



United States Department of the Interior



BUREAU OF LAND MANAGEMENT
Montana State Office
5001 Southgate Drive
Billings, Montana 59101-4669
<http://www.blm.gov/mt>

In Reply Refer To:

SDR-922-11-02
3160 (MT9220.WL)

March 23, 2011

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

DECISION

Mr. Randall M. Kirk
Messner & Reeves, LLC
1430 Wynkoop St., Suite 300
Denver, Colorado 80202-6172

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SDR No. 922-11-02

AFFIRMED

Brigham Oil & Gas, L.P. (Brigham), through its attorney, Randall M. Kirk, requests a State Director Review (SDR) in accordance with 43 CFR 3165.3(b), of the February 11, 2011, Notice of Incidents of Noncompliance (INC) and the accompanying \$5,000 assessment issued by the North Dakota Field Office (NDFO) for drilling the Esther Hynek 10-11 #1-H well on Federal lease NDM98083 without prior approval. The SDR was considered timely filed on March 10, 2011, in accordance with 43 CFR 3165.3(b), and was assigned number SDR-922-11-02.

BACKGROUND

The surface location of the Esther Hynek 10-11 #1-H well is on privately owned surface in the SWNW, Section 10, T. 155 N., R. 93 W., Mountrail County, North Dakota which is on Lease NDM98038. The well is a horizontal well in a 1,280 acre drilling and spacing unit established by the North Dakota Industrial Commission, combining all of Sections 10 and 11, T. 155 N., R. 93 W. for the Alger-Bakken Pool.

Brigham submitted a Notice of Staking to the NDFO for this well on November 12, 2010. This was followed by an Application for Permit to Drill (APD) which was submitted on December 15, 2010. The NDFO failed to notify Brigham within 10 days of receiving the APD as to whether or not the application was complete as required by Onshore Oil and Gas Order No. 1. Since no determination was made as to whether or not the application was complete, no additional notice was provided to Brigham. Onshore Oil and Gas Order No. 1 requires that within 30 days after the operator has submitted a complete APD, the Bureau of Land Management (BLM) will: approve the permit, notify the operator that it is deferring action on the permit, or deny the permit. Since Brigham did not receive either notification from the NDFO, it assumed its APD had been granted by process of elimination.

On February 9, 2011, the NDFO discovered that this well had been spud on January 24, 2011. On February 10, 2011, the NDFO issued an INC which included a \$5,000 assessment in accordance with 43 CFR 3163.1(b)(2) which states:

“For drilling without approval or for causing surface disturbance on Federal or Indian surface preliminary to drilling without approval, \$500 per day for each day that the violation existed, including days the violation existed prior to discovery, not to exceed \$5,000.”

BRIGHAM ARGUMENTS

Brigham does not dispute the fact that the well was spud prior to approval of the APD; however, Brigham claims that since it did not receive any notice of any area of incompleteness or deficiency related to its APD package and no 30 day notice of deferral of action on its APD, it reasonably assumed that its APD had been granted.

Brigham bases its argument on Section 366 of the Energy Policy Act of 2005, Onshore Oil and Gas Order No. 1, and Washington Office Instruction Memorandum (IM) No. 2007-115 dated May 2, 2007. Section 366 of the Energy Policy Act of 2005, entitled “*Deadlines for Consideration of Applications for Permits*” states:

“(1) IN GENERAL - Not later than 10 days after the date on which the Secretary receives an application for any permit to drill, the Secretary shall—

- (A) notify the applicant that the application is complete; or
- (B) notify the applicant that information is missing and specify any information that is required to be submitted

(2) ISSUANCE OR DEFERRAL.—Not later than 30 days after the applicant for a permit has submitted a complete application, the Secretary shall—

- (A) issue the permit, if the requirements under the National Environmental Policy Act of 1969 and other applicable law have been completed within such timeframe; or
- (B) defer the decision on the permit and provide to the applicant a notice—
 - (i) that specifies any steps that the applicant could take for the permit to be issued; and
 - (ii) a list of actions that need to be taken by the agency to complete compliance with applicable law together with timelines and deadlines for completing such actions”

Brigham points out that the Preamble to Onshore Oil and Gas Order No. 1 states:

“The timeframe for processing APDs is mandated by the Energy Policy Act of 2005. As such the agencies must comply with this timeframe”. See 72 FR 10316

Brigham supplements their argument by referencing Washington Office IM No. 2007-115 that was issued to all BLM Field Offices. Brigham points out that the following was included in the IM:

“Section 366 of the Energy Policy Act of 2005 (Act) requires the BLM to notify the operator within 10 days of receiving an APD (10-day letter) that either the APD is complete; or the BLM must tell the operator what is missing or deficient if the APD is not complete.”

“Thirty days after the APD is deemed complete the BLM must approve, defer, or deny the APD...If the BLM is deferring the APD, it must notify the operator of any actions that it could take to allow the APD to be issued and/or the list of actions that the BLM or the FS must take to comply with applicable law before making a decision on the APD.”

Brigham also references a February 17, 2011, U.S. District Court ruling granting an injunction requiring the Secretary of the Department of the Interior to act on pending offshore permits within 30 days. In *Ensco Offshore, Et Al v. Kenneth Lee “Ken” Salazar*, Case 2:10-cv-01941-MLCF-JCW Document 229 Filed 02/17/11, the Eastern District Court of Louisiana stated:

“Not acting at all is not a lawful option. To discharge the Secretary’s oversight responsibility, without any time-sensitive obligation to do so, unmask the fiction of transparency in government. Where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason.”

Brigham also points out that in the ruling the Court quoted the Tenth Circuit’s *Forest Guardians v. Babbitt*:

“Strained resources do not amend the government’s duty to act on permit applications that pass before it and limited resources cannot excuse an agency’s nondiscretionary duty to act”. See *Forest Guardians v. Babbitt*, 174 F.3d 1178 at 1191 (10th Cir. 1999) cited in the February 17, 2011 ruling on *Ensco Offshore, Et Al v. Kenneth Lee “Ken” Salazar*

Brigham provided a summary of records of communication with the NDFO in relation to this well. The communications include:

- A November 12, 2010, conference call with the NDFO in which Brigham disclosed a targeted spud date in mid-December 2010. Brigham was informed that a Notice of Staking (NOS) could be submitted to begin the process
- A November 12, 2010, email to the NDFO submitting the NOS.
- A December 14, 2010, email to the NDFO informing them that an APD package had been sent via FEDEX for scheduled delivery on December 15, 2010.

- A December 20, 2010, email to the NDFO to confirm BLM received the application. The NDFO replied to the email confirming receipt.

Brigham points out that the communications reflect that the NDFO did not furnish the required 10-day letter or the required 30-day notice.

Brigham also argues that drilling without approval in this situation should not be considered a “major” violation as defined in the regulations. Brigham requests that the INC be rescinded. If the rescission is not granted, Brigham requests vacation of the INC as issued for a major violation and a corresponding reduction of the assessment.

DISCUSSION

The regulations are clear that the operator must receive approval prior to drilling a well. The regulations at 43 CFR 3162.3-1(c) state:

“The operator shall submit to the authorized officer for approval an Application for Permit to Drill for each well. No drilling operations, nor surface disturbance preliminary thereto, may be commenced prior to the authorized officer’s approval of the permit.”

This regulation is unambiguous and there are no exceptions given for this regulation.

The BLM acknowledges that the APD processing timeframes described in Section 366 of the Energy Policy Act of 2005, Onshore Oil and Gas Order No. 1, and IM 2007-115 were not met. The NDFO has seen a significant increase in oil and gas activity in the recent past. This includes an overwhelming number of APDs being submitted. This increase in activity has caused delays in the processing of APDs. Permits are processed as expeditiously as possible and in the order that they are received. Unfortunately, this means that the processing timeframes are not always met. This situation, however, does not result in the automatic or “assumed” approval of permits.

The regulations and numerous Interior Board of Land Appeals (IBLA) decisions support this. The regulations at 43 CFR 1810.3(a) state:

“The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescence of its officers or agents, **or delays in the performance of their duties.**” (emphasis added)

The IBLA references this regulation in numerous decisions including *Ron Coleman Mining, Inc.*, 172 IBLA 392 (2007); *Mallon Oil Co.*, 107 IBLA 150, 155 (1989); and *W&T Offshore, Inc.*, 148 IBLA 359 (1999). In *W&T Offshore, Inc.*, the IBLA goes on to state:

“...the Department’s authority to protect the public interest by enforcing its oil and gas lease regulations, which it must do (*McKay v. Wahlenmaier*, 226 F 2d 35 (D.C. Cir. 1955)), is not vitiated by delays in the performance of its duties.”

Brigham cites some of the language from *Ensco Offshore, Et Al v. Kenneth Lee “Ken” Salazar*, Case 2:10-cv-01941-MLCF-JCW Document 229 Filed 02/17/11 to support its opinion. (NOTE: An appeal on this ruling was filed by the Federal Government with the U.S. Court of Appeals, Fifth Circuit, on March 9, 2011.) The ruling in this case orders the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE) to act on the five pending permit applications within 30 days of the order. Nowhere in the ruling does it state or imply that the pending permit applications are assumed to be approved due to the BOEMRE not meeting its processing timeframes.

Brigham also points out that in the ruling the Court quoted the Tenth Circuit’s *Forest Guardians v. Babbitt*:

“Strained resources do not amend the government’s duty to act on permit applications that pass before it and limited resources cannot excuse an agency’s nondiscretionary duty to act”. See *Forest Guardians v. Babbitt*, 174 F.3d 1178 at 1191 (10th Cir. 1999) cited in the February 17, 2011 ruling on *Ensco Offshore, Et Al v. Kenneth Lee “Ken” Salazar*

The ruling, however, goes on to further address the situation. Specifically, the ruling states:

“Unlike in *Barr*, it does not appear that ordering the government to act here would disrupt a queue; indeed, it appears that the government has considered no applications for any activities falling within the scope of the moratorium. Where there should be a queue, there is instead an untended pile. Finding that the government should act within thirty days on the five permits identified by plaintiff would not displace other permit applications, because it appears the government has neglected to act at all on permits that were once covered by its blanket moratorium.”

Unlike the situation at issue in the ruling, the NDFO does indeed have a queue. The NDFO is processing permits as expeditiously as possible in the order they are received.

Brigham cites the preamble of Onshore Oil and Gas Order No. 1 which states the timeframe for processing APDs is mandated by the Energy Policy Act of 2005 and as such the agencies must comply with this timeframe. The preamble, however, also states:

“...the Energy Policy Act does not relieve the BLM or the FS from complying with other applicable laws. Section 366 of the Act clearly states that the BLM cannot approve a permit without first complying with other applicable laws.”

This clearly indicates the BLM's obligation to ensure compliance with other applicable laws prior to approving a permit, and mandates the inability to meet processing timeframes not override this obligation.

Brigham pointed out the communications that it had with the NDFO. From the information provided, it is clear that Brigham had a point of contact with the NDFO and had communicated with them on many occasions. It is disturbing that Brigham did not utilize this point of contact to confirm whether or not its APD had been approved prior to drilling this well and instead "assumed" the permit had been approved.

Brigham argues that drilling without approval is not a "major" violation in this situation. The regulations at 43 CFR 3163.1(b) are very clear:

"Certain instances of noncompliance are violations of such a serious nature as to warrant the imposition of immediate assessments upon discovery. Upon discovery the following violations shall result in immediate assessments, which may be retroactive, in the following specified amount per violation:

(1) For failure to install blowout preventer or other equivalent well control equipment, as required by the approved drilling plan, \$500 per day for each day that the violation existed, including days the violation existed prior to discover, not to exceed \$5,000

(2) For drilling without approval or for causing surface disturbance on Federal or Indian surface preliminary to drilling without approval, \$500 per day for each day that the violation existed including days the violation existed prior to discovery, not to exceed \$5,000."

A major violation is defined as noncompliance that causes or threatens immediate, substantial, and adverse impacts on public health and safety, the environment, production accountability, or royalty income. APDs are evaluated by BLM resource specialists to ensure protection of the environment and public health and safety. Any potential issues must be addressed prior to approval of the permit or are attached to the permit as conditions of approval. Since the evaluations by resource specialists did not occur prior to drilling the well, there was a definite threat of immediate, substantial, and adverse impacts on public health and safety and the environment.

DECISION

Based on the discussion above, the INC and assessment issued by the NDFO is affirmed. While it is unfortunate that the current workload in the NDFO prevents them from meeting the APD processing timeframes, it does not mean that operators are allowed to drill wells without prior approval.

Brigham's request that the assessment be reduced has also been considered. Based on the discussion above, a reduction of the assessment is not warranted.

APPEAL RIGHTS

This Decision may be appealed to the Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 CFR 4.400 and Form 1842-1 (Enclosure 1). If an appeal is taken, a Notice of Appeal must be filed in this office at the aforementioned address within 30 days from receipt of this Decision. A copy of the Notice of Appeal and of any statement of reasons, written arguments, or briefs must also be served on the Office of the Solicitor at the address shown on Form 1842-1. It is also requested that a copy of any statement of reasons, written arguments, or briefs be sent to this office. The appellant has the burden of showing that the Decision appealed from is in error.

If you wish to file a Petition for a Stay of this Decision, pursuant to 43 CFR 4.21, the Petition must accompany your Notice of Appeal. A Petition for a Stay is required to show sufficient justification based on the standards listed below. Copies of the Notice of Appeal and Petition for a Stay **must** also be submitted to each party named in the Decision and to the Interior Board of Land Appeals and to the appropriate Office of the Solicitor (see 43 CFR 4.413) at the same time the original documents are filed with this office. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a Decision pending appeal shall show sufficient justification based on the following standards:

- (1) The relative harm to the parties if the stay is granted or denied;
- (2) The likelihood of the appellant's success on the merits;
- (3) The likelihood of immediate and irreparable harm if the stay is not granted; and
- (4) Whether the public interest favors granting the stay.

/s/ Theresa M. Hanley

Theresa M. Hanley,
Deputy State Director
Division of Resources

Enclosure
1-Form 1842-1 (1p)

cc: WO-310, LS, Rm. 501
All BLM State Offices
North Dakota Field Office
Miles City Field Office
Great Falls Oil and Gas Field Office