

QUITMAN REFINING CO.

IBLA 81-204

Decided August 17, 1981

Appeal from a decision of the Acting Chief, Conservation Division, Geological Survey, affirming the rejection of appellant's application to purchase OCS royalty oil. GS-10-Offshore O&G

Affirmed.

1. Applications and Entries: Generally -- Oil and Gas Leases: Contracts for Sale of Royalty Oil or Gas -- Outer Continental Shelf Lands Act: Generally

An application to purchase offshore royalty oil, submitted in response to a notice published in the Federal Register on January 14, 1980, is properly rejected where the applicant's runs to stills per calendar day exceed the applicant's refining capacity per calendar day.

APPEARANCES: Elizabeth D. Haile, Esq., Washington, D.C., for appellant; L. Poe Leggett, Esq., U.S. Department of the Interior, Washington, D.C., for Geological Survey.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Quitman Refining Company (Quitman) appeals from a decision of the Acting Chief, Conservation Division, Geological Survey (GS), dated October 17, 1980, affirming the rejection of appellant's application to purchase offshore royalty oil.

By a notice published on January 14, 1980, 45 FR 2832, the Secretary of the Interior, in consultation with the Secretary of Energy, determined that small refiners did not have access to adequate supplies of oil at equitable prices. In an attempt to remedy this situation, the Secretary of the Interior made available for purchase by small refiners some 91,000 barrels of royalty oil per day (bpd) pursuant to

section 27(b)(2), Outer Continental Shelf (OCS) Lands Act Amendment of 1978, 43 U.S.C. § 1353(b)(2) (Supp. II 1978). Appellant Quitman submitted a timely application for purchase but was informed orally by GS only 2 days before allocation that it was ineligible to purchase.

In the aforementioned notice, GS required that applications to purchase contain the following information, as authorized by 30 CFR 225a.6:

A. (1) Name and address.

(2) Location of refinery or refineries.

(3) Affiliation or association with any other refiner of oil or diversified company. Specify exact affiliation or association.

(4) Total number of employees including those employed by affiliated or associated companies.

B. (1) Capacity of each refinery as certified by the ERA.

(2) Crude oil currently available from production or by purchase in the open market, broken down by source, amount, and type or grade into the following categories:

(a) From applicant's own and controlled production. Include information on any current sales of owner or controlled production.

(b) By purchases under firm contracts running 6 months or more.

(c) From day-to-day spot purchases or other arrangements.

(d) From crude oil imported by allocation under the mandatory imports program, include details of current exchange agreements connected with such import allocations and any information concerning the disposition of any unused import allocations.

(e) By purchase under all existing Federal royalty oil contracts, both onshore and offshore, and the expiration date of each such contract.

C. (1) Minimum amount and grade of additional crude oil needed to meet existing and future commitments or the needs of existing certified operating capacity. If any of the stated need is based on new or expanded refinery capacity which is inoperable, that amount must be quantified.

(2) Name of fields which, you believe, offer a potential source of crude oil supply.

D. A tabulation, for the last 12 months of operation, of the amount and grade of crude oil refined each month and kind and amount of the principal finished products.

E. A self-certification that the refinery is a small business concern in accordance with the appropriate guidelines of the Small Business Administration, Title 13 of the code of Federal Regulations, Part 121.3-9. [Emphasis supplied.]

Quitman's application provided the necessary information.

The basis for the rejection of Quitman's application appears to be the finding by GS that Quitman's monthly runs to stills 1/ exceeded its refinery capacity. Counsel for appellant maintains that GS incorrectly calculated Quitman's runs to stills by considering data from only 2 of the 12 months requested in the notice. If data had been considered from each of the 12 months in calendar year 1979, counsel maintains (and GS acknowledges) that Quitman would have been eligible to purchase 280 barrels of royalty oil per day. 2/

The best explanation of the standards applied by GS in denying Quitman's application is provided by a letter dated July 31, 1980, from the Deputy Division Chief, Offshore Minerals Regulation, to the Deputy Division Chief, Onshore Minerals Regulation. Therein, it is stated:

In section 27(b)(2), Congress said it was concerned about small refiners who do not have access to adequate supplies, and that the Division was to limit allocations of oil to these refiners. This is why we adopted the principal of need.

Allocations to refiners were limited to the lesser of:

1. 60 percent of a refiner's certified operating capacity, as required by 30 CFR 225(a)(3);
2. a refiner's excess refining capacity; or,

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1/ "Runs to stills" is defined by the Deputy Division Chief, Offshore Minerals Regulation, as the amount of oil run through a refinery. See letter of July 31, 1980, quoted infra.

2/ Letter of Mar. 29, 1980, from the Deputy Division Chief, Offshore Minerals Regulation, GS, to Chief, Legislation Regulations, and Appeals, GS.

3. the volume of crude requested by a refiner. [3/]

The determination of whether a refiner had excess refining capacity was made in the following manner.

1. The total refining capacity of each small refiner in barrels per calendar day as certified as operable on or before April 1, 1980, by the Economic Regulatory Administration (ERA), was identified. This equaled 6,600 barrels per day for Quitman.

2. The runs to stills (amount of oil run through the refinery) on a calendar day basis was determined in all cases as follows:

A. The Department of Energy (DOE) supplied runs to stills figures for the months of November and December 1979 and January 1980. These were the latest figures available at the time the calculations were made by the Geological Survey (GS).

B. The two closest agreeing months were selected for averaging to get a representative runs per calendar day for each refiner. \* \* \*

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<u>Quitman</u>	<u>DOE runs to stills</u>	<u>Processing Agreements</u>	<u>GS runs to stills</u>
November 1979	197,854	--	197,854
December 1979	210,659	--	210,659
January 1980	216,743	--	216,743

Average runs per calendar day:

November 1979 - 6,595

December 1979 - 6,795

January 1980 - 6,991

December and January are closest months:

$(210,659 + 216,743) \div 62 = 6,894 \text{ b/d.}$

\* \* \* \* \*

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3/ A definition of "excess refining capacity" is provided by an example set forth by the Deputy Division Chief in his July 31, 1980, letter: "A refiner has an existing certified operating capacity of 10,000 barrels per calendar day. The refiner has a supply of 3,000 barrels per calendar day. Therefore, the amount of additional crude needed to meet the needs of existing certified operating capacity is 7,000 barrels per calendar day, or that refiner's excess refining capacity."

Several refiners called to our attention that their other supply contracts were going to expire soon or had expired already. We did not change the figures for this because we had no way of knowing whether these refiners had made (or would make) other arrangements to purchase the oil elsewhere. It was more reliable to look at the amount of oil they had processed most recently. Just because a supply contract is to expire does not necessarily mean that the source will no longer be available.

3. The runs to stills figures were subtracted from the ERA certified capacities to yield excess refining capacities. In this case, the data for \* \* \* Quitman were as follows:

$$\text{capacity} - \text{runs} = \text{excess refining capacity}$$

\* \* \* \* \*

$$\text{Quitman } 6,600 \text{ b/d} - 6,894 \text{ b/d} = [ ] \text{ b/d}$$

Therefore, \* \* \* Quitman did not demonstrate any need for royalty oil. Quitman was ruled ineligible for an allocation.

Quitman maintains that use of its November and December 1979 runs to stills figures was arbitrary and inequitable, because these months were not representative of actual crude oil supplies. Appellant notes that it was utilizing crude oil from its inventory during these months due to down time at the refinery in September. Eligibility for offshore purchases, Quitman contends, should be based upon figures over a 12-month period consistent with the requirements of the notice and 30 CFR 225a.6(f). <sup>4/</sup> It charges that it was the only refiner that complied with all OCS requirements but did not receive a single barrel in the allocation.

In its statement of reasons on appeal, appellant argues that if GS departs from the standards in its regulations at 30 CFR Part 225a, it must give all parties sufficient notice of such changes as required by section 3 of the Administrative Procedure Act (APA), 5 U.S.C. § 552(a)(1976). That section states in part:

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public --

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<sup>4/</sup> These regulations were superseded on March 13, 1980, by the issuance of new regulations by the Department of Energy. See 45 FR 9526 (Feb. 12, 1980). The requirement of a tabulation for a 12-month period has been retained in the new regulations at 10 CFR 391.140(a)(5).

(D) substantial rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be \* \* \* adversely affected by, a matter required to be published in the Federal Register and not so published.

Appellant argues that the January 14, 1980, Notice is a rule applicable to all refineries that sought to apply for an allocation of OCS royalty oil. <sup>5/</sup> The substitution by GS of a new standard under which a refiner's runs to stills are determined by a 2-month period, counsel maintains, must be preceded by notice, and an opportunity for comment. 5 U.S.C. § 553 (1976). Absent such proceedings, the GS decision regarding Quitman's eligibility must be invalidated.

Counsel's contentions are answered in the negative by Little America Refining Co. and Sinclair Oil Corp. v. Cecil D. Andrus and Charles W. Duncan, Jr., No. C80-00673 (D. Wyo. Mar. 4, 1981). Therein Judge Brimmer held that the Department of the Interior was not promulgating a new rule or regulation with the issuance of the January 14, 1980, notice but was rather administering the regulations previously in effect at 30 CFR § 225. Alternatively, Judge Brimmer held that if the notice constitutes a rule as defined by the Administrative Procedure Act, it is one of agency procedure falling within the exception to the notice and hearing requirements of the APA and not a substantive rule requiring compliance with 5 U.S.C. § 553(b)(1976).

Although the royalty oil at issue in Little America Refining Co. was onshore oil, we do not believe that a different result should follow in the instant case involving offshore oil. The notice of January 14, 1980, required an applicant for offshore royalty oil to submit information which would permit GS to determine whether the applicant could participate in the proposed sale and the extent of such participation. The notice did not set forth the method of calculating runs to stills which GS in fact used in holding that Quitman had no excess refining capacity. Although the notice specified that an applicant submit a tabulation for the last 12 months of operation, there is nothing in the notice to indicate whether the information from this entire period, or merely part, would be used to calculate an applicant's need for royalty

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<sup>5/</sup> Counsel refers us to 5 U.S.C. § 551(4)(1976) for a definition of a "rule":

"[R]ule means the whole or a part of an agency statement of general particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency \* \* \*."

oil. Need could also be determined by the sources of supply available to an applicant, whether from the applicant's own production or by purchase from other sources. We note that GS justifies its use of a 2-month average in calculating runs to stills by citing administrative convenience necessitated by a high number of applicants (which totaled 114).

There is no suggestion in the record that Survey used a different standard in calculating Quitman's excess refining capacity than it used in calculating a similar figure for other applicants. On the contrary, it would appear from the Deputy Division Chief's letter of July 31, 1980, quoted above in part, that GS used a 2-month average in calculating runs to stills for all applicants. While we acknowledge that GS's use of a 2-month average was not made known in either the regulations or the notice, we cannot say that its action was unfair or arbitrary. Even had GS resorted to formal rulemaking procedures to announce its intended utilization of the "2-month average" formula, this would not have improved Quitman's position or altered the end result. Quitman acknowledges that GS had the authority to select a different standard to evaluate applications, but insists that such must be promulgated in accordance with the Administrative Procedure Act. We disagree, but wish to note that in any event, appellant has failed to show how it would have been benefited.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Acting Chief is affirmed.

Edward W. Stuebing  
Administrative Judge

We concur:

Gail M. Frazier  
Administrative Judge

Douglas E. Henriques  
Administrative Judge

