No. 15-20030

In the United States Court of Appeals
For the Fifth Circuit

ENVIRONMENT TEXAS CITIZEN LOBBY, INCORPORATED; SIERRA CLUB,
Plaintiffs – Appellants,

v.

EXXON MOBIL CORPORATION; EXXONMOBIL CHEMICAL COMPANY; EXXONMOBIL REFINING & SUPPLY COMPANY,
Defendants – Appellees.

Appeal from the United States District Court for the Southern District of Texas, Houston Division; No. 4:10-CV-4969

BRIEF OF APPELLEES

WINSTEAD PC
Albert R. Axe
Keith A. Courtney
401 Congress Ave., Suite 2100
Austin, TX 78701
(512) 270-2800
(512) 370-2850 (Fax)

BECK REDDEN LLP
Russell S. Post
Eric J.R. Nichols
Fields Alexander
Robert D. Daniel
William R. Peterson
Bryon A. Rice
1221 McKinney, Suite 4500
Houston, TX 77010
(713) 951-3700
(713) 951-3720 (Fax)

COUNSEL FOR APPELLEES, EXXON MOBIL CORPORATION, EXXONMOBIL CHEMICAL COMPANY AND EXXONMOBIL REFINING & SUPPLY COMPANY

No. 15-20030

In the United States Court of Appeals
For the Fifth Circuit

ENVIRONMENT TEXAS CITIZEN LOBBY, INCORPORATED; SIERRA CLUB,
Plaintiffs – Appellants,

v.

EXXON MOBIL CORPORATION; EXXONMOBIL CHEMICAL COMPANY; EXXONMOBIL REFINING & SUPPLY COMPANY,
Defendants – Appellees.

Appeal from the United States District Court for the
Southern District of Texas, Houston Division; No. 4:10-CV-4969

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Defendants-Appellees:

Exxon Mobil Corporation
ExxonMobil Chemical Company
ExxonMobil Refining & Supply Company

***Plaintiffs- Appellants*:**

Environment Texas Citizen Lobby
Sierra Club

***Counsel for Defendants-Appellees*:**

BECK REDDEN LLP
Russell S. Post
Eric J.R. Nichols
Fields Alexander
Robert D. Daniel
William R. Peterson
Bryon A. Rice
1221 McKinney, Suite 4500
Houston, TX 77010

WINSTEAD PC
Albert R. Axe
Keith A. Courtney
401 Congress Ave., Suite 2100
Austin, TX 78701

Counsel for Plaintiffs-Appellants:

Philip H. Hilder
philip@hilderlaw.com
HILDER & ASSOCIATES, P.C.
819 Lovett Boulevard
Houston, TX 77006

Charles C. Caldart
cccnelc@aol.com
NATIONAL ENVIRONMENTAL LAW CENTER
1402 Third Avenue, Suite 715
Seattle, WA 98101

Joshua R. Kratka
josh.kratka@nelconline.org
NATIONAL ENVIRONMENTAL LAW CENTER
294 Washington Street, Suite 500
Boston, MA 02108

David A. Nicholas
dnicholas@verizon.net
20 Whitney Road
Newton, MA 02460

/s/ Russell S. Post
Russell S. Post
Attorney of Record for Appellees

STATEMENT REGARDING ORAL ARGUMENT

ExxonMobil agrees that oral argument will aid the decisional process.

STATEMENT REGARDING RECORD REFERENCES

The district court issued detailed Findings of Fact and Conclusions of Law, spanning 86 pages. ROA.11358-443 [App. RE 3]. They cite the record as follows: "*Trial Transcript* at x-yyy:zz." The "x" indicates the day, "yyy" the page of that day's transcript, and "xx" the line on the page. For the convenience of the Court, should it wish to examine evidence cited in the Findings, ExxonMobil submits the following table of parallel Trial Transcript and ROA references:

Day 1, Trial Transcript 1-5 to 1-270:	ROA.11927-12192
Day 2, Trial Transcript 2-5 to 2-256:	ROA.12453-12704
Day 3, Trial Transcript 3-5 to 3-275:	ROA.56332-56602[1]
Day 4, Trial Transcript 4-5 to 4-279:	ROA.12709-12983
Day 5 Trial Transcript 5-5 to 5-207:	ROA.12988-13190
Day 6 Trial Transcript 6-5 to 6-191:	ROA.13195-13381
Day 7 Trial Transcript 7-5 to 7-252:	ROA.13386-13633
Day 8 Trial Transcript 8-5 to 8-230:	ROA.13638-13863
Day 9 Trial Transcript 9-5 to 9-190:	ROA.13868-14053
Day 10 Trial Transcript 10-5 to 10-277:	ROA.14058-14330
Day 11 Trial Transcript 11-5 to 11-286:	ROA.14335-14616
Day 12 Trial Transcript 12-5 to 12-248:	ROA.14621-14864

[1] This volume for trial day 3 was initially omitted from the Record on Appeal and later submitted in a Supplemental Record on Appeal – thus the out-of-sequence numbering.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASE **PAGE(S)**

STATUTES

RULES

OTHER AUTHORITIES

ISSUES PRESENTED

In this citizen suit under the Clean Air Act ("CAA"), the district court found some actionable permit violations—but far fewer than the plaintiffs had alleged. The court weighed the multiple factors that guide a determination of civil penalties under the CAA and decided that, under those factors, no penalties were warranted. The court also denied ancillary requests for declaratory and injunctive relief.

This judgment presents the following three issues on appeal:

1. Whether the district court abused its discretion in declining to award civil penalties under the citizen-suit provision of the CAA.

2. Whether the district court clearly erred in its factual findings about actionable violations under the citizen-suit provision of the CAA.

3. Whether the district court abused its discretion in denying declaratory and injunctive relief.

STATEMENT OF THE CASE

Plaintiffs-Appellants, Environment Texas Citizen Lobby and Sierra Club, brought this action under the citizen-suit provision of the Clean Air Act ("CAA"), 42 U.S.C. § 7604. ROA.31. Defendants-Appellees Exxon Mobil Corporation, ExxonMobil Chemical Company, and ExxonMobil Refining & Supply Company (collectively "ExxonMobil") operate a refinery, olefins plant, and chemical plant in Baytown, Texas (the "Baytown Complex" or "Complex"). The litigation involves Plaintiffs' allegations that ExxonMobil is responsible for "repeated" or "ongoing" CAA violations at the Complex—the standard for a citizen suit under the CAA—and should be penalized and enjoined as a result. ROA.11359-60, 11390-93.

Among other regulations, the Baytown Complex is subject to approximately 120,000 provisions in permits issued under the CAA. ROA.11362, 56408-09. ExxonMobil must report certain events involving air emissions or deviations from its permits to the regulatory authorities, and must record others. ROA.11362-63. Plaintiffs based their claims on ExxonMobil's reports and records over a period of nearly eight years (October 14, 2005-September 3, 2013). ROA.11268-71, 11359. For each report and record, they sought—under the CAA citizen-suit provision—civil penalties, declaratory and injunctive relief, fees, and costs. ROA.11262-82. They requested the maximum penalty for each legally-required report and record. Plaintiffs originally requested more than $1 billion in penalties; at the time of trial, they still sought more than $640 million in penalties. ROA.11281, 11359 n.3.

During trial, this approach came to be known as Plaintiffs' "gotcha" theory. To assert it, Plaintiffs recruited a handful of members who could plausibly satisfy the "actual injury" test for environmental standing, using them as instruments to seek civil penalties and draconian injunctions for virtually every alleged violation that might have occurred over the entire period of suit. ROA.11376-82, 11384-89.

ExxonMobil asserted that Plaintiffs lacked standing and had not shown any actionable violations of the CAA. ExxonMobil also asserted that it had addressed the events and deviations described in the reports and records, thus eliminating any justification for citizen-suit enforcement. *See* ROA.11288-357.

The district court (Hittner, J.) conducted a bench trial in February 2014, taking testimony from 25 witnesses and receiving 1,148 exhibits. ROA.11358. The court determined that no relief was warranted. ROA.11430-31, 11444.

The Clean Air Act Enforcement Scheme

Implementation and enforcement of the CAA are accomplished through the combined resources of EPA and the relevant state "air pollution control agency," which in Texas is the Texas Commission on Environmental Quality ("TCEQ"). ROA.14773-74. This framework is founded on cooperative federalism.

The CAA requires each state to create a State Implementation Plan ("SIP") that will implement and enforce the National Ambient Air Quality Standards ("NAAQS"). *See* 42 U.S.C. § 7410. Once EPA approves a SIP, the state agency has primary responsibility for enforcement. *See id.* at § 7407(a).

Since long before the time period at issue in this case, Texas has had a SIP (which includes TCEQ permitting and enforcement regulations) approved by EPA. *See* 40 C.F.R. § 52.2270 (relating to EPA-approved regulations in the Texas SIP). Thus, primary responsibility for enforcement of the CAA in Texas lies with TCEQ. 42 U.S.C. § 7407(a); *see also* 30 Tex. Admin. Code § 1.1, *et seq*.

Beyond basic statutory requirements, "states enjoy a measure of discretion" with respect to implementing the CAA. *State of Texas v. EPA*, 690 F.3d 670, 675 (5th Cir. 2012) (citing *Union Elec. Co. v. EPA*, 427 U.S. 246, 266 (1976)). Thus, implementation of the CAA represents "'an experiment in federalism.'" *Id*. (quoting *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1036 (7th Cir. 1984)).

As part of that cooperative relationship, EPA and TCEQ have entered into a Multi-Year Multi-Media Enforcement Memorandum of Understanding ("MOU") to guarantee the effective use of state and federal resources. DX546 at 26, 30-31. It provides that EPA may enforce violations of the CAA directly if necessary. DX546 at 26.

Likewise, EPA always retains the authority to seek CAA relief in response to any violation by a regulated entity. 42 U.S.C. § 7413(a)(1). Were EPA to determine that TCEQ had failed to address a particular violation appropriately, including through the assessment of an appropriate penalty, EPA would have the authority to "over-file" and pursue enforcement for the violation. ROA.14774; DX546 at 27, 35-36.

EPA's willingness to enforce the CAA is shown by an action it filed in 2005 alleging violations of the CAA at several ExxonMobil refineries, including the Baytown Complex. *See United States v. Exxon Mobil Corp.*, No. 1:05-cv-05809 (N.D. Ill. Dec. 13, 2005). This action resulted in a consent decree that remains in effect today ("Consent Decree"). DX227.

The Consent Decree imposed penalties and required capital improvements, emissions reductions, and a corrective action program for future "flaring" events. DX227 at 139-42, 131-38, 17-124. ExxonMobil must report to EPA twice per year and must pay stipulated penalties for specified violations of the Consent Decree. *Id*. at 138–39, 143–67.

Plaintiffs accuse TCEQ of failing to live up to its enforcement obligations, but EPA has consistently found that TCEQ has carried out the terms of the MOU. DX546 at 3. EPA has never had to "over-file" with respect to any of the actions taken by TCEQ regarding the Baytown Complex. *Id*.

In this complex regulatory scheme, private plaintiffs play a very limited role. Citizen suits play an "interstitial" role that is designed to "supplement" and not to "supplant" the regulators. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 61 (1987). In sum, "citizen suits are proper only 'if the Federal, State, and local agencies fail to exercise their enforcement responsibility.'" *Id*. at 60. Plaintiffs' complaints in this litigation defy that "interstitial" role.

The Baytown Complex and Efforts to Reduce Emissions Events

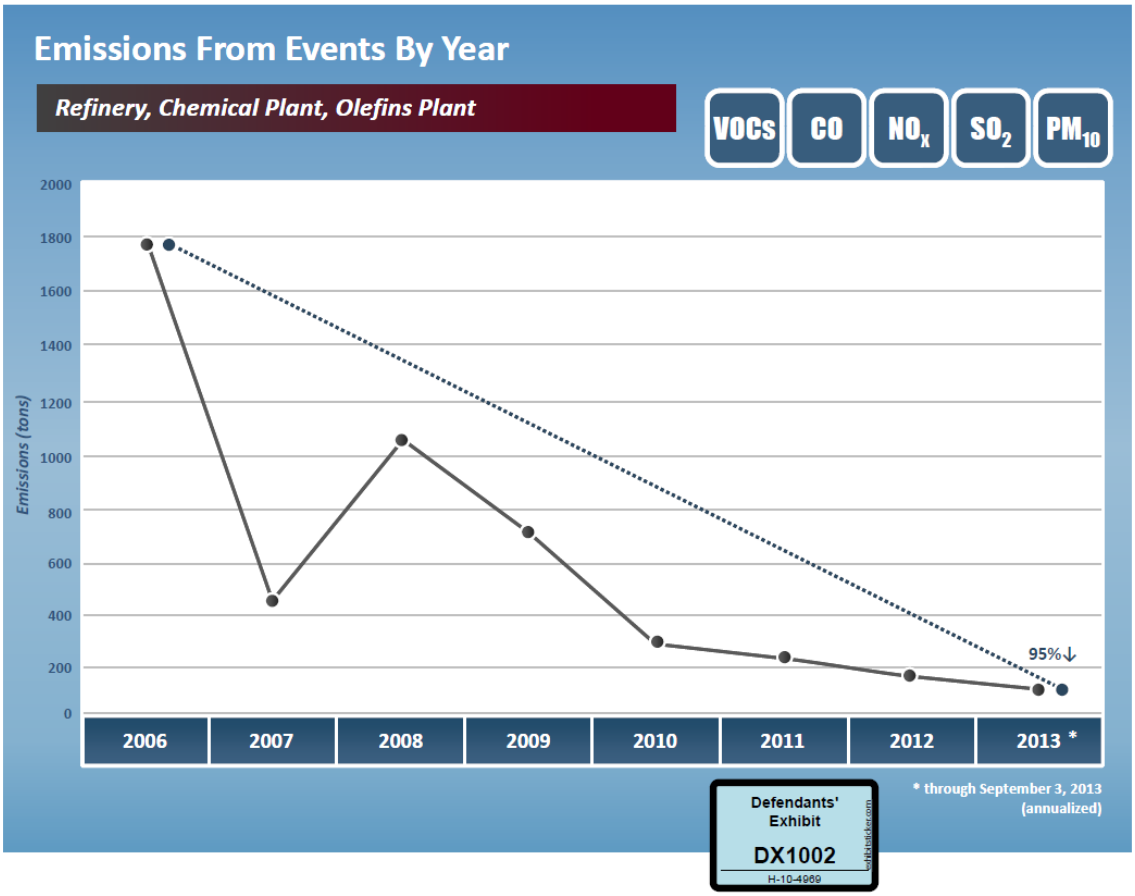
The Baytown Complex is one of the largest industrial sites in the country. ROA.12875-77, 56401. It occupies approximately 3,400 acres and its vast array of equipment includes about 10,000 miles of pipe, one million valves, 2,500 pumps, 146 compressors, and 26 flares. ROA.56398-99, 13683, 56351-52, 56577, 13619, 56399-400. The Complex can process over 550,000 barrels of crude oil each day and produce approximately 13 billion pounds of petrochemical products each year. ROA.56404-07. Approximately 3,000 employees and contractors at the Complex are involved in maintenance work. ROA.13585-600; DX1019H.

In this environment, complete elimination of emissions of air contaminants (also known as "pollutants") is impossible. CAA permits allow and account for the fact that industrial facilities like those that comprise the Complex will emit pollutants during their normal operations. In addition, any industrial facility—especially one as massive as the Baytown Complex—will have "emissions events." An "emissions event" is technically defined as "[a]ny upset event or unscheduled maintenance, startup, or shutdown activity, from a common cause that results in unauthorized emissions of air contaminants from one or more emissions points ...." Tex. Admin. Code § 101.1(28); *see also id.* § 101.1(110) (defining "upset events" as "unplanned and unavoidable" events that result in "unauthorized emissions"). TCEQ and EPA realize it is impossible to operate complex industrial facilities without any emissions events. DX190 at 7-9, 14; DX 546 at 11; ROA.56439.

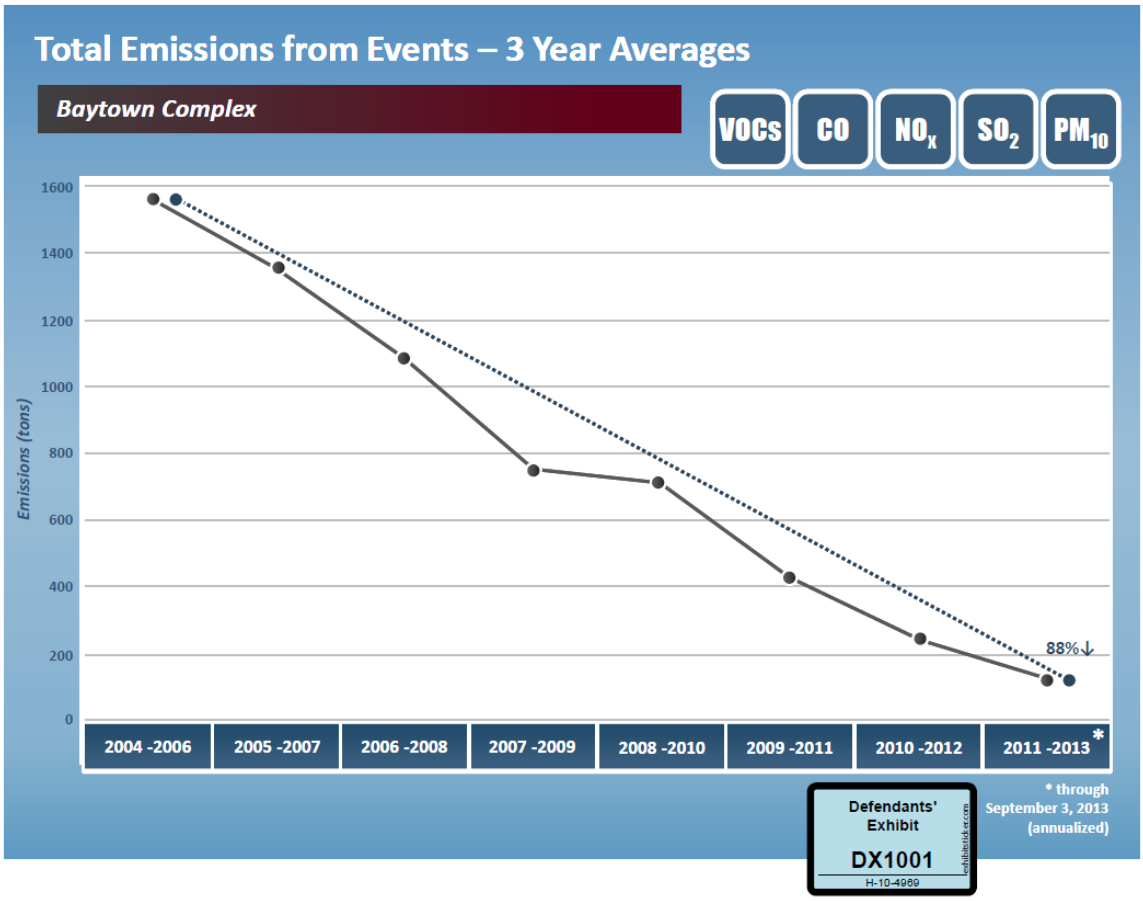
Even still, the Baytown Complex is a leader in environmental compliance. ExxonMobil prioritizes environmental compliance and performance enhancements, ROA.56407-09, 56417-18, and to that end, it takes significant steps to minimize emissions events and avoid breakdowns that interrupt production at the Complex. DX63 at 6-13, 22; DX64 at 66; DX65 at 66. ExxonMobil dedicates significant resources to maintenance of plant equipment and environmental compliance. *Id*. Everyone at the Complex—both employees and contractors—must work toward plant reliability and environmental compliance. ROA.13600, 56409-14; DX222. The Complex has a Safety Security Health and Environmental ("SSHE") group of nearly 80 employees (many of whom are dedicated to environmental compliance), which has an annual budget of about $25 million. ROA.12642-43, 14841-42. Additionally, the Complex employs a broad array of emissions-reduction and emissions-detection equipment. ROA.14100-16, 14130-31.

Over the past several years, ExxonMobil has spent more than $1 billion on regulatory compliance and environmental improvement projects at the Complex. ROA.14855-56. From 2005 to 2013, hundreds of millions of dollars were invested every year on maintenance projects: 2005 ($464 million); 2006 ($539 million); 2007 ($519 million); 2008 ($599 million); 2009 ($642 million); 2010 ($598 million); 2011 ($583 million); 2012 ($607 million); 2013 ($685 million). DX413; *see also* ROA.11372-73 (noting the increasing investment over time).

These commitments have made a real impact. Even though it is not possible to operate a plant without emissions events, the Baytown Complex has achieved significant reductions in the number of emissions events and the total amounts of emissions from such events since 2005. DX222 at 3. The total emissions of "criteria pollutants" (the pollutants subject to NAAQS standards, *see* p. 23, *infra*) from emissions events at the Complex decreased from 2006 to September 3, 2013 (the end of the period covered by this case) on an annual basis by 95%. DX1002.



This improvement had begun before 2005 and it has proceeded consistently, as evidenced by a series of rolling three-year periods. DX 1001.



In short, ExxonMobil has spent huge sums on its efforts to reduce emissions, beginning before this litigation was even filed (and continuing after its conclusion). Pursuing this objective is part of the Complex's core mission. ROA.14834-50.

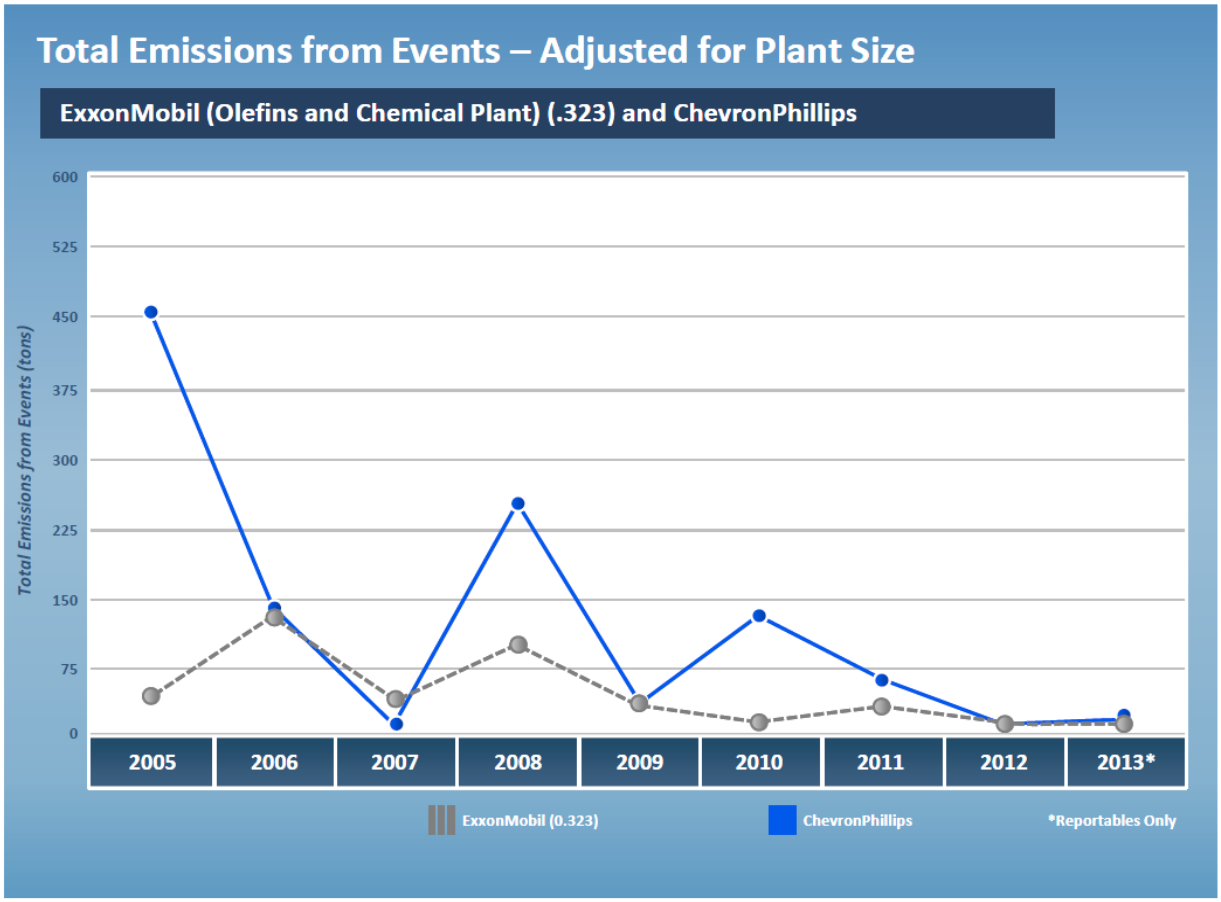
One important signal of this improvement is the reduction in "flaring." Flaring is a safety practice that burns many excess hydrocarbon gases that would otherwise be released, such as during emissions events. ROA.13087-88, 56353-55. Burning excess hydrocarbon gases is a legally proper and environmentally sound practice to avoid releasing gases directly into the atmosphere. *See* ROA.56355.

ExxonMobil has implemented a flare minimization plan for the Complex. ROA.14847-48. Many flares are being linked to flare gas recovery compressors. ROA.14109.[2] As a result of these flare minimization efforts, the Complex has reduced flaring by 73% since 2000. DX547 at 12. In addition, all the Complex's flares have flow rate velocity meters and are monitored for vent gas heat content, and ExxonMobil takes steps to ensure that each flare operates in compliance with all applicable regulatory requirements. ROA.14114.

Thanks to all these efforts, the Baytown Complex has met or exceeded the performance of its peers in reducing emissions from events over the time period covered by this lawsuit—and it has done so without the need for a court order resulting from a citizen suit. These Plaintiffs also brought CAA citizen suits against the Shell Oil Deer Park Facility and the Chevron Phillips Cedar Bayou Chemical Plant, both of which resulted in consent decrees. DX393; DX394. Nevertheless, the Deer Park Facility and the Cedar Bayou Chemical Plant have continued to experience emissions events—even after having satisfied and been released from the provisions of those decrees. DX394; ROA.12533-41. Thus, citizen-suit enforcement is not a panacea that eliminates emissions events; in fact, the Baytown Complex is performing at least as well as its peers in this area without judicial intervention.

[2] Additional flare gas recovery compressors would be inefficient because the modest reduction in emissions would not justify the expense. ROA.14515-22; DX190 at 15-20; DX190C.

The Baytown Complex has taken actions that are the same as, or similar to, those required by the Shell and ChevronPhillips consent decrees. ROA.14370-81. Without entering into a consent decree, the Complex has equaled or exceeded the environmental performance of these other facilities. DX1006, DX1009, DX1010. For example, a comparison of emissions events at the Baytown chemical plants and the ChevronPhillips chemical plant (adjusted for plant size) shows as follows:



DX1006.

Consistent with this improving performance, TCEQ's Executive Director at the time this lawsuit was filed testified that he did not believe Plaintiffs' lawsuit against ExxonMobil would provide "any additional value." ROA.14765-67.

The Air Permits

Undeterred, Plaintiffs' "gotcha" theory swept up every emissions event at the Baytown Complex between 2005 and 2013. Before analyzing their complaints, it is necessary to discuss the permitting and regulatory process in greater detail.

First, air emissions from normal operations at the Baytown Complex are regulated largely by 11 New Source Review ("NSR") permits issued by TCEQ. Two of them (covering the refinery and the olefins plant) are referred to as "flexible permits." ROA.12658; PX129–PX133, PX216–PX217, PX220–PX221; PX155–PX159, PX161–PX168, PX170–PX176. Thus, it is useful to distinguish between "regular" and "flexible" permits.

Regular permits list each emissions point and source covered by the permit, each pollutant that may be lawfully emitted from that particular point and source, and the limits on hourly and annual emissions for each air pollutant with respect to each emissions point and source. *E.g.*, PX139. Thus, each regular NSR permit for the Chemical Plant specifies the "maximum allowable emission rates" for specific "facilities, sources, and related activities." PX139 at 17. Specific emission rates are established in "pounds per hour" and "tons per year" for specific contaminants, at specific emissions points, from specific sources. For volatile organic compounds ("VOCs"), for example, the permit provides a series of maximum emission rates with respect to each emissions point and source. PX139 at 17-18 (designated as "ETSC 076146-47" on the original exhibit) [RE 1].

To take one particular example, the permit authorizes 0.08 pounds per hour, and 0.20 tons per year, of VOCs to be emitted from emissions point "FS28" attributable to source "Flare." PX139 at 17. Maximum rates for other pollutants (NO_x, SO2, CO, and NH3) are also specified for this emissions point and source. *Id*. There are eight other emissions points and sources from which emissions of VOCs are permitted, each with its own specific limits. *Id*. at 17-18.

On the other hand, a flexible permit creates one aggregate emission limit for a pollutant, which may be emitted from multiple emissions points and sources. *E.g*., PX155. This aggregate limit is frequently referred to as an "emissions cap." For example, the Refinery Permit is a flexible permit covering a number of different air pollutants, providing aggregate emission caps for those pollutants in pounds per hour and tons per year for the specified emissions points and sources. To take the same example, the VOC limit covers hundreds of points and sources, establishing a total limit of 6,027.79 pounds per hour and 6,242.93 tons per year in the aggregate. *See* PX155 at 56-83 (ETSC 076368-95) [RE 2].

The Baytown Complex is also governed by federal operating permits, referred to as "Title V permits," that incorporate the NSR permits issued by TCEQ. 30 Tex. Admin. Code § 122.142(b); ROA.12655-57.

Taken together, these air permits contain approximately 120,000 provisions. ROA.56408-09. Each constitutes an independent "emission standard or limitation" within the meaning of the CAA citizen-suit provision. 42 U.S.C. § 7604(f)(4).

Event Rules for Reportable Events, Recordable Events, and Deviations

Because emissions events are—by definition—unplanned and unscheduled departures from normal operations, TCEQ does not incorporate those events into its NSR permits. DX 190 at 6, 22–23. Instead, TCEQ regulates emissions events through a comprehensive set of rules that determine the appropriate response whenever an emissions event occurs. These rules are known as "Event Rules." *Id*.; *see also* 30 Tex. Admin. Code §§ 101.201–101.222.

First, the Event Rules define the "reportable quantities" for air pollutants, specifying events that must be reported to TCEQ. Reports are submitted through the State of Texas Environmental Electronic Reporting System ("STEERS"). 30 Tex. Admin. Code § 101.1(87); 27 Tex. Reg. 8514; ROA.14780. In this case, it is undisputed that each reportable event at issue was properly reported to TCEQ by ExxonMobil. DX546 at 64-65. Due to ExxonMobil's ongoing investments in regulatory compliance and environmental improvement projects, the total number of reportable events occurring at the Complex on an annual basis decreased 81% from 2005 through 2013. DX1000.

TCEQ investigates each reportable event, as it is required to do by state law. DX546 at 8; ROA.12689, 12692, 12709, 13718. It uses about 500 investigators, who do approximately 100,000 investigations annually (20,000 of them onsite). DX546 at 1-2. TCEQ has conducted such investigations at the Baytown Complex. ROA.14136-37.

After an investigation, TCEQ decides whether enforcement is warranted. DX546 at 3-4; ROA.14776-78. TCEQ's enforcement decision is discretionary. 42 U.S.C. § 7410(a)(2)(C); Tex. Health & Safety Code § 7.051.

In exercising its enforcement discretion, TCEQ first decides whether an emissions event was "excessive." *See* 30 Tex. Admin. Code § 101.222(a). If not, before an enforcement decision is made, the owner or operator is entitled to assert certain affirmative defenses. *See* 30 Tex. Admin. Code § 101.222(b)-(e).

If TCEQ determines that the affirmative defense criteria are met, it will not impose a penalty. ROA.12690. Otherwise, TCEQ makes an enforcement decision based on its written Enforcement Initiation Criteria. DX546 at 3-4; PX623 at 6-7; ROA.14777-78. These criteria, which are intended to provide consistency in TCEQ's exercise of its enforcement discretion, are referenced throughout this brief as the "EIC."

Possible TCEQ enforcement actions include issuing a notice of violation ("NOV") or a notice of enforcement ("NOE"). *See* DX546 at 49; PX623 at 59; ROA.56527-29.

If TCEQ issues a NOV and the company takes appropriate corrective action, TCEQ may not take any further enforcement action. DX24-26; ROA.5627-29.

If TCEQ issues a NOE, it may issue an enforcement order that may impose a penalty to be determined in accordance with its penalty policy and may require the company to implement corrective action. PX623 at 59; DX27-29; ROA.5627-29.

In this manner, TCEQ administers a comprehensive regulatory scheme. This combination of self-reporting, TCEQ investigation, and—where TCEQ deems it appropriate—enforcement action assures that each reportable emissions event is handled properly and consistently. This coordinated scheme has contributed to the historical improvements at the Baytown Complex.

Second, in addition to requiring the reporting of emissions events that exceed reportable quantities, the Event Rules require the owner or operator to maintain records of "recordable" events. 30 Tex. Admin. Code § 101.201(b). Recordable events are emissions events that do not result in unauthorized emissions "equal to or in excess of the reportable quantity." 30 Tex. Admin. Code §§ 101.1(71). It is undisputed that the Complex properly recorded each recordable event at issue in this case.

Finally, an "indication" that operations varied from a term or condition of a Title V permit is known as a "deviation." 30 Tex. Admin. Code § 122.10. The term "indication" is material; a deviation is not proof of a permit violation, but only a basis for closer examination. Title V permit holders must submit a semi-annual report that identifies all "deviations, the probable cause of the deviations, and any corrective actions or preventative measures taken for each emission unit addressed in the permit." 30 Tex. Admin. Code § 122.145(2). Again, it is undisputed that each deviation at issue in this case was duly reported by the Complex.

Emissions Events and Deviations at Issue and TCEQ Enforcement

This litigation involves 241 "reportable" events, 3,735 "recordable" events, and 901 "Title V deviations." ROA.11363-64. Before turning to the details of Plaintiffs' claims and the district court's reasoning, it is useful to know the history of these events and deviations—and the response of ExxonMobil and TCEQ.

Reportable Events

For each of the 241 reportable events, ExxonMobil did an investigation, evaluated the root cause of the event, and implemented corrective action to ensure that the root cause would not recur. ROA.56442-44, 12730, 14092-93; *see also* ROA.11364-68. ExxonMobil did not wait for the regulators to act.

A root cause analysis examines a number of factors, such as equipment and human factors, and can determine whether a failure resulted from recurring factors. ROA.14284-85. The former head of TCEQ's enforcement division testified that it is important to know whether an emissions event resulted from a recurring pattern. DX546 at 6. A root cause analysis meets this need by identifying "where that emission came from, why that emission occurred, what the company did to mitigate that event, [and] whether there was any offsite or onsite impact." *Id.*[3] Based on its root cause analysis, ExxonMobil took appropriate corrective action for each of the 241 reportable events. ROA.56442-44, 12730, 14092-93.

[3] The need for a root cause analysis is underscored by Plaintiffs' effort to lump together incidents as disparate as a squirrel short-circuiting electrical equipment and a hawk dropping a snake onto such equipment—which the court found "neither credible nor persuasive." ROA.11417 n.224.

As required by law, TCEQ thoroughly investigated all 241 reportable events. ROA.12709; DX18-DX36. Civil penalties were imposed, either by TCEQ or by a local regulatory authority, for 75 events. DX30-DX32; ROA.56519-20, 56526-27. The penalties totaled $1,423,632. ROA.11365-66 & n.36 (citing PX337, DX502). The regulatory authorities also required ExxonMobil to take corrective actions or document the corrective actions already taken. DX472; DX 488.

With regard to 44 reportable events, TCEQ issued a notice of violation and ExxonMobil took corrective actions. In accordance with its EIC, *see* p. 15, *supra*, TCEQ did not impose penalties for these events. DX24-DX29; ROA.56527-29.

With regard to 11 reportable events, TCEQ issued a notice of enforcement and ExxonMobil took the required corrective actions. In accordance with its EIC, TCEQ did not impose penalties for these events. DX27-DX29; ROA.65628-29.

TCEQ elected not to pursue enforcement on 97 reportable events because it determined that the affirmative defense criteria set forth in the Texas SIP were met. DX18-DX20AA; ROA.56529-33. A few other events were subject to emergency proclamations issued during Hurricane Ike and related directives, which established another defense. ROA.56533-37; DX225; *see also* ROA.14583.

Thus, TCEQ exercised its discretion, in accordance with its standard policy as set forth in the Event Rules and its EIC, with respect to the reportable events.

Recordable Events

The 3,735 recordable events were modest in duration and/or total emissions, posing relatively little threat to public health or the environment. ROA.14780. Concerning duration, 43% of the recordable events lasted less than half an hour; 55% less than one hour; 62% less than two hours; and 73% less than five hours. DX1007A. Concerning total emissions, 58% of the recordable events involved emissions of 20 pounds or less; 80% involved emissions of 100 pounds or less; and 87% involved emissions of 200 pounds or less. *Id*. All involved total emissions below TCEQ's "reportable quantities" thresholds. *See* ROA.11368.

For example, ExxonMobil recorded events as mundane as wisps of smoke emanating from a power receptacle as a result of a faulty extension cord, DX2; ROA.14849-50, and a fire in a cigarette butt can at a smoking area—for which the corrective action was "douse the smoldering materials in the butt can" with water. DX2. Plaintiffs lumped together disparate and unconnected events like these, regardless of their severity, as part of their "gotcha" theory.

TCEQ has the power to take enforcement action regarding recordable events should it determine that enforcement is justified. DX546 at 5-6. For example, TCEQ may take enforcement action if it observes a trend of recurring events. *Id*. That was not an issue here: ExxonMobil systematically analyzes recordable events in search of trends. ROA.14272-73.

Title V Deviations

The 901 Title V deviations were composed of two categories of events. Approximately half involved emissions events: 415 involved deviations relating to a reportable or recordable event (which were redundant of those emissions events), and 78 involved emissions that occurred during the normal course of operations. ROA.14262-63; *see also* ROA.11369-70.

The other Title V deviations (408) involved no air emissions whatsoever. ROA.56445, 14257, 14261. Most involved mundane recordkeeping issues such as failure to inspect a drain on schedule and late submission of a report regarding an engine's hours of operation. DX15 at 4; DX300 at 8 (ETSC 068743); ROA.14260. Regardless, Plaintiffs' indiscriminate "gotcha" theory proposed the same treatment for such recordkeeping deviations as for releases of pollutants that had resulted in TCEQ penalties and corrective action requirements.

TCEQ reviews each semi-annual deviation report and, when appropriate, takes action based on its investigation and its EIC. ROA.14256; DX546 at 8. Consistent with that policy, TCEQ has taken action against the Baytown Complex based on Title V deviations. DX31. But TCEQ took no enforcement action regarding the deviations at issue here (aside from those related to reportable events, addressed earlier).

The 2012 Agreed Order

Reflecting its active enforcement of the CAA during the period in question, TCEQ negotiated a forward-looking enforcement order with ExxonMobil in 2012 (the "Agreed Order"). DX222. Former TCEQ executives (who have consulted with ExxonMobil to assist its environmental compliance efforts following their TCEQ employment) described the Agreed Order as a more efficient approach to enforcement and a model for future TCEQ enforcement efforts. ROA.15821-22; DX546 at 110-11. Plaintiffs' brief criticizes the Agreed Order, App. Br. at 25-26, but they did *not* object during the public comment period. ROA.12503, 14786-87.

The Agreed Order recognized the Baytown Complex's historical reductions in emissions during the period covered by this lawsuit. DX222 at 3. In addition, the Agreed Order also (1) resolved enforcement for certain past reportable events; (2) set forth a structure for stipulated penalties related to future reportable events; (3) required specified emissions reductions; and (4) mandated that the Complex implement four new environmental improvement projects. DX222 at 3–4.

First, the Agreed Order obligated ExxonMobil to pay stipulated penalties on some of the 241 past reportable events at issue. DX222 at 3-5; ROA.14975.

Second, the Agreed Order obligates ExxonMobil to pay stipulated penalties for most future reportable events. DX222 at 5-7. For any reportable event subject to the Agreed Order, ExxonMobil forfeits its right to assert an affirmative defense. DX222 at 6.

Thus, the Agreed Order does not "allow[] the Complex to continue violating its permits." App. Br. at 25. It establishes a predictable enforcement scheme, consistent with the reality that eliminating all emissions events is impossible. DX190 at 7–8, 14. Plaintiffs do not accept that reality—but the district court did:

> Both the TCEQ and the EPA recognize it is not possible to operate any facility—especially one as complex as the Complex—in a manner that eliminates all emissions events and deviations. Despite good practices, at any industrial facility there will always be mechanical failure and human imperfection leading to noncompliance with Title V permit conditions.

ROA.11374.

Importantly, the Agreed Order does not restrict TCEQ's ability to assess greater remedies than those set forth in the order's stipulated penalty tables if TCEQ determines that a reportable event was an "excessive emission event" or adversely impacted human health and the environment. DX222 at 5-7. Therefore, TCEQ continues to be "in a good position to take enforcement when necessary." ROA.14766-67. Plaintiffs' implication that TCEQ has "sold out" is untrue.

Finally, the Agreed Order also obligates ExxonMobil to implement four new environmental improvement projects, at a cost of approximately $20 million. DX222 at 7-10; ROA.56362-67. These projects could not have been mandated under existing laws and regulations; they go beyond the regulatory requirements. DX222 at 8; ROA.56917, 14793-94.

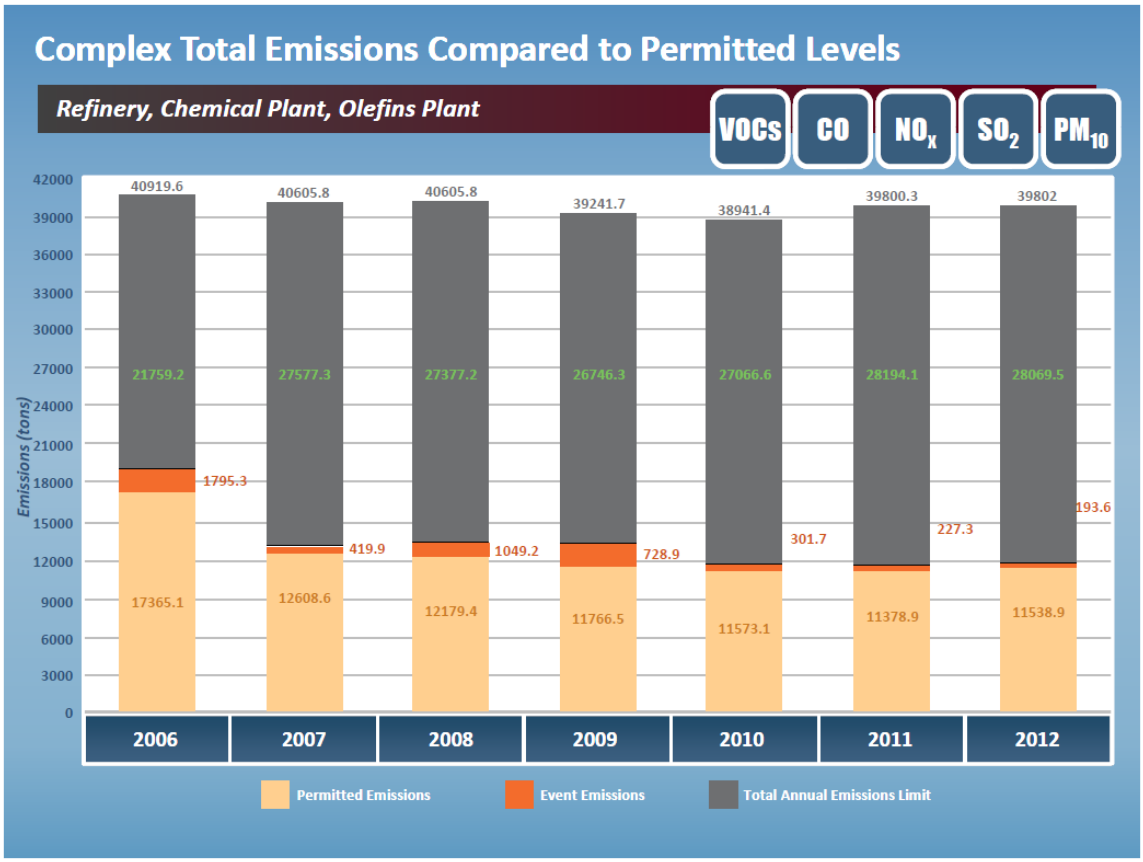
Placing the Emissions Events and Deviations Into Context

Because Plaintiffs disagree with the enforcement and oversight decisions of TCEQ and EPA, demanding the maximum penalty and extensive injunctive relief for each emissions event and deviation despite regulatory decisions to the contrary, it is important to place the alleged violations into context.

The area in which the Baytown Complex operates is populated with numerous other refineries, petrochemical plants, and industrial facilities that emit air contaminants—both as part of normal operations and during emissions events. ROA.14363-69. These sites, like the Baytown Complex, emit "criteria pollutants" and "non-criteria pollutants." "Criteria pollutants" are those that EPA regulates by developing human health- and environmentally-based standards called NAAQS, *see* p. 3, *supra*) pursuant to 42 U.S.C. § 7408(a)(1)(A). NAAQS standards dictate maximum concentration levels for the six criteria pollutants: sulfur dioxide (SO2), carbon monoxide (CO), particulate matter (PM), ozone (O3), oxides of nitrogen (NO_x), and lead. 42 U.S.C. § 7409; 40 C.F.R. §§ 50.4-17.

During each of the years at issue, the actual emissions of criteria pollutants and non-criteria pollutants from the Baytown Complex fell far below the rates authorized by the Complex's air permits. DX1004; DX1008. Those emissions generally declined over time. *Id*.; DX1000; DX1002. In fact, from 2006 to 2012, the emissions of criteria pollutants at issue in this case represented a small fraction of the total volume of emissions authorized by the Complex's permits. DX1004.

For example, in 2012 the Baytown Complex was authorized to emit 39,802 tons of criteria pollutants. DX1004. The Baytown Complex emitted 11,538.9 tons of permitted emissions of criteria pollutants that year during normal operations. DX1004. It emitted 193.6 tons of criteria pollutants during emissions events—representing 1.65% of the Complex's total criteria pollutant emissions for 2012. Even with emissions during emissions events, which are not covered by permits, the Baytown Complex still released 28,069.5 *fewer* tons of criteria pollutants than its permits authorized—so its total emissions, including those from upset events, represented just 29.5% of the total permitted criteria emissions. DX1004.



In short, Plaintiffs' claims involve a tiny fraction of the total emissions—most of them authorized—from the Complex. If those emissions had been planned as part of normal operations, the total emissions would not even have approached the annual emission limits in the permits (which were set at conservative levels well below any scientifically recognized risk to public health or the environment). DX1004; DX418; ROA.13916-20. Because they resulted from unplanned events, however, Plaintiffs demand the maximum penalty.

Trial

To assert their claims, Environment Texas and Sierra Club recruited a few new members to act as citizen-suit plaintiffs; four individuals testified at trial about a variety of claimed nuisances, without any serious effort to link their experiences to the alleged violations. ROA.11376-82. In total, the district court found that they "credibly correlate[d]" only five events to the violations alleged in this case. *Id*. Nevertheless, the district court held that standing principles allowed them to seek civil penalties for thousands of alleged violations. *See* ROA.11384-89.

But the CAA does not allow citizens to sue for any individual violation; citizens may sue "if there is evidence that the alleged violation has been repeated" or if the defendant is "in violation of" a particular emission standard or limitation at the time of suit. 42 U.S.C. § 7604(a)(1). An "emission standard or limitation" includes "any permit term or condition." 42 U.S.C. § 7604(f)(4).

In practice, this statute requires proof of "repeated" or "ongoing" violations. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 57 (1987). Plaintiffs advocated an extremely broad reading of the "repeated or ongoing" test. Under their theory, every emissions event or deviation that relates to a pollutant listed in an air permit is actionable, regardless of the emissions point, the source, the circumstances, or any other factors. ROA.10719-25, 11088, 11265-68. Thus, they argued that every such violation satisfies the "repeated or ongoing" test. *Id*.

Consistent with this theory, Plaintiffs argued that penalties are warranted for all events set forth in the Complex's legally-required reports and records. ROA.11107, 11118-19, 11277, 11280. Their case was based on spreadsheets summarizing all the reportable events, recordable events, and Title V deviations—to which ExxonMobil had stipulated based on the underlying reports and records. *See* PX1A-7E. In their view, no other proof was necessary. ROA.10725, 11268.

Taking the spreadsheets to which ExxonMobil had stipulated with the data regarding reportable events, recordable events, and deviations, Plaintiffs added a new column calculating "days of violations" under their theory. *See* PX587-603.

These spreadsheets made no effort to differentiate the violations or analyze the data in any other way; they treated every event the same regardless of seriousness or circumstances. Nor did they account for a contrary interpretation of the citizen-suit provision that would require more particularized determinations. Plaintiffs consciously chose an all-or-nothing approach.

Plaintiffs' "days of violation" approach represented a "gotcha" methodology based on the concept that any self-report or record of an event or Title V deviation is automatically subject to the highest maximum penalty (up to $37,500 per day) under the citizen-suit provision of the CAA.

To that end, Plaintiffs sought maximum penalties for every reportable event, recordable event, and Title V deviation at the Complex between 2005 and 2013—without regard for the circumstances of each event, the root cause of each event, the isolated or ongoing nature of each event, ExxonMobil's response to each event, or TCEQ's enforcement decisions. ROA.10691, 10725-28, 11086-93, 11119-20, 11219-21, 11268-71. They demanded $640 million at trial. ROA.11120, 11281.

ExxonMobil opposed this "gotcha" liability theory on several grounds. First, ExxonMobil challenged Plaintiffs' standing. ROA.11329-37.[4]

Second, ExxonMobil argued that particular violations are not actionable as "repeated" or "ongoing" violations unless they arise from a common root cause. ROA.11337-42. On this theory, a "violation" is an emission of a specific pollutant, from a specific source, as a result of a specific root cause. ROA.11339-40. Applying this standard, there were no actionable violations. ROA.11337-42.

[4] ExxonMobil does not agree with the district court's analysis of the standing issue, but does not raise the issue on appeal because its main standing challenge (on the element of redressability in the context of civil penalties) is tied to the "repeated and ongoing" requirement for citizen suits and is thus "intermeshed" with the merits. *Sierra Club v. Shell Oil Co.*, 817 F.2d 1169, 1173 (5th Cir. 1987). Because the district court denied the claim, it is unnecessary to raise the issue.

Third, ExxonMobil vigorously contested the need for additional penalties, pointing out that the emissions events in question had been the subject of thorough regulatory investigations and decisionmaking (including 75 penalty assessments) and arguing that improvements in performance at the Baytown Complex indicated that no additional investment or penalty was warranted. ROA10514-21.

Notably, Plaintiffs made no attempt to demonstrate how ExxonMobil could have prevented any of the events or deviations that were the subject of their claims. The closest they came was a "crude estimate" that ExxonMobil should have spent $90 million more annually on maintenance. ROA.12971. Their expert swore that half should have been spent on "material" and half on 900 new employees to do "stuff that needs to be done." ROA.12885-86. ExxonMobil refuted this claim with evidence of its substantial investment in maintenance and compliance efforts. *See* pp. 7-11, *supra*.

Indeed, Plaintiffs' own expert had opined that ExxonMobil should spend $540 million annually in maintenance, PX427, but ExxonMobil had spent more than that each year since 2008. DX413. Plaintiffs' other recommendations were neither necessary nor technically sound. DX64 at 60–64, 68; DX65 at 60–64, 68; DX190 at 15-20; ROA.14377-78, 14386-88. In fact, according to both TCEQ and EPA guidance and practice, their suggestions were economically unreasonable. ROA.14485-522; DX 190, at 15–20, 23; DX 190B; DX 190C.

The District Court's Judgment

The district court rejected Plaintiffs' overreaching theory with respect to both liability and the ultimate question of civil penalties and other relief.

With respect to liability, the district court rejected the "gotcha" theory and refused to take Plaintiffs' spreadsheets based on ExxonMobil's reports and records as proof of "repeated" or "ongoing" violations. ROA.11395, 11399, 11401, 11410. The district court did not accept ExxonMobil's contention that "repeated" or "ongoing" violations must arise from a common root cause, ROA.11392-93 n.155, but agreed with ExxonMobil that "Plaintiffs must prove Exxon repeatedly violated *an* emission standard or limitation, which includes a standard, limitation, schedule, term, or condition *in* one of Exxon's Title V permits. Thus, it is insufficient to prove violation of one standard or limitation followed by violation of a different standard or limitation." *Id*. (citation omitted). After carefully studying the record, both during and after trial, the court found a small number of actionable violations. ROA.11403-09.

Additionally, the district court ruled that it would deny civil penalties even if Plaintiffs had proved all the alleged violations. ROA.11413. The court expressly rejected Plaintiffs' theory that penalties are mandatory for any proved violation—which would deprive courts of any discretion in the application of the CAA and regulators of any meaningful role in the citizen-suit process. ROA.11413-14.

Instead, the district court looked at the statutory factors that guide penalties:

- Size of the business and economic impact of penalties: The court found that both factors favored a penalty. ROA.11414-15.

- Full compliance history and good-faith efforts to comply: The court found that the history of the Complex's compliance efforts and its reductions in emissions weighed against any penalty. ROA.11414-18. The court particularly emphasized ExxonMobil's consistent increases in funding for maintenance efforts and the Complex's recent history of reducing emissions events. ROA.11416.

- Duration: Because of "tremendous variance in durations," the court found that the duration factor cut both ways. ROA.11419-20.

- Prior penalties: The court found that penalties of $1.4 million had been paid for the events and deviations at issue. ROA.11420.

- Economic benefit: The court found that ExxonMobil had not gained any economic benefit from its failure to invest more resources in pollution prevention, accepting ExxonMobil's proof and rejecting the implausible testimony of Plaintiffs' expert. ROA.11420-23.

- Seriousness: The court found that the violations were not serious, ROA.11423-29, specifically finding there was no "credible evidence that any of the specific Events and Deviations were of a duration and concentration to—even potentially—adversely affect human health or the environment." ROA.11426. Plaintiffs' evidence to the contrary was "too tenuous and general to rise above mere speculation." ROA.11427.

Balancing these factors, the district court declined to impose any penalty. ROA.11430-31. The district court also denied declaratory and injunctive relief. ROA.11412, 14432-35. Plaintiffs did not seek reconsideration or argue that the evidence could satisfy the district court's interpretation of the citizen-suit statute; instead, they appealed. ROA.11598.

SUMMARY OF THE ARGUMENT

Plaintiffs have made this appeal a test case for an overreaching interpretation of the CAA citizen-suit provision. Their 103-page principal brief, assailing nearly every adverse ruling by the district court, is riddled with legal and factual errors.

Plaintiffs' overreaching interpretation is based on three false premises. First, they assert that any "violation" related to a single pollutant involves the same "emission standard or limitation" under the CAA, such that all violations related to one pollutant are "repeated" or "ongoing" without regard to any other factors. Second, they assert that any emission not expressly authorized by a CAA permit and any deviation from a Title V permit, even one that did not involve emissions, constitutes a "violation" of an "emission standard or limitation" for purposes of the CAA citizen-suit provision. Third, they assert that reports filed with regulators and records maintained under regulations conclusively establish actionable violations, depriving district courts of any discretion in determining whether to grant relief and compelling the maximum civil penalty allowed by the citizen-suit provision (up to $37,500 per day). If successful, this strategy would be the ultimate "gotcha" theory of environmental law.

This theory distorts the limited, defined role of CAA citizen-suit litigation. Throughout the period in question, TCEQ has conscientiously enforced the CAA with respect to ExxonMobil's Baytown Complex. Plaintiffs' litigation is simply an unjustified attempt to second-guess TCEQ's enforcement efforts.

The district court assessed the situation using the penalty factors in the CAA, considered ExxonMobil's good-faith efforts to comply and the compliance history of the Baytown Complex, gave due respect to the enforcement decisions of TCEQ, and took into account the Plaintiffs' implausible legal and factual positions. Ultimately, the district court determined that no additional penalty was warranted. ROA.11430-31. That ruling was a sound exercise of discretion under the CAA and it provides an independent basis to affirm the judgment.

If the Court finds it necessary to decide Plaintiffs' fact-bound challenges to the district court's findings, preservation of error rules and the standard of review will permit an easy decision. Plaintiffs take issue with virtually all of the findings, and in addition, they develop a series of new theories that were not raised below. Their brief asserts as "true" conclusions drawn from spreadsheets that were never presented to the district court, based on legal theories that were never raised below. Those claims are waived and the district court's findings are not clearly erroneous.

Finally, the district court reasonably exercised its discretion in refusing to grant unnecessary declaratory relief and unjustified injunctive relief.

Citizen suits have a defined role in CAA enforcement, but it is secondary to the enforcement efforts of government regulators. Plaintiffs refuse to accept that limited role under the CAA, perceiving themselves as the only legitimate defenders of the environment. Their theory is unsound. The judgment should be affirmed.

STANDARD OF REVIEW

Findings of Fact – "Clearly Erroneous" Review

The standard of review is the most important legal rule in this appeal. "Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. R. Civ. P. 52(a)(6). The district court's findings regarding liability and underlying its penalty decision are subject to review only for clear error. *U.S. Bank, N.A. v. Verizon Comm., Inc.*, 761 F.3d 409, 431 (5th Cir. 2014) (liability); *United States v. CITGO Pet. Corp.*, 723 F.3d 547, 551 (5th Cir. 2013) (environmental penalty assessment).

"Clear error" is an onerous test. District court findings should be upheld unless the Court is left with "the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). This Court must "view the evidence in the light most favorable to the verdict" and "defer to all reasonable inferences made by the trial court." *Boehms v. Crowell*, 139 F.3d 452 (5th Cir. 1998). When "the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *U.S. Bank*, 761 F.3d at 431 (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573–74 (1985)).

"In practice, the 'clearly erroneous' standard requires the appellate court to uphold any district court determination that falls within a broad range of permissible conclusions." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400 (1990) (citing *Anderson*, 470 U.S. at 573-74). This deferential review applies "even when the district court's findings do not rest on credibility determinations, but are based instead on . . . documentary evidence or inferences from other facts." *Anderson*, 470 U.S. at 574. And when findings do turn on credibility, they receive "even greater deference . . . for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Id.* at 575. Accordingly, when a trial judge's finding is based on credibility determinations, "that finding, if not internally inconsistent, can virtually never be clear error." *Id.* at 575-76 (citation omitted).

> These principles are fundamental to the functioning of our legal system:
>
> > The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' ... rather than a 'tryout on the road.'"

Id. at 574-75 (quoted citation omitted).

Penalty Determination – Abuse-of-Discretion Review

Balancing environmental penalty factors is a "'highly discretionary'" role. *CITGO*, 723 F.3d at 551 (quoting *Tull v. United States*, 481 U.S. 412, 427 (1987)). Responsibility for balancing the factors in the ultimate penalty calculus is entrusted to the district court, and its judgment is reviewed solely for an abuse of discretion. *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 573 (5th Cir. 1996). Therefore, abuse-of-discretion review of the ultimate penalty decision is "highly deferential." *CITGO*, 723 F.3d at 551; *see also United States v. Marine Shale Processors*, 81 F.3d 1329, 1338 (5th Cir. 1996); *Cedar Point*, 73 F.3d at 576.

Under the abuse-of-discretion standard, substantial deference is essential. *See Cooter & Gell*, 496 U.S. at 400. "Generally, an abuse of discretion only occurs where no reasonable person could take the view adopted by the trial court." *Friends for American Free Enterprise Ass'n v. Wal-Mart Stores, Inc.*, 284 F.3d 575, 578 (5th Cir. 2002) (quoted citations omitted).

Declaratory and Injunctive Relief – Abuse-of-Discretion Review

The decision whether to grant declaratory or injunctive relief is reviewed for abuse of discretion. *Concise Oil & Gas P'ship v. Louisiana Intrastate Gas Corp.*, 986 F.2d 1463, 1471 (5th Cir. 1993); *Aransas Project v. Shaw*, 775 F.3d 641, 663 (5th Cir. 2014). Factual findings supporting the exercise of discretion are reviewed only for clear error. *Aransas Project*, 775 F.3d at 663.

ARGUMENT

I. The District Court Did Not Abuse Its Discretion by Denying Penalties.

Assuming that there were any actionable violations, the district court did not abuse its discretion in declining to award penalties. The judgment can be affirmed on this independent basis without reaching Plaintiffs' fact-bound complaints about the various counts in their case.

A. The district court made an alternative holding in favor of the denial of penalties.

The district court soundly rejected the vast majority of Plaintiffs' allegations, and had no difficulty concluding that "Exxon should not be penalized for the actionable events." ROA.11413. Additionally, it made an alternative holding that "even if the Court had found every Event and Deviation in this case is actionable, the Court would still find Exxon should not be penalized." *Id*. Thus, the judgment can be affirmed without even considering whether the district court's findings regarding Plaintiffs' allegations were clearly erroneous.

B. The CAA grants district courts broad discretion in deciding whether to assess civil penalties in a citizen suit.

The CAA provision governing civil penalty awards, 42 U.S.C. § 7413(e), confers broad discretion on district courts—including discretion *not* to penalize. This discretion is especially broad in citizen suits. Thus, the district court was entitled to decline any assessment of penalties in its judgment, even if Plaintiffs had established that all their allegations were actionable.

This Court recently upheld EPA's interpretation of Section 7413(e), specifically endorsing EPA's position that the criteria set forth in that provision are considered "in determining *whether or not to assess a civil penalty* for violations, and if so, the amount." *Luminant Generation Co. v. EPA*, 714 F.3d 841, 852-53 (5th Cir. 2013) (emphasis added); *see also NRDC v. EPA*, 749 F.3d 1055, 1063 (D.C. Cir. 2014) (same). That observation was correct: district courts are entitled "not to assess" civil penalties under the CAA. If anything, district courts enjoy even greater discretion to deny civil penalties in a citizen suit than they do in a suit brought by EPA.

This sensible conclusion follows from the plain language of Section 7413(e), the contrast with the comparable provision in the CWA, the history of the CAA, and the difference between citizen suits and government enforcement actions.

1. Section 7413(e) confers broad discretion over civil penalties.

As with any dispute concerning statutory construction, the analysis starts with the statutory text and proceeds under the rule that, unless otherwise defined, statutory terms are to be interpreted in accordance with their ordinary meaning. *See, e.g.*, *Sebelius v. Cloer*, 133 S. Ct. 1886, 1893 (2013).

Subsections 7413(e)(1)-(2) govern the process for assessing and calculating of civil penalties in both government enforcement actions under Section 7413 and citizen suits under Section 7604(a). This process is explicitly discretionary.

The first sentence of Subsection 7413(e)(2) provides that "[a] penalty *may* be assessed for each day of violation." 42 U.S.C. § 7413(e)(2) (emphasis added). The second sentence then provides rules for "determining the number of days of violation for which a penalty *may* be assessed." *Id*. (emphasis added). The word "may" is an inherently discretionary grant of authority.

This repeated use of the word "may" reveals Congress's intention to grant district courts broad discretion—including the discretion not to assess any penalty. The Supreme Court interpreted virtually identical statutory language from the Declaratory Judgment Act in *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995). Emphasizing that "the Act provides that a court '*may* declare the rights and other legal relations of any interested party seeking such declaration,'" *id*. at 286-87 (emphasis in original), the Court held the word "may" in this analogous context "conferred on federal courts unique and substantial discretion," constituting a "textual commitment to discretion" and creating "broad leeway" for courts not to grant declaratory relief at all. *Id.* at 286-87; *see id*. at 287-90.

District courts have equally "broad leeway" not to grant CAA civil penalties; the word "may" should be given the same interpretation in this analogous context. *See Carder v. Continental Airlines, Inc.*, 636 F.3d 172, 178 (5th Cir. 2011) (quoting *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 574 U.S. 71, 85-86 (2006)).

This analysis is further confirmed by Subsection 7413(e)(1), which provides that a court "*shall* take into consideration" specified factors in determining any penalty amount. 42 U.S.C. § 7413(e)(1) (emphasis added). If Congress had intended courts to assess a civil penalty for every violation, it would have used similarly mandatory language in Subsection 7413(e)(2) and provided that a penalty "shall" be assessed. Instead, Congress chose the discretionary term "may."

This divide between "may" and "shall" is reflected throughout Section 7413, as Congress deliberately chose to use mandatory language in some circumstances and discretionary language in others.[5] As this Court recently noted, such a contrast between "may" and "shall" "suggests a deliberate choice by Congress to make one [action] precatory and the other mandatory." *Knapp v. U.S. Dep't of Agriculture*, No. 14-60002, 2015 WL 4604914, at *14 (5th Cir. July 31, 2015).

In sum, whenever Congress anticipated that the court or the Administrator might have grounds *not* to take the authorized legal action regarding civil penalties, it chose the word "may." Thus, Congress must have intended that a district court would be free to exercise the discretion granted by Subsection 7413(e)(2) *not* to assess a civil penalty.

[5] *E.g.*, 42 U.S.C. §§ 7413(a)(1) (in specified circumstances, the Administrator "shall" give notice but "may" take certain action); 7413(a)(2) (the Administrator "shall" give notice, but "may" take enforcement steps); 7413(b) (the Administrator "shall" bring suit in certain circumstances, and "may" bring suit in others); 7413(d)(1), (d)(2)(A)-(B) (in cases involving civil penalties less than $200,000, EPA "may" issue an order imposing penalties, and "may" compromise or modify the penalty, but in specified cases, "shall" give notice); 7413(f) (the Administrator "may" pay an award for information leading to criminal or civil sanctions).

Congress's textual commitment to discretion is further evidenced by the language of Subsection 7413(e)(1), which establishes criteria for "determining the amount of *any* penalty to be assessed under this section." 42 U.S.C. § 7413(e)(1) (emphasis added); *see also* 42 U.S.C. § 7604(a) (authorizing courts in citizen suits "to apply any appropriate civil penalties"). This use of the word "any" confirms that a district court enjoys the discretion not to assess *any* penalty; it is tantamount to saying "a penalty, *if any*, to be assessed." If Congress had intended otherwise, Subsection 7413(e)(1) would refer to "*a*" penalty, "*the*" penalty, or "*such*" penalty (and Section 7604(a) would order district courts to award "a" civil penalty). Instead, Congress chose the indefinite term "any." The plain language of the CAA unambiguously grants courts discretion in deciding whether to impose penalties.

2. The CAA differs from the CWA with respect to penalties.

The corresponding civil penalty provision of the Clean Water Act (CWA) proves these points. It provides that any person who commits a CWA violation "*shall* be subject to a civil penalty . . . ." 33 U.S.C. § 1319(d) (emphasis added). When the current language of Section 7413(e) was enacted in 1990, it had been held that the word "shall" required imposition of a penalty for a CWA violation. *Stoddard v. W. Carolina Reg'l Sewer Auth.*, 784 F.2d 1200, 1208 (4th Cir. 1986). Congress carefully used the permissive "may" in Subsection 7413(e)(2) to ensure that this mandatory approach would not govern CAA civil penalty assessment, granting district courts discretion not to assess civil penalties under the CAA.

Similarly, the corresponding penalty-determination provision of the CWA specifies the criteria for consideration, like the CAA, but describes the process as "determining the amount of *a* civil penalty." 33 U.S.C. § 1319(d). This language strongly suggests that "a" penalty will be assessed.[6] Congress' decision to use a different phrase in Subsection 7413(e)(1), referring to "the amount of *any* penalty," embraces the possibility that a district court will not assess any penalty at all.

3. The history of the CAA civil penalty provision confirms that penalties are discretionary.

Congress amended the CAA to allow civil penalties in citizen suits in 1990, three years after the decision in *Tull v. United States*, 481 U.S. 412 (1987). In *Tull*, a government action for penalties under the CWA, the Court emphasized that "highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties." *Id.* at 427. In the course of this analysis, *Tull* referred to the ruling in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), which recognized that any statutory remedy a court "may" invoke "is not an automatic or mandatory remedy." *Tull*, 481 U.S. at 415-16.

Tull formed part of the backdrop for the CAA amendments of 1990. Thus, when Congress added civil penalties to the citizen-suit remedies authorized by the CAA and used the discretionary term "may" in Subsection 7413(e)(1), it embraced the *Tull* and *Albemarle Paper* principle that such penalties are discretionary.

[6] The amount of such a penalty is discretionary. *Tull v. United States*, 481 U.S. 412, 427 (1987); *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 576 (5th Cir. 1996).

4. Courts have greater discretion in citizen suits than government enforcement litigation.

The government enforcement provisions of Section 7413(b) reinforce the conclusion that Congress intended district courts to have the broadest discretion in deciding whether to award civil penalties in citizen suits. Section 7413(b) governs enforcement of the CAA at the behest of the EPA Administrator. In certain cases, it provides that the "Administrator *shall, as appropriate*," file a civil action for an injunction "*or* to assess and recover *a* civil penalty" (or both). 42 U.S.C. § 7413(b) (emphasis added). It further provides that in such a government-initiated action, the court "shall have jurisdiction to restrain such violation, to require compliance, [and] to assess *such* civil penalty." *Id*. (emphasis added).

The mandatory command that EPA "shall" file an enforcement action in certain circumstances, with discretion to seek an injunction or "*a* civil penalty," distinguishes such actions from citizen suits. Moreover, in enforcement actions, district courts are authorized to "assess *such* civil penalty." 42 U.S.C. 7413(b). This text stands in contrast to the phrase "any penalty" in Subsection 7413(e)(1), and to the court's power to apply "any appropriate" civil penalties in a citizen suit. 42 U.S.C. § 7604(a). As the Supreme Court recently ruled, "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) (citation omitted). These distinctions in the text of Section 7413 are crucial.

5. Plaintiffs' theory that civil penalties are mandatory is textually unsound and incompatible with the CAA.

Plaintiffs contend that civil penalties are mandatory in CAA citizen suits, insisting that the district court lacked any discretion to deny penalties altogether. *See* App. Br. at 29, 62-66, 90-96. Notably, Plaintiffs did not make that argument before the district court—and with good reason. Their new interpretation is incompatible with the statutory text and the limited role of citizen-suit litigation.

First, statutory interpretation always begins with the language of the statute. But notably, Plaintiffs never discuss the text of the CAA civil penalty provisions—and little wonder, given the inherently discretionary terms of the statutory text. Standing alone, this omission is sufficient reason to dismiss Plaintiffs' argument. *United States v. Am. Commercial Lines, L.L.C.*, 759 F.3d 420, 425 (5th Cir. 2014) ("Statutory construction begins with the language of the statute, and, in the absence of ambiguity, often ends there.").

Lacking any textual argument, Plaintiffs begin their analysis by quoting a district court decision stating that the "root purpose" of the CAA requires violators "'to be held strictly accountable.'" App. Br. at 62. But the Supreme Court holds that courts are not free to rewrite statutes simply because they think it makes sense; "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam).

Instead, a district court in an environmental citizen suit "must exercise [its] discretion with an eye to the congressional policy *as expressed in the statute*." *United States v. Marine Shale Processors*, 81 F.3d 1329, 1360 (5th Cir. 1996) (emphasis added). Plaintiffs quote this principle, App. Br. at 62, but never discuss any relevant statutory language. This omission is not surprising, because their argument ignores "congressional policy as expressed in the statute."

Moreover, Plaintiffs derive their view of Congressional purpose from a case involving a governmental enforcement action. *See id*. They ignore the difference between governmental enforcement actions and citizen suits. As explained above, the statutory language is materially different.

This difference between enforcement actions and citizen suits makes sense. In EPA litigation, Congress sensibly relied on the expertise and sound judgment of EPA concerning the proper remedy for a particular violation, and therefore enacted provisions tying judicial enforcement to the discretion of its administrative agency. Congress had no comparable reason to rely on the judgment of private parties who initiate citizen suits, so it granted courts even greater discretion in such cases.

Plaintiffs' disregard for this difference is perfectly illustrated by the fact that their authority quoted a House Report accompanying the 1977 CAA amendments. *See id*. But the intent of Congress in 1977 is irrelevant; Congress did not amend the CAA to authorize civil penalties in citizen suits until 1990.

Indeed, just three years before the 1990 amendments, the Supreme Court had construed the CWA citizen-suit provision in *Gwaltney*. As noted above, the CWA uses mandatory language requiring civil penalties for a violation. *See* p. 40, *supra*. Yet even in that stronger context, the Court concluded from the text and history of the CWA that a "citizen suit is meant to supplement rather than to supplant governmental action." *Gwaltney*, 484 U.S. at 60. The Court rejected the theory that citizen suits are key elements of CWA enforcement, reasoning that it would "change the nature of the citizens' role from interstitial to potentially intrusive. We cannot agree that Congress intended such a result." *Id.* at 61.

When Congress authorized civil penalties for CAA citizen suits in 1990, therefore, it knew of the Court's ruling that citizen suits serve an "interstitial" and "supplemental" role in environmental enforcement. Rather than rejecting that rule, Congress reinforced it by choosing the discretionary term "may" for civil penalties under the CAA. *See* p. 38, *supra*.

The rest of Plaintiffs' arguments about the supposed "purpose" of the CAA reflect the same defects. They cite hortatory language from a Senate Report and *dicta* from a Supreme Court case about the importance of penalties under the CWA (with its mandatory language), App. Br. at 64-65, as well as district court decisions imposing civil penalties in government actions on their unique facts. *Id.* at 64-66. None of these authorities supports the assertion that district courts lack discretion in citizen suits under the CAA—which is unsurprising, given the statutory text.

Unable to find mandatory language in the citizen-suit provision of the CAA, Plaintiffs complain the district court's failure to penalize ExxonMobil constituted a "*de facto*" revision of its permits. App. Br. at 63-64. Obviously, that is not true. A discretionary decision not to impose penalties, after weighing all relevant factors and giving weight to a defendant's compliance history and deference to regulators, is plainly not a "revision" of the permit. Plaintiffs' authorities are inapposite.

Viewed in context, Plaintiffs' theory that civil penalties are mandatory in citizen suits reflects their "gotcha" theory—the notion that citizen suits can compel a penalty assessment based solely on a defendant's regulatory records and reports, and district courts are powerless to refuse. App. Br. at 32-35. That goes too far. In effect, Plaintiffs contend that citizens—not TCEQ, and not the district court—have discretion to decide whether facilities like the Complex should be penalized; if citizens elect to do so, they need only submit a defendant's reports and records, and the district court is obligated to impose a penalty for every actionable violation reflected in these records—penalizing the defendant for faithfully complying with CAA recordkeeping requirements. This sweeping interpretation cannot be correct. If it were, the "interstitial" nature of citizen suits recognized by *Gwaltney* would be exchanged for the "intrusive" role rejected by Congress. *Gwaltney*, 484 U.S. at 61. Plaintiffs' overreaching arguments are ample justification for Congress's decision, acknowledged in *Gwaltney*, that citizen litigants cannot insist on civil penalties that would be "potentially intrusive" to government enforcement efforts. *Id.*

C. The district court properly considered the statutory factors in its discretionary penalty determination.

In considering civil penalties under the CAA, a district court must consider (and this district court did consider) the following factors:

(1) size of the defendant, ROA.11414-15;

(2) economic impact of the penalty on the defendant, ROA.11414-15;

(3) defendant's full compliance history and good faith efforts to comply, ROA.11415-18;

(4) duration of the violation, ROA.11419-20;

(5) payment of a penalty assessed for the same violation, ROA.11420;

(6) economic benefit of noncompliance due to the violation, ROA.11420-23;

(7) seriousness of the violation, ROA.11423-29; and

(8) such other factors as justice may require.

See 42 U.S.C. § 7413(e)(1). Weighing penalty factors is "highly discretionary." *Sierra Club v. Cedar Point Oil Co*., 73 F.3d 546, 576 (5th Cir. 1996) (citing *Tull*). The district court faithfully examined these factors and found they did not weigh in favor of penalties. ROA.11412-31. That ruling was a sound exercise of discretion.

1. Size and economic impact.

The district court found that ExxonMobil's size and the economic impact of a penalty weighed in favor of a penalty. ROA.11415. But the court found the other statutory factors "all weigh much more heavily against assessing a penalty." ROA.11430-31.

2. Full compliance history and good faith efforts to comply.

When examining "full compliance history and good faith efforts to comply," 42 U.S.C. § 7413(e)(1), a district court should "determine whether the permittee took any actions to reduce the number of violations or attempted to lessen the impact of their discharges on the environment." *United States v. Smithfield Foods*, 191 F.3d 516, 631 (4th Cir. 1999). The district court did so here, ROA.11415-18, and found that "penalties should not be assessed." *NRDC*, 749 F.3d at 1063.

a. The court properly found a good compliance history and good faith efforts to comply.

The district court found that, by implementing the Agreed Order and other performance initiatives, "Exxon made substantial efforts to improve environmental performance and compliance" and "the Complex achieved significant reduction in the number of Reportable Events, the amount of unauthorized emissions of criteria pollutants and the total amount of emissions over the years at issue in this case." ROA.11416; *see also* ROA.11370-75. Those findings were amply supported.

First, the *number* of reportable events at the Complex and total *emissions* from reportable and recordable events have been reduced significantly during the life of this litigation. *See* pp. 8-9, *supra*. Reportable events on an annual basis decreased 81% since 2005. DX1000. Total emissions from events also declined. DX1001. Indeed, ExxonMobil reduced total emissions of criteria pollutants by 95% across the Baytown Complex from 2006 to 2013. DX1002.

Second, as the district court found, these massive reductions were achieved through a serious commitment to plant reliability and environmental compliance—including an investment of more than $1 billion in these priorities in recent years and an annual maintenance budget that has increased over $200 million since 2005 ($464 million to $685 million). ROA.11372-73, 14855-56, 56600-01; DX413. The court found that these investments proved ExxonMobil's good faith effort to reduce emissions and comply with its permits. ROA.11372-73.

Third, the district court found that ExxonMobil's good faith was shown by its practice of investigating each reportable event, performing a root cause analysis, and taking corrective actions. ROA.11365, 11417, 12730, 56441-44. Similarly, for recordable events, ExxonMobil analyzes the records for trends and ways to improve and implements corrective actions. ROA.56444, 14092–93, 14272–73.

Fourth, the court credited TCEQ's former Deputy Director of Compliance and Enforcement, who testified that ExxonMobil "always made a concerted effort to comply" with its myriad regulations and permit conditions. DX546 at 14. According to him, ExxonMobil is not a "bad actor." *Id*. Indeed, another expert in the petrochemical and industrial field said he would "rank the Baytown Complex at or near the top" of petrochemical facilities, recognizing it as being among the "leaders in maintenance and operation practices." ROA.14632. The court found both witnesses "persuasive and credible," ROA.11418, which the Supreme Court holds "can virtually never be clear error." *Anderson*, 470 U.S. at 575-76.

b. The court properly considered the events in context.

Plaintiffs base their theory on the premise that it is possible to operate an industrial facility like the Baytown Complex without upset emissions—which are, by definition, "unplanned and unavoidable." 30 Tex. Admin. Code § 101.1(110); *see also* p. 6, *supra* (defining upset events). The district court reasonably rejected this hopelessly utopian view. ROA.11415-16; *see also* p. 6, *supra*.

The evidence in support of the district court's finding is overwhelming. TCEQ and EPA recognize that emissions events will occur at industrial facilities such as the Baytown Complex. DX190 at 7–8, 14; DX546 at 11. It is not possible to eliminate all emissions events. *Id.*; ROA.56439, 56353. Because of this reality, the former Executive Director of TCEQ testified that the agency "never took a position that a refinery or, for that matter, any regulated entity could have a perfect compliance record." ROA.14796–97.

Even Plaintiffs' own proffered engineering "expert" supported this view, admitting that it is not possible to operate technically complex facilities such as the Baytown Complex in a manner that eliminates all emissions events. ROA.12806. In his words, "stuff happens . . . Unexpected stuff." ROA.12806-07.

Given this evidence, the district court had ample reason to find that "there is no credible evidence that any of the Events or Deviations resulted from a recurring pattern or that improvements could have been made to prevent recurrence." ROA.11417; *see also* ROA.11416-17 & n.224 (rejecting Plaintiffs' evidence).

c. Plaintiffs' criticisms ignore the standard of review.

Plaintiffs' position on ExxonMobil's history of compliance and good faith demonstrates their disdain for the standard of review. For example, they assert "[i]t was an error of law for the Court to conclude that larger facilities are allowed to commit greater numbers of violations and that full compliance is impossible." App. Br. at 91.

As noted, however, the district court did not conclude that "larger facilities are allowed to commit greater numbers of violations." Rather, the district court stated that the number of alleged violations must be considered in context. Indeed, the district court's handling of this issue was nuanced. It did not rely upon the impossibility of eliminating emissions events as "a reason not to impose penalties;" it simply explained that, given the massive size of the Complex, the total number of events "does not alone mean Exxon did not make a good faith effort to comply." ROA.11415-16 & n.221.

Similarly, the court's finding that "it is not possible to operate any facility—especially one as complex as the [Baytown] Complex—in a manner that eliminates all Events and Deviations," ROA.11415-16, is amply supported by the evidence. Plaintiffs' utopian resistance to this finding reflects their unwillingness to accept that the court was free to choose from "a broad range of permissible conclusions." *Hartmarx*, 496 U.S. at 400. Its findings are "plausible in light of the record viewed in its entirety," *U.S. Bank*, 761 F.3d at 431, so they are unassailable.

3. Duration.

The district court also was bound to consider the duration of any violations. 42 U.S.C. § 7413(e)(1). The court found this factor to be neutral. ROA.11419-20.

Primarily, the district court correctly noted that the duration of the events "differs tremendously," *id*., although it did note that many of them were brief. *Id*.; DX1007A; *see also* p. 19, *supra*. A majority of the recordable events lasted less than one hour (and recordable events represented 93.9% of the events at issue). *Id*. Indeed, some lasted less than a minute. PX2D. Nevertheless, the court found that "the tremendous variation in durations" meant the duration factor "weighs neither towards nor against assessing a penalty." ROA.11419-20.

The court also took this opportunity to point out Plaintiffs' overreaching. Noting that Plaintiffs "made no effort to differentiate the duration" of the events and deviations, the court scorned their "gotcha" theory: "**Plaintiffs ask the Court to assess the maximum penalty allowed by law for *each* Event and Deviation, regardless of duration**." ROA.11419 (emphasis in original).

Plaintiffs criticize the district court for failing to differentiate events based on duration, App. Br. at 89-90, but it was Plaintiffs who failed to do so at trial. ROA.11419. In each case, Plaintiffs failed to seek an appropriate penalty based on "the duration of *the violation*." 42 U.S.C. §7413(e)(1) (emphasis added). In sum, the court was free to reject Plaintiffs' all-or-nothing approach, and Plaintiffs cannot complain that the court refused to do their job for them.

4. Payment of prior penalties.

The district court found that ExxonMobil had paid $1,423,632 in penalties. ROA.11420. These penalties were assessed for the more serious reportable events, in accordance with TCEQ's enforcement criteria. ROA.11365-66, 11434.

5. Economic benefit of noncompliance.

For each actionable violation, the district court was required to consider the "economic benefit" to Exxon "of non-compliance." 42 U.S.C. § 7413(e)(1). Under the CWA, this Court holds that a "reasonable approximation" of economic benefit is "central to the ability of a district court to assess the statutory factors." *United States v. CITGO Petroleum Corp.*, 723 F.3d 547, 551-52 (5th Cir. 2013). Courts have recognized "two general approaches to calculate economic benefit": (1) "the cost of capital" required "to correct the violation" or (2) "the actual return on capital" diverted from compliance efforts. *Id*. The district court faithfully applied these legal principles, ROA.11420, and issued detailed findings concerning "the economic benefit of non-compliance." ROA.11421-23.

a. The court properly found that Exxon obtained no benefit from noncompliance.

"After carefully considering all of the evidence," the district court found the "most reasonable estimate of Exxon's economic benefit of noncompliance is $0." ROA.11423. Only a company that has made a serious commitment to compliance could realistically secure such a finding—and ExxonMobil is such a company.

The district court noted that ExxonMobil had made substantial investments "in an effort to reduce emissions and unauthorized emissions events." ROA.11422. This spending included "four environmental improvement projects costing approximately $20 million Exxon was not required to undertake under law, and over $500 million on maintenance and maintenance-related capital projects each year at issue." ROA.11422-23; *see also* ROA.11370-73; DX222; ROA.56359-76, 56517-18; DX413; ROA.13609-18. In the years prior to trial, moreover, ExxonMobil expended another $1 billion on regulatory compliance and environmental improvement projects. ROA.14855-56; *see also* ROA.11422. Plaintiffs have never questioned the amount of these expenditures, which proved that ExxonMobil did *not* save costs in an effort to benefit from noncompliance.

The district court's findings belie Plaintiffs' argument that the court failed to "approximate the amount Exxon earned as a result of delaying or avoiding capital maintenance expenditures" that might have reduced emissions. App. Br. at 68-69. The district court found the testimony urging additional expenditures unreliable and also found that the suggested equipment and maintenance activities would not have avoided any of the events or associated emissions. Thus, the court reasoned, these savings could not be counted as an economic benefit of noncompliance. ROA.11421-22. Plaintiffs make no contrary argument based on the evidence. Indeed, they cannot; their evidence was justifiably discredited by the district court.

Plaintiffs attempted to establish economic benefit through two witnesses—an engineering expert (Bowers) and an economic expert (Shefftz). ROA.11421. They attempted to use the "return on capital" method to establish that ExxonMobil had benefited from failing to invest $90 million more every year on maintenance and more than $200 million in capital improvements. *Id*. The court allowed both witnesses to testify but found them unreliable and lacking credibility.

Bowers offered "vague and undetailed" opinions advocating more funding, and the court found his testimony "neither reliable, credible, nor persuasive." ROA.11421. Neither Bowers "nor any other evidence credibly demonstrated that" additional spending on maintenance or Bowers's suggested capital improvements "would have prevented any of the Events or Deviations." ROA.11422. Instead, the court found that "the preponderance of the credible evidence shows Bowers's suggested capital improvements would not help reduce emissions." ROA.11422; *see also* ROA.14109-10, 14386-88, 14642-50. Significantly, Plaintiffs' brief cites no contrary evidence on either point.

Shefftz added nothing to this picture except an economic model. Because he "made it very clear that he had no opinion as to the reliability" of Bowers's inputs, his opinion on the "economic benefit of noncompliance" was "equally unreliable." ROA.11421.

Credibility determinations like these "can virtually never be clear error." *Anderson*, 470 U.S. at 575-76. Plaintiffs cannot overcome that high hurdle.

b. Plaintiffs' arguments ignore the standard of review and misconstrue the "economic benefit" factor.

Plaintiffs admit that these findings are subject to "clearly erroneous" review. App. Br. at 28. Undeterred, Plaintiffs argue that it was an abuse of discretion not to make alternative benefit findings based on their disputed evidence. *Id.* at 67-72. This Court repeatedly rejects that approach. To the extent that "plaintiffs assert their own version of the facts," those "efforts are in vain." *Cox v. City of Dallas*, 430 F.3d 734, 747 (5th Cir. 2005) (citation omitted).

For example, rather than try to defend Bowers's opinion, Plaintiffs cite other evidence about two potential capital projects that were "recommended" by Bowers. App. Br. at 69-70 & n.38. But cherry-picking such evidence does not establish clear error. The district court found "Bowers's suggested capital improvements" (including these two projects) "would not help reduce emissions." ROA.11422. Plaintiffs do not assail this finding, so there was no benefit "of noncompliance." 42 U.S.C. § 7413(e)(2).

Plaintiffs make several unsupported arguments about benefits from "delay," arguing that ExxonMobil's "delay" in undertaking various improvement projects—which it indisputably has undertaken—should be used to penalize ExxonMobil based on the "economic benefit" of delaying the improvements. App. Br. at 70-72. These arguments are a literal example of "no good deed goes unpunished." Legally, they are all profoundly misguided.

The question is not whether ExxonMobil "benefited" from delaying projects, but whether it secured any "benefit *of noncompliance*." 42 U.S.C. § 7413(e)(2) (emphasis added). If it were otherwise, every dollar spent on anything other than environmental improvements would be treated as a "benefit" for penalty purposes, which would be absurd.[7] Therefore, it is essential that courts limit assessments of "economic benefit" to any "benefit of noncompliance."

As noted above, the district court found no credible evidence that any of the projects or other investments "would have prevented any Events or Deviations." ROA.11422. Because pursuing these projects sooner would not have contributed to compliance, delaying them did not secure any "benefit of noncompliance."

Moreover, Plaintiffs' "benefit" calculation would penalize ExxonMobil for its voluntary pollution-control expenditures efforts. That result would be perverse. No permittee would undertake pollution control efforts voluntarily if the "delay" in doing so might become a basis for civil penalties. Congress plainly did not intend to discourage voluntary pollution-control efforts with a threat of civil penalties, and courts should not allow citizen suits to be used to frustrate such voluntary compliance efforts. *See Gwaltney,* 484 U.S. at 60-61.

[7] Plaintiffs' fallacious reasoning is exposed by their argument that ExxonMobil could "benefit" even from delaying environmental improvement projects that were not required by law, contending that the absence of a legal obligation "is irrelevant to the economic benefit analysis." App. Br. at 71 n.41. This argument does violence to the text. Delaying projects that were not required for compliance could not have resulted in any "benefit" from "noncompliance."

Indeed, as Plaintiffs note, benefit analysis is intended "to level the economic playing field and prevent violators from gaining an unfair competitive advantage." *United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338, 348 (E.D. Va. 1997), *aff'd in pertinent part*, 119 F.3d 516 (4th Cir. 1999); *accord PIRG v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 80 (3d Cir. 1990) (quoting legislative history of CWA explaining the rationale for benefit consideration: "[v]iolators should not be able to gain an economic benefit vis-à-vis their competitors"); App. Br. at 67. But penalizing ExxonMobil based on voluntary compliance efforts would directly undermine that goal, giving the competitive advantage to ExxonMobil competitors who do not undertake similar voluntary compliance efforts.

These arguments expose the extreme nature of Plaintiffs' theory. They even suggest that the court erred by failing to "approximate the amount of profits Exxon gained from operating *instead of shutting down to comply*." App. Br. at 68 (emphasis added). This argument goes beyond the pale, exposing the real agenda behind the "gotcha" theory: shutting down productive industrial activity.

Congress could have required consideration of the overall operational profits of a permittee in the penalty analysis, which would indeed create an incentive to "shut down to comply." In all but the most extreme cases, it is implausible to think Congress intended such a choice—especially since full compliance is impossible. *See* pp. 50-51, *supra*. This theory "would change the nature of the citizens' role from interstitial to potentially intrusive." *Gwaltney*, 484 U.S. at 61.

Congress did not choose that path. Instead, it required consideration of the "benefit *of noncompliance*." 42 U.S.C. § 7413(e)(2). Entire operational profits reflect the benefits of innumerable factors; only in the most philosophic sense can those profits be considered a "benefit of noncompliance," and calculating them would require a much more thorough record than these Plaintiffs bothered to make. Disaggregating profits earned "by virtue of operating in a non-compliant state," App. Br. at 68, from profits attributable to other business factors would pose a devilish causation problem (and would be inconsistent with the only two methods this Court has approved: either the cost of preventing violations or the return on capital diverted from compliance). *CITGO*, 723 F.3d at 552. Plaintiffs made no record suitable for that task; instead, they suggest a crude multiplier without any factual basis, like a closing argument for punitive damages. App. Br. at 68 n.37. That will not do.

The district court's faithful consideration of the economic benefit factor under *CITGO* and its well-supported finding that ExxonMobil did not obtain any "economic benefit of noncompliance" constitute valid fact-finding and a proper exercise of the district court's discretion. Under this "central" variable for the assessment of civil penalties, *CITGO*, 723 F.3d at 551-52, the district court was fully justified in concluding that no penalty was appropriate.

6. Seriousness.

For each actionable violation, the district court was required to consider the "seriousness of the violation." 42 U.S.C. § 7413(e)(1). The district court carefully considered this factor and found that Plaintiffs had not proved "serious" violations. ROA.11423-29. That conclusion resulted from four specific findings:

- Plaintiffs "made no effort to differentiate the degree of seriousness for the different Events and Deviations," ROA.11423-25;
- there was no "credible evidence" that any violation could potentially harm human health or the environment, ROA.11425-27;
- the claim of nuisance-type impacts was "not supported by the preponderance of the credible evidence," ROA.111427-29; and
- the recordkeeping deviations were not serious violations, ROA.11429.

Plaintiffs barely even address some of these findings, and when they do, they ignore the clear error standard of review.

a. The court properly found that Plaintiffs failed to differentiate among the seriousness of violations.

First, as with the duration issue, the district court emphasized that Plaintiffs' "gotcha" theory failed to differentiate among the seriousness of various violations: "**Rather, Plaintiffs ask the Court to assess the maximum penalty allowed by law for each Event and Deviation, regardless of degree of seriousness**." ROA.11424 (emphasis in original). "Such an approach is inappropriate in this case because each of the Events and Deviations differ tremendously." *Id.*

That factual finding was inarguably correct. As the district court observed, reportable events are generally more serious than recordable events, and deviations not due to events are even less serious. ROA.11424-25; *see also* pp. 14-16, *supra*. Here, there are 241 reportable events and 3,735 recordable events at issue. Thus, "there are many more less-serious events at issue than more-serious events." *Id*. Moreover, "the majority of the Recordable Events were less serious because they emitted lower quantities of emissions." *Id*. This is all true. *See* p. 16, *supra*. Finally, the court noted that 45% of the 901 deviations "involved no emissions" and "were not serious at all." ROA.11425. Again, this is true. *See* p. 16, *supra*. Importantly, the court did not deny penalties on this basis, but simply concluded this part of its analysis with the self-evident truth that "there are many more Events and Deviations that were not serious or less serious than were more serious." *Id*.

Plaintiffs contend the district court relied on less serious violations to negate or minimize more serious violations. App. Br. at 73-75. On the contrary, the court simply noted the differences in the seriousness of the few proved violations and the absurdity of Plaintiffs' "gotcha" theory that each warranted the maximum penalty. ROA.11423-24. Consistent with their all-or-nothing approach, Plaintiffs made no attempt at trial to distinguish between "serious" events and "less serious" events. Thus, they cannot fault the district court. The court's factual findings are correct, and it did not refuse to penalize serious violations; it simply viewed the violations in context and with full knowledge that TCEQ had penalized "serious" violations.

b. The court properly found that Plaintiffs failed to prove any harm to public health or the environment.

Next, the district court turned to Plaintiffs' allegation that the violations had adversely affected public health. ROA.11425-27. The court acknowledged that Plaintiffs had offered generic evidence of possible health effects from air pollution but found that they did not "include credible evidence that any of the specific Events and Deviations were of a duration and concentration to—even potentially—adversely affect human health or the environment." ROA.11426. On this record, the court found that Plaintiffs' evidence "is too tenuous and general to rise above mere speculation." *Id*. Again, this finding was well-supported.

i. Scientific analysis disproved health risks.

First, ExxonMobil introduced testimony from two air dispersion modelers and a toxicologist, offering a scientific analysis of nearly every event in dispute. Air dispersion modeling is a mathematical simulation of how air contaminants disperse in the atmosphere. ROA.13321. It is used to predict the dispersion and ambient air concentration of a contaminant released during an emissions event. ROA.13323. The air dispersion models used here were developed by EPA. ROA.13325; DX187. Ambient air monitoring data collected from the vicinity of the Complex were also analyzed. ROA.13805-06, 13813-14, 14003-04; DX165. This analysis allowed the district court to determine, for each violation it found, "the seriousness of *the violation*." 42 U.S.C. § 7413(e)(1) (emphasis added).

This analysis revealed that none of the reportable events that was analyzed, and none of the recordable events, exceeded "NAAQS" standards or endangered public health or the environment.[8] ROA.13760, 13765, 13791, 13818-19, 13894. This scientific analysis was the best evidence at trial on the issue of seriousness.

The National Ambient Air Quality Standards ("NAAQS") are promulgated by EPA to protect public health. 42 U.S.C. § 7409(b); 40 C.F.R. § 50.4-17; DX165 at 5, 9–10; DX195 at 15–16. They set maximum concentration levels for the six criteria pollutants. ROA.13759. They are very conservative, "allowing an adequate margin of safety" to "protect the public health." 42 U.S.C. § 7409(b)(1).

NAAQS standards cover only criteria pollutants; for non-criteria pollutants, TCEQ has developed its own scientifically-based air comparison values ("ACVs"). ROA.13761-62, 13925-26, 13935-37; DX165 at 6-8. ACVs are screening levels, which are set below the levels of known health risks; concentrations of pollutants below the ACV are not expected to endanger public health or the environment. Indeed, exceeding an ACV does not mean that human health or the environment has been harmed; it simply means that a toxicological evaluation is warranted. ROA.13761-64, 13917-24, 14017-18; DX195 at 7–10, 16; DX196 at 5–6; DX418. Thus, ACVs provide a conservative and reliable benchmark for analysis.

[8] ExxonMobil's experts "modeled" the 3,735 recordable events and all of the reportable events except those 75 events for which ExxonMobil paid penalties to regulatory authorities and those 11 events that were excused by Governor Perry's Hurricane Ike Proclamation. *See* DX225.

ExxonMobil's experts analyzed 153 of the 241 reportable events at issue—all except (i) those for which ExxonMobil already paid a penalty to regulators and (ii) those that were subject to the Hurricane Ike proclamation. DX165-DX167; DX195-DX197; *see also* DX21–DX23 (penalties), DX30–DX32 (Hurricane Ike).[9]

This analysis showed that none of these 153 events involved emissions of a criteria pollutant that exceeded the pollutant's NAAQS. DX165–DX167; DX 195; ROA.13760, 13915-16.

For 139 of these events, the maximum offsite ground-level concentration of each non-criteria pollutant involved in the event also did not exceed its ACV. DX165–DX167, DX195–DX197, DX533; ROA.13788, 13801, 13898-903.

With respect to the 14 events for which modeling predicted that the maximum offsite ground-level concentration of at least one non-criteria pollutant had exceeded its ACV, further toxicological analysis established that those events did not cause or contribute to a condition of air pollution or harm public health or the environment. ROA.13964-67, 13988-92; DX195–DX197. The district court specifically found "the greater weight of the credible evidence does not support a finding that any of the Events or Deviations actually or potentially adversely affected human health or the environment." ROA.11426 n.254.

[9] ExxonMobil did not contest TCEQ's findings as to events for which penalties were assessed and relied on the state mandate to shut down the Complex as to the Hurricane Ike events.

ExxonMobil's experts also evaluated each of the 3,735 recordable events. DX166–DX167, DX196–DX197; ROA.13757-58, 13913-15. This analysis proved that *none* of these events involved emissions of a criteria pollutant that exceeded the pollutant's NAAQS. DX166–DX167, DX 196-197; ROA.13760, 13894.

For 3,605 of these events, the maximum offsite ground-level concentrations of each non-criteria pollutant involved in the event also did not exceed its ACV. DX166–DX167, DX196–DX197, DX532; ROA.13766-72, 13784, 13894-96.

With respect to the 130 recordable events for which modeling predicted the maximum offsite ground-level concentration of at least one non-criteria pollutant had exceeded its ACV, further toxicological analysis established that those events did not cause or contribute to a condition of air pollution or harm public health or the environment. ROA.13972-92; DX195–DX197. Indeed, most recordable events involved very modest total emissions—especially when compared to the emissions during normal operations and the emissions authorized by the Complex's permits. DX1007A; ROA.14267–68; *see also* ROA.14265-66.

Finally, almost half of the 901 Title V deviations involved no emissions, ROA.14261-63, and there was no evidence that any of the other deviations had caused or contributed to a condition of air pollution or exceeded any NAAQS.

Given all this evidence, the district court had good reason to find that none of the violations endangered public health or the environment. ROA.11425-27.

ii. Plaintiffs offered no credible evidence.

Faced with adverse factual findings and the clear error standard of review, Plaintiffs doggedly say there was "undisputed" proof of a "potential risk of harm." App. Br. at 75. They ignore the contrary evidence and overstate their own proof, which the court found "too tenuous and general to rise above mere speculation." ROA.11427. That finding was not clearly erroneous.

For their part, Plaintiffs made no effort to conduct air dispersion modeling, evaluate air monitoring data, refute ExxonMobil's air dispersion modeling experts, or offer any toxicological testimony regarding possible impacts from any violation. They called just one witness to testify in general terms about potential health risks from various pollutants—and he did not testify that any of the alleged violations had resulted in emissions at a high enough concentration, for a long enough time, to endanger public health. *See* ROA.13406-07, 13548-51, 13569-70.

Plaintiffs' primary attempt to prove potential harm was based on 69 studies, white papers, and reports regarding the general health effects of various pollutants. ROA.13722–29, PX493, PX496, PX499-PX500, PX502–PX504, PX517–PX552, PX554–PX555. But none of those studies was linked to the violations in this case; indeed, Plaintiffs did not even bother to elicit testimony about most of them.

Unimpressed, the court reasonably found that no "credible evidence" proved any of the violations was "of a duration and concentration to—even potentially—adversely affect human health or the environment." ROA.11426.

Lacking evidence of any actual impact on public health or the environment, Plaintiffs assert that the district court was "foreclosed" from considering that issue. App. Br. at 76. But once again, they fail to acknowledge the standard of review. The case upon which they rely did not hold that a district court is "foreclosed" from considering actual harm in its seriousness analysis; it simply held that the "absence of a measurable harm . . . does not necessarily indicate that a violation is not 'serious.'" *Pound v. Airosol Company*, 498 F.3d 1089, 1099 (10th Cir. 2007). That does not mean a court is *required* to ignore evidence *negating* actual harm.[10] *Pound* was an unusual case in which the court ignored evidence of actual harm and injected invalid considerations into the penalty analysis. *See id*. at 1095-1100. Here, by contrast, the district court conscientiously applied the statutory factors, weighed the competing evidence on seriousness, and found for the defendant.

Similarly, Plaintiffs cannot avoid the defects in their proof by pointing to the total volume of air contaminants released annually as a result of emissions events. App. Br. at 79–80. Courts are bound to consider "the seriousness of *the violation*," 42 U.S.C. § 7413(e)(1), not some aggregate. On that issue, the scientific analysis of the emissions events at issue is a superior indicator of "seriousness." Moreover, emissions events were dwarfed by total permitted emissions. *See* p. 24, *supra*.

[10] The absurdity of Plaintiffs' position is highlighted by the fact that, under their view of the law, courts would be powerless to consider evidence of "actual harm" when evaluating penalties in a case about emissions that caused actual, demonstrated harm to public health or the environment.

iii. Plaintiffs' efforts to fill the gaps in their proof on appeal are unavailing.

In an attempt to bolster their proof on appeal, Plaintiffs now contend that ExxonMobil admitted the seriousness of the alleged violations in numerous ways. These arguments are all distractions.

First, Plaintiffs contend that "[t]he parties stipulated to the admissibility of government documents describing the adverse health effects of the pollutants" emitted during emissions events. App. Br. at 22. But they fail to acknowledge that those general scientific studies lacked any link to the events at issue in this case. Plaintiffs' strategy was akin to a toxic tort litigant who proves "general causation" but forgets about "specific causation." *See Knight v. Kirby Inland Marine Inc*., 482 F.3d 347, 351 (5th Cir. 2007). Little wonder that the district court found their proof was "mere speculation" rather than "credible evidence." ROA.11426-27.

Second, Plaintiffs quote an ExxonMobil manager's testimony out of context to create the impression that he admitted reducing emissions necessarily improves public health. App. Br. at 78. But using ellipses, they omit the rest of his answer, which rejected Plaintiffs' theory. *Id*. Here is the rest of the story:

> You're implying that if I breathe in one molecule of air, it is better than if I breathe in two molecules of air. And the question is: Is there a difference between breathing in two molecules of air or one molecule of air, and I don't know the answer to that question. There may be a threshold below which the number is irrelevant, and that all of it is protective of human health.

ROA.56582-83. Read in context, the supposed "admission" evaporates.

As the ExxonMobil manager explained, the proper inquiry is whether the emissions were of such a concentration or duration that they negatively impacted human health or caused a condition of air pollution. *Id.* It was Plaintiffs' burden to demonstrate that they did, but Plaintiffs failed to meet their burden.

Third, Plaintiffs contend that an ExxonMobil brochure and comments made by an ExxonMobil employee at a Baytown City Council hearing were admissions that emissions from the Complex "adversely affected the surrounding community." App. Br. at 78. Once again, Plaintiffs overstate their evidence. Neither statement was an admission by ExxonMobil that specific emissions at issue in this case adversely affected public health or the environment,[11] and ExxonMobil offered powerful scientific evidence to the contrary. The district court was free to weigh the evidence and place greater weight on scientific analysis of the events at issue.

Finally, Plaintiffs warn that "many" pollutants released in emissions events "have been targeted by Congress as particularly dangerous." App. Br. at 84. Plaintiffs' generic statements about criteria pollutants and hazardous air pollutants cannot overcome the specific scientific evidence regarding every criteria pollutant and hazardous air pollutant that was emitted during the majority of events at issue. *See* pp. 62-65, *supra*. Plaintiffs' assertions regarding generalized health concerns, *see id*. at 84-90, prove nothing of consequence to this case.

[11] Indeed, the evidence at that public hearing demonstrated ExxonMobil's genuine commitment to good environmental performance, which Baytown officials have acknowledged. DX547 at 7.

c. The court properly found that Plaintiffs failed to prove any serious nuisance impacts.

Next, the district court addressed Plaintiffs' claims of nuisance impacts, noting that "these impacts could have been caused by ExxonMobil's *authorized* emissions or *other* companies' emissions" and that "unauthorized emissions were a very small percentage of total emissions at the Complex for each year at issue." ROA.11427. These findings were well-supported. *See* pp. 23-25, *supra*.

In addition, the court found Plaintiffs' testimony on nuisance impacts was "largely unsubstantiated" and "controverted by persuasive testimony" from others "who have lived very close to the Complex for many years." *Id*. & n.259; *see also* ROA.14183-84, 14193-95, 14434, 14443-45, 14699, 14705-06, 14712. Obviously, resolving such disputes in the evidence is the job of the fact-finder.

On balance, the court found Plaintiffs' allegation that nuisance impacts were serious violations "not supported by the preponderance of the credible evidence." ROA.11429. Plaintiffs' criticism of this fact-bound conclusion, App. Br. at 85-87, is simply an illegitimate invitation to reweigh the evidence on appeal.

d. The court properly found that the Title V deviations were not serious violations.

Finally, the district court found that the deviations not involving emissions (approximately half of the deviations) were not serious, and Plaintiffs' proof was "too vague to support a finding" of seriousness. ROA.11429. Plaintiffs do not even challenge this common-sense finding.

D. The district court reasonably declined to impose any penalties.

"After carefully considering all of the penalty assessment factors," ROA.11430, the district court declined to impose penalties on ExxonMobil. *Id*. "Although some of the factors and evidence weigh towards assessing a penalty against ExxonMobil, more factors and much more credible evidence weigh against assessing a penalty." *Id*. This determination was a conscientious application of the multi-factor test for penalties set forth by the CAA. Given the "highly deferential" nature of appellate review, *CITGO*, 723 F.3d at 551, Plaintiffs cannot demonstrate an abuse of discretion in this ruling. *See Cooter & Gell*, 496 U.S. at 400.

This conclusion does not depend on the district court's factual findings regarding the alleged violations, because the district court expressly ruled that it would not impose a penalty "even if all the Events and Deviations are actionable." ROA.11430. The judgment can be affirmed on this independent basis.

If those factual findings are upheld, moreover, the judgment is unassailable. Plaintiffs' complaint on appeal that the district court abused its discretion by failing to assess penalties for the violations it found actionable—94 violations, representing less than 1% of their allegations—is simply an invitation to reweigh the discretionary factors on appeal. App. Br. at 95-96. Plaintiffs did not bother to make this request after receiving the Findings of Fact and Conclusions of Law, waiving any request for such relief, and they cannot show an abuse of discretion. In addition, those factual findings are well-supported, as we shall now explain.

II. The District Court Did Not Clearly Err In Its Liability Findings.

Unlike the broad enforcement authority entrusted to government agencies, the CAA only authorizes citizen suits against a defendant "who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of an emission standard or limitation." 42 U.S.C. § 7604(a)(1) (internal numbering omitted). Thus, Plaintiffs had the burden to: (1) identify an "emission standard or limitation"; and (2) prove that the Baytown Complex either (a) repeated a violation of that emission standard; or (b) was in violation of that emission standard at the time of suit. For penalties, Plaintiffs also needed to prove "the number of days of violation" of the relevant standard. 42 U.S.C. § 7413(a)(2). An "emission standard or limitation" ("emission standard") includes, *inter alia*, "any permit term or condition." 42 U.S.C. § 7604(f)(4).

Plaintiffs challenge the district court's findings on five counts of their case. If the Court reaches these fact-bound challenges, it will find no clear error.

Count II, the heart of the case, involves 13,738 alleged days of violation. ROA.11119. According to Plaintiffs, these emissions exceeded the limits set forth in a Maximum Allowable Emission Rate Table (MAERT) in each permit. In truth, by ExxonMobil's estimate, less than one-half of 1% of the emissions at issue in Count II actually exceeded the maximum hourly emission rates. The district court found that Plaintiffs proved repeated or ongoing violations of 9 emission standards (a total of 25 violations), rejecting the rest of their claims. ROA.11398-405.

Count I involves 10,749 alleged days of violation at the Baytown Refinery. ROA.11119. Unlike the other permits, the Refinery permit provides that certain emissions are "not authorized" (although it does not say that they are "prohibited"). The district court concluded that Plaintiffs failed to identify any emission standard that was violated by allegedly "unauthorized" emissions. ROA.11396.

In Count III, Plaintiffs alleged 18 days of violation of a rule limiting emissions of highly reactive volatile organic compounds (HRVOCs). ROA.11119; ROA.11406-407. The district court found 9 violations. ROA.11407.

In Count IV, Plaintiffs alleged 44 days of violation of a rule governing visible emissions from flares. ROA.11119; ROA.11407. The district court found 28 violations. ROA.11408.

Finally, Count VII involved 4,677 alleged days of violation of more than 300 regulations (which are conditions of Title V permits). *See* ROA.11119 (days); ROA.39701-10 (list of regulations). Plaintiffs' evidence consisted of deviations set forth in deviation reports, which are merely "indication[s] of noncompliance." Tex. Admin. Code § 122.10(6). Lacking more, the district court found that such "indications" did not prove any of the deviations were violations. ROA.11411-12.

These claims were based on 20,000+ pages of legally-required reports about emissions events and deviations that were submitted to state and federal regulators, as well as other records maintained by ExxonMobil. *See* ROA.19316-38083; ROA.39712-42043.

Plaintiffs created 18 spreadsheets summarizing these reports and records. Each horizontal row corresponds to a specific emission of a pollutant or incident of another alleged violation. ExxonMobil stipulated that the spreadsheets accurately reflected the information recorded by ExxonMobil.[12] These spreadsheets take up nearly 1,500 pages of the record. ROA.38169-39683; PX2A [RE 3] (sample).

Plaintiffs then modified each spreadsheet by adding a new vertical column ("days of violation") indicating whether Plaintiffs claim that the emission violated an emission standard and, if so, the number of days that violation occurred. Plaintiffs' modified spreadsheets take up more than 900 pages of the record. ROA.55117-56069; PX589 [RE 4] (sample).

Finally, Plaintiffs provided summary spreadsheets for each of the counts. *See* ROA.39684-39700. These summaries are the heart of Plaintiffs' liability case; Plaintiffs used them to inform the district court of their allegations at trial and they asked the district court to adopt the summaries in their Proposed Findings of Facts and Conclusions of Law. *E.g.*, ROA.10812-10813 (asking the court to adopt the summary chart contained in PX10).

With this overview, ExxonMobil will address each count in turn.

[12] "The ExxonMobil Defendants stipulate that the information and data contained in Attachment 1 accurately reflects: (1) the information and data related to each event as it was recorded and maintained by the ExxonMobil Defendants, as required by law; and (2) the information and data for each event either (a) as it was reported to TCEQ by the ExxonMobil Defendants, as required by law, or (b) as it is maintained and made publicly available by TCEQ." ROA.8151. Significantly, ExxonMobil did *not* stipulate to the accuracy of the underlying data.

A. The district court did not clearly err in determining the number of actionable violations under Count II.

ExxonMobil will begin, as Plaintiffs' brief does, with Count II.

In Count II, the most significant count, Plaintiffs asked the district court to find ExxonMobil liable for 13,738 "days of violation," arguing that the Complex exceeded the maximum hourly emission rates set by the permits. ROA.10821. Every permit limits the maximum hourly rate at which particular pollutants may be emitted from particular sources. Such a maximum hourly emission rate is a "permit term," which is an "emission standard or limitation" within the meaning of the CAA. 42 U.S.C. § 7604(f)(4).

For example, here is the emission limit for nitrogen oxide in Permit 18287, limiting NO_x emissions to 0.002 lbs/hr from the listed sources:

Emission Point No. (1)	Source Name (2)	Air Contaminant Name (3)	Emission Rates* lb/hr	TPY
NO_x Sources				
MAINANALYZE	Analyzer maintenance	NO_x		
MAINTANKTO	Tank maintenance - TO	NO_x		
	FINAL EMISSIONS CAP	NO_x	0.002	0.001

ROA.43964.

The district court correctly held that each specific hourly limit in each permit is a separate "emission standard," so to establish an actionable citizen-suit claim, Plaintiffs had to establish a "repeated" or "ongoing" violation of a particular limit. ROA.11392-93.

In theory, Count II concerns alleged violations of these maximum hourly emission rates. In reality, Count II concerns several different and unrelated types of alleged violations, very few of which (ExxonMobil estimates less than 0.5%) involve events exceeding the maximum hourly emission rates found in the permits. For the most part, the district court concluded that Plaintiffs had failed to prove repeated or ongoing violation of a specific emission standard. ROA.11398-405. The district court found that Plaintiffs had proved repeated or ongoing violation of just nine emission standards under Count II. *Id*.[13]

Plaintiffs raise two challenges on appeal. Their first challenge is routine: Plaintiffs argue that the district court erred in rejecting the arguments they presented below. App. Br. at 30-38. This theory is preserved but unmeritorious—there was no clear error in the district court's findings.

Their second challenge is an extraordinary abuse of appellate procedure: Plaintiffs' brief includes new charts and arguments that were never presented to the district court. App. Br. at 39-47. These charts purport to summarize hundreds of pages of the record, including tens of thousands of lines from various spreadsheets. *Id.* at 39. Their theory appears to be that any conceivable electronic manipulation of record evidence is "in the record" for purposes of appeal. That is absurd.

[13] ExxonMobil respectfully disagrees with this finding, *see* p. 27, *supra*, but in light of the take-nothing judgment, it is harmless.

1. The nature of the evidence in this case made it imperative that Plaintiffs explain its legal significance at trial.

This Court holds that a district court "is not a way station or entry gate. Rather, trials are the heart of the system. Trial, not appeal, is the main event." *Highlands Ins. Co. v. Nat'l Un. Fire Ins. Co.*, 27 F.3d 1027, 1032 (5th Cir. 1994). One rule that safeguards the "central role" of district courts, *id*., is the requirement that error be preserved.

It is axiomatic that "[a]n argument not raised before the district court cannot be asserted for the first time on appeal." *XL Specialty Ins. Co. v. Kiewit Offshore Servs., Ltd.*, 513 F.3d 146, 153 (5th Cir. 2008). "An argument must be raised to such a degree that the district court has an opportunity to rule on it." *Dallas Gas Partners, L.P. v. Prospect Energy Corp.*, 733 F.3d 148, 157 (5th Cir. 2013) (quoting *Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 339-40 (5th Cir. 2005)). To assure that the district court has fair notice, "the litigant must press and not merely intimate the argument during the proceedings before the district court." *FDIC v. Mijalis*, 15 F.3d 1314, 1327 (5th Cir. 1994).

Like any other legal argument, arguments concerning the legal significance of evidence are waived if not presented to the district court. *E.g.*, *First Sec. Bank of Beaver v. Taylor*, 964 F.2d 1053, 1056 (10th Cir. 1992) (concluding that an argument was forfeited because the party "wholly failed to advise the trial court of the legal significance of the existing evidence" in a directed verdict motion).

The Seventh Circuit colorfully explained this principle in another context: "Courts are entitled to assistance from counsel, and an invitation to search without guidance is no more useful than a litigant's request to a district court at the summary judgment stage to paw through the assembled discovery material. 'Judges are not like pigs, hunting for truffles buried in' the record." *Albrechtsen v. Bd. of Regents of Univ. of Wisconsin Sys.*, 309 F.3d 433, 436 (7th Cir. 2002) (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)).

Given the sheer volume of evidence and Plaintiffs' choice to summarize it using spreadsheets, it was essential for them to identify the legal significance of their evidence in a way that would permit the district court to apply law to facts. They needed to do more than bury evidence somewhere in the thousands of pages of underlying reports and records; they needed to raise their arguments "to such a degree that the district court [had] an opportunity to rule on [them]." *Dallas Gas*, 733 F.3d at 157. They failed to do so.

2. At trial, Plaintiffs failed to carry their burden of proving actionable violations of specific, valid emission standards.

At trial, Plaintiffs failed to prove repeated or ongoing violation of any specific emission standard. Instead, for each permit, Plaintiffs merely provided the district court with lists of pollutants and counts of alleged "days of violations." The district court found that Plaintiffs' evidence failed in two ways, and those findings are not clearly erroneous.

a. Plaintiffs failed to show that violation of any specific emission standard was repeated or ongoing.

First, because their spreadsheets grouped violations by pollutant, rather than by emission standard, Plaintiffs failed to show repeated or ongoing violation of any specific emission standard.

For each pollutant, Plaintiffs' spreadsheets aggregated alleged violations of several alleged emission standards. Most of the emissions that Plaintiffs count as "violations" were well within the maximum hourly emission rates of the permits. Plaintiffs count these emissions as violations based on *implied* emission standards: Plaintiffs allege they were either "not authorized" or exceeded a limit of "0 lbs/hr." (The invalidity of these theories is addressed in the next section of this brief.)

Some emissions actually violated a specific maximum hourly emission rate in a permit, but that does not mean that they violated the *same* emission standard (because a single permit often sets different maximum hourly emission rates for one pollutant depending on the circumstances). Thus, even within a single permit, there are often multiple maximum hourly emission rates for a single pollutant.

Because Plaintiffs failed to distinguish between violations of these different (and frequently non-existent) emission standards, they did not prove a "repeated" or "ongoing" violation of any specific standard. An example reveals how Plaintiffs improperly grouped different emission standards together. Here is an excerpt from Plaintiffs' Table 10 (part of their summary of Count II) for carbon monoxide:

Refinery Flexible Permit 18287

Violations of General Condition 8, Special Condition 1, and MAERT Limits for Emissions of:	Pre-Complaint Days of Violation		Post-Complaint Days of Violation		TOTALS
	Days of Violation From STEERS	Days of Violation From Recordables	Days of Violation From STEERS	Days of Violation From Recordables	
Carbon Monoxide (CO)	189	488	8	248	**933**

ROA.39687. The 933 days of violations for carbon monoxide in this spreadsheet are drawn from PX589 and PX590.

The emissions counted as violations in this chart include alleged violations of several distinct alleged emission standards. Some purported violations involved releases of trace amounts where the spreadsheet listed a "0 lbs/hr" limit:

G	H	I
Air Contaminant	Emissions (lbs)	Permit Limit (lbs/Hr)
CO (Carbon Monoxide)	0.04	0.00

ROA.55740 (line 11,378). Others involved releases well within maximum hourly emission rates where the spreadsheet listed that the emission was "not authorized":

Authorization	Unit	Emission Point	EPN	Contaminant	Amount Released (lbs)	Reported Emission Limit (lbs/hr)
Not specifically authorized	Hydrocracker Unit 1	Flare 11	FLARE11	Carbon Monoxide	2.00	3804.09

ROA.55523 (line 455). ExxonMobil will explain the legal invalidity of these two supposed emission limits in the next section; for now, the relevant point is that they were commingled in the spreadsheets with other alleged violations.

In the few instances where the spreadsheets indicated that emissions actually exceeded a maximum hourly emission rate, the limit varied wildly. For example, one involved violation of a purported 1 lb/hr limit:

Duration (h:mm)	Authorization	Unit	Emission Point	EPN	Contaminant	Amount Released (lbs)	Reported Emission Limit (lbs/hr)
39:44	Permit #9153	Sulfur Conversion Unit	SCU2 F-549	SCU2 F-549	Carbon Monoxide	70.00	1.00

ROA.55486 (line 114).[14] Another involved violation of a 3,736.48 lbs/hr limit:

Duration (Hrs)	Air Contaminant	Emissions (lbs)	Permit Limit (lbs/Hr)
1.0	CO (Carbon Monoxide)	4536.00	3736.48

ROA.55568 (line 1251). Obviously, these two limits were dramatically different.

Despite all these variations, the aggregate number presented by Plaintiffs—933 carbon monoxide "violations"—failed to distinguish between all the different alleged emission standards. Short of manually and *sua sponte* reviewing the thousands of lines of spreadsheets, the district court had no way to discern which specific emission standard Plaintiffs believed each emissions event had violated, and thus whether any violations were "repeated" or "ongoing" under the CAA.

[14] In PX589, Plaintiffs counted this emission as two "days of violation." ROA.55486 (line 114). But because emissions events rarely occur in a constant fashion, it is impossible to know how many hours the 1 lb/hr limit was violated. From the spreadsheet alone, it is entirely possible that most of the 70.00 lbs of carbon monoxide were released in a brief period, with the remainder of the emissions under the 1 lb/hr hourly emission limit for most of the 39 hours, 44 minutes. Thus, standing alone, the spreadsheet does not prove the duration of the alleged violation.

If Plaintiffs had wished to give the district court fair notice of the issues and an opportunity to apply its legal rulings to the facts, they should have presented a summary of their carbon monoxide allegations for the Refinery like this one:[15]

Pollutant	**Emission Standard or Limitation**	**Number of Violations**	**Days of Violation**
Carbon Monoxide	"not authorized" or "portions authorized"	81	107
	implied 0 lbs/hr limit	343	954
	1.00 lbs/hr	1	2
	3,736.48 lbs/hr	3	4
	3,804.09 lbs/hr	1	1

Notice that only *five* of these 933 alleged "violations" involved emission events that exceeded the maximum hourly emission rate limits set forth in the permits.

The transparent approach on this chart would have shown the district court precisely (i) which emission standards Plaintiffs accused ExxonMobil of violating, (ii) how many times each standard was allegedly violated, and (iii) the number of days of violation for each standard.[16] Lacking such details, once the district court rejected Plaintiffs' mistaken theory that every "violation" involving the same pollutant automatically involves the same emission standard, their summaries became useless.

[15] This chart lists more days of violation than Plaintiffs' summary because ExxonMobil is unable to recreate Plaintiffs' count of violations. Without electronic access to PX589 and PX590, precise reproduction of Plaintiffs' summaries is impossible.

[16] To be precise, such a chart would also need to identify whether an alleged violation occurred "pre-complaint" or "post-complaint" for purposes of the "repeated and ongoing" determination. *See* p. 80, *supra* (Plaintiffs' spreadsheet drawing such a distinction). But that is a separate issue.

Plaintiffs attempt to save their summaries by arguing that all violations of a permit involving the same pollutant necessarily involve one emission standard. *See* App. Br. at 36-37. But this theory is incorrect: each "permit term or condition" is a distinct emission standard. 42 U.S.C. § 7604(f)(4). The district court resolved this dispute correctly. ROA.11392-93.

This conclusion is apparent on the face of the permits. A single permit frequently includes several different maximum emission rates for one pollutant. For example, Permit 36476 provides one set of maximum emission rates for ordinary conditions:

FS28	Flare	VOC	0.10
		NO_x	3.00
		SO_2	67.72
		CO	103.55
		H_2S	0.70
		COS	0.04
		NH_3	0.15

ROA.43368. But the same permit provides larger maximum hourly emission rates during maintenance, start-up, and shutdown:

Maintenance, Start-Up, and Shutdown Emissions

FS28	Flare	VOC	3.31
		NO_x	41.91
		SO_2	2768.94
		CO	992.28
		H_2S	28.40
		COS	1.80
		NH_3	5.31

ROA.43369. These different permit terms establish different emission standards, for each of which Plaintiffs had to prove a "repeated" or "ongoing" violation.

Plaintiffs appear to treat the meaning of "emission standard" as an abstract question of law: "it is the 'parameter' (pollutant) that is the key to determining whether a violation from a source is ongoing." App. Br. at 37. The district court correctly ruled that—at the very least—an "emission standard" must be determined by reference to the specific terms and conditions of the permit. ROA.11392-93.[17] Neither logic nor authority supports Plaintiffs' claim that a permit may include only one "parameter" per pollutant. Permit 36476, cited above, proves otherwise; it includes multiple permit terms regulating the same pollutant from the source.

Plaintiffs also claim violations need not involve the same emission standard, but need only be "the same 'type'" of violation. App. Br. at 36. This argument is inconsistent with the CAA. The plain language of the citizen-suit statute requires that the violation of "an emission standard or limitation" be repeated or ongoing. 42 U.S.C. § 7604(a)(1). This unambiguous statutory text cannot be transformed into requiring only repeated or ongoing violation of "the same type of emission standard or limitation."

Because Plaintiffs' spreadsheets failed to distinguish between violations of different emission standards, the district court's finding that Plaintiffs proved only 25 actionable violations was not clearly erroneous.

[17] ExxonMobil contended that, in addition, a violation is only "repeated" or "ongoing" if it arises from a common cause. *See, e.g.*, 30 Tex. Admin. Code § 101.1(28) (defining "emissions event" as an event that causes unauthorized emissions "from a common cause"). In light of the denial of any award of civil penalties, it is unnecessary to reach that issue in this appeal.

b. Plaintiffs alleged violations of emission standards that do not actually appear in the permits.

This commingling was deliberate. For the vast majority of the "violations" alleged by Plaintiffs in their summaries, Plaintiffs failed to show that the emissions violated *any* emission standard—much less the maximum hourly emission rates that purportedly formed the basis for Count II.

Plaintiffs alleged violations of "hourly emission limits" in the permits. ROA.11398. And on a few, rare occasions, the maximum hourly emission rates in the permits were exceeded. But the vast majority of emissions alleged by Plaintiffs to be "violations" in Count II did not actually involve emissions in excess of the maximum hourly emission rates. Instead, Plaintiffs said these emissions were "violations" because the spreadsheet listed them as "not authorized" by the permits or because they exceeded a supposed limit of "0 lbs/hr" that appears nowhere on the face of the permits. App. Br. at 30-31.

The district court concluded that only the first category—emissions that exceeded maximum hourly emission rates appearing on the face of the permits—were actionable under the CAA citizen-suit provision; the other claims did not involve violations of *any* emission standard in the permits. ROA.11399-405. Thus, Plaintiffs' summaries were useless; the district court had no realistic way to identify the few potential violations of maximum hourly emission rates.

i. Plaintiffs failed to identify any maximum hourly emission rate of "0 lbs/hr."

Plaintiffs counted emissions of a pollutant when a spreadsheet listed a "Reported Emission Limit" of "0 lbs/hr" as violations of an emission standard.[18] But Plaintiffs have never identified any permit term (or another emission standard) that imposes such a maximum hourly emission rate. None of the permits includes an express maximum rate of "0 lbs/hr" on particular emissions. Nor have Plaintiffs identified any other source for a "0 lbs/hr" maximum emission rate.

ExxonMobil stipulated that the spreadsheets accurately summarized the underlying reports, *see* p. 74 n.12, *supra*, but that stipulation does not affect the absence of any "0 lbs/hr" limit in the permits. Plaintiffs bore the burden to prove that these emissions violated an emission standard. Because they failed to carry their burden, the district court correctly held these emissions are not actionable.

ii. Plaintiffs failed to establish that "not authorized" emissions violated an emission standard.

Similarly, Plaintiffs counted emissions of a pollutant when a spreadsheet stated that the emission was "not specifically authorized" or "portions authorized." Again, they failed to prove that these emissions violated any emission standard. *See, e.g.*, ROA.11399.

[18] The records maintained by and reported by ExxonMobil include "limits" for each pollutant for each event. These are recorded in the spreadsheets as the "Reported Emission Limit" or "Permit Limit" column. *See* ROA.38523 (Table 2A); ROA.38607 (Table 2B).

Plaintiffs declare that "not authorized" or "not specifically authorized" necessarily means the "MAERT emission limit is zero." App. Br. at 35. But they offer no support for this crucial proposition. This theory represents the entire focus of Count I, which asserts that a permit "prohibits" any emissions that it does not expressly "authorize." Thus, it is addressed in detail in connection with Count I. *See* pp. 94-96, *infra*. But its basic defect can be stated simply: These emissions do not violate any specific emission standard that appears on the face of the permits.

Plaintiffs also contend that the indefinite phrases "portions are authorized" and "[x] lbs. out of [y] total lbs. are authorized" mean "the lbs/hr emission limits in the MAERT was exceeded." App. Br. at 35 n.17. Their record citation does not support the proposition, and it is demonstrably incorrect.

For example, the following is an emission that Plaintiffs count as a violation:

Duration (h:mm)	Authorization	Unit	Emission Point	EPN	Contaminant	Amount Released (lbs)	Reported Emission Limit (lbs/hr)
8:20	681 lbs of total 1,962 lbs are authorized under Permit #18287/PSD-TX-730M4/PAL7.	Fluidized Catalytic Cracking Unit 3	FCCU3 Wet Gas Scrubber	FCCU3WGS	TOTAL NOX: Nitrogen dioxide, Nitrogen Oxide	1,281.00	1747.18

ROA.55546 (PX589, line 759). This entry shows that 1,281 lbs of NO_x were released over 8 hours, 20 minutes. But the emission limit was 1,747.18 lbs/hr—more than the *total* amount released. This event cannot be a violation.

Because Plaintiffs failed to establish that "not authorized" emissions violated any emission standard, the district court correctly held they are not actionable.

iii. Plaintiffs failed to identify the few occasions on which maximum hourly emission rates were actually exceeded.

Last, commingled with the emissions discussed above were a small number of occasions on which a maximum hourly emission rate set forth in a permit was actually exceeded. If Plaintiffs had limited their arguments at trial to these events, then the district court might have been in a position to determine whether those alleged violations were actionable. But by aggregating all of the alleged violations under their "gotcha" theory, Plaintiffs made it virtually impossible for the court to identify the potentially actionable violations in Count II.

In order to identify the few occasions on which emissions during events exceeded maximum hourly emission rates in the permits, the district court would have been forced to pore over six spreadsheets comprising more than 1000 pages. *See* ROA.38523-606 (Table 2A); ROA.38607-876 (Table 2B); ROA.38877-929 (Table 2C); ROA.38930-39029 (Table 2D); ROA.39030-53 (Table 2E); ROA.39054-830 (Table 2F). The district court was not obligated to engage in this "truffle-hunting," which would have been virtually impossible. *See* p. 78, *supra*.

3. Plaintiffs' new arguments on appeal are unavailing.

On appeal, Plaintiffs attempt to cure the deficiencies in the presentation of their case to the district court. They now argue that the "undisputed factual record established thousands of days of continuing and repeated violations" based on a series of new charts that the district court never saw. *See* App. Br. at 39-47.

a. Because Plaintiffs' new arguments and new charts were never presented to the district court, they are waived and cannot demonstrate clear error.

For the first time, Plaintiffs' brief attempts to organize their allegations by alleged emission standards rather than by pollutants. These arguments are waived.

The district court never saw this presentation. Although the underlying data was in the record—buried somewhere within thousands of pages of spreadsheets—Plaintiffs failed to identify its legal significance at trial. They did not inform the district court of what they now claim the evidence proved, which would have given the district court a fair opportunity to rule on it. Again, the court was not required to hunt for truffles buried in the record. *Albrechtsen*, 309 F.3d at 436.

By introducing tens of thousands of pages of evidence into the record, Plaintiffs did not preserve every conceivable argument based on that evidence. The ultimate test for preservation is fair notice: "An argument must be raised to such a degree that the district court has an opportunity to rule on it." *Dallas Gas*, 733 F.3d at 157. The district court had no notice of the claims Plaintiffs now make and no opportunity to rule on whether Plaintiffs' current presentation demonstrates repeated or ongoing violations of an emission standard. Furthermore, this decision was strategic: Plaintiffs structured their proof at trial to fit their "gotcha" theory, deliberately taking the most aggressive position. They cannot change course now, simply because their overreaching gamble failed.

Plaintiffs defend their new charts by arguing the evidence within them was "fully available to the trial court." App. Br. at 39. But this assertion is incorrect. Even according to Plaintiffs, preparing the charts required electronic manipulation of documents in a manner that Plaintiffs never performed themselves or suggested that the district court perform. A district court has no duty to engage in *sua sponte* electronic manipulation of the evidence presented at a bench trial, and it would be unwise and unprecedented for this Court to hold that any conceivable manipulation of an Excel spreadsheet is "in the record" for purposes of appeal.

b. Neither ExxonMobil nor this Court can verify the accuracy of Plaintiffs' new charts.

One essential reason why Plaintiffs needed to present their new charts at trial is that trial, unlike appeal, is the appropriate occasion to verify factual assertions. Plaintiffs ask ExxonMobil and the Court to assume that the charts on pages 41-46 of their brief accurately summarize hundreds of pages, and more than 18,000 lines, of six different spreadsheets. *See* ROA.55475-943 (PX589-94); App. Br. at 39 (noting that the tables are based on PX589-94).

This Court cannot independently verify the accuracy of these new charts. The Court does not have access to the "native Microsoft Excel versions" of the exhibits that Plaintiffs purportedly used to create their new charts. App. Br. at 39. Manually evaluating whether the charts are accurate summaries of the underlying 18,000 spreadsheet entries would be practically impossible.

Likewise, ExxonMobil has not had an opportunity to evaluate the accuracy of Plaintiffs' new charts—and the 18,000 entries they purport to summarize—through the crucible of the fact-finding process. Like this Court, ExxonMobil has never had access to electronic copies of PX589-94. Reliance on the new charts presented in Plaintiffs' brief would be an act of blind faith. "Trust me" is not how the appellate process operates. Courts do not accept expert testimony based on the *ipse dixit* of an expert, *see General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997), and this Court should not accept Plaintiffs' charts based on the *ipse dixit* of a party. To preserve these arguments, Plaintiffs had to raise them before the district court. Because they failed to do so, the new charts are not properly before this Court.

c. Plaintiffs' new charts cannot be trusted.

ExxonMobil's limited analysis of Plaintiffs' new charts gives good reason to distrust them. As an initial matter, Plaintiffs' assurance that these new charts were created by "sorting PX 2A through 2F (and the corresponding tables in PX 589-94) by each specific numerical limit," App. Br. at 39, appears to be questionable. ExxonMobil anticipates that creating the new charts would be significantly more complicated than Plaintiffs suggest. For instance, in ExxonMobil's electronic copy of PX2A, the "sorting" function is inoperable. Plaintiffs cannot credibly contend that the district court should have performed this analysis and created these charts *sua sponte* when they do not even go so far as to describe precisely what steps must be followed to create them.

Furthermore, even a limited review of Plaintiffs' new charts reveals a variety of inaccuracies (which are undoubtedly the tip of the iceberg). For example, Plaintiffs provide the following entry in their new charts:

Pollutant	Emission Limit (lbs/hr)	Days of Violation – Reportable Events (PX 589)	Days of Violation – Recordable Events (PX 590)	Was Limit Violated More Than Once?
Benzene	91.92	9	-	Y

App. Br. at 41.

The last line suggests that on more than one occasion the Baytown Complex emitted more than 91.92 lbs/hr of benzene, which would be essential for proving a "repeated" violation that would be actionable under the CAA citizen-suit statute. This is incorrect. The 91.92 lbs/hr maximum emission rate was not exceeded "more than once." The nine "days of violation" occurred in a single event, between July 10 and July 18, 2008. *See* ROA.55501 (line 248).

Indeed, it is not certain that the maximum emission rate was *ever* exceeded. The underlying spreadsheet shows emissions of 442.10 lbs over a 202-hour period:

Duration (h:mm)	Authorization	Unit	Emission Point	EPN	Contaminant	Amount Released (lbs)	Reported Emission Limit (lbs/hr)
202:00	34 lbs of the 442.1 lbs are authorized by Permit 18287	Wastewater Treatment Plant	Wastewater Treatment Plant	SEWERFUG	Benzene	442.10	91.92

ROA.55501 (line 248). Without more, this data proves nothing.

Because emissions events rarely occur in a constant fashion, it is impossible to know from this scanty information whether the 91.92 lb/hr limit was violated (and if so, for how long). Dividing the 442.10 lbs by 202 hours yields an average emissions rate of just 2.19 lbs/hr—far below the maximum hourly emission limit. Of course, it is unlikely that emissions occurred at this rate. But the spreadsheet offers no further details, so it is possible that the 91.92 lb/hr hourly emission limit was never exceeded. Without more proof, the district court had no way to know—nor does this Court.

According to Plaintiffs, the phrase "34 lbs of the 442.1 lbs are authorized" (in the "Authorization" column) means that "the lbs/hr emission limit in the MAERT was exceeded." App. Br. at 35 n.17. That conclusion does not follow, and this example confirms Plaintiffs are incorrect. Plaintiffs presented no evidence that the release of 442.10 lbs over 202 hours somehow exceeded the 91.92 lbs/hr maximum emission rate for a period of nine days.

Plaintiffs' new charts are even inconsistent with the very methodology they describe in their brief. They claim the phrase "not specifically authorized" means "the MAERT emission limit is zero." App. Br. at 35. But their new charts classify many "not specifically authorized" emissions as violations of specific hourly rates. *Compare* ROA.55484 (line 99; "not specifically authorized" release of NO_x at an average rate of 10.8 lbs/hr) *with* App. Br. at 42 (counting this emission as violating the 33.6 lbs/hr "emission limit").

Rather than a mistake, this classification scheme appears to be a deliberate attempt to conceal how few of the emissions in Count II actually exceeded the maximum hourly emission rates set forth in the permits. But without a fair chance to test the evidence in the crucible of trial, it is impossible to know for certain.

In summary, without access to electronic copies of PX598 through PX594, fully reviewing the accuracy of the new charts would be practically impossible. Nonetheless, the above examples confirm the inaccuracy of Plaintiffs' new charts. Even if they were properly before this Court, Plaintiffs' charts cannot be trusted.

Plaintiffs gambled on an all-or-nothing trial strategy concerning Count II, and they lost. They cannot correct that oversight now by creating a new record. The district court did not clearly err in its factual findings regarding Count II.

B. The district court did not clearly err in determining the number of actionable violations under Count I.

Count I concerns emissions that occurred during "upset events" at the Baytown Refinery. Count I is limited to the Refinery because only Permit 18287, the permit applicable to the Refinery, mentions "upsets." An "upset event" is an "unplanned and unavoidable breakdown or excursion of a process or operation that results in unauthorized emissions." 30 Tex. Admin. Code § 101.1(110). Emissions that result from upset events are "upset emissions." When multiple pollutants are released, one "upset event" causes multiple "upset emissions."

Special Condition 38 of Permit 18287 provides:

> This permit does not authorize upset emissions . . . . Upset emissions are not authorized, including situations where that upset is within the flexible permit emission cap or an individual emission limit.

ROA.44819 (Special Condition 38). Special Condition 39 is similar.

Plaintiffs reason that this language "ban[s]" upset emissions and creates a limit of "0 lbs/hr," and thus every upset emission violates an emission standard. App. Br. at 54; *see also id*. at 47 (arguing that Permit 18287 "flatly prohibits all upset-related emissions"). The district court correctly disagreed. ROA.11396.

1. Emissions during upset events are not prohibited.

Permit 18287 does not "ban" or "prohibit" emissions during upset events; according to its express language, the permit merely does not "authorize" them. ROA.44819. This difference is meaningful; by its terms, the permit neither allows nor disallows emissions from upset events.

This treatment of upset emissions contrasts with the hourly emission limits. General Condition 15 of Permit 18287 provides that "[e]missions that exceed the limits of this permit are not authorized *and are violations* of this permit." ROA.44799 (emphasis added). This difference in language should be given effect. *Cf. In re Positive Health Mgmt.*, 769 F.3d 899, 907 (5th Cir. 2014) (noting that "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.") (quoting *Sosa v. Alvarez–Machain*, 542 U.S. 692, 711 n.9 (2004)).

In other circumstances, courts have recognized the distinction between not "authorizing" an event and "prohibiting" it. *See Ass'n of Civilian Technicians v. Fed. Labor Relations Auth.*, 269 F.3d 1112, 1116 (D.C. Cir. 2001); *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433 (9th Cir. 1994). Upset emissions are not "authorized" by Permit 18287 but are not "prohibited" by it either.

This interpretation is rational. Because upset emissions are, by definition, "unplanned and unavoidable," it would make no sense to plan for them in permits. Tex. Admin. Code § 101.101(110). Upset emissions are not governed by permits, but by regulations. *See* Tex. Admin. Code §§ 101.201, *et. seq*.

The district court heard testimony confirming this understanding from a licensed engineer who spent more than 25 years as a TCEQ air permit reviewer and manager. ROA.14454-55. As she put it, the condition that upset emissions are "not authorized" is an attempt "to define what is within the scope of the permit." ROA.14480. That is, upset emissions are outside the scope of the permit and are instead handled by regulations in Chapter 101 of the Texas Administrative Code. It is unnecessary to discuss this regulatory regime in detail because Plaintiffs have not alleged that the Baytown Complex violated any administrative regulations relating to upset emissions.

On its face, Permit 18287 does not ban or prohibit upset emissions, and the district court correctly concluded that Plaintiffs failed to establish that ExxonMobil violated an emission standard under Count I.

2. Plaintiffs' other complaints are irrelevant.

Plaintiffs raise other complaints about the district court's analysis but none establishes clear error. First, arguments about the clarity of Plaintiffs' allegations, App. Br. at 48-52, are irrelevant. The district court correctly noted that Plaintiffs' allegations about the emission standard at issue in Count I had been inconsistent, but its decision did not rest on this basis.

Second, Plaintiffs complain that the district court analyzed Count I by examining maximum hourly emission rates instead of treating upset emissions as *per se* violations. App. Br. at 55 n.30. This argument simply restates Plaintiffs' principal complaint. The district court properly rejected Plaintiffs' theory that all upset emissions are actionable violations, and thus recognized that these emissions were actionable, if at all, only if they exceeded the maximum hourly emission rates (meaning that Plaintiffs' claims regarding upset emissions were indistinguishable from their claims at issue in Count II).

Third, Plaintiffs now suggest that each "upset event" could be counted as a single violation, rather than as multiple violations (*i.e.*, one for each pollutant emitted during the upset event). This new theory is both waived and meritless. Before the district court, Plaintiffs never argued that each "upset event" should be treated as a single violation, so this new theory is waived. *See* pp. 77-78, *supra*. Moreover, this argument fails for the same reasons as the "upset emissions" theory: Permit 18287 does not prohibit upset "events" any more than it does "emissions."

C. The district court did not clearly err in determining the number of actionable violations under Count III and Count IV.

There is no clear error in the district court's factual determinations related to the claimed violations under Count III and Count IV. Between the two counts, Plaintiffs alleged 62 violations, and the district court determined that Plaintiffs carried their burden to prove 37 violations. ROA.11406-08. They appeal the court's failure to find 25 additional violations.

1. Any error in the liability findings was harmless.

The easiest way to resolve Plaintiffs' arguments about Counts III and IV is to hold that any error in the liability findings was harmless. As discussed above, the district court had broad discretion regarding remedies. There is no reason to believe that finding an additional 25 violations—a *de miminis* portion of Plaintiffs' total allegations—would have affected the remedy analysis. *See* ROA.11430 ("[T]he Court finds no amount of penalty is appropriate in this case even if all the Events and Deviations are actionable.").

Plaintiffs have the burden to demonstrate harm, and have not done so—because they cannot. Because any error did not affect Plaintiffs' substantial rights and would not have changed the outcome of the case, it was harmless. *See*, *e.g.*, *McCaig v. Wells Fargo Bank (Texas), N.A.*, 788 F.3d 463, 484 (5th Cir. 2015); *Dresser-Rand Co. v. Virtual Automation Inc.*, 361 F.3d 831, 842 (5th Cir. 2004). Plaintiffs' complaints about Counts III and IV can be decided on this basis alone.

2. Plaintiffs have failed to demonstrate clear error.

In addition, Plaintiffs have not demonstrated clear error. For both Count III and Count IV, Plaintiffs relied on the spreadsheets summarizing ExxonMobil's event and deviation reports, without any other evidence. *See* ROA.11406-08 (discussing Plaintiffs' evidentiary support).

Plaintiffs claim that the district court erred in rejecting their claims "[a]s a matter of law," App. Br. at 56, but they identify no legal error. App. Br. at 56-58. The district court simply ruled that Plaintiffs failed to satisfy their burden of proof as to all of their allegations. *See* ROA.11407 (Count III); ROA.11408 (Count IV). To challenge this finding, Plaintiffs must show clear error—a standard of review they do not even address. App. Br. at 56-58.

In effect, Plaintiffs must show that the only permissible view of the evidence was that every entry on the spreadsheets constituted an actionable violation under the CAA citizen-suit provision. But Plaintiffs offer no argument to explain why the district court was required to credit the spreadsheets.

ExxonMobil agreed that the spreadsheets accurately summarized its records, but not that the underlying records themselves established actionable violations. *See* ROA.8151. Gambling that no other proof would be needed to persuade the fact-finder, Plaintiffs relied on the spreadsheets without any additional evidence. The district court might have been persuaded by this approach, but it was equally entitled to conclude that Plaintiffs had failed to carry their burden of proof.

On appeal, Plaintiffs cite three district court decisions for the proposition that "a permittee's own records of violations *are sufficient* to establish liability." App. Br. at 29 (emphasis added). But this argument fails to establish clear error. If Plaintiffs were defending favorable factual findings, it would be enough for them to show that they presented "sufficient" evidence. But to establish clear error, Plaintiffs must show that the district court *was obligated* to credit their evidence. Even if Plaintiffs are correct that a fact-finder *may* find liability based on a permittee's records, they have not demonstrated that a fact-finder *must* do so.

There was good reason for the district court to demand additional evidence ("corroboration") from Plaintiffs. For example, consider the line entry referring to STEERS Tracking Number 114,911 in Table 3 (the basis for Count III). ROA.39134. It notes that "portions of the Polypropylene Unit are authorized." *Id.* But the spreadsheet does not establish how much was authorized. If the authorized portion is excluded, does the unauthorized portion still violate the HRVOC limit? Plaintiffs made no attempt to answer that question; they simply introduced the spreadsheet and asked the district court to assume that all of the events violated the emission standard.

Crucially, the district court noted that many lines in Table 3 expressly state that the emissions event "exceeded the 1200 lb/hr HRVOC limit." ROA.39134. Without further explanation or evidence from Plaintiffs, it was reasonable for the district court to draw the negative inference that the other events did not.

3. Plaintiffs' "admission" arguments are meritless.

Plaintiffs attempt to sidestep their failure of proof by arguing that ExxonMobil "admitted" liability for Count III and Count IV. That claim is false. ExxonMobil has not conceded liability.

First, Plaintiffs claim that ExxonMobil made a "judicial admission" based on a quote from the district court's opinion, which they take out of context:

> Exxon does not dispute that the alleged violations under Counts II, III, IV, and V of Plaintiffs' complaint constitute violations of an emission standard or limitation. However, Exxon does dispute that the alleged violations under Counts I, VI, and VII constitute violations of an emission standard or limitation.

ROA.11390 n.153.

This argument is mistaken. A judicial admission is a statement by a litigant, not by a court. "A judicial admission is a formal concession in the pleadings or stipulations by a party or counsel that is binding on the party making them." *Martinez v. Bally's Louisiana, Inc.*, 244 F.3d 474, 476 (5th Cir. 2001). Here, ExxonMobil never judicially admitted that *any* of Plaintiffs' allegations constituted actionable violations under the citizen-suit provision. Plaintiffs are misinterpreting the district court's statement, which simply referred to the actionability of various legal theories in general, not to the specific alleged violations in this case.[19]

[19] The district court may have been referring to ExxonMobil's proposed conclusions of law, which pointed out that some of Plaintiffs' alleged violations were not, in fact, violations of any "emission standard or limitation." *See* ROA.11338 (discussing Count I and Count VI).

To be absolutely clear, ExxonMobil did not dispute that there were *some* emission standards applicable to Plaintiffs' claims under Counts II through V.[20] But ExxonMobil never admitted that specific events or emissions were violations (and the district court plainly understood that position since it did not find liability on all of the allegations in those counts). Plaintiffs' argument simply takes the district court's statement out of context.

Plaintiffs next contend that ExxonMobil admitted the spreadsheets are conclusive evidence of violations because they refer to "violations" in their titles. App. Br. at 57. This argument is worse than meritless—it contradicts Plaintiffs' own commitments about the effect of the stipulation regarding these spreadsheets: "Such a stipulation would not prevent Exxon from arguing that the Court should not find it liable for any of the alleged violations." ROA.7919. Plaintiffs cannot exploit the title of the spreadsheets to transform ExxonMobil's limited stipulation that the spreadsheets accurately summarize its underlying records into a supposed admission of liability.

Finally, even if the spreadsheets established "violations," that would not be the end of the matter. Plaintiffs had to prove "repeated" or "ongoing" violations. Thus, even on its own terms, the supposed "admissions" would not establish that the district court clearly erred in its findings regarding Counts III and IV.

[20] As noted above, ExxonMobil denies that most of the alleged violations in Count II represent actionable violations of any "emission standard or limitation." *See* pp. 85-87, *supra*.

D. The district court did not clearly err in determining the number of actionable violations under Count VII.

Finally, the district court did not clearly err in concluding that Plaintiffs failed to carry their burden of proof under Count VII, which involved nearly 5,000 alleged days of violation based on deviations in certain "deviation reports."

As with Counts III and IV, Plaintiffs evade the clear error standard of review and insist that "the District Court held that, as a matter of law, Deviation Reports by themselves are not sufficient to establish violations." App. Br. at 59. In truth, the district court held nothing "as a matter of law" about the deviation reports. Instead, the district court simply concluded that the reports submitted by Plaintiffs failed to satisfy their burden of proof for the particular claims in this case. ROA.11412. Plaintiffs must—but cannot—show clear error in the determination that they did not satisfy their burden of proof.

Plaintiffs' only evidence under Count VII was a list of "deviation reports" filed by ExxonMobil. App. Br. at 59. The relevant regulations define "deviation" as merely an "indication of noncompliance with a term or condition of the permit." Tex. Admin. Code § 122.10(6). Federal regulations confirm that "[a] deviation is not always a violation." 40 C.F.R. § 71.6(a)(3)(iii)(C). Citing these definitions, the district court reasonably concluded that Plaintiffs had failed to prove that the list of deviations established violations. ROA.11411.

Plaintiffs insist that the deviation spreadsheet "contains all of the *prima facie* evidence needed to establish that a permit violation occurred." App. Br. at 60. Arguments about "*prima facie* evidence" prove only that the district court *could* have found violations based on this evidence, not that it was *required* to do so.

Plaintiffs next argue that "a reported deviation indicates that a violation has been committed unless the report also contains 'other information'" indicating that it was not a violation. App. Br. at 61. But federal regulations create an *option* to provide additional information, not an *obligation*. *See* 62 Fed. Reg. 54,900, 54,937 (Oct. 22, 1997) ("an owner or operator *may include* information" indicating that a deviation was not a violation) (emphasis added). The inference Plaintiffs attempt to draw from the absence of "other information" in deviation reports is untenable. At a minimum, the district court was not compelled to draw the inference.

Finally, Plaintiffs argue that an ExxonMobil environmental supervisor "testified at trial . . . that the deviations Exxon includes in its reports are, in fact, instances of 'non-compliance' or 'violations.'" App. Br. at 61-62 (citing ROA.12409).[21] Plaintiffs omit the witness's later clarification of this testimony, which explained that a deviation is merely "an indication of non-compliance." ROA.56446. Plaintiffs cannot establish clear error by disregarding evidence that supports the district court's findings.

[21] The rest of Plaintiffs' lengthy string citation of the record is irrelevant to the question whether deviations are, in fact, violations. *See* App. Br. at 62.

III. The District Court Properly Denied Ancillary Relief.

Last, Plaintiffs challenge the district court's denial of declaratory and injunctive relief. Such equitable rulings are reviewed for abuse of discretion. *Concise Oil & Gas P'ship v. Louisiana Intrastate Gas Corp.*, 986 F.2d 1463, 1471 (5th Cir. 1993); *Aransas Project v. Shaw*, 775 F.3d 641, 663 (5th Cir. 2014).

A. Denying declaratory relief was a valid exercise of discretion.

The Declaratory Judgment Act only "provides that a court '*may* declare the rights and other legal relations of any interested party seeking such declaration'" *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286-87 (1995) (citing 28 U.S.C. § 2201) (emphasis added). This "textual commitment to discretion" grants courts a unique "breadth of leeway." *Id.* at 287 (citations omitted). The district court properly exercised "this broad discretion" in declining relief. *See Torch, Inc. v. LeBlanc*, 947 F.2d 193, 194 (5th Cir. 1991).

Having "already made . . . findings" on all the contested issues in the case, the district court sensibly declined to issue a superfluous declaration that would not serve any useful purpose. ROA.11412. This Court has held that a district court "does not abuse its discretion in denying declaratory relief" in these circumstances. *Concise*, 986 F.2d at 1471 (citations omitted). Plaintiffs selectively quote *Concise*, App. Br. at 97, but ignore its ultimate holding: the district court did "not abuse its discretion in denying declaratory relief." *Concise*, 986 F.2d at 1471. That holding applies with full force here.

Plaintiffs nevertheless ask this Court to order declaratory relief repackaging the district court's findings. App. Br. at 100. This request flies in the teeth of *Wilton* and *Concise*. In contravention of the "broad leeway" recognized in *Wilton* and basic principles of abuse-of-discretion review, Plaintiffs seek to substitute their own wishes for the district court's reasoned judgment. And they do not explain how restating findings in a declaratory judgment could serve any useful purpose—much less how declining to do so could be an abuse of discretion.[22]

The Declaratory Judgment Act confers no "absolute right upon the litigant." *Wilton*, 515 U.S. at 287. Congress has "created an opportunity, rather than a duty, to grant" declaratory relief. *Id.* at 288. Denying declaratory relief was a proper exercise of the district court's discretion.

B. Denying injunctive relief was a valid exercise of discretion.

"An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010) (citation omitted). "[A] plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief." *Id.* at 156 (citation omitted). No factor may be presumed. *Id.* at 157-58.

[22] *Venator Group Specialty, Inc. v. Matthew/Muniot Family, LLC*, 322 F.3d 835 (5th Cir. 2003), is inapposite. App. Br. at 98. In that case, this Court conducted "de novo review," *id.* at 838, and held the district court had "erred . . . as a matter of law" in dismissing a declaratory judgment action as unripe. *Id.* at 842. That holding has nothing do with the decision in this case.

Plaintiffs concede that this test applies, ROA.11094, and with good reason. The CAA confers "jurisdiction" in a citizen suit to "enforce" permit "limitations." 42 U.S.C. § 7604(a). That statutory language requires application of traditional equitable principles. *See Hecht v. Bowles*, 321 U.S. 321, 326 (1944).

1. There is no threat of imminent future injury.

Plaintiffs must "show that they will suffer irreparable injury" if an injunction is not issued. *Monsanto*, 561 U.S. at 162. This burden requires plaintiffs to "establish a real and immediate threat" of a specific "future" injury. *In re Stewart*, 647 F.3d 553, 557 (5th Cir. 2011) (citation omitted). To satisfy this requirement, Plaintiffs were required to show a "cognizable danger of recurrent violation." *Kansas v. Nebraska*, 135 S. Ct. 1042, 1059 (2015) (citation omitted). And they had to demonstrate a future injury "apart from any past injury." *Aransas Project*, 775 F.3d at 664-65 (citation omitted).

Plaintiffs did not establish any impending threat of *future* injury to any of their members due to a *future* CAA violation. Their proposed findings only addressed *past* injury from, and mere "concerns" about, plant emissions in general. ROA.11097-101, 11273. Therefore, the district court properly found no evidence of any future injury resulting from future unlawful acts; on the contrary, it found "that the preponderance of the credible evidence does not support such a finding" of a "continuing likelihood of recurrence." ROA.11392 n.155. This finding is a sufficient basis to affirm the denial of injunctive relief.

2. The balance of harms justified denying an injunction.

Plaintiffs also had the burden to show that, "considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted." *Monsanto*, 561 U.S. at 156-57. The district court responsibly concluded, however, that harm to ExxonMobil and the burdens on the court resulting from an injunction and its enforcement justified denying relief. ROA.11433-35.

The Supreme Court has observed that a district court in an environmental citizen suit "properly may conclude that an injunction would be an excessively intrusive remedy because it could entail continuing superintendence of the permit holder's activities by a federal court—a process burdensome to court and permit holder alike." *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 193 (2000). Plaintiffs discuss other aspects of *Friends of the Earth*, App. Br. at 101, but ignore this principle. A principle "can extend through its logic beyond the specific facts of the particular case," *Los Angeles County v. Humphries*, 562 U.S. 29, 38 (2010), and the *Friends of the Earth* principle indisputably applies to this environmental citizen suit. The district court's reasoning was sound.

Plaintiffs admit that an injunction would impose a burden on ExxonMobil, merely arguing that Exxon can afford it. App. Br. at 102-103. That is no answer. The district court's balancing analysis—considering the burdens of an injunction, ExxonMobil's good faith and compliance efforts, the lack of any evidence of harm, and the lack of any public benefit—is unassailable. ROA.1132-25.

CONCLUSION

The judgment of the district court should be affirmed. ExxonMobil requests all other relief to which it is entitled.

Respectfully submitted,

BECK REDDEN LLP

By: *Russell S. Post*
Russell S. Post
Eric J.R. Nichols
Fields Alexander
Robert D. Daniel
William R. Peterson
Bryon A. Rice
1221 McKinney, Suite 4500
Houston, TX 77010
(713) 951-3700
(713) 951-3720 (Fax)

WINSTEAD PC
Albert R. Axe
Keith A. Courtney
401 Congress Ave., Suite 2100
Austin, TX 78701
(512) 270-2800
(512) 370-2850 (Fax)

ATTORNEYS FOR APPELLEES

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2015, a true and correct copy of the above and foregoing Brief of Appellees was forwarded to all counsel of record by the Electronic Filing Service Provider, if registered, otherwise by email, as follows:

Philip H. Hilder
philip@hilderlaw.com
HILDER & ASSOCIATES, P.C.
819 Lovett Boulevard
Houston, TX 77006

Charles C. Caldart
cccnelc@aol.com
NATIONAL ENVIRONMENTAL LAW CENTER
1402 Third Avenue, Suite 715
Seattle, WA 98101

Joshua R. Kratka
josh.kratka@nelconline.org
NATIONAL ENVIRONMENTAL LAW CENTER
294 Washington Street, Suite 500
Boston, MA 02108

David A. Nicholas
dnicholas@verizon.net
20 Whitney Road
Newton, MA 02460

Attorneys for Plaintiffs-Appellants,
Environment Texas Citizen Lobby, Incorporated and Sierra Club

/s/ *Russell S. Post*
Russell S. Post

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Rule 32(a)
Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 24,906 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). On September 1, 2015, the Court granted leave to file a brief not exceeding 25,000 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14 pt. font.

Dated: September 10, 2015.

/s/ *Russell S. Post*
Russell S. Post