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IBLA Reverses BSEE Incident of Noncompliance; Upholds Operator's Right to Determine Scope of Crane Inspections

In a recent decision, the Interior Board of Land Appeals (IBLA or Board) rejected an attempt by the Bureau of Safety and Environmental Enforcement (BSEE) to require an offshore operator to adopt manufacturer recommendations regarding crane maintenance. The dispute arose from a January 2015 incident of noncompliance BSEE issued to our client (the "Operator") for a crane in the Gulf of Mexico. The Operator appealed the incident of noncompliance. Mark Farley and Scott Elliott of Katten's Houston office represented the Operator.

Under BSEE's regulations, "[a]ll cranes installed on fixed platforms must be operated in accordance with American Petroleum Institute's Recommended Practice for Operation and Maintenance of Offshore Cranes, API RP 2D...." See 30 C.F.R. § 250.108. API RP 2D in turn provides guidance on how and when crane operators should inspect their cranes. This guidance outlines several factors owners and operators should consider when establishing a crane maintenance program, such as type, frequency of use and manufacturer recommendations.

At issue in the appeal was BSEE's contention that the Operator was *required* to follow a manufacturer recommendation to perform "tear down" inspections every 3 or 5 years for certain infrequently used winches. While the Operator considered the manufacturer's recommendations in developing its maintenance program, it also relied heavily on its own expertise, maintenance records, equipment data and the actual usage of the crane to develop a state-of-the-art maintenance program that complied with API RP 2D, but did not adopt the manufacturer's recommendation regarding tear down inspections.

The Operator appealed the BSEE incident of noncompliance, arguing in part that by citing the Operator for not following a manufacturer's recommendation, BSEE was improperly converting API RP 2D's advisory language (which merely directed Crane Owners to consider, among other factors, manufacturer's recommendations when establishing a preventive maintenance program) into a prescriptive requirement to follow manufacturer's recommendations. The IBLA agreed with the Operator, noting that "the [incident of noncompliance] simply does not identify a requirement with which [the Operator] failed to comply and, therefore, 'lacks a rational basis that is stated in the [incident of noncompliance].'" In reaching this determination, the IBLA agreed with the Operator's argument that it was required only to consider manufacturer recommendations, and that BSEE's guidance "appears to suggest that BSEE inspectors are to issue [incidents of noncompliance] if any such [manufacturer] recommendations are not followed, which is clearly not required by law or rule."

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API RP 2D did not require the Operator to implement any manufacturer recommendations. As noted by the Board, “Had BSEE intended that [the Operator] do so, *it could have expressly said so in its rules.*” (Emphasis added).

The decision is significant because BSEE and other regulators increasingly are attempting to use industry standards or recommended practices as a basis for identifying non-compliance. All too frequently, the agencies often then conflate discretionary aspects of the standards with mandatory requirements.

A copy of the Board’s decision is available [here](#).

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