

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

In re:)	
)	
Ocean Era, Inc. Modified National Pollution)	NPDES Appeal No. 25-01M
Discharge Elimination System Permit No.)	
FL0A00001 for the Velella Epsilon Facility in)	
the Gulf of Mexico)	
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**PETITIONERS' REPLY TO EPA REGION IV'S COMBINED RESPONSE
TO PETITIONS FOR REVIEW**

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Exhibit 1: AR B.31, Memorandum Re: removal of microplastics monitoring from final modified NPDES permit for Ocean Era.

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.

One of the most notable modifications to the project in the new application is a change of material for the proposed fish pens, from copper alloy mesh to plastic. 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 pollutants from the project and that they could result in unreasonable degradation and violate the Ocean Dumping Act.

Within the Administrative Record is a document demonstrating that EPA's decision not to monitor the amount of microplastics released by the project is arbitrary, clearly erroneous, and in bad faith. This document was never made available before August 20, 2025, and therefore could not have been addressed in the Petition for Review. Petitioners do not object to EPA filing a Sur-Reply to address this new issue.

¹ AR B.10, FOA Comment pp. 12-13. The APA limits review to "[o]nly" those objections that were "raised with reasonable specificity during the period for public comment." 42 U.S.C. § 7607(d)(7)(B). However, a party seeking review need not have personally raised the issue, so long as it is adequately identified in the record. *Masias v. EPA*, 438 U.S. App. D.C. 405, 416, 906 F.3d 1069, 1080 (2018)

The document at issue is a post-decisional memorandum by the primary permit analyst outlining the reasons for EPA's final decision not to include a requirement to monitor for microplastics in the modified permit.² This 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.³ The memorandum details the EPA's failure to consider microplastics as a pollutant in its Ocean Discharge Criteria Evaluation (ODCE).⁴ The memorandum provides the 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).⁵ The memorandum points out 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.⁶

² AR B.31, Exhibit 1.

³ Exhibit 1 at 3-4. To the extent this document documents agency deliberations, it is nevertheless proper to consider it in deciding this appeal. "The deliberative process privilege must be construed as narrowly as is consistent with efficient government operation." *Wolfe v. Dep't of Health & Human Servs.*, 839 F.2d 768, 773 (1988) *Wolfe*, 839 F.2d at 773. "Agency deliberations not part of the record are deemed immaterial. That is because the actual subjective motivation of agency decision-makers is immaterial as a matter of law — unless there is a showing of bad faith or improper behavior." *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 156 F.3d 1279, 1279-80, 332 U.S. App. D.C. 251 (D.C. Cir. 1998). This memorandum is part of the record. The agency is responsible for compiling the administrative record, and it must include "all documents and materials that the agency 'directly or indirectly considered,' no more and no less." *Oceana, Inc. v. Ross*, 290 F. Supp. 3d 73, 77 (D.D.C. 2018) (quoting *Maritel, Inc. v. Collins*, 422 F. Supp. 2d 188, 196 (D.D.C. 2006)). The agency's designation of the record is "entitled to a strong presumption of regularity." *Id.* (quoting *Pac. Shores Subdivision, Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 5 (D.D.C. 2006)). Further, the memorandum details the improper motivations of the decision-makers. Finally, it is a post-decisional document explaining the rationale for the decision, not part of the back-and-forth of the deliberative process. 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). "Accordingly, the Supreme Court and [the D.C. Court of Appeals] require disclosure of documents which explain an agency's final decision but protect documents which are predecisional." *Wolfe*, 839 F.2d at 774.

⁴ *Id.* at 4-6.

⁵ *Id.* at 6.

⁶ *Id.* at 6-7.

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.”⁷

The Board reviews the administrative record to determine whether “the permit issuer made a reasoned decision and exercised his or her ‘considered judgment.’” *In re MHA Nation Clean Fuels Refinery*, 15 E.A.D. 648, 653 (EAB 2012) (citing *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-18 (EAB 1997)). In its review of the record, “the Board looks to determine whether the record demonstrates that the permit issuer duly considered the issues raised in the comments and whether the approach ultimately adopted by the permit issuer is rational in light of all the information in the record.” *In re City of Attleboro, MA Wastewater Treatment Plant*, 14 E.A.D. 398, 411 (EAB 2009).

According to the primary permit analyst, the information before the 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. Refusing to require monitoring for microplastics is arbitrary and capricious and clearly erroneous. The conduct described in the memorandum also demonstrates a level of bad faith or improper motivation that is striking.

⁷ *Id.* at 12.

In its Response, EPA merely recites the same wording that it included in the final version of the Response to Comments.⁸ This response was obviously inadequate to explain why the 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 hold the modified NPDES permit invalid and remand the permit to the EPA to correct the deficiencies described above and in the Petition for Review. *See* 40 C.F.R. § 124.19(l)(2)(iii). The EPA must provide a thorough explanation of its process and its ultimate finding. If the EPA cannot make an affirmative finding, based on the evidence before it, that microplastics need not be monitored, that the discharge will not significantly impact the surrounding environment, harm endangered species, or cause unreasonable degradation, then it must prohibit the discharge.

Respectfully submitted this 12th day of September, 2025,

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⁸ EPA Response at 28.

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

This response 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 12th day of September, 2025:

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