

II. CLEAN AIR ACT

Environment Texas Citizen Lobby, Inc. v. ExxonMobil Corp.:
Increased Scrutiny for Standing Under the Clean Air Act

Standing assertions by environmental groups undertaking citizen suits will face new challenges in the Fifth Circuit, following the court's recent decision in *Environment Texas Citizen Lobby, Inc. v. ExxonMobil Corp.*, 968 F.3d 357 (5th Cir. 2020). Considering whether the plaintiffs had standing to recover for more than 16,000 violations of emissions standards at ExxonMobil's Baytown, Texas complex, the court broke from precedent and ruled that plaintiffs must prove standing for *each* violation alleged.¹

As the court explained, emissions from the complex are regulated in part by permits issued by the Texas Commission on Environmental Quality pursuant to Title V of the Clean Air Act.² In turn, the EPA and the Commission are responsible for enforcement. To ensure compliance with emissions standards, the Commission requires polluters to document unauthorized emissions events and report those events that release pollutants in excess of certain thresholds.³ Plaintiffs Environment Texas Citizen Lobby and Sierra Club brought a citizen suit, seeking civil penalties payable to the government for each of Exxon's documented emissions events from October 2005 through September 2013.⁴ On remand from a previous appeal, the district court determined that 16,386 days of violations alleged by the plaintiffs were actionable and imposed a \$19.95 million civil penalty.⁵ Exxon appealed the judgment, attacking the penalty factors used by the district court, alleging new affirmative defenses, and challenging plaintiffs' standing by contending that plaintiffs must prove standing for each violation alleged.⁶

In making its determination, the Fifth Circuit first explained that a plaintiff must assert at least two violations of the same standard in order to allege a claim under the Clean Air Act. Once done, however, the court noted that a "penalty may be assessed for each day of violation."⁷ Taking

1. *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 968 F.3d 357, 365-66 (5th Cir. 2020).

2. *Id.* at 363.

3. *Id.*

4. *Id.*

5. *Id.* at 364.

6. *Id.* at 364-65.

7. *Id.* at 365 (citing 42 U.S.C. § 7413(e)(2)).

into account the vast number of violations at issue, Exxon could be held liable for an excess of \$600 million. To avoid such liability, Exxon raised the novel issue that plaintiffs must prove standing for each violation rather than for each Clean Air claim.

Because § 7413(e)(2) of the Clean Air Act authorizes penalties for each day of violation, the court agreed with Exxon that Clean Air Act penalties are tied to violations, not claims.⁸ It further explained that “one injury does not entitle a litigant to right other wrongs that did not injure it,” and thus plaintiffs may not have the “necessary stake in litigating conduct of another kind, although similar, to which they have not been subject.”⁹ Next, the court distinguished the case from prior proceedings, reasoning that the case at issue involved a greater number and variety of violations than those that had come before.¹⁰ The court also reasoned that, unlike previous cases, the present case contained doubt as to whether the pollutant emitted could cause the plaintiff’s alleged injuries.¹¹ Contrary to previous cases, in which plaintiffs’ injuries were clearly caused by the pollutants emitted, the court reasoned that the plaintiffs in this case asserted a “variety of aesthetic and health-related injuries, allegedly traceable to 24 different pollutants emitted in a variety of ways.”¹² In particular, the court noted that while some violations entailed minor or scant emissions, others were major emissions events.¹³ For these reasons, the court held that plaintiffs bringing suit for a large variety of violations must prove standing for each violation in support of their claims.¹⁴

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8. *Id.* at 365.

9. *Id.* (quoting *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982)).

10. *Id.* at 366.

11. *Id.* The court later found that members of the plaintiff organization “regularly saw flares, smoke, and haze coming from the Exxon complex; smelled chemical odors; suffered from allergy-like or respiratory problems; feared for their health; refrained from outdoor activities; or moved away.” *Id.* at 368.

12. *Id.*

13. *See id.* “Exxon’s thousands of violations include accidents as minor as smoke caused by plugging in an extension cord and a fire in a cigarette butt can that lasted one minute. Both accidents lasted ‘0.0 hours’ and emitted 0.01 pounds of carbon monoxide and 0.01 pounds of nitrous oxide.” *Id.* at 366-67.

14. *Id.* at 367.

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