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Interior Board of Land Appeals
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ISLAND OPERATING CO., INC.

IBLA 2013-137 Decided September 25, 2015

Appeal from a decision of the District Supervisor, Houma District Office, Bureau of Safety and Environmental Enforcement, entitled Notification of Incident(s) of NonCompliance, with respect to offshore operations in the Gulf of Mexico, off the coast of Louisiana. OCS-G 00071.

Affirmed.

1. Oil and Gas Leases: Generally--Oil and Gas Leases: Incidents of Noncompliance--Outer Continental Shelf Lands Act: Administrative Construction

Under Departmental regulations implementing the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (2012), whenever the regulations in 30 C.F.R. Part 250 require the lessee to meet a requirement or perform an action in a safe and workmanlike manner, the lessee, operator, and the person actually performing the activity to which the requirement applies are jointly and severally responsible for complying with the regulation.

APPEARANCES: Lowell M. Rothschild, Esq., Kevin A. Ewing, Esq., Sandra Y. Snyder, Esq., Washington, D.C., for appellant; David Longly Bernhardt, Esq., Lawrence Jensen, Esq., Washington, D.C., for Amici Curiae; Sarah Doverspike, Esq., Office of the Solicitor, Division of Mineral Resources, U.S. Department of the Interior, Washington, D.C., for Bureau of Safety and Environmental Enforcement.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

Island Operating Co., Inc. (Island) has appealed from a March 5, 2013, decision of the District Supervisor, Houma District Office, Bureau of Safety and Environmental

Enforcement (BSEE),[1] entitled Notification of Incident(s) of NonCompliance (INC),[2] with respect to Island's offshore operations in the South Pelto Area, Block 11, Platform F, situated in the Gulf of Mexico, off the coast of Louisiana, within Outer Continental Shelf (OCS) oil and gas lease OCS-G 00071 (Lease).[3]

We are persuaded that BSEE properly issued Island an INC for the cited violation,[4] in accordance with applicable facts and law, and that Island has not carried its burden on appeal to show otherwise. Therefore, we will affirm BSEE's decision.

I. Background

On March 5, 2013, the District Supervisor issued the INC citing Island, as the "Drill, Prod[uce], P/L [Parts/Labor] Contractor," for having violated the general safety requirements of 30 C.F.R. § 250.107(a), by failing to perform all operations on the Platform in a safe and workmanlike manner.[5] The accident occurred as follows: On

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[1] BSEE's safety and environmental enforcement responsibilities were formerly undertaken 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). References herein to BSEE refer to MMS, BOEMRE, or BSEE, as appropriate.

[2] For the sake of clarity, we refer to the Notification generally as an INC and the particular INC, cited therein, as a violation.

[3] On Mar. 20, 2014, National Ocean Industries Association (NOIA) and the U.S. Oil and Gas Association (USOGA) jointly sought leave to file an Amicus Brief. The Board grants the joint request of NOIA and USOGA to serve as Amici Curiae. Their joint brief in support of Island is accepted.

[4] The INC concerned a single violation listed as G-110. BSEE maintains a list of potential incidents of noncompliance (PINC). Each PINC has a unique identifier. The G in an issued INC stands for general operations. *See* http://www.bsee.gov/Inspection-and-Enforcement/Enforcement-Programs/Potential-Incident-of-Noncompliance---PINC/ (last visited Sept. 4, 2015). The enforcement action was identified as "C," signifying a Component Shut-In.

[5] Elsewhere, Island is referred to as the "Contractor" of the operator of the Lease (Apache Corporation (Apache)). Accident Investigation Report, BSEE, dated Sept. 27, 2012, at 1; Accident/Incident Form, BSEE, dated June 26, 2012, at unpaginated (unp.) 1. On appeal, Island identifies Apache as the "lessee-operator" of the Lease. Statement of Reasons for Appeal (SOR) at 3.

June 3, 2012, two Island employees attempted an "improp[]er transfer" of flammable liquid chemicals (paraffin solvent) from one portable tank, brought from shore, 7 miles away, and lifted from a boat to a permanent tank on the Platform.[6] *See* Accident Investigation Report at 2; Accident/Incident Form at unp. 1. During the chemical transfer, the Island employee operating the crane shut down the crane and left his position to get lunch. *Id.* The receiving tank could not hold all the liquid in the dispersing tank, and the chemicals began to overflow the receiving tank.[7] Accident Investigation Report at 2. The shut-off valve on the dispersing tank, designed to stop the liquid flow, "could not be reached" by the Island employee holding the hose at the receiving tank. Accident/Incident Form at unp. 1. Nor could that employee operate the crane, and thereby lower the dispersing tank and stop the flow. *See* Answer at 2.

The accident, caused by "Human Error," resulted in a chemical fire, which damaged the tanks and other nearby equipment, but caused no injuries, fatalities, or structural damage to the Platform.[8] Accident Investigation Report at 1; Accident/ Incident Form at unp. 1. The INC ordered Island to correct the violation by submitting a letter of explanation, "explaining how the . . . incident occurred and what will be done to prevent future incidents." It noted that, while the INC could be appealed, any appeal would not suspend the requirement to comply with the INC.

Immediately following the June 3 accident, BSEE conducted a June 5, 2012, investigation, issuing an INC, citing Apache, as the "Lease Operator," for having violated the general safety requirements of 30 C.F.R. §§ 250.107 and 250.401(e),

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[6] Island did so by using the Platform's crane to raise the first tank, which contained the chemicals, above the second tank, which was to receive the chemicals, and then allowing the chemicals to flow down from the higher tank, by the means of gravity, through a hose connecting the two tanks, into the lower tank. The two Island employees involved in the accident had been sent to the otherwise unmanned Platform to effect the chemical transfer. *See* Letter to BSEE from Island, dated Mar. 19, 2013, at unp. 2.

[7] The crane operator never returned to the crane, but evacuated the Platform, along with the other employee.

[8] Wind blew the overflowing chemical onto a nearby hot exhaust stack, where it was ignited and burned for approximately 30 minutes, until the fire, which spread to the tanks, was extinguished by water, sprayed from nearby boats. *See* Accident Investigation Report at 2; Accident/Incident Form at unp. 2-3; Answer at 3. Production from the platform was quickly shut down following activation of an emergency shutdown (ESD). *See* Accident Investigation Report at 2; Accident/ Incident Form at unp. 3.

because of the improper transfer of chemicals. The INC ordered Apache to correct the violation by submitting a letter of explanation, "explaining how the . . . incident occurred and what will be done to prevent future incidents." Apache later certified that the INC had been corrected on June 19, 2012.

Thereafter, BSEE undertook to decide, in accordance with pertinent policy guidance in Interim Policy Document (IPD) No. 12-07, dated August 15, 2012, whether it should also issue an INC to Island, as Apache's contractor. In IPD No. 12-07, the Director, BSEE, sought to provide general policy guidance regarding the exercise of BSEE's enforcement authority, establishing "the parameters by which the bureau will consider the issuance of INCs to contractors[.]" IPD No. 12-07 at 1. He generally noted that BSEE retained the statutory authority to take enforcement action against "[a]ny person performing an activity under a[n] [OCS] lease," but that it would "primar[il]y focus . . . on lessees and operators," also taking enforcement action against contractors "for serious violations," when the contractor has "engaged in egregious conduct." *Id.* at 1, 2. He then set forth four basic factors for deciding whether to issue an INC to a contractor:

> (1) the "type of violation," and thus whether the act or failure to act violated health, safety, or environmental requirements;
> (2) the "harm (or threat of harm) resulting from the violation," and thus whether the violation directly resulted or could have directly resulted in serious injury or environmental damage;
> (3) the "[f]oreseeability of harm (or threat of harm)," and thus whether it was reasonably foreseeable that the violation could directly result in serious injury or environmental damage; and
> (4) the "extent of the contractor's involvement in the violation[]," and thus whether the contractor had control over the activity that resulted in the violation, whether the contractor's act or failure to act played a significant role in the violation, and whether the contractor knew or should have known that its activity might result in the violation.

Id. at 1, 2. The Director concluded that, when a BSEE inspector believed that an INC should be issued to a contractor, he would provide the relevant facts to the District Supervisor, who would decide whether such action was appropriate, in accordance with the policy guidance. *See id.* at 2.

In undated and unsigned documents, one labeled "Accident Investigation," to which was attached a "Determination of Possible Contractor INC," BSEE concluded, after noting the relevant facts concerning the accident, that the four factors outlined in the IPD had been met. It so concluded because (1) Island's actions violated the safety requirements of 30 C.F.R. § 250.107(a); (2) the violation could have directly resulted in the serious injury or death of either or both of the employees, owing to the ensuing

fire; (3) it was reasonably foreseeable that the violation could directly result in the serious injury or death of either or both of the employees, since the act of transferring the chemicals was unattended, thus allowing anything to happen; and (4) Island had control over the act of transferring the chemicals, which resulted in and played a significant role in the violation, and Island should have known that this activity might result in a violation.

On March 5, 2013, BSEE issued the INC to Island.[9] On March 19, 2013, Island sought its rescission, asserting that, at the time of the incident, the violation was committed by the two Island employees acting, under Louisiana law, as "'borrowed employee[s]'" of Apache, since they were under Apache's direct supervision, and thus issuing an INC to Island, in addition to Apache, was "both redundant and *contradictory to this rule of law*." Letter to BSEE from Island, dated Mar. 19, 2013, at unp. 3 (emphasis added). Island noted it had taken action to avoid any repetition of the incident, including requiring its crane operator to successfully complete "a full crane operator certification course" before being allowed to perform any further crane operations and disseminating the results of its own investigation and "chemical transfer requirements" to all Island personnel. *Id.* at unp. 2.

The Regional Supervisor, Gulf of Mexico Region, BSEE, denied Island's rescission request on April 17, 2013, concluding that BSEE had broad authority under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-1356 (2006), and 30 C.F.R. § 250.146(c) to take enforcement action for a violation of the statute and its implementing regulations against a lessee, an operator, or any person who actually performed the activity on an OCS lease deemed to be violative of the statute or regulation.[10] He also noted that the "borrowed employee" doctrine of Louisiana law was not adopted as Federal law, pursuant to section 3(a) of the OCSLA, 43 U.S.C. § 1333(a) (2006), since such State law was not applicable to BSEE's enforcement actions and, even if it were, it was inconsistent with the OCSLA and its implementing regulations, because it would "negate a contractor's express responsibility" to comply with such Federal law. Letter to Island from Regional Supervisor, dated Apr. 17, 2013, at 2.

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[9] BSEE later referred the INC for a civil penalty review (Case No. G-2013-024), pursuant to 30 C.F.R. §§ 250.1400, 250.1404, and 250.1405. *See* Letter to Island from BSEE, dated June 3, 2013 (Ex. 21 attached to SOR).

[10] 30 C.F.R. § 250.146(c) provides, in relevant part, that, "[w]henever 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." (Emphasis added.)

Island appealed timely. It does not dispute BSEE's description of the events in the INC, including the chemical fire and resulting damages that occurred as a direct consequence of the negligent actions of its employees in attempting to transfer chemicals. Island contends that it "is neither legally nor factually the proper recipient of the INC." SOR at 1.

II. Discussion

The OCSLA, 43 U.S.C. §§ 1331-1356 (2012), authorizes the Department, *inter alia*, to issue and administer leases in the OCS 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 the likelihood of blowouts, loss of well control, fires, spillages, . . . or other occurrences which may cause damage to the environment or to property, or endanger life or health." 43 U.S.C. § 1332(6) (2012).

Section 22 of the OCSLA, 43 U.S.C. § 1348 (2012), directs the Secretary of the Interior to enforce the safety and environmental regulations promulgated pursuant to OCSLA, and, correspondingly, imposes upon the OCS lessee a duty to maintain all operations in the leased area "in compliance with regulations intended to protect persons, property, and the environment on the outer Continental Shelf[.]" *See W&T Offshore, Inc.*, 148 IBLA 323, 354 (1999). The safety and environmental regulations applicable to offshore oil and gas operations are 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). Section 24(b) of the OCSLA, 43 U.S.C. § 1350(b) (2012), authorizes the Secretary to assess civil penalties against any person who fails to comply with the OCSLA, any of its implementing regulations, or any lease term, but "*only* after notice of such failure and expiration of a reasonable period allowed for corrective action." *W&T Offshore, Inc.*, 148 IBLA at 355.

In *Apache Corp.*, 183 IBLA at 288 we outlined the respective burdens borne by BSEE and an appellant in issuing and challenging an INC for a safety or environmental violation regarding offshore oil and gas operations:

> If BSEE determines, based on reliable, probative, and substantial evidence, that an OCS lessee or operator has not followed any requirement of a statute, regulation, order, or lease term for any Federal [offshore] oil [and] gas lease, then it may issue an INC, stating therein the nature of the violation and how to correct it. . . . The burden is on the appellant challenging such a [discretionary] decision [on factual grounds] to demonstrate, by a preponderance of the evidence, that BSEE

> committed a material error in its factual analysis, or that its decision is not supported by a record showing that BSEE gave due consideration to all relevant factors and acted on the basis of a rational connection between the facts found and the choice made. *See, e.g., Black Elk Energy Offshore Operations, LLC*, 182 IBLA 331, 341 (2012), and cases cited.

The appellant may also challenge such a decision on legal grounds, in which case it bears the burden to demonstrate that the decision is contrary to law. *See Pacific Offshore Operators, Inc.*, 165 IBLA 62, 74-75 (2005).

In issuing the subject INC, BSEE charged Island with a single violation of 30 C.F.R. § 250.107(a), for having failed to perform all operations in a safe and workmanlike manner. 30 C.F.R. § 250.107(a) generally provides, in relevant part, that "*You* must protect health, safety, property, and the environment by: (1) Performing all operations in a safe and workmanlike manner[.]" (Emphasis added.) "*You*" is, in turn, defined by 30 C.F.R. § 250.105 as "a lessee, the owner or holder of operating rights, a designated operator or agent of the lessee(s), a pipeline right-of-way holder, or a State lessee granted a right-of-use and easement."

A. Whether BSEE is Authorized to Issue an INC to a Contractor

Island argues that BSEE was not authorized by the OCSLA and its implementing regulations in 30 C.F.R. Part 250 to charge a contractor with a violation of 30 C.F.R. § 250.107(a) or other regulatory provisions, stating: "In the 60 years since the passage of [OCSLA] . . . no tribunal has ever found a contractor liable for an OCSLA violation.[] The reason is simple--[BSEE] lacks legal authority from Congress to take enforcement action against contractors." SOR at 1. Island asserts its view is supported by a proper reading of the language of the statute and regulations, and their legislative and regulatory history. *See id.* at 3-13.

1. OCSLA & Legislative History

Section 22 of the OCSLA provides, in subsection (a), that the Secretary "shall enforce safety and environmental regulations" promulgated pursuant to the statute, *and*, in subsection (b), that the "holder of a lease" under the OCSLA has a duty to maintain "all places of employment within the lease area . . . in compliance with occupational safety and health standards and . . . free from recognized hazards to employees of the lease holder . . . or of any contractor . . . operating within such lease area," and to maintain "all operations within [its] lease area . . . in compliance with regulations intended to protect persons, property, and the environment on the outer Continental Shelf[.]" 43 U.S.C. § 1348(a) and (b) (2012). Island conflates these

two separate statutory subsections to conclude that section 22 of the OCSLA "unambiguously directs that enforcement shall be against the 'holder of a lease[']['.]" SOR at 3; *see* Reply Brief at 5 ("Section [5] grants the Secretary *authority* to issue regulations applicable to all operations . . . under a lease. Section [22] ascribes to lessees . . . the *duty* to comply with such regulations.").

Subsection (a) is the only statutory provision that specifically authorizes *the Secretary* to enforce the safety and environmental regulations promulgated pursuant to the OCSLA. It does not define "the entities subject to enforcement," or, indeed, contain any language limiting the objects of enforcement or otherwise constraining the exercise of the Secretary's enforcement authority. SOR at 3. Therefore, we do not agree that section 22 of the OCSLA "plain[ly] and unambiguous[ly]" prevents the Secretary from taking enforcement action against a contractor. *Id.* at 4; *see* H.R. Rep. No. 95-590, at 159 (1977), *reprinted in* 1978 U.S.C.C.A.N. 1450, 1565 ("Subsection 22(a) requires strict enforcement of OCS safety and environmental regulations").

Island, however, appears to conclude that, since the corresponding duty to comply with the safety and environmental regulations falls only on the "holder of a lease," in accordance with subsection (b), only the lessee is properly the object of any enforcement, under the authority of subsection (a). We disagree. While the duty spoken of in subsection (b) "belongs to the lessee," we think it clear from the OCSLA that it imposes a duty to comply with regulations promulgated under the statute *on parties other than the lessee*.[11] SOR at 4.

The Secretary is charged, by section 3 of the OCSLA, 43 U.S.C. § 1332 (2012), with making the OCS "available for expeditious and orderly development, subject to environmental safeguards," and with ensuring that operations in the OCS are "conducted in a safe manner . . . using technology, precautions, and techniques sufficient to prevent or minimize the likelihood of . . . fires . . . or other occurrences which may cause damage to the environment or to property, or endanger life or health." Further, the Secretary is afforded, by section 5(a) of the OCSLA, 43 U.S.C. § 1334(a) (2012), the authority to generally "administer" the OCSLA and "prescribe such rules and regulations as may be necessary to carry out [the] provisions" of the OCSLA. Such rules and regulations "shall . . . apply to *all operations conducted under a lease issued [under OCSLA]*," and "shall include, but not be limited to, provisions"

[11] Taken to its logical extreme, Island's reliance on section 22(b) of OCSLA as imposing exclusive responsibility for compliance with OCSLA's implementing regulations on lessees would preclude enforcement actions by BSEE *against operators*. However, that is not Island's stated position on appeal.

to, *inter alia*, suspend or temporarily prohibit any operation or activity on a lease, cancel a lease, and explore and develop the lease area. 43 U.S.C. § 1334(a) (2012) (emphasis added); *see* H.R. Conf. Rep. No. 95-1474, at 82-83 (1977), *reprinted in* 1978 U.S.C.C.A.N. 1674, 1681-82 ("The amended subsection [5(a)], while not limiting the generality of the power granted to promulgate any appropriate regulation, does provide statutory guidelines and requirements for certain types of regulations").

The Secretary is authorized to prescribe regulations "necessary" to ensure that "operations" in the OCS are "conducted in a safe manner . . . 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 and 1334(a) (2012). It is thus clear that the one of principal focuses of OCSLA is on operations conducted on the OCS. *See* H.R. Rep. No. 95-590, at 47 ("To manage activities on a lease, the Secretary of the Interior is to issue regulations to enforce the Act"), 127 ("[I]n administering . . . [the OCSLA], . . . responsible Federal officials must insure that activities on the shelf are undertaken in an orderly fashion, so as to safeguard the environment[.] . . . [R]esponsible Federal officials must insure that operations in the [OCS] are safe. In . . . assuring compliance with safety and environmental regulations, the officials are to require that activities and operations are conducted . . . to prevent or minimize blowouts, loss of well control, fires, spills, . . . and other possible damage.") (1977), *reprinted in* 1978 U.S.C.C.A.N. 1450, 1454, 1533.

We agree this general statutory charge and authority affords the Secretary authority to hold any person actually performing any activity, in connection with any operations, on an OCS lease, accountable for the failure to prevent or minimize the likelihood of a fire or any other occurrence which might cause damage to the environment or property or endanger life or health. *See* Answer at 6 ("Nowhere in [section 5(a)] does Congress limit the scope of who is deemed to be responsible for conducting . . . operations in accordance with the regulations; accordingly, all who conduct operations are responsible"), 8 ("[I]t makes little sense for a Congress that recognized the importance of 'well-trained personnel' conducting offshore operations to ensuring safety in [section 3], to then limit responsibility and liability for violation of safety regulations to lessees who may not actually conduct the operations themselves"). Further, we think the regulations adopted by the Secretary to implement OCSLA clearly make any person actually performing any activity, in connection with any operations on an OCS lease, liable for failing to perform the activity in a safe and workmanlike manner. *See* 30 C.F.R. §§ 250.107(a) and 250.146(c).

We do not think a fair reading of section 5(a) limits its reach only to lessees, "against whom the Secretary is authorized to take action" in the event of harm or threat of harm to life, health, property, or the environment, and, while section 5(a) "says

nothing at all about contractors," by the same token it does not exclude contractors from its ambit. Reply Brief at 1, 4.

We agree with Island that the OCSLA intended to confer rights and impose duties regarding the exploration and development of offshore oil and gas principally by means of the issuance of Federal leases, whereby the Secretary "establishes privity with specific entities and holds these entities responsible for all offshore operations[.]" Reply Brief at 3. It is the lessee who is the party to whom the Secretary looks when deciding how to structure exploration and development on the OCS. *See, e.g.*, 43 U.S.C. §§ 1337(b), 1340(b)-(e), and 1351 (2012). However, we agree with BSEE that, in order to properly and completely fulfill that role, Congress invested the Secretary with the full authority to regulate the activities of all those who engage in operations on the OCS, whether they be lessees, designated operators, or contractors. *See* Answer at 6.

Section 24(b) of the OCSLA provides that "*any person* [who] fails to comply with any provision of the [OCSLA] . . . or any regulation . . . issued under the [OCSLA], . . . shall be liable for a civil penalty[.]" 43 U.S.C. § 1350(b) (2012) (emphasis added). It provides that, in cases where the failure threatens serious, irreparable, or imminent harm to life, property, or the environment ((b)(2)), liability exists, but, in cases where the failure does not pose such a threat ((b)(1)), liability arises only "*after notice of [the] failure [to comply]* and expiration of any reasonable period allowed for corrective action[.]" *Id.* (Emphasis added.) Such "notice" is accomplished by issuing an INC, which may, as provided in the statute, be issued to "any person [who] fails to comply[.]" *See* Answer at 7 ("BSEE provides notice of regulatory violations and orders corrective actions through the issuance of an INC"). Thus, since an INC is the prerequisite to liability for a civil penalty of any person who failed to comply with the OCSLA or its implementing regulations, which failure did not constitute such a threat, the INC may be issued to such person, which includes lessees, designated operators, and contractors, where they are deemed to have failed to comply. *See* Answer at 9 ("[I]f responsibility for compliance with OCSLA and its implementing regulations rests solely on lessees, then Congress should have limited civil penalty assessment to those lessees"); H.R. Rep. No. 95-590, at 159 (1977), *reprinted in* 1978 U.S.C.C.A.N. 1450, 1565 ("[Section 22] is intended to provide mechanisms and procedures for the enforcement of regulations issued pursuant to the provisions of the [OCSLA]. Failure to comply with any provision of . . . any implementing regulation[] . . . would subject the violators to civil . . . penalties under section 24[.]"); H.R. Conf. Rep. No. 95-1474, at 111 (1977), *reprinted in* 1978 U.S.C.C.A.N. 1674, 1710 ("[Section 22] is to provide mechanisms and procedures for the enforcement of safety and environmental regulations issued pursuant to the provisions of the [OCSLA]. Failure to comply with any provision of . . . any implementing regulation[] . . . would subject the violators to civil . . . penalties under Section 24[.]").

Island argues that liability for a civil penalty under section 24(b) only arises once a person has been shown to have violated the statute or its implementing regulations, and, since only a lessee has a duty under section 22 to comply with the regulations intended to protect persons, property, and the environment, only a lessee can be held liable for a civil penalty for having violated such regulations.[12] *See* SOR at 6; Reply Brief at 8, 9. It notes that, where a duty is otherwise imposed by other provisions of the statute and regulations on a contractor, the contractor may be held liable for a civil penalty. Island concludes that a contractor is a "person," within the meaning of section 24(b), for the purpose of compliance with other provisions of the statute and regulations, but not for the purpose of compliance with regulations intended to protect persons, property, and the environment.

We agree that civil penalty liability under section 24(b) is only imposed upon "any person [who] fails to comply" with the OCSLA or its implementing regulations. However, we do not agree that section 22(b), which is restricted to lessees, is the only statutory provision that requires compliance with the regulations intended to protect persons, property, and the environment. Rather, section 5(a) generally authorizes the Secretary to regulate all operations occurring under leases of the OCS, pursuant to appropriate regulations, and section 22(a) generally authorizes the Secretary to enforce the safety and environmental regulations promulgated pursuant to the OCSLA. The statute does not limit the operation concerning which enforcement action may be taken or the party against whom the enforcement action may be directed. In effect, the statute requires contractors undertaking any operations on leases of the OCS to comply with the Department's safety and environmental regulations, failing which they may be held to account.

Further, a party cannot be held liable for a civil penalty unless it has also failed to comply with a provision of the OCSLA or one of its implementing regulations. *See* SOR at 13 ("[N]o . . . ['person' can be penalized for a violation unless he or she has committed one"). We therefore think that the fact BSEE is authorized by the OCSLA to exact a civil penalty from "any person" where it has committed a violation of the statute or its implementing regulations means that BSEE is also entitled to charge any person with having committed a violation of the statute or its implementing regulations.

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[12] Island also states that the regulations implementing section 24(b) of the OCSLA "specifically preclude the application of penalties to contractors." SOR at 13. We find no such limitation in the language or regulatory history of such regulations. Like the statute, such regulations prescribe the manner of imposing a civil penalty "whenever a lessee, operator *or other person* engaged in oil[] [and] gas . . . operations in the OCS has a violation." (Emphasis added.) 30 C.F.R. § 250.1400; *see* 30 C.F.R. § 250.1402 ("*Violator* means a person responsible for a violation").

Nor do we accept Island's assumption that Congress must have intended to withhold authority from the Secretary to take action against a contractor for violating an OCS rule, since the lessee is the party that places itself at financial risk and stands to reap the financial benefit from the underlying exploration, development, and production activity. *See* SOR at 4. Though they do not hold the basic lease rights, operators and contractors, are likewise compensated for their labors and are no less involved in such activity. We simply do not believe Congress intended to except contractors from liability for such failures.

Island further asserts that the legislative history of section 22 of the OCSLA demonstrates that, in formulating that statutory provision, "Congress specifically considered but rejected authorizing enforcement against contractors," and thus "actively relieved contractors . . . of the burden of enforcement responsibility under OCSLA[.]" SOR at 3, 5. It notes that, when the language that eventually became section 22 was first introduced in the House and Senate, it provided, in subsection (b), that "[a]ll holders of leases . . . shall . . . be responsible *jointly with any employer or subcontractor* for the maintenance of occupational safety and health, environmental protection, and other safeguards, in accordance with regulations intended to protect persons, property, and the environment[.]" (Emphasis added.) Outer Continental Shelf Lands Act Amendments of 1977, H.R. 1614, 95th Cong. § 22(b) (1977); Outer Continental Shelf Lands Act Amendments of 1977, S. 9, 95th Cong. § 22(b) (1977); H.R. Rep. No. 95-590, at 99 (1977), *reprinted in* 1978 U.S.C.C.A.N. 1450, 1505 ("Almost as soon as the 95th Congress convened, the Outer Continental Shelf reform legislation . . . was introduced in both Houses, becoming H.R. 1614, and S. 9"). It clearly placed responsibility for compliance with the regulations promulgated pursuant to OCSLA *on contractors*.

However, this language was substantially revised in the version of subsection (b) enacted by Congress to delete language explicitly identifying contractors as responsible for compliance with regulations promulgated pursuant to the OCSLA. In doing so, the Conference Committee explained as follows:

> The House amendment provides for certain duties of a holder of a lease . . . to maintain places of employment in accordance with safety and health standards and free from recognized hazards to employees, and to maintain operations in compliance with all other regulations. . . . The conference report follows the House amendment. Of course, this section *does not relieve any contractor or subcontractor from other obligations under the law.*

H.R. Conf. Rep. No. 95-1474, at 111 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1674, 1710 (emphasis added). Island concludes that this Conference Committee

explanation establishes that, while the final language of subsection (b) placed responsibility for compliance with all of the regulations promulgated pursuant to OCSLA on lessees, contractors were only required to comply with "'*other* obligations[]'" of law. SOR at 5 (quoting H.R. Conf. Rep. No. 95-1474, at 111 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1674, 1710).

Although Congress deleted the language in subsection (b), it did not alter the language in subsection (a), which authorizes the Secretary to enforce such regulations, without limitation. We will not interpret language in section 22(b), which understandably explicitly places on lessees the duty to comply with regulations, as well as the duty to provide requested access to any operation by BSEE inspectors, to provide all requested documents and records pertinent to occupational or public health, safety, or environmental protection, and to protect the occupational health and safety of all employees, including employees of contractors operating within the lease area, as limiting the reach of section 22(a). *See* BSEE Supplemental Brief at 6 ("[I]n section [22(b)] Congress recognized that the lessees would be the ultimate managers of OCS operations and, accordingly, should be held to an additional layer of responsibility for ensuring the overall safety of the workers, safety of the environment, and access to inspectors"); H.R. Rep. No. 95-590, at 160 (1977), *reprinted in* 1978 U.S.C.C.A.N. 1450, 1565 ("[C]ompliance with the [OCSLA], applicable regulations, and the terms of the lease, is required by *all those responsible for actual operations*" (Emphasis added)).

Our reading of the Conference Committee report also differs from Island's. While the Committee adopted language of the House amendment stating that lessees were responsible for complying with all of the regulations promulgated pursuant to the statute, the Committee did not state that lessees were exclusively responsible. Indeed, we read the reference to "not reliev[ing] any contractor . . . from other obligations under the law" as making clear they are not exempt from any laws otherwise applicable to the OCS. *See* Answer at 10 ("[A] contractor is, 'of course,' not relieved of its *specific responsibility* to conduct its activities in accordance with the OCSLA and its implementing regulations (and any other law applicable on the [OCS])"); Supplemental Brief at 7 ("[A] contractor does not bear the same overarching responsibility for maintaining a safe workplace and safe overall operation, but a contractor is . . . not relieved of its specific responsibility to conduct its activities in accordance with OCSLA and its implementing regulations").

Island does not point to anything in the statute or its legislative history establishing that the Committee meant "the law" to exclude the OCSLA and its implementing regulations. *See* SOR at 6. Rather, it argues that the reference to "the law" was intended to exclude the OCSLA and its implementing regulations since they had yet to be enacted and promulgated, and because Congress referred to "the Act,"

rather than "the law," when referring to the OCSLA in the Committee report. *See* Reply Brief at 5-6. We are not persuaded by Island's divining what Congress may have intended when the OCSLA was enacted, particularly since the statement in the Committee Report, like the statutory language being enacted, was prospective in nature, referring to the fact that contractors would not, in the future, be relieved of other obligations under "the law," which would include OCSLA, as amended, and its implementing regulations. There is no indication that "the law" did not include "the "Act."

We conclude that subsection (b) of section 22 was designed to define the duties imposed by OCSLA regulations on lessees, but not to affect the duties imposed by OCSLA regulations on contractors. *See* Answer at 12 ("[T]he legislative history is devoid of any language expressing disapproval of the concept of contractor responsibility and liability").

2. OCSLA Regulations & Regulatory History

Island further argues that OCSLA's implementing regulations and their regulatory history support its reading of the statute as precluding BSEE from enforcing the Act's safety and environmental regulations against contractors, since only lessees are required to comply with such regulations. It notes that 30 C.F.R. § 250.107(a) places the general obligation to protect health, safety, property, and the environment, by performing all operations in a safe and workmanlike manner, on "You," which regulatory term is defined by 30 C.F.R. § 250.105 "to exclude contractors[.]" SOR at 7. It specifically points out that the term "You" is defined, in relevant part, to encompass "a lessee, the owner or holder of operating rights, [or] a designated operator or agent of the lessee(s)," all of whom must be either granted rights by the Department (lessee) or approved by the Department (operating rights owner or holder or designated operator or agent of lessee(s)). 30 C.F.R. § 250.105; *see* SOR at 8 ("It is [F]ederal authorization that confers rights and correlative responsibilities under the regulations").

We agree with Island that the term "You" does not encompass contractors such as Island.[13] *See* 30 C.F.R. § 250.105 (defining "*Lessee*" as "a person who has entered

[13] Island also properly points out that the regulatory history underlying § 250.107(a) underscores the conclusion that contractors are excluded from its ambit. *See* SOR at 9-10. Since its initial promulgation in 1954 and for many years thereafter, the regulatory obligation to conduct operations in a safe and workmanlike manner fell exclusively to "lessee[s][.]" 30 C.F.R. § 250.45 (19 Fed. Reg. 2655, 2659 (May 8, 1954)); 30 C.F.R. § 250.46 (34 Fed. Reg. 13544, 13547 (Aug. 22, 1969)). The Department then proposed in 1998 to impose the obligation on "You," defining that

(... continued)

into a lease with the United States to explore for, develop, and produce the leased minerals," and "*Operator*" as "the person the lessee(s) designates as having control or management of operations on the leased area," including "a lessee, the [Department]-approved . . . designated agent of the lessee(s), or the holder of operating rights under a [Department]-approved operating rights assignment"); BSEE Power Point Presentation, dated Mar. 15, 2011 (Ex. 20 attached to SOR), at 33 ("30 CFR 250.105 defines '*YOU*[.]'. . . This definition *DOES NOT* include a CONTRACTOR.").

However, while § 250.107, together with the definition of "You" in § 250.105, "require the lessee to meet a requirement or perform an action," specifically the requirement to perform in a safe and workmanlike manner, the rule at 30 C.F.R. § 250.146(c) broadly and clearly provides that, "[w]henever the regulations in 30 CFR [P]art 250 . . . require the lessee to meet a requirement or perform an action, the lessee, operator[,] . . . and *the person actually performing the activity to which the requirement applies* are jointly and severally responsible for complying with the regulation."[14] (Emphasis added.) The plain language of § 250.146(c) makes "the person actually performing the activity to which the requirement applies" responsible for complying with the regulation.[15] *See* 63 Fed. Reg. at 7335 ("[A]ll persons who conduct lease

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regulatory term as "the Lessee, right-of-way holder, or *person acting on behalf of a lessee* or a right-of-way holder." (Emphasis added.) 63 Fed. Reg. 7335, 7342 (Feb. 13, 1998) (proposed 30 C.F.R. §§ 250.2 ("*You*") and 250.4(a)). The term "You" could thus encompass a contractor, where it was acting on behalf of the lessee. However, in adopting the final regulations, the Department deleted the reference to "a person acting on behalf of a lessee." *See* 64 Fed. Reg. 72756, 72780 (Dec. 28, 1999) (30 C.F.R. § 250.105 ("*You*")).

[14] In substantially the same form as it now appears, 30 C.F.R. § 250.146(c) was originally proposed on Feb. 13, 1998 (63 Fed. Reg. 7335, 7345 (Feb. 13, 1998) (proposed 30 C.F.R. § 250.15(d)), and finally adopted effective Jan. 27, 2000 (64 Fed. Reg. 72756, 72783 (Dec. 28, 1999)).

[15] We do not agree that § 250.146(c) serves as an "analogue" of section 22 of OCSLA, simply "requiring that all offshore activities conform to the rules," thus providing no "guidance as to *which entities are liable* for violating" OCSLA's implementing regulations. Reply Brief at 10 (emphasis added). Such a reading ignores the language and purpose of the provision. Rather, § 250.146(c) places responsibility for complying with OCSLA's implementing regulations directly on contractors. Having done so, like section 22(b), it serves, in Island's parlance, to "ascribe[] to [contractors]
(... continued)

activities on behalf of the lessee or operator must also comply with our regulations"); *Stone Energy Corp.*, 185 IBLA 342, 362 (2015); *ATP Oil & Gas Corp.*, 178 IBLA 88, 97 (2009) ("Outer Continental Shelf lessees and operators are responsible for ensuring safe and workmanlike operations and conditions, 30 C.F.R. § [250.]107(a), *and that includes contractors acting on their behalf*, 30 C.F.R. § 250.146(c)"); Supplemental Brief at 10 ("[I]t is clear that lessees and operators cannot shield themselves from liability by hiring contractors, nor can contractors shield themselves from liability by arguing that their actions on behalf of lessees and operators do not come with their own compliance obligations").

There can be no question that § 250.107(a) applies to the transfer of chemicals on a Platform and that the person that actually performed that activity, in this case, was Island. We, therefore, conclude it was "responsible" for complying with § 250.107(a), and, since it failed to fulfill that responsibility, Island was properly issued an INC by BSEE for that act of noncompliance.[16]

Island argues, however, that we should distinguish between the regulatory concept of "responsibility" for compliance, which is dictated by § 250.146(c), and actual "accountability" for the noncompliance, which is not dictated by § 250.146(c), adding: "[§ 250.146(c)] does not impose *liability* on contractors for Part 250

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. . . the *duty* to comply with such regulations," such that BSEE may then "impose *liability* on duty holders who fail to comply with these regulations." *Id.* at 5.

[16] Moreover, Island argues that, since we conclude that § 250.146(c) places the obligation to perform operations in a safe and workmanlike manner on contractors, we must also hold that the regulation is contrary to section 22 of OCSLA, and thus void. *See* SOR at 10 n.13 ("[T]he Board must strike the provision as contrary to the Act"), 12 ("To hold . . . that § 250.146(c) imposes liability directly on contractors would require the Board to invalidate § 250.146(c) as contrary to the plain language of the authorizing statute"). We lack the authority to declare a *duly promulgated* regulation of the Department invalid, and, since it has the force and effect of law, such a regulation will be deemed binding on BSEE and this Board. *See, e.g., Alamo Ranch Co., Inc.*, 135 IBLA 61, 69, 71 (1996). A regulation will be deemed not duly promulgated where it is, in the context of the particular case at hand, clearly contrary to, and thus affirmatively conflicts with, the statute upon which it was premised. *See id.* at 71. We are not persuaded that the regulation now at issue is clearly contrary to the statute, and thus decline to declare it void, as not duly promulgated.

violations."[17] SOR at 10, 11; *see id.* at 12 ("§ 250.146(c) . . . reflect[s] a dual structure under which the activities of offshore contractors must conform to the safety and environmental requirements of Part 250, while government enforcement liability for inadequa[te] [conformance] lies with those holding rights from the government"); Reply Brief at 9 ("The distinction [between responsibility for compliance and liability for noncompliance] is central to this case"). It states that, while Island may be deemed responsible for performing all operations in a safe and workmanlike manner, Island may not be held accountable for its failure to so perform operations. We reject this interpretation, since it is not supported by the language of the regulations, their regulatory history, or logic. Plainly, a party that has failed to fulfill its responsibility can be properly held to account for its failure.

Island points only to the regulatory history of § 250.146(c) in support of its position. *See* SOR at 11; Reply Brief at 11-12. It notes that when subsection (c) was originally proposed in 1998 as subsection (d) of 30 C.F.R. § 250.15, the Department stated:

> We would emphasize in § 250.15(d) that, in addition to the lessee and operator, all persons who conduct lease activities on behalf of the lessee or operator must also comply with our regulations. The operator is responsible for the performance of its contractors. *[BSEE] will hold the operator accountable for the contractors' performance.* [Emphasis added.]

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[17] Island also indicates that affording the regulatory term "You" a broad interpretation that encompasses contractors, pursuant to § 250.146(c), would also "greatly expand" regulatory obligations regarding "leasing, payment of rent and making royalty payments" to contractors. SOR at 19 (citing, *e.g.*, 30 C.F.R. § 250.180). Island overlooks the fundamental fact that, other than a lessee and an operator, § 250.146(c) places the obligation to satisfy a regulatory requirement under Part 250 only on "the person actually performing the activity to which the requirement applies[.]" Thus, unless a contractor is "actually" paying rent or royalty or undertaking the other tasks associated with leasing, the contractor would not be required to do so, under § 250.146(c), and hence would not be liable for failing to do so. *See* Supplemental Brief at 9 n.7 ("For example, a contractor hired to resupply a platform with a chemical would be required to perform the transfer in a safe and workmanlike manner so as to prevent the chemical from harming human health, property, and the environment[,] . . . but would not be required to comply with regulations governing . . . casing and cementing requirements[.] . . . Moreover, BSEE has issued [the IPD] . . . [which] provides contractors with additional information regarding when INCs may be issued to them.").

63 Fed. Reg. at 7335. While the preamble states that BSEE will hold the operator accountable in instances where the failure to comply with a Part 250 requirement arose from the conduct of a contractor, it does not state that only the operator will be held to account, or otherwise indicate that the contractor cannot also be held to account.

We think the statement only reflects the fact that BSEE will look, first and foremost, to the lessee and operator to ensure compliance with Part 250 requirements, holding them accountable for any act of noncompliance. *See* IPD at 1 ("[T]he primary focus of BSEE's enforcement actions will continue to be on lessees and operators"); *ATP Oil & Gas Corp.*, 178 IBLA at 97-98, 99 ("[T]he INC fundamentally rest[ed] on failed supervision on [the lessee's] part and the consequent failure to prevent unsafe operations by the contractor"). There is no indication that it absolves a contractor where it is the party that engaged in the noncompliance. *See* IPD at 1 ("BSEE will hold lessees and operators directly and fully responsible for all activity conducted under a[n] [OCS] lease . . . *without limiting its ability to pursue enforcement actions against contractors*" (Emphasis added)).

B. Whether the Department is Required to Engage in Formal Rulemaking

Island also argues that the Department's consistent policy and practice under the OCSLA and its implementing regulations has been to not charge a contractor with a violation of 30 C.F.R. § 250.107(a) (or other regulatory provisions). Thus, to the extent it is now doing so, Island claims BSEE is acting without the benefit of a substantive rule and in violation of the notice and opportunity-for-comment formal rulemaking requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (2006). *See* SOR at 13-20. Island states that, by issuing the INC, BSEE is now attempting to go against its "longstanding, explicit *disavowal*" of its authority to charge a contractor with an OCSLA violation, which may only occur following formal rulemaking. *Id.* at 1 (emphasis added). We are not persuaded.

Island states the Department's policy and practice is evidenced by the fact that BSEE's PINC guidelines, which guide its inspectors, and its INC form (BSEE Form BSEE-1832 (October 2011)), refer only to lessees and designated operators.[18,19] *See*

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[18] Island cites General PINC Guidelines (http://www.bsee.gov/uploadedFiles/BSEE/Enforcement/Inspection_Programs/GL-G_JBA%20Changes%20Included.pdf). *See* SOR at 14 n.19.

[19] Island also asserts that "'[a] fundamental norm of administrative procedure'" requires BSEE "'to treat like cases alike.'" SOR at 24 (quoting *Westar Energy, Inc. v. Federal Energy Regulatory Commission,* 473 F.3d 1239, 1241 (D.C. Cir. 2007)). It thus (... continued)

SOR at 14. However, we do not agree that BSEE has thereby "long directed inspectors to take enforcement action only against lessees and designated operators," thus precluding any enforcement action against contractors. *Id.* We find no such "direct[ion]" by BSEE. Rather, it is evident from the PINC guidelines and INC form that BSEE is generally focused on taking enforcement action against lessees and operators. We find nothing that indicates that BSEE cannot take enforcement action against contractors, in appropriate circumstances.

Island also states the Department's policy and practice was evident in the fact that its "Subpart S" regulations "require operators to develop and implement Safety and Environmental Management Systems (SEMS)" for operations in the OCS (75 Fed. Reg. 63610 (Oct. 15, 2010)), whereas the term "You" means only those identified in 30 C.F.R. § 250.105 ("*You*"), and thus "Subpart S *does not require* a contractor . . . performing work for [a lessee or operator] on a[n] [OCS] facility . . . to have a SEMS." SOR at 15 (quoting National Notice to Lessees and Operators of Federal Oil, Gas, and Sulphur Leases, OCS, No. 2011-N05, dated Oct. 21, 2011 (Ex. 22 attached to SOR), at 2). It further refers to the fact that, in explaining the Subpart S regulations, BSEE stated that "[BSEE] does not regulate contractors; we regulate operators." *Id.* at 14 (quoting 75 Fed. Reg. at 63616). Both of the above-quoted statements pertain *only to the Subpart S regulations,* which require an operator to develop and implement a SEMS program. *See* 30 C.F.R. §§ 250.1900 and 250.1902 ("You must have a properly documented SEMS program in place"). No contractor is required to adopt a SEMS program precisely because the program is designed to govern the activities of all operator and contractor employees. *See* 30 C.F.R. §§ 250.1901 ("The goal of your SEMS program is to promote safety and environmental protection *by ensuring all personnel aboard a[n] [OCS] facility* are complying with the policies and procedures identified in your SEMS" (emphasis added)), 250.1903 ("*Personnel* means direct employee(s) of the operator and contracted workers who are involved with or affected by specific jobs or tasks"), and 250.1909 through 250.1924; Supplemental Brief at 14

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asserts that, since BSEE has never before issued an INC to a contractor in any of several prior incidents "involving a crane or a tank overflow," even though the contractor's employees were operating the crane, and thus made an exception in each of those cases, it must "'either make an exception in a similar case or point to a relevant distinction between the two cases.'" *Id.* at 23, 24 (quoting *Westar Energy, Inc. v. Federal Energy Regulatory Commission*, 473 F.3d at 1241).

We agree that BSEE must treat like cases alike. *See, e.g., Gifford Engineering, Inc.*, 140 IBLA 252, 258 (1997). However, we think this norm only applies where BSEE has affirmatively acted in prior cases, not where BSEE has foregone action.

n.16 ("BSEE is currently requiring only operators to implement [the Subpart S regulations]").

Island contends the Department's policy and practice is evident in prior rulings by the Board, citing *Seneca Resources Corp.*, 167 IBLA 1 (2005), *Petro Ventures, Inc.*, 167 IBLA 315 (2005), and *ATP Oil & Gas Corp.*, 178 IBLA 88 (2009). *See* SOR at 16. There, the Board determined that BSEE properly held the lessee and/or operator liable where their contractor had failed to comply with the applicable safety and environmental regulation. *See* 167 IBLA at 5-9, 12 (failure by direct and contracted employees to ensure proper operation of automatic shutdown valve); 167 IBLA at 316, 317, 324 (failure by contracted employee to maintain operability of ESD stations); 178 IBLA at 89-91, 97-99 (failure by contracted employees to exercise stop-work authority to cease personnel transfer onto unsafe platform boat landing). A lessee or operator may be liable for a failure by its contractor to comply with a safety and environmental regulation, which is what we held in the three cited cases. However, "there is no Board precedent on this question [of contractor liability]." Answer at 17.

We are not persuaded that the prior Department policy and practice precludes BSEE from taking enforcement action against contractors under the OCSLA and its implementing regulations. BSEE's forbearance does not establish that BSEE lacked the necessary statutory and regulatory authority, or suggest that it must engage in rulemaking before exercising that authority.

Island argues that the IPD was "legally insufficient" to reverse BSEE's longstanding policy and practice since it constituted a substantive rule that was not promulgated pursuant to the notice and opportunity-for-comment formal rulemaking requirements of the APA.[20] SOR at 15; *see id.* at 17.

Having already promulgated 30 C.F.R. § 250.146(c), the Department was not required to engage in further rulemaking before issuing INCs to contractors. The Department adequately notified all persons who might perform an activity to which any of the Part 250 regulatory requirements applied that they might be held responsible for compliance, and liable for a failure to comply, which satisfied the "'[t]raditional concepts of due process incorporated into administrative law [which preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule].'" SOR at 19 (quoting

[20] Island also argues that the IPD fails absent a suitable definition of who constitutes a contractor. *See* SOR at 19. We think that the term contractor simply refers to "the person actually performing the activity to which the requirement [at issue] applies," as provided for in § 250.146(c).

NetworkIP, LLC v. Federal Communications Commission, 548 F.3d 116, 122-23 (D.C. Cir. 2008)).

Island argues that, having long interpreted the OCSLA regulations to preclude enforcement actions against contractors, the Department cannot reinterpret its regulations so as to permit enforcement actions against contractors without having first promulgated that new interpretation pursuant to formal rulemaking. *See* SOR at 17-20; Reply Brief at 12-15. The proposition advanced by Island, in its initial briefing, held sway in the Federal circuit courts for many years. *See, e.g., Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 628-30 (5th Cir. 2001); *Alaska Professional Hunters Association, Inc. v. Federal Aviation Administration,* 177 F.3d 1030, 1034 (D.C. Cir. 1999) ("When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment"); *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997), *cert. denied*, 523 U.S. 1003 (1998). However, Island informed the Board on July 6, 2015, that the Supreme Court recently "overturn[ed]" the proposition adopted in *Paralyzed Veterans* and like cases in *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199 (2015). Update to Board Regarding Supplemental Authorities (Update) at 1; *see* 135 S. Ct. at 1206 ("Th[e] [APA] exemption of interpretive rules from the notice-and-comment process is categorical, and it is fatal to the rule announced in *Paralyzed Veterans*. . . . Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule."). Island notes the Court further stated that, although an agency may change a regulatory interpretation without engaging in formal rulemaking, in "*chang[ing] its interpretation of a regulation*," it must not rewrite the regulation, or ignore any serious interests that have arisen in reliance on the prior interpretation, because to do so is arbitrary and capricious, violative of the APA. Update at 1 (emphasis added); *see id.* at 2-3 (citing *Perez v. Mortgage Bankers Association*, 135 S. Ct. at 1208-09, 1209).

We see no basis for applying the Court's reasoning in *Perez*, where, as in the case before us, we find no longstanding interpretation by the Department that it was *precluded from taking enforcement actions against contractors*, from which it now deviates, and, therefore, we are not persuaded that BSEE changed any regulatory interpretation or rewrote its regulation.

Island points not to any written interpretation by BSEE of its regulations, but only to the absence of prior enforcement action against contractors. *See* SOR at 17 ("Even if OCSLA authorized BSEE to issue INCs to contractors, BSEE's clear pattern and practice over several decades . . . has been to forego accepting that authority"), 18 ("Contractors reasonably relied on BSEE's longstanding policy of not taking

enforcement against them"[21]); Reply Brief at 2 ("[T]he historical record shows that BSEE has for decades consistently interpreted and enforced its safety and environmental regulations to impose liability on lessees, not contractors, even when the contractor is at fault"), 10 n.10; Answer at 13 ("BSEE and its predecessors have not, until recently, elected to issue INCs to contractors."); Supplemental Brief at 12-14 ("The seriousness of the *Deepwater Horizon* explosion and oil spill motivated BSEE to establish, in the first instance, a policy whereby it would exercise its longstanding authority to take enforcement action against contractors under limited circumstances."). And Island admits that, in response to the April 20, 2010, *Deepwater Horizon* accident in the Gulf of Mexico, BSEE had issued INCs to contractors. *See* SOR at 18 n.27 (citing BSEE Press Release, dated Oct. 12, 2011 (Ex. 1 attached to SOR), at 1 ("This is the first time the Department of the Interior has issued INCs directly to a contractor that was not the well's operator")); IPD at 1 ("Starting in 2011, BSEE has exercised its authority over contractors by issuing INCs to Transocean and Halliburton following the *Deepwater Horizon* tragedy"); Answer at 20.

Just as BSEE's forbearance in enforcement does not constitute its interpretation of a regulation, neither does its more rigorous post-*Deepwater Horizon* enforcement constitute a change in any interpretation of authority or a change in the regulation, requiring the Department to take serious reliance interests into account, under *Perez,* and constraining it, in any way, from enforcing the rule against contractors.[22]

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[21] Island also argues that BSEE should not be permitted to change its longstanding interpretation since it upsets the myriad ways in which contractors have reasonably relied on that interpretation in setting prices, allocating liability, and otherwise establishing their contractual relationship with lessees/operators. *See* SOR at 18, 19; Affidavit of Gregg Falgout, President and Chief Executive Officer, Island, dated June 28, 2013 (Ex. 7 attached to SOR), ¶¶ 32, 33, at 4. We are not persuaded that such reliance, even assuming it exists, precludes BSEE from taking enforcement action against a contractor that has failed to comply with an applicable safety and environmental regulation.

[22] We also do not find any prior policy pronouncement, absolving contractors of liability under OCSLA and its implementing regulations, that might be considered "a *definitive and binding statement on behalf of [BSEE]* . . . com[ing] from a source with the authority to bind the agency," thus now requiring BSEE, in deciding to pursue enforcement actions against contractors, to first engage in formal rulemaking. *Devon Energy Corp. v. Kempthorne*, 551 F.3d at 1040 (emphasis added). We do not regard statements by the Director, BSEE, made in November 2011, to the effect that BSEE had previously forgone the opportunity to take enforcement action against

(... continued)

In sum, all parties agree that BSEE has never before taken enforcement action against a contractor, though disagreement exists as to the characterization and import of the change. Nevertheless, even if a shift in enforcement practice were considered a shift in regulatory interpretation, under *Perez*, BSEE was not required to engage in formal rulemaking before proceeding against a contractor.

C. *Whether Island is Properly Deemed to Have Violated 30 C.F.R. § 250.107(a)*

Finally, Island argues that, even if BSEE is authorized to take enforcement action against a contractor for a violation of 30 C.F.R. § 250.107(a), it was not entitled to issue the INC to Island, since Island's have not been shown to have violated the regulation, even though they engaged in the negligent conduct at issue. *See* SOR at 20-26. First it asserts that, in the IPD or elsewhere, BSEE has not provided, "any guidance as to which incidents subject a contractor to liability for violating § 250.107(a)[] and which do not." *Id.* at 21. Island states that the IPD does not afford such guidance since it provides only "four vague factors," which are not set out "in any detail," and are otherwise deficient: "[The IPD does not define] how the[] [factors] will be weighed, the degree of control the contractor must have over the activity resulting in the violation, or when a contractor's actions constitute a 'significant' role in the violation." *Id.* at 21, 22.

(... continued)
contractors, as proclaiming BSEE lacks authority to take such actions. *See* SOR at 14; Reply Brief at 10 n.10. Nor is there any indication that BSEE's past practice was based on any prior official policy pronouncements by someone with authority to bind the agency. *See* Answer at 14 ("BSEE . . . acknowledges that[,] in some cases, BSEE officials have . . . made public statements to the effect that contractors are not liable for regulatory compliance. . . . [Such statements] are . . . not to be taken as establishing binding policy positions of the Department[.]"), 15 ("[I]t is the formally adopted and binding policy . . . that must be examined to establish whether there has been a change in policy, not simply public statements of agency officials (which may sometimes be in error or . . . represent an individual official's personal views)").

With respect to Island's assertion that *Devon* is not applicable in the present case since it arose in the D.C. Circuit, whereas "the conduct in this case occurred" in the Fifth Circuit (Reply Brief at 13), we note we have long rejected the view that D.C. Circuit precedent is not applicable to appeals before the Board because only precedent arising in the circuit where the land at issue is situated is applicable. *See, e.g., Pacificorp*, 95 IBLA 16, 17-18 (1986).

In order to establish that a contractor violated 30 C.F.R. § 250.107(a), BSEE must demonstrate only that, in accordance with § 250.146(c), the contractor was "the person actually performing the activity" that violated § 250.107(a); the activity being performed constituted, in accordance with § 250.107(a), "operations" under the lease; and the contractor failed to perform such operations, in accordance with § 250.107(a), "in a safe and workmanlike manner[.]" Here, BSEE properly concluded that Island was actually performing the activity, which violated § 250.107(a), and which constituted operations under the Lease, and failed to perform them in a safe and workmanlike manner, thus violating § 250.107(a).

In the IPD, however, the Director, BSEE, announced his intentions, at that time, to focus on four factors in determining whether the contractor had committed a "serious violation," as a result of "egregious conduct," and in this way, could be held to have violated 30 C.F.R. § 250.107(a). IPD at 1-2. (The IPD established "the parameters by which the bureau will consider the issuance of INCs to contractors[.] . . . BSEE will consider the following four factors in determining whether to issue INCs to contractors[.] . . . The list . . . is intended to provide *general guidelines* for enforcement actions against contractors[.]" (Emphasis added)).

Island avers that BSEE was required to promulgate the IPD pursuant to formal rulemaking. *See* SOR at 21. It was issued as agency policy to provide "general guidelines" to BSEE employees with respect to enforcement against contractors under 30 C.F.R. § 250.107(a). As such, the IPD is not a substantive rule of law. *See* 5 U.S.C. § 553(b) and (c) (2006); *e.g., Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 535-38 (D.C. Cir. 1986) (Policy guidance defining when it is appropriate to also hold mine operator jointly and severally liable for violation by independent contractor not substantive rule of law). Indeed, we think that, like the policy guidance at issue in *Brock*, the Director, in the IPD, "did not establish a 'binding norm,' but merely 'announced [his] tentative intentions for the future,' *Pacific Gas [& Electric Co. v. Federal Power Commission]*, 506 F.2d [33,] 38 [(D.C. Cir. 1974)], leaving himself 'free to exercise his informed discretion,' *Guardian Federal [Savings & Loan Association v. Federal Savings & Loan Insurance Corp.]*, 589 F.2d [658,] 666 [(D.C. Cir. 1978)]." 796 F.2d at 538.

Island attempts to establish that the 4 IPD factors were not present, and thus it should be excluded from liability as a contractor. *See* SOR at 22. We disagree. IPD focuses exclusively on perceived deficiencies in BSEE's undated and unsigned "Accident Investigation," and attached "Determination of Possible Contractor INC." Island states that BSEE had referred to the fact that the "operator's conduct" was unsafe, and that BSEE had failed to explain how that conduct was "germane to the contractor." *Id.* Island is mistaken. It appears Island meant to quote from BSEE's Determination of Possible Contractor INC, mistakenly using the term "operator's" when

BSEE had, in fact, used the term "Op[e]rators." Since BSEE stated, at the top of the document, that the "Operator" was "Apache" and the "Contractor" was "Island Op[e]rators," it is clear that BSEE's reference to "Op[e]rators conduct" meant Island's conduct. We find the record adequately supports BSEE's determination of a violation. Island has, thus, failed to establish, with convincing argument or supporting evidence, that it did not satisfy each of the four IPD factors and, therefore, that BSEE erred in not excepting its conduct from contractor liability, under § 250.107(a).

We conclude that BSEE's issuance of the INC to Island was fully consistent with the regulatory requirements of 30 C.F.R. §§ 250.107(a) and 250.146(c) *and* the IPD, and Island has not carried its burden of showing otherwise.

D. Whether Island is Absolved of Liability Because Its Employees were under Apache's Control

Island next argues that it is absolved of liability because its employees were under Apache's control at the time of the violation. Island explains that the two persons "were provided by Island to its customer, the lessee-operator of [the] Lease . . . pursuant to a personnel supply contract, not a services contract," adding: "No Island management was present or directing or even aware of the activities at the time the incident occurred." SOR at 2. Island further states that "[w]hen acting as a personnel supply company, as in this case, Island provides lessees and operators with personnel *to be supervised and managed as the customer sees fit*."[23] *Id.* at 23 (emphasis added). It faults Apache for failing to provide tanks of sufficient size to permit the transfer of the chemicals without any overflow, for failing to ensure that the shutoff valve was in reach of the employee stationed at the receiving tank, for failing to select the right Island personnel for the job, and for failing to supervise the two employees. *See id.* It also notes that Island had no authority to supervise its employees during the incident, and thus "Island had no knowledge of--and no practical means of asserting authority or control over--any of the actions or activities for which Island received this INC."[24] *Id.*

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[23] *See* Falgout Affidavit, ¶¶ 7, 13, 15, 20-26, 27 ("The workers involved in the incident in question were functioning entirely under the direction and oversight of the Customer which had plenary authority over those workers' activities"), at 1, 2, 3.

[24] *See* Falgout Affidavit, ¶¶ 15, 16, 17, 23 ("[N]o Island management was present or directing the activities when this incident occurred"), 27 ("Island did not oversee the quality or methods of any of the work performed on behalf of the Customers by the[] workers"), 30, at 2, 3.

Even assuming the accident cannot be deemed the consequence of Island's failure to properly supervise the employees, it is undisputed that the employees who committed the actions that directly caused the accident, and the resulting damage were, in fact, Island employees. While Apache can be deemed to have violated § 250.107(a) by reason of its failure to ensure that the actual transfer of chemicals was undertaken in a safe and workmanlike manner, because it failed to provide the prerequisites necessary to the safe transfer of chemicals and properly supervise the activity, Island can be deemed to have violated § 250.107(a) by reason of the failure of its employees to undertake the actual transfer of the chemicals in a safe and workmanlike manner. The fact that Apache negligently supervised the employees does not absolve Island employees of their negligent actions.

E. Whether the "Borrowed Employee" Doctrine Absolves Island of Liability

Next, Island argues that it has a valid "defense[]" to liability for a violation of § 250.107(a) under the "Borrowed Employee" doctrine. *See* SOR at 24-26; Reply Brief at 17-19. It claims this doctrine constitutes a defense to liability in the context of operations in the OCS governed by the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950 (2006), which, pursuant to section 4(b) of OCSLA, 43 U.S.C. § 1333(b) (2012), is expressly applicable to operations conducted in the OCS.[25] Island asserts that, since the doctrine serves as an affirmative defense to liability in the context of LHWCA, it should also serve as an affirmative defense to liability in the context of OCSLA. SOR at 25.

Under the doctrine, as construed by the U.S. Supreme Court, "'One may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person, with all the legal consequences of the new relation.'" SOR at 25 (quoting *Standard Oil Co. v. Anderson*, 212 U.S. 215, 220 (1909)). The doctrine arose under the common law, as a means of assigning responsibility for the tortious conduct of an employee to the "proper employer," under the doctrine of *respondeat superior*. *Total Marine Services, Inc. v. Director, Office of Worker's Compensation Programs, U.S. Department of Labor*, 87 F.3d 774, 777 (5th Cir. 1996).

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[25] Section 4(b) of OCSLA provides that, in the case of disability or death of an employee "resulting from any injury occurring as the result of operations conducted on the [OCS]" for the purpose of exploring for or developing the natural resources of the OCS, "*compensation shall be payable under the provisions of the* [*LHWCA.*]" (Emphasis added.) 43 U.S.C. § 1333(b) (2012).

In the context of the LHWCA, an affirmative defense to liability arises in a civil action brought by an employee seeking recovery under the common law for damages resulting from the alleged negligence of his employer, since the LHWCA is deemed to provide the exclusive remedy in such circumstances pursuant to 33 U.S.C. § 905(a) (2006). In effect, the doctrine reassigns liability under the LHWCA from the lending to the borrowing employer, barring liability under the common law, since the statute provides the exclusive remedy.

In the present case, which arises under the OCSLA, Island states that, under the Borrowed Employee doctrine and the doctrine of *respondeat superior*, the Island employees became Apache's employees with respect to the chemical transfer and, as such, Apache, not Island, is liable for the employees' actions violative of 30 C.F.R. § 250.107(a). *See* SOR at 25-26 (citing *Melancon v. Amoco Production Co.*, 834 F.2d 1238, 1244-45 (5th Cir. 1988)); Falgout Affidavit, ¶¶ 11, 15, 18, 20-24, 26-27, 30, at 2, 3.

The Borrowed Employee doctrine *provides no defense to Island's liability here.* In the case of civil actions brought by an injured employee under the common law, seeking damages from his employer for tortious conduct, the defense to liability is provided by the LHWCA. The doctrine only serves to transfer liability, whether under the LHWCA or OCSLA, from the lending to the borrowing employer, for *respondeat superior* purposes, where the employee in question is deemed to be the employee of the borrowing employer, by virtue of the establishment of a new employment relation. The OCSLA provides no defense to liability in the case of enforcement actions brought by BSEE under the OCSLA, seeking corrective action by an employer for noncompliant activity.

We need not analyze the doctrine to determine the limits of its applicability to the OCSLA. It is enough for us to determine that the doctrine is not applicable to the matter at issue in this appeal. Even if the Borrowed Employee doctrine established a "'new relation'" between the employees and Apache, supplanting the relation between the employees and Island, thus giving rise to "'all the legal consequences of the new relation,'" including under the LHWCA, it is of no relevance here. We are not concerned with whether the doctrine may be invoked by Apache as a defense to liability under common law for injury to the Island employees that occurred as a consequence of Apache's negligence, since the LHWCA provides the exclusive remedy. We are concerned with liability to the United States under the OCSLA. *See* Reply Brief at 19; *Fruge v. Parker Drilling Co.*, 337 F.3d at 561-63, 563 ("The [OCSLA] regulations govern the parties' joint and several liabilities vis-à-vis the Government,[] not amongst themselves"); Response to Reply Brief at 3 ("[T]he INC under appeal is not . . . a claim by an injured worker for damages against [his] constructive employer. It is . . . an enforcement action under the OCSLA and its implementing regulations. *Island*

distorts a defensive tort doctrine favoring a temporary employer by applying it outside the tort arena to immunize the employees' permanent employer against an enforcement action by the government." (Emphasis added)).

We agree with BSEE that application of the doctrine is not necessary in order to find Apache liable for having violated OCSLA, since liability affixed to Apache by virtue of its status as the lessee/operator. *See* Answer at 26. Similarly, we agree that application of the doctrine cannot be used to find Island not liable for having violated OCSLA, since liability affixed to Island by virtue of its status as the person that actually performed the activity that resulted in the violation at issue. Island offers no convincing argument or supporting evidence for absolving it of liability under OCSLA. *See id.* ("The[] employees were employed by Island to perform a specific duty [governed by OCSLA] for which Island had been hired as a contractor").

To the extent not addressed herein, all other errors of fact or law raised by Island have been considered and are rejected as contrary to the facts or law, or immaterial to the disposition of the appeal.

We conclude that, under the facts of this case, BSEE's ability to pursue enforcement actions against contractors is supported by a proper reading of OCSLA and its implementing regulations. Therefore, we hold that, in his March 2013 INC, the District Supervisor properly charged Island with a single violation of the general safety requirements of 30 C.F.R. § 250.107(a), in its conduct of operations on the Platform, within Lease OCS-G 00071.

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.

Christina S. Kalavritinos
Administrative Judge

I concur:

James K. Jackson
Administrative Judge