

PETRO-X CORP.

IBLA 91-239

Decided August 12, 1993

Appeals from two decisions of the Deputy State Director, Mineral Resources, Utah State Office, Bureau of Land Management, one affirming in part and vacating in part incidents of noncompliance on oil and gas leases UTU-31738 and UTU-16962A (SDR No. UT-91-8), and the other affirming in part and modifying in part an incident of noncompliance on oil and gas lease UTU-31738 (SDR No. UT-91-7).

Appeal dismissed in part; decisions affirmed.

1. Oil and Gas Leases: Incidents of Noncompliance

Where an oil and gas operator is cited by BLM with violations of the oil and gas operations regulations and Onshore Oil and Gas Orders, the operator may not escape liability for those infractions by asserting that BLM has failed to cite other operators with allegedly more serious violations.

2. Oil and Gas Leases--Incidents of Noncompliance--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Standing to Appeal

When an oil and gas lease operator challenges incidents of noncompliance that have been removed from the record by the decision under appeal and the operator does not contest the fact of violation, the appeal will be dismissed because there is no effective relief that can be afforded to the operator by the Board.

3. Oil and Gas Leases: Incidents of Noncompliance

An incident of noncompliance is properly issued where the site facility diagram does not include all the information required by 43 CFR 3162.7-5(d)(3), including the current seal placements, valve positions, and the prevailing security plan and its location.

4. Oil and Gas Leases: Incidents of Noncompliance

Failure to seal a sales valve during the production phase is a major violation. The production phase is defined in 43 CFR 3162.7-5(a) as that period of time or mode of operation during which crude oil is delivered directly to or through production vessels to the storage facilities and includes all operations at the facility other than those defined by the sales phase. Where production from an oil well on a Federal lease is present in a storage tank on the lease and it is not being removed from the tank for sales, transportation, or other purposes, the operation must be construed to be in the production phase.

5. Oil and Gas Leases: Civil Assessments and Penalties--Oil and Gas Leases: Incidents of Noncompliance

An assessment may be levied pursuant to 43 CFR 3163.1(a) for failure to comply with a written order or instruction of the authorized officer within the time stated for abatement or compliance. Such an assessment is not a penalty or fine, but is in the nature of liquidated damages to cover loss or damage incurred by the lessor as a result of the specified incident of noncompliance. For a major violation, \$500 per day for each day nonabatement continues may be assessed.

6. Oil and Gas Leases: Civil Assessments and Penalties--Oil and Gas Leases: Incidents of Noncompliance

A decision to assess \$500 for a major violation is a judgmental decision by agency personnel who have special authority to make such decisions. The Board normally accords deference to such BLM decisions when supported by substantial evidence. However, an appellant may overcome such a decision by a preponderance of the evidence.

APPEARANCES: R. Garry Carlson, President, Jim C. Drossos, Vice President, and Dean H. Christensen, Secretary, Petro-X Corporation, Salt Lake City, Utah, for appellant.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Petro-X Corporation (Petro-X) has appealed from two decisions of the Deputy State Director, Mineral Resources, Utah State Office, Bureau of Land Management (BLM), issued in response to separate requests for State Director Review (SDR) under 43 CFR 3165.3.

In a March 26, 1991, decision on SDR No. UT-91-7, the Deputy State Director affirmed the issuance of incident of noncompliance (INC) FAO 091003

to Petro-X by the Moab District Office for a violation of Onshore Oil and Gas Order No. 3 (Order No. 3), 54 FR 8055-8084 (Feb. 24, 1989), for failure to effectively seal the sales valve on tank No. 1 at the well No. 1-1 facility on lease UTU-31738 and modified the assessment for failure to timely abate the violation by reducing the amount of the assessment from \$1,000 to \$500.

Two days later, the Deputy State Director issued a decision in SDR No. UT-91-8 affirming the issuance of eight INC's and vacating another.

All nine INC's had been issued by the Moab District Office for various minor violations discovered during a January 16, 1991, inspection of wells and facilities on leases UTU-31738 and UTU-16962A, the same day that BLM discovered the major Order No. 3 violation discussed above. 1/ In that decision, the Deputy State Director stated that "[o]nly violations FAO91004, FAO91006, FAO91007, FAO91008, and FAO91009 are related to production accountability and will be included in the operator inspection history" (Decision at 4).

For the one major violation, INC FAO 091003, Petro-X was given 1 day from receipt of notice to correct the violation, for minor violations INC FAO 091005 and INC FAO 091006, 2 days, and for the remaining minor violations, 30 days.

All the violations cited in the INC's under appeal were timely corrected, except the major violation. In a reinspection conducted on the morning of January 30, 1991, BLM found that this violation had not been

1/ The INC's that were affirmed are:

INC FAO 091001 for failure to identify the current operator at well No. 3-1 on UTU-31738 in violation of 43 CFR 3162.6;

INC FAO 091002 for failure to install a well sign at well No. 1-2 on UTU-31738 in violation of 43 CFR 3162.6;

INC FAO 091004 for failure to submit a proper site facility diagram for the well No. 1-1 facility on UTU-31738 in violation of 43 CFR 3162.7-5 and Order No. 3, III H.1.1;

INC FAO 091006 for failure to effectively seal a drain valve on production tank No. 2, well No. 1-1, on UTU-31738 in violation of 43 CFR 3162.7-5 and Order No. 3, III A.1.b.c.g.2;

INC FAO 091007, INC FAO 091008, and INC FAO 091009 for failure to install a gauge reference point and height on production tank No. 1, tank No. 2, and tank No. 3, well No. 1-1, on UTU-31738, in violation of 43 CFR 3162.7-2 and Onshore Oil and Gas Order No. 4 (Order No. 4) III A.c.1.a;

INC FAO 091010 for failure to install a well sign on UTU-16962A in violation of 43 CFR 3162.6.

The vacated INC, FAO 091011, cited a failure to obtain prior approval for disposal pits at well No. 22-3 on UTU-16962A.

In addition, BLM issued INC FAO 091005 for failure to effectively seal a fill line valve on production sales tank No. 1 on UTU-31738. Petro-X did not challenge that INC in SDR, and it is not at issue in this appeal.

corrected within the allotted abatement period. The Moab District Office, BLM, on February 7, 1991, issued a Notice of Assessment pursuant to 43 CFR 3163.1 in the amount of \$500 for each day the violation was not abated. After Petro-X certified that the violation had been corrected in the afternoon of January 30, 1991, BLM levied a \$1,000 assessment based on 2 days of nonabatement.

In February 1991, Petro-X filed two separate requests for SDR's in accordance with 43 CFR 3165.3, one for INC FAO 091003 and the associated assessment of \$1,000 and the other for the minor violations. An oral presentation was held in Salt Lake City, Utah, on March 7, 1991, and the Deputy State Director subsequently issued the above-described decisions that are the subject of these appeals.

The principal thrust of appellant's statement of reasons (SOR) for its appeals is that it has been deliberately targeted for selective enforcement, amounting to harassment, by BLM. It argues that BLM has breached its own inspection and enforcement policies by inspecting Petro-X's operations, while leaving higher priority sites with outstanding violations uninspected and uncited. Appellant also claims that the SDR review was unfair and biased, and that the assessment levied against it is the result of "well documented personal animosity" between appellant's corporate secretary and certain BLM personnel in the Moab District Office (SOR at 1).

[1] We note that the Board has previously rejected as unfounded a charge of discrimination in the selection by the Moab District Office of a company for a product verification inspection, where Petro-X's corporate secretary was at that time affiliated with that company and made the charges on behalf of the company. C.C. Co., 116 IBLA 384, 387 (1990). Moreover, the real question presented by the appeals herein is not whether BLM has engaged in selective enforcement of the oil and gas operations regulations, but whether the alleged violations in question existed. Appellant may not escape liability for its own infractions by asserting that BLM has failed to cite other operators with allegedly more serious violations. 2/ Accordingly, we turn to consideration of the violations cited by BLM.

[2] Although Petro-X has included in its appeal arguments concerning INC FAO 091001, INC FAO 091002, and INC FAO 091010, we consider the appeal to be moot as to those INC's and dismiss the appeal as it relates to them. The reason is that there is no effective relief that the Board may grant regarding those INC's. We have held that where there is no effective relief it can afford to the appellant, the Board will dismiss an appeal. Utah Wilderness Association, 91 IBLA 124, 130 (1986). The relief sought by Petro-X in SDR review was removal of the violations from the record; it did not challenge the fact of violation. As indicated above, in his decision in

2/ Whether appellant is the focus of discrimination by certain BLM employees is a matter for review by BLM management and not properly a subject for analysis by this Board in the context of this appeal.

SDR No. UT 91-8, the Deputy State Director stated that only the violations included in the five INC's FAO 091004 and FAO 091006 through FAO 091009 would be included in the inspection history record, because they related to production accountability. Accordingly, the Deputy State Director granted removal of INC FAO 091001, INC FAO 091002, and INC FAO 091010 from Petro-X's record.

Thus, the appeal before us properly addresses only INC FAO 091003, INC FAO 091004, and INC FAO 091006 through INC FAO 091009. We will first consider those INC's concerning minor violations.

INC FAO 091004

[3] Departmental regulation 43 CFR 3162.7-5(d) requires site facility diagrams for all facilities used in storing oil produced from Federal lands. While no particular format is prescribed, the diagram "shall accurately reflect the actual conditions at the site" by clearly identifying the vessels, piping, metering system, and pits used in handling and disposal of oil, gas, and water. 43 CFR 3162.7-5(d)(3). Further, the diagram must indicate valve position and seals employed during production and sales phases, and must identify the facility involved and site security plan employed. *Id.* Such facility diagrams are required to be filed within 60 days after the facility is modified. 43 CFR 3162.7-5(d); see also Order No. 3, III.I.1. 3/

In INC FAO 091004, the BLM inspector stated that the operator had failed to submit a diagram "that reflects actual [sic] position of equipment and all production related equipment on location, and piping." In his SDR decision, the Deputy State Director concluded:

A review of the site facility diagram shows that it does not meet the minimum standards of OOGO 3 [Order No. 3]. The diagram does not indicate piping between tanks, all valves on each tank, or pits, etc. It does not indicate which valves are to be sealed in what position during sales or production phases. Additionally, the diagram does not identify the site security plan covering the facility. Further [sic] are necessary to bring the site facility diagram into compliance with the minimum standards of OOGO 3.

(SDR UT-91-8 Decision at 2).

The record shows that the most recent site facility diagram on file in January 1991 was accepted by the Moab District Office on April 18, 1990. The flaws in this diagram are exactly as BLM described them in its SDR decision. BLM reports that this violation was cured as of February 4, 1991. However, the record before us does not include a new submission from Petro-X in this matter. Regardless, the diagram in question did not satisfy the

3/ Order No. 3 and Order No. 4 (discussed infra) are binding on operators on Federal oil and gas leases, as appropriate. 43 CFR 3164.1(b).

regulatory requirements. Accordingly, we must conclude with respect to INC FAO 091004 that it was properly issued.

INC FAO 091006

In this INC, the inspector described the violation as a failure to effectively seal the drain valve on production tank No. 2. In its challenge of this violation on appeal, appellant merely reiterates what was argued in the SDR proceeding. In its SDR protest, Petro-X asserted that the BLM inspector knew that the No. 2 tank in question was not used for storage and was not even connected to the No. 1 storage tank. In its decision, BLM concluded that the site facility diagram for this facility indicated that the tanks were indeed connected and reported that the BLM inspector found the tanks to be connected by fill lines and equalizer, or overflow, lines. The conditions stated on the face of an INC are presumed to be those encountered by BLM at the time of inspection. Yates Petroleum Corp., 91 IBLA 252, 258 (1986). All lines entering or leaving oil storage tanks are required to have valves capable of being effectively sealed during production and sales operations, and the operator is directed to seal those valves as applicable. See 43 CFR 3162.7-5(b)(1). Valves on any tank which is connected to the production tank are considered subject to the seal requirements (Order No. 3, III.A.1.d). We find that appellant's arguments with respect to this INC were fully considered by BLM in its decision, and appellant has presented no new evidence or arguments on appeal. Thus, we affirm the issuance of INC FAO 091006.

INC FAO 091007 through INC FAO 091009

The BLM inspector issued these INC's for failure to have gauge reference points and heights on three tanks at the well No. 1-1 facility on lease UTU-31738. Appellant's position is that a tank reference gauge point and a tank tag had been installed on each tank and that if they were missing, it was not the fault of appellant.

Each tank is required to be equipped with "a gauging reference point, with the height of the reference point stamped on a fixed bench-mark plate or stenciled on the tank near the gauging hatch." Order No. 4, III.C.1.c, 54 FR 8094 (Feb. 24, 1989). While there is no reason to doubt appellant's assertion that tank tags were previously installed on the tanks in question, such an assertion is not relevant. The fact that such tags may have been removed by persons unknown does not mitigate the fact that the tags were not on the tanks at the time of BLM's inspection. INC FAO 091007, INC FAO 091008, and INC FAO 091009 were properly issued.

We find no error in BLM's determination to include the violations included in these five INC's in the operator inspection history based on the fact that they relate to production accountability.

INC FAO 091003

[4] Finally, we turn to the issue of the major violation, INC FAO 091003, and the attendant \$500 assessment. All lines entering or leaving

storage tanks are required to have valves capable of being sealed and all appropriate valves shall be sealed during the applicable production or sales phase. 43 CFR 3162.7-5(b)(1), (4). Failure to seal a sales valve during the production phase, the situation at issue here, is considered a major violation (Order No. 3, III.A.2.a). The required corrective action is to install the proper seal within the 24-hour period following notice. Id.

Appellant does not deny that the subject seal was not in place during the January 16 inspection. In his SDR decision, the Deputy State Director summarized the arguments made by appellant and noted that the inspection field notes and photographs demonstrated that the subject sales valve was not sealed on January 16, 1991. He concluded that the facility was in a production phase because "[t]he definition of production phase contained in OOGO 3 includes all operations at the facility other than those defined by the sales phase" (SDR UT-91-7 Decision at 2). He stated that oil present in the tank warranted application of the sealing requirements and obviated Petro-X's claim that the well was incapable of producing.

"Production phase" is defined in 43 CFR 3162.7-5(a) and Order No. 3, II.S., as the period of time or mode of operating during which crude oil is delivered to the storage facilities and includes all operations other than those defined by the sales phase. It is undeniable that oil was present in the storage tank and that the facility was not in the sales phase. The BLM inspector gauged the oil present in the tank at 8 feet 7 inches on January 16. Oil in the tank triggers application of the sealing requirements. The fact that the well may not have been producing because of an inoperable pumping unit does not affect the conclusion that the well facility was in the production phase, as defined in the regulations.

In its SOR, appellant asserts error in BLM's determination that a violation existed but does not demonstrate how BLM's conclusions are in error. We have reviewed BLM's conclusions in SDR UT-91-7 and find them well-reasoned and supportive of the decision to sustain the INC. We, therefore, conclude that INC FAO 091003 was properly issued for failure to effectively seal a sales valve during the production phase.

There remains the question of whether the assessment is properly sustained. In this case, the violation at issue went unabated during the stipulated compliance period. Petro-X received notice of the violation on January 28 and certified that it corrected the situation on January 30. Petro-X was notified by decision dated February 7, 1991, of an assessment based on the violation remaining unabated for two days. BLM in the SDR decision modified the assessment to reflect a 1-day period of unabatement.

[5] BLM may assess an operator up to \$500 per day for failure to abate a major violation. 43 CFR 3163.1(a)(1). 4/ Such an assessment is

4/ Civil penalties may be imposed under 43 CFR 3163.2 where the violation remains uncorrected after 20 days.

not considered a fine or penalty; rather, it is in the nature of "liquidated damages" to cover loss or damage to the lessor from specific instances of noncompliance. Fancher Oil Co., 121 IBLA 397, 400 (1991). It is well established that BLM is entitled to assess liquidated damages when an operator fails to comply with a written order within the time specified in that order. Omimex Petroleum, Inc., 123 IBLA 1, 4 (1992). In its SDR protest, appellant asserted that there was a lack of communication about what was required to abate the violation and whether an assessment would be levied. Even if Petro-X was uncertain about what it would take to abate the violation or needed more time to do so, it only had to contact BLM. It is incumbent upon an operator to seek timely clarification of an INC or, alternatively, to seek an extension of the abatement period within which to have BLM clarify what was required. Id. at 5. There is no evidence that Petro-X sought clarification of the abatement requirement or an extension of the abatement period.

The assessment is based on appellant's failure to abate the violation as directed. A party challenging BLM's determination that violations were not abated within the allotted period has the burden to prove by a preponderance of the evidence that BLM's determination is incorrect. Omimex Petroleum, Inc., supra at 4. Appellant has not presented such evidence on appeal. Rather, Petro-X argues that no assessment is warranted because the INC did not indicate that there would be one. In the SDR UT-91-7 decision, BLM explained that the section of the form in question (Form 3160-0 (January 1989), Assessment for Noncompliance) was intended for use in issuing immediate assessments or levying assessments for failure to comply with a previous INC.

None of the INC's issued to Petro-X by the BLM inspector in this case provided notice of any assessment to be levied. Before an assessment for noncompliance can be made under 43 CFR 3163.1(a), BLM must afford the affected operator an opportunity to abate the violation. Chuska Energy Co., 123 IBLA 321 (1992). Thus, under that regulation, an assessment is appropriate only where there is a failure to abate the violation timely. When Petro-X failed to comply within the abatement period prescribed in the INC, an assessment was proper. Appellant's arguments that the assessment was procedurally incorrect are without merit.

Appellant additionally asserts that the violation did not go unabated inasmuch as a Federal seal was placed on the subject valve by the BLM inspector. The inspector was operating in accordance with Order No. 3 in installing the Federal seal. That protective measure by BLM did not constitute abatement of the violation by the operator. Despite the presence of a Federal seal, the operator is required to take the specified action within the allowed abatement period in order to meet the compliance requirement (Order No. 3, IV).

[6] Appellant asks for the assessment to be reconsidered because it is based on BLM's animosity toward it. The regulations at 43 CFR 3163.1(a)(1) provide for a \$500 daily assessment for major violations for each day nonabatement continues. In addition, the regulations allow the State Director to "compromise or reduce" assessments. 43 CFR 3163.1(e). Here, the Deputy

State Director reduced the assessment from \$1,000 to \$500 based on his conclusion regarding the number of days the violation was unabated. He did not compromise the assessment. Thus, he tacitly held that an assessment was proper in this case. In a case such as this involving a judgmental decision by agency personnel who have special authority to make such decisions, the Board normally accords deference to such BLM decisions when supported by substantial evidence. An appellant may overcome such a decision by a preponderance of the evidence. Omimex Petroleum, supra at 5. In this case, the record supports the Deputy State Director's decision.

All other arguments presented by appellant have been considered by the Board and determined not to demonstrate error in BLM's decision.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed in part and the decisions appealed are affirmed.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

John H. Kelly
Administrative Judge