

## For Immediate Release

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### **EPA Issues Final Rule Governing Use of Chemical Dispersants on Oil Spills** *Rules Are an Improvement But Further Local Action Will Be Essential*

Berkeley, CA (June 13, 2023) — The U.S. Environmental Protection Agency (EPA) has issued a long-awaited [final rule](#) governing oil spill response that may better safeguard the health of millions of people living on United States coastlines, rivers, and even highways where oil spills occur. Prompted by a [lawsuit filed in 2020](#) by Earth Island Institute, the ALERT Project, Alaska Community Action on Toxics, Cook Inletkeeper, the Center for Biological Diversity, an Alaskan Native health aide, and a Gulf Coast commercial fisher, the EPA was compelled by court order to update its antiquated regulations that govern the use of chemical products in oil spill response. Plaintiffs' concern about the toxicity of these products was the primary motivation for their demand that the EPA revisit its decades-old "National Contingency Plan" for oil spills.

The Clean Water Act (CWA) directs EPA to develop a National Contingency Plan (NCP) that includes: (1) a schedule identifying what products may be used during oil spill response; (2) the waters where these products may be used; and (3) what quantities can be used safely in specific local contexts. EPA last revised the NCP in 1994—i.e., nearly 30 years ago—without the benefit of long-term lessons learned from the *Exxon Valdez* and BP Deepwater Horizon oil spill tragedies and associated response efforts. Plaintiffs successfully sued EPA on the grounds that the CWA requires periodic updates to the NCP to keep it current with scientific and technical developments, including, increased understanding of the dangers of chemical methods of addressing spilled oil through broad scale use of dispersants.

EPA's newly announced regulatory revisions, published in the Federal Register on June 12, 2023 and effective six months later (December 11, 2023) — are a welcome improvement in critical respects. The NCP will now provide, on a nationwide basis:

- Improved testing of the efficacy and toxicity of dispersants before they are listed on the NCP "product schedule" as permissible for use in oil response efforts;
- Public notification of when chemical and biological agents are deployed in emergency response situations;
- Significantly greater public disclosure of data relevant to dispersants' chemical constituents, environmental fate, intended uses, and health and safety effects by prohibiting manufacturers from withholding this as "proprietary business information."
- Removal of products based on misleading, inaccurate, outdated, or incorrect statements regarding product composition or use, including advertisements, technical literature, electronic media, and more.

The new NCP continues to sanction broad scale use of chemical dispersants, but now it also requires that the decision to use dispersants in any specific setting be addressed by local, state, and regional planners as well as the responders. The NCP devolves considerable authority to

the entities involved in regional and area planning for oil spill response, including that of making more conservative decisions as they see fit. This means it will be critical for these many bodies to be kept scientifically informed and resourced nationwide to ensure least-toxic responses to future oil spills. The plaintiffs in the NCP lawsuit thus regard the new regulations as a mixed result that will require ongoing, intensive civic engagement at the sub-national level.

**Dr. Riki Ott**, director of Earth Island Institute's [ALERT Project](#), the lead plaintiff in the case, witnessed first-hand as a commercial fisher and marine toxicologist the long-term health and environmental impacts of the nation's two largest maritime oil disasters. "Dispersants will now have to pass much more stringent testing protocols to be listed for use. And misinformation in any communication about dispersants is now grounds for product delisting under the new rules," Dr. Ott said. "The new rules authorize state and regional planners to obtain the quality information they need to make informed decisions about whether dispersants can be used safely in any waters." However, Dr. Ott also shares some plaintiffs' concerns that the new rules do not prevent the ongoing use of potentially harmful chemical dispersants, especially in coastal waters near populated areas.

**Kindra Arnesen**, a plaintiff and community activist in Louisiana, expressed concerns about the new rule. "Dispersant use in the wake of the BP disaster took a huge toll on my community. It's hard to explain to my community that these new rules are good when they allow for a repeat of the same mistakes that were made during BP's Deepwater Horizon disaster."

"It is good that EPA has heard us on so many issues, but the allowance of products of concern for oil spill response continues to leave our communities and their members at risk," said plaintiff **Rosemary Ahtuanguaruak**, an Iñupiat tribal leader and activist who lives in the now oil-industrialized zone of the North Slope in Alaska. "Further, although the new rule requires that people be notified when these products are used during an oil spill, the complex terminology may prevent clear transfer and understanding of the information." Ahtuanguaruak has worked with Tribal councils to pass resolutions banning dispersant use in Arctic waters where Alaskan Natives hunt and fish. She is currently the Mayor of Nuiqsut, Alaska. The opinions she expresses are her own.

Existing and expanding oil and gas operations in U.S. waters increase the ongoing risk of an oil spill. This is particularly concerning in Cook Inlet and the Arctic, where ice and cold water may further reduce the effectiveness of dispersants, and where geographic remoteness makes manual oil removal difficult. "Oil corporations and shipping companies can't clean up oil with traditional tools in Alaska's cold, dark and unforgiving waters," said **Sue Mauger**, with plaintiff Cook Inletkeeper. "We are pleased that the new rules make it more difficult to use dispersants since testing will now be required to prove they work at cold temperatures. They don't, and we've known this for a long time. This raises the question of whether oil drilling or increased shipping traffic can be allowed in Alaskan waters, or other areas like deep waters in the Gulf of Mexico, where oil spills can't be cleaned up."

**Pamela Miller**, executive director of plaintiff Alaska Community Action on Toxics, agreed that the new rule has many positive features. "This final rule gives us access to the tools and information we need to protect the health and well-being of our waters, wildlife, and people

from exposure to dispersants that make oil spills even more toxic. It increases transparency and accountability. It requires complete disclosure of *all* the ingredients in a product. I can't imagine why people would allow dispersants when they learn that some of the ingredients are carcinogens or teratogens that kill or deform developing embryos, including human babies." **Miller** remained concerned, however, about the lack of health and safety monitoring protocols for response workers and the public. "These rules do not address any of the updated science showing long-term harm to people from oil spill exposure. Instead, EPA deferred to OSHA standards for worker protection. But these rules also [need to be updated](#) to better protect the people from our communities when they are needed to work oil spill response."

**Sumona Majumdar**, CEO for Earth Island Institute, noted that the new NCP, though imperfect, creates important structural improvements irrespective of its specific terms. "EPA's final rule addressed two key concerns. First, it clarifies the authority of state and regional planners to determine what and how products can be used safely in specific regions and areas. This provides an opportunity for civic engagement with our local and state government. Second, the final rule requires that the local area and regional plans are updated regularly to keep them aligned with current science and technology. Both were needed."

**UC Berkeley Environmental Law Clinic (ELC)** served as lead counsel in this matter and represented most plaintiffs. Said **Claudia Polsky**, ELC director and lead counsel: "The human health toll of dispersant-intensive spill response is now well known, as is the long-term harm to marine life. Although it's unfortunate that EPA did not issue a more substantively robust rule, we're hopeful that improved toxicity testing protocols and greater public availability of information about the constituents of chemical dispersants — if combined with ongoing civic engagement around this issue—will spur development of safer methods for oil spill response."

The **Center for Biological Diversity (CBD)** served as co-counsel in the NCP litigation, and represented itself. **Kristen Monsell**, oceans program legal director at CBD, agreed that the revised rule represents a notable improvement on the prior NCP. "We are happy that the EPA has localized decision-making authority during the planning phase. This is where it belongs—with the people who will live with the consequences of using dispersant or any other product. It will be critical for citizens in every state to hold their states accountable to get information and make informed decisions."

**Individuals** whose health and lives have been severely impacted by the BP Deepwater Horizon oil spill exposures are available for interview upon request. A **backgrounder** with more detail is also available upon request and will be posted on [www.alertproject.org](http://www.alertproject.org) ASAP.

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THE FOLLOWING IS NOT PART OF THE PRESS RELEASE

### **Backgrounder on EPA's Final Rule Governing Use of Chemical Dispersants and Other Products**

This background is intended to broaden the public understanding of the scope and significance of the final rule revising our nation's contingency plan for oil spill response.

The last substantial revision to the NCP was in 1994. In the intervening quarter of a century, the rules had become a tangled mess of jurisdictions that resulted in ill-informed decisions based on outdated science, misinformation, and lack of public involvement.

The Clean Water Act directs EPA to develop a national contingency plan (NCP) that includes a schedule identifying what products may be used during oil spill response, the waters where they may be used; and what quantities *can* be used safely in such waters. To address the first two objectives, EPA developed a national screening protocol to compare products based on their effectiveness and toxicity. EPA does not require use of any products.

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To meet the third objective, Congress passed the Oil Pollution Act of 1990, which established Area Committees, composed of regional, state, and local planners, and tasked them to work together to decide what products, if any, *can* be used safely in the specific ecosystems under their jurisdiction. Yet state and area planning languished due to lack of knowledge and funding.

Lacking quality information and local engagement to make informed decisions about ecosystem-specific use, area planning quickly defaulted to preauthorization plans that gave nearly carte blanche authorization to the government entity leading an oil spill response (i.e., the EPA, U.S. Coast Guard, or lead state agency, called the On Scene Coordinator or OSC) to use any products on the national list during an oil spill without first testing for their environmental effects on local waters with local species.

The dispersant catastrophe during the British Petroleum (BP) Deepwater Horizon oil spill disaster demonstrates the danger when state and local governments lack the wherewithal, knowledge, and funding to deal with oil spills, even when policy is on their side. Without advance preparation and planning to [address the concerns](#) of state and local governments, industry interests can dominate during the panic of a spill. The Coast Guard OSC during the BP Deepwater Horizon response authorized daily use of Corexit dispersants for nearly three months at the sea surface and subsea at depth – over [1.8 million gallons](#) in total, not counting use in coastal waters that was [stricken from daily reports](#). The unprecedented amount of products with [known human health hazards](#) and unknown environmental fates led to *still ongoing* [long-term harm](#) to people and to wildlife.

The BP Deepwater Horizon double disaster is what finally precipitated review of, and changes to, many policies relating to oil spill response to [mitigate harm to people](#) and wildlife from the hazards associated with [hazardous waste operations](#), including oil spill response and, specifically, the rules governing use of dispersant and other oil-spill mitigating products.

**What this new regulation does**

While the EPA closed many loopholes that have allowed toxic products to be used for decades, the agency also delegated critical decision-making authority to local, state, and regional planners, allowing them to set even more stringent standards for use of dispersant and other oil-mitigating products. The rules compel the planners to determine whether products **can** be used safely, based on a wealth of required information like specific limits for quantities and duration of use, water depth, distance to shore, proximity to populated areas, and more. In all previous spills, such information about products was not available.

But there is a catch. The rules now *allow* extended use of dispersants in significant quantities on the sea surface and at depth during very large oil spills – exactly what occurred during the BP Deepwater Horizon disaster with [deadly consequences](#) for response workers, impacted residents, and the environment.

By delegating authority to local, state, and regional planners to decide what products to use during spill response, the new rules attempt to provide tools and authority to states to better protect their wildlife and residents, i.e., the people who will live with the consequences of product use. But the rules mean nothing if the states don't use them, if the state efforts are not properly funded, or if the regional planners don't respect the states' authority.