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National Contingency Plan/CERCLA/Clean Water Act: U.S. Environmental Protection Agency Final Rule Addressing Dispersants/Spill Mitigating Substances

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The United States Environmental Protection Agency (“EPA”) published a final rule in the June 12th Federal Register amending the requirements in Subpart J of National Oil and Hazardous Substances Pollution Contingency Plan (“NCP”). See 88 Fed. Reg. 38280.

The final rule addresses the use of dispersants, other chemicals, and spill mitigating substances when responding to oil discharges in jurisdictional waters of the United States.

EPA has described the NCP as the federal government’s blueprint for responding to both oil spills and hazardous substance releases. The NCP was originally enacted in 1968 and has been amended a number of times as Congress has enacted additional federal statutory authorities.

Three federal environmental statutes address the NCP:

- Clean Water Act
- Comprehensive Environmental Response, Compensation, and Liability Act
- Oil Pollution Act of 1990

The NCP is implemented through regulations and therefore has the force of law. The relevant regulations are found at 40 CFR Part 300.

EPA states that the purpose of the June 12th federal rule is to address:

. . . the efficacy and toxicity of dispersants and other chemical and biological agents, as well as public, state, local, and federal officials’ concerns regarding their use.

EPA amends the Subpart J regulatory requirements for the NCP Product Schedule in two ways:

- Adds new listing criteria, revising the efficacy and toxicity testing protocols, and clarifying the evaluation criteria for removing products from the NCP Product Schedule
- Amends requirements for the authorities, notifications, and data reporting when using chemical or biological agents in response to oil discharges to Clean Water Act 311 jurisdictional waters and adjoining shorelines

The stated intent of these requirements is to:

- Develop safer and more effective spill mitigating products
- Better target the use of the products to reduce the risk of oil discharges and response technologies to human health and the environment
- Ensure that On-Scene Coordinators, Regional Response Teams, and Area Committees have sufficient information to support agent authorization of use decisions

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