



Appeals court strikes another blow against Exxon

U.S. Court for the Southern District of Texas



The action in NELC's long-running case against ExxonMobil has now moved back to the U.S. District Court in Houston.

NEW ORLEANS—The federal Fifth Circuit Court of Appeals has dealt another setback to ExxonMobil Corporation in the company's long-running battle to avoid responsibility for thousands of violations of the Clean Air Act at its Baytown, Texas, oil refinery and chemical plant complex.

In an opinion issued on July 29, 2020, a panel of three appellate judges rejected nearly every argument Exxon raised in its appeal of the record-setting \$19.95 million penalty imposed by a federal trial court judge. The "crux of the dispute," wrote Circuit Judge Gregg Costa for the panel, is whether plaintiffs Environment Texas and Sierra Club showed that each of the 16,386 proven violations was of a type or magnitude that was "capable of causing" the kinds of proven harms suffered by the groups' members who live near the sprawling facility.

While the appeals panel found that the trial court's findings established such "traceability" for a large number of violations, it nonetheless sent the case back to the trial judge for the "limited purpose" of determining which of the remaining violations were also capable of causing the plaintiffs' injuries and whether there should be any adjustment of the penalty amount.

"We look forward to the next round of this litigation, in which we will point the trial judge to all the evidence we presented at trial that shows Exxon's violations clearly contributed to the respiratory and other impacts suffered by people in the Baytown community and beyond," said National Environmental Law Center Senior Attorney Josh Kratka.

Exxon's 3,400-acre complex in Baytown is located about 25 miles east of down-

town Houston. Tens of thousands of people live within three miles of the complex.

"We will also argue that the original penalty assessed by the district court continues to be fully justified by the extraordinary number and serious magnitude of Exxon's years-long pattern of illegal emissions of a wide range of dangerous air pollutants," Kratka added.

In rejecting other grounds for Exxon's appeal, the appeals court found Plaintiffs' members had sufficiently proved they suffered injuries from Exxon's violations that are redressable by a favorable decision, and that Exxon failed to prove its violations were excusable by the "affirmative defense" set up under Texas law.

The trial court may issue its new findings in early 2021.



Depositions in U.S. Steel case highlight effects on community, company's failure to take responsibility

PITTSBURGH—As NELC attorneys adapt to the “new normal” of travel restrictions and social distancing, remote depositions are well underway in NELC’s lawsuit against U.S. Steel for violations of the Clean Air Act. The suit, filed on behalf of PennEnvironment and Clean Air Council, arises from a massive fire at U.S. Steel’s Clairton Coke Works facility in December 2018. The fire knocked out key pollution control devices, subjecting nearby communities to months of dramatically increased exposure to airborne pollutants, including sulfur dioxide and hydrogen sulfide.

A recent focus in the litigation has been U.S. Steel’s depositions of members of PennEnvironment and Clean Air Council. Under the legal concept known as “standing to sue,” a group filing a citizen enforcement lawsuit must demonstrate that its individual members

have a direct stake in the environmental problem being addressed. To establish standing, members of environmental groups must show that they are suffering an actual or threatened injury to their health, recreational, or aesthetic interests; that the alleged violator has caused or contributed to their injury; and that a favorable court decision would offer some measure of relief.

Johnie Perryman, a 76-year-old PennEnvironment member, testified that he began feeling weak and short of breath within months of moving to Clairton from Seattle in 2007. Although word of the December 2018 fire initially reached him through social media, he learned of its severity “by the way it was kicking my natural butt.”

After the fire, Mr. Perryman grew weaker, and he testified that he often

woke up with his “chest thumping.” To protect himself, he purchased and wore painter’s masks inside his home, installed air purifiers, and began running his furnace nonstop to take advantage of the attached air filter.

As standing witness depositions continue, attorneys for NELC have conducted depositions of key U.S. Steel officials, including the Clairton Coke Works plant manager and U.S. Steel’s vice president of environmental affairs.

“The powerful testimony from our standing witnesses stands in stark contrast with testimony from U.S. Steel officials,” notes NELC attorney Matt Donohue. “The company appears unwilling or unable to demonstrate that it is concerned with the effect of its conduct on the environment and neighboring communities, which reinforces the need for federal court intervention.”

For example, Kurt Barshick, general manager of the three U.S. Steel plants affected by the December fire, testified that he was unaware of any efforts by the company to determine whether the December fire could have been prevented, to determine whether increased emissions after the fire affected public health, or to determine whether such increased emissions had any effect on the environment.

Trial against U.S. Steel is currently scheduled to commence in the summer of 2021.

Courtesy of Johnie Perryman



Johnie Perryman, a PennEnvironment member from Clairton, Pa., testified to experiencing firsthand the effects of airborne pollutants from U.S. Steel’s Clairton Coke Works.

Settlement of landfill suit brings relief to the surrounding community

WORCESTER, MASS.—On Oct. 31, 2020, the plaintiffs and defendants in a contentious public health and environmental lawsuit filed a stipulation of dismissal with the United States District Court for Massachusetts, bringing a close to a significant chapter in the dispute over the Southbridge Recycling and Disposal Park, a 51-acre solid waste landfill operated by Casella Waste Systems in Southbridge, Massachusetts.

Representing Toxics Action Center (now Community Action Works) and Environment Massachusetts, NELC attorneys filed suit against Casella and the Town of Southbridge in 2017, alleging violations of the Clean Water Act and federal hazardous waste law. Joining the suit were 33 families who alleged that leachate from the landfill had contaminated their drinking water wells with 1,4-dioxane, lead, and toxic chemicals, and who sought relief under Massachusetts state law.

The Massachusetts Department of Environmental Protection (MassDEP) also stepped in to take administrative action against the landfill, and the twin legal proceedings have had a considerable impact.

Seventeen months after the NELC lawsuit was filed, Casella and the town stopped receiving waste at the landfill, and Casella and the town subsequently completed supplemental response measures, under the direction of MassDEP, designed to stabilize the remaining waste and reduce leachate migration. They are now working to install a “cap” on the landfill to eliminate or substantially reduce the influx of rainwater. While this will not wholly eliminate the discharge of leachate from the landfill to nearby



Photo courtesy of Conservation Law Foundation

Residents of Charlton, Mass., whose drinking water was contaminated by the nearby Casella Waste Systems landfill, will receive relief under the October 2020 settlement of NELC’s lawsuit against the company.

groundwater, it will reduce the migration of leachate that would otherwise be caused by the flow of rainwater through the landfill. Further, Casella and the town have funded a \$10 million waterline that provides municipal water to homes whose wells were contaminated—or were at risk of contamination—by landfill pollutants.

With the recent settlement of the lawsuit, the individual families are receiving a substantial financial payment from Casella and the town as compensation for the contamination of their drinking water aquifer.

Moreover, District Court Judge Timothy Hillman has granted an Oct. 30, 2020, motion from NELC attorneys asking him to vacate a previous opinion he had entered dismissing the federal environmental law claims from the lawsuit. The plaintiffs agreed to waive their right to appeal the dismissal of those claims in order to enable the broader settlement of the lawsuit to take place.

“We strongly disagreed with the opinion dismissing the federal environmental claims and had looked

forward to the opportunity to secure reversal in an appeal to the First Circuit Court of Appeals,” explained NELC Litigation Director Chuck Caldart. “However, we felt it was more important to facilitate a beneficial settlement for the affected community, and the judge’s order vacating the dismissal opinion means it will be taken off the books and not be a precedent for future cases.”

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Inside This Issue

Page 1:

- Appeals court strikes another blow against Exxon

Page 2:

- Depositions in U.S. Steel case highlight effects on community, company's failure to take responsibility

Page 3:

- Settlement of landfill suit brings relief to the surrounding community

Judge clears the way for second claim against New Hampshire landfill

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NELC's lawsuit against Casella Waste Systems seeks to protect New Hampshire's Ammonoosuc River.

CONCORD, N.H.—On Sept. 2, 2020, over the strenuous opposition of defendant Casella Waste Systems, United States District Court Judge Paul J. Barbadoro granted the motion of NELC attorneys to add a second count to their Clean Water Act (CWA) suit seeking to protect New Hampshire's Ammonoosuc River from the continuing discharge of landfill pollutants.

The suit, filed in 2018 on behalf of Toxics Action Center and the Conservation Law Foundation, initially alleged that the Casella solid waste landfill in Bethlehem, N.H., is discharging pollutants to the river via a surface channel that the company maintains as a waste drainage system. However, after the U.S. Supreme Court ruled in April that pollutant discharges that pass through groundwater to reach surface waters can be subject to the permitting requirements of the CWA, NELC attorneys asked to add such a claim to the Bethlehem lawsuit. In their successful motion to amend, they noted that Casella's own engineering consultants concluded that there has been a "preferential" groundwater pathway carrying wastes from the landfill site to the river for several decades.

This sets the stage for a decision on the status of landfill pollution under the CWA, a vital issue for communities throughout the country.

About NELC

The National Environmental Law Center (NELC) is a nonprofit research and litigation center. With the support of our members, we are dedicated to enforcing anti-pollution laws and promoting long-term solutions to the nation's pressing environmental problems. Visit us online at www.nelconline.org, call us at (800) 841-7299, or email nelc@nelconline.org.

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