

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

In re:	)	
	)	
Ocean Era, Inc. Modified National Pollution	)	NPDES Appeal No. 25-01
Discharge Elimination System Permit No.	)	
FL0A00001 for the Velella Epsilon Facility in	)	
the Gulf of Mexico	)	
	)	
	)	
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	)	

**PETITIONERS' OPPOSITION TO EPA REGION IV'S MOTION FOR LEAVE TO
FILE A CORRECTED ADMINISTRATIVE RECORD INDEX**

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Petitioners, Center for Food Safety, Recirculating Farms Coalition, Tampa Bay Waterkeeper, Suncoast Waterkeeper, Healthy Gulf, Sierra Club, and Food & Water Watch filed their petition for review of the conditions of modified National Pollution Discharge Elimination System (NPDES) Permit No. FL0A00001 (modified Permit or Permit), issued to Ocean Era, Inc. (Ocean Era) by the Regional Administrator, U.S. Environmental Protection Agency Region IV (EPA) on June 14, 2025. On August 15, 2025, EPA filed a combined response to the petitions filed in this matter and a companion case, NPDES Appeals No. 25-02. On August 20, 2025, EPA made available for the first time the Administrative Record for the modified permit. On September 12, 2025, Petitioners filed a reply to EPA's response, based on new significant information that was only discovered when the Administrative Record was disclosed. On September 22, 2025, EPA filed a Motion for Leave to File a Corrected Administrative Record Index, in which it would remove the document that is the basis for Petitioners' September 12 reply. Petitioners oppose this motion on the grounds that, contrary to EPA assertions raised only after this document was highlighted by Petitioners that it is predecisional and constitutes deliberative material, it is in fact post-decisional and is properly part of the administrative record.

It is not surprising that EPA hopes to pull this document from the record, as it plainly demonstrates that its decision not to monitor the amount of microplastics released by the project is arbitrary, clearly erroneous, and in bad faith. As noted in Petitioners' response, the document at issue is a post-decisional memorandum by the primary permit analyst reviewing the reasons for EPA's *final decision* not to include a requirement to monitor for microplastics in the modified permit. AR B.31. The memorandum details the extensive scientific support for requiring the monitoring of microplastics, including the fact that they are likely to be generated in this specific project's operation and the impacts they have on the marine environment. AR

B.31 at 3-4. The memorandum describes EPA's failure to consider microplastics as a pollutant in its Ocean Discharge Criteria Evaluation (ODCE) and provides a legal justification and basis for including a microplastics monitoring requirement, including 40 C.F.R. § 122.4(j), 40 C.F.R. § 122.48, 40 C.F.R. § 122.44(i)(1)(iii), and 40 C.F.R. § 122.43(a). AR B.31 at 4-6. It further highlights that the reasons provided for not monitoring microplastics are equally applicable to the pollutants that are required to be monitored, thus creating a contradictory and unsupported analysis. AR B.31 at 6-7. As previously noted, Friends of Animals commented in response to the draft permit that microplastics were a distinct harm that would result from this project and that they must be adequately accounted for.¹ Petitioners also commented on the danger from debris and pollutants from the project.²

EPA's entire argument is that this memorandum document should be protected by the deliberative process privilege, and thus the document should be pulled from the administrative record. EPA argues at length that the document is deliberative and does not reflect the final decision, but the document itself contradicts this. Courts have made clear that, "[t]he deliberative process privilege must be construed as narrowly as is consistent with efficient government operation" and that "disclosure of documents which explain an agency's final decision" is required. *Wolfe v. Dep't of Health & Human Servs.*, 839 F.2d 768, 773-74 (1988). For material to be protected from disclosure by the deliberative process privilege, it must be both predecisional and deliberative. See *Jordan v. United States DOJ*, 591 F.2d 753, 774 (D.C. Cir. 1978); *EPA v. Mink*, 410 U.S. 73, 88, 93 S. Ct. 827, 35 L. Ed. 2d 119 (1973). (in the context of FOIA). As the Supreme Court has explained, "[d]ocuments are 'predecisional' if they were generated before

¹ FOA Comment at 12-13.

² Petitioners' Original Comments at 9, 12; Petitioner Recirculating Farms' Original Comments at 9, 12; Petitioners' Supplemental Comments at 16-17.

the agency's final decision on the matter, and they are "deliberative" if they were prepared to help the agency formulate its position. There is considerable overlap between these two prongs because a document cannot be deliberative unless it is predecisional." *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 592 U.S. 261, 268 (2021) (internal citations omitted).

The document at issue, a memorandum prepared to explain a final decision and its deficiencies, is clearly post-decisional. The context of the document with regards to the decision is crucial – if a final decision **has already been made**, as is clearly so here, the document is not protected by the privilege. The Court in *Sierra Club* plainly held that, "[t]his rationale does not apply of course to documents that embody a final decision, because once a decision has been made, the deliberations are done" and that, "[w]hat matters...[is] whether it communicates a policy on which the agency has settled." *Id.* The document at issue in *Sierra Club*, a draft biological opinion that was never adopted, could not be more different from the document at issue here – a post-decision memorandum explaining and critiquing a final decision. The Supreme Court has noted that courts, "have uniformly drawn a distinction between pre-decisional communications, which are privileged, and communications made after the decision and designed to explain it, which are not." *Nat'l Lab. Rel. Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151-52 (1975). This is unequivocally a communication made after the decision, designed to explain it, and thus not protected by privilege. The fact that the explanation reveals the final decision to be arbitrary does not change that.

EPA attempts to argue that this document is predecisional, simply because the date on it is one day prior to the publication of the final modified permit. However, this argument fails on its face. The time stamp on the memorandum is May 14, 2025 at 15:58:44. EPA had to have already made its final decision with respect to the final modified permit at the time this

memorandum was created, as the permit package was dated the next day. It even states that it is post-decisional within the document itself. The primary permit analyst (not simply some random staff member, as EPA attempts to insinuate) created this document to detail the inconsistencies in EPA's position regarding microplastics vis-à-vis other pollutants, and he notes that, "[t]he final permit package was routed for WD Director signature on 05/02/25 with the final permit being signed on or before 05/15/25. Prior to signature, managers made a final decision to remove MP monitoring from the final modified permit." AR B.31 at 8. This clearly demonstrates that a final decision had already been made about the permit at the time of the writing of the memorandum, and thus, certainly for purposes of the deliberative process privilege, this document is post-decisional. Thus, as the Court made clear in *Sierra Club*, since this document is not predecisional, it also cannot be deliberative.

Moreover, as noted in Petitioners' response, given the significant scientific and legal basis for requiring microplastics monitoring, the memorandum reaches the inevitable conclusion that EPA "made a final decision to remove MP [microplastics] monitoring from the modified NPDES permit based on policy related reasons that may include political motivations that is not supported by the available science. Management's decision is not consistent with the rationale for monitoring all other pollutants in the 2022 or modified NPDES permit. The modified permit conditions related to MP monitoring are likely inconsistent with CWA Sections 402 or 403, and all applicable implementing regulations for the NPDES program." AR B.31 at 12.

According to the primary permit analyst, the information before EPA relating to microplastics was as compelling as that for the pollutants that are required to be monitored by the modified Permit and its decision not to monitor for it was contrary to established science. The conduct described in the memorandum also demonstrates a level of bad faith or improper

motivation that is striking. The analyst who authored the memorandum states that, “[m]anagers used threatening behavior and retaliation in response to concerns that I provided [and] used the threat of the project’s reassignment to inappropriately influence or coerce [him] into removing MP monitoring from the permit.” AR B.31 at 8. In fact, the analyst was so concerned about the agency’s behavior that after multiple scientific integrity (SI) concerns raised by him were ignored, he filed an allegation of Loss of SI with EPA’s SI official and R4 SI Liaison. AR B.31 at 2.

In its Response, EPA merely recites the same wording that it included in the final version of the Response to Comments.³ This response was obviously inadequate to explain why EPA ignored the significant information before it and deleted the requirement to monitor microplastics. EPA’s Response fails to explain or address the contradictory and policy-driven rationale behind its decision-making in this matter.

Petitioners respectfully request that the Board reject EPA’s attempt to remove this document, as it is properly part of the record. The only reason for EPA attempting to do so is because the document demonstrates clear bad faith and improper motivation in its move to omit microplastics monitoring requirements from the final modified permit, contrary to established science. Such a move is arbitrary and capricious and clearly erroneous.

Respectfully submitted this 6th day of October 2025,

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³ EPA Response at 28.

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

This opposition contains less than 7,000 words, as required by 40 C.F.R. § 124.19(d)(3).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply and attached Exhibit in the matter of Ocean Era, Inc.'s NPDES permit for Ocean Era, Inc. were served by electronic mail, pursuant to the Revised Order Authorizing Electronic Service of Documents in Permit and Enforcement Appeals dated September, 21, 2020, on the following persons, this 6th day of October, 2025:

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