



February 5, 2014

VIA CERTIFIED MAIL

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**Re: Proposed Revisions to National Contingency Plan Subpart J  
Rulemaking**

Dear Administrator McCarthy, Director Burwell, and Administrator Shelanski,

We write on behalf of the undersigned organizations to urge timely publication of the proposed "Revisions to the National Oil and Hazardous Substances Pollution Contingency Plan; Subpart J Product Schedule Listing Requirements" (RIN No. 2050-AE87) ("Subpart J rulemaking"). The proposed rule was initiated by the Environmental Protection Agency ("EPA") on August 20, 2001.<sup>1</sup> The need for this rulemaking and for a reform to the existing Subpart J regulations became tragically clear during the response to the Deepwater Horizon disaster in 2010. Despite this, and despite representations from high-level EPA staff that the proposed rule would be published in the Federal Register for public comment by December 2012, the Office of Information and Regulatory Affairs ("OIRA") at the Office of Management and Budget ("OMB") has yet to take up its pre-publication review of the proposed rule even

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<sup>1</sup> *Revisions to the National Oil and Hazardous Substances Pollution Contingency Plan; Subpart J Product Schedule Listing Requirements*, U.S. Env'tl. Prot. Agency, <http://yosemite.epa.gov/opei/rulegate.nsf/byRIN/2050-AE87?opendocument> (last visited Jan. 28, 2014).

now, and the proposal languishes for reasons unknown to the public. This delay is unacceptable to coastal communities who suffer the direct brunt of oil spills and the use of dispersants in oil spill response. These communities, represented by the 63 undersigned local, regional, and national organizations, demand expeditious publication of the proposed rule.

## BACKGROUND

The Clean Water Act directs the President to prepare and publish a National Contingency Plan ("NCP") to respond to oil spills, which must include among other things, a schedule identifying (1) "dispersants, other chemicals, and other spill mitigating devices and substances, if any, that may be used in carrying out the Plan," (2) "the waters in which such dispersants, other chemicals, and other spill mitigating devices and substances may be used," and (3) "the quantities of such dispersant, other chemicals, or other spill mitigating device or substance which can be used safely in such waters."<sup>2</sup> Responsibility for the preparation and publication of this schedule (the "NCP Product Schedule" or "Product Schedule") was delegated to EPA,<sup>3</sup> and EPA promulgated the Subpart J regulations to "make[] provisions for such a schedule."<sup>4</sup>

Once listed on the NCP Product Schedule, a dispersant can be selected for use in an oil spill response – whether through preauthorization by regional response teams or approval during the heat of an ongoing oil spill response – without further testing or further study of the chemical's impacts.<sup>5</sup> This is deeply problematic because the current regulatory framework requires only minimal toxicity testing, effectiveness testing, and information submission for a chemical to be listed on the Product Schedule. The Product Schedule does not identify the waters and quantities in which listed dispersants can be used safely. Indeed, under the current Subpart J regulations, dispersants are not required to meet any toxicity criteria or safety threshold to be listed on the Product Schedule.<sup>6</sup> The current Subpart J regulations also permit manufacturers to withhold the identity of the ingredients in dispersants.<sup>7</sup>

The use of dispersants in oil spill response necessarily entails a tradeoff because dispersants do not actually reduce or eliminate oil. Rather, dispersants assist in breaking oil down into small droplets that mix more easily into water below the ocean's surface. "[B]ecause chemical dispersants promote the movement of oil below the surface, their use exposes the underwater environment and the ocean floor to more of the spilled oil . . . . Therefore, decisions about whether to use dispersants involve trade-offs between the risks that untreated oil poses to

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<sup>2</sup> 33 U.S.C. § 1321(d)(2)(G). For ease of reference, this letter refers to these substances collectively as dispersants.

<sup>3</sup> Exec. Order No. 12,777, 56 Fed. Reg. 54,757 (Oct. 18, 1991).

<sup>4</sup> 40 C.F.R. § 300.900(a).

<sup>5</sup> See *id.* § 300.910.

<sup>6</sup> See *id.* § 300.915(a).

<sup>7</sup> See *id.* § 300.920(c).

the water surface and shoreline habitats and the risks that chemically dispersed oil poses to underwater environments . . . .”<sup>8</sup>

The minimal testing and information required by EPA, and the lack of any toxicity criteria for listing a chemical on the Product Schedule, severely limit the utility of the Product Schedule in guiding responders who have to decide whether to make this tradeoff – a fact that became catastrophically evident during the 2010 Deepwater Horizon response. Nearly one month after BP started using Corexit in response to the oil gushing from the Macondo well, and after hundreds of thousands of gallons of Corexit had already been released into the Gulf,<sup>9</sup> EPA directed BP to identify and to begin using a less toxic alternative from the Product Schedule on grounds that dispersant was being used “in unprecedented volumes and because much is unknown about the underwater use of dispersants.”<sup>10</sup> In response, BP identified five alternative dispersants on the Product Schedule. BP ruled out one of these products because it contained a potentially endocrine-disrupting ingredient, and as BP explained, “[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.”<sup>11</sup>

With respect to the other potentially less toxic alternatives, BP noted that it would “be prudent to obtain the chemical formulas [of these dispersants] . . . and evaluate them for their potential to degrade to [an endocrine disruptor],” but that it was not “able to obtain this information in the 24 hour time frame provided in [EPA’s] directive.”<sup>12</sup> BP further pointed out that “there may be only limited information on the constituents of the dispersants, since the dispersants typically contain proprietary substances whose identities are not publicly available.”<sup>13</sup> Ultimately, BP justified its decision to continue using Corexit based on the lack of availability of other less toxic dispersants and a lack of understanding about the potential impacts of those that were available.<sup>14</sup>

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<sup>8</sup> Report to Congressional Requesters, U.S. Gov’t Accountability Office, *Oil Dispersants: Additional Research Needed, Particularly on Subsurface and Arctic Applications* 1 (2012) (“GAO Report”), available at [http://docs.lib.noaa.gov/noaa\\_documents/NOAA\\_related\\_docs/oil\\_spills/GAO\\_12\\_585\\_oil\\_dispersants.pdf](http://docs.lib.noaa.gov/noaa_documents/NOAA_related_docs/oil_spills/GAO_12_585_oil_dispersants.pdf).

<sup>9</sup> Two dispersants – Corexit 9500 and Corexit 9527 – were used during the response. Corexit 9500 was the primary dispersant used; Corexit 9527 was only used at the beginning of the response effort.

<sup>10</sup> News release, U.S. Env’tl. Prot. Agency, EPA: BP Must Use Less Toxic Dispersant (May 20, 2010), <http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/0897f55bc6d9a3ba852577290067f67f!OpenDocument>. See also *Dispersant Monitoring and Assessment Directive – Addendum 2*, Env’tl. Prot. Agency (May 20, 2010), <http://www.epa.gov/bpspill/dispersants/directive-addendum2.pdf>.

<sup>11</sup> Letter from Douglas J. Suttles, BP, to Rear Admiral Mary Landry, U.S. Coast Guard & Samuel Coleman, P.E., U.S. Env’tl. Prot. Agency (May 20, 2010), <http://www.epa.gov/bpspill/dispersants/5-21bp-response.pdf>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

This astounding lack of information about the dispersants listed on the NCP Product Schedule persists today, even as the impacts of the use of Corexit are being slowly uncovered in the aftermath of the Deepwater Horizon response. Research in the years following the Deepwater Horizon disaster has raised serious concerns about the safety, effectiveness, and wisdom of the dispersant application that occurred in that response. One study by scientists at the Mote Marine Laboratory Tropical Research Station in Summerland Key, Florida, found, for instance, that "exposure of coral larvae to oil spill related contaminants, particularly the dispersant Corexit® 9500, has the potential to negatively impact coral settlement and survival, thereby affecting the resilience and recovery of coral reefs following exposure to oil and dispersants."<sup>15</sup> Another study by biologists at the Georgia Institute of Technology shows that Corexit 9500A and oil have similar toxicity, but when the dispersant is mixed with oil, the toxicity of the dispersant-oil combination to marine rotifers, critically important organisms at the base of the food chain, increased 52-fold.<sup>16</sup>

## THE NEED FOR REVISIONS TO THE SUBPART J REGULATIONS

The Deepwater Horizon response tragically embodied the problems that arise under a regulatory framework requiring only minimal testing and information submission prior to making a dispersant eligible for use. Since the Deepwater Horizon disaster, the need for EPA to revise the existing Subpart J regulations has become widely accepted. Indeed, EPA itself has promised to publish a proposed rulemaking that reforms Subpart J, but has failed repeatedly to meet its own projected deadlines for doing so.

### I. The Need for a Rulemaking to Revise Subpart J is Well-Established and Uncontroversial.

The National Commission on the Deepwater Horizon incident explicitly recommended revisions to the Subpart J regulations in its January 2011 Report to the President. The Commission concluded:

Prior to the *Deepwater Horizon* incident, the federal government had not adequately planned for the use of dispersants to address such a large and sustained oil spill, and did not have sufficient research on the long-term effects of dispersants and dispersed oil to guide its decision-making. Officials had to make

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<sup>15</sup> Gretchen Goodbody-Gringley et al., *Toxicity of Deepwater Horizon Source Oil and the Chemical Dispersant, Corexit® 9500, to Coral Larvae*, 8, PLoS ONE 1 (2013), available at <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0045574>

<sup>16</sup> Roberto Rico-Martinez et al., *Synergistic toxicity of Macondo crude oil and dispersant Corexit 9500A® to the Brachionus plicatilis species complex (Rotifera)*, 173 *Envtl. Pollution* 5 (2013), available at <http://www.sciencedirect.com/science/article/pii/S0269749112004344>.

decisions about dispersant use without important relevant information or the time to gather such information.<sup>17</sup>

The Commission consequently identified “[t]he [n]eed for [n]ew [r]egulations to [g]overn the [u]se of [d]ispersants” and recommended that EPA “update its dispersant testing protocols and require more comprehensive testing prior to listing or pre-approving dispersant products.”<sup>18</sup>

In an August 2011 report, EPA’s Office of Inspector General similarly recommended that EPA’s Office of Solid Waste and Emergency Response “take steps to revise Subpart J to incorporate the most appropriate efficacy testing protocol and capture dispersant information.”<sup>19</sup> In arriving at this recommendation, EPA’s Office of Inspector General noted that during the Deepwater Horizon incident, “the EPA Administrator testified that changes are needed to the NCP’s Subpart J, including dispersant registration and a more complete range of tests to address human and environmental health.”<sup>20</sup>

## **II. EPA Has Repeatedly Failed to Meet its Own Deadlines for Promulgating a Revised Subpart J.**

Despite EPA’s professed commitment to revising the Subpart J regulations, it has failed for years to meet its own projected deadlines for promulgating a proposed rule. Even before the Deepwater Horizon disaster, the agency had been revising the rule and intended to “prepare[] a proposed rule to modify the efficacy test and several other test and data requirements,” which was to be promulgated in late spring 2010.<sup>21</sup> After the Deepwater Horizon disaster, EPA apparently attempted to incorporate lessons from that response into its rulemaking, and a 2012 Government Accountability Office (“GAO”) Report indicated that “EPA anticipates issuing a proposed rule in winter 2012 that would revise the requirements for listing a product on the Product Schedule and is considering changes to effectiveness and toxicity testing protocols.”<sup>22</sup>

In a May 17, 2012, letter, Lawrence Stanton, Director of EPA’s Office of Emergency Management, acknowledged the need for a rulemaking to revise Subpart J:

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<sup>17</sup> Report to the President, 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* 270 (2011), [http://docs.lib.noaa.gov/noaa\\_documents/NOAA\\_related\\_docs/oil\\_spills/DWH\\_report-to-president.pdf](http://docs.lib.noaa.gov/noaa_documents/NOAA_related_docs/oil_spills/DWH_report-to-president.pdf).

<sup>18</sup> *Id.* at 270-71.

<sup>19</sup> Hotline Report, U.S. Env’tl. Prot. Agency Office of Inspector Gen., *Revisions Needed to National Contingency Plan Based on Deepwater Horizon Oil Spill*, Report No. 11-P-0534 (2011), <http://www.epa.gov/oig/reports/2011/20110825-11-P-0534.pdf>.

<sup>20</sup> *Id.* at 10.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

We acknowledge your concerns and share your strong sense of urgency about the revision of the Subpart J regulatory requirements regarding use of dispersants and other chemical remediation agents on oil spills. In fact, this rulemaking is an extremely high priority with the Administrator and Agency senior leadership and I have insisted that OEM honor the current rulemaking schedule for revisions to the Subpart J requirements. OEM is aggressively working to develop the proposed rule accordingly. Final Agency Review of the proposed rule package is slated for late June.<sup>23</sup>

Director Stanton went even further to specify the anticipated schedule for rulemaking:

A review by the Office of Management and Budget (OMB) is schedule[d] to begin late July as required under the Agency's Action Development Process. Part of the OMB process involves a review by other federal agencies that have a stake in the rulemaking. In anticipation of this interagency review, the EPA is coordinating with partner agencies to ensure a smooth and timely completion. The proposed rule would then be published in the Federal Register for public comment by December 2012.<sup>24</sup>

Despite EPA's purported sense of urgency concerning the need to revise Subpart J, the proposed rule was not published as promised in December 2012. Now, over a year later, and more than 13 years since EPA first started revising the Subpart J regulations, the public continues to await publication of a proposed rule.

### **III. The Delay in Revising Subpart J Has Real and Detrimental Consequences for the Public.**

The lengthy and unexplained delay of a rule widely recognized as necessary is troubling as a matter of public policy. It is also problematic in a very real sense for those who live in coastal communities that can expect the future use of dispersants in response to oil releases from ocean transport and offshore drilling. Whether preauthorized as part of regional response plans or not, the dispersants listed on the Product Schedule comprise the universe of chemicals that may be used in the event of an oil spill, and as the National Commission on the Deepwater Horizon incident noted, and as EPA itself has recognized, these chemicals are being made eligible for use with insufficient testing and information about their efficacy and impacts.

In its 2012 report, the GAO emphasized that, in making decisions about whether to use dispersants,

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<sup>23</sup> Letter from Lawrence M. Stanton, Dir., Office of Emergency Mgmt., to Hannah Chang, Earthjustice (May 17, 2012) (on file with author).

<sup>24</sup> *Id.*

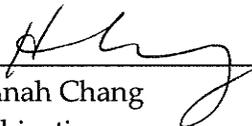
decision makers need timely and reliable scientific information on the trade-offs between the risks that untreated oil poses to the water surface and shoreline habitats and the risks that chemically dispersed oil poses to underwater environments. This information must be available *before* a spill happens and incorporated into response planning . . . .<sup>25</sup>

With each missed deadline to propose a revised rule that would require necessary testing and information for dispersants listed on the Product Schedule, EPA prolongs the risk that on-scene responders and coastal communities will again face the difficult tradeoffs of dispersant use with inadequate knowledge to make responsible decisions.

### CONCLUSION

The undersigned organizations represent the interests of communities in the Gulf of Mexico, in Alaska, and along all of our nation's coasts who are directly affected by oil spills and oil spill responses and have long been waiting for EPA to fulfill its promise to revise Subpart J. The signatories call on EPA and OMB to meet EPA's own February 2014 deadline for publication of the proposed rule.<sup>26</sup> After all, if, as the GAO noted, "the future of oil production will rely to a substantial extent on producing oil from deep, offshore wells in the Gulf of Mexico and off the Alaskan Coast,"<sup>27</sup> then the communities in these regions, and in others where oil will be produced and transported by sea, deserve the benefit of rulemaking widely-recognized as critical for the responsible use of dispersants.

Sincerely,

  
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On behalf of Signatory Organizations

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<sup>25</sup> GAO Report at 45 (emphasis added).

<sup>26</sup> See *Revisions to the National Oil and Hazardous Substances Pollution Contingency Plan; Subpart J Product Schedule Listing Requirements*, U.S. Env'tl. Prot. Agency, <http://yosemite.epa.gov/opei/rulegate.nsf/byRIN/2050-AE87?opendocument> (last visited Jan. 28, 2014).

<sup>27</sup> GAO Report at 22.

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