United States Department of the Interior

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TENGASCO, INC.

IBLA 2013-7 Decided June 23, 2014

Appeal from a July 20, 2012, Final Decision of the Reviewing Officer, Gulf of Mexico Region, Bureau of Safety and Environmental Enforcement, assessing civil penalties in the amount of $386,000 for eight Incidents of Noncompliance for violations of the inspection and testing rules at 30 C.F.R. § 250.804(a) on Lease OCS-G 06164, High Island Area Block 176, Platform B. Civil Penalty Case No. G-2011-016.

Affirmed.

1. Oil and Gas Leases: Generally--Oil and Gas Leases: Civil Assessments and Penalties--Outer Continental Shelf Lands Act: Oil and Gas Leases

   Pursuant to the Outer Continental Shelf Lands Act, any operation undertaken under the Act is "subject to environmental safeguards." The Department adopted safety regulations, including rules requiring installation, inspection, and testing of safety devices on OCS rigs to minimize the potential for catastrophic events on the rig and to protect human life, the environment, and the mineral resources. Such safety devices must be tested at regular intervals pursuant to 30 C.F.R. § 250.804(a).

2. Oil and Gas Leases: Generally--Oil and Gas Leases: Civil Assessments and Penalties--Outer Continental Shelf Lands Act: Oil and Gas Leases

   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) (2006). The implementing

regulation requiring record-keeping and retention provides that the lessee shall maintain records for a period of 2 years for each subsurface and surface safety device installed. 30 C.F.R. § 250.804(b).

3. Oil and Gas Leases: Generally--Oil and Gas Leases: Civil Assessments and Penalties--Outer Continental Shelf Lands Act: Oil and Gas Leases

Section 24(b) of OCSLA provides that before the Department may "assess, collect, and compromise" a civil penalty for failure to comply with OCS regulations, the violation must constitute 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, the violator must receive notice that the violation occurred. The decision whether to impose a penalty, and, if so, its amount, constitutes an exercise of BSEE's discretionary authority.

4. Oil and Gas Leases: Generally--Oil and Gas Leases: Civil Assessments and Penalties--Outer Continental Shelf Lands Act: Oil and Gas Leases

At the civil penalty stage, the burden is upon an appellant challenging a civil penalty assessment issued pursuant to Section 24(b) of OCSLA to demonstrate by a preponderance of the evidence that the violations for which BSEE assessed the civil penalties on appeal were not of a nature subject to civil penalties pursuant to the OCSLA and BSEE's civil penalty regulations, and are therefore unauthorized, that the decision is predicated on a material error in factual analysis, not supported by a record evincing due consideration of all relevant factors, including possible mitigation, or that no rational connection exists between the facts found and the civil penalty assessed.

5. Oil and Gas Leases: Generally--Oil and Gas Leases: Civil Assessments and Penalties--Outer Continental Shelf Lands Act: Oil and Gas Leases

BSEE 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 safety system device at required intervals), even if no actual harm results from the violations. The Department's safety regulations at 30 C.F.R. Part 250 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. And the regulation at 30 C.F.R. § 250.1404 does not limit BSEE's authority to assess civil penalties for violations causing actual harm or injury (30 C.F.R. § 250.1404(c)), but explicitly embraces "[v]iolations that BSEE determines may constitute, or constituted, a threat." It is not necessary that the violation harm the environment, human life, or property; it need only increase the risk of harm.

6. Oil and Gas Leases: Generally--Oil and Gas Leases: Civil Assessments and Penalties--Outer Continental Shelf Lands Act: Oil and Gas Leases

The safety system testing regulations in 30 C.F.R. § 250.804(a), require periodic testing for each device listed in separate subsections of the rule. The plain meaning of the regulation is that each failure to test each device as required in each time period constitutes a single, separate violation.

7. Oil and Gas Leases: Generally--Oil and Gas Leases: Civil Assessments and Penalties--Outer Continental Shelf Lands Act: Oil and Gas Leases

BSEE's guidelines, including the National Office Potential Incident of Noncompliance List, and Enforcement, National Field Potential INC and Guideline List, and the penalty assessment matrix are not substantive rules

requiring notice and comment rulemaking under the APA, but rather are tools in the enforcement of duly-promulgated regulations, and fall within the APA's exception to promulgation for "interpretive rules, general statements of policy, or rules of agency organization, procedure or practice." 5 U.S.C. § 553(b)(3)(A) (2006).

8. Oil and Gas Leases: Generally--Oil and Gas Leases: Civil Assessments and Penalties--Outer Continental Shelf Lands Act: Oil and Gas Leases

Affidavits, statements from individuals, and other forms of circumstantial evidence produced to prove compliance with testing requirements are insufficient to constitute the specific, contemporaneous verification of testing that owners and operators are required to maintain and produce upon request *within the 2-year time period* under 30 C.F.R. § 250.804(b). Deficiencies in appellant's proffered evidence during this 2-year time period are not cured by circumstantial evidence.

APPEARANCES: Jonathan A. Hunter, Esq., and Stephen Wiegand, Esq., New Orleans, Louisiana, for Tengasco, Inc.; Eric Andreas, Esq., and R. Scott Nuzum, 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 KALAVRITINOS

Tengasco, Inc., appeals from a July 20, 2012, Final Decision of the Reviewing Officer (RO), Gulf of Mexico Region, Bureau of Safety and Environmental Enforcement (BSEE), assessing civil penalties in the amount of $386,000 for eight Incidents of Noncompliance (INCs) resulting from a February 23, 2011, inspection of Lease OCS-G 06164, High Island Area Block 176, Platform B. The INCs were issued for failure to perform certain safety inspections and tests at intervals required by Departmental regulations at 30 C.F.R. Part 250. Tengasco challenges BSEE's authority to assess civil penalties for what it describes as a failure to provide documentation, causing no endangerment to life or property. Appellant has failed to carry its burden on this appeal and the Final Decision is affirmed.

BACKGROUND

Tengasco is lessee and operator of Lease OCS-G 06164, High Island Area Block 176. On February 23, 2011, BSEE conducted an on-site inspection of Platform B, found that appellant could not produce records demonstrating the periodic inspections and testing of certain safety devices, as required by Departmental regulations, and cited appellant with 24 INCs.[1] Administrative Record (AR) Tab A-9. BSEE conducted additional inspections, dropped some INCs from consideration for civil penalty review, and, by letter dated July 7, 2011, advised Tengasco that 12 of the INCs were referred for civil penalty review. AR Tab A-9. BSEE's August 17, 2011, Civil Penalty Case Report described each INC in detail. AR Tab A-10 at 3-4. During August and September 2011, BSEE requested additional clarifying information from Tengasco. AR Tab B-6, B-7.

Upon further consideration, including review of information provided by Tengasco, BSEE reduced the number of INCs reviewed for civil penalty assessment from 12 to 8.[2] AR Tab B-9. All eight of the INCs retained for civil penalty assessment involved violations of the safety system testing rules at 30 C.F.R. § 250.804(a), and were identified as having a "threat" impact. *Id.* at 1-3. They are described in the

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[1] Under the regulations at 30 C.F.R. §§ 250.104, 290.2, if BSEE determines, based on reliable, probative, and substantial evidence, that an OCS lessee or operator has failed to follow any requirement of a statute, regulation, order, or lease term for any Federal oil or gas lease, then it may issue an INC, stating the nature of the violation and how to correct it. INCs are appealable to this Board. 30 C.F.R. §§ 250.104, 290.2; *Apache Corp.*, 183 IBLA 273, 288 (2013); *ATP Oil & Gas Corp.*, 178 IBLA 88, 92 (2009). Appellant did not appeal issuance of the INCs. BSEE states that since the period for appellant to appeal the INCs is over, "all that should be addressed in this appeal is the amount of the civil penalty." Answer at 5 n.6. Appellant states that "BSEE's attempt to impose civil penalties is an entirely independent action," but claims that "BSEE has the burden of proving every element of its claim, including that a regulatory violation actually occurred which warranted a penalty assessment." Reply at 2-3. Appellant correctly identifies an issue on appeal (whether the underlying violations, which are the subject matter of the INCs, support civil penalty assessments under the law), but misallocates the burden on appeal, as we discuss below.

[2] The four INCs dropped from proposed civil penalty assessment were issued for violations of 30 C.F.R. §§ 250.107 (protection measures), 250.108 (crane safety requirements), 250.301 (inspection and record retention), and 250.1006 (pipeline decommission), respectively. BSEE rescinded the INCs for failing to meet pollution inspection requirements and failing to decommission a pipeline.

October 26, 2011, Notice of Proposed Civil Penalty Assessment, which notified Tengasco "of the initiation of administrative civil penalty proceedings and to offer you the opportunity for a meeting on the matter," pursuant to 43 U.S.C. § 1350(b) (2006) and 30 C.F.R. § 250.1404(b). *Id.* at 4. The Notice proposed a civil assessment in the amount of $476,000 and detailed violations of § 250.804(a)(1)(i), § 250.804(a)(1)(iii), § 250.804(a)(3)(ii), § 250.804(a)(4)(i), § 250.804(a)(5), and § 250.804(a)(6), for specific failures to test various safety devices on the production wells for leakage and to verify the integrity of the safety system and all safety devices, "which subjected personnel, environment, and equipment to a threat of serious and/or immediate injury or damage." AR Tab B-9 at 1-3. The Notice set forth the specific amount assessed for each testing violation committed in each test period, and referenced the attached Civil Penalty Worksheet used in calculating the proposed assessment. *Id.* at 4-5.

Tengasco responded by letter dated November 22, 2011, requesting a meeting to discuss the proposed civil penalties and asking for additional time to respond due to difficulties in obtaining records from Rhino Offshore, the contractor who was to conduct the visits and tests.[3] AR Tab C-1. A meeting was held January 19, 2012, at BSEE's Gulf of Mexico Regional Office. AR Tab C-3 (includes minutes of the meeting, Tengasco's presentation, and email documents). Tengasco outlined its corrective measures, asserted its belief that the INCs were issued for a lack of paperwork and not for any accident or incident of exposure, and discussed Rhino's reluctance to provide documents. *Id.* ("According to conversations, the paperwork is there but because Rhino's lawyers . . . ."). Following the meeting, BSEE issued subpoenas to both Tengasco and Rhino pursuant to its authority under 43 U.S.C. § 1348 and 30 C.F.R. § 250.1405, requesting all testing records from June 2010 through February 2011. AR Tab D-2, D-3.

On February 22, 2012, Rhino responded with "all responsive documents in its possession . . . ." AR Tab D-2. These included National Pollution Discharge Elimination System Discharge Data Reports from June through November 2010, a September 13, 2010, "Safety and Compliance Inspection Report" (September 2010 Inspection Report), and a June 14, 2010, U.S. Coast Guard Fixed OCS Facility Inspection Report (U.S. Coast Guard form). AR Tab D-5, Appendices 1-3. Tengasco provided flight records, boat logs, and helicopter invoices to show that former Rhino employee, Randy Walker, made trips to Platform B, during the period for which records are missing, however, those documents neither identify the work performed at Platform B, nor document any safety test results, as explained in the Final Decision. AR Tab D-4; AR Tab E-1 at 5. Tengasco also provided Walker's affidavit,

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[3] Tengasco terminated its contract for testing services with Rhino on Jan. 6, 2011. AR Tab D-5.

which states that he was present for the subject tests during the period of missing documents, and an exhibit to the affidavit, consisting of "reconstructed" test result forms, which, according to the affidavit, were "completed from [Walker's] personal knowledge of the events in question, [his] log books and field notes relating to [the] same."[4] AR Tab D-4, Appendix 1 at 2. These "reconstructed" forms were not contemporaneous records of testing at Platform B, and, in some instances, showed information that differed from some test reports reviewed by BSEE during the February 2011 investigation. *See* AR Tab E-1 at 6; Answer at 4 n.4.

The RO issued the Final Decision on July 20, 2012, assessing Tengasco civil penalties for violations of the inspection and testing rules at 30 C.F.R. § 250.804(a).[5] AR Tab E-1. Before outlining each violation in detail, he identified all information obtained from Tengasco, including the subpoenas, inspection reports, general evidence of trips to the platform, and Walker's "reconstructed" documents. He addressed Tengasco's contention that penalties were inappropriate in the absence of any incident or accident, and explained that civil penalties are appropriate where, as here, the violations constituted a threat of harm to life, property, and the environment. In consideration of the entire record, including, in particular, the September 2010 Inspection Report, the RO mitigated the assessment, reducing it from $476,000 to $386,000. *Id.*

Arguments

Tengasco argues that BSEE carries the burden of proof on appeal, claiming that penalties should only be imposed in cases that are clear and free from doubt. Statement of Reasons (SOR) at 7. Tengasco contends that the evidence it submitted adequately shows that the required testing was, in fact, performed, and that its only possible violation was its failure to have records available for review, which poses no threat of harm, calls for an opportunity for correction, and does not support the imposition of civil penalties. *Id.* at 8-17. Tengasco challenges BSEE's calculations, arguing that the agency's use of an assessment matrix and guidelines to calculate the civil penalties violates the Administrative Procedure Act's (APA) prohibition against adopting substantive rules without notice and comment rulemaking procedures. *Id.* at 17-19. With respect to the amount of civil penalties, appellant also challenges the per-device basis for calculating penalties, and the degree of detail provided,

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[4] Tengasco did not submit the referenced log books or field notes.

[5] BSEE cited 30 C.F.R. § 250.804(a)(1), INCs P-280 and P-283; § 250.804(a)(3), INCs P-303 and P-304; § 250.804(a)(4), INCs P-314 and P-315; § 250.804(a)(5), INC P-307; and § 250.804(a)(6), INC P-308. AR Tab E-1 (Final Decision); AR Tab B-8.

specifically asserting that the decision failed to take into account record evidence from a September 2010 Inspection Report. Tengasco asks the Board to vacate or significantly reduce the assessment. Reply at 3-6; SOR at 5-24.

BSEE explains that the INCs were issued for failure to test safety devices as required by duly promulgated regulations, noting that a lessee has the burden of retaining testing documents for 2 years and providing them upon request, and that appellant failed to provide them upon request during the inspection and in response to the subpoenas, and has failed to produce other contemporaneous documentation evincing compliance. BSEE disputes the probative value of Tengasco's documents, which indicate only generally that platform personnel traveled to Platform B during the time period in question, and Tengasco's claim that the absence of testing reports constitutes no threat of harm. BSEE clarifies that Tengasco was issued civil penalties not for failing to provide records, but for failing to verify testing compliance, and cites Board precedent recognizing that, pursuant to the regulations, failure to test safety devices increases the risk of harm, whether or not actual harm results. BSEE concludes that its assessment, including the $90,000 in reductions, was legally authorized, reasonable, based on careful consideration of information received from Tengasco, and fully articulated in the decision and assessment notice worksheets.

Discussion

[1] We begin by placing the decision to assess civil penalties in proper statutory and regulatory context. The Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-1356 (2006), authorizes the Department to issue and manage leases on the OCS for the exploration, development, and production of hydrocarbons. Any operation on an OCSLA lease is "subject to environmental safeguards." 43 U.S.C. § 1332(3) (2006). 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* 43 U.S.C. § 1348(b) (2006); *Apache Corp.,* 183 IBLA at 287; *Black Elk Energy Offshore Operations, LLC,* 182 IBLA 331, 338 (2012); *Pac. Operators Offshore, LLC,* 181 IBLA 165, 176-77 (2011); *ATP Oil & Gas Corp.*, 178 IBLA 88, 93 (2009). Accordingly, the Department promulgated safety regulations in 30 C.F.R. Part 250. These regulations require installation of safety devices on OCS rigs to minimize the potential for catastrophic events on the rig and to protect human life, the environment, and the mineral resources. The safety devices must be tested at regular intervals pursuant to 30 C.F.R. § 250.804(a).

[2] 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) (2006). The implementing regulation requiring record-keeping and retention provides:

> 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 BSEE. 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 C.F.R. § 250.804(b).

[3] Section 24(b) of OCSLA provides that, before the Department may "assess, collect, and compromise" a civil penalty for failure to comply with OCS regulations, the violation must constitute 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, the violator must receive notice that the violation occurred, and they must be "given an opportunity for a hearing."[6] 43 U.S.C. § 1350(b)(2) (2006); *Black Elk Energy*, 182 IBLA at 338-39; *BP Exploration & Prod., Inc.*, 172 IBLA 372, 380, 381 (2007) (OCSLA is designed to promote safety by authorizing assessment of civil penalties); *Petro Ventures, Inc.*, 167 IBLA 315, 321-22 (2005).

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[6] In *W&T Offshore Inc.,* 148 IBLA 323, 358-59 (1999), the Board discussed what qualifies as a hearing under section 24(b) of OCSLA.

Under Departmental regulations, revised in 1997, BSEE determines whether the underlying violation is of the type to which a civil penalty could attach, whether a civil penalty should be assessed in this instance, and the amount appropriately assessed for any penalty. *See* 30 C.F.R. §§ 250.1400 – 250.1409; 62 Fed. Reg. 42667 (Aug. 8, 1997) (effective Oct. 7, 1997).[7]

The decisions whether to impose a penalty, and, if so, its amount, constitute an exercise of BSEE's discretionary authority. *Black Elk Energy*, 182 IBLA at 341; *Petro Ventures*, 167 IBLA at 325. At the civil penalty stage, when BSEE has established that a violation occurred and has issued an INC (whether or not an appeal of an INC was taken), a party has the opportunity to demonstrate that the Department should exercise its discretion and forego assessing a civil penalty as set forth in 30 C.F.R. § 250.1404, or consider mitigating factors that would decrease the penalty amount. *See* 43 U.S.C. § 1350(b)(1) ("The Secretary *may* assess, collect, and *compromise* any such penalty." (emphasis added)). Appellants have raised such issues to the Board in numerous cases appealing OCS civil penalty decisions. *See, e.g.*, *Black Elk Energy*, 182 IBLA at 338; *BP Exploration & Prod.*, 172 IBLA at 383; *Houston Exploration Co.*, 169 IBLA 166, 175 (2006); *Petro Ventures*, 167 IBLA at 324-25; *Blue Dolphin Exploration Co.*, 166 IBLA 131, 137 (2005).

The regulations provide that a civil penalty is appropriate if the violation constituted, among other things, a "serious, irreparable, or immediate harm or damage to life." 30 C.F.R. § 250.1404(c). "If the Reviewing Officer determines that a civil penalty should be assessed, the Reviewing Officer will send the violator a letter of notification," which includes a proposed civil penalty amount. 30 C.F.R. § 250.1406. The violator may decline to pay the proposed civil penalty in favor of submitting countervailing information to show why a civil penalty should not be assessed and/or that there are mitigating circumstances affecting its amount. 30 C.F.R. § 250.1407. After reviewing the case file and additional information submitted by the respondent, the RO then issues a decision that includes the amount of any final civil penalty, the basis for the civil penalty, and instructions for paying or appealing the civil penalty. 30 C.F.R. §§ 250.1404, 250.1406, 250.1408; *see* 43 U.S.C. § 1350(b)(1) (2006).

BSEE's exercise of discretionary authority to assess civil penalties will be upheld when there is a "reasonable explanation" for the agency's decision and "a

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[7] The revision was originally codified as 30 C.F.R. §§ 250.200 – 250.209, but was redesignated 9 months later as 30 C.F.R. §§ 250.1400 – 250.1409. *See* 63 Fed. Reg. 29478 (May 29, 1998).

rational connection exists between its findings and the choice it makes." *Black Elk Energy*, 182 IBLA at 341; *Petro Ventures*, 167 IBLA at 325 (quoting *Pac. Operators Offshore, Inc.*, 154 IBLA 100, 113 (2000)). The burden is upon the appellant challenging a civil penalty assessment issued pursuant to section 24(b) of OCSLA to demonstrate, by a preponderance of the evidence, that the RO committed a material error in his factual analysis, or that his decision is not supported by a record showing that he 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; *Houston Exploration Co.*, 169 IBLA at 174 (citing *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)).

[4] We consider first whether Tengasco, in challenging the civil penalty assessment issued pursuant to section 24(b) of OCSLA, has carried its burden to show, by a preponderance of the evidence, that the violations for which BSEE assessed the civil penalties on appeal were not of a nature subject to civil penalties pursuant to OCSLA and BSEE's civil penalty regulations, and are therefore unauthorized. We then consider whether appellant has preponderated in showing that the decision is predicated on a material error in factual analysis, it is not supported by a record evincing due consideration of all relevant factors, including possible mitigation, or no rational connection exists between the facts found and the civil penalty assessed.

The RO determined that the violations underlying the INCs issued to Tengasco —failure to comply with the periodic safety inspection and testing requirements of 30 C.F.R. § 250.804(a)—are of the type to which a civil penalty may attach, because such violations "may constitute, or constituted, a threat of serious, irreparable, or immediate harm or damage to life." 30 C.F.R. § 250.1404(b). Tengasco disagrees, arguing that civil penalties are inappropriate because the alleged violations did not cause a serious or actual threat or harm—the same argument the Board squarely addressed and rejected in *Black Elk Energy*.

> 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[s] and orders. The Department has stated that "[b]y pursuing, assessing, and collecting civil penalties, [the Department's] program is designed to encourage compliance with OCS statutes and regulations." 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 [BSEE's predecessor agency] did not assess civil penalties for actual harm, but rather for . . . 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. Further, we reject [the] 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. There is no disagreement that a leaking SCSSD [surface controlled subsurface device] 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.
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> 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. Contrary to [the] argument, actual harm need not result from the failure to test the SCSSD for there to be a violation of the rule. . . . "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 [the] 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.

182 IBLA at 338-40 (citations omitted).

[5] We further noted that the regulation at 30 C.F.R. §§ 250.1404 does not limit BSEE's authority to assess civil penalties for violations causing actual harm or

injury (30 C.F.R. §§ 250.1404(c)), but explicitly embraces "[v]iolations that BSEE determines may constitute, or constituted, a threat." 30 C.F.R. §§ 250.1404(b). Tengasco has not carried its burden of showing that violations of the safety testing regulations, for which BSEE assessed civil penalties, are not subject to the exercise of BSEE's authority to assess civil penalties, even when no actual harm or injury resulted.

Tengasco also attempts to distinguish the underlying violations in this appeal from those properly subject to civil penalties by arguing that, at worst, the company violated only the rule at 30 C.F.R. § 250.804(b), which requires retention and production of records of the inspections and testing required under 30 C.F.R. § 250.804(a), and that BSEE erred in disregarding evidence purportedly showing that Tengasco had, in fact, timely undertaken the requisite testing.[8] Here too, Board precedent directly addresses and rejects these arguments. The appellant in *Blue Dolphin*, like Tengasco, contended that civil penalties should not be assessed because, while it may have violated subsection 250.804(b) by misplacing records, that violation posed no endangerment. We observed that "[w]hile the misplacement of testing records is not itself a safety risk, the provision is designed to ensure compliance with other provisions of [agency] rules that are designed to limit risks to health, safety, and the environment." *Blue Dolphin*, 166 IBLA at 138.

> It is true that [30 C.F.R. §] 250.804(b) was not listed as an INC. However, [§§ 250.804(a) and (b)] are part of the same regulation and must be read together. A violation of [§] 250.804(b) must be analyzed in conjunction with [§] 250.804(a)[]. A lessee may be charged a civil penalty for not testing [a safety device] if it cannot show documentation to satisfy [§] 250.804(b).
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> [Appellant's] argument incorrectly characterizes the nature of its offense. [Appellant] 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 [safety devices] in accordance with [§] 250.804(a)[]. [Appellant] has not shown, with documentation, that it did test the

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[8] As the time for appealing the underlying INCs has passed and those decisions are administratively final for the Department, we consider this argument only in the context of whether the subject violations are of the nature of the violations subject to civil penalties under the OCSLA and regulations; we do not adjudicate the merits of the decision to issue the INCs.

> tubing plugs. Thus, [the agency] has properly assessed a civil penalty for the violation of an environmental, health, or safety provision.

Id.

Tengasco asserts that general travel logs, Walker's affidavit, and his "reconstructed" test result forms demonstrate that testing was, in fact, done. SOR at 12. When the appellant in *Blue Dolphin* raised a similar contention, we ruled that affidavits and statements from individuals, attesting to compliance with testing requirements are insufficient to constitute the specific, contemporaneous verification of testing that owners and operators are required to maintain and produce upon request *within the 2-year time* period under 30 C.F.R. § 250.804(b).[9] *Blue Dolphin*, 166 IBLA at 137. We also discounted the alleged need for "reliable, probative, and substantial evidence" that is "clear and free from doubt" to establish that testing was not accomplished during the 2-year record retention period, thus distinguishing *W&T Offshore, Inc.*, 148 IBLA at 360. *Blue Dolphin* at 136-38. Tengasco's similar arguments fail accordingly. BSEE "is not required [to] prove a negative, that testing was not done. *Blue Dolphin* at 137. Otherwise, BSEE would be faced with a situation in which "it would be virtually impossible . . . to enforce the testing requirements of 30 C.F.R. 250.804(a) in the absence of an express admission by the lessee that testing was not completed." *Id.* The RO properly assessed civil penalties for violations under 30 C.F.R. § 250.804(a) when Tengasco failed to produce records verifying that it had timely inspected and tested various rig safety systems during the 2-year record-keeping period prescribed by 30 C.F.R. § 250.804(b). *Id.* Tengasco has not demonstrated that the violations for which BSEE assessed the civil penalties on appeal were of a nature not subject to civil penalties under the OCSLA and BSEE's civil penalty regulations.

We next consider whether appellant has demonstrated by a preponderance of the evidence that BSEE committed a material error in its factual analysis, or that its decision is not supported by a record showing that BSEE 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, e.g., Black Elk Energy*, 182 IBLA at 341.

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[9] We held that, by failing to have documents required by 30 C.F.R. § 250.804(b), Blue Dolphin failed to show it timely complied with 30 C.F.R. § 250.804(a)(1)(iii), which requires lessees to test, at a minimum of every 6 months, OCS tubing plugs, a type of subsurface safety device that shuts off the well in the event of an emergency.

[6] Appellant asks the Board to reduce the penalties "in cases where testing of multiple devices occurred at the same time and was documented on a single form," arguing that "Tengasco should not be penalized for multiple violations." SOR at 20-21. Appellant challenges BSEE's decision to assess civil penalties "based in part on the number of devices that Tengasco allegedly failed to test" per period. *Id.* at 21-22. Tengasco contends it "should only have been penalized once per testing period—for the failure to have on hand the single record documenting the multiple tests—rather than penalized multiple times for each device, especially given that the devices were all tested." *Id.* at 22. Tengasco provides no support for this argument, and we find no merit in it. The safety system testing regulations in 30 C.F.R. § 250.804(a), require periodic testing for each device listed in separate subsections of the rule. The plain meaning of the regulation is that each failure to test each device as required in each time period constitutes a single, separate violation. BSEE's civil penalty assessment is consistent with this plain regulatory language. Tengasco has not shown error in BSEE's interpretation and implementation of the rules.

[7] Tengasco claims that certain BSEE guidelines, including the National Office Potential Incident of Noncompliance List, and Enforcement, National Field Potential INC and Guideline List, and the penalty assessment matrix are substantive rules requiring notice and comment rulemaking under the APA, an argument we explicitly rejected in *BP Exploration & Prod., Inc.*, 172 IBLA 372, 384-85 (2007), holding that "these items fall within the APA's exception to promulgation for 'interpretive rules, general statements of policy, or rules of agency organization, procedure or practice' [under] 5 U.S.C. § 553(b)(3)(A)." *BP Exploration & Prod., Inc.*, 172 IBLA at 384-85. The assessment matrix and guidelines are tools in the enforcement of duly-promulgated regulations, rather than substantive rules. We need not discuss the guidelines, since the time for challenging the merits of the INCs is long past. And we reaffirm our prior determination that the assessment matrix is "an internal agency procedure to help insure consistency in penalty assessments," that "does not repudiate or change any of the existing, APA-compliant, regulations in Part 250." 172 IBLA at 384-85 (citing *Am. Mining Congress v. MSHA*, 995 F.2d 1106, 1112 (D.C. Cir. 1993)). BSEE has not erred in utilizing the matrix in exercising its discretionary authority to determine an appropriate civil penalty assessment.

In *BP Exploration*, we also rejected the argument that the Final Decision should have included new worksheets rather than relying on those attached to the proposed assessment as the latter do not support the Final Decision because the penalties initially proposed were reduced. 172 IBLA at 385. We reasoned:

> The factors considered and the calculations made in assessing the proposed penalty amounts are shown in the Notice of Proposed Penalty

> Assessment and the attached worksheets. The reductions and recalculations in the penalty amounts made by the Reviewing Officer were fully explained in [the] Final Penalty Assessment Decision, as noted above. Moreover, it is clear from its SOR that [appellant] was able to determine the proposed and revised calculations used in assessing the penalties. Indeed, the reductions made by the Reviewing Officer in her Final Penalty Assessment Decision . . . are in response to input [appellant] provided in its response to the Proposed Decision. Thus, the information, documentation, and analysis used to assess the final penalty amounts is contained in the record and the Final Penalty Assessment Decision provides a detailed explanation of the factors considered in reducing the final penalty assessment from that initially proposed.

Id. (citations and footnote omitted). In the instant case, the information, documentation, and analysis used to assess the final penalty amounts is contained in the record, and the Final Decision explains the factors considered in reducing the final penalty assessment from that initially proposed. Tengasco cites two instances in which it believes BSEE failed to make a rational connection between the facts found and the civil penalty assessed.

Tengasco avers that BSEE erred in not fully taking into account information in the September 2010 Inspection Report that supports a further reduction in the civil penalties finally assessed, identifying two specific instances.[10] SOR at 22-23. Tengasco states that BSEE erred in assessing civil penalties for INC P-280, which cites Tengasco for failing to verify compliance with the requirements of 30 C.F.R. § 250.804(a)(1)(i), to test, at intervals not to exceed 6 months, all Surface Controlled Subsurface Safety Valves (SCSSVs) installed in all production wells (B-1, B-2, B-2d, and B-3 wells for Platform B) from June 9, 2010, to February 23, 2011 (both the June 2010 and December 2010 test periods), using specific protocols,[11] and for INC P-283, which cites Tengasco for failing to verify compliance with 30 C.F.R.

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[10] We consider this claim for the limited purpose of determining whether appellant has preponderated in showing that the Final Decision and record supporting it demonstrate that BSEE committed a material error in the factual analysis, failed to give due consideration to all relevant factors, or failed to rationally connect the facts found and the civil penalty assessed.

[11] The regulation at 30 C.F.R. § 250.804(a)(1)(i) requires that "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."

§ 250.804(a)(1)(iii), requiring testing, at intervals not to exceed 6 months, of all SCSSV safety devices being used as a safety plug for the B-3d well for Platform B for the same two periods.[12] Tengasco claims that BSEE failed to appropriately consider evidence that it, in fact, performed the requisite tests in June 2010, pointing to the September 2010 Inspection Report it provided, identifying the last inspection of "SCSSC" as June 14, 2010. Tengasco claims that the September reference to a June SCSSC inspection is corroborated by the June 14, 2010, helicopter log, and "[t]hus, at most, only one set of SCSSV testing records was missing in both INC No. P-280 and INC No. P-283," and, therefore, the penalty assessed for each INC should be reduced accordingly. *Id.* This argument is unpersuasive.

[8] The one-page September 2010 Inspection Report is composed of three vertical columns—one labeled, "Type," the second, "Date of Last Inspection," and the third, "Date of Next Inspection." AR Tab D-5, Appendix 2. Under "Type" are the categories "Annual," Semi-Annual," and "Quarterly." "SCSSV" is listed under "Semi-Annual." *Id.* Under "Date of Last Inspection" for SCSSV, is the date "6/14/10," and under "Date of Next Inspection" is the date "12/14/10." Tengasco mistakes this general, non-contemporaneous information for the specific inspection and detailed testing records required by 30 C.F.R. §§ 250.804(a)(1)(i) and 250.804(a)(1)(iii), with respect to SCSSV safety devices for production wells and for use as a safety plug, respectively. Furthermore, as discussed above, affidavits, statements from individuals, and other forms of circumstantial evidence produced to prove compliance with testing requirements are insufficient to constitute the specific, contemporaneous verification of testing that owners and operators are required to maintain and produce upon request *within the 2-year time period* under 30 C.F.R. § 250.804(b). *Blue Dolphin*, 166 IBLA at 137. The deficiencies in appellant's proffered evidence are not cured by the circumstantial evidence it submitted for the period in question, in the form of helicopter logs. Tengasco has not produced records required to be retained for 2 years verifying its compliance with the two SCSSV testing regulations of 30 C.F.R. §§ 250.804(a)(1)(i) and 250.804(a)(1)(iii), and has not shown that the Final Decision erred in assessing a civil penalty for failure to test both SCSSV safety systems in June 2010.

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[12] The regulation at 30 C.F.R. § 250.804(a)(1)(iii) requires inspection by opening the well to possible flow, and, "[i]f 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," or an additional tubing plug may be installed in lieu of removal. The civil penalties at issue in *Blue Dolphin*, 166 IBLA 131, were assessed for violations of this rule. *See supra* n.9.

We find that Tengasco has failed to carry its burden to demonstrate, by a preponderance of the evidence, that the RO or BSEE committed a material error in the factual analysis, that the Final Decision was not supported by a record showing that due consideration was given to all relevant factors, or that a rational connection does not exist between the facts found and the civil penalty assessed. *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.

//original signed

Christina S. Kalavritinos
Administrative Judge

I concur:

// original signed

James K. Jackson
Administrative Judge