

Fifth Circuit Rules on Civil Penalties in Citizen Lawsuit Case

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The *Fifth Circuit* in ***Environmental Texas Citizen Lobby, Inc; Sierra Club v. ExxonMobil Corporation***, ___ F.3d ___ (5th Cir. May 27, 2011), reversed and remanded a ***Clean Air Act*** citizen lawsuit (42 U.S.C. §7604) case on issues of ongoing or repeated air permit violations and assessment of civil penalties therefor. The District Court denied most of plaintiffs' claims and denied relief.

The facility at issue was Exxon's Baytown refinery and chemical plants. Plaintiffs claimed the plant sustained unauthorized upsets, excess emissions, repeated flare violations, and other air permit violations thousands of times over eight years. Plaintiffs relied on Exxon's own emission reports filed in Texas, including its deviation reports. The Court held on the violations that, inter alia, violations of permit limits on specific pollutants at specific emission points (e.g., related groups of equipment sources at the plant) which are repeated are violations of the Act, regardless if the permitted emission limits have changed over time due to different versions in permit amendments or renewals. The Court also held upsets (e.g., unauthorized emissions from unplanned and unavoidable breakdown or excursions) and excess smoking flare violations for volatiles to be violations of the Act. The Court indicated that plaintiffs could rely on the permittee's own emission reports to establish many violations but held their reliance on separate deviation reports alone is not sufficient to prove violations. Deviation reports are only indications of violations without further proof.

The Court also discussed the seven (7) statutory factors for imposing civil penalties (§7413(e)(1)). They are:

1. the size of the business;
2. the economic impact of the penalty on the business;
3. the violator's full compliance history and good faith efforts to comply;
4. the duration of the violation as established by any credible evidence;
5. payment by the violator of penalties previously assessed for the same violation;
6. the economic benefit of noncompliance; and

7. the seriousness of the violation.

The Court stated that business size and economic impact of penalty factors (Nos. 1 and 2) weighed in favor of a penalty.

The Court indicated on the prior penalty factor that defendant's previous penalties assessed by and paid to Texas (\$1.5 million) for some of the same violations should be deducted from any additional penalties warranted (No. 5).

On the compliance history and good faith to comply factor (No. 3), the Court indicated that Exxon's agreement with Texas to perform environmental improvement projects, its reduction in overall unauthorized emissions, and the complexity of its compliance weighed against a penalty. The Court also stated that the number of similar past violations and prior enforcement actions are not specific penalty factors.

The Court held that the economic benefit of noncompliance factor (No. 6) properly includes Exxon's saved cost from delayed expenditure of compliance, as evidenced here by the environmental improvement projects previously ordered by Texas and Exxon failing to implement them earlier. However, the Court remanded the issue of whether those improvement projects were "necessary to correct" the violations (if found on remand that those are tied specifically to prevention of each violation that would favor penalties).

The Court on the duration of the violation factor (No. 4) held that short and long violations cannot "offset" the overall duration of violations.

Likewise, on the seriousness of violation factor (No. 7), the Court held the overall number and quantitative seriousness of emissions is evidence of seriousness and balancing among them is not proper. These, besides factors 1, 2, 4, 6, and 7 weighed in favor of assessing a penalty.

The Court denied permanent injunctive relief and declaratory relief but remanded the case for an assessment of penalties and hearing any defenses (e.g., "non-excessive upset events").

Although the case deals with the Clean Air Act, and each media statute varies on the elements of citizen suits, especially over past or repeated violations, the factors for civil penalties are comparable enough for the case to serve as general guidance to parties.

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