OFFICE OF LAND AND EMERGENCY MANAGEMENT
WASHINGTON, D.C. 20460

January 13, 2025

Riki Ott, PhD
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Dear Dr. Ott:

This letter is to acknowledge the *Coalition of Gulf Coast Advocates and Allies for Environmental and Climate Justice* letter of June 23, 2022, titled *Petition to Supplement Proposed Rule* to the U.S. Environmental Protection Agency (EPA or the Agency). Your June 2022 letter is one in a series of correspondence received by the Agency over recent years requesting actions relative to the National Oil and Hazardous Substances Contingency Plan (NCP), specifically to actions under Subpart J that address the use of dispersants, and other chemical and biological agents when responding to oil spills into U.S waters. This response to your 2022 letter complements previous written responses the Agency has provided (enclosed) to correspondence received between 2012 and 2021, namely:

- November 14, 2012, letter from a *Coalition of concerned citizens* titled: *Petition for Rulemaking*
- June 2, 2014, letter from the *Coalition of concerned citizens* titled: *Supplement to Petition for Rule Making.*
- September 30, 2021, email from *Gulf Coast Advocates & Allies for Environmental Justice* titled: *Request for Immediate Action. Petition to Supplement Proposed* Rule

The Agency refers you to the recent regulatory actions that amended the Subpart J provisions of the NCP. In January of 2015, the Agency proposed to amend Subpart J of the NCP to revise the existing NCP Product Schedule listing criteria, testing protocols, and authorization of use procedures, as well as to establish new provisions for dispersant monitoring (80 FR 3383, January 22, 2015).

In July 2021, EPA published a final rule addressing the environmental monitoring of dispersant use in response to major discharges and to certain dispersant use situations. Specifically, the Agency established monitoring requirements for any subsurface use of dispersant in response to an oil discharge, surface use of dispersant in response to oil discharges of more than 100,000 U.S. gallons occurring within a 24-hour period, and surface use of dispersant for more than 96 hours after initial application in response to an oil discharge (86 FR 40234, July 27, 2021). The new provisions are to ensure the response community is equipped with the proper data and information to inform

authorization of use decisions and, if authorized by an On-Scene Coordinator (OSC), help ensure the use of dispersant products in a judicious and effective manner.

On May 31, 2023, the EPA Administrator signed a second final action addressing the remaining outstanding provisions from the 2015 proposal (June 12, 2023, 88 FR 38280). This final rule amended two distinct sets of requirements under Subpart J: (1) those related to chemical and biological agent testing and listing, and (2) those related to authorization of use. Specifically, the Agency added, amended, or removed certain regulatory definitions associated with Subpart J, and updated requirements for the authorization of agent use (including preauthorization plan development, approval, and review; case by case authorization of use; prohibited agents; storage; agent use; recovery; and reporting of use); testing of products (including efficacy and toxicity testing protocols in Appendix C of the NCP); and listing on the NCP Product Schedule (including data and information requirements, processes for adding or removing a product to or from the NCP Product Schedule, and proprietary business information claims.) The amendments are to ensure only products that perform effectively in laboratory testing are listed on the NCP Product Schedule, encouraging the development of safer and more effective spill mitigating products. These requirements are also anticipated to better target the use of these products to reduce the risks of oil discharges and response technologies to human health and the environment. When taken together, the amendments are intended to ensure that OSCs, Regional Response Teams (RRTs), and Area Committees (ACs) are equipped with data and information to support preauthorization or authorization of use decisions and help ensure the use of agent products in a judicious and effective manner.

While EPA believes that the 2021 and 2023 NCP Subpart J amendments address the concerns raised in your multiple correspondence, it is taking this opportunity to highlight how both regulatory actions speak to your specific petitions identified and addressed herein. Where EPA has taken action that revises Subpart J in a manner that meets the requests in your correspondence, EPA views the petitions as granted. Where your requests go beyond the Subpart J revisions, EPA considers those petitions denied.

November 14, 2012, letter from the Coalition of Concerned Citizens titled: Petition for Rulemaking and June 2, 2014, letter from the Coalition of concerned citizens titled: Supplement to Petition for Rule Making.

The 2012 and 2014 correspondence requested that EPA promulgate regulations under the National Contingency Plan Product Schedule to amend specific requirements under Subpart J. The responses below are to each specific request as follows:

1. Require that mechanical containment and recovery be utilized as the primary line of defense in oil spill response.

The circumstances surrounding oil discharges and the factors influencing the choice of response methods are many. While mechanical recovery devices are outside the scope of Subpart J, the Agency specifically emphasized in both the 2015 proposed amendments, and subsequently in the 2023 final amendments, that Subpart J does not state or imply that chemical or biological agents are preferred over other response options such as mechanical recovery devices. The final action highlighted dispersants are not the only response option available during a response, recognizing there are other response options (e.g., mechanical recovery) available to consider that may lower

overall environmental damage depending on the incident-specific nature of the response. The Subpart J provisions build upon the existing NCP framework, providing expanded opportunities for decisionmakers to consider any advancements in science beyond efficacy and toxicity valuations as part of listing, planning and response activities. The Agency thus denies the petition to include a specific mechanical containment and recovery requirement under Subpart J.

2. Strengthen the efficacy test protocols for products.

The final 2023 amendments updated the process for listing products on the NCP Product Schedule and improved laboratory protocols to increase the overall scientific soundness of the data collected. EPA considered relevant science related to efficacy and toxicity testing to support both new and updated laboratory testing protocols, and to expand the listing thresholds under Subpart J for chemical and biological agent products. The amended Subpart J testing and listing requirements will help ensure that only products that perform effectively in laboratory testing will be listed on the NCP Product Schedule for use in mitigating the effects of oil discharges. The amended data and information requirements, including the improved testing protocols, serve as the basis for a national level screening of chemical and biological agent products. In this manner the Agency granted the petition to strengthen the efficacy testing protocols for listing products on the NCP Product Schedule.

3. Establish a public process whereby products may be removed from the Schedule.

Section 311(d)(2)(G) of the CWA solely delegates authority to EPA to prepare a schedule identifying dispersants, other chemicals, other spill mitigating devices and substances, if any, that may be used in carrying out the NCP; and the waters and quantities in which they may be used safely. Thus, the final 2023 Subpart J amendments do not allow for entities other than EPA to remove a product from the NCP Product Schedule. Nonetheless, the amendments highlight the concern that misleading, inaccurate, or incorrect statements within a product submittal package or within language that refers to the listing of a product on the NCP Product Schedule or the Sorbent Product List may result in their improper or incorrect use. To address these concerns, the final action provides both criteria for the removal of a product and the process for the removal of a product from the NCP Product Schedule or the Sorbent Product List. The provisions include, but do not limit, causes for removal from the NCP Product Schedule or Sorbent Product List: statements or information that are misleading, inaccurate, outdated, or incorrect regarding the composition or use of the product to remove or control oil discharges made to any person, or private or public entity, including on labels, advertisements, technical literature, or electronic media, or within the product submission to EPA; any alterations to the components, concentrations, or use conditions of the product without the required proper notification to EPA; failure to print the required disclaimer on all labels, advertisements, technical literature, or electronic media; or any new or relevant information not previously considered concerning the impacts or potential impacts of the product to human health or the environment. While the Agency denies the petition to establish a public process for removing products from the NCP Product Schedule, the final 2023 Subpart J amendments provide for any person or private or public entity to bring to EPA's attention information, including relevant scientific data, that they believe may warrant consideration for EPA to remove a product from the NCP Product Schedule.

4. Immediately delist or remove certain products from the Schedule.

The final 2023 amendments recognize the importance for products on the NCP Product Schedule to reflect the amended requirements. The final amendments also recognized the importance that chemical and biological agent products on the current NCP Product Schedule be available to be considered in the event of a response during a transition to a new NCP Product Schedule. EPA denies the petition from your November 2012 letter to immediately delist or remove certain products from the NCP Product Schedule. However, the Agency did not exempt any product listed as of the effective date of the final 2023 action, December 11, 2023, from retesting and relisting requirements under the amended regulations. To this end, the amendments provide for a 24-month transition period during which all products on the NCP Product Schedule as of December 11, 2023, remain conditionally listed and available for planning and response activities. All conditionally listed products must be retested, and the new data and information be submitted to the Agency for reevaluation of the current listings by December 12, 2025. Products conditionally listed on the NCP Product Schedule for which a new submission is not received, or that upon review of their submissions do not meet the revised listing criteria, will be removed from the NCP Product Schedule at the end of the 24-month transition period. The final provisions ensure that all products transitioned to the new NCP Product Schedule meet the updated applicable efficacy and toxicity listing criteria, follow the amended testing protocols and additional testing requirements, and have submitted updated data and information to the Agency.

Importantly, listing a product on the NCP Product Schedule does not constitute approval or endorsement of that product, nor a recommendation of its use. Product listing means only that data and information have been submitted to EPA as required by Subpart J of the NCP. EPA believes potential impacts from chemical and biological agent use is situational and more appropriately considered when authorizing their use. OSCs retain discretion not to authorize the use of a product if they determine that the product's use is inappropriate considering incident specific circumstances.

5. Immediately and unconditionally prohibit use of any products that contain human health hazards and/or proprietary (CBI) chemicals within all special maritime and territorial waters of the United States, including and extending from the upper intertidal zone (18 USC §7).

The Agency recognizes that there may be health concerns associated with any response. The NCP framework, separate from Subpart J, already provides for health and welfare concerns to be addressed while not requiring the use of, or while allowing limitations on the use of any, spill response agents. It provides for OSCs and RRTs with access to robust scientific information and support from HHS and state health agencies to minimize and mitigate potential exposure to the greatest extent possible, including from the use of spill response agents. The Agency expects that the OSCs and RRTs are considering human health when planning for and responding to oil discharges.

Nonetheless, EPA notes that certain requirements under Subpart J may provide information to assist in addressing potential health and welfare concerns. For example, in addition to product information on environmental impacts, the amended final rule requires submission of the Safety Data Sheet (SDS), which includes, for example, available toxicological and health effects information. The amendments also limit the information that can be claimed as Proprietary

Business Information (PBI) as part of a product submission for listing on the NCP Product Schedule, so that product manufacturers will not be allowed to withhold information on product components. This information is available for RRTs and OSCs to consider as appropriate, and to address broader health and welfare concerns, as part of both planning and of authorization of use during a response. Given the available NCP framework that already addresses the concerns raised, the Agency denies taking further action under Subpart J.

6. Require notification 72 hours in advance of intentional releases of products on the Schedule to the public at the national, state, and local levels.

The Agency generally agrees with providing timely public reporting of product use and partially granted this petition. The final 2023 amendments include a new public notification provision to strengthen NCP provisions that already provide for the OSC to ensure all appropriate public and private interests are kept informed and that their concerns are considered throughout a response, to the extent practicable. The new Subpart J provisions require the OSC to provide for public notification, updated during a response as appropriate, specifically on chemical and biological agents used in response to an oil discharge. The information to be provided includes product name, quantity and concentrations used, duration of use, and location(s) of use. This is to give the public prompt, accurate information on the nature of the incident and the actions underway to mitigate the damage. EPA believes the new public notification provisions also address notifications at the state and local levels, including notification of Tribal governments, Area Committees, Citizens' Advisory Councils, and landowners.

EPA denies the specific petition to require 72-hour advance notification of the use of products on the NCP Product Schedule. While EPA agrees that the OSC should provide timely public notification, the Agency disagrees that the initial notification should be required to be within a set timeframe. EPA believes the OSC should have the flexibility to establish the initial timeframe to avoid potential delays in addressing roles and responsibilities under the NCP, such as obtaining the necessary concurrences and consultations from certain RRT member agencies on chemical and biological agent use.

7. Require participation of Regional Citizens Advisory Councils as members of all Regional Response Teams (RRTs) and require concurrence of all RRT members in the authorization to use products on the Schedule without exception.

The Oil Pollution Act of 1990 amended the CWA by specifically authorizing the establishment of two regional citizens advisory council groups in Alaska to provide input on two specific demonstration programs unrelated to ACP/RCP planning. Nonetheless, both public and private stakeholders have an opportunity to participate in area and regional contingency planning activities that are open to public participation (e.g., at AC meetings that are open to the public). In addition to specifying which federal agencies are to provide representatives to the national and regional response teams, EO 12777 provides that RRTs may include representatives from Indian tribal governments, and local governments as agreed upon by the states. EPA believes that the current process provides sufficient opportunities to provide input to the RRT from external stakeholders, including community advisory panels. Area and regional contingency planning provisions in the NCP that are not found in Subpart J, including RRT membership, are outside the scope of the Subpart J rulemakings. Thus, EPA denies this petition.

8. Establish updated toxicity criteria for products listed on the NCP Product Schedule under controlled laboratory conditions, including realistic field scenarios and appropriate test species known to be sensitive to the substances being tested.

The Agency granted the petition to update the toxicity criteria for listing products on the NCP Product Schedule. The final 2023 amendments revise the efficacy and toxicity testing protocols and listing criteria for all chemical and biological agents on the NCP Product Schedule. The revisions include updated laboratory protocols for dispersant and bioremediation efficacy and toxicity intended to increase the overall scientific soundness of the data collected. These amendments to Subpart J will help to ensure that only products that perform effectively in laboratory testing will be listed on the NCP Product Schedule for use in mitigating the effects of oil discharges.

In amending the NCP Product Schedule listing provisions, EPA considered relevant science related to efficacy and toxicity testing and has determined it supports both establishing new protocols and updating existing protocols under Subpart J for testing chemical and biological agent products for listing on the NCP Product Schedule. These product testing protocols, along with additional requirements for data and information, serve as the basis for a national level screening of chemical and biological agent products, and include procedures that commercial laboratories are already familiar with or can readily adopt. While standard tests required in the final rule for the purpose of listing products on the NCP Product Schedule encompass only a few species, the amended Subpart J provisions include the option for the RRT to require supplemental testing to gather scientific information relevant to a given site or geographic location and allows for better targeting chemical and biological agent use during a response.

9. Require updated toxicity testing, under controlled laboratory conditions, including realistic field scenarios and appropriate test species known to be sensitive to the substances being tested, of products prior to listing, and as a condition of retention of products already listed, on the NCP Product Schedule.

The Agency granted the petition to update toxicity testing for listing products on the NCP Product Schedule. The final 2023 Subpart J amendments revise the data and information requirements for listing products on the NCP Product Schedule or Sorbent Product List, identifying the relevant science to establish a national screening process for products to be listed. The provisions not only include updated ecotoxicity testing protocols, but also listing thresholds for ecotoxicity for chemical and biological agents on the NCP Product Schedule. Specific to dispersants, in addition to the required acute toxicity testing and listing thresholds, the amendments require developmental toxicity and sub-chronic testing for which the product would also have to meet established listing thresholds. These requirements for toxicity testing and listing threshold for listing chemical and biological agent products on the NCP Product Schedule serve to screen products for hazard.

Further, regional differences necessitate that some issues be addressed at a regional level. Standard toxicity tests required in the final rule encompass only a few species and are not necessarily intended to be protective of site-, area- or ecosystem-specific concerns. Decades of research show that species can vary substantially in sensitivity, and that ecosystems contain a diversity of species of mostly unknown sensitivity. As the NCP Product Schedule is established on a national level, regional and site-specific considerations are integrated into Subpart J through the

authorization of use process established for response activities, and through the RRT's and Area Committee's regional and area planning activities. For example, the amended provisions retain the option for the RRT to require supplemental testing, monitoring, and information that addresses incident-specific concerns for both planning and response relative to product use.

10. Require public disclosure of a product's ingredients as a condition of placement, or retention, on the NCP Product Schedule.

The Agency granted the petition to require public disclosure of components for listing products on the NCP Product Schedule. The 2023 amended Subpart J provisions limit the information that can be claimed as Proprietary Business Information (PBI) as part of a product submission for listing on the NCP Product Schedule. The limitations to what submitters are allowed to claim as PBI are intended to balance public access to information with proprietary business needs. Specifically, the amendments provide that product manufacturers submitting a product for listing on the NCP Product Schedule, or the Sorbent Product List may only assert, and the Agency will only consider, PBI claims for the concentration, maximum, minimum, and average weight percent, and units of each component in the product. All other required information submitted to EPA for listing a product on the NCP Product Schedule or the Sorbent Product List, including the identity of components and relevant health and environmental effects information, will not be considered PBI and will be available for public disclosure upon submission without further notice to the submitter. This information will also be available for RRTs and OSCs to consider as appropriate, for planning and authorization of use within the respective Area or Regional Contingency Plans.

September 30, 2021, letter from the Gulf Coast Advocates & Allies for Environmental Justice titled: Request for Immediate Action

The 2021 correspondence requested that EPA take several actions in finalizing the 2015 NCP Subpart J proposed rule. The response below is to the specific petition to withdraw the final rule issued July 27, 2021.

EPA denies this petition. Subpart J of the NCP does not state or imply that chemical or biological agents are preferred over other response options such as mechanical recovery devices. Subpart J sets forth the regulatory requirements for the use of chemical and biological agents, including provisions for product testing and listing, dispersant monitoring, and for authorization of use procedures. Nonetheless, none of the new or amended provisions mandate chemical or biological agent use, nor removes them from consideration as a response option. Rather, Subpart J provides a framework to consider their authorization, as appropriate. EPA believes this is the appropriate approach given that the circumstances surrounding oil discharges vary and therefore there are many factors influencing the choice of response methods.

The new Subpart J dispersant monitoring action published on July 27, 2021 (86 FR 40234) is to better target dispersant use and reduce the risks to the environment. The new provisions are to ensure that On-Scene Coordinators (OSCs) and Regional Response Teams (RRTs) have relevant information to support response decision-making regarding the waters and quantities in which dispersants or other chemical agents may be safely used in such waters. Given these new requirements in no way mandate dispersant use, the Agency proceeded to finalize the remaining

amendments to the listing and authorization of use provisions (88 FR 38280, June 12, 2023) without withdrawing the final monitoring action.

In summary, the 2021 and 2023 amendments include new and updated provisions for product testing and listing, for environmental monitoring of dispersant use in response to major discharges and to certain dispersant use situations, and for authorization of use procedures. These requirements provide the structure and information for the OSC to determine in each case the waters and quantities in which dispersants or other chemical agents may be safely used in such waters, if any. These determinations are to be based on all relevant circumstances, testing and monitoring data and information, and made in accordance with the authorization of use procedures, including the appropriate concurrences and consultations, found within the regulation. When taken together, the Subpart J regulatory requirements address the types of waters and the quantities of listed agents that may be authorized for use in response to oil discharges. The wide variability in waters, weather conditions, organisms living in the waters, and types of oil that might be discharged requires this approach. To that end, the final 2021 and 2023 regulatory amendments to Subpart J of the NCP collectively address the multiple concerns raised in your 2012, 2014, 2021, and 2022 correspondence. With this letter the Agency considers petitions in these correspondence discharged.

Thank you again for your letters, patience, and continued interest in regulatory requirements addressing responses to oil discharges. If you have any further questions, please contact Patricia Gioffre, Director, Regulations Implementation Division in the Office of Emergency Management at gioffre.patricia@epa.gov.

Sincerely,

BARRY BREEN

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Enclosures
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EARTH ISLAND_AX-14-001-0628 Outgoing_07232014
HEALTHY GULF_AX-22-000-0355 Outgoing_05162022

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