

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	)	
	)	
	)	
_____	)	

**PROPOSED SUR-REPLY**

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## **I. INTRODUCTION**

On August 15, 2025, the Region filed its Consolidated Response to two separate petitions seeking review of the Region's NPDES permit modification 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 is an internal deliberative document not reflecting EPA's final decision and should not be considered as part of the Administrative Record for this matter. Accordingly, EPA has moved to correct the Administrative Record Index to remove the Microplastics Memo. Moreover, while the Region addressed microplastics generally in its response brief, the Region did not have the opportunity to address arguments advanced by Petitioners based on the Microplastics Memo specifically because they were not raised until the Petitioners' reply briefs. Therefore, the Region addresses these newly-raised microplastic-related arguments in this sur-reply.

## **II. ARGUMENT**

The Petitioners characterize the Region's decision not to monitor for microplastics, based on the internal deliberative memo described above, as unscientific and political. However, as the Region's Response to Comments (RTC) for the Modified Permit made clear, there were valid factual and scientific grounds for finding that microplastics monitoring was not necessary:

The short duration of the facility within federal waters, replacement of net material as necessary, and the large amount of dilution available in the Gulf of America adequately mitigates any risk of microplastics.

The use of KikkoNet netting material instead of copper alloy mesh may introduce plastic particles into the marine environment due to the natural wear and tear of the mesh netting over time. While the KikkoNet mesh is known to be very durable for extended periods of time, there is the potential for some amount of wear and tear which may lead to plastic leaching into the water column. However, due to the durability of the netting, regular netting inspections, and the short time span of the project (only 1 year), the effects from natural wear and tear of the KikkoNet to ESA-listed species is expected to be insignificant. On February 18, 2025, NMFS issued an ESA concurrence letter that stated, “the proposed action is not likely to adversely [a]ffect the NMFS ESA-listed species and/or designated critical habitat.”

RTC for Modified Permit at 14-15.

The Petitioners argue that the short duration of the project is improperly cited because the permit has a five-year term. However, the permit authorizes discharges only during one production cycle. *See* Final Modified Permit at pages 1 (authorizing discharge for “One Production Cycle.”) and 8 (“[t]he discharge from the facility is limited to one production cycle of approximately 55,000 lbs over the course of approximately 12 months. A production cycle is defined as the period of time that starts when fish are placed in the cage until all fish are harvested.”).<sup>1</sup>

The Petitioners claim that the Region’s decision not to require microplastics monitoring was unscientific. However, the Region had a reasonable basis for determining that the level of discharged microplastics would be mitigated by dilution and the short duration of the project, and that the level of impacts to protected species would be “insignificant,” as stated in the RTC. *See* RTC for Modified Permit at 14-15. Even modeling of the primary pollutants proposed for

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<sup>1</sup> The Region included the five-year term to allow flexibility as to when the one production cycle takes place. This was appropriate in light of the fact that the facility has not been constructed and will also require a Rivers and Harbors Act Section 10 Permit from the U.S. Army Corps of Engineers (COE). The COE permit has not yet been issued and the time-line for obtaining that permit is unknown.

discharge (nutrients from fish feed and fish feces) indicated that these common pollutants would be difficult to detect and would have undiscernible impacts a short distance from the facility. For example, modeling indicated that the ammonia nitrogen will be undetectable within 5 meters of the cage using the estimated water flow regimes at the proposed site. *Id.* The RTC further noted that the project “will present challenges for monitoring and detecting environmental impacts on sediment chemistry or benthic communities because of the circulation around the project location and the small mass flows of materials from the net pen installation. *Id.* Where monitoring for this facility was expected to be difficult generally, including for the primary pollutants expected from this facility, it was reasonable for the Region to exercise use its judgment to conclude that monitoring levels of a pollutant expected to be insignificant would be unproductive.<sup>2</sup>

Friends of Animals, at page 9 of their reply, cite the lack of symmetry between the 2022 Permit’s requirement to monitor for copper with the Final Modified Permit’s lack of a monitoring requirement for microplastics, which replaced copper as the cage material. However, the Region’s prior inclusion of a copper monitoring requirement never reflected a concern that copper posed a risk of unreasonable degradation, as the EAB properly concluded in its opinion relating to the 2022 Permit. In its decision concluding that copper did not pose a risk of unreasonable degradation, the EAB stated:

The fact that the Region conservatively decided to impose a monitoring requirement for copper given the unique nature of this project and the limited water quality data regarding the use of copper in marine aquaculture operations—to ensure that copper is not released at a level of concern—does not undermine the Region’s conclusion that copper is not expected to occur in measurable levels in the Facility’s effluent. CFS has not met its burden to show that the Region clearly erred in its consideration of copper in its evaluation of the Ocean Discharge Criteria.

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<sup>2</sup> It should also be noted there is not an EPA-approved analytical method in 40 CFR Part 136 for microplastics. This distinguishes microplastics from copper, which was to be monitored under the 2022 Permit when the cage material consisted of copper.

*In re Ocean Era Inc.*, 18 EAD 678, 711 (2022).

Similar to the EAB's findings with respect to copper, while the Region may have had discretion under Section 308 of the Clean Water Act, 33 U.S.C. § 1318<sup>3</sup>, to include a monitoring condition for microplastics to learn more about the discharge for other purposes, this does not mean they had an *obligation* to do so, when, as here, there is no need for data to ensure that environmental standards are met. The Region properly determined that microplastics discharges would not cause unreasonable degradation of the marine environment and would not adversely affect marine species. Further, the Region properly exercised its discretion in deciding not to require microplastics monitoring. The Petitioners have failed to demonstrate that the Region's determination was clearly erroneous. Thus, the Petitions for review of the permit modification should be denied.<sup>4</sup>

### III. CONCLUSION

For the foregoing reasons, the Petition for Review should be denied.

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<sup>3</sup> See, e.g., *In re Avon Custom Mixing Services, Inc.*, 10 E.A.D. 700, 709 (EAB 2002)

<sup>4</sup> The microplastics-based arguments by Petitioners in their Petitions for Review were originally grounded in the Ocean Discharge Criteria or Endangered Species Act Requirements. FOA argued that the discharge of microplastics could cause unreasonable degradation of the marine environment or adverse impacts to protected species, while the CFS Petition made an Ocean Dumping Act argument relating to release of cage materials and microplastics, which the Region assumed was related to an unreasonable degradation argument. Petitioners now attack the Region's decision not to require monitoring for microplastics, which is a wholly different issue not raised in comments on the Modified Permit. None of the Petitioners complained about the lack of microplastics monitoring in their comments on the draft Modified Permit, where no microplastics monitoring was required. These arguments are thus not properly raised under 40 CFR 124.19(a)(4)(ii). In any case, the Petitioners fail to show that the Region's determinations regarding microplastics were clearly erroneous.

Respectfully submitted.

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Paul Schwartz  
Office of Regional Counsel  
EPA Region 4  
61 Forsyth St., SW Atlanta GA 30303  
[Schwartz.paul@epa.gov](mailto:Schwartz.paul@epa.gov)  
404-562-9576 (phone)

Of Counsel:

Chase Raines  
Office of General Counsel  
U.S. Environmental Protection Agency  
Washington, D.C. 20004

Andrew Teodorescu  
Office of Regional Counsel  
EPA Region 4  
Atlanta, Georgia 30303



**STATEMENT OF COMPLIANCE WITH WORD LIMITATION**

I, Paul Schwartz, certify that, in accordance with 40 C.F.R. § 124.19(d)(3), this Proposed Sur-Reply does not exceed 7,000 words in length.

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Paul Schwartz  
Counsel for EPA Region 4  
Office of Regional Counsel  
EPA Region 4  
61 Forsyth St., SW  
Atlanta, GA 30303  
404-562-9576 (phone)

## 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 Proposed Sur-Reply via the EAB's electronic filing system, and by sending a true and correct copy, via e-mail, to the following:

Clay Garside  
Waltzer Wiygul & Garside, LLC  
3201 General Degaulle Dr., Ste 200  
New Orleans, LA 70114  
Email: [clay@wwglaw.com](mailto:clay@wwglaw.com), [service@wwglaw.com](mailto:service@wwglaw.com)

Jennifer Best  
Director, Wildlife Law Program  
Friends of Animals  
7500 E. Arapahoe Rd., Ste. 385  
Centennial, CO 80112  
Tel. (720) 949-7791  
[jennifer@friendsofanimals.org](mailto:jennifer@friendsofanimals.org)

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Paul Schwartz  
Counsel for EPA Region 4  
Office of Regional Counsel  
EPA Region 4  
61 Forsyth St., SW  
Atlanta, GA 30303  
404-562-9576 (phone)  
[Schwartz.paul@epa.gov](mailto:Schwartz.paul@epa.gov)  
[schwartz.paul@epa.gov](mailto:schwartz.paul@epa.gov)