

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
ENVIRONMENTAL APPEALS BOARD

In re:)
)
Ocean Era, Inc. – Velella Epsilon Facility)
) NPDES Appeals No. 25-01M & No. 25-02
)
NPDES Permit No. FL0A00001)
)
)

**EPA REGION 4's MOTION FOR LEAVE TO FILE A CORRECTED
ADMINISTRATIVE RECORD INDEX**

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<u>Attachment No.</u>	<u>Name of Document</u>
1	Corrected Certification of Administrative Record Index
2	Corrected Administrative Record Index

I. INTRODUCTION

On August 15, 2025, the Region filed its Consolidated Response to two separate petitions seeking review of the Region’s modified NPDES permit issued for an aquaculture facility in the Gulf of America, NPDES Appeals No. 25-01 & No. 25-02. On September 12, 2025, both Petitioners filed replies to the Region’s response. Both replies include arguments related to Administrative Record Document B.31 for the first time, described in the Administrative Record Index as “Memorandum re: removed permit conditions.” (hereinafter “Microplastics Memo”). *See* Friends of Animals (FOA) Reply Br. at pages 7-12 & Attachment 1; Center for Food Safety *et al* (CFS) Reply Br. & Attachment 1.

The Microplastics Memo constitutes deliberative material that should not be part of the administrative record as a matter of law. The Region erroneously included the Microplastics Memo in the Administrative Record and now seeks to file a Corrected Administrative Record Index to remove that document.¹ The Region was not aware of the inadvertent inclusion until the document was raised by Petitioners in their reply briefs on September 12, 2025, which is why the Region is only now moving to correct the Administrative Record. Both Petitioners have advised the Region that they oppose the Region’s Motion for Leave to File a Corrected Administrative Record Index.

II ARGUMENT

The Microplastics Memo is clearly pre-decisional and deliberative and thus was erroneously included in the Administrative Record. It contains the opinions of a single, non-decision-maker employee on a matter related to, and taking place prior to, the issuance of the

¹ The Region would make a related change to document B.3 in the Administrative Record made available to Petitioners. Document B-3, which is the Administrative Record Index Spreadsheet for the Modified Permit, and contains the same error as the Administrative Record Index previously certified and filed in this Action. The Region would correct the Index in document B.3 to delete Item B-31.

Final Modified Permit, but does not reflect the Region’s decision on the Final Modified Permit. The Microplastics Memo is not properly part of the Administrative Record and EAB should not consider the Microplastic Memo in its consideration of the instant Petitions for review of the Final Modified Permit.

Review of EPA’s actions is to be based on the rationale provided by the agency and the information considered by the agency in the course of making the decision, not on the agency’s internal decision-making process. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *PLMRS Narrowband Corp. v. FCC*, 182 F.3d 995, 1001 (D.C. Cir. 1999). “[T]he actual subjective motivation of agency decisionmakers is immaterial as a matter of law” *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 156 F.3d 1279, 1279 (D.C. Cir. 1998). Thus, it is a well-established principle that deliberative materials, including internal memoranda such as the Microplastics Memo, are not part of an agency’s administrative record. *See Emuwa v. United States Dep’t of Homeland Sec.*, 113 F.4th 1009, 1018 (D.C. Cir. 2024) (“[P]redecisional and deliberative documents are not part of the administrative record to begin with, just as a law clerk’s bench memorandum would not be part of the record on which a judicial decision is based.”) (cleaned up); *Kansas State Network, Inc. v. FCC*, 720 F.2d 185, 191 (D.C. Cir. 1983) (“In general, an agency’s action should be reviewed based upon . . . the agency’s stated justifications” rather than “intra-agency memoranda and documents recording the deliberative process leading to an agency decision”); *Norris & Hirshberg, Inc. v. SEC*, 163 F.2d 689, 693, (D.C. Cir. 1947), cert. denied, 333 U.S. 867, 68 S. Ct. 788, 92 L. Ed. 1145 (1948) (“[I]nternal memoranda made during the decisional process . . . are never included in a record.”).

Determining whether a document is deliberative depends on whether the agency considers it to be its final stance on the issue, effectively communicating a policy or decision on which the agency has settled. *United States Fish & Wildlife Serv. v. Sierra Club, Inc.*, 592 U.S. 261, 268 (2021). Some ideas are developed only to be later abandoned or left to languish and thus are not reflective of an agency’s position. *Id.* Dead-end ideas, however documented, “can hardly be described as reflecting the agency’s chosen course.” *Id.*

The Microplastics Memo is an example of a rejected view that does not reflect the Region's final decision regarding the change in netting material and the need to monitor for microplastics discharges. While the Region may have considered an alternative decision where microplastics monitoring was included—and staff may have advocated for it—that deliberation was not a basis for the Region’s *actual* decision, to not include that monitoring condition. Instead, the Region’s final decision on this matter is demonstrated by the conditions in the Final Modified Permit itself and the voluminous breadth of scientific and analysis documents properly contained in the Administrative Record. The only thing the Microplastics Memo adds to the record is internal deliberations and the opinion of a single staff person that differed from that of others in the Regional decision-making chain, including the final decision maker.

Additionally, the Microplastics Memo contains no new factual or technical information beyond what is in other Administrative Record documents. *See Ad Hoc Metals Coal. v. Whitman*, 227 F.Supp.2d 134 (D.D.C. 2002) (“Where an agency has considered an issue and included relevant material on the record, supplementation with similar or identical documents is not always required.”). Rather than providing new factual information, the Microplastics Memo documents one employee’s views on the interim conversations and meetings that occurred within EPA—conversations and meetings which themselves are clearly deliberative from the face of the

Memo. Further, the Microplastics Memo is not post-decisional, as claimed in footnote 3 of the CFS Reply. The Microplastics Memo is dated May 14, 2025, while the Final Modified Permit was issued on May 15, 2025. Finally, to the extent CFS’s footnote 3 alludes to “improper motivation” allegedly documented by the Microplastics Memo, such allegations of bad faith or improper behavior require a “strong showing” to justify the “substantial intrusion into the Executive’s functioning” that probing the Region’s subjective motivation would entail. *FDA v. Wages & White Lion Invs., L.L.C.*, 145 S. Ct. 898, 923 (2025).

The internal airing of different views on a permit-related decision is not proper for inclusion in the Administrative Record, as discussed above, and the EAB should permit EPA to file a Corrected Administrative Record Index which does not contain this purely deliberative document.

II. CONCLUSION

For the foregoing reasons, the Region seeks leave to file a Corrected Administrative Record Index that does not contain the Microplastics Memo. A proposed corrected Certification of the Administrative Record Index and proposed Corrected Administrative Record Index are attached to this Motion.

Respectfully submitted.

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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I, Paul Schwartz, certify that, in accordance with 40 C.F.R. § 124.19(d)(3), this Motion for Leave to File a Corrected Administrative Record Index does not exceed 7,000 words in length.

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CERTIFICATE OF SERVICE

I, Paul Schwartz, hereby certify that on September 22, 2025, I caused to be served a true and correct copy of the foregoing Motion for Leave to File Corrected Administrative Record Index via the EAB's electronic filing system, and by sending a true and correct copy, via e-mail, to the following:

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