

ANADARKO PRODUCTION CO.

IBLA 85-251

Decided March 25, 1986

Appeal from a decision of the Montana State Office, Bureau of Land Management, affirming nine incidents of noncompliance and assessments of liquidated damages totalling \$ 2,250. M-14-20-0256-4032, M-14-20-0256-4574.

Reversed.

1. Oil and Gas Leases: Civil Assessments and Penalties

Where BLM issues notices of incidents of noncompliance to an oil and gas operator for failure to seal "appropriate valves" under 43 CFR 3162.7-4(a) and assesses the operator \$ 250 per violation in accordance with 43 CFR 3163.3(j), and on appeal the operator establishes that, as applied to the operator's situation, the "appropriate valve" requirement is ambiguous, the violations and assessments will be overturned.

APPEARANCES: Marla J. Williams, Esq., for Anadarko Production Company, Denver, Colorado.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Anadarko Production Company (Anadarko) appeals the December 20, 1984, decision of the Bureau of Land Management (BLM), Montana State Office, upholding nine notices of incidents of noncompliance (INC's) against Anadarko. ^{1/} BLM issued the INC's following a November 6, 1984, onsite inspection of Anadarko's oil and gas operations on oil and gas leases M-14-20-0256-4574 and M-14-20-0256-4032 in Valley County, Montana. The INC's charge Anadarko with failure to seal water disposal tank recycle valves (DH 2-1, DH 2-7, DH 3-3), oil storage tank recycle valves in the open position during recycling (DH 2-2, DH 2-5, DH 3-1, DH 3-2), and recycle valves at the header, while recycling (DH 2-3, DH 2-6). All the INC's cite Anadarko with violating 43 CFR 3162.7-4(b)(1). DH 2-1, DH 2-7, and DH 3-3 state that the failure to seal the equipment also violated 43 CFR 3162.1 and 43 CFR 3162.7-1(d). Pursuant to 43 CFR 3163.3(j), BLM assessed Anadarko \$ 250 per violation, totalling \$ 2,250.

^{1/} This decision represented the culmination of Anadarko's request, pursuant to 43 CFR 3165.3, that the Montana State Office conduct a technical and procedural review (TPR) of 10 INC's. The decision upheld nine INC's and determined the \$ 2,250 assessment was correct. It reversed the other INC wherein BLM charged Anadarko with unauthorized flaring of gas.

In its statement of reasons Anadarko argues that 43 CFR 3162.7-4(b)(1), which requires that "appropriate valves" must be sealed, is ambiguous and that

the consequences of the regulation's ambiguity are particularly onerous where each instance of noncompliance results in an automatic charge of \$ 250 without an opportunity to correct the situation. The onerous consequences are further amplified by the fact that appellant will now have a "history of previous violations," that will translate into higher penalties under 43 CFR 3163.4-1(e) in the event of any future violations.

(Statement of Reasons (SOR) at 4).

Anadarko asserts it "reasonably interpreted 3162.7-4(b)(1) to require use of seals in such a manner that a theft, through reasonably foreseeable means, could be detected" (SOR at 5). It notes that unlike locks, seals do not prevent unauthorized entry. Seals only show when a closed valve has been opened or when an open valve has been closed, according to appellant.

With regard to DH's 2-1, 2-7, and 3-3, BLM stated the water tank recycle valve provides "an unprotected access or connection in the recycling piping arrangement" (TPR Decision at 2). Appellant states, however, that none of these valves is connected to the recycling system and no oil could be diverted into a water storage tank through such a valve.

DH's 2-3 and 2-6 charge Anadarko with failure to seal recycle valves at the header while recycling. Anadarko states the header valve is not used in the recycling process but is used only in the "rare instance that hot oil is needed to thaw piping, or to flush the system via reverse flow" (SOR at 6). Appellant also argues that the seal requirements do not apply to headers.

Finally, as to DH's 2-2, 2-5, 3-1, and 3-2, Anadarko states it was informed by BLM's inspection officer that if it had sealed the header valves mentioned in DH's 2-3 and 2-6, the system would have been "closed" and appellant would not have been required to seal the oil tank recycle valves in the open position during recycling. ^{2/} Anadarko contends it is unreasonable to assume an operator would interpret 43 CFR 3162.7-4 precisely as did the BLM official, given the regulation's ambiguous language.

Anadarko claims 43 CFR 3163.3(j), as interpreted by BLM, is a de facto penalty. 43 CFR 3163.3(j) provides for a \$ 250 assessment for failure to maintain effective seals, required by applicable regulations, orders, and notices. Anadarko argues the operator must be informed its method of operation is in need of modification or correction prior to assessment, and the operator must be given an opportunity to correct the INC's prior to assessment.

^{2/} See, however, comments at 48 FR 31799 (July 11, 1983), which are set out in this opinion, *infra*. In those comments "headers" are specifically mentioned as not included as valve for which seals are required.

BLM filed no answer in response to Anadarko's appeal.

[1] In each INC Anadarko is cited with violating 43 CFR 3162.7-4(b)(1). 3/ That regulation provides:

All appropriate valves on lines entering or leaving oil storage tanks shall be effectively sealed during the production phase and during the sales phase. The piping and connections in a closed system which are tamper proof or tamper resistant are essentially protected from unauthorized or undocumented entry, but the piping and connections in an open system shall be protected. For a minimum of 6 years the operator shall maintain a record of seal numbers used and shall document on which valves or connections they were used as well as when they were installed and removed. The site facility diagram(s) shall show which valves will be sealed in which positions during both the production and sales phase, and shall show whether the piping is an open or closed system.

43 CFR 3162.7-4(b)(1).

BLM noted in the preamble accompanying the final rulemaking for this regulation: 4/ "Almost all commenters stated that the proposed regulations were unclear. * * * Several commenters were concerned with such items as what constitutes an appropriate or effectively sealed valve * * *." 48 FR 31798-99 (July 11, 1983). In the final rules BLM included a definition of "appropriate valves." Id. That term is defined at 43 CFR 3162.7-4(a) as: "Those valves in a particular piping system, i.e., fill lines, equalizer lines, sales lines, circulating lines, drain lines, or other lines, that must be sealed during a given phase of operations." Thus, inserting the definition in 43 CFR 3162.7-4(b)(1), would result in the regulation reading: "[a]ll * * * valves

3/ Anadarko is also cited in DH's 2-1, 2-7, and 3-3 with violating 43 CFR 3162.7-1 and 43 CFR 3162.1. 43 CFR 3162.7-1(d) requires the lessee to conduct operations in a manner so as "to prevent unavoidable loss of oil or gas." Among other requirements 43 CFR 3162.1 requires the lessee to "comply with applicable laws and regulations, with lease terms" and to conduct operations so as to ensure proper site security of lease hold production, and "maximum ultimate economic recovery of oil and gas with minimum waste." Anadarko argues these provisions are too general to imply a duty to seal the recycle valve on a water storage tank that is not even connected to the recycle line. In addition, Anadarko charges there is no basis for automatic assessment under 43 CFR 3163.3 for violations of these regulations. Anadarko's arguments are well taken. These regulations do not support an assessment under 43 CFR 3163.3.

4/ The preamble language accompanied the final rulemaking for 30 CFR 221.37(b)(1), which was the previous codification for 43 CFR 3162.7-4(b)(1). 30 CFR Part 221 was redesignated as 43 CFR Part 3160. 48 FR 36583 (Aug. 12, 1983).

that must be sealed during a given phase of operations * * * shall be effectively sealed." Appellant identifies this as "circular language," and asserts the question left unanswered by the regulation is "which valves need to be sealed in which position and when?" (SOR at 5).

The preamble to the final rules stated with regard to the sealing requirement:

It is not possible to cover every variation in production and storage facilities in existence due to the variety of circumstances. Equipment and handling of production are more or less dictated by the type, quantity, and quality of the production, and climatic and topographic considerations. In recognition of this fact, the final minimum standards are directed only at the sales and storage facilities and to the piping system related to such facilities, i.e., fill lines, equalizer lines, sales lines, circulating lines, and drawdown lines. At this time, the standards are not applicable to the production vessels, headers, wellheads, or connections thereon. Based on the definitions provided and considering the various activities that routinely occur at production facilities and the construction of the piping systems, it is believed that valves or connections that could permit unauthorized access to production and undocumented movement of production from the storage or sales facilities can be identified and protected. The seal requirements depend on continuing activity, i.e., any tank from which sales are to be made by hand gauging must, prior to sales, be completely isolated by use of seals. During the sales phase, only the sales outlet valve may be opened. Once the sale is completed, the sales valve is required to be closed and sealed and valves on the other lines opened as needed for production. This standard will not be applicable to sample cocks on storage or wash tanks nor will it apply to production fill lines from separators on gas well installations where each individual well has its own production facilities and contains only one tank for the storage of produced condensate. It will, however, apply to all lines leaving the tank. This exception is being made due to the small volume of production, the frequency of gathering such production, and the volatile nature of condensate.

48 FR 31799 (July 11, 1983).

This explanation admits the difficulty of covering the myriad of circumstances in the field. However, neither the regulation nor the preamble can be interpreted as requiring the sealing of all valves.

The Board has considered two appeals in which the appellants were charged with failure to seal valves. Yates Energy Corp., 89 IBLA 150 (1985), and Farmers Union Central Exchange, 87 IBLA 332, 92 I.D. 281 (1985). In neither of those cases did the appellants challenge the substance of 43 CFR 3162.7-4(b)(1), rather they were concerned with the assessments. They did

not question BLM's findings that certain valves were not effectively sealed. Thus, they are distinguishable from this case where Anadarko disputes the necessity for the seals or its ability to foresee the necessity based on the language of the regulation.

Appellant's arguments have pointed out the flaws of 43 CFR 3162.7-4(b)(1). The lack of specificity and the circular language, based on the definition of appropriate valves, lead to the conclusion that, when applied to the facts in this case, the regulation is ambiguous. It is not clear the valves in question were "appropriate valves" requiring sealing pursuant to 43 CFR 3162.7-4(b)(1).

BLM assessed Anadarko a total of \$ 2,250 for nine INC's under 43 CFR 3163.3(j), which provides that the United States may recover liquidated damages for the lessor's "failure to maintain effective seals required by the regulations in this part and by applicable orders and notices." (Emphasis added.) Since the regulations are unclear whether the specific valves cited in Anadarko's INC's must be sealed, we hold that BLM improperly assessed Anadarko \$ 2,250 under 43 CFR 3163.3. 5/

We note that effective March 22, 1985, BLM suspended assessments pursuant to 43 CFR 3163.3(c) through (j), 6/ while BLM reviewed 43 CFR Part 3160 in order to propose revisions to those regulations. 50 FR 11517 (Mar. 22, 1985). See also IM No. 85-384 (Apr. 16, 1985); IM No. 84-594 Change 4, Apr. 16, 1985). BLM stated in the Federal Register notice:

It is the intent of the Bureau to more clearly define the operational requirements of the Federal Oil and Gas Royalty Management Act [FOGRMA]. While the necessary in-depth analysis of these regulations is occurring, the Bureau, through the exercise of its delegated discretionary authority, is taking interim actions to: (1) Suspend the use of the assessment for noncompliance provisions of 43 CFR 3163.3 (c) through (j), except where actual loss

5/ Even assuming assessments were proper, in Instruction Memorandum (IM) No. 84-594 Change 3 (Jan. 4, 1985), BLM placed a maximum on assessments under each paragraph of 43 CFR 3163.3(c) through (j). Regardless of the number of INC's issued for failure to maintain effective seals, BLM set the maximum assessment under 43 CFR 3163.3(j) as \$ 500.

6/ Suspension of 43 CFR 3163.3(j) occurred after issuance of BLM's decision in this case. While that regulation was in effect at the time BLM took its action, we have in the past applied an amended version of a regulation to a pending matter where to do so would benefit the affected party and there were no countervailing public policy reasons or intervening rights. James E. Strong, 45 IBLA 386 (1980). We need not address that issue in this case, since 43 CFR 3163.3(j) does not apply because there was no violation of the seals regulation. However, we note that in Somont Oil Co., 91 IBLA 137 (1986), the Board applied the Strong principle to a case concerning the suspended assessment regulations.

or damage can be ascertained; (2) suspend the application of administrative penalties under 43 CFR 3163.4-1(a) except for failure to abate major violations that are required to be corrected in less than 20 days and which have the immediate potential to affect public health and safety, cause significant environmental damage, affect production or royalty accountability, and those where drilling or other operations are conducted without prior approval; and (3) delay processing of inspection and enforcement assessments for the period October 22, 1984, to January 4, 1985, pending a ruling from the Comptroller General regarding the Bureau's request to retroactively apply a "cap" on all Bureau assessments. [Emphasis added.]

50 FR 11517 (Mar. 22, 1985).

Subsequently, on January 30, 1986, BLM proposed rules to clarify the operational requirements of FOGRMA and the Mineral Leasing Act contained in 43 CFR Part 3160. 51 FR 3882 (Jan. 30, 1986). BLM stated in the preamble to the proposed rules:

Several comments suggested that the Bureau of Land Management revise the regulations so that they more closely follow the intent of the law as to site security and seals. * * *

The Bureau of Land Management has reviewed all of the comments in the context of the intent and actual requirements of the Federal Oil and Gas Royalty Management Act. After a review with Bureau field officials and visits to oil fields, it was determined that the regulations relating to site security and seals should be revised to follow more closely the intent and language of the Act, to emphasize production accountability, and to provide local flexibility to Bureau managers to address the varying oil field characteristics and differences. The proposed rulemaking revises the requirement for seals so that they would be applicable to the storage and sales facilities only and would clarify the existing regulations to provide uniformity in use and enforcement. [Emphasis added.]

51 FR 3884 (Jan. 30, 1986).

In addition, BLM further stated:

The significant changes contained in this proposed rulemaking relate to site security requirements (§ 3162.7-4), assessments under the various Acts authorizing the leasing of minerals (§ 3163.3), penalties under the Federal Oil and Gas Royalty Management Act (§ 3163.4) and technical procedural review procedures (§ 3165.3).

Site security requirements have been simplified and clarified by the proposed rulemaking to require that all lines entering

or leaving tanks shall be effectively sealed during the production or sales phases, as appropriate. [Emphasis added.]

51 FR 3887 (Jan. 30, 1986).

Under the proposed rulemaking, 43 CFR 3162.7-4(b)(1) is revised to require that:

All lines entering or leaving oil storage tanks shall have valves capable of being effectively sealed during the production and sales operations unless otherwise modified by other subparagraphs of this paragraph, and any equipment needed for effective sealing shall be located at the site. For a minimum of 6 years the operator shall maintain a record of seal numbers used and shall document on which valves or connections they were used as well as when they were installed and removed. The site facility diagram(s) shall show which valves will be sealed in which position during both the production and sales phases of operation.

51 FR 3889 (Jan. 30, 1986).

Finally, the proposed rules eliminate the assessment for the failure to maintain seals, 43 CFR 3163.3(j). In the preamble BLM states: "Assessments under the various Acts authorizing the leasing of minerals would be modified by the proposed rulemaking to eliminate automatic assessments 7/ for noncompliance involving violations of §§ 3163.3(d), (e), (g), (h), and (j) of the existing regulations." (Emphasis added.) 51 FR 3887 (Jan. 30, 1986). 8/ Therefore, under the proposed rules, a lessee cited with the failure to maintain effective seals required by regulations, orders and notices would be given a specified time in which to comply with a notice, written order or instruction pursuant to proposed rule 43 CFR 3163.3(b)(1). Hence, under such a rule, BLM would not automatically assess a lessee but would be required to give it notice that it had violated the seal requirements. The absence of

7/ It is not clear that the prior regulations required automatic assessments. However, it was BLM's stated policy to automatically assess for violations of 43 CFR 3163.3(c)-(j). See IM No. 84-594 (July 14, 1984); IM No. 84-594 Change 3 (Jan. 4, 1985).

8/ 43 CFR 3163.3, as proposed, provides that certain instances of noncompliance are violations of such a serious nature as to warrant the imposition of immediate assessments, which may be retroactive, upon discovery. Among violations which warrant immediate assessment are the failure to install blow out preventer equipment (43 CFR 3163.3(a)(1)); drilling without approval (43 CFR 3163.3(a)(2)); and abandoning a well without prior approval (43 CFR 3163.3(a)(3)). Other instances of noncompliance will be subject to assessment of \$ 250 upon discovery of nonabatement for failure to comply with a notice, written order or instruction of the authorized officer. 43 CFR 3163.3(b); 51 FR 3889 (Jan. 30, 1986). Failure to have effective seals would be such a violation.

such prior notice is the gravamen of this appeal. While neither the suspension nor the proposed regulations are dispositive herein, to the extent they reflect BLM's position concerning the seal requirements, we note that our holding is consistent with that posture.

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 Montana State Office is reversed.

Bruce R. Harris
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

R. W. Mullen
Administrative Judge.

