



Criminal Liability for OCS Contractors Reexamined in Black Elk Decision

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[Jonathan Simon](#), [R. Scott Nuzum](#), and [Jenna Mandell-Rice](#)

On November 16, 2012, a welding accident and explosion on the West Delta Block 32 Platform E—located eight nautical miles off the Louisiana coast in the Gulf of Mexico—resulted in the deaths of three workers and multiple other injuries and environmental consequences. Following the incident, the United States brought criminal charges against two groups of defendants – the owner/operator of the platform and a group of “Contractor-Defendants,” which included the engineering firm hired by the owner/operator to design the construction project that resulted in the accident and the construction crews hired by the owner/operator to conduct the work.

On April 14, 2016, the United States District Court for the Eastern District of Louisiana dismissed the United States’ claims against the Contractor-Defendants. The case, *United States v. Black Elk Energy Offshore Operations, LLC*, is potentially significant because the court found that independent contractors generally cannot be held criminally liable for violations of Bureau of Safety and Environmental Enforcement (“BSEE”) regulations implementing the Outer Continental Shelf Lands Act (“OCSLA”).

This alert summarizes the respective parties’ arguments for and against prosecution, examines the district court’s decision, and discusses the potential implications of the district court’s ruling that contractors are immune from criminal liability under BSEE’s OCSLA regulations.

Summary of Arguments

In the indictment, the United States alleged that the Contractor-Defendants were at fault for the explosion due to their failure to properly inspect the area on the platform where the work was performed, to ensure it was safe to weld in the area, and to obtain written authorization for performing so-called “hot work.” The United States sought to hold the Contractor-Defendants criminally liable under BSEE regulations specifying the requirements that “you” must meet if “you cannot weld in one of the designated safe-welding areas” listed in “your” safe welding plan.

In motions to dismiss the indictment, the Contractor-Defendants argued that BSEE’s regulations do not apply to independent contractors. The Contractor-Defendants argued that they could not be held criminally liable for violations because BSEE’s regulations—which are written in the second person and address what “you” are required to do—define “you” as “a lessee, the owner or holder of operating rights, a designated operator or agent of the lessee(s), a pipeline right-of-way holder, or a State lessee granted a right-of-use and easement.” Because the definition of “you” did not capture independent contractors, the Contractor-Defendants asserted that they were not subject to the regulations.

The District Court’s Decision

The district court agreed that the Contractor-Defendants could not be held criminally liable under BSEE’s regulations. First, the Court rejected the United States’ argument that independent contractors are included in the word “you” as agents of the owner/operator of the platform, finding that general principles of agency do not trump BSEE’s more specific rules. Because BSEE’s regulations require an owner/operator to formally designate its agents, and because the Contractor-Defendants were not so designated, the district court found that the Contractor-Defendants were not included in the definition of “you” as agents.

Second, the court rejected the United States’ argument that the Contractor-Defendants could be held criminally liable under a BSEE regulation imposing joint and several liability to comply with a regulation requiring the lessee “to meet a requirement or perform an action” on the lessee, operator, and “person

actually performing the activity.” Examining the regulatory history, the court found that this provision addresses regulatory compliance, not criminal liability.

Finally, the court rejected the United States’ argument that section 24(c) of OCSLA imposes criminal liability on the Contractor-Defendants by providing for the prosecution of “any person” who knowingly and willfully violates any OCSLA regulation. Referencing its earlier analysis, the court again found that the Contractor-Defendants did not meet BSEE’s definition of “you” and therefore could not be found to violate a regulation that did not apply to them.

Although the court granted the Contractor-Defendants’ motions to dismiss, it did conclude that the case could go forward against the owner/operator of the platform, including on claims that require the owner/operator to have a heightened mental state. The court found that the Contractor-Defendants’ knowledge of criminal acts could be imputed to the owner/operator if they intended, at least in part, to benefit the owner.

Implications

Black Elk marks the first time that a district court has had occasion to address whether BSEE’s regulations allow criminal liability to attach to independent contractors. This is because BSEE’s effort to hold contractors liable—whether criminally or otherwise—is a recent phenomenon. For nearly seven decades, the federal government’s OCSLA enforcement regime was focused strictly on oil and gas lessees and “designated operators.” Following the April 2010 Macondo incident, however, BSEE began issuing Incidents of Noncompliance (“INCs”) to and assessing penalties on independent contractors for a range of offshore incidents.

To date, BSEE’s enforcement of its regulations on lessees and operators, and more recently independent contractors, has been primarily civil in nature. The question of whether contractors can be held civilly liable for violations of BSEE’s regulations is currently before the U.S. District Court for the Western District of Louisiana in *Island Operating Co. Inc. v. Jewell*, 16-civ-145 (filed Jan. 29, 2016). Because the standard for imposing criminal liability is higher than for civil liability—statutes creating criminal penalties are to be strictly construed—it is possible that the district court could interpret BSEE’s regulations to apply civil liability to independent contractors.

Black Elk, however, serves as a strong statement against BSEE’s authority to impose criminal liability on contractors. It remains to be seen whether the United States will appeal the district court’s decision, or whether other district courts may be called upon to answer the same question and decide it similarly. Whether BSEE might also be moved to revise its Part 250 regulations to capture independent contractors is yet another question.

For more information

Van Ness Feldman’s [Upstream Oil & Gas](#) practice regularly monitors and assists clients in navigating BSEE regulations and other issues related to offshore oil & gas development. If you have any questions on this decision or any of BSEE’s regulatory activities, please contact [Jonathan Simon](#) or [Scott Nuzum](#) at 202-298-1800.

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