

Fatal Explosions on Oil Platforms in Gulf Lead to Criminal Charges

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The long arm of the law reaches out to sea. When crimes happen on oil rigs, way out on the outer continental shelf (“OCS”), the federal government is in charge. In addition to typical offenses such as assaults against co-workers or theft, crimes can include manslaughter following rig disasters.

Think of the biggest oil spill in U.S. history: the 2010 explosion on a BP exploratory oil well more than 40 miles into the Gulf of Mexico, which killed 11 well workers. Two rig

supervisors were indicted in November 2012 for 11 counts of involuntary manslaughter. The two men, known as Well Site Leaders, were employed by a BP subsidiary. The indictment states that the Well Site Leaders had the duty to ensure that negative testing and other safety measures were followed, but instead, according to the indictment, they were grossly negligent by ignoring indications that the drill pipe was not secure and that pressure was building up unexpectedly.¹

In addition to being charged with involuntary manslaughter under 18 U.S.C. § 1112 for each of the 11 men who died as a result of the explosion, they were charged with 11 counts seaman's manslaughter under 18 U.S.C. § 1115. All 22 manslaughter charges were dismissed in 2015.²

Those were not the only manslaughter charges brought as a result of the BP oil spill. In January 2013, BP Exploration and Production, Inc. pleaded guilty to 11 counts of felony manslaughter, as well as to violations of the Clean Water Act ("CWA") and the Migratory Bird Treaty Act. In its allocution to the charges, in which a defendant admits the facts that led to the charge, BP stated that the Well Site Leaders "negligently caused the deaths of the men" and admitted that the two "observed clear indications that the Macondo well was not secure ... but chose not to take obvious and appropriate steps to prevent the blowout."³ The corporation paid a \$4 billion penalty for the crimes, but nobody went to jail.

Other than a statement that the prosecutors did not believe they could get a conviction of the Well Site Leaders, it is not clear why the involuntary manslaughter charges against the Well Site Leaders were dismissed, especially in light of the statement by BP that the two did the actions as charged. Involuntary manslaughter is a crime in which the defendant did not have malice towards the person who died and the action was either unlawful (but not a felony), or lawful but committed in an unlawful manner or without due caution and consideration. It would seem that a jury could find that the leaders' failure to respond to the non-secured drill pipe and the increasing pressure at the well amounted to a lawful act committed without due caution and circumspection.

The BP oil spill cases illustrate that prosecutors are not limited in what charges are brought by the fact that the place of the crime is on a tiny platform way out to sea. The Outer Continental Shelf Lands Act⁴ ("OCSLA") asserts federal control over submerged lands seaward of state-owned lands as well as the structures on those lands. The OCS is treated as federal land with applicable federal laws. Also, OCSLA makes the civil and criminal laws of the adjacent state applicable to the islands and structures on the OCS; those laws are administered by the federal government.⁵ Therefore, a platform miles away from shore is still under the watchful eye of the federal government. Crimes on those platforms are prosecuted federally in the district court onshore.

Additionally, OCSLA provides for civil and criminal penalties for violating its rules and regulations. At the time the Justice Department was choosing who to prosecute for the BP oil spill, an explosion occurred eight nautical miles off the coast of Louisiana at an offshore oil drilling operation. Three workers died at the well, which was operated by Black Elk Energy Offshore Operations, LLC ("Black Elk Energy"). The explosion occurred on the platform and did not lead to a massive oil spill. This case is noteworthy when considering crimes at sea because it marks the first time charges were brought under OCSLA against a contractor since the law's enactment in 1953.

Offshore oil production is a collaboration. The company purchasing the lease may not be the one that builds the platform, or assembles the equipment, or runs the drilling rig. In the case of Black Elk Energy, there were multiple contractors involved: a contractor to design plans to alter the piping on the platform and two different contractors to provide workers for the welding project. Welding is known as "hot work," which includes activities that cause sparks, and OCSLA has specific regulations on how it should be conducted, as is appropriate for using fire near petroleum. The work was to modify the contraption that measures petroleum at the same time that it transfers the petroleum from the platform, known as a Lease Automatic Custody Transfer ("LACT") unit. The regulations require a specific protocol for hot work, which was followed on the platform for a while. But then a change was necessary, and work order approvals for activities away from the LACT were copied and signed without inspection for work conducted at the petroleum transfer unit. According to the district court, "neither the piping nor the tanks in the LACT area were rendered inert prior to the start of construction in the area," and when a sump line pipe was cut, spilling liquid, "the crew decided that the liquid was water and continued cutting and welding in the area."⁶ Boom.

The explosion occurred November 16, 2012, and the indictment was issued "three years later."⁷ Multiple defendants were charged, including Black Elk Energy, Grand Isle Shipyards, Inc. (one of the contractors that provided the workers), the Wood Group (another contractor) and several individuals with supervisory authority. They were charged with involuntary manslaughter, criminal violations of the CWA, and criminal violations of OCSLA specifically regarding performing hot work.

It is not unusual for federal statutes to provide for both civil and criminal enforcement. The Endangered Species Act, the CWA, and the Migratory Bird Treaty Act, for example, all have one set of penalties for a civil violation and another for criminal. Choosing to prosecute civilly or criminally depends on just how bad the violator meant to be, a/k/a intent, although making that determination is largely up to the prosecutor when bringing the charges. Conviction is up to a jury. Yet it is a surprise that the first example of criminal indictments against a contractor under OCSLA came only after sixty years. The indictments for OCSLA violations, however, failed to bring a conviction against the contractors. The prosecution failed not because a jury found the facts of the case did not support a crime, but because a judge found the semantics of the regulation did not support the charges.

The regulatory word play is due to the regulation's failure to include "contractor" in the definition of "you." (For a while it was thought that writing regulations with "you" rather than "person" made them easier to understand. Some regulations have not been revised since that awkward phase.) OCSLA states that "any person who knowingly or willingly" violates any regulation designed to protect health, safety, or the environment, shall "be punished by a fine of not more than \$100,000, or by imprisonment for not more than ten years, or both."⁸ And that law defines "person" as "in addition to a natural person, an association, a State, a political subdivision of a State, or a private, public, or municipal corporation."⁹ But the OCSLA regulations were written using the second person voice. For example, one of the charges is that the defendants intentionally violated the OCSLA regulation which states "You may not begin welding until: (i) The welding supervisor or designated person in charge advises in writing that it is safe to weld."¹⁰ The contractor-defendants argued, and the courts (both district and court of appeals) agreed, that the regulations did not define "you" to include contractors. Instead, 30 C.F.R. § 250.105 defines "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." Lots of types of people, but not a contractor.

The government argued that because the statute says "person," and the contractors are persons, the law must apply. The Court of Appeals considered how charges were brought

under OCSLA, noting "the government's failure ever before to seek criminal penalties against a contractor or individual employees in the sixty-plus year history of the OCSLA."¹¹ The court looked at statutory language in 43 U.S.C. § 1348(b) indicating OCSLA regulations were to apply to lessees and permittees – without including contractors – as well as the government's own language in describing the regulations: "BSEE stated that it [the regulation] 'does not regulate contractors; we regulate operators.'"¹² Based on this history and this language, the court dismissed the criminal charges against the contractors for OCSLA regulatory violations in September 2017.

The involuntary manslaughter and CWA crimes were not dismissed. The CWA charges were brought against all the defendants, including the contractors and individuals, but the involuntary manslaughter charges were made only against the corporations Black Elk Energy and Grand Isle Shipyard. Black Elk Energy filed for bankruptcy.¹³ 🐦

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Endnotes

1. United States v. Kaluza and Vidrine, Crim. Action No. 12-265, at 18 (E.D. La. *Indictment* Nov. 14, 2012).
2. Oliver Milman, *Manslaughter charges dropped against two BP employees in Deepwater spill*, The Guardian (Dec. 3, 2015).
3. EPA, Summary of Criminal Prosecutions (FY 2013), *BP Exploration and Production, Inc. Pleads Guilty, Is Sentenced to Pay Record \$4 Billion for Crimes Surrounding Deepwater Horizon Incident*.
4. 43 U.S.C. §§ 1331 - 1356b.
5. 43 U.S.C. § 1333.
6. United States v. Black Elk Energy Offshore Operations, LLC, Crim. Action No. 15-197, 2016 WL 1458925, *2 (E.D. La. Apr. 14, 2016).
7. United States v. Moss, 872 F.3d 304, 306 (5th Cir. 2017).
8. 43 U.S.C. § 1350(c).
9. 43 U.S.C. § 1331(d).
10. 30 C.F.R. § 250.113(c)(1)(i).
11. United States v. Moss, 872 F.3d 304, 309 (5th Cir. 2017).
12. *Moss*, 872 F.3d at 312 (referring to language found at 75 Fed. Reg. 63610, 63616 (Oct. 15, 2010)).
13. David Hunn, *The Fall of Black Elk Energy*, Houston Chronicle (Jan. 13, 2017).