

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
625 BROADWAY  
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Proposed Field-wide Spacing and  
Integration Rules for the

**COUNTY LINE FIELD,**

Pursuant to Article 23 of the Environmental  
Conservation Law and Parts 550 through 559 of  
Title 6 of the Official Compilation of Codes,  
Rules and Regulations of the State of New  
York.

DEC Project No. DMN-02-05

INTERIM DECISION OF THE ASSISTANT COMMISSIONER

May 24, 2005

INTERIM DECISION OF THE ASSISTANT COMMISSIONER<sup>1</sup>

Staff of the Department of Environmental Conservation ("Department") commenced proceedings pursuant to part 624 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") proposing issuance of an order that would establish field-wide spacing and integration rules for the County Line natural gas field located in Steuben, Chemung, and Schuyler Counties (the "Field"). Fortuna Energy Inc. ("Fortuna"), Department staff, party-status petitioner Western Land Services, Inc. ("WLS"), and party-status petitioner Buck Mountain Associates ("Buck Mountain") appeal from a February 20, 2004 Ruling on Issues and Party Status ("Issues Ruling") issued by Administrative Law Judge ("ALJ") Susan J. DuBois.

In the Issues Ruling, the ALJ held, among other things, that WLS raised an adjudicable issue concerning the location of the western boundary of the western spacing unit in the Field and whether an extension unit should be created at this time. The ALJ also held that Buck Mountain failed to raise an adjudicable issue concerning the proposed spacing and compulsory integration order.

For the reasons that follow, I modify the ALJ's ruling

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<sup>1</sup> Acting Commissioner Denise M. Sheehan delegated decision making authority in this proceeding to Assistant Commissioner Henry L. Hamilton by memorandum dated February 18, 2005.

by holding that WLS raised an adjudicable issue concerning the western boundary of the western spacing unit only, and remand the matter to the ALJ to conduct a hearing on the issue. I also affirm the ALJ's denial of party status to Buck Mountain. Finally, because a hearing on the western boundary of the western unit in the Field will not affect the configuration of the remaining units in the Field, I direct Department staff to prepare an interim order establishing the remaining units and integrating the interests therein.

#### Background and Proceedings

In July 2000, Fairman Drilling Company ("Fairman") and East Resources, Inc. ("East Resources") began development of the Field, and Pennsylvania General Energy Corporation ("PGE") commenced drilling operations. These companies subsequently conveyed their interests in the Field to Fortuna. Fortuna continued to develop the Field and permits to drill were issued for the existing gas wells.

Department staff determined that an order establishing the field-wide spacing and integration rules for the Field was necessary. Accordingly, Department staff entered into a stipulation dated December 30, 2002, with Fairman and PGE, which is binding upon Fortuna as successor to Fairman and PGE. The stipulation contains proposed field-wide well spacing rules and procedures for future wells, and provides for compulsory

integration of interests within the gas well spacing units.

The County Line Field as presently proposed would contain five spacing units (see County Line Field Proposed Production Units [2-12-03], Exh A). Those spacing units, from west to east, are known as the Youmans unit (630.6 acres), the Roy unit (635.9 acres), the Whiteman unit (550.4 acres), the Peterson unit (509.9 acres) and the Purvis unit (498.8 acres).

Department staff referred the matter to the Department's Office of Hearings and Mediation Services for proceedings pursuant to the Department's permit hearing procedures (see 6 NYCRR part 624 ["Part 624"]) and ALJ DuBois was assigned. WLS and individual landowners Alan T. Stephens and Darcie J. Stephens filed a joint petition seeking full party status in the proceedings. The Stephens own two contiguous parcels of property (for a total of 22.904 acres) (the "Stephens tract") located less than 100 feet to the west of the proposed western boundary of the Youmans unit. Thus, the Stephens tract is located outside any of the presently proposed spacing units for the Field. WLS holds an oil and gas lease for the Stephens tract.

Buck Mountain filed a separate petition for full party status. Buck Mountain is the holder of oil and gas leases for various parcels of property (104.415 acres in total) located 300 to 400 feet to the east of the eastern boundary of the proposed

Purvis unit and, thus, outside any of the presently proposed spacing units.

In their respective petitions, WLS and Buck Mountain challenged, among other things, the size, boundaries and configuration of the proposed spacing units. WLS and Buck Mountain sought to have the boundaries of the Field re-drawn so as to include the properties for which they hold oil and gas leases. In the alternative, WLS sought to have a drilling unit established west of the Youmans unit.

After conducting a Part 624 legislative hearing and issues conference, the ALJ issued the February 20, 2004 Issues Ruling. In that ruling, the ALJ held, among other things, that Buck Mountain failed to raise an adjudicable issue concerning the eastern boundary of the Field. The ALJ also rejected the remaining issues raised by Buck Mountain (see Issues Ruling, at 22-26). Accordingly, the ALJ denied party status to Buck Mountain (see id. at 6-7).

With respect to WLS, the ALJ held that WLS raised an adjudicable issue concerning the western boundary of the Youmans unit (see id. at 8-12), but rejected the remaining issues raised by WLS (see id. at 12-22). Because of the issue it raised concerning the western boundary of the Youmans unit, the ALJ granted party status to WLS (see id. at 6-7).

Fortuna, Department staff, WLS and Buck Mountain each

filed expedited appeals pursuant to 6 NYCRR 624.8(d)(2) from the Issues Ruling. Fortuna and Department staff filed separate replies<sup>2</sup> to WLS and Buck Mountain's appeals. WLS filed a reply to the appeals by Fortuna and Department staff.

### Discussion

#### Statutory and Regulatory Background

ECL article 23 requires the Department to regulate the development, production and operation of natural gas and oil wells within the State in a manner that will maximize the recovery of gas and oil, prevent the waste of those natural resources, and protect the correlative rights of all persons, including landowners and the general public (see ECL 23-0301). Whenever the Department finds, after notice and hearing, that the spacing of wells in a field is necessary to carry out the policy provisions of ECL 23-0301, the Department must issue an order establishing spacing units in the field that will, in the opinion of the Department, result in the efficient and economical development of the pool as a whole (see ECL 23-0501[2], [4]). Spacing units in a field are to be of "approximately uniform size and shape . . . , except that where circumstances reasonably

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<sup>2</sup> As an attachment to Department staff's reply to WLS's appeal, staff also provided an affidavit of John K. Dahl, Director of the Bureau of Oil and Gas Regulation in the Department's Division of Mineral Resources, which responded to questions the ALJ directed to staff in the Issues Ruling (see Issues Ruling, at 13). That affidavit is accepted into the hearing record.

require," the Department may grant variances from the size or shape of any spacing unit or units, provided that the allowable production from the wells is adjusted so that the owners of each spacing unit "shall receive their just and equitable share of the production from the pool" (ECL 23-0501[3]).

The Department is also authorized to issue an order integrating all tracts and interests in the spacing units for development and operation. In the absence of voluntary integration, and after a finding that integration is necessary to accomplish the policies of ECL 23-0301, the Department must, after notice and hearing, issue a compulsory integration order (see ECL 23-0901[2], [3]). The hearing on compulsory integration may be held coincidentally with the hearing required prior to issuance of a spacing order (see ECL 23-0901[2]).

In general, after a well operator has developed one or more gas producing wells in a field, Department staff determines whether an order establishing the size and boundaries of the unit from which each well will draw natural gas, and integrating interests within those units, is necessary to accomplish the purposes of ECL 23-0301 (see Matter of Western Land Services, Inc., Declaratory Ruling DEC #23-13, Jan. 29, 2004, at 2 ["DR 23-13"]). To arrive at proposed spacing units, staff reviews test data usually provided by the operator of the proposed units. Department staff enters into a stipulation with the operator that

includes, among other things, the size and boundaries for each well spacing unit and terms for compulsory integration of interests. Thereafter, staff initiates the public notice and hearing process required by ECL 23-0501 and 23-0901, and refers the matter to the Department's Office of Hearings and Mediation Services for proceedings pursuant to Part 624. After Part 624 proceedings are concluded, the Commissioner issues a gas well spacing and compulsory integration order based upon the record developed through the Part 624 process.

#### Applicability of Part 624 Procedures and Use of Stipulations

On its appeal, WLS objects to the use of Part 624 procedures for hearings held pursuant to ECL 23-0501 or ECL 23-0901. Specifically, WLS objects to the use of the "substantive and significant" test to determine whether issues raised by party-status petitioners are adjudicable (see 6 NYCRR 624.4[c][1][iii]). WLS contends that application of the "substantive and significant" test at the issues conference stage of the proceeding violates its constitutional and statutory due process rights.

A similar challenge was recently rejected in Matter of Terry Hill South Field (Commissioner's First Interim Decision, Dec. 21, 2004, at 9-10). As noted in Terry Hill South, Part 624 permit hearing procedures are expressly made applicable to gas well spacing orders by regulation, and provide the parties with

the maximum opportunity available under the Department's regulations to participate in review of such orders (see id. at 8; see also 6 NYCRR 624.1[a][6]; DR 23-13, at 4). Moreover, for the reasons stated in Terry Hill South, use of the "substantive and significant" test to determine whether issues proposed by party-status petitioners require an evidentiary hearing does not deprive them of their right to a hearing (see Terry Hill South, at 9-10). Thus, the ALJ's rejection of WLS's objection to the application of Part 624 procedures to this proceeding is affirmed (see Issues Ruling, at 21-22).

WLS's challenge to Department staff's practice of entering into stipulations with well operators is also rejected for the reasons stated in Terry Hill South (see id. at 8-9).<sup>3</sup> Because the stipulation was not executed by all parties to the proceeding, it does not have the effect of removing any issues from adjudication (see id.). The stipulation executed by staff and Fortuna is merely the functional equivalent of a draft permit, and party-status petitioners remain free to challenge the terms and conditions of the order proposed by the stipulation, so

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<sup>3</sup> On its appeal, Buck Mountain also challenges the Department's use of stipulations in gas well spacing proceedings. Buck Mountain did not raise its challenge before the ALJ, however. Therefore, its arguments on this issue are not properly before me (see Matter of Village of Freeport, Decision of the Commissioner, Nov. 26, 2003, at 8-9; Matter of Town of Brookhaven, Interim Decision of the Commissioner, July 27, 1995, at 5).

long as the standards for raising an adjudicable issue under Part 624 are met (see id.). Accordingly, the ALJ's determination to reject WLS's challenge to Department staff's use of stipulations is also affirmed (see Issues Ruling, at 15).

#### Adequacy of Public Hearing Notice

Buck Mountain argues that the February 20, 2003 combined notice of public hearing and notice of negative declaration issued in this proceeding was inadequate. Buck Mountain contends that the notice failed to adequately advise all parties and all potentially interested parties in the County Line Field about the scope of the proceedings, the administrative process, and subsequent changes that might affect correlative rights in the Field. Accordingly, Buck Mountain seeks re-issuance of the notice of public hearing.

Buck Mountain's challenge to the February 20, 2003 notice of public hearing is rejected. Because Buck Mountain received actual notice of the proceedings, filed a petition for party status, appeared and was given the full opportunity to be heard at the issues conference, it lacks any basis for the contention that it received inadequate notice (see Matter of Lovett v Flacke, 83 AD2d 718, 719 [3d Dept], lv denied 55 NY2d 604 [1981] [citing Matter of Zartman v Reisem, 59 AD2d 237, 242 [4th Dept 1977])). In addition, Buck Mountain fails to identify any statutory or regulatory requirement the notice failed to

satisfy (see 6 NYCRR 624.3[a]; see also Matter of Pennsylvania General Energy, Inc. [Quackenbush Hill Field], Commissioner's Interim Decision, Oct. 28, 2002, at 4). To the contrary, the record reflects that all regulatory publication requirements were satisfied. Moreover, the notice gave sufficient detail to provide all potential parties with reasonable notice concerning the nature and scope of the Part 624 proceeding.

#### Spacing Unit Configuration

##### 1. Purvis Unit

Buck Mountain challenges the ALJ's ruling that it failed to raise an adjudicable issue concerning the configuration of the Purvis unit (see Issues Ruling, at 25). Buck Mountain notes that as presently proposed, the Peterson and Purvis units are differently sized, and the gas wells are not located in the centers of the spacing units. Buck Mountain contends that spacing units are statutorily required to be of uniform size and configuration (see ECL 23-0501[3]). Buck Mountain argues that nothing in the record supports a departure from these statutory requirements. Buck Mountain maintains that if the size of the Purvis unit is changed even slightly, property subject to its oil and gas leases would be included in the Field. Buck Mountain's offer of proof, however, fails to raise an adjudicable issue concerning the configuration and boundaries of the Purvis unit.

In a Part 624 proceeding concerning a proposed gas well

spacing order, where, as here, Department staff has independently reviewed the data supporting a proposed well spacing order and concluded that the proposal meets applicable statutory and regulatory requirements, the party proposing an issue challenging the proposed order has the burden at the issues conference stage of demonstrating that the issue is "substantive and significant" (see 6 NYCRR 624.4[c][4]; Terry Hill South, at 9). A party proposing a factual issue may carry its burden at the issues conference in one of several ways. First, the party may offer proof, usually in the form of proposed expert testimony, alleging that facts are either contrary to those in the stipulation and its supporting materials, or that defective information was used to support the proposed spacing order (see Terry Hill South, at 11). In such circumstance, an intervenor must also allege that if its facts are correct, relevant regulatory or statutory standards or criteria might not be met. In the alternative, an intervenor may offer proof that demonstrates an omission or defect in the stipulation or its supporting materials that is likely to substantially affect the proposed order (see id.).

Once an intervenor asserts that a substantive and significant issue exists, a proponent of the proposed gas well spacing order may seek to rebut the assertion through reference to the stipulation and supporting materials in order to assist the ALJ in ruling on the matter (see id. at 12). The ALJ will

take into account the arguments, offers of proof, the stipulation and supporting documents, and Department staff's expertise in reviewing the matter. An issue will be advanced to adjudication where sufficient doubt exists about whether a proposed well spacing order meets all statutory and regulatory criteria such that a reasonable person would inquire further (see id.).

Buck Mountain's offer of proof at the issues conference was insufficient to raise an adjudicable issue concerning the size and configuration of the Field. Buck Mountain's contentions that the proposed spacing units are not of uniform size and that the wells are not centrally located in each unit are not sufficient alone to raise an adjudicable issue. ECL 23-0501(3) does not require absolute uniformity in all circumstances. Rather, ECL 23-0501(3) requires that spacing units be of "approximately uniform size and shape" and, where "circumstances reasonably require," the Department may grant variances from the size and shape of any spacing unit (see also ECL 23-0501[5] [requiring "a reasonably uniform spacing pattern"]).

Moreover, Buck Mountain's assertion that the eastern boundary of the Purvis unit is incorrectly located is rebutted by other information in the record. The field report submitted in support of the stipulation indicates that the subsurface gas-bearing feature -- the "graben" -- ends just off the eastern end of the Purvis unit (see County Line Field Report [10-20-02],

Stipulation, Exh C, at 14). This conclusion was confirmed by Department staff after it reviewed the available maps and seismic information (see Issues Conference Transcript, at 138). Buck Mountain failed to make an offer of proof challenging this information that suggests that such information was defective, that information exists contrary to that supporting the stipulation, or that some other defect or omission affects the proposed boundary and spacing unit configuration such that a reasonable person would inquire further. Accordingly, Buck Mountain failed to raise an adjudicable issue concerning the proposed configuration of the Purvis unit, and the ALJ's ruling on this point is affirmed.<sup>4</sup>

## 2. Youmans Unit

On their appeals, both Fortuna and Department staff challenge the ALJ's determination that WLS raised a substantive and significant issue concerning whether the western boundary of the Youmans unit should be moved to the west to include the Stephens tract or, if the Stephens tract is not included in the Youmans unit, whether an extension unit should be created to the west of the Youmans unit (see Issues Ruling, at 11-12). Fortuna

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<sup>4</sup> Although Buck Mountain argued issues before the ALJ concerning the configuration of the Peterson unit, it does not raise any specific issues concerning the Peterson unit on appeal. In any event, to the extent Buck Mountain's appeal may be read as raising such issues, its failure to raise an adjudicable issue concerning its inclusion in the Field renders its challenges to the configuration of the Peterson unit academic.

and staff contend that WLS's offer of proof is speculative and conclusory, and lacks a factual foundation. I conclude, however, that the ALJ properly applied the substantive and significant standard in holding that WLS's offer of proof was sufficient to raise an adjudicable issue concerning the western boundary (see Matter of Hyland Facility Assoc., Commissioner's [Third] Interim Decision, Aug. 20, 1992, at 2).

At the issues conference, WLS noted that the Youmans well is located closer to the western boundary of the Youmans unit than to the eastern boundary -- the Youmans well is located 3,620 feet from the western boundary and 7,560 feet from the eastern boundary. WLS proffered the testimony of its expert, Michael Joy, Ph.D., a geologist with experience concerning the Black River and Trenton carbonates in New York. Dr. Joy indicated that the subsurface gas-bearing feature likely continues to the west of the Youmans unit. In support of this proposition, WLS offered an earlier map of the Youmans unit prepared by PGE, Fortuna's predecessor in interest, and submitted to the Department, which shows the gas-bearing feature trending to the west and under the Stephens tract. Dr. Joy also offered to testify that nothing in the record suggests the presence of a subsurface gradient that would support a finding that the Youmans well will drain a greater area to the east than to the west of the well. Accordingly, Dr. Joy offered to testify that it is

reasonable to conclude, based upon the information in the stipulation and supporting materials, that the Youmans well will drain an area equal in size both east and west of the well and, therefore, drain natural gas from acreage located to the west of the western boundary of the Youmans's unit as presently proposed.

WLS's offer of proof raises a "significant" issue (see 6 NYCRR 624.4[c][3]). Fortuna is correct that the governing statutes and regulations do not specifically require that a gas well be centrally located within a proposed spacing unit. Nevertheless, ECL 23-0501 does require that "no unit shall be smaller than the maximum area that can be efficiently and economically drained by one well" (ECL 23-0501[4]). If a productive well in the Youmans unit would drain lands to the west of the western boundary, the Youmans unit as presently proposed would be smaller than the maximum area that would be drained by such a well and, thus, the requirements of ECL 23-0501(4) would not be met. Accordingly, WLS has identified an issue that has the potential to result in a major modification of the spacing order as proposed (see 6 NYCRR 624.4[c][3]).

Moreover, WLS's offer of proof raises sufficient doubt about whether the western boundary is correctly placed so as to reasonably require further inquiry (see 6 NYCRR 624.4[c][2]). Dr. Joy's assertion that the gas-bearing feature likely extends to the west is supported by the map prepared by PGE. Moreover,

WLS offers proof, in the form of expert testimony, that absent evidence of a subsurface gradient or other evidence to the contrary, gas wells generally drain areas equidistantly in all directions. If a productive well in the Youmans unit would be expected to drain lands approximately 7,560 feet to the eastern boundary of the unit, it would generally be expected that such a well would also drain lands approximately 7,560 feet to the west. Thus, WLS's offer of proof raises a reasonable doubt about the propriety of the western boundary, which is located only about 3,620 feet from the presently proposed Youmans well.

In response to WLS's offer of proof, Fortuna and Department staff offered nothing that rebuts the assertions made by WLS so as to remove that doubt. In contrast to the record concerning the eastern boundary of the Purvis unit, nothing in the stipulation, its supporting materials, or the issues conference record indicates that the subsurface gas-bearing feature ends at the western boundary of the Youmans unit. Although Department staff asserts that it has reviewed the available geological data and concluded that the boundary is correctly placed, it does not explain how it reached that conclusion or offer any evidence that would support that conclusion.

Moreover, Fortuna's offer of proof at the issues conference that the Youmans well is presently unproductive and

that it plans to re-drill the well horizontally to the east also fails to remove the doubt raised by WLS's offer of proof. To the contrary, Fortuna's arguments join factual and credibility issues that cannot be resolved at the issues conference stage. Thus, WLS carried its burden of establishing an issue for adjudication.

Fortuna and Department staff also contend that WLS's issue is not significant because the stipulation allows for the future development of extension units. They do not explain, however, how the correlative rights of land owners to the west of the Youmans unit are protected if the Youmans well would drain those lands before an extension unit is developed, if one is developed at all.

I disagree with the ALJ, however, that WLS raised an adjudicable issue concerning whether an extension unit should be created to the west of the Youmans unit at this time. Nothing in WLS's offer of proof indicates that any party has sought to develop a well to the west of the Youmans unit or otherwise satisfied the criteria for the establishment of an extension unit at this time. Thus, I modify the ALJ's ruling in this regard and hold that WLS failed to raise an adjudicable issue concerning the creation of an extension unit.

#### Compulsory Integration

##### 1. Buck Mountain's Remaining Issues on Appeal

Buck Mountain argues that the proposed well spacing

order for the County Line Field is inconsistent with prior compulsory integration orders, particularly the orders issued for the Stagecoach Field and the Wilson Hollow Field. Buck Mountain challenges the terms and conditions by which interests within the Field are integrated into the proposed compulsory integration order. However, Buck Mountain raised no adjudicable issue concerning the configuration of the Field and, accordingly, no issue concerning whether property for which it holds gas and oil leases should be included in the Field. Thus, because Buck Mountain has no interest in the Field as proposed, its challenge to the terms by which interests within the Field are integrated is academic. Moreover, Buck Mountain fails to indicate how any future drilling permit or extension unit that might include its interests are adversely affected by the integration of interests within the Field as presently proposed. Accordingly, because Buck Mountain's arguments have no potential to affect the proposed compulsory integration order, it fails to raise a significant issue (see 6 NYCRR 624.4[c][3]).

## 2. WLS's Remaining Issues on Appeal

The remaining issues WLS raises on its appeal also concern the terms by which its interests in the Field would be integrated into the proposed compulsory integration order (see ECL 23-0901). Because those issues depend upon a determination that lands for which WLS holds mineral leases should be included

in the Field, they are not ripe for review at this time. Accordingly, I reserve decision on WLS's remaining issues until such time as it is determined whether the Stephens tract should be included in the Youmans unit.

3. Department Staff's Remaining Issue on Appeal

Department staff requests that even if the location of the western boundary of the Youmans unit is subjected to adjudication, I should issue an interim order establishing the Roy, Whiteman, Peterson, and Purvis units, and integrating the interests associated with those units. Department staff contends that moving the Youmans unit's western boundary to the west would not affect the configuration of the remaining unit. In response, WLS offers only conclusory assertions that if the western boundary of the Youmans unit is moved, the remaining units may need to be adjusted.

WLS's assertions are insufficient to raise an adjudicable issue concerning the configuration of the remaining units in the Field. Accordingly, staff's request is granted in part and the matter is remanded to staff for issuance of an interim order establishing the configuration of the Roy, Whiteman, Peterson and Purvis units, and integrating the interests therein.

Conclusion

In sum, petitioner Buck Mountain failed to carry its

burden of raising an adjudicable issue concerning the size and configuration of the Purvis unit. Thus, the ALJ's ruling denying Buck Mountain party status is affirmed in all respects.

Petitioner WLS raised an adjudicable issue concerning the western boundary of the Youmans unit, but did not raise an adjudicable issue concerning the establishment of an extension unit west of the Field as presently proposed. Accordingly, the ALJ's ruling is modified in part and otherwise affirmed, and the matter is remanded to the ALJ to conduct an adjudicatory hearing and prepare a hearing report concerning the western boundary of the Youmans unit. With respect to the remaining issues raised by WLS concerning the terms and conditions of its integration into the Field, I reserve decision until it is determined whether WLS's interests should be included in the Field.

With respect to the remand for adjudication, Fortuna asserts that much of data supporting unit configuration is being withheld as confidential. Should it be necessary for Fortuna to reveal such data in order to carry its burden at hearing, the ALJ should take the appropriate steps to determine whether the information is confidential and, if so, take necessary precautions to make sure confidential information is protected during the hearing process (see, e.g., Matter of Glodes Corners Road Field, Interim Decision of the Commissioner, Feb. 25, 2000, at 5).

