Attachment to EPA Region 8's Motion for Leave to File Surreply:
Proposed Surreply

BEFORE THE ENVIRONMENTAL APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re: MPLX Permit No. V-UO-000005-2018.00	CAA Appeal No. 20-01

EPA Region 8's Surreply

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Introduction

EPA Region 8 files this Surreply to address two arguments that MPLX LP (MPLX) raised for the first time on reply, and to assist the Board's decision-making by correcting three misstatements by MPLX.

Argument

1. Responses to MPLX's new arguments

MPLX's new argument that the standard of review at 40 C.F.R. § 124.19(a) does not apply to this appeal.

MPLX asserts that the usual regulatory standard of review does not apply to this case – that instead the Board must simply interpret the 2012 Consent Decree, and that "EPA receives no deference."[1] As noted in Region 8's motion for leave to file this Surreply, this is a new argument. MPLX's Petition did not even mention the standard of review for this proceeding, much less argue that the regulatory standard should not apply. Accordingly, the Region responds here.

MPLX is incorrect about the standard of review because this matter is in large part about interpreting and applying EPA regulations – not simply about contractually enforcing a consent decree. MPLX itself has made this point, repeatedly purporting to state what is required by EPA regulations:

> …a backup control device is not required by Subpart HH.[2]

[1] MPLX Reply at 9. The Consent Decree is included as Exhibit 5 to EPA Region 8's Response to Petition for Review (EPA Region 8 Response) in this matter.
[2] MPLX/Andeavor Public Comments on Draft Part 71 Permit (EPA Region 8 Response Ex. 8) at 3; MPLX Petition at 2.

> Subpart HH does not make an allowance for uncontrolled emissions for an affected source; therefore, it is not plausible that Unit C-2 would be a Subpart HH control device.[3]
>
> …Subpart HH… requires that the control device used to control emissions from dehydrator "shall be one" of three devices, one of which is a flare….[4]
>
> …Subpart HH does not mandate a backup control device in the event the pilot light on a flare temporarily goes out….[5]

Even considering the simple question of whether MPLX has correctly restated the regulatory requirements, the Region disagrees with MPLX as to one of the above statements – "therefore, it is not plausible that Unit C-2 would be a Subpart HH control device."[6] Beyond that disagreement, we differ with MPLX as to how these and other regulations apply to the facts of this case. The "extremely deferential"[7] standard of review at 40 C.F.R. § 124.19(a) must apply to these disagreements. Therefore, that standard governs the Board's analysis of the question at the core of this case: whether the enclosed combustor at the facility's glycol dehydrator must comply with EPA regulations governing control devices at glycol dehydrators.

The Region acknowledges, of course, that the Consent Decree is relevant to this matter, and that MPLX claims that the Consent Decree excuses it from complying with the regulations that would otherwise apply to its control device. Although the Decree was terminated in 2014, the obligations established in several paragraphs of the Decree remain binding, and it is a valid question whether the obligations established in those paragraphs vitiate federal regulatory requirements. The answer to that question, however, is that they do not. The Decree specifically says so, in the lone provision that MPLX claims has no effect: "[n]othing in this Paragraph shall

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[3] MPLX Petition at 3.
[4] MPLX Reply at 6.
[5] MPLX Reply at 13-14.
[6] *See* EPA Region 8 Response at 10-11.
[7] MPLX Reply at 8.

affect QEPFS's obligation to meet applicable requirements of 40 C.F.R. Part 63." [8] Accordingly, contrary to MPLX's claim, in this matter EPA has not rewritten the Consent Decree, but has instead acted in accordance with its express preservation of regulatory requirements. As noted in another case involving a consent decree and the argument that the Agency was contractually bound, the Board "decides each case before it 'based on the applicable statute and regulations,' 40 C.F.R. § 1.25(e), and applies the standard of review set forth in 40 C.F.R. § 124.19(a)."[9] That standard applies here.

MPLX's new argument that the date of a regulation's amendment means that MPLX's petition should be granted.

In its Reply, MPLX states that "at the time the Consent Decree was negotiated and filed, Subpart HH had a 'Startups, Shutdowns, and Malfunctions' ('SSM') provision which exempted sources from the requirement to comply with emission standards during periods of SSM."[10] The statement is correct, but MPLX's point is not clear. If anything, it undermines their argument that the final sentence of the Consent Decree's paragraph 17 has no effect. That is, MPLX claims that EPA's reading of the provision preserving part 63's applicability would cause the "absurd result" of nullifying the downtime provision.[11] But under the then-existing SSM exemption, paragraph

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[8] EPA Region 8 Response Ex. 8 at ¶17. QEPFS was how the Consent Decree referred to QEP Field Services Company, formerly known as Questar Gas Management Company, the defendant in the Clean Air Act enforcement matter that led to the Consent Decree. *See id.* at 1. QEPFS is now known as Andeavor Field Services LLC; Andeavor was the operator of the facility identified in the permit renewal application. *See* Federal Operating Permit Renewal Application (EPA Region 8 Response Ex. 1) at 1. As the current operator of the facility, MPLX submitted the Petition on behalf of Andeavor. *See* Petition at 1.

[9] *In re General Electric Co.*, 17 E.A.D. 434, 435 (2018). The Region recognizes that the Board in *General Electric* noted that "the Board conducts its own analysis of any legally applicable documents — including the Consent Decree and 2000 Permit [at issue in that case] — to determine their meanings and how to interpret them," and that the Board considered whether provisions of the permit at issue in that matter presented any "facial conflict" with the terms of the decree. *Id.* at 486, 487. As explained in the Region 8 Response and this Surreply, because of the Consent Decree's express preservation of part 63's applicability, there is no possibility of such a conflict here.

[10] MPLX Reply at 27.

[11] *See* MPLX Reply at 25.

17's 140-hour downtime provision could have been implemented consistent with subpart HH as of the time the Decree was negotiated and filed, because at the time oil and gas facilities were allowed to take advantage of a general exemption from emissions regulations during periods of startup, shutdown, or malfunction.[12] Accordingly, if it otherwise complied with the Decree and with the regulations then in effect, as of the July 3, 2012 effective date of the decree[13] the dehydrator would have been able to emit without an operating control device for up to 140 hours per year during SSM events. As of October 15, 2012, however, the SSM exemption was no longer available under the regulations. Accordingly, from that date the requirements of 40 C.F.R. §§ 63.765, 63.771(c), and 63.771(d) applied to the facility without any SSM exemption, and uncontrolled emissions could no longer occur consistent with the regulations, even for less than 140 hours.

Whether the 2012 amendments apply to the facility in light of the Consent Decree might be an interesting question (although MPLX has not identified any language excusing the facility from complying with revised regulations) if not for the last sentence of paragraph 17. With that sentence, though, there is no question: part 63, as amended, applies to the facility.

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[12] *See* Final Rule, Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews, 77 Fed. Reg. 49490, 49507 (Aug. 26, 2012) (effective date Oct. 15, 2012) (describing SSM exemption and explaining its forthcoming elimination).

In the response to comments associated with this 2012 rule, the Agency also made clear that the regulations do not allow the approach advocated by MPLX: "The use of a flare or combustor as a control device is subject to the requirement that standards be met at all times. In the event that such a device operates and emits without flame, this would contravene the requirement to operate a flare or combustion device to reduce emissions to the atmosphere." Final Response to Public Comments on Proposed Rule (76 FR 52738), Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews, 211 (April 17, 2012), posted at *https://www.regulations.gov/document?D=EPA-HQ-OAR-2010-0505-4546*.

[13] *See* EPA Region 8 Response Ex. 5 at 33, 37.

This last point is strengthened by the fact that the parties to the Consent Decree were on notice, via the August 2011 proposal to eliminate the SSM exemption from subpart HH,[14] that this requirement would change in any final rule. And all parties nonetheless agreed to the provision stating that nothing in paragraph 17 would override the applicable requirements of part 63 – which includes subpart HH. Consistent with that provision, the subsequent amendments to subpart HH apply to the facility.

2. Correction of MPLX's misstatements

In addition to raising two new arguments, MPLX's reply erroneously characterizes some provisions of the Consent Decree. The Region will not belabor these points, but identifies them here for the Board's consideration.

MPLX's claim that the Consent Decree "plainly states that Subpart HH applies only to the Flare."[15]

Confusing necessity with sufficiency, MPLX finds a plain statement where none exists. That is, the Consent Decree states in paragraph 15 that installing a flare is *necessary* to comply with subpart HH, but it does not say that the flare is the *only* device that has to comply with subpart HH. Thus, the statement that MPLX relies on as "plainly" proving its case does not do so, even by inference.

[14] *See* Proposed Rule, Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews, 76 FR 52738, 52787 (Aug. 23, 2011).
[15] MPLX Reply at 7.

MPLX's claim that paragraph 17 of the Consent Decree "incorporates by reference Paragraph 15." [16]

Paragraph 17 refers to paragraph 15 – "[t]he flares installed pursuant to Paragraph 15 shall achieve…." – but it does not incorporate it. There is a meaningful difference between a mere cross-reference and "incorporation by reference."[17] By using the latter phrase, MPLX apparently seeks to add paragraph 15 to the Consent Decree's list of provisions that were to survive termination.[18] But there is no textual support for treating the reference as an incorporation. Further, despite having the opportunity, the parties did not include paragraph 15 in the list of surviving provisions.[19] Accordingly, paragraph 15 did not survive termination of the Decree.

MPLX's claim that the end of paragraph 17 "does not even mention…Subpart HH." [20]

MPLX is correct that the phrase "subpart HH" does not appear in the final sentence of paragraph 17, which provides that the permittee remains obligated to meet "applicable requirements of 40 C.F.R. Part 63." But part 63, of course, includes subpart HH. Part 63 provides National Emission Standards for Hazardous Air Pollutants for various listed source categories. Within part 63, subpart HH is the category – Oil and Natural Gas Production Facilities – to

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[16] MPLX Reply at 21.
[17] "Incorporation by reference," as relevant here, is "[a] method of making a secondary document part of a primary document by including in the primary document a statement that the secondary document should be treated as if it were contained within the primary one." Black's Law Dictionary (11th ed. 2019).
[18] *See* MPLX Reply at 21 ("Neither EPA nor EAB can simply pretend that Paragraphs 15 (or Paragraph 16, or any other 'terminated' provision of the Consent Decree) never existed. Moreover, Paragraph 17, which *incorporates by reference* Paragraph 15, and which implements the Subpart HH regulations in Paragraph 16, did survive termination.")
[19] The list of provisions surviving termination – "Paragraphs 17, 19, 20, and 23" – appears first in paragraph 79 of the Decree, then is repeated seven times over the course of paragraphs 81, 82, and 83. Paragraph 15 is not mentioned. On the other hand, in several other instances the parties *did* specifically cross-reference both paragraphs 15 and 17, indicating that they did not view the latter as incorporating the former. *See* EPA Region 8 Response Ex. 5 at paragraphs 24, 25, and 36.
[20] MPLX Reply at 18.

which MPLX's facility belongs. Nonetheless, MPLX apparently concludes that the paragraph 17 reference to part 63 regulations was not intended to include subpart HH.[21] This result would be perverse. The only reasonable reading is that the reservation of part 63's applicability includes the portion of part 63 directly applicable to oil and gas facilities: subpart HH.

Conclusion

MPLX's case in this matter boils down to an argument that their facility does not have to comply with several federal regulations. Having failed to explain why in their public comment or petition, they seek to widen the argument on reply and alter the standard of review, in the process erroneously characterizing important paragraphs of the Consent Decree. Contrary to MPLX's new argument, the deferential standard of review in 40 C.F.R. § 124.19(a) applies to this proceeding. But under any standard, MPLX's arguments are unpersuasive. The Board should deny MPLX's petition.

Respectfully submitted this 31st day of July, 2020

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[21] MPLX dismisses the unambiguous preservation of part 63 requirements as merely a "stray sentence," and asserts that in the original 2013 Title V permit, EPA took the position that this language had no effect. "EPA's entire case presupposes that this provision overrides everything that came before (even though it took exactly the opposite position when issuing the original 2013 Permit)." MPLX Reply at 17. But MPLX's characterization of the original permit is incorrect: "For *each* control device, the Permittee shall comply with the applicable control device requirements specified in § 63.771(d) or § 63.771(f)." 2013 Part 71 Operating Permit (EPA Region 8 Response Ex. 4) at 4 (emphasis added).

Statement of Compliance with Word Count Limitation

Exclusive of the Table of Contents, Table of Authorities, and this Statement of Compliance, this Surreply submitted by EPA Region 8 contains 2300 words, as calculated using Microsoft Word.

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