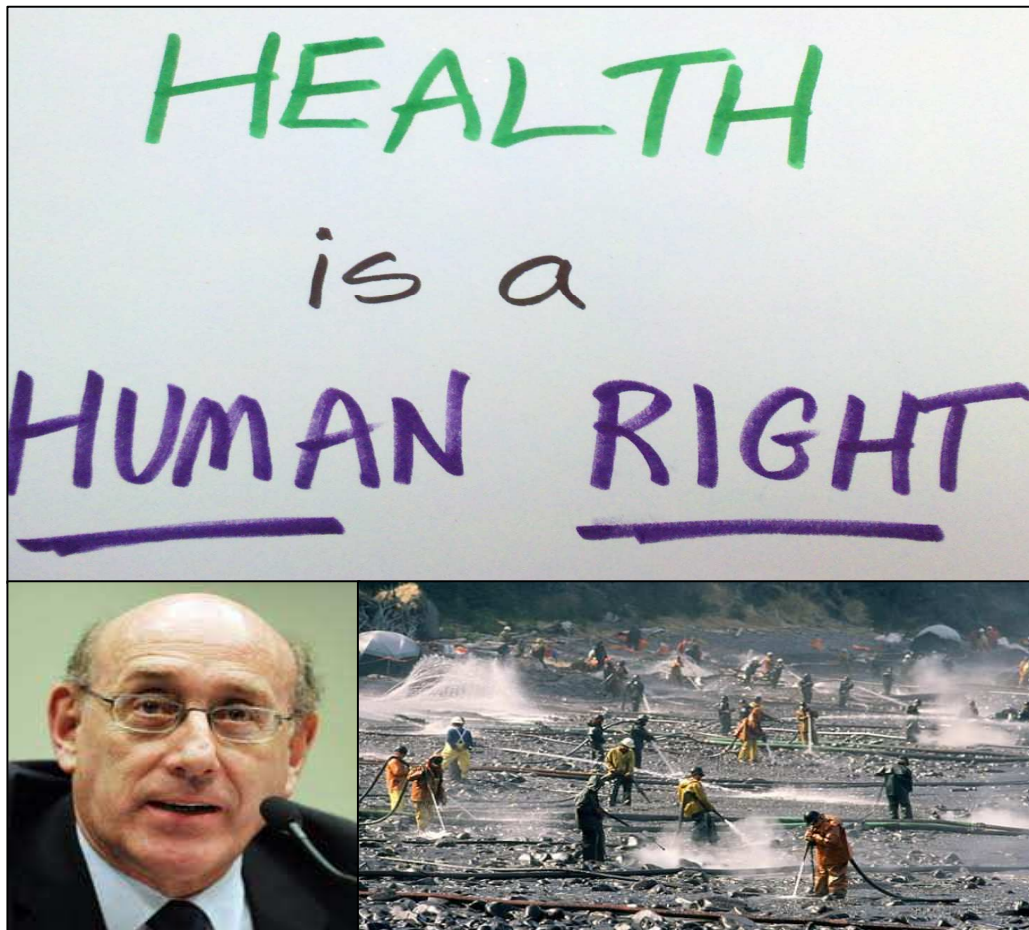




Upholding our human right to a healthy environment

The Human Right to Health Denied: Feinberg's Rejection of BP Illness Claims Breaks with Past Practices



By Nathalie Walker & Monique Harden
Advocates for Environmental Human Rights

July 27, 2011

The Human Right to Health Denied: Feinberg's Rejection of BP Illness Claims Breaks with Past Practices is a special report by Advocates for Environmental Human Rights ("AEHR"). AEHR is a public interest law firm dedicated to upholding our human right to live in a healthy environment. We hold companies and the government accountable when this right is violated, and we advocate for public policy that supports this right. With every step, we educate people about their right to live in healthy communities.

On June 11, 2010, in the aftermath of the April 20, 2010 BP oil drilling disaster, AEHR exposed the fact that BP contracted with a claims processing company that promoted its record of reducing lost dollar pay-outs for injuries and damage caused by its client companies. This company, ESIS, Inc., was administering the claims filed by people who suffered injuries and losses from the BP oil disaster. A few weeks later, Kenneth Feinberg was appointed as the administrator to take over the BP claims process and he established the Gulf Coast Claims Facility.

Special thanks to Parker Patterson, AEHR legal intern, and Ada McMahon, Bridge the Gulf Project.



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Introduction

Kenneth Feinberg, the administrator of the Gulf Coast Claims Facility ("GCCF"), has denied all claims seeking compensation for illnesses related to toxic exposure from the BP oil drilling disaster off the coast of Louisiana in April 2010.¹ BP funded the GCCF with \$20 billion to process damage claims arising from the oil disaster.² According to Feinberg, he received "a couple hundred" illness claims, and rejected them all because they failed to provide "proof" in the form of medical documentation that the illnesses were caused by toxic exposures during the BP oil cleanup work.³



Feinberg's requirement of medical proof of causation for BP illness claims is a break from his past practices in processing claims and pay-outs in the 9/11 Victims Compensation Fund and the Agent Orange Settlement Fund. As the administrator of those funds, Feinberg did not require medical proof that a claimant's illness or disability was caused by being exposed to toxic air pollution resulting from the September 11, 2001 terrorist attacks or the toxic chemicals in Agent Orange sprayed during the Vietnam War. These disaster fund programs paid claimants based on a showing that they were in the vicinity where harmful chemicals were present and had a medically diagnosed illness or disability.⁴



The rationale for not requiring medical proof of causation in the Agent Orange Settlement Fund, which was replicated in the 9/11 Victims Compensation Fund, is "the inconclusive state of the scientific evidence" to demonstrate that a specific toxic exposure caused a specific physical harm.⁵

By creating a significantly higher burden of proof standard for illness claims by people exposed to toxic chemicals during their cleanup of BP's oil disaster, Feinberg effectively denies all damage claims for illnesses associated with exposure to the toxic BP crude oil and/or toxic chemical dispersants that were applied to the oil spill. Feinberg's unprecedented standard implies that the sacrifices that cleanup workers and volunteers have made to protect the coastal communities, livelihoods, culture, marine species, and wildlife of the Gulf Region from the largest environmental disaster in the history of the United States are of lesser importance. It also implies that people living in or visiting the Gulf Coast who were exposed to BP's oil and/or chemical dispersants do not deserve the same level of protection afforded to the residents and visitors in the vicinity of the September 11, 2001 terrorist attacks, who received financial compensation for toxic exposure-related illness without medical proof of causation.

Feinberg's unreasonable requirement of medical proof of causation for GCCF claimants effectively denies them compensation for their illnesses and undermines their human right to health.

The Agent Orange Settlement Fund

In 1984, several years prior to the BP oil drilling disaster, Feinberg developed a plan for compensating Vietnam veterans exposed to Agent Orange, a toxic herbicide, that did not require medical proof of causation. A federal court approved Feinberg's plan and appointed him to administer the Agent Orange Settlement Fund. The fund distributed pay-outs based on a showing that a veteran was present in an area where Agent Orange was sprayed in Vietnam and that the veteran either died from a non-traumatic cause or developed a medically diagnosed disability.⁶ The option of requiring medical proof of causation between the exposure and the disability or death was rejected because scientific evidence has not yet been developed to prove causation "for either individual claimants or individual diseases with any appropriate degree of probability."⁷

The 9/11 Victims Compensation Fund

In the aftermath of the September 11, 2001 terrorist attacks, U.S. Attorney General John Ashcroft appointed Feinberg to be the administrator of the 9/11 Victims Compensation Fund. As the administrator, Feinberg was given broad authority to establish and implement federal regulations governing claims processing and pay-outs.⁸ Similar to his administration of the Agent Orange Settlement Fund, Feinberg did not require medical proof of causation between the illness and the exposure to toxic air pollution.⁹ The 9/11 Victims Compensation Fund received approximately 4,200 claims for physical

harm not involving death or hospitalization immediately following the attack.¹⁰ Approximately 80 to 90 percent of these claims alleged respiratory illnesses from exposure to toxic air pollution.¹¹ Feinberg paid out approximately 2,425 illness claims that were predominantly for toxic exposures based on a showing that the claimant, which included rescue workers and civilians, were in the vicinity of a September 11, 2001 terrorist attack and presented a medical diagnosis of a physical harm.¹²

Comparative Analysis of Kenneth Feinberg's Processing of Toxic Exposure-Related Illness Claims in Disaster Fund Programs				
Disaster Fund	Requires Medical Proof of Causation	Number of Toxic Exposure-Related Illness and Death Claims Filed	Number of Toxic Exposure-Related Illness and Death Claims Awarded	Total Amount Awarded for Toxic Exposure-Related Illness and Death Claims
Agent Orange Settlement Fund ¹³	No	105,000	52,000	\$197 million
9/11 Victims Compensation Fund ¹⁴	No	4,200	2,425	\$380 million
Gulf Coast Claims Facility ¹⁵	Yes	Approx. 200	0	\$0

Conclusion

It is unconscionable that the GCCF administered by Kenneth Feinberg requires medical proof of causation for illness claims brought by people exposed to BP's toxic crude oil and/or chemical dispersants sprayed on the oil. Feinberg did not require such proof in his administration of the Agent Orange Settlement Fund, which a federal court approved as an appropriate and equitable standard. Nor did Feinberg require this proof in his administration of the 9/11 Victims Compensation Fund. However, in his administration of the GCCF, Feinberg breaks with his past practices. By requiring medical proof of causation, Feinberg has effectively denied the human right to health for people suffering from illnesses associated with the BP oil disaster toxins, but who cannot provide medical proof that their specific illnesses were caused by specific exposures to the hazardous substances. Furthermore, given the inconclusive state of scientific evidence that a specific toxic



exposure caused a specific physical harm, Feinberg's requirement that GCCF claimants provide medical proof of causation is outrageous.

It should be sufficient evidence for GCCF claimants to show that they were in the vicinity of BP's toxic crude oil and/or chemical dispersants and have a medically diagnosed illness or disability. People of the Gulf Region deserve the same treatment as people who received compensation for their toxic exposure-related illnesses from the Agent Orange Settlement Fund and the 9/11 Victims Compensation Fund. Anything less denies their human right to health.

ENDNOTES

¹ Ada McMahon, *Feinberg Has Received Cleanup Illness Claims, Rejected Them All*, Bridge the Gulf, available at <http://bridgethegulfproject.org/node/379>.

² Gulf Coast Claims Facility, *General Information about the Gulf Coast Claims Facility*, available at <http://www.gulfcoastclaimsfacility.com/faq#Q1>.

³ *Id.* See also Gulf Coast Claims Facility, *Final Rules Governing Payment Options: Eligibility and Substantiation Criteria, and Final Payment Methodology, Attachment D. Documentation Requirements* (“Documents establishing the cause of the injury or death. Claimants must provide documents from the treating medical practitioner providing a description of the cause of the injury/death, such as hospital records, medical records, or affidavits.”), available at <http://www.gulfcoastclaimsfacility.com/methodologylanding>.

⁴ U.S. Department of Veterans Affairs, *The Agent Orange Settlement Fund*, available at <http://www.vba.va.gov/bln/21/benefits/herbicide/AOno2.htm>; and 28 C.F.R. §104.2(c).

⁵ *In re Agent Orange Product Liability Litigation* MDL No. 381, 818 F.2d 179, 184 (2nd Cir. 1987). See also Kristen E. Schleiter, *Proving Causation in Environmental Litigation*, 11 VIRTUAL MENTOR 6, p. 456-460 (June 2009), available at <http://virtualmentor.ama-assn.org/2009/06/hlaw1-0906.html>; Robert Rabin, *Environmental Liability and the Tort System*, 24 HOUSTON LAW REVIEW 27 (2007).

⁶ *The Agent Orange Settlement Fund*, *supra* n. 4.

⁷ *In re Agent Orange Product Liability Litigation*, 818 F.2d 179, 183 (recognizing that the equitable allocation of a fund can be determined by the relative “deservedness of claimants” without requiring proof of causation, and affirming a fund distribution plan that is “governed by criteria that are relatively easy and inexpensive to apply.”)

⁸ 49 U.S.C. § 404(a)(2).

⁹ 28 C.F.R. §104.2(c).

¹⁰ Lloyd Dixon and Rachel Kaganoff Stern, Rand Institute for Civil Justice, *Compensation for Losses from the 9/11 Attacks*, p. 56, (2004), available at http://www.rand.org/content/dam/rand/pubs/monographs/2004/RAND_MG264.pdf.

¹¹ *Id.*

¹² *Id.*

¹³ Source of the data provided for the Agent Orange Settlement Fund: *The Agent Orange Settlement Fund*, *supra* n. 4.

¹⁴ Source of the data provided for the 9/11 Victims Compensation Fund: *Compensation for Losses from the 9/11 Attacks*, *supra* n. 10

¹⁵ Source of the data provided for the Gulf Coast Claims Facility: *Final Rules Governing Payment Options: Eligibility and Substantiation Criteria, and Final Payment Methodology*, *supra* n. 3; and *Feinberg Has Received Cleanup Illness Claims, Rejected Them All*, *supra* n. 1.