



STATE OF FLORIDA

BILL McCOLLUM
ATTORNEY GENERAL

VIA U.S. MAIL AND E-MAIL

August 20, 2010

Kenneth R. Feinberg, Esq.
Feinberg Rozen, LLP
The Willard Office Building
1455 Pennsylvania Avenue, NW
Suite 390
Washington, DC 20004-1008

A handwritten signature in cursive that reads "Ken".

Re: Protocol for Emergency Advance Payments

Dear Mr. ~~Feinberg~~:

I am writing to you to express my strong objections to the Protocol for Emergency Advance Payments, the narrative on Understanding the Eligibility Criteria for Emergency Advance Payments, and the GCCF Claims Form.¹ Despite the sincere and diligent efforts of my office and others over the last seven weeks to work with you to craft a claims process that allows *at least* the same protections and rights as the Oil Pollution Act of 1990 ("OPA"), our input has been completely disregarded. Instead, the documents regrettably fall far short of even the minimal protections mandated by OPA. Moreover, these documents are confusing and contradict many of your public statements regarding the claims process.

The appointment of an independent Administrator of a facility to process the Deepwater Horizon claims of individuals and businesses was meant to replace *and improve upon* the claims process that BP had implemented to fulfill its OPA obligations as a responsible party for the Spill. However, the current process appears to be even less generous to Floridians than the BP process. Such an outcome is completely unacceptable.

¹ The 18-page GCCF Claims form was released to the public this morning but has never previously been provided or discussed with my office, despite the statement in the press release accompanying the claim form that the process was developed after working "closely with the Governors and Attorneys General of Louisiana, Alabama, Mississippi and Florida." Likewise, my office saw the Criteria document for the first time yesterday afternoon.

As Florida's chief legal officer, I must again respectfully disagree with your interpretation of the law applicable to the Gulf Coast Claims Facility ("GCCF") process. The GCCF was proposed as an alternative to the BP claims process, which was seen as lacking credibility and efficiency. However, the GCCF was never contemplated as a means of reducing the requirements for an OPA claims process. The GCCF has been represented to be "OPA-plus" in the protections and rights it will confer on eligible Claimants. Unfortunately, the current process is far more onerous than OPA allows and greatly reduces Claimants' rights. Indeed, the process appears to have as its primary goal the reduction or elimination of claims against BP, instead of making claimants whole.

My office has communicated with you on numerous occasions and in various ways in an effort to develop a claims process that meets the needs of the people of Florida and the Gulf Coast and the requirements of the law but virtually every substantive edit that we have offered has been rejected.² Specifically, although the list below does not detail every major deficiency with the Protocol, the following provisions are particularly troublesome:

- **Proximate Causation:** The inclusion of language concerning a Claimant's alleged burden to prove "proximate causation" between his or her damages and the Spill improperly increases the burden of proof imposed upon Claimants. OPA and its implementing regulations allow a Claimant to recover damages which are "the result of" the Spill – a less onerous standard of causation, reflective of the fact that OPA is a strict liability statute. OPA's only mention of proximate causation is in the limitation of liability context. My staff has provided the necessary edits for the Protocol to conform to the OPA standards. The Protocol's continued reference to "proximate causation," by deviating from the language of OPA, suggests an increased burden of proof on Claimants. Just creating such an ambiguity disserves the public, is contrary to the goal of creating a means of obtaining compensation for damages without the need for litigation, and violates OPA.
- **Limitation on the Right to File Interim Claims:** The Protocol proposes a limitation on the time and ability of Claimants to file "Interim Claims" without any legal authority for doing so. Interim Claims under OPA are intended to provide Claimants with a mechanism for obtaining partial recovery of known damages, without providing a release to a responsible party. The Protocol limits the right to obtain such Interim Payments to 90 days after the GCCF begins operation, in violation of OPA. The Protocol also creates a two-tiered claims

² Without having the chance to review the Criteria document in detail, my July 2nd letter explains why the extensive reliance on geographic proximity is so misplaced.

process scheme with only “Emergency Advance Payments,” which must be filed before November 23, 2010, and “Final Payments,” which require an as-yet unspecified release of claims by the Claimant. Although a footnote characterizes “Emergency Advance Payments” as “Interim Payments,” and the Protocol later states that interim claims will be considered, after November 23, 2010, in “appropriate circumstances,” this characterization appears to be nothing more than a thinly veiled attempt to make the Protocol *seem to provide* the elements required by OPA – while actually violating the rights provided by OPA. Interim Payments are a required part of the OPA claims process and payment of such claims cannot and should not be at the complete discretion of the administrator.

- **Presentment:** The Protocol fails to acknowledge that filing a claim with the GCCF for an Emergency Advance Payment satisfies OPA’s requirement that a Claimant first present a claim to the responsible party before they can either obtain money from the Oil Pollution Liability Trust Fund or file a suit for damages. Fixing the ambiguity *should* have been an easy edit – but it was not made, despite repeated requests by my office. Rather, the latest draft further obfuscates this issue by stating that: “Whether or not a claim has been presented shall be governed by OPA and applicable law.”
- **Refiling Claims:** While the Protocol states that all pending claims previously filed with BP will be transferred to the GCCF, today’s press release indicates that every Claimant who has a pending claim with BP will have to refile their claim with the GCCF on an 18-page claims form (but without the supporting documentation). Nothing in the Protocol or the Criteria reveals this refiling requirement, however. Claimants with pending claims should not and cannot be required to refile and thus restart the 90-day clock provided in OPA for processing their claims, especially since BP has admitted delaying the processing of thousands of claims in anticipation of the GCCF beginning operations. It is also unclear what will happen if Claimants do not refile their claims. While I recognize your desire to re-evaluate claims that have been denied and to make sure that claims are brought fully up-to-date, this procedure does not accomplish those goals in an effective manner.

Although the leak has been stopped, the Deepwater Horizon Spill is an on-going environmental disaster, not a one-time event. While it is all of our most fervent hope that the Gulf and the people who rely on it for their life and livelihoods will recover soon from the scourge of the Spill, it is our duty to provide for the possibility that the recovery will take some time to be fully realized. Part of the recovery process will depend on

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providing a credible claims process that, at the very least, meets the requirements of OPA. We remain committed to that goal and hope that you will adopt a Final Protocol that incorporates the edits that we have previously and repeatedly provided to you and which are necessary to meet the requirements of OPA. My office is, as always, available to consult with you.

Sincerely,

A handwritten signature in brown ink, appearing to read "Bill", with a stylized flourish at the end.

Bill McCollum
Attorney General