

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
ENVIRONMENTAL APPEALS BOARD

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

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

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I. INTRODUCTION

On September 22, 2025, the Region filed a Motion for Leave to File a Corrected Administrative Record. On October 6, 2025, Petitioners in NPDES Appeal No. 25-01 filed a Response Opposing that Motion, and on October 7, 2025, Petitioner in NPDES Appeal No. 25-02 filed a Response also opposing the Region's Motion. This is the Region's Reply to both Responses pursuant to 40 C.F.R. § 124.19(f)(4).

The Region's Motion sought leave to correct the Administrative Record by removing Administrative Record Document B.31, described in the Administrative Record Index as "Memorandum re: removed permit conditions." (hereinafter "Microplastics Memo" or the "Memo"). The Region's Motion sought leave to remove the document because it constitutes deliberative material that should not be part of the Administrative Record as a matter of law, and the document was included in the Administrative Record in error.

II. ARGUMENT

Petitioners in NPDES Appeal No. 25-01 argues: (1) that the document is not subject to the deliberative process privilege; (2) that the document is post-decisional and therefore could not be categorized as deliberative. The Petitioners in NPDES Appeal No. 25-02 similarly argue that the document does not qualify for the deliberative process privilege and also argue that: (1) the document fits within the enumerated contents of an administrative record under 40 C.F.R. 124.18(b)(6), which provides for inclusion of "other documents contained in the supporting file for the permit; and (2) EPA guidance about compiling the administrative record states that it should "include the scientific or technical literature, technical analysis, and other factual

information considered by the decision-maker, including his/her staff, in developing the Agency's final position."

A. The Microplastics Memo is Deliberative and Does Not Belong in the Administrative Record.

Both Petitioners seem to misperceive the nature of the Region's argument regarding the deliberative documents. The Region is not conceding that the Microplastics Memo forms a valid basis for the Region's action but is nevertheless withholding the Memo on the grounds it is privileged. Rather, the Region is asserting that the Memo does not form a basis for the Region's action to begin with, regardless of the Memo's status with regard to privilege. Legally privileged documents can sometimes be included in confidential portions of administrative records. *See, e.g.,* 40 CFR § 300.810 (d), governing Superfund administrative records, regarding placement of privileged documents in a confidential portion of an administrative record file. However, deliberative documents are not properly part of the administrative record because they reflect an agency's internal decision-making rather than substantive information that was considered and analyzed. *See e.g.,* 40 C.F.R. § 300.810 (b):

Documents not included in the administrative record file. The lead agency is not required to include documents in the administrative record file which do not form a basis for the selection of the response action. Such documents include but are not limited to draft documents, internal memoranda, and day-to-day notes of staff unless such documents contain information that forms the basis of selection of the response action and the information is not included in any other document in the administrative record file.

See also Kansas State Network, Inc. v. FCC, 720 F.2d 185, 191, 232 U.S. App. D.C. 10 (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 . . .").

EPA’s Administrative Record Guidance, on which Petitioners in NPDES Appeal No. 25 rely, explicitly supports the Region’s approach here. The Guidance provides that deliberative documents are to be excluded from the administrative record as a matter of relevance:

[T]he exclusion of deliberative documents from the record is based on relevance, not privilege. Most documents that are subject to a FOIA privilege (deliberative process, attorney-client, and work-product documents, for example) will also be excluded from the administrative record because they are internal and pre-decisional, and thus “deliberative”. However, a “deliberative” document does not need to be privileged in order to be excluded from the administrative record.”.

U.S. Environmental Protection Agency, *EPA’s Action Development Process: Administrative Records Guidance* (2011), at page 5, fn 4.

The Microplastics Memo is a recounting of internal deliberations on the issue of whether to include microplastics monitoring in the permit, and those deliberations do not belong in the Administrative Record. To the extent the Microplastics Memo references actual scientific and technical documents, those documents are already contained in the Administrative Record and the Petitioners are free to rely upon—and have relied upon— those documents in challenging the Region’s action in this matter.

B. The Microplastics Memo is Pre-Decisional

The Petitioners in NPDES Appeal No. 25-01 argue that the Microplastics Memo is not deliberative because it is post-decisional and not pre-decisional, and therefore cannot be deliberative. This argument is erroneous for the simple reason that the memo pre-dates issuance of the final permit by one day, and is pre-decisional on its face. The final decision on permit terms was not made until the permit was issued. This is true notwithstanding any language in the Memo that indicated finality, because that characterization was the perspective of a single employee lower in the chain but not that of the final decision maker.

If Petitioners' argument that the Memo is post-decisional were to be accepted, the Memo would also be excluded from the Administrative Record on that ground. Post-decisional information is not properly part of the Administrative Record. *Utah Environmental. Congress. v. Troyer*, 479 F.3d 1269, 1284 (10th Cir. 2007)(consideration of post-decisional data by District Court held to be error). Post-decision information "may not be advanced as a new rationalization either for sustaining or attacking an agency's decision."¹ *Southwest Ctr. for Biological Diversity v. United States Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996).

C. The Microplastics Memo Recounts Internal Deliberations Without Adding Any Factual, Technical or Scientific Information

In support of its claim that the Microplastics Memo is not deliberative, the Petitioner in NPDES Appeal No. 25-02 describes the Memo as "largely factual" and states that the Memo "contains multiple scientific studies and examples of technical analysis not otherwise available in the record." The Region disagrees with this characterization. As noted above, the Microplastics Memo is a recounting of deliberative discussions internal to the Region. To the extent the Memo cites to technical and scientific documents, those documents are separately included in the Administrative Record. The Petitioners can and do make arguments based on those same technical and scientific documents, and do not need to rely on the internal opinion of an EPA employee to make those arguments. Opinions voiced during the deliberative process are simply not facts or technical information and do not belong in the Administrative Record.

D. 40 C.F.R. § 124.18(b)(6) Does Not Apply to the Microplastics Memo

The Petitioner in NPDES Appeal No. 25-02, argues that the Microplastics Memo should be included in the Administrative Record under 40 C.F.R. § 124.18(b)(6), which is a catch-all

¹ There are limited and narrow exceptions to this general rule excluding post-decisional information that are not applicable here.

that provides for including “other documents contained in the supporting file for the permit.” However, this regulation does not require that *any* document in *any* supporting file of *any* EPA staffer becomes part of the administrative record even if it would not otherwise meet the criteria for inclusion. Rather, it notes the commonsense principle that other non-enumerated documents which form a basis EPA’s permitting decisions should be part of the administrative record. Here, the Microplastics Memo does not form a basis for the Region’s decision and should not be part of the Administrative Record based on its deliberative nature. The mere fact that the Memo is formalistically addressed to the “Administrative record” does not change that underlying nature.

Moreover, the Petitioner’s maximalist reading of the provision would lead to absurd results and would swallow up the exclusion of deliberative materials altogether. For example, under Petitioner’s reading the Region would be required to add to the Administrative Record every iteration of the draft permit as it was developed and all draft iterations of all permit-related documents created by EPA, and all internal emails relating to development of the Permit. Clearly, such documents are not intended to be added to Administrative Records. *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...”). *See also Administrative Records Guidance* at pages 5-7.

II. CONCLUSION

For the foregoing reasons, the Region requests that its Motion for Leave to file a Corrected Administrative Record be granted. A corrected Certification of the Administrative Record Index and the Corrected Administrative Record Index were attached to the Region’s 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 Response to Petition for Review does not exceed 7,000 words in length.

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CERTIFICATE OF SERVICE

I, Paul Schwartz, hereby certify that on the date of my electronic signature below, I caused to be served a true and correct copy of the foregoing Reply in Support of 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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