

June 15, 2010

The Honorable Eric Holder
Attorney General
United States Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

Dear Attorney General Holder:

We are closely following both the environmental catastrophe in the Gulf of Mexico and the arguments being advanced to limit BP's liability. For over twenty years, the National Whistleblowers Center has actively represented whistleblowers to fight fraud and enforce adherence to environmental laws. We are deeply concerned that the public is being misled concerning the legal remedies available to the United States to hold BP fully accountable for the Deepwater Horizon disaster.

Applicability of False Claims Act to the Deepwater Horizon Catastrophe

Facts already on the public record evidence that BP made misrepresentations about its safety and emergency response procedures in order to operate under leases from the United States and profit from offshore drilling. For example, the Associated Press reported a series of material misrepresentations made by BP in both its Deepwater Horizon Plan and its Regional Spill Plan. These misrepresentations and false statements include:

- Vast overstatements of BP's preparedness to deal with a major leak;
- Vast understatements of the dangers posed to the environment and the public by an uncontrolled leak;
- False statements such as listing a national wildlife expert whom the company would rely upon for its compliance obligations even though this expert had died 4 years prior to the submission of the plan.

See Justin Pritchard, et al "BP Spill response plans severely flawed," *Associated Press* (June 9, 2010)

These statements, along with others reported in the national media, constitute compelling evidence that BP violated the False Claims Act¹ to obtain authorization to commence its drilling operations under the lease for the Deepwater Horizon oil rig. Under the recently

¹ See 31 USC § 3729 *et. seq.*

amended False Claims Act, all BP contractors and subcontractors who participated in any manner in a violation of the Act would be jointly and severally liable. The investigation into BP must include an investigation into all its contractors and subcontractors.

The False Claims Act is the appropriate legal instrument to police BP's alleged misconduct, because BP's leases permitted them to obtain oil owned and controlled by the United States in exchange for payments and commitments under leasing obligations. While the purpose of the False Claims Act is not to protect the environment *per se*, it is applicable in this case because it is intended to ensure honesty and openness when companies do business with and obtain benefits from the United States, such as a lease.

Under the False Claims Act there are no caps or limitations on the amount of damages BP owes to the U.S. taxpayer. To the contrary, the law mandates treble damages for violations, meaning BP owes the U.S. taxpayer three times the amount of all damages caused by its false claims. Holding BP accountable under this law should fully pay for the clean up and the economic damages for which the cap would not cover. In addition, BP is liable to the United States for three times the amount of any money made from the lease prior to the catastrophe because they made false statements to the U.S. government to operate under the lease. ²

The Role of Whistleblowers Under the False Claims Act

In addition to favorable damage provisions, the False Claims Act authorizes whistleblowers to step forward and assist the government. The law has specific provision that empowers any worker, subcontractor or agent with direct information of fraudulent conduct by the company to file allegations confidentially with the Attorney General. Such information will provide the United States with the opportunity to obtain the detailed factual basis to prove the false claims. Whistleblowers who step forward with this information are entitled to strict legal protection under the law. First, the False Claims Act prohibits their being fired or otherwise being retaliated against in their employment. Second, the False Claims Act provides a reward provision that mandates the Department of Justice compensate whistleblowers who come forward with information used to hold BP fully accountable.

The Justice Department has aggressively used the False Claims Act to police the medical and pharmaceutical industry and has already collect over 25 billion dollars through the whistleblower provisions. Justice Department lawyers already have significant expertise using this law to fight fraud and hold major corporations accountable for wrongdoing. The False Claims Act is the best and most important federal law to hold BP and other

² Liability attaches for any false or fraudulent claim presented to the United States. To the extent BP obtained any benefits from any leases in the Gulf based upon similarly false claims they could be held liable whether or not a leak has occurred in another site. The government need not wait for the next disaster to occur to hold BP liable under this law.

wrongdoers fully accountable for their violations and to make them pay adequate damages to cover the extent of their misconduct.

Utilize the False Claims Act Effectively

As you are aware, the False Claims Act has a number of provisions that, if effectively implemented, will significantly increase the ability of the Justice Department to investigate BP and ensure that every single false claim is identified and paid. We request that the Department of Justice use its discretion and take steps to ensure the law is used. These steps include:

- Notifying all BP employees, contractors, and subcontractors of their rights under the False Claims Act and explain to them how to properly file a claim with the Justice Department and in court;
- Informing BP employees, contractors, and subcontractors of the anti-retaliation provisions of the False Claims Act and how the Justice Department enforces these provisions;
- Ensuring that all claims filed by whistleblowers are investigated within the 60 day time frame required by law or demonstrate good cause to a court for an enlargement of that deadline;
- Informing all whistleblowers that the U.S. will exercise its discretion to ensure that no valid claims are dismissed on technical grounds BP may employ (which the Justice Department is authorized to cure or oppose), and that the Justice Department will fairly and adequately ensure the rewards provisions of the law are enforced.³

Conclusion

The False Claims Act was signed into law by President Abraham Lincoln in 1863 to address a national crisis of then unprecedented proportion: frauds against the United States during the Civil War. The heart of Lincoln's law is to encourage whistleblowers with inside information of fraud to step forward. The process must be fully implemented to combat the current crisis. It is a clarion call to patriotic Americans who are concerned about the beauty of our environment and the integrity of our mineral wealth.

³ See *e.g.* 31 U.S.C. § 3730(e)(4) which allows the Justice Department to oppose dismissal of a case based on an allegation that a matter has been publically disclosed. Any new information brought to your office should be protected from an attempt to dismiss it on grounds that much information is already on the public record. You must make this commitment to ensure Whistleblowers come forward with details needed to prosecute cases.

The law has been strengthened three times since 1986, because it works. The oil leak in the Gulf of Mexico presents a modern day challenge to the environment on the coast and to the integrity of all federal leases. Any company who benefits by extracting the mineral wealth of our nation must be held fully accountable under law.⁴ When false claims impact the welfare of the entire Gulf region, the False Claims Act is the appropriate and best legal instrument to enforce true accountability.

If you need more detail with respect to the applicability of this law to the Deepwater Horizon disaster we would be honored to provide any assistance your Department may need.

Respectfully submitted,

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⁴ Again, any false claim would be actionable. There may be significant cause to investigate all leases and royalty payments for all oil obtained in the Gulf. We doubt any of the major companies responsible for the safety of this process have adhered to legal requirements and they would be liable for false claims as a result. Please do not wait for the next catastrophe to enforce this law.