



BLACK ELK ENERGY OFFSHORE OPERATIONS, LLC

182 IBLA 331

Decided August 20, 2012



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

BLACK ELK ENERGY OFFSHORE OPERATIONS, LLC

IBLA 2011-215

Decided August 20, 2012

Appeal from a July 6, 2011, decision of the Reviewing Officer, Gulf of Mexico Region, Bureau of Ocean Energy Management, Regulation, and Enforcement, assessing civil penalties for an Incident of Noncompliance issued for two violations of 30 C.F.R. § 250.804. Civil Penalty Case No. G-2011-001.

Affirmed.

1. Federal Oil and Gas Royalty Management Act of 1982:
Civil Penalties--Oil and Gas Leases: Civil Assessments and Penalties

The Bureau of Ocean Energy Management, Regulation, and Enforcement properly assesses civil penalties against the lessee/operator of an OCS lease for violations of 30 C.F.R. § 250.804 (failing to test each surface-controlled subsurface safety device (SCSSD) at intervals not exceeding 6 months, and failing to remove, repair, and reinstall or replace an SCSSD when a gas leakage rate in excess of 5 cubic feet per minute is detected) even though no actual harm results from the violations. The Department's safety regulations were adopted to prevent the occurrence of conditions or circumstances that constitute a threat of serious, irreparable, or immediate harm or damage to life, property, any mineral deposit, or the marine, coastal, or human environment. It is not necessary that the violation harm the environment, human life, or property; it need only increase the risk of harm.

APPEARANCES: Ted LeBlanc, VP, HSE & Compliance, Black Elk Energy Offshore Operations, LLC; Silvia Murphy, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Safety and Environmental Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Black Elk Energy Offshore Operations, LLC (Black Elk), appeals from the July 6, 2011, Final Decision of the Reviewing Officer, Gulf of Mexico Region, Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE), assessing civil penalties in the amount of \$307,500 for an Incident of Noncompliance (INC), P-280, issued as a result of an inspection of Lease OCS 00495, Vermilion Area Block 124, Platform F. The INC was issued for two violations of 30 C.F.R. § 250.804: (1) a failure to test each surface-controlled subsurface safety device (SCSSD)¹ at intervals not exceeding 6 months, and (2) a failure to remove, repair, and reinstall or replace an SCSSD when a gas leakage rate in excess of 5 cubic feet per minute (cfm) is observed.

BACKGROUND

Black Elk is lessee and operator of Lease OCS 00495, Vermilion Area Block 124. On July 30, 2010, inspectors from BOEMRE's Lake Charles District Office conducted an annual inspection of Well F-3 located on Platform F of the lease.² Upon review of the operator's maintenance reports for this shut-in well, BOEMRE discovered several problems with the SCSSD that was used in lieu of a tubing plug in Well F-3. The operator's records show that the SCSSD was last tested on August 3, 2009, with zero leakage. According to those records, testing was attempted on January 31, 2010, but could not be conducted due to "frozen valves." The records

¹ In the record, both the agency and the operator often refer to this "device" as an SCSSV, or the acronym for surface-controlled subsurface safety *valve*. However, as the regulation specifically states that it is a *device*, which is being regulated, we will use SCSSD, with the understanding that, for purposes of this appeal, these terms are interchangeable.

² In 2010, BOEMRE was organized and designated as the successor agency to the Minerals Management Service (MMS) until three new agencies could be organized. Secretarial Order No. 3299 (May 10, 2010); Secretarial Order No. 3302 (June 18, 2010). On Oct. 1, 2010, the Secretary of the Interior transferred the revenue collection function to the Office of Natural Resources Revenue, while the authority to administer Federal oil and gas leasing on the Outer Continental Shelf (OCS) was transferred to BOEMRE. Secretarial Order No. 3306; *see* 75 Fed. Reg. 61051, 61052 (Oct. 4, 2010). More recently, on Oct. 1, 2011, the functions of BOEMRE were divided between the newly-created Bureau of Ocean Energy Management (BOEM) and Bureau of Safety and Environmental Enforcement (BSEE). Secretarial Order 3299A (Aug. 29, 2011); *see* 76 Fed. Reg. 64432 (Oct. 13, 2011). We will, for the purpose of our discussion, refer to BOEMRE as the decision-maker in this instance, noting that this matter is now actually managed by BSEE.

further show that the SCSSD was tested on March 31, 2010, and again on April 5, 2010, when there was observed leakage at the rate of 15.3 cfm and 21.5 cfm, respectively, in obvious excess of the maximum regulatory limit of 5 cfm for gas. As a result of what was gleaned from the operator's record, BOEMRE issued INC P-280 on July 30, 2010, documenting Black Elk's failure to comply with the following safety requirements of 30 C.F.R. § 250.804(a)(1)(i):

Each surface-controlled subsurface safety device installed in a well, including such devices in shut-in and injection wells, shall be tested in place for proper operation when installed or reinstalled and thereafter at intervals not exceeding 6 months. If the device does not operate properly, or if a liquid leakage rate in excess of 200 cubic centimeters per minute or a gas leakage rate in excess of 5 cubic feet per minute is observed, the device shall be removed, repaired and reinstalled, or replaced.

The BOEMRE inspectors writing the INC described the situation as "exceeded time limits" and "Operator failed to report [the leaking SCSSD] and failed to take corrective action." INC P-280 (Form MMS-1832), dated July 30, 2010. The inspectors further advised Black Elk that it "needs to submit a letter . . . explaining why corrective action hasn't been performed and how they will prevent this from happening in the near future." *Id.*

In a responsive letter, the Chief Operating Officer for Black Elk explained that the responsible parties within the company were not immediately made aware of the situation, noting that it had assumed "operatorship" on January 1, 2010, and there "was clearly a breakdown in communication between the operators in the field and the team that would put together the well procedures to resolve the issue." Aug. 3, 2010, Letter to BOEMRE at 1. He stated that procedures had commenced to correct the leaking SCSSD and outlined an aggressive program to ensure future compliance, including immediate visits by a compliance program specialist and supervisor to each location to review records personally, the hiring of a compliance specialist to regularly visit each location, the gathering of updated reports from each location to ensure compliance, the education of field operators and supervisors on the severity of noncompliance and the need for timely reporting, and the scheduling of meetings with field supervisors and operators to ensure commitment to compliance. *Id.* at 2. By letter dated August 9, 2010, Black Elk reported to BOEMRE that it had taken the following corrective action: "The master valve stem was broken and in the closed position. Black Elk set 2 plugs in the well and repaired the master valve by replacing the stem and bonnet. Master valve is operational. SCSSV is locked out and a certified plug (SN 2313X42) is set in X-Nipple just below SCSSV."

In a February 1, 2011, Notice, BOEMRE apprised Black Elk that the INC had been referred for a civil penalty review, Case No. G-2011-001. On April 5, 2011, the assigned Reviewing Officer, BOEMRE, issued a Notice of Proposed Civil Penalty Assessment. After identifying the two violations, the Reviewing Officer explained that Black Elk then had an opportunity to meet on the matter or submit additional information. To facilitate a discussion, the Reviewing Officer enclosed a copy of the Civil Penalty Worksheet describing a proposed penalty in the amount of \$380,000—\$2,500 per day for 152 days of violation (March 1 through July 30). The worksheet sets forth the process for determining the \$2,500 per day assessment:

Case fits Categories A [of Assessment Table] since the violation involved a threat rather than an occurrence of harm, damage, or pollution. Cat. A/Enf. Code C [of Assessment Table, C is for Component Shut-in] for one day has a rate of \$5,000 to \$35,000 per day with a starting point of \$15,000. Proposed assessment is for \$2,500 per day for a total of \$380,000 for 152 days of violation. I did not stay within the range based on minimum threat considering the following:

- *Facility is a 4-pile facility which offers protection to the wells.
- *Facility is unmanned.
- *The well was a gas well.
- *This well was Shut-in during the violation period.

Apr. 5, 2011, Notice, Attached Worksheet; *see also* Civil Penalty Assessment Table, *attached to* Worksheet. The worksheet also shows that the Reviewing Officer took into account Black Elk's compliance history.

By letter dated April 26, 2011, Black Elk requested a meeting with BOEMRE "to provide information and documents that will ultimately mitigate the issue and proposed assessment." Black Elk also set forth in this letter detailed information from "additional data and documents pertaining to the frequencies of the semi-annual tests and the methods." Apr. 26, 2011, Letter at 2. Black Elk noted that it took "the position that the March 31, 2010 and April 5, 2010 SCSSV plug integrity tests were at best, faulted, and inconclusive." *Id.* Black Elk claimed that there was pressure on the SCSSV control line during the integrity test, allowing pressure to migrate to the SCSSV, and therefore it was an error in judgment for the site supervisor and the BOEMRE inspectors to document the two tests as anything but failed and inconclusive tests. *Id.* According to Black Elk, during an integrity test performed on July 31, 2010 (the day following the INC), when "the F-3 Well SCSSV control line" was bled to 0 psi prior to testing the SCSSV, a leakage rate of only 1.625 cfm, well within the tolerable limits, was observed. *Id.* at 3. While acknowledging a failure in its internal communications, Black Elk asserted that

the imposition of a civil penalty would be “based solely on inconclusive data,” and that BOEMRE’s finding that the SCSSV had “failed the integrity test is unjustifiable, inappropriate and undeserved.” *Id.*

Regarding the amount of the proposed civil penalty, Black Elk put forth the following mitigating factors: The hydraulic control line needle valve remained in the open position at all times; none of the six wells on the F platform were producing and no production was crossing the platform; pipelines were out of service; the 4-pile platform was properly lighted and equipped; there were no crane operations at the time; no potential electrical or other hazards on the platform existed; there were no potential electrical or fire hazards; and there was no potential damage that could result in pollution. *Id.* at 4. Black Elk argued that the proposed assessment was “based on invalid documentation, which cannot be substantiated and is based solely on a subjective interpretive [sic] from partial bits of information by the BOEMRE,” and concluded that sufficient data and documents from the record verify that there was no threat to the safety of personnel and environment during the subject time period. *Id.*

BOEMRE (six employees) and Black Elk (five employees) met on May 25, 2011. The handwritten minutes and follow-up e-mails evince a cordial and productive dialogue, with both sides reinforcing information and discussion earlier presented. Administrative Record, Attach. 3. On July 6, 2011, the Reviewing Officer issued a Final Decision in Civil Penalty Case G-2011-001. He modified his proposed assessment, but prior to doing so, he addressed the following concerns and arguments expressed by Black Elk:

Black Elk states that pressure existed on the SCSSV control line during the integrity test. . . . In addition, it is noted that Black Elk states that during this test there was a missing “critical” step to bleed the control line pressure to 0 psi. . . . Black Elk takes the position that the March 31 and April 5, 2010 tests were procedurally erred. . . .

It should be noted . . . that Black Elk “acknowledged the failure in communications with its contracted offshore platform operators delayed actions to immediately correct this violation and notify the BOEMRE . . . that the F-3 well had a mechanical problem.” Regardless of the leakage rate being caused by procedural and/or mechanical failure, no investigation or corrective action was conducted to verify the cause of the leakage rate.

. . . Black Elk concurred that a SCSSV plug test attempted on January 31, 2010 was well within the acceptable 6-month inspection frequency [and]

was a “non-test” in that it could not verify a leakage rate exceeding the allowable 5 CFM leakage rate.

After review of all of the information, I conclude that the F-3 well was unable to be tested on January 31, 2010 due to a frozen valve. . . . Therefore, since the valve was unable to be tested and was not tested until beyond the 6-month interval . . . , I find Black Elk failed to comply with the testing requirements of 30 CFR 250.804(a)(1)(i) and/or (iii).

. . . Black Elk takes the position that the March 1, 2010 to July 30, 2010 daily violation start date is based on subjective interpretive information and cannot be substantiated.

After review of the information and further discussion, the assessment of civil penalty will now be assessed in the following manner:

From March 1 through 31, 2011: This will be assessed for one interval in which Black Elk failed to test the SCSSV within the 6-month requirement of 30 CFR 250.804(a)(1)(i) and/or (iii) which expired February 28, 2010.

From April 5 to July 30, 2011: This will be assessed as a per day violation in which Black Elk failed to take the necessary corrective action in accordance with 30 CFR 250.804(a)(1)(i) and/or (iii).

Black Elk has included the following information as mitigation for the assessment

The following items were considered as mitigating information as a part of the initial assessment:

1. The facility is a 4-pile facility which offers protection to the well;
2. The facility is unmanned;
3. The subject well was a gas well; and
4. The well was shut in during the violation period.

. . . In conclusion, I find the [other factors cited] do not mitigate or eliminate the threat assessment.

[P]ost issuance of the INC, Black Elk immediately called for a “safety stand-down” for all facilities to review 30 CFR 250.804 Also, it is noted that Black Elk has implemented corrective procedures It is also noted that the violation was immediately corrected by the installation of a DX plug.

Although subsequent actions taken cannot be considered for mitigation purposes, I find that Black Elk is to be commended for their immediate actions taken to correct the violation and prevent the violation from occurring in the future.

Final Decision at 2-4. The Reviewing Officer then implemented a penalty of \$307,000—\$15,000 for one incident of failure to inspect for leakage and proper operations of the SCSSD at intervals not exceeding 6 months and \$2,500 per day for 117 days (April 5 to July 30) for failure to take the necessary corrective action to remove, repair, and reinstall or replace the SCSSD after observance of a gas leakage rate in excess of 5 cfm. Black Elk filed its appeal.³

ARGUMENTS

In its statement of reasons, Black Elk does not dispute that the subject SCSSD was not tested within the 6 month period, but argues that this violation involves only an expiration of time and no serious, irreparable, or immediate harm. Black Elk also asserts error in the determination that the interval where the SCSSD was not corrected constituted a threat of harm, citing several physical characteristics associated with the well and platform. Black Elk reiterates its assertion that the integrity tests conducted on March 31 and April 5 were faulty and inconclusive as evidenced by the July 31 test which showed that the SCSSD was operating within the regulatory limits. Black Elk asks the Board to regard the penalty assessment as excessive, given that this is the first civil penalty assessed against Black Elk. Additionally, Black Elk argues that the Reviewing Officer failed to properly consider the mitigating factors it cited.

In its Answer, BOEMRE argues that Black Elk's reasons for appeal are repetitive of the arguments presented before the decision-maker and do not show error in the reasoned decision. Regarding the argument that the failure to timely test did not pose a threat of harm, BOEMRE avers that such SCSSDs, downhole safety devices, are designed to shut-in possible leaks or abnormal conditions, thus preventing a potential harm. The failure of such a device will certainly pose a threat of harm, it argues, and the lack of timely testing will delay the detection of such failure. BOEMRE contends that the failure to test is more than an expiration of a time period as argued by Black Elk. As for the failure to take corrective action, BOEMRE explains that Black Elk has misconstrued the issue. Acknowledging the lack of definitive evidence regarding whether the integrity tests were faulty or the reports

³ Black Elk complied with 30 C.F.R. § 250.1409 and 30 C.F.R. Part 290, requiring submission of a processing fee of \$150 and a surety bond in the amount of the penalty.

inaccurate, BOEMRE argues that the critical undeniable fact at issue here is Black Elk's failure to take corrective action once the test results suggested a leakage problem. BOEMRE contends that Black Elk's mechanical or procedural deficiencies cannot justify noncompliance with its legal duty to undertake corrective action as outlined by the regulations, and asserts that the Reviewing Officer's analysis of the mitigation factors was thorough and reasonable.

DISCUSSION

In the Outer Continental Shelf Lands Act (OCSLA), *as amended*, 43 U.S.C. §§ 1331-1356 (2006), Congress authorized the Secretary of the Interior to issue and manage leases on the OCS for the exploration and development of oil and gas. Declaring the OCS to be "a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, *subject to environmental safeguards*," Congress mandated that

operations in the Outer Continental Shelf should be conducted in a safe manner by well-trained personnel using technology, precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, physical obstruction to other users of the waters or subsoil and seabed, or other occurrences which may cause damage to the environment or to property, or endanger life or health.

43 U.S.C. § 1332(3), (6) (2006) (emphasis added); *see also* 43 U.S.C. § 1332(5) (2006); 43 U.S.C. § 1348(b) (2006); *Pacific Operators Offshore, LLC*, 181 IBLA 165, 176-77 (2011); *ATP Oil & Gas Corporation*, 178 IBLA 88, 93 (2009).

Implementing this policy, the Department promulgated safety regulations in 30 C.F.R. Part 250. Under section 24(b) of OCSLA, Congress authorized the Secretary to assess civil penalties when a violation of the safety regulations constitutes 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, coastal, or human environment. 43 U.S.C. § 1350(b)(2) (2006); *BP Exploration & Production, Inc.*, 172 IBLA 372, 380, 381 (2007) (the OCSLA is designed to promote safety by authorizing assessment of civil penalties); *Petro Ventures, Inc.*, 167 IBLA 315, 321-22 (2005). In the instant case, BOEMRE imposed civil penalties against Black Elk for two documented violations of the rule at 30 C.F.R. § 250.804.

Black Elk argues that civil penalties are inappropriate and urges the Board to reverse the Reviewing Officer's assessment on the basis that the alleged violations did not constitute a serious or actual threat. We reject Black Elk's argument. Civil

penalties in general have the primary objectives of punishing and deterring future damage to the environment and providing operators with incentive to comply timely with applicable requirement and orders. *See generally In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, 841 F. Supp. 2d 988, 1004 (E.D. La. 2012); *Grynberg Petroleum Co. v. BLM*, 172 IBLA 167, 181 (2007), *aff'd*, *Grynberg Petroleum v. Salazar*, 2011 WL 940819 (D. Colo.). The Department has stated that "[b]y pursuing, assessing, and collecting civil penalties, [BSEE's] program is designed to encourage compliance with OCS statutes and regulations." 62 Fed. Reg. 42667 (Aug. 8, 1997). Violation of a regulation designed to prevent environmental damage does not necessarily become less serious simply because of the good fortune in a particular case that little damage occurred.

Our review of the circumstances herein shows that BOEMRE did not assess civil penalties for actual harm, but rather for Black Elk's failure to comply with a safety regulation designed to protect the environment. That lack of compliance constituted a *threat* of serious, irreparable, or immediate harm or damage to life, property, any mineral deposit, or the marine, coastal, or human environment. *See* 43 U.S.C. § 1350(b)(2) (2006). Further, we reject Black Elk's argument that, because the violations did not constitute a serious threat, BOEMRE issued the civil penalties in error. As a "threat" of danger or injury is by definition one which is unrealized, it is sufficient that the potential exists. *Conn Energy, Inc.*, 151 IBLA 53, 64 (1999). There is no disagreement that a leaking SCSSD could cause severe environmental damage if not detected and remedied. The purpose of the Department's safety regulations is to take steps to prevent the occurrence of dangerous conditions or circumstances, and to that end, the regulations impose an affirmative duty to regularly test SCSSDs and ensure that they are in proper working order, and able to respond should an emergency arise. *See id.*

With respect to the first violation of 30 C.F.R. § 250.804, the failure to test within the mandated period or more frequently, if operating conditions warrant, this Board has held on several occasions that even though no actual harm may have occurred from an alleged failure to conduct a required test or inspection within the mandated period, it is appropriate to assess civil penalties for a violation of the testing or inspection requirements which seek to reduce the risks associated with the device or equipment to be tested or inspected. *The Houston Exploration Company*, 169 IBLA 166, 176 (2006) (crane); *Blue Dolphin Exploration Company*, 166 IBLA 131, 136 (2005) (tubing plugs); *Conn Energy, Inc.*, 151 IBLA at 63-64 (both tubing plugs and SCSSDs). Contrary to Black Elk's argument, actual harm need not result from the failure to test the SCSSD for there to be a violation of the rule. As the Board stated in *W&T Offshore*, 148 IBLA 323, 362 (1999): "It is not necessary that the violation harm the environment, human life, or property, it need only increase the risk of harm." We therefore find that Black Elk's failure to test the integrity of the

SCSSD within the mandated period constituted a violation of 30 C.F.R. § 250.804, and that BOEMRE properly issued an incident of noncompliance and assessed a civil penalty for this violation.

As for the second violation, we find that Black Elk's failure to take corrective action where a leakage problem has been indicated is contrary to the purpose of the Department's safety regulations—Congress' mandate "to *prevent or minimize the likelihood* of blowouts, loss of well control, fires, spillages, physical obstruction to other users of the waters or subsoil and seabed, or other occurrences which may cause damage to the environment or to property, or endanger life or health." 43 U.S.C. § 1332(6) (2006) (emphasis added). The Department's instruction in 30 C.F.R. § 250.804(a)(1)(i) is very clear: "If the device does not operate properly, or if a liquid leakage rate in excess of 200 cubic centimeters per minute or a gas leakage rate in excess of 5 cubic feet per minute is observed, the device shall be removed, repaired and reinstalled, or replaced." There is no dispute that Black Elk *observed* a gas leakage rate in excess of 5 cfm but waited 3 months, and only after the matter was brought to its attention by BOEMRE, to act upon that information. Black Elk's choice not to act can only be construed as noncompliance with the regulation.

Black Elk argues that it performed an integrity test on the SCSSD on July 31, 2010, and verified an acceptable leakage rate of 1.6 cfm, and contends that this is evidence that the two earlier tests were faulty. In its August 9, 2010, report of action in response to the INC, Black Elk states that it "will report any [SCSSD] failures to the District Office immediately and take corrective action." Aug. 9, 2010, Letter to BOEMRE. There is no evidence that Black Elk actually complied with the unequivocal requirement in 30 C.F.R. § 250.804 that the SCSSD be removed when a leakage rate in excess of 5 cfm is observed.

For purposes of this appeal, we accept Black Elk's assertion that, as of the July 31 test, corrective action was no longer an issue. This, however, does not eliminate or mitigate Black Elk's violation of 30 C.F.R. § 250.804(a)(1)(i) and the operator's liability for failure to take action upon observing conditions that exceeded the regulatory limit. *W&T Offshore*, 148 IBLA at 362. Had Black Elk acted promptly, as the regulation requires, then any problem with the SCSSD or with the testing process would have been resolved at that time. The situation here is simple to describe—a threat existed (whether it would have resulted in an actual leakage event does not extinguish the threat) and the established process to eliminate the threat was ignored when the operator did not comply with the safety regulations designed to eliminate such threats. Black Elk's position that a faulty process was the cause for an incorrect test reading ignores the fact that a reading of leakage in excess of the regulatory limit was observed not only on March 31, but when Black Elk

performed the integrity test again on April 5. Twice Black Elk failed to take appropriate action. We conclude that the Reviewing Officer correctly identified noncompliance in failing to take corrective action and was justified in assessing a civil penalty.

The decision whether, and to what extent, to impose a penalty constitutes an exercise of BOEMRE's discretionary authority, which will be upheld when there is a "reasonable explanation" for the agency's decision and "a rational connection exists between its findings and the choice it makes." *Petro Ventures, Inc.*, 167 IBLA at 325 (quoting *Pacific Operators Offshore, Inc.*, 154 IBLA 100, 113 (2000)). The burden is upon the appellant challenging such a decision to demonstrate, by a preponderance of the evidence, that BOEMRE committed a material error in its factual analysis, or that its decision is not supported by a record showing that BOEMRE gave due consideration to all relevant factors and acted on the basis of a rational connection between the facts found and the choice made. See *UOS Energy, LLC*, 177 IBLA 341, 349 (2009) and cases cited; *Rocky Mountain Helium, LLC*, 148 IBLA 317, 319 (1999) (the Board will affirm discretionary decisions when the record demonstrates that the relevant factors were considered and the decision is in accord with statutory directives).

Appellant argues that BOEMRE did not properly consider its record of safety and environmental compliance in favor of eliminating any civil penalty. The record shows that, in his assessment, the Reviewing Officer did indeed consider Black Elk's history of civil penalties and INCs. Apr. 5, 2011, Notice, Attach. 1 (Worksheet). The instructions of the Department's Assessment Table employed by the Reviewing Officer provide for consideration of the lessee's record of noncompliance and penalty assessment as factors suggesting an increase in the amount of penalty to be imposed. *Id.*, Civil Penalty Assessment Table, *attached to* Worksheet. Here, Black Elk received the benefit of its favorable history, as the Reviewing Officer chose not to apply any such increase.

The record shows that BOEMRE considered input throughout the period of noncompliance review. The information, documentation, and analysis BOEMRE used to measure the final penalty amount is contained in the record and the Final Decision provides a detailed explanation of the factors considered in the final penalty assessment. Black Elk has benefitted from BOEMRE's consideration of "mitigating factors." First, under the guidelines relevant to Black Elk's violations, the suggested assessment is \$5,000 to \$35,000 per day, with a starting point of \$15,000. Apr. 5, 2011, Notice, Civil Penalty Assessment Table (*attached to* Worksheet). BOEMRE proposed a significantly reduced assessment of only \$2,500 per day, which is "not within the range" established by the Assessment Table, based on an observation that the violations constituted "minimum" threats. *Id.*, *Attached Worksheet*. Second, the

Reviewing Officer separated the two incidents of noncompliance, and applied only a one-time “interval” assessment in the amount of \$15,000 for the failure to test timely, rather than a per-day assessment covering the month of March. July 6, 2011, Final Decision, at 4. Third, he applied the reduced per-day assessment for failure to take corrective measures on the basis of only 117 days (April 5 to July 30, 2010), the fewest number of days for which he could assess a penalty bgiven the factual circumstances described here. *Id.* In light of these substantial reductions, we find that BOEMRE gave due consideration to all relevant factors and acted on the basis of a rational connection between the facts found and the civil penalties assessed. *See Petro Ventures, Inc.*, 165 IBLA at 325. Thus, the combined civil penalties here are appropriate.

Appellant has failed to carry its burden to demonstrate, by a preponderance of the evidence, that BOEMRE and the Reviewing Officer committed a material error in the factual analysis, or that the Final Decision was not supported by a record showing that BOEMRE gave due consideration to all relevant factors and acted on the basis of a rational connection between the facts found and the choice made regarding the appropriate civil penalty. *See UOS Energy, LLC*, 177 IBLA at 349.

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

_____/s/
James F. Roberts
Administrative Judge

I concur:

_____/s/
Christina S. Kalavritinos
Administrative Judge