

September 29, 2017

## The Fifth Circuit Restricts BSEE's Enforcement Authority Over Offshore Contractors in the Gulf of Mexico

On Wednesday, September 27, the US Court of Appeals for the Fifth Circuit issued an important decision in [\*United States vs. Moss, No. 16-30561\*](#) that limits the authority of the federal government to bring enforcement actions against offshore contractors for alleged violations of environmental and safety regulations promulgated under the Outer Continental Shelf Lands Act (OCSLA). Because the Fifth Circuit has jurisdiction over the majority of offshore production platforms within the Gulf of Mexico, the decision represents a significant restriction to the Bureau of Safety and Environmental Enforcement's (BSEEs) jurisdiction over contractors in the wake of the Deepwater Horizon incident.

*United States vs. Moss* arose from a 2012 explosion that resulted in three fatalities on an offshore platform operated by Black Elk Energy. 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. Each such knowing and willful violation was charged as a felony, exposing the contractors to up to 10 years in prison and a fine not to exceed \$100,000.

The contractors moved to dismiss the OCSLA-related charges within the indictment, arguing that they cannot be held criminally liable under the Act or its implementing regulations. 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. The United States appealed.

In a 20-page opinion, the Fifth Circuit affirmed the district court's decision, holding that the environmental and safety regulations at issue in the case did not apply to contractors. As part of its analysis, the Fifth Circuit first examined the legislative and statutory history of OCSLA, which was enacted in 1953. Although the Court noted that the language of the statute appeared to limit the Department of Interior's authority to promulgate and enforce safety and environmental regulations against offshore contractors—stating that there was “much to be said for the [contractors'] argument” on this topic—the court ultimately declined to reach this issue.

Instead, the Fifth Circuit focused on whether the regulations in force during the Black Elk incident applied to offshore contractors and thus could give rise to criminal liability for those contractors. The court engaged in a holistic and detailed analysis of the various BSEE

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regulations at issue, ultimately agreeing with the district court that BSEE's regulatory definition of "you" purposely excluded contractors and dismissing at every turn the government's post-Deepwater Horizon rationalizations to the contrary.

While *United States vs. Moss* focused specifically on criminal liability, the Fifth Circuit went out of its way to address the applicability of civil liability for contractors under BSEE's regulations. As the court explained:

"The government's past inaction speaks volumes about the scope of its regulatory authority. . . . BSEE and its predecessors enforced the regulations here at issue for over sixty years only against lessees, permittees and designated operators of offshore production rights. The agency placed responsibility, both civil and potentially criminal, on the named parties for ensuring compliance with the regulations by all of the many contractors, subcontractors and individual employees whose efforts are necessary to develop the Outer Continental Shelf. The agency explicitly disclaimed imposing direct regulatory control on the subordinate parties. The agency's 2011 about-face "flatly contradicts" the agency's earlier, contemporaneous interpretation of the regulations.

These statements were not made in a vacuum. A second challenge to BSEE's enforcement authority to civilly enforce OCSLA against contractors through issuance of Incidents of Noncompliance (INCs), *Island Operating Co. vs. Jewell*, No. 17-130440, is currently pending before the Fifth Circuit. In a direct nod to the *Island* case, the Fifth Circuit stated that BSEE's "new position is hardly entitled to deference in the civil context" and directly cited to the district court's decision in the *Island* case.

Despite the Fifth Circuit's clear rejection of the government's broad interpretation of BSEE's current regulations, the court left open the possibility that BSEE may in the future issue new regulations under OCSLA that are applicable to contractors. If it were to do so, however, the agency would surely face claims that the Act does not authorize BSEE to regulate contractors at all—the issue that the Fifth Circuit declined to reach in *United States vs. Moss*. Given the current administration's view of limited government, however, it seems unlikely that such regulations would be imminent.

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