

The Death Knell for Dispersants?

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On August 9, 2021, the U.S. District Court for the Northern District of California ordered the Environmental Protection Agency (EPA) to issue a final rule amending regulations on the use of dispersants in oil spill responses. In *Earth Island Institute v. Regan*, Case No. 3:20-cv-00670 (N.D. Cal. 2021), the Court determined that EPA's delay in updating the statutorily required National Contingency Plan (NCP) for responding to oil spills constituted a failure to undertake a nondiscretionary duty under the Clean Water Act (CWA). Thus, the Court ordered the EPA to issue a final rule on dispersant listing and authorization of use by the end of May 2023. Although the Court's decision requires EPA to finalize a rule that was previously proposed in 2015 and that was intended to address, for the first time since 1994, new information regarding the efficacy and toxicity of dispersants, and other chemical and biological agents used in oil spill responses, significant questions remain as to whether EPA's final rule will address the most recent science regarding environmental and human health impacts of dispersants.

The NCP and Dispersants

The NCP is the U.S. federal government's blueprint for responding to oil spills and hazardous substance releases. While the EPA is charged with updating the NCP itself, once a response has been triggered under the NCP, either the EPA or the Coast Guard (depending on where the primary impact from the spill occurs) take the lead on the response as the federal on-scene coordinator. While the EPA has revised sections of the NCP over the years—the section on dispersants (Subpart J) concerning listing and authorization of use has not been updated since 1994.

Dispersants are a class of chemicals designed to remove oil from the water's surface by working to break up oil slicks into small droplets. These small droplets are easier for oil-eating microbes to break down through biodegradation. Additionally, these small droplets are less buoyant, which allows them to scatter through the water column more easily, thereby reducing the size of oil slicks at the water's surface. One of the criticisms concerning dispersants is that while they can remove oil slicks on the water surface and shore (which are dangerous to seabirds and marine mammals), they can transfer that danger to plants and animals in the water column.

Since the last update to Subpart J in 1994, the Deepwater Horizon spill dramatically changed the landscape of oil spill response in the U.S. During the Deepwater Horizon spill, BP sprayed approximately 1.84 million gallons of dispersant on the ocean surface and near the subsea wellhead. An [NIH study](#) is analyzing potential human health impacts associated with this dispersant use. Additionally, significant new information has come to light concerning potential environmental impacts associated with dispersant use.

In 2015, EPA proposed amendments to its Subpart J regulations. The proposed rule expressed EPA's intent to revise the NCP 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." The proposed revisions to Subpart J of the NCP were anticipated to encourage the development of safer and more effective spill mitigating products.

Although EPA issued a final rule on the monitoring provisions on Subpart J in July 2021, the revisions did not address all components of the 2015 rule, including revisions to the data and information requirements for chemical agent products to be listed on the Subpart J Product Schedule, and revisions to the authorization of use of procedures for chemical agents in response to an oil discharge to waters of the United States. The delay in authorization of new dispersants has resulted in continued use of dispersants even though new information highlights concerns regarding their toxicity and environmental impacts, including claims that chemical dispersants currently allowed under the NCP and used in oil spill responses are more toxic to humans and the environment when mixed with oil compared to impacts from oil alone.



Court Order

In a prior ruling, the Court had concluded that EPA has a nondiscretionary duty to revise or amend the NCP when there is new information that shows that the current standards for efficient, coordinated, and effective action to minimize damage from oil and hazardous substance pollution are insufficient to safely provide for mitigation of any pollution.

In its August 9, 2021 ruling, the Court concluded that the EPA breached such duty under the CWA to amend the NCP in light of new information on dispersants' impacts on the environment. The Court concluded that an Office of Inspector General report after the Deepwater Horizon oil spill and the proposed rule from 2015 demonstrated that the current NCP is inadequate.

Additionally, the Court found that EPA had unreasonably delayed the rulemaking in violation of the Administrative Procedure Act (APA), which permits the Court to "compel agency action unlawfully withheld or unreasonably delayed." The Court found that the plaintiffs' CWA and APA claims were distinct because they involved separate violations.

In light of these violations, the Court ordered the EPA to issue a final rule on dispersant listing and authorization of use by the end of May 2023.

Looking Ahead

EPA's rulemaking will be closely watched by those charged with oil spill preparedness requirements, environmentalists, and emergency responders. While industry continues to strive to minimize the risk of oil spills, a risk always remains. How to best respond to a spill—including the decision on whether to use dispersants—continues to be a complicated and nuanced decision. While many contend dispersants remain an important tool in the response toolkit, in practice the use of dispersants seems to have been in sharp decline since the Deepwater Horizon response in the U.S.

Going forward, industries subject to oil spill planning requirements will want to closely monitor amendments to the NCP, including to Subpart J.

Once EPA finalizes the rule, interested parties may argue that additional revisions are needed. Despite the significant time lag between the 2015 proposed rule and the time that EPA is required to finalize the rule in 2023, the Court rejected arguments by the plaintiffs that EPA should be ordered to revise and re-issue the 2015 proposed rule prior to its finalization to reflect changes in scientific knowledge since the 2015 proposed rule was issued. Thus, EPA may proceed with finalizing the rule as proposed in 2015. Moreover, EPA's proposed schedule does not appear to include an additional public comment period. Both of these factors appear to increase the likelihood of future challenge to the rule, once finalized.

For More Information

If you would like more information about EPA's Subpart J revisions or oil spill preparedness and response legal requirements, including vessel response plans, facility response plans, offshore oil spill response plans, or area contingency planning, please contact [Rachael Lipinski](#) or [Jenna Mandell-Rice](#) at (206) 623-9372.

