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NORTHWEST ROCKY MOUNTAIN WASHINGTON, DC INTERNATIONAL

February 22, 2011

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Office of Incident Management & Preparedness (CG 533)
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Re: Comments for Consideration at the February 23, 2011 National Response Team Meeting on Dispersant Use

Dear Ms. Tulis and Captain Caplis:

We write on behalf of the undersigned organizations to raise our hope that the National Response Team ("NRT") not take steps to establish dispersant use guidance based on premature conclusions about lessons learned from using dispersants during the Deepwater Horizon response before critical information is available about the impacts of such dispersant use. As you know, an unprecedented 1.84 million gallons of dispersant were released into the Gulf of Mexico – 1.07 million gallons sprayed on the ocean's surface and 771,000 gallons experimentally applied nearly a mile below the surface. Now, with a natural resource damage assessment in progress and studies under way, scientists are just beginning to establish the testing and monitoring protocols that will enable us to understand the long-term impacts of this incident and response on the Gulf ecosystem. The Deepwater Horizon experience suggests the need for more research on the toxicity and long-term impacts of dispersants, among other things, but it will be some time before we fully understand the effects of the dispersants used. It is therefore premature to incorporate subsea dispersant use into standard oil spill response – much less preauthorize subsea dispersant use – based solely on the Deepwater Horizon experience.

Both the December 16, 2010 memorandum sent by you to NRT Members and Regional Response Team ("RRT") Co-Chairs and the agenda for the February 23, 2011 meeting seem to assume that subsea dispersant use will be a mode of operation in future spill response and to promote pre-authorization of dispersant use as the norm. We commend the NRT's willingness to improve oil spill response in the aftermath of this disaster, and we similarly applaud the efforts of the Environmental Protection Agency ("EPA") to re-examine Subpart J of the National Contingency Plan, 40 C.F.R. §§ 300.900-920, in order to bring the National Product Schedule in

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line with its statutorily mandated purpose and to make the Schedule helpful in guiding the use of dispersants and other chemical countermeasures. Until further research is done on dispersant use and new Subpart J regulations are in place that provide appropriate testing, information, and use criteria for chemicals listed on the National Product Schedule, however, it is hard to imagine how Area Contingency Plans (ACPs) and Regional Contingency Plans (RCPs) can incorporate protocols for subsea dispersant use and still adhere to the national response priority of "minimiz[ing] adverse impacts to the environment." 40 C.F.R. Pt. 300, App. E § 5.8(b).

Clearly, as the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling ("Commission") recommended, steps should be taken to clarify lines of authority and communication in oil spill response and more research on dispersants must be conducted, but putting a thumb on the scales in favor of dispersant use as a result of "lessons learned" from the Deepwater Horizon response is premature at best. As the Commission's Final Report recognizes:

> The decision to use dispersants involves difficult tradeoffs: If dispersants are effective, less oil will reach shorelines and fragile marsh environments, but more dispersed oil will be spread throughout the water column.[1]

Given that much more needs to be known about the toxicity of individual dispersants and the impacts of dispersed oil and dispersants in the water column, we urge the NRT not to get ahead of the science in promoting subsea dispersant use and continued pre-authorization of dispersant use. As we set forth below, lessons from dispersant use in the Gulf have yet to be fully understood, and some lessons will be unique to the novel circumstances of that incident and to the Gulf ecosystem; dispersant pre-authorization is not necessary to the success of oil spill response; and the development of national guidance by the NRT and any revisions to ACPs and RCPs must invite broad public participation.

I. Subsea Dispersant Use Should Not Be Incorporated into ACPs and RCPs at this Time, Much Less Preauthorized, Because the Impact of Dispersant Use from the Deepwater Horizon Response Is Not Yet Understood.

The complexities of the Deepwater Horizon disaster, in National Incident Commander Thad Allen's words, were "more analogous to the challenges posed by Apollo 13 than the *Exxon Valdez* spill of 1989."[2] In other words, we were in unknown territory when responding to the spill; and we remain in unknown territory as scientists now assess the long-term effects of the unprecedented response.

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[1] Nat'l Comm'n on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Report to the President, The Gulf Oil Disaster and the Future of Offshore Drilling 270 (2011) [hereinafter Commission Report].

[2] U.S. Coast Guard Nat'l Incident Command, Nat'l Incident Commander's Report: MC252 Deepwater Horizon 3 (2010), *available at* http://www.nrt.org/production/NRT/NRTWeb.nsf/AllAttachmentsByTitle/SA-1065NICReport/$File/Binder1.pdf?OpenElement.

The Final Report of the Commission, released in January 2011, confirmed that "[s]o much remains unknown that will only become clearer after long-term monitoring of the marine ecosystem."[3]

> Because the Deepwater Horizon spill was unprecedented in size, location, and duration, deepwater ecosystems were exposed to large volumes of oil for an extended period. It will take further investigation and more time to assess the impacts on these ecosystems, their extent and duration.[4]

The Commission acknowledged that "dispersants . . . pose potential threats," because "[l]ess oil on the surface means more in the water column, spread over a wider area, potentially increasing exposure for marine life."[5] "As of November 2010, three independent, peer-reviewed studies confirmed the presence of a deepwater plume of highly dispersed oil droplets and dissolved gases at between 3,200 and 4,200 feet deep and extending for many miles . . . ."[6] The Commission further noted that such "[c]hemically dispersed oil can be toxic in both the short and long term," and scientific findings thus far have "not rule[d] out potential impacts of deepwater oil and dispersant concentrations on individual species."[7]

Apart from the unknown effects of the underwater plumes of dispersed oil that were exacerbated by the application of dispersant, are the unknown effects of the dispersant and the dispersant/oil mix. The first results from research on the fate of Corexit in the Gulf are only now being published. A peer-reviewed study released on January 26, 2011 shows that a component of Corexit "was sequestered in deepwater hydrocarbon plumes at 1000-1200 m [approximately 3200-4000 feet] water depth," "persisted up to 300 km [approximately 190 miles] from the well, 64 days after deepwater dispersant applications ceased," and underwent only "negligible, or slow, rates of biodegradation in the affected waters."[8] The study's authors view these findings as a foundation for future studies on the effects of the dispersants in the oceans:

> By knowing how the dispersant was distributed in the deep ocean, we can begin to assess the subsurface biological exposure, and ultimately what effects the dispersant may have had. . . . [W]hile we have provided needed insight into the fate and transport of the dispersant we still don't know just how serious the threat is; the deep ocean is a sensitive ecosystem unaccustomed to chemical irruptions like this, and there is a lot we don't understand about this cold, dark world.[9]

In other words, nearly a year after the blowout, scientists are just beginning to grasp what happened to the dispersants used, which is only a precursor to any understanding of the effect of the dispersants on the ecosystem.

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[3] Commission Report 174.
[4] *Id.* at 182.
[5] *Id.* at 143.
[6] *Id.* at 182.
[7] *Id.* at 143, 182.
[8] Elizabeth B. Kujawinski, Fate of Dispersants Associated with the Deepwater Horizon Oil Spill, Envtl. Sci. & Tech. (2011), *available at* http://pubs.acs.org/doi/abs/10.1021/es103838p.
[9] Press Release, First Study of Dispersants in Gulf Spill Suggests a Prolonged Deepwater Fate (Jan. 26, 2011), http://www.whoi.edu/page.do?pid=7545&tid=282&cid=89188&ct=162.

Among other things, little is yet known about the long-term impacts of dispersant and dispersed oil on deepwater ecosystems and how such impacts will ripple through the entire Gulf food web. Studies have shown that dispersants can significantly increase the bioavailability and toxicity of oil to marine species,[10] and the increased bioavailability of dispersed oil may lead to PAH level increase in organisms throughout the food chain.[11] Thus, even if a particular dispersant by itself may be less toxic than oil, the dispersant may act to make the oil more harmful than oil alone. The implications of this for marine organisms in the Gulf and ultimately, as the impacts on species move throughout the ecological web and up the food chain, for the consumers of such marine species – including humans – have yet to fully manifest.

A research question posed in the National Research Council's 30-month study on the effects of the Deepwater Horizon incident asks: "How did the spill affect [Gulf ecosystem] services in the short-term, and what is known about potential long-term impacts given the other stresses, such as coastal wetland loss, on the Gulf ecosystem?"[12] Tellingly, even a 30-month study that is not expected to produce a final report until fall of 2012 – more than two and a half years after the blowout – seeks to provide answers only on short-term impacts and merely *ventures* to identify long-term impacts.

In addition to the research undertaken by independent scientists, federal and state natural resource trustees currently are working with BP in more than a dozen technical groups to carry out natural resource damage assessment ("NRDA") under the Oil Pollution Act. Technical working groups are studying the impacts of the spill and spill response on marine mammals and fish, and have deployed several hundred research transmitters on wide-ranging species, such as whale sharks, sperm whales, and bluefin tuna.[13] Studies also are being conducted on the impacts of the spill and spill response on deep water habitat (including deepwater coral), near-shore habitat (including sea grasses, mud flats, and coral reefs), shoreline habitat (including salt marsh, beaches, and mangroves), and land-based habitat.[14] Impacts on such habitats could potentially disrupt migration patterns, food availability, and life cycles.[15] In short, as the National Oceanic and Atmospheric Administration ("NOAA") emphasized: "[t]he concept of assessing injuries may sound simple, but understanding complex ecosystems . . . and the impacts caused by oil and hazardous substances takes time – often years."[16]

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[10] *See, e.g.*, Allison Schein et al., *Oil Dispersion Increases the Apparent Bioavailability and Toxicity of Diesel to Rainbow Trout*, 28-3 Envtl. Toxicology & Chemistry 595 (2009); M.F. Wolfe et al., *Influence of Dispersants On the Bioavailability and Trophic Transfer of Petroleum Hydrocarbons to Primary Levels of a Marine Food Chain*, 42-3 Aquatic Toxicology 211 (1993).

[11] *See, e.g.*, Shahunthala D. Ramachandran et al., *Oil Dispersant Increases PAH Uptake By Fish Exposed to Crude Oil*, 59 Ecotoxicology & Envtl. Safety 300 (2004).

[12] Project Information, Nat'l Acads., http://www8.nationalacademies.org/cp/projectview.aspx?key=49311 (last visited Feb. 18, 2011).

[13] *See* NRDA by the Numbers – January 2011, BP Deepwater Horizon Spill (2011), http://www.gulfspillrestoration.noaa.gov/wp-content/uploads/2011/01/Final-NRDA-by-the-Numbers-Jan-20111.pdf

[14] *See* Gulf Spill Restoration: Co-Trustees, NOAA, http://www.gulfspillrestoration.noaa.gov/about-us/co-trustees/ (last visited Feb. 18, 2011).

[15] *See* Gulf Spill Restoration: Affected Gulf Resources, NOAA, http://www.gulfspillrestoration.noaa.gov/oil-spill/affected-gulf-resources/ (last visited Feb. 18, 2011).

[16] *See* Gulf Spill Restoration: Damage Assessment, NOAA, http://www.gulfspillrestoration.noaa.gov/assessment/ (last visited Feb. 18, 2011).

Clearly, the science has not yet caught up to the understandable desire to implement lessons learned about the use of dispersants. Even if there were a firm scientific understanding of the effects of dispersant use from the Deepwater Horizon response on the Gulf, however, this understanding would translate only in small part to other incidents and other ecosystems. The ecology of the Gulf is unique and seasonally variable. Gulf waters are home to corals, shellfish, dolphins, and endangered sea turtles and sperm whales, and its coast is lined by salt marshes, mudflats, mangroves, wetlands, and sand beaches. In May, June, and July, bluefin tuna were en route to their spawning grounds; brown pelicans were nesting on beaches; and bottlenose dolphins were calving.[17] At this time, 771,000 gallons of Corexit were applied a mile below the surface of the Gulf and 1.07 million gallons were sprayed at the surface on light sweet Louisiana crude, when the average water temperature at the spill site was about 4.4°C[18] and average surface water temperature was around 30°C.[19] The crude was gushing at an estimated rate of 53,000-62,000 barrels per day 50 miles from the fragile coastline and nearly a mile below the ocean's surface,[20] where the pressure reaches over 150 atmospheres.[21]

Even if we understood the long-term impacts of this dispersant use under these conditions (which we do not), it would be patently unreasonable to think that the subsea use of dispersants during this unprecedented incident in the unique time, location, and conditions of the Gulf proffers comparable lessons about subsea dispersant use in other incidents, times, and places. Arctic waters, for instance, are inhabited not by dolphins and pelicans, but by sea lions, seals, otters, and eiders,[22] and in stark contrast to the balmy waters of the Gulf, ocean temperatures off the Alaska coast in the winter average around 2.7°C *at the surface*.[23] Biochemical reactions happen much more slowly at these temperatures, and these waters host far less active oil-depleting microbes than warmer waters.[24]

The Arctic region may be a drastic example, but water and wind conditions and marine and coastal species and habitats all differ from region to region, and these factors – not to mention the variance that arises from the timing and location of any specific incident – play a significant role in determining a dispersant's effectiveness and impact. Without an

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[17] *Gulf Oil Spill Pictures: Ten Animals at Risk*, Nat'l Geographic, May 6, 2010, *available at* http://news.nationalgeographic.com/news/2010/05/photogalleries/100506-nation-animals-oil-spill-gulf-pictures/#/gulf-oil-spill-wildlife-threatened-bluefin-tuna-sushi_19947_600x450.jpg.

[18] Cong. Research Serv., Deepwater Horizon Oil Spill: Selected Issues for Congress 2 (2010) [hereinafter "CRS Report"], *available at* http://www.fas.org/sgp/crs/misc/R41262.pdf.

[19] Monitoring the Gulf of Mexico Conditions During the Deepwater Horizon Oil Spill: XBT and CTD Observations, NOAA, Atlantic Oceanographic & Meteorological Laboratory, http://www.aoml.noaa.gov/phod/dhos/xbt_ctd.php (last visited Feb. 18, 2011).

[20] Joel Achenbach & David A. Fahrenthold, *Oil spill dumped 4.9 million barrels into Gulf of Mexico, latest measure shows*, Wash. Post, Aug. 3, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/08/02/AR2010080204695.html.

[21] CRS Report 1, 6; *see also* Commission Report 174.

[22] Conservation Science, Alaska SeaLife Center, http://www.alaskasealife.org/New/research/index.php?page=pinnipeds.php (last visited Feb. 18, 2011).

[23] Alaska Coast, Nat'l Oceanographic Data Ctr., http://www.nodc.noaa.gov/dsdt/cwtg/alaska.html (last visited Feb. 18, 2011).

[24] Commission Report 174; Jessica Marshall, *Gulf Oil Spill Not the Biggest Ever*, Discovery News, Jun. 1, 2010, *available at* http://news.discovery.com/earth/gulf-oil-spill-ixtoc.html.

understanding of the long-term effects of Corexit on the Gulf or even the long-term effects of any particular dispersant that might be available at the time of any specific spill, and without any basis for applying such an understanding to other incidents, the NRT, RRT, and Area Committees are not in a position to incorporate subsea dispersant use into standard oil spill response, much less pre-authorize its use.

II. Pre-authorization of Dispersant Use Is Not Necessary for Successful Oil Spill Response.

The hastiness with which the NRT seems to be acting to add subsea dispersant use as an additional weapon in the oil spill response arsenal is not matched by a parallel effort to rethink existing assumptions and outdated modes of operation. In the December 16, 2010 memorandum to NRT members and RRT Co-Chairs, you noted that "[t]he challenges faced during the Deepwater Horizon Response" – specifically "the continuous and uncontrolled release of oil, and the unprecedented use in the U.S. of almost 2 million gallons of dispersants on a single incident, including the use of subsea dispersants nearly a mile below the ocean surface" – "were not envisioned during the pre-authorization process." Memorandum from Dana S. Tulis and Captain John Caplis to NRT Members and RRT Co-Chairs (Dec. 16, 2010) ("Dec. 16 Memorandum"). The memorandum then raised questions about whether limitations should be placed on pre-authorization:

> Do we need to develop trigger points which when exceeded, would result in dispersant use no longer being pre-authorized? Do we want to specify according to gallons (e.g., greater than 10,000 gallons per day) of dispersants used per day? Do we specify when the spill is greater than a certain number of gallons (e.g., 100,000, 300,000 gallons)? Do we specify only when the spill is continuous and uncontrolled for greater than a certain number of days (e.g., R6 RRT is recommending 7 days). . . . Or should we specify that the pre-authorization of the use of dispersants, regardless of circumstance is only intended to apply during the first several days of the response, pending the convening of appropriate members of the RRT to monitor operations and determine a long term dispersant use plan for the spill?

Dec. 16 Memorandum. Underlying these questions is a tacit acknowledgment that unlimited pre-authorization of dispersant use is not desirable – that at some point during an oil spill response, the potential costs of continued dispersant use must be weighed against the benefits provided. Given the staggering lack of knowledge about the impacts of dispersant, including the dispersants identified on the National Product Schedule, there is ample reason to extend this acknowledgment even further and to reconsider the value of pre-authorization in the first place.

Any assumption that pre-authorization is necessary to promote oil spill readiness is misguided. What is necessary for oil spill readiness are clear channels of communication to enable expeditious decision-making and available response mechanisms, including stockpiles of appropriate dispersants. In the Deepwater Horizon response, federal authorities seeking to find less toxic dispersants faced problems of supply, but there is no evidence that the availability of

Corexit and the lack of stockpiles of alternative dispersants were related to pre-authorization.[25] Thus, while efforts to increase response capacity and the availability of more effective, less toxic dispersants for particular ecosystems are an important part of contingency planning, such efforts can go forward without pre-authorization of dispersant use.

Incident-specific consultation rather than pre-authorization is the best way for decision-makers to meet their responsibilities to protect natural resources. As the RRTs know well, effective spill response must be responsive to the conditions of the particular incident, and each incident is characterized by unique conditions, including the type and amount of oil released, whether the release is from a spill or from a sub-surface release, the location of the incident, the prevailing wind and water conditions, the temperature of the waters, the time of year, and so on. Each of these factors in turn determines the effectiveness and potential impact of the dispersant. For instance, the degree of water turbulence and water temperature dictate in no small part the effectiveness of a given amount of dispersants, the location of a spill determines the species that will be affected and the presence and activity level of oil-degrading microbes, and the time of year serves as an indicator for the life stages of the various species that will be impacted.[26] Depending on this wide variety of factors, mechanical responses, in situ burning, use of dispersants, or simply leaving the oil may be the most appropriate response action. Yet, none of these factors can be known in advance of an incident, and all of these factors and their implications must be considered in order to make an informed decision that "minimize[s] adverse impact to the environment." 40 C.F.R. Pt. 300, App. E § 5.8.

In addition to uncertainty regarding spill conditions, there is tremendous uncertainty about the impacts of dispersants on the environment and human health, as Administrator Jackson repeatedly acknowledged during the Deepwater Horizon response. This lack of knowledge stems in part from the absence of a long-term research agenda as called for by the National Research Council[27] and in part from the minimal testing required of chemicals placed on the National Product Schedule. Subpart J of the National Contingency Plan requires only acute toxicity testing on two marine species and no toxicity criteria for a chemical to be placed on the National Product Schedule.[28] On this basis, a dispersant that is fatal to 100% of the tested species could be added to the Schedule, after which the dispersant could be used for oil spill response anywhere in the country without further regulation.

We commend EPA's efforts to fill these gaps in the science and regulation – specifically, its efforts to design a long-term research agenda to understand the environment and public health

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[25] *See, e.g.*, E-mail from Lisa P. Jackson to Doug Suttles re: Dispersant Availability and Choices (May 16, 2010) (asking about the availability of sufficient stockpiles for products other than COREXIT); E-mail from Doug J. Suttles to Lisa Jackson re: Sea Brat (May 18, 2010) (noting that BP is "working on alternative dispersants" though BP was "still working on supply issues"); "Evaluation of EPA-Pre Approved Chemical Oil Dispersants," Attachment to Letter from BP to Lisa Jackson 4 (May 20, 2010) (listing quantities currently available and reliability of supply as an important consideration in identifying and selecting possible alternative dispersants).

[26] *See* Nat'l Research Council, Oil Spill Dispersants: Efficacy and Effects 63-67 (2005).

[27] *Id.*; Nat'l Research Council, Using Oil Spill Dispersants On the Sea (1989).

[28] *See* Petition under the Clean Water Act to Establish Toxicity Criteria and Require Toxicity Testing and Public Disclosure of Ingredients for Products on the National Contingency Plan Product Schedule (Oct. 13, 2010), *available at* http://earthjustice.org/sites/default/files/files/dispersant_petition_0.pdf. *See also* Commission Report 144 (noting that Subpart J's "required testing is limited to acute (short-term) toxicity studies on one fish species and one shrimp species; it does not consider issues such as persistence in the environment and long-term effects").

impacts of dispersant use and to overhaul the Subpart J regulations for listing of chemicals on the National Product Schedule. Ideally, the additional research and testing that EPA has expressed its intent to conduct and require will yield information about where dispersants can and cannot be used and where and under what conditions specific dispersants are more effective and less toxic. Armed with this information, RRTs and Area Committees could design carefully tailored pre-authorization plans that permit the use of specific dispersant or dispersants under specific circumstances that have been found to be most beneficial under the conditions typical of their region or area.

However, given that the circumstances of each spill dictate a dispersant's effectiveness and impact and that we currently do not know much about any given dispersant's effectiveness and impact, such carefully tailored dispersant pre-authorization simply is not possible at present. As long as the NRT and RRTs are weighing the need to limit pre-authorizations, we urge them to reconsider the need for and desirability of pre-authorizations in the first place, especially where appropriate contingency planning in advance of an incident and modern communication technology make it possible for RRT representatives, affected states, and natural resource trustees to communicate and reach a timely decision. Lines of authority and the obligations to consult must be clear, but timely decision-making does not require pre-authorization.

III. The Process of Establishing New Guidance on Dispersant Use Must Be Transparent and Afford Opportunities for Public Participation.

One lesson from the use of dispersant in the Deepwater Horizon response surely was that such use is extremely controversial and not well-supported by the public. In a working paper, Commission staff noted that as recently as mid-January 2011, public comments at a forum in New Orleans "revealed continuing apprehension and anecdotal observations that dispersants were making people sick."[29]

As the NRT, RRT, and Area Committees move forward in making both interim and long-term changes to dispersant use guidelines in the wake of Deepwater Horizon and forthcoming revisions to the Subpart J regulations, the public – the people who must live with the natural resources and consequences of an oil spill and its response – should be fully informed and provided opportunities to engage in the process. The Dec. 16 memorandum appears to address public transparency solely in the context of post-spill decision-making and asks:

> What specific recommendations do you have to ensure transparency of data and an understanding of who makes the decisions? Public web sites? Public Meetings? How do we involve the public? How do we share decisions with the public?

Dec. 16 Memorandum. These questions are relevant not only to post-spill response decisions, however, and should be asked now, before a spill occurs and as steps are taken to prepare the

[29] Nat'l Comm'n on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Staff Working Paper No. 16: Rebuilding an Appetite for Gulf Seafood after Deepwater Horizon, *available at* http://www.oilspillcommission.gov/sites/default/files/documents/Rebuilding%20an%20Appetite%20for%20Gulf%20Seafood%20after%20Deepwater%20Horizon_0.pdf.

best response for the next incident. The active engagement of the people whose lives and livelihoods will be affected by the response decisions will ensure that all voices are heard and considered and will consequently minimize the pervasive mistrust that has characterized local reaction to the Deepwater Horizon response.

IV. **Conclusion**

We hope that the February 23rd meeting airs the full range of issues related to the use of dispersants and is informed by a measured understanding of the lessons learned from the Gulf. We urge you to develop a set of policies that will improve readiness, ensure adequate information about the effectiveness and toxicity of chemical countermeasures, and encourage incident-specific decision-making that includes consideration of the potential impacts of the use of dispersants on human health and the environment.

Please feel free to contact me if you would like to discuss the concerns raised in this letter. In addition, in furtherance of our shared goal of increasing public transparency, we request that you make publicly available on the NRT website correspondence and other documents that are developed in the process of formulating national guidance on dispersant use. Recognizing that setting up such website access may take some time, we request that you send us copies of the correspondence and other documents in the meantime. Thank you for your consideration of our concerns.

Respectfully submitted,

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On behalf of: