

BLUE DOLPHIN EXPLORATION COMPANY

IBLA 2002-438

Decided July 8, 2005

Appeal from part of the Reviewing Officer's Final Decision issued by the Gulf of Mexico OCS Region, Minerals Management Service, on May 13, 2002, that assessed civil penalties under 30 CFR 250.804(a)(1)(iii). Civil Penalty Case No. G-2000-059.

Affirmed.

1. Administrative Procedure: Burden of Proof--Evidence: Burden of Proof--Oil and Gas Leases: Generally--Oil and Gas Leases: Civil Assessments and Penalties--Outer Continental Shelf Lands Act: Oil and Gas Leases

MMS properly assesses a civil penalty when a lessee does not have the records required by 30 CFR 250.804(b) to show that safety-system devices have been inspected and tested at specified intervals.

APPEARANCES: Anthony C. Marino, Esq., and Paul J. Goodwine, Esq., New Orleans, Louisiana, for appellant Blue Dolphin Exploration Company; Frank A. Conforti, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Blue Dolphin Exploration Company (Blue Dolphin) appealed a portion of the Final Decision issued by the Reviewing Officer, Gulf of Mexico OCS Region, Minerals Management Service (MMS), on May 13, 2002, that assessed a \$24,000 civil penalty. After an inspection of outer continental shelf (OCS) leases owned by Blue Dolphin, MMS assessed civil penalties against Blue Dolphin for eight incidents of noncompliance (INCs) involving 30 CFR 250.804(a)(1)(iii), which requires lessees to test OCS tubing plugs, a type of subsurface safety device (SSSD) that shuts off the well in the event of an emergency, a minimum of every 6 months.

The alleged violations stem from Blue Dolphin's activities on OCS Leases 00709 (Platform A) and 00714 (Platform B), Galveston Area Blocks 288 and 296 respectively. In early October 2000, an MMS inspector visited Blue Dolphin's wells located on the two leases to ensure that Blue Dolphin was complying with applicable Federal regulations. As part of his examination, the inspector looked at the Blue Dolphin facilities and asked for records to verify that the SSSDs were properly tested at the required intervals. At that time, the inspector noted 23 INCs for suspected violations of Federal regulations. Although the inspector found a few violations for crane and electrical deficiencies, violations of 30 CFR 250.108 and 30 CFR 250.114(c), respectively, the vast majority of the INCs (19) were issued for the alleged violations of 30 CFR 250.804(a)(1)(iii), which mandates that lessees test tubing plugs at least every 6 months.

On May 4, 2001, after examining the records of the inspection, MMS's Reviewing Officer sent Blue Dolphin a Notice of Proposed Civil Penalty Assessment that contained 23 violations: 7 violations of 30 CFR 250.804(a)(1)(iii) at Block 288; 13 violations of 30 CFR 250.804(a)(1)(iii) at Block 296, which included a violation, but not a monetary fine, for a leaking tubing plug; 2 violations of 30 CFR 250.108, and 1 violation of 30 CFR 250.114(c). For the failure to perform the required tubing plug tests, the Reviewing Officer relied on the records Blue Dolphin produced during its inspection that indicated the last date the test was conducted. According to the Reviewing Officer, the records given to the MMS inspector in October 2000 revealed the following:

Well	Violation	Last Test Date Recorded	Number of Tests Allegedly Missed
A-3L	Tubing Plug Test	August 27, 1999	2
A-3U	Tubing Plug Test	September 1, 1999	2
A-6L	Tubing Plug Test	August 27, 1999	2
A-6U	Tubing Plug Test	August 27, 1999	2
A-12U	Tubing Plug Test	August 27, 1999	2
A-15L	Tubing Plug Test	August 27, 1999	2
A-15U	Tubing Plug Test	August 27, 1999	2
B-1L	Tubing Plug Test	August 27, 1999	2
B-1U	Tubing Plug Test	No Date Found	4
B-5L	Tubing Plug Test	August 27, 1999	2

B-5U	Tubing Plug Test	August 27, 1999	2
B-7A	Tubing Plug Test	April 2, 1999	3
B-7D	Tubing Plug Test	April 2, 1999	3
B-12L	Tubing Plug Test	April 2, 1999	3
B-12U	Tubing Plug Test	April 2, 1999	3
B-15L	Tubing Plug Test	April 2, 1999	3
B-15U	Tubing Plug Test Tubing Plug Leak	August 27, 1999	2
B-17L	Tubing Plug Test	April 2, 1999	3
B-17U	Tubing Plug Test	April 2, 1999	3

Based on her findings, the Reviewing Officer proposed a civil penalty of \$205,200 for the violations, including \$60,200 for the crane and electrical violations. (Notice of Proposed Civil Penalty Assessment at 4.)

After the initial inspection and continuing after its receipt of the Notice of Proposed Civil Penalty Assessment, Blue Dolphin provided MMS with information that it believes proved that several of the penalties for the failure to inspect the tubing plugs were incorrect. Included in the information sent by Blue Dolphin were additional tubing plug inspection reports, as well as affidavits and signed statements from the president of the wells' operator and its employees purporting to verify that it tested all tubing plugs quarterly. The Reviewing Officer examined the information Blue Dolphin supplied and revised her assessment based on the additional documentation of the plug report inspections, but not the affidavits and statements.

On May 13, 2002, the MMS Reviewing Officer issued a Final Decision assessing civil penalties totaling \$61,600, including \$24,000 for 8 violations of 30 CFR 250.840(a)(1)(iii) and \$37,600 for crane and electrical violations. The 8 tubing plug test violations allegedly occurred on Block 296, Wells B-1U, B-7A, B-7-D, B-12L, B-12U, B-15L, B-17L, and B-17U, because the additional records submitted by Blue Dolphin indicated that those 8 wells were tested on April 2, 1999, and next on February 2, 2000. Thus, the time between recorded testings was greater than six months.

On July 19, 2002, Blue Dolphin filed a Notice of Appeal appealing the portion of MMS's decision regarding the tubing plug test fines, under 30 CFR

250.840(a)(1)(iii), but it paid and did not appeal the \$37,600 civil penalty for the crane and electrical violations.

In its Statement of Reasons (SOR), Blue Dolphin argues that MMS erred by not considering the affidavits and statement that indicated that Blue Dolphin performed a tubing plug test on the eight wells at issue on August 27, 1999. MMS filed an Answer on October 23, 2002, in which it contends that due to the health, safety, and environmental risks, it cannot rely solely on affidavits and statements without corroborating reports or documents that demonstrate that the tests were actually performed.

The Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (2000), declares that the Secretary of the Interior shall “administer the * * * leasing of the [OCS], and shall prescribe such rules and regulations as may be necessary to carry out such provisions.” 43 U.S.C. § 1334(a) (2000). The Secretary may also assess civil penalties for the failure to comply with regulations related to the OCS. 43 U.S.C. § 1350(b) (2000).

[1] The Secretary has prescribed several regulations relating to the safety of OCS operations and the procedures for assessing civil penalties. With respect to SSSDs, the regulations state:

The safety-system devices shall be successfully inspected and tested by the lessee at the interval specified below or more frequently if operating conditions warrant. * * *

(1) Testing requirements for subsurface safety devices are as follows:

* * * * *

(iii) Each tubing plug installed in a well shall be inspected for leakage by opening the well to possible flow at intervals not exceeding 6 months. * * *

30 CFR 250.804(a). A lessee is required to retain its testing records for two years.

The lessee shall maintain records for a period of 2 years for each subsurface and surface safety device installed. These records shall be maintained by the lessee at the lessee’s field office nearest the OCS facility or other locations conveniently available to the District Supervisor. These records shall be available for review by a representative of MMS. The records shall show the present status and

history of each device, including dates and details of installation, removal, inspection, testing, repairing, adjustments, and reinstallation.

30 CFR 250.804(b). It is a lessee's duty to "allow prompt access * * * to any inspector, and to provide such documents and records which are pertinent to occupational or public health, safety, or environmental protection, as may be requested. 43 U.S.C. § 1348(b)(3) (2000).

Blue Dolphin's central argument is that the affidavits and statement it provided, which asserted that the tubing plug testing had occurred in August 1999, is sufficient documentation to avoid a civil penalty. Blue Dolphin alleges that MMS must prove that Blue Dolphin did not conduct the tubing plug tests with "reliable, probative, and substantial evidence." SOR at 6-7, quoting W&T Offshore, Inc., 148 IBLA 323, 360 (1999). Blue Dolphin claims that MMS cannot prove that the tests were not actually conducted in August 1999, because the affidavit and statement indicate the tubing plug tests were in fact conducted, even if there was no documentation that the tests actually occurred.

Blue Dolphin's evidence consists of an August 9, 2001, letter from David Gaither, President of Petroleum Offshore Professional Services (POPS), the operator who ran Blue Dolphin's leases in Blocks 288 and 296 at the time. In that letter, Gaither states that POPS complied with all Federal regulations, as specified in the contract it entered into with Blue Dolphin. Gaither's affidavit provides that "POPS performed Quarterly Well Plug Checks to verify that the well bore plugs held and that there was no sign of hydrocarbon leakage * * *." Gaither further explains that he contacted Walter Bichon, POPS's Offshore Supervisor at the time, who verified that the plug checks were completed in August 1999. Bichon also provided a statement recounting that "during August 1999 * * * Mark Lindsey and I completed plug checks on all of the wells at Galveston 288A and Galveston 296B. * * * It is my recollection that on August 27, 1999 all wireline work and plug checks were completed on Galveston 288A and Galveston 296B." Bichon did not provide any further documentation regarding the purported plug checks.^{1/}

MMS responds that in order for lessees to avoid civil penalties, lessees must provide contemporaneous documentation of the SSSD tests and that letters, affidavits, and statements are insufficient to show that the tests were performed. MMS notes that "[n]either [the Gaither letter and affidavit or the Bichon statement] is supported by corroborative or contemporaneous documentation, direct or indirect, that the August 27, 1999 tests were conducted on these 8 wells." (Answer at 8.) MMS asserts that it is crucial to its system of enforcing safety procedures for

^{1/} In contrast, the Offshore Supervisor in April 2000 provided an affidavit and copies of his original tally sheets of the tests.

companies to maintain testing records for the two years required by 30 CFR 250.804(b), and that allowing affidavits and statements to be used to replace documents supposedly retained by the company would defeat the purpose of the recording requirement.

While we agree with Blue Dolphin that there is circumstantial evidence that suggests the tubing plug tests may have been performed, the regulations require that actual documentation be retained for two years and presented to MMS upon request. Within the 2-year period defined by 30 CFR § 250.804(b), Blue Dolphin bears the burden of producing documentation to verify its SSSD tests. However, as the Board in W&T Offshore discussed, if MMS wishes to assess a civil penalty more than two years after the alleged violation, then it must prove the violation with “reliable, probative, and substantial evidence.” W&T Offshore, Inc., 148 IBLA at 360, citing BLM v. Ericsson, 88 IBLA 248 (1985)).

Blue Dolphin mistakenly relies on this language from W&T Offshore in an attempt to prove that MMS can only assess a civil penalty for the failure to test its tubing plugs when it has “reliable, probative, and substantial evidence” that is “clear and free from doubt” that the plugs were not tested. In that case, W&T Offshore was assessed civil penalties based on three MMS orders, GOM 95-06, GOM 95-07, and GOM 95-08, issued in February 1996. Id. at 325. In GOM 95-08, W&T Offshore was accused of removing a type of SSSD for longer than 15 days, in violation of 30 CFR 250.121(h)(1) (1996). Id. at 360. W&T Offshore’s documentation showed that the SSSD was removed on October 3, 1990. Id. The SSSD was present during an MMS inspection on December 11, 1990. Id. However, there was no documentation recording when, between October 3 and December 11, 1990, the SSSD was replaced. Id. A crew was working on the SSSD between October 21 and November 4, but they did not record replacing the SSSD at issue. Id. The Reviewing Officer determined that an unidentified employee must have replaced the SSSD shortly before the inspection. Id. at 361. To make this decision, the Reviewing Officer relied on the absence of any documentation that suggested otherwise. Id.

The Board reversed the Reviewing Officer’s decision, stating:

In this case, the period that the SSSD was out of the well is determinative both as to the violation and the amount of the penalty assessed for the violation. Therefore, we do not deem it important to determine which assumption carries more weight. Rather, we find it inappropriate to assess a civil penalty for violation of this regulation based upon an assumption regarding when the violation took place. It was just as logical to assume that someone failed to make a notation on a wireline report or to assume that certain of the wireline reports had been discarded because the regulatory period for keeping those reports

had run as it was to assume that an unknown wireline operator had placed the SSSD in the well and the report of that work was lost.

We find that MMS has failed to sufficiently substantiate its allegation that W&T Offshore violated the provisions of 30 C.F.R. 250.121(h)(1) (1996) with reliable, probative, and substantial evidence that the SSSD was absent from that well for a period in excess of 15 days between October 3 and December 11, 1990. The evidence it relied upon was not clear and free from doubt. * * *

Id. (emphasis added). Thus, MMS could not assess a penalty for that alleged violation because W&T Offshore was no longer required to keep the documentation that would have recorded when the wireline was reinserted.

This is not the case for Blue Dolphin. MMS asked Blue Dolphin for the records of the plug tests within the two years specified by the regulations. Section 250.804(b) places the burden of providing testing documentation on the lessees for two years. Within that time period, MMS is not required prove a negative, *i.e.*, that the testing was not done. Without the requirement that documents be kept during the two-year period it would be virtually impossible for MMS to enforce the testing requirements of 30 CFR 250.804(a) in the absence of an express admission by the lessee that the testing was not completed.^{2/} Thus, affidavits and statements from individuals, which state that the testing was completed, are insufficient to provide documentation of the testing within the two-year time period provided in the regulations.

Blue Dolphin asserts that civil penalties should not be assessed in its case because, although it may have violated 30 CFR 250.804(b) by misplacing records, that violation did not endanger the environment or safety of property or people. While the misplacement of testing records is not itself a safety risk, the provision is designed to ensure compliance with other provisions of MMS rules that are designed to limit risks to health, safety, and the environment.

MMS may begin to assess a civil penalty when it “determines, on the basis of available evidence, that a violation occurred and a civil penalty review is appropriate * * *.” 30 CFR 250.1400. A violation includes a failure to comply with a regulation.

^{2/} We note that in one of the first correspondences that MMS received from Blue Dolphin, Blue Dolphin’s vice president of operations stated that “[t]he failure to check these plugs within the required time interval was an oversight on the part of our platform operators. All efforts are being made to insure this does not occur again.” Letter from Vernon R. Luning, Vice President of Operations, Blue Dolphin, to R. B. Tate Jr., MMS (Oct. 18, 2000).

30 CFR 250.1402. Civil penalties may be issued for “[v]iolations that MMS determines may constitute, or constituted, a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), property, any mineral deposit, or the marine, costal, or human environment[.]” 30 CFR 250.1404(b).

It is true that 30 CFR 250.804(b) was not listed as an INC. However, 30 CFR 250.804(a)(1)(iii) and 250.804(b) are part of the same regulation and must be read together. A violation of 30 CFR 250.804(b) must be analyzed in conjunction with 30 CFR 250.804(a)(1)(iii). A lessee may be charged a civil penalty for not testing its tubing plug if it cannot show documentation to satisfy 30 CFR 250.804(b).

Blue Dolphin’s argument incorrectly characterizes the nature of its offense. Blue Dolphin is not being penalized for misplacing records but rather for not being able to verify, as it is required to do, that it properly tested the tubing plugs in accordance with 30 CFR 250.804(a)(1)(iii). Blue Dolphin has not shown, with documentation, that it did test the tubing plugs. Thus, MMS has properly assessed a civil penalty for the violation of an environmental, health, or safety provision.

Blue Dolphin also quotes the 1992 MMS Penalty Program Guidebook, which states that a violation may be considered a threat to the environment, “if there is documentable evidence that [the violation] is causing, has caused, or could have caused” environmental harm. Blue Dolphin mistakenly reads this provision as requiring that MMS must prove that harm to the environment occurred.

In W&T Offshore, the Board also affirmed, as modified, MMS’s assessment of civil penalties for GOM 95-06 and GOM 95-07. W&T Offshore, 148 IBLA at 369. The violations in GOM 95-06 and GOM 95-07, like those in this case, were for violations of regulations enacted to prevent situations that “may cause damage to the environment or to property, or endanger life or health.” Id. at 362. The Board stated: “It is not necessary that the violation harm the environment, human life, or property, it need only increase the risk of harm.” Id. Thus, even though there may have been no harm from Blue Dolphin’s alleged failure to test the well plugs, it is appropriate to assess civil penalties for violation of the requirement of biannual tests mandated in 30 CFR 250.804(a)(1)(iii), which seeks to ameliorate the risks associated with well plugs. There is no disagreement that leaking well plugs could cause severe environmental damage if not detected and remedied.

Therefore, pursuant to the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Will A. Irwin
Administrative Judge

I concur:

Lisa Hemmer
Administrative Judge