

ISSUE & POLICY RECOMMENDATIONS rev. 1

to inform the DOI interim report on oil and gas development on public lands and waters
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as requested by Healthy Gulf for the DOI/BOEM Consultation on 4.20.2020
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SKIRTING SCIENCE-BASED DISPERSANT USE**ISSUE 1: Abuse of agency discretion – DOI/BOEM’s mandate for SSDI***Concerns:*

- In Nov. 2010, BOERME issued a mandate to lessees and operators of federal oil and gas leases on the Outer Continental Shelf to include Subsea Dispersant Injection (SSDI) as part of its government-approved oil spill response plans. This policy is industry-driven, and it is not part of the existing 1994 NCP. It has not been vetted by independent science nor gone through a public approval process. This sets really bad precedent as it allows industry to drive policy!
- The industry wants to institutionalize this “atypical” dispersant use in policy. There is an unfinished 2015 rulemaking on rules governing dispersant use and a citizens’ suit over unreasonable delay in finalizing it. The past administration attempted to issue a partial rulemaking only for atypical dispersant use, leaving the possibility of no closure on rest of rulemaking once industry gets its way.

Policy recommendations:

- 1.1 The Secretary of the Interior shall revoke its premature Notice to Lessees and Operators of federal oil and gas leases on the OCS (Nov. 2010) mandating Subsea Dispersant Injection (SSDI) on OCS oil and gas leasing and development.
- 1.2 The Secretary of Interior shall issue a moratorium on SSDI by lessees and operators of federal oil and gas leases on the OCS at least until the 2015 rulemaking on rules governing dispersant use is finalized, *based on current science and technology (including 2015–2021 studies), in its entirety.*

ISSUE 2: Abuse of agency discretion – On Scene Commander (OSC) discretion*Concerns:*

- OSC decisions during the BP DWH oil spill reflected the industry desire to test atypical dispersant application – SSDI and surface application in large quantities over long durations.

- SSDI was then instituted in DOI policy (NTL Nov. 2010, above) without any public process and in a complete science void. Science later found this application to be ineffectual in a blowout scenario.
- Applications in large quantities and over long durations were proposed by the EPA in the 2015 rulemaking. However, this science is now stall. Emerging science – and the public – have found deadly long-term consequences of these applications.
- The OSC allows spillers to use the so-called “Valdez exemption” to HAZWOPER training – reducing the required training from 40-hours to 4 hours. The OSC also allows spillers, when pressed by the public, to only train so-called “front-line” workers with the full 40-hour HAZWOPER training while giving others, supposedly at less risk, for 8- or 4-hours HAZWOPER trainings. Office contract workers are typically given no training, *even though everyone is breathing the same contaminated air 24/7.*
- The OSC is not guided by science or public conscious. The OSC is guided by industry, specifically the spiller whose liability concerns outweigh any public good. OSC discretion undermines all public process and intended outcome of only using products that do more good than harm. It also provides no incentive for industry to support updating the NCP based on current science when it can get what it wants during an oil spill – and what it wants then becomes future policy.

Policy recommendations:

- 2.1 Revoke OSC discretion during oil spill response.
- 2.2 Alternatively, if OSC discretion dictates use of dispersants or other products in ways or in quantities or in areas that are not addressed in the NCP, then the response immediately becomes a hazardous substance removal response under the NCP with a change in the lead agency from the USCG to the EPA and with all of the attendant response requirements of hazardous substance removal.
- 2.3 If the OCS sanctions anything less than the full 40-hour HAZWOPER training for *any* contract workers employed for response work, then the spiller is liable for triple fines and penalties, arising from legal claims related to work-related injuries and illnesses, private health claims, and NRDA damages.

ISSUE 3: Dispersants are ineffective at certain temperatures and salinities.

Concerns:

- Dispersant use in oil spill response plans *and the presumption that dispersants work as designed in field conditions* enable the federal government to approve oil and gas industry activities, including leasing, developing and transporting materials
- Dispersants are ineffective below 20 ppt seawater and below 5° C. Ocean depths are below 5° C; the Arctic Ocean is below 5° C in winter.

Policy recommendations:

- 3.1 Issue a moratorium on dispersant use in seawater of less than 20 parts per thousand salinity and/or below 5° C.

ISSUE 4: Preauthorization of dispersant use*Concerns:*

- Preauthorization allows common use of dispersants in coastal areas to hide oil leaks and spills.
- There is no required notice to the public when preauthorized dispersants are used.
- Preauthorization favors use of dispersants during oil spills and discourages any incentive to develop (much) less toxic alternatives or mechanical response.
- The safety bar needs to be raised before dispersants can be preauthorized, as this effectively guarantees dispersants will be used with no public reporting of use.

Policy recommendations:

- 4.1 The Secretary of Interior and the Administrator of the Environmental Protection Agency shall only allow dispersant preauthorization in States and federal areas where current studies with local/regional economically and environmentally important species have demonstrated no short- or long-term harm in environmentally-realistic test conditions.
- 4.2 All instances of preauthorized use of dispersants must be publicly reported in locally available media outlets within 24 hours of use and include the type and quantity of the product released, the area of the release, a product SDS for each product released, and a listing of potential health symptoms of exposure.
- 4.3 All instances of preauthorized use of dispersants must be treated as release of a hazardous substance with environmental and public health monitoring as required under the NCP for Hazardous Substance Pollutant discharges. No exemptions or exceptions.

MINIMIZING HARM FROM DISPERSANT USE

ISSUE 5: Dispersants contain human health hazards and, when combined with oil, the resulting “product” is more hazardous to people and wildlife than oil alone; exposures lead to short- and long-term harm.

Concerns:

- Intentional releases of products with known human health hazards should not be treated differently than accidental releases of the same products. Oil spill response requirements are inadequate for releases of hazardous substances, in terms of public notification, environmental monitoring, worker safety training, public health protection, waste disposal, and local food safety, among others.
- The EPA with bold audacity waives any liability for product use in the NCP with a mandatory disclaimer.
- During the *Exxon Valdez* oil spill, the spiller paid contract workers to sign a waiver against long-term health care from any work-related illnesses. The waiver held up in court.
- During the *Exxon Valdez* oil spill and the BP DWH oil spill-disaster, contract workers were not given proper Personal Protective Equipment (PPE), or if they were given, for

example respirators, the workers were told that using the PPE would be grounds for job termination. (Workers wearing HAZWOPER PPE make the exposures appear dangerous for the unprotected local residents and others who are breathing the same air as the workers but were trained in the use of PPE.)

- During both of these disasters, decontamination workers were not warned about the chemical hazards and risk of exposure involved in their jobs. DECON workers were often not given proper PPE. During the BP disaster, residents were also not educated as to the human health risks from exposures to chemical hazards used at DECON sites, which were often set up in neighborhoods or public marinas.
- Oil spill work-related chemical illnesses are invisible under government regulations. The Health Hazard Evaluations conducted by NIOSH typically assign potential symptoms of chemical exposures to natural illnesses such as colds and flu – the ubiquitous “Valdez Crud” during the *Exxon Valdez* oil spill or the “BP Oil Spill Syndrome” during the BP DWH spill-disaster and conclude that long-term health effects are unlikely. The OSHA regulations for “recordable” illnesses exempt colds and flu as not considered work-related [1904.5(b)(2)(viii)], yet these very symptoms are considered characteristic of exposure to oil spills by OEM-trained medical professionals.
- The worker health records, including illness data and air quality data, were sealed by court order for 30 years in the case of *Garry Stubblefield and Melissa Stubblefield v. Exxon Shipping Company, Exxon Corp., VECO, Inc., and Norcon, Inc.* (3AN-91-6261 CV, Alaska Superior Court, Third Judicial District at Anchorage, 1994). These records contain information critical to protecting company employees in oil and gas occupations and contract workers in future spills. The records also provide evidence for removing the OSHA exemption for recordable illnesses [1904.5(b)(2)(viii)].
- The spiller claims the shield defense in court for using government-sanctioned products and so avoids responsibility for liability for injury from use of its product. Either industry stands by its products and the intended use and consequences of its products in field conditions – or the products are not used.
- The spiller has a conflict of interest in training workers to recognize work-related chemical illnesses and in collecting environmental data like air and water quality data to support evidence of such illnesses, which are likely to result in disabilities or chronic illnesses requiring long-term healthcare or which may be lethal. The government, not the spiller, should be in charge of evidence-based standards that trigger government action – like evacuation or beach closures – when necessary to protect the public from exposures and illnesses under NCP-driven emergency responses.
- The State of Massachusetts has an excellent working model, the Licensed Site Professionals licensed through the State Board of Registration of Hazardous Waste Site Cleanup Professionals, a program that protects the interests and health and safety of contract workers, the public, and wildlife during oil spills and hazardous substance releases. It also allows public comment and feedback to weed out unscrupulous emergency response contractors.
- Tribes, fence-line communities, front-line communities, and environmental justice regions or communities need special attention and considerations as they are more at risk.

- Whales, sea otters and possibly other marine mammals are not included in Natural Resource Damage Assessments (NRDA), due to permitting processes that allow a certain “take” of such marine mammals during oil and gas activities. However, this policy minimizes the spiller’s liability and the public’s impression of damages.
- Agencies are allowed to set site specific screening levels for compounds of concern in air and water and seafood. For example, during the BP disaster, the EPA established a 1-year screening level for the carcinogen benzene of 20 part per billion (ppb), as the level above which action would be taken to protect public health. However, this screening level was higher than all other relevant state, national, and international benzene standards including the Clean Air Act’s Unacceptable Cancer Risk Level of 13 ppb. (For comparison, the CAA’s Low Cancer Risk Level is 0.13 ppb.) Also, the cancer risk level for seafood safety was raised two orders of magnitude making it more likely that Gulf seafood would pass the test – but putting consumers at additional risk.

Policy recommendations:

- 5.1 If dispersants or other products containing human health hazards are released during an oil spill response, the response immediately becomes a hazardous substance removal response under the NCP with a change in the lead agency from the USCG to the EPA and with all of the attendant requirements for public notifications, environmental monitoring, worker safety training and PPE, public health protection, and waste disposal, among others.
- 5.2 All contract workers who will be stationed in the region impacted by oil spills and hazardous substance releases under the NCP shall complete a 40-hour HAZWOPER training. No exemptions or exceptions – ever. Workers must be given proper PPE for the hazardous waste activities, trained how to wear it and maintenance of it, and there must be subsequent monitoring to ensure proper use and maintenance. If any of these conditions are missing, the spiller will be subject to triple fines and penalties in all spill-related criminal, civil and private legal proceedings.
- 5.3 The OSHA exemptions for recordable illnesses [1904.5(b)(2)(viii)] do not apply during spills and releases covered under the NCP: All illnesses are recordable. NIOSH shall conduct follow up studies to its initial HHE in two, five, and ten years to account for the onset of long-term illnesses – and to make public, in a timely manner, such information that may be relevant for legal actions of private parties.
- 5.4 For Tribes and residents of front-line communities and/or People of Color (POC) communities within the region impacted by the oil spill or hazardous substance release, the government – not industry – shall develop and implement real-time air quality, water quality, [seafood safety](#) monitoring and real-time reporting to these communities. During spill or disaster response under the NCP, evidence-based standards shall apply for Tribes and in front-line and/or POC communities.
- 5.5 Agencies shall use the nation’s most protective screening levels for compounds of concern during oil spills. In addition, evidence-based standards shall be developed by

- government with members of the public who have been impacted by or who live in fence-line communities, and with OEM-trained treating doctors. The standards shall be in effect for response workers and the public or Tribal members during oil spills and hazardous substance releases under the NCP. Government actions to protect worker safety and public health shall be immediately implemented if these standards are triggered. Appropriate actions – such as beach closures, immediate evacuation, temporary relocation of residents of coastal communities, public education, medical treatment by OEM-trained health care providers, and mandatory long-term environmental monitoring and long-term health monitoring and treatment – should be planned in advance. Costs shall be recovered from the spiller – in litigation, if necessary.
- 5.6 If evidence-based standards are triggered and/or action is required to protect workers or the public from further exposure during oil spills or hazardous substance releases under the NCP, then the spiller shall be held accountable for the costs of long-term environmental monitoring (air quality, water quality, seafood safety) and long-term healthcare, but not for government-sanctioned implementation of these activities.
- 5.7 Agencies shall use the nation’s most protective seafood safety standards during oil spills. When oil and dispersants or other products with related human health hazards are used in NCP-driven response activities, or these materials or their byproducts are detected in seafood, the FDA shall warn the public to cease or limit consumption and fisheries shall be closed in areas deemed at risk.
- 5.8 If the spiller uses the shield defense in a court of law or legal arbitration against health claims arising from any products used under the NCP, this action will serve as legal grounds for the products that were the cause of the legal actions to be removed immediately from the NCP and any stockpiles owned or controlled by the federal government to be destroyed as hazardous substances. Evidence of any waivers or releases of healthcare arising from work-related illnesses will also serve as legal grounds for removal of the product from the NCP and destruction of any government owned or controlled stockpiles, as above.
- 5.9 All court records from toxic tort proceedings or any other work-related illness claims under NCP-driven responses shall not be sealed from the public. Ever. The government shall formally demand the records from the 1994 *Stubblefield v. Exxon* case and obtain the complete set immediately upon release. Once obtained, the government shall immediately enter the records into the federal record and Library of Congress.
- 5.10 The government will include all injured wildlife, including whales and other marine mammals like sea otters, in NRDA assessments and any penalties and fines, arising from these damages.

ADDRESSING OTHER SUBSIDIES, LAWS AND FLAWED BUSINESS MODELS THAT INCREASE RISK TO THE PUBLIC AND WILDLIFE

ISSUE 6: The Halliburton Loophole allows oil and gas waste to be deemed nontoxic. During an oil spill response, there is tremendous industry pressure to declassify oil spill wastes from “hazardous” to non-hazardous, resulting in disposal of (still) hazardous oil spill waste, often contaminated with dispersants, in municipal landfills.

Concerns:

- Municipal landfills are designed for household waste, not hazardous waste by any name.
- The majority of the [nine municipal disposal sites](#) used during the BP DWH disaster were located in [POC communities](#), adding insult to injury. Do no more harm!
- No hastily constructed and approved industrial waste sites, either.

Policy recommendations:

- 6.1 Close the Halliburton Loophole for oil and gas waste. No exemptions during oil spills or hazardous substance releases.
- 6.2 If products containing known human health hazards including dispersants and decontamination products, among others, are released during an oil spill response, the oil contaminated waste is and remains hazardous substance pollutants that must be disposed of in a pre-existing industrial waste landfill. No exemptions or exceptions.
- 6.3 Require parties to identify industrial waste disposal sites that they would use during response operations as part of their government-approved oil spill response plan.

ISSUE 7: There is no incentive to make dispersants less toxic, owing to the nature of the business model.

Concerns:

- Once stockpiles are depleted during a spill response, they are replaced with no change in formulation. This stockpile sits until the next major spill depletes it.
- The immediate replenishment and stockpiling of dispersant product guarantees, in future spills, a repeat of any short- and long-term harm to workers, the public and wildlife.
- The Corexit dispersants can be recycled back to refineries and upgraded for use in other products.
- The current formulation of Corexit dispersants 9227A and 9500A used in the BP DWH oil-disaster have known deadly short- and long-term consequences for people and wildlife.
- Under the current outdated NCP regulations governing dispersant use, there is no formal way for the public to delist products once they are listed on the NCP Product Schedule. Once a listed product is deemed unsafe or ineffective, then it should be delisted and existing stocks destroyed to prevent use in other countries and our world ocean. Upcycling discontinued stocks into other products at refineries may be a viable option.

Policy recommendations:

- 7.1 The federal government shall delist Corexit 9500A and Corexit 9227A from the NCP Product Schedule, effective immediately. The federal government shall devise and implement a plan with the oil industry to move existing stockpiles of these dispersants into upstream feedstock at U.S. refineries, essentially recycling them into less hazardous products, at minimal cost to U.S. taxpayers, in light of decades of subsidies to these same U.S. oil companies. This shall be a one-time offer. In the future, owner companies shall pay the government to remove discontinued stock for the privilege of using it as resources for other products.
- 7.2 New rules must be devised for approval of any chemicals for use in oil spill cleanup to use the best available scientific research in determining product safety. Any product that cannot be shown with reasonable assurance to improve rather than worsen human, animal, and environmental health outcomes versus cleaning oil mechanically must not be approved.

ISSUE 8: Inappropriate industry influence in government- and/or university-sponsored publications can compromise government regulations to protect workers, the public and wildlife from harm caused by the donors' profit-making activities.

Concerns:

- Corporations should contribute to solutions when they cause a problem. Intramural and Gift funds also are received by public agencies like NIH from private entities for studies. However, it is not public record who donated to these private funding pots.
- Yet the integrity of such studies could be compromised by large contributions. For example, the \$34 million long-term Gulf Study on oil spill workers was funded in part by BP and undisclosed private entities. The Gulf Study is more about tobacco use than oil spill-related health issues.
- The public has a right to know who, and how much, private entities donate to studies that will undoubtedly affect future oil spill cleanup regulations.

Policy recommendations:

- 8.1 Government agencies like the National Institutes of Health and the NIHES and others shall provide full disclosure on donations and other monetary "gifts" to studies that impact corporate profits and outcomes.

ISSUE 9: Piecemeal incremental development instead of full disclosure of development plans at the permitting phase results in projects that may not have been approved had the full details been understood by the public and agencies upfront. Such permitting is deceptive.

Concerns:

- Accurate information is critical to long-term survival of indigenous people. For example, on the North Slope of Alaska in association with onshore development of Prudhoe Bay and surrounding fields, the industry claimed there would be 20 over flights annually, 200 workers and 14-acre gravel pad footprints. Instead, there were 1,900 flights, 1,200 workers and 500-acre gravel footprints, which has resulted in precipitous decline of subsistence resources.

- Full disclosure of development plans upfront could allow for staggering growth and monitoring effects on the environment, wildlife and humans. This allows an opportunity to limit development if harmful effects are found.
- The best information and science should be available and used at every stage. For example, the European chemical assessments are more comprehensive than the U.S. SDS.
- While universities typically compete for the lucrative health assessment impact studies, academic understanding of the situation often falls far short of local knowledge – as was acknowledged in the Oil Pollution Act of 1990. Alaska Community Action on Toxics current has a good working model for participatory research in Alaska Native communities. The Prince William Sound Science Center has good models for participatory and comprehensive ecosystem research after an oil spill.

Policy recommendations:

- 9.1 Agencies shall require full disclosure of entire development plans at the permitting phase of all oil and gas projects.
- 9.2 If the development phase exceeds the minimal statements made during the permitting phase, the development will be halted until another public comment period and new health assessment can be conducted, analyzed and reported. Development may or may not proceed, depending on the outcome of the public comments and the current health assessment.
- 9.3 The company will incur substantial penalties for the difference between what it promised and what it delivered. These penalties shall be paid to the local communities to support participatory research projects.
- 9.4 Current human health and environmental assessments should be conducted and included as part of the initial project assessments – and assessments should continue for the development phase or during sporadic but inevitable adverse events.
- 9.5 The health assessments shall be conducted as participatory research studies that are community owned and controlled and extend over multiple generations and last as long as there are impacts even if the oil development is no longer active.
- 9.6 Exemptions to agreed-upon principles shall not be allowed.

ISSUE 10: Bringing local expertise into oil spill prevention and response planning has not happened despite the promise of the Oil Pollution Act of 1990.

Concerns:

- Regarding securing more input from local citizens, OPA 90 established two Regional Citizens' Advisory Councils (RCACs) as demonstration programs in Alaska after the *Exxon Valdez* oil spill (EVOS) with the understanding that, if successful, these councils could be expanded into other regions. 33 USC §2732. The councils, especially the Prince William Sound RCAC, have been highly successful in combating industry and government complacency and in improving oil spill prevention and response

measures. Such councils are already authorized under OPA90; they need to be established in practice in every region. 33 USC §2732(a)(1)(2)(J).

- Critical lessons have been learned from the Alaska RCAC pilot models and any subsequent RCACs could be improved.
- Since the EVOS, communities impacted by oil spills have requested an RCAC in their region. For example, a multi-state mid-west coalition (in IL, IN, MI, MN and WI) of citizens impacted by the 2014 BP Whiting refinery spill in Lake Michigan responded with public comments on the settlement and consent decree, asking for a third tier of spill prevention and response involving local government and concerned citizens. The same multi-state mid-west coalition also responded with public comments on the settlement and consent decree for the much larger 2010 Enbridge tar sands pipeline oil spill, asking this time for a third tier of spill prevention and response for the upper Mississippi River. Meanwhile, citizens across five Gulf Coast states impacted by the BP oil disaster also attempted to get congressional action to create Gulf Coast RCAC. All citizen-driven attempts have been ignored.
- Regarding securing more input from local government, OPA90 specifically established Area Committees composed of local government agencies and others and required them to coordinate with Citizens' Advisory Councils (in Alaska) and Local Emergency Planning Committees (LEPCs) to develop Area Contingency Plans under the guidance of the OSC. The intent was to have the people most familiar with the area establish protection priorities regarding product use during a response.
- This was an unfunded mandate and it never happened. Instead, Area C-Plans are developed largely by industry.

Policy recommendations:

- 10.1 Establish newer model Regional Citizens' Advisory Councils in each of the EPA/USCG regions under the NCP. Geographically diverse regions must have more than one RCAC. Provide a funding mechanism.
- 10.2 Any new oil and gas lease sales shall be accompanied with an RCAC for the area under consideration.
- 10.3 Provide a funding mechanism to include the LEPCs in the Regional Response Team's oil spill prevention and response planning process – and in local spill response.
- 10.4 Any new oil and gas lease sales shall be accompanied with funding for full participation by the local government LEPCs in the area under consideration.