

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Proposed
Field-wide Spacing and Integration Rules
for the County Line Field,
pursuant to ECL Article 23 and 6 NYCRR
Parts 550 through 559

RULING ON ISSUES
AND PARTY STATUS

February 20, 2004

DMN Project No. DMN-02-5

Summary

The Department of Environmental Conservation ("DEC") Staff has proposed issuance of an Order which would establish field-wide spacing and integration rules for the County Line natural gas field, located in Steuben, Chemung and Schuyler Counties.

The present ruling finds that there is one adjudicable issue, concerning the western boundary of the proposed Youmans unit. Petitions for party status were submitted by: Western Land Services, Alan T. Stephens and Darcie J. Stephens, participating together; Buck Mountain Associates; Anne A. McLaughlin and William E. McLaughlin, participating together; and Jack R. Gaylord. Western Land Services' request for party status is granted and the other requests are denied.

Background

By notice dated February 20, 2003, the DEC scheduled a hearing on the proposed establishment of field-wide spacing and integration rules for a natural gas field known as the County Line Field. The acreage designated as the County Line Field is located in the Town of Catlin, Chemung County, the Towns of Dix and Montour, Schuyler County, and the Town of Hornby, Steuben County. Pursuant to part 553 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR part 553"), DEC Staff is proposing that the Commissioner of the DEC issue an order establishing the spacing and integration rules.

The DEC is responsible for establishing spacing units for oil and natural gas pools and fields, pursuant to Environmental Conservation Law ("ECL") section 23-0501, in order to carry out the policy provisions of ECL 23-0301. This latter section states that, "It is hereby declared to be in the public interest to regulate the development, production and utilization of natural resources of oil and gas in this state in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be had, and that the correlative rights of all owners and the rights of all persons including landowners and the general public may be fully protected...."

Fairman Drilling Company ("Fairman") and East Resources, Inc. ("East") began development of the field in July 2000. In May 2002, Pennsylvania General Energy Corp. ("PGE") commenced drilling operations in the field. These companies' interests have been conveyed to Fortuna Energy, Inc. ("Fortuna"), 1519 Olean-Portville Road, Olean, New York 14760. Fortuna continues to complete and produce wells to develop the existing field and to identify similar producing reservoirs in adjacent areas. Permits to drill were issued for the existing wells pursuant to 6 NYCRR 552.1.

In order to ensure that all affected interest owners receive fair and equitable compensation upon issuance of a final spacing order, the DEC required that Fairman and PGE escrow royalties generated as a result of this production, which Fortuna has agreed to continue and maintain. Five production units¹ are proposed in the field. Some production units contain a small number of unleased parcels where the right to develop the oil and/or natural gas has not been conveyed to Fortuna. DEC Staff determined that compulsory integration is necessary to incorporate the unleased parcels into the proposed spacing unit for the purpose of distributing escrowed and future royalties.

An order establishing field-wide spacing units will serve to configure production units for each of the existing wells and will include procedures for establishing spacing units for future wells. All ownership interests identified for existing production units and proposed spacing units will be integrated so that the proceeds attributable to development within each unit can be disseminated.

The DEC entered into a Stipulation, dated December 30, 2002, with Fairman and PGE, which is binding upon Fortuna as successor to Fairman and PGE.² It is DEC Staff's position that this Stipulation resolves issues pertaining to field wide spacing rules and establishes procedures for future wells. According to DEC Staff, the Stipulation's provisions are based upon an analysis of available geologic, engineering and seismic data from wells within the County Line Field and from similar reservoirs in the vicinity. The DEC Staff requested that a hearing be scheduled concerning the proposed establishment of field-wide spacing and integration rules for the field.

The proposed County Line Field appears on a map as a long, narrow, and slightly curved strip of land extending approximately west-southwest to east-northeast. The December 30, 2002

¹ In the context of the DEC regulations relative to the natural resources of oil and gas, a "unit" means "two or more leases which have been combined in such a manner that the combined leases may be regarded as a common lease" (6 NYCRR 550.3(aw)). ECL 23-0901 governs compulsory integration and unitization in oil and natural gas pools and fields.

² Fortuna purchased leasehold interests from Fairman, East and PGE and assumed regulatory responsibility for the wells that were drilled, owned and/or operated by these three companies in the County Line Field. See Administrative Order dated November 4, 2002 (which also bears the date October 31, 2002) and Administrative Order dated March 17, 2003 (marked as Exhibit 5 for identification in the hearing record).

Stipulation proposed spacing units for four wells. On February 21, 2003, Fortuna and the DEC Staff submitted a joint agreement requesting that the exhibits of the Stipulation be revised to incorporate an additional unit (the Peterson unit). The five units under the revised proposal, going from west to east along the field, would be the Youmans, Roy, Whiteman, Peterson and Purvis units.

The DEC is lead agency for review of this action under the State Environmental Quality Review Act ("SEQRA," ECL article 8 and 6 NYCRR part 617). The DEC Staff reviewed the establishment of field-wide spacing rules and the integration of interests within units for the County Line Field in accordance with the criteria set forth in 6 NYCRR 617.7 and determined that the establishment of the field-wide spacing and integration rules within the units will have no significant adverse impact on the environment. The DEC Staff issued a negative declaration to this effect on January 6, 2003.

Notice of the hearing and of the negative declaration was published in the February 26, 2003 issue of the DEC's Environmental Notice Bulletin ("ENB") and in the February 28, 2003 edition of the Elmira Star-Gazette. The notice was also mailed, on or about February 21, 2003, to local governmental officials and to those persons who had contacted the DEC regarding the proposal.

The hearing began with a legislative (public comment) hearing on the evening of March 25, 2003, at the Holiday Inn in Painted Post, New York, before Administrative Law Judge ("ALJ") Susan J. DuBois. The hearing continued on the following day, at the same location, with an issues conference for discussion of what issues, if any, may require adjudication and what parties would participate in an adjudicatory hearing regarding the proposal. The hearing is being held pursuant to the procedures in 6 NYCRR part 624 (Permit Hearing Procedures).

Two petitions for party status in an adjudicatory hearing were received at the address specified in the notice of hearing by the March 20, 2003 due date for such petitions. These were a petition submitted by Allan R. Lipman, Esq., of the law firm of Lipman & Biltekoff, LLP, on behalf of Western Land Services, Inc., Alan T. Stephens and his wife Darcie J. Stephens (referred to together in this ruling as "Western Land Services" or "WLS"), and a petition submitted by Anne A. McLaughlin and William E. McLaughlin ("the McLaughlins") on their own behalf. An additional petition was received on March 21, 2003 from Buck Mountain Associates. On July 16, 2003, after the issues conference had taken place, Jack R. Gaylord, of Beaver Dams, New York, also requested party status.

At the issues conference, Fortuna was represented by John H. Heyer, Esq., Olean, New York. The DEC Staff was represented by Arlene J. Lotters, Esq., DEC Division of Legal Affairs, Albany, New York. Western Land Services was represented by Mr. Lipman and by Michael P. Joy, Esq., of Lipman & Biltekoff, Williamsville, New York. The McLaughlins were represented by Ms. McLaughlin, Campbell, New York. Buck Mountain Associates was represented by Vincent C. Stalis, President of Buck Mountain Associates.

The transcript of the issues conference was received by the DEC Office of Hearings and Mediation Services ("OHMS") on April 29, 2003.

As discussed further below under "Motions," on May 29, 2003, DEC Staff moved for a stay of issuance of the ruling on issues and party status (i.e., the present ruling). I granted this motion, as discussed further below, and then granted subsequent requests for extensions of this stay until November 3, 2003 and January 30, 2004.

Documents comprising the current proposal

As identified at the issues conference (Tr. 152 - 154), the proposal consists of the December 30, 2002 Stipulation among DEC, Fairman and PGE, as updated by the February 21, 2003 joint agreement between DEC and Fortuna, including the following exhibits to the Stipulation: Exhibit A (map of County Line Field, dated February 12, 2003); Exhibit B1 (map of Purvis unit, dated February 12, 2003, and ownership tabulation); Exhibit B2 (map of Whiteman unit, dated September 24, 2002, and ownership tabulation); Exhibit B3 (map of Roy unit, dated September 24, 2002, and ownership tabulation); Exhibit B4 (map of Youmans unit, dated September 24, 2002, and ownership tabulation); Exhibit B5 (map of Peterson unit, dated February 12, 2003, and ownership tabulation); Exhibit C (report, dated October 10, 2002, plus the February 11, 2003 addendum to the report); Exhibit D (map depicting the outline of the geologic feature, dated February 12, 2003); and Exhibit E (map showing location of seismic coverage, dated February 12, 2003). The ownership tabulations that accompany the unit maps are all dated February 18, 2003.

Comments at Legislative Hearing

Approximately 80 persons attended the legislative hearing, six of whom made statements for the record. All but one of the speakers were affiliated with the parties or potential parties to the hearing, and their positions regarding the proposal are discussed below in connection with the proposed issues. The one additional speaker was George Pribulick, Bradford, New York, who stated that Fairman and East Resources had mishandled their work on the Whiteman unit, had not responded to his phone calls, and had not paid him any royalties. He provided a copy of Fairman's May 31, 2001 map of the Whiteman unit, which differs from the Whiteman unit as currently proposed, and stated that people whose land was in the first version of the unit but not the second should get payments based upon the escrow.

One comment letter was submitted by mail. The letter was from Lorena Roe, Beaver Dams, New York, who stated that it was unfair that her neighbor's land was in the County Line Field but hers was not. She stated her view that the State of New York is trying to get most of the royalties by drawing the boundaries to include mostly State owned land at the expense of the landowners in the area.

Motions

On March 25, 2003, DEC Staff transmitted to me a letter taking the position that no issues had been raised that require adjudication. This letter was also presented at the issues conference on March 26, 2003. The letter requested a ruling that would allow DEC Staff to immediately prepare and complete a Commissioner's Decision and Order establishing units and releasing royalties generated by production to date in the County Line Field. The letter also asked that, in the event that any late-filed petitions for party status were accepted, DEC Staff be allowed to prepare a similar Decision and Order for units not affected by proposed issues. At the issues conference, I reserved ruling on the motion because issues had been proposed that could potentially affect multiple units in the field, a situation different from that in an earlier hearing in which a similar motion had been granted with respect to some of the units in the field (Transcript page ("Tr.") 203). In the June 23, 2003 ruling on DEC Staff's motion for a stay, I continued to reserve ruling on the March 25, 2003 motion.

Ruling: The present ruling finds that an issue has been raised that will require adjudication, and it is uncertain whether this would affect more than one unit. The motion to allow for immediate preparation of a Decision and Order is denied.

At the issues conference, Western Land Services moved that I recuse myself from the hearing due to the rulings and report I made in the Quackenbush Hill Field hearing on issues similar to those in the present case. Western Land Services recommended that the County Line Field hearing be consolidated with the Terry Hill South Field hearing, and that ALJ Maria E. Villa, who is presiding in the Terry Hill South hearing, conduct the consolidated hearing. On June 23, 2003, I denied the motion for recusal, for reasons discussed in the June 23, 2003 ruling on that motion.

On May 29, 2003, DEC Staff moved for a stay of issuance of the ruling on issues and party status. DEC Staff stated that a petition by Western Land Services for a declaratory ruling by the DEC General Counsel under 6 NYCRR part 619, seeking an interpretation of ECL 23-0901(3), was pending. DEC Staff stated that the legal issues presented in the petition are similar to questions currently pending in the present hearing, and that DEC Staff had been advised to expect that the General Counsel would issue the declaratory ruling by mid-summer 2003. On June 23, 2003, after replies from Fortuna and Western Land Services, I granted the motion to the extent that the ruling would be held in abeyance until the declaratory ruling was issued or until August 22, 2003, whichever was first. On August 7, 2003, DEC Staff requested an extension of the stay. On September 19, 2003, after correspondence about clarifying the length of the requested extension, I agreed to hold the issues ruling in abeyance until November 3, 2003 unless the declaratory ruling was issued before that date. The ruling was not issued by November 3, but I continued to hold the present issues ruling in abeyance based upon the understanding that the declaratory ruling would be issued in the near future. On January 14, 2004, DEC Staff requested a further stay, of limited but unidentified duration. I responded that I would not issue a ruling on

issues and party status until after the declaratory rulings were issued or until after January 30, 2004, whichever was earlier. The declaratory rulings were issued on January 29, 2004, and were transmitted to the service list for this hearing by Ms. Lotters on January 30, 2004. These are declaratory rulings DEC 23-13 and DEC 23-14.

Party Status

Section 624.5(d) of 6 NYCRR provides that full party status will be granted based on: "(i) a finding that the petitioner has filed an acceptable petition pursuant to paragraphs (b)(i) and (2) of this section [the filing and contents of petitions]; (ii) a finding that the petitioner has raised a substantive and significant issue or that the petitioner can make a meaningful contribution to the record regarding a substantive and significant issue raised by another party; and (iii) a demonstration of adequate environmental interest." In addition, the DEC Staff and the applicant (in this case, Fortuna) are mandatory full parties pursuant to 6 NYCRR 624.5(a).

Both DEC Staff and Fortuna argue that no issues have been raised and that the petitioners have not offered any scientific proof to show that they own interests in the field.

The consolidated party consisting of Western Land Services, Inc., Alan T. Stephens and Darcie J. Stephens filed a petition which meets the requirements of 6 NYCRR 624.5. Although the land owned by the Stephens, on which Western Land Services, Inc. has an oil and gas lease, is not inside the boundaries of any of the proposed units of County Line Field, it is immediately adjacent to the field. WLS has raised a substantive and significant issue regarding whether the boundary of a unit in the field should be changed in a manner that would put some or all of the Stephens land within the unit. These parties have an adequate environmental interest in the proposal due to its possible effect on a natural resource (gas) at the Stephens' land. WLS's request for party status is granted.

Buck Mountain Associates' petition was received one day after the deadline for receipt of petitions for party status. Although DEC Staff argues that the petition should be rejected since it arrived after the deadline, there is no indication that any party or potential party was prejudiced by the one-day delay in receipt of the petition. Buck Mountain Associates' petition is being evaluated on its substance, apart from the procedural question, which can be done at the discretion of the ALJ under 6 NYCRR 624.5(b)(4). Buck Mountain Associates did not raise any adjudicable issues, however, nor did it show how it could make a meaningful contribution to the record on an issue raised by another party. Buck Mountain Associates' request for party status is denied.

The McLaughlins own land located east of the Youmans unit. Ms. McLaughlin stated near the start of the issues conference that they were going to withdraw their petition for party status (Tr. 32). There was no further clarification of whether the McLaughlins have withdrawn their petition or decided not to do so. Ms. McLaughlin's statements at the issues conference have been reviewed as though the petition is still pending and was not withdrawn.

As discussed below, in the section on proposed issues, the McLaughlins did not raise any issues that require adjudication and did not demonstrate that their participation as a party would assist in the determination of issues raised in the hearing. The McLaughlin's request for party status is denied.

Jack R. Gaylord sought to become involved in the hearing well after the date of the issues conference. He initially contacted me by electronic mail on July 1, 2003, describing his interaction with Fairman and Fortuna, asking that a portion of his land be removed from the Whiteman unit, and requesting any help the Office of Hearings and Mediation Services could give him. I wrote to Mr. Gaylord on July 3, 2003, stating that I did not know whether his letter was intended as a petition for party status and sending him information on how to request party status late. On July 16, 2003, Mr. Gaylord sent a letter requesting party status for reasons that were essentially the same text as his e-mail. I distributed this petition to the persons on the interim service list. Fortuna and the DEC Staff opposed granting Mr. Gaylord party status; Western Land Services and Buck Mountain supported granting him party status.

As discussed below, Mr. Gaylord's petition does not raise any issues requiring adjudication in the hearing on the proposed spacing and integration rules for the County Line Field. In addition, the petition does not include information on two of the three factors that must be shown in order for a late-filed petition to be considered under 6 NYCRR 624.5(c). One could infer that the reason for the late filing is that the events discussed in the petition took place after the date of the issues conference, but the petition does not address the other two factors, particularly any demonstration that Mr. Gaylord's participation would materially assist in the determination of issues raised in the proceeding. Mr. Gaylord's petition does not meet the requirements of 6 NYCRR 624.5(c) or (d) and his request for party status is denied.

On October 16, 2003, James E. Halpin, Esq., Odessa, New York, wrote to me stating that he represents the estate of Jack R. Gaylord. Mr. Gaylord apparently is deceased. Mr. Halpin's letter did not indicate whether or not the estate intended to continue the request for party status, so I have treated the request as still being active.

Ruling: The parties to this hearing are the DEC Staff, Fortuna, and Western Land Services. The requests for party status by Buck Mountain Associates, the McLaughlins and Mr. Gaylord are denied.

Standards for identifying issues for adjudication

Section 624.4(c) of 6 NYCRR specifies the standards for adjudicable issues in a DEC permit hearing. An issue is adjudicable if it relates to a dispute between the DEC Staff and an applicant over a substantive term or condition of the draft permit (6 NYCRR 624.4(c)(1)(i)). When Department Staff has determined that a permit application, conditioned by a draft permit, will meet all statutory and regulatory requirements, the potential party proposing an issue has the

burden of persuasion to demonstrate that the proposed issue is substantive and significant (6 NYCRR 624.4(c)).

An issue is substantive if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria such that a reasonable person would inquire further (6 NYCRR 624.4(c)(2)). An issue is significant if it has the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit (6 NYCRR 624.4(c)(3)).

In order to establish that adjudicable issues exist, "an intervenor must demonstrate to the satisfaction of the Administrative Law Judge that the Applicant's presentation of facts in support of its application do not meet the requirements of the statute or regulations. The offer of proof can take the form of proposed testimony, usually that of an expert, or the identification of some defect or omission in the application. Where the proposed testimony is competent and runs counter to the Applicant's assertions an issue is raised. Where the intervenor proposes to demonstrate a defect in the application through cross-examination of the Applicant's witnesses, an intervenor must make a credible showing that such a defect is present and likely to affect permit issuance in a substantial way. In all such instances a conclusory statement without a factual foundation is not sufficient to raise issues." (Matter of Halfmoon Water Improvement Area, Decision of the Commissioner [April 2, 1982]). Subsequent decisions of the Commissioner have provided additional interpretation of this standard.

Proposed Issues

Western Land Services proposes twelve issues, which are summarized at pages 44 through 46 of its petition for party status. In addition, the petition argues that the standard for identifying issues under 6 NYCRR part 624 should not apply to hearings on gas well spacing and integration of interests (Petition, pp. 39 - 43). The proposed issues are stated below, followed by discussion and the ruling on whether they will be adjudicated in the hearing.

- (a) Whether the western boundary of the Youmans Drilling Unit should be moved to the west so as to include the Stephens Tract, or if the Stephens Tract is not included in the Youmans Drilling Unit, whether an extension unit should be created to the west of the Youmans Drilling Unit which includes the Stephens Tract.

According to an affidavit of Alan T. Stephens, the Stephens own two parcels of land in the Town of Hornby, located just west of the western boundary of the proposed Youmans unit. These lots are identified on the tax assessment map as map number 228-1-19.2 and 228-1-20.11. Western Land Services leases the oil and gas rights on these parcels.³

³ The map numbers of the parcels, the proposed unit boundaries, and the well location are shown on Exhibit B4 of the Stipulation. Mr. Stephens's affidavit is Exhibit 1 of WLS's

Mr. Stephens's affidavit states that an earlier map of the unit showed the Stephens' land as being within the unit outline submitted to DEC by PGE. This statement is based upon a map that Mr. Stephens states he received from Roger Youmans, and Mr. Youmans in turn received from a representative of PGE. Mr. Stephens also states that a representative of PGE told him the change in the unit outline was based upon DEC requiring PGE to move the unit outline farther east to eliminate a gap of acreage between the Youmans unit and the Roy unit, and that but for this change, the Stephens' land would have been included in the Youmans unit.

The Youmans well is located closer to the western boundary of the unit than to the eastern boundary of the unit. WLS's petition describes these distances as being approximately 3,620 feet between the western boundary and the well, and approximately 7,560 feet between the eastern boundary and the well. WLS proposes testimony by Michael Joy, Ph.D. that there is no scientific basis for shifting the unit east. WLS argues that, under the current proposal, the Youmans well would drain gas from the area to the west of the unit boundary, depriving landowners and lessees located there of the value of gas drained from their land, while those near the eastern border of the unit would receive a windfall (Petition, p. 4).

WLS's petition includes an affidavit by Dr. Joy, stating his qualifications and asserting that based upon the information presented in the Stipulation, it is reasonable to conclude that the well would drain an area equal in size both east and west of the well. Dr. Joy states that, unlike the information provided for the east end of the field, the Stipulation exhibits do not indicate that any seismic information shows that the gas-bearing feature ends at the western end of the Youmans unit. He also states it is likely that the gas-containing feature continues west under the Stephens Tract, and that there is no information suggesting a subsurface gradient that would support a finding that the Youmans well would drain a greater area east of the well than west of the well (Exhibit 2 of WLS's petition).⁴ WLS's petition proposes, as the outcome of this issue, that the western boundary of the Youmans unit be extended to include the Stephens Tract or that the Commissioner create a spacing unit to the west of and contiguous with the Youmans unit.

WLS states that, under 6 NYCRR 624.9(b)(1), the burden of proof is on DEC Staff and Fortuna to show that the proposed order will comply with all applicable laws and regulations administered by the Department. WLS argues that although Dr. Joy's affidavit shows there is no basis for excluding the Stephens Tract from a spacing unit in the County Line Field, DEC Staff and Fortuna have not put evidence to the contrary in the record. WLS states that if there are concerns about protection of confidential information, these concerns can be accommodated within the hearing process.

petition for party status.

⁴ WLS is not contesting the north or south boundaries of the Youmans unit. These boundaries are based upon seismic information indicting the location of a graben or structural low area in the rocks underground (see Stipulation Exhibit C, pp. 4 - 6).

In response to this proposed issue, DEC Staff argues that no adjudication is required on this proposed issue since no scientific support has been provided for moving the Youmans boundary and because the Stipulation provides procedures for developing an extension unit should Fortuna or others propose to drill a well west of the Youmans unit. At the issues conference, DEC Staff stated that the scientific documentation supporting the units proposed for the County Line Field has been carefully reviewed by experts within the DEC Division of Mineral Resources (Tr. 53). This review was described as meetings in March and August 2002 between DEC Staff and representatives of Fortuna and/or two of the other companies that were drilling wells in the County Line Field, which led DEC Staff to conclude that the proposed unit boundaries are correct (Tr. 138, 145). DEC Staff stated that ECL 23-0501(5) and (6) require that units be spaced so that there are not mineral interest owners who would be in a gap between wells, as the unit was originally configured (Tr. 53).

Fortuna states that WLS has not submitted any data that contravenes the proposal. Fortuna questions Dr. Joy's qualifications and argues that his opinion should be given less weight than that of Fortuna's or DEC's experts since Dr. Joy works for the law firm that represents WLS.

The procedures used in this hearing are those of 6 NYCRR Part 624, the DEC Permit Hearing Procedures. Since the proposal here is that the Commissioner issue an order establishing spacing and integration rules for a gas field, rather than that the Commissioner approve issuance of a permit, and since the proponents are DEC Staff and a company rather than a permit applicant, the procedures need to be read in the context of the present proposal and parties. Under 6 NYCRR 624.9(b)(1), the applicant has the burden of proof to demonstrate that its proposal will be in compliance with all applicable laws and regulations administered by the Department. In the present case, DEC Staff and Fortuna have this burden of proof. The Stipulation and its exhibits can be treated as being analogous to an application and a draft permit in a permit case. Accordingly, at the issues conference stage of the hearing, intervenors have the burden of persuasion to demonstrate that their proposed issues are both substantive and significant (6 NYCRR 624.4(c)(4)).

Western Land Services has met its burden of going forward by offering expert opinion that the information currently in the record supports an interpretation that would lead to a major modification of the proposal, in other words, that identifies an issue which is significant. Although no *voir dire* testimony took place at the issues conference,⁵ the information presented by Dr. Joy, including paragraph 2 of his affidavit, supports a preliminary conclusion that he would be qualified to offer an opinion on this subject. WLS specified the nature of the evidence⁶

⁵ Testimony of any kind is not usually taken during an issues conference. One purpose of the issues conference is to identify what issues need to be the subject of testimony in an adjudicatory hearing (6 NYCRR 624.4(b)(2)).

⁶ "Evidence" includes testimony (Black's Law Dictionary 576 [7th ed 1999]).

it expects to present and explained the grounds upon which its assertion is made with respect to this issue.

Sufficient doubt has been raised about whether the proposed western boundary of the unit complies with applicable standards, particularly protection of correlative rights, that a reasonable person would inquire further. Thus, the issue is also substantive. In making a determination about whether an issue is substantive, an ALJ must consider the proposed issue in light of the application and related documents, the draft permit, the content of any petitions filed for party status, the record of the issues conference and any subsequent written argument authorized by the ALJ (6 NYCRR 624.4(c)(2)). Other than the report and the maps that are included in the Stipulation, the information upon which DEC Staff and Fortuna are relying is not in the record and thus cannot be relied upon to find that no issue is raised. Neither DEC Staff nor Fortuna has submitted any affidavits by their experts. In contrast, WLS presented an affidavit by its proposed expert explaining why the information available in the Stipulation indicates that the boundary is in the wrong place. DEC Staff has not shown how the possibility of extension wells would protect the interests of the Stephens if the gas under their land would be drained the by Youmans well. DEC Staff also has not shown how avoiding a gap between units necessitates the proposed location of the western boundary of the Youmans unit.

Exhibit C of the Stipulation (the report) states that various data related to the unit boundaries were reviewed with DEC Staff under provisions for confidentiality. If there is evidence relevant to the present issue that is a trade secret, protection of the trade secrets can be obtained through procedures to be established for the hearing (Matter of Glodes Corners Road Field, Interim Decision of the Commissioner [Feb. 25, 2000]; see also New York Tel. v Public Serv. Comm., 56 NY2d 213, 451 NYS2d 679 [1982]).

A portion of the argument concerning this issue, specifically on the availability of the data supporting the spacing units, was also addressed in a September 17, 2002 petition for a declaratory ruling under 6 NYCRR part 619 submitted by Western Land Services. This petition asked that the DEC General Counsel issue a declaratory ruling which would state, among other things, that no test data, including seismic data, be considered in determining the size and configuration of a spacing unit unless it is offered in evidence at the hearing or a stipulation (as described earlier in that petition) is entered into by all owners that may be adversely affected.

Declaratory ruling DEC 23-13, issued on January 29, 2004, declined to rule on this question, stating that whether a particular record is properly withheld is a highly factual inquiry not appropriately answered in a declaratory ruling. The declaratory ruling identified 6 NYCRR part 616 (Access to Records) and part 624 (Permit Hearing Procedures) as providing procedures for obtaining information necessary to participate in DEC hearings (declaratory ruling DEC 23-13, footnote 3 and page 6).

Ruling: A substantive and significant issue has been raised concerning whether the western boundary of the Youmans unit should be moved to the west so as to include the Stephens Tract,

or if the Stephens Tract is not included in the Youmans Drilling Unit, whether an extension unit should be created to the west of the Youmans Drilling Unit which includes the Stephens Tract.

- (b) Whether WLS as lessee of the Stephens Tract is entitled to a share of the working interest of production in the Youmans Drilling Unit, or if the Stephens Tract is not included in the Youmans Drilling Unit, an extension unit in which the Stephens Tract is located.

This issue is stated slightly differently at page 12 of the petition as “whether Fortuna and the DEC will recognize that [WLS] is entitled to a working interest share of production with respect to the Stephens Tract whether it is included in the Youmans Unit or a future unit drilled as an extension well in the County Line Field.” The petition, at page 13, further identifies this interest as a “7/8th working interest.” Western Land Services’ petition presents arguments about the interpretation of ECL 23-0901(3) and the interpretation of the term “owner” in this context.

The petition acknowledges that Western Land Services’ contentions on this subject were under review by the DEC’s General Counsel in connection with the then-pending declaratory ruling. The petition also states that the Commissioner held, in the Interim Decision in the Matter of Pennsylvania General Energy, Inc. (Quackenbush Hill Field) [Oct. 28, 2002] that any owners of mineral rights within the drilling unit who are not operators were not entitled to participate in the working interest of the unit. The petition goes on to state that the Commissioner’s Interim Decision in the Quackenbush hearing must be overruled by the ALJ in the present hearing.⁷

DEC Staff argues that no adjudication of this issue is necessary since, in Staff’s view, no scientific support has been provided for moving the Youmans unit boundary and since the Stipulation provides adequate procedures for developing and allocating production within an extension unit. Fortuna argues that Western Land Services’ proposed issue is not a disagreement with the Stipulation but with ECL 23-0901 itself, and that Western Land Services is misinterpreting the statute. Fortuna states that Western Land Services is trying to raise this issue in the wrong forum, and that its remedy is in the courts.

The Commissioner’s December 30, 2002 Decision and Order in the Quackenbush matter was challenged in a proceeding under article 78 of the Civil Practice Law and Rules in Supreme Court, Chemung County (Cafilisch v Crotty, Index No. 03-1579). On January 9, 2004, counsel for Fortuna transmitted a copy of the December 31, 2003 decision in the article 78 proceeding. The Court’s decision dismissed the article 78 petition and upheld the Commissioner’s decision in the Quackenbush case. On February 5, 2004, counsel for WLS transmitted copies of both a notice of appeal filed in the Cafilisch case, and a motion for permission to renew the petition and complaint in Supreme Court in view of the issuance of declaratory ruling 23-14.

⁷ An ALJ does not have the authority to overrule the Commissioner.

On January 29, 2004, DEC General Counsel James H. Ferreira issued declaratory ruling DEC 23-14 in response to WLS's petition for a ruling. The summary of the ruling states, in part, that:

"First, unit interests which have not entered into leases, joint operating agreements or other voluntary arrangements with the well operator by 90 days after receiving notice that their interests may be affected by compulsory integration may be eligible to receive up to eight-eighths of the proportionate share of unit production attributable to their acreage after the well operator has recouped 200% of the expenses listed in ECL §23-0901(3). Such eligibility, however, is not an automatic entitlement as compulsory integration orders must be "just and reasonable" based upon field-specific factors. ECL Article 23 does not require the well operator to initiate specific offers. The Department does not involve itself in offers to enter into leases, joint operating agreements or other voluntary arrangements." (Declaratory ruling DEC 23-14, at 6 - 7).

The issue that WLS summarized as issue (b) depends partly on the outcome of issue (a), regarding whether the Stephens tract should be within a unit in the County Line Field. If the answer to (a) is no, WLS would not have an interest in the field and proposed issue (b), regarding the nature of that interest, need not be addressed. If the answer to issue (a) is yes, the question becomes whether WLS has made an offer of proof regarding facts that would need to be considered taking into account the judicial and administrative interpretation of ECL 23-0901(3). The answer to this question is no. A review of WLS's petition for party status shows that WLS made arguments about a hypothetical unit and legal arguments about the definition of "owner"⁸ but did not propose to show or contest any field-specific facts relevant to this proposed issue. Thus, WLS's proposed issue (b) is not an issue requiring adjudication.

While the proposed issue will not be adjudicated, both the Cafilisch decision and declaratory ruling DEC 23-14 suggest that several factual questions should be answered in the record of the present hearing since the Commissioner may need to consider them.⁹ These questions are: (1) whether the DEC has issued a drilling permit to Western Land Services for a well on the Stephens' land; (2) the terms of Western Land Services' lease with the Stephens; and (3) whether Western Land Services controls enough acreage to qualify for a drilling permit to drill on the Stephens' land. These questions can be answered by affidavits submitted by DEC Staff and Western Land Services and by submission of a copy of the lease.

Ruling: No issue has been raised for adjudication concerning whether WLS as lessee of the Stephens Tract is entitled to a share of the working interest of production in the Youmans Drilling Unit, or if the Stephens Tract is not included in the Youmans Drilling Unit, an extension

⁸ WLS petition for party status, at 13 - 25, 46 - 49.

⁹ See, Cafilisch decision, fifth unnumbered page, and declaratory ruling DEC 23-14, footnote 16.

unit in which the Stephens Tract is located. The three items of information specified above may be submitted for the record.

- (c) Whether Fortuna and the Department can rely on information which is not part of the record in support of the location, size and configuration of the Youmans Drilling Unit.

Ruling: This proposed issue is actually an argument about the burden of proof and the burden of going forward with regard to issue (a) above, concerning the western boundary of the Youmans unit, and has been discussed under that proposed issue. No additional issue is raised for adjudication.

- (d) Whether the Department exceeds the scope of its authority by entering into a pre-hearing stipulation with Fortuna.

Western Land Services' petition for party status contains discussion related to this proposed issue at pages 10 to 11, 35 to 39 and 48. WLS argues that the present practice of entering into a stipulation with the operator of wells in a proposed gas field is improper, and that due process requires that neither the Department nor the DEC Staff contractually bind itself to any issues before a public hearing on the matter. WLS also contends that execution of the Stipulation violated the DEC Organization and Delegation Memorandum 94-13, entitled "Effect of Stipulations on Decision Making in Permit and Enforcement Hearings," in that the Stipulation was not signed by all entities that have applied for party status.

DEC Staff states that no adjudication is required on this issue, and that the Stipulation is not binding on the ALJ or the Commissioner but merely serves as a joint proposal by Fortuna and DEC Staff that may be contested during the hearing process.

The second of the two petitions for declaratory rulings submitted by Western Land Services, dated September 17, 2002, poses a related question by asking for a declaratory ruling that would state the ECL mandates that the DEC:

"...not enter into any Stipulation with the operator of the proposed spacing unit in which they designate the size and configuration of the spacing unit and the procedure to determine the location, size and configuration of spacing units for any additional wells that may be drilled in the field unless and until such Stipulation is also executed by all owners that may be adversely affected."

This proposed issue does not involve any disputes of fact and therefore no testimony would be necessary. It is solely a legal dispute, and was decided by the General Counsel on January 29, 2004 in declaratory ruling DEC 23-13. This declaratory ruling upheld the established procedure for determining well spacing and compulsory integration. It stated that the

DEC Staff is free to enter into stipulation agreements with well developers and/or potential parties to an adjudicatory hearing.

Ruling: No issue has been raised for adjudication concerning whether the Department exceeded the scope of its authority by entering into a pre-hearing stipulation with Fortuna.

- (e) Whether the 100% penalty provision as set forth in ECL 23-0901(3) is applicable to WLS where Fortuna has not given WLS an opportunity to participate in the well costs.

Western Land Services' arguments about this proposed issue are presented at pages 25 through 30 of its petition for party status. WLS argues that "the 100% penalty set forth in ECL §23-0901(3) should not be imposed where WLS has not been offered the opportunity to participate in the cost of the well" and that even in situations of compulsory integration, "ECL §23-0901 recognizes the fundamental right of an owner to retain the production attributed to its parcel after the operator has recouped 200% of its costs."

DEC Staff states that this issue need not be adjudicated since no scientific support has been provided for incorporating the Stephens Tract into the Youmans unit, and because the Stipulation provides adequate procedures regarding extension units. Fortuna argues that this proposed issue is premature and irrelevant since WLS is not within the boundaries of the proposed unit.

As discussed above under issue (a), the location of the western boundary of the Youmans unit is an issue for adjudication, and the outcome might be that the Stephens' land, on which WLS has a lease, would be within the final boundary of the Youmans unit. Despite this, proposed issue (e) will not be adjudicated since it is a legal issue that was decided by the General Counsel in declaratory ruling 23-14. The summary of this declaratory ruling states, in part, that:

"Second, the Petition seeks elimination of the '100% of cost' penalty upon non-participating interests where the non-participating interest has not been offered the opportunity to participate in the cost of the well. Such elimination is not possible because the 100% risk penalty charge is mandatory pursuant to statute."

Ruling: No issue has been raised for adjudication regarding the "100% penalty provision."

- (f) Whether WLS's share of production is co-owned with Fortuna or whether Fortuna is first allowed to take and market all the gas attributable to the tracts it controls for its sole account and leave the remaining gas for further disposition, if any, by WLS at some later time.

Western Land Services describes this proposed issue at pages 30 through 35 and page 42 of its petition. The issue is also mentioned at page 12. WLS combined its discussion of proposed issues (f) and (h) at the issues conference. WLS argues that DEC Staff has indicated in similar projects that it intends to allow the operator of a unit to take out first (emphasis in original) its share of the gas and then allow the other working interest owners to take out the remaining gas if they have the ability to do so, and that if the other owners do not have such ability the well is to be plugged and abandoned. WLS states that this procedure could result in waste of a natural resource. WLS states that, "If Fortuna proceeds in accordance with staff's suggestions, it will raise serious doubts about its ability to meet statutory criteria." WLS's contention about the DEC Staff's alleged position is based upon an August 8, 2002 letter from John K. Dahl, Director of the Bureau of Oil and Gas Regulation, to Timothy L. Jackson of Rural Energy Development Corp., concerning negotiations about two units of the Wilson Hollow Field, which letter is included as Exhibit 4 of WLS's petition for party status.

DEC Staff, in its March 24, 2003 letter to me, states that no adjudication of this proposed issue is necessary since no scientific support has been provided for incorporating acreage controlled by WLS into any unit currently proposed in the County Line Field. The letter also states that the hypothetical situation described by WLS is under evaluation by the General Counsel in the context of the declaratory ruling petition, but does not point out where this question appears in the petition for a declaratory ruling. It may be within the second of the additional questions on which the General Counsel solicited comment through the December 4, 2002 ENB notice. Declaratory ruling DEC 23-14 does not appear to address this question directly, but does note that ECL article 23 contains procedures both for voluntary integration and for compulsory integration. At the issues conference, DEC Staff identified the provision that would address the opportunity for other operators to participate in the drilling of future proposed wells (Stipulation section IV.F.4; Tr. 115).

It is not clear which, if any, of the paragraphs of Fortuna's response to WLS petition address this proposed issue.

This proposed issue is based on Western Land Services' implication that an arrangement that was part of a proposal suggested by DEC Staff as a starting point for negotiation concerning two units in another gas field is what DEC Staff and Fortuna are proposing for the County Line Field. Based upon the August 8, 2002 letter, and upon the text of the Stipulation in the present case, WLS's implication is not accurate. The Stipulation does not propose the arrangement that WLS is contesting in this proposed issue. Even the August 8, 2002 letter includes this arrangement as only one of five opportunities for a company in the other gas field to recover its gas. Through this proposed issue, Western Land Services is objecting to a provision that is not even part of the proposal for the County Line Field.

Ruling: The proposed issue quoted above as issue (f) is not an issue for adjudication.

- (g) Whether the well costs incurred or to be incurred by Fortuna are appropriate.

The petition contains no discussion of this proposed issue and no offer of proof regarding it. The one sentence proposing this issue appears in the summary of proposed issues (Petition, p. 45). At the issues conference, I asked counsel for WLS what pages of the petition or exhibits attached with the petition relate to this issue (Tr. 88 - 89; 99). Counsel for WLS stated that this proposed issue was part of a document that WLS presented at the issues conference and that was marked for identification as Exhibit 3 on that date but has not been offered or received in evidence. Exhibit 3 is a proposal by Western Land Services for the method of determining how the operator and other potential non-operator lessees should participate in the development of any well drilled as an extension of the County Line Field. Exhibit 3 includes a Model Form Operating Agreement and an attachment that are marked as "Exhibit C" and entitled "Accounting Procedure Joint Operations." The model operating agreement is also mentioned in the proposed changes to the Stipulation that are noted in pencil on Exhibit 3 of WLS's petition for party status.¹⁰

WLS has at most made a legal argument that a model agreement, that would include provisions about expenses for development and operation of gas wells, should be included in the Stipulation. WLS has not proposed any factual issue concerning well costs that could affect the proposed well spacing and integration rules.

Ruling: No issue has been raised for adjudication concerning the appropriateness of well costs incurred or to be incurred by Fortuna.

- (h) Whether Fortuna has an obligation to transport and/or market the gas produced from the Youmans Well that is owned by WLS.

This proposed issue was not discussed separately in Western Land Services' petition for party status or at the issues conference, but was included in the discussion of proposed issue (f) (see Tr. 109; also see Petition pp. 12, 34 - 35, 42 - 43 and Petition Exhibit 4). The DEC Staff responds that WLS does not own any gas to be produced by the Youmans unit, and that the issue regarding transportation and marketing of gas described by WLS is under review by the General Counsel in the context of a declaratory ruling requested by WLS.

This question was raised in a supplemental petition for a declaratory ruling from WLS that the DEC received on January 31, 2003 (see, declaratory ruling DEC 23-14, at 2, 7 and 14-15). The supplemental petition is not in the record of the present hearing. The declaratory ruling notes that ECL 23-0901(3) does not include language regarding marketing and transporting gas.

Other than the question whether WLS owns any gas that would be produced by the Youmans well, which is a question that would be decided through the adjudication of issue (a),

¹⁰ See Ex. 3 of WLS's Petition for party status, at pp. 2, 3, and 11.

there is no adjudicable issue raised by WLS's proposed issue (h). WLS has not made an offer of proof, nor has it cited any legal requirement, in support of its position on this issue, or in support of its contention that Fortuna should be required to show that it will have the ability to transport all of the gas produced from the unit including the portion thereof attributable to other working interests (Petition for party status, pp. 34 - 35).

Ruling: No issue has been raised for adjudication concerning whether Fortuna has an obligation to transport and/or market any gas produced from the Youmans well that may be owned by WLS.

- (i) Whether the working interest share of the production owned by WLS should be held in escrow by Fortuna pending a final order in this proceeding.

This issue is listed in the summary of proposed issues that appears on pages 44 through 46 of WLS's petition for party status, but it is not discussed in the petition except to the extent it follows from WLS's discussion of issues (a) and (b) above. At the issues conference, WLS contended that Fortuna was taking the proceeds of gas owned by WLS and might be using it to pay back financial obligations to overseas lenders, putting it beyond the jurisdiction of New York State courts if it becomes necessary for Fortuna to pay the money to WLS (Tr. 105 - 107; 108-109). The DEC Staff argued that no adjudication is required, on the basis that WLS has not provided scientific support that it owns any share of production in existing proposed units in the County Line Field.

This proposed issue actually appears to be a motion, since it requests that action be taken prior to the final decision and order in this matter. It also assumes that WLS does own a share in the production of the proposed gas field, and that this share is a working interest. The first assumption is an issue that is in dispute and has not yet been decided. The second assumption has not been demonstrated in the record as it currently exists, and it is questionable whether the information that may be added to the record concerning Western Land Services and the Stephens land (see, proposed issue (b)) will demonstrate it. There is not a basis for this motion to be granted in the present ruling.

If WLS does have a royalty interest in the Youmans Unit (i.e., if the final unit boundary is such that all or part of the Stephens Tract is in the unit), the existing escrow account protects the money that would be paid as royalty payments once the Commissioner issues a Decision and Order concerning the County Line Field. Section II.C.2 of the Stipulation provides that, for existing wells including the Youmans well, production may proceed when the operator provides an affidavit stating that all royalty payments attributable to leased and unleased parcels shall be held by the operator of the well in an interest-bearing account until a final order is issued by the Commissioner.

Ruling: No issue has been raised for adjudication, and no other ruling is necessary at the present time, in response to this proposed issue.

- (j) Whether information concerning tracts in the units that have not been leased should be given trade secret status.

The proposed issue, described at pages 43 and 44 of WLS's petition, has to do with information that Fortuna sought to have redacted from the ownership tabulations that are exhibits to the Stipulation. The version of these tabulations that were sent to me by DEC Staff as part of the February 21, 2003 joint agreement between DEC Staff and Fortuna differ from the original tabulations that were part of the Stipulation. The revised tabulations list, for each proposed production unit, the persons who are a "lessor/current oil and gas owner," information about the location of their land including the tax parcel identification number, the number of acres each person has in the unit, and their percentage of the unit. The earlier versions of the tabulations also included, for each entry, the lease status and book and page. This information was omitted from the revised tabulations on the basis of DEC Staff's determination that the lease status information constitutes a trade secret under 6 NYCRR 616.7.¹¹ The joint agreement requested that the revised ownership tabulations be substituted for the ownership tabulations that were Exhibits B1 through B4 of the Stipulation. The joint agreement also requested other additions and changes to update the Stipulation and to incorporate an additional unit for the Peterson location (Exhibit B5).

Western Land Services characterizes the revised tabulations as "tabulations of lease status that do not identify the names of landowners who have not entered into any oil and gas leases" (Petition, p. 44).¹² WLS argues that the omitted information should be made public so that landowners who have not entered into oil and gas leases can join together to fully protect their correlative rights, and so that the ALJ and interested parties can confirm that proper notice of this proceeding has been given to such landowners. DEC Staff responds that this issue need not be adjudicated since it is more properly decided in the context of 6 NYCRR part 616, through an appeal of denial of access to records. Fortuna states that WLS could examine public records and find out the status of the leases on its own, and that Fortuna should not have to "do their homework for them."

Notice of the hearing was given according to the procedures in 6 NYCRR 624.3. In addition to the required notice, it is my understanding that the current practice of the DEC Division of Mineral Resources in hearings on gas well spacing and integration is to mail the notice of hearing to all owners listed on the tabulations. On February 21, 2003, Ms. Sanford notified me that this additional notice distribution would be done in the present case. Thus, the

¹¹ This determination is contained in a February 20, 2003 letter from Kathleen F. Sanford, Chief of the Permits Section of the DEC Division of Mineral Resources, to Nick Markic of Talisman Energy, Inc. and Harv Rasmussen of Fortuna.

¹² This does not appear to be an entirely accurate characterization of the revised tabulations since the names of all of the "landowners" (actually listed as "lessor/current oil and gas owner") are on the tabulations although the tabulations no longer distinguish among these persons on the basis of their lease status.

lessors/current oil and gas owners would have received the notice of hearing regardless of their lease status.

At the issues conference, I noted that there is a process for appealing denial of access to records under 6 NYCRR part 616.¹³ Dr. Joy stated that WLS had made a FOIL request and would avail itself of the procedures. Ms. Sanford confirmed that Dr. Joy had made a FOIL request on behalf of WLS on March 13, 2003, which she described as a very comprehensive request, and that DEC Staff was preparing a response including an evaluation of whether certain information in addition to the lease status would be treated as trade secrets. I stated that it might be necessary to consider this proposed issue further after DEC Staff's response to the FOIL request was known and after knowing whether WLS would appeal denial of access to the lease status information (Tr. 89 - 98).

Since the date of the issues conference, I have not received any correspondence from Western Land Services concerning whether it requested access under FOIL to the lease status information on the ownership tabulations or appealed DEC Staff's determination to treat this information as trade secrets, nor any decision on such an appeal. Appeals of denials of access to DEC Records under FOIL are addressed to the Assistant Commissioner for Hearings and Mediation Services and are reviewed by the OHMS (6 NYCRR 616.8(a)). This office's records include a letter of July 22, 2003 from Acting Assistant Commissioner James T. McClymonds and ALJ Kevin J. Casutto to Russ Erlandson, Senior Foreman, Fortuna Energy. The letter is in response to Mr. Erlandson's May 7, 2003 FOIL appeal concerning documents that had been requested by Dr. Joy on March 13, 2003 and that were the subject of an April 25, 2003 determination by DEC Staff. DEC Staff had stated they would release three documents for which Fortuna had asserted trade secret protection, and Mr. Erlandson appealed this decision. The documents that were the subject of this appeal do not include the ownership tabulations. The Office of Hearings and Mediation Service's file of FOIL appeal decisions does not include any decision in response to an appeal by WLS or its attorneys, or any additional decision concerning records related to the County Line Field.

There is nothing in the record of this hearing, or in the OHMS records of FOIL appeal decisions, that would indicate that WLS pursued obtaining the lease status information under the procedure discussed at the issues conference. In addition, presuming that the hearing notice was mailed to all persons on the tabulations and given the fact that this mailing was optional to begin with, identifying the lease status of the owners would not be relevant to evaluating whether there was a procedural defect in the notice. None of the owners came forward to state that they were owners of unleased oil and gas interests and that Fortuna or its predecessors had failed to notify them under section II.C of the Stipulation.

¹³ The transcript, at page 89, reflects that I cited the wrong section with regard to appeals, specifically section 616.28 (appeals regarding records containing personal information). The provision concerning appeals of denial of access to DEC records generally is 6 NYCRR 616.8.

Ruling: WLS did not follow through on the process for appealing denial of access to this information, and may be considered to have abandoned the proposed issue. WLS also did not show how this proposed issue could affect the Commissioner's decision on the proposal. No issue has been raised for adjudication.

- (k) Whether the changes to the Stipulation proposed by WLS should be adopted in the final order.

These proposed changes are noted on a copy of the Stipulation (Exhibit 3 of WLS's petition). The changes would reflect WLS's position about several of the proposed issues above, particularly proposed issue (b). Proposed issue (k) is essentially a question of whether WLS's position on several other proposed issues should prevail at the end of the hearing process. Since these proposed issues have not been found to be issues requiring adjudication, proposed issue (k) does not need to be considered further except as argument regarding any legal issues that the Commissioner may decide. None of the proposed issues other than issue (a) (location of the western boundary of the Youmans unit) will be adjudicated in the hearing. The changes proposed in Exhibit 3 do not address the location of this boundary.

Ruling: No issue has been raised for adjudication about whether the changes to the Stipulation that were proposed by WLS should be adopted in the final order.

- (l) Whether the general provisions of the Model Operating Agreement as modified by WLS shall be incorporated by reference in the final order and that any offer by Fortuna to WLS to participate in well costs be based upon such provisions.

Ruling: This is a sub-issue of the previous issue, since incorporation of the Model Operating Agreement is one of the changes WLS proposed be made to the Stipulation. As with proposed issue (k), no issue has been raised for adjudication.

In addition to issues (a) through (l) as summarized on pages 44 through 46 of the petition, the petition argues that the "substantive" and "significant" standard is not applicable to this proceeding (Petition, pp. 39 - 43). This argument contends that the standard for identifying adjudicable issues under 6 NYCRR part 624 should not apply to hearings on gas well spacing and integration of interests since there is no reference to the "substantive and significant" standard in either ECL 23-0501 or ECL 23-0901. Western Land Services further argues that the procedures in 6 NYCRR part 624 should only serve as guidance where necessary in such hearings and should not be used "to deprive parties of their fundamental constitutional rights." Fortuna responds that this standard is part of the regulations, and that WLS's remedy is to challenge the regulations in court.

The standards for adjudicable issues are set forth at 6 NYCRR 624.4(c). These provide, among other things, that an issue is adjudicable if it is proposed by a potential party and is both substantive and significant. The section goes on to define both terms.

An earlier version of part 624, that was in effect prior to January 9, 1994, was available as guidance in conducting DEC adjudicatory hearings other than permit hearings and enforcement hearings. Former section 624.1 provided that, "All or part of the procedures set forth below may be utilized for other adjudicatory hearings conducted by the Department other than enforcement hearings (see 6 NYCRR Part 622 [the enforcement hearing procedures])." In 1994, part 624 was amended and was made applicable to hearings such as the present hearing (see 6 NYCRR 624.1(a)(6)). Thus, the "substantive and significant" standard for identifying issues applies in the present case.

Western Land Services is essentially asking that I conclude that the Commissioner did not have authority to adopt the current text of 6 NYCRR 624.1(a)(6). Such a conclusion is beyond the authority of an Administrative Law Judge. In addition, the Department's decision to promulgate a regulation "represents a final determination of the agency that there is adequate statutory authority for same" (Matter of James R. Lee (Allegro Oil and Gas), Interim Decision of the Commissioner [Dec. 12, 1989]).

Declaratory ruling DEC 23-13 recently upheld use of the procedures in 6 NYCRR part 624 for hearings on well spacing and compulsory integration.

* * * * *

Buck Mountain Associates submitted a petition for party status that proposed four issues, three of which contain sub-issues. Buck Mountain Associates states it has approximately 104 acres of leases located approximately 300 to 400 feet east of the east end of the Purvis unit (i.e., east of the east end of the proposed County Line Field). Both DEC Staff and Fortuna oppose adjudication of any of the issues proposed by Buck Mountain Associates and oppose granting party status to Buck Mountain Associates. Fortuna makes a general response stating that Buck Mountain Associates had submitted no evidence in support of its petition and had merely submitted opinion and argument much of which is not relevant. DEC Staff responds specifically to the proposed sub-issues in Buck Mountain Associates' petition.

I. Buck Mountain Associates' petition states that the notice of public hearing is improper and the exhibits are incomplete. It asserts that the notice to the Town of Catlin was not received within what it described as the 21 day requirement, and that the Stipulation exhibits on the DEC web site did not include the ownership tabulations. Buck Mountain Associates' petition includes a copy of the first page of the Stipulation with a date stamp that appears to be March 3, 2003 and the initials "TMS," but no reference to the Town of Catlin. The petition also states that Exhibit C of the Stipulation states that the seismic trend ends at the eastern boundary of the Purvis unit based upon interpretation of a particular seismic line, but that the seismic line is not shown on

Exhibit E of the Stipulation.¹⁴ The petition also states that the Purvis unit boundaries were changed from "the original Purvis maps," and poses the one-word question, "Why?"

DEC Staff argues that the hearing notice requirements in 6 NYCRR 624.3(a) were met by publication of the notice in the February 26, 2003 Environmental Notice Bulletin ("ENB"). DEC Staff submitted a copy of a United Parcel Service shipping label and tracking summary for the documents sent to the Town of Catlin, showing a delivery date of February 25, 2003. DEC Staff argues that there are no statutory or regulatory requirements that any of the Stipulation exhibits be posted on the web site and that the tabulations were available at the locations listed in the notice of hearing. DEC Staff cites the February 21, 2002 joint agreement as noting an error in an earlier version of Exhibit B1 (the Purvis unit), but also as stating that the configuration of the unit did not change when the revised map was substituted. DEC Staff also notes that Buck Mountain Associates has not identified the "original Purvis maps" nor described any alleged changes.

The applicable hearing notice requirements are those of 6 NYCRR 624.3(a). These requirements were met, as demonstrated by the affidavit of publication from the Elmira Star-Gazette and the copy of the ENB notice (marked for identification as Exhibits 1 and 2 of the hearing record). The Office of Hearings and Mediation Services also mailed copies of the notice to the chief executive officers of the municipalities in which the proposed gas field is located and to addresses of persons who had contacted the Division of Mineral Resources about the field. The petition's assertions about distribution and availability of the Stipulation do not raise any issues regarding adequacy of the notice.

With regard to the ownership tabulations, the petition contains the statement, "This omission was reviewed in previous DEC hearings and the [A]dministrative Law Judge stated that all future hearings should have the ownership tabulations on the DEC web sites as they are part of the exhibits." Based on Mr. Stalis's statement at the legislative hearing (March 25, 2003 transcript, p. 64 - 65), this is a reference to a statement in the issues ruling concerning the Quackenbush Hill Field. In that ruling, I stated that it would be preferable to have the ownership

¹⁴ Buck Mountain Associates submitted further, unauthorized, arguments about its proposed issues in August 6, 2003 correspondence responding to Mr. Gaylord's petition for party status. Among these arguments, Buck Mountain Associates asserted that the New York State Department of Transportation issued a permit for a seismic study along NYS Route 14, and questioned whether the exhibits were being reviewed properly. Buck Mountain Associates did not identify the location of Route 14 with regard to the proposed units, and neither the roads nor the town boundaries are identified on the maps in the Stipulation. However, a review of the February 12, 2003 versions of Stipulation exhibits B1 and E, in comparison with the New York State Atlas (NYS DOT, 4th ed [1998]), reveals a seismic line is located approximately where Route 14 would be found in relation to Catherine Creek. Buck Mountain Associates failed to support its suggestion that DEC Staff's review was deficient with regard to this seismic line. This additional argument does not raise any issue, nor do any of the arguments made in the August 6, 2003 letter raise issues.

tabulation available at the local document repositories with the maps and the stipulation, rather than requiring a person to make a Freedom of Information Law request to review the ownership tabulation (Matter of Pennsylvania Energy, Inc. (Quackenbush Hill Field), Ruling on Issues and Party Status. p. 8 [Feb. 13, 2002]). That ruling did not address what information should be on the DEC web site.

With regard to Buck Mountain Associates' assertion that the exhibits are incomplete in not showing one of the seismic lines, this statement is refuted by the DEC Staff whose assertions are supported by the Stipulation exhibits. Mr. Dahl's March 25, 2003 letter responding to the petition states that line 01-ERNY-16-Sch is depicted on the map although it is not labeled. This is apparently a reference to the February 12, 2003 version of Exhibit E. The earlier September 24, 2002 version of Exhibit E actually shows a seismic line, labeled 01-ERNY-16-SCH, at a location similar to the unlabeled one on the later version. With regard to the "original Purvis maps," Buck Mountain Associates did not provide a copy, did not describe any changes that would raise an issue regarding the Purvis unit boundaries, and did not assert, much less offer to prove, that the earlier map was correct.

Ruling: No issue requiring adjudication is raised concerning the notice of hearing or completeness of the exhibits.

II. Buck Mountain Associates asserts that the Peterson and Purvis unit sizes are incorrect. With regard to the Purvis unit, Buck Mountain Associates states that the well is not located in the center of the unit "as required." Buck Mountain Associates states that the unit size should be increased to 640 acres. It notes that the Learn #1 well was drilled east of the Purvis well and argues that this verifies that the gas fault extends northeast from the Purvis unit. With regard to the Petersen unit, Buck Mountain Associates asserts that the well is to be re-drilled and that the unit size cannot be predetermined. As the basis for this, Buck Mountain Associates cites opinions reported in the hearing report that is included in the Decision and Order on the Stagecoach Field (Matter of Stagecoach Field, Decision and Order of the Commissioner [Sept. 24, 1993]).

DEC Staff states that there is no statutory or regulatory requirement that the Purvis well be centered in the unit, and that ECL 23-0501(5) allows exceptions from a reasonably uniform spacing pattern for wells drilled or drilling when a spacing order is issued. DEC Staff states that the well location results from interpretation of seismic line 01-ERNY-15 Sch and the requirement that the Purvis unit abut the Peterson unit in order to cover all lands believed to be underlain by the pool (ECL 23-0501(6)). DEC Staff states that the Learn well is temporarily abandoned and has not been assigned to a field. With regard to the Peterson unit, DEC Staff states that the unit cannot reasonably be reconfigured differently and still comply with ECL 23-0501(6), and that ECL 23-0501(5) clearly contemplates that a unit may be established prior to the drilling of a well thereon. DEC Staff states that Buck Mountain Associates has not demonstrated control of acreage in or adjacent to the Peterson unit.

Buck Mountain Associates has not proposed any testimony in support of its position on this proposed issue, and its arguments are refuted by the DEC Staff's response. Buck Mountain Associates cited no basis for its assertions about the Purvis well needing to be in the center of the unit, nor about the unit size, and neither ECL 23-0501 nor 6 NYCRR part 553 (Well spacing) would impose such requirements on the County Line Field.

Ruling: No issue is raised for adjudication concerning the size of the Peterson or Purvis units.

III. Buck Mountain Associates argues that DEC is not consistent in its stipulations, decisions and orders. Buck Mountain Associates states two ways in which it believes the Stagecoach Field Decision and Order differs from the Stipulation in the present case with regard to escrowed production proceeds and royalties. Buck Mountain Associates also argues that other operators controlled four percent of the Stagecoach Field and signed a stipulation with DEC, but that this practice is not being followed in current fields.

DEC Staff argues that no affected interest is disputing the terms proposed for integration of unleased owners in County Line Field, and that Buck Mountain Associates has not presented scientific support that acreage it controls should be incorporated into any of the proposed units. DEC Staff states that the escrow requirement and the integration of interests proposed in the County Line Field are consistent with those in the Decision and Order in the Matter of Glodes Corners Road Field [Feb. 25, 2000], as well as in subsequent orders. DEC Staff states that the six fields involved in these orders are all geologically similar to the County Line Field, while the Stagecoach Field is not. DEC Staff argues that establishing a royalty fraction for unleased parcels of the lowest royalty fraction but not less than one eighth avoids creating a disincentive to lease, while providing the highest royalty fraction to unleased owners could result in less successful leasing and less drilling, a result inconsistent with the policy in ECL 23-0301. DEC Staff states that the Commissioner's Second Interim Decision in the Matter of Wilson Hollow Field [Aug. 8, 2001] found that the statute was properly applied with respect to integration of unleased owners. Although DEC Staff maintains that its negotiations with operators at Stagecoach Field are irrelevant, it notes that it has entered into a Stipulation with all known operators who control interests in the units proposed for County Line Field.

With this proposed issue, Buck Mountain Associates has not raised any factual issue or legal issue. The Decision and Order in Stagecoach Field do not govern the procedures to be followed or the contents of an order concerning the County Line Field, in view of the Decisions and Orders issued by the Commissioner since Stagecoach Field, and the other reasons cited by DEC Staff.

Ruling: No issue is raised for adjudication concerning consistency with the Stagecoach Field Decision and Order.

IV. The final issue in the petition is summarized as "Buck Mountain Inc. leases will be effected by Stipulation issue." The discussion of this issue goes on to state that the exclusion of Buck Mountain Associates' leases from the Purvis unit is not based on concrete evidence, and that future drilling permits will be affected since the proposed spacing requirements prohibit wells closer than 9,000 feet. The petition cites the Stagecoach Field Decision and Order as requiring that no drilling permits shall be considered by the Department unless 75% of the interests "are controlled by permit."

DEC Staff's response states that the petition provides no scientific support to dispute the current proposed configuration of the Purvis unit, and that the Stipulation in no way prevents development of acreage east of the proposed Purvis unit. DEC Staff states that the Decision and Order for County Line Field will only apply to existing wells identified in the Stipulation and wells which extend the field, and that since Staff has confirmed that, geologically, the field ends at the east boundary of the Purvis unit, there is no basis to assume that the County Line Field rules would apply east of seismic line 01-ERNY-16-Sch.¹⁵ DEC Staff noted that even if the proposed County Line Field rules would apply to Buck Mountain Associates' acreage, extension wells could be drilled closer than 9,000 feet to an existing well if justified and smaller units could be approved with justification.

As discussed under its first issue above, Buck Mountain Associates has not raised any issue concerning the boundaries of the Purvis unit, and its leases are outside that unit. Buck Mountain Associates has not shown why future drilling permits would be affected, in view of the area to which the proposed spacing rules would apply and in view of the provision for justifying future wells closer to existing wells (Stipulation section IV.A.3). The Stagecoach Field Decision and Order would not govern future wells in the County Line Field. Even if the reference to 75% percent of the interests was intended as a reference to Stipulation section IV.F.1, Buck Mountain Associates has not asserted that this would be inconsistent with any statutory or regulatory requirements, nor described why this would be so.

Ruling: No issue is raised for adjudication concerning effects of the Stipulation on Buck Mountain Associates' leases.

* * * * *

Anne A. and William E. McLaughlin submitted a letter stating they were requesting party status. The letter does not propose any issues, describe any evidence they expect to present, or identify any of their interests that would be affected by the proposal. Ms. McLaughlin participated in the issues conference, however, and provided some information about their position at that time. Ms. McLaughlin stated that at one time she had a map, that she had been told was prepared by PGE, but that she had not been able to locate the map as of the date of the issues conference. Ms. McLaughlin described the map as showing most of the McLaughlin

¹⁵ The map submitted by Buck Mountain Associates, showing the location of its leases, depicts parcels both east and west of seismic line 01-ERNY-16-Sch.

property as being within the Youmans unit, although their property is east of the currently proposed unit. She stated that she had heard conflicting statements, from or attributed to representatives of PGE and Fortuna, about whether the boundary of the Youmans unit might be changed from that in the present proposal. Ms. McLaughlin stated that she intended to withdraw the request for party status since she thought that whatever she said would not make any difference (Tr. 30-34, 176-177).

In response to a statement that Fortuna was evaluating whether to drill horizontally towards the east from the existing Youmans well, Ms. McLaughlin questioned whether this might go underneath the McLaughlin property. Robert Bonnar, exploration manager for Fortuna's parent company, stated that if this drilling occurs, Fortuna would not drill outside the unit, and probably not within 300 or 400 feet of the unit edge (Tr. 129-131, 139-141).

Since the date of the issues conference, the McLaughlins have not submitted the map to which Ms. McLaughlin referred, nor confirmed that the map was found.

The McLaughlins have not raised any issue that would require adjudication. To the extent that the map may be relevant to the one adjudicable issue identified above, it could be offered by another party and a ruling on its receipt in evidence would be made at that time.

Ruling: No issues requiring adjudication were raised by the McLaughlins.

* * * * *

Mr. Gaylord's petition states that, according to Fortuna, three-tenths of an acre of his land is in the proposed Whiteman unit, although he had been told earlier by Fairman that there was no gas on his acreage. According to Mr. Gaylord, he was sent a check by Fortuna in April, 2003 with a statement that by endorsing the check he would agree to continuing the lease for another year beyond its April 2003 expiration date. Mr. Gaylord stated that he sent back the check but Fortuna continued the lease "automatically" based upon the three-tenths of an acres being with in the unit. Mr. Gaylord objected to having his land "tied up" and unable to be leased to another company, and asked that the three-tenths of an acre be taken out of the unit.

The DEC Staff's August 15, 2003 response to Mr. Gaylord's petition transmitted a corrected ownership tabulation, dated August 13, 2003, which states that 0.94 acres of Mr. Gaylord's lease is in the Whiteman unit, although the corrections to the acreage figures for various parcels within that unit do not change the boundary lines and the orientation of the unit. The DEC Staff stated that Mr. Gaylord's lease terms with Fortuna are outside of the DEC's jurisdiction.

The Commissioner has held that the DEC does not participate in the negotiation of lease agreements (see Glodes Corners Road Field, *supra*; Wilson Hollow Field, *supra*). No legal or factual basis has been shown for changing the boundary of a unit based upon a disagreement between the operator and a landowner about a lease. The question whether or not Fortuna should

still have a lease on Mr. Gaylord's land might be a matter to be contested in court but is not within the jurisdiction of the DEC.

Ruling: No issue for adjudication was raised with regard to removing Mr. Gaylord's land from the Whiteman unit.

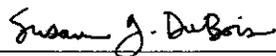
Appeals

Pursuant to 6 NYCRR 624.6(e) and 624.8(d), these rulings on party status and issues may be appealed in writing to the Commissioner on an expedited basis. While 6 NYCRR 624.6(e)(1) provides that such appeals are to be filed with the Commissioner in writing within five days of the disputed ruling, this time frame may be modified by the ALJ, in accordance with 6 NYCRR 624.6(g), to avoid prejudice to any party.

Any appeals must be received at the office of the Commissioner no later than 4:00 P.M. on Friday, March 19, 2004, at the following address: Commissioner Erin M. Crotty, NYS Department of Environmental Conservation, 625 Broadway, Albany, New York 12233-1010. Any replies must be received no later than 4:00 P.M. on Friday, April 2, 2004 at the same address.

The parties are to transmit copies of any appeals and replies to all persons on the service list at the same time and in the same manner as they are sent to the Commissioner, with two copies being sent to my address. Service by fax is not authorized. The service list will remain the same as the October 20, 2003 interim service list for now, in case there are appeals by persons whose requests for party status were denied. The service list will be revised as necessary after the deadline for appeals or after any interim decision on the appeals, whichever is later.

Albany, New York
February 20, 2004



Susan J. DuBois
Administrative Law Judge

TO: Arlene J. Lotters, Esq.
John H. Heyer, Esq.
Allan R. Lipman, Esq.
Vincent C. Stalis
Anne A. McLaughlin
James E. Halpin, Esq.
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October 20, 2003