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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

EARTH ISLAND INSTITUTE/ALERT PROJECT; ALASKA COMMUNITY ACTION ON TOXICS; COOK INLETKEEPER; CENTER FOR BIOLOGICAL DIVERSITY; ROSEMARY AHTUANGARUAK; AND KINDRA ARNESEN,

Plaintiffs,

vs.

MICHAEL REGAN, in his official capacity as Administrator of the United States Environmental Protection Agency; and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

Case No.: 3:20-cv-00670-WHO

PLAINTIFFS' NOTICE OF MOTION, MOTION FOR SUMMARY JUDGMENT, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Hearing date: July 7, 2021
Time: 2:00 pm
Dept: [Courtroom 2, 17th floor San Francisco Courthouse]
Via Zoom unless otherwise indicated
Judge: Hon. William H. Orrick

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NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

On July 7, 2021 at 2:00 p.m., or as soon as possible thereafter, Plaintiffs Earth Island Institute/ALERT Project, Alaska Community Action on Toxics, Cook Inletkeeper, Center for Biological Diversity, Rosemary Ahtuangaruak, and Kindra Arnesen (collectively, Plaintiffs) will move for summary judgment pursuant to Federal Rule of Civil Procedure 56. Plaintiffs move for summary judgment because there is no genuine dispute as to any material fact and Plaintiffs are entitled to judgment as a matter of law.

Plaintiffs seek an order declaring that Defendant Michael Regan in his official capacity as Administrator of the United States Environmental Protection Agency (EPA), and EPA, (1) have failed to perform a nondiscretionary duty imposed by the Clean Water Act (CWA) when they failed to update the 1994 National Contingency Plan (NCP) to reflect improvements in scientific and technological knowledge, and (2) are violating the Administrative Procedure Act (APA) by unreasonably delaying issuance of a final rule to update the NCP. Plaintiffs also seek an order requiring EPA to (1) issue a new proposed rule to amend the NCP within 90 days of the Court's decision; (2) issue a final rule within one year of the Court's decision; and (3) provide the Court with a status report 180 days from the date of the Court's decision.

This Motion is based on this Notice, the supporting Memorandum of Points and Authorities and the declarations and exhibits attached thereto, all pleadings and documents on file in this action, and oral and documentary evidence presented at or before the Motion hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE ISSUES

Eleven years ago today, the largest catastrophic oil spill in U.S. history—the BP Deepwater Horizon well blowout in the Gulf of Mexico—gushed oil for 87 days, releasing roughly 200 million gallons of oil into the marine environment. The spill response involved use

of more than two million gallons of toxic chemicals to disperse spilled oil. Dispersant chemicals were aerially applied, drifting onto the skin and into the airways of disaster first-responders such as Coast Guard officers. These chemicals similarly affected Gulf coast residents. Health effects from the disaster, which included enduring respiratory illness and skin lesions, became so prevalent in impacted communities that they are known locally as "BP Syndrome." The oil-and-dispersant mixture also had toxic effects on the marine environment, including numerous species of wildlife.

More than a decade later, serious dispersant-induced human health harm persists among the dispersant-exposed. In parallel, long-term scientific studies of BP Deepwater Horizon effects have confirmed both the human and ecological risks of dispersant use. Broad deployment of chemical dispersants nonetheless remains a permissible and industry-preferred oil spill response method, pursuant to the EPA's 1994 "National Contingency Plan" (NCP) that governs oil spill response.

EPA has not updated its NCP in more than a quarter century, despite the Clean Water Act's command that the federal government maintain a scientifically and technologically current NCP that "shall provide for efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges." 33 U.S.C. § 1321(d)(2). Further, despite the Administrative Procedure Act's command that an agency "within a reasonable time . . . conclude a matter presented to it" (5 U.S.C. § 555(b)), EPA has not concluded a pending rulemaking to update the NCP more than *eight years* after several Plaintiffs first filed a petition seeking a rule revision, more than *seven years* after Plaintiff Earth Island Institute filed a supplemental petition, and more than *six years* since EPA issued a proposed rule.

Both agency failures are unlawful. The Court should thus grant Plaintiffs' motion, and impose deadlines by which EPA must issue a scientifically current proposed rule and final rule.

RELEVANT FACTS AND BACKGROUND

Oil spills of varying sizes are a routine and inevitable incident of oil production and transport. Between 2006 and 2015, excluding the catastrophic BP Deepwater Horizon spill, the Bureau of Ocean Energy Management recorded 334 oil spills of more than one 42-gallon barrel of oil from offshore platforms.[1] These spills caused a total of 10,951 barrels of oil to enter the Gulf of Mexico.[2] Thus, on average, at least 37 oil spills occur annually from platforms in the Gulf, with roughly 1,200 barrels of oil entering waters. The NCP allows broad use of dispersant chemicals in response efforts, posing a constant threat to Plaintiffs' interests.

Chemical dispersants break up oil slicks on the water's surface and disperse oil particles.[3] In the process, they can act as sinking agents, sending oil below the surface, where it becomes difficult or impossible to remove. [AR] *Supplement to Petition for Rulemaking to Amend National Contingency Plan (NCP) Product Schedule* 10 (Jun. 2, 2014) (*2014 Pet. Supp.*).[4] The ability of dispersant chemicals to seemingly disappear huge swaths of oil has clear public relations value, but their ability to actually remediate oil spills is much less certain. Scientific evidence indicates that dispersants exacerbate a spill's ecological impact, and have significant adverse human health effects. [AR] *Petition for Rulemaking to Amend National Contingency Plan (NCP) Product Schedule* 8–9 (Nov. 14, 2012) (*2012 Pet.*) (describing evidence of harms to

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[1] Bureau of Ocean Energy Management/Bureau of Safety and Environmental Enforcement, *2016 Update of Occurrence Rates for Offshore Oil Spills* 16, Table 5, https://www.bsee.gov/sites/bsee.gov/files/osrr-oil-spill-response-research/1086aa.pdf.

[2] *Id.*

[3] *The Use of Dispersants in Marine Oil Spill Response*, National Center for Biotechnology Information (Apr. 5, 2019), https://www.ncbi.nlm.nih.gov/books/NBK556755/.

[4] This is not a case to be decided upon a traditional administrative record, insofar as there can be no bounded record where an agency has failed to act. *See, e.g., San Francisco Baykeeper v. Whitman*, 297 F.3d 877, 886 (9th Cir. 2002). Plaintiffs nonetheless here designate by [AR] the documents that Defendants have certified to the Court as the "administrative record." Plaintiffs propose to submit a Joint Appendix with Defendants at the conclusion of briefing.

human health); *2014 Pet. Supp.* 33 (citing numerous studies finding that oil and dispersants, when combined, are more toxic to marine life than oil alone).

An early large-scale application of dispersants occurred in 1969 off the coast of Santa Barbara in response to a well blowout that released 42 million gallons of oil. *Id*. at 6. Dispersants were later a significant part of the 1989 *Exxon Valdez* oil spill response in Prince William Sound, Alaska, and an even bigger part of the 2010 BP Deepwater Horizon oil spill response in the Gulf of Mexico. *2012 Pet.* 6; *2014 Pet. Supp.* 7.

The massive dispersant volume deployed in response to BP Deepwater Horizon—nearly two million gallons (80 Fed. Reg. 3380, 3381 (Jan. 22, 2015))—was indeed unprecedented. Further, almost half of this dispersant was injected at a deep wellhead (*id.*), despite dispersants' design for use atop the ocean and corresponding lack of efficacy testing for subsurface use.[5]

The Clean Water Act (CWA) of 1972 is intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Cognizant that oil and hazardous substances threaten the integrity of such waters, Congress, through Section 311 of the CWA, mandated that the President "shall prepare and publish a National Contingency Plan for removal of oil and hazardous substances" in the waters of the United States. *Id*. § 1321(d)(1).

Section 311's "overall intent is to require a number of activities to ensure the efficacy of the NCP and the ability to safely provide for mitigation of any pollution." *Order Re Mot. to Dismiss* 8, ECF No. 42 (*June 2 Order*). Accordingly, Congress instructed that the NCP "shall provide for efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges." 33 U.S.C. § 1321(d)(2). To this end, the CWA states that the President "may, from time to time, as the President deems advisable, revise or otherwise amend"

[5] National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling: Report to the President* 144 (2011), https://www.govinfo.gov/app/details/GPO-OILCOMMISSION.

the NCP. *Id.* § 1321(d)(3). The President delegated this statutory duty to EPA by executive order. Exec. Order No. 12777, 56 Fed. Reg. 54,757 (Oct. 22, 1991). The last NCP update was in 1994, more than a quarter-century ago. *See* 80 Fed. Reg. at 3383.

The NCP must include "a schedule identifying dispersants, chemicals, and other products that may be used under the NCP; the waters in which such [products] may be used; and the quantities of [products] that can be used safely in such waters." 33 U.S.C. § 1321(d)(2)(G). Subpart J of the NCP contains a Product Schedule that identifies allowable dispersants. *See* 40 C.F.R. § 300.900.

The 1994 NCP permits extensive use of chemical dispersants. It contemplates preauthorized use of chemical dispersants in response to oil spills, allowing responders to deploy these chemicals without spill-specific authorization from any regulator. *See id.* § 300.910(a). The NCP further delegates broad discretion to on-scene response coordinators to authorize the use of *any* dispersant in certain situations, including those not on the Product Schedule. *Id.* § 300.910(d). The practical effect of Subpart J is thus that chemical dispersants are broadly available for oil spill response. Indeed, dispersants are increasingly chosen over mechanical cleanup methods, and have become a virtually automatic spill response. *2012 Pet.* 6; *2014 Pet. Supp.* 9.

There is no toxicity threshold for placing a dispersant on the NCP Product Schedule. Rather, to qualify products for inclusion, manufacturers are simply required to submit to EPA, *inter alia*, information about the products' effectiveness, and the results of toxicity testing. 40 C.F.R. § 300.915(a). Toxicity test results do not, however, automatically disqualify a dispersant from placement on the Schedule. *See id.* § 300.920(a)(3). Further, current tests use the death of test organisms as their endpoint for evaluation, rather than the more sensitive endpoint

of harm from sub-lethal chemical exposure.[6] Thus, dispersant testing under the current NCP greatly underestimates the environmental and human health harms of dispersant use.

Dispersant testing under the 1994 NCP also significantly overestimates dispersants' utility in remediating oil spills. Laboratory tests for efficacy specified by the NCP, for instance, omit variables such as salinity and sediment that greatly affect dispersant performance in realistic field conditions. *2012 Pet.* 10.

In 2011, EPA's Office of the Inspector General (OIG) issued a report concluding that the NCP's approach to efficacy and toxicity review of dispersants was inadequate, and that the agency had known this for more than a decade. [AR] EPA, Office of Inspector General, *Report: Revisions Needed to National Contingency Plan Based on Deepwater Horizon Oil Spill* 21 (Aug. 2011) (*2011 EPA-OIG Report*). The report specifically found that "EPA has not updated the NCP since 1994 to include the most appropriate efficacy testing protocol," and noted that if the NCP had reflected up-to-date testing procedures for dispersant efficacy, "more reliable efficacy data" would have been available at the time of the BP Deepwater Horizon spill. *Id.* at 8.

In November 2012, several Plaintiffs filed a rulemaking petition with EPA urging an NCP update. *See 2012 Pet.*[7] Facing ongoing agency inaction, Plaintiff Earth Island Institute filed a supplemental petition in June 2014. *See 2014 Pet. Supp*.

In 2015, in response to both external and internal pressure to revise the NCP, EPA issued a Notice of Proposed Rulemaking. The Notice announced its intention to update the NCP—and

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[6] *See, e.g.,* Darrin Greenstein *et al., Comparison of Methods for Evaluating Acute and Chronic Toxicity in Marine Sediments*, 27 Envtl. Toxicology & Chemistry 933 (2008) (describing utility of testing for chronic as well as acute toxicity to marine life), http://www.sccwrp.org:8060/pub/download/DOCUMENTS/JournalArticles/558_ChronicMethodsETC.pdf).

[7] Plaintiffs Earth Island Institute, Rosemary Ahtuangaruak, and Kindra Arnesen filed the 2012 Petition. *2012 Pet.* 19–20.

in particular, Subpart J—to "address[] the efficacy, toxicity, environmental monitoring of dispersants, and other chemical and biological agents, as well as public, state, local, and federal officials' concerns regarding their use." 80 Fed. Reg. at 3380.

As urged in Earth Island Institute's petitions, the proposed NCP changes were meant to implement lessons from the BP Deepwater Horizon spill about the toxicity, environmental impacts, and efficacy (or lack thereof) of chemical dispersants. *Id.* at 3381. EPA stated that the proposed rule was "anticipated to encourage the development of safer and more effective spill mitigating products, and would better target the use of these products to reduce the risks to human health and the environment." *Id.* at 3380. EPA anticipated that NCP amendments would revise efficacy and toxicity standards, environmental trade-off determinations, and dispersant monitoring requirements. *Id.* at 3381.

Nearly six years since the public comment period on the proposed rule closed, however, and more than seven years since Plaintiffs filed their second rulemaking petition, EPA has failed to issue a final rule. This leaves all oil spill responses governed by a dangerously outdated plan, even as 12.45 million acres of the Outer Continental Shelf is subject to active petroleum leases, with 2.5 million acres currently producing.[8]

JURISDICTION

This action arises under the CWA, 33 U.S.C. § 1365(a)(2), and the APA, 5 U.S.C. § 706(1). Plaintiffs have standing to sue because of substantive injuries traceable to EPA's failure to update the NCP (as required by the CWA), and procedural injury based on EPA's failure to take final action on Earth Island Institute's rulemaking petitions (as required by the APA).

[8] *See* Bureau of Ocean Energy Management, *Combined Leasing Report as of April 1, 2021,* https://www.boem.gov/sites/default/files/documents/regions/pacific-ocs-region/oil-gas/Lease%20stats%204-1-21.pdf.

Although this Court need only find one party with standing to assert jurisdiction (*Melendres v. Arpaio*, 665 F.3d 990, 999 (9th Cir. 2012) ("[O]nce the court determines that one of the plaintiffs has standing, it need not decide the standing of the others")), all Plaintiffs here satisfy standing requirements.

EPA's delay in finalizing its rulemaking creates the "substantial risk" of a concrete future harm, which is an injury-in-fact to individual plaintiffs Rosemary Ahtuangaruak and Kindra Arnesen. *See, e.g.*, *In re Zappos.com, Inc.,* 888 F.3d 1020, 1024 (9th Cir. 2018) ("A plaintiff threatened with future injury has standing to sue . . . [if] there is a 'substantial risk that the harm will occur'" (quoting *Susan B. Anthony List v. Driehaus,* 573 U.S. 149, 158 (2014)). The delay in updating the 1994 NCP preserves a "harmful status quo, in which dangerous dispersant chemicals are the go-to method for oil spill response." Declaration of Kindra Arnesen (Arnesen Decl.), ¶ 42. The Gulf coast regularly sees oil spills, with actual or threatened use of NCP-sanctioned dispersants in response: Ms. Arnesen describes seeing "tanks on boats, prepared to spray dispersants in the next spill." *Id*. ¶¶ 31–32.

Ms. Ahtuangaruak's Native community in Alaska is also at risk, because it is "completely surrounded by oil and gas development, both onshore and offshore." Declaration of Rosemary Ahtuangaruak (Ahtuangaruak Decl.) ¶ 9. Further, global wind, weather, and tide patterns make the Arctic a "totem pole for contaminants" from elsewhere. *Id*. ¶¶ 24, 35.

Without a finalized rule, these demonstrated harms will likely recur. Members of Ms. Arnesen's family, who have had direct contact with dispersants, have experienced loss of muscle mass, severe nausea and migraines, vomiting, vertigo, and chronic fatigue. Arnesen Decl. ¶¶ 11, 13. Those working with dispersants have suffered neurological effects, chronic illnesses, and chemical hypersensitivity. Ahtuangaruak Decl. ¶¶ 25–27. Even those not directly exposed have

suffered post-spill rashes, migraines, sinus infections, palpitations, and even loss of consciousness. Arnesen Decl. ¶¶ 8, 14–15.

Plaintiffs Arnesen and Ahtuangaruak have also been harmed—and without regulatory change, are likely to be harmed again—by dispersants' adverse effects on the marine life on which they depend for food and economic survival. In the Gulf, where dispersants and oil have mixed in the marine ecosystem, fish have turned up with oil sludge in their stomachs, and dramatic drops in fishing yields after the BP Horizon Oil Spill disaster point to "water desert" conditions for commercial fishing. *Id*. ¶¶ 27–29.

Ahtuangaruak's Inupiaq community depends on a high-meat diet of marine resources, such as whales and fish, that are at risk of chemical contamination from dispersant use. Ahtuangaruak Decl. ¶¶ 13, 20–21. It would cost a "fortune" these communities cannot afford to replace their traditional diet with purchased foods. *Id*. ¶ 19. Marine resource impacts of oil spills and their toxic cleanups have greatly compromised the income of commercial fishers, Arnesen Decl. ¶ 29, and the social stability of village communities. Ahtuangaruak Decl. ¶ 19.

Organizational Plaintiffs Earth Island Institute/ALERT Project, Alaska Community Action on Toxics (ACAT), and Cook Inletkeeper are harmed by EPA's rulemaking delay because it directly conflicts with their missions: to protect the environments and local communities affected by oil spills. *See* Declaration of Pamela Miller (Miller Decl.) ¶ 7; Declaration of Robert Shavelson (Shavelson Decl.) ¶ 5; Declaration of Dr. Riki Ott (Ott Decl.) ¶ 16. Indeed, one of ALERT's founding purposes was to "ensure that EPA updated the [NCP] for responding to oil leaks and spills, and restricted dispersant use." Ott Decl. ¶ 16.

Related, these Plaintiffs have had to expend organizational resources "building an informed public" and encouraging that public to advocate for an NCP update. Ott Decl. ¶ 23; Shavelson Decl. ¶ 18; Miller Decl. ¶ 11. They have accordingly diverted organizational

resources from core functions: "thousands of hours and thousands of dollars" for Earth Island Institute's ALERT Project (Ott Decl. ¶ 29); "at least 250 hours of staff time" for Cook Inletkeeper (Shavelson Decl. ¶ 21); and "a full two to four months working solely on dispersant issues" for ACAT's Executive Director. Miller Decl. ¶¶ 15–16.

This concrete drain on these organizational Plaintiffs' resources, which directly impairs fulfillment of their missions, makes their harm more than a mere setback to abstract interests. *East Bay Sanctuary Covenant v. Biden,* No. 18-17274, WL 1220082, at *10 (9th Cir. Mar. 24, 2021) ("an organization has direct standing . . . where it establishes that the defendant's behavior has frustrated its mission and caused it to divert resources in response to that frustration of purpose"); *accord, Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002).

Plaintiff Center for Biological Diversity (CBD) has representational standing because "its members would otherwise have standing to sue in their own right, the interests it seeks to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). EPA's challenged inaction threatens to directly injure CBD's members' recreational, aesthetic, scientific, and other interests. *See* Declaration of Blake Kopcho (Kopcho Decl.) ¶¶ 6–7, 9–10 (CBD member discussing interests in recreating off Southern California and observing wildlife, and threats to his interests from the use of dispersant chemicals); Declaration of Miyoko Sakashita ¶¶ 3–8 (describing CBD's mission and its members' interests); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs, Inc.*, 528 U.S. 167, 183 (2000) ("We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." (internal citation omitted)).

All these harms are "fairly trace[able]" to EPA's failure to finalize its proposed rule, and are "likely" to be "redressed by a favorable decision." *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). For example, once the rule is finalized, the diversion of certain Plaintiffs' resources will end. ALERT "could refocus its efforts on building knowledge, skills, and resilience in the frontline communities it serves" (Ott Decl. ¶ 30); Cook Inletkeeper could refocus on its "larger goal of transitioning to a just, clean energy future" (Shavelson Decl. ¶ 15); and ACAT could refocus on the community educational events, advocacy, and research that advance its core mission. Miller Decl. ¶ 15. Each and every Plaintiff thus has Article III standing to sue EPA for its unlawful actions.

STANDARD OF REVIEW

Summary judgment is proper if the depositions, affidavits or declarations, or other materials in the record show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a), (c). The moving party can meet its burden by simply pointing out a lack of evidence supporting the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Once the moving party satisfies its initial burden, the non-moving party must go beyond the pleadings and present specific facts proving that there is a genuine issue for trial. *Id.* at 324. Summary judgment should be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322.

ARGUMENT

I. EPA's Failure to Update the National Contingency Plan Violates the CWA

This Court has already determined that EPA has violated the Clean Water Act, which requires the agency to maintain an NCP that provides for effective oil spill response—response

that minimizes damage, and reflects contemporary developments in science and technology. *See* 33 U.S.C. §§ 1321(d), 1365(a)(2). In its Order denying Defendants' Motion to Dismiss Plaintiffs' Clean Water Act claim, the Court considered "whether, as a matter of law, the CWA imposes a nondiscretionary duty on the EPA to update or amend the National Contingency Plan." *June 2 Order* 1. The Court concluded that "EPA has such a duty," and thus Plaintiffs "[are] allowed to bring a cause of action pursuant to the CWA's citizen-suit provision." *Id.*

A U.S. Supreme Court case decided after the Motion to Dismiss was briefed confirms the correctness of this Court's CWA ruling. In *County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462 (2020) (*County of Maui*), the Court emphasized the importance of context in determining the meaning of statutory terms in the CWA. In that case, the Court explained that the commonplace word "from," as used in the CWA definition there at issue (33 U.S.C. § 1362(12)(A)), necessarily drew its specific meaning from context. *Id.* at 1473. The Court reasoned that an agency interpretation of a particular word is "neither persuasive nor reasonable" where it "would open a loophole allowing easy evasion of the statutory provision's basic purposes." *Id*. at 1474.

In adopting a functional rather than literal definition of pollutant discharges that require a CWA permit, the Court acknowledged that although "a more absolute position . . . may be easier to administer. . . [it would] have consequences that are inconsistent with major congressional objectives, as revealed by the statute's language, structure, and purpose." *Id*. at 1477.

Here, to find that EPA has a merely discretionary option to update the NCP because of the use of the word "may" in the relevant CWA provision would directly undermine that provision's goal: to ensure that the NCP provides effective oil spill response, in keeping with advancements in technology and science. *See* 33 U.S.C. § 1321(d)(3). Such an interpretation would thus condone "easy evasion of the statutory provision's basic purposes."

See County of Maui, 140 S. Ct. at 1474. Interpreting EPA's duty to update the NCP as discretionary is thus "neither persuasive nor reasonable." *See id*.

Further supporting the legal conclusion that EPA must update the NCP, the agency has twice agreed with recommendations from its OIG that were intended to remedy inadequacies in NCP dispersant review protocols. In so doing, EPA has *de facto* deemed it "advisable" to revise the NCP that contains those protocols.

In the agency's formal response to OIG's 2011 report, EPA called out the need for an NCP update, with EPA's leadership stating: "We agree with the seven recommendations contained in this report." *Memorandum from Asst. Administrator to Inspector General re: Response to Final OIG Evaluation Report "Revisions Needed to National Contingency Plan Based on Deepwater Horizon Oil Spill"* (Nov. 11, 2011).[9] EPA then provided an action plan for each of the seven recommendations, and predicted that it would execute those plans by mid-to-late 2012. *Id.* at 1-3. In early 2012, OIG accepted and "closed" all the corrective actions and plans. *Memorandum from Inspector General to Asst. Administrator re: Response to Corrective Action Plan for OIG Report No. 11-P-1534* (Feb. 7, 2012).[10] These included EPA actions and plans for revisions to NCP Subpart J, and for a framework for contingency plan updates. *Id*. at 2.

In 2013, the OIG followed up on its 2011 audit, "to determine whether the contingency planning structure for responding to oil spills and hazardous substance releases is effective, and whether plans are updated to reflect lessons learned from recent major events and new developments or industry trends." EPA-OIG, *EPA Could Improve Contingency Planning for Oil*

[9] https://www.epa.gov/sites/production/files/2015-10/documents/11-p 0534_agency_response_oswer-1st.pdf.

[10] https://www.epa.gov/sites/production/files/ 2015-10/documents/11-p-0534_ig_comment_on_response_oswer-2nd.pdf.

and Hazardous Substance Response (Feb. 15, 2013).[11] The OIG found that corrective actions were still needed. *Id.* EPA again agreed with the OIG's recommendations. *See id.*

OIG found significant defects in the NCP nearly a decade ago, and again a year and a half later. EPA could not, and did not, deny the need to execute OIG's recommendations. To the contrary, EPA responded by developing action plans to address each distinct recommendation, and estimated completion dates falling primarily in 2012–2013. This timing evidenced how pressing these NCP shortcomings were, and are. To this day, however, EPA continues to delay its NCP update. This failure abrogates the agency's nondiscretionary duty under the CWA.

II. EPA's Years-Long Delay in Issuing a Final Rule Is Unreasonable

EPA has failed to conclude its rulemaking to update the NCP within a reasonable time, as the APA requires. *See* 5 U.S.C. § 555(b). The APA authorizes a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." *Id.* § 706(1). An agency's unreasonable delay in finalizing a rule is an actionable failure. *See, e.g., In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1149 (D.C. Cir. 1992) (finding unreasonable delay in the Occupational Health and Safety Administration's failure to issue final cadmium standards); *In re Cmty. Voice*, 878 F.3d 779, 785 (9th Cir. 2017) (holding that by granting a petition for rulemaking, the EPA "came under a duty to conclude a rulemaking proceeding within a reasonable time").

While "[t]here is no *per se* rule as to how long is too long to wait for agency action, . . . a reasonable time . . . is typically counted in *weeks or months*, not years." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (finding agency delay of six years "nothing less than egregious") (emphasis added and internal citations omitted). Courts use a context-specific, multifactor balancing test to determine whether delay is "unreasonable." *In re*

[11] https://www.epa.gov/sites/production/ files/2015-09/documents/20130215-13-p-0152.pdf.

Int'l Chem. Workers Union, 958 F.2d at 1149. The Ninth Circuit has adopted the six-factor test enunciated in *Telecomms. Rsch. & Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) (*TRAC*).

The so-called "*TRAC* factors" are: (1) the time agencies take to make decisions must be governed by a "rule of reason;" (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude to hold that agency action is unreasonably delayed. *Id*.

Of the six *TRAC* factors, courts consider the first factor—the requirement that the agency's timeframe be guided by a "rule of reason"—to be the most important. *In re Core Commc'ns*, 531 F.3d 849, 855 (D.C. Cir. 2008). None of the factors are independently dispositive, however, and courts consider all six when determining whether an agency's delay is unreasonable. *See In re A Community Voice*, 878 F.3d at 786.

EPA's years-long delay in finalizing the NCP and taking final action on Plaintiffs' petitions is unreasonable. Notwithstanding evidence that the use of chemical dispersants authorized by the outdated NCP has harmed and will harm human health and the marine environment, EPA has stalled for more than six years on its rulemaking to update the NCP, and more than eight years on taking final action on Plaintiffs' original petition. At the same time, it has pursued deregulatory projects with alacrity. All six *TRAC* factors weigh in favor of this Court finding unreasonable agency delay.

A. *Factor One: EPA's Protracted Delay Violates the "Rule of Reason"*

Ninth Circuit precedent makes plain that EPA's delay is unreasonable. In *In re A Community Voice*, for example, the Ninth Circuit held that EPA had unreasonably delayed in failing to act on a rulemaking petition granted eight years prior. *Id.* at 782. Petitioners, a coalition of community and environmental health organizations, had petitioned EPA to lower its dust-lead and lead-paint hazard standards. *Id.* at 783. EPA granted the petition, but did not commit to a timeframe for rulemaking. *Id.* Five years later, the organizations filed a lawsuit against EPA, alleging unreasonable delay under both the Toxic Substances Control Act and the APA. *Id.* at 784.

The court held that "having chosen to grant the petition for rulemaking, EPA came under a duty to conclude a rulemaking proceeding within a reasonable time," not merely to "begin[] an appropriate proceeding." *Id.* at 785. By granting the petition for rulemaking, the court explained, EPA had begun the "matter" of rulemaking; to "conclude" that "matter," EPA had to "reach some final decision." *Id.* It could not, as EPA there argued, simply grant a petition but never finish the rulemaking process. *See id.*

Most recently, the Ninth Circuit held that EPA had unlawfully delayed response to a 2009 petition requesting that it end use of the household pesticide tetrachlorvinphos, based on severe health threats to children. *Nat. Res. Def. Council v. EPA*, 956 F.3d 1134, 1136–37 (9th Cir. 2020) (*NRDC*). The court relied on *In Re A Community Voice* in ruling that EPA's multi-year delay in responding to a petition in a case implicating serious health harms had "stretched the 'rule of reason' beyond its limits." *NRDC* at 1039–40 (internal citation omitted).[12] Here too,

[12] Cases in which the Ninth Circuit did not find an agency's delay unreasonable are readily distinguishable. In *Independence Mining Co. v. Babbitt*, for example, the Ninth Circuit held that a two- to three-year delay in responding to mining patent applications was not unreasonable because Congress had explicitly given defendant Department of Interior five years to make such determinations. 105 F.3d 502, 509 (9th Cir. 1997). Likewise, the Ninth Circuit

EPA has been petitioned to regulate a serious health threat, in the form of toxic chemical dispersants used in oil spill response. Where the agency has taken more than eight years since Plaintiffs' 2012 rulemaking petition, seven years since their follow-up petition, and six years since issuing a proposed rule, EPA has stretched the "rule of reason" beyond its elastic limits.

B. *Factor Two: The Clean Water Act Dictates Immediate Action*

The second *TRAC* factor (statutory guidance as to a reasonable timetable for agency action) also weighs in Plaintiffs' favor. This factor requires "an examination of any legislative mandate" and requires a court to consider whether "delay may be undermining the statutory scheme." *Cutler v. Hayes*, 818 F.2d 879, 897–98 (D.C. Cir. 1987). Here, EPA's delay clearly undermines the purpose of the CWA, which is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

C. *Factors Three & Five: EPA's Delay Threatens Public Health and Welfare*

The third *TRAC* factor, requiring the Court to balance the economic harm of a regulation against the public health and welfare harm caused by delay, weighs overwhelmingly in favor of Plaintiffs. As the *TRAC* court explained: "[D]elays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake." *TRAC*, 750 F.2d at 80. Courts often analyze this factor in conjunction with the fifth factor—the nature and extent of the interests prejudiced by delay (*id*. at 80)—which also weighs in Plaintiffs' favor.

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declined to find unreasonable delay in *In re California Power Exchange Corp.*, in which plaintiffs sought a final order regarding their outstanding refund requests to the Federal Energy Regulatory Commission (FERC). 245 F.3d 1110, 1125 (9th Cir. 2001). Fatal to plaintiffs' claim of unreasonable delay was that only four months had passed between their request for a refund and the claim of unreasonable delay. *Id.* Applying the first *TRAC* factor, the court noted that "the cases in which courts have afforded relief have involved delays of years, not months," and thus "*a fortiori,* FERC's four-month delay does not run afoul of any 'rule of reason.'" *Id.*

Plaintiffs explain profound effects of past and possible future use of chemical dispersants on their health, lives, and livelihoods. *See* Arnesen Decl., ¶¶ 10–15 (describing the severe health harms Ms. Arnesen's family experienced following dispersant use in the wake of the BP Deepwater Horizon oil spill); Ahtuangaruak Decl., ¶¶ 16–20 (describing Ms. Ahtuangaruak's concerns over continued dispersant use, and dispersants chemicals' impact on her Native community's health and food security); Miller Decl., ¶¶ 17–20 (describing cultural effects of potential dispersant use on ACAT board member Harriet Penayah, a Yupik Elder on Saint Lawrence Island in the Bering Sea, where she and her family rely on the harvest of fish and marine mammals for spiritual, physical, and cultural sustenance); Kopcho Decl., ¶ 10 (describing Mr. Kopcho's fear of an oil spill accompanied by dispersant use in the Santa Barbara Channel, whose whales and other creatures inspire him as he sails, surfs, and dives).

Plaintiffs have experienced first-hand the severity of dispersants' health effects:

- *I've always been relatively healthy, but after the spill I have dealt with severe migraines and chronic fatigue. For a number of years now, when the fatigue hits me, my body feels like it's attacking itself. I feel like someone's hit me with electricity in my hands and my feet and then my muscles and limbs begin to cramp really hard. It gets progressively worse. Within thirty to forty minutes, the leg cramps start, first at my ankles then they move though my whole body. The only thing that relieves the pain is going to sleep.* Arnesen Decl., ¶ 13.

- *I witnessed the impact of dispersant use related to the Exxon Valdez spill in my work as a community health aide. I worked with individuals that had been exposed to dispersants used in oil spill response. It was general knowledge handed down from elders and community health aides that those who worked with dispersants were first to die. One of my patients was a ship captain for a skimmer. He talked about how when people were using the dispersants, their gear would break down and they would get the substances on their bodies. They would complain of being very sick. People exposed during spill response got headaches, dizziness, had difficulty thinking. Those neurological effects stay with people for a long time, and can develop into long-term disabilities. Those exposed by the initial spill responses suffer re-exposure due to other events and develop chronic illnesses and chemical hypersensitivity.* Ahtuangaruak Decl., ¶¶ 25–27.

- *From 2005-2010, my community was healthy. There were a couple of families that had a family member fighting cancer of some sort, but things really changed after the spill. I've witnessed my community experience an explosion of cancer cases. I know I went to twenty-two funerals in eighteen months. Then, I stopped counting*.
  Arnesen Decl., ¶ 24.

Stakeholders not parties to this proceeding confirmed the health urgency of an NCP update in their comments on EPA's Proposed Rule:

- *A report by Earthjustice found that, of the 57 ingredients in [the chemical dispersant] Corexit, five of the chemicals are associated with cancer; 33 are associated with skin irritation from rashes to burns; 33 are linked to eye irritation; 11 are or are suspected of being potential respiratory toxins or irritants; and 10 are suspected kidney toxins. The toxin 2-butoxyethanol, found in the blood samples taken from BP offshore and near shore workers, was linked to severe health problems with cleanup workers on the Exxon Valdez oil spill, including respiratory, nervous system, liver, kidney, and blood disorders. Many of those workers suffered long-lasting neurological problems.*
  [AR] Government Accountability Project (GAP), Comment on Proposed NCP Rule (Apr. 23, 2015), Addendum: GAP, *Deadly Dispersants in the Gulf: Are Public Health and Environmental Tragedies the New Norm for Oil Spill Cleanups?* (2013), at 32; *see also* [AR] Earthjustice, *Comment Letter on Proposed Revisions to National Oil and Hazardous Substances Pollution Contingency Plan* (Apr. 22, 2015), at 198.

Further, as in *NRDC*, where EPA acknowledged that the chemical at issue posed a serious toxic risks (956 F.3d at 1141), here too, EPA has acknowledged the inadequacy of the NCP's approach to evaluating dispersity toxicity. *2011 EPA-OIG Report*; s*ee also In re A Community Voice*, 878 F.3d at 787 (concluding that the third factor weighed in plaintiff's favor because of the clear threat to human welfare that EPA itself had acknowledged).

D. *Factor Four: No Higher, Competing Priorities Justify EPA's Delay*

Given the severity of health and ecological harms attributable to ongoing use of chemical dispersants, EPA's delay cannot be justified by actions of a competing or higher priority—the balancing required by the fourth *TRAC* factor. As the *NRDC* court noted, EPA does not "[get] a free pass" on this factor "simply because all its activities to some extent touch on human health, such that prioritization of one goal will necessarily detract from competing priorities."

956 F.3d at 1141.

Rather, the *NRDC* court held that EPA was still required to prioritize issuing a final rule because of the agency's own recognition of the threat the pesticide posed to children, such that "'more stringent regulatory restrictions are necessary to protect public health.'" *Id.* at 1142; *see also In re Pesticide Action Network N. Am.,* 798 F.3d 809, 814 (9th Cir. 2015) (explaining that EPA should prioritize regulation of chlorpyrifos notwithstanding competing health-regulatory matters, because of EPA's own assessment of the pesticide's dangers). So too here: EPA has repeatedly acknowledged that the existing NCP is insufficiently protective of public health and the environment, and does not reflect the best available science. And EPA has provided nothing in its administrative record to suggest that to advance the agency's mission, other actions must take priority over the NCP update.

E. *Factor Six: EPA's Delay Coincides with Numerous Deregulatory Actions*

This Court "need not find any impropriety lurking behind agency lassitude to hold that agency action is unreasonably delayed" (*TRAC*, 750 F.2d at 80), and Plaintiffs have no evidence of impropriety specific to the NCP rulemaking. However, EPA's abrupt pivot away from issuance of health-protective rules and towards deregulatory actions from 2016 until the recent change in administration, in the period when EPA would logically have been finalizing its NCP rule, is striking. In light of the agency's mission "to protect human health and the environment" (*see* EPA, *About EPA,* https://www.epa.gov/aboutepa/our-mission-and-what-we-do), EPA's prioritization of deregulation in this period arguably represents wholesale- rather than retail-level impropriety in its regulatory task sequencing.

Many complex rulemakings from 2016–2020 that reduced health and environmental

protections took less than two years.[13] And yet, rulemakings tremendously consequential for EPA's mission, including the NCP rulemaking, have languished on EPA desks for far longer:

Action	Comments	Time from Proposed to Final Rule
Resource Conservation and Recovery Act: revising current rules to allow coal ash pond operators to use alternate liners[14]	42,000	0 years, 9 months
Clean Air Act (CAA): regulatory amendments to the new source performance standards for volatile organic compound (VOC) emissions from the oil and natural gas sector and rescinding the new source performance standards for methane emissions[15]	509,000	1 year, 11 months
CAA: regulatory amendments to the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule setting revised standards for corporate average fuel economy and tailpipe carbon dioxide emissions for passenger vehicles and light-duty trucks for model years 2021–2026.[16]	619,000	1 year, 9 months
CAA: regulatory amendments to the Affordable Clean Energy Rule (ACE).[17]	500,000	0 years, 11 months
CWA: National Contingency Plan update for the use of dispersants in oil spills[18]	81,000	Incomplete at 6 years, 5 months (Jan. 2015 to Apr. 2021)

[13] *See generally* Sabin Center for Climate Change Law, *Climate Deregulation Tracker*, Columbia Law School, https://climate.law.columbia.edu/climate-deregulation-tracker.

[14] https://climate.law.columbia.edu/content/epa-further-weakens-coal-ash-protections; https://www.epa.gov/sites/production/files/2020-10/documents/ccr_part_b_frn_rin_2050-ah11_op_for_signature_10_15_20_admin_0.pdf.

[15] https://climate.law.columbia.edu/content/epa-weakens-voc-controls-oil-and-gas-facilities; https://www.epa.gov/sites/production/files/2020-08/documents/frn_og_reconsideration_2060-at54_final_rule_20200812_admin_web.pdf; https://climate.law.columbia.edu/content/epa-rescinds-methane-standards-oil-and-gas-facilities; https://www.epa.gov/sites/production/files/2020-08/documents/frn_oil_and_gas_review_2060-at90_final_20200812_admin_web.pdf; https://beta.regulations.gov/document/EPA-HQ-OAR-2017-0483-2291.

[16] https://climate.law.columbia.edu/content/epa-and-nhtsa-finalize-rollback-federal-clean-car-standards; https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/final_safe_preamble_web_version_200330.pdf; https://beta.regulations.gov/docket/EPA-HQ-OAR-2018-0283.

[17] https://climate.law.columbia.edu/content/epa-publishes-final-rule-repeal-and-replace-clean-power-plan; https://www.federalregister.gov/documents/2019/07/08/2019-13507/repeal-of-the-clean-power-plan-emission-guidelines-for-greenhouse-gas-emissions-from-existing; https://beta.regulations.gov/docket/EPA-HQ-OAR-2017-0355.

[18] https://www.epa.gov/emergency-response/revisions-national-oil-and-hazardous-substances-pollution-contingency-plan.

Although a finding of agency impropriety is not necessary to a determination that an agency's delay is unreasonable, EPA's general de-prioritization of actions that protect human health during its period of protracted delay in NCP rulemaking tips this factor in Plaintiffs' favor.

III. The Proper Remedy is for the Court To Impose Near-Term Deadlines for EPA to Update and Reissue its Proposed Rule, and Then to Promulgate a Final Rule.

This Court has broad discretion under the APA and the All Writs Act to fashion equitable relief that redresses Plaintiffs' substantive and procedural injuries. The proper remedy is for the Court to issue an injunction that compels EPA by Court-specified dates to (1) update and reissue its proposed rule, and then (2) promulgate a final rule.

An order requiring EPA to update and reissue its proposed rule is appropriate where EPA's proposed rule is nearly six years old; where key data from long-term studies of the effects of the BP Deepwater Horizon spill and dispersant-reliant response have in that time become available; and where the CWA requires the agency to maintain an NCP that reflects current science and technology. An order that further requires EPA to proceed to a final rule by a date certain, and to provide a status report to the Court between the proposed and final rules stages, is appropriate because EPA has long delayed completing this rulemaking, and has not adhered to self-imposed deadlines.

As a threshold matter, the APA requires a court to order an agency to act in response to an agency's unlawful failure to act. When a court finds that agency action has been unlawfully withheld or unreasonably delayed, a court "shall . . . compel agency action." 5 U.S.C. § 706(1); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999) ("Through § 706 Congress has stated unequivocally that courts must compel agency action unlawfully withheld or unreasonably delayed."); *see also Vietnam Veterans of Am. v. CIA*, 811 F.3d 1068, 1081 (9th Cir. 2016) ("The word 'shall' requires a court to compel agency action when, as here, there is a 'specific, unequivocal command' that the agency must act."). Additionally, the CWA vests

courts with the authority to compel EPA to take a legally required action that it has failed to take. *See* 33 U.S.C. § 1365(a).

Here, the Court has clear authority to impose deadlines and to compel EPA to act by dates certain. *See In re A Community Voice*, 878 F.3d at 779, 788 ("[W]hen there has been an unreasonable delay in rulemaking, courts have power and discretion to enforce compliance within some form of timeline."); James T. O'Reilly, *Administrative Rulemaking* § 14.4 (2021) ("[A] district court possesses broad discretion to set deadlines for compliance.").

The All Writs Act (AWA) further provides this Court with authority to craft tailored relief that redresses Plaintiffs' injuries. The AWA states that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Courts derive authority from the AWA to issue varied equitable relief. Samuel I. Ferenc, *Clear Rights and Worthy Claimants: Judicial Intervention in Administrative Action Under the All Writs Act*, 118 Colum. L. Rev. 127, 140 (2018).

The AWA gives a federal court considerable flexibility to "achieve the ends of justice entrusted to it." *United States v. N.Y. Tel. Co*., 434 U.S. 159, 172–73 (1977). The Ninth Circuit has invoked the AWA, for example, to enjoin litigants from filing repeated, frivolous suits, and to appoint counsel. *See Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1057 (9th Cir. 2007); *Perez v. Barr*, 957 F.3d 958, 965 (9th Cir. 2020). Federal district courts have also relied on AWA authority to direct agency action appropriate to resolving matters in judicial controversy. *See, e.g.*, *Astrazeneca Pharms. LP v. Burwell*, 197 F. Supp. 3d 53 (D.D.C. 2016) (invoking the AWA to order the Food and Drug Administration not to approve or deny pending applications by generic drug manufacturers to sell their versions of a leading cholesterol drug); *S.C. Coastal Conservation League v. Ross*, No. 2:18-CV-03326-RMG, 2019 WL 259116 (D.S.C. Jan. 18, 2019) (enjoining Department of Commerce defendants and non-party federal agencies from

taking action to promulgate, approve, or take any other official action regarding pending permit applications).

This Court thus has discretion to provide the precise relief that Plaintiffs seek: an order to EPA to update and reissue its proposed rule for public comment before finalizing the rule, particularly in light of new data highly salient to the rule's content. Here, revising the rule would also serve judicial economy, by making the final rule more likely to comport with the CWA's command, and thus less susceptible to substantive challenge (or at least, fruitful challenge) by stakeholders. This remedy is indeed similar to that imposed to redress agency delay in *Center for Biological Diversity v. Brennan*, 571 F. Supp. 2d 1105, 1134 (N.D. Cal. 2007).

In *Brennan*, the Global Change Research Council (the Council)—a federal body that analyzes global environmental conditions—had failed to comply with task timelines and procedures mandated by its organic act, the Global Change Research Act of 1990. *Id.* at 1136. The Council's mandatory Scientific Assessment was more than two and a half years overdue; its required Research Plan was more than a year overdue; and the Council had failed to publish a summary of its proposed Research Plan for public comment as required. *Id.* at 1112–13. As remedy, the court ordered the Council to both: (1) publish a summary of the Research Plan in the Federal Register, and (2) issue an *updated* Research Plan and Scientific Assessment. *Id.* at 1132. These steps ensured that up-to-date public comment could inform the final Research Plan, thus avoiding "[p]laintiffs' participation [being] rendered meaningless." *Id.* at 1133.

Here, requiring EPA to update and reissue its proposed rule, so that Plaintiffs (and other stakeholders) can supplement or modify their prior public comments to reflect changes in scientific knowledge since the 2015 proposed rule was issued, will likewise vindicate Plaintiffs' right to participate in a meaningful public comment process aimed at achieving a CWA-compliant final rule.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for summary judgment; declare that EPA's ongoing delay in updating the National Contingency Plan violates the Clean Water Act and the Administrative Procedure Act; establish a schedule for EPA's rulemaking actions, through final rule promulgation; and retain jurisdiction to ensure the agency's compliance with court-imposed deadlines.

DATED: April 20, 2021

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

EARTH ISLAND INSTITUTE/ALERT PROJECT; ALASKA COMMUNITY ACTION ON TOXICS; COOK INLETKEEPER; CENTER FOR BIOLOGICAL DIVERSITY; ROSEMARY AHTUANGARUAK; AND KINDRA ARNESEN,

Plaintiffs,

vs.

MICHAEL REGAN, in his official capacity as Administrator of the United States Environmental Protection Agency; and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

Case No.: 3:20-cv-00670-WHO

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Before the Court is Plaintiffs' Motion for Summary Judgment. Having considered the papers filed in support of and in opposition to the motion, and having conducted a hearing, the Court finds that granting Plaintiffs' motion is appropriate. First, as this Court previously ruled in this matter, the Clean Water Act creates a nondiscretionary duty for Defendants to update the National Oil and Hazardous Substances Pollution Contingency Plan. Dkt. #16, Order Denying Motion to Dismiss, at 11; Dkt. #47, Order Denying Motion for Leave to File Motion for Reconsideration, at 2. *See also In re A Community Voice*, 878 F.3d 779, 784 (9th Cir. 2017) (holding that Toxic Substances Control Act language strikingly similar to the operative Clean Water Act language here imposed a nondiscretionary duly on the Environmental Protection Agency (EPA)).

Second, Defendants have unreasonably delayed issuance of a final rule updating the National Oil and Hazardous Substances Pollution Contingency Plan and taking final action on Plaintiffs' rulemaking petition. *See* 5 U.S.C. § 706(1).

Accordingly, IT IS HEREBY ORDERED that Plaintiffs' Motion for Summary Judgment is GRANTED and that judgment is entered in favor of Plaintiffs and against Defendants Michael Regan, in his official capacity as Administrator of EPA, and EPA. IT IS HEREBY FURTHER ORDERED that Defendants shall:

(1) Issue a proposed rule to update the National Oil and Hazardous Substances Pollution Contingency Plan within 90 days of the date of this Order;

(2) Provide a written status report to the Court within 180 days of date of this Order; and

(3) Issue a final rule to update the National Oil and Hazardous Substances Pollution Contingency Plan within one year of date of this Order.

IT IS SO ORDERED.

DATED: _____

_____
HON. WILLIAM H. ORRICK
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALERT PROJECT, EARTH ISLAND INSTITUTE; ALASKA COMMUNITY ACTION ON TOXICS; CENTER FOR BIOLOGICAL DIVERSITY; COOK INLETKEEPER; ROSEMARY AHTUANGARUAK; AND KINDRA ARNESEN, Plaintiffs, vs. MICHAEL REGAN, in his official capacity as Administrator; and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendants.	Case No. 3:20-cv-00670-WHO **DECLARATION OF ROSEMARY AHTUANGARUAK**

I, Rosemary Ahtuangaruak, declare as follows:

1. I have personal knowledge of all the facts set forth below, and if called as a witness, I could and would testify competently to them. Expressions of opinion reflect my own personal opinions and judgement.

2. I am a resident of Nuiqsut, Alaska. I am a member of the Iñupiat tribe, as well as a member of the Native Village of Barrow.

3. I attended the University of Washington Medex Northwest Physician Assistant program and graduated in 1991. During my program, I completed a year of clinical rotations in Seattle, Washington, and at both the Alaska Native Medical Center in Anchorage, Alaska and the Samuel Simmonds Memorial Hospital in Utqiagvik, Alaska. I also received an Honorary Doctor of Humanities degree from Oberlin College and Conservatory in 2017.

4. I first moved to Nuiqsut in 1986 and returned in 1991 to work as a community health aide. I lived in Nuiqsut through 2009, when I moved to Barrow, Alaska. I lived in Barrow through 2016, and then moved back to Nuiqsut. I have lived in Nuiqsut since 2016.

5. I raised my family in Nuiqsut. I have one daughter, four sons, twelve granddaughters, and eight grandsons. We live a traditional lifestyle that includes hunting, fishing, whaling, and gathering much of our food.

6. Nuiqsut is located on the North Slope of Alaska, on the banks of the Colville River. Nuiqsut residents depend on the land and water to feed their families. We hunt and eat birds, such as ducks and geese; fish, such as arctic cisco and salmon; land mammals, such as caribou; and marine mammals, such as bearded seals and bowhead whales. We also harvest various berries, plants, roots, and herbs.

7. Families share harvests with one another to ensure that there is enough food for all the communities throughout the North Slope. Anything that puts the health of the land or water at risks impacts our harvesting and our food sharing system.

8. I learned how to hunt from my mother and other family members. In turn, I have taught my family and other in my community how to hunt, fish, whale, and gather in the

traditional way. Hunting and gathering is an important social tie that binds me to my family and my community.

9. When I first moved to Nuiqsut, the closest oil and gas development was 60 miles away. Now, there are over 1,000 wells drilled within a 75-mile radius of the village. The closest well is within three miles of the community school. Our village is completely surrounded by oil and gas development, both onshore and offshore. We are boxed in by pipelines.

10. The closest nearshore oil and gas development to our community is the Liberty oilfield, which is located four miles off the coast.

11. Oil and gas development, both onshore and offshore, has greatly affected our community's traditional hunting and gathering activities. Seismic testing for offshore drilling makes the whales more aggressive and more dangerous to harvest. Noise pollution from oil and gas activities causes the whales to travel further into deeper waters, which makes it harder for us to land a successful harvest.

12. We have also seen tremendous impacts on health of our fish, including problems with parasites and fish mold. We are concerned the changes are related to contaminants from the oil and gas development process.

13. If we can successfully harvest a whale, we can feed our community for a year. If we can't, it is very hard on us. When you watch a village go from being fully sustained by harvesting and being able to provide in all seasons, to not being able to harvest fish, whale, and caribou, you witness the repercussions of oil and gas development. As a community health aide and community leader, I've seen more alcoholism, drug use, suicide attempts, domestic violence, and the breakdown of the family structure due to increased difficulty with hunting and food security.

14. Some village residents live in constant fear of another disaster due to oil and gas development. In 2012, we experienced the impact of the Repsol oil well blowout. Emissions blew into Nuiqsut, and within two hours, people in the village were developing respiratory illnesses. In 2018, when we watched ConocoPhillips drill its Putu 2 exploration well, I had a 4th

grader ask me, “When do we have to worry about the oil spill and the blow out?” because she knew that her sibling had gotten sick from the Repsol blowout.

15. In addition to blowouts, people fear oil spills. Several years ago, when I was working as a community health aide, I received calls from villagers who thought that an algae bloom was a big oil spill. Some even threatened suicide over concerns that the foods that they depended on weren’t safe to eat because of what they thought was an oil spill. They had lost hope.

16. An oil and gas spill or blowout would put our entire community at risk. All of our local entities, like the North Slope Incident Command Center, the Native Village of Barrow, the Native Village of Nuiqsut, and the City of Nuiqsut would be involved in the response. If chemical dispersants were used in the cleanup, most of our people would be exposed — depending on the response area involved—because so many of our jobs are tied to spill response.

17. Many of those involved in the spill response would be young people. I’m concerned that these young people would be exposed to toxic dispersants from being near or working on the scene. Dispersant chemicals can disrupt reproductive health. Exposure to these chemicals could wipe out our young people’s ability to reproduce, which would have multi-generational effects for our community.

18. An oil spill would devastate my community’s food security. All of our hunting, gathering, and harvesting would be impacted from any event where dispersants are used. Our community is twelve miles from offshore oil and gas development, but we rely on the entire Colville Delta. If an oil spill impacted the Delta’s vitality, our entire village and region would suffer. We would not be able to feed families from the land or from the water.

19. We could not afford to pay for foods that come from elsewhere to replace what we couldn’t harvest. We have a high meat diet which is very important for where we live. In order to survive in the Arctic, we need our foods to have a high oil content. To replace the native foods that we consume would cost a fortune. I’m worried that, without our traditional foods, we would see more nutritional health problems in our community.

20. We would see abnormalities in our fish from chemicals used in response to an oil spill. We eat many of our foods because of their oil content, and the purpose of chemical dispersants is to break up oil. I worry about what chemical dispersants will do to the healthy oils in the fish we eat. Liver is high in oil content and is both an important nutritional staple and a delicacy, because it is a rare fresh food source during harsh winters. Oil and gas pollution, and the use of dispersants, threatens this traditional food source because of the potential exposure to chemicals.

21. Dispersants also give us a lot of concern with respect to the migration of animals like the bowhead whale. I worry that the whale could be exposed to dispersants at any point along its migratory route. There are so many zones of bowhead whale migrations; it's a complex process with many points of potential exposure.

22. Our community needs to harvest across all seasons. Even if an animal was away during the winter, and there was a spill, the animal would be re-exposed when it came back to the area. Every year when there's a melt, the contaminants come to the surface and back into the ecosystem to re-contaminate the animals in the area.

23. If an oil spill were to contaminate the Colville Delta or an area through which the animals we hunt migrate, we would have to consider issuing advisories to our people. We are very hesitant to share food that might have been exposed to oil and gas-related chemicals, including dispersants. If we see any abnormalities in the harvest, we don't risk distributing it. We are very aggressive in teaching our hunters about this. I have gone to hunters and told them not to consume harvest because it came into contact with oil and gas-related chemicals.

24. Because of global wind, weather, and tide patterns, toxic chemicals used throughout the world migrate to and concentrate in the Arctic. I am worried that even if dispersants are used in an oil spill far from the Arctic, the chemicals will still make their way to the Arctic and contaminate our land and our animals.

25. I witnessed the impact of dispersant use related to the Exxon Valdez spill in my work as a community health aide. I worked with individuals that had been exposed to dispersants

used in oil spill response. It was general knowledge handed down from elders and community health aides that those who worked with dispersants were first to die.

26. One of my patients was a ship captain for a skimmer. He talked about how when people were using the dispersants, their gear would break down and they would get the substances on their bodies. They would complain of being very sick.

27. People exposed during spill response got headaches, dizziness, had difficulty thinking. Those neurological effects stay with people for a long time, and can develop into long-term disabilities. Those exposed by the initial spill responses suffer re-exposure due to other events and develop chronic illnesses and chemical hypersensitivity.

28. There's a real strategy in Alaska not to tie illness to oil and gas exposure. The patient forms that I would fill out as a community health aide didn't have any boxes to check for environmental exposures to help correlate illness to chemical exposure. After the Repsol blowout, community members were expressing a lot of health concern about exposures to oil and gas. But our current community health aide manual still does not address chemical exposures.

29. I also saw the use of chemical dispersants firsthand when I traveled to the Gulf Coast in 2010, following the BP Deepwater Horizon disaster. We were able to see planes that were spraying dispersants. We asked what they were doing, because I had seen planes spraying chemicals on farms, but never out on the water.

30. I had just come from conducting the whale census up in the Arctic, and I remember the smell of the water in the Gulf. I had been expecting the beautiful smell of the ocean, but instead, there was a sick, sweet smell of crude. It was terrible. The smell was even worse from the water. We were on a boat, and we saw a blue cloud over the spill site. As we got closer, I saw porpoises that came up in the spill. I could just see our bowhead whales having to do same thing. I saw birds spinning in the water, trying to find food. I worried about what would happen when those birds tried to migrate back to the Arctic.

31. In response to the risk of dispersant use near our Alaskan communities, I worked to pass tribal resolutions opposing the use of chemical dispersants in oil and gas operations. In

total, 31 Alaskan Native villages passed resolutions opposing the use of chemical dispersants, including Nuiqsut. An example of one of these resolutions is attached as Exhibit A.

32. I've spoken publicly about dispersants many times, including presenting testimony before Congress. I have specifically raised concerns about the use of chemical dispersants in response to oil spills, especially around Shell's potential oil exploration in the Arctic. These include my concerns about the industry-dominated process by which the Alaska Regional Response Team has preauthorized dispersants for use in response to offshore spills. Nobody on the Response Team wanted to hear about the community's concerns. A Coordinator for the Response Team who was very responsive to industry input tried to get me kicked off of their calls. When the Response Team realized I had raised serious concerns about the use of dispersants, they were more hesitant, but the authorization process continued to move forward. Now, the Response Team has expanded preauthorization for the regional use of dispersants, which is allowable under the current National Contingency Plan (NCP).

33. I was a co-petitioner on the 2012 petition to the EPA drafted by Dr. Riki Ott petitioning the EPA to ask for an updated NCP rule. And I signed on to Dr. Ott's 2015 comments on the EPA's proposed rule. I feel that the current NCP, which allows the use of dispersant chemicals in oil spill cleanup, does not adequately protect my community's health or the health of the ecosystems upon which we depend for our food and cultural traditions.

34. I worry about the EPA's failure to issue a final rule to update the NCP, particularly because of the oil and gas development that surrounds my community. Because we are reliant on the land and ocean for subsistence and cultural traditions, anything that affects the land or the water threatens our food security. Without an updated rule, chemical dispersants could be used in the event of an oil spill near my community. If dispersants were to contaminate the water, or the delta, our food security would be threatened.

35. The EPA's failure to issue a final update to the NCP threatens my community even if a spill were to happen far from the Arctic. The Arctic is like a totem pole for contaminants. Contaminants from all over the world end up in the Arctic because of the wind,

the ocean currents, and the animal migrations. These contaminants end up in the ice, and then they re-contaminate our land and water when the ice melts.

36. As a result of this lawsuit, I hope that the EPA issues a final update to the NCP. I hope that update is responsive to the public comments, like mine, that urged the EPA to take a precautionary approach to the use of chemical dispersants in oil spill cleanup, because dispersant use puts the food security and health of my community at risk.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 9 day of January 2020 at Nuiqsut, Alaska.

RAhtuangaruak

Rosemary Ahtuangaruak

Exhibit A

Inupiat Community of the Arctic Slope
Resolution re: Oil Dispersants

IÑUPIAT COMMUNITY of the ARCTIC SLOPE

an IRA Regional Tribal Government

P.O. Box 934 · Barrow, Alaska 99723
Ph: (907) 852-4227 1-888-788-4227 Fax: (907) 852-2449

RESOLUTION 2011-06

A RESOLUTION OPPOSING THE EXTENSIVE USE OF DISPERSANTS IN THE SPILL RESPONSE PLANS FOR THE ARCTIC

WHEREAS, The Inupiat Community of the Arctic Slope (ICAS) is a federally recognized Native tribe of Inupiat Eskimos under the Indian Reorganization Act of 1934, a Regional Tribal Government, as amended, whose governing body is the ICAS Executive Board with representatives from all eight Inupiat tribal councils in the North Slope Borough of Alaska; and

WHEREAS, ICAS Regional Tribal Council (a.k.a, ICAS Executive Board) is the governing body of ICAS and is responsible for protecting the interests of its tribal members and its rights of self governance; and

WHEREAS, the tribe represents the interest of over 7,000 members residing in the Arctic communities of Anaktuvuk Pass, Atqasuk, Barrow, Kaktovik, Nuiqsut, Pt. Hope, Pt. Lay and Wainwright; and

WHEREAS, ICAS was founded to promote the security and social welfare of its mebers, to exercise its power of tribal self-government, and to advance, protect, and preserve its common interest as descendants of the aboriginal Inupiat people of the Arctic Slope region of Alaska; and

WHEREAS, ICAS members depend on the livelihood from the Arctic, and Pacific Oceans, including the Beaufort and Chukchi Seas, and the adjacent coastal areas, for subsistence, community well-being and cultural traditions and identity; and

WHEREAS, the Arctic and the Pacific Oceans supports a large number of animals that migrate including the Bowhead Whale, Ice-Seals, Walrus, Salmon and Beluga that are critical to the traditional way of life if ICAS members. The Arctic and Pacific Ocean including the Chukchi and Beaufort Seas are our garden that has sustained coastal Alaska Native people and communities since time immemorial; and

WHEREAS, the bowhead whale and all other animal of the Arctic and Pacific Oceans including the Chukchi and Beaufort Seas depend on healthy oceans and sea habitat and ecosystems; and

WHEREAS, the Arctic and Pacific Oceans are undergoing serious changes due to global warming; and

WHEREAS, there is little western science about many of the species that inhabit the Arctic Ocean and the effects that industrial human activities, including oil and gas lease exploration and development will have on them; and

WHEREAS, the United Nations passed a declaration; and

WHEREAS, the threat of the oil spill off the coast of Australia and the threat of the oil spill in the Gulf of Mexico threaten the indigenous life style of the people; and

WHEREAS, the health and welfare of the ocean is vital to the health and well being of the Inupiat and adding dispersants to the ocean is adding chemicals to a chemical spill endangering the Inupiat and the resources they depend upon by adding unnatural substances in to the natural environment; and

WHEREAS, the Environmental Justice meeting in the Gulf of Mexico region has express concern to the use of dispersants, the lack of appropriate process for their use, the lack of approved biomarkers are not identified making monitoring the region for health affects limited, the extensive usage of the substances did not have the approval prior to their usage and the monitoring amounts used was not adequate increasing the health risks of the region; and

WHEREAS, EPA has issued recommendations to change the use of dispersants in the spill response for the Gulf of Mexico due to additional information learned; and

WHEREAS, the use of dispersants in the Exxon Valdez spill was not studied but studies show that a majority workers who worked with dispersants have been fatal and many were made sick after working with these substances; and

WHEREAS, the ICAS board members and staff have expressed concern in many meetings related to spill response plans, oil and gas development, and exploration related to these plans and concern affecting the health and welfare of the Inupiat and the natural environment; and

NOW THEREFORE, BE IT RESOLVED, that the ICAS opposes the extensive use of dispersants in the Arctic spill response plans; and

BE IT FURTHER RESOLVED, that this resolution shall be the policy of ICAS until it is withdrawn or modified by a subsequent resolution.

CERTIFICATION:

I, the undersigned hereby certify that the Inupiat Community of the Arctic Slope Council of 13 members of whom 9 are present at this meeting held on this 5th day of May 2011 and the resolution attachment was adopted by a vote of 9 voting for, ~~0~~ against and ~~0~~ abstaining.

APPROVE: X ATTEST:_____

7/16/12 Doreen Ahgeak 07/17/2012

Doreen Lampe, President Date Doreen Ahgeak, Secretary Date

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALERT PROJECT, EARTH ISLAND INSTITUTE; ALASKA COMMUNITY ACTION ON TOXICS; CENTER FOR BIOLOGICAL DIVERSITY; COOK INLETKEEPER; ROSEMARY AHTUANGARUAK; AND KINDRA ARNESEN, Plaintiffs, vs. MICHAEL REGAN, in his official capacity as Administrator; and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendants.	Case No. 3:20-cv-00670-WHO **DECLARATION OF KINDRA ARNESEN**

I, Kindra Arnesen, hereby declare as follows:

1. I have personal knowledge of all the facts set forth below, and if called as a witness, I could and would testify competently to them. Expressions of opinion reflect my own personal opinions and judgement.

2. I am a resident of Buras, Louisiana, part of Plaquemines Parish. My husband George and I own a commercial fishing business with multiple boats, and depend on the Gulf's natural resources for our livelihood. Our shrimp boat works the estuaries from Saint Bernard Parish to Grand Isle. Our mullet boat mostly works in Plaquemines Parish. Our biggest boat, which has a federal license for deep sea fish such as red snapper, mangrove snapper, and king mackerel, operates for many miles off the mount of the Mississippi River.

3. In April 2010, at the time of the BP Deepwater Horizon oil rig explosion, I was living in Venice, Louisiana. We were living in a trailer on our property in Venice, because our home in Buras, my dream home, was damaged in Hurricane Katrina and took six years to fix. If not for the spill, we could've moved back to our house in Buras four to six months sooner. We are essentially professional evacuees: I can be out of my house with all my important papers and photos in three hours.

4. Nine days after the 2010 BP Deepwater Horizon oil spill, I took a boat ride around Chandelier Island. The Island is beautiful and the water is usually crystal clear. I started coming across areas where the waves had beat the surface of the oil together, like a brassy looking peanut butter. I came across areas of orangish looking stuff suspended in the water column. I've been fishing around Chandelier Island for twenty years and had never seen that before. It smelled like a mixture of petroleum products and death. I was ignorant of what we were dealing with. I dipped up samples and sent them to Louisiana State University. I found out it was chemical dispersants that we dipped up. They got all over us.

5. In the wake of the spill, I would hear from fishermen about what was going on in the Gulf. I wanted to learn as much as possible. I was given clearance by the Coast Guard to enter the BP Deepwater Horizon explosion incident command post and got to attend their spill

response task force meetings. I got access to helicopter rides, airplanes, and other vessels. I would take air and water samples. I saw dispersants being sprayed around the Gulf.

6. After that, my husband and I continued to fish in the Gulf. I believe we were exposed to dispersants again because of our contact with the environment.

7. In May of 2010, in the immediate aftermath of the BP spill, a gray haze set in over the trees in Southeast Louisiana. We don't usually get fog that time of year and this was no ordinary fog. The smell was super-strong. The filter turned black in our swimming pool, and the water around the edge of our pool had a thick, slimy surface on top. I put my hand in and could tell it was some kind of oily substance.

8. I believe my kids, Aleena and David, were exposed to dispersants when the chemicals came onto the land via air; I did not allow my kids to go out onto the Gulf, so their exposure couldn't have been from coming into direct contact with the water. We're on a peninsula, we're surrounded by water, and the response workers were spraying dispersants all around us. These chemicals drift in the air. My kids' exposure was inevitable.

9. I kept my kids here after the spill because federal officials and response workers downplayed the risks dispersants posed to us. I believed at the time that our federal officials had our best interest at heart. Now, I feel very differently.

10. Since the spill, my family and I have suffered health consequences and financial harm due to a decline in the Gulf's fish population. I worry about my family's ability to weather another catastrophic oil spill and botched response effort like the one we lived through in 2010. We still live with the consequences.

11. My husband George is definitely not the same person he was before the spill, physically. George went downhill really quickly after the spill. There are not many days that he feels really well. His body mass has changed. He has lost a lot of muscle mass. He has had horrible ear infections. He gets severe headaches, nausea, vomiting, and vertigo. He gets sick more than what I would consider normal. He has a cough that rattles the whole room—he coughs daily, and at night while he sleeps. I reach out in the night to make sure he's still breathing. BP cut us a $7,500 check for George's medical impacts. That's it.

12. We fish commercially for a living. That's a physically hard job. When George gets really sick and the vertigo comes with it, he can't drive the truck to go back and forth to the boat. I make him stay home because I worry he could hurt himself or someone else. When we fish, we climb all over the boat. If he was to fall he could fall overboard and we could lose him altogether. I make him stay home when the vertigo is going on.

13. I've always been relatively healthy, but after the spill I have dealt with severe migraines and chronic fatigue. For a number of years now, when the fatigue hits me, my body feels like it's attacking itself. I feel like someone's hit me with electricity in my hands and my feet and then my muscles and limbs begin to cramp really hard. It gets progressively worse. Within thirty to forty minutes, the leg cramps start, first at my ankles then they move though my whole body. The only thing that relieves the pain is going to sleep. The chronic fatigue I deal with has gotten worse since the BP oil spill response started. This is something I deal with on a daily basis.

14. There was nothing wrong with my daughter, Aleena, before the spill. After the spill, she got rashes; at school, they called her "scab girl." She would also get heart palpitations out of nowhere, not even due to exercise. She would scream "Mommy, my chest!" And then, a panic attack would start. Her first episode was in early 2011. Now she gets really bad migraines, and within three or four days of migraines starting, there are incidents where she passes out.

15. After the spill, my son David started having what the doctors called "allergy problems," for which we have him on two medications. If he misses his medication, he deals with more frequent sinus infections and headaches.

16. In 2010 or 2011, we started seeing Dr. Mike Robichaux, an ear, nose, and throat doctor in Raceland, Louisiana. He told us he thought my symptoms, David's symptoms, and Aleena's symptoms were due to dispersant exposure from the spill. Unfortunately, we couldn't see him regularly, because his office is two and a half hours from our house.

17. Dr. Robichaux told me about a residential detoxification program specifically designed for people exposed to chemicals from the spill response. My whole family did the program. It included weigh-ins; taking our vitals and temperatures; taking niacin and doing thirty

minutes on the exercise bike; and going into a hot box, like a dry sauna. We basically had to drink a lot of water, take vitamins, and sweat it out.

18. Before the detox program, I kept having rashes break out all over my body, frequent headaches that would last for weeks, and fatigue that made me feel horrible all the time. After the program, the headaches subsided— I didn't have a headache for four to six months after the program—and the skin rashes improved. Aleena seemed to have fewer headaches and more energy. David's allergy symptoms improved. But we never became fully well.

19. Exposure to chemical dispersants after the spill changed my family and my community. We've learned to live sickly.

20. Our medical problems since the spill have taken a toll on our lives. We've missed events: the Circus, and Monster Jams. When we took a family trip to Disneyworld, I spent the first two days in our hotel room with Aleena because she was sick. We finally made it to Disneyworld when she felt a little better. But at the end of the day when they were getting ready to do the fireworks, Aleena looked up at me and said "I don't feel well." She passed out. There I was in the middle of Disneyworld with my daughter on the ground and people surrounding us. She woke up and started crying.

21. Things like this have happened a lot over the years since the BP spill response. We have missed a lot; it's disheartening. It has affected the way we do business. It's really challenging because the physical problems come with depression, like a black cloud. One day, I woke up to the realization that we have to learn to live with these problems. The only way I can function is to not dwell on it every day.

22. We didn't have health insurance at the time of the BP oil spill. So, all of our medical expenses in the wake of the spill came out-of-pocket. I spent $8,000 on a volatile solvent profile and food allergy testing. The volatile solvent profile was a blood test for chemical exposure— all of us had some level of the tested chemicals in our bloodstream. I spent several thousand dollars on pediatric cardiology visits for Aleena. Each time we visited the medical center, it cost $90-$100, and more if we had any type of testing or shots.

23. I worry about the further financial stress my family will face if we are exposed to more dispersants and related health effects after another catastrophic oil spill.

24. Dispersant use in the wake of the BP spill has taken a huge toll on my community. From 2005-2010, my community was healthy. There were a couple of families that had a family member fighting cancer of some sort, but things really changed after the spill. I've witnessed my community experience an explosion of cancer cases. I know I went to twenty-two funerals in eighteen months. Then, I stopped counting. This has been really emotionally challenging.

25. The unknown is the scariest thing. In our community I've seen several people diagnosed with cancer since the BP incident. Some of these cancers have been in kids. So, I have this nagging concern that's always in the back of my mind about what will happen in Aleena's future. She's a beautiful, intelligent, vibrant young woman. She's extremely bright—national honors society, gifted and talented program—she's got a really bright future ahead of her. I worry that the exposure from this incident could have impacts on her future.

26. The use of dispersants in the wake of the spill has also had a devastating and lasting impact on the Gulf ecosystem, our family business, and our quality of life.

27. One of my favorite things to do is get up in the crow's nest of our boat and ride on a slick, calm day. It's absolutely beautiful. When I did this prior to the BP spill, I would see acres of bait fish. After the Deepwater Horizon incident, I watched them disappear; it just got worse and worse. My husband refers to this as "riding through a water desert," where all life is gone. Now, I sometimes ride in the crow's nest on a clear day, and see that there is a slow recovery in process. But the marine life is nothing like what it was before the BP spill.

28. The damage to fish happened slowly over time. We watched bait fish—specifically, blue runner—eating dispersed oil droplets in the water. Bigger fish ate those bait fish, and we started to see physical impacts like I had never seen before. I saw oil sludge in the stomachs of fish we caught. One time, I cut open a red snapper and found a big growth inside the fish, like a giant tumor. I saw Greater Amberjack that were really skinny, had no mass on them. When they're healthy, these fish are can be as big as 125 pounds. We harvest mullet for their

eggs. There were a couple of years when the eggs weren't developing the way they were supposed to. We're starting to see recovery in terms of fish population numbers, but almost a decade later, we're still not back to where we were before the BP spill.

29. The harms to the Gulf ecosystem have brought financial hardship. We depend on the Gulf for our livelihood. In 2015, I claimed the lowest amount of cleared income on my taxes in about twenty years. Subsequent years haven't been much better. For example, before the ABP spill, I could often harvest 1800-2200 pounds of shrimp in a 16-18 hour period. Now, we average about 700-800 pounds of shrimp for the same working time. Fuel and equipment prices haven't gone down, even though our income has. This means we don't have the capital to make repairs to our boats or equipment. I've put plywood down to cover holes in the floor of my shrimping boat, so I don't hurt myself while operating it. I've sold equipment, boats, and personal property to stay afloat. It has definitely changed the way we do business.

30. I have been spurred to activism regarding dispersants and the Environmental Protection Agency (EPA)'s authorization of their use in oil spill response because of the health harm to my community, and because I want to see the Gulf recover for our business and for future generations. We've got to do better as a human race; we are destroying the Gulf's vast resources under the surface of the water.

31. Huge as the BP oil spill was for us, this isn't a one-incident issue. We have oil spills here regularly, whether they be big or small. And the risk is here 365 days a year, seven days a week. Some days we walk outside and there's a really strong smell in the air. Those are the times that I worry. Dispersants are still used here on a regular basis. I see it when I'm out on the estuary. In the years since the BP spill, I recall we were once out mullet fishing near Burwood, to the southeast of the mouth of the Mississippi River, and we came across an area where there was a big spill. I can't recall the exact year this occurred, because spills happen so often here. It appeared that the well-heads had busted and there was crude everywhere. There was a boat with a big tank spraying it down with chemicals, dispersing the oil.

32. We know for a fact dispersants are still used, because we regularly see them used. Mostly we see tanks on boats, prepared to spray dispersants in the next spill. We are at imminent risk of further harm because of this.

33. There is also a delayed effect with dispersant use. Each time there's a hurricane, we get hit with dispersants again. We have seen more dispersed oil wash into our estuaries after hurricanes than we did after initial impacts. This puts us at continual risk.

34. I'm a different person now than I was before the BP spill. Before the spill, I didn't use the computer. Now, I'm on email, I introduced myself to Google, and started asking questions about oil spills, response chemicals, and their effects. I would read all night and then go to community meetings.

35. I have been driven to activism on the dispersant issue. I have made trips to Washington, D.C. to lobby members of Congress for dispersant reform. I've also gone to state representatives. I go to these people, banging on their doors, asking for change.

36. I've attended community meetings with EPA and the Coast Guard. I've gone toe to toe with EPA officials. At a community meeting at Venice Elementary School, I got an EPA official to admit they had endorsed the use of Corexit after the BP spill.

37. At a 2011 press conference for a movie about the harms of oil spill pollution and response (*The Big Fix*), I described our family's and community's ongoing suffering from the BP spill. My videotaped statement is available at: www.youtube.com/watch?v=p4sPNw4b0XA.

38. I was a co-petitioner on the petition to EPA drafted by Dr. Riki Ott of ALERT requesting EPA to initiate rulemaking on updating the National Contingency Plan (NCP). I also signed on to Dr. Ott's 2015 comment letter on EPA's proposed rule to update the NCP. Getting EPA to change its rule is a mission for me, because use of dispersants under the existing rule has destroyed my family's health and harmed us in so many other ways.

39. I worry about several things because of EPA's failure to issue a final rule to update the NCP, and its continued allowance of the use of dangerous dispersant chemicals. I worry about the impacts on my family's day to day health. I worry about increased health costs to myself and my family because we are all still suffering the effects from use of dispersants

following Deepwater Horizon and I have seen first-hand the health problems the use of these chemicals can cause. I worry about the harm to and destruction of our fishery stocks from the continued use of dispersants, and the inability of our family to continue to make a living commercial fishing. I worry about people in our community being diagnosed with horrible cancers. I worry about having to look into the faces of family members of people whose loved ones lay in a box. My list of worries is pretty long when it comes to the continued use of dispersants.

40. As a result of this lawsuit, I hope EPA issues a final rule that changes the policy for the use of dispersants. I want a rule that protects human life and the environment. We shouldn't have to beg our federal agencies for that.

41. We need a policy that actually cleans up oil spills, not just sinks them. We didn't have an excuse in 2010 not to actually clean up after the BP spill. And we have no excuse now, with all the lessons learned from the BP disaster, for not doing better.

42. EPA's years long delay in issuing a final rule to update the NCP preserves the harmful status quo, in which dangerous dispersant chemicals are the go-to method for oil spill response. Allowing this outdated plan to stay in place puts me and my community in danger; we are exposed to oil spills every day and are at increased risk of another catastrophic spill because of our proximity to oil extraction operations. Under the current system, dispersant chemicals would be used to respond to such a spill. My community, my family, and I are at increased risk of further dispersant-related health problems and other harms because we were left vulnerable in the aftermath of the 2010 spill response.

43. Because of EPA's delay in issuing a final rule, I have devoted time and energy to pushing EPA to do its job and complete the rulemaking process.

44. At minimum, issuance of a final rule by EPA would allow me to stop devoting resources to this fight. And I very much hope that when EPA issues a final rule, it is one that is responsive to comment letters, like the one I signed with Dr. Ott, so the NCP is actually protective of human life and the ocean ecosystem.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 23 day of March 2020 at Buras, Louisiana.

Kindra Arnesen

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALERT PROJECT, EARTH ISLAND INSTITUTE; ALASKA COMMUNITY ACTION ON TOXICS; CENTER FOR BIOLOGICAL DIVERSITY; COOK INLETKEEPER; ROSEMARY AHTUANGARUAK; AND KINDRA ARNESEN, Plaintiffs, vs. MICHAEL REGAN, in his official capacity as Administrator; and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendants.	Case No. 3:20-cv-00670-WHO **DECLARATION OF BLAKE KOPCHO**

I, Blake Kopcho, declare as follows:

1. I have personal knowledge of the matters stated below, and I could and would testify to these statements if called as a witness.

2. I have been a member of the Center for Biological Diversity since 2015, the same year I joined its staff as a campaign organizer. Although I left my staff position at the Center in December 2019, I am still an active member and supporter of the organization. I share the Center's mission to protect all living creatures and their habitats, and I trust it to represent my interests and values in this regard.

3. I grew up in the coastal town of Rancho Palos Verdes and often spent time on the water and at the beach throughout Southern California with my parents, who have a beach house in Newport Beach, and grandmother, who lives in Huntington Beach. These experiences led to a life-long love for the ocean and marine animals, and this love steered the direction of many aspects of my life—my educational pursuits, hobbies, and professional career.

4. I love to surf, scuba dive, sail, and spend other time in and around the ocean, and it is no exaggeration to say my quality of life depends on the quality of its waters. I currently live in Santa Barbara, and as someone who lives and recreates in the constant view of both natural beauty and offshore oil platforms, the worry of an oil spill is never far from my mind. I am concerned because the EPA has a decades-old oil spill response plan that allows the widespread use of chemical dispersants. An oil spill would seriously harm my interests, but I worry that dispersants may harm my interests even more rather than helping the problem.

5. I received a bachelor's degree in aquatic biology from U.C. Santa Barbara in 2007 and a master's degree in marine biology from the University of Auckland, New Zealand, in 2011. My post-graduate work in New Zealand focused on marine ecology and evolutionary biology, with a year of intensive field work and studies on the nutritional ecology of herbivorous marine fish. I also participated in a semester abroad program at Woods Hole Oceanographic Institution in 2008 focused on biological oceanography, during which I sailed for six weeks from Hawaii to Tahiti, assisting with navigation and sailing duties along the way, as well as data collection to study the equatorial undercurrent. These experiences gave me a deeper

understanding and appreciation of the interactions and interdependency of everything in the ocean—from currents to seaweed and from plankton to whales.

6. I started surfing when I was 14 and it has grown into a self-described obsession. The act of riding waves is a big part of the attraction of course, but another big part is just being in the ocean. I enjoy sitting on my surfboard, watching the pelicans, dolphins, and occasional sea otter, and experiencing the colors and textures of the water. It is something that not only improves my physical health but my mental health as well—giving me time to reconnect with the natural world and forget about the stress and busyness of the day. These psychological, emotional, and physical benefits from surfing are essential to my well-being. I regularly surf near Santa Barbara since that is where I live, including places like Rincon and Sands Beach near Santa Barbara, Naples on the Gaviota Coast, Jalama Beach near Point Conception, and Oxnard Shores and Silver Strand in Ventura, to name just a few—but I have surfed up and down the entire California coast and off the Channel Islands as well. I go as often as possible, usually at least a couple of times a week, though I am currently recovering from a shoulder injury and just starting to get back in the water.

7. One of my favorite places to go is the Channel Islands, and in fact, I am planning a day hike on Santa Cruz Island on Thursday this week. I go there most years to sail, scuba, surf, freedive, camp, and hike with family and friends, and it is something I always look forward to. I enjoy looking for sea anemones, sea stars, urchins, and abalone in tidepools there, and watching the wildlife that live around the islands, including elephant seals, harbor seals, fur seals, sea lions, and island foxes. My most memorable trip was in 2005, when I went with a group of friends to Santa Rosa Island and spent eight days camping and hiking there. We did some of the most hard-core hiking and surfing of my life, ran out of food at the end, and were exhausted, but the boat ride back made everything worthwhile: we saw a pod of endangered blue whales and were incredibly fortunate to see a blue whale fluke, which is very rare since they are so massive and do not usually dive deep enough for their tails to emerge from the water. We also saw a "superpod" of common dolphins numbering between 500 and 1,000 individuals, with dolphins

swimming in every direction I looked and as far as my eye could see. It was a top highlight of my life and an experience I will never forget.

8. I have not seen blue whales since that 2005 trip, but I love to sail in the Santa Barbara Channel and look for them whenever I am out on the water, and I enjoy seeing all the different whale species that migrate through the area or call the Channel home. I often charter a sailboat with a group of friends and sail out to the Channel Islands, loading up the boat with gear and sleeping on the boat for three or four days. The last time I chartered a sailboat was with my parents in September 2019, when we sailed around the Channel Islands for three days and saw native foxes while hiking on Santa Rosa Island.

9. I also am an avid scuba diver, something I started doing in college and continue to do about once a year around the Channel Islands. I was not able to go last fall due to my shoulder injury, but I went in 2019 and plan to go again this year, either in the late summer or early fall, when visibility is best. I have done twenty or more dives around the islands over the last 16 years. I am fascinated by the richness and diversity of life found there and have seen some incredible things, including a giant moray eel, baby horn shark, schools of bat rays, garibaldi damselfish, lots of different reef fish, mola mola (a type of sunfish), spiny lobster, sea hares, nudibranchs, and black, green, and red abalone. I also enjoy standup paddle-boarding, swimming, and freediving along the Southern California coast, diving as deep as possible and swimming through kelp forests. I became fascinated with all types of seaweed from my time spent studying herbivorous fish and their diets for my master's thesis, and I appreciate everything about them—the way they look, smell, and feel, and the critic role they play in temperate marine ecosystems. They play a similar role in temperate water as coral reefs do in the tropics, providing habitat and food for a wide range of marine life.

10. Many of the best moments of my life have been spent surfing, sailing, and diving in the Santa Barbara Channel. Its beauty and biodiversity inspire and move me. These activities are an important part of my life, and I am greatly concerned the use of dispersants would have devastating, long-lasting impacts to the marine life and environment that mean so much to me. The real risk of an oil spill exists every day, as I am reminded every time I see offshore oil

platforms on the horizon, or sail past them on my way out to the Channel Islands. It was tragic when a large oil spill occurred near Refugio Beach in 2015, and I am relieved officials decided to forgo the use dispersants. I heard horror stories from Gulf Coast residents about the effects of dispersants used in the BP oil spill, and it is inexcusable that the EPA has not updated its plan for so long and is relying on old science and information. As I understand it from reading news articles and other literature including Riki Ott's *Not One Drop*, dispersants cause oil to scatter and sink, putting it into the water column. There also seems to be evidence showing the chemicals make oil even more toxic. I would be extremely worried about potential health effects if I were to be exposed to these chemicals, and I would be reluctant to get back in the water or go to the beach for a very long time. But even more than my own health, I would be concerned about the effects that dispersants would have on the health of everything I see in that wondrous underwater world—from sea hares to blue whales.

11. It is my hope we soon end offshore oil drilling and our dependency on fossil fuels altogether, but in the meantime, the EPA should do its job to ensure it has the best possible plan to cleanup any oil spills. My interests are at risk every day the EPA operates under its outdated oil response plan and refuses to revisit its use of dispersants with the benefit of today's science and information. My interests in swimming, surfing, sailing, and diving are not just recreational, but they are an essential part of who I am and my well-being. I believe these interests would be protected if the EPA updates its plan to reflect the most current science.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 16, 2021, in Santa Barbara, California.

Blake Kopcho

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALERT PROJECT, EARTH ISLAND INSTITUTE; ALASKA COMMUNITY ACTION ON TOXICS; CENTER FOR BIOLOGICAL DIVERSITY; COOK INLETKEEPER; ROSEMARY AHTUANGARUAK; AND KINDRA ARNESEN,

Plaintiffs,

vs.

MICHAEL REGAN, in his official capacity as Administrator; and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

Case No. 3:20-cv-00670-WHO

DECLARATION OF PAMELA MILLER

I, Pamela Miller, declare as follows:

1. I have personal knowledge of all the facts set forth below, and if called as a witness, I could and would testify competently to them. Expressions of opinion reflect my own personal opinions and judgment.

2. I am a resident of Anchorage, Alaska. I hold a Bachelor of Arts in Biology from Wittenberg University in Springfield, Ohio, and a Master of Environmental Science in Aquatic Biology and Environmental Science from Miami University in Oxford, Ohio.

3. I founded Alaska Community Action on Toxics (ACAT) in 1997, and have held the position of Executive Director ever since. As Executive Director, I am responsible for the overall vision and management of the organization. I supervise all staff and maintain relations with the Board of Directors. I also direct the scientific aspects of ACAT's work. I am the principal investigator for ACAT's community-based research, funded by the National Institute of Environmental Health Sciences. I am familiar with the organization, membership, policies, and practices of ACAT.

4. In my personal capacity, I am also a financial supporter of ACAT. I am additionally a member of Cook Inletkeeper.

5. ACAT is a 501(c)(3) nonprofit organization. ACAT is funded through individual contributions from supporters, contributions from foundations, and federal research grants.

6. ACAT's main office is located in Anchorage, Alaska. ACAT also has staff and conducts community health research in Gambell and Savoonga, both located on Saint Lawrence Island, Alaska.

7. ACAT's mission is to assure environmental health and justice in Alaska by advocating for environmental and community health.

ACAT believes that everyone has a right to clean air, clean water, and toxic-free food. ACAT works to achieve its goals through collaborative research, science, education, organizing, and advocacy.

8. ACAT employs a community-based approach guided by the following core values: community right-to-know, environmental justice, the precautionary principle, elimination

of the production and release of toxics, rights and sovereignty of Indigenous peoples, and a culture of caring and wellness.

9. ACAT opposes the production and use of toxic chemicals that can harm the environment, wildlife, and people. These chemicals include the dispersants used intensively in oil-spill cleanups.

10. ACAT works primarily with Alaska Native communities who rely on the land and ocean for physical, spiritual, and cultural sustenance. The Alaska Native communities with which ACAT works depend on healthy marine ecosystems, in particular, for hunting, fishing, and food security. ACAT views dispersants as a threat to the marine environment, which sustains the communities that ACAT serves.

11. ACAT conducts public education programs, including presentations, to educate its constituent members about the risks of chemical dispersants. ACAT also shares information about the risks associated with chemical dispersants via direct communications with its supporters, through electronic media and newsletters.

12. ACAT also been involved in a long-term investigation of the Exxon Valdez oil spill's effects on response workers, collaborating with Dr. Riki Ott of plaintiff ALERT. Dr. Ott and I supervised a graduate student intern working on her Master of Public Health degree, Annie O'Neill, who wrote her thesis on "Self-Reported Exposures and Health Status Among Workers from the Exxon Valdez Oil Spill Cleanup" (Yale University, 2003). Annie did the internship with ACAT, and Dr. Ott and I co-supervised her. Information on worker exposures was also included in Dr. Ott's book, *Sound Truth and Corporate Myths* (2005), which ACAT collaborated on. Through this work, we have learned that those workers who had direct contact with dispersants suffered greater adverse health impacts than those who did not.

13. In addition to public education campaigns and investigations, ACAT has participated in administrative procedures to compel the U.S. Environmental Protection Agency (EPA) to update the 1994 National Contingency Plan. Specifically, ACAT, along with other organizations, submitted comments in April 2015 on EPA's then-proposed revisions to the NCP. Those comments emphasized the need for an NCP that protects human health and the

environment, and that specifically considers the effects of oil spill response on subsistence fishing communities and other vulnerable populations unfairly burdened by environmental problems.

14. ACAT has also been involved in prior litigation regarding the use of chemical dispersants. In 2010, ACAT, along with other organizations notified EPA of the organizations' intent to sue EPA, challenging the use of chemical dispersants under the NCP. That Notice of Intent led to a 2012 lawsuit challenging the NCP Product Schedule, in which ACAT was a plaintiff. Finally, ACAT signed on to an October 2019 Notice of Intent to Sue letter sent to the EPA and the U.S. Department of Justice in this lawsuit.

15. ACAT has been forced to expend resources on litigation because of the EPA's failure to complete the rulemaking process initiated in 2015. If the EPA had instead completed its rulemaking in a timely way, ACAT would have been able to devote more of its resources to the community educational events, advocacy, and research that advance ACAT's core mission.

16. In my capacity as Executive Director, I have been the primary person working on dispersant issues for ACAT. I have worked on the issue of chemical dispersants through ACAT since 2002. I estimate that I have spent, in total, a full two to four months working solely on dispersant issues for ACAT.

17. The use of dispersant chemicals in the event of an offshore oil spill would greatly impact the health and cultural well-being of ACAT's supporters, including its board members. One example is ACAT board member Harriet Penayah, a Yupik Elder from the Native Village of Savoonga on Saint Lawrence Island in the Bering Sea.

18. Harriet and her family rely on the harvest of marine fish and marine mammals for spiritual, physical, and cultural sustenance. A significant part of their diet comes from the ocean, including fish like salmon, cod, and halibut, as well as marine mammals like ringed seal, bearded seal, walrus, and bowhead whale.

19. St. Lawrence Island is located in the northern Bering Sea and within the Norton Sound region on the Alaska Outer Continental Shelf. The Norton Sound area experienced oil and

gas development in the 1980s. It is also proposed for oil and gas leasing under the federal Bureau of Ocean Energy Management's Draft Proposed Program for 2019-2024.

20. The use of chemical dispersants in response to an oil spill in the Norton Sound region would impact Harriet and her family's food security by polluting the marine ecosystems on which they depend for food. It would also disrupt the migratory patterns of important marine mammals, such as the bowhead whale. Marine animals form the basis of Harriet's diet and cultural traditions. If chemical dispersants impacted the safety of these food sources, Harriet and her family would not be able to replace these sources with food purchased from a grocery store, due to the deep cultural importance that these animals hold for Harriet and her family.

21. ACAT board member Violet Yeaton, a member of the Sugpiaq people who currently lives in Anchorage, Alaska, would be similarly harmed by the use of chemical dispersants in oil spill response. Violet relies on the marine ecosystem for traditional foods, including seaweeds, intertidal invertebrates, and fish. Cook Inlet off Anchorage is already a site of offshore oil activity—not merely possible future activity—and thus risks of dispersant use are present risks.

22. Violet lived in Port Graham, Alaska, during the Exxon Valdez oil spill. Violet and other Alaska Native peoples in Port Graham saw the marine ecosystems upon which they depended directly affected by the spill. The oil spill made it unsafe to eat the foods they had harvested for generations—foods with great cultural significance. The use of dispersants compounded fears that the food was unsafe to harvest and consume.

23. Personally, I enjoy kayaking, seabird and marine mammal observing, in coastal and marine areas of Alaska that are likely to be harmed by the use of chemical dispersants in the event of any oil spills. I also fish for salmon in Cook Inlet and depend on the health of salmon and other seafood from Cook Inlet, the Gulf of Alaska and Bering Sea as a vital part of my diet and that of my family. The use of dispersants would cause long-term damage to the coastal and marine ecosystems which are important for my well-being and provide food security for my family and me. Additionally, I conduct ecological and toxicological research in the coastal environment of St. Lawrence Island that would be confounded and compromised by the use of

dispersants. The pursuit of this litigation, to prevent the unnecessary use of dispersants in order to protect the health of the marine environment, is for these reasons important to me personally. If U.S. EPA updates the NCP, my interests and the interests of other ACAT supporters will be better protected from the adverse health and environmental effects of dispersant use in Alaska.

24. If U.S. EPA updates the NCP, then ACAT as an organization can focus on its other programmatic priorities, such as reform and proper implementation of state and other federal laws (such as the Toxic Substances Control Act) to prevent harmful exposures to other substances, work on the international Stockholm Convention on Persistent Organic Pollutants, community-based research and advocacy, and educational programs.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 19 day of April, 2021 in Anchorage, Alaska.

Pamela K. Miller

Pamela K. Miller

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALERT PROJECT, EARTH ISLAND INSTITUTE; ALASKA COMMUNITY ACTION ON TOXICS; CENTER FOR BIOLOGICAL DIVERSITY; COOK INLETKEEPER; ROSEMARY AHTUANGARUAK; AND KINDRA ARNESEN,

Plaintiffs,

vs.

MICHAEL REGAN, in his official capacity as Administrator; and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

Case No. 3:20-cv-00670-WHO

DECLARATION OF DR. RIKI OTT

I, Dr. Riki Ott, declare as follows:

1. I have personal knowledge of all the facts set forth below and, if called as a witness, I could and would testify competently to them. Expressions of opinion reflect my own personal opinions and judgment.

2. I am a resident of Vashon Island, King County, Washington. I hold a Bachelor of Science from Colby College (1976); a Master of Science in marine biology, with an emphasis on the effects of oil on zooplankton, from the University of South Carolina, Baruch Institute (1980); and a PhD in marine toxicology, with an emphasis on the effects of heavy metals on benthic invertebrates, from University of Washington, School of Fisheries (1985).

3. I was a commercial salmon fisher in Alaska in Prince William Sound and the Copper River Delta, from 1985 to 1994. I was the permit holder and co-owner of a fishing boat from 1986 to 1994. From 1987 to 1994, I served as a delegate to the boards of the Copper River Fishermen's Cooperative (focus: harvesting and marketing quality fish products), Cordova District Fishermen United (focus: addressing air and water quality issues from the Alyeska marine tanker terminal), and United Fishermen of Alaska (Chair of Habitat Committee, focused on oil, timber, and mining issues statewide that impacted fish habitat).

4. I experienced first-hand the trauma and devastation of the *Exxon Valdez* oil spill in Alaska thirty years ago. I lived about sixty miles, by boat, from Bligh Reef, where the *Exxon Valdez*'s hull tore open on March 24, 1989, and gushed eleven to thirty-three million gallons of crude oil into Prince William Sound, according to Exxon and the State of Alaska, respectively. I flew in on a small plane the morning of the spill. It was flat calm, and the blood red hull of the *Exxon Valdez* sat starkly amidst a spreading sea of inky black oil. I saw, and became nauseated by, the swirling bluish cloud of hydrocarbons rising from the massive oil slick into the air. I did not see any of the mechanical spill response equipment that should have been deployed, as stated in Alyeska's government-approved spill response plan.

5. I stayed in Valdez for several days, where I heard first-hand how Exxon's on-the-water test burn near the Native Village of Tatitlek had not been announced, nor had people been evacuated, and how the oily smoke plumes had sickened the villagers. The day after the big

storm moved the oil through the Sound, I heard from fishermen about oil-soaked beaches littered with dead and dying sea otters, birds, and other marine life that washed away with every ebbing tide, only to be replaced with fresh corpses on the flooding tide.

6. The failure to have an adequate, rapid, robust oil spill response in place left fishing communities scrambling to defend the Sound's fisheries. Initially, I received early reports early reports from fishermen of persistent coughs, headaches, and nausea that were unusual for them. When Exxon took over the disaster response and fishermen's fleet, I began to hear a lot more, especially after a high-pressure hot water wash became the standard beach treatment protocol. Exposure to oil mist and aerosols caused beach workers to experience persistent colds and flu-like symptoms. These were so common they were dubbed the "Valdez Crud." Exxon's own data confirmed that about one-third of the beach workers were sick at any one time during entire six-month response, despite a high turnover of the workers. I called and personally spoke with health care providers in Cordova and Anchorage to warn them about chemical illnesses and encourage them to bring in specialty Occupational and Environmental Medicine doctors to properly diagnose and treat workers for chemical illnesses, but to my knowledge none did.

7. I again heard stories of adverse health effects first-hand from fishermen when Exxon started experimental use of solvent-based products, including Corexit dispersants and the dispersant-like solvent product Inipol EAP22 that Exxon quietly discontinued several years later. After an interval of spraying dispersants on the surface oil offshore, Exxon began using Corexit dispersants in the nearshore area with Coast Guard approval, despite a pre-spill agreement with spill-response parties, including me as the commercial fishermen's delegate, that beaches and nearshore areas were a "No-Go Zone" for dispersants and other such toxic products.

8. One boat crew refused to spray the kerosene-like Corexit 9580, because the label warned that it was "toxic to fish." That crew was fired and replaced.

9. Exxon also adapted Inipol for beach washing. Specially-trained "Bioremediation Application Teams (BAT)," dressed in plastic rain gear, sprayed Inipol from backpacks onto oiled beaches. The flood tide floated the dispersed oil to the surface, where workers in boats used the force of the water behind their boat propellers to push the oil below the sea surface, literally

sinking the oil into biologically sensitive marine habitat. BAT workers who tested positive for blood in their urine—an indicator of overexposure to the solvent product—did not receive proper medical attention, but were instead relieved of their duties. I also heard about other symptoms of overexposure to Inipol, including skin rashes, headaches, blisters or skin lesions, and nausea.

10. After an Inipol treatment, signs were posted to keep people and wildlife off the beaches for 48 hours to allow the toxic solvents to thoroughly flush from the beaches. However, the signage was not accurate or always obvious (or heeded by wildlife). An entire beach crew from Seldovia was hospitalized after washing a supposedly-safe Inipol-treated beach, and a town meeting was held to demand accountability, but product use continued. I also heard first-hand from recreational sea kayakers and fishermen about feeling nauseous and dizzy after camping on, or visiting, respectively, Inipol-treated beaches days after the beaches were supposedly safe. And I heard from Alaska Natives in Chenega village who monitored their subsistence beaches during the 48-hour window after Inipol application, and reported thick windrows of dead salmon smolts along the high tideline.

11. The physical and economic devastation wrought by the *Exxon Valdez* disaster wreaked emotional havoc on individuals and families that lasted for decades— and in many cases, lifetimes. People were overwhelmed and overworked. Clinically diagnosed post-traumatic stress disorder and general anxiety disorder were rampant from a palpable feeling of uncertainty over whether the fisheries and Sound would recover – and then, after the Sound's main fisheries collapsed in 1993, over whether the civil lawsuit would adequately compensate people for their losses. Commercial and subsistence fisheries were closed, and the regional economy was devastated. Cordova's social fabric was ripped apart – and it mostly stayed that way until the end of the civil lawsuit for damages twenty years later.

12. To share lessons from the *Exxon Valdez* experience, I began working in other communities impacted by devastating oil disasters (notably, *Aegean Sea*, 1992, Spain; *Sea Prince*, 1995, South Korea (visit in 2005); *Hebei Spirit*, 2007, South Korea (visits in 2008, 2017); BP Deepwater Horizon, 2010; Enbridge Kalamazoo River, MI, 2010; ExxonMobil Little Rock, AR, 2013; BP Whiting refinery, 2014; *Marathassa*, 2015, Vancouver, BC). After the 2010

BP Deepwater Horizon disaster, I also began working in frontline communities, those that experience the first and worst consequences of oil and gas activities, to strengthen environmental justice leadership and enhance public awareness of the enormous societal costs of oil dependency. This has included work in Native American communities in both the U.S. and Canada.

13. I have written several books on the ecological and socio-economic impacts of oil disasters, including *Sound Truth and Corporate Myths* (2004) and *Not One Drop: Betrayal and Courage in the Wake of the* Exxon Valdez *Oil Spill* (2008). I have also appeared in award-winning documentaries on the nation's largest maritime oil disasters (BLACK WAVE: THE LEGACY OF THE EXXON VALDEZ (2008), THE BIG FIX (2011), DIRTY ENERGY (2012), and THE COST OF SILENCE (2020)).

14. In 1993, I received Alaska Conservation Foundation's Celia Hunter award for outstanding professional contributions for my volunteer work after the *Exxon Valdez* oil spill. In 2010, I was runner up for *Huffington Post*'s Game Changer in the Environment Award for my volunteer work in Gulf coast communities after the BP Deepwater Horizon disaster. In 2015, I received the Grace Lee Boggs Award from the Make It Safe Coalition for my work empowering people to have a voice in energy choices in their own backyard.

15. I am the founder and Executive Director of ALERT. ALERT is a nonprofit project of the Earth Island Institute, which is a 501(c)(3) nonprofit organization. I am responsible for managing ALERT's policy, personnel, volunteers, contractors, finances, and fundraising. I am familiar with the organization, its constituents, policies, and activities.

16. I founded ALERT in 2014, in part to take care of unfinished business from the 1989 *Exxon Valdez* oil spill. Specifically, I wanted to ensure that EPA updated the National Contingency Plan (NCP) for responding to oil leaks and spills, and restricted dispersant use. I also wanted to empower frontline communities with trainings on health consequences of oil and chemical exposures and on local oil spill prevention, preparation, and response. ALERT's mission is to strengthen environmental justice leadership by working collaboratively to reduce

toxic exposures from oil-chemical activities in at-risk communities, and to build towards a healthy energy future globally.

17. One of ALERT's focus areas is developing safe regulations regarding dispersant use, particularly in response to offshore oil leaks and spills. The present, outdated NCP—now 26 years old—permits extensive dispersant use in response to marine oil spills and leaks. Ostensibly pursuant to this NCP, but in reality never contemplated by it, the U.S. Coast Guard has mandated dispersant applicators for subsea use. This use is scientifically unsupported. EPA's trend since the *Exxon Valdez* oil spill is to allow ever more dispersant use, with ever fewer safeguards, despite the known harm that dispersants pose to humans and to the marine and coastal ecosystems upon which we rely. EPA's ongoing delay in finalizing the rulemaking regarding dispersant use, as one part of updating the entire NCP—is of grave concern to ALERT and the frontline communities it serves.

18. ALERT works to educate and collaborate with diverse constituents, all of whom have direct interests in a safe energy future. This depends, in large part, on reducing environmental exposures and keeping oil and toxic dispersants out of waterways and human environments. ALERT has over 1,800 constituents from all over the United States, literally from 10 of the 13 regions governed by the NCP, including California, the Gulf of Mexico, and Alaska. Constituents have diverse backgrounds and relationships with waters of the U.S. that are impacted by oil spills and subsequent product use, including exposure to oil-solvent combinations.

19. ALERT's constituents include people living in areas where dispersants are manufactured, shipped, and used or staged for oil disasters; commercial, recreational, and subsistence fishermen; tourism industry professionals; boat owners and scuba divers (dispersants dissolve O-rings in boat engines and scuba gear, for example); and property owners. It includes people who been exposed to chemically dispersed oil, and even directly to dispersants—notably, during the BP disaster—who are suffering debilitating health consequences.

20. ALERT's constituents also include members of Alaska Native Tribes and communities, American Indian Tribes, and First Nations (Canada) who have unique interests in

protecting the air, land, and water from dispersants. Indigenous communities have religious and spiritual connections to ecosystems, and members conceive of themselves as integral parts of those systems. Damage wreaked by oil and dispersants interferes with, and can even prevent, these communities from carrying out traditional religious ceremonies and subsistence-living practices. Traditions broken and practices unpracticed directly harm these communities' culture and erode their way of life. Oil spills and dispersants therefore directly impact Indigenous Peoples and their communities in both tangible and intangible ways.

21. ALERT's constituents receive information and tools created by ALERT through its website, social media, and webinar or in-the-field trainings. ALERT sends out information about the organization's or others' research on oil and chemical exposures and illnesses, including the latest scientific findings that oil and dispersants combined are more toxic than oil alone when used *in the environment* rather than under laboratory conditions. (*See, e.g.*, ALERT Fact Sheet, *About dispersants: Persistent myths & hard facts*, available at https://alertproject.org/programs/, Exhibit A hereto). We also provide our constituents with information on oil or chemical disasters and health consequences, including dispersant use, and notice of federal comment periods relevant to preventing oil disasters or strengthening oil spill preparation and response.

22. ALERT is unique as a leader in translating, for the general public and medical community, the science regarding fate and effects of oil spills and dispersant use *to humans*. ALERT also helps laypeople and the medical community understand oil and chemical exposures, including those caused by oil, dispersants, and oil-dispersant exposures; why certain individuals are more at risk of toxic exposures; how chemical illnesses manifest in different individuals; and how individuals can advocate for themselves and their families in their own medical treatment. ALERT recognizes that identification and diagnosis of chemical illnesses is critical for individuals to receive effective treatment and proper guidance from medical professionals. ALERT develops its training manuals and workshops in collaboration with people most at risk from acute (disaster-related) and chronic exposures to oil and hazardous chemicals to ensure that its materials are accessible and usable. ALERT develops, organizes, and conducts "skill-up"

workshops and webinars, and "train-the-trainer" trainings, to empower frontline communities so that they can use such information in their own self-defense and advocacy efforts.

23. ALERT's primary research and advocacy focus for the past ten years has been two-fold: 1) Building public awareness of oil and chemical exposures and illnesses—things that are commonplace, prevalent, yet largely unknown; and 2) bringing the NCP up to date to reflect current scientific knowledge regarding the extreme harms dispersant use causes to human health, environmental health, and ecological health have been. Building an informed public has led to ever-increasing work, including webinars, in-the-field tours and trainings, media interviews, volunteering in documentary films, and research and analysis of scientific papers. Policy and legal work have been directed at EPA, to compel the Agency to fulfill its responsibilities under the Clean Water Act to maintain a current and science-informed NCP. Because the EPA has failed to complete its NCP rulemaking, ALERT and I personally have been forced to expend resources to induce the EPA to do its job.

24. The predecessor organization to ALERT, The Citizens' Coalition to Ban Toxic Dispersants, first submitted a petition to EPA to revise the NCP through rulemaking in November 2012. This petition, which I drafted, was in direct response to the BP Deepwater Horizon disaster—formally federally designated a "Spill of National Significance"—and the unprecedented amount of dispersants used, in unprecedented ways, with no environmental or human health monitoring. In response to a huge public outcry to ban dispersants in the wake of the spill response effort, and the fact that I believed, based on my professional experience, that Gulf coast residents were being exposed to and sickened by the oil-dispersant mixture that had been used, the petition requested EPA to promulgate rules to restrain dispersant use. For example, it asked EPA to strengthen testing protocols, to establish procedures by which to delist (i.e., disapprove) dispersant products, to prohibit use of products containing hazardous chemicals, and to prohibit products containing proprietary chemicals whose hazards the public cannot assess.

25. The Citizens' Coalition submitted a supplemental petition to the EPA, which I also drafted, in June 2014. The supplemental petition urged the EPA to incorporate responses to unconventional oil spills in the previously requested update to the NCP.

26. After EPA finally issued a proposed rule to update the NCP in January 2015, which addressed some but not all of the issues raised in the Citizen Coalition's petition, ALERT and other plaintiffs in this action timely submitted extensive public comments to EPA (filed on April 22, 2015). Our comments highlighted the existing NCP's key deficiencies, including that: it fails to recognize harms that dispersants cause to humans and wildlife; it fails to recognize the *magnified* harms to humans and wildlife resulting from combining oil and dispersants; it fails to identify that dispersants likely inhibit removing oil from water and instead act to sink oil to the bottom of a waterbody; and it presumes that products containing chemicals known to be hazardous to human health can be used safely in oil spill response.

27. From 2015 to 2018, ALERT worked with the Government Accountability Project (GAP) to track the pending NCP rulemaking process and analyze stakeholder concerns, as reflected in the public comment. ALERT and GAP identified how the current NCP's approach to oil cleanups reflects the oil industry's preferences and interests, and how it runs contrary to the approaches endorsed by environmental and public health organizations and concerned members of the public.

28. ALERT and its constituents have waited more than seven years for EPA to issue a final response to ALERT's rulemaking petition, and more than four years since the close of public comment, for the EPA to issue a final rule updating the NCP. I personally have worked for 30 years to right this particular wrong from the *Exxon Valdez* oil spill—that the current generation of dispersant chemicals do more harm than good.

29. EPA's failure to update the NCP forces continued implementation of an outdated plan that relies on ever-increasing quantities of dispersants and their widespread deployment. This places the living and non-living resources that ALERT's constituents depend upon at risk of short- and long-term devastating impacts from oil disasters—disasters that will become more frequent with expanded oil leasing and activity. EPA's failure to complete the NCP rulemaking

it began has forced ALERT to divert thousands of hours and thousands of dollars to this administrative process.

30. If EPA were finally to complete its rulemaking, ALERT could refocus its efforts on building knowledge, skills, and resilience in the frontline communities it serves. A top priority for ALERT would be to take the very successful Toxic Trespass trainings we piloted in the Gulf Coast States up the Mississippi corridor states and into the western Great Lake states, following the path of human illnesses from fracking and tar sands activities.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my personal knowledge.

Executed this 24 day of December, 2019 in Vashon, Washington.

Dr. Riki Ott

Dr. Riki Ott

EXHIBIT A

ALERT Fact Sheet re: Dispersants

About dispersants: Persistent myths & hard facts

by Dr. Riki Ott, ALERT, a project of Earth Island Institute

About Dispersants[1]

Dispersants are mixtures of solvents, surfactants, and additives that are designed to break apart slicks of floating oil and facilitate formation of small droplets of oil in the water column to enhance dispersion and microbial degradation.

The U.S. National Contingency Plan (NCP or Plan) governs our nation's oil and chemical pollution emergency responses. The first NCP, in 1970, advocated mechanical methods to remove and dispose of spilled oil, but it allowed for use of chemical dispersants if they were listed on the NCP Product Schedule. For over a decade, dispersant use was restricted; it wasn't until the mid-1980s that the Plan began to shift to include more chemical treatment measures and requirements. 1994 updates to the Plan included provisions for expedited and preauthorized use of dispersants, as government and industry acted to anticipate and avoid public opposition to dispersant use during future spills—a public relations 'lesson learned' from the 1989 *Exxon Valdez* oil disaster.

During the 2010 BP Deepwater Horizon oil disaster response, unprecedented amounts of dispersants were used at the surface and subsurface wellhead, over an unprecedented duration of nearly three months, leading to unprecedented amounts of oil deposition on the ocean floor. The 1994 National Contingency Plan still remains in effect, despite public outcry over dispersant use.

Persistent Myths & Hard Facts

MYTH 1: A listing on the NCP Product Schedule means that dispersants are "safe" for use during oil spill response.

FACT: "The listing of a product on the NCP Product Schedule does not constitute approval of the product" [§300.920(e)] and products are required be labeled with a disclaimer to that effect. Rather, the listing means only that data have been submitted to EPA as required by Subpart J of the NCP. The EPA authorizes, it does NOT *approve*, use of dispersants listed on the Product Schedule.

The data include a screening test for toxicity, based on short-term, 96-hour lab tests on lab-tolerant species, and meeting an efficacy test threshold, based on the average of results from two test oils. The data are used to indicate relative toxicity and efficacy of products in laboratory conditions. These laboratory tests bear little resemblance to, and are not indicative of toxicity or performance in, natural environments where products may be used.

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[1] EPA, 2015, Rulemaking on Subpart J, NCP, Supplemental Information, Background and Definitions www.epa.gov/emergency-response/national-contingency-plan-subpart-j

MYTH 2: Dispersants do more good than harm; they mitigate environmental damage from oil spills.

FACT: Dispersants are proprietary mixtures of oil-based solvents, surfactants, and additives that are—by nature—toxic to wildlife and people. According to a July 2010 scientific consensus statement: "The properties that facilitate the movement of dispersants through oil also make it easier for them to move through cell walls, skin barriers, and membranes that protect vital organs, underlying layers of skin, the surfaces of eyes, mouths, and other structures."[2]

The two Corexit dispersants used during the BP DWH disaster—over scientists' objections—were Corexit EC9500A and Corexit EC9527A. According to Safety Data Sheets, these products should not be allowed contact with surface water—the water on the surface of a river, lake, wetland, or ocean. Any accidental leaks should be stopped and contained "to ensure runoff does not reach a waterway."[3] Further, Corexit EC9500A and Corexit EC9527A are listed as "harmful" or "toxic" to aquatic life, respectively.[4]

Studies following the BP DWH disaster have confirmed that while oil and dispersants are each independently toxic to sea life, the combined (synergistic) toxicity of chemical-enhanced oil is more deadly to marine wildlife from the seafloor to the upper ocean, from bacteria and plankton to coral, and from fish to dolphins.[5]

MYTH 3: Dispersants don't sink oil.

FACT: In standardized lab conditions where dispersants are developed and tested, dispersants may not cause oil to sink. According to the EPA, dispersants "submerge" oil below the water surface "but generally not to the bottom of the water body . . . ."[6] The EPA acknowledges, however, that oil droplets readily form oil-mineral aggregates with naturally occurring marine

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[2] Consensus Statement: Scientists oppose the use of dispersant chemicals in the Gulf of Mexico, July 16, 2010, pp. 1–2. Statement drafted by Dr. Susan D. Shaw, Marine Environmental Research Institute. https://www.peer.org/assets/docs/fda/8_4_10_CONSENSUS_STATEMENT_ON_DISPERSANTS.pdf

[3] Nalco Safety Data Sheet, Corexit EC9500A, revision date 9/26/16: www.nalcoenvironmentalsolutionsllc.com/wp-content/uploads/COREXIT-EC9500A-GHS-SDS-USA.pdf
Nalco Safety Data Sheet, Corexit EC9527A, revision date 12/17/14: www.nalcoenvironmentalsolutionsllc.com/wp-content/uploads/COREXIT%E2%84%A2-EC9527A-GHS-SDS-USA.pdf

[4] Ibid., Nalco 2014 and 2016, (FN 3).

[5] Samantha Joye et al., 2016. 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.
Suzanne M. Lane et al., 2015. 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*.
Lori H. Schwacke et al., 2017. 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.

[6] EPA 2015, p. 3385 (FN 1).

detritus, sediment particles, and bacteria.[7] During the BP disaster, this "marine snow" was found to coalesce into underwater oily plumes and sink, as the plumes accumulated more mass over time. Dispersants facilitate the transport of large quantities of oil to the ocean bottom.[8]

In the 2015 rulemaking on dispersant use, EPA maintained the prohibition on use of sinking agents in the National Contingency Plan but revised the definition of "sinking agents" to become, "those substances deliberately introduced into an oil discharge to submerge the oil to the bottom of a water body."[9]

Since dispersants arguably don't fit this description, EPA's loophole and entrenched 'look-the-other-way' approach to regulating dispersants undermine the Clean Water Act's mandate to "prevent, minimize, or mitigate damage to public health and welfare" from the oil spill and spill mitigating products [311 (a)(1)(8)].[10]

MYTH 4: Dispersants work in all waters of the U.S.

FACT: Dispersants were designed for use on conventional (floating) oil in saltwater environments and their effectiveness decreases as the salinity of the water decreases. Effectiveness is minimal in freshwater environments. EPA proposed a conditional listing for dispersant use only in saltwater environments in its 2015 rulemaking, but that rulemaking was never concluded. Current rules in effect allow dispersant use in all waters of the U.S.[11]

MYTH 5: Use of subsea dispersant injections disperses oil released from deep sea wellheads and minimizes the amount of harmful volatile hydrocarbons upwelling from depth.

FACT: Independent studies conducted on BP's Gulf Science Dataset indicate that oil distribution at depth and throughout the water column was controlled by temperature- and pressure-dependent processes, not subsea dispersant injections.[12] The pressurized jet of oil that blew out of the wellhead led to rapid expansion of the dissolved gases, which atomized the gas-saturated oil into micro-droplets. This shifted the droplet size distribution to smaller droplets that remained suspended in a deep oily plume thousands of meters below the

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7 Ibid., EPA 2015, p. 3385 (FN 1).

8 Passow U, Sweet J, Quigg A. How the dispersant Corexit impacts the formation of sinking marine oil snow. *Mar Pollut Bull.* **2017** Dec 15, 125(1–2):139–145. doi: 10.1016/j.marpolbul.2017.08.015. Epub 12 Aug 2017.

Suja LD, Summers S, Gutierrez T. Role of EPS, dispersant and nutrients on the microbial response and MOS formation in the subarctic northeast Atlantic. *Front Microbiol.* **2017**, 8:676. Epub 21 Apr 2017. doi:10.3389/fmicb.2017.00676

Doyle SM, Whitaker EA, De Pascuale V, et al. Rapid formation of microbe-oil aggregates and changes in community composition in coastal surface water following exposure to oil and the dispersant Corexit. *Front Microbiol.* **2018** Apr 11, 9:689. doi: 10.3389/fmicb.2018.00689.

9 EPA 2015, p. 3422 (FN 1).

10 EPA 2015, p. 3393 (FN 1).

11 EPA 2015, p. 3406 (FN 1).

12 Paris CB, Berenshtein I, Trillo ML, et al., 2018**.** BP Gulf Science Data reveals ineffectual subsea dispersant injection for the Macondo blowout. *Front. Mar. Sci.* doi.org/10.3389/fmars.2018.00389

surface—until it started to break down after the discharge stopped. Efforts to control the Macondo blowout and repair the riser increased the turbulent energy and increased the flow rate, which, data show, also mechanically dispersed the oil into micro-droplets that remained suspended at depth. The timing of these operations coincided with increased subsea dispersant injection and oil collection at the wellhead. Disaster responders at the surface erroneously attributed the decrease in benzene and other light hydrocarbons upwelling from depth to successful use of dispersants, rather than—as the data show— to mechanical dispersion.

MYTH 6: Use of dispersants during oil spill response is safe; it does not have unintended consequences for workers or the general public.

FACT: Dispersants are sprayed from planes and on the water from boats during oil spill response, as recommended by the manufacturer.[13] The resulting chemical-enhanced oil droplets are more harmful to humans and wildlife than oil alone.[14] 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-oil exposure and higher rates of coughing, pulmonary issues, and gastrointestinal issues, compared to those exposed to oil alone.[15]

Aerial spraying of dispersants contributed to widespread dispersion of oil-chemical pollutants that likewise adversely affected coastal communities. Studies of Louisiana residents in areas most likely impacted by chemical-enhanced oil[16] reported residents had high incidence of respiratory illness and other exposure-related health complaints compared to communities further inland.[17]

MYTH 7: Dispersant manufacturers can be held liable for harm caused by their product from use during oil spill response.

FACT: In November 2012, a U.S. District Court in Louisiana ruled that under federal law, the government's authority during an emergency overrides any state product liability laws.

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[13] EPA NCP Subpart J Technical Notebook: A Compendium to the NCP Product Schedule, March 2019, pp. 104–106 (Corexit EC9527A) and pp. 114–117 (Corexit EC9500A). www.epa.gov/emergency-response/ncp-product-schedule-products-available-use-oil-spills

[14] Sindhu Ramesh et al., 2018. 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.

[15] Melannie Alexander et al., 2018. The Deepwater Horizon oil spill Coast Guard cohort study: A cross-sectional study of acute respiratory health symptoms, 162 *Environmental Research* 196, 200–201.

[16] Earthea Nance et al., 2016. Ambient air concentrations exceeded health-based standards for fine particulate matter and benzene during the BP DHOS. *J. Air Waste Manag. Assoc.* 66(2):224-36. doi: 10.1080/10962247.2015.1114044.

[17] 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).

Under this ruling, dispersant manufacturers such as Nalco are not liability for any harmful side effects from use of its product as long as the federal government has listed them on the NCP Product Schedule.[18]

MYTH 8: Dispersants must be pre-authorized for use during oil spills.

FACT: Dispersant pre-authorization is NOT mandatory, although most coastal states have pre-authorized dispersant use. Dispersants that are not pre-authorized may also be used in oil spill response. In pre-disaster oil spill prevention and response planning, the task of determining which products, if any, should be pre-authorized falls to Area Committees—local officials and citizens. The NCP requires Area Committees to work with "federal, state and local officials to expedite decisions for the use of dispersants and other mitigating substances and devices" during oil spills [40 CFR §300.205 (c)(3)].

Area Committees are required to develop a detailed annex that provides for pre-authorization of application of specific countermeasures or removal actions that, if expeditiously applied, will minimize adverse spill-induced impacts to fish and wildlife resources, their habitat, and other sensitive environments [40 CFR §300.210 (c)(4)(ii)(D)] *emphasis added.*

The explicit assumption in the pre-authorization process is that products listed on the NCP Product Schedule mitigate oil spill impacts. Since Corexit dispersants are known to exacerbate rather than mitigate environmental harm, these products should not be pre-authorized—or used at all—for oil spill response. Instead, these Corexit dispersants should be removed from the NCP Product Schedule.

Pre-authorization of Corexit dispersants is a big disincentive to developing—and using—less toxic alternatives.

[18] Nalco skirts lawsuits over Corexit use after BP oil spill, Law306, 2012, www.law360.com/articles/397322/nalco-skirts-lawsuits-over-corexit-use-after-bp-oil-spill.
Emily Pickrell, Dispersant maker to be dismissed in spill case. *Houston Chronicle*, Dec. 1, 2012. www.chron.com/business/energy/article/Dispersant-maker-to-be-dismissed-in-spill-case-4082622.php.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALERT PROJECT, EARTH ISLAND INSTITUTE; ALASKA COMMUNITY ACTION ON TOXICS; CENTER FOR BIOLOGICAL DIVERSITY; COOK INLETKEEPER; ROSEMARY AHTUANGARUAK; AND KINDRA ARNESEN, Plaintiffs, vs. MICHAEL REGAN, in his official capacity as Administrator; and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendants.	Case No. 3:20-cv-00670-WHO **DECLARATION OF MIYOKO SAKASHITA**

I, Miyoko Sakashita, declare as follows:

1. I have personal knowledge of the matters stated below, and I could and would testify to these statements if called as a witness.

2. I am the director of the Center for Biological Diversity's Oceans Program.

3. The Center for Biological Diversity ("Center") is a non-profit corporation with offices in Oakland, and elsewhere in California and around the country. The Center works to protect wild places and their inhabitants. The Center believes that the health and vigor of human societies and the integrity and wildness of the natural environment are closely linked. Combining conservation biology with litigation, policy advocacy, and strategic vision, the Center is working to secure a future for animals and plants hovering on the brink of extinction, for the wilderness they need to survive, and by extension, for the physical health and spiritual welfare of generations to come. In my role as director of the Center's Oceans Program, I oversee all aspects of the Center's work relating to ocean conservation.

4. The Center works to protect imperiled species and their habitats impacted by offshore oil and gas development, to protect public health, and to attain clean water, a safe climate, and a healthy web of life. One of the Ocean Program's top priorities is the full implementation of existing environmental laws to reduce impacts to endangered species and fragile ecosystems. We also aim to address climate change and help spur the transition from a fossil fuel dependent society to a clean energy future.

5. The Center works on behalf of its members, who rely upon the organization to advocate for their interests in front of state, local and federal entities — including the U.S. Environmental Protection Agency ("EPA") — and the courts. The Center has over 81,800 members nationwide, including members that live near and recreate in the areas of California, the Gulf of Mexico, Cook Inlet, and other areas impacted by EPA's failure to update the National Contingency Plan for responding to oil spills challenged in this case.

6. In pursuit of its mission, the Center has undertaken numerous actions to help protect species affected by offshore oil and gas activities including sperm whales, humpback whales,

beaked whales, North Atlantic right whales, Gulf of Mexico Bryde's whales, Cook Inlet beluga whales, polar bears, loggerhead sea turtles, leatherback sea turtles, Kemp's Ridley sea turtles, and corals, among others. The Center has, for example, petitioned the federal government and taken legal actions to protect many of these species under the Endangered Species Act or to designate critical habitat. The Center also filed a rulemaking petition to EPA to limit the discharge of harmful water pollution from offshore oil platforms in the Pacific Ocean.

7. The Center has also filed litigation to protect these species from oil spills, water pollution, noise pollution, and other harms from the oil and gas industry. The Center has, for example, filed litigation challenging an EPA Clean Water Act permit allowing offshore platforms in the Gulf of Mexico to discharge unlimited amounts of produced wastewater, including chemicals used in offshore fracking and acidizing. The Center has also filed litigation challenging the federal government's approval of the use of offshore fracking in federal waters off California without adequately analyzing the risks to the environment or endangered species; litigation challenging the approval of the first offshore oil development project from fully within federal waters in the Arctic Ocean; and litigation challenging rules that allow the take of marine mammals incidental to oil and gas activities in Cook Inlet. The Center also regularly comments on proposed agency actions that involve offshore oil and gas drilling.

8. The Center also has a history of working on dispersants. For example, the Center issued a report in 2011 titled *A Deadly Toll: The Gulf Oil Spill and the Unfolding Wildlife Disaster* documenting the harm caused to wildlife following the Deepwater Horizon disaster, including from the use of dispersants. The Center also commented on EPA's 2015 proposed rule to amend the National Oil and Hazardous Substances Pollution Contingency Plan, Subpart J, the rules governing dispersant use.

9. This case, which seeks to compel EPA to comply with its mandates under the Administrative Procedure Act and Clean Water Act and thereby reduce the impacts of the agency's inaction on sensitive species, water quality, and other environmental resources, falls clearly within our organizational mission. The Center has deep and abiding interests in the

species, habitats, water quality, and other resources that are harmed by EPA's reliance on an outdated National Contingency Plan and failure to comply with the law.

10. Achieving our mission and protecting the interests of our members depends in large part on the federal government's proper compliance with environmental laws, including laws designed to prevent agency inaction. It also depends in large part on the compliance with environmental laws that are designed to protect these species, clean water, and other resources. The Clean Water Act is a key law for reducing water pollution, and harm to public health, wildlife and their habitats from such pollution. Congress recognized as much by requiring EPA to update its regulations implementing the statute based on scientific advancements and new information, including the National Contingency Plan for responding to oil spills at issue in this case. The Clean Water Act cannot fulfill its function and protect water quality and our interests unless EPA prepares proper and adequate environmental analyses.

11. The Center and our members also have important procedural and informational interests advanced by the Clean Water Act, Administrative Procedure Act, and other laws such as the National Environmental Policy Act that requires federal agencies to analyze the environmental impacts of their actions. Our interests in attaining full, clear, and accurate information regarding the impacts to air, habitat, species, and other resources are injured by the EPA's failure to act. We are also deprived of our right to participate fully and meaningfully in the environmental review and decisionmaking process.

12. EPA's failure to update the National Contingency Plan harms the aesthetic informational, and procedural interests of the Center and its members. These harms would likely be reduced and remedied if the Center were to prevail in this lawsuit.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 17th, 2021, in Oakland, California.

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IN THE UNITED STATES DISTRICT COURT
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ALERT PROJECT, EARTH ISLAND INSTITUTE; ALASKA COMMUNITY ACTION ON TOXICS; CENTER FOR BIOLOGICAL DIVERSITY; COOK INLETKEEPER; ROSEMARY AHTUANGARUAK; AND KINDRA ARNESEN, Plaintiffs, vs. MICHAEL REGAN, in his official capacity as Administrator; and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendants.	Case No. 3:20-cv-00670-WHO **DECLARATION OF ROBERT WILLIAM SHAVELSON, JR.**

I, Robert William Shavelson, Jr., declare as follows:

1. I have personal knowledge of all the facts set forth below, and if called as a witness, I could and would testify competently to them. Expressions of opinion reflect my own personal opinions and judgment.

2. I am a resident of Homer, Alaska. I hold a B.A. in Biology from Boston University and a J.D. from the University of Oregon, with certificates in Natural Resources Law and Ocean and Coastal Law.

3. I am the Advocacy Director at Cook Inletkeeper. I have worked for Cook Inletkeeper for twenty-three years. In my current role, I am responsible for leading the policy and advocacy efforts of the organization. Previously, I was the Executive Director of Cook Inletkeeper, and I was responsible for managing the policy, personnel, finances, and fundraising of the organization. I am familiar with the organization, membership, policies, and practices of Cook Inletkeeper.

4. Cook Inletkeeper is a 501(c)(3) nonprofit organization funded by grants, membership dues, and event proceeds. The organization's headquarters is located in Homer, Alaska, with a field office located in Soldotna.

5. The mission of Cook Inletkeeper is to protect Alaska's Cook Inlet watershed and the life it sustains. The organization applies a holistic lens to the connections between the health of the watershed and ecological, economic, and human health. Cook Inletkeeper was formed in 1995 by Alaskans concerned about rapid ecological changes and gaps in environmental protection in the Cook Inlet watershed.

6. Cook Inletkeeper is a membership organization. Members rely on Cook Inletkeeper to advance their interests in protecting the Cook Inlet watershed. Members include Alaskans from many walks of life, including commercial fishermen, sport fishermen, Alaska Natives, property owners, hunters, scientists, ecologists, and subsistence users. Cook Inletkeeper's members use Cook Inlet for economic, recreational, aesthetic, professional, scientific, subsistence, and other purposes and intend to continue to frequently engage in these activities and to use and enjoy Cook Inlet and its wildlife in the future.

7. I am also a member of Cook Inletkeeper and a member of Alaska Community Action on Toxics, another plaintiff in this case. Personally, I enjoy recreating in the waters of the Cook Inlet. I have gone kayaking, fishing and boating in the Inlet, and walked along its shores in addition to other recreational activities. I am concerned about the impacts dispersants could have on Cook Inlet if they are deployed in response to an oil spill. For example, I am concerned that the use of chemical dispersants would harm the halibut, critically endangered beluga whales, and their prey that live in Cook Inlet and decrease my ability to observe and enjoy these species. I also worry that the use of dispersants and my potential exposure to them could make me sick

8. Cook Inletkeeper has over 2,000 members. They receive communications through the organization's mail or email lists. Our members and supporters regularly receive information about threats to Cook Inlet and opportunities to take action on these issues.

9. Our members and supporters respond to these requests for action; they can also volunteer for the organization in various ways, depending on their skills and interests. Volunteer activities include, but are not limited to, help with identifying oil spills, assistance with water quality work, letter writing, event organizing, and mailings.

10. Cook Inletkeeper operates under four primary programs: Clean Water, Healthy Habitat, Community & Economy, and Clean Energy. Through its Clean Energy program, Cook Inletkeeper works to address the root causes of climate change and other impacts from oil, gas, and coal development. Inletkeeper believes the oil and gas industry must internalize the true costs of pollution, rather than shifting these costs to Alaskans and our environment as at present.

11. Lower Cook Inlet is considered the "Halibut Capital of the World," and also provides important habitat for salmon, cod and other species. Cook Inlet is home to an extremely lucrative commercial fishery and sports fishery, as well as related tourism industries. Cook Inlet fisheries generate over $1 billion a year in economic activities.

12. Cook Inlet is also home to the critically endangered Cook Inlet beluga whale. Cook Inletkeeper was the lead petitioner in the effort to list the Cook Inlet beluga whale as

endangered, and it has led and supported citizen-based science efforts to count, identify, and better understand the Cook Inlet beluga whale. Cook Inletkeeper also works to protect wild salmon habitat to ensure belugas and other marine mammals in the Inlet have sufficient food sources. Exposure to pollution threatens Cook Inlet beluga whales and their prey, and further degrades their habitat.

13. Cook Inlet is one of the birthplaces of modern oil and gas production. In 1957, before the passage of federal environmental statutes, oil was discovered in the area, and oil extraction operations quickly moved offshore. The area continues to be a regulatory backwater where development receives much less scrutiny than elsewhere. The combination of an abundance of extractive activities, a lack of regulatory oversight, and harsh ice, weather and tidal conditions in the Inlet puts the area at very high risk for oil spills.

14. Cook Inlet is still affected by the 1989 *Exxon Valdez* oil spill. Each year since the spill, Alaskans have discovered *Exxon Valdez* crude seeping from local beaches, and these seeps continue to harm nearshore fisheries and ecosystems. In the event of another oil spill, the use of chemical dispersants is currently a readily available option for emergency response.

15. Under the 1994 National Contingency Plan (NCP) currently in place, agencies and industries have great latitude to use chemical dispersants on the scene of an oil disaster. Not only does use of these dispersants directly harm the health and economy of communities in the Cook Inlet watershed—compromising Cook Inletkeeper's mission—but it also diverts resources from our larger goal of transitioning to a just, clean energy future.

16. Pollution is a subsidy. Risk is a subsidy. The use of chemical dispersants decreases costs for the industries that cause these spills, but shifts these costs to the individuals, communities, and ecosystems affected by the pollution. Cook Inletkeeper is participating in this litigation because the organization, representing the interests of its members, believes that the lack of an updated NCP threatens Cook Inlet and the surrounding ecosystem due to water contamination from dispersant usage in response to an inevitable oil spill. The toxic dispersants create health and safety hazards for the people who live and recreate here, as well as for the animals and ecosystems on which many depend for sustenance, livelihood, business, and

recreation. The contamination from the use of chemical dispersants and the associated detriment to the ecosystem and the people who depend on it directly undermines Cook Inletkeeper's mission to protect Cook Inlet and the life it sustains.

17. Cook Inletkeeper has engaged in multiple advocacy activities, including but not limited to litigation, to confront the hazards posed by use of chemical dispersants in oil spill response. In 2012, Cook Inletkeeper was a plaintiff in a citizen suit against the U.S. Environmental Protection Agency (EPA) that challenged certain substantive aspects of the 1994 NCP, including its lack of specificity with respect to which dispersants may be used in which waters and in which quantities.

18. The NCP establishes a system of Regional Response Teams, which develop "Preauthorization Plans" delineating which dispersants should and should not be used in particular spill response scenarios. In 2014, our organization supplied its members and the public with information on the Alaska Regional Response Team (ARRT) process in an "Action Alert," which encouraged members to take action by submitting comments to the Coast Guard opposing pre-authorization of dispersant use. Later that year, our organization also advocated before the Alaska Department of Environmental Conservation regarding the Alaska Regional Response Team and potential pre-authorization of dispersants in the Arctic and other waters around Alaska. The ARRT plays a central role advising the federal on-scene coordinator in spill response scenarios, and its position on dispersant use shapes how industry and state and federal agencies will respond to spills.

19. In April 2015, Cook Inletkeeper signed onto two comments in response to EPA's proposed rule regarding the NCP that was published in the Federal Register—one authored by Dr. Riki Ott of plaintiff ALERT, the other by environmental law organization Earthjustice. In 2017, Cook Inletkeeper helped spread awareness about the plan to bring this legal challenge. Finally, in October 2019, Cook Inletkeeper signed onto a Notice of Intent to Sue EPA over the allegations at issue in this lawsuit.

20. Cook Inletkeeper is the only organization with a strong focus on oil and gas production in south-central Alaska, where active oil and gas exploration, development and

production occur. Many of our members fear the use of chemical dispersants in this region. EPA's failure to update an NCP that currently allows heavy use of chemical dispersants for oil spill response harms Cook Inletkeeper's members by increasing their health risks and the risks to halibut, salmon, Cook Inlet belugas, Pacific cod, mussels, hard shell clams and other natural resources which they study, enjoy, use, and depend on. For example, Craig Matkin, a long-time member, has studied marine mammals for over twenty-five years, and has detailed records and knowledge of how oil spills and associated response efforts have had negative impacts on Orca whales and the entire marine food chain. He worries that use of dispersants in or near Cook Inlet would harm Orcas in the Inlet and decrease his ability to observe and study the species.

21. PA's failure to conclude the NCP rulemaking process also harms Cook Inletkeeper as an organization, by forcing us to expend institutional resources on pressuring EPA simply to perform its statutory duty to maintain a scientifically current oil spill response plan. Cook Inletkeeper has now participated in actions related to the obsolete 1994 NCP for several years; I would conservatively estimate that we have spent at least 250 hours of staff time on these advocacy activities. The issuance of a final rule would allow Cook Inletkeeper to spend its resources on pursuing its programmatic work to transition to cleaner energy sources.

22. The lack of a final EPA rule responding to stakeholders' many thoughtful comments about the existing NCP's deficiencies permits ongoing indiscriminate use of chemical dispersants in response to oil spills, despite abundant evidence indicating that dispersants are toxic to humans and harmful to marine life and aquatic ecosystems. Cook Inlet—along with waters in the Alaskan Arctic—are particularly vulnerable to these impacts, because the high volume of offshore oil activity means the potential for an oil spill is also high.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 20th day of December 2019 at Homer, Alaska.

Robert William Shavelson, Jr.