

INTERIOR BOARD OF LAND APPEALS

W & T Offshore, Inc.

164 IBLA 193 (December 20, 2004)

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W & T OFFSHORE, INC.

IBLA 2002-214

Decided December 20, 2004

Appeal from a decision of the Minerals Management Service denying an appeal of a proposed civil penalty assessment. MMS-99-0002-PEN.

Affirmed.

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

MMS appropriately assessed civil penalties against a Federal offshore oil and gas lessee who authorized welding and burning activities in a manner that did not comply with rules applicable to such practices on the Outer Continental Shelf. The fact that such activities may have taken place in association with well abandonment does not exempt them from safety regulations governing welding and burning practices during production operations.

APPEARANCES: John C. McNeese, Esq., New Orleans, Louisiana, for W & T Offshore, Inc.; Frank F. Conforti, Esq., Office of the Solicitor, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

W & T Offshore, Inc. (W&T), appeals a January 4, 2002, decision of the Associate Director for Policy, Management and Improvement, Minerals Management Service (MMS), denying W&T's appeal of a proposed civil penalty assessment in the amount of \$40,000. The MMS decision imposed \$20,000 in penalties for two 1-day violations of MMS regulations regarding welding and burning activities on Federal offshore oil and gas lease OCS-G 4228, offshore Louisiana.

The Secretary of the Interior is authorized under the Outer Continental Shelf Lands Act (OCSLA), as amended, 43 U.S.C. §§ 1331-1356 (2000), to issue leases on the outer Continental Shelf for the exploration and development of oil and gas. Notably for purposes of this appeal, section 3 of the OCSLA makes clear that Congress intended to ensure that development of oil and gas resources be conducted safely in a manner to minimize risk to life and health.

[O]perations in the [OCS] 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 obstructions to other users of the waters or subsoil and seabed, or other occurrences which may cause damage to the environment or to property, or endanger life or health.

43 U.S.C. § 1332(6) (2000); see also 43 U.S.C. § 1348(b) (2000). Congress directed the Secretary to prescribe rules and regulations deemed necessary to accomplish the stated objectives of the statute. See 43 U.S.C. § 1334(a) (2000); see W&T Offshore, Inc., 148 IBLA 323, 354 (1999).

Congress established that the Secretary may issue civil penalties for violations of the statute, implementing regulations, or lease terms.

Except as provided in paragraph (2), if any person fails to comply with any provision of this Act, or any term of a lease, license, or permit issued pursuant to this Act, or any regulation or order issued under this Act, after notice of such failure and expiration of any reasonable period allowed for corrective action, such person shall be liable for a civil penalty of not more than \$20,000 for each day of the continuance of such failure. \* \* \*

(2) If a failure described in paragraph (1) constitutes a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), property, any mineral deposit, or the marine, coastal or human environment, a civil penalty may be assessed without regard to the requirement of expiration of a period allowed for corrective action.

43 U.S.C. § 1350(b) (2000). Consistent with the statute, MMS regulations provide for the assessment of civil penalties for violations of the OCSLA itself, or of “any provision of a lease, license, or permit issued pursuant to the Act.” 30 CFR 250.200(a)(1) (1996); see also 30 CFR 250.1402 and Subpart N (2003).

The following facts are not in dispute. In December 1996, W&T was lessee and operator of offshore oil and gas lease OCS-G 4228. In this capacity, W&T was conducting activities on Platform 4 of the Gulf Island IV rig in Ship Shoal Block 133. (Administrative Record Document (AR) 20A, Accident Investigation Report, at 1-2.) According to MMS records, on December 7, 1996, W&T was conducting “development/production” activities in an operation associated with plugging and abandonment of the well. Id. For several days beginning on December 3, W&T’s crew and a contractor were working on a gas flowline. On December 7, welder Wayne Bergeron “was cutting bolts on the flowline flange, with a cutting torch while Jason Ray stood by as fire watch.” Id. at 2. As a result of “residual gas in the flowline or well,” a flash fire occurred killing Bergeron and leading to subsequent medical problems for Ray. Id. at 3.

On December 8, 1996, MMS investigators conducted an onsite investigation. As part of the investigation report, MMS attached a document entitled “Welding, Burning, and Hot Tapping Safe Practices and Procedures Plan (30 CFR 250.52)” (Plan). (AR 20A.) On that same date, MMS issued a Notice of Incidents of Noncompliance (INCs) for four violations of 30 CFR 250.52 (1996), governing “welding and burning practices and procedures,” including requirements identified in the Plan. (AR 20B.) These violations were identified as follows:

G-302 Lessee doesn’t have any welding, burning, or hot tap forms to issued welder to perform his duties. (Welder was cutting for 2 days without permit for[m] (12-7-96 and 12-8-96).

G-312 Lessee doesn’t have a portable gas detector for welding and burning operation for Fire Watcher to use.

G-314 Lessee fail[ed] to keep Fire Watch at welding area for 30 minutes after Welding or Burning operation was completed.

G-310 Lessee fail[ed] to have all piping containers, tanks, or other vessels which have contained a flammable substance been rendered inert [sic].

Id. at 1-2.

On January 15, 1997, W&T responded to the INCs and advised MMS that “[d]iscussion of W & T’s Safe Welding and Burning Practices Manual shall be incorporated into the pre-job meetings on all future jobs and the importance of adherence to the plan shall be stressed.” (AR 20C.) W&T also responded that it

would ensure compliance with other requirements of the plan, but asserted that it had been unaware that the torch would be used in the operation, and that the flowline “had, in fact, been purged and vented in order to render [it] inert.” Id.

On March 19, 1998, the MMS Reviewing Officer for the incident issued a Notice of Proposed Civil Penalty Assessment. (AR 18.) The letter notified W&T of the initiation of an administrative civil penalty proceeding, proposed penalties of \$60,000 for three 1-day violations of 30 CFR 250.52(d)(1), (d)(2), and (d)(4) (1996), and offered to meet with W&T to discuss the matter. (AR 18 at 1-2.)

The Reviewing Officer and W&T representatives convened a meeting on June 4, 1998. (AR 14.) Subsequently, on June 4, 1998, W&T hand-delivered a letter to MMS asserting that the proposed penalty was in error because the regulation upon which MMS relied, 30 CFR 250.52 (1996), covered drilling and production operations and not “abandonment operations following plugging of the well.” (AR 13.) Accordingly, W&T argued that the “cited regulations do not apply.” Id. W&T concluded:

Inasmuch as W & T’s Welding, Burning and Hot-Tapping Safe Practices and Procedures Plan encompasses the requirements of the cited regulations, strict adherence to the Plan would be inapplicable; however, as a prudent operator and contractor, a fire watch was maintained on location.

(AR 13 at 2.)

On November 18, 1998, the MMS Reviewing Officer issued a final decision assessing civil penalties of \$40,000 for two 1-day violations of 30 CFR 250.402(d)(1) and (d)(2) (1998) (formerly 30 CFR 250.52(d)(1) and (2) (1996)), as a result of the fact that a “burning operation, which involved the use of a torch to cut bolts off a flange on a flow line, was being conducted without the issuance of a written authorization for the work [and] the site was not being monitored with a portable gas detector.” (AR 11, Final Decision, at 1.) The Reviewing Officer concluded:

[T]hese violations are [governed by] the provisions of 43 U.S.C. 1350(b) and 30 CFR 250.1404 (formerly 30 CFR 250.404) in that [they] constituted a threat of serious, irreparable, or immediate harm or damage to life \* \* \* or human environment. W&T’s contention that the regulations cited are not applicable to the operations being conducted at the time of the accident is not correct. The removal of a flow line or any other equipment or facilities following cessation of production are considered as the final steps in production operations and, as such, are subject to the provisions of 30 CFR 250.402(a) (iii) [formerly 30 CFR

250.52(a)(2)(iii)]. W&T's being unaware that a cutting torch would be used on the operation does not relieve W&T from being responsible for the operations of the facility and does not mitigate the threat that existed.

(AR 11 at 2.)

W&T timely appealed the final decision to the MMS Director. (AR 10.) In its statement of reasons for appeal to the State Director, W&T raised the same arguments discussed above. With respect to the Reviewing Officer's conclusion that removal of a flowline following cessation of production is a final step in production operations subject to 30 CFR 250.402(a)(iii) (1998), formerly 30 CFR 250.52(a)(2)(iii) (1996), W&T objected and argued that "such a conclusion, based on no authority whatsoever, strains credulity." At the very least, W&T argued, the MMS Director should resolve any ambiguity in favor of the lessee in a civil penalty matter, citing Exxon Company, U.S.A., 113 IBLA 199, 206 (1990). (AR 10 at 2-7.)

On January 4, 2002, the MMS Associate Director issued the decision challenged here (AD Decision). In relevant part, he affirmed the Reviewing Officer's conclusion that such activities as "removal of a flow line or any other equipment or facilities following cessation of production are considered as the final steps in production operation," citing 30 CFR 250.402(a)(iii) (1998) (formerly 250.52(a)(iii) (1996)). (AR 4, AD Decision, at 6.) In relevant part, the Associate Director stated:

In regard to W&T's contentions that the operation being conducted at the time of the incident is governed by [30 CFR] Subpart G, "Abandonment of Wells" instead of [30 CFR] Subpart D, "Oil and Gas Drilling Operations," I disagree with W&T. Subpart G deals with abandonment of wells which requires submittal of a form MMS-124, "Sundry Notices and Reports on Wells" (Sundry Notice) for approval for all abandonment operations. The removal of a flow line from a well does not require a Sundry Notice. Subpart G regulations concern themselves with the well itself (i.e., everything below the tree).

1. INC G-302 states: "Lessee doesn't have any welding, burning, or hot tap forms to issued [sic] welder to perform his duties. Welder was cutting for 2 days without permit (12-7-96 and 12-8-96)

MMS applied 30 CFR 250.52(d)(1), dated July 1, 1996, in issuing INC G-302. Section 250.52(d)(1) provides:

Prior to the commencement of any of these operations, the lessee's designated person in charge at the installation shall inspect the qualifications of the welder(s) to assure that the welder(s) is properly qualified in accordance with the approved qualifications standards or requirements for welders. The designated person in charge and the welder(s) shall inspect the work area and areas(s) at elevations below the work area where slag, sparks, or other hot materials could fall for potential fire and explosion hazards. After it has been determined that it is safe to proceed with the welding and burning operation, the designated person in charge shall issue a written authorization for the work.

Also, on page 2 of the Compliance Review Form (Form MMS-129) MMS states: "Using a welding and burning permit may have forewarned the on site supervisor to the on site hazards. A review of W&T Offshore Inc.'s welding and burning plan may have informed the plug and abandoned [sic] crew to safety procedures that could have prevented this accident."

In its appeal, W&T does not deny that it did not have any welding, burning or hot tap forms to issue the welder to perform his duties, and that the welder was cutting for 2 days without a permit (December 7 and 8, 1996). I find that W&T violated 30 CFR 250.52(d)(1). Also, I find that the violation constituted a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), property, or the marine, coastal, or human environment under the provisions of 43 U.S.C. §1350(b) and 30 CFR 250.204 (1996).

\* \* \* \* \*

3. INC G-312 states: "Lessee doesn't have a portable gas detector for welding and burning operation for fire watcher to use."

MMS applied 30 CFR 250.52(d)(2), dated July 1, 1996, in issuing INC [G-312]. Section 250.52(d)(2) provides:

During these welding or burning operations, one or more persons shall be designated as a fire watch. The person(s) assigned as a fire watch shall have no other duties while actual welding or burning operations are in

progress. If the operation is to be in an area which is not equipped with a gas detector, the fire watch shall also maintain a continuous surveillance with a portable gas detector during the welding and burning operation. The fire watch shall remain on duty for a period of 30 minutes after welding or burning operations have been completed.

Also, on page 3 of the Compliance Review Form \* \* \* MMS states: "A portable gas detector may have alerted the on site personnel to the presents [sic] of gas in the welding and burning area. This devise [sic] has been a very inexpensive and useful tool in the workplace."

In its appeal, W&T does not deny that it did not have a portable gas detector for welding and burning operations for a fire watcher to use. I find that W&T violated 30 CFR 250.52(d)(2). Also, I find that the violation constituted a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), property, or the marine, coastal, or human environment under the provisions of 43 U.S.C. §1350(b) and 30 CFR 250.204 (1996).

W&T argues that there is significant ambiguity as to the cited regulations' applicability to the circumstances under which the incident occurred. W&T states that penal provisions, even those involving civil penalties, should be strictly construed; the requirements for strict construction refers to sufficiently clear regulations; and if a regulation is ambiguous, any doubt as to its meaning should be resolved favorable to the lessee. W&T cites First National Bank of Gordon v. Department of the Treasury, 911 F.3d 57, 65 (8<sup>th</sup> Cir. 1990); and Exxon Company, U.S.A., 113 IBLA 206, 211 (February 21, 1990) in support of this argument.

The First National Bank of Gordon v. Department of the Treasury and Exxon Company, U.S.A. cases cited by W&T do not apply. It is true that in the Exxon case [IBLA] stated: "If a regulation is ambiguous, any doubt as to its meaning should be resolved favorable to the lessee." However, I find that there is no ambiguity as to the applicability of 30 CFR 250.52(d)(1) and 30 CFR 250.52(d)(2) to the circumstances of this case. The principle stated in Exxon and First National Bank of Gordon therefore does not apply.

Therefore, based on the record before me, and for the reasons stated herein, the subject appeal must be, and is, denied.

(AR 5, AD Decision, at 13-16.)

W&T timely appealed. In its statement of reasons (SOR), W&T reiterates the arguments made before the Director. Thus, it does not dispute the way in which the Director interpreted the applicable regulations at 30 CFR 250.52 (1996) to the situation at hand.<sup>1/</sup> As it argued to the Director, however, W&T contends that there is “no authority whatsoever” for the suggestion that those regulations can be construed to apply to the factual situation involving Bergeron’s death because it occurred during an activity undertaken for purposes of abandonment of a well. W&T asserts that abandonment “is not to be conflated with production activities.” (SOR at 4.) Interpreting all aspects of 30 CFR 250.52 to apply only to drilling and production, W&T states that no “threat of civil penalty” can accompany welding or burning activities if they take place in association with well abandonment. (SOR at 4.) Citing Exxon Company, U.S.A., 113 IBLA 206, 211 (1990), W&T repeats its assertion that the regulation is at best ambiguous and should be resolved in favor of the lessee. (SOR at 2.)

W&T’s argument is based upon the following logic: W&T argues that 30 CFR 250.52 is within Subpart D of Part 250. Subpart D covers “Oil and Gas Drilling Operations” while Subpart G covers “Abandonment of Wells.” Because the discussion of welding practices at 30 CFR 250.52 appears only under the heading of “drilling operations,” W&T states that either the regulation did not apply to “abandonment of wells” or that a lessee had no reasonable notice that such rule would apply to abandonment. W&T argues that the regulation itself specifies the four conditions to which it applies, and that none of those conditions is applicable here. See 30 CFR 250.52(a)(2) (i) - (iv).

We must reject W&T’s argument. In fact, 30 CFR 250.52(a)(2)(iii) states clearly that it applies, inter alia, to “any platform \* \* \* or other installation during any \* \* \* production operation.” “Production” is defined in Part 250 to include “those activities which take place after the successful completion of any means for the removal of minerals, including such removal, field operations, transfer of minerals to shore, operation monitoring, maintenance, and work-over operations.” 30 CFR 250.2 (emphasis added). The definition thus makes clear that activities after the successful completion of means for removal of minerals will be subsumed within production. We see no basis within that definition for adopting the conclusion implicit in W&T’s argument that “production” means activities after such completion, but before the moment in time in which activities relate to well abandonment.

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<sup>1/</sup> The regulations at 30 CFR Part 250 have twice been amended and recodified. For the remainder of this decision, all citations are to the rules applicable to lessees on Dec. 7, 1996, found in the 1996 volume of the Code of Federal Regulations.

Moreover, we reject W&T's argument that any lessee should have seen the regulations as ambiguous regarding their clear and unfailing goal of human safety. Subpart A at the beginning of Part 250 establishes regulations applicable on the OCS.

(a) The lessee shall perform all operations in a safe and workmanlike manner and shall maintain all equipment in a safe condition for the protection of \* \* \* the health and safety of all persons \* \* \* .

(b) The lessee shall immediately take all necessary precautions to control, remove, or otherwise correct any \* \* \* health, safety, or fire hazard.

30 CFR 250.20 (emphasis added). The regulations regarding "drilling" operations at Subpart D reaffirm that obligation in Subpart A:

The lessee shall take necessary precautions to keep its wells under control at all times. The lessee shall utilize the best available and safest drilling technology \* \* \*. The lessee shall utilize personnel who are trained and competent and shall utilize and maintain equipment and materials necessary to assure the safety and protection of personnel \* \* \* .

30 CFR 250.50. Regulations discussing "oil and gas production safety systems" at Subpart H specify that "production safety equipment shall be designed, installed, used, maintained, and tested in a manner to assure the safety and protection of the human \* \* \* environment." 30 CFR 250.120. Likewise, they specify that lessees "shall comply with the following production safety system requirements \* \* \* incorporated by reference in [30 CFR] 250.122(b) of this part." 30 CFR 250.123(a). These incorporated safety system requirements include the following obligation: "(d) *Welding and burning practices and procedures. All welding, burning, and hot-tapping activities shall be conducted according to the specific requirements in § 250.52 of this part.*" 30 CFR 250.123(d) (emphasis added).

To accept W&T's arguments that the regulations at 30 CFR Subpart D (and, presumably, by the same reasoning, those at Subpart H) do not apply because they cover drilling and "production" in a manner that does not include "abandonment" operations would require us to jettison not only the applicability of 30 CFR 250.52, but also the requirements governing the safety of operations and use of equipment within 30 CFR 250.50, 250.120, and 250.123. We find this an implausible construction of the rules.

Subpart G, governing abandonment, notably eschews any discussion of actual operations or activities associated with abandonment, use of equipment during

abandonment, or safety requirements, that are found within Subparts D and H. Thus, in order to accept W&T's argument, we would be required to find that the ubiquitous provisions regarding safety of operations throughout Part 250 apply to all operations and activities on the OCS except abandonment at Subpart G, where, by refusing to address it, the Secretary actually intended safety requirements not to apply. We reject such a conclusion.

Moreover, to the extent W&T suggests that the lessee could reasonably have been confused about the requirements regarding welding and burning practices found at 30 CFR 250.52 as applied here, we find this an implausible reading of Part 250. As noted above, the requirements regarding "welding and burning" appear in 30 CFR 250.52 in Subpart D, discussing "drilling operations." Those requirements expressly apply to production operations. 30 CFR 250.52(a)(2)(iii). This is later confirmed in Subpart H, governing "oil and gas production safety systems." Subpart H expressly includes regulations governing the operation of "flowlines," the welding and burning on which resulted in death in this case. 30 CFR 250.123(b)(2). That regulation specifically incorporates the rules in 30 CFR 250.52 regarding welding and burning practices. 30 CFR 250.123(d). Other aspects of Part 250 do the same. See 30 CFR 250.77 (incorporating rules governing welding and burning activities at 30 CFR 250.52 to well-completion operations); 30 CFR 250.97 (incorporating rules governing welding and burning activities at 30 CFR 250.52 to well workover operations).

It is absolutely clear that the rules at 30 CFR Part 250 meant to ensure that all welding and burning activities were to be conducted under the terms of 30 CFR 250.52. We find no exclusion from this requirement anywhere within Part 250, let alone within the abandonment regulations at Subpart G. Notably, those rules do not discuss the conduct of "abandonment" activities at all. We reject the assertion that welding and burning practices are subject to stringent safety requirements, the goal of which is to avoid exactly the situation present in this case, except when welding and burning activities take place in association with well abandonment.

Finally, we note that W&T received a "Welding, Burning, and Hot Tapping Safe Practices and Procedures Plan," established at 30 CFR 250.52(b), in association with operations on the OCS. (AR 20A.) The copy of the plan in the record before us states within the section entitled "Undesignated Welding and Burning Areas" the requirements that all welding operations be subject to a written authorization for the work ensuring that it was safe to proceed, and that the Fire Watch have at hand a portable gas detector. Except in association with the arguments addressed above, W&T has neither submitted a copy of the Plan in its possession, nor explained why these Plan requirements were not followed.

Even if we were to assume that neither the regulations nor the Plan applied here, we would nonetheless affirm MMS for assessing a penalty for violation of the terms of the OCSLA itself, for failing to ensure that the welding and burning activities were “conducted in a safe manner by well-trained personnel using technology, precautions, and techniques sufficient to prevent or minimize the likelihood of \* \* \* fires \* \* \* which may \* \* \* endanger life or health.” 43 U.S.C. § 1332(6) (2000); see also 43 U.S.C. § 1348(b)(1) (2000) (duties of lessee to maintain lease area free from “recognized hazards” to ensure safety of employees and contractors); W&T Offshore, Inc., 148 IBLA at 354.

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

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Lisa Hemmer  
Administrative Judge

I concur:

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David L. Hughes  
Administrative Judge