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Re: *ExxonMobil Comment on Draft SEIS*

Dear Ms. Jennings:

The National Oceanic and Atmospheric Administration ("NOAA"), as a member of the Exxon Valdez Oil Spill Trustee Council (hereinafter "Trustee Council" or "Trustees"), has prepared a draft supplemental Environmental Impact Statement ("DSEIS") under the National Environmental Policy Act ("NEPA") to narrow the scope of restoration efforts for the remaining EVOS funds. Our client, Exxon Mobil Corporation ("ExxonMobil") notified the Trustee Council during the scoping process that the SEIS process would be circumvented if underlying scientific data funded by the Trustees was not released so that the public can fairly assess and comment on the impacts of the proposed action in the DSEIS.

The public has not been able to participate in a meaningful way in this process given the failure to disclose data and key reports pertaining to some of the categories that the Trustees have proposed should continue to receive funding. For example, one of the areas identified by the Trustee Council for continuing restoration efforts is lingering oil. Yet the final reports for the lingering oil projects headed by Jacqueline Michel, Michel Boufadel, and Albert Venosa have not been released on the Trustee Council's website, even though the Trustee Council has at least one of these reports in its possession. Similarly, it has been almost four years since the Ballachey and Bodkin final reports related to sea otters and harlequin ducks were drafted, but the Trustee Council has never released these reports. The subject of these reports, sea otters and harlequin ducks, have been identified in the DSEIS as "recovering" and in need of further long-term monitoring, which is another category singled out for continued funding. (DSEIS, at § 4.2.2.)

ExxonMobil has tried to obtain these reports and the underlying data over the past three years through its Freedom of Information Act ("FOIA") requests, but the federal agencies have repeatedly denied the FOIA requests and administrative appeals or failed to respond. For instance, despite repeated requests, we have received none of the interim or final reports and very little of the scientific data related to the Michel[1] and Boufadel[2] projects under FOIA, which are purportedly designed to provide information that will allow the Trustee Council to "reach a decision point on further efforts for active remediation." *See* Notice of Intent to Prepare a Supplemental Environmental Impact Statement on the Exxon Valdez Oil Spill Trustee Council's Restoration Efforts, at 3708 (Jan. 22, 2010). As a result, we were forced to file a complaint on February 18, 2010 asking the U.S. District Court of the District of Columbia to require NOAA and the U.S. Environmental Protection Agency ("EPA") to produce the withheld reports and data.

In addition, EPA has refused to disclose the reports and almost all of the data responsive to our request for records related to the Venosa microcosm study,[3] another project that seems pivotal to the Trustee Council's decision to include lingering oil as an area for further restoration efforts. EPA's justification for withholding the reports and data was based on the false assertion that this request is the subject of ExxonMobil's lawsuit regarding the Michel and Boufadel data and that the documents are subject to the FOIA exemption for "pre-decisional" documents. But "[p]urely factual reports and scientific studies cannot be cloaked in secrecy by an exemption designed to protect only those internal working papers in which opinions are expressed and policies formulated and recommended." *Bristol-Myers Co. v. Fed. Trade Comm'n,* 424 F.2d 935, 939 (D.C. Cir. 1970). Moreover, even if EPA could claim this privilege, "the deliberative process privilege does not protect documents in their entirety; if the government can segregate and disclose non-privileged factual information within a document, it must." *Loving v. Department of Defense*, 550 F.3d 32, 38 (D.C. Cir. 2008) (emphasis added); *see also Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 983 (9th Cir. 2009) (ordering the agency to release the raw data used in the analysis even if CIA analysts' evaluation of that data, their calculations, and their thought processes were exempt).

Without the reports and underlying data used to support the decision to prepare an SEIS and the proposed action, the public is left with the impression that work toward the objectives of delineating subsurface oil ("SSO"), assessing the potential for further bioremediation, and exploring biomarkers as exposure indicators was encouraging. Yet the Trustee Council is aware that these findings are not factually complete and certainly not entirely accurate. For instance, the Trustee Council's Report on Recent Lingering Oil Studies used to prepare the Notice of Intent to prepare an SEIS stated that previous studies on sea otters to demonstrate ongoing oil exposure were merely "methodologically challenging" and the data not reliable. (Report on

[1] EVOSTC Restoration Project 070801 entitled "Assessment of the Areal Distribution and Amount of Lingering Oil in Prince William Sound and the Gulf of Alaska." The principal investigator is Jacqueline Michel.
[2] EVOSTC Restoration Project 070836 entitled "Factors Responsible for Limiting the Degradation Rate of Exxon Valdez Oil in Prince William Sound." The principal investigator is Michel Boufadel.
[3] EVOSTC Restoration Project 080840 entitled "Microcosm Study on the Biodegradability of Lingering Oil in Prince William Sound." The principal investigator for the project is Albert Venosa.

Recent Lingering Oil Studies, at 17.) In fact, as we alerted NOAA and the Alaska Department of Law over a year ago, the studies measured completely the wrong gene sequence in otters (a point that is indisputable but which has never been acknowledged by the Trustees in public). If the results are not sound, the Trustee Council has a duty to share the data and publicly retract its statements relying on such faulty data.

Moreover, the Trustees fail to address the large body of science that repudiates ongoing oil exposure. The Trustees studied oiled mussel beds (restored and reference) in 1999 (Carls et al. 2004) and showed that "oil concentrations were typically at background levels in restored and oiled reference mussel beds." Oil and particularly the most toxic components, PAHs, are not above background levels in the waters off shorelines where SSO exists. PAH levels in forage species for otters and ducks are the same for oiled and unoiled areas, which indicates that SSO is not in their food chain. Despite its absence from the water and the food, Trustee scientists now speculate that the ducks and otters encounter the SSO while foraging and transfer it to themselves while preening. But, with the exception of a claim that a sheen of oil was found in one pit of soft sediment,[4] no oil has been found in any location where otters and ducks forage. Even the logic of this exposure pathway defies common sense, as it would mean that otters or ducks move the armor of large rocks and boulders that have protected remaining SSO from wave action for the last 20 years. It is then hardly surprising that investigators who sought areas of overlap between where SSO exists and where ducks and otters forage found no such overlap and, without overlap, there is simply no justification for further oil studies.

None of these technical considerations that provide the justification for continued lingering oil studies are addressed in the DSEIS as required under NEPA. *See Sierra Club v. Bosworth*, 199 F. Supp. 2d 971, 980 (N.D. Cal. 2002) (finding that it was insufficient for USFS to provide information in support of its position solely in the administrative record and that mere "consideration" of contrary opinions was insufficient where "EIS fails to disclose or analyze such opinions"); *League of Wilderness Defenders--Blue Mountains Biodiversity Project v. United States Forest Service*, 2004 U.S. Dist. LEXIS 24413, at *43 (D. Or. Nov. 19, 2004) (holding that USFS needed to disclose scientific opinions in support of and against conclusion that proposed logging plan would reduce the risk of future fires in burned areas). If the Trustees have reports and data that refute these technical considerations and support further oil studies, they have refused to share them with the public and, therefore, ExxonMobil and the rest of the public cannot meaningfully evaluate the soundness of funneling funding to this category. Without such reports and data, it is impossible to fully understand the impact of the Trustees' decision to earmark the funds for five specific categories, one of which is the lingering oil projects.

With the initiation of the SEIS process, the Trustee Council can no longer continue to dismiss or ignore the large body of technical presentations and peer-reviewed literature that is at odds with the Trustees' lingering oil findings. Nor can it continue to mislead the public by

[4] Here again, examination of the data purporting to support this claim is warranted since soft sediments do not support sequestration of oil.

refusing to release the key reports and underlying data. Although the Trustee Council has continued to deny the public these reports and data it is obligated to provide under NEPA both during the initial scoping process and the public comment period that ends on July 19, 2010, we urge the Trustee Council to immediately release all of the scientific reports and data supporting the DSEIS, Notice of Intent, and Lingering Oil Status Report including, but not limited to, the withheld Michel, Boufadel, Venosa, Bodkin, and Ballachey reports and data that ExxonMobil has been denied under FOIA. Otherwise, the DSEIS is invalid since the public has been prevented from meaningfully participating in the process and the Trustees have not provided sufficient support for their proposed action.

Denying meaningful access to such reports and data, particularly during the scoping process that is designed to encourage public participation, does a disservice to the State of Alaska and violates a primary objective of an environmental impact statement under NEPA. *See, e.g.*, *State of Cal. v. Block*, 690 F.2d 753 (9th Cir. 1982) (holding that supporting data or studies expressly relied upon in EIS could not be utilized to uphold validity of EIS on review where that data and studies were not available and accessible to public); *Life of the Land v. Brinegar*, 485 F.2d 460, 468-69 (9th Cir. 1973) (holding that supporting studies for EIS need to be available and accessible by the public); *Idaho Sporting Cong. v. Thomas,* 137 F.3d 1146, 1150 (9th Cir. 1998) ("NEPA requires that the public receive the underlying environmental data from which a[n] . . . expert derived her opinion."), *overruled on other grounds by Lands Council v. McNair*, 537 F.3d 981, 997 (9th Cir. 2008); *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs,* 511 F.3d 1011, 1026 (9th Cir. 2008) ("[W]e now adopt this rule: An agency, when preparing an [Environmental Assessment], must provide the public with sufficient environmental information, considered in the totality of circumstances, to permit members of the public to weigh in with their views and thus inform the agency decision-making process."); *Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, 387 F.3d 989, 996 (9th Cir. 2004) ("NEPA documents are inadequate if they contain only narratives of expert opinions" and the underlying environmental data relied upon to support the expert conclusions must be made available to the public); *Sierra Nevada Forest Protection Campaign v. Weingardt*, 376 F. Supp. 2d 984, 992-93 (E.D. Cal. 2005) (holding that agency's failure to provide for effective pre-decisional public involvement in preparation of Environmental Assessments is "contrary to law" where, among other things, the agency withheld already-prepared data and analyses "even though the documents were completed before the end of the public comment period").

Even if the Trustees have not proposed a specific percentage of additional funding for lingering oil studies in the DSEIS, the overarching decision to channel funding to this category needs to be justified and supported in the DSEIS. *See Thomas*, 137 F.3d at 1150-51 (holding that failure to disclose underlying scientific information precluded public from having enough information to adequately challenge agency's proposed action); *Weingardt*, 376 F. Supp. 2d at 992 (finding that USFS failed to provide sufficient information regarding environmental impact of proposed projects when it issued its scoping notices). It is insufficient to address these concerns in other "yet-to-be-created plans," which is what the Trustees propose in the DSEIS with respect to lingering oil. *See Seattle Audubon Soc'y v. Espy*, 998 F.2d 699, 704 (9th Cir. 1993) (invalidating EIS for, among other reasons, stating impact a decrease in spotted owl

viability would have on other old-growth-forest-dependent species would be addressed in future "yet-to-be-created" plans), *overruled on other grounds by McNair*, 537 F.3d at 1001. The decision to include lingering oil as one of only five categories that will be considered for future funding demands further explanation "in support of and in opposition to the NEPA decision" because that decision necessarily impacts any excluded categories or evaluation of alternative funding schemes. *See Bosworth*, 199 F. Supp. 2d at 981 (holding that EIS violated NEPA because it failed to disclose scientific opinion for and against its conclusion that the proposed project would help to reduce wildfires in previously burned areas). A general statement regarding the possible impact a proposal might have on a particular habitat or species is insufficient without meaningful, detailed explanation. *Ecology Center, Inc. v. Austin*, 430 F.3d 1057, 1067-68 (9th Cir. 2005) (holding EIS insufficient for failing to explain the basis for conclusions regarding impact of treating old-growth forests so that public could make "informed comparison of the alternatives"), *overruled on other grounds by McNair*, 537 F.3d at 990-94, 1002. While the DSEIS draws general scientific conclusions related to lingering oil, it fails to provide anything to substantiate such conclusions. *See* DSEIS, at § 2.4.2; *see also Klamath-Siskiyou Wildlands Center v. Bureau of Land Mgmt.*, 387 F.3d 989, 996 (9th Cir. 2004) (finding that a NEPA document is inadequate if it contains only "narratives" of expert opinions); *Thomas*, 137 F.3d at 1150 (holding that production of cursory report of expert's opinion without disclosing "underlying environmental data" did not satisfy NEPA's reporting requirements). Not only have the Trustees failed to disclose the data underpinning the DSEIS conclusions, but they have not even released the expert reports that explain what the data reveal about lingering oil prevalence and effects.

To the extent that NOAA and the Trustee Council claim they do not have the underlying reports[5] and data and the decision to draft an SEIS limiting funding to lingering oil was based ***solely*** upon a narrative summary by Drs. Michel and Boufadel, this reliance on such cursory information violates the requirements of NEPA. *See* Defendants' Motion for Summary Judgment, Case No. 1:10-cv-00250-RMU, at 28, filed July 15, 2010 ("NOAA . . . drafted [the] Notice of Intent to Prepare a Supplemental Environmental Impact Statement based upon the [public] summary report [of the work of Drs. Boufadel and Michel], ***not upon any data or other reports*** generated by Dr. Boufadel or Dr. Michel.") (emphasis added); *see also Klamath-Siskiyou*, 387 F.3d at 996 (finding that a NEPA document is inadequate if it contains only "narratives" of expert opinions); *Thomas*, 137 F.3d at 1150 (holding that production of cursory report of expert's opinion without disclosing "underlying environmental data" did not satisfy NEPA's reporting requirements). The Trustees cannot have it both ways -- either they must release the underlying reports and data that substantiate the DSEIS or the proposed action in the DSEIS is without adequate scientific support.

[5] This claim by the Commerce Department in ExxonMobil's FOIA lawsuit is particularly inexplicable given NOAA's statement over three months ago that it was withholding under FOIA a "courtesy copy" of the Michel final report in its possession and confirmed that it would post the report on the EVOSTC website, which it has not done to date. *See* NOAA's letter dated April 8, 2010 in response to Request No. NOAA-2010-00157 for "all of the presentations and underlying data for the January 2010 Alaska Marine Science Symposium related to the Spill."

It is our opinion that the entire SEIS process has been tainted because the Trustees have continuously refused, even at this juncture, to provide the foundational reports and data relied upon for the proposed far-reaching governmental action and failed to adequately explain the bases for its conclusions. This is particularly disturbing since what little is known so far about these studies appears to lend no substantive support for further remediation of lingering oil, even though the Trustees continue to spend millions of dollars to fund these studies. In fact, despite the Trustees failing to publicly disclose the full scientific bases for their SEIS decision pertaining to lingering oil to date, the Trustees recently approved another $81,000 for additional field work by Boufadel to repeat the tracer delivery testing to confirm his 2009 results. If the Trustees continue the SEIS process without releasing the expert reports and underlying data so that the public can properly assess and fairly comment on it before the SEIS is finalized, ExxonMobil may have no choice but to seek injunctive and declaratory relief to invalidate the SEIS process and any findings under it.[6]

Sincerely,

Carla J. Christofferson
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[6] *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882-83 (1990) (holding that a party can challenge "agency action" that violates NEPA under the Administrative Procedure Act) (quoting 5 U.S.C. § 702); *see also Sierra Nevada Forest Prot. Campaign v. Weingardt*, 376 F. Supp. 2d 984, 994 (E.D. Cal. 2005) (granting plaintiffs' motion for summary judgment alleging defendant violated NEPA during the Environmental Assessment process); *Sierra Club v. Bosworth*, 199 F. Supp. 2d 971, 993 (N.D. Cal. 2002) (granting plaintiffs' motion for summary judgment and injunctive relief alleging defendant's EIS failed to comply with NEPA); *Seattle Audubon v. Espy*, 998 F.2d 699, 704-705 (9th Cir. 1993) (affirming district court's grant of injunctive relief in favor of plaintiff's challenge that EIS violated NEPA); *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 369 (2008) (noting that declaratory or injunctive relief are remedial tools available in judicial challenges associated with preparation of an EIS).