



STONE ENERGY CORPORATION

185 IBLA 342

Decided June 1, 2015



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

STONE ENERGY CORPORATION

IBLA 2013-102

Decided June 1, 2015

Appeal from a decision of the Reviewing Officer, Gulf of Mexico Region, Bureau of Safety and Environmental Enforcement, assessing a civil penalty for the unauthorized disposal of equipment into the waters of the Gulf of Mexico. OCS-G 05825; Case No. G-2012-013.

Affirmed as modified.

1. Oil and Gas Leases: Generally--Oil and Gas Leases: Civil Assessments and Penalties

Under 43 U.S.C. § 1350(b) (2006), the Secretary is authorized to assess, collect, and compromise a civil penalty against any person who fails to comply with the Outer Continental Shelf Lands Act, any of its implementing regulations, or any lease term. Such a penalty may be assessed only after notice of such failure and expiration of a reasonable period allowed for corrective action, except where the failure constituted a threat of serious, irreparable, or immediate harm or damage to life, property, any mineral deposit, or the marine, coastal, or human environment.

2. Oil and Gas Leases: Generally--Oil and Gas Leases: Civil Assessments and Penalties

To assess a civil penalty under 43 U.S.C. § 1350(b) (2006) and 30 C.F.R. §§ 250.107(a) and 250.300(b)(6) 200(a)(1), the record before the Board must show the existence of a violation and that the violation constitutes 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, coastal, or human environment. The unauthorized disposal of equipment into Gulf of Mexico

waters constitutes such a threat warranting the assessment of a civil penalty.

3. Oil and Gas Leases: Generally--Oil and Gas Leases: Civil Assessments and Penalties

Even though the violations at issue may, in fact, have resulted in no harm to any persons or property, and even though the violator may have taken precautions to ensure that no harm would occur, the Bureau of Safety and Environmental Enforcement properly assesses a civil penalty when, at the time it occurred, the violation posed a threat of serious, irreparable, or immediate harm to persons or property and might have resulted in such actual harm.

4. Administrative Procedure: Administrative Procedure Act--Oil and Gas Leases: Generally--Oil and Gas Leases: Civil Assessments and Penalties

BLM's use of the Civil Penalty Assessment Table does not violate the rulemaking requirements of the Administrative Procedure Act. The Table sets forth interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice, designed to ensure consistency in the determination of specific penalty amounts in the case of particular violations, in accordance with the existing statutory and regulatory enforcement authority.

5. Oil and Gas Leases: Generally--Oil and Gas Leases: Civil Assessments and Penalties

The Bureau of Safety and Environmental Enforcement was not precluded from assessing civil penalties with respect to a violation of the general requirement of 30 C.F.R. § 250.107(a) to perform operations in a safe and workmanlike manner *and* a violation of the specific requirement of 30 C.F.R. § 250.300(b)(6) to avoid disposing of any equipment or other materials into offshore waters, even though both violations are attributable to one incident.

APPEARANCES: Jonathan A. Hunter, Esq., and Stephen W. Wiegand, Esq., New Orleans, Louisiana, for appellant; A. Scott Loveless, 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

Stone Energy Corporation (Stone) has appealed from a January 15, 2013, Final Decision of the Reviewing Officer, Gulf of Mexico Region, Bureau of Safety and Environmental Enforcement (BSEE),<sup>1</sup> assessing a civil penalty for two violations (G-110 and E-108)<sup>2</sup> associated with the unauthorized disposal of equipment into Gulf of Mexico waters. The incident occurred at Platform A (Platform), located in the Mississippi Canyon Area, Block 109, off the coast of Louisiana. The Platform was installed and is operated pursuant to Federal Lease OCS-G 05825. Stone, the Designated Operator of the Platform, was assessed a civil penalty of \$45,000 for the violation.

Because Stone fails to establish any error of fact or law in BSEE's assessment of a civil penalty, we affirm the Final Decision. However, since we conclude that BSEE erred in its determination of the appropriate civil penalty for violation G-110, we modify the decision accordingly.

#### BACKGROUND

On January 4, 2012, BSEE issued a Notification of Incident(s) of Noncompliance (INC), for the commission of two violations of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-1356 (2006), and its implementing regulations, 30 C.F.R. Part 250. Both violations were for the unauthorized disposal of equipment, *i.e.*, a wireline jarring tool,<sup>3</sup> into the waters of the Gulf of Mexico on the morning of December 29, 2011. Stone initially reported this disposal to BSEE.<sup>4</sup>

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<sup>1</sup> BSEE's safety and environmental enforcement responsibilities were formerly performed by the Minerals Management Service (MMS), and later by the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE). *See Black Elk Energy Offshore Operations, LLC*, 182 IBLA 331, 332 n.2 (2012).

<sup>2</sup> BSEE maintains a list of potential incidents of noncompliance (PINC). Each PINC has a unique identifier. The G stands for general operations and the E refers to environmental protection. *See generally* <http://www.bsee.gov/Inspection-and-Enforcement/Enforcement-Programs/Potential-Incident-of-Noncompliance---PINC.aspx> (last visited on Mar. 15, 2015). For the sake of clarity, we refer to the Notification generally as an INC and the particular INCs, cited therein, as violations. The particular cited violations may also be referred to as INCs.

<sup>3</sup> BSEE describes the wireline jarring tool as a "fishing" tool used to deliver either an upward or downward blow to tools in a well bore. [It] . . . is generally some 4-5 feet  
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BSEE states that on December 29, 2011, employees of Superior Energy Services, Inc. (Superior) (a company under contract with Stone), in the course of conducting slick-line operations on the Platform, dropped the wireline jarring tool onto the deck of the Platform, damaging the tool. BSEE further states:

[T]he contracted wireline operator [Rudy Breaux, Wireline Operator, Superior] instructed his helper [Lance Lemmons, Wireline Assistant, Superior] to throw the damaged wireline jarring tool overboard into Gulf waters. The wireline operator failed to follow both Stone Energy and the contractor's policies. In addition, *the wireline helper failed to utilize Stop Work Authority and complied with the wireline operator's noncompliant instructions [in dropping the tool into the waters].*<sup>5</sup> This failure posed an immediate threat to personnel safety on lower decks and/or personnel in crew boats that may have been tied to the platform.

Decision at 2 (emphasis added); see Civil Penalty Case Report at 1-2. BSEE reports that "the tool was not recovered." Civil Penalty Case Report at 1.

Stone does not dispute the fact that the tool was dropped into the Gulf waters. Nor does Stone dispute the fact that Lemmons dropped the tool into the Gulf waters at the insistence of Breaux, the wireline operator. Lemmons has explained that Breaux told him on two successive occasions on December 29 to "throw" the damaged tool into the Gulf waters. Affidavit of Lemmons, dated Aug. 20, 2012 (attached to e-mail from Stone to BSEE, dated Sept. 28, 2012) (Lemmons Affidavit). He stated that he complied, under pressure, by "drop[ping]" the tool into the water, after he had "walk[ed] to the ledge of the platform [and] double check[ed] for any potential boats, people, or any part of the platform that could be damaged[.]" *Id.*

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in length and weighs 40-50 [pounds]." Answer at 2 n.1. In its Civil Penalty Case Report, dated Apr. 6, 2012, BSEE stated at page 1 that the tool was 5' x 1' ½" in size.

<sup>4</sup> BSEE also cited Stone with a violation (G-253) of 30 C.F.R. § 250.300(d), which involved failing to record, in the Platform's daily operations report, the fact that the tool had been dropped overboard. This third violation was not referred for civil penalty review by BSEE and is not at issue in this appeal.

<sup>5</sup> Lemmons could have invoked Stop Work Authority, which would have allowed him to decline to abide by what he considered a "non-compliant" demand by the operator, while the matter was reviewed by superior management personnel. Incident Investigation Report, Superior, dated Jan. 12, 2012, at 2. He did not do so.

There is no evidence in the record that any persons, property, or the environment were damaged by the act of dropping the tool into the Gulf waters.

In the case of the first violation (G-110), BSEE concluded that Stone had violated 30 C.F.R. § 250.107(a) as a consequence of Lemmons having dropped the damaged wireline jarring tool into Gulf waters. Under § 250.107(a), Stone was required to “protect health, safety, property, and the environment by: 1) Performing all operations in a safe and workmanlike manner; and (2) Maintaining all equipment and work areas in a safe condition.” BSEE specifically found that Stone had reported that Superior had committed an unsafe act by dropping the wireline jarring tool into the Gulf of Mexico. It listed the relevant enforcement action as “W,” which signified that the INC constituted a “Warning.”

In the case of the second violation (E-108), BSEE concluded that Stone had also violated 30 C.F.R. § 250.300(b)(6) when Lemmons dropped the wireline jarring tool into the Gulf waters. Under § 250.300(b)(6), the “[d]isposal of equipment, cables, chains, containers, or other materials into offshore waters is prohibited.” BSEE specifically cited Stone for having “failed to prevent the intentional disposal” of the tool into the Gulf waters. BSEE listed the relevant enforcement action as “S,” which signified that the INC constituted a “Facility Shut-in.” However, BSEE explained that, since the enforcement action was “administrative only,” Stone was “permitted to continue production operations as normal” on the Platform.

Stone received the INCs on January 4, 2012. It responded on January 17, 2012, by certifying to BSEE that the cited violations had been corrected. By letter dated January 18, 2012, Stone informed BSEE that it had conducted its own investigation and determined that Breaux was knowledgeable and properly trained. However, Stone acknowledged that Breaux’s actions were contrary to BSEE’s regulations, as well as the policies of Stone and Superior, and that he had “used poor judgment in his choice to dispose of damaged tools by having them thrown overboard.” Letter to BSEE, dated Jan. 18, 2012, at unpaginated (unp.) 1. Stone further explained that both Stone and Superior had taken corrective action, with the aim of ensuring that such an incident did not recur.<sup>6</sup> Stone did not request a hearing

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<sup>6</sup> That corrective action included the following: (1) Superior terminated Breaux’s employment; (2) Superior shutdown all operations while it discussed the December 29 incident with its operators, “stress[ing] [the] consequences of not adhering to company policies”; (3) Superior required all of its offshore employees to watch a video regarding marine debris disposal by Feb. 15, 2012; (4) Superior required all operators to attend training regarding risk management and other matters by Mar. 31, 2012; and (5) Stone issued a Safety Alert on Jan. 16, 2012, informing all offshore employees and third-party contractors in the Gulf that Stone considered it unacceptable to throw anything overboard, that throwing debris overboard would result in the person’s immediate removal from all of its facilities, (continued...)

on the record on either violation, as allowed by 30 C.F.R. § 250.1454, or otherwise seek to appeal them directly to this Board under 30 C.F.R. § 290.4.

BSEE gave Stone notice on April 9, 2012, that its District Office had referred both of these violations for civil penalty review. It issued a Notice of Proposed Civil Penalty Assessment (NPCP) on August 7, 2012, which afforded Stone 30 days from receipt of the NPCP to submit additional information in writing or to request a meeting to present additional information in challenging the proposed civil penalty.

Attached to the NPCP was a Civil Penalty Worksheet setting forth BSEE's computations for the proposed civil penalty of \$45,000. This proposed penalty represented the sum of \$20,000, assessed for a 1-day violation of 30 C.F.R. § 250.107(a), plus \$25,000, assessed for a 1-day violation of 30 C.F.R. § 250.300(b)(6). According to the Worksheet, each of the violations was placed in "Category A," since it "involv[ed] the threat of harm, damage, or pollution." Civil Penalty Worksheet, dated Aug. 6, 2012, at 1, 2. Indeed, designation as a "Category A" violation signified, under BSEE's Civil Penalty Assessment (CPA) Table, dated July 30, 2011, that the violation at issue had posed, *inter alia*, a threat of harm to life, property, and/or the marine or coastal environment.<sup>7</sup>

The CPA Table establishes a matrix for civil penalty assessment purposes and specifies recommended civil penalties, depending on the intersection of one of three violation categories (A, B, or C) and one of three enforcement codes (W, C, or S). As noted, INC G-110 involved a violation designated as "Category A," with an enforcement action designated "W." The proposed civil penalty for this violation would range from \$5,000 to \$40,000, with an assessment starting point of \$15,000. In the case of INC E-108, the violation was categorized as "A" and the enforcement

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and that third-party contractors were prohibited from disposing of any debris overboard or in any unapproved manner. Letter to BSEE, dated Jan. 18, 2012, at unp. 2.

<sup>7</sup> The CPA Table was set forth in a July 30, 2011, National Notice to Lessees and Operators of Federal Oil and Gas and Sulphur Leases in the OCS (NTL) No. 2011-N06, which can be found on BSEE's website at [http://www.bsee.gov/uploadedFiles/BSEE/Enforcement/Civil\\_Penalties\\_and\\_Appeals/NTL2011-N06\(1\).pdf](http://www.bsee.gov/uploadedFiles/BSEE/Enforcement/Civil_Penalties_and_Appeals/NTL2011-N06(1).pdf) (last visited Mar. 15, 2015). The Table was originally contained in Appendix E (Assessment Tables) of BSEE's May 2007 OCS Civil/Criminal Penalties Program Policy and Procedures Guidebook (Guidebook). See Guidebook at 46. The Guidebook, together with the Table, established the policies and procedures applicable to BSEE's civil penalty program during the time period that is now at issue. See *id.* at 12.

action was designated “S.” The proposed civil penalty for this second violation ranged from \$15,000 to \$40,000, with an assessment starting point of \$25,000.

In each case, BSEE began with the starting point and then determined whether to increase or decrease the proposed civil penalty within the prescribed range. BSEE concluded that it found “no compelling reason to deviate from the proposed assessment.” Civil Penalty Worksheet at 1, 2. In reaching this conclusion, BSEE reviewed Stone’s compliance history, as follows:

Averaging performance statistics for 2009 to 2011[,] Stone Energy Corporation’s INC to Component ratio for platform inspections is greater than the GOM [Gulf of Mexico] average ( $0.053 > 0.043$ )[.] However, the INC to Inspection ratio for rig inspections is less than the GOM average ( $0.183 < 0.257$ ).

Stone Energy Corporation’s history shows from December 29, 2009[,] to December 29, 2011, Stone Energy Corporation received 338 INCs issued with 0 E-108 type INCs. There is 1 CP [Civil Penalty] case with a status of “Closed & Final Amount Paid” within 2 years prior to this incident.

. . . .

Stone Energy Corporation’s history shows from December 29, 2009[,] to December 29, 2011, Stone Energy Corporation received 338 INCs issued with 15 G-110 type INCs. There is 1 CP case with a status of “Closed & Final Amount Paid” within 2 years prior to this incident.[<sup>8</sup>]

*Id.* at 1-2. Stone responded to the NPCP by letter dated August 23, 2012, and by e-mail dated September 28, 2012, to which were attached, *inter alia*, a January 12, 2012, Incident Investigation Report, prepared by Superior, and the Lemmons Affidavit. In addition, a Civil Penalty Meeting was held on October 9, 2012, attended by representatives of BSEE, Stone, and Superior, at which Stone urged that its notice to BSEE of this incident be considered when assessing an appropriate civil penalty.

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<sup>8</sup> The INC-to-Component ratio reflected the ratio of the total number of INCs issued with respect to platforms in any calendar year to the total number of platform components inspected in that year, and the INC-to-Inspection ratio reflected the ratio of the total number of INCs issued with respect to drilling rigs in any calendar year to the total number of rigs inspected in that year. *The Houston Exploration Co.*, 169 IBLA 166, 171 n.7 (2006).

The Reviewing Officer issued his Final Decision on January 15, 2013, assessing a civil penalty for the two violations in the total amount of \$45,000, pursuant to section 24(b) of the OCSLA, 43 U.S.C. § 1350(b) (2006), and 30 C.F.R. § 250.1404(b) and (c).<sup>9</sup> He assessed \$20,000 for a 1-day violation of 30 C.F.R. § 250.107(a), and \$25,000 for a 1-day violation of 30 C.F.R. § 250.300(b)(6).

After considering all of the attendant circumstances, the Reviewing Officer specifically held that both “violations constituted a threat of harm to life, property, and the environment under the provisions of 43 U.S.C. § 1350(b) and 30 CFR 250.1404(b),” even though, through “*good fortune*,” no harm materialized.<sup>10</sup> Decision at 3. He found Stone liable, “regardless of who actually performed the activity on Mariner’s lease,” because a lessee is liable for any actions by any person performing any activity on its platform.<sup>11</sup> *Id.* at 2 (citing 30 C.F.R. § 230.126(c)). He also found dropping that tool into the Gulf of Mexico created a threat of harm “to personnel, property, and the environment,” and that Lemmons’ double-checking to make sure no one was below before he dropped it “does not mitigate or eliminate the threat assessment.” *Id.* at 3. Finally, the Reviewing Officer stated that Stone’s subsequent actions to prevent future violations did not mitigate the penalty. *See id.* at 3.

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<sup>9</sup> A previous Final Decision, issued on Jan. 11, 2013, was revised and replaced by the Jan. 15, 2013, Final Decision, in order to correct a minor error in the prior decision. In a Jan. 10, 2013, Invoice (No. OTH100004906) attached to the Final Decision, BSEE required payment of the civil penalty by Mar. 16, 2013. Evidently, the requirement to pay has been stayed pending a final resolution of the present appeal.

<sup>10</sup> Under 30 C.F.R. § 250.1404, BSEE will review four specified basic violations for “potential civil penalties,” including, under subsection (b), “[v]iolations that BSEE determines may constitute, or constituted, a *threat of serious, irreparable, or immediate harm or damage* to life[,] . . . property, . . . or the marine, coastal, or human environment[.]” (Emphasis added.)

<sup>11</sup> Under 30 C.F.R. § 250.146(c), “[w]henver the regulations in 30 CFR [P]art[] 250 . . . require the lessee to meet a requirement or perform an action, the lessee, the operator (if one has been designated), and the person actually performing the activity to which the requirement applies are jointly and severally responsible for complying with the regulation.” BSEE concluded that, since the wireline operator was “*working on behalf of Stone*,” Stone was ultimately liable for the two violations of 30 C.F.R. Part 250 now at issue. Decision at 2. The fact that the wireline operator acted contrary to Stone’s dictates, even knowingly and willfully, did not absolve Stone of responsibility for the penalty.

Rather than request a hearing on the record, as permitted by 30 C.F.R. § 250.1056, Stone appealed the Reviewing Officer's Final Decision, requesting the Board to either reverse the decision to assess any civil penalty as unlawful or at least significantly reduce the civil penalty.

### DISCUSSION

Under OCSLA, 43 U.S.C. §§ 1331-1356 (2006), the Secretary of the Interior is authorized, *inter alia*, to issue and administer OCS leases for oil and gas exploration, development, and production. Any operation on an OCS lease must “be conducted in a safe manner by well-trained personnel using technology, precautions, and techniques sufficient to *prevent or minimize . . . [any] 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).

Section 22 of OCSLA, 43 U.S.C. § 1348 (2006), specifically directs the Secretary to enforce the safety and environmental protection regulations promulgated pursuant to OCSLA, and correspondingly imposes upon the OCS lessee a duty to maintain all operations in its leased area “in compliance with regulations intended to protect persons, property, and the environment on the [OCS].” *See W&T Offshore, Inc.*, 148 IBLA 323, 354 (1999). The safety and environmental protection regulations applicable to offshore oil and gas operations are currently found at 30 C.F.R. Part 250. The requirement to comply with the regulations extends to the lessee, the owner or holder of operating rights, and the designated operator. *See* 30 C.F.R. §§ 250.105 (“You”) and 250.146; *Apache Corp.*, 183 IBLA 273, 293 (2013).

### *Assessment of Civil Penalty*

[1] Section 24(b) of OCSLA, 43 U.S.C. § 1350(b) (2006), authorizes the Secretary to “assess, collect, and compromise” a civil penalty against any person who “fails to comply” with OCSLA, any of its implementing regulations, or any lease term. It further provides that a penalty may be assessed “only after notice of such failure and expiration of a reasonable period allowed for corrective action,” except where the failure 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 W&T Offshore, Inc.*, 148 IBLA at 355, 361-62.

BSEE has the discretionary authority under section 24(b) of OCSLA to impose a civil penalty for the violations now at issue and to determine the amount of the penalty. *See* 43 U.S.C. § 1350(b)(1) (2006) (“The Secretary may assess, collect, and compromise any such penalty.”). The Board recently stated under similar circumstances:

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 [315,] 325 [(2005)] (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).

*Black Elk Energy Offshore Operations, LLC*, 182 IBLA at 341; see also *BP Exploration & Production, Inc.*, 172 IBLA 372, 384, 386 (2007).

BSEE is required to provide a reasoned and factual "explanation of the factors used as the basis of determining th[e] [penalty] amount and the weight given to those factors[.]" *W&T Offshore, Inc.*, 148 IBLA at 365. Thereafter, in the absence of a showing of legal error, the ultimate burden is upon an appellant to demonstrate, by a preponderance of the evidence, that BSEE committed a material error in its factual analysis, or that the decision generally 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.<sup>12</sup> This burden is

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<sup>12</sup> Stone argues, citing *W&T Offshore, Inc.*, 148 IBLA at 360, that BSEE bears the ultimate burden of establishing that its assessment of a civil penalty is supported by "reliable, probative, and substantial evidence." See SOR at 4-5. Our statement in *W&T Offshore* was in error, since it relied on application of 5 U.S.C. § 556(d) (2006), which provides that the proponent of a rule or order "has the burden of proof," adding that no sanction may be imposed unless it is "supported by and in accordance with the reliable, probative, and substantial evidence." However, that statute is only applicable in the case of administrative hearings. See 5 U.S.C. § 556(a) (2006); e.g., *BLM v. Ericsson*, 88 IBLA 248, 254-55 (1985) (BLM bears the ultimate burden of proof to establish liability for grazing trespass on the public lands).

While *W&T Offshore* does not properly assign the burden of proof in the present case, we agree that a civil penalty should not be imposed "except in cases

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not satisfied simply by expressions of disagreement with BSEE's analysis or conclusion.

Stone contends on appeal that BSEE failed to carry its burden to justify the civil penalty. SOR at 5. Stone maintains that the record failed to provide a rational basis for BSEE's imposition of a civil penalty, and failed to demonstrate that BSEE gave due consideration to all relevant factors and acted on the basis of a rational connection between the facts found and the decision made. As BSEE correctly states, "the only issues [in the present case] are whether the violations were sufficiently severe to warrant a civil penalty and, if so, the amount of that penalty." Answer at 4 n.3.<sup>13</sup>

Stone asserts that, under "the clear statutory language" of section 24(b) of OCSLA, "BSEE cannot impose a civil penalty simply based on a regulatory violation," but may do so only when the violation constitutes "a threat of serious, irreparable, or immediate harm" to life, property, or the marine, coastal, or human environment. SOR at 7, 9 (quoting 43 U.S.C. § 1350(b) (2006)). According to Stone, "penalties may not be assessed in the case of *all* threats of harm," but only where they are "serious, irreparable, or immediate." *Id.* at 7. Stone concludes that "BSEE can point to no evidence in the record to show that a threat of serious, irreparable, or immediate harm existed." Reply Brief at 4.

[2] BSEE is authorized, under section 24(b)(1) of OCSLA, to impose a civil penalty whenever "any person *fails to comply* with any provision of [OCSLA], or any term of a lease, license, or permit issued pursuant to [OCSLA], or any regulation or order issued under [OCSLA][.]" 43 U.S.C. § 1350(b)(1) (2006) (emphasis added);

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that are clear and free from doubt," with "all questions of doubt . . . resolved in favor of the party from whom the penalty is sought." 148 IBLA at 360 (quoting *Houghland Farms, Inc. v. BLM*, 77 IBLA 245, 247 (1983)). The Board adheres to the general rule in civil penalty cases that applicable statutory and regulatory provisions should be strictly or narrowly construed, in determining liability. *See, e.g., Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 375 (1973); *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

<sup>13</sup> The present case is a civil penalty proceeding, undertaken after the issuance of an INC, which charged Stone with two violations of the OCSLA and its implementing regulations. Having failed to appeal the INC, the fact of the violations are deemed to have been determined as a matter of administrative finality, and are no longer subject to review by the Board, in the absence of compelling legal or equitable reasons, such as protecting the basic rights of a party or preventing a manifest injustice. *See, e.g., West Virginia Highlands Conservancy, Inc.*, 166 IBLA 39, 44 (2005); *Turner Brothers Inc. v. OSM*, 102 IBLA 111, 121-22 (1988). We find no such compelling reasons here.

see *The Houston Exploration Co.*, 169 IBLA 166, 174-75 (2006). The violation rests on the failure to comply. However, absent the exception in subsection (b)(2), BSEE is therefore permitted to assess a penalty only after providing notice and a reasonable period of time to correct the violation. See *Conoco, Inc.*, 78 IBLA 192, 195 (1984). However, it may also assess a penalty for a violation, without first providing notice and a reasonable time period for corrective action, when the violation poses or posed a threat of serious, irreparable, or immediate harm. 43 U.S.C. § 1350(b)(2) (2006);<sup>14</sup> see *The Houston Exploration Co.*, 169 IBLA at 173-74 n.11.

In promulgating OCSLA's implementing regulations, the Department now provides that it will appoint a Reviewing Officer to decide whether to impose a civil penalty only when "BSEE determines, on the basis of available evidence, that a violation occurred *and a civil penalty review is appropriate[.]*" 30 C.F.R. § 250.1400 (emphasis added); see *Petro Ventures, Inc.*, 167 IBLA at 325 ("The process after issuance of an INC is to determine the need for and amount of a civil penalty assessment."); *Blue Dolphin Exploration Co.*, 166 IBLA 131, 137 (2005) ("[BSEE] may begin to assess a civil penalty when it [makes the appropriate determination under 30 C.F.R. § 250.1400]."); Guidebook at 4 ("Not all violations warrant review for initiation of civil penalty proceedings.")<sup>15</sup> In that context, BSEE will determine whether the violation at issue poses or posed a threat of *serious, irreparable, or*

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<sup>14</sup> Section 8201 of the Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484, 570, first authorized BSEE to assess a civil penalty absent notice and a reasonable time period for corrective action, where the violation at issue constitutes or constituted a threat of serious, irreparable, or immediate harm. Immediately after enactment of this statute, BSEE provided in 30 C.F.R. § 250.200(b) for a civil penalty review in only two basic circumstances: (1) violations not timely corrected following notice ((b)(1)), and (2) violations that constitute or constituted a threat of serious, irreparable, or immediate harm ((b)(2)). BSEE further provided in 30 C.F.R. § 250.203(a) for declining to pursue such review where, in the case of (b)(1), the required notice was not provided or the violation did not continue after the time period for correction, and, in the case of (b)(2), there was not substantial record evidence that the violation constitutes or constituted a threat of serious, irreparable, or immediate harm. See 56 Fed. Reg. 21953, 21955 (May 13, 1991).

<sup>15</sup> A civil penalty review is appropriate only when the violation at issue falls into one of the four specific categories defined in 30 C.F.R. § 250.1404: (a) violations that are not corrected within the time period for correction established by BSEE in its INC; (b) violations that BSEE determines may constitute or constituted a threat of serious, irreparable, or immediate harm or damage to life, property, or the environment; (c) violations that cause serious, irreparable, or immediate harm or damage to life, property, or the environment; or (d) violations of oil spill financial responsibility requirements.

immediate harm or damage.<sup>16</sup> 30 C.F.R. § 250.1404(b); see *Blue Dolphin Exploration Co.*, 166 IBLA at 137. In the present case, BSEE determined that the unauthorized disposal of equipment into Gulf of Mexico waters constituted such a threat warranting the assessment of a civil penalty.

We, therefore, proceed to address the question of whether it was appropriate for BSEE to impose any civil penalty, and then address the question regarding the proper amount of the penalty.

### *BSEE Properly Assessed a Civil Penalty*

In challenging BSEE's imposition of a civil penalty for the G-110 violation, Stone argues that the administrative record demonstrates that the violation did not pose a threat of serious, irreparable, or immediate harm. Stone contends that the act of dropping the wireline jarring tool into the Gulf waters never posed a threat of serious, irreparable, or immediate harm *to persons or property*. Stone states that it was not “good fortune” but the “precautionary measures” undertaken by the wireline operator's assistant that “prevented any such risk of harm[.]” SOR at 8 (quoting Decision at 3). Stone asserts that Lemmons checked the area next to the Platform before he dropped the tool into the water. Stone further states that the act of dropping the tool into the Gulf waters never posed a threat of serious, irreparable, or immediate harm *to the marine or coastal environment*, citing as support BSEE's having allowed, over the years, offshore pipelines and even offshore drilling rigs to remain without any threat to the environment.<sup>17</sup> See *id.* at 10.

Stone further states that the severity of the G-110 violation was confirmed by BSEE's determination that the appropriate enforcement action for the violation was denoted as a “W,” signifying a Warning, rather than a “C” (Component Shut-In), or “S,” (Facility Shut-In). See SOR at 7-8. Stone argues that an enforcement action of “W”

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<sup>16</sup> BSEE can also pursue civil penalties under subsections (a), (c), or (d) without first determining that the violation at issue poses or posed a threat of serious, irreparable, or immediate harm. However, that is not the present situation.

<sup>17</sup> Stone asserts that BSEE failed to establish a threat of harm to persons or property in the case of the G-110 violation, and a threat of harm to the marine or coastal environment in the case of the E-108 violation. We read the Final Decision's assessment of civil penalties as resting on a “find[ing] that [both] these violations constituted a threat of harm to life, property, and the environment[.]” Decision at 3 (emphasis added). In fact, BSEE states on appeal that its “Final Decision makes abundantly clear that the agency considered serious and immediate threat and danger to have indeed been present *at the time of the incident.*” Surreply at 2-3 (emphasis added).

means that the violation posed no immediate danger to personnel or equipment, and that by adopting that enforcement action, BSEE “categorically negate[d] the presence of any threat of harm,” including serious, irreparable, or immediate harm. *Id.* at 9.

We conclude that BSEE’s decision to adopt the enforcement action of “W” signifies only that there was no “immediate” danger to personnel or equipment when it issued the INC on January 4, 2012, but that does not “categorically negate” the fact that the violation constituted a threat of serious, irreparable, or immediate harm when it occurred on December 29, 2012.<sup>18</sup>

The act of dropping the wireline jarring tool, by its nature, posed a threat of serious, irreparable, and/or immediate harm to persons or property. It may be true that Lemmons exercised a modicum of care when he violated 30 C.F.R. § 250.300(b)(6), but what Stone fails to acknowledge is that, despite his best intentions, there was the potential for Lemmons to slip in the process of dropping the tool or to otherwise drop the tool in a manner that risked striking persons or property. Also, between the time Lemmons surveyed the scene and when he dropped the tool, a person or piece of property may have entered the actual trajectory or even the intended trajectory. At its very best, dropping the tool off the Platform embodied an inherent risk of serious, irreparable, and/or immediate harm to any persons or property encountered along its path. We agree with BSEE’s statements on appeal:

While there was no human tragedy in this instance, Stone cannot base a defense on the fortunate fact that no one below stepped out, leaned out, or floated out into the way of the falling 50 pound piece of steel before it hit the water. . . . [T]he assistant’s visual check could not verify that fish, turtles, coral, or other aquatic life were not in the path of the heavy tool dropped overboard.

Answer at 7; *see* Guidebook at 4-5 (“A violation may be considered as posing a threat of serious, irreparable, or immediate harm . . . if there is evidence that it . . . could have caused . . . [h]arm . . . to humans; or . . . damage to property or equipment; or . . . [d]ischarge of . . . pollutants into the ocean; or . . . [h]arm . . . [to] aquatic life; or . . . disturbance of any biological . . . resources.”).

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<sup>18</sup> In its Surreply, BSEE indicates that it may have erred in assigning a “W” to the G-110 violation, since BSEE policy instructs that, when an INC is issued after the occurrence of the violation, BSEE will normally assign a “W” when no corrective action is possible, but should assign a “C” or “S” when a civil penalty might result. *See* Surreply at 2. It is not clear whether BSEE is instructed to assign a “C” or “S” even where the shut-in of the component or the facility would serve no useful purpose. In any event, BSEE does not seek to amend its INC, and, in fact, we deem the issue of the appropriate enforcement code administratively final.

Stone further challenges BSEE's imposition of a civil penalty for the E-108 violation. It disputes BSEE's decision to impose a civil penalty simply based on the "occurrence" of the disposal of the tool into the Gulf waters, absent any determination that the disposal posed any threat of serious, irreparable, or immediate harm. SOR at 10 (quoting Decision at 2). We conclude that BSEE's determination to assess a civil penalty for the E-108 violation rests on the same rationale as its determination to assess a civil penalty for the general violation of 30 C.F.R. § 250.107(a), *i.e.*, the dropping of the wireline jarring tool into the Gulf waters, in specific violation of 30 C.F.R. § 250.300(b)(6), gave rise to a threat of serious, irreparable, and/or immediate harm.<sup>19</sup>

[3] Stone has failed to overcome BSEE's determination that dropping the tool into Gulf waters gave rise to a threat of serious, irreparable, and/or immediate harm, in connection with the G-110 and/or E-108 violations. Even though the violations at issue may have resulted in no actual harm to any persons or property, and even though the violator may have taken precautions to carefully ensure that no harm would occur, BSEE properly assesses a civil penalty when, at the time it occurred, the violation posed a threat of serious, irreparable, or immediate harm to persons or property and might have resulted in such actual harm. *See* Answer at 6 ("BSEE's regulations at 30 C.F.R. Part 250 are in place specifically to try to avoid actual accidents.").

A civil penalty is intended to deter risky behavior that by its nature poses a threat of harm to persons or property. As the Board has stated, "[a]s 'threat' of danger or injury is by definition one that is unrealized, it is sufficient that the potential for a threat *may* exist." *Conn Energy, Inc.*, 151 IBLA 53, 64 (1999). "[N]o regulatory provision conditions the existence of a violation on the materialization of the danger posed by a failure to comply with the . . . regulation." *Id.* We conclude BSEE is entitled to issue an INC and authorized to impose a civil penalty for the violation, regardless of whether actual harm has occurred as a consequence of the violation. Indeed, the appropriateness of assessing any penalty is, in accordance with 30 C.F.R. § 250.1404(b), to be determined by whether the violation at issue "constituted" a threat of serious, irreparable, or immediate harm. *See Black Elk Energy Offshore Operations, LLC*, 182 IBLA at 339 (failure to regularly test offshore equipment, designed to prevent leaks, and to remedy leaks posed threat of serious

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<sup>19</sup> We disagree with Stone's assertion that BSEE based its civil penalty for the E-108 violation simply on the occurrence of the disposal of the tool. The Reviewing Officer stated that "[t]h[e] INC documents the occurrence of the pollution event involving the wireline jarring tool." Decision at 2 (emphasis added). However, for the G-110 violation, the civil penalty was itself based on the "threat of harm to life, property, and the environment under the provisions of 43 U.S.C. § 1350(b) and 30 CFR 250.1404(b)[.]" *Id.* at 3 (emphasis added).

harm); *The Houston Exploration Co.*, 169 IBLA at 172, 175-76 (failure to regularly inspect offshore equipment, designed to ensure safety of operations, posed threat of serious harm); *Seneca Resources Corp.*, 167 IBLA 1, 11, 12-14 (2005) (failure to ensure proper operation of automatic shutdown valve, designed to prevent spill, posed threat of serious harm); *Blue Dolphin Exploration Co.*, 166 IBLA at 137-38 (failure to regularly test offshore equipment, designed to prevent leaks, posed threat of serious harm).

“Stone does not dispute the basic principle that civil penalties may be imposed if a threat of harm is ‘sufficiently serious[.]’” Reply Brief at 6. Since we here find that the dropping of the wireline jarring tool posed a threat of serious, irreparable, and/or immediate harm, we conclude that BSEE was justified in assessing a civil penalty for that act, under 30 C.F.R. §§ 250.107(a) and 250.300(b)(6).

Further, Stone argues that the Board should set aside BSEE’s imposition of any civil penalty since BSEE’s penalty program, specifically the CPA Table, set forth in NTL No. 2011-N06, and the National PINC and Guideline List, constituted a substantive rule of law that was promulgated without complying with the notice and opportunity-for-comment rulemaking requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (2006). See SOR at 11-13 (citing, e.g., *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616 (5th Cir. 1994), *cert. denied*, 514 U.S. 1092 (1995)). It asserts that both the CPA Table and the National PINC and Guideline List established predetermined standards for inspecting and enforcing OCSLA violations and for fixing civil penalty liability that “le[ft] no room for agency discretion,” and were thus substantive rules of law binding on BSEE. *Id.* at 12 n.25. It notes that the Table particularly “fixe[d] both *minimum* penalty amounts and ‘*starting point*’ penalty amounts,” which were not mandated by OCSLA or its implementing regulations. *Id.* at 12.

It is true that BSEE did not adopt the CPA Table or the National PINC and Guideline List as a consequence of notice and opportunity-for-comment rulemaking. However, we need not address whether the National PINC and Guideline List was promulgated in violation of the APA, because it has no bearing on BSEE’s current assessment of civil penalties, which is what is now at issue. The List identifies the procedure for BSEE’s inspection of offshore facilities and equipment and describes the circumstances under which BSEE should take specific enforcement actions (whether a Warning, Component Shut-In, or Facility Shut-In), both in general and with respect to particular proposed INCs. In the present case, the INC, which included the results of BSEE’s inspection of the Platform after being notified of Superior’s violations by Stone, was issued on January 4, 2012. The 60-day period of time for appealing the INC under 30 C.F.R. § 290.4 has long since passed. Thus, the violations have become administratively final for the Department, absent compelling legal or equitable reasons. We find no compelling reasons to revisit the INC. Thus, the specific enforcement action taken with respect to each cited violation, which bears on the question of a proper civil penalty, must stand as issued.

*The CPA Table Does Not Constitute a Substantive Rule of Law or Violate the APA*

We do, however, address whether the CPA Table was promulgated in violation of the APA, 5 U.S.C. § 553 (2006). Since we conclude that the Table does not constitute a substantive rule of law, we hold that BSEE was not required to adopt it following notice and opportunity-for-comment rulemaking, and thus no APA violation occurred.

We start with the fact that, regardless of the intersection of the Category A, B, and C columns and the Enforcement Code W, C, and S lines, the maximum penalty provided for in the Table does not exceed the amount currently authorized by 30 C.F.R. § 250.1403 (“The maximum civil penalty is \$40,000 per day per violation.”). Beyond that, the Table defines the basic differences between Category A, B, and C violations, with correspondingly increasing starting points and ranges for civil penalties as one moves across the columns, along each Enforcement Code line, from the lesser Category A (threat of harm), to the intermediate Category B (minor actual harm), and to the greater Category C (serious actual harm). Further, the starting points and ranges also increase as one moves down the Enforcement Code lines, under each Category, from W (Warning), to C (Component Shut-In), and to S (Facility Shut-In).<sup>20</sup> In addition, the Table establishes four factors (Record of compliance, severity of violation, similar case precedent, and civil penalty case history) to be considered in determining whether to increase or decrease the penalty, but never exceeding the prescribed range, or the maximum penalty of \$40,000.

In the present case, BSEE did not move beyond the starting point to the range of penalties. Rather, having determined the violation fell into Category A, and had an enforcement action of W or S, BSEE simply adopted the starting point identified in the Table as the appropriate penalty, seeing no reason to either increase or decrease the penalty.

Nonetheless, we view the Table, in conjunction with the Guidebook, as a set of guidelines for determining an appropriate civil penalty for a violation of safety or environmental protection standards of the OCSLA, its implementing regulations, and OCS leases. The Table provides a fairly broad range for regarding the appropriate penalty for a particular violation. It allows BSEE to consider the severity of the

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<sup>20</sup> For example, with Enforcement Code W, the progression across Category A, B, and C goes from a starting point of \$15,000 (within a range of \$5,000 to \$40,000) to a starting point of \$25,000 (within a range of \$20,000 to \$40,000). By contrast, with Enforcement Code S, the progression across Category A, B, and C goes from a starting point of \$25,000 (within a range of \$15,000 to \$40,000) to a starting point of \$37,000 (within a range of \$35,000 to \$40,000).

violation and appropriate enforcement response to identify a starting point and also relevant factors for increasing or decreasing the recommended penalty, within a prescribed range.

Stone correctly notes that BSEE somewhat restricted the exercise of its discretion in setting a penalty, particularly by prescribing a monetary starting point and range for its penalty determination. However, the Table and associated Guidebook do not dictate the size of a penalty or preclude assessing a penalty that does not strictly conform to its guidance. Rather, the Table and Guidebook are couched in hortatory, not mandatory, terms (e.g., BSEE “*should* use the starting point,” *should* stay within the prescribed range, and “*should* . . . consider [enumerated] factors” for increasing or decreasing the penalty). Guidebook at 46; see Guidebook at 3 (“The purpose of this guidebook is to provide guidance to [BSEE] employees for handling OCS civil penalty cases.”); *David M. Burton*, 11 OHA 117, 122-23 (1995). We also note that, in practice, BSEE has in appropriate circumstances deviated from the prescriptions in the Table. See *Black Elk Energy Offshore Operations, LLC*, 182 IBLA at 334-37, 341. We conclude that the Table leaves sufficient room for BSEE to exercise its discretion and, therefore, does not constitute a substantive rule of law.

[4] We will follow our earlier ruling in *BP Exploration & Production, Inc.*, 172 IBLA at 384-85, and hold that BSEE’s civil penalty program, as implemented by the CPA Table, does not violate the rulemaking requirements of the APA. The Table sets forth “interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice,” designed to ensure consistency in the determination of specific penalty amounts in the case of particular violations, in accordance with the existing statutory and regulatory enforcement authority. BSEE has not created new or amended existing authority. Rather, it has interpreted its existing authority under section 24(b) of the OCSLA and 30 C.F.R. §§ 250.1400 through 250.1409 to impose a civil penalty up to the maximum amount of \$40,000, based on consideration of the threat of harm or actual harm to life, property, or the marine, coastal, or human environment, and other relevant factors. See *American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106, 1107 (D.C. Cir. 1993) (“A rule does not . . . become an amendment merely because it supplies crisper and more detailed lines than the authority being interpreted.”).

#### *BSEE Did Not Err by Refusing to Significantly Reduce Civil Penalties*

Before addressing Stone’s challenge to the civil penalty amounts, we note that BSEE erred in its determination of the appropriate penalty for the G-110 violation. The Civil Penalty Worksheet correctly shows the severity of the violation was Category A. It mistakenly stated G-110 was enforcement code C, rather than the W identified in the INC. Rather than a starting point penalty of \$15,000 under the Table for the G-110 violation, the Worksheet identified it as \$20,000. There is no support or

explanation in the worksheet, record, or decision for this deviation. In order to bring the penalty into conformance with the Table, we will modify BSEE's civil penalty assessment to adopt the \$15,000 recommended penalty for the G-110 violation. We do not change the assessed penalty of \$25,000 for the E-108 violation. The total civil penalty assessment for the INC is modified to \$40,000.

We now turn to Stone's argument that BSEE should have significantly reduced the penalties. First, Stone asserts that BSEE should not have attributed two violations (G-110 and E-108) to the single incident of dropping the wireline jarring tool into Gulf waters. Stone states that this amounts to a double civil penalty that was "fundamentally unfair and contradicts the well-established requirement that penal statutes be applied narrowly." SOR at 16. Stone offers the analogy of provisions of the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §§ 651-678 (2006), which, like the OCSLA regulations at issue here, provide both a specific standard of conduct for employees and a general standard of conduct that prescribes a general duty to afford employees a hazard-free workplace. Stone states that, in such cases, Federal courts have concluded that, where the conduct by an employer violates both a specific and the general standard of conduct under OSHA, the employer should be held to have violated only the specific standard. Stone asserts that application of the specific standard is preferred because it provides superior notice of statutory requirements, and that application of the general standard should be a last resort, and in lieu of a finding of violation of the specific standard. *Id.* at 14 (citing, e.g., *Reich v. Montana Sulphur & Chemical Co.*, 32 F.3d 440, 445 (9th Cir. 1994), *cert. denied*, 514 U.S. 1015 (1995) ("OSHA contemplates that the Secretary will promulgate specific safety standards to insure safe and healthful working conditions . . . . The general duty clause applies when there are no specific standards." (quoting *Donovan v. Royal Logging Co.*, 645 F.2d 822, 829 (9th Cir. 1981))). Stone concludes that, in accordance with the OSHA precedent, "BSEE at most should have penalized Stone for violating th[e] specific provision [of 30 C.F.R. § 250.300(b)(6)] alone, rather than penalizing Stone for violating *both* the specific prohibition against dumping materials into the water *and* the general safety catch-all provision under 30 C.F.R. § 250.107(a)[]." *Id.* at 15. "Stone cannot be penalized twice for the same conduct." Reply Brief at 7. We disagree as we find no law, rule, or precedent preventing BSEE from issuing two or more penalties for the same conduct resulting in the same threat or harm.

BSEE identifies two separate violations, one involving 30 C.F.R. §§ 250.107(a) and the other involving 250.300(b)(6), namely, (1) the action of the wireline operator's assistant in dropping the wireline jarring tool into the Gulf waters and (2) the failure of the wireline operator to stop his assistant from dropping the tool. *See* Answer at 12. We agree with Stone that both violations are based on a single act of dropping the tool into the Gulf waters. *See* Reply Brief at 7. That act, whether it is attributed to the actual actions of the assistant or the failure of the operator to act to prevent such actions, alone gave rise to one immediate threat to the safety of any persons and property in the path of the tool. Indeed, we note that BSEE, on appeal,

states that, “[t]ogether, these actions [violative of §§ 250.107(a) and 250.300(b)(6)] posed an immediate threat” to persons and property in the path of the tool. Answer at 1.

However, even though there was only one act and threat of harm in this case, there were two separate regulatory violations. One was for disposing of the tool into Gulf waters, which violated § 250.300(b)(6), and the other was dropping that tool, which constituted a failure to “[p]erform[] all operations in a safe . . . manner,” which violated § 250.107(a). Thus, while only one act occurred and only one basic threat arose, we agree that BSEE was right to charge Stone with violations of both regulations.

The OSHA precedent relied upon by Stone does not convince us that BSEE could not determine the single act of dropping the wireline jarring tool into the Gulf waters to be violative of the specific prescriptions of 30 C.F.R. § 250.300(b)(6), and also charge Stone with having violated the general prescriptions of 30 C.F.R. § 205.107(a) as to performing all operations in a safe and workmanlike manner. Plainly, at the time the wireline operator and his crew were deciding whether to dispose of the tool by dropping it into the Gulf waters, § 250.300(b)(6) provided Superior with notice that such disposal was prohibited. It clearly and explicitly informed the operator, its contractors, and their crews that they could not lawfully drop that tool into the Gulf of Mexico. Their failure to heed that specific directive is a clear violation of § 250.300(b)(6). However, that failure does not mean that BSEE is restricted to citing Stone for a violation of § 250.300(b)(6). BSEE was fully justified in also finding a violation of the general duty to perform operations in a safe and workmanlike manner under § 250.107(a).

None of the cases cited by Stone specifically involve a conflict between application of the general duty clause and a specific standard of conduct under OSHA. We thus look to other cases. In doing so, we find that the applicable OSHA precedent holding that a specific standard of conduct prevails over the general duty clause is underlain by a particular regulation, 29 C.F.R. § 1910.5(c), which expressly allows the application of the general duty clause, only in the absence of an applicable, specific standard of conduct. The regulation also expressly precludes application of the general duty clause when there is an applicable specific standard of conduct. *See, e.g., Bristol Steel & Iron Works, Inc. v. Occupational Safety & Health Review Commission*, 601 F.2d 717, 719-22 (4th Cir. 1979). We find no such statutory or regulatory provision applicable in the present case.

[5] BSEE was not precluded from assessing civil penalties with respect to a violation of the general requirement of § 250.107(a) to perform operations in a safe and workmanlike manner *and* a violation of the specific requirement of § 250.300(b)(6) to avoid disposing of any equipment or other materials into offshore waters, even though both violations are attributable to the “exact same incident[.]” SOR at 14.

Further, whether it was determining the appropriate penalty for a general violation of 30 C.F.R. § 250.107(a) or for a specific violation of 30 C.F.R. § 250.300(b)(6), BSEE used the CPA Table to determine into which Category (A, B, or C) and which Enforcement Code (W, C, or S) the violation fell, and then decided whether to increase or decrease the recommended penalty, within the prescribed range. Whether in the case of the G-110 violation or the E-108 violation, we find no error in BSEE's application of the CPA Table. Nor does Stone make any noteworthy effort to demonstrate any error.

Stone asserts that BSEE should have significantly reduced the civil penalty for the G-110 and E-108 INCs because Stone promptly self-reported the December 29 incident and fully complied with BSEE's investigation; both the wireline operator and his assistant were contractors, not Stone employees, and it was they who acted contrary to the dictates of Stone's applicable policies and procedures; and the incident posed only a "minimal" risk of harm. SOR at 13; *see id.* at 17-18.

The CPA Table and associated Guidebook do not provide for reducing a penalty based upon the factors enumerated by Stone. *See* Guidebook at 11-12, 46. BSEE properly noted that under 30 C.F.R. § 250.146(c) the designated operator (Stone), as well as the lessee and "the person [who] actually perform[ed] the activity" that violated the applicable 30 C.F.R. Part 250 regulations (Superior), are "jointly and severally responsible" for failing to comply with the regulations. Thus, Stone is not absolved of any liability because the violations were caused by a contractor. *See ATP Oil & Gas Corp.*, 178 IBLA 88, 97 (2009). Nor did we, in *Petro Ventures*, hold that BSEE should take into account the fact that a contractor, rather than the operator, committed the violation at issue when assessing a civil penalty. *See* 167 IBLA at 324 ("The fact that it was a [contractor] . . . who closed the bypass valve [in violation of applicable regulations] does not insulate [the appellant] . . . from the assessment of civil penalties for the dangerous situation left in place.").

However, we have held that the fact that a violation "actually posed very little risk of harm 'has a material bearing when considering the degree of risk when calculating the penalty amount[.]'" SOR at 17 (quoting *W&T Offshore, Inc.*, 148 IBLA at 364). We think that the degree of risk relates to the severity of the violation. Under BSEE's CPA Table, the severity of the violation is, for the most part, taken into account when BSEE decides whether to designate the violation as Category A, B, or C. In the present case, BSEE adopted the lowest Category A for both the G-110 and E-108 violations, because there was only a threat of harm to life, property, and the marine or coastal environment. *See* Answer at 13 ("[B]oth civil penalties were assessed as threats (Category A)").

Stone argues that "a company's cooperation in an enforcement action should be taken into account when determining the proper civil penalty amount." SOR at 18

(citing *Petro Ventures, Inc.*, 167 IBLA at 324-26). Stone states that “[a]bsent [its] self-reporting, BSEE would never have known of this incident. *Id.* According to Stone, the fact that it self-reported the incident is reason to “reduce the civil penalty assessment.” *Id.*

The CPA Table states that the Reviewing Officer should consider lowering the starting point civil penalty based on “[p]recedents set by similar cases.” In *Petro Ventures*, the company informed the Department that it was relying on inaccurate information to determine the period of violation. 167 IBLA at 320. Although *Petro Ventures* objected to being assessed a civil penalty because of its cooperation, the Department maintained that its cooperation was “appropriately” considered by the Reviewing Officer. 167 IBLA at 321, 324. The Board found *Petro Ventures*’ cooperation was taken “into account in assessing the lowest possible amount of civil penalty,” which was “entirely consistent” with the factors to be considered in assessing civil penalties. 167 IBLA at 325. The Board then affirmed that civil penalty assessment: “The record in this case shows that MMS gave due consideration to all relevant factors in the case and properly exercised its authority to assess civil penalties and to set the daily penalty amount at the lowest end of the civil penalty range.” *Id.* It therefore appears that *Petro Ventures* establishes a precedent for considering operator cooperation when determining an appropriate civil penalty amount under the CPA Table.

BSEE asserts “Stone’s voluntary cooperation in self-report[ing] the incident was laudatory, but also required” by 30 C.F.R. § 250.300(d).<sup>21</sup> Answer at 14. BSEE’s decision assessing the civil penalty herein constitutes an exercise of its discretionary authority. *Black Elk Offshore Operations, LLC*, 182 IBLA at 341; *BP Exploration & Production, Inc.*, 172 IBLA at 384, 386. The burden is on Stone to demonstrate, by a preponderance of the evidence, that BSEE erred in its factual analysis or failed to act on the basis of a rational connection between the facts found and the choice made. *Id.* at 384; *Petro Ventures, Inc.*, 167 IBLA at 325. The record shows this incident was reported to BSEE on an internal company form, Items Lost Overboard Notification Form. Civil Penalty Case File, Att. C. Since Stone proffers no evidence showing this tool was not subject to mandatory reporting under 30 C.F.R. § 250.300(d), we conclude it has not met its burden to show BSEE erred in not reducing its civil penalty based on its reporting of this incident.

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<sup>21</sup> The rule at 30 C.F.R. § 250.300 states in relevant part:

(c) Materials, equipment, tools, containers, and other items used in the Outer Continental Shelf (OCS) which are of such shape or configuration that they are likely to snag or damage fishing devices shall be handled and marked as follows . . .

\* \* \* \*

(d) Any of the times described in paragraph (c) of this section that are lost overboard shall be . . . reported to the District Manager.

*CONCLUSION*

We, therefore, conclude that the Reviewing Officer properly assessed a civil penalty for two offshore safety and environmental protection violations, G-110 and E-108. However, as discussed above, because BSEE erred in applying the prescribed procedures, set forth in the CPA Table, for determining the appropriate civil penalty for the G-110 INC violation, we reduce the assessed penalty from \$20,000 to \$15,000. We do not change the penalty assessment of \$25,000 for the E-108 violation. We modify the amount of the total penalty to \$40,000. We affirm BSEE's decision in all other respects.

Accordingly, 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 as modified.

\_\_\_\_\_  
/s/  
James F. Roberts  
Administrative Judge

I concur:

\_\_\_\_\_  
/s/  
James K. Jackson  
Administrative Judge