



JANUARY 2018 • NO. 1

The Courts Strike Down Oilfield Contractor Penalty Liabilities

On December 18, 2017, the U.S. Court of Appeals for the Fifth Circuit dismissed the U.S. government’s appeal regarding a Bureau of Safety and Environmental Enforcement (“BSEE”) Notification of Incident of Noncompliance (“INC”) civil penalty issued against an oilfield contractor. This development brings closure to the long-standing question of whether BSEE has authority to enforce civil and criminal penalties against offshore contractors.

BACKGROUND

Following the tragic explosion and subsequent sinking of the offshore drilling rig *Deepwater Horizon* on April 20, 2010, BSEE issued numerous INCs to offshore lessors and operators as part of larger U.S. government concerted efforts to hold alleged wrongdoers accountable. Surprisingly though, BSEE also attempted to issue INCs to oilfield contractors for reasons such as failing to “protect health, safety, property and the environment,” failing to “take measures to prevent unauthorized discharge of pollutants,” and failing to “take necessary precautions” related to well control. By issuing INCs to contractors, BSEE took novel steps towards imposition of civil penalties and fines in an enforcement posture with which offshore stakeholders at that time had not previously experienced.

In fact, prior to the *Deepwater Horizon* incident, BSEE did not take civil penalty enforcement action against oilfield contractors. Rather, the regulations had been applied to the drilling site operator and lessee. In this regard, the entities to which the regulations apply hinge upon a determination

of the definition of “you.” For example, the regulations require that “*you* must protect health, safety, property, and the environment,” (30 C.F.R. §250.107) and “*you* must take necessary precautions to keep wells under control at all times.” (30 C.F.R. §250.420). The term “you” is defined only as “a lessee, the owner or holder of operating rights, a designated operator or agent of the lessee(s)....” 30 C.F.R. §250.105.

In August 2012, BSEE issued an Interim Policy Document (“IPD”) No. 12-07 entitled “Issuance of an Incident of Non Compliance (INC) to Contractors,” which established parameters by which BSEE would consider issuing INCs to contractors conducting offshore exploration, development, and production activities. While IPD No. 12-07 purported to declare BSEE’s justification for issuance of INCs against contractors at a time when there was governmental focus on the severity of the *Deepwater Horizon* incident, such enforcement steps were nonetheless unprecedented and thus the question of whether BSEE had the authority to issue civil penalties given this background was questionable.

THE “BLACK ELK” CASE AND OILFIELD CONTRACTOR CRIMINAL PENALTY LIABILITY

The issue of criminal liability for contractors was resolved earlier in 2017. Set against the backdrop of the subsequent enforcement posture following the *Deepwater Horizon* incident, the Department of Justice sought *criminal* sanctions for OCSLA violations against the owner and operator of the platform, several oilfield contractors, and the lease holder Black Elk Energy Offshore Operations, LLC, following a platform explosion in 2012. The contractors moved to dismiss the charges on the grounds that OCSLA did not cover their conduct since they were neither an operator nor lease holder. The district court ruled for the contractors, and the government appealed. Ultimately, in September 2017 the Fifth Circuit affirmed the district court’s judgment and ruled against the government, finding criminal liability did not apply to contractors since the regulatory definition of “you” only applied to lessees, permittees and designated operators. *United States v. Moss, et al.*, 872 F.3d 304 (5th Cir. 2017). The Court also noted that agency policy for 60 years had been silent on criminal enforcement against contractors and declined to counter that precedent. A little less than three months later, the Fifth Circuit also resolved the question of contractor’s civil liability as discussed next.

ISLAND OPERATING CO. AND OILFIELD CONTRACTOR CIVIL PENALTY LIABILITY

In June 2012, Island Operating Co.’s (“Island”) employees were working for Apache on a platform on the Outer Continental Shelf. The employees caused a chemical spill and fire that resulted in a discharge in the Gulf of Mexico. Several months later, BSEE issued an INC to Island for a violation of failure to “protect health, safety, property, and the environment by...performing all operations in a safe and workmanlike manner.” Island appealed the issuance of the INC to the Interior Board of Land Appeals (“IBLA”).

In their appeal, Island argued that interpretation of OCSLA did not authorize BSEE to take enforcement measures against service providers such as contractors, but rather only against operators or lease holders. This interpretation of OCSLA was buttressed by decades of precedent by BSEE on failing to take enforcement action against contractors. Nonetheless, on September 25, 2015, the IBLA affirmed BSEE’s issuance of the INC to Island, interpreting OCSLA’s authorities broadly and rejecting the notion that years of civil penalties inaction against contractors amounted to mandatory policy. Island’s appeal to the Western District of Louisiana followed.

On appeal, Island challenged BSEE’s authority to issue an INC and enforce the safety and environmental provisions under OCSLA and its implementing regulations against contractors. *Island Operating Co., Inc. v. Jewell*, 6:16-CV-00145, 2016 WL 7436665 (W.D. La. Dec. 23, 2016). The District Court reviewed both the plain statutory language of the OCSLA, as well as its implementing regulations, and found that while the relevant regulations may appear to have been drafted more broadly to impose a duty on the person actually performing the work, such an interpretation would impermissibly exceed the reach of OCSLA. Thus, the Court found invalid any BSEE enforcement action against Island for failure to comply with OCSLA since Island was neither a lease holder nor a permit holder. More importantly, since Island was not a lease holder or permit holder and thus did not have a duty to comply with applicable OCSLA statutes or implementing safety and environmental regulations, the Court found that BSEE had no authority under OCSLA to impose a civil penalty or fine against Island. In May 2017, the Government appealed to the U.S. Court of Appeals for the Fifth Circuit, and on December 18, 2017, the Fifth Circuit dismissed their appeal, bringing finality to the case. Notably, IPD No. 12-07 is no longer available on the BSEE website.

CONCLUSIONS

The question of whether oilfield contractors were subject to BSEE civil penalties has been a point of consternation for several years in the offshore energy development and exploration sector. With this ruling, the Court effectively struck down BSEE’s overreach and its attempt to apply an overly broad interpretation of OCSLA and its implementing regulations. Importantly, offshore stakeholders now have a clear understanding of their civil—and criminal—risk and liabilities when operating on the OCS.

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