



Via First-Class Mail and Electronic Mail

April 18, 2011

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RE: 60-Day Notice of Intent to Sue: Violations of the Endangered Species Act Related to the Approval of Chemical Dispersants

Dear Ms. Jackson:

This letter serves as a sixty day notice on behalf of the Center for Biological Diversity of intent to sue the U.S. Environmental Protection Agency (“EPA”) over violations of Section 7 of the Endangered Species Act (“ESA”)(16 U.S.C. § 1531 *et seq.*) for actions and inactions related to the continued authorization of the use of chemical dispersants, including Corexit, pursuant to the Clean Water Act, 33 C.F.R. § 1321(d) and its implementing regulations. Pursuant to the CWA, the US government is required to develop a National Contingency Plan for responding to oil spills in US waters. As part of the plan, the EPA establishes a list of dispersants that may be used to respond to oil spills. These dispersants are known to or likely to adversely affect multiple threatened and endangered species, including loggerhead, leatherback, Kemp’s ridley, hawksbill, olive ridley, and green sea turtles; multiple whales including sperm, blue, fin, gray humpback, bowhead, North Atlantic and Pacific Right, and sei whales; other marine mammals including Steller’s sea lion, sea otters, Hawaiian monk seal, spotted seal and polar bear; many

marine and anadromous fish species including Atlantic salmon, several species of Pacific salmon, green sturgeon, Pacific eulachon and Gulf sturgeon, smalltooth sawfish, and many sea birds and coastal birds such as short-tailed albatross, Western snowy plover, piping plover, and Steller's and spectacled eiders. This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the ESA, to the extent such notice is deemed necessary by a court. *See* 16 U.S.C. § 1540(g).

The BP *Deepwater Horizon* oil spill disaster in the Gulf has illustrated that in the case of an accident, listed dispersants will be used in large amounts without further analysis. Approximately 1.84 million gallons of total dispersant were applied, with about 771,000 gallons applied undersea. According to the National Commission on the BP *Deepwater Horizon* Oil Spill's Report to the President (Commission Report), in the course of the attempted clean up "responders would wield dispersants in the battle against oil for the . . . 12 weeks, using novel methods and unprecedented volumes." While dispersants are known to be toxic, there is no analysis of the likely impact to listed species of this type of use. "Prior to the *Deepwater Horizon* incident, the federal government had not adequately planned for the use of dispersants to address such a large and sustained oil spill, and did not have sufficient research on the long-term effects of dispersants and dispersed oil to guide its decision-making. Officials had to make decisions about dispersant use without important relevant information or the time to gather such information." Commission Report at 270. As EPA Administrator Jackson acknowledged, the "long term effects [of dispersants] on aquatic life are unknown."¹ Although effects of using such enormous volumes of these chemicals, or of using them at such depths, have never been tested, much less thoroughly evaluated, at least two of the dispersants EPA has approved for use, Corexit 9500 and Corexit 9527, have been banned by the United Kingdom due to their adverse effects on the marine environment.

One year later, we now know that catastrophic oil spills can and do happen, and we must recognize the need to prepare for oil spill responses that have the least impact on wildlife and the environment. Dispersant use is preauthorized by the EPA's approved list of dispersants for responding to oil spilled in the waters of the United States from any source, including oil wells and transportation sources. . . .

EPA's decision to authorize the use of chemical dispersants without ensuring that the use of such chemicals is not likely to jeopardize the continued existence of threatened and endangered species, or destroy or adversely modify critical habitat, violates the agency's duties under the ESA. The EPA violated ESA Section 7 by listing Corexit 9500A, 9527A, and other dispersants for use in oil spill response activities as part of the NCP Product Schedule without undertaking consultation and otherwise ensuring that such approval would not result in jeopardy to a species or destruction or adverse modification of critical habitat.

¹ EPA, Statement by EPA Administrator Lisa P. Jackson from Press Conference on Dispersant Use in the Gulf of Mexico with U.S. Coast Guard Rear Admiral Landry (PDF) (May 24, 2010), available at <http://www.epa.gov/bpspill/dispersants/statement-dispersant-use-may24.pdf> (last visited April 14, 2011).

EPA must examine or re-examine each of these agency actions pursuant to its obligations under Section 7 of the ESA in order comply with its duty to ensure against harm to species and their critical habitat.

I. LEGAL AND FACTUAL BACKGROUND

A. Oil Spill Response and Dispersant Approval under the Federal Water Pollution Control Act (“Clean Water Act”) and the National Contingency Plan

The federal government’s oil spill response duties and procedures are set forth in Section 311 of the federal Clean Water Act. In the event of an oil spill, this provision requires the President to take actions necessary to ensure effective and immediate removal of the discharged oil, as well as mitigation or prevention of a substantial risk of discharge of oil into the waters of the United States.² The President’s duties with respect to responding to oil spills have been delegated to EPA and the Coast Guard, among others.³ Removal activities must be conducted pursuant to a detailed National Contingency Plan (“NCP”) for the removal of oil and hazardous substances.⁴ Among other requirements, the NCP must contain:

A schedule, prepared in cooperation with the States, identifying--

- (i) dispersants, other chemicals, and other spill mitigating devices and substances, if any, that may be used in carrying out the Plan,
- (ii) the waters in which such dispersants, other chemicals, and other spill mitigating devices and substances may be used, and
- (iii) the quantities of such dispersant, other chemicals, or other spill mitigating device or substance which can be used safely in such waters, which schedule shall provide in the case of any dispersant, chemical, spill mitigating device or substance, or waters not specifically identified in such schedule that the President, or his delegate, may, on a case-by-case basis, identify the dispersants, other chemicals, and other spill mitigating devices and substances which may be used, the waters in which they may be used, and the quantities which can be used safely in such waters.⁵

This schedule is known as the NCP Product Schedule.⁶

“EPA publicizes all dispersants that have been authorized for use on the National Contingency Plan (NCP) Product Schedule, which is a list of authorized dispersants and other chemicals that may be used to respond to oil discharges.”⁷ EPA’s regulations implementing Section 311(d) set forth the process for maintaining the NCP Product Schedule as well as adding

² 33 C.F.R. § 1321(c)-(d).

³ Exec. Order 12777 (Oct. 18, 1991).

⁴ 33 C.F.R. § 1321(c)-(d).

⁵ 33 C.F.R. § 1321(d)(2)(G).

⁶ 40 C.F.R. 300.905(a).

⁷ <http://www.epa.gov/bpspill/dispersants.html> (last visited April 18, 2011).

products to it.⁸ To add a dispersant to the list, manufacturers must provide EPA with the required data specified in 40 C.F.R. 300.915(a), including information on effectiveness and toxicity. These regulations require that a dispersant achieve a 45% or greater effectiveness value to be added to the schedule. Results of toxicity testing factor into the product's effectiveness value.⁹ EPA retains the right to conduct its own testing to verify industry results and to weigh testing results in determining whether the product meets listing criteria.¹⁰ EPA's establishment and maintenance of the NCP Product Schedule is a prerequisite to the use of a dispersant in oil spill response activities.

Regional response teams ("RRTs") and Area Committees, both of which include representatives from and are overseen by EPA and the Coast Guard, may authorize the use of a given dispersant listed on the NCP Product Schedule as part of their planning activities and include these as part of their preauthorization plans.¹¹ Preauthorization plans may address factors such as the type of oil likely to be spilled, likely source of spill, and environmentally sensitive areas. The plans must be approved by EPA representatives, among others.¹² For situations that are not addressed by the preauthorization plan, the federal on-scene coordinator ("FOOSC") may authorize the use of dispersants listed on the NCP Product Schedule with the concurrence of EPA and other representatives of the RRT.¹³

EPA's NCP Product Schedule currently lists 15 dispersants, 2 of which belong to the Corexit brand.¹⁴ In addition to the NCP list, EPA publishes a NPC Product List Technical Notebook, which contains information on conditions in which the products may be used and instructions for use.¹⁵ EPA maintains and regularly updates the NCP list and technical notebook. Over the years, 46 products have been removed from the list. EPA most recently updated its NCP Product Schedule and technical notebook on March 29, 2011. The two principal dispersants being employed by BP – despite significant questions regarding their safety – have been listed and remain listed today. Corexit 9500 was listed under Subpart J on April 13, 1994; it was re-listed December 18, 1995 under the name Corexit EC9500A (commonly referred to as "Corexit 9500A"). Corexit 9527 was originally listed on March 10, 1978 and was re-listed December 18, 1995. This dispersant is now listed under the name Corexit EC9527A (commonly referred to as "Corexit 9527A").¹⁶ EPA's NCP Product Schedule Guide indicates that Corexit 9500A and 9527A are most appropriate for surface application and have average effectiveness rates around 50%.¹⁷ In the wake of the *Deepwater Horizon* spill response, EPA exercised its

⁸ *Id.* at 300.905(a) and 300.920.

⁹ 40 C.F.R. 300.915(a)(8), 300.920(a).

¹⁰ *Id.* at 300.920(a).

¹¹ *Id.* at 300.910(a).

¹² *Id.*

¹³ *Id.* at 300.910(b).

¹⁴ EPA, NCP Product Schedule (March 29, 2011).

¹⁵ EPA, [NCP Product Schedule Technical Notebook \(March 29, 2011\)](#)

¹⁶ *Id.*

¹⁷ EPA, Guide to Using the NCP Product Schedule Notebook (May 11, 2010) at 2-3 and 12-13.

discretion independently to test eight of the dispersants on the list, including Corexit 9500 and Corexit 9527.¹⁸

In the response to the *Deepwater Horizon* spill, dispersants were used in previously unprecedented amount. The Commission Report notes:

From April 27 to May 3, responders applied 141,358 gallons to the surface. The following week, they applied 168,988 gallons. The Coast Guard and other responders had often deployed dispersants to respond to spills, but never in such volumes; during the Exxon Valdez spill, responders sprayed about 5,500 gallons, and that use was controversial., and more than 225,000 gallons to the deep waters near the source of the leak – nearly a mile below the depth at which the product is generally supposed to be applied.

Commission Report at 144.

B. The Endangered Species Act

1. Procedural and Substantive Duties Under the ESA

The Endangered Species Act, 16 U.S.C. §§ 1531-1544, (“ESA”) was enacted, in part, to provide a “means whereby the ecosystems upon which endangered species and threatened species depend may be conserved...[and] a program for the conservation of such endangered species and threatened species...”¹⁹

The ESA vests primary responsibility for administering and enforcing the statute with the Secretaries of Commerce and Interior. The Secretaries of Commerce and Interior have delegated this responsibility to the National Marine Fisheries Service (“NMFS”) and the U.S. Fish and Wildlife Service (“FWS”) respectively.²⁰ NMFS has responsibility for the listed whale species, pinipeds, fish and listed coral species. FWS has responsibility for the manatee, polar bear, sea otter and listed bird species, as well as terrestrial and freshwater species. NMFS and FWS share responsibility for the five listed sea turtle species.

Section 2(c) of the ESA establishes that it is “...the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.”²¹ The ESA defines “conservation” to mean “...the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.”²² Similarly, Section 7(a)(1) of the ESA directs

¹⁸ <http://www.epa.gov/bpspill/dispersants-testing.html#phase1> (last visited April 18, 2011).

¹⁹ 16 U.S.C. § 1531(b).

²⁰ 50 C.F.R. §402.01(b).

²¹ 16 U.S.C. § 1531(c)(1).

²² 16 U.S.C. § 1532(3).

that the Secretary review "...other programs administered by him and utilize such programs in furtherance of the purposes of the Act."²³

In order to fulfill the substantive purposes of the ESA, federal agencies are required to engage in Section 7 consultation with FWS or NMFS, depending on the species at issue, to "insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species... determined...to be critical..."²⁴

Section 7 consultation is required for "any action [that] may affect listed species or critical habitat."²⁵ Agency "action" is defined broadly in the ESA's implementing regulations to include "(b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air."²⁶

At the completion of consultation, FWS or NMFS will issue a biological opinion that determines if the agency action is likely to jeopardize the species. If so, the opinion may specify reasonable and prudent alternatives that will avoid jeopardy and allow the agency to proceed with the action.²⁷ FWS or NMFS may also "suggest modifications" to the action during the course of consultation to "avoid the likelihood of adverse effects" to the listed species even when not necessary to avoid jeopardy.²⁸

An agency's duty to avoid jeopardy is continuing, and "where discretionary Federal involvement or control over the action has been retained or is authorized by law," the agency must in certain circumstances reinitiate formal consultation:

- (a) If the amount or extent of taking specified in the incidental take statement is exceeded;
- (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
- (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or
- (d) If a new species is listed or critical habitat designated that may be affected by the identified action.²⁹

²³ 16 U.S.C. § 1536(a)(1).

²⁴ 16 U.S.C. § 1536(a)(2) (Section 7 consultation).

²⁵ 50 C.F.R. § 402.14.

²⁶ 50 C.F.R. § 402.02.

²⁷ 16 U.S.C. § 1536(b).

²⁸ 50 C.F.R. § 402.13.

²⁹ 50 C.F.R. § 402.16.

Section 7(d) of the ESA, 16 U.S.C. § 1536(d), provides that once a federal agency initiates consultation on an action under the ESA, the agency, as well as any applicant for a federal permit, “shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.” The purpose of Section 7(d) is to maintain the environmental status quo pending the completion of consultation. Section 7(d) prohibitions remain in effect throughout the consultation period and until the federal agency has satisfied its obligations under Section 7(a)(2) that the action will not result in jeopardy to the species or adverse modification of its critical habitat.

EPA’s listing of dispersants on the NCP Product Schedule under the Clean Water Act is a federal agency action subject to the ESA Section 7 consultation requirement.³⁰ Clean Water Act Section 311(d) and its implementing regulations set forth the process and requirement by which EPA selects dispersants for that may be used in oil response activities. Clean Water Act Section 311(d)(2)(G) authorizes EPA to select dispersants for the NCP Product Schedule and to subscribe the location and manner of their use as well as the quantities in which each dispersant may be used.³¹ EPA’s regulations further specify that, before being placed on the NCP Product Schedule, a dispersant must be demonstrated to achieve a minimum rate of effectiveness, which includes consideration of the product’s toxicity.³² EPA expressly retains discretion to conduct its own, separate analyses of a dispersant’s effectiveness and toxicity, as well as to request further information from the manufacturer, to aid its determination whether to place the dispersant on the NCP Product Schedule.³³

In responding to oil spills, Regional Response Team plans rely heavily on EPA’s determination via listing on the NCP Product Schedule that the dispersant is appropriate, effective, and safe for use in responding to oil spills. No dispersant can lawfully be used without EPA’s first listing the product on the NCP Product Schedule. By establishing that a product’s use is permissible and establishing guidelines for its use, EPA has undertaken an agency action subject to ESA Section 7 obligations. Yet EPA has failed entirely to comply with those obligations.

D. Impacts of Dispersants on Listed Species

1. Endangered and Threatened Species in the Gulf of Mexico and Florida

The United States’ coastal waters are home to numerous threatened and endangered species of marine mammals, sea turtles, seabirds, and fish. On belief and knowledge EPA did

³⁰ See *Washington Toxics Coalition v. EPA*, 413 F.3d 1024 (9th Cir. 2005).

³¹ 33 U.S.C. § 1321(d)(2)(G).

³² 40 C.F.R. 300.915(a)(7)-(8), 300.920(a).

³³ *Id.* at 300.920(a).

not engage in or complete Section 7 consultation regarding the effects of listing dispersants on the NPL list nor did it engage in consultation on the effects of re-listing Corexit 9500A or 9527A or any other dispersant when it updated the NCP Product Schedule in March of 2011.

2. Likely Effects of Dispersants on Wildlife and Habitat

Dispersants and dispersed oil have been shown to have significant negative impacts on many forms of marine life, including turtles plankton, fish, corals, and birds. Dispersants release toxic break-down products from oil that, alone or in combination with oil droplets and dispersant chemicals, can make dispersed oil more harmful to marine life than untreated oil. Both the short-term and long-term impacts of dispersants on marine life have not been adequately tested. As acknowledged by the EPA, the “long term effects [of dispersants] on aquatic life are unknown.”³⁴

Endangered and threatened species can be affected by dispersants through a number of pathways. For example, bowhead, humpback, fin, blue, and sei whales feed by skimming plankton, small fish, and squid from the surface. This feeding mechanism puts them at risk of ingesting dispersants and dispersed oil, as well as food contaminated with these chemicals. In addition, both whales and sea turtles must surface to breathe, and in doing so can breathe in fumes from or ingest dispersants and dispersed oil. According to the Minerals Management Service, dispersant components absorbed by sea turtles can affect their organs and interfere with digestion, excretion, and respiration.³⁵

Birds diving into the water to feed may be exposed through direct contact with dispersants and dispersed oil as well as through contaminated prey. Studies have found that dispersed oil, including oil dispersed by Corexit 9527, damages the insulating properties of seabird feathers more than untreated oil, making the birds more susceptible to hypothermia and death.³⁶ Dispersants and dispersed oil have also been shown to have toxic effects on bird eggs that are similar or worse than from untreated oil.³⁷ Birds exposed to dispersed oil that return to their nests risk contaminating their eggs, which can lead to the death of those eggs.³⁸

Dispersants and dispersed oil in the water column are of at least equal concern. Sea turtles, whales, and fish may all be exposed to dispersants and dispersed oil as the swim and feed in the water column. While the effects of such exposure are not well known for whales and sea turtles, studies have shown that dispersants create a toxic environment for fish by releasing harmful oil break-down products into the water. Dispersed oil has been shown to be toxic to fish

³⁴ <http://www.epa.gov/bpspill/dispersants-qanda.html> (last visited April 18, 2011)

³⁵ Minerals Management Service, Final Environmental Impact Statement: Gulf of Mexico Oil and Gas Lease Sales: 2007-2012 (April 2007) (“MMS FEIS”) at 4-282.

³⁶ Jenssen, B.M., Review Article: Effects of Oil Pollution, Chemically Treated Oil, and Cleaning on the Thermal Balance of Birds, *Environmental Pollution*, 86: 207-15 (1994).

³⁷ MMS FEIS at 2-17.

³⁸ Albers, P.H., Effects of Corexit 9527 on the Hatchability of Mallard Eggs, *Bull. Environm. Contam. Toxicol.*, 23: 661-68 (1979).

at all life stages, from eggs to larval fish to adults, according to numerous laboratory studies that have tested a variety of species.³⁹

Dispersants could also wreak havoc on sessile staghorn and elkhorn corals. Dispersants and dispersed oil are particularly toxic to corals, leading scientists to call for a ban on dispersant use near coral reefs. Dispersants and dispersed oil harm the early stages of corals by increasing death rates, reducing settlement on reefs, and altering behavior.⁴⁰ A formulation of one of the dispersants being used in the BP spill response, Corexit 9527, has been shown to prevent fertilization of mature eggs and hinder the development of young life stages of reef-building corals.⁴¹

Reports on monitoring data have indicated that the use of the Corexit dispersants killed up to 25% of all organisms living 500 feet below the surface in areas where the dispersant was used.⁴² Significant reductions in dissolved oxygen have been reported in the vicinity of underwater dispersed oil plumes. These phenomena are likely to lead to severe reductions in plankton, fish, and other prey species upon which listed species – and their ecosystems – depend. There can be no doubt that EPA’s authorization of dispersant use could have potentially significant adverse effects of threatened and endangered species and their critical habitat.

Moreover, the use of dispersants underwater, as permitted by the Environmental Protection Agency in the *Deepwater Horizon* spill response, can result in the formation of massive deepwater oil plumes extending many miles from the spill site.⁴³ Species that frequent and feed in deep water could suffer serious adverse impacts from this deep water contamination by swimming through dispersed oil plumes and feeding on contaminated prey. The effects of these plumes are unlikely to remain isolated to deep water habitats, and have the potential to harm the entire ecosystem from the bottom up. In addition, significant reductions in dissolved oxygen have been reported in the vicinity of underwater dispersed oil plumes, resulting from oil digestion by microbes.⁴⁴ A study of the gaseous hydrocarbons discharged during the *Deepwater Horizon* oil spill found that gaseous hydrocarbons may have comprised up to 40 percent of the spill, exceeding background levels by up to 75,000 times which scientists estimate will lead to

³⁹ Khan, R.A. and J.F. Payne, Influence of a Crude Oil Dispersant, Corexit 9527, and Dispersed Oil on Capelin (*Mallotus villosus*), Atlantic Cod (*Gadus morhua*), Longhorn Sculpin (*Myoxocephalus octodecemspinosus*) and Cunner (*Tautoglabrus adspersus*), *Bull. Environm. Contam. Toxicol.* 75: 50-56 (2005); Anderson, B.S. et al., Preliminary investigation of the effects of dispersed Prudhoe Bay Crude Oil on developing topsmelt embryos, *Atherinops affinis*, *Environmental Pollution*, 157: 1058-61 (2009).

⁴⁰ Shafir, S., J. Van Rijn, and B. Rinkevich, Short and Long Term Toxicity of Crude Oil and Oil Dispersants on Two Representative Coral Species, *Environ. Sci. Technol.* 41: 5571-74 (2007).

⁴¹ Venn, A.A., J. Quinn, R. Jones, and A. Bodnar, P-glycoprotein (multi-xenobiotic resistance) and heat shock protein gene expression in the reef coral *Monastraea franksi* in response to environmental toxicants, *Aquatic Toxicology* 93: 188-95 (2009).

⁴² Farren, L. and B. Blackburn, May 21, 2010, “EPA May Not Force BP to Change Dispersants,” ABC World News, avail. at <http://abcnews.go.com/WN/epa-bp-dispersants/story?id=10711367>.

⁴³ NOAA 2010, Diercks 2010; Kujawinski et al. 2011.

further oxygen depletion of the Gulf of Mexico.⁴⁵ Oxygen depletion is likely to lead to reductions in plankton, fish, and other prey species upon which listed species – and their ecosystems – depend. The northern Gulf of Mexico already experiences the annual formation of a hypoxic “dead zone”—a large area of oxygen-poor conditions that can barely support life—and the oxygen deprivation caused by the deep-sea oil plumes could increase the size of this zone.⁴⁶

II. VIOLATIONS OF LAW

A. Failure to Insure Against Jeopardy to Listed Species

As demonstrated above, EPA violated its procedural and substantive obligations under ESA Section 7 to ensure that its actions are not likely to jeopardize listed species or destroy or adversely modify their critical habitat. EPA has listed dispersants on the NCP Product Schedule, including Corexit 9500A and 9527A, that “may affect” listed species without engaging in Section 7 consultation regarding the effects of listing these products for use in oil spill response. None of the dispersants on the NCP Product Schedule, including Corexit 9500A and 9527A, could be lawfully used in the United States absent listing by the EPA. EPA’s listing of dispersants constitutes “agency action” under the ESA, and since such action, at a minimum, “may affect” listed species and their critical habitat, EPA is required by Section 7 of the ESA to ensure through consultation that listing of these dispersants does not jeopardize the continued existence of listed species or destruction or modification of their critical habitat. EPA has utterly failed to comply with this procedural and substantive mandate.

In order to correct these violations, EPA must undertake consultation regarding the listing of Corexit 9500A, 9527A, and other dispersants on the NCP Product. The agencies also must engage in rigorous monitoring, data collection, and analysis of the effects of dispersants already injected into the Gulf ecosystem. This undertaking must include gathering and releasing to the public sufficient information to demonstrate that jeopardy to listed species or destruction or adverse modification of critical habitat are not likely to occur. Thus far, public statements made by these agencies, as well as the Services, indicate that none of the agencies has such information, much less any confidence that dispersant use is not causing jeopardy or adverse modification.

B. Violation of Conservation Obligations

Section 2(c) of the ESA establishes that it is “...the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.” 16 U.S.C. § 1531(c)(1). The ESA defines “conservation” to mean “...the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the

⁴⁵ Joye et al. 2011.

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measures provided pursuant to this Act are no longer necessary.” 16 U.S.C. § 1532(3). Similarly, Section 7(a)(1) of the ESA directs that the Secretary review “...other programs administered by him and utilize such programs in furtherance of the purposes of the Act.” 16 U.S.C. § 1536(a)(1). The Supreme Court stated in *TVA v. Hill* that these provisions of the ESA create a “stringent mandatory language [that] reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species.” *TVA v. Hill*, 437 U.S. 153, 183 and 185 (1978). EPA has failed to satisfy this duty by failing to use its authorities to regulate dispersant use so as to avoid the adverse impacts of dispersants on the ecosystem, threatened and endangered species that occur therein, and their critical habitat.

III. CONCLUSION

In sum, EPA has failed to comply with their ESA Section 7 duties to protect listed species and their habitats at virtually every step of the process. EPA’s listing of Corexit 9500A, Corexit 9527A, and other dispersants without completing consultation on the impacts of their use on multiple threatened and endangered species constitute ongoing violations of Section 7 of the ESA. If EPA does not act within 60 days to correct the violations described in this letter, the Center will pursue litigation against your agencies in Federal Court and seek declaratory and injunctive relief. An appropriate remedy that would prevent litigation would be for the EPA to initiate formal consultation regarding the effects of the dispersants it has listed and continues to list on the NCP Product Schedule on threatened and endangered.

If you have any questions, or wish to meet to discuss this matter, please contact me at (971) 255-0966. Thank you for your concern.

Sincerely,

A handwritten signature in black ink, appearing to read "Deirdre McDonnell", written over a horizontal line.

Deirdre McDonnell

Senior Attorney, the Center for Biological Diversity