

One year since the BP oil spill: Obama “claims czar” provides no relief for the people of the Gulf

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The central thrust of the Obama administration response to the Gulf oil disaster—protecting BP and the oil industry as a whole—has succeeded.

BP’s fourth-quarter profits for 2010 were up 30 percent over 2009. Flush with cash drawn from spiraling oil prices, over the past several months BP has gone on a global shopping spree, buying up billions of dollars worth of energy deals in Russia, Brazil, Indonesia, China, India and Australia. It remains the largest lease holder in the Gulf of Mexico, and has recently signaled that it intends to resume deep-sea exploration and production.

Nothing could more clearly express BP’s confidence that its financial liability for the Gulf oil disaster will be minimal. Under the Clean Water Act, it could face tens of billions in fines for the spill—but only if criminal negligence is established. There is virtually no chance the Obama administration will pursue such an outcome. From the beginning, the White House treated the disaster not as a crime, but an accident.

But while from the first days of the blowout the White House moved to shield BP from federal fines and criminal investigations, financial circles warned that the London-based oil major could be crippled by what was anticipated to be an avalanche of lawsuits from those who suffered financial loss due to the disaster.

In June 2010, as the size of the spill became undeniable, the question of whether BP would survive began to be raised. For example, *New York Times* business columnist Andrew Ross Sorkin wrote on June 7, “The idea that BP might one day file for bankruptcy, particularly as part of a merger that would enable it to cordon off its liabilities from the spill, is starting to percolate on Wall Street. Bankers and lawyers are already sizing up potential deals (and counting their potential fees).”

The Obama administration determined that even the absorption of BP by its rivals could not be allowed. Such a development would be perceived as a punishment.

On June 16, Obama met with BP CEO Tony Hayward and chairman Carl-Henric Svanberg in the White House. Afterward, he announced the creation of a BP claims escrow account of up to \$20 billion to be funded over four years, which came to be known as the Gulf Coast Claims Facility (GCCF). In words carefully tuned to financial markets on Wall Street and the City of London, Obama declared, “BP is a strong and viable company and it is in all of our interests that it remain so.” From that point on, BP’s stocks and profits have been on an upward spiral (see “Obama seeks ‘inflection point’ on Gulf oil disaster”).

The GCCF is not funded by anything close to \$20 billion. BP is required to pay \$1.25 billion per quarter into the fund, equivalent to about 22 percent of its \$5.6 billion in profits for the fourth quarter 2010.

Much of what is paid out from the fund BP can count against its taxes in both the US and the UK; whatever it does not pay out will be returned to it

in the form of profit. It can count “cleanup costs” against the fund—costs it alone determines—as well as legal damages and state-level fines, but not federal fines. Beyond this, Obama in August 2010 approved a deal whereby whatever fines BP pays will be tied to its Gulf oil revenue. In other words, BP is protected from suffering almost any loss.

Obama tapped Washington lawyer Kenneth Feinberg to head the fund, based on the attorney’s prior work shielding private corporations and the federal government from lawsuits. Through escrow accounts and other maneuvers, Feinberg had earlier protected chemical giants Dow and Monsanto from the litigation of Vietnam veterans sickened by the defoliant Agent Orange; pharmaceutical corporation A.H. Robins from women maimed by the Dalkon Shield contraceptive device in the 1970s; and the Bush administration from lawsuits over the 9/11 terrorist attacks that might have lifted the lid on government secrets. More recently, Obama tapped Feinberg as “pay czar.” In this role, he green-lighted seven-figure pay packages for executives at financial institutions that had received federal bailouts (see “Who is Kenneth Feinberg?”).

Feinberg was never in doubt as to the nature of his assignment. “Investors in BP should know that there’s now an alternative to the litigation system in place,” Feinberg told CNBC soon after Obama’s announcement. “I think that’s a really helpful sign if you’re an investor.... It’s a way for BP to avoid lawsuits in the end.”

Those who accept money from the fund agree to waive in perpetuity the right to sue BP for further damages. Under these draconian terms, the GCCF has so far paid out a mere \$3.8 billion from the “\$20 billion” fund. With Feinberg claiming that he has already “processed” nearly 80 percent of all claims, it is likely that not much more will be forthcoming. According to an analysis by Mississippi Attorney General Jim Hood, the GCCF has paid only 3 percent of business claims and 9 percent of individual claims.

Feinberg reports that about 300,000 of 800,000 claimants have received some compensation. According to several media accounts, they have gotten about 10 percent of what they requested. The GCCF has reportedly forwarded several thousand of these claims to the US Department of Justice for mail fraud investigation, and at least one individual has already been imprisoned for attempting to defraud BP. In contrast, not a single BP or Transocean executive has faced criminal investigation, much less jail time.

Should those whose claims were rejected seek to appeal, they will enter the courts under the cloud of the decision by Feinberg’s supposedly independent escrow. As for the victims who have accepted GCCF awards, it is probable that many have settled for far less than what they might have gotten if they had retained an attorney. This was precisely the purpose of the entire program.

Immediately after Obama and BP established the fund, Feinberg

launched a high-publicity media campaign, in which he advised victims that they would be “crazy” to sue. Feinberg specifically cautioned them against hiring legal representation.

“[U]nder this program, you will receive, if you’re eligible, compensation without having to go to court for years, without the uncertainty of going to court, since I’ll be much more generous than any court will be,” he said in July 2010. “And at the same time, you won’t need to pay lawyers and costs.”

Attorneys in the Gulf states and legal experts countered that it was unethical to advise victims that they should not have legal representation. This was doubly true because Feinberg was not licensed to practice law in any of the affected states, and therefore should not have been offering legal advice.

Feinberg’s “advice” was especially duplicitous, because he acted under the color of neutrality and with the official public sanction of Obama. In fact, he was and remains an attorney on BP’s payroll. “This is an independent, private program,” Feinberg declared soon after the creation of GCCF. “I’m not beholden to BP. I’m an independent administrator calling the shots as I see them.”

There is nothing independent about either the GCCF or Feinberg. BP pays his six-attorney law firm, Feinberg Rozen, more than \$10 million per year.

In a July 19, 2010, web chat, Feinberg said he would not say how much BP pays him, declaring, “that’s between me and BP.” Under mounting pressure, Feinberg revealed that BP pays his firm \$850,000 a month. The sum has recently been increased to \$1.25 million per month. However, he still refuses to make public the terms of his contract, raising the distinct possibility that his pay could be related to the proportion of claims he rejects.

In a December 2010 letter to new BP CEO Robert Dudley, the Center for Justice and Democracy (CJD) pointed to the “lack of transparency and potential conflicts of interest related to the administration of the Gulf Coast Claims Facility.” It stated, “Mr. Feinberg, employed by BP, has decided on his own authority that all claims recipients must release all companies who caused this disaster from any and all legal responsibility, no matter how grossly negligent they were. This sweeping release, which assigns victims’ claims to BP, benefits only one actor: BP—the company that happens to pay Mr. Feinberg’s salary.

“Despite repeated calls for the release of documents establishing the formal relationship between BP and Feinberg Rozen....This failure to release the terms of all these financial arrangements under circumstances of tremendous historic and public significance is simply unacceptable.”

Even as he encouraged Gulf residents to relinquish their right to sue, Feinberg established rules that prohibited the great majority of those affected by the BP blowout from getting adequate redress through the GCCF.

Among those effectively barred from receiving payment are the many Gulf Coast fishermen and charter boat owners who operated on a largely cash basis. Feinberg also ruled that those affected by what he called “the perception” of damage from the oil spill—as opposed to those directly hit by oil—will be unlikely to see awards. This policy has prevented most homeowners who saw their house values decline and many coastal businesses not directly tied to economic activity on Gulf waters from submitting claims to the GCCF.

In an especially parsimonious decision, Feinberg ruled that cleanup workers, many of them displaced fishermen, would see any pay they received from BP for this dangerous work deducted from final GCCF claims.

Attorneys general of four Gulf Coast states this month asked US District Judge Carl Barbier to conduct an inquiry into the claims process and the GCCF. They assert that Feinberg is using “economic duress to manipulate financially desperate claimants” into signing off on insufficient

settlements in the GCCF’s Quick Pay option, which gives \$5,000 to individuals and \$25,000 to businesses in return for waiving the right to sue or seek further money from the claims facility.

Feinberg attacked the appeal to Barbier in emphatic language, saying that it verges on “defamation.” “The court does not have the power under the Oil Pollution Act to impose upon the GCCF the monitoring sought by the attorney general,” said Feinberg lawyer David Pitofsky in a court filing this week. Such a step would “chill the ability of GCCF personnel to work expeditiously without fear of running afoul of an independent auditor and a court-imposed evidentiary hearing.” This is tantamount to an admission that judicial scrutiny could expose the GCCF’s shotgun rejection methods.

Feinberg also dismissed the notion that some might take a quick settlement in order to meet pressing bills. “The idea that people can’t do anything other than take the \$5,000, I’m dubious,” declared the multimillionaire attorney in a recent news conference.

In another recent interview, the claims czar equated the oil blowout to a natural disaster. “Bad things happen to good people in this country every day,” he said. “Tornadoes, hurricanes, earthquakes, Katrina. There’s no \$20 billion fund for those people. There’s no money set aside for that segment of the victims of life’s misfortune.”

Such provocative statements and his increasingly open defense of BP have heightened anger on the Gulf Coast toward Feinberg, as well as Democrats and Republicans, who have done everything to protect the oil industry and virtually nothing for the population.

The vast majority of those who have filed claims face ruin, among them fishermen, small business owners, homeowners and hourly workers in the tourism industry.

Telley Madina, executive director of the Louisiana Oystermen Association, told the *Huffington Post* that most fishermen have received no payment from the GCCF.

“Less than 10 percent of GCCF payments have gone to Gulf fishermen, shrimpers and oystermen, who so far have been compensated for only a fraction of their losses,” he said.

“I don’t think problems on the coast will wrap up in 2012 as Ken Feinberg says. We’re still seeing big tar balls wash ashore in lower Plaquemines, and I won’t be surprised if we have more, enormous fish kills, like we did last September.... Oystermen need money to pay their mortgage or rent. You can’t survive these days floating up and down the river on a boat.”

Oyster fisherman Wilbert Collins told Russell Britt of *MarketWatch* that he received only 10 percent of the revenue he lost as a result of the destruction of 2,000 acres of marshland that he farms. He had to lay off 10 workers, most of them family members, at Christmas.

“It appears they’re working a strategy of delay, delay, delay,” said another oyster farmer, John Tesvich.

Then there is the question of what the future holds. It is not clear when the Gulf fishing industry will fully recover. According to some marine biologists, the potential for future die-offs may actually increase in the coming years. Public health experts warn that medical and psychological problems related to exposure to oil and chemical dispersants will continue for decades.

By then, the GCCF will be long gone, and those who have accepted payments from Feinberg, forfeiting their right to sue, will be in a legal straitjacket.

“We’ve made a little bit of money on the cleanup,” fishing boat captain Kerry O’Neill told the *World Socialist Web Site*. “But it could be at the cost of our shrimping. What is next year going to bring? We’ve got a lot of bills. If there is a decline in the seafood industry, it’s all I’ve ever done. I’m 43 years old and it’s all I’ve ever known.”



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