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Ferrets, "Ipse Dixits," and "Logical Fallacies": Fifth Circuit Opinions Shine Light on Messy Citizen Suit Standing Precedents

Facility owners and operators with air permits will want to pay close attention to a recent Fifth Circuit ruling on a private citizen's ability to seek penalties for/and defenses against alleged violations of the Clean Air Act. Following a bench trial, an appeal, and another bench re-trial, this decade-old case has again gone up to the appeals court and had the trial court's judgment vacated and remanded, this time to decide the Plaintiffs' standing to bring the case in the first place and to judge the viability of two key affirmative defenses. *Environment Texas Citizen Lobby, Inc. v. Exxon Mobil 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. Apr. 26, 2017), *vacated and remanded,* slip op. No. 17-20545, 2020 WL 4345337 (5th Cir. Jul. 29, 2020), *as revised* (Aug. 3, 2020). According to the majority opinion, the panel gave both the lower court and the regulated community guidelines for when *each* CAA violation is "fairly traceable" to a plaintiff's alleged injury to support standing under Article III of the U.S. Constitution. According to the concurrence, the Fifth Circuit's standing precedents are "a mess" that are trending toward the unconstitutional elimination of "but-for" causation; a paradox that should be clarified by the full court *en banc* to stop a continuing loop of confusion.

Background

Plaintiffs the Sierra Club and the Environment Texas Citizen Lobby filed the case against defendant ExxonMobil (Exxon) in 2010 as a citizens suit under the Clean Air Act (CAA), 42 U.S.C. §§ 7604(a)(1) and 7413(e)(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 "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 Exxon's Baytown, Texas petroleum facility had committed more than 16,000 days' worth of CAA violations from 2005 to 2013. If each violation was found to be "actionable" under the statute (repeated and ongoing at the time plaintiffs filed their complaint), the possible assessment of daily penalties could reach $600 million.

The 2014 initial non-jury 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. Plaintiffs appealed, and in 2016 the Fifth Circuit found the district court's view of "actionability" too narrow and ordered the lower court to reapply several of the civil penalty assessment factors. 824 F.3d 507, 514 (5th Cir. 2016); see also 42 U.S.C. § 7413(e)(1).

On re-trial 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 defendant Exxon.

Proof of Standing and Evidence of Defenses

Not surprisingly, Exxon appealed the second judgment. What was surprising, however, was that when the Fifth Circuit again reversed, it did so by declaring that this time, Plaintiffs had failed to prove they had standing to bring the case in the first place. Yes, 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 Exxon's specific CAA **violations**, rather than to just 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." *Slip op*. at *5.

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." *Id.* at *7. 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." *Id.* at *6. Thus, the majority panel's concept of fair traceability does not equate to definitively proven to be so.

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 Plaintiffs' members injuries and a number of Exxon'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:

1. "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.

2. "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." at *8.

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. Without a hint of irony (given its instructions to the trial court on tracing Plaintiffs' injuries to violations for standing) the majority admonished that "Judges 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 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* (upon no proof). *Id.* at *11, 12. He recommended that the *en banc* court revisit the standing issue before the instant case is remanded and returned, again, to the Fifth Circuit. *Id.* at *14. Without clarification from the full Court, Judge Oldham observed that the Fifth Circuit's "ever-growing mountain of *ipse dixits* and logical fallacies" that comprise its current Citizen Suit standing cases are incongruous with Article III "but for causation" standing requirements. *Id.*at *13-14.

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. And, the more the Circuit Courts of Appeal muddy the waters on the test for standing, the more likely it is that the United States Supreme Court will be the one to clean up the mess – and then no one may be happy. Stay tuned.

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