IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALASKA COMMUNITY ACTION ON TOXICS, 505 West Northern Lights Blvd, Suite 205 Anchorage, Alaska 99503, COOK INLETKEEPER, 3734 Ben Walters Lane Homer, Alaska 99603, FLORIDA WILDLIFE FEDERATION, 2545 Blairstone Pines Drive Tallahassee, Florida 32301, GULF RESTORATION NETWORK, 338 Baronne Street, Suite 200 New Orleans, Louisiana 70112, LOUISIANA ENVIRONMENTAL ACTION NETWORK, 162 Croydon Ave. Baton Rouge, Louisiana 70896, LOUISIANA SHRIMP ASSOCIATION, 193 Cypress St. Grand Isle, LA 70358, SIERRA CLUB, 85 Second Street, 2nd Floor San Francisco, CA 94105, and WATERKEEPER ALLIANCE, 17 Battery Place, Suite 1329 New York, NY 10004, Plaintiffs, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Ariel Rios Building 1200 Pennsylvania Avenue, NW Washington, DC 20460, and	Civil Action No. _____ **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

LISA JACKSON,
Administrator,
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460,

Defendants.

1. Alaska Community Action on Toxics, Cook Inletkeeper, Florida Wildlife Federation, Gulf Restoration Network, Louisiana Environmental Action Network, Louisiana Shrimp Association, Sierra Club, and Waterkeeper Alliance (collectively "Plaintiffs") bring this suit against the United States Environmental Protection Agency ("EPA") and EPA Administrator Lisa Jackson (collectively "Defendants") for their ongoing failure to publish a schedule that identifies dispersants and other oil spill control agents eligible for use in oil spill response, identifies the waters in which these agents may be used, and identifies the quantities of these agents that can be used safely in such waters. EPA has a mandatory duty to take this action as part of its responsibilities for preparing and publishing the National Oil and Hazardous Substances Pollution Contingency Plan ("National Contingency Plan" or "NCP"), which governs responses to discharges of oil and hazardous substances. *See* 33 U.S.C. § 1321(d)(2)(G) (2006).

2. Dispersants are chemical agents that disperse oil into small droplets, which then enter the water column. *See* National Research Council, *Oil Spill Dispersants: Efficacy and Effects* 10 (2005) ("NRC Report") ("Dispersants are chemical agents (surfactants, solvents, and other compounds) that reduce interfacial tension between oil and water in order to enhance the natural process of dispersion by generating larger numbers of small droplets of oil that are entrained into the water column by wave energy."). Dispersants do not eliminate oil but instead

move oil away from the surface of the water into the water column. *See* Nat'l Comm'n on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling* 143 (Jan. 2011) ("Report to the President"), *available at* http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER_ReporttothePresident_FINAL.pdf ("Less oil on the surface means more in the water column, spread over a wider area, potentially increasing exposure for marine life.").

3. The combination of oil and dispersant can be toxic and, depending on the specific circumstances, may be more or less toxic than the dispersant alone or the oil alone. *See id.*; *see also* NRC Report at 207. As a result, the use of dispersants in responding to an oil spill on water is a trade-off – decreasing risk to the water surface and coastal habitats while increasing risk to life in the water column and on the ocean floor – which "require[s] risk-based decisionmaking at the time of a spill." NRC Report at 2, 10.

4. Under the Clean Water Act, EPA is required to prepare the NCP, which must include a schedule ("NCP Product Schedule") identifying dispersants and other oil spill control agents eligible for use in oil spill response, the waters in which the agents may be used, and the quantities of the agents that can be used safely in such waters. *See* 33 U.S.C. § 1321(d)(2)(G).

5. EPA publishes the NCP Product Schedule identifying dispersants and other oil spill control agents that are eligible to be pre-authorized or authorized for use during an oil spill. The NCP Product Schedule, published on EPA's website, identifies neither the waters in which these agents may be used nor the quantities of these agents that can be used safely in identified waters.

6. This suit seeks declaratory and injunctive relief compelling EPA to comply with the Clean Water Act and to identify in the NCP Product Schedule the waters in which listed

dispersants and other oil spill control agents can be used and the quantities in which such dispersants and other oil spill control agents can be used safely in the identified waters.

JURISDICTION AND VENUE

7. This action arises under the Clean Water Act, 33 U.S.C. § 1365(a)(2), and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706.

8. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (action arising under the laws of the United States), 33 U.S.C. § 1365(a) (Clean Water Act citizen suit provision), and 5 U.S.C. § 703 (APA). The Court is authorized "to order the Administrator to perform [a non-discretionary] act or duty," 33 U.S.C. § 1365(a), and may issue a declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201-02.

9. Plaintiffs provided notice of this action to Defendants on October 13, 2010, and October 26, 2010. The 60-day notice period mandated by the Clean Water Act, *see* 33 U.S.C. § 1365(b)(2), expired on Monday, December 26, 2010.

10. Venue lies in the District of Columbia pursuant to 28 U.S.C. § 1391(e) because Defendant EPA has its principal office in the District, and a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in the District.

PARTIES

11. Plaintiff Alaska Community Action on Toxics ("ACAT") is a statewide non-profit environmental health research and advocacy organization established in 1997 and dedicated to protecting environmental health and achieving environmental justice in Alaska. ACAT protects the rights to clean air, clean water, and toxic-free food; works to ensure communities' right-to-know and to achieve policies based on the precautionary principle; supports the rights of indigenous peoples; and works to eliminate the release of toxic chemicals, including dispersants,

that may harm human health or the environment. ACAT helps communities implement effective strategies to limit their exposure to toxic substances and to protect and restore the ecosystems that sustain them and their way of life.

12. ACAT has over 450 members from across Alaska. These individuals include Alaska Natives who reside on St. Lawrence Island in the Bering Strait and in communities located on the coast of Norton Sound near Nome. These communities primarily consist of subsistence fisherpersons who depend on the health of the marine environment for their survival. About seventy-five percent of the subsistence fisherpersons represented by ACAT also fish commercially and are economically dependent on the health of the Bering Strait and Norton Sound. As the permitting process for oil and gas drilling off the northwest coast of Alaska has accelerated, ACAT's members have become increasingly concerned about the devastating impacts they would suffer from a potential oil spill and the resultant use of dispersants under current regulations. In the absence of information about whether dispersants are safe to use in the uniquely challenging conditions of Arctic waters and of the quantities of dispersants that might be used safely in these waters, oil spill response in Alaska that includes dispersant use would seriously threaten the interests of ACAT's members. The residents of Saint Lawrence Island and the Norton Sound coast already are exposed to a dangerous toxic load due to the bioaccumulation of toxins in the local marine life that forms the basis of their diet. The use of dispersants with unknown health and environmental impacts would further adversely affect ACAT members whose lives depend on the health of the marine ecosystem.

13. Cook Inletkeeper is a community-based nonprofit organization that combines advocacy, education, and science in its mission to protect Alaska's Cook Inlet watershed and the life it sustains. Cook Inletkeeper was founded in 1995 by Alaskans deeply impacted by the

catastrophic Exxon Valdez oil spill and concerned about rapid ecological changes unfolding in Cook Inlet. Cook Inlet fisheries generate over $1 billion a year in economic activities, and the area provides important habitat for halibut, salmon, and cod, among other species, and supports an endangered Beluga whale population. Cook Inletkeeper's vision is for clean water, healthy fish and wildlife, strong communities, clean energy, and lasting jobs in the Cook Inlet region.

14. Cook Inletkeeper has over 1,200 members and supporters throughout Alaska who use and enjoy the waters of Cook Inlet and represent diverse socioeconomic backgrounds, including commercial fisherpersons, sport fisherpersons, personal use fisherpersons, Alaska Natives and small businesses. The past few years have seen resurgence in oil and gas activity in Cook Inlet, which was among the areas impacted by the Exxon Valdez spill two decades ago. Because the use of dispersants in oil spill response is preauthorized in Coook Inlet, dispersants are very likely to be used in the event of a spill in these waters. It would take only the authorization of the federal on-scene coordinator in the event of a spill to permit the use of a dispersant for which there has been no identification of the quantities that can be used safely in specified waters. In an environment as fragile and unique as Cook Inlet, which sustains endangered species and valuable fisheries and varies dramatically from the environment in other U.S. waters in which oil spills might occur, the use of dispersants with unknown effects and at quantities with unknown impacts would adversely impact Cook Inletkeeper and its members, a vast majority of whom live, work, and recreate in the Cook Inlet region and depend on the clean water and healthy ecosystems of the Cook Inlet watershed for their livelihoods and way of life.

15. Plaintiff Florida Wildlife Federation ("FWF") is a statewide non-profit conservation and education organization with approximately 13,000 members throughout Florida. As the state affiliate of the National Wildlife Federation, FWF has been working to

preserve and manage Florida's fish, wildlife, soil, water, and plant life since 1937. FWF's goal is to promote the conservation, restoration, sound management, and wise and ethical use of Florida's natural resources so that present and future Floridians may live, work, and pursue traditional outdoor activities in a healthy and thriving natural environment.

16. FWF's mission includes the preservation, management, and improvement of Florida's marine resources, and FWF acts on behalf of its 13,000 members to protect Florida's water resources and the wildlife that use those waters as habitat. FWF members use and enjoy Gulf of Mexico waters for commercial fishing, commercial tourism and recreational fishing, among other activities, and have a strong interest in protecting these waters to ensure continued safe use and enjoyment. For example, Manley Fuller, a longtime FWF member, has a lifetime Florida State fishing license and regularly fishes in the Gulf of Mexico. Mr. Fuller also routinely walks on beaches along the Gulf of Mexico in order to look at seabirds, sea turtles, and other marine animals. The uninformed use of dispersants with unknown impacts on marine ecosystems during the Deepwater Horizon oil spill adversely affected Mr. Fuller, as it did other FWF members, who restricted their normal enjoyment of and activities in and around the Gulf of Mexico as a result. Since that time, unusual mortality rates in dolphins and sea turtles and deformities in fish, shrimp, and other marine life that may be attributed in part to the massive use of dispersants during the Deepwater Horizon disaster continue to adversely impact FWF members. A recent peer-reviewed study indicating that the use of dispersants likely disrupted the Gulf of Mexico's food chain in severe and ongoing ways further substantiates these adverse impacts to FWF members, who rely on the healthy functioning of the Gulf of Mexico ecosystem for commercial and recreational purposes.

17. Plaintiff Gulf Restoration Network ("GRN") is an incorporated, non-profit regional network of environmental, social justice, and citizens' groups and individuals committed to uniting and empowering people to protect and restore the resources of the Gulf of Mexico region for future generations. GRN, which is headquartered in New Orleans, Louisiana, currently has 44 member organizations throughout the region. GRN pursues campaigns on priority issues affecting the Gulf region, including water quality, wetlands, sustainable fisheries, and oil spill prevention and response. GRN has been actively involved in monitoring and in educating the public about the environmental effects of the BP Deepwater Horizon oil disaster and cleanup efforts. As a part of this work, GRN seeks to ensure that cleanup workers, citizens, and officials have information about the human health and environmental impacts of the dispersants that were used and are available for use in the Gulf of Mexico.

18. In addition to member organizations, GRN's membership includes more than 4,000 individuals from the Gulf States (Texas, Mississippi, Louisiana, Florida, and Alabama) and across the United States who joined GRN to protect their interests in preserving the natural beauty and healthy functioning of the Gulf ecosystem and resources. Many of GRN's members reside and recreate along the coast and in the waters of the Gulf of Mexico and are members of families who have fished, sailed, canoed, and swam in the Gulf for generations. GRN member Josephine Billups, for instance, grew up fishing in the Gulf of Mexico with her father, a deep-sea fisherman, and continues to fish recreationally in the Gulf today, along with sailing, canoeing, swimming, and walking on the beaches of the Gulf. For Ms. Billups and other GRN members, the use of dispersants in the Deepwater Horizon response in massive volumes and with little or no knowledge of the dispersants' impacts on people and on life in the water was both tragic and traumatic. Certain GRN members were aware that dispersants were used to move oil down into

the water column and ocean depths, at virtually unknown cost to the life in those waters. Some GRN members remain concerned about the safety of seafood from Gulf waters as a result of the use of dispersants and have curtailed their consumption of Gulf seafood, even though it is a central part of the regional diet and sustains the livelihoods of many in the community. The increased numbers of sick and deformed sea life that have been observed in the Gulf in the two years since the Deepwater Horizon disaster have only heightened this concern. Other GRN members are concerned about health impacts from indirect exposure to dispersants. Whether for recreational, seafood consumption, health, or other reasons, the use of dispersants for which there was no information about safe use and safe quantities injures the interests of GRN and its members in the clean water and healthy ecosystems of the Gulf of Mexico.

19. Plaintiff Louisiana Environmental Action Network ("LEAN") is a statewide non-profit membership organization dedicated to fostering communication and cooperation among citizens and groups to assess and address Louisiana's environmental problems. LEAN was founded in 1986 to help citizens develop, implement, protect, and enforce legislative and regulatory environmental standards in order to create and maintain a cleaner and healthier environment. In the wake of the Deepwater Horizon tragedy, LEAN has coordinated emergency relief, disseminated accurate information about pollution and its impacts, and worked toward restoration of the region's habitats and cultures, including ensuring that any dispersants used in the event of future such oil releases are used only if safe in the affected waters and only in safe quantities.

20. LEAN has over 100 member groups and over 1,700 individual members. Nearly all of LEAN's members live near the Gulf of Mexico, and most of them work and recreate on the waters of the Gulf. These members hold a close and abiding connection to the Gulf of Mexico

and have longstanding interests in using and enjoying the natural resources of the Gulf, as they have for generations. Following the Deepwater Horizon disaster, LEAN members participated in response efforts to help clean up the shores and waters of the Gulf. During the cleanup, these individuals were directly or indirectly exposed to the dispersants that were applied to the Gulf, and many of them fear that they have suffered or will suffer health effects related to their exposure to the chemicals found in dispersants. LEAN members also are concerned about the impacts of the application of dispersants on the wildlife and ecosystem of the Gulf of Mexico, as the unusual numbers of dead and deformed marine life potentially linked to dispersants and dispersed oil from the Deepwater Horizon disaster have severely and detrimentally impacted LEAN members' use and enjoyment of the Gulf.

21. Plaintiff Louisiana Shrimp Association ("LSA") is a statewide non-profit trade association of commercial shrimp fisherpersons and related businesses dedicated to protecting and promoting the Louisiana and domestic commercial shrimp industry as well as the unique culture and heritage of Louisiana's historic fishing community. LSA's members earn a living from the Gulf of Mexico and coastal inland waters, and depend on the health of the Gulf's marine ecosystem and shrimp populations. Having been severely impacted by the 2010 BP oil disaster, LSA's members have a strong interest in ensuring the safe use of dispersants and other oil spill control agents in response to future oil disasters.

22. LSA's approximately 600 members include fisherpersons and other individuals with direct connections to the Louisiana shrimp fishing industry. LSA members are economically dependent upon the health of the Gulf of Mexico and were harmed by the Deepwater Horizon disaster and the application of unprecedented volumes of dispersants in that response. LSA fisherpersons who are based on Barataria Bay suffered from a forty percent

decline in the white shrimp harvest during the fall of 2011, and are now reporting a fifty percent decrease in the brown shrimp harvest during the spring of 2012. These individuals have observed local shrimp populations afflicted by reproductive and genetic problems consistent with warnings listed for dispersant products, and believe that dispersants are in part to blame for the poor health and survival rate of the Gulf shrimp populations and the consequent economic losses they have suffered. LSA members also are concerned about the impacts that dispersants applied in the Gulf of Mexico may be having on their own health. During the aftermath of the Deepwater Horizon disaster, at least eleven Louisiana fisherpersons were rushed to hospitals due to respiratory problems and severe headaches they attributed to the chemicals found in dispersants. LSA members fear that their exposure to dispersants may also subject them and their families to long term health threats including cancer and miscarriages. These individuals have a strong interest in ensuring that, in the event of another well blowout or oil spill in the Gulf region or elsewhere in the waters of the United States, dispersants are applied only where they are safe and only in quantities that are safe.

23. Plaintiff Sierra Club is a nationwide non-profit organization dedicated to protecting wild places, promoting responsible use of ecosystems and resources, and educating communities to protect and restore the quality of the natural and human environment. The Sierra Club has over 600,000 members across the country. Approximately 57,000 Sierra Club members live in the Gulf States of Louisiana, Mississippi, Alabama, Florida, and Texas, and many of these members reside in parishes and counties that border the Gulf of Mexico, including counties whose waters, barrier islands, coastal marshes, and shorelines have been and continue to be adversely affected by the Deepwater Horizon oil disaster. In the aftermath of the Deepwater Horizon disaster, the Sierra Club has worked actively to protect the interests of its Gulf Coast

members by promoting meaningful response and recovery efforts that include ensuring transparency about the environmental health impacts of the disaster, including impacts from the use of dispersants in the Deepwater Horizon response.

24. Members and staff of the Sierra Club frequently use and enjoy the waters of the Gulf of Mexico and the estuarine and coastal waters, barrier islands, shorelines, and marshes that border the Gulf Coast of Louisiana, Mississippi, Alabama, Florida, and Texas. Sierra Club members engage in an array of activities in the Gulf, including swimming, canoeing, kayaking, sailing, sport boating, wildlife observation, photography, personal and commercial research, and recreational, commercial, and sport fishing. The poorly substantiated use of dispersants in unprecedented quantities and in novel applications (i.e. sub-sea) during the Deepwater Horizon disaster injured the interests of Sierra Club members in their use and enjoyment of the Gulf of Mexico. The lack of knowledge about the dispersants' safety in the unprecedented quantities in which they were used – a result of EPA's failure to identify the waters in which dispersants can be used and the quantities in which dispersants can be used safely in such waters – adversely impacted the interests of Sierra Club members, such as Carol Adams-Davis. Sierra Club members including Ms. Davis limited their visits to the Gulf; others felt their enjoyment of activities on the Gulf severely dampened by knowledge of the underwater plume of dispersed oil caused in part by dispersants; still others limited consumption of seafood from the Gulf and continue to do so today, as dolphins and sea turtles show increased mortality rates, and deformities in fish, corals, crabs, and shrimp are observed throughout the region. These injuries to Sierra Club and its members remain as offshore drilling continues in the Gulf of Mexico, where dispersants are pre-approved for use without knowledge of the waters in which such

dispersants can be used or the quantities in which such dispersants can be used safely in identified waters.

25. Plaintiff Waterkeeper Alliance is a non-profit coalition of grassroots environmental advocates dedicated to patrolling and protecting over 100,000 miles of rivers, streams, and coastlines in North America and around the world. Waterkeeper Alliance, together with its local affiliate programs, seeks to restore and maintain all waterways as fishable, swimmable, and drinkable waters. Waterkeeper Alliance has a significant presence in the Gulf of Mexico, where seven local programs – the Apalachicola Riverkeeper, Atchafalaya Basinkeeper, Emerald Coastkeeper, Galveston Baykeeper, Louisiana Bayoukeeper, Lower Mississippi Riverkeeper and Mobile Baykeeper – fight daily for a clean and healthy Gulf. With its commitment to local communities' right to clean water and vision of fishable, swimmable, and drinkable waterways, and its specific mission to preserve and protect the Gulf of Mexico, Waterkeeper Alliance has a strong interest in ensuring the careful and safe use of dispersants in waters where oil spills are likely to occur.

26. Waterkeeper Alliance is a membership organization with two classes of members. One class is comprised of the nearly 200 local affiliates chartered and licensed by Waterkeeper Alliance, including the seven local programs in the Gulf of Mexico. A second class of Waterkeeper Alliance members is comprised of individual members who reside in communities across the United States, Canada, and elsewhere. At present, more than 46,000 individual members support Waterkeeper Alliance through monetary contributions. Some of these members hold close and vital ties to the waters of the Gulf of Mexico – whether as lifelong residents along the Gulf, regular visitors to the coast and the barrier islands and waters of the Gulf, or commercial fisherpersons who rely on the Gulf and the life it sustains. These members

have been detrimentally impacted by EPA's failure to identify the waters in which dispersants can be used in the event of an oil spill and the quantities in which dispersants can be used safely in such waters. Waterkeeper Alliance member Deborah Kuhns, for example, is a commercial and subsistence fisherperson whose wellbeing was directly impacted by the use of dispersants during the BP Deepwater Horizon disaster and who remains concerned about the impacts on her fishing business from the submerged clouds of dispersed oil that now sit on the floor of some areas of the Gulf as a result of the use of dispersants. Ms. Kuhns also is concerned about potential adverse health impacts to herself and her family as a result of their consumption of shrimp, crabs, and fish exposed to dispersants.

27. Defendant EPA is a federal agency with its principal offices located at 1200 Pennsylvania Avenue, NW, Washington, DC 20460. EPA is the agency responsible under the Clean Water Act for preparing and publishing a schedule of dispersants, other chemicals, and other spill mitigating devices and substances.

28. Defendant Lisa Jackson is the Administrator of EPA and in that capacity has final responsibility for actions taken by EPA. Administrator Jackson's principal place of business is located in Washington, DC. Administrator Jackson is sued in her official capacity.

EPA'S DUTY TO PREPARE AND PUBLISH THE NCP PRODUCT SCHEDULE

29. The NCP is the federal government's comprehensive scheme for responding to oil spills and hazardous substances releases. *See* 40 C.F.R. § 300.1 ("The purpose of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) is to provide the organizational structure and procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants."). The first NCP was developed in 1968 in response to the catastrophic oil spill from the oil tanker *Torrey Canyon* off the coast of

England. *See* U.S. EPA, Emergency Management, http://www.epa.gov/oem/content/lawsregs/ncpover.htm (last visited Aug. 3, 2012).

30. In 1972, Congress passed the Clean Water Act of 1972, Pub. L. 92-500, 86 Stat. 816 (Oct. 1972), directing the President to "prepare and publish a National Contingency Plan for removal of oil and hazardous substances . . . [which] shall provide for efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges, including containment, dispersal, and removal of oil and hazardous substances, and shall include, but not be limited to—":

> (G) a schedule, prepared in cooperation with the States, identifying (i) dispersants and other chemicals, if any, that may be used in carrying out the Plan, (ii) the waters in which such dispersants and chemicals may be used, and (iii) the quantities of such dispersant or chemical which can be used safely in such waters, which schedule shall provide in the case of any dispersant, chemical, or waters not specifically identified in such schedule that the President, or his delegate, may, on a case-by-case basis, identify the dispersants and other chemicals which may be used, the waters in which they may be used, and the quantities which can be used safely in such waters . . . .

Id., 86 Stat. 816, 865-66. The President subsequently delegated to EPA the authority to prepare and publish this schedule of dispersants and other chemicals. *See* Exec. Order No. 11,735 § 1, 38 Fed. Reg. 21,243 (Aug. 3, 1973).

31. Through various amendments to the Clean Water Act over the course of the last four decades, this provision mandating the preparation and publication of the NCP Product Schedule has remained substantively the same. In 1990, the Oil Pollution Act, enacted in the aftermath of the Exxon Valdez oil spill in 1989, overhauled the nation's response to oil spills and amended the Clean Water Act's NCP provisions. *See* Oil Pollution Act of 1990, Pub. L. 101-380, 104 Stat. 484 (1990); *see also* Conference Report on H.R. 1465, Oil Pollution Act of 1990, 136 Cong. Rec. H6933-02, 1990 WL 111529 (Aug. 3, 1990). The Oil Pollution Act's

amendment to the Clean Water Act retained the provision requiring the preparation and publication of the NCP Product Schedule. *See* Oil Pollution Act of 1990 § 4201, Pub. L. 101-380, 104 Stat. 484, 523-26 (1990).

32. Specifically, as it reads today, the Clean Water Act states:

> The President shall prepare and publish a National Contingency Plan for removal of oil and hazardous substances . . . [which] shall provide for efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges, including containment, dispersal, and removal of oil and hazardous substances, and shall include, but not be limited to, the following: . . .
>
> **(G)** A schedule, prepared in cooperation with the States, identifying—
>
> **(i)** dispersants, other chemicals, and other spill mitigating devices and substances, if any, that may be used in carrying out the Plan,
>
> **(ii)** the waters in which such dispersants, other chemicals, and other spill mitigating devices and substances may be used, and
>
> **(iii)** the quantities of such dispersant, other chemicals, or other spill mitigating device or substance which can be used safely in such waters,
>
> which schedule shall provide in the case of any dispersant, chemical, spill mitigating device or substance, or waters not specifically identified in such schedule that the President, or his delegate, may, on a case-by-case basis, identify the dispersants, other chemicals, and other spill mitigating devices and substances which may be used, the waters in which they may be used, and the quantities which can be used safely in such waters.

33 U.S.C. § 1321(d)(1), (2)(G) (as amended by the Oil Pollution Act of 1990 § 4201, Pub. L. 101-380, 104 Stat. 484, 523-26 (1990)).

33. The President has delegated to EPA responsibility for preparing and publishing the NCP, including the NCP Product Schedule. *See* Exec. Order No. 12,777 § 8(b), 56 Fed. Reg. 54,757, 54,768 (Oct. 18, 1991).

EPA REGULATIONS IMPLEMENTING THE NCP PRODUCT SCHEDULE

34. In 1994, EPA promulgated a revised NCP reflecting the Oil Pollution Act's amendments. *See* National Oil and Hazardous Substances Pollution Contingency Plan, 59 Fed. Reg. 47,384 (Sept. 15, 1994) (codified at 40 C.F.R. Pts. 9, 300). Subpart J of the NCP, "Use of Dispersants and Other Chemicals," contains the regulations implementing the NCP Product Schedule. *See* 59 Fed. Reg. 47,453 (Sept. 15, 1994) (codified at 40 C.F.R. §§ 300.900-300.920) ("Section 311(d)(2)(G) of the CWA requires that EPA prepare a schedule of dispersants, other chemicals, and other spill mitigating devices and substances, if any, that may be used in carrying out the NCP. This subpart makes provisions for such a schedule.").

35. The Subpart J regulations set forth the procedure for adding a product to the NCP Product Schedule. *See* 40 C.F.R. §§ 300.915, 300.920. Specifically, to add a dispersant or other product to the NCP Product Schedule, an applicant must submit technical product data specified in section 300.915. *See id.* § 300.920. Slightly different data requirements are mandated for dispersants, *id.* § 300.915(a); surface washing agents, *id.* § 300.915(b); surface collecting agents, *id.* § 300.915(c); bioremediation agents, *id.* § 300.915(d); miscellaneous oil spill control agents, *id.* § 300.915(f); and mixed products, *id.* § 300.915(h), but generally the required data includes the contact information of the manufacturer, vendor, and primary distributors; special handling and worker precautions for storage and application; shelf life; recommended application procedures, concentrations, and conditions for use; and components.

36. In addition to these basic data requirements, EPA requires certain limited toxicity and effectiveness testing. All products except bioremediation agents are tested for toxicity using a standard method set forth in the regulations but, importantly, no product is required to meet any particular safety threshold in order to be listed on the NCP Product Schedule. *See id.* §

300.915(a)(8), (b)(7), (c)(7), (f)(8); *see also id.* Pt. 300, App. C § 3.0 ("Revised Standard Dispersant Toxicity Test").

37. The Revised Standard Dispersant Toxicity Test used to assess a product's toxicity tests only for acute impacts under laboratory conditions. The test involves exposing two aquatic species to varying concentrations of the test product, both by itself and mixed with No. 2 fuel oil, to determine mortality rates at the end of either 48 or 96 hours, depending on the species. *See id.* Pt. 300, App. C. § 3.1. This limited toxicity testing required by EPA means that very little is known by EPA or the public about a product's safety, including its long-term and chronic impacts.

38. EPA requires that manufacturers "submit test results and supporting data, along with a certification signed by responsible corporate officials of the manufacturer and laboratory . . . ," *id.* § 300.915(a)(8), but the actual results of the acute mortality test – that is the acute toxicity of the product – need not fall below any particular threshold in order for a product to be listed on the NCP Product Schedule. In other words, a product need not be "safe" to be listed on the NCP Product Schedule.

39. As for effectiveness, EPA requires such testing only for dispersants and bioremediation agents. EPA has specified that "[a] dispersant must attain an effectiveness value of 45 percent or greater to be added to the NCP Product Schedule." *Id.* § 300.915(a)(7). Appendix C to Part 300 of the regulations describes the Swirling Flask Dispersant Effectiveness Test that manufacturers must perform to ascertain a dispersant's effectiveness value. *See id.* Pt. 300, App. C § 2.0. Dispersant manufacturers are merely "encouraged to provide data on product performance under conditions other than those captured by [the laboratory test described in Appendix C]." 40 C.F.R. § 300.915(a)(7).

40. EPA requires effectiveness testing for bioremediation agents as well, but sets no thresholds or standards of effectiveness that the bioremediation agent must meet before listing on the NCP Product Schedule. *See id.* § 300.915(d)(7) & Pt. 300, App. C § 4.0.

41. The remaining types of products – that is, surface washing agents, surface collecting agents, and miscellaneous oil spill control agents – are not required to be tested for effectiveness at all. *Compare* 40 C.F.R. § 300.915(a), *with id.* §§ 300.915(b), (c), (f). For all non-dispersant products (surface washing agents, surface collecting agents, bioremediation agents, and miscellaneous oil spill control agents) for which EPA does not require a particular level of effectiveness, "[i]f EPA determines that the required data were submitted, EPA will add the product to the Schedule." *Id.* § 300.920(b)(1).

EPA'S PUBLICATION OF THE NCP PRODUCT SCHEDULE

42. EPA publishes the NCP Product Schedule on its website. *See* Office of Emergency Mgmt., EPA, NCP Product Schedule (Aug. 2012), *available at* http://www.epa.gov/oem/docs/oil/ncp/schedule.pdf. The Product Schedule also may be obtained from the Emergency Response Division at EPA. *See* 40 C.F.R. § 300.905(a)(1).

43. The most recent version of the NCP Product Schedule, updated August 1, 2012, lists 111 products: 18 dispersants, 52 surface washing agents, 2 surface collecting agents, 25 bioremediation agents, and 14 miscellaneous oil spill control agents. *See* NCP Product Schedule at 3. The Schedule identifies each product's name; its type; the name and contact information of the submitter; and the dates the product was listed, previously removed, or relisted.

44. The NCP Product Schedule does not identify the waters in which such products may be used or the quantities of such products that can be used safely in identified waters.

45. EPA listed the miscellaneous oil spill control agent Aqua N-Cap™ Polymer on the NCP Product Schedule on November 9, 2006, and this product remains on the Product Schedule. *See id.* at 23. EPA has not identified the waters in which Aqua N-Cap™ Polymer may be used or the quantities in which it can be used safely in such waters.

46. EPA listed the surface washing agent E-Safe© on the NCP Product Schedule on November 27, 2006, and this product remains on the Product Schedule. *See id.* at 11. EPA has not identified the waters in which E-Safe© may be used or the quantities in which it can be used safely in such waters.

47. EPA listed the surface washing agent Sheen-Magic© on the NCP Product Schedule on November 27, 2006, and this product remains on the Product Schedule. *See id*. EPA has not identified the waters in which Sheen-Magic© may be used or the quantities in which it can be used safely in such waters.

48. EPA listed the microbiological culture Spillremed (Marine)® on the NCP Product Schedule on January 8, 2007, and this product remains on the Product Schedule. *See id.* at 19. EPA has not identified the waters in which Spillremed (Marine)® may be used or the quantities in which it can be used safely in such waters.

49. EPA listed the nutrient additive JE 1058BS on the NCP Product Schedule on December 3, 2007, and this product remains on the Product Schedule. *See id.* EPA has not identified the waters in which JE 1058BS may be used or the quantities in which it can be used safely in such waters.

50. EPA listed the surface washing agent Procleans on the NCP Product Schedule on June 16, 2008, and this product remains on the Product Schedule. *See id*. at 11. EPA has not

identified the waters in which Procleans may be used or the quantities in which it can be used safely in such waters.

51. EPA relisted the miscellaneous oil spill control agent Elastol on the NCP Product Schedule on June 30, 2008, and this product remains on the Product Schedule. *See id*. at 23. EPA has not identified the waters in which Elastol may be used or the quantities in which it can be used safely in such waters.

52. EPA listed the dispersant Nokomis 3-AA on the NCP Product Schedule on July 31, 2008, and this product remains on the Product Schedule. *See id.* at 6. EPA has not identified the waters in which Nokomis 3-AA may be used or the quantities in which it can be used safely in such waters.

53. EPA listed the microbiological culture Bioworld Bioremediation Hydrocarbon Treatment Products on the NCP Product Schedule on November 24, 2008, and this product remains on the Product Schedule. *See id* at 19. EPA has not identified the waters in which Bioworld Bioremediation Hydrocarbon Treatment Products may be used or the quantities in which it can be used safely in such waters.

54. EPA listed the surface washing agent Spillclean on the NCP Product Schedule on March 30, 2009, and this product remains on the Product Schedule. *See id* at 11. EPA has not identified the waters in which Spillclean may be used or the quantities in which it can be used safely in such waters.

55. EPA relisted the enzyme additive Oil Spill Eater II on the NCP Product Schedule on September 22, 2009, and this product remains on the Product Schedule. *See id.* at 18. EPA has not identified the waters in which Oil Spill Eater II may be used or the quantities in which it can be used safely in such waters.

56. EPA listed the surface washing agent TXChem HE-1000™ on the NCP Product Schedule on March 15, 2010, and this product remains on the Product Schedule. *See id* at 11. EPA has not identified the waters in which TXChem HE-1000™ may be used or the quantities in which it can be used safely in such waters.

57. EPA listed the surface washing agent Nokomis 5-W on the NCP Product Schedule on May 11, 2010, and this product remains on the Product Schedule. *See id.* at 12. EPA has not identified the waters in which Nokomis 5-W may be used or the quantities in which it can be used safely in such waters.

58. EPA listed the miscellaneous oil spill control agent Oil Bond® on the NCP Product Schedule on June 3, 2010, and this product remains on the Product Schedule. *See id.* at 23. EPA has not identified the waters in which Oil Bond® may be used or the quantities in which it can be used safely in such waters.

59. EPA listed the surface washing agent G-Marine OSC-1809 on the NCP Product Schedule on July 2, 2010, and this product remains on the Product Schedule. *See id.* at 12. EPA has not identified the waters in which G-Marine OSC-1809 may be used or the quantities in which it can be used safely in such waters.

60. EPA listed the surface washing agent Green Beast ™ Oil Spill & Odor Remediator on the NCP Product Schedule on July 6, 2010, and this product remains on the Product Schedule. *See id.* EPA has not identified the waters in which Green Beast ™ Oil Spill & Odor Remediator may be used or the quantities in which it can be used safely in such waters.

61. EPA relisted the surface washing agent De-Solv-It Industrial Formula on the NCP Product Schedule on July 7, 2010, and this product remains on the Product Schedule. *See id.* at

8. EPA has not identified the waters in which De-Solv-It Industrial Formula may be used or the quantities in which it can be used safely in such waters.

62. EPA listed the surface washing agent Tulxa on the NCP Product Schedule on July 13, 2010, and this product remains on the Product Schedule. *See id* at 12. EPA has not identified the waters in which Tulxa may be used or the quantities in which it can be used safely in such waters.

63. EPA listed the surface washing agent Marine Green Clean™ on the NCP Product Schedule on July 28, 2010, and this product remains on the Product Schedule. *See id.* EPA has not identified the waters in which Marine Green Clean™ may be used or the quantities in which it can be used safely in such waters.

64. EPA listed the surface washing agent Marine Green Clean Plus™ on the NCP Product Schedule on July 28, 2010, and this product remains on the Product Schedule. *See id.* at 13. EPA has not identified the waters in which Marine Green Clean Plus™ may be used or the quantities in which it can be used safely in such waters.

65. EPA listed the surface washing agent Clean Green on the NCP Product Schedule on August 5, 2010, and this product remains on the Product Schedule. *See id.* EPA has not identified the waters in which Clean Green may be used or the quantities in which it can be used safely in such waters.

66. EPA listed the surface washing agent SOC 10 (Surface Oil Cleaner) on the NCP Product Schedule on August 5, 2010, and this product remains on the Product Schedule. *See id*. EPA has not identified the waters in which SOC 10 may be used or the quantities in which it can be used safely in such waters.

67. EPA listed the surface washing agent Biograss® Extra on the NCP Product Schedule on August 17, 2010, and this product remains on the Product Schedule. *See id.* EPA has not identified the waters in which Biograss® Extra may be used or the quantities in which it can be used safely in such waters.

68. EPA listed the miscellaneous oil spill control agent Opflex® The Green Stuff™ on the NCP Product Schedule on August 17, 2010, and this product remains on the Product Schedule. *See id.* at 23. EPA has not identified the waters in which Opflex® The Green Stuff™ may be used or the quantities in which it can be used safely in such waters.

69. EPA listed the miscellaneous oil spill control agent Gelco 200 on the NCP Product Schedule on August 17, 2010, and this product remains on the Product Schedule. *See id.* EPA has not identified the waters in which Gelco 200 may be used or the quantities in which it can be used safely in such waters.

70. EPA listed the surface washing agent Environmental 1 Crude Oil Cleaner on the NCP Product Schedule on August 25, 2010, and this product remains on the Product Schedule. *See id.* at 13. EPA has not identified the waters in which Environmental 1 Crude Oil Cleaner may be used or the quantities in which it can be used safely in such waters.

71. EPA listed the surface washing agent Sandklene 950 on the NCP Product Schedule on October 4, 2010, and this product remains on the Product Schedule. *See id.* EPA has not identified the waters in which Sandklene 950 may be used or the quantities in which it can be used safely in such waters.

72. EPA listed the microbiological culture Munox SR® on the NCP Product Schedule on October 28, 2010, and this product remains on the Product Schedule. *See id* at 19. EPA has

not identified the waters in which Munox SR® may be used or the quantities in which it can be used safely in such waters.

73. EPA listed the surface washing agent De-Solv-It Clean Away APC Super Concentrate on the NCP Product Schedule on November 10, 2010, and this product remains on the Product Schedule. *See id.* at 14. EPA has not identified the waters in which De-Solv-It Clean Away APC Super Concentrate may be used or the quantities in which it can be used safely in such waters.

74. EPA listed the surface washing agent EO All Purpose Soap-Lavender on the NCP Product Schedule on November 17, 2010, and this product remains on the Product Schedule. *See id.* at 14. EPA has not identified the waters in which EO All Purpose Soap-Lavender may be used or the quantities in which it can be used safely in such waters.

75. EPA listed the microbiological culture/ nutrient additive Soil Rx on the NCP Product Schedule on November 17, 2010, and this product remains on the Product Schedule. *See id.* at 20. EPA has not identified the waters in which Soil Rx may be used or the quantities in which it can be used safely in such waters.

76. EPA listed the surface washing agent Dynamic Green™ on the NCP Product Schedule on December 7, 2010, and this product remains on the Product Schedule. *See id.* at 14. EPA has not identified the waters in which Dynamic Green™ may be used or the quantities in which it can be used safely in such waters.

77. EPA listed the surface washing agent Veru-Solve™ Marine 200 HP on the NCP Product Schedule on December 9, 2010, and this product remains on the Product Schedule. *See id.* at 14. EPA has not identified the waters in which Veru-Solve™ Marine 200 HP may be used or the quantities in which it can be used safely in such waters.

78. EPA listed the microbiological culture/ nutrient additive Pro-Act on the NCP Product Schedule on December 15, 2010, and this product remains on the Product Schedule. *See id.* at 20. EPA has not identified the waters in which Pro-Act may be used or the quantities in which it can be used safely in such waters.

79. EPA listed the microbiological culture Biorem-2000 Oil Digester™ on the NCP Product Schedule on December 15, 2010, and this product remains on the Product Schedule. *See id.* EPA has not identified the waters in which Biorem-2000 Oil Digester™ may be used or the quantities in which it can be used safely in such waters.

80. EPA listed the surface washing agent Naturama G3 A-5 on the NCP Product Schedule on January 26, 2011, and this product remains on the Product Schedule. *See id.* at 14. EPA has not identified the waters in which Naturama G3 A-5 may be used or the quantities in which it can be used safely in such waters.

81. EPA listed the microbiological culture Drylet™ MB Bioremediation on the NCP Product Schedule on February 22, 2011, and this product remains on the Product Schedule. *See id* at 20. EPA has not identified the waters in which Drylet™ MB Bioremediation may be used or the quantities in which it can be used safely in such waters.

82. EPA listed the surface washing agent Safe Kleen on the NCP Product Schedule on February 25, 2011, and this product remains on the Product Schedule. *See id.* at 15. EPA has not identified the waters in which Safe Kleen may be used or the quantities in which it can be used safely in such waters.

83. EPA listed the surface washing agent Coriba 700 SR on the NCP Product Schedule on February 25, 2011, and this product remains on the Product Schedule. *See id.* EPA

has not identified the waters in which Coriba 700 SR may be used or the quantities in which it can be used safely in such waters.

84. EPA listed the surface washing agent Coriba 713 SR on the NCP Product Schedule on February 25, 2011, and this product remains on the Product Schedule. *See id.* EPA has not identified the waters in which Coriba 713 SR may be used or the quantities in which it can be used safely in such waters.

85. EPA listed the dispersant Supersperse™ WAO2500 on the NCP Product Schedule on March 23, 2011, and this product remains on the Product Schedule. *See id.* at 6. EPA has not identified the waters in which Supersperse™ WAO2500 may be used or the quantities in which it can be used safely in such waters.

86. EPA listed the surface washing agent JEP-Marine Clean on the NCP Product Schedule on May 11, 2011, and this product remains on the Product Schedule. *See id.* at 15. EPA has not identified the waters in which JEP-Marine Clean may be used or the quantities in which it can be used safely in such waters.

87. EPA listed the microbiological culture Dualzorb® on the NCP Product Schedule on May 18, 2011, and this product remains on the Product Schedule. *See id* at 20. EPA has not identified the waters in which Dualzorb® may be used or the quantities in which it can be used safely in such waters.

88. EPA listed the nutrient additive Remediade™ on the NCP Product Schedule on June 8, 2011, and this product remains on the Product Schedule. *See id.* at 21. EPA has not identified the waters in which Remediade™ may be used or the quantities in which it can be used safely in such waters.

89. EPA listed the surface washing agent Ethos Clean on the NCP Product Schedule on June 28, 2011, and this product remains on the Product Schedule. *See id.* at 15. EPA has not identified the waters in which Ethos Clean may be used or the quantities in which it can be used safely in such waters.

90. EPA listed the surface washing agent OSR-10 on the NCP Product Schedule on June 28, 2011, and this product remains on the Product Schedule. *See id.* EPA has not identified the waters in which OSR-10 may be used or the quantities in which it can be used safely in such waters.

91. EPA listed the surface washing agent Accell Clean™ on the NCP Product Schedule on July 13, 2011, and this product remains on the Product Schedule. *See id* at 16. EPA has not identified the waters in which Accell Clean™ may be used or the quantities in which it can be used safely in such waters.

92. EPA listed the dispersant Accell Clean™ DWD on the NCP Product Schedule on July 18, 2011, and this product remains on the Product Schedule. *See id.* at 6. EPA has not identified the waters in which Accell Clean™ DWD may be used or the quantities in which it can be used safely in such waters.

93. EPA listed the microbiological culture/ enzyme additive/ nutrient additive Ergofit Micro Mix Aqua on the NCP Product Schedule on July 27, 2011, and this product remains on the Product Schedule. *See id.* at 21. EPA has not identified the waters in which Ergofit Micro Mix Aqua may be used or the quantities in which it can be used safely in such waters.

94. EPA listed the nutrient additive Shamantra Green on the NCP Product Schedule on August 17, 2011, and this product remains on the Product Schedule. *See id.* EPA has not

identified the waters in which Shamantra Green may be used or the quantities in which it can be used safely in such waters.

95. EPA listed the microbiological culture Sump Safe Bio-Reclaim on the NCP Product Schedule on October 13, 2011, and this product remains on the Product Schedule. *See id.* EPA has not identified the waters in which Sump Safe Bio-Reclaim may be used or the quantities in which it can be used safely in such waters.

96. EPA listed the surface washing agent EPA Oil Field Solution™ on the NCP Product Schedule on October 13, 2011, and this product remains on the Product Schedule. *See id.* at 16. EPA has not identified the waters in which EPA Oil Field Solution™ may be used or the quantities in which it can be used safely in such waters.

97. EPA listed the dispersant FFT-Solution™ on the NCP Product Schedule on November 1, 2011, and this product remains on the Product Schedule. *See id.* at 7. EPA has not identified the waters in which FFT-Solution™ may be used or the quantities in which it can be used safely in such waters.

98. EPA listed the surface washing agent Petromax PSC 3 on the NCP Product Schedule on March 5, 2012, and this product remains on the Product Schedule. *See id* at 16. EPA has not identified the waters in which Petromax PSC 3 may be used or the quantities in which it can be used safely in such waters.

99. EPA listed the dispersant Marine D-Blue Clean™ on the NCP Product Schedule on April 23, 2012, and this product remains on the Product Schedule. *See id.* at 7. EPA has not identified the waters in which Marine D-Blue Clean™ may be used or the quantities in which it can be used safely in such waters.

100. EPA listed the miscellaneous oil spill control agent Norsorex® APX on the NCP Product Schedule on April 26, 2012, and this product remains on the Product Schedule. *See id.* at 24. EPA has not identified the waters in which Norsorex® APX may be used or the quantities in which it can be used safely in such waters.

101. EPA listed the surface collecting agent Thickslick 6535 on the NCP Product Schedule on June 29, 2012, and this product remains on the Product Schedule. *See id* at 16. EPA has not identified the waters in which Thickslick 6535 may be used or the quantities in which it can be used safely in such waters.

102. EPA listed the surface collecting agent Siltech Op-40 on the NCP Product Schedule on June 29, 2012, and this product remains on the Product Schedule. *See id.* EPA has not identified the waters in which Siltech Op-40 may be used or the quantities in which it can be used safely in such waters.

103. EPA listed the surface washing agent Green Technologies Solutions-Oil Recovery on the NCP Product Schedule on July 12, 2012, and this product remains on the Product Schedule. *See id.* at 16. EPA has not identified the waters in which Green Technologies Solutions-Oil Recovery may be used or the quantities in which it can be used safely in such waters.

THE IMPACTS OF EPA'S FAILURE TO INCLUDE REQUIRED INFORMATION IN THE NCP PRODUCT SCHEDULE

104. Listing of a product on the NCP Product Schedule indicates that the product "may be authorized for use on oil discharges" either through preauthorization or authorization at the time of a spill. 40 C.F.R. § 300.905(a) (2000).

105. Regional Response Teams ("RRT") and Area Committees are required to address "as part of their planning activities, the desirability of using appropriate dispersants, surface

washing agents, surface collecting agents, bioremediation agents, or miscellaneous oil spill control agents *listed on the NCP Product Schedule*." *Id.* § 300.910(a) (emphasis added). Where RRTs and Area Committees develop a preauthorization plan addressing when such products should and should not be used, and the preauthorization plan is approved by the appropriate federal officials and the states with jurisdiction over the waters to which the plan applies, an On-Scene Coordinator at the time of a spill may authorize the use of the products without any further approvals or testing. *See id.* § 300.910(a).

106. When spills occur in areas not addressed by a preauthorization plan, the On-Scene Coordinator, with the concurrence of and in consultation with the appropriate federal officials and the state with jurisdiction over the threatened waters, "may authorize the use of dispersants, surface washing agents, surface collecting agents, bioremediation agents, or miscellaneous oil spill control agents on the oil discharge, *provided that the products are listed on the NCP Product Schedule.*" *Id.* § 300.910(b) (emphasis added).

107. The only circumstance under which a product not listed on the NCP Product Schedule may be used is when "in the judgment of the [On-Scene Coordinator], the use of the product is necessary to prevent or substantially reduce a hazard to human life." *Id.* § 300.910(d).

108. Because products listed on the NCP Product Schedule are presumptively the ones that will be used in the event of a spill, EPA's failure to include statutorily-required information about the waters and quantities in which such products may be used safely in these waters has significant adverse impacts on the nation's ability to respond to oil spills. EPA's failure to obtain, and in turn include on the NCP Product Schedule, this statutorily-mandated information has seriously hobbled emergency response to oil spills, most recently in the Deepwater Horizon oil disaster.

109. During that uncontrolled discharge of nearly 5 million barrels of oil into the Gulf of Mexico, beginning in April 2010, responders applied approximately 1.84 million gallons of the dispersants Corexit EC9500A and Corexit EC9527A – 1. 07 million gallons on the ocean's surface and 771,000 gallons subsea – "using novel methods and unprecedented volumes." Report to the President at 143.

110. Dispersant use in the Gulf of Mexico had been preauthorized by the relevant regional response teams. *See* Federal Region VI Regional Response Team, RRT-6 FOSC Dispersant Pre-Approval Guidelines and Checklist 1 (2001) ("Region 6 Pre-Approval"), *available at* http://www.losco.state.la.us/pdf_docs/RRT6_Dispersant_Preapproval_2001.pdf; *see also* Region IV Regional Response Team Response and Technology Committee Dispersant Workgroup, Use of Dispersants in Region IV 3 (1996) ("Region 4 Pre-Approval"), *available at* http://www.nrt.org/production/NRT/RRTHome.nsf/Resources/DUP/$file/1-RRT4DISP.PDF. "Under the terms of the preauthorization, Corexit was a permissible dispersant because EPA listed it on the National Contingency Plan Product Schedule." Report to the President at 144; *see also* Region 6 Pre-Approval at 1 ("The only requirement for dispersant product selection is that the dispersant must be included on the NCP Product Schedule and considered appropriate by the FOSC [Federal On-Scene Coordinator] for existing environmental and physical conditions."); Region 4 Pre-Approval at 12 ("Only those products specifically listed in the EPA National Contingency Plan's (NCP's) Product Schedule as dispersants will be considered for use during dispersant application operations.").

111. EPA's listing of Corexit on the NCP Product Schedule therefore placed an imprimatur on that product's use in response to the oil discharge, yet EPA's failure to list the "waters in which [Corexit] may be used" and "the quantities of [Corexit] which can be used

safely in such waters," 33 U.S.C. § 1321(d)(2)(G)(ii)-(iii), as required, translated into uninformed decision-making even as millions of gallons of the dispersant were being released into the Gulf of Mexico.

112. Response efforts were marred by EPA's own lack of information about the quantities of dispersants that could be safely used in the Gulf of Mexico. On May 20, 2010, nearly one month after BP started using Corexit in the Deepwater Horizon response, EPA directed BP to identify within 24 hours and to begin using within 72 hours a less toxic alternative listed on the Product Schedule on grounds that dispersant was being used "in unprecedented volumes and because much is unknown about the underwater use of dispersants." Press Release, Envtl. Prot. Agency, EPA: BP Must Use Less Toxic Dispersant (May 20, 2010), http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/0897f55bc6d9a3ba852577290067f67f!OpenDocument; *see also* Envtl. Prot. Agency, Dispersant Monitoring and Assessment Directive – Addendum 2 (May 20, 2010), *available at* http://www.epa.gov/bpspill/dispersants/directive-addendum2.pdf. Administrator Jackson explained EPA's rationale for issuing this directive:

> We are still deeply concerned about these things we don't know. The long-term effects on aquatic life are still unknown, and we must make sure that the dispersants that are used are as non-toxic as possible. Those unknowns and the lengthening period of this crisis are why we last week directed BP to look for more effective, less toxic alternatives to their current dispersants. We felt it was important to ensure that all possible options were being explored in the hopes that we might minimize the environmental tradeoffs in whatever ways possible.

Transcript of EPA Press Conference on Dispersant Use in the Gulf of Mexico with U.S. Coast Guard Rear Admiral Landry 3 (May 24, 2010) ("May 24 Press Conference"), http://www.epa.gov/bpspill/dispersants/transcript-may24.pdf.

113. In response, BP identified within 24 hours five dispersants on the Product Schedule that were as effective as Corexit 9500, but less toxic. As BP explained, however, one of these products, Sea Brat # 4, was ruled out as an alternative because the product contains an ingredient that may degrade to a potential endocrine disrupting chemical, but "[t]he manufacturer has not had the opportunity to evaluate this product for those potential effects, and BP has not had the opportunity to conduct independent tests to evaluate this issue either." Letter from Douglas J. Suttles, BP, to Rear Admiral Mary Landry, Commander, Eighth Coast Guard District & Samuel Coleman, Director, Superfund Division, U.S. Envtl. Prot. Agency Region 6 (May 20, 2010), *available at* http://www.epa.gov/bpspill/dispersants/5-21bp-response.pdf.

114. Finding BP's response unsatisfactory, EPA announced on May 24 that it would perform its own scientific verification "to determine the least toxic, most effective dispersant available in the volumes necessary for a crisis of this magnitude." May 24 Press Conference at 4. More than a month later on June 30, 2010, when one million gallons of Corexit had already been applied at the surface and 565,000 gallons applied subsea, EPA released the results of its first round of toxicity testing. *See* Nat'l Comm'n on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *The Use of Surface and Subsea Dispersants During the BP Deepwater Horizon Oil Spill: Staff Working Paper No. 4*, at 11 (updated Jan. 11, 2011), *available at* http://www.oilspillcommission.gov/sites/default/files/documents/Updated%20Dispersants%20Working%20Paper.pdf. Results from the second phase of testing to determine potential endocrine disruption effects and to assess cytotoxicity of the various available dispersants were released in August 2010, weeks after the well had been plugged and dispersant use had halted. *See* EPA, *EPA's Toxicity Testing of Dispersants* (last updated Oct. 14, 2011), http://www.epa.gov/bpspill/dispersants-testing.html.

115. Two days after announcing its intent to conduct its own testing, but before arriving at any test results, EPA ordered BP to reduce the total amount of dispersant applied to "the minimum amount possible," with the "overall goal of reducing dispersant application by 75% from the maximum daily amount used." *See* EPA, *Dispersant Monitoring and Assessment Directive – Addendum 3* (May 26, 2010), *available at* http://www.epa.gov/bpspill/dispersants/directive-addendum3.pdf. EPA's directive mandated that BP "eliminate the surface application of dispersants" except "[i]n rare cases when there may have to be an exemption." *Id.* To obtain an exemption, BP had to submit a written request providing justification to the Federal On-Scene Coordinator, who would have to "approve the request and volume of dispersant prior to initiating surface application." *Id.* EPA also limited subsea application to no more than 15,000 gallons a day. *Id.* Records of BP's use of dispersants later revealed that EPA's directive to reduce surface dispersant use to zero except in "rare cases" was effectively nullified by near-daily exemptions to apply dispersants. *See* Letter from Brad Miller, Chairman, Investigations and Oversight Subcomm. & Ed Markey, Chairman, Energy and Env't Subcomm., to Gene L. Dodaro, Acting Comptroller Gen., Gov't Accountability Office (Sept. 27, 2010).

116. Ultimately, "[w]hile federal officials did not possess the scientific information they needed to guide their choices, they had to make choices nevertheless." Report to the President at 144. These choices led to the release of nearly 1.84 million gallons of dispersants into the Gulf of Mexico, including some 771,000 gallons nearly a mile below the ocean's surface, in the absence of knowledge of the short- and long-term impacts of subsea dispersant application. *See id.* at 143-44 ("No federal agency had studied subsea dispersant use and private studies had been extremely limited.").

117. Had EPA performed its duty under the Clean Water Act, it already would have determined in which waters oil spill control agents, such as Corexit, could be used and what quantities could be safely used in such waters. Consistent with the Clean Water Act's statutory intent, the waters and quantities analyses and underlying data would have been available for use in response efforts. EPA's failure to comply with the law meant that these analyses were not done before products were listed on the NCP Product Schedule and thereby made eligible for use.

118. The result, in the case of the Deepwater Horizon disaster, was a poorly planned and haphazard response. The impacts of this response will be felt for years to come by Plaintiffs and their members, who have vital ties to the waters in this nation that are most susceptible to oil spills and the consequent uninformed use of oil spill control agents listed in the NCP Product Schedule. The continuing pace of offshore drilling, including the anticipated start of drilling in Arctic waters, means that a repeat of these events – a release of oil and the use of dispersants listed on the NCP Product Schedule – is likely inevitable. Without a NCP Product Schedule that identifies waters in which listed dispersants may be used and the quantities in which the listed dispersants may be used safely in the identified waters, Plaintiffs and their members stand to suffer continued harm as a result of EPA's failure to comply with the Clean Water Act.

FIRST CAUSE OF ACTION
Violation of Clean Water Act

(Failure to Identify Waters in Which Dispersants, Other Chemicals, and Other Spill Mitigating Devices and Substances May Be Used)

119. Plaintiffs hereby reallege and incorporate each and every allegation in the preceding paragraphs.

120. The Clean Water Act requires EPA, as part of preparing and publishing the NCP, to prepare a schedule identifying "the waters in which such dispersants, other chemicals, and other spill mitigating devices and substances may be used." 33 U.S.C. § 1321(d)(2)(G)(ii).

121. EPA has failed to perform this mandatory duty because it does not identify in the NCP Product Schedule the waters in which listed products may be used.

SECOND CAUSE OF ACTION
Violation of Clean Water Act

(Failure to Identify the Quantities of Dispersants, Other Chemicals, and Other Spill Mitigating Devices and Substances Which Can Be Used Safely in Identified Waters)

122. Plaintiffs hereby reallege and incorporate each and every allegation in the preceding paragraphs.

123. The Clean Water Act requires EPA, as part of preparing and publishing the NCP, to prepare a schedule identifying "the quantities of such dispersant, other chemicals, or other spill mitigating device or substance which can be used safely in [identified] waters." 33 U.S.C. § 1321(d)(2)(G)(iii).

124. EPA has failed to perform this mandatory duty because it does not identify in the NCP Product Schedule the quantities of the listed products that may be used safely in the waters identified for each product.

THIRD CAUSE OF ACTION
Violation of Administrative Procedure Act

(Failure to Identify Waters in Which Dispersants, Other Chemicals, and Other Spill Mitigating Devices and Substances May Be Used)

125. Plaintiffs hereby reallege and incorporate each and every allegation in the preceding paragraphs.

126. EPA does not identify in the NCP Product Schedule "the waters in which such dispersants, other chemicals, and other spill mitigating devices and substances may be used." 33 U.S.C. § 1321(d)(2)(G)(ii).

127. In violation of the APA, 5 U.S.C. § 706(1), EPA has unreasonably delayed taking action required by the Clean Water Act, 33 U.S.C. § 1321(d)(2)(G)(ii).

FOURTH CAUSE OF ACTION
Violation of Administrative Procedure Act

(Failure to Identify the Quantities of Dispersants, Other Chemicals, and Other Spill Mitigating Devices and Substances Which Can Be Used Safely in Identified Waters)

128. Plaintiffs hereby reallege and incorporate each and every allegation in the preceding paragraphs.

129. EPA does not identify in the NCP Product Schedule "the quantities of . . . dispersant, other chemicals, or other spill mitigating device or substance which be used safely in [identified] waters." 33 U.S.C. § 1321(d)(2)(G)(iii).

130. In violation of the APA, 5 U.S.C. § 706(1), EPA has unreasonably delayed taking action required by the Clean Water Act, 33 U.S.C. § 1321(d)(2)(G)(iii).

FIFTH CAUSE OF ACTION
Violation of Administrative Procedure Act

(Failure to Identify Waters in Which Dispersants, Other Chemicals, and Other Spill Mitigating Devices and Substances May Be Used)

131. Plaintiffs hereby reallege and incorporate each and every allegation in the preceding paragraphs.

132. EPA's failure to identify in the NCP Product Schedule "the waters in which such dispersants, other chemicals, and other spill mitigating devices and substances may be used" is

arbitrary, capricious, an abuse of discretion, and not in accordance with the Clean Water Act. 33 U.S.C. § 1321(d)(2)(G)(ii); *see* 5 U.S.C. § 706(2)(A).

SIXTH CAUSE OF ACTION
Violation of Administrative Procedure Act

(Failure to Identify the Quantities of Dispersants, Other Chemicals, and Other Spill Mitigating Devices and Substances Which Can Be Used Safely in Identified Waters)

133. Plaintiffs hereby reallege and incorporate each and every allegation in the preceding paragraphs.

134. EPA's failure to identify in the NCP Product Schedule "the quantities of . . . dispersant, other chemicals, or other spill mitigating device or substance which can be used safely in [identified] waters" is arbitrary, capricious, an abuse of discretion, and not in accordance with the Clean Water Act. 33 U.S.C. § 1321(d)(2)(G)(iii); *see* 5 U.S.C. § 706(2)(A).

SEVENTH THROUGH SIXTY-FIFTH CAUSES OF ACTION
Violations of Administrative Procedure Act

135. Plaintiffs hereby reallege and incorporate each and every allegation in the preceding paragraphs.

136. In the last six years, EPA has listed or relisted 59 products on the NCP Product Schedule for which it has identified neither the waters in which the product may be used nor the quantities of the product which can be used safely in identified waters.

137. Each product listing for which EPA failed to identify the waters in which the product may be used and the quantities in which the product can be used safely in identified waters is arbitrary, capricious, an abuse of discretion, and contrary to the Clean Water Act and constitutes an individual cause of action. *See* 33 U.S.C. § 1321(d)(2)(G); 5 U.S.C. § 706(2)(A). Each such cause of action is identified in the table below.

Cause of Action	Product Name	Date Listed or Relisted on NCP Product Schedule
7th	Aqua N-Cap™ Polymer	November 9, 2006
8th	E-Safe©	November 27, 2006
9th	Sheen-Magic©	November 27, 2006
10th	Spillremed (Marine)®	January 8, 2007
11th	JE 1058BS	December 3, 2007
12th	Procleans	June 16, 2008
13th	Elastol	June 30, 2008
14th	Nokomis 3-AA	July 31, 2008
15th	Bioworld Bioremediation Hydrocarbon Treatment Products	November 24, 2008
16th	Spillclean	March 30, 2009
17th	Oil Spill Eater II	September 22, 2009
18th	TXChem HE-1000™	March 15, 2010
19th	Nokomis 5-W	May 11, 2010
20th	Oil Bond®	June 3, 2010
21st	G-Marine OSC-1809	July 2, 2010
22nd	Green Beast™ Oil Spill & Odor Remediator	July 6, 2010
23rd	De-Solv-It Industrial Formula	July 7, 2010
24th	Tulxa	July 13, 2010
25th	Marine Green Clean™	July 28, 2010
26th	Marine Green Clean Plus™	July 28, 2010
27th	Clean Green	August 5, 2010
28th	SOC 10 (Surface Oil Cleaner)	August 5, 2010
29th	Biograss® Extra	August 17, 2010
30th	Opflex® The Green Stuff™	August 17, 2010
31st	Gelco 200	August 17, 2010
32nd	Environmental 1 Crude Oil Cleaner	August 25, 2010
33rd	Sandklene 950	October 4, 2010
34th	Munox SR®	October 28, 2010
35th	De-Solv-It Clean Away APC Super Concentrate	November 10, 2010
36th	EO All Purpose Soap-Lavender	November 17, 2010
37th	Soil Rx	November 17, 2010
38th	Dynamic Green™	December 7, 2010
39th	Veru-Solve™ Marine 200 HP	December 9, 2010
40th	Pro-Act	December 15, 2010
41st	Biorem-2000 Oil Digester™	December 15, 2010
42nd	Naturama G3 A-5	January 26, 2011

43rd	Drylet™ MB Bioremediation	February 22, 2011
44th	Safe Kleen	February 25, 2011
45th	Coriba 700 SR	February 25, 2011
46th	Coriba 713 SR	February 25, 2011
47th	Supersperse™ WAO2500	March 23, 2011
48th	JEP-Marine Clean	May 11, 2011
49th	Dualzorb®	May 18, 2011
50th	Remediade™	June 8, 2011
51st	Ethos Clean	June 28, 2011
52nd	OSR-10	June 28, 2011
53rd	Accell Clean™	July 13, 2011
54th	Accell Clean™ DWD	July 18, 2011
55th	Ergofit Micro Mix Aqua	July 27, 2011
56th	Shamantra Green	August 17, 2011
57th	Sump Safe Bio-Reclaim	October 13, 2011
58th	EPA Oil Field Solution™	October 13, 2011
59th	FFT-Solution™	November 1, 2011
60th	Petromax PSC 3	March 5, 2012
61st	Marine D-Blue Clean™	April 23, 2012
62nd	Norsorex® APX	April 26, 2012
63rd	Thickslick 6535	June 29, 2012
64th	Siltech Op-40	June 29, 2012
65th	Green Technologies Solutions-Oil Recovery	July 12, 2012

REQUEST FOR RELIEF

THEREFORE, Plaintiffs request that this Court:

1. Declare that EPA has failed to perform nondiscretionary duties to prepare and publish the NCP Product Schedule identifying the waters in which dispersants, other chemicals, and other spill mitigating devices and substance may be used;

2. Declare that EPA has failed to perform nondiscretionary duties to prepare and publish the NCP Product Schedule identifying the quantities in which dispersants, other chemicals, and other spill mitigating devices and substances can be used safely in identified waters;

3. Vacate and set aside each of EPA's product listings on the NCP Product Schedule during the last six years;

4. Order EPA to prepare and publish the NCP Product Schedule identifying the waters in which dispersants, other chemicals, and other spill mitigating devices and substances may be used and the quantities in which they can be used safely in such waters;

5. Award Plaintiffs their reasonable fees, costs, and expenses, including attorneys' fees associated with this litigation; and

6. Grant Plaintiffs such further and additional relief as the Court may deem just and proper.

Respectfully submitted this 6th day of August 2012,

/s/ Timothy D. Ballo
Timothy D. Ballo
D.C. Bar No. 977077
Earthjustice
1625 Massachusetts Avenue NW, Suite 702
Washington, DC 20036-2212
Phone: 202-667-4500
Fax: 202-667-2356
tballo@earthjustice.org

Marianne Engelman Lado
Hannah Chang
Earthjustice
156 William Street, Suite 800
New York, NY 10038
Phone: 212-791-1881
Fax: 212-918-1556

Counsel for Plaintiffs