the preponderance of the credible evidence shows Exxon made good faith efforts to comply with the CAA.[238] Accordingly, Exxon's full compliance history and good faith efforts to comply weigh against assessing a penalty.

c. Duration of the Violation

62. The Fifth Circuit's opinion held the Court abused its discretion by viewing violations of a longer duration as offset by violations of a shorter duration. The Circuit's opinion also indicated the Court should revisit its approach as to, whether in calculating the duration of a violation, a court should look to the duration of each individual violation or the period of time over which the violations occurred. *See Env't Tex.*, 824 F.3d at 531. The Court was instructed on remand, if it continued to consider durations of the violations individually, to determine whether any violation standing alone was sufficient to justify imposing a penalty.[239]

63. The Court first turns to the proper standard for determining whether this factor requires examining the length of an individual violation or the period of

[238] In addition to the aforementioned issues, Plaintiffs contend Exxon's policy of always asserting the affirmative defense to penalties to the TCEQ is, in itself, bad faith. Based on the greater weight of the credible evidence, the Court disagrees such policy is in bad faith. Although Exxon initially asserts the affirmative defense when reporting an event to the TCEQ, the TCEQ, after investigation, determines whether the affirmative defense actually does apply.

[239] Exxon contends the Court should continue to look to duration of the violations standing alone in analyzing this factor. However, Exxon cites no case law to support this proposition.

time over which the violations occurred. Exxon does not address the case law cited by Plaintiffs, and referred to by the Fifth Circuit, that indicates the Court should consider the period of time over which the violations occurred on this factor. *See United States v. Vista Paint Corp.*, No. EDCV 94-0127 RT, 1996 WL 477053, at *15 (C.D. Cal. Apr. 16, 1996); *United States v. B & W Inv. Props., Inc.*, No. 91 C 5886, 1994 WL 53781, at *4 (N.D. Ill. Feb. 18, 1994); *United States v. Midwest Suspension & Brake*, 824 F. Supp. 713, 736–37 (E.D. Mich. 1993); *United States v. A.A. Mactal Constr. Co. Inc.*, Civ. A. No. 89-2372-V, 1992 WL 245690, at *3 (D. Kan. Apr. 10, 1992). Nor does Exxon argue that the plain meaning of the phrase "duration of the violation" requires examining each individual violation as opposed to the period of time over which the violations occurred. The Court, in light of the Fifth Circuit's notation of the authority supporting the position, adopts the interpretation of this factor that examines the period of time over which the credible evidence establishes the violations occurred.

64. The Court next turns to, whether looking to the period of time over which the violations occurred, the duration factor supports imposing a penalty. The credible evidence establishes the violations at issue occurred over an eight-year period. During that eight-year time period, Exxon averaged more than one

violation per day. Accordingly, the Court finds the duration factor weighs in favor of assessing a penalty.[240]

d. Payment by the Violator of Penalties Previously Assessed for the Same Violation

65. Exxon has paid $1,423,632 in monetary penalties for the Events and Deviations at issue in this case to either the TCEQ or Harris County.[241] Plaintiffs accede this amount should be deducted from the total penalty determined by the Court, and the Court agrees. Accordingly, $1,423,632 will be deducted from any penalty otherwise warranted.[242]

e. Economic Benefit of Noncompliance

66. Generally, economic benefit of noncompliance is the financial benefit obtained by ***"delaying*** capital expenditures and maintenance costs on pollution-

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[240] The Court finds even under its previous interpretation of this factor, looking to the individual violation's duration, there are individual violations of a sufficient duration to weigh in favor of assessing penalties. The Court previously found that any longer violations where balanced out by the numerous cursory violations. The Circuit held utilizing the balancing methodology for analyzing the duration factor was an abuse of discretion. As directed by the Circuit on remand, the Court now looks to the actionable violations and determines that a sufficient quantity of violations of a sufficient duration occurred to weigh in favor of assessing penalties. For example, under Count II, there were 138 actionable violations that were more than forty-eight hours in duration. *See Plaintiffs' Exhibits* 589, 590, 591, 592, 593 & 594.

[241] *Supra* ¶ II.8.

[242] Plaintiffs contend on remand this amount should be reduced given the Court's finding on Count VII; however, as this issue was not appealed or part of the Fifth Circuit's instructions on remand, the Court will not revisit the issue.

control equipment." *CITGO Petroleum Corp.*, 723 F.3d at 552 (emphasis added). "[T]here are two general approaches to calculate economic benefit: (1) the cost of capital, i.e., what it would cost the polluter to obtain the funds necessary to install the equipment necessary to correct the violation; and (2) the actual return on capital, i.e., what the polluter earned on the capital that it declined to divert for installation of the equipment." *Id.* (internal quotation marks omitted). A district court must make a reasonable estimate of economic benefit of noncompliance. *Id.* at 552–53.

67. The Fifth Circuit held this Court erred in failing to enter findings as to whether Exxon received an economic benefit in delaying implementation of the four environmental improvement projects from the Agreed Order.[243] Although the Circuit upheld the Court's rejection of Bower's expert testimony on this issue as not credible,[244] the Circuit held that Plaintiffs elicited testimony on this issue from

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[243] *Supra* ¶ II.12.

[244] As to Bower's testimony, the Court's initial opinion made the following findings, in paragraphs 41–42 of the Court's *Findings of Fact and Conclusions of Law*, Document No. 225:

> 41. Plaintiffs claim Exxon's economic benefit of noncompliance is $657 million as of June 2014. This number is based on Bowers's opinion that the Events and Deviations would not have occurred if (1) if Exxon would have spent $90 million more annually on maintenance and (2) if Exxon would have installed certain capital equipment (an additional sulfur unit costing $100 million, an additional sour gas flare costing $10 million, and two additional compressor stations costing $50 million each). Plaintiffs offered the testimony of an economist, Jonathan Schefftz, who

Shefftz that was independent of Bower's testimony. *Env't Tex.*, 824 F.3d at 529, 529 n.17. The Circuit noted this Court found Shefftz's method for calculating the economic benefit reliable. On remand, the Court was instructed that "the economic benefit estimate must 'encompass *every* benefit that defendants received

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used Bowers's inputs as to maintenance and capital expenditure costs delayed to calculate present-day economic benefit using the weighted-average cost of capital. The Court finds Schefftz's method of calculating economic benefit to be reliable. However, Schefftz made it very clear that he had no opinion as to the reliability of the inputs given to him by Bowers. For reasons explained infra, the Court finds Bowers's inputs to be neither reliable, credible, nor persuasive. Therefore, Schefftz's economic benefit of noncompliance figure is equally unreliable.

42. Bowers is a retired refinery and chemical plant engineer. Bowers's opinions and the bases for his opinions were vague and undetailed. Of the $90 million Bowers opined should have been spent on maintenance, Bowers opined half of the $90 million needed to be spent to hire 900 new employees to "run[ ] around inspecting things" and "[j]ust do more" maintenance and "stuff that needs to be done." He opined the remainder of the $90 million needed to be spent on "material." He said his estimate was a "crude estimate," and he did not create a detailed budget of the type that he would have created when he was a project manager. Neither Bowers nor any other evidence credibly demonstrated that spending an additional $90 million on maintenance would have prevented any of the Events or Deviations. Similarly, neither Bowers nor any other evidence credibly demonstrated that any of Bowers's suggested capital improvements would have prevented any of the Events or Deviations. Instead, the preponderance of the credible evidence shows Bowers's suggested capital improvements would not help reduce emissions. Moreover, Exxon has spent a substantial amount of money on maintenance, emissions-reduction and emissions-detection equipment, and capital improvement projects in an effort to reduce emissions and unauthorized emissions events. This includes four environmental improvement projects costing approximately $20 million that Exxon was not required to undertake under law, and over $500 million on maintenance and maintenance-related capital projects each year at issue.

from violation of the law' regardless of the inherently speculative nature of the inquiry." *Id.* at 530 n.19 (citing *United States v. Gulf Park Water Co.*, 14 F. Supp. 2d 854, 864 (S.D. Miss 1998)). Further, after making such findings, the Court was instructed to consider whether those four improvement projects were necessary to correct the violations. The Circuit noted the evidence indicated the projects "appear to be correlated in at least a general way" and the Court's inquiry on remand "should center on whether the projects will ameliorate the kinds of general problems that have resulted in at least some of the permit violations upon which Plaintiffs have sued." *Id.* at 530, 530 n.19.

68. The Court interprets the Fifth Circuit's opinion as instructing it to do a two-step analysis on remand: (1) enter findings based on Shefftz's testimony as to the economic benefit Exxon received from delaying implementation of the projects[245]; and (2) enter findings on the "necessary to correct" prong as to whether the four improvement projects would generally ameliorate the violations on which the Plaintiffs have sued, without requiring a showing that the projects are specifically tied to the prevention of each violation.

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[245] The Court interprets the Circuit's opinion as holding that Shefftz's testimony alone is sufficient to carry Plaintiff's burden of proof on the first step. To the extent Exxon contests the sufficiency of Shefftz's testimony, in regards to the interest rate chosen in the calculations and because he failed to account for the cost of delay by ignoring the increase in equipment expense, the Circuit instructed the Court to consider "*every* benefit . . . regardless of the inherently speculative nature of the inquiry." *Env't Tex.*, 824 F.3d at 530 n.19 (emphasis in original).

69. On the first step, the Court turns to Shefftz's testimony as to any economic benefit Exxon received from delaying implementation of the four projects in the Agreed Order. The Court previously found Shefftz's methodology reliable. Shefftz calculated the economic benefit to Exxon from delaying implementation as $11,746,234 as of November 22, 2013 (the date of Shefftz's report).[246] The economic benefit would increase by $61,066 per month until the economic benefit was disgorged in the form of a civil penalty.[247] It is now April 2017, which is forty-one additional months from the date of Shefftz's report. Therefore, the economic benefit would encompass an additional $2,503,706 and the total economic benefit from delay is $14,249,940. Accordingly, the Court finds Exxon received an economic benefit of $14,249,940 from the delayed implementation of the improvement projects.[248]

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[246] *Trial Transcript* 5-57:14 to 58:13; *Plaintiffs' Exhibit* 556 at 1, 18–21.

[247] *Plaintiffs' Exhibit* 556 at 14, 19. *Trial Transcript*, 5-49:5–9, 5-52:6–10.

[248] Plaintiffs also contend on remand that because the Circuit instructed the Court to consider every benefit, the one billion dollars the Court found demonstrated Exxon's good faith efforts to comply should now be included in the calculation of the economic benefit from delay. The scope of the Circuit's remand was clear that its instructions pertained to the Shefftz's testimony about the four projects and every benefit derived from the delaying the projects' implementation. Even if Plaintiffs' contention were within the scope of remand, the Court finds the evidence cited insufficient to support even a highly speculative inquiry, and additionally, the argument is waived because it was not raised in any of the previously filed proposed findings of fact and conclusions of law.

70. The Court now turns to the Circuit's direction on the second step, whether a delayed project is "necessary to correct" the types of violations in the complaint. The Circuit has articulated a general correlation standard to utilize in analyzing this step.[249] As an example of the general correlation standard, the Circuit notes that "one project aims to 'more effectively monitor and troubleshoot' a refinery flare system in order to 'improve the identification and characterization of flaring events' (Count IV) and the order estimates that the projects will specifically achieve reductions in HRVOC emissions (Count III)." *Env't Tex.*, 824 F.3d at 530. Given the Fifth Circuit's holding that at least one project meets the general correlation standard, the Court finds the Plaintiffs have met their burden as to at least one project on the "necessary to correct" step. Additionally, the Circuit noted this Court had previously recognized in its order the "projects reflect 'an effort to reduce emissions and unauthorized emissions events' at the Baytown complex."[250] *Id.* As the Fifth Circuit instructed the Court to analyze the "necessary to correct" step at a high level of generality, the Court finds Plaintiffs have carried their burden of proof.[251] Plaintiffs have demonstrated that: (1) the

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[249] *Supra* ¶ III.67.

[250] *Supra* ¶ II.12.

[251] To the extent Exxon argues the projects were voluntary and not required for compliance, and therefore, not a proper basis for determining delayed economic benefit, the Court notes the Fifth Circuit directed it to use those projects on remand in its analysis of the factor.

Plant Automation Venture "is intended to provide early identification of potential events and/or instrumentation abnormalities, allowing proactive response"[252]; (2) the Fuels North Flare System Monitoring/Minimization Project is intended to "more effectively monitor and troubleshoot" the refinery flares[253]; (3) the BOP/BOPX Recovery Unit Simulators Project is intended to "improve operator training and competency, resulting in reduced frequency and severity of emissions events"[254]; and (4) the Enhanced Fugitive Emissions Monitoring Project is a program to locate VOC and HRVOC leaks.[255] Accordingly, under the generally correlated standard articulated by the Fifth Circuit, the Court finds the four improvement projects were "necessary to correct" the violations at issue in this suit.

71. The Court has found Exxon received an economic benefit of $14,249,940 by delay four implementation of four improvement projects that were necessary to correct the violations at issue in this suit. Accordingly, the Court finds the economic benefit of noncompliance factor weighs in favor of assessing a penalty.

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[252] *Defendants' Exhibit* 222, ¶ 12.a.

[253] *Defendants' Exhibit* 222, ¶ 12.a.

[254] *Defendants' Exhibit* 222, ¶ 12.b.

[255] *Defendants' Exhibit* 222, ¶ 12.d.

f. Seriousness

72. The CAA does not define "seriousness" in relation to the penalty assessment factors. *See* 42 U.S.C. § 7413(e)(1). Some circuit courts, not including the Fifth Circuit, have held that "a court may still impose a penalty if it finds there is a risk or potential risk of environmental harm" even if there is "a lack of evidence on the record linking [a defendant's] CAA violations to discrete damage to either the environment or the public." *Pound*, 498 F.3d at 1099 (citing *Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 79 (3d Cir. 1990)). The Fifth Circuit, however, did not issue any guidance in its opinion as to the proper definition of the term. Instead, the Fifth Circuit held the Court abused its discretion in viewing the violations it found to be more serious as offset by the numerous less serious violations. In doing so, the Circuit noted—without explicitly adopting—courts have recognized that "the overall number and quantitative severity of emissions or discharges may properly be relied upon as evidence of seriousness." *Env't Tex.*, 824 F.3d at 532 (citing *Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 79 (3d Cir. 1990)).

73. In light of the Circuit's guidance, the Court looks to the overall number and quantitative severity of the emissions or discharges.[256] The overall

[256] The Court maintains its findings from its initial findings of fact and conclusions of law that most the violations were not serious from a public health and environmental perspective. As is necessary for parts of the Court's initial judgment left undisturbed by the Fifth Circuit's opinion, which relied on those findings, the Court reiterates here paragraphs 47 and 48 from the *Findings of Fact and Conclusions of Law*, Document No. 225:

> 47. Plaintiffs claim the Events and Deviations were serious because they adversely affected public health. To support this claim, Plaintiffs submitted evidence of the potential health effects caused by the types of pollutants emitted during the Events and Deviations. For example, hydrogen sulfide, which smells like rotten eggs or feces, can cause sore throat, cough, fatigue, headaches, nausea, and poor memory at low concentrations. Factors affecting potential risk of harm from pollutants include duration of exposure and concentration of pollutants. As discussed supra, the Events and Deviations differ tremendously in terms of duration and amount. Plaintiffs' aforementioned evidence of the potential health effects caused by the types of pollutants emitted does 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. Although Plaintiffs' evidence of potential health effects provides some support of a potential risk of harm to human health, this evidence in this case is too tenuous and general to rise above mere speculation.
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> 48. Plaintiffs also claim the Events and Deviations were serious because they created "nuisance-type impacts" to the community that interfered with daily life. Four Plaintiffs' members experienced impacts to their life while living or visiting near the Complex, including pungent odors, allergies, respiratory problems, disruptive noise from flaring, concerns for their health after seeing haze believed to be harmful, and fears of explosion after seeing flares. However, these impacts could have been caused by Exxon's authorized emissions or other companies' emissions, because certain emissions and flares are authorized by permit and the nearby area in which the Complex operates is populated with numerous other refineries, petrochemical plants, and industrial facilities. Indeed, unauthorized emissions were a very small percentage of total emissions at the Complex for each year at issue. Plaintiffs' members were only able to

number of violations weighs in favor finding the violations serious. 16,386 days of violations are supported by the evidence.[257] As to the quantitative severity of the emissions, approximately ten million pounds of pollutants were released into the atmosphere as a result of the violations in this case.[258] Accordingly, the Court finds given the number of days of violations and the quantitative amount of emissions released as a result, the seriousness factor weighs in favor of the assessment of a penalty.

g. Balancing the Factors

74. The maximum penalty for each day of violation is $32,500 for violations occurring before January 13, 2014, and $37,500 for violations occurring on January 13, 2009, and thereafter. 42 U.S.C. § 7413(e)(2); 40 C.F.R. § 19.4.

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correlate some of the impacts, such as odor and noise, to five Events or Deviations at issue in this case. Moreover, Plaintiffs' members' testimonies regarding impacts were controverted by persuasive testimony from three other residents of the community who have lived very close to the Complex for many years. These residents testified the Complex has not impacted their lives, including that they have had no health problems they attribute to the Complex and that they have not experienced any problems with flaring, odors, noises, or emissions coming from the Complex. For all these reasons, the proposition that the Events or Deviations were serious because they created nuisance-type impacts on the surrounding community is not supported by the preponderance of the credible evidence.

[257] Days of violations per count are as follows: (1) Count I: 10,583 days; (2) Count II: 5,709 days; (3) Count III: 18 days; (4) Count IV: 44 days; and (5) Count V: 32 days.

[258] *Plaintiffs' Exhibit* 609.

Plaintiffs contend the total maximum penalty, after deducting for overlapping violations, is $573,510,000. However, Plaintiffs are only seeking $40,815,618 in penalties on remand.[259] Exxon contends it should not be assessed a penalty.

75. After carefully considering all of the penalty assessment factors discussed above, the Court determines a penalty is appropriate in this case.[260] The size and economics factor, duration factor, economic benefit from noncompliance factor, and seriousness factor, all weigh towards assessing a penalty. While Exxon's compliance history weighs against assessing a penalty, that factor is not sufficient to outweigh the factors supporting assessing a penalty. Any penalty assessed will deduct the $1,423,632 Exxon was already penalized from the amount.

76. The CAA does not prescribe a specific method for determining appropriate penalties. Some courts use the top-down approach, in which the court starts at the maximum penalty allowed by law and reduces downward as appropriate considering the factors as mitigating factors. *CITGO Petroleum Corp.*, 723 F.3d at 552. Other courts employ the bottom-up approach, in which the court

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[259] *Plaintiffs' Proposed Findings of Fact and Conclusions of Law Following Remand*, Document No. 253, Exhibit 1, ¶52.

[260] Exxon did not contend in its initial proposed findings of fact and conclusions of law that the Court should consider the "justice so requires" factor. Therefore, the Court declines to address those arguments on remand.

starts at the economic benefit of noncompliance and adjusts upward or downward as appropriate considering the factors. *Id.* Rejecting a requirement that a district court must employ either the top-down or bottom-up approach, some circuit courts have held the district court can "simply rely[ ] upon [the] factors to arrive at an appropriate amount" without starting at a specific amount because "[t]he statute only requires that the [penalty] be consistent with a consideration of each of the factors." *United States v. Anthony Dell'Aquilla, Enters. & Subsidiaries*, 150 F.3d 329, 339 (3d Cir. 1998); *see Pound*, 498 F.3d at 1095. "The [Fifth] [C]ircuit has never held that a particular approach must be followed" and has left such decision to the discretion of the district court. *CITGO Petroleum Corp.*, 723 F.3d at 552, 554.

77. Plaintiffs calculate the maximum penalty as follows[261]: (1) Count I: 10,583 days of violation with a $370,405,000 penalty; (2) Count II: 7,920 days of refinery violations with a $277,200,000 penalty, 4,038 days of olefins violations with a $141,330,000 penalty, and 1,671 days of chemical plant violations with a $58,485,000 penalty; (3) Count III: 18 days of violations with a $630,000 penalty; (4) Count IV: 44 days of violations with a $1,540,000 penalty; and (5) Count V: 32

[261] Plaintiffs apply a penalty rate of $35,000 per day across the board, given that approximately half the violations occurred when the rate was $32,500 and half when the rate was $37,500. Defendants do not contest this specific point in determining the maximum penalty. Therefore, as it is uncontested, the Court adopts this methodology as well.

days of violations with a $1,120,000 penalty. The Court agrees with this calculation. As the Court found Exxon liable on the refinery violations in Count I, it will not include the refinery violations in Count II when calculating the maximum penalty. The total maximum penalty, therefore, is $573,510,000.

78. **Plaintiffs** have submitted proposed findings of fact and conclusions of law that **adopt a bottom-up approach**, which calculates the penalty at an amount that is **fifty percent** higher than the economic benefit from noncompliance.[262] Therefore, as the Court has discretion as to which method to follow, the Court adopts the method proposed by Plaintiffs. The Court determined the economic benefit from noncompliance to be $14,249,940.[263] Using Plaintiffs' proposed methodology for calculating the penalty (which includes a 50% multiplier), the resulting penalty is $21,374,910. The Court determines, considering its finding that Exxon made a good faith effort to comply, the amount is sufficient to account for the factors that weighed towards assessing a penalty. The majority of the factors weigh towards imposing a penalty, which the Court determines justifies an increase from the base economic benefit from noncompliance number. Subtracting

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[262] *Plaintiffs' Proposed Findings of Fact and Conclusions of Law Following Remand*, Document No. 253, Exhibit 1, ¶52.

[263] Plaintiffs' proposed findings of fact and conclusions of law utilized a higher base amount (approximately $28 million); however, as the Court rejected Plaintiffs' theory that led to the higher base amount, the Court uses the amount in the actual finding to calculate the penalty. *Supra* ¶ III.69, III.69 n.248; *Plaintiffs' Proposed Findings of Fact and Conclusions of Law Following Remand*, Document No. 253, Exhibit 1, ¶52.

the $1,423,632 already paid by Exxon in penalties, the resulting penalty amount is $19,951,278.

E. Injunctive Relief

79. "The party seeking a permanent injunction must meet a four-part test. It must establish (1) success on the merits; (2) that a failure to grant the injunction will result in irreparable injury; (3) that said injury outweighs any damage that the injunction will cause the opposing party; and (4) that the injunction will not disserve the public interest." *VRC LLC v. City of Dallas*, 460 F.3d 607, 611 (5th Cir. 2006). "Other Fifth Circuit authority recognizes that the inadequacy of monetary damages also is a factor in the analysis." *Reservoir, Inc. v. Truesdell*, No. 4:12-2756, 2013 WL 5574897, at *7 (S.D. Tex. Oct. 9, 2013) (Atlas, J.) (citing *ITT Educ. Servs., Inc. v. Arce*, 533 F.3d 342, 347 (5th Cir.2008)). "[A]n 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). It is within the court's discretion to grant or deny injunctive relief. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982). Even if a plaintiff prevails in a citizen suit, the court does not have to award any injunctive relief. *Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519, 530 (5th Cir. 2008).

80. Plaintiffs request Exxon be enjoined for five years from violating the emission standards and limitations found by this Court to be actionable. The CAA

provides that district courts have jurisdiction to enforce emission standards or limitations. 42 U.S.C. § 7604(a). However, "[t]he grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Weinberger*, 456 U.S. at 313. "Denial of injunctive relief does not necessarily mean that the district court has concluded there is no prospect of future violations for civil penalties to deter." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 193 (2000). Rather, the court in a "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." *Id.* In addition, an injunction ordering a party to obey the law allows for a possible contempt citation and threat of judicial punishment should the party disobey the law. *See Schmidt v. Lessard*, 414 U.S. 473, 476 (1974). In determining whether to grant injunctive relief, the court may consider the "attitude and laudable efforts" of a defendant "in continuously trying to improve the level of emissions." *See Ala. Air Pollution Control Comm'n v. Republic Steel Corp.*, 646 F.2d 210, 214 (5th Cir. Unit B 1981) (internal quotation marks omitted).

81. Enjoining Exxon from violating CAA standards and limitations would do nothing more than require Exxon to obey the law in the future. The Court finds that such an injunction is unnecessary and that Plaintiffs have not established injury to the public outweighs damage to Exxon. Exxon—without an injunction ordering it to comply with the CAA—already faces threat of TCEQ enforcement actions, including penalties, and threat of citizen suits should it not comply with the CAA. The Court believes any additional benefit the public would gain from Exxon having the additional threat of judicial contempt and punishment for violation of a court order is minimal. Additionally, for reasons explained supra in footnote 251, the greater weight of the credible evidence does not support a finding that the Events or Deviations were harmful to the public or the environment, and there is no evidence that any potential future emissions events or deviations will be more harmful to the public or the environment than past Events and Deviations allegedly were. To the contrary, the number of Reportable Events, the total amount of emissions, and the amount of unauthorized emissions of criteria pollutants have all decreased over the years at issue.[264] This is likely due to Exxon's substantial efforts to improve environmental performance and compliance.[265] Moreover, proving compliance with the CAA to this Court for five

[264] *Supra* ¶ II.16.

[265] *See supra* ¶¶ II.12–14.

years would be unduly burdensome on Exxon. Likewise, ensuring Exxon's compliance with the CAA for five years would be unduly burdensome on this Court. For these reasons, the Court finds Plaintiffs have not established denial of the requested injunction will cause injury to the public that outweighs damage the injunction would cause Exxon. Accordingly, Plaintiffs have not established the third requirement for injunctive relief, and injunctive relief is denied.

F. Special Master

82. Plaintiffs request the Court appoint a special master to monitor compliance with the injunctive relief granted in this Order. Plaintiffs request the special master be paid for by Exxon; have full access to the Complex, its personnel, and records; and be able to retain services of professional and technical people as needed. Having found no injunctive relief is warranted, a special master to monitor compliance with injunctive relief is consequently not warranted.

83. Moreover, even if the Court had granted the requested injunctive relief, a special master would still not be warranted. Plaintiffs did not show by the preponderance of the credible evidence that a special master could do a better job at reducing emissions events and deviations than the Complex's existing workforce. In addition, a special master would be excessively intrusive to Exxon's operations. Accordingly, Plaintiffs' request that the Court appoint a special master is denied.

G. Attorneys' Fees

84. Plaintiffs request an award of attorneys' fees, expert witness fees, and costs pursuant to 42 U.S.C. § 7604(d).[266] Exxon has not responded in opposition to this request. The Court finds an award of reasonable attorneys' fees, expert fees, and costs is appropriate as the Plaintiffs have substantially prevailed. Plaintiffs have ninety days to file their costs. The Plaintiffs are directed to file an appropriate and timely application for fees following the entry of judgment.

IV. CONCLUSION

Based on the foregoing, the Court hereby

ORDERS that Plaintiffs Environment Texas Citizen Lobby, Inc. and Sierra Club's requests in this case for a declaratory judgment, injunctive relief, and appointment of a special master, are **DENIED**. Plaintiffs' request for penalties against Defendants is **GRANTED IN THE AMOUNT OF $19,951,278**. Further, the Court

ORDERS that Plaintiffs' request for attorneys' fees, expert witness fess, and costs is **GRANTED**. The Court further

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[266] *Addendum to Plaintiffs' Proposed Findings of Fact and Conclusions of Law Following Remand*, Document No. 254. Exxon did request attorneys' fees and costs in its proposal; as Exxon is not the substantially prevailing party, the Court denies that request.

ORDERS that Defendants' request for attorneys' fees and costs is **DENIED**.

The Court will issue a separate Final Judgment.

SIGNED at Houston, Texas, on this 26 day of April, 2017.

DAVID HITTNER
United States District Judge