This document is scheduled to be published in the
Federal Register on 05/12/2025 and available online at
https://federalregister.gov/d/2025-08226, and on **https://govinfo.gov**

[Billing C]ode: 4410-11

DEPARTMENT OF JUSTICE
Antitrust Division

United States of America v. XCL Resources Holdings, LLC, Verdun Oil Company II, LLC, and EP Energy LLC

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)-(h), that the Response of Plaintiff United States to Public Comment on the Proposed Final Judgment in *United States of America v. XCL Resources Holdings, LLC, Verdun Oil Company II, LLC, and EP Energy LLC,* Civil Action No. 1:25-cv-00041 has been filed in the United States District Court for the District of Columbia, together with the response of the United States to the comment.

Copies of the public comment and the United States' Response are available for inspection on the Antitrust Division's website at http://www.justice.gov/atr.

Suzanne Morris,
Deputy Director of Civil Enforcement Operations.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. XCL RESOURCES HOLDINGS, LLC, VERDUN OIL COMPANY II LLC, and EP ENERGY LLC *Defendants.*	Civil Action No. 1:25-cv-00041-TSC

RESPONSE OF PLAINTIFF UNITED STATES TO PUBLIC COMMENT ON THE PROPOSED FINAL JUDGMENT

Pursuant to the requirements of the Antitrust Procedures and Penalties Act (the "APPA" or "Tunney Act"), 15 U.S.C. § 16, the United States hereby responds to the one public comment received regarding the proposed Final Judgment in this case. After careful consideration of the submitted comment, the United States continues to believe that the civil penalties and injunctive relief required by the proposed Final Judgment provides an effective and appropriate remedy for the violation alleged in the Complaint and is therefore in the public interest. The United States will move the Court for entry of the proposed Final Judgment after the public comment and this response have been published as required by 15 U.S.C. § 16(d).

I. PROCEDURAL HISTORY

On July 26, 2021, Defendants Verdun Oil Company II LLC ("Verdun") and EP Energy LLC ("EP") entered into a Membership Interest Purchase Agreement ("Purchase Agreement") whereby Verdun proposed to acquire EP for approximately $1.4 billion. The proposed transaction was subject to notification and waiting-period requirements imposed by Section 7A of the Clayton Act, 15 U.S.C. § 18a, commonly known as the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act"). Defendants made the required pre-merger notification filing with the antitrust agencies; they failed, however, to satisfy their waiting-period obligations. Instead, upon executing the Purchase Agreement, EP allowed Verdun and its sister company, Defendant XCL Resources Holdings, LLC ("XCL"), to assume operational and decision-making control over significant aspects of EP's day-to-day business operations.

The United States filed a civil antitrust Complaint against Defendants on January 7, 2025, seeking civil penalties and equitable relief for the violation of the HSR Act. The Complaint alleges that Defendants were in continuous violation of the HSR Act from July 26, 2021, through October 27, 2021, when Defendants amended the Purchase Agreement and Verdun and XCL ceased exercising operational control over EP's business. *See* Dkt. No. 1-1.

At the same time the Complaint was filed, the United States filed a proposed Final Judgment and a Stipulation and Order in which the United States and Defendants consent to entry of the proposed Final Judgment after compliance with the requirements of the Tunney Act, 15 U.S.C. § 16. *See* Dkt. Nos. 1-2, 1-3. The proposed Final Judgment requires Defendants to pay civil penalties totaling of $5,684,377 within 30 days of entry of the Final Judgment, prohibits Defendants from engaging in specified conduct designed to prevent future violations of the HSR Act, and imposes compliance and compliance-reporting obligations.

Pursuant to the APPA's requirements, the United States filed a Competitive Impact Statement ("CIS") on January 7, 2025, describing the transaction and the proposed Final Judgment. *See* Dkt. No. 1-4. On January 21, 2025, the United States published the Complaint, proposed Final Judgment, and CIS in the *Federal Register*, *see* 90 Fed. Reg. 7159, and caused notice regarding the same, together with directions for the submission of written comments relating to the proposed Final Judgment, to be published in *The Washington Post* for seven days, from January 15, 2025 through January 21, 2025. The 60-day period for public comment ended on March 24, 2025. The United States received one comment, attached as Exhibit A.

II. THE COMPLAINT AND THE PROPOSED FINAL JUDGMENT

The Complaint alleges that Defendants were in continuous violation of the HSR Act each day beginning on July 26, 2021, and ending on October 27, 2021, when XCL and Verdun ceased exercising operational control over relevant aspects of EP's business.

The HSR Act's reporting and waiting-period requirements apply to a transaction if, as a result of the transaction, the acquirer will "hold" assets or voting securities valued above the applicable thresholds. Under HSR Rule 801.1(c), to "hold" assets or voting securities means "beneficial ownership, whether direct, or indirect through fiduciaries, agents, controlled entities or other means." 16 C.F.R 801.1(c). Thus, under the HSR Act, parties must make an HSR Act filing and observe a waiting period before transferring beneficial ownership of the assets or voting securities to be acquired. The Statement of Basis and Purpose accompanying the Rules explains that beneficial ownership is determined on a case-by-case basis, based on the indicia of beneficial ownership which include, among others, the right to obtain the benefit of any increase in value or dividends and the risk of loss of value. 43 Fed. Reg. 33,449 (July 31, 1978). A firm may also gain beneficial ownership by obtaining "operational control" of an asset.

The rights provided by EP to XCL and Verdun in the Purchase Agreement, and XCL and Verdun's exercise of those rights in the period following signing the Purchase Agreement, transferred beneficial ownership of EP's business to XCL and Verdun before Defendants had fulfilled their obligations under the HSR Act. Specifically, the Purchase Agreement provided for the immediate transfer of control over key aspects of EP's business to XCL and Verdun, including granting XCL and Verdun approval rights over EP's ongoing and planned crude oil development and production activities and many of EP's ordinary-course expenditures. XCL put an immediate halt to EP's new well-drilling activities, so that XCL could control the development and production plans for EP's drilling assets moving forward. Even though XCL and Verdun eventually allowed EP to resume its own well-drilling and planning activities, the temporary halts resulted in EP having crude oil supply shortages in the following months. Defendants predicted these shortages would occur, and the Purchase Agreement specifically provided that XCL and Verdun—not EP—would bear all costs associated with EP's supply shortages.

XCL and Verdun also exercised operational control over EP by, *inter alia*, working directly with EP's customers on EP's behalf; requiring EP to provide competitively sensitive information to XCL and Verdun businesspeople; requiring approval of ordinary-course expenditures; and coordinating with EP on EP's contract negotiations with certain customers in the Eagle Ford production area. The illegal conduct lasted through October 27, 2021, when the Defendants executed an amendment to the Purchase Agreement which allowed EP to once again operate independently and in the ordinary course of business, without XCL's or Verdun's control over its day-to-day operations.

The Defendants were in violation of the HSR Act for a period of 94 days, from when the Purchase Agreement was signed on July 26, 2021 until the Purchase Agreement was amended on October 27, 2021.

As explained in the CIS, the proposed Final Judgment will prevent future violations of the HSR Act of the type Defendants committed and secures monetary civil penalties. The proposed Final Judgment sets forth prohibited and permitted conduct, requires Defendants to maintain compliance programs, and provides procedures to ensure ongoing compliance. These conditions will expire ten years after the entry of the Final Judgment. The proposed Final Judgment also imposes civil penalties in the amount of $5,684,377. The penalty amount was adjusted downward from the maximum permitted under the HSR Act, in part because Defendants were willing to resolve the matter by consent decree and avoid a prolonged investigation and litigation.

III. STANDARD OF JUDICIAL REVIEW

Under the Clayton Act and APPA, proposed Final Judgments, or "consent decrees," in antitrust cases brought by the United States are subject to a 60-day comment period, after which the court shall determine whether entry of the proposed Final Judgment is "in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

Id. § 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one, as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *United States v, U.S. Airways Group, Inc.*, 38 F.

Supp. 3d 69, 75 (D.D.C. 2014) (noting the government has broad discretion of the adequacy of the relief at issue); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable").

As the United States Court of Appeals for the District of Columbia Circuit has held the APPA requires the court to consider, among other things, the relationship between the specific allegations in the government's Complaint and the remedy secured, whether the proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the proposed Final Judgment, a court may not "make de novo determination of facts and issues." *United States v. W. Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (quotation marks omitted); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 16 (D.D.C. 2000); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3.

Instead, "[t]he balancing of competing social and political interests affected by a proposed antitrust decree must be left, in the first instance, to the discretion of the Attorney General." *W. Elec. Co.*, 993 F.2d at 1577 (quotation marks omitted). "The court should also bear in mind the *flexibility* of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities is the one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest." *Microsoft*, 56 F.3d at 1460 (quotation marks omitted); *see also United States v. Deutsche Telekom AG*, No. 19-2232 (TJK), 2020 WL 1873555, at *7

(D.D.C. Apr. 14, 2020). More demanding requirements would "have enormous practical consequences for the government's ability to negotiate future settlements," contrary to congressional intent. *Microsoft*, 56 F.3d at 1456. "The Tunney Act was not intended to create a disincentive to the use of the consent decree." *Id.*

The United States' predictions about the efficacy of the remedy are to be afforded deference by the Court. *See, e.g.*, *Microsoft*, 56 F.3d at 1461 (recognizing courts should give "due respect to the Justice Department's . . . view of the nature of its case"); *United States v. Iron Mountain, Inc.*, 217 F. Supp. 3d 146, 152–53 (D.D.C. 2016) ("In evaluating objections to settlement agreements under the Tunney Act, a court must be mindful that [t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms[;] it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." (internal citations omitted)); *United States v. Republic Servs., Inc.*, 723 F. Supp. 2d 157, 160 (D.D.C. 2010) (noting "the deferential review to which the government's proposed remedy is accorded"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) ("A district court must accord due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case."). The ultimate question is whether "the remedies [obtained by the Final Judgment are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.'" *Microsoft*, 56 F.3d at 1461 (*quoting W. Elec. Co*., 900 F.2d at 309).

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the

proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 (concluding that "the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459-60. As this Court confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." 489 F. Supp. 2d at 15.

In its 2004 amendments to the APPA, Congress made clear its intent to preserve the practical benefits of using judgments proposed by the United States in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This language explicitly wrote into the statute what Congress intended when it enacted the Tunney Act in 1974. As Senator Tunney explained: "The court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). "A court can make its public interest determination based on the competitive impact statement and response to public comments alone." *U.S. Airways*, 38 F. Supp. 3d at 76 (citing *Enova Corp.*, 107 F. Supp. 2d at 17).

IV. SUMMARY OF THE COMMENT AND THE UNITED STATES' RESPONSE

The United States received one public comment in response to the proposed Final Judgment from a member of the public. The commenter inquires as to (a) whether the Defendant companies were publicly traded and, if so, whether the conduct alleged in the Complaint affected the pricing of stock transactions, and (b) whether civil penalties would address harm, if any, to consumers potentially paying more at the gas pump.

Nothing in the comment warrants a change to the proposed Final Judgment or supports a conclusion that the proposed Final Judgment is not in the public interest. . Section (g)(1) of the HSR Act, 15 U.S.C. §18a(g)(1), provides that the United States may recover a civil penalty for violations of the HSR Act. Here, Defendants will pay civil penalties totaling $5,694,377 pursuant to the terms of the proposed Final Judgment, representing approximately 65 percent of the statutory maximum.[1] The United States has determined that this amount, along with the additional injunctive relief, will appropriately penalize Defendants and deter it and others from future violations of the HSR Act. As required by the APPA, the comment[2] and this response will be published in the Federal Register.

V. CONCLUSION

After careful consideration of the public comment, the United States continues to believe that the proposed Final Judgment provides an effective and appropriate remedy for the violation alleged in the Complaint and is therefore in the public interest. The

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[1] The maximum daily civil penalty, which had been $10,000, was increased to $11,000 for violations occurring on or after November 20, 1996, pursuant to the Debt Collection Improvement Act of 1996, Pub. L. 104-134 § 31001(s) and FTC Rule 1.98, 16 DC.F.R. § 1.98, 61 Fed. Reg. 54548 (Oct. 21, 1996). The maximum daily penalty is adjusted annually in accordance with the Federal Civil Penalties Inflation Adjustment Act Improvement Act of 2015, and is currently $53,088 for violations occurring on or after January 17, 2025. *See*, 90 Fed Reg. 5580 (Jan. 17, 2025). The maximum daily penalty in effect at the time of Defendant's conduct was $46,517 per day.

[2] Aside from a redaction of personally identifiable information, the comment is provided in its entirety.

United States will move this Court to enter the Final Judgment after the comment and this response are published as required by 15 U.S.C. § 16(d).

Dated: May 6, 2025

Respectfully Submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA

/s/ Kenneth A. Libby
KENNETH A. LIBBY

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EXHIBIT A

Miercoles 08 Emero 2025

Dear Ms. Petrizzi,

Following news release on justice.gov website. I'm submitting my comments or questions about Tunney Act enforcement in USA vrs. XCL, Verdun, EP energy.

1. DOJ is asking on penalties for HSR Act. The companies are publicly traded? Iff, then where there public transactions on price for stock affected by their concert in pricing. How is that being litigated?

2. The price of by products, i.e. gas at the pump would have being affected by those actions? That would mean civil penalties for those affected?

I thank you for allowing to learn from your pursuit of the rule of law. That premise of equality, freedom, and justice is what makes the United States and its constitution a most beatiful country. Something admirable and worth protecting.

Praying for your continued success.

Saludos cordiales,

[Redacted]

[FR Doc. 2025-08226 Filed: 5/9/2025 8:45 am; Publication Date: 5/12/2025]