Rule 11 motion to outweigh the advantage of any monetary sanction that might be awarded. Telephone Interviews with Attorney Number 8, *supra* note 100; Attorneys Number 10, Number 11, and Number 12, *supra* note 104; *cf. infra* note 244 (noting that local or regional entities typically bring SLAPP suits).

167. See Carl Tobias, *Reassessing Rule 11 and Civil Rights Cases*, 33 *How. L.J.* 161, 175 (1990). Attorneys in these firms apparently have been more willing to invoke Rule 11 in litigation involving insurers and corporations under CERCLA, because the financial stakes are much higher. See *supra* notes 23-24 and accompanying text; *infra* note 204.

168. These ideas are based on conversations with numerous attorneys who practice primarily in large cities. See generally MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* (1991) (analyzing legal culture in large law firms).

169. The companies and attorneys probably enjoy less cordial relations quantitatively and qualitatively than those that obtain between the government and public interest litigants. See *supra* notes 147-48, 160 and accompanying text.

that the prospects for success would be minimal. The limited likelihood of succeeding is attributable to a number of considerations. Important factors are the quality of the legal work that institutional environmental plaintiffs produce, including the reasonable nature of prefiling inquiries that they conduct and the thoroughly researched papers that they file, the relatively cordial relations that many plaintiffs enjoy with judges, and the concomitant solicitude that judges exhibit for the plaintiffs.<sup>170</sup> Prior failure also may have discouraged subsequent attempts to invoke Rule 11. For example, environmental defendants could well have concluded that employing the Rule was fruitless, given the few sanctions motions that courts granted and the small amounts judges awarded after 1983.<sup>171</sup> This situation probably enhanced the already substantial appeal of several relatively efficacious alternatives to Rule 11.<sup>172</sup> All of these considerations seemingly have reduced the incentives of private defendants to seek sanctions and may explain the low incidence of Rule 11 activity.

(3). *Civil Rights Defendants and Attorneys Contrasted*

Much stated in the previous subsection apparently applies to an insignificant number of civil rights defendants and their lawyers. The ideas probably pertain, for example, when plaintiffs sue departments of the federal government for employment discrimination.<sup>173</sup> Many attorneys in the DOJ Civil Division will be equally familiar with defending the government, and be nearly as detached from their clients, as numerous lawyers in the Environment and Natural Resources Division.

Different factors, however, help to explain the high rate at which many institutional defendants and their counsel invoke Rule 11 in civil rights actions. States or localities have recently become the defendants in considerable civil rights litigation against the government.<sup>174</sup> A number of these governmental units were

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170. See *supra* notes 25-54, 147-50 and accompanying text.

171. See *supra* notes 31-57 and accompanying text.

172. See *infra* notes 239-57 and accompanying text.

173. Examples of this litigation are *Cook v. Boorstin*, 763 F.2d 1462 (D.C. Cir. 1985) and *Perez v. FBI*, 707 F. Supp. 891 (W.D. Tex. 1988). *But see* *Blue v. United States Dep't of the Army*, 914 F.2d 525 (4th Cir. 1990) (largest employment discrimination class action litigation ever filed against Army in which government recovered substantial Rule 11 sanctions), *cert. denied*, 111 S. Ct. 1580 (1991); *Napier v. Thirty or More Unidentified Fed. Agents*, 855 F.2d 1080 (3d Cir. 1988) (involving single plaintiff civil rights action in which government recovered Rule 11 sanctions).

174. For recent examples of cases in which courts rejected Rule 11 motions that local

previously sued rather infrequently and traditionally possessed and allocated relatively few resources for litigating, much less for paying judgments. These circumstances could have been exacerbated by the significant quantity of civil rights litigation that alleges intentional misconduct, which means that governments may not be immunized from suit or be covered by insurance.<sup>175</sup> Moreover, the attorneys for many of the entities are comparatively unaccustomed to handling the cases and identify rather closely with their clients, for whom they often serve as employees. Furthermore, many lawsuits name local governmental officials, such as police officers or elected officials, individually as defendants and charge them with participating in deliberate wrongdoing, such as racial or gender discrimination.<sup>176</sup> These factors, especially the emotionally and politically charged nature of the assertions that plaintiffs lodge and must prove, increase the likelihood that judges or defendants will invoke Rule 11 and may leave plaintiffs vulnerable to sanctions.<sup>177</sup>

## 2. *Environmental Litigation and Civil Rights Litigation*

### a. *Environmental Litigation*

Certain inherent characteristics of most environmental litigation help to explain why there has been so little Rule 11 activity in the cases. Much environmental law actually or apparently is complex and dynamic, involving substantial, convoluted statutory

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governmental entities filed, see *Hughes v. City of Fort Collins*, 926 F.2d 986 (10th Cir. 1991); *Danese v. City of Roseville*, 757 F. Supp. 827 (E.D. Mich. 1991); *Tutton v. Garland Indep. Sch. Dist.*, 733 F. Supp. 1113 (N.D. Tex. 1990). See generally ROBERT H. FREILICH & RICHARD G. CARLISLE, SECTION 1983: SWORD AND SHIELD (1983) (analyzing state and local liability under civil rights statutes).

175. See ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW §§ 5.3(f), 5.4(d) (1988) (noting that losses caused intentionally by insured not covered by liability insurance); SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION §§ 8.06, 8.12 (Supp. 1990) (discussing immunity defense and intentional misconduct); see also RESTATEMENT (SECOND) OF TORTS §§ 895B, C (1979) (restating law of state and local government immunity); WILLIAM L. PROSSER & W. PAGE KEETON, THE LAW OF TORTS § 131 (5th ed. 1984 & Supp. 1988) (same).

176. See *Kentucky v. Graham*, 473 U.S. 159 (1985) (holding that civil rights plaintiff may not recover attorney's fees from a state if a state employee, individually, is the losing party); *Arnold v. Board of Educ.*, 880 F.2d 305, 308 (11th Cir. 1989) (suing school officials in individual capacities).

177. For recent examples of cases in which courts granted Rule 11 motions filed by state or local governmental entities, see *In re Kunstler*, 914 F.2d 505 (4th Cir. 1990), cert. denied, 111 S. Ct. 1607 (1991); *Cochran v. Ernst & Young*, 758 F. Supp. 1548 (E.D. Mich. 1991); *Gutierrez v. City of Hialeah*, 723 F. Supp. 1494 (S.D. Fla. 1989).

schemes.<sup>178</sup> The legal theories that underlie numerous environmental lawsuits correspondingly seem complicated or nontraditional.

The Supreme Court is partially responsible for these conditions, especially the complicated, rapidly changing appearance of the environmental field. The Court infrequently addresses environmental issues and may not even interpret a major environmental statute during any specific Term.<sup>179</sup> When the Supreme Court considers environmental questions, it may speak in ways that are not dispositive and that leave open the applicability of environmental law in numerous doctrinal areas.<sup>180</sup> The Court's limited treatment of environmental law means that much of the field has been in flux and that the lower federal courts have assumed primary responsibility for developing considerable environmental law, although they have done so inconsistently.<sup>181</sup>

A number of environmental cases, particularly challenges to administrative agency action, predominantly involve legal issues, such as statutory interpretation.<sup>182</sup> Many of the questions impli-

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178. See *supra* notes 33-40 and accompanying text.

179. See, e.g., Vol. 111 S. Ct. (no cases interpreting major environmental statute); Vol. 110 S. Ct. (no cases interpreting Clean Water Act or National Environmental Policy Act); Vol. 108 S. Ct. (only one case interpreting a major environmental statute—the Clean Water Act); cf. RODGERS, *supra* note 82, § 4.6, at 91 (noting that with one or two notable exceptions, Supreme Court members are disinterested in or uninformed about water pollution). The Court's recent willingness to impose hypertechnical procedural requirements on plaintiffs pursuing a public lands case may evince the Court's heightened interest in the underlying substance of environmental law. See *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177 (1990); see also *supra* note 162.

180. See, e.g., *Lujan*, 110 S. Ct. 3177; *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987). See generally *supra* note 121 (stating that the Supreme Court's opinion in *Gwaltney* triggered significant litigation over timing issues under the Clean Water Act).

181. See, e.g., *General Motors Corp. v. United States*, 110 S. Ct. 2528, 2531 & n.1 (1990) (granting certiorari because of disagreement among circuits on Clean Air Act interpretation); *Gee v. Boyd*, 471 U.S. 1058, 1060 (1985) (White, J., dissenting from denial of certiorari) (urging that the Court should grant certiorari because "lower courts have long been in disarray on what standard of review to apply to an agency's decision not to undertake an" environmental impact statement under NEPA); cf. *General Elec. v. Litton Indus. Automation Sys.*, 920 F.2d 1415, 1422 n.10 (8th Cir. 1990) (split in district courts over whether private party can recover attorneys' fees and costs incurred in bringing cost-recovery action under CERCLA, 42 U.S.C. § 9607(a)(4)(B) (1988)), *cert. denied*, 111 S. Ct. 1697 (1991). This inconsistency is not surprising with 12 circuits interpreting complex issues that arise under convoluted statutes and with the Supreme Court unable to resolve all of the inconsistencies. See generally SAMUEL ESTREICHER & JOHN SEXTON, *REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS* 52-59 (1986) (proposing criteria for selecting cases in order to harmonize conflicts among federal circuits).

182. E.g., *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984); *Consumer Fed'n of Am. v. United States Consumer Prod. Safety Comm'n*, 883 F.2d 1073 (D.C. Cir. 1989); *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918 (D.C. Cir. 1989).

cated have not been definitively resolved or at least remain sufficiently unclear that a broad spectrum of legal arguments regarding them will seem plausible. These factors have complicated the efforts of environmental defendants to convince judges that plaintiffs pursued frivolous legal theories or failed to perform reasonable pre-filing legal inquiries and, thus, violated Rule 11.

In some environmental cases, the factual issues are inconsequential or clear—having been documented in an administrative record, an agency's files, or a discharger's pollution reports—while much information necessary to satisfy Rule 11 is easily assembled or is accessible to environmental plaintiffs who can afford to collect and analyze the data. For example, one form of citizen suit which is principally pursued under the Clean Water Act proceeds against regulated interests for violations of permit conditions, is premised on noncompliance reports that the dischargers submit to EPA, and is fairly described as "summary judgment material."<sup>183</sup> In a number of other cases that do involve important, contested facts, information needed to satisfy Rule 11 will be in defendant's exclusive control and can be secured only through discovery.<sup>184</sup>

Moreover, in most environmental litigation, the judiciary has required little fact pleading of plaintiffs, applying the flexible, pragmatic pleading regime that was a keystone of the original 1938 Federal Rules, a regime to which the Supreme Court subscribed in the 1957 case of *Conley v. Gibson*.<sup>185</sup> In numerous

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183. See, e.g., *Student Pub. Interest Research Group, Inc. v. Monsanto Co.*, 721 F. Supp. 604, 608 (D.N.J.), *aff'd mem.*, 870 F.2d 652 (3d Cir.), and *modified on reconsideration*, 727 F. Supp. 876 (D.N.J. 1989); *Student Pub. Interest Research Group, Inc. v. P.D. Oil & Chem. Storage*, 627 F. Supp. 1074, 1090 (D.N.J. 1986); see also Telephone Interview with Attorney Number 22, *supra* note 138.

184. See *supra* notes 31-32 and accompanying text. See generally Tobias, *supra* note 25, at 497-98 (outlining this specific difficulty and basic Rule 11 and evidentiary problems in civil litigation).

185. 355 U.S. 41, 45-46 (1957); cf. *infra* note 195 and accompanying text (listing major categories of cases in which only minimal pleading is required); *Ascon Properties v. Mobil Oil Co.*, 866 F.2d 1149, 1152-56 (9th Cir. 1989) (requiring minimal pleading of plaintiff property owner in CERCLA suit). But see *infra* notes 209-10 and accompanying text (observing that elevated pleading is required in civil rights cases). See generally Marcus, *supra* note 15, at 434-45 (discussing pre- and post-1938 history of pleading); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 983-84 (1987) (same). The Court's recent willingness to impose hyper-technical procedural requirements on plaintiffs pursuing a public lands case may be a sign that the Court would reconsider flexible pleading. See *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177 (1990); cf. *Cash Energy, Inc. v. Weiner*, 768 F. Supp. 892 (D. Mass. 1991) (extending specificity of pleading requirements to CERCLA cases); *Supporters to Oppose Pollution, Inc. v. Heritage Group*, 760 F. Supp. 1338 (N.D. Ind. 1991) (holding that complaint

remaining environmental lawsuits, plaintiffs have comprehensively pled the facts.<sup>186</sup> These considerations have made it difficult for environmental defendants to persuade courts that plaintiffs conducted deficient prefiling investigations into the facts or that their papers were not well-grounded factually and, therefore, contravened the Rule.

Additional intrinsic characteristics of environmental litigation, pertaining both to prefiling legal inquiries and to factual investigations, explain the dearth of Rule 11 activity in the suits. In nearly all environmental cases, there are numerous alternatives to the Rule, such as resolution on the merits, the application of which can be superior.<sup>187</sup> The invocation of these options, particularly if successful, concomitantly complicates and even precludes use of Rule 11.<sup>188</sup> Many environmental lawsuits are so complex, contested, or close that parties have no colorable argument for the Rule's violation.<sup>189</sup>

In much environmental litigation, the character of a plaintiff's accusations, of the remedy sought, of the means of attaining relief and of the judicial role are rather noncontroversial,<sup>190</sup> which can be ascribed partly to the relatively low cost for defendants of implementing the relief and of the litigation itself and to the rather apolitical nature of the cases.<sup>191</sup> For example, suits against

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must include allegations respecting all material elements of all claims asserted; bare legal conclusions attached to narrated facts are insufficient); *Bradley Indus. Park v. Xerox Corp.*, No. 88 Civ. 7574(CSH), 1991 U.S. Dist. LEXIS 1492, at \*31 (S.D.N.Y. Feb. 4, 1991) (declaring it insufficient for notice pleading simply to track statutory language in conclusory fashion); *Cook v. Rockwell Int'l Corp.*, 755 F. Supp. 1468, 1475 (D. Colo. 1991) (same).

186. See *supra* notes 133-34 and accompanying text.

187. See *infra* notes 239-57 and accompanying text.

188. For example, it would be disingenuous for a defendant, who vigorously argued that certain medical questions were so unclear that a physician should be precluded from offering an opinion on them and that a plaintiff must prove a prima facie case as to them before proceeding, to then assert that the issues were so clear that the plaintiff should not have filed papers and thus violated Rule 11. See *infra* notes 242-43, 251 and accompanying text.

189. See, e.g., *supra* notes 178-81, *infra* note 197 and accompanying text (complex, close legally); *infra* note 225 and accompanying text (complex, abstruse factually, legally, and scientifically).

190. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (exemplifying classic treatment of judicial role in public law litigation). See generally Resnik, *supra* note 13 (analyzing new judicial role in case management as a means of controlling increasing caseloads).

191. The costs of implementation are relatively low for government defendants who essentially "pass through" the expense to regulated interests. The United States Treasury absorbs the government's litigation costs. Cf. *infra* notes 222-26 and accompanying text (apolitical nature); *supra* notes 131-32, 162-65 and accompanying text (government as environmental plaintiff and defendant). Government plaintiffs rarely have attempted to recover

the government typically allege that agencies, as institutional bureaucracies, missed statutory deadlines for promulgating pollution control regulations or inadequately enforced existing administrative rules, ask that agencies satisfy their obligations within a certain time, and request that courts place the government on compliance schedules.<sup>192</sup> Because these constituents of environmental disputes are comparatively noncontroversial, defendants have little vested interest in the litigation or concomitant incentive to seek sanctions.

In some environmental actions, time pressures, which are created by the need for temporary relief to prevent imminent environmental injury and by short statutory deadlines for filing suit, can make plaintiffs' pre-filing inquiries or the papers that they submit appear deficient.<sup>193</sup> A few courts have considered this acute lack of time relevant to plaintiffs' compliance with Rule 11.<sup>194</sup>

Certain characteristics examined already and others inhere in significant, specific types of environmental cases. In one important category of litigation involving challenges to considerable agency decisionmaking, such as EPA rulemaking under the Clean Water Act, Congress has expressly provided for plaintiffs to file terse review petitions with the circuit courts.<sup>195</sup> Because Congress has demanded so little of the papers that plaintiffs tender, defendants can hardly require more, and virtually no defendants have sought Rule 11 sanctions from such plaintiffs.<sup>196</sup>

or actually recovered attorneys' fees that they have incurred in environmental litigation. *See, e.g.,* *United States v. M/V Zoe Colocotroni*, 602 F.2d 12, 15 (1st Cir. 1979) (denying attorneys fees to government in oil spill case). Some courts have stated that government plaintiffs can recover attorneys' fees under CERCLA. *See, e.g.,* *United States v. Hardage*, 750 F. Supp. 1460, 1511 (W.D. Okla. 1990); *United States v. Mottolo*, 695 F. Supp. 615, 630-31 (D.N.H. 1988); *United States v. Northernair Plating Co.*, 685 F. Supp. 1410, 1417 (W.D. Mich. 1988), *aff'd sub nom. United States v. R.W. Meyer, Inc.*, 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1527 (1990). *But cf. supra* note 161 (Executive Order instructing government counsel to seek sanctions when proper).

192. *See, e.g., supra* note 183 and accompanying text; *supra* notes 120, 150.

193. *See, e.g.,* *Maine Audubon Soc'y v. Purslow*, 907 F.2d 265 (1st Cir. 1990) (involving threat of imminent injury); *see also supra* notes 60-63, 80-81 and accompanying text.

194. *See, e.g., Purslow*, 907 F.2d at 268-69; *see also supra* note 61.

195. Clean Water Act, 33 U.S.C. § 1369(b)(1) (1988); *accord* Clean Air Act, 42 U.S.C. § 7607(b)(1) (1988). *See generally* 1 FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 1.05[2][c] (1990) (describing statutory review of administrative agency actions); 16 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 3940-44 (1977 & Supp. 1991) (discussing administrative review proceedings in a wide range of cases).

196. *See supra* note 116 and accompanying text.

A second major classification consists of citizen suits alleging that the government failed to comply with a clear, mandatory duty, or a debatable responsibility, that Congress imposed in environmental legislation.<sup>197</sup> The obligations, which plaintiffs at least can contend are arguable under the statutes, frustrate attempts of defense counsel to show that the papers that plaintiffs filed lacked legal or factual support or were not preceded by adequate inquiries.

Even in the particular categories of environmental cases that are more controversial, some intrinsic characteristics help to explain why there have been more threats to invoke Rule 11 than have materialized into formal action. First, in the group of Clean Water Act citizen suits whose resolution is less clear than those described earlier,<sup>198</sup> parties and attorneys have employed the Rule primarily for tactical, not substantive, purposes.<sup>199</sup>

Second, many CERCLA cases settle, which means that most Rule 11 activity "washes out."<sup>200</sup> In a number of CERCLA actions that do not settle, the minimal nature of certain jurisdictional requisites—particularly the requirements for making potentially responsible parties (PRPs) of entities that were not initially implicated in creating or disposing of hazardous wastes—has severely limited Rule 11's formal use.<sup>201</sup>

Third, in much toxic tort litigation, several characteristics of pleading practice may have restricted reliance on Rule 11. The quantity of legal, technical, and scientific material that many plaintiffs secure before filing and their tendency to plead comprehensive factual allegations and traditional legal theories out of concern about Rule 11 mean that plaintiffs' prefiling inquiries and papers will appear to comply with the provision.<sup>202</sup> The "boilerplate denials, lack of substantive information and laundry list of defenses" that counsel for defendants include in answers

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197. The classic example is agency failure to comply with a congressionally imposed deadline for issuing regulations. See *supra* note 150; *supra* text following note 191; cf. *supra* note 183 and accompanying text (another form of straightforward citizen suit).

198. See *supra* note 183 and accompanying text (describing such citizen suits); *supra* notes 116-22 (discussing suits whose disposition is less clear).

199. See *supra* notes 117-19 and accompanying text.

200. See *supra* note 114 and accompanying text.

201. "If the government can make people PRPs on the basis of almost nothing, it is hard to" impose more rigorous requirements on other litigants. Telephone Interview with Attorney Number 17, *supra* note 106.

202. See *supra* notes 131-46 and accompanying text.

probably have made them reluctant to invoke Rule 11, lest their opponents pursue counter-motions.<sup>203</sup>

In the specific classes of actions treated and in much additional environmental litigation, when plaintiffs file suit, the infractions of the defendants are clear, a circumstance that is partly attributable to the care with which many plaintiffs select cases, conduct pre-filing inquiries, and draft papers. These and numerous other considerations above mean that relatively few environmental actions will seem frivolous and that the suits comprise a small percentage of the federal docket, so that the cases apparently contribute minimally to the perceived litigation explosion. Thus, insofar as Rule 11 has been employed as a mechanism for combatting that explosion, courts have had little need to invoke the provision in environmental suits. All of these factors seem responsible for the dearth of Rule 11 activity in environmental litigation.<sup>204</sup>

#### *b. Civil Rights Litigation Contrasted*

In contrast, some inherent characteristics of civil rights litigation may explain why so much Rule 11 activity has arisen in these lawsuits. The cases often assert unpopular or novel legal theories that are premised on complex, vague statutes or on open-ended constitutional terms, such as "due process" and "equal protection."<sup>205</sup>

The Supreme Court has treated substantive civil rights law in ways that appear definitive and that narrow its applicability in

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203. Telephone Interview with Attorney Number 21, *supra* note 132; see also PRELIMINARY DRAFT, *supra* note 2, at 2 (setting forth proposed Rule 11(b), which expressly subjects defendants' papers to Rule's requirements).

204. The absence of these inherent characteristics may help to explain the rather high incidence of Rule 11 activity in types of cases not defined as "environmental litigation" in this Article and, thus, lend support to the ideas here. For example, in litigation between companies and insurers involving the disposal and cleanup of toxic materials, the unclear, controversial, sharply contested character of the allegations asserted, the substantial amount of money at stake, and the great expense of litigating the cases may explain the elevated level of sanctions motions filed. Compare these ideas with those *supra* note 191 and accompanying text. See generally *supra* notes 21-24 and accompanying text (defining "environmental litigation").

Even in litigation involving private defendants, some considerations similar to those in the remainder of this subsection apply. For example, plaintiffs' allegations usually are lodged against corporations as institutions, and plaintiffs ask judges to place defendants on compliance schedules. Different considerations, however, do obtain in a number of suits. See, e.g., *Student Pub. Interest Research Group, Inc. v. Powell Duffryn Terminals*, 913 F.2d 64, 80 (3d Cir. 1990) (finding \$4,205,000 penalty could be appropriate for Clean Water Act violation), *cert. denied*, 111 S. Ct. 1018 (1991).

205. See *BURBANK*, *supra* note 10, at 68-72.

many doctrinal areas.<sup>206</sup> This evolution in the civil rights field probably has led numerous appellate and district judges to consider much of the law as clear or static.<sup>207</sup> These factors have made it relatively easy for civil rights defendants to persuade courts that plaintiffs were pursuing frivolous legal theories or had not conducted reasonable prefiling legal inquiries and had, therefore, contravened Rule 11.

In many civil rights lawsuits, the factual issues are very important or sharply contested, while much information necessary to satisfy Rule 11 is difficult to secure or is in the minds or files of defendants and, thus, is available only upon discovery. Even when data needed for Rule 11 compliance are more accessible, the material may be expensive to gather and evaluate. A number of civil rights cases "test the limits" factually, involve information that is not documented in writing, and can unravel factually.<sup>208</sup>

These difficulties are compounded by the rigorous pleading regime that every circuit has now instituted for civil rights litigation.<sup>209</sup> The requirement that plaintiffs plead with specificity demands more of the complaints that litigants file and, thus, can make plaintiffs' pleadings and their prefiling inquiries seem in-

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206. Many Supreme Court rulings of the 1988 Term involving substance, procedure, and litigation financing epitomize these developments. *See, e.g.*, *Martin v. Wilks*, 490 U.S. 755 (1989) (allowing challenge by white firefighters to hiring and promotion practices designed to integrate force); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (requiring plaintiffs to show direct link between statistical evidence and job discrimination claims before suit can proceed on remand). Congress modified most of these rulings with the Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 105, 108, 138 Lab. Rel. Rep. (BNA) 5-8 to 5-9 (1991). *See also infra* note 209 and accompanying text (demonstrating that all federal circuits now impose stringent pleading requirements on civil rights plaintiffs). *See generally* Steven R. Greenberger, *Civil Rights and the Politics of Statutory Interpretation*, 62 U. COLO. L. REV. 37 (1991) (arguing that the Court constricts legislative intent in its civil rights holdings); Cassandra Butts et al., Comment, *Reconstruction, Deconstruction and Legislative Response: The 1988 Supreme Court Term and the Civil Rights Act of 1990*, 25 HARV. C.R.-C.L. L. REV. 475 (1990) (criticizing the Court for restricting the ability to pursue civil rights suits); *supra* note 158 and accompanying text (stating that the Court made it more difficult for civil rights lawyers to recover attorneys' fees).

207. Courts so treat civil rights law, although it arguably resembles environmental law in many respects. *See infra* note 219 and accompanying text.

208. *See, e.g.*, Tobias, *supra* note 25, at 495-98; *see also infra* note 219.

209. *See* *Hobson v. Wilson*, 737 F.2d 1, 29-31 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *accord* *Elliott v. Perez*, 751 F.2d 1472, 1479-81 (5th Cir. 1985). A more recent example is *Arnold v. Board of Education*, 880 F.2d 305, 309-10 (11th Cir. 1989) (holding that Rule 8 is applied more strictly in § 1983 cases). *See generally* *Cash Energy, Inc. v. Weiner*, 768 F. Supp. 892 (D. Mass. 1991) (extending specific pleading requirements to CERCLA cases); Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935 (1990) (arguing that a rigorous standard of pleading in civil rights actions is unnecessary and unjustifiable).

adequate.<sup>210</sup> These considerations have simplified the efforts of civil rights defendants to show that plaintiffs submitted papers that were not well grounded in fact or failed to undertake reasonable factual investigations before filing and, therefore, violated the Rule.

Other intrinsic characteristics of civil rights lawsuits that pertain to prefiling legal inquiries and factual investigations may explain the high level of Rule 11 activity in those cases. Civil rights litigation is a capacious category of suits which spans a broad spectrum.<sup>211</sup> The litigation includes cases of individuals who pursue monetary damages for workplace discrimination and class action suits with thousands of parties and hundreds of issues that seek fundamental reform of massive bureaucracies, such as schools and prisons.<sup>212</sup>

Correspondingly, some actions denominated civil rights cases are only nominally civil rights suits or should not even be so classified, because counsel who file them merely append a civil rights count to a claim that essentially involves another substantive area.<sup>213</sup> These civil rights counts can seem less well considered, while characterization of the cases as civil rights actions may have artificially inflated the number of civil rights lawsuits in which Rule 11 activity has occurred.<sup>214</sup>

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210. The rigorous pleading regime, thus, twice disadvantages civil rights plaintiffs. It complicates their efforts to reach the merits and makes them more vulnerable to Rule 11 sanctions. See generally Tobias, *supra* note 13, at 304-08.

211. See BURBANK, *supra* note 10, at 69-70; CALL FOR COMMENTS, *supra* note 1, 131 F.R.D. at 345.

212. See Tobias, *supra* note 13, at 279-82 (giving case examples and discussing the litigation); see also Blaze, *supra* note 209, at 936-40 (analyzing litigation, especially as part of federal docket); cf. FINAL REPORT, *supra* note 3, § 1C, at 2 (reporting that civil rights cases represented approximately 10% of civil docket on average in five districts surveyed).

213. See Marcus, *supra* note 15, at 463. Indeed, even environmental plaintiffs pled civil rights counts, especially prior to the advent of the major regulatory statutes. See, e.g., Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 19-20 (1981); Garcia v. Cecos Int'l Inc., 761 F.2d 76, 82-83 (1st Cir. 1985). See generally YANNACONE ET AL., *supra* note 80, § 6:4.

214. At the Rule 11 public hearing held during February, 1991, several members of the Advisory Committee were concerned about the amount of Rule 11 activity in civil rights cases and asked the Federal Judicial Center to refine its recently collected data on the cases. Telephone Interview with Thomas Willging, Deputy Research Director, Federal Judicial Center (Feb. 26, 1991). Analysis of the case files for all civil rights actions in which courts imposed sanctions in the five pertinent districts showed that plaintiffs' Rule 11 violations consisted principally of deficient prefiling legal inquiries, occasionally of inadequate factual investigations, but rarely of papers filed for improper purposes. Moreover, judges sanctioned few represented plaintiffs over the relevant three year period. Few of the cases presented good faith arguments for change in the law or were the "*Brown v. Board of Education* or *Gideon v. Wainwright* of the nineties." Thomas Willging, Statement at Advisory Comm. Meeting, Washington, D.C. (May 23, 1991).

In much civil rights litigation, the nature of the allegations asserted, of the relief requested, of the means of achieving it, and of the court's role are extremely controversial. These effects are partially attributable to the comparative expense of the litigation and of effectuating the relief as well as the litigation's relatively political character. For example, in school desegregation cases, plaintiffs may accuse the local school board of racial discrimination, ask the judge to enter a structural decree ending segregation, and request that the court adopt a busing plan that crosses the boundaries of several localities and that requires active judicial oversight of the educational system for many years.<sup>215</sup>

Other forms of civil rights litigation can be even more highly charged. In employment discrimination cases, plaintiffs may claim that specific managerial personnel discriminated on the basis of race, age, or gender when hiring and promoting employees and may ask that affirmative action measures be instituted to rectify the alleged discrimination.<sup>216</sup> In many civil rights actions, the lack of a paper record, the complex, subtle, and subjective nature of discrimination, and the difficulty of proving bias mean that the suits devolve into swearing matches between plaintiffs who passionately assert that they suffered discrimination and defendants who fervently deny any bias.

Civil rights cases may be the most emotional category of federal civil lawsuit. The actions also can implicate political issues that much environmental litigation simply does not. For example, the accusation that an individual discriminated on the basis of race or gender exposes the raw nerves of society in ways that charging a company with air pollution cannot.<sup>217</sup> Many civil rights

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215. See, e.g., *Board of Educ. v. Dowell*, 111 S. Ct. 630 (1991); *Missouri v. Jenkins*, 495 U.S. 33 (1990). See generally BERNARD SCHWARTZ, SWANN'S WAY: THE SCHOOL BUSING CASE AND THE SUPREME COURT (1986) (discussing the evolution of school desegregation cases during the years of the Warren and Burger Courts).

216. See, e.g., *Martin v. Wilks*, 490 U.S. 755 (1989); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984). For a sense of the controversial nature of the relief sought in such litigation, which can last for decades and involve many classes of litigants, see *United States v. Yonkers Board of Education*, 927 F.2d 85 (2d Cir.), cert. denied, 112 S. Ct. 70 (1991) and *United States v. City of Chicago*, 897 F.2d 243 (7th Cir. 1990). The costs of litigation and implementing relief can be substantial.

217. This idea remains true even though advocates of vigorous civil rights enforcement have sustained some recent setbacks in the area of doctrinal civil rights law. See *supra* note 206 and accompanying text. See generally KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY (1988) (describing the emotion-filled personal civil rights encounters of the author's interviewees and difficulties discrimination victims encounter in vindicating civil rights); *Putting Civil Rights on Automatic Pilot*, WASH. POST NAT'L WKLY EDITION, Mar. 25-31, 1991, at 14.

disputes are bitterly fought contests over matters of principle in which plaintiffs seek to press the extremes of law, fact, or policy; to challenge entrenched political or economic interests; or to rectify intractable social problems through unpopular or untested means.

The role of the judge in civil rights cases can be quite controversial. Plaintiffs may request that the court expansively interpret the open-textured provisions of the Constitution, divine congressional intent from terse or ambiguous statutory phraseology, intercede in the political decisionmaking of local elected officials, or even order such officers to spend funds or face contempt.<sup>218</sup>

Certain of these factors, such as the substantial emotional stakes and the strong motivations for invoking Rule 11, increase the likelihood that judges and defendants will employ Rule 11 in civil rights litigation. Most of the factors can make the prefilings legal and factual inquiries that plaintiffs perform and the papers that they submit look deficient, thereby enhancing the plaintiffs' susceptibility to sanctions.

Despite the discrepancies between Rule 11 activity in environmental cases and in civil rights actions, the similarities between these two types of actions are striking. For example, in both kinds of litigation, plaintiffs plead novel legal theories, premise their suits on complex, unclear statutes, litigate in areas of law that are complicated and fast-changing, raise delicate questions of federalism and judicial authority, lack access to facts important for Rule 11 compliance, and experience time pressures in conducting prefilings inquiries. Despite these commonalities, courts seem to attach different, and often diametrically opposed, significance to analogous conditions in the cases. For instance, judges apparently consider similar, nontraditional legal theories creative when asserted in environmental suits but frivolous when alleged in civil rights actions.<sup>219</sup>

### 3. *The Federal Judiciary's Perceptions*

The federal judiciary's apparently positive perceptions of, and solicitude for, environmental lawyers, litigants, and cases also

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218. See, e.g., *Jenkins*, 495 U.S. 33; *Spallone v. United States*, 493 U.S. 625 (1990).

219. See *supra* notes 30-37, 179-82, 208-09 and accompanying text. Some judges, in applying Rule 11, recently have recognized certain difficulties that civil rights plaintiffs confront. See, e.g., *Hughes v. City of Fort Collins*, 926 F.2d 986, 989-90 (10th Cir. 1991); *Mareno v. Rowe*, 910 F.2d 1043, 1046-47 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991); *Kraemer v. Grant County*, 892 F.2d 686, 690 (7th Cir. 1990).

seem important to the paucity of Rule 11 activity in environmental suits.<sup>220</sup> For example, many judges appear to believe that numerous attorneys who represent environmental plaintiffs possess substantial expertise, and the judges often have cordial, continuing relations with the lawyers and their clients.<sup>221</sup> A number of judges may be receptive to the individuals whom environmental plaintiffs purportedly represent, to the substantive interests that they attempt to vindicate, to the means of accomplishing the objectives that the plaintiffs seek, and to the ends themselves.

Many judges seem to consider environmental actions as socially significant but view them differently from other cases that implicate social welfare or "social regulation," namely civil rights lawsuits.<sup>222</sup> These perceptual distinctions may be ascribed to quite a few factors, such as the disparate nature of the allegations asserted in, and the legal theories that underlie, the litigation. The claim that an agency violated a regulation or even that a corporation harmed an endangered species is simply less incriminating and discomfiting to judges than the accusation that an individual was convicted because of the person's race or religion. Correspondingly, numerous courts seem more responsive to cases that are grounded in clear statutory mandates than to those that require judicial construction of the general provisions in the Constitution.<sup>223</sup>

Moreover, comparatively few judges will be indifferent to the charges of environmental degradation that are brought in many environmental actions, especially disputes that involve a local resource, such as an airshed or a river. A judge who lives in the community<sup>224</sup> breathes the very air or drinks the same water and thus could be exposed to pollution but may never experience discrimination.

Furthermore, a number of judges apparently consider many environmental cases to be complicated, find daunting the abstruse

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220. What is said in this subsection cannot be proved, because it speaks to perceptions of judges. I rely upon what judges state in their opinions and what lawyers who practice environmental law have said about judges, although neither source is totally reliable.

221. See *supra* notes 130, 147-52 and accompanying text.

222. "President Bush, who claims to be the environmental President," did appoint some of the judges. Telephone Interview with Attorney Number 15, *supra* note 106; cf. William Lilley III & James C. Miller III, *The New "Social Regulation"*, 47 PUB. INTEREST 49 (1977) (discussing social legislation of which environmental statutes are a quintessential example).

223. See, e.g., *Missouri v. Jenkins*, 495 U.S. 33 (1990).

224. See 28 U.S.C. § 134(b) (1988) (requiring each district judge, except those in the District of Columbia, to reside in the district or districts for which he or she is appointed).

factual, legal, scientific, and policy issues embedded in some suits, and experience tremendous difficulty handling certain complex aspects of the litigation.<sup>225</sup> If courts encounter such a multitude of problems resolving the cases, they could well be reluctant to hold that attorneys and parties who pursue the actions contravened Rule 11.<sup>226</sup>

Although the propositions above cannot be proved, most of the ideas may be illustrated by contrasting them with many judges' rather negative view of, and unresponsiveness to, civil rights lawyers, plaintiffs, and litigation. One compelling indication is the dramatic statistical disparity between Rule 11 activity in civil rights cases and environmental suits. The federal judiciary has issued approximately forty times as many published Rule 11 opinions in civil rights actions as in environmental cases.<sup>227</sup> Another telling sign is that civil rights plaintiffs are more than twice as likely as other litigants to be sanctioned under Rule 11 in a number of federal districts.<sup>228</sup>

An unfavorable judicial perception of, or lack of solicitude for, civil rights attorneys may be evidenced by recent determinations that three of the country's highest profile civil rights lawyers—Julius Chambers, William Kunstler, and Ramsey Clark—violated Rule 11 in unrelated, controversial civil rights cases.<sup>229</sup> Certain judges apparently think that some members of the civil rights bar lack substantive experience, and the judges may have mediocre or strained relations with the attorneys and none with their clients.<sup>230</sup>

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225. See *supra* notes 31-39 and accompanying text.

226. Telephone Interview with Attorney Number 15, *supra* note 106.

227. Approximately 500 civil rights cases and 14 environmental cases involving Rule 11 have been published. See *supra* notes 10, 26 and accompanying text. Civil rights plaintiffs also are sanctioned at a higher rate than environmental plaintiffs. Compare Vairo, *supra* note 3, at 200-01 with *supra* notes 26-27 and accompanying text and *infra* note 228 and accompanying text.

228. Data collected from five federal district courts with computerized docket data indicate that civil rights plaintiffs on the average are 2.6 times as likely to be sanctioned as other litigants. See FINAL REPORT, *supra* note 3, § 1C, at 3.

229. See *Blue v. United States Dep't of the Army*, 914 F.2d 525 (4th Cir. 1990) (affirming lower court determination that Chambers violated Rule 11), *cert. denied*, 111 S. Ct. 1580 (1991); *In re Kunstler*, 914 F.2d 505 (4th Cir. 1990) (affirming lower court determination that Kunstler violated Rule 11), *cert. denied*, 111 S. Ct. 1607 (1991); *Saltany v. Reagan*, 886 F.2d 438 (D.C. Cir. 1989) (reversing lower court determination that Clark had not violated Rule 11), *cert. denied*, 110 S. Ct. 2172 (1990). See generally Ruth Marcus, *Rule 11: Does It Curb Frivolous Lawsuits or Civil Rights Claims?*, WASH. POST, Apr. 12, 1991, at A17 (discussing the *Chambers* and *Kunstler* cases).

230. See *supra* notes 153-58 and accompanying text.

A number of judges have been relatively unreceptive to many civil rights cases.<sup>231</sup> Several members of the Supreme Court, which has recently narrowed much civil rights law, and numerous lower federal court judges appear to believe that civil rights actions as a category are more frivolous than other civil cases, including environmental litigation.<sup>232</sup> All of the circuits have now relied partially on the notion that civil rights suits are less meritorious to demand that civil rights plaintiffs plead with particularity under Rule 8, although the provision's terms impose no such requirement<sup>233</sup> and neither empirical data nor judicial authority supports more stringent pleading.<sup>234</sup> The judicial perception that civil rights actions are comparatively frivolous in conjunction with their constituting a significant percentage of the federal docket<sup>235</sup> could lead courts to associate the cases with the litigation explosion, a major focus of Rule 11's 1983 amendment.

Some judges have seemed indifferent to civil rights lawsuits, while a few have exhibited hostility toward the actions.<sup>236</sup> Indeed, the apparent insensitivity to civil rights of a recent district court judge nominated to the Eleventh Circuit led him to be the first Bush Administration nominee whom the Senate has rejected.<sup>237</sup>

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231. One example is pro se prisoner suits under 42 U.S.C. § 1983 (1988).

232. See *supra* note 206 and accompanying text.

233. See FED. R. CIV. P. 8; *Jones v. Community Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984); *supra* note 209 and accompanying text. A few judges have expressly stated that civil rights cases are more frivolous. See, e.g., *Rotolo v. Borough of Charleroi*, 532 F.2d 920, 922 (3d Cir. 1976).

The Advisory Committee expressly required more stringent pleading only of plaintiffs who allege fraud under Rule 9. See FED. R. CIV. P. 9(b). See generally Tobias, *supra* note 13, at 299 (discussing heightened pleading requirements).

234. See *Elliott v. Perez*, 751 F.2d 1472, 1483 (5th Cir. 1985) (Higginbotham, J., concurring) (discussing lack of authority); *Rotolo*, 532 F.2d at 927 (Gibbons, J., concurring in part and dissenting in part) (discussing lack of data). Numerous courts may find that Rule 11 affords a convenient way to discourage the pursuit of cases that judges already believed were disproportionately frivolous, which may reflect their substantial concern about the litigation explosion.

235. See *supra* notes 211-12 and accompanying text.

236. See, e.g., *United States v. City of Chicago*, 897 F.2d 243, 244 (7th Cir. 1990); *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1083-85 (7th Cir. 1987), cert. dismissed, 485 U.S. 901 (1988).

237. See Neil A. Lewis, *Bush Picking the Kind of Judges Reagan Favored*, N.Y. TIMES, Apr. 10, 1990, at A1 (describing example of apparent insensitivity); *Topics of the Times; Judge Ryskamp's Own Words*, N.Y. TIMES, Apr. 14, 1991, § 4, at 18 (discussing apparent insensitivity and rejection).

The concepts in the text may also be demonstrated by the federal judiciary's growing reluctance to enter certain forms of relief, such as structural decrees, that civil rights plaintiffs frequently seek. Courts seem to find increasingly controversial the means for

The factors examined mean that judges are rather likely to raise Rule 11 *sua sponte* and to grant defendants' sanctions motions in civil rights cases. Insofar as courts have formulated negative impressions of civil rights plaintiffs, attorneys, and litigation, the judges may not appreciate or consider certain pertinent factors. These include most importantly the resource deficiencies that plague many of the plaintiffs and lawyers, the cutting-edge nature of much civil rights litigation, and express congressional intent that the judiciary facilitate the plaintiffs' vindication of fundamental civil rights.<sup>238</sup>

#### 4. *Alternatives to Rule 11*

The wide range and relative efficacy of alternatives to Rule 11 that judges and environmental litigants have invoked could explain the dearth of Rule 11 activity in environmental cases. Of course, in much environmental litigation, disposition on the merits may be preferable. As a lawyer who pursues toxic tort actions cogently observed, the "goal of attorneys for plaintiffs is to get to the end of the case rather than fight peripheral battles," which are exemplified by satellite litigation involving Rule 11.<sup>239</sup>

Many courts apparently have considered the substantive resolution of disputes to be the best approach. A number of judges have relied on numerous substitutes for Rule 11 that are as

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effecting the relief, the judicial role that implementation necessitates, and the thorny questions of federalism and deference to the political branches that can be implicated. For helpful treatment of these issues, see DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977); Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1 (1984); Owen M. Fiss, *The Supreme Court, 1978 Term-Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978).

238. Congressional intent is expressed in substantive, procedural, and fee-shifting legislation. See, e.g., Civil Rights Act of 1964, 28 U.S.C. § 1447 (1988); Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1988). The Supreme Court also has recognized that civil rights suits are essential to liberty. See, e.g., *Bounds v. Smith*, 430 U.S. 817, 828 (1977); *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968) (per curiam).

Individual judges' perceptions of Rule 11, as a valuable or worthless tool, for example, may be important in specific cases. Those perceptions, however, seem to have limited explanatory power, especially when the federal judiciary has been so willing to apply Rule 11 in civil rights cases and so reluctant to apply it in environmental cases. Cf. FINAL REPORT, *supra* note 3, § 1A, at 1 (80% of district judges favor retaining Rule 11 in present form, but a like number believe litigation abuse is minor problem).

239. Telephone Interview with Attorney Number 21, *supra* note 132; cf. *supra* note 168 and accompanying text (noting desire of defense counsel in large firms to resolve litigation on merits). But cf. *infra* notes 241-46 and accompanying text (describing defense techniques that do not lead directly to resolution on merits).

effective as the Rule. These substitutes include vigorous case management (especially under Rule 16's requirements governing pretrial conferences), civil contempt, the federal provision holding attorneys liable for excessive costs,<sup>240</sup> and state bar ethics restrictions.<sup>241</sup>

Many environmental litigants, principally defendants, have asked that judges employ most of these measures and certain others in lieu of Rule 11. One favored technique, which defense counsel increasingly encourage federal courts to apply, is the *Lone Pine* doctrine, named for the case in which a New Jersey state trial judge originally articulated the concept.<sup>242</sup> Lawyers for defendants essentially seize on any perceived vulnerability in a plaintiff's case, typically involving causal links or unsettled scientific questions, and request that the court discontinue discovery in the litigation until the plaintiff makes a prima facie showing on the disputed point.<sup>243</sup>

Defendants in environmental actions have employed several other mechanisms that can fairly be characterized as countersuits and that are intended primarily to discourage the vigorous pursuit of environmental cases. The most notorious, and widely used, alternative is Strategic Litigation Against Public Participation (SLAPP) suits.<sup>244</sup> These cases seek substantial damages from environmental plaintiffs for commencing or participating in ad-

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240. 28 U.S.C. § 1927 (1988).

241. See, e.g., *Northside Sanitary Landfill v. City of Indianapolis*, 902 F.2d 521, 523 (7th Cir. 1990) (applying 28 U.S.C. § 1927); *Polger v. Republic Nat'l Bank*, 709 F. Supp. 204, 212 n.1 (D. Colo. 1989) (same); *Can Am Indus. v. Firestone Tire & Rubber Co.*, 631 F. Supp. 1180, 1188 (C.D. Ill. 1986) (applying 28 U.S.C. § 1927 and Rule 65). See generally Carl Tobias, *Judicial Discretion and the 1983 Amendments to the Federal Civil Rules*, 43 RUTGERS L. REV. 933, 944-46, 948-50 (1991) (discussing use of Rule 16, inherent judicial authority, and informal threats as Rule 11 substitutes); Vairo, *supra* note 3, at 233 (arguing for use of § 1927 and other informal means).

242. *Lore v. Lone Pine Corp.*, No. L 33606-85 (N.J. Super. Ct. Law Div. Nov. 18, 1986) (LEXIS, States library, NJ file).

243. Telephone Interviews with Attorneys Number 15, *supra* note 106 and Number 21, *supra* note 132.

244. See, e.g., *Oregon Natural Resources Council v. Mohla*, 944 F.2d 531 (9th Cir. 1991). For descriptions of the suits, see Joseph Brecher, *The Public Interest and Intimidation Suits: A New Approach*, 28 SANTA CLARA L. REV. 105 (1988); Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 LAW & SOC'Y REV. 385 (1988); Eve Pell, *SLAPPed Silly*, CAL. LAW., Feb. 1990, at 24. Professor George Pring, who received a National Science Foundation grant to study SLAPP suits, observed that they have been employed in "hundreds of the cases, only ten percent of which have been reported"; that environmental defendants prefer the suits to Rule 11 because they threaten plaintiffs with greater exposure to liability; and that the litigation typically is brought by local or regional entities. Telephone Interview with Professor George Pring, Denver University College of Law (Mar. 19, 1991).

ministrative proceedings or courtroom litigation.<sup>245</sup> A second attorney involved in many toxic tort actions stated that SLAPP suits "scare victims who have been exposed to toxic materials to death" and that his "clients are absolutely freaked out by the cases."<sup>246</sup> Litigation under the Racketeering Influenced and Corrupt Organizations Act (RICO) is another form of countersuit to which defense counsel resort, though less frequently.<sup>247</sup>

Numerous reasons justify courts', lawyers', and parties' reliance on alternatives to Rule 11. Judges and plaintiffs may have preferred certain options, such as merits-disposition and vigorous case management, because the alternatives achieve Rule 11's primary purpose of deterring litigation abuse as effectively as the Rule while minimizing the Rule's principal disadvantages—limiting federal court access, chilling legitimate lawsuits, eroding civility among judges, attorneys and parties, and spawning satellite litigation.<sup>248</sup> Public interest litigants apparently appreciate that Rule 11 as written intrinsically favors defendants and, thus, is rather ineffective. For example, the limited time that the Federal Rules afford defendants to file answers makes those responses less vulnerable to sanctions motions.<sup>249</sup>

Some environmental defendants and defense counsel may have different perspectives on Rule 11's purposes and diverse views of efficacy as it relates to the invocation of alternatives. For instance, Rule 11's compensatory objective may appear significant to a defendant who has incurred substantial costs in successfully resisting charges that it damaged the air or water and wishes to recover those expenses.

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245. See Canan & Pring, *supra* note 244; Pell, *supra* note 244; Telephone Interview with Professor George Pring, *supra* note 244.

246. Telephone Interview with Attorney Number 15, *supra* note 106.

247. An asbestos manufacturer pursued the leading case against tire workers who allegedly were injured by exposure to asbestos and who had settled their claims with the manufacturer. See *Raymark Indus. v. Stemple*, 714 F. Supp. 460, 468-76 (D. Kan. 1988); see also *In re Tire Workers Asbestos Litig.*, 125 F.R.D. 617 (E.D. Pa. 1989) (discussing charges of fraud against tire workers). See generally Al Buchanan, Note, *Evolving RICO Issues for the Environmental/Natural Resources Practitioner*, 6 J. MIN. L. & POL'Y 185 (1990-91) (discussing the application of RICO to environmental cases).

248. See *supra* notes 161-65, 239-41 and accompanying text; cf. *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2454 (1990) (discussing Rule 11's purposes and disadvantages); William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013 (1988) (same).

249. See FED. R. CIV. P. 12(a) (defendants generally have 20 days to answer); see also PRELIMINARY DRAFT, *supra* note 2, at 2 (setting forth proposed Rule 11(b), which expressly subjects defendants' papers to Rule's requirements).

Correspondingly, defense counsel who want to limit similar costs from the outset of litigation primarily by restricting an action's scope will consider the *Lone Pine* doctrine<sup>250</sup> more effective than Rule 11. *Lone Pine* motions can reduce defendants' expenditures, particularly on discovery, by suspending much pre-trial activity in suits and immersing them in complex medical and scientific questions, while requiring that plaintiffs spend large sums to have expert witnesses conduct complicated analytical research and encouraging the litigants to settle.<sup>251</sup> An important incentive for defendants to exercise this and other options is that they deflect attention from the substance of environmental disputes, thereby permitting defendants to evade responsibility for pollution.

SLAPP suits afford another telling example. The principal reason why many environmental defendants pursue these actions is to expose environmental plaintiffs to "liability which is orders of magnitude larger than Rule 11" and defendants, therefore, substantially increase the potential for chilling the plaintiffs and for restricting federal court access.<sup>252</sup>

Several theories explain why the appeal of, and reliance on, SLAPP suits and other alternatives have increased since Rule 11's amendment in 1983. Defense counsel had little initial success either in persuading courts that plaintiffs had contravened the provision or in convincing judges to impose substantial sanctions on plaintiffs found in violation.<sup>253</sup> This refusal to award large assessments and judicial recognition that deterrence, not compensation, is the Rule's primary purpose rendered it ineffective as a mechanism for recouping litigation expenses and for discouraging environmental litigation.<sup>254</sup>

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250. See *supra* notes 242-43 and accompanying text.

251. See Telephone Interviews with Attorneys Number 15, *supra* note 106; Number 21, *supra* note 132; cf. *supra* note 188 (arguing that such tactics may preclude the use of Rule 11).

252. Telephone Interview with Attorney Number 15, *supra* note 106; accord Telephone Interview with Professor George Pring, *supra* note 244.

253. See *supra* notes 31-57 and accompanying text; Telephone Interview with Attorney Number 15, *supra* note 106 ("jurisprudence of Rule 11 in environmental cases" never developed because initial lack of success discouraged defense counsel who resorted to other mechanisms); Telephone Interview with Attorney Number 23 (Apr. 11, 1991) (same).

254. None of the attorneys for public interest litigants whom I interviewed believed that Rule 11 discouraged their organizations from litigating. Cf. *supra* note 246 and accompanying text (indicating that SLAPPs discourage individuals who consider pursuing toxic tort litigation); see also *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2454 (1990) (providing

Related peculiarities of litigation financing also explain why environmental litigants have invoked alternatives to Rule 11. Public interest litigants can secure attorneys' fees under most environmental statutes when they prevail and thus have little reason to employ the Rule for compensatory objectives.<sup>255</sup> Governmental plaintiffs and defendants may be relatively unconcerned about recovering litigation costs,<sup>256</sup> while some private defendants may prefer absorbing those expenses to running the risks entailed in seeking to recoup them from plaintiffs.<sup>257</sup>

## B. Lessons

### 1. Rule 11's Advantages and Disadvantages

This analysis of Rule 11 activity in environmental lawsuits supports tentative assessments of the benefits and disadvantages of the provision's implementation. Rule 11 may encourage certain environmental plaintiffs and their counsel to "stop and think" before filing court papers. The Rule, therefore, could limit somewhat the quantity of frivolous papers submitted and the amount of litigation abuse in environmental cases.<sup>258</sup> Both amounts apparently had been small, however, when Rule 11 was amended in 1983, and the subsequent dearth may be attributable to factors already examined, such as the incentives that motivate environmental plaintiffs to conduct prefiling inquiries and to file papers that seem to satisfy the Rule.<sup>259</sup>

The relative lack of Rule 11 activity in environmental litigation and courts' reluctance to sanction, and solicitude for, environmental plaintiffs and lawyers suggest that the Rule has not chilled

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judicial recognition that deterrence, not compensation, is Rule 11's primary purpose); *supra* notes 47-53 and accompanying text (discussing courts' refusal to award large sanctions against environmental plaintiffs). See generally *supra* notes 171-72 and accompanying text (discussing abuse of discretion standard for Rule 11 decisions).

255. See *supra* notes 82, 144 and accompanying text; cf. *supra* note 248 and accompanying text (noting that plaintiffs may be loath to invoke Rule 11 because of its potential to limit federal court access and to chill legitimate litigation).

256. See *supra* note 191.

257. See *supra* notes 166-72 and accompanying text; *supra* note 204.

258. I am not implying that the quantity of either has been large. Cf. Schwarzer, *supra* note 248, at 1014-15 (asserting that Rule 11 generally has caused attorneys to stop and think and has deterred some frivolous litigation).

259. See *supra* notes 135-46 and accompanying text; cf. Glaser v. Cincinnati Milacron, Inc., 808 F.2d 285 (3d Cir. 1986) (reversing \$165,000 attorney fee award under pre-1983 version of Rule 11 to 89 benzene manufacturers who were dismissed from the action because plaintiffs' prefiling investigation was not so deficient as to constitute subjective bad faith).

parties and attorneys who pursue most kinds of environmental actions.<sup>260</sup> Correspondingly, application of Rule 11 in ways that disadvantaged plaintiffs has been more ubiquitous in civil rights suits than in certain types of public law cases and may not even be occurring in other forms of that litigation. The infrequent invocation of Rule 11 in environmental actions probably means that many judges, litigants, and lawyers involved in the suits have experienced neither the loss of civility nor the increase in satellite litigation that Rule 11 has provoked in other types of cases.<sup>261</sup>

These "benefits" should be qualified, and some advantages actually could be detriments. Most significantly, the ideas are premised primarily on formal Rule 11 activity, which has apparently disadvantaged public interest litigants, including environmental plaintiffs, less than informal activity.<sup>262</sup> Informal Rule 11 activity, thus, may be dampening the enthusiasm of numerous environmental plaintiffs and attorneys, especially those who bring more controversial environmental actions, such as toxic tort suits.

Encouraging environmental plaintiffs and lawyers to "stop and think" before filing may not be an unqualified benefit and might have deleterious side effects. For example, it increases the "front-end" costs of litigation, expenses that apparently cannot be recouped, and imposes them on parties and attorneys, a number of whom have limited ability to bear the costs.<sup>263</sup> Indeed, threats to employ Rule 11 in toxic tort cases have "made counsel for plaintiffs so paranoid that they cling to precedent and plead traditional theories," thereby discouraging innovation in an otherwise dynamic area of environmental law.<sup>264</sup>

These and related concerns, such as the possible need to spend large sums participating in unnecessary satellite litigation or

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260. See *supra* note 253; cf. *infra* notes 264-67 and accompanying text (discussing chilling effect of informal Rule 11 activity).

261. These disadvantages and those enumerated above in note 248 and the accompanying text are ones that have been especially problematic in civil rights cases. See Tobias, *supra* note 167, at 163-64; see also INTERIM REPORT OF THE COMM. ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT 20 (1991) (describing Rule 11 sanctions as "incivility flash point").

262. This informal activity has especially disadvantaged civil rights plaintiffs. See Tobias, *supra* note 25, at 501-02.

263. See *supra* notes 70-74 and accompanying text (recounting instance in which expenses could not be recouped); Tobias, *supra* note 25, at 495-98 (discussing front-end costs and persons with limited ability to bear).

264. Telephone Interview with Attorney Number 15, *supra* note 106. The attorney was alluding to the propensity of plaintiffs' counsel to plead "duty to warn" in accord with the early leading precedent of *Borel v. Fibreboard Paper Products*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

appealing trial court imposition of sanctions, could dissuade environmental plaintiffs and lawyers from commencing, or zealously pursuing, legitimate actions. This effect is especially true of suits that advocate novel or creative legal theories; involve voluminous, unclear or sharply contested facts; are close legally, scientifically, or factually; raise controversial issues; or are expensive to litigate.<sup>265</sup> For example, in the recent First Circuit case in which two respected members of the Maine bar appealed a Rule 11 sanction of \$250 levied by the district judge,<sup>266</sup> the attorneys probably spent thousands of dollars to contest the decision. They apparently did so as a "matter of principle" and to protect their reputations, even though the First Circuit found that the lower court had not abused its discretion in what the appellate panel acknowledged was a close case.<sup>267</sup>

Numerous "advantages" described above are attributable to the low incidence of Rule 11 activity in environmental litigation. Some of the comparative inactivity can be ascribed to the informed judgments of many environmental defendants and defense counsel that Rule 11 is a rather ineffective mechanism for achieving their purposes. Certain of the objectives correspondingly may have questionable validity. These include discouraging environmental plaintiffs and lawyers from instituting and vigorously pursuing environmental actions, imposing substantial litigation costs on the parties and attorneys, and diverting the focus of lawsuits from the merits to extraneous matters, thus avoiding responsibility for environmental degradation.

## 2. Study of Rule 11

The assessment of Rule 11 activity in environmental litigation affords insights on conducting additional studies of the Rule and similar evaluations. The experience discloses certain difficulties in performing the research. For instance, relying too substantially on reported judicial opinions and even on formal activity can undermine accuracy because much Rule 11 activity is informal,

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265. It is impossible to discern the number of valid cases that have not been pursued because of these concerns. See *supra* note 83.

266. *Maine Audubon Soc'y v. Purslow*, 907 F.2d 265 (1st Cir. 1990).

267. See *id.* at 266, 269; *supra* note 60 and accompanying text; cf. *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531 (9th Cir. 1986) (providing another example of large expenditures to litigate a matter of principle). The result in *Purslow* is particularly troubling because considerable environmental litigation that is not undertaken by institutional plaintiffs is performed by lawyers on a pro bono basis.

as has been much of the activity that seemingly disadvantages public interest litigants the most.<sup>268</sup> This potential problem apparently did not materialize in environmental cases, because the quantity and effects of both formal and informal activity seemed so similar.

Speaking with attorneys who participate actively in environmental disputes, however, enhances understanding of Rule 11 and environmental litigation in ways that examining published judicial decisions cannot. For example, such opinions rarely enable readers to discern the reasons why environmental plaintiffs file certain cases, to comprehend the parties' ongoing relations with judges and other environmental litigants, or to appreciate the multitude of alternatives to Rule 11 and why they might have seemed preferable. This analysis of environmental suits thus emphasizes the importance of consulting sources in addition to published determinations.<sup>269</sup>

Correspondingly, gathering data on informal Rule 11 activity may be quite expensive, because considerable relevant information is anecdotal. Some instructive material, therefore, can be assembled most effectively by conducting time-consuming telephone or personal interviews or by circulating carefully phrased questionnaires and compiling the responses.<sup>270</sup>

This difficulty, and the study as a whole, illustrate the complications of collecting, analyzing, and synthesizing applicable empirical data and of drawing justifiable conclusions from the material assembled.<sup>271</sup> Attempting to premise credible assessments on the internal dynamics of such multifaceted and byzantine institutions as the federal courts and large law firms can be especially problematic. To designate and to accord relative responsibility to the pertinent variables that could explain why Rule 11 is invoked more frequently in certain forms of CERCLA

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268. See Tobias, *supra* note 25, at 501-03; Tobias, *supra* note 167, at 170 n.46; cf. BURBANK, *supra* note 10, at 45, 59 (explaining that considerable Rule 11 activity is informal).

269. Cf. Burbank, *supra* note 11, at 1939-40 (calling for law faculty to undertake empirical research outside of law schools).

270. The Federal Judicial Center circulated a questionnaire to all federal district judges in its recent study. See FINAL REPORT, *supra* note 3, §§ 2A-2C. The American Judicature Society recently circulated a questionnaire to lawyers in the Fifth, Seventh, and Ninth Circuits who had had experience with Rule 11 during the preceding year. See AMERICAN JUDICATURE SOCIETY RULE 11 STUDY PRELIMINARY ANALYSIS (1991).

271. See Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REF. 647, 686-91 (1988) (discussing problems entailed in treating empirical data).

litigation than in some kinds of NEPA cases is equally difficult.<sup>272</sup>

The examination of Rule 11 activity in environmental lawsuits offers additional perspectives on this type of effort. Before undertaking the evaluation, I speculated that Rule 11's application was affecting environmental plaintiffs and lawyers adversely, because substantial Rule 11 activity has disadvantaged civil rights plaintiffs and attorneys. Moreover, since 1986, several writers and numerous public interest and civil rights lawyers have suggested that Rule 11 activity in public law cases apart from civil rights actions might be adversely affecting public interest litigants.<sup>273</sup> Finding that Rule 11 activity in environmental suits was less detrimental to plaintiffs than I had projected underscores the importance of maintaining a neutral, detached viewpoint and of formulating conclusions only after assembling and analyzing sufficient data.<sup>274</sup>

The study also demonstrates the need both to differentiate between forms of public law litigation, even between those that have the number of similarities that exist between such paradigmatic kinds of modern litigation as environmental lawsuits and civil rights actions,<sup>275</sup> and to distinguish between the various types of environmental cases and civil rights litigation.<sup>276</sup> Public law suits and environmental cases are not monolithic.

The analysis illustrates as well the hazards of overgeneralization. The great discrepancies between Rule 11 activity in environmental actions and civil rights lawsuits can be ascribed to the different views that participants in the cases have of both types of litigation's purposes, of the reasons for invoking Rule 11, and of alternatives to it. These ideas offer the best generalized explanation of the disparities, but the concepts do not purport

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272. This analysis of potential variables obviously is not exhaustive. *See generally supra* notes 23-24 and accompanying text (discussing problem of defining public law litigation); *infra* note 276 and accompanying text (discussing problem of distinguishing types of environmental cases).

273. *See, e.g.,* Arthur B. La France, *Federal Rule 11 and Public Interest Litigation*, 22 VAL. U. L. REV. 331 (1988); Tobias, *supra* note 167, at 170; Tobias, *supra* note 25, at 502-03 (citing telephone interviews); Vairo, *supra* note 3, at 200-02.

274. Professor Marcus observed that "scholarly insights sometimes lead in directions the scholar finds discomfiting . . . [b]ut that conclusion underscores the importance of the dispassionate scholar who observes and explores without a stake in a particular outcome." Marcus, *supra* note 271, at 694.

275. *See supra* note 219 and accompanying text.

276. Examples include the distinction between toxic tort litigation and other forms of environmental litigation. *See, e.g., supra* notes 202-03, 264 and accompanying text. *See generally supra* notes 106-122, 195-201 and accompanying text (discussing differences among various types of environmental suits).

to be exhaustive or to explain specific situations. What is occurring in particular circumstances will depend on the constellation of variables comprising them, each of which must be identified, isolated, and assigned relevance.<sup>277</sup>

In sum, although most explanations for Rule 11 activity in environmental lawsuits inform understanding of the Rule, the cases, and the current legal culture in the federal courts, they are not dispositive. Ironically, the explanations neither definitively resolve the controversy that has attended Rule 11's implementation since 1983 nor clearly indicate the best course of future action. Indeed, some of them even exacerbate that controversy.<sup>278</sup>

#### IV. CONCLUSION

The evaluation of Rule 11's implementation in environmental litigation shows that little formal or informal activity has occurred. Courts have evinced solicitude for environmental plaintiffs, few of whom have been sanctioned. These determinations contrast sharply with findings derived from studying the Rule's application in civil rights cases. Rule 11 activity in those lawsuits has been highly controversial and has dampened the enthusiasm of civil rights plaintiffs and lawyers. Because the Rule has detrimentally affected them and other parties and attorneys while imposing considerable cost on the civil justice system, numerous observers have suggested that the provision promptly be amended, and those with rule-revising responsibility have recently proposed amendment. The disadvantages may well warrant expeditious revision of the Rule, even though minimal Rule 11 activity has been present in environmental litigation, judges have enforced the provision with comparative solicitude for environmental plaintiffs, and the study of Rule 11's implementation in environmental cases affords instructive insights on modern civil litigation.

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277. See Carl W. Tobias, *Of Public Funds and Public Participation: Resolving the Issue of Agency Authority to Reimburse Public Participants in Administrative Proceedings*, 82 COLUM. L. REV. 906, 954 (1982); Carl Tobias, *Rule 19 and the Public Rights Exception to Party Joinder*, 65 N.C. L. REV. 745, 791 (1987).

278. Nonetheless, the Advisory Committee proposed in August, 1991, that Rule 11 be amended. See *supra* note 6.