

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, affirming an incident of noncompliance citation for failure to obtain approval prior to performing a water shut-off operation and approving an assessment of \$250. NM 67612.

Affirmed in part, vacated in part, and remanded.

1. Oil and Gas Leases: Generally -- Regulations: Applicability

When the only reasonable construction of 43 CFR 3162.3-2(a), as evidenced by prior regulations, the rule-making process, and other regulations, is that "water shut-off" is a subsequent well operation requiring prior approval, an operator under an oil and gas lease cannot rely on the mispunctuation of the regulation as an ambiguity which can excuse failure to obtain approval prior to commencing with water shut-off activities.

2. Oil and Gas Leases: Civil Assessments and Penalties

An assessment pursuant to 43 CFR 3163.3(d) may be vacated by this Board, in view of the suspension of that regulation and change in Department policy that such assessments should be automatically levied.

APPEARANCES: Michael Cunningham, Esq., Farmington, New Mexico, for Bolack Minerals Company.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Bolack Minerals Company (Bolack) appeals from a decision of the New Mexico State Office, Bureau of Land Management (BLM), dated March 20, 1985, affirming an Incident of Noncompliance (INC) citation issued by the Farmington, New Mexico, Area Manager, BLM, on February 22, 1985, and a resulting assessment of \$250.

Bolack operates the No. 1 Gallo Canyon Well in sec. 13, T. 23 N., R. 6 W., New Mexico Principal Meridian, Rio Arriba County, New Mexico, under oil and gas lease NM 67612. On February 15, 1985, Bolack filed with BLM a copy of Form 3160-5 (Nov. 1983) - SUNDRY NOTICES AND REPORTS ON WELLS - to describe recent operations it had conducted on this well. In the space provided on the form, this filing was characterized by Bolack as a "subsequent report of water shut-off." In the report, Bolack describes efforts to locate sources of excess water and to "seal-off" responsible formations during the period from January 9 through February 8, 1985.

On February 22, 1985, the Farmington Area Manager, BLM, issued an INC for failure to obtain prior approval under 43 CFR 3162.3-2(a) before performing the water shut-off operation. BLM levied an assessment of \$250 pursuant to 43 CFR 3163.3(d).

In a letter received by BLM on March 5, 1985, Bolack requested a technical and procedural review in accordance with 43 CFR 3165.3. In the letter, Bolack asserted that its determination to shut-off excess water sources, decided while in the process of repairing well tubing, "substantially enhanced [well] production" and "actually prevented 'loss and damage to the lessor.'" (Emphasis in original.) It argued that if it had not acted responsibly and filed the subsequent report, its corrective measures would never have been disclosed and BLM would not have the occasion to issue the INC. Bolack alleged such "unnecessary and impractical" enforcement of the regulation causes many other operators to perform remedial measures without disclosure to BLM, and argues it should not be subjected to selective treatment because it filed a report.

In its March 20, 1985, decision, the New Mexico State Office, BLM, affirmed the INC and resulting assessment after determining that the facts indicated the operator had violated the prior approval requirement found in 43 CFR 3162.3-2(a). In the decision, BLM held that the water shut-off operation performed by Bolack had "potential to damage the well" despite an assertion that the operation resulted in improved conditions. BLM concluded the potential danger to the well posed by the operation was sufficient reason to require prior BLM approval. Bolack appeals from the March 20, 1985, decision.

In its statement of reasons, appellant argues BLM's decision to issue the INC is unreasonable because the water shut-off procedure cited by BLM in the INC is not listed among those actions in 43 CFR 3162.3-2(a) which require prior approval. Bolack contends the "water shut-off conversion to injection" operation specifically identified in the regulation distinctly differs from the "water shut-off" procedure which BLM cited as an activity enumerated in the regulation. Appellant asserts the reason for BLM's inaccurate citation lies in its incomplete reading of the regulation. As for the assessment, appellant argues the decision to levy one is arbitrary and capricious because 43 CFR 3163.3 requires the presence of actual damages before an assessment may be imposed. It contends the "potential" nature of a loss as stated by BLM renders the regulation inapplicable to this situation and asserts that losses from a failure to obtain prior approval are "de minimus." Moreover, appellant alleges the assessment process has violated its due process rights.

[1] As published, the Departmental regulation at issue, 43 CFR 3162.3-2, reads:

§ 3162.3-2 Subsequent well operations.

(a) A plan proposing further well operations shall be submitted by the lessee on Form 9-331 for approval by the authorized officer prior to commencing operations to redrill, deepen, perform casing repairs, plug-back, alter casing, perform nonroutine fracturing jobs, recomplete in a different interval, perform water shut-off conversion to injection. A subsequent report on these operations also will be filed on Form 9-331. The authorized officer may prescribe that each plan contain all or a portion of the information set forth in § 3162.3-1 of this title.

(b) Unless additional surface disturbance is involved and if the operations conform to the standard of prudent operating practice, prior approval is not required for routine fracturing or acidizing jobs, or recompletion in the same interval; however, a subsequent report on these operations must be filed on Form 9-331.

(c) No prior approval or a subsequent report is required for well cleanout work, routine well maintenance, or bottom hole pressure surveys.

This regulation provides three alternatives for reporting subsequent well operations to BLM; *i.e.*, prior approval with subsequent report, subsequent report without prior approval, and no prior approval or subsequent report. Each approach, of course, depends upon the operation to be performed. As the regulation requires an operator who performs a subsequent well operation to adopt the approach of the subsection under which the operation is identified or listed, the operator has a responsibility to determine which category applies. It is without doubt that water shut-off is a subsequent well operation. Scrutiny of subsection (b), those operations requiring only a subsequent report, and subsection (c), those operations needing neither prior approval nor subsequent report, does not reveal the type of operation at issue here or any other category which can be construed as being remotely similar. As noted by appellant, subsection (a) contains the following phrase: "perform water shut-off conversion to injection." The appealed decision is based upon BLM's conclusion that this phrase identifies two separate and distinct operations. Appellant challenges that conclusion and suggests, unless the phrase is applied as written, the regulation is ambiguous and should be unenforceable against water shut-off operations not involving conversion to injection.

The Department has long recognized that regulations should be so clear there is no basis for noncompliance. See James M. Chudnow, 82 IBLA 262 (1984); Charles J. Rydzewski, 55 IBLA 373, 88 I.D. 625 (1981); A. M. Shaffer, 73 I.D. 293, 299 (1966). The Board has held that where the failure to comply with a regulation has been caused by ambiguous language, an individual should not suffer for the drafter's mistake. Charles J. Rydzewski, *supra*. However, a key to this principle for waiving compliance is that noncompliance "has

been caused by" the ambiguous language. Hickory Creek Oil Co., 63 IBLA 313 (1982). Thus, ambiguity in a regulation can excuse compliance with the terms of the regulation only where the failure to comply is caused by the presence of the ambiguity. Id.

As a result, the issue to be determined is whether the language of 43 CFR 3162.3-2 should be construed to identify "water shut-off" as an operation encompassed by subsection (a), despite the fact that the language appearing therein is not precise. In order to effect the meaning of the regulation favored by BLM, the regulation must be read as if a comma were inserted between "water shut-off" and "conversion to injection." Determining the acceptability of such a practice requires the employment of rules of interpretation. The meaning of a duly promulgated regulation should be determined in accordance with the rules of statutory construction. Sutherland Stat. Const. (Sutherland) § 31.06 (4th Ed.); see Trustees of Indiana University v. United States, 618 F.2d 736, 739 (Ct. Cl. 1980); KCMC, Inc. v. F.C.C., 600 F.2d 546 (5th Cir. 1979).

An insertion may be supplied in the provision of a statute or regulation in order to give the provision effect, where omission is due to inadvertence or clerical error, or where omission makes the provision meaningless or unreasonable. See Sutherland, supra at § 47.38. Where punctuation is involved, the provision should be construed as punctuated in a manner which will effectuate the intent of the drafter. See id. at § 47.15.

We first review the phrase in question "perform water shut-off conversion to injection" without the benefit of proposed punctuation. We are unable to verify such terminology exists for any of the practices employed in the oil and gas industry. By comparison, "perform water shut-off" is a common procedure where cement is employed to seal off water-bearing formations. See H. Williams and C. Meyers, Manual of Oil and Gas Terms, 961 (6th ed. 1984), reprinted in, 8 H. Williams and C. Meyers, Oil and Gas Law, 961 (1984). Likewise, conversion to injection describes a common process where a well is modified for injecting other fluids under pressure into underground formations. Id. at 423. There is no comparable definition for "water shutoff conversion to injection," or anything which could be construed as a definition of this term. The regulatory interpretation favored by BLM would, therefore, be the likely interpretation accepted by the industry.

The background of the regulation, the preface to promulgation, and prior regulations addressing this subject, also provides valuable guidance in determining the purpose of a regulation. See Sutherland, supra at § 48.03. Until 1982, any water shut-off operation performed on a well required prior approval of the procedures and methods to be employed in the operation and a follow-up report within 15 days under 30 CFR 221.23 and 221.28 (1982). During the process of promulgating new regulations, the Department proposed that water shut-off operations require only follow-up reports, provided the method employed conformed to the standard of prudent operating procedures. 46 FR 56564, 56569 (Nov. 17, 1981) (proposed 30 CFR 221.27). However, that proposal was abandoned when the final version of 30 CFR 221.27, now codified as 43 CFR 3162.3-2, was adopted. See 47 FR 47758, 47770 (Oct. 27, 1982). The preamble to this final rulemaking reads in part: "A number of comments suggested that § 221.27 be clarified to

better define the specific type of operation pertinent to each reporting requirement. This suggestion was adopted by utilizing separate paragraphs to list the well operations having the same reporting requirements." 47 FR at 47763. It is evident that the paragraphs comprising the final version of the new regulation were intended to include all common types of subsequent well operations. However, two major operations addressed in previous regulations and listed in the proposed rule-making, "convert to injection" and "water shutoff," are only recognizable in the published version of the final regulation as the phrase "water shut-off conversion to injection."

Another indication that the phrase is misspelled is found in 43 CFR 3163.3(d), the regulation under which the assessment was levied. That regulation reads:

(d) For failure to obtain approval of a plan for subsequent well operations before commencing work on a well to redrill, deepen, convert to injection, using any well for gas storage or water disposal, or any other operation requiring prior approval under § 3162.3-2 of this title, \$250. [Emphasis added.]

Thus, the process "convert to injection" is identified in this regulation as an operation listed in 43 CFR 3162.3-2. However, under appellant's interpretation of 3162.3-2(a), the reference in 43 CFR 3163.3(d) to "convert to injection" would be rendered meaningless. Where the interpretation of a regulation would obscure the meaning of a related regulatory provision, such construction is undesirable. See Sutherland, supra at §§ 51.01 through 51.03.

Finally, an aid in determining the intended meaning of 43 CFR 3162.3-2(a) may be found in the Department's proposal to amend the aberrant phrase to read: "perform water shut-off, commingling production between intervals, conversion to injection." See 51 FR 3882, 3889 (Jan. 30, 1986). With this amendment, the Department has affirmed the proper interpretation of 43 CFR 3162.3-2. The stated rationale for the amendment is the correction of a previous error which caused the identified operation "commingling of production" to be inadvertently omitted from the regulation. 51 FR at 3886. There is no mention of a problem encountered by operators or others in construing the published regulation to identify water shut-off as a distinct operation requiring prior approval.

Appellant argues the regulation in question is misleading. However, appellant has failed to demonstrate that "water shut-off conversion to injection" has meaning relevant to the oil and gas industry. We hold it should have been evident to appellant that "water shut-off" is a separate operation for which prior approval is required. Thus, there is no nexus between the misspelling of 43 CFR 3162.3-2(a) and appellant's failure to seek prior approval as directed by that regulation. Therefore, BLM properly affirmed issuance of the INC.

[2] Despite our conclusion that appellant was responsible for obtaining prior approval for its water shut-off operation, we find that the assessment of \$250 for this failure to comply should be vacated.

On March 22, 1985, BLM suspended the use of assessments for noncompliance pursuant to 43 CFR 3163.3(c) through (j), except where actual loss or damage could be ascertained, 50 FR 11517 (Mar. 22, 1985). This suspension was implemented by Instruction Memorandum No. 85-384 (Apr. 16, 1985), as follows:

Enclosed is a copy of the Notice of Intent to propose rulemaking which was published in the Federal Register on March 22, 1985. As stated in this notice, the following actions are hereby taken:

-- The assessment for noncompliance provisions under 43 CFR 3163.3(c) through (j) are suspended, except where actual loss or damage can be ascertained.

On January 30, 1986, BLM proposed rules to clarify the operational requirements of the Federal Oil and Gas Royalty Management Act contained in 43 CFR Part 3160, 51 FR 3882 (Jan. 30, 1986). In the preamble to the proposed regulations BLM states: "Assessments under the various Acts authorizing the leasing of minerals would be modified by the proposed rulemaking to eliminate automatic assessments 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). Therefore, under the proposed rules BLM would not automatically assess Bolack but would be required to give it notice that it had not properly obtained prior approval before commencing its subsequent well operations.

We recognize 43 CFR 3163.3(d) was in effect at the time BLM took its action, and neither the suspension nor the proposed regulations are clearly dispositive herein. They do, however, reflect the Department's present policy concerning the levy of an assessment for failure to comply with the identification and the reporting requirements. In the past this Board has applied the present BLM policy to a pending matter, if to do so would benefit the affected party, and if there were no countervailing laws, public policy reasons, or intervening rights. Somont Oil Co., 91 IBLA 137 (1986). For that reason, we vacate the decision to levy an assessment pursuant to 43 CFR 3163.3(d). As a result, we do not find it necessary to address appellant's other arguments relating to BLM's authority to levy an assessment.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part, vacated in part, and remanded.

R. W. Mullen  
Administrative Judge

We concur:

Franklin D. Arness  
Administrative Judge

James L. Burski  
Administrative Judge

