

May 9, 2017

### Fifth Circuit To Decide Whether BSEE Can Regulate Contractors Under the Outer Continental Shelf Lands Act

In the wake of the 2010 Deepwater Horizon incident, which involved multiple contractors, the federal government revised its approach to offshore safety and environmental regulation. For the first time, the Bureau of Safety and Environmental Enforcement (BSEE) began to enforce the Outer Continental Shelf Lands Act (OCSLA), which was originally enacted in 1953, against contractors who work for owners and lessees of offshore oil platforms. This change in enforcement policy was a dramatic shift as BSEE, and its predecessor agency, the Minerals Management Service, had previously stated that it did not regulate offshore contractors.

Contractor liability under OCSLA became a key issue when BSEE responded to the November 2012 explosion on an offshore oil platform in the Gulf of Mexico owned by Black Elk Energy, which had resulted in three fatalities and dozens of injuries. BSEE conducted an investigation and issued Incidents of Non-Compliance (INCs) to Black Elk Energy and three contractors on the platform at the time of the explosion, citing civil violations of its regulations. The contractors challenged the INCs, but the resolution of this civil enforcement proceeding was stayed when the government opened a criminal investigation.

In November 2015, the United States indicted two contractor companies and three of their employees, along with Black Elk Energy, for their alleged roles in causing the explosion. According to the government, the contractors knowingly and willfully failed to abide by welding regulations that had been promulgated under OCSLA. It charged the contractors with multiple felonies under OCSLA, each of which is punishable by up to 10 years in prison and a fine not to exceed \$100,000. *See* 43 U.S.C. § 1350(c)(1).

The contractors moved to dismiss the indictment, arguing that they cannot be held criminally liable under OCSLA. More specifically, the contractors argued that, when Congress amended OCSLA, it only authorized the federal government to bring enforcement actions against the holder of a lease or permit on the Outer Continental Shelf. Thus, as a statutory matter, contractors cannot be held liable for violations of OCSLA. In the alternative, the contractors argued that, even if Congress authorized the federal government to regulate the conduct of contractors, the government had failed to promulgate regulations under which contractors could be held criminally liable. In other words, as a regulatory matter, contractors cannot be held criminally liable.

The US District Court for the Eastern District of Louisiana agreed with the contractors and dismissed the OCSLA counts of the indictment against both the contracting companies and their employees in April 2016. The United States appealed this decision and on May 1,

For more information, please contact the following members of Katten's **Environmental and Workplace Safety** practice, who represented one of the contractor companies in the Black Elk Energy matter.

Lily N. Chinn  
+1.415.293.5810  
lily.chinn@kattenlaw.com

Robert T. Smith  
+1.202.625.3616  
robert.smith1@kattenlaw.com

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the US Court of Appeals for the Fifth Circuit, represented by Judges Edith Jones, Edith Brown Clement, and Jennifer Walker Elrod, heard oral argument in *United States v. Moss*, No. 16-30561.

Almost immediately out of the gate, the Fifth Circuit judges appeared to be skeptical of the government's arguments. For example, Judge Jones suggested that Congress did not authorize the federal government to regulate contractors—only the holder of a lease or permit. And Judge Clement implied that the federal government had failed to hold contractors accountable under regulations that had been promulgated under OCSLA.

If the Fifth Circuit, which has jurisdiction over the majority of the Gulf of Mexico, accepts the contractors' statutory argument and ultimately holds that Congress did not authorize the federal government to pursue any type of enforcement action against contractors, BSEE would be precluded not only from criminally enforcing OCSLA against contractors, but also would be precluded from issuing INCs or other types of civil enforcement actions against contractors in the Gulf.

While there is no timetable for a decision, it is reasonable to expect that the Fifth Circuit will issue an opinion by the end of the summer. The decision will undoubtedly influence the future of oil and gas exploration in the Gulf of Mexico given the important role that contractors play in offshore development and operations.

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