# Standing After *Environment Texas*: The Problem of Cumulative Environmental Harm

## INTRODUCTION

*Environment Texas Citizen Lobby v. ExxonMobil* reaffirms the age-old adage that Everything is Bigger in Texas.[1] The facts drip with superlatives. Baytown, Texas is home to Exxon's prized facility, the "largest petroleum and petrochemical complex in the nation."[2] The plaintiffs—environmental groups suing on behalf of Baytown residents—alleged Exxon committed over 16,000 violations of the Clean Air Act (CAA).[3] The District Court for the Southern District of Texas ordered Exxon to pay the "largest civil penalty ever imposed in an environmental citizen suit."[4] Yet, the unprecedented victory was short-lived. The Fifth Circuit Court of Appeals vacated the order, instructing the lower court on remand to analyze whether the plaintiffs had standing for *each* of the 16,000 violations.[5] Demonstrating that *claims*, or groups of CAA violations, met the requirements for standing was not enough; citizen-suit plaintiffs must demonstrate that each alleged *violation* met the requirements of Article III.[6]

The Fifth Circuit's violation-by-violation approach creates ambiguity over whether cumulative environmental harm can confer standing to citizen suit plaintiffs. One reading of the Fifth Circuit's approach is that the granular, violation-by-violation standing inquiry prevents a wide-ranging analysis of aggregate harm. However, this In Brief provides an alternative reading of the Fifth Circuit's holding. By emphasizing that any discrete violation of the CAA may *contribute* to an injury, citizens can continue to vindicate their statutory

DOI: https://doi.org/10.15779/Z38KD1QM1G


1. Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 968 F.3d 357 (5th Cir. 2020).
2. *Id.* at 362.
3. *Id.*
4. *Federal Court Exxon Violated Clean Air Act Over 16,000 Times, Must Pay $19.95 Million Penalty*, NAT'L ENV'T L. CTR. (Apr. 26, 2017), https://nelconline.org/federal-court-exxon-violated-clean-air-act-over-16000-times-must-pay-1995-million-penalty.
5. *Env't Tex.*, 968 F.3d at 367. On remand, the implications of this new standing requirement became evident. The Southern District of Texas reduced the once $19.95 million penalty to $14.25 million. *See* Luke Metzger, *Federal Judge Again Orders Record Penalty Against Exxon for Thousands of Clean Air Act Violations*, ENV'T TEX. (Mar. 2, 2021), https://environmenttexas.org/news/txe/federal-judge-again-orders-record-penalty-against-exxon-thousands-clean-air-act-violations.
6. *Env't Tex.*, 968 F.3d at 365.

rights while deterring emissions that have cumulative consequences for human health.

## I. BACKGROUND

### *A. Citizen Suits and Article III*

The CAA created a "comprehensive program for controlling and improving the nation's air quality."[7] The statute directs the Environmental Protection Agency (EPA) to promulgate "minimum national standards for air quality" while creating "a comprehensive permit system for all major sources of air pollution."[8] The statute incentivizes technological responses to environmental challenges and establishes the "broad availability of citizen lawsuits" as one way to enforce its statutory mission.[9]

The citizen suit provision allows "any person" to bring a civil action against an entity for violating the CAA.[10] By including this private right of action, Congress proclaimed that citizens are not "nuisances or troublemakers" but are instead "welcomed participants in the vindication of environmental interests."[11] Any recovery from citizen suits goes to the United States Treasury.[12] Although the CAA allows government agencies to bring enforcement actions, the statute's legislative history reflects a congressional desire to complement public enforcement with private litigation.[13] Citizen suit provisions are not unique to the CAA.[14] Indeed, "virtually every major federal environmental statute enacted since 1970" authorizes these lawsuits.[15] Nearly all were successful: private lawsuits "transformed the environmental movement" and "secured compliance by . . . thousands of polluting facilities."[16] In doing so, these everyday Americans moonlighting as private attorneys general "conserved innumerable agency resources and saved taxpayers billions."[17]

---

7. Sierra Club v. EPA, 774 F.3d 383, 386 (7th Cir. 2014); *see also* 42 U.S.C. §§ 7401–7671.

8. KATE C. SHOUSE & RICHARD K. LATTANZIO, CONG. RSCH. SERV., CLEAN AIR ACT: A SUMMARY OF THE ACT AND ITS MAJOR REQUIREMENTS 1 (2020), https://fas.org/sgp/crs/misc/RL30853.pdf.

9. Henry A. Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 ENV'T L. 1721, 1742 (1991).

10. 42 U.S.C. § 7604(a).

11. Friends of the Earth v. Carey, 535 F.2d 165, 172 (2d Cir. 1976).

12. 42 U.S.C. § 7604(g).

13. *See* S. REP. NO. 91-1196, at 35–36 (1970) ("Government initiative in seeking enforcement under the Clean Air Act has been restrained. Authorizing citizens to bring suits for violations of standards should motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings.").

14. *See, e.g.*, 16 U.S.C. § 1540; 33 U.S.C § 1365; 42 U.S.C. § 6972.

15. Matthew Burrows, *The Clean Air Act Citizen Suits, Attorneys' Fees, and the Separate Public Interest Requirement*, 36 B.C. ENV'T AFFS. L. REV. 103, 104 (2009).

16. James R. May, *Now More Than Ever Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1, 3 (2003).

17. *Id.* at 4.

But citizen suits have endured a winding and dramatic journey in recent years as the Supreme Court has attempted to reconcile Congress's seemingly broad statutory authorization with Article III's standing requirements.[18] Article III of the U.S. Constitution limits the jurisdiction of federal courts and defines what types of suits Congress may authorize.[19] In interpreting Article III's requirement that federal jurisdiction only extends to "cases" and "controversies,"[20] the Supreme Court has articulated three basic principles of Article III standing that determine who has the ability to sue. First, the plaintiff must have suffered an "injury in fact" which is both "concrete and particularized" and "actual or imminent."[21] Second, a plaintiff must show a "causal connection between the injury and the conduct complained of."[22] Third, it must be "likely" that the injury is redressable by a "favorable decision."[23] Indeed, some of the Court's most seminal standing decisions, *Lujan v. Defenders of Wildlife* and *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, were both citizen suits under environmental statutes.[24]

### *B. Procedural History of* Environment Texas

*Environment Texas* ultimately involved the second prong of the standing requirement: causation.[25] The plaintiffs, environmental groups suing on behalf of Baytown residents, brought a citizen suit against Exxon for over 16,000 CAA violations.[26] Under the CAA, the Texas Commission on Environmental Quality requires emitters to document unauthorized "emissions events"—in other words, "unplanned or unscheduled emissions."[27] These violations generally fell into five categories: upset emissions, hourly limits, weight limits, visible flares, and pilot flame requirements.[28] To demonstrate causation, the plaintiffs provided evidence tracing their injuries to some, but not all, emission events.[29] Some examples of evidence submitted were witnesses recounting visible flares and affidavits describing odors and respiratory difficulties following emission

18. *See* Steven G. Davison, *Standing to Sue in Citizen Suits Against Air and Water Polluters Under* Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 17 TUL. ENV'T L.J. 63 (2003).

19. Jonathan H. Adler, *Stand or Deliver Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENV'T L. & POL'Y F. 39, 53 (2001).

20. U.S. CONST. art. III, § 2.

21. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

22. *Id.*

23. *Id.* at 561.

24. *See generally* Brief for the Respondents at 7, *Lujan*, 504 U.S. 555 (No. 90–1424); Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 173 (2000).

25. Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 968 F.3d 357, 368 (5th Cir. 2020) ("The next question is whether the injuries these individuals suffered are traceable to the violations. This is the crux of the dispute.").

26. *Id.* at 362.

27. *Id.* at 363.

28. *Id.*

29. *Id.* at 368.

events.[30] This evidence clearly established causation as to some violations.[31] However, the plaintiffs did not have concurrent, precise testimony for each of the 16,000 violations.[32] The question presented to the Fifth Circuit was whether the plaintiffs needed to show their injuries were traceable to *each* of the emission events or whether the general claim allowed the plaintiffs to demonstrate Article III standing.[33]

The Fifth Circuit found that the plaintiffs needed to trace their injuries to each violation of the CAA.[34] A general rule of standing, according to the panel, is that "one injury does not entitle a litigant to right other wrongs that did not injure" them.[35] The court reasoned that federal jurisdiction should only extend to litigants who have a "necessary stake" in litigation.[36] The court also noted that CAA penalties track the number of violations and are not dependent on the underlying claim.[37] The fact that "no court" had ever found standing for "some Clean Air Act violations but not others" gave the court "some pause."[38] But the Fifth Circuit resolved this hesitation by pointing to the fact that this case concerned an unprecedented amount of violations and number of pollutants involved.[39]

Once the Fifth Circuit determined that the district court must assess standing as to each violation, the panel opined on what would meet the traceability requirements.[40] Going forward, traceability

> requires something more than conjecture ("The Exxon complex in Baytown emits pollutants, and I live in Baytown") but less than certainty ("I was outside the Baytown complex on November 15, between 1:00 and 5:00 pm, at which time hydrogen sulfide was emitted, and I recall my throat feeling sore even though it did not feel sore earlier in the day").[41]

Thus, the Fifth Circuit held that plaintiffs must make two showings. First, they must demonstrate that "*each violation* . . . causes or contributes to the kinds of injuries they allege."[42] This standard is satisfied if the violation "(1) created flaring, smoke, or haze; (2) released pollutants with chemical odors; or (3) released pollutants that cause respiratory or allergy-like symptoms."[43] Second, the plaintiffs must show "the existence of a specific geographic or other causative

30. *Id.* at 367.
31. *Id.* at 371.
32. *Id.* at 368.
33. *Id.* at 365, 368.
34. *Id.* at 365.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 366.
39. *Id.*
40. *Id.* at 368.
41. *Id.*
42. *Id.* at 369–70 (emphasis added).
43. *Id.* at 370.

nexus such that the violation could have affected their members."[44] The panel thought this "geographic nexus" requirement was necessary because some emissions "could have dissipated before leaving Exxon grounds," given how large the facility is.[45]

## II. ANALYSIS

Humans inhale roughly twenty-five sextillion molecules with every breath.[46] While any single molecule poses little danger as a discrete entity, certain pollutants may "aggregate over time" as a result of ongoing exposure, exponentially increasing health risks.[47] Such ongoing exposures have "cumulative impacts," which are consequences resulting from an action "when added to other past, present, or reasonably foreseeable future actions."[48] Some aspects of environmental law proactively tackle this problem by targeting seemingly "small actions" at the outset rather than waiting for harms to fester.[49] Both the Clean Water Act and the CAA establish criteria "to address cumulative pollution."[50] Indeed, the National Environmental Policy Act of 1969 requires all federal agencies to consider the cumulative environmental effects of their actions.[51]

Environmental agencies understand that cumulative impacts are a "centrally relevant factor" in regulatory decisions.[52] Some scholars argue an agency's failure to consider cumulative impacts is "arbitrary and capricious" and warrants judicial scrutiny.[53] Concern for cumulative environmental consequences need not stop at the implementation and regulation stage. Citizen suits must

---

44. *Id.*

45. *Id.*

46. Simon Worrall, *The Air You Breathe Is Full of Surprises*, NAT'L GEOGRAPHIC (Aug. 12, 2017), https://www.nationalgeographic.com/science/article/air-gas-caesar-last-breath-sam-kean.

47. *See* CHAD J. MCGUIRE, ENVIRONMENTAL LAW FROM THE POLICY PERSPECTIVE: UNDERSTANDING HOW LEGAL FRAMEWORKS INFLUENCE ENVIRONMENTAL PROBLEM SOLVING 213 (2014); *see also* X. Wu et al., *Evaluating the Impact of Long-Term Exposure to Fine Particulate Matter on Mortality Among the Elderly*, 6 SCI. ADVANCES 1, 1 (2020).

48. 40 C.F.R. § 1508.7 (1978) (repealed). The original definition of "cumulative impact," as described by 40 C.F.R. § 1508.7 (1978), was repealed in 2020. *See* 40 C.F.R. § 1508.1(g)(3) (2020). However, the Biden administration is currently reevaluating that decision. *See* Ted A. Warpinski & M. Andrew Skwierawski, *The Biden Administration Environmental Agenda So Far*, NAT'L L. REV. (Mar. 11, 2021), https://www.natlawreview.com/article/biden-administration-environmental-agenda-so-far. Additionally, several challenges to the original rollback have been proceeding through federal district courts across the country. *See, e.g.*, Wild Virginia v. CEQ, No. 3:20-cv-00045 (W.D. Va. Sept. 11, 2020); First Amended Complaint for Declaratory and Injunctive Relief, Alaska Cmty. Action on Toxics v. CEQ, No. 3:20-cv-5199-RS (N.D. Cal. Oct. 6, 2020).

49. *See* MCGUIRE, *supra* note 47, at 213.

50. Robert W. Adler, *Integrated Approaches to Water Pollution Lessons from the Clean Air Act*, 23 HARV. ENV'T L. REV. 203, 251 (1999).

51. Courtney A. Schultz, *History of the Cumulative Effects Analysis Requirement Under NEPA and Its Interpretation in U.S. Forest Service Case Law*, 27 J. ENV'T L. & LITIG. 125, 126–27 (2012).

52. *See* Sanne H. Knudsen, *The Flip Side of* Michigan v. EPA *Are Cumulative Impacts Centrally Relevant*, 2018 UTAH L. REV. 1, 22 (2018).

53. *See id.* at 41.

"supplement government action" in this regard and center discussions of cumulative environmental impacts.[54]

*Environment Texas* leaves open the question of whether cumulative environmental harm meets the standing requirements of Article III. The Fifth Circuit's violation-by-violation approach particularizes and isolates each emission event.[55] District courts under this new rubric must determine if "*an* emission" event is large enough to send "pollutants in discernible quantities" outside of the Baytown complex.[56] But any single emission event may not produce enough pollutant to cause the injuries contemplated by the court. For example, Exxon could have a small emission event on a Monday that might not cause injury by itself. A plaintiff cannot recover for that violation. After all, in the court's view, there is no evidence this single, discrete violation *caused* any harm to the plaintiffs.[57] But imagine Tuesday comes, and Exxon emits again. The Fifth Circuit's approach requires a plaintiff to show the Monday and Tuesday events each individually satisfy the requirements of Article III.[58] A plaintiff may have trouble demonstrating which, if any, emission event actually *caused* his injury—especially if formerly emitted pollutants linger and coalesce with new ones in the area.

This is a problem because air pollution has a cumulative impact on human health. Scientific evidence is clear: "continual exposure to environmental pollutants can be very serious" *even when* any single emission event may meet ambient air quality standards.[59] While a plaintiff showing signs of injury after just two emission incidents may have a fairly easy time showing causation, some citizen suits—like the one in *Environment Texas*—involve *thousands* of CAA violations spanning several years.[60]

While *Environment Texas* leaves the cumulative impacts question open, there is an expansive reading of the holding that would avoid the concerns outlined here. Judge Costa's opinion indicates that a plaintiff can establish causation as to each violation that "causes or *contributes* to the kinds of injuries they allege."[61] District courts may emphasize the "*contributes* to" language to

54. *See* Will Reisinger et al., *Environmental Enforcement and the Limits of Cooperative Federalism Will Courts Allow Citizen Suits to Pick up the Slack?*, 20 DUKE ENV'T L. & POL'Y F. 1, 5 (2010); *see also* Patrick Gallagher, *Environmental Law,* Clapper v. Amnesty International USA*, and the Vagaries of Injury-in-Fact "Certainly Impending" Harm, "Reasonable Concern," and "Geographic Nexus*", 32 UCLA J. ENV'T L. & POL'Y 1, 12 (2014).

55. *See* Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 968 F.3d 357, 366 (5th Cir. 2020).

56. *Id.* at 370 (emphasis added).

57. *See id.*

58. *See id.* at 367. For the purposes of this hypothetical, assume that these emissions do not violate a "nonzero emissions standard" or otherwise need "to be reported under Texas regulations," as those types of emissions would satisfy the causation requirement according to the court. *See id.* at 371.

59. Yingcun Xia & Howell Tong, *Cumulative Effects of Air Pollution on Public Health*, 25 STAT. MED. 3548, 3548 (2006).

60. *See Env't Tex.*, 968 F.3d at 363.

61. *See id.* at 369–70 (emphasis added).

consider evidence of cumulative harm going forward.[62] Thus, a plaintiff may allege that a single violation *contributes* to their injury if, combined with another violation, the cumulative emissions produce harm.[63] However, this is not a clear-cut issue, as Judge Oldham's concurrence demonstrates by raising the fear that district courts must now "hazard a guess" at whether certain injuries are sufficiently traceable when there is a timeframe differential between the violations.[64] Until the Fifth Circuit clarifies this question, some district courts may conclude that plaintiffs in these situations cannot "recover a penny" under Article III.[65]

This uncertainty should be resolved in favor of allowing federal courts to account for cumulative environmental impacts without running afoul of the Constitution. Federal courts outside of the Fifth Circuit have found that Article III does not preclude recognizing cumulative environmental harm. The Seventh Circuit in *American Bottom Conservancy v. U.S. Army Corps of Engineers* held that an environmental group had standing to challenge the destruction of 18.4 acres of wetlands.[66] The plaintiffs alleged that destroying the wetlands would disturb their wildlife-watching activities and converting the area to a landfill would create bad odors, diminishing the area's recreational value.[67] In finding the environmental group had standing, Judge Posner rejected the idea that a mere 18.4 acres would be too "small a fraction of the wetlands" to cause the plaintiffs' injuries.[68] If Article III required plaintiffs to allege a "substantial elimination of wildlife" to establish standing, a "cumulatively immense elimination of wildlife could occur as a result of numerous small projects requiring destruction of wetlands, none of which would create an injury great enough to support standing."[69]

One might argue that *American Bottom Conservancy* deals only with the *magnitude* of injury, while *Environment Texas* primarily focuses on the *causation* standing requirement.[70] The Ninth Circuit's decision in *United States v. Alpine Land & Reservoir Company* provides insight on this point.[71] There, the Pyramid Lake Paiute Tribe challenged several classifications of upstream water rights that would have negatively affected the Tribe's downstream fishery.[72] The lower court found that the Tribe did not have standing because "the incremental

62. *See id.* (emphasis added).
63. *See id.*
64. *See id.* at 378 (Oldham, J., concurring).
65. *See id.*
66. Am. Bottom Conservancy v. U.S. Army Corps of Eng'rs., 650 F.3d 652, 660 (7th Cir. 2011).
67. *Id.* at 657–58.
68. *Id.* at 660.
69. *Id.*
70. *See* Gallagher, *supra* note 54, at 36 ("Although Judge Posner's reference to cumulative harm goes more to the *magnitude* of injury than its geographic location, the opinion still validates the basic premise espoused here: injury-in-fact cannot be assessed without reference to the total environmental impacts of an action.").
71. United States v. Alpine Land & Reservoir Co., 887 F.2d 207, 208–09 (9th Cir. 1989); *see also* Gallagher, *supra* note 54, at 36–37.
72. *Alpine Land & Reservoir Co.,* 887 F.2d at 208–09; *see also* Gallagher, *supra* note 54, at 36.

effect of changing an *individual* classification is minimal."[73] The Ninth Circuit rejected this view and held that the tribe had standing to pursue its claims because "the *total effect* on the Tribe's water rights is ultimately the sum of the individual parts."[74]

These examples, of course, are not binding in the Fifth Circuit. But they can provide insight to district courts in the Fifth Circuit questioning whether *Environment Texas* prohibits an analysis of cumulative environmental harm in its violation-by-violation approach to Article III's causation requirement. District courts should not err on the side of dismissing claims alleging cumulative environmental impacts on standing grounds. The science of cumulative environmental harm is indisputable, and "its application to standing law should not be controversial."[75]

## CONCLUSION

With environmental enforcement at the federal level dependent on the administration in power, citizen suits remain one of the only avenues for consistent environmental accountability. The problem with viewing violations in isolation for purposes of establishing whether causation exists under Article III is that it ignores the complexity and interlocking nature of environmental harm. As some scholars have noted, "environmental law's greatest remaining problems are caused by the cumulative effects of many actions, each of which contributes only a small increment to the larger problem."[76] Although *Environment Texas* may "rais[e] the bar for environmentalists to prove Article III standing," the ability to analyze cumulative harm need not be a collateral consequence.[77] Until the Fifth Circuit clarifies whether cumulative harm is cognizable under Article III, district courts should not close the courthouse doors to plaintiffs seeking to vindicate their aggregate environmental injuries.

*Andrew Barron*

---

73. *Alpine Land & Reservoir Co.*, 887 F.2d at 214 (emphasis added); *see also* Gallagher, *supra* note 54, at 36.

74. *Alpine Land & Reservoir Co.*, 887 F.2d at 214 (emphasis added); *see also* Gallagher, *supra* note 54, at 36.

75. *See* Gallagher, *supra* note 54, at 35.

76. Dave Owen, *Critical Habitat and the Challenge of Regulating Small Harms*, 64 FLA. L. REV. 141, 143 (2012) (citing William E. Odum, *Environmental Degradation and the Tyranny of Small Decisions*, 32 BIOSCIENCE 728, 728 (1982); J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrative State A Guide for Whittling Away*, 98 CALIF. L. REV. 59, 64–65 (2010)).

77. Stuart Parker, *In Exxon Case, 5th Circuit Raises Standing Bar for Air Law Citizen Suits*, INSIDEEPA.COM (July 30, 2020), https://insideepa.com/daily-news/exxon-case-5th-circuit-raises-standing-bar-air-law-citizen-suits.