

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 Motion for Leave to File Surreply

In accordance with 40 C.F.R. § 124.19(f), Region 8 of the United States Environmental Protection Agency moves the Environmental Appeals Board for leave to file a surreply in response to Petitioner MPLX LP’s Reply. Allowing this surreply will help ensure adherence to the Board’s procedural regulations, will promote equity and efficiency, and will assist the Board in its decision-making.

On May 13, 2020, MPLX filed its Petition for Review in this matter. Region 8 filed its Response on June 16, 2020. After obtaining an extension of time, MPLX filed its reply¹ on July 14, 2020. Although surreplies are not specifically addressed in the 40 C.F.R. part 124 regulations governing permit appeals, the Environmental Appeals Board Practice Manual provides that for permit appeals other than New Source Review permit appeals, if a reply brief has been filed, the Board may on motion allow the filing of a surreply brief.² The Board typically does so when new arguments are raised in reply briefs or when further briefing would assist the Board in resolving

¹ MPLX LP’S Reply to EPA Region 8’s Response to Petition For Review (MPLX Reply).

² U.S. EPA, Environmental Appeals Board, *Practice Manual* at 49 (Jan. 2013).

disputed claims.³ Both factors apply here, and weigh in favor of accepting the Region’s attached Surreply in this matter.

First, MPLX’s Reply raised new issues and arguments that the Region has not previously had the opportunity to address. Specifically, MPLX made two significant assertions for the first time in its Reply, even though the permit appeal regulations state that petitioners “may not raise new issues or arguments in the reply.”⁴ Moreover, a petitioner is precluded at *any* time in the appeals process from raising issues not previously raised during the permit public comment period.⁵ The Board is not obligated to consider the MPLX arguments not previously raised in comments on the draft permit or in the Petition for Review. But if the Board chooses to do so, equity requires that the Region be granted leave to file a surreply to address the new arguments. These MPLX arguments are listed below, with brief explanations of how each is a newly raised issue:

The standard of review at 40 C.F.R. § 124.19(a) does not apply to this appeal. MPLX argues that the regulatory standard of review does not apply to this case – that instead the Board must simply interpret the 2012 Consent Decree, and “EPA receives no deference.”⁶ But MPLX’s petition did not even mention the standard of review for this proceeding, much less argue that the regulatory standard should not apply. Only after receiving the Region’s response in this matter did MPLX claim that the Board cannot look to the permit appeal regulations for the standard of

³ See *In re City of Lowell, NPDES Permit No. MA0100633* (citing *In re ArcelorMittal Cleveland, Inc.*, NPDES Appeal No. 11-01 at 1 (EAB Dec. 9, 2011), and 40 C.F.R. § 124.19(n)).

⁴ 40 C.F.R. § 124.19(c)(2).

⁵ See 40 C.F.R. § 124.19(a)(4)(ii).

⁶ MPLX Reply at 9.

review in this permit appeal proceeding. The Region should have the opportunity to respond to this argument.

The date of amendment to a regulation applicable to the facility means that MPLX's petition should be granted. MPLX's reply brief includes an argument based on the date of amendment of a previous EPA regulatory exemption concerning startup, shutdown, and malfunction (SSM).⁷ But MPLX has not previously mentioned the SSM exemption or made any arguments based on the date of amendment of any EPA regulation. Having seen this argument for the first time in the MPLX Reply, the Region should now be allowed to respond.

Further support for this Motion arises from several misstatements in MPLX's Reply, which could cause confusion if not corrected. These misstatements are:

- The Consent Decree “plainly states that Subpart HH applies only to the Flare.”⁸
- Paragraph 17 of the Consent Decree “incorporates by reference Paragraph 15.”⁹
- The end of paragraph 17 “does not even mention...Subpart HH.”¹⁰

Concise explanations of the inaccuracy of these statements appear in the Region's proposed Surreply. Providing accurate information as to these points will assist the Board in its decision-making.

In accordance with 40 C.F.R. § 124.19(f)(2), on July 31, 2020 the Region contacted counsel for MPLX to ascertain its position on this motion. Petitioner's counsel responded that given that MPLX has not seen the proposed Surreply, MPLX does not take a position on this motion, and reserves all rights.

⁷ MPLX Reply at 27.

⁸ MPLX Reply at 7.

⁹ MPLX Reply at 21.

¹⁰ MPLX Reply at 18.

Region 8 respectfully asks that the Board grant leave to file the attached proposed Surreply.

Date: July 31, 2020

Respectfully submitted,

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Certificate of Service

In the Matter of MPLX, CAA Appeal No. 20-01

I certify that on July 31, 2020, I electronically filed **EPA Region 8's Motion for Leave to File Surreply**, with its attached proposed **EPA Region 8's Surreply**, with the Clerk of the Board, and served it by email on these persons:

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