EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

October 13, 2010

BY CERTIFIED MAIL

Lisa Jackson, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave., NW
Washington, DC 20460

Eric Holder, Attorney General
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

RE: 60-Day Notice of Intent to Sue for Failure to Perform Nondiscretionary Duties under the Clean Water Act

Dear Administrator Jackson:

This letter is written on behalf of Alaska Community Action on Toxics, Cook Inletkeeper, Florida Wildlife Federation, Gulf Restoration Network, Louisiana Shrimp Association, Sierra Club, and Waterkeeper Alliance to provide notice of their intent to sue the United States Environmental Protection Agency (EPA) for failure to perform nondiscretionary duties under the Federal Water Pollution Control Act (Clean Water Act).[1] Specifically, EPA has failed to publish a schedule identifying the waters in which dispersants, other chemicals, and other spill mitigating devices and substances may be used, 33 U.S.C. § 1321(d)(2)(G)(ii) (2006), and the quantities at which such dispersants, other chemicals, and other spill mitigating devices can be used safely, *id.* § 1321(d)(2)(G)(iii). The Clean Water Act requires EPA to take these actions as part of its responsibilities for preparing and publishing the National Contingency Plan (NCP), which governs responses to discharges of oil and hazardous substances. *See id.* § 1321(d).

EPA's failure to take these actions was one of the many causes of the confusion, concern, and uncertainty surrounding the response to the recent oil spill in the Gulf of Mexico. Approximately 1.84 million gallons of dispersants were applied in the Gulf despite widespread

[1] The signatories are non-profit public interest advocacy organizations that seek to improve contingency planning for dispersant use. Please find a brief description of the undersigned organizations in the Appendix.

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recognition that little was known about the health and environmental effects of applying such massive quantities of dispersants, and applying them beneath the ocean's surface. *See, e.g.*, Lisa Jackson, Administrator, Envtl. Prot. Agency, Remarks at Press Conference 3 (May 24, 2010), http://www.epa.gov/bpspill/dispersants/transcript-may24.pdf ("We are still deeply concerned about the 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."). Indeed, the response efforts were marred by EPA's lack of information about the quantities of dispersants that could be safely used. In the middle of the oil spill, EPA began conducting its own tests on the toxicity and endocrine disruption potential of dispersants.[2] As the federal government and BP went back and forth over which dispersants should be used, how dispersants should be applied, and what quantity of dispersant would be optimal, it became apparent how little planning had been done beforehand. For its part, EPA officials repeatedly acknowledged their ignorance about the effects of the dispersants being poured into the Gulf. *See, e.g.*, NPR, Transcript of Interview with Lisa Jackson, EPA Administrator (May 25, 2010), http://www.npr.org/templates/story/story.php?storyId=127118171 ("[W]e're having to get science on the fly. We are having to collect data every day and review the data to make sure we're not making a bad situation any worse.").[3] The Gulf of Mexico became a proving ground for the novel and untested use of dispersants.

Had EPA performed its duty under the Clean Water Act, it already would have determined in which waters dispersants such as COREXIT EC9500A and COREXIT EC9527A could be used and what quantities could be safely used. Consistent with statutory intent, the waters and quantities analyses and underlying data would have been available for use in response efforts. Due to EPA's failure to abide by the law, these analyses were never done, and the result was a poorly planned, haphazard response, the effects of which will be felt for years to come.

It is time for EPA to perform its duties under the Clean Water Act. EPA must identify the waters in which dispersants and other chemicals may be used and the quantities in which they can be safely used. These determinations will go a long way toward ensuring that the next time an oil spill occurs, responders can make informed decisions to minimize harm to human health and the environment.

LEGAL BACKGROUND

A. Preparation of the NCP Product Schedule

The NCP is a comprehensive scheme for planning and authorizing responses to discharges of oil and hazardous substances that was first developed in the late 1960s and has since been statutorily amended multiple times. *See generally National Oil and Hazardous Substances Pollution Contingency Plan Overview*, EMERGENCY MANAGEMENT,

[2] EPA conducted two phases of testing. Phase 1 test results were released on June 30, 2010, and phase 2 test results were released on August 2, 2010. *See EPA's Toxicity Testing of Dispersants*, EPA RESPONSE TO BP SPILL IN THE GULF OF MEXICO, http://www.epa.gov/bpspill/dispersants-testing.html (last visited Oct. 12, 2010).

[3] *See also Oversight Hearing Before the S. Comm. on Env't and Public Works on the Use of Oil Dispersants in the Deepwater Horizon Oil Spill*, 111th Cong. 5 (2010) (testimony of Paul Anastas, Assistant Administrator, EPA Office of Research and Development) ("[M]uch is unknown about the underwater use of dispersants.").

http://www.epa.gov/oem/content/lawsregs/ncpover.htm (last visited Oct. 12, 2010). The Oil Pollution Act of 1990 (OPA), which was enacted to address systemic failures in responding to oil spills, including the Exxon Valdez spill, and "to strengthen the national response system," National Oil and Hazardous Substances Pollution Contingency Plan, 59 Fed. Reg. 47,384, 47,384 (Sept. 15, 1994) (codified at 40 C.F.R. pts. 9, 300), amended the Clean Water Act to require the preparation of a schedule of dispersants and other chemicals as follows:

> **(d) National Contingency Plan**
>
> **(1) Preparation by President**
>
> The President shall prepare and publish a National Contingency Plan for removal of oil and hazardous substances pursuant to this section.
>
> **(2) Contents**
>
> The National Contingency Plan 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 . . . .

33 U.S.C. § 1321 (as amended by the Oil Pollution Act § 4201, Pub. L. No. 101-380, 104 Stat. 484, 523-26 (1990)). The President delegated to EPA responsibility for preparing and publishing the NCP, including the schedule of dispersants and other chemicals. Exec. Order No. 12,777 § 8(b), 56 Fed. Reg. 54,757, 54,768 (Oct. 18, 1991). In turn, EPA has acknowledged its understanding that Congress intended the NCP Product Schedule to guide application and use of dispersants in an environmentally protective way:

> EPA believes that Congress' primary intent in regulating products under the NCP Product Schedule is to protect the environment from possible deleterious effects caused by the application or use of these products. In looking at the long- and short-term effects on the environment of all spill mitigating devices and substances, EPA has concluded that chemical and bioremediation countermeasures pose the greatest threat for causing deleterious effects on the environment.

59 Fed. Reg. at 47,406-07.

B. The Citizen Suit Provision of the Clean Water Act

The Clean Water Act authorizes citizen suits against EPA "where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator." 33 U.S.C. § 1365(a)(2). A citizen may not file suit alleging a failure to perform a nondiscretionary duty prior to 60 days after giving notice of such action to the EPA Administrator. *Id*. § 1365(b)(2).

FACTUAL BACKGROUND

A. Dispersants and Other Chemical Substances Used in Responding to Oil Spills

The use of dispersants in responding to an oil spill on water "require[s] risk-based decisionmaking at the time of a spill." NAT'L RESEARCH COUNCIL, OIL SPILL DISPERSANTS: EFFICACY AND EFFECTS 10 (2005). "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." *Id.* The combination of oil and a dispersant is toxic, and, depending on the specific circumstances, may be more or less toxic than the dispersant alone or the oil alone. *Id.* at 207. Dispersants do not eliminate oil but instead move the oil away from the surface into the water column. As a result, using dispersants 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 floor of the ocean. *Id.* at 2.

Determining whether to use dispersants and to make this trade-off is complex and requires adequate data on the effects of dispersants and mixtures of dispersants and oil. This data, and the assessments based on the data, cannot be gathered in the midst of a spill. Accordingly, Congress required that dispersants eligible for use in oil spill response be identified ahead of time in the NCP Product Schedule, along with the waters in which the dispersants may be used and the quantities that can safely be used. *See* 33 U.S.C. § 1321(d)(2)(G).

Unfortunately, EPA has failed to identify the mandated specifics on the waters in which dispersants on the Product Schedule may be used and the quantities of dispersant that can be used safely – and thus health and environmental information critical to decision-making on the ground is grossly inadequate. If EPA had complied with its duties under the Clean Water Act to determine the waters in which dispersants can be used and the quantities that can be used safely, government officials would have been much better prepared to respond to the Gulf oil spill. EPA already would have assessed where dispersants such as COREXIT could be used and the volume that could safely be applied. Having failed to comply with the statute, however, EPA was left to scramble to make these determinations during the midst of the spill.

B. EPA's Publication of the NCP Product Schedule

EPA has issued regulations pursuant to the requirement that EPA maintain a schedule of dispersants eligible for use in carrying out the National Contingency Plan. *See* 40 C.F.R. §§ 300.900-300.920 (2010). The regulations fail to address, however, two critical statutory

requirements for the NCP Product Schedule. Congress required EPA not only to identify dispersants eligible for use, but also to identify the waters in which they may be used and the quantities that can be used safely. *See* 33 U.S.C. § 1321(d)(2)(G). The current NCP Product Schedule does not identify the waters in which any of the listed products may be used nor the quantities that can be used safely.[4]

VIOLATIONS OF LAW

A. Failure to Identify the Waters in Which Dispersants and Other Chemicals May Be Used

Section 311(d)(2)(G)(ii) of the Clean Water Act requires EPA 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). EPA has failed to perform this nondiscretionary duty. EPA has not identified on the Product Schedule the waters in which each dispersant, other chemicals and other spill mitigating device and substance may be used.

B. Failure to Identify the Quantities of Dispersants and Other Chemicals That Can Be Used Safely

Section 311(d)(2)(G)(iii) of the Clean Water Act requires EPA 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 such waters." 33 U.S.C. § 1321(d)(2)(G)(iii). EPA has failed to perform this nondiscretionary duty. EPA has not identified on the Product Schedule the quantities of each dispersant, other chemical, and other spill mitigating device and substance that can be used safely.

CONCLUSION

EPA has failed to perform two nondiscretionary duties mandated by section 311(d)(2)(G) of the Clean Water Act, 33 U.S.C. § 1321(d)(2)(G). EPA has failed to publish a schedule identifying the waters in which dispersants and other chemicals may be used and the quantities of such dispersants and other chemicals that can be used safely. If EPA does not comply with these two statutory requirements within the next 60 days, Alaska Community Action on Toxics, Cook Inletkeeper, Florida Wildlife Federation, Gulf Restoration Network, Louisiana Shrimp Association, Sierra Club, and Waterkeeper Alliance intend to file suit in federal court to compel EPA to comply with the statute.

If you have any question or wish to discuss this matter, please contact me.

[4] EPA publishes the NCP Product Schedule on its website and maintains the schedule in table form as well as in a PDF. *See National Contingency Plan Product Schedule*, EMERGENCY MANAGEMENT, http://www.epa.gov/OEM/content/ncp/product_schedule.htm (last visited Oct. 12, 2010).

Sincerely,

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On behalf of the Signatory Organizations

Appendix
Signatory Organizations

Alaska Community Action on Toxics
505 West Northern Lights Blvd, Suite 205
Anchorage, Alaska 99503
(907) 222-7714
Alaska Community Action on Toxics (ACAT) is a statewide non-profit environmental health research and advocacy organization dedicated to protecting environmental health and achieving environmental justice. *See* http://www.akaction.org/. The mission of ACAT is to assure justice by advocating for environmental and community health. ACAT protects the rights to clean air, clean water, and toxic-free food, and works to ensure the community's right-to-know, to achieve policies based on the precautionary principle, and to eliminate the release of toxic chemicals that may harm human health or the environment, including dispersants.

Cook Inletkeeper
P.O. Box 3269
Homer, AK 99603
(907) 235-4068 x22
Cook Inletkeeper is a community-based non-profit public interest organization that combines advocacy, education and science toward its mission to protect Alaska's Cook Inlet watershed and the life it sustains. *See* http://www.inletkeeper.org/. Cook Inletkeeper's monitoring and science work, together with its education and advocacy efforts, are directed to ensure a vibrant and healthy Cook Inlet watershed necessary to support abundant fish and wildlife and strong local communities. After the use of dispersants in the Exxon Valdez oil spill response, Cook Inletkeeper has a deep interest in ensuring careful and safe use of dispersants going forward.

Florida Wildlife Federation
P.O. Box 6870
Tallahassee, FL 32314
(850) 656-7113
Florida Wildlife Federation, Inc. is a statewide non-profit conservation and education organization with approximately 13,000 members throughout Florida. *See* http://www.fwfonline.org/Index.htm. 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 protect Florida's water resources and the animals that use those waters as habitat. Members of the Federation use and enjoy Gulf Coast waters for commercial fishing and recreation and have a strong interest in protecting these waters to ensure continued safe use.

Gulf Restoration Network
P.O. Box 2245
New Orleans, LA 70176
(504) 525-1528
Gulf Restoration Network, Inc. (GRN) 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. *See* http://healthygulf.org/. GRN has been actively involved in 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, GRN seeks to ensure that cleanup workers, citizens, and officials have information on the ingredients and human health and environmental impacts of the dispersants that were used and are available for use in the Gulf of Mexico.

Louisiana Shrimp Association
P.O. Box 1088
Grand Isle, LA 70358
(504) 952-4368
Louisiana Shrimp Association (LSA) is a statewide non-profit trade association of commercial shrimp fishermen and related businesses dedicated to protecting and promoting the Louisiana and domestic commercial shrimp industry and Louisiana's historic fishing community culture and heritage. *See* http://www.louisianashrimp.org/. LSA's members earn a living from the Gulf of Mexico and coastal inland waters and depend on the Gulf's marine ecosystem and shrimp populations. Having been severely impacted by the BP oil disaster, LSA's members have a strong interest in ensuring the safe use of chemical dispersants in response to future oil disasters.

Sierra Club
85 Second Street, 2nd Floor
San Francisco, CA 94105
(415) 977-5500
Sierra Club is a non-profit, environmental grassroots membership organization comprised of 1.3 million members and supporters. *See* http://www.sierraclub.org/. It is 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. In the aftermath of the Gulf oil spill disaster, Sierra Club has been actively working to ensure speedy and efficient cleanup and to ensure greater preparedness for and prevention of future oil disasters.

Waterkeeper Alliance
50 S. Buckhout, Suite 302
Irvington, NY 10533
(914) 674-0622
Waterkeeper Alliance is a non-profit international coalition of grassroots environmental advocates comprised of nearly 200 local Waterkeeper organizations, including a significant presence in the Gulf of Mexico where seven programs fight daily for a clean and healthy Gulf. *See* http://www.waterkeeper.org/. These programs include the Apalachicola Riverkeeper, Atchafalaya Basinkeeper, Emerald Coastkeeper, Galveston Baykeeper, Louisiana Bayoukeeper, Lower Mississippi Riverkeeper and Mobile Baykeeper. With its commitment to local communities' right to clean water and vision of fishable, swimmable, and drinkable waterways, Waterkeeper has a strong interest in ensuring the careful and safe use of dispersants.