

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA**

FLORIDA WILDLIFE FEDERATION, INC.	*	Civ. No. 10-293
and GULF RESTORATION NETWORK, INC.,	*	
<i>Plaintiffs,</i>	*	
 	*	
<i>versus</i>	*	Complaint for Injunctive Relief
 	*	
 	*	
UNITED STATES ENVIRONMENTAL	*	
PROTECTION AGENCY	*	
<i>Defendant.</i>	*	
* * * * *	*	

INTRODUCTION

1. Since April 20, 2010, when the Deepwater Horizon drilling platform exploded in the Gulf of Mexico, BP has added nearly two million gallons of chemical dispersant to the waters of the Gulf. Much is unknown about the potential effects of this unprecedented volume of dispersant on health and the environment. The application of dispersant at the source of the leak, deep under the surface of the water, is also unprecedented. Though public information warns that people handling dispersant should avoid contact, ensure adequate ventilation, and seek medical attention “if irritation persists,” the manufacturers of the dispersants and their chemical ingredients and the defendant withhold key health and safety information. Information on alternative dispersants and health and safety data related to the constituent ingredients of dispersants is essential for workers, policy makers, researchers, and the others who are trying to make informed decisions to protect their own health and the health of others, as well as the environment. Plaintiffs requested this critical information from the Environmental Protection Agency (EPA) and now seek to enforce their rights pursuant to the Freedom of Information Act (“FOIA”).

2. This is an action for injunctive and other appropriate relief under FOIA, 5 U.S.C. § 552, seeking the disclosure and release of agency records improperly withheld from Plaintiffs by the defendant EPA.

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B). Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

PARTIES

4. Plaintiff Florida Wildlife Federation, Inc. (“the Federation”) is a statewide non-profit conservation and education organization. It is membership-based, with approximately 13,000 members throughout Florida. The organization’s mission includes the preservation, management, and improvement of Florida’s marine resources, and the Federation acts on behalf of its members to preserve and protect Florida’s water resources and the animals that use those waters as habitat. Members of the Federation use and enjoy Gulf Coast waters, including open, coastal and estuarine waters in the Florida Panhandle region, for sport and commercial fishing, boating, wildlife observation, recreational shellfish harvesting, canoeing, and kayaking, and intend to continue using those waters for these purposes. The Federation's principal place of business is 2545 Blairstone Pines Drive, Tallahassee, Florida, 32301.

5. Plaintiff Gulf Restoration Network, Inc. is a non-profit network of local, regional, and national groups and individuals dedicated to protecting and restoring the natural resources of the Gulf of Mexico. Gulf Restoration Network has been actively

involved in investigating, monitoring, and educating the public about the environmental effects of the BP Deepwater Horizon oil spill and cleanup efforts. As a part of this work, Gulf Restoration Network seeks to ensure that cleanup workers, citizens, and officials have information on the ingredients of, as well as the human health and environmental impacts of, dispersants being used and available for use in the Gulf of Mexico. Gulf Restoration Network's principal place of business is 338 Baronne Street, Suite 200, New Orleans, Louisiana, 70112.

6. Defendant United States Environmental Protection Agency ("EPA") is an agency within the executive branch of the United States government. EPA is an agency within the meaning of 5 U.S.C. § 552(f)(1).

BACKGROUND

7. EPA regulates the constituents of dispersants pursuant to the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2601-2695. EPA may require the manufacturers of the constituents of dispersants to submit information regarding adverse reactions, health and safety studies and data, and notices of potential risks to health or the environment. *See* TSCA §§ 4, 5, 8, 15 U.S.C. §§ 2603, 2604, 2607. Among other things, section 8(e) of TSCA requires U.S. manufacturers, importers, processors, and distributors of chemicals to notify EPA immediately after obtaining information on any of their chemical substances or mixtures that reasonably supports the conclusion that such substance or mixture presents a substantial risk of injury to health or the environment. 15 U.S.C. § 2607.

8. EPA also regulates dispersants pursuant to the National Contingency Plan (“NCP”), 33 U.S.C. § 1321. EPA regulations require the manufacturer of a dispersant to submit data to EPA identifying the ingredients of the dispersant as well as data on the toxicity and effectiveness of the dispersant. 40 C.F.R. § 300.915. A manufacturer must submit this information along with an application to place a dispersant on the NCP Product Schedule, which lists the dispersants eligible for use in responding to an oil spill. *Id.* at § 300.920.

9. On April 20, 2010, the Deepwater Horizon drilling platform exploded in the Gulf of Mexico, off the coast of Louisiana, after a catastrophic blowout. The blowout killed eleven workers and resulted in a devastating oil spill that has yet to be controlled.

10. Since the explosion, BP has applied almost two million gallons of dispersants on the surface as well as beneath the surface of the waters of the Gulf of Mexico. According to the Deepwater Horizon Unified Command, as of July 11, 2010, BP had used more than 1.07 million gallons of surface dispersant and more than 721,000 gallons of subsea dispersant. (July 12, 2010) (Exhibit 1).¹

11. Officials have acknowledged that the quantity and the manner in which dispersants have been applied is unprecedented. EPA Administrator Lisa Jackson stated, “BP has used dispersants in ways never seen before. That is in terms of both the amount applied – which is approaching a world record – and in the method of application.”

Statement by EPA Administrator Lisa P. Jackson from Press Conference on Dispersant

¹ <http://www.deepwaterhorizonresponse.com/go/doc/2931/774039/>.

Use in the Gulf of Mexico with US Coast Guard Rear Admiral Landry (May 24, 2010). (Exhibit 2).²

12. The potential health and environmental effects of the dispersants used in the Gulf are not well understood. On July 10, 2010, the *Nature News* reported on concerns expressed by researchers about the implications of the use of dispersants. David Valentine, a geomicrobiologist at the University of California, Santa Barbara, described BP's use of dispersants as "an experiment that's never been performed before – to dump that much of an industrial chemical into the ocean." Amanda Mascarelli, *Debate Grows Over Impact of Dispersed Oil*, NATURE (July 10, 2010). (Exhibit 3).³

13. Given the unprecedented use of dispersants in the Gulf of Mexico, there is widespread public interest concerning the process for approving use of dispersants, the availability of alternative dispersants with lower toxicity, and the health and environmental effects of dispersants.

14. When use of dispersants began, the public did not have access to critical information on dispersants, such as the names and Chemical Abstracts Service ("CAS") numbers of the ingredients of the dispersants being used or those available for use. *See, e.g.*, Letter from Douglas J. Suttles to Mary Landry and Samuel Coleman (May 20, 2010)(BP's Response to EPA's Dispersant Directive, with Attachment), at Attachment 4-5 (redactions labeled "Confidential Information"). (Exhibit 4).⁴ The lack of information about the dispersants and their constituents impeded public understanding of the effects of dispersants being used in massive quantities.

² <http://www.epa.gov/bpspill/dispersants/statement-dispersant-use-may24.pdf>.

³ <http://www.nature.com/news/2010/100710/full/news.2010.347.html>.

⁴ <http://www.epa.gov/bpspill/dispersants/5-21bp-response.pdf>.

15. The public continues to have a compelling interest in access to information about the relative toxicity of alternative dispersants that are eligible for use in the Gulf as the oil leak continues. The EPA acknowledges that BP's scientific analysis of alternative dispersants "was found insufficient by both EPA and the U.S. Coast Guard." "Has BP Been Complying with EPA's Request to Identify a Less Toxic Dispersant Alternative?" (Exhibit 5).⁵

16. The EPA's National Contingency Plan includes precautions for handling Corexit EC9500A, the dispersant being used in the Gulf. These include the use of ventilation and protective clothing, as well as warnings against contact with eyes, skin, and clothing. The National Contingency Plan Product Schedule for Corexit EC9500A states, "In case of skin contact, immediately flush with large amounts of water, and soap if available. Remove contaminated clothing, including shoes, after flushing has begun. If irritation persists, seek medical attention. For open systems where contact is likely, wear long sleeve shirt, chemical resistant gloves, and chemical protective goggles." *Corexit EC9500A*, Technical Product Bulletin #D-4, NCP Product Schedule. (Exhibit 6).⁶

17. The public, including workers, recreational users of Gulf waters, the fishing industry, and consumers, continue to have a compelling interest in access to health and environmental data and information about health and safety studies of the constituents of the dispersants.

⁵ <http://www.epa.gov/bpspill/dispersants.html#pr> (last visited July 13, 2010).

⁶ <http://www.epa.gov/emergencies/content/ncp/products/corex950.htm> (last updated October 09, 2009).

PLAINTIFFS' FOIA REQUEST

18. On May 28, 2010, Plaintiffs submitted a FOIA request to EPA seeking the release of records pertaining to dispersants. (Exhibit 7). Specifically, Plaintiffs requested:

the following records for COREXIT EC9500A, COREXIT EC9527A, DISPERSIT SPC 1000, MARE CLEAN 200, NEOS AB3000, NOKOMIS 3-AA, NOKOMIS 3-F4, SEA BRAT #4, and other dispersants suitable for use in the Gulf oil spill:

1. Any records submitted to EPA pursuant to 40 C.F.R. § 300.915(a)(10) or otherwise identifying or disclosing the chemical name of each component of the dispersant, the CAS number of each chemical ingredient, and any known or suspected contaminants and byproducts. Our goal is to have full public disclosure of all chemical ingredients of the dispersants (including their CAS number), as well as contaminants and byproducts. If this information is made fully available to the public in some form, we would no longer seek all of the records containing it unless they fall within some other part of this request.
2. All records submitted to EPA pursuant to 40 C.F.R. § 300.915(a)(8), including all test results, supporting data, and certifications.
3. The application to place the dispersant on the NCP Product Schedule pursuant to 40 C.F.R. § 300.920, along with copies of any correspondence between the applicant and EPA concerning the application, any additional information requested by EPA, and records documenting and explaining EPA's decision to place the dispersant on the NCP Product Schedule. This request does not extend to information about production facilities or capabilities, such as the process for manufacturing or processing substances, or information on the portion of a mixture comprised by any chemical substance. Instead, our interest is in information on toxicity, efficacy, and human health and ecological risks.

For each chemical substance that is a constituent of COREXIT EC9500A, COREXIT EC9527A, DISPERSIT SPC 1000, MARE CLEAN 200, NEOS AB3000, NOKOMIS 3-AA, NOKOMIS 3-F4, SEA BRAT #4, or any other dispersant suitable for use in the Gulf oil spill, we request:

1. All records of adverse reactions, health and safety studies and data, and notices of potential risks to health or the environment (with attachments) submitted to EPA pursuant to the Toxic Substances

Control Act (“TSCA”), §§ 4, 5, and 8 (c)-(e), 15 U.S.C. §§ 2603, 2604, 2607(c)-(e).

Additionally, we request:

2. Unredacted copies of communications made between April 20, 2010 and the date of this request between EPA and BP concerning the selection and use of dispersants in response to the Deepwater Horizon oil spill in the Gulf of Mexico.

EPA’S FAILURE TO COMPLY WITH PLAINTIFFS’ REQUEST

19. Plaintiffs submitted their FOIA request to EPA by e-mail on May 28, 2010. By letter dated June 1, 2010, EPA acknowledged that it received Plaintiffs’ FOIA request on June 1, 2010. (Exhibit 8). On June 2, 2010, EPA denied Plaintiffs’ request for expedited processing but approved Plaintiffs’ request for a fee waiver (except for publicly available records). (Exhibit 9). EPA provided no further response to the FOIA request.

20. In June 2010, EPA posted on a website the names and CAS numbers of COREXIT EC9500A and EC9527A, the dispersants that BP has used in the Gulf of Mexico. However, EPA has not released any of the other information Plaintiffs requested, including: the names and CAS numbers of the ingredients of dispersants other than COREXIT, data and studies submitted to EPA pursuant to TSCA and the NCP regarding dispersants and their constituents, and unredacted copies of communications between EPA and BP concerning the use of dispersants during the response to the BP Deepwater Horizon oil spill.

21. An agency must respond to a FOIA request within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i). EPA did not respond to Plaintiffs’ FOIA request within 20 working days.

22. Where an agency fails to respond to a FOIA request within the applicable time limit, the person making the request to the agency shall be deemed to have exhausted his administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i). EPA did not respond within the applicable time limit.

REQUESTED RELIEF

WHEREFORE, Plaintiffs pray that this Court:

1. Order EPA to disclose the requested records in their entireties and to make copies of the requested records available to Plaintiffs;
2. Provide for expeditious proceedings in this action;
3. Award Plaintiffs their costs and reasonable attorneys' fees incurred in this action; and
4. Grant such other relief as the Court may deem just and proper.

RESPECTFULLY SUBMITTED this 14th day of July, 2010.

Marianne Engelman Lado*
NY Bar No. 2212579
Earthjustice
156 William Street, Suite 800
New York, NY 10038-5326
Phone: (212) 791-1881
Fax: (212) 918-1556
mengelmanlado@earthjustice.org

s/ Monica K. Reimer
Monica K. Reimer (FL #0090069)
Florida Bar No. 0090069
Earthjustice
111 S. Martin Luther King Jr. Blvd.
Tallahassee, FL 32301
Phone: (850) 681-0031
Fax: (850) 681-0020
mreimer@earthjustice.org

COUNSEL FOR PLAINTIFFS

* Northern District of Florida Admission Application Pending