17. In addition, each year at issue, total emissions were far below the annual emissions limits.[87] For example, in 2012, the annual emissions limit of volatile organic compounds ("VOCs") was 7,778.4 tons, but the Complex only emitted 2,958.1 tons of VOCs in that year.[88] Also, each year at issue, unauthorized emissions were a very small percentage of total emissions and an even smaller percentage of the annual emissions limits.[89] For example, in 2012, of the total VOCs emitted, only 54.9 tons were unauthorized, which is only 1.9% of the Complex's total VOC emissions that year and only 0.7% of the annual VOC emissions limit.[90]

### *H. Plaintiffs and Plaintiffs' Members*

18. Environment Texas is a non-profit corporation with a purpose "to engage in activities, including public education, research, lobbying, litigation, issue advocacy, and other communications and activities to promote pro-environment political ideas, policies and leaders."[91] It has approximately 2,900 dues-paying

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[87] *Defendants' Exhibits* 1004, 1008. Emissions from "event emissions" are at issue in this case, not "permitted emissions."

[88] *Defendants' Exhibit* 1004 at 1.

[89] *Defendants' Exhibits* 1004, 1008.

[90] *Defendants' Exhibit* 1004 at 1.

[91] *Plaintiffs' Exhibit* 338 at ¶ II(2); *Trial Transcript* at 1-227:16–25.

members in Texas.[92] Similarly, Sierra Club is a non-profit corporation with a purpose to protect humanity, the environment, and the ability to enjoy the outdoors.[93] The Lone Star (Texas) Chapter of the Sierra Club has approximately 25,000 members.[94] Plaintiffs called four members of either Environment Texas or Sierra Club to testify.

19. First, Diane Aguirre Dominguez is a member of Environment Texas and Sierra Club.[95] She grew up in Baytown at her parents' home, which is about a mile and a half from the Complex.[96] The Complex is the closest industrial facility to her parents' home.[97] She lived in Houston from 2006 through 2013 while attending college and working, during which time she regularly visited her parents' home in Baytown.[98] In March 2013, she moved to Oakland, California.[99] She has returned to Baytown to visit her family at her parent's home, and she has plans to

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[92] *Trial Transcript* at 1-234:24 to 1-235:4.

[93] *Trial Transcript* at 2-125:11–22.

[94] *Trial Transcript* at 2-125:23 to 2-126:4.

[95] *Trial Transcript* at 1-192:2–22.

[96] *Trial Transcript* at 1-193:8 to 1-194:16.

[97] *Trial Transcript* at 1-194:17–20.

[98] *Trial Transcript* at 1-196:6 to 1-199:9.

[99] *Trial Transcript* at 1-199:8–9.

visit Baytown again for the holidays in 2014.[100] While growing up in Baytown, she often smelled odors at her parents' home and other places in Baytown, and she had allergies characterized by running nose, watery eyes, and chest constriction, for which she took medication.[101] These symptoms improved when she moved away from Baytown and she was able to stop taking medication, but the symptoms return whenever she visits her family in Baytown.[102] However, she cannot correlate any of these symptoms to specific Events or Deviations at issue in this case.[103] Further, she has seen flares, smoke, and a brownish haze over the Complex.[104] She finds these sights and smells worrisome because she thinks they indicate Exxon is emitting harmful chemicals; she is also concerned about the risk of explosion from an emergency condition at the Complex.[105] However, she understands some flaring is a normal, permitted part of the operation of the Complex, and she does not know of a time when she observed unpermitted flaring.[106] Lastly, she enjoys running outdoors, but when she is visiting Baytown,

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[100] *Trial Transcript* at 1-199:10–25.

[101] *Trial Transcript* at 1-200:1 to 1-201:15, 1-205:6–25, 1-219:1–14.

[102] *Trial Transcript* at 1-205:19 to 1-206:11.

[103] *Trial Transcript* at 1-207:25 to 1-209:23, 1-220:1 to 1-222:4.

[104] *Trial Transcript* at 1-202:2 to 1-203:8, 1-218:6–17.

[105] *Trial Transcript* at 1-203:9 to 1-204:9.

[106] *Trial Transcript* at 1-218:3–24.

she refrains from doing so because she experiences labored breathing and an abrasive feeling in her throat and lungs.[107]

20. Second, Marilyn Kingman is a member of Sierra Club.[108] She lives in a town that neighbors Baytown, but she shops, banks, attends church, and conducts other activities several times a week in Baytown, including nearby the Complex.[109] She has smelled a chemical smell around the Complex, seen flares at the Complex, and seen a gray or brown haze over the Complex.[110] The odors she has smelled, which she attributes to the Complex, cause her to be concerned for her health.[111] She limits her outdoor activities in Baytown when she smells odors or sees haze.[112] Also, flaring at the Complex concerns her because she is afraid of explosion and because she believes flaring indicates something is wrong.[113] However, she does not claim to have any physical ailments or health conditions that she attributes to

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[107] *Trial Transcript* at 1-204:10 to 1-205:5.

[108] *Trial Transcript* at 6-69:11–14.

[109] *Trial Transcript* at 6-71:3 to 6-75:6.

[110] *Trial Transcript* at 6-75:2 to 6-76:15.

[111] *Trial Transcript* at 6-76:16–23, 6-83:6–12.

[112] *Trial Transcript* at 6-76:24 to 6-77:24.

[113] *Trial Transcript* at 6-78:13 to 6-80:5.

anything happening at the Complex.[114] Also, she was not able to correlate any of her experiences or concerns to specific Events or Deviations at issue in this case.[115]

21. Third, Richard Shae Cottar is a member of Sierra Club.[116] From April 2010 through September 2012, he lived a quarter of a mile from the Complex.[117] Since September 2012, he has lived approximately two miles from the Complex.[118] While living at the closer address, he saw or heard flaring events at the Complex from his home that were audibly disruptive, woke him up, rattled the windows of his house, involved plumes of black smoke, involved large flames, and lasted for several hours in duration.[119] He also smelled strong, pungent odors that, on occasion, caused him headaches and awoke him in the night.[120] He attributed odors at his home to being caused by the Complex because when the wind was blowing from the Complex towards him during flaring events, he smelled the

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[114] *Trial Transcript* at 6-95:14–20.

[115] *Trial Transcript* at 6-91:23 to 6-95:9. On February 13, 2014, Kingman smelled an odor she attributed as emanating from the Complex, and a Recordable Event occurred that day; however, February 13, 2014, is outside the time frame of this case.

[116] *Trial Transcript* at 1-98:18 to 1-99:13.

[117] *Trial Transcript* at 1-102:7 to 1-103:6.

[118] *Trial Transcript* at 1-102:3–4, 1-106:5–11.

[119] *Trial Transcript* at 1-108:5–24, 1-109:12–20, 1-118:13–24, 1-121:7 to 1-123:18, 1-128:2–3.

[120] *Trial Transcript* at 1-109:21 to 1-112:3, 1-131:5 to 1-132:4, 1-176:6–9.

odors, but when the wind was blowing towards the Complex away from him during flaring events, he did not smell the odors.[121] He has also smelled odors that became more intense the closer he got to the Complex while driving.[122] His asthmatic symptoms were exacerbated when living at the closer address, and since moving further from the Complex, his asthmatic symptoms have decreased.[123] He moved further away from the Complex out of concern for his health and safety.[124] When visiting the nature center next to the Complex, he does not stay if he sees emissions.[125] He does not want to breathe unauthorized emissions, and his concerns about air quality would be lessened if Exxon were to reduce its unauthorized emissions.[126] However, he understands that certain emissions and flaring are allowed by permits.[127] In total, he was able to credibly correlate three flaring events he observed to specific Events or Deviations, one of which woke him up from noise and involved a "sweet odor" outside his home.[128]

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[121] *Trial Transcript* at 1-119:5–18.

[122] *Trial Transcript* at 1-111:10–20.

[123] *Trial Transcript* at 1-148:3 to 1-149:19, 1-187:12 to 1-188:1.

[124] *Trial Transcript* at 1-144:21 to 1-145:17.

[125] *Trial Transcript* at 1-152:11–21.

[126] *Trial Transcript* at 1-153:9–20.

[127] *Trial Transcript* at 1-153:9–13, 1-169:3–18.

[128] *Trial Transcript* at 1-123:19 to 1-131:1, 1-168:17 to 1-181:12.

22. Fourth, Sharon Sprayberry is a member of Sierra Club.[129] She lived in Baytown from 2004 until June 2012, about one mile from the Complex.[130] While living in Baytown, she heard flares at the Complex from inside her home, saw smoke coming from the flares, saw haze over the Complex, and smelled a chemical odor outdoors when the wind was blowing from the Complex towards her or when she saw flares.[131] These smells concerned her because she was afraid they were toxic or harmful.[132] While living in Baytown, she also experienced respiratory issues.[133] Her respiratory problems went away within a few weeks of moving to a different city—McGregor, Texas.[134] She would like to return to Baytown to visit friends and attend events, but she is unlikely to return because during her last visit the air quality affected her breathing.[135] She would have retired in Baytown if the air quality were better.[136] She understands not all flares involve unauthorized

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[129] *Trial Transcript* at 6-5:19–23.

[130] *Trial Transcript* at 6-11:23 to 6-13:13, 6-37:2–5, 6-40:3–10.

[131] *Trial Transcript* at 6-15:18 to 6-16:19, 6-33:12 to 6-36:13.

[132] *Trial Transcript* at 6-36:16 to 6-37:1.

[133] *Trial Transcript* at 6-15:7–17.

[134] *Trial Transcript* at 6-37:9–24.

[135] *Trial Transcript* at 6-38:2–19.

[136] *Trial Transcript* at 6-38:20–22.

emissions because some flares and emissions are authorized by permit.[137] In total, she was able to credibly correlate two events she observed to Events or Deviations.[138]

## *I. Baytown Residents Called by Exxon*

23. Exxon called three residents of the Baytown community to testify. First was Fred Aguilar, who has lived approximately eight blocks from the Complex for **35 years**.[139] He has no health issues or concerns that he attributes to the Complex, does not worry about living near the Complex, and has never had any concerns about any emissions events or flares that have occurred at the Complex.[140] He has only rarely heard very loud noise from flaring, the last time being six or seven years ago, and such noise never affected his ability to enjoy his property.[141]

24. Second was Billy Barnett, who has lived across the street from the Complex for 17 years and in close proximity to the Complex for a total of **37**

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[137] *Trial Transcript* at 6-50:12–20.

[138] *Trial Transcript* at 6-17:7 to 6-23:8, 6-45:20 to 6-49:16, 6-65:20 to 6-67:24.

[139] *Trial Transcript* at 10-130:11 to 10-131:9.

[140] *Trial Transcript* at 10-140:8–24, 10-142:1–6, 10-155:4–12.

[141] *Trial Transcript* at 10-142:7–18.

**years**.[142] He does not "feel impacted or influenced" by his close proximity to the Complex.[143] Specifically, he has had no health issues that he attributes to living across the street from the Complex, flaring at the Complex has not disturbed his enjoyment of his property, and he has not had problems with loud noises coming from the Complex.[144] He has smelled substantial odors a couple of times in 37 years but does not characterize the odors as overpowering.[145]

25. Third, Gordon Miles has lived very close to the Complex for **28 years**.[146] He has never experienced any problems with flaring, odors, or noises coming from the Complex; has no health problems that he attributes to anything happening at the Complex; and has no complaints about Exxon as a neighbor.[147]

## III. CONCLUSIONS OF LAW

### *A. Standing*

1. An organization "has standing to bring suit on behalf of its members when: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and

[142] *Trial Transcript* at 11-101:8 to 11-102:3, 11-104:10–19.

[143] *Trial Transcript* at 11-114:13–18.

[144] *Trial Transcript* at 11-113:7–11, 11-114:19 to 11-115:1, 11-115:10–14.

[145] *Trial Transcript* at 11-115:5–9.

[146] *Defendants' Exhibit* 545; *Trial Transcript* at 12-82:11 to 12-86:5.

[147] *Trial Transcript* at 12-89:22 to 12-90:14, 12-96:13–22.

(3) neither the claim asserted nor the relief requested requires the participation of individual members." *Texans United for a Safe Econ. Educ. Fund v. Crown Cent. Petroleum Corp.*, 207 F.3d 789, 792 (5th Cir. 2000). Exxon does not contest the second and third requirements, and the Court finds these requirements are met. At issue is the first requirement.

2. In order for a member to have standing to sue in his or her own right, (1) he or she must have suffered an actual or threatened injury, (2) that is fairly traceable to the defendant's action, and (3) the injury must likely be redressed if the plaintiff prevails in the lawsuit. *Id.* The plaintiff has the burden to prove these requirements by the preponderance of the evidence. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Envtl. Conservation Org. v. City of Dallas*, No. 3-03-CV-2951-BD, 2005 WL 1771289, at *4 n.2 (N.D. Tex. July 26, 2005). Each requirement is addressed in turn.

***a. Injury-in-Fact***

3. To satisfy the injury-in-fact requirement, the plaintiff must prove injury to himself or herself, not injury to the environment. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). There is a "low threshold for sufficiency of injury" to confer standing. *Save Our Cmty. v. EPA*, 971 F.2d 1155, 1161 (5th Cir. 1992). For an environmental plaintiff, effect to his or her recreational or aesthetic interests constitutes injury-in-fact. *Laidlaw*,

528 U.S. at 183. Also, "breathing and smelling polluted air is sufficient to demonstrate injury-in-fact and thus confer standing under the CAA." *Texans United*, 207 F.3d at 792; *Concerned Citizens Around Murphy v. Murphy Oil USA, Inc.*, 686 F. Supp. 2d 663, 670–71 (E.D. La. 2010).

4. In this case, four members of either Environment Texas or Sierra Club testified. As detailed supra in paragraphs II.19–22, while living or visiting near the Complex during the time period at issue in this case, at least one of these members experienced the following, inter alia: allergies; respiratory problems; the smell of pungent odors, which occasionally caused headaches; audibly disruptive noise; and visions of flares, smoke, and haze. In addition, at least one of these members was worried about the risk of explosion after seeing flares and worried about his or her health after seeing flares, smoke, and haze.[148] Because of at least one of the aforementioned experiences or worries, at least one of these members made the following changes in his or her life, inter alia: refrained from running outdoors, limited outdoor activities when odors were smelled or haze seen, left the nature center next to Complex early, and moved away from Complex.[149] Collectively, these experiences, worries, and changes satisfy the injury-in-fact requirement.

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[148] *Supra* ¶¶ II.19–22.

[149] *Supra* ¶¶ II.19–22.

***b. Traceability***

5. So long as there is a fairly traceable connection between a plaintiff's injury and the defendant's violation, the traceability requirement of standing is satisfied. *Comer v. Murphy Oil USA*, 585 F.3d 855, 864 (5th Cir. 2009). To confer standing, the plaintiff's injury does not have to be linked to exact dates that the defendant's violations occurred, and the plaintiff does not have to "show to a scientific certainty that defendant's [emissions], and defendant's [emissions] alone, caused the precise harm suffered by the plaintiffs." *Texans United*, 207 F.3d at 793; *Save Our Cmty.*, 971 F.2d at 1161 (internal quotation marks omitted); *see Tex. Campaign for the Env't v. Lower Colo. River Auth.*, No. H-11-791, 2012 WL 1067211, at *4–5 (S.D. Tex. Mar. 28, 2012) (Miller, J.). Rather, circumstantial evidence of traceability suffices, such as observation of smoke coming from the defendant's plant while at the same time smelling odors, and expert evidence that on certain days when the defendant's violations occurred, excess emissions were detectable in the plaintiff's neighborhood. *Texans United*, 207 F.3d at 793.

6. Even though Plaintiffs' members' injuries do not have to be linked to exact dates that the Events and Deviations occurred, Plaintiffs' members correlated some of the experiences described supra, such as odor and noise, to five Events or Deviations.[150] Also, Plaintiffs' members have seen flares, smoke, and haze over

[150] *Supra* ¶¶ II.19–22 (Dominguez-0, Kingman-0, Cottar-3, and Sprayberry-2).

the Complex.[151] Some of the members smelled odors at their homes while living very close to the Complex, particularly when the wind was blowing towards their homes from the Complex, and the Complex was the closest industrial facility to their homes.[152] One member who lived a quarter of a mile from the Complex saw or heard flaring events at the Complex from his home, and he smelled odors that became more intense the closer he got to the Complex while driving.[153] Some of the members' allergies and respiratory problems decreased when they moved away from the Complex.[154] Additionally, Plaintiffs submitted evidence of the potential health effects caused by the types of pollutants emitted during the Events and Deviations, and some of these potential health effects match some of the experiences of Plaintiffs' members.[155] All the aforementioned evidence suffices to establish a fairly traceable connection between Plaintiffs' members' injuries and the Events and Deviations at the Complex. Accordingly, the traceability requirement is satisfied.

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[151] *Supra* ¶¶ II.19–22.

[152] *Supra* ¶¶ II.19, 21–22.

[153] *Supra* ¶ II.21.

[154] *Supra* ¶¶ II.19, 21–22.

[155] For example, hydrogen sulfide can smell badly and cause headaches, and one of Plaintiffs' members smelled strong, pungent odors that, on occasion, caused him headaches. *Plaintiffs' Exhibit* 476 at 38–39; *Plaintiffs' Exhibit* 540 at 1, 4, 10; *Trial Transcript* at 7-89:25 to 7-91:9, 9-161:24 to 9-162:8; *supra* ¶ II.21.

### *c. Redressability*

7. A plaintiff must prove redressability "for each form of relief sought." *Laidlaw*, 528 U.S. at 185. Relief that prevents or deters violations from reoccurring satisfies the redressability requirement. *Id.* at 185–86. Here, Plaintiffs request penalties for the Events and Deviations, an injunction enjoining Exxon from violating the CAA, a special master to monitor compliance with the injunctive relief, and a declaratory judgment that Exxon violated its Title V permits. Civil penalties in a CAA citizen suit satisfy the redressability requirement of standing because they deter future violations. *Texans United*, 207 F.3d at 794; *Laidlaw*, 528 U.S. at 185–86.[156] An injunction requiring the defendant to cease its violations also satisfies the redressability requirement of standing. *Texans United*, 207 F.3d at 794; *Envtl. Conservation Org.*, 2005 WL 1771289, at *4. Because the purpose of the special master in this case would be to ensure violations do not recur, the request for a special master in this particular case also satisfies the redressability requirement. Lastly, because a public, court-ordered declaratory judgment that Exxon has violated its Title V permits would help deter Exxon from

[156] To the extent the redressability requirement in a CAA case is only satisfied as to penalties for ongoing violations, not wholly past violations, the Court notes Exxon has some ongoing violations. *See infra* ¶¶ III.9–48 (finding that because Exxon violated some of the same emission standards or limitations both before and after the complaint was filed, those violations are considered ongoing under the CAA and are thus actionable in a citizen suit).

violating in the future, the request for a declaratory judgment in this particular case satisfies the redressability requirement. Accordingly, the redressability requirement is satisfied as to all relief sought.

8. Because the injury-in-fact, traceability, and redressability requirements are satisfied, Plaintiffs' members have standing to sue in their own right, and Plaintiffs have standing.

***B. Actionability***

9. It is undisputed Exxon violated some emission standards or limitations under the CAA.[157] The issue is whether such violations are actionable under the CAA as a citizen suit. The CAA provides citizens may bring a civil action "against any person . . . 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 under [the CAA]." 42 U.S.C. § 7604(a)(1). The plaintiff must prove these requirements by a preponderance of the evidence. *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1061, 1063–64 (5th Cir. 1991).[158] The plaintiff

[157] Specifically, 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.

[158] *Carr* is a Clean Water Act ("CWA") case. The "to be in violation" provision in the CAA is identical to the "to be in violation" provision in the CWA. *Compare* 42 U.S.C. § 7604(a) (CAA), *with* 33 U.S.C. § 1365(a)(1) (CWA). Interpretations of the CWA provision are instructive when analyzing the CAA provision. *See United States v. Anthony Dell'Aquilla, Enters. & Subsidiaries*, 150 F.3d 329, 338 n.9 (3d Cir. 1998).

can prove a person is "in violation," otherwise known as proving ongoing violation, in one of two ways: first, "by proving violations that continue on or after the date the complaint is filed, or [second] by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of recurrence in intermittent or sporadic violations." *Id.* at 1062. Proof of one post-complaint violation is conclusive that the corresponding pre-complaint violation is actionable. *Id.* at 1065 n.12; *Natural Res. Def. Council, Inc. v. Texaco Ref. & Mktg., Inc.*, 2 F.3d 493, 502 (3d Cir. 1993). The plaintiff can prove "a continuing likelihood of recurrence" in one of two ways: "[f]irst, by proving a likelihood of recurring violations of the same parameter; or second, by proving a likelihood that the same inadequately corrected source of trouble will cause recurring violations of one or more different parameters." *Texaco Ref.*, 2 F.3d at 499. In summary, the plaintiff must prove by the preponderance of the evidence one of the following in a CAA citizen suit:

(1) "to have violated": repeated violation of the same emission standard or limitation before the complaint was filed; or

(2) "to be in violation":

(a) violation of the same emission standard or limitation both before and after the complaint was filed; or

(b) continuing likelihood of recurrence:

(i) likelihood of recurring violations of the same parameter; or

(ii) likelihood that the same inadequately corrected source of trouble will cause recurring violations of one or more different parameters.

*See* 42 U.S.C. § 7604(a)(1); *Carr*, 931 F.2d at 1062; *Texaco Ref.*, 2 F.3d at 499; *see also Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, No. H-10-4969, ECF No. 126 at 10–13 (S.D. Tex. Apr. 3, 2013) (Smith, Mag.) (memorandum and recommendation on motion for summary judgment in this case), *adopted by* ECF No. 135 (S.D. Tex. May 2, 2013) (Hittner, J.) (order adopting the memorandum and recommendation). The definition of "emission standard or limitation" includes any "standard," "limitation," "schedule," "term," or "condition" in a Title V permit. 42 U.S.C. § 7604(f)(4).

10. Here, Plaintiffs claim Exxon either (1) repeatedly violated the same emission standards or limitations in its Title V permits before the complaint was filed, or (2)(a) violated the same emission standards or limitations in its Title V permits both before and after the complaint was filed. Plaintiffs do not claim satisfaction of the third method of proving actionability: method (2)(b) continuing likelihood of recurrence.[159]

[159] Because Plaintiffs do not claim a continuing likelihood of recurrence for purposes of actionability, the Court declines to address in detail this method of proving actionability. However, the Court does find that the preponderance of the credible

11. Title V permits incorporate numerous, different regulatory requirements, and the Complex is regulated by over 120,000 permit conditions.[160] 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. *See* 42 U.S.C. § 7604(a)(1), (f)(4). Thus, it is insufficient to prove violation of one standard or limitation followed by violation of a different standard or limitation. *ExxonMobil Corp.*, ECF No. 126 at 13 (holding that the CAA allows citizen suits for a wholly past violation so long as there is a second violation of the *same* emission standard or limitation) (citing

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evidence does not support such a finding. The number of Events and Deviations does not alone prove a likelihood of recurring violations. *See supra* ¶ II.7; *infra* ¶¶ III.60–61. The testimony of Keith Bowers, particularly his opinion that the Events and Deviations had "common causes," is not persuasive to prove the same inadequately corrected source of trouble will cause recurring violations of different parameters. *See infra* ¶ III.61 n.224. There is no credible evidence that any of the Events or Deviations resulted from the same root cause. *Infra* ¶ III.61. Accordingly, none of the Events or Deviations are actionable due to a continuing likelihood of recurrence.

Exxon contends that to be actionable, the law requires the violations to have involved the same equipment, the same emissions point, and the same root cause. Such considerations may be applicable to one way to prove actionability: method (2)(b) continuing likelihood of recurrence, particularly method (2)(b)(ii) likelihood that the same inadequately corrected source of trouble will cause recurring violations of one or more different parameters. However, such considerations are not required to prove actionability the other two ways: method (1) repeated violation of the same emission standard or limitation pre-complaint, or method (2)(a) violation of the same emission standard or limitation both before and after the complaint. For additional background on why violations are not required to have involved the same equipment, the same emissions point, and the same root cause to be actionable, see *ExxonMobil Corp.*, ECF No. 126 at 11–13.

[160] *Supra* ¶ II.4.

*Patton v. Gen. Signal Corp.*, 984 F. Supp. 666, 672 (W.D.N.Y. 1997)) (citing *Satterfield v. J.M. Huber Corp.*, 888 F. Supp. 1561, 1564–65 (N.D. Ga. 1994)). Similarly, it is insufficient to prove repeated violation a Title V permit, without showing which specific standard, limitation, schedule, term, or condition in the Title V permit was repeatedly violated.

12. As evidentiary support for the actionability of the alleged violations in each count of their complaint, Plaintiffs cite to the stipulated spreadsheets of Events and Deviations;[161] spreadsheets created by Plaintiffs that correspond to the stipulated spreadsheets, the only difference being a column added containing Plaintiffs' "number of days of violation" calculations; and tables that tally the alleged number of days of pre-complaint and post-complaint violations from the aforementioned spreadsheets.[162] The Court addresses each count of Plaintiffs' complaint in turn.

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[161] *Plaintiffs' Exhibits* 1A–7E; *see supra* ¶ II.5. These stipulated spreadsheets span hundreds of pages and contain thousands of rows of alleged violations. The Court has reviewed the details of all these spreadsheets.

[162] *Plaintiffs' Exhibits* 9–15.

***a. Count I***

*1. Special conditions 38 and 39 are standards or limitations within the meaning of the CAA*

13. Plaintiffs contend the language in flexible permit 18287's special conditions 39 and 39 stating upset emissions are "not authorized" is a standard or limitation under the CAA. Exxon contends that special conditions 38 and 39 are not standards or limitations under the CAA because the term "not authorized" exempts upset emissions from the permit.

14. The Court's initial opinion found Plaintiffs failed to provide corroborating evidence of violations of special conditions 38 and 39 because the evidence provided in support of Count I failed to specify which standards and limitations were allegedly violated. To the extent Plaintiffs did allege a violation of air containment conditions or limitations, the Court found the evidence did not prove a repeated violation of the same, specific limitation. On appeal, the Circuit held the Court conflated its analysis of Count I with the alleged MAERT limitation violations in Count II. As a matter of law, the Circuit held Count I sufficiently alleged an alternate theory from Count II, that every emissions event at the refinery constitutes a violation of the "no upset emissions" provision in special conditions 38 and 39. The Court's judgment on Count I was vacated and remanded. The Circuit determined the Court "appl[ied] the wrong law to the events set forth" by