

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In re:	)	
	)	NPDES Appeal No. 25-02
	)	
Permit applicant: Ocean Era, Inc.	)	
	)	
Permitted facility: Velella Epsilon	)	
	)	
NPDES Permit No. FL0A00001	)	
	)	
	)	

**FRIENDS OF ANIMALS’ RESPONSE IN OPPOSITION TO EPA REGION 4’s MOTION FOR
LEAVE TO FILE A CORRECTED ADMINISTRATIVE RECORD INDEX**

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INTRODUCTION

Over a month after certifying the administrative record, and after briefing before the Environmental Appeals Board was complete, the Environmental Protection Agency (EPA) sought to remove an unfavorable document from the administrative record on the false premise that it was “deliberative.” *See* EPA’s Motion for Leave to File a Corrected Administrative Record Index (“EPA’s AR Mot.”). The document EPA seeks to remove, Administrative Record Document B.31 (hereinafter, “Microplastics Memo”), was drafted for the administrative record and includes scientific information and analysis about microplastic pollution in marine aquaculture.

As described in more detail below, EPA has failed to provide any legitimate basis to remove the Microplastics Memo from the record. It is not deliberative material and was rightly included in the administrative record. Binding EPA regulations and EPA’s own internal guidance and procedures demonstrate that it must be included in the record regardless of whether EPA now claims that its inclusion in the record was erroneous. There is no basis for EPA’s attempt to skew the administrative record and exclude the Microplastics Memo merely because it is unfavorable to its final decision. In short, the EAB should deny EPA’s motion for leave to file a corrected administrative record.

ARGUMENT

The Microplastics Memo is not deliberative. It documents extensive scientific research about the potential for the Ocean Era facility to shed microplastics into the water, as well as a senior EPA employee’s concerns about EPA’s decision to remove microplastics monitoring from the Permit conditions. Furthermore, it was rightly included in the administrative record in accordance with binding EPA regulations and EPA’s internal

guidance. EPA cannot belatedly attempt to exclude the Microplastics Memo from the record just because the Memo reflects a conflicting viewpoint within the agency and is unfavorable to it. And finally, even assuming the Court applies precedents recognizing a qualified privilege for deliberative materials, EPA cannot invoke that privilege here because it failed to properly assert it and the relevant factors strongly favor including the Microplastics Memo in the record.

A. The Microplastics Memo belongs in the administrative record according to EPA's regulations and policy.

Including the Microplastics Memo in the administrative record was required by EPA's binding regulations and internal policies. The regulations that govern EPA's permit decisions state that "[t]he administrative record for any final permit shall consist of the administrative record for the draft permit and: . . . [o]ther documents contained in the supporting file for the permit." 40 C.F.R. § 124.18(b)(6).

Here, the Microplastics Memo was explicitly written to the "Administrative record for Ocean Era's final modified NPDES Permit (FL0A00001)" and was contained in the supporting file for the Final Modified Permit. Microplastics Memo at 1. Thus, it was required to be included in the administrative record. *See* 40 C.F.R. § 124.18(b)(6). In a similar case, *In re Powertech (USA) Inc.*, the EAB held that the documents at issue "fall within 40 C.F.R. § 124.18(b)(1) and are required to be part of the record." 19 E.A.D. 23, 44 (EAB 2024). This case is just as simple; the Microplastics Memo is required to be part of the record because it falls within 40 C.F.R. § 124.18(b)(6).

EPA's own guidance also supports including the Microplastics Memo in the administrative record. The NPDES permitting manual has a table that interprets the regulations that govern draft permit administrative records at 40 C.F.R. § 124.9. U.S.

Environmental Protection Agency, *NPDES Permit Writers' Manual* at 11-8 (2010). The manual clarifies that the language “other documents in the supporting file” means “**all other** items in the supporting file.” 40 C.F.R. § 124.9(b)(5); *Id.* (emphasis added). The requirement at 40 C.F.R. § 124.18(b)(6) that the administrative record for final permits must include “other documents in the supporting file” demonstrates that EPA cannot exclude the Microplastics Memo.

Other EPA guidance about compiling the administrative record also 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.” U.S. Environmental Protection Agency, *EPA’s Action Development Process: Administrative Records Guidance*, 7 (2011). The Microplastics Memo contains numerous scientific studies on microplastics pollution. Microplastics Memo at 3-8, 13-14. For example, the Microplastics Memo details how “[m]icroplastics are a significant and growing concern in marine aquaculture, acting as an emerging pollutant with various negative impacts.” Microplastics Memo at 3. It cites and summarizes several scientific studies on this topic, describing the potential negative impacts of microplastics to the marine environment. *Id.* at 3-4. The Microplastics Memo also explains how this scientific research applies to the Ocean Era facility. *Id.* at 4. For example, some of Ocean Era’s practices, such as scrubbing the plastic net and the frequency of cleaning, could lead to more microplastic pollution. *Id.* In addition, Ocean Era’s proposed use of hydrogen peroxide to treat certain fish pathogens could weaken the structural integrity of the line, causing additional microplastic pollution. *Id.*

This factual information, as well as Mr. Tyler’s technical analysis of it, was “considered by the decision-maker, including his/her staff” in developing EPA’s final position on microplastics monitoring. *EPA’s Action Development Process* at 7. It was presented by Mr. Tyler, the Senior Permitting Specialist/Environmental Engineer assigned as the permit writer, and he shared his analysis and related factual information with management, including the Water Division Director and Deputy Director. *See Microplastics Memo* at 1-2.

Regardless of whether EPA ultimately chose to cite this information in its final decision or base the required Clean Water Act findings upon it, the scientific literature and technical analysis that weighed against that choice was presented to the decisionmaker and therefore must be included in the record.

B. The Microplastics Memo is not deliberative material because it is an objective document that details technical analysis of factual information and was not part of the deliberative process.

EPA’s claim that the Microplastics Memo should be excluded from the record because it constitutes “deliberative material” is without merit. *Contra* EPA’s AR Mot. at 5-8. The standard for whether a document is deliberative is whether it “reflects the give-and-take of the consultative process.” *Nat’l Ass’n of Home Builders v. Norton*, 309 F.3d 26, 39 (D.C. Cir. 2002). Simply because a document is predecisional, meaning that it was created prior to the final Permit decision, is not sufficient to show that it is deliberative. *Vaughn v. Rosen*, 523 F.2d 1136, 1143 (D.C. Cir. 1975). The “document must be a direct part of the deliberative process,” meaning that it is “part of the agency give-and-take – of the deliberative process – by which the decision itself is made.” *Id.* at 1144; *see also United States Fish & Wildlife Serv. v. Sierra Club, Inc.*, 592 U.S. 261, 268 (2021) (defining

“deliberative” as documents that “were prepared to help the agency formulate its position.”).

Indeed, the deliberative process privilege is based on the rationale that individuals would not engage in frank discussion in formulating legal or policy matters if they knew such discussions would be disclosed to the public. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-51 (1975). As a result, disclosing deliberative process material could hinder public policy discussions and injury the quality of agency decisions. *Id.*

In *Vaughn*, the court ruled that “final objective analyses of agency performance under existing policy” which are “informational in nature” are not part of the decisional process and are thus not deliberative materials that would be protected from disclosure. *Vaughn*, 523 F.2d at 1145. Here, like in *Vaughn*, the Microplastics Memo was not part of the deliberative process for the Permit decision. The Microplastics Memo was created to document factual information about microplastics, as well as to objectively analyze EPA’s performance under its regulations and scientific integrity policies. Microplastics Memo at 3-8, 13-14. Likewise, the Microplastics Memo was not prepared as part of a give-and-take, nor was it drafted to help the agency formulate its position. Instead, it was written as a final memo to be included in the record to document factual and technical matters that the agency considered and rejected. *Id.*

Moreover, there is no risk that disclosure of the memo would hinder candid discussion regarding decisions because it was explicitly drafted for the “[a]dministrative record.” *Id.* at 1. Indeed, the author explains that he had a “legitimate scientific critique” and “notified [his] managers multiple times that a memorandum to file or differing scientific

opinion would be created to document my position.” *Id.* at 9. A manager acknowledged this and even stated that it was “common” to prepare such a memorandum for the file. *Id.*

Rather than exposing private debates, the Microplastics Memo exposes a stark lack of debate and failure to accept scientific evidence that was adverse to EPA’s permitting decisions. *Id.* The Memo describes how the EPA decision-makers threatened the “primary person responsible for the permit conditions and analysis” with reassignment instead of engaging with this expert scientific analysis in any way. *Id.* at 8. As the Microplastics Memo describes, this retaliatory behavior violated EPA’s own scientific integrity policies and internal guidance on handling scientific disputes. *Id.* at 9.

EPA errs in arguing that “[d]etermining 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.” EPA’s AR Mot. at 7 (citing *Sierra Club, Inc.*, 592 U.S. at 268). Whether an agency considers a document to be its final stance goes to whether the document is *predecisional*, not whether it is *deliberative*. *Sierra Club, Inc.*, 592 U.S. at 268. Contrary to EPA’s argument, the case that it cites for support defines deliberative material as documents that “were prepared to help the agency formulate its position” – not a memo to the record detailing scientific information and concerns. *See id.*

EPA includes no discussion of how the Microplastics Memo can be considered deliberative. To the contrary, the memo is largely factual and was prepared for inclusion in the administrative record, not as a confidential discussion. *See Informed Consent Action Network v. CDC & Prevention*, No. 1:23-cv-747 (GMH), 2025 U.S. Dist. LEXIS 187851, *25 (D.D.C. Sept. 24, 2025) (finding that “decisions in this Circuit have stated that pure factual

material is generally unprotected by the deliberative process privilege”). *United States v. City of Los Angeles*, No. 2:11-cv-00974-PSG-JC, 2023 U.S. Dist. LEXIS 152770, *48 (C.D. Cal. Aug. 28, 2023) (finding disclosure of information would “not hinder frank and independent discussion regarding contemplated policies and decisions because it is largely a factual matter”).

Moreover, this is far from the type of probing into subjective mental processes cautioned against in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 409 (1971). Rather, it is the “ordinary judicial task of evaluating whether the agency’s decision itself was objectively valid.” *See In re United States*, 138 S. Ct. 371, 373 (2017) (Breyer, J., dissenting from the grant of a stay). EPA has not demonstrated that disclosure of this information would “expose the deliberative process within an agency.” *Petroleum Info. Corp. v. United States Dep’t of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992).

C. EPA cannot exclude the Microplastics Memo merely because it views it as unfavorable.

The “complete or official administrative record for an agency decision includes all documents, materials, and information that the agency relied on directly or indirectly in making its decision.” *In re Dominion Energy Brayton Point, L.L.C.*, 12 E.A.D. 490, 510 (EAB 2006). Furthermore, a complete administrative record “should include all materials that might have influenced the agency’s decision, and not merely those upon which the agency relied in its final decision.” *Amfac Resorts, LLC v. U.S. Dept. of Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001) (internal quotations omitted). “The ‘whole’ administrative record, therefore, consists of all documents and materials directly or *indirectly* considered by agency decision-makers and **includes evidence contrary to the agency’s position.**” *Thompson v. U.S. Department of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (emphasis added); *see also Bar*

MK Ranches v. Yuetter, 994 F.2d 735, 739 (10th Cir. 1993) (“An agency may not unilaterally determine what constitutes the Administrative Record.”).

The D.C. Circuit warned that reviewing less than the full record might allow an agency “to withhold evidence unfavorable to its case,” thereby improperly shielding its decision from scrutiny. *Walter O. Boswell Memorial Hospital v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984).

EPA’s claim that “[r]eview of EPA’s actions is to be based on the rationale provided by the agency” is misleading. See EPA’s AR Mot. at 6. Notably, the cases EPA cites do not support its position. The Supreme Court held that “[t]he reviewing court should not attempt itself to make up for [] deficiencies” in the agency’s analysis. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This is because “an agency’s action must be upheld, if at all, on the basis articulated by the agency itself.” *Id.* at 50. It does not follow that an agency can exclude documents from the record because they are inconsistent with the rationale provided by the agency. To the contrary, courts should look beyond the reasons given by the agency to the “whole record” to discern whether action violated the Administrative Procedure Act. *Id.* at 50; See also *Earth Island Inst. v. Hogarth*, 494 F.3d 757, 768-69 (9th Cir. 2007) (relying on an administrative record that included “internal memoranda” as well as draft “talking points”).

EPA’s reliance on other cases to justify its exclusion of the Microplastics Memo are also misplaced because they concern privileged material or agency deliberations that were “not part of the record.” *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 156 F.3d 1279, 1279 (D.C. Cir. 1998); see also *Emuwa v. United States Dep’t of Homeland Sec.*, 113 F.4th 1009, 1018 (D.C. Cir. 2024) (considering whether qualified

privilege applied). Likewise, review of orders from the Federal Communications Commission, and Securities and Exchange Commission involve different statutory provisions and due process concerns that are not at issue here. *See Kan. State Network, Inc. v. FCC*, 720 F.2d 185, 191 (D.C. Cir. 1983); *Norris & Hirshberg, Inc. v. S.E.C.*, 163 F.2d 689, 692 (D.C. Cir. 1947).

Allowing an agency to withhold unfavorable evidence that was before it at the time of the decision, such as the Microplastics Memo, would frustrate meaningful review of Clean Water Act permitting decisions. *See Boswell Memorial Hosp.*, 749 F.2d at 792; *County of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 76 (D.D.C. 2008); *Bazzi v. Gaki*, No. 19-cv-484 (RDM), 2020 U.S. Dist. LEXIS 174428, at *12 (D.D.C. Sept. 23, 2020); *see also In Re United States*, 138 S. Ct. at 372 (Breyer, J., dissenting from grant of stay) (“Effective review depends upon the administrative record containing all relevant materials presented to the agency, including not only material supportive of the government’s decision but also materials contrary to the government’s decision.”).

Here, keeping the Microplastics Memo in the record is required to satisfy both the public’s and the EAB’s strong interests in fully evaluating the entire basis for EPA’s decision. *See Nat’l Courier Asso. v. Bd. of Governors of Fed. Res. Sys.*, 516 F.2d 1229, 1241 (D.C. Cir. 1975) (“Private parties and reviewing courts alike have a strong interest in fully knowing the basis and circumstances of an agency’s decision.”).

The Microplastics Memo contains multiple scientific studies and examples of technical analysis not otherwise available in the record, which EPA considered and which it is therefore necessary for the EAB to review in order to fully analyze the EPA’s decision. The Microplastics Memo also points out how monitoring for microplastics is “required by the

CWA implementing regulations.” Microplastics Memo at 5-6. By disregarding important scientific evidence, EPA cannot ensure that the Permit “will not cause unreasonable degradation.” 40 C.F.R. § 125.123(a). Moreover, without monitoring microplastic pollution, the monitoring program is not “sufficient to assess the impact of the discharge,” on the marine environment. 40 C.F.R. § 125.123(d)(2). The Microplastics Memo includes evidence how the EPA’s stated justifications “do not align with the scientific information available.” Microplastics Memo at 11. It also highlights how EPA’s justifications are contradictory because it applied different standards to microplastics monitoring than it did to other pollutants without giving any valid justification. *Id.* at 6-7.

“A plaintiff can make a *prima facie* showing that an agency excluded adverse information from the record by proving that the documents at issue (1) were known to the agency at the time it made its decision, (2) ‘are directly related to the decision,’ and (3) ‘are adverse to the agency’s decision.’” *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 198 (D.D.C. 2005) (quoting *Public Citizen v. Heckler*, 653 F. Supp. 1229, 1237 (D.D.C. 1987)). The Microplastics Memo easily satisfies each requirement.

First, EPA plainly knew about the Microplastics Memo. It was created by EPA, retained in its files, included in the administrative record, and even produced to Friends of Animals and others. Thus, it was clearly before the agency. *See County of San Miguel*, 587 F. Supp. 2d at 76 (“[I]t is axiomatic that documents created by an agency itself or otherwise located in its files were before it.”); *Fund for Animals*, 391 F. Supp. 2d at 198 (finding that the agency knew about the documents because the agency created them).

Second, the memo is directly related to EPA’s approval of the facility because it evaluates microplastics pollution, which is an environmental impact central to the agency’s

statutory obligations. Documents addressing the effects of the action and factors the agency must weigh are by definition directly related. *Fund for Animals*, 391 F. Supp. 2d at 198 (finding that documents were relevant to the decision when the documents described the decision's impacts and contained important factors the agency should consider in making the decision).

Third, the memo is adverse to EPA's decision. For this factor, "the question is not whether the information is adverse to the Record as a whole," but "whether the information is adverse to the ultimate decision." *County of San Miguel*, 587 F. Supp. 2d at 76. The Court need not decide "[w]hether the Record as a whole -- inclusive or exclusive of these documents -- supports the [agency's] decision." *Id.* "Rather, the issue is whether these documents potentially disprove the [agency's] decision." *Id.*

Here, the memo provides evidence that EPA's approval of the facility may cause unreasonable degradation of the marine environment and raises concerns about microplastics pollution. Thus, it is adverse to EPA's decision. *See id.*; *Fund for Animals*, 391 F. Supp. 2d at 198 (finding the document adverse because they suggest that the decision "could have negative system-wide effects.").

Accordingly, EPA's attempt to exclude the microplastics memo from the administrative record is improper. The document was before the agency, directly relevant, and adverse to its decision. It must therefore be part of the administrative record.

D. The Microplastics Memo is not privileged material.

Even if the Microplastics Memo were deliberative—which it is not—EPA failed to invoke the deliberative process privilege. Courts are divided on whether withholding deliberative documents from the administrative record constitutes a qualified privilege that

must be formally asserted, but the Supreme Court has noted that “executive privilege is not to be lightly invoked.” *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953). Moreover, courts have set forth “specific procedures that must be complied with before a claim of government deliberative privilege will even be considered.” *Williams v. District of Columbia*, No. 96-0200-LFO, 1997 U.S. Dist. LEXIS 23711, *4 (D.D.C. Apr. 25, 1997). Here, EPA has made no attempt to claim that a privilege applies.¹

Courts are clear that when an agency voluntarily discloses deliberative materials to non-federal parties, it forfeits any privilege claim. *See, e.g., In re Sealed Case*, 121 F.3d 729, 741-42 (D.C. Cir. 1997) (finding that the White House waived its claims of privilege by voluntarily disclosing documents to third parties). Moreover, in *UnitedHealthcare Ins. Co. v. Azar*, the Court found that two documents properly belonged in the administrative record and that the deliberative privilege process did not apply. 316 F. Supp. 3d 339, 342 (D.D.C. 2018). There, the agency waived its privilege when it released those documents to the public. *Id.*

Here, EPA disclosed the Microplastics Memo to Friends of Animals and other parties by providing it in the administrative record. The Memo itself was created for the record, and EPA never claimed it was privileged even after it was aware that it was released to third

¹ Courts have recognized that “[t]he deliberative process privilege is a qualified one” and that “[a] litigant may obtain deliberative materials if his or her need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure.” *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). Here, the Microplastics Memo is not deliberative in nature, and the EPA has not asserted any claim of privilege over it. Accordingly, Friends of Animals does not address the balancing factors that typically apply to deliberative process privilege. However, even if the Memo were subject to the deliberative process privilege, Friends of Animals’ need for the Memo and the EAB’s need for accurate fact-finding plainly outweigh EPA’s alleged interest in secrecy.

parties. Thus, the Microplastics Memo cannot be considered privileged deliberative material.

CONCLUSION

For the above reasons, Friends of Animals opposes EPA's Motion for Leave to File a Corrected Administrative Record Index. The Microplastics Memo is not deliberative in nature and contains information and analysis that will be important in reviewing EPA's decision to issue the Modified Ocean Era Permit. It was rightly included in the administrative record consistent with EPA's regulations and guidance and should not be excluded now.

Date: October 7, 2025

Respectfully submitted,

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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

In accordance with 40 C.F.R § 124.19(f)(3), (5), I hereby certify that this response does not exceed 7,000 words. Not including the cover page, tables, signature block, statement of compliance with word limitation, and certificate of service, this response contains 3,618 words (including footnotes), as counted by Microsoft Word.

CERTIFICATE OF SERVICE

I, Jennifer Best, hereby certify that on October 7, 2025, I served a true and correct copy of the foregoing Response in Opposition To EPA Region 4's Motion for Leave to File a Corrected Administrative Record Index through the EAB's e-filing system and through e-mail to the following:

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