

March 22, 2019

**VIA CERTIFIED MAIL**  
**Return Receipt Requested**

Andrew Wheeler, Administrator  
U.S. Environmental Protection Agency  
William Jefferson Clinton Building  
1200 Pennsylvania Avenue, N.W.  
Mail Code: 1101A  
Washington, DC 20460

William Barr, Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

**Re: 60-Day Notice of Intent to File Citizen Suit for Failure to Perform  
Nondiscretionary Duty under the Clean Water Act**

Dear Administrator Wheeler:

The University of California, Berkeley Environmental Law Clinic, on behalf of ALERT, a project of Earth Island Institute; Cook Inletkeeper; Alaska Community Action on Toxics (ACAT); Kindra Arnesen; and Rosemary Ahtuanguaruak, respectfully provides notice that, sixty days from your receipt of this letter, the undersigned organizations and individuals intend to sue U.S. Environmental Protection Agency (EPA) and you, in your official capacity as Administrator, for failure to perform a nondiscretionary duty under the Federal Water Pollution Control Act and amendments (Clean Water Act or CWA). The CWA requires EPA to maintain a National Contingency Plan (NCP or Plan) that will “provide for . . . effective action to minimize damage” from oil spills in the nation’s waters. 33 U.S.C. § 1321 (d)(2). To ensure that the NCP facilitates action that is truly “effective” in minimizing harms, EPA has a nondiscretionary duty to periodically amend the Plan in response to scientific and technological developments.<sup>1</sup> 33 U.S.C. § 1321 (d)(3). EPA last amended the plan in 1994.<sup>2</sup>

EPA has shirked its nondiscretionary duty to amend the NCP. In the twenty-five years since EPA last updated the Plan, there have been significant advances in understanding the behavior and risks of using such chemical dispersants on conventional

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<sup>1</sup> The Act specifically directs the President to amend the NCP, but this duty was delegated to EPA via Executive Order 12777, 56 Fed. Reg. 54757 (Oct. 22, 1991).

<sup>2</sup> EPA, National Oil and Hazardous Substances Pollution Contingency Plan, Final Rule, 59 Fed. Reg. 47384 (September 15, 1994).



marine oil spills—a response method contemplated in the existing NCP and used, with widely publicized adverse outcomes, in the BP Deepwater Horizon oil spill of 2010. Despite EPA’s awareness and public acknowledgement of these developments, and despite its commencement of a regulatory process to update the NCP in 2015, it has failed to update the NCP provisions governing dispersant use.

The need to update the NCP is urgent. Under the 2019-2024 Draft Proposed Outer Continental Shelf Oil and Gas Leasing Program, which the federal government anticipates will go into effect this year, ninety percent of U.S. coastal areas will be open for oil and gas drilling.<sup>3</sup> This leasing program, combined with the planned dismantling of federal drilling safety standards,<sup>4</sup> puts coastal communities at serious risk of disastrous oil spills. Given the history of offshore oil drilling, it is simply a matter of when—not if—a devastating oil spill will occur. Therefore, it is critical that EPA acts immediately to amend the NCP, ensuring that it can facilitate “effective” cleanup that “minimize[s] damage,” as the CWA instructs.

ALERT is a grassroots organization that has long been advocating for an update to the NCP. ALERT’s concerns with dispersant use stem from Director Riki Ott’s first-hand experience assisting communities harmed by the 1989 *Exxon Valdez* oil spill and chemical products used in response and, more recently, assisting communities harmed by the 2010 BP Deepwater Horizon disaster. ALERT and its coalition predecessor<sup>5</sup> voiced extensive concerns with the current NCP regulations in its petition for rulemaking in November 2012, its supplemental petition for rulemaking in June 2014, and its April 22, 2015, comments in the 2015 rulemaking process.

Cook Inletkeeper is a community-based nonprofit organization that uses advocacy, education, and science to protect Alaska’s Cook Inlet watershed and the life it sustains. In 1995, Alaskans deeply impacted by the catastrophic *Exxon Valdez* oil spill founded this organization. Since then, its members have fought for clean water, healthy fish and wildlife, strong communities, clean energy, and lasting jobs in the Cook Inlet region. Cook Inletkeeper is deeply concerned about EPA’s delay in updating the National Contingency Plan regulations and the risk that delay poses to the Cook Inlet region, an area already impacted by oil and gas development.

Alaska Community Action on Toxics (ACAT) is a nonprofit research and advocacy organization dedicated to protecting environmental health and achieving environmental justice in Alaska. Established in 1997, ACAT relies on community research and advocacy to change local and international toxics policy and help communities implement strategies to limit their exposure to harmful chemicals. In the aftermath of the *Exxon Valdez* oil spill, ACAT’s members experienced, firsthand, the harms dispersants cause to people, wildlife,

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<sup>3</sup> 83 Fed. Reg. 829 (Jan. 8, 2018).

<sup>4</sup> Lisa Friedman and Hiroko Tabuchi, *U.S. to Roll Back Safety Rules Created After Deepwater Horizon Spill*, N.Y. Times, Dec. 28, 2017.

<sup>5</sup> The coalition predecessor was responsible for filing the 2012 petition for rulemaking which spurred the rulemaking procedure currently contested. The coalition consisted of Dr. Riki Ott along with tribal members, small business owners, academics, environmental nonprofits, and individuals—all concerned citizens interested in updating the outdated NCP regulations.

and the environment. ACAT seeks an immediate update to the NCP's dispersant provisions to address the toxicity and environmental risks associated with using these chemicals in oil-spill response.

Kindra Arnesen is a commercial fisherwoman who lives in the coastal town of Buras, Louisiana, a town deeply impacted by the BP Deepwater Horizon oil disaster and the dispersants liberally used in its aftermath. Ms. Arnesen, her husband, and her two kids were all exposed to dispersants after the spill and later became sick with respiratory problems, lesions, headaches, rashes, and body aches. The toxic combination of dispersants and oil also devastated fish stocks in the Gulf, and Ms. Arnesen's family fishing business experienced a significant drop in revenues after the spill. Ms. Arnesen worries about future spills and how, without an update to the NCP, dispersant use can again hurt her family, her community, and the marine resources that sustain them.

Rosemary Ahtuanguaruak is an Iñupiat woman living in Nuiqsut, Alaska, a majority-Iñupiat community enclosed completely by oil rigs and pipelines that impede the movement of culturally important wildlife and threaten the community's subsistence culture. Most of Ms. Ahtuanguaruak's community depends on subsistence fishing and whaling for food. She is deeply concerned that, in the likely event of another oil spill, dispersants will exacerbate the harms to the wildlife and arctic ecosystem central to her community. To protect her community, Ms. Ahtuanguaruak worked to pass local resolutions banning dispersant use in Nuiqsut and other Alaskan Native villages. For Ms. Ahtuanguaruak, an update to the dispersant provisions of the NCP is long overdue.

Through their retained counsel, these organizations and individuals intend to sue to compel EPA to update the NCP. Section 1365(a)(2) of the CWA authorizes any person to commence a civil action against the Administrator, after sixty days' notice, for failure to perform a nondiscretionary duty.<sup>6</sup> The undersigned have also sent a copy of this notice, by certified mail, to the Attorney General of the United States.<sup>7</sup>

## I. LEGAL BACKGROUND

The purpose of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>8</sup> Section 311 of the Act addresses oil spills, and requires EPA to set forth an NCP that "shall provide for . . . effective action to minimize damage from oil . . . discharges."<sup>9</sup> To ensure that the NCP is both "effective" and can "minimize damage" resulting from an oil spill, it must reflect current scientific understanding of spill-response methods. Accordingly, the CWA imposes on EPA a nondiscretionary duty to update the NCP periodically.<sup>10</sup>

The legislative history of the CWA affirms that Congress expected EPA to review and revise the NCP to reflect scientific and technological developments. A Senate report explained that "[b]ecause information on acceptable procedures for prevention of oil

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<sup>6</sup> 33 U.S.C. §1365(a)(2).

<sup>7</sup> 40 C.F.R. §135.2(b).

<sup>8</sup> 33 U.S.C. § 1251(a).

<sup>9</sup> 33 U.S.C. §1321(d)(1) – (2).

<sup>10</sup> 33 U.S.C. §1321(d)(3).

discharges and methods of cleanup[] is limited, it is anticipated that the regulations established pursuant to this section will be periodically reviewed and updated to take into account new information and new technology.”<sup>11</sup> By as early as 1969—i.e., a half-century ago—Congress was deeply concerned that “[u]ntold ecological damage can result not only from the oil itself but also from chemicals used in attempting to deal with the oil,” and it wanted EPA to ensure that “any technique[] to disperse oil [. . .] is not more damaging than oil itself.”<sup>12</sup> Accordingly, Congress expected the agency to amend the NCP “to reflect changing conditions and to take into account advances in the technology for the handling of oil and for removing oil discharged.”<sup>13</sup>

## II. FACTUAL BACKGROUND

Mounting evidence, including scientific studies and EPA’s own determinations, demonstrates that EPA urgently needs to amend the NCP’s provisions governing dispersants. Dispersants are chemical mixtures applied to oil spills with the objective of breaking up the oil into smaller droplets; this, in turn, is assumed to enhance microbial biodegradation of the oil.<sup>14</sup> The NCP’s dispersant provisions operate on this understanding of dispersant function, but this understanding is deeply flawed as a matter of science. As discussed below, both empirical studies and EPA’s own analyses point to the same conclusion: an update to the NCP’s dispersant provisions is critical and long overdue, to address abundant “new information” since the last NCP update in 1994.

### A. Scientific Studies

The shortcomings of the NCP’s dispersant provisions became glaringly apparent in the aftermath of the BP Deepwater Horizon disaster in 2010—the largest oil spill in U.S. history<sup>15</sup>—when over two million gallons of dispersants were deployed in the Gulf of Mexico.<sup>16</sup> Scientific investigations and analysis of dispersant use after the BP Deepwater Horizon disaster revealed that this chemical response method was not effective and, in fact, exacerbated the harms from the spill. Several studies revealed, for example, that the dispersants used actually impeded oil biodegradation in the Gulf, instead of enhancing this process.<sup>17</sup>

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<sup>11</sup> S. Rep. No. 91-351, at 16 (1969).

<sup>12</sup> H.R. Rep. No. 91-127, at 2, 14 (1969).

<sup>13</sup> *Id.* at 67.

<sup>14</sup> Sara Kleindienst et al., *Using dispersants after oil spills: impacts on composition and activity of microbial communities*, 13(6) *Nature Rev. Microbiology* 388, 388 (2015).

<sup>15</sup> Kendra L. Daly, et al. *Assessing the impacts of oil-associated marine snow formation and sedimentation during and after the Deepwater Horizon oil spill*, 13 *Anthropocene* 18, 18 (2016).

<sup>16</sup> *Id.* at 19.

<sup>17</sup> Shokouh Rahsepar et al., *Chemical dispersants: Oil biodegradation friend or foe*, 108 *Marine Pollution Bulletin* 113, 116–118 (2016); Sara Kleindienst et al., *Chemical dispersants can suppress the activity of natural oil-degrading microorganisms*, 112(48) *Proc Natl Acad Sci* 14900, 14901 (2015); Samantha Joye et al., *Microbial dynamics following the Macondo oil well blowout across Gulf of Mexico environments*, 64(9) *BioScience* 766, 774–775 (2015).

Additionally, there are indications that dispersant use may have enhanced sinking of oil after the spill, contributing to substantial oil deposition on the ocean floor that was unprecedented in scale.<sup>18</sup> The ecological harm of smothering the ocean floor in oil is severe and, therefore, the NCP expressly prohibits use of sinking agents.<sup>19</sup> The phenomena of dispersants functioning as sinking agents, or indirectly enhancing sinking of oil, are highly concerning, and highlight another shortcoming of the NCP: It does not contemplate that these chemicals can act as sinking agents, directly or indirectly, by mobilizing oil into the water column. This is in part because the NCP is not predicated on realistic field conditions. Thus, deployment of dispersants in a manner consistent with the current NCP can undermine—and has undermined—the stated purpose of the Plan, which is to minimize damage from oil discharges.

After the BP Deepwater Horizon disaster, dispersants were used in high volumes and over a long duration, at the sea surface and in subsea injections. The use of these dispersants was not only ineffective, but it was also very harmful to human health and the environment. While dispersants and crude oil are each independently toxic to humans, their combined (synergistic) toxicity is much greater.<sup>20</sup> For example, an ongoing assessment of the health impacts on Coast Guard responders after the BP Deepwater Horizon disaster showed a strong correlation between these workers' dispersant exposure and higher rates of coughing, pulmonary issues, and gastrointestinal issues, compared to those without contact with dispersants.<sup>21</sup>

This chemical pollution from dispersant use has likewise adversely affected coastal communities near dispersant application locations, where residents reported high incidence of respiratory illness and other health complaints.<sup>22</sup> Additionally, the oil-dispersant particles in the Gulf of Mexico had a severe impact on marine wildlife from the seafloor to the upper ocean; these particles have been linked to large dolphin die-offs, fish kills, and deformities.<sup>23</sup>

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<sup>18</sup> Odd G. Brakstad, et al. *A critical review of marine snow in the context of oil spills and oil spill dispersant treatment with focus on the Deepwater Horizon oil spill*. 135 *Marine Pollution Bulletin* 346, 353–54 (2018); Uta Passow et al., *How the dispersant Corexit impacts the formation of sinking marine oil snow*, 125 *Marine Pollution Bulletin* 139, 139, 143-144 (2017).

<sup>19</sup> 40 C.F.R. § 300.310(b) and § 300.910(e).

<sup>20</sup> Sindhu Ramesh et al., *Evaluation of behavioral parameters, hematological markers, liver and kidney functions in rodents exposed to Deepwater Horizon crude oil and Corexit*, 199 *Life Sciences* 34, 37–38 (2018).

<sup>21</sup> Melannie Alexander et al., *The Deepwater Horizon oil spill Coast Guard cohort study: A cross-sectional study of acute respiratory health symptoms*, 162 *Environmental Research* 196, 200–201 (2018).

<sup>22</sup> Lauren Peres et al., *The Deepwater Horizon oil spill and physical health among adult women in southern Louisiana: The women and their children's health (WaTCH) study*, 124 *Environmental Health Perspectives* 1208, 1211–1212 (2016).

<sup>23</sup> Samantha Joye et al., *The Gulf of Mexico ecosystem, six years after the Macondo oil well blowout*, 129 *Deep Sea Research Part II: Topical Studies in Oceanography* 4, 13–16 (2016). Suzanne M. Lane et al., *Reproductive outcome and survival of common bottlenose dolphins sampled in Barataria Bay, Louisiana, USA, following the Deepwater Horizon oil spill*, 282 *Proc. Biol. Sci* 1 (2015); Lori H. Schwacke et al.,

This is just a sample of the mounting scientific evidence demonstrating how dispersants were ineffective, and indeed extremely harmful, when deployed in response to the largest oil spill in U.S. history.

## **B. EPA's Analysis and Conclusions**

The numerous problems with dispersant use in response to the BP Deepwater Horizon disaster revealed to the public the inadequacies of the 1994 NCP. But these flaws were hardly news to EPA. EPA's internal reviews and assessments of the NCP for the preceding decade concluded, repeatedly, that the agency needed to amend the provisions governing dispersants. Regardless, the BP Deepwater Horizon disaster refocused EPA's attention on amending the NCP, at least for a time.

Public concern about the deployment of large volumes of dispersants in response to the disaster led EPA's Office of the Inspector General to investigate and review the NCP's dispersant provisions in 2011.<sup>24</sup> The Inspector General's report concluded that the NCP's approach to efficacy and toxicity review of dispersants was inadequate, and it cited the EPA Administrator's public declarations asserting the same.<sup>25</sup>

In fact, the Inspector General's investigation revealed that as early as 1999, EPA was concerned about "poor reproducibility" of the NCP's dispersant efficacy testing protocols and had funded a research study to develop a new testing procedure.<sup>26</sup> That effort resulted in EPA drafting a proposed rule to update the NCP's dispersant efficacy testing requirements, but the agency never publicly issued that proposed rule. In setting this effort aside, EPA cited changes in management and shifting agency priorities.<sup>27</sup>

EPA embraced the recommendations in the 2011 Inspector General's report, however, and resumed efforts to revise the NCP provisions governing dispersants. And this time, EPA did issue a proposed rule, in January 2015.<sup>28</sup> EPA explained that it developed the proposed rule to incorporate lessons learned from the BP Deepwater Horizon disaster. It stated that the amendments would revise the NCP's efficacy and toxicity standards, environmental trade-off determinations, and dispersant monitoring requirements.<sup>29</sup> The comment period on the proposed rule closed in April 2015. Since that date, EPA has taken

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*Quantifying injury to common bottlenose dolphins from the Deepwater Horizon oil spill using an age-, sex-, and class-structured population model*, 33 *Endangered Species Research* 265 (2017).

<sup>24</sup> EPA Office of Inspector General, Report No. 11-P-0534, Revisions Needed to National Contingency Plan Based on Deepwater Horizon Oil Spill (Aug. 25, 2011).

<sup>25</sup> *Id.* at 11, 20.

<sup>26</sup> *Id.* at 9 – 10.

<sup>27</sup> *Id.* at 10.

<sup>28</sup> EPA, National Oil and Hazardous Substances Pollution Contingency Plan, 80 Fed. Reg. 3, 380 (proposed January 22, 2015).

<sup>29</sup> *Id.* at 3,381.

no further public action on this rulemaking.<sup>30</sup> EPA's unlawful inaction prompts this Notice.

### III. FAILURE TO PERFORM A NONDISCRETIONARY DUTY

EPA has failed to update the NCP in response to significant advances in understanding of the risks and effectiveness of chemical dispersants. For nearly two decades, EPA has been aware that it needs to amend the dispersant provisions of the NCP. In January 2015, the agency even took the step of issuing a proposed rule to make these changes. Since the comment period on this rule closed, however, EPA has taken no further action to finalize this rule. Thus, EPA has failed to fulfill its nondiscretionary duty under § 1321 (d)(3) of the CWA to amend the NCP, ensuring that it facilitates "effective" action that "minimize[s] damage" from oil spills.

If, in the next sixty days, EPA does not finalize its proposed rule to amend the NCP and address its shortcomings regarding dispersant use,<sup>31</sup> the undersigned organizations and individuals intend to file suit in federal court to compel EPA to fulfill this statutory duty.

If you have any questions or would like to discuss this matter, please contact us. The undersigned organizations and individuals have retained legal counsel in this matter. Accordingly, please direct all communications to:

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Respectfully,

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Dr. Riki Ott, Director  
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<sup>30</sup> See EPA, Unified Agenda Fall 2018, RIN 2050-AE87, available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=2050-AE87>.

<sup>31</sup> EPA, National Oil and Hazardous Substances Pollution Contingency Plan, 80 Fed. Reg. 3,380 (proposed January 22, 2015).

/s/

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