

Congress of the United States
Washington, DC 20515

July 28, 2022

The Honorable Michael S. Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator Regan,

We write to urge the Environmental Protection Agency (EPA) to update and strengthen the final rule it plans to issue amending existing regulations governing the use of chemical dispersants in response to oil spills. New scientific research has demonstrated an urgent need for stronger regulations that better reflect the latest understanding of the risks that certain dispersants can pose to the environment and public health. Timely issuance of a robust final rule on chemical dispersants will significantly improve the health and safety of oil spill response workers and Americans in coastal communities at risk from oil spills.

EPA first proposed revisions to the chemical dispersant regulations — Subpart J of the National Contingency Plan (NCP), promulgated under the Clean Water Act (CWA) — more than seven years ago.¹ Subpart J sets forth the “[p]rocedures and techniques to be employed in identifying, containing, dispersing, and removing oil and hazardous substances” and a schedule for identifying and evaluating “dispersants, other chemicals, and other spill mitigating devices and substances” that may be used in response to oil discharges.²

EPA has never finalized this important proposed rule. In litigation over EPA’s failure to issue a final rule — *Earth Island Institute v. Regan* — Judge William H. Orrick of the Northern District of California granted summary judgment to the plaintiffs and ruled in 2021 that “EPA breached its nondiscretionary duty to issue the final rule . . . [and] delayed unreasonably in the process.”³ The court further found that EPA “failed to fulfill its nondiscretionary duty to revise or amend the NCP” in light of “new information relevant to dispersant efficacy, toxicity, and terms of authorization.”⁴ This was a necessary step, the court found, because “current standards for hazardous substances were insufficient to accomplish Congress’ goal” that EPA “provide for efficient, coordinated, and effective action to minimize damage from oil and hazardous substance

¹ 33 U.S.C. § 1321(d)(2)(g); National Oil and Hazardous Substances Pollution Contingency Plan, 80 Fed. Reg. 3380 (proposed Jan. 22, 2015) (to be codified at 40 C.F.R. pts. 110 and 300).

² 33 U.S.C. § 1321(d)(2)(F), (G).

³ 553 F.Supp.3d 737, 740 (N.D. Cal. 2021).

⁴ *Id.* at 746.

discharges, including containment, dispersal, and removal of oil and hazardous substances.”⁵ The court ordered EPA to submit the final rule for publication in the Federal Register by May 31, 2023.⁶

Recent studies have found that oil-dispersant mixtures are very harmful to human health and wildlife.⁷ For example, the use of oil dispersants in the 2010 BP Deepwater Horizon disaster has been linked to molecular and cellular effects, organ dysfunction, and the debilitating illness of clean-up workers and area residents⁸ — harms for which BP compensated the victims in settling litigation over the spill.⁹ The forthcoming final rule must reflect the danger that oil dispersants pose, and must protect workers and their families from serious health effects. Our responses to hazardous oil spills should never sacrifice the health and well-being of those undertaking the difficult task of mitigating the environmental damage oil spills cause.

In the *Earth Island Institute* order, the court addressed EPA’s argument that it had previously amended the NCP: “[T]he amendments do not address chemical dispersants and oil spill response and are therefore unresponsive to the ‘new information’ that triggers the EPA’s duty to update the NCP.” In finalizing the chemical dispersant rule, EPA should heed the court’s words. If “new information” in the form of recent scientific research can make the standard for the use of oil dispersant chemicals safer and more effective, EPA should not ignore it. It is important for EPA to supplement the rule with the latest science. Without it, EPA cannot fully satisfy its duty under the CWA to identify whether dispersants can be used safely *at all* in the deep sea or in large quantities over long durations at its surface.¹⁰

To help us better understand EPA’s progress in issuing a long-overdue final rule on chemical dispersants that adequately protects human and ecological health, we request responses in writing to the following questions by August 30, 2022:

1. Will EPA supplement its final rule, due by May 31, 2023, with current science? Is EPA planning to reopen public comments as part of any process to supplement its 2015 proposed

⁵ *Id.* at 740, 743 (quoting 33 U.S.C. § 1321(d)(2)).

⁶ *Id.* at 752.

⁷ E.g., Hristina Denic-Roberts et al., *Acute and longer-term cardiovascular conditions in the [BP DWH] oil spill Coast Guard Cohort*, *Envtl. Int’l*, Vol. 158 (Jan. 2022), <https://doi.org/10.1016/j.envint.2021.106937>; Stephanie Venn-Watson et al., *Adrenal gland and lung lesions in Gulf of Mexico Common Bottlenose Dolphins (*Tursiops truncatus*) Found Dead following the [BP] Deepwater Horizon Oil Spill*, *PLoS ONE* (May 20, 2015), <https://doi.org/10.1371/journal.pone.0126538>.

⁸ Mark A. D’Andrea, *The Development of Long-Term Adverse Health Effects in Oil Spill Cleanup Workers of the [BP] Deepwater Horizon Offshore Drilling Rig*, *Frontiers in Public Health* (Apr. 26, 2018), <http://doi.org/10.3389/fpubh.2018.00117>; Danielle Major et al., *Effects of Corexit oil dispersants and the WAF of dispersed oil on DNA damage and repair in cultured human bronchial airway cells*, *Science Direct, Gene Reports* (June 2016), <https://doi.org/10.1016/j.genrep.2015.12.002>.

⁹ *In Re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010*, MDL No. 2179, 2:10-md-02179-CJB-SS, Exhibits to Deepwater Horizon Medical Benefits Class Action Settlement Agreement, Ex. 8 (Specified Physical Conditions Matrix) (E.D. La. May 3, 2012), <https://www.laed.uscourts.gov/sites/default/files/OilSpill/6.pdf>.

¹⁰ 33 U.S.C. § 1321(d)(2)(g)(iii).

rule with current science? If not, please explain if and how EPA is planning to accommodate the current science in its final rule.

2. If EPA is not supplementing its final rule with current science, please provide an explanation of how the existing version of the proposed rule addresses the implications of current science for deep sea dispersant use; dispersant use in large quantities over long durations at the sea surface; and dispersant use in state waters.

3. As part of this rulemaking proceeding, has EPA already used, or made plans to use, information from individuals (including testimony in legal proceedings) who wish to make EPA aware of medical conditions they attribute to an oil spill or dispersant exposure? If yes, how? If no, why not?

4. In addition to a final rule, what action is EPA considering, if any, to address the known long-term human and ecological health harms of oil spills and subsequent cleanup?

5. Please describe EPA's ability to secure a reliable source of reference oils needed to test dispersant toxicity and efficacy.

6. Does EPA have, or plan to have, a written description of the current science on the long-term human and ecological health impacts of chemical dispersants, on which EPA relies in making policy decisions on dispersant use or harms to human and ecological health? If so, please provide a copy.

7. In response to the 2021 oil spill off the coast of Orange County, California:

- a. Which dispersants were used in response to this spill and where and in what quantity were they used?
- b. What agency process was used to determine the response measures chosen, and what public participation opportunities did it afford?
- c. Were community members and first responders notified before dispersants were used?
- d. What research has been, or is being, conducted to assess the environmental and public health impacts of the dispersant used for this spill?

8. Individuals in communities potentially affected by dispersant use have asked to receive advance warning of dispersant use. Will EPA commit to using its authority to notify the public in advance of future dispersant use, and provide citizens an enforceable right to this information?

9. Given the long-term human and ecological harms wrought by oil spills and dispersant use, how does EPA intend to better involve local governments, citizens, and Tribes—as opposed to only state and federal regulatory agencies—in decision-making regarding oil spill preparation and response planning?

The Honorable Michael S. Regan

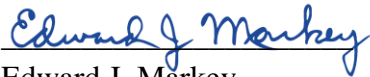
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10. How do EPA's plans for stakeholder involvement in oil spill preparation and response planning compare to those established by the Oil Pollution Act, *i.e.*, Area Committees, Regional Citizens' Advisory Committees, and involvement of Local Emergency Planning Committees and Tribal Emergency Planning Committees?

Thank you for your careful attention to this matter. We look forward to learning about your progress and urge you to ensure that recent strong science is reflected in the final rule.

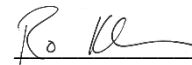
Sincerely,



Edward J. Markey
United States Senator



Nanette Diaz Barragán
Member of Congress



Ro Khanna
Member of Congress