

# Exxon Ruling Makes Traceability Key In Clean Air Citizen Suits

By **Jane Fedder**

Facility owners and operators with air permits will want to pay close attention to the recent ruling from the U.S. Court of Appeals for the Fifth Circuit in *Environment Texas Citizen Lobby v. ExxonMobil Corp.*, concerning a private citizen's ability to seek penalties for alleged violations of the Clean Air Act, or CAA.

Following a bench trial, an appeal and another bench trial, this decadelong case again went up to the appeals court, where the trial court's judgment was vacated and remanded — this time to rule on the plaintiffs' standing to recover penalties for thousands of alleged CAA violations, and to judge the viability of certain affirmative defenses.[1]



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According to the two-judge majority opinion, a citizen suit plaintiff must demonstrate that each alleged CAA violation — rather than each alleged cause of action or claim — is "fairly traceable" to a plaintiff's alleged injury in order to support standing under Article III of the U.S. Constitution. It found the district court had failed to make such a determination, and remanded the case with detailed instructions on how to accomplish the inquiry based upon the extensive record.

The appellate court also reversed on denial of ExxonMobil's act-of-God defenses — excusing violations caused during Hurricane Ike in 2008 — but rejected the company's no-fault affirmative defense for lack of proof.

In a concurring and dissenting opinion, Judge Andrew Oldham decried the extension of the Fifth Circuit's citizen suit standing precedents as "a mess," and argued that the case should be reheard by the full court en banc to stop what he characterized as a continuing loop of confusion on standing, made worse by the majority's ruling.

At first blush, a requirement that CAA plaintiffs must prove standing for each violation in support of their claims appears arduous. However, the Fifth Circuit's expansive view of traceability between alleged violations and injuries may actually make it easier for plaintiffs to show eligibility to bring such lawsuits.

Undoubtedly, the seemingly never-ending saga of this litigation reminds parties litigating citizen suits to weigh the risks and benefits of addressing basic jurisdictional issues — and affirmative defenses — from the outset.

## **Background**

The Sierra Club and the Environment Texas Citizen Lobby filed the case against ExxonMobil in 2010, as a citizen suit under the Clean Air Act.[2]

Citizen suit provisions are found in most of the major environmental statutes, and provide

an avenue for the public to serve as private attorneys general and bring suit when federal or state authorities are ostensibly inadequately policing alleged polluters. Any penalties recovered in such lawsuits are paid to the government. Legal fees and costs, however, may be awarded to the lawyers and public interest groups who bring the cases.

The underlying lawsuit claimed that ExxonMobil's Baytown, Texas, petroleum facility had committed more than 16,000 days' worth of CAA violations from 2005 to 2013. If each violation were found to be actionable under the statute, the possible assessment of daily penalties could reach \$600 million.

The initial 2014 bench trial produced a district court ruling that only 94 of the thousands of alleged violations were actionable under the CAA, and that none of these violations warranted the imposition of penalties. The plaintiffs appealed, and in 2016, the Fifth Circuit found the district court's view of actionability too narrow, ordering the lower court to reapply several of the civil penalty assessment factors.[3]

On retrial in 2017, the same district court found 16,386 days of actionable violations. And after reconsidering the penalty factors in accordance with the Fifth Circuit's remand mandate, the trial court imposed a \$19.95 million civil penalty against ExxonMobil.

Not surprisingly, ExxonMobil appealed the second judgment. What was surprising, however, was that when the Fifth Circuit again reversed, it did so by declaring that this time, the plaintiffs had failed to prove they had standing to bring the case in the first place.

The trial court's record showed that individual members of the plaintiffs' groups had been injured. Missing, however, were the requisite showings that those injuries were fairly traceable to ExxonMobil's specific CAA violations, rather than just generally to the conduct alleged in their claims:

To be sure, many of Exxon's emissions violations were of a serious magnitude. Some flaring events and leaks lasted for hours and spilled thousands of pounds of harmful pollutants into the air. But because of the great variety of the challenged emissions — both in terms of type and scale — we cannot say that Plaintiffs' proving standing for some violations necessarily means they prove standing for the rest.[4]

### **Establishing Standing and Affirmative Defenses**

To establish a connection between violations and injury on the new remand, the Fifth Circuit instructed plaintiffs to make two showings: (1) that each violation in support of their claims "causes or contributes to the kinds of injuries they allege;" and (2) the existence of a "specific geographic or other causative nexus' such that the violation could have affected their members." [5]

Meeting these standing requirements calls for "more than conjecture" but less than certainty; "less of a causal connection than tort law;" and may be satisfied where "the injury [is] fairly traceable to the challenged conduct." [6] The majority panel's concept of fair traceability does not equate to definitive proof.

The appeals court went on to list examples of the types of evidence already in the trial court's record that supported fair traceability between the plaintiffs' injuries and a number of ExxonMobil's violations. Then, on what the Fifth Circuit directed as a limited remand, the district court was told to determine which groups of violations — to be presented in a tabulated format by type and magnitude — could have caused the plaintiffs' injuries.

Recognizing that this remand was "no doubt an arduous task," the Fifth Circuit noted that it was not requiring "line-by-line findings for the thousands of violations," and provided the following guide:

For any violation that could cause or contribute to flaring, smoke, or haze, the district court's findings have established traceability. The district court need only decide which violations fall within this category. ...

For violations that could not contribute to flaring, smoke, or haze, the district court should first consider whether the pollutant emitted could cause or contribute either to (a) chemical odors or (b) allergy-like or respiratory symptoms. If so, the district court will conduct the geographic nexus inquiry described above, finding it satisfied if the emission (i) violated a nonzero emissions standard, (ii) had to be reported under Texas regulations, or (iii) is otherwise proven to be of sufficient magnitude to reach Baytown neighborhoods outside the Exxon complex in quantities sufficient to cause chemical odors, allergy-like symptoms, or respiratory symptoms.[7]

Turning to Exxon's act-of-God and no-fault affirmative defenses, the Fifth Circuit essentially split the baby: ordering that on remand, the trial court should determine which violations were shown to have been caused by Hurricane Ike in 2008 and were, therefore, excusable — but then rejecting Exxon's no-fault defenses, because its 200 proposed factual findings, with citations and summary tabulation of proof, put too much onus on the trial court to search for the referenced evidence in the record.

Essentially, the court applied a different sort of traceability standard for each no-fault defense, requiring that Exxon Mobil tie "emission events," i.e., violations, to specific evidence.

Without a hint of irony — given its permission for the trial court to group violations into buckets and connect them to types of injuries for standing purposes — the majority admonished that "[j]udges are not ferrets," and the district court would not be required "to do a litigant's work for them by ferreting out facts from a massive record" to decide whether or not evidence existed supporting Exxon's no-fault defenses.

### **A Concurring Dissent**

In a separate opinion, Judge Andrew Oldham concurred in the judgment but dissented from the majority's opinion, to emphasize that the Fifth Circuit's citizen suit standing precedents are "a mess," and were decided ipse dixit, i.e., upon no proof.[8] He recommended that the en banc court revisit the standing issue before the instant case is returned to the Fifth Circuit.[9]

Without clarification from the full court, Judge Oldham observed that the "ever-growing mountain of ipse dixits and logical fallacies" that comprise the Fifth Circuit's current citizen suit standing cases are incongruous with Article III but-for causation standing requirements.[10]

Given the record and history of the litigation, no doubt one or both sides in the endless, expensive saga are currently taking him at his word, and considering seeking en banc review.

### **Takeaways**

Parties who ignore the constitutional requirements for bringing a citizen suit — and their rights to defend against one — at the outset of litigation do so to their detriment.

The fair traceability of injuries to violations is obviously subject to wide-ranging interpretations. And the more the circuit courts muddy the waters on the test for standing, the more likely it is that the U.S. Supreme Court will be the one to clean up the mess — and then no one may be happy. Stay tuned.

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[1] *Environment Texas Citizen Lobby Inc. v. ExxonMobil Corp.*, 66 F.Supp.3d 875 (S.D. Tex. 2014), vacated and remanded, 824 F.3d 507 (5th Cir. 2016), on remand, No. H-10-4969, 2017 WL 2331679 (S.D. Tex. April 26, 2017), vacated and remanded, slip op. No. 17-20545, 2020 WL 4345337 (5th Cir. July 29, 2020), as revised (Aug. 3, 2020).

[2] 42 U.S.C. §§ 7604(a)(1) and 7413(e)(2).

[3] 824 F.3d 507, 514 (5th Cir. 2016); see also 42 U.S.C. § 7413(e)(1).

[4] Slip op. at \*5.

[5] *Id.* at \*7.

[6] *Id.* at \*6.

[7] *Id.* at \*8.

[8] *Id.* at \*11, 12.

[9] *Id.* at \*14.

[10] *Id.* at \*13-14.