

United States Senate

WASHINGTON, DC 20510

June 17, 2010

Attorney General Eric Holder
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Attorney General Holder:

We applaud you for opening an investigation into the Deepwater Horizon disaster, but as United States Senators we are deeply concerned about reports that BP has withheld and distorted information regarding the amount of oil flowing into the Gulf of Mexico. We are writing to ensure that your criminal inquiry thoroughly investigates these allegations.

BP has an obvious incentive to downplay the size of this spill, as their liability could change by billions of dollars depending on the final official tally. As President Obama said on May 27: "Their interest may be to minimize the damage and, to the extent that they have better information than anybody else, to not be fully forthcoming." Under the Clean Water Act, depending on BP's culpability, the company could be fined up to \$4,300 per barrel of oil spilled. BP's original, obviously understated estimate of 1,000 barrels per day would mean a fine of less than \$300 million. But if the flow rate turns out to have been up to 60,000 barrels per day, as experts now estimate, then BP's fines could approach \$15 billion. Even for a company as large as BP, \$15 billion is powerful incentive to withhold or distort information.¹

If BP is shown to have misrepresented or suppressed critical information, these acts would be punishable under federal law. Under the Federal Fraud and False Statements statute,² it is a crime to make any "materially false, fictitious, or fraudulent statement or representation" in connection with "any matter within the jurisdiction of the federal government." In addition, BP may be liable for false statement penalties under the Clean Water Act³ and other appropriate laws. You have the statutory authority to fully investigate these allegations and punish BP if they hold true.

And there is much to investigate. The record is quite clear that BP withheld information. Within a matter of days BP had robot-operated cameras at the source of the spill but it took a month for the company to release a live feed from those cameras to the public. It took almost three weeks more, until June 8, an astounding 50 days after the explosion, for BP to provide the appropriate high resolution video needed for accurate scientific assessment of the flow rate. In the meantime, BP senior officials claimed that "there's just no way to measure it."⁴ In addition, the substantial video archives of these recordings have not been released in their entirety so that they

¹ This does not include what BP owes the federal government for lost royalty revenue, which could top \$50 million.

² 18 U.S.C. § 1001 (2009)

³ CWA 33 U.S.C. § 1319(c)(4)

⁴ BP SVP Ken Wells statement on NPR May 12, 2010. Similarly, BP COO Doug Suttle testified before Congress on May 11, 2010 that "you can't measure what's coming out of the seabed."

can be analyzed by experts. To date BP has also failed to provide the video archives in a readily accessible form, which has made it difficult for the government-convened panel of scientific experts charged with evaluating the flow rate of the spill to fulfill their responsibilities.

BP also allegedly withheld critical data from scientists, including government scientists, who are best equipped to estimate the spill flow rate. A BP spokesman claimed the company was sharing data with “legitimate interested parties,”⁵ while in reality, some scientists said that they were left in the dark. Woods Hole Oceanographic Institute experts were poised to fly to the Gulf soon after the spill to conduct volume measurements, but BP told them not to come. And when the National Institute for Undersea Science and Technology team, funded by NOAA and with the government’s support, first discovered the oil plume and began gathering data on its extent, BP denied that a plume existed and disrupted data collection.⁶

In addition to withholding information and blocking data collection, BP has seemingly misrepresented the magnitude of the spill. Astoundingly, at first, after the Deepwater Horizon burst into flames and then sunk to the ocean floor, BP claimed that there was no spill. The next day they estimated an absurdly low flow rate of 1,000 barrels per day. On May 20, BP said they were siphoning off 5,000 barrels of oil a day from what they then claimed was a 5,000 barrel a day spill. Video feed released under pressure from Congress on May 21 showed a very different story, with a heavy flow of oil still spewing from the well. In response, the company adjusted their siphon estimate down to 2,200 barrels a day to explain why oil was still flowing. We now know that what the video actually showed was a much, much heavier flow rate.

Only recently have experts begun to have access to some of the data they need to make more credible estimates. On June 15, Secretary of Energy Steven Chu, Secretary of the Interior Ken Salazar, and Marcia McNutt, Director of the USGS and the government convened Flow Rate Technical Group, estimated that the flow may be as high as 60,000 barrels a day, which means that an estimated 3 million barrels may have spilled so far. That would amount to more than 13 Exxon Valdez spills.

We cannot overstate the importance of knowing how much oil has been and is being spilled. In addition to holding BP accountable for Clean Water Act fines, for lost royalty payments, and for all damages, knowing the amount of oil spilled is important for NOAA to understand the volume of oil that could hit the nation’s coasts, including Atlantic Coast locations, and to ensure that all states are properly equipped for the worst-case scenario. And if BP is shown to have misled the government in estimating the size of the spill, it may have compromised response efforts.

BP’s potentially criminal withholding and distortion of information has hampered the government’s ability to ensure that all costs are paid by the polluters, not taxpayers. An investigation by your office of BP’s withholding of information and misinformation should be an important focus alongside other aspects of your investigation. Thank you for your hard work to investigate this ongoing disaster.

⁵ Toby Odone, a BP spokesman in mid-May, 2010, reported in multiple news outlets.

⁶ Over 300,000 gallons of dispersant have been used under the surface of the water, an action that seems less about protecting the environment than about making the spill seem smaller.

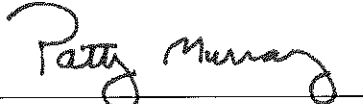
Sincerely,



ROBERT MENENDEZ
United States Senator



CHARLES SCHUMER
United States Senator



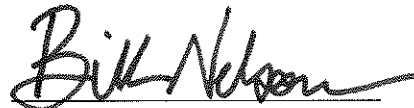
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