

**STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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In the Matter of the Integration of  
Interests within an Individual Spacing  
Unit Pursuant to Environmental  
Conservation Law ("ECL") § 23-0901(3)  
Known as,

**DZYBON 1.**

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In the Matter of the Integration of  
Interests within an Individual Spacing  
Unit Pursuant to Environmental  
Conservation Law ("ECL") § 23-0901(3)  
Known as,

**EOLIN 1.**

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In the Matter of the Integration of  
Interests within an Individual Spacing  
Unit Pursuant to Environmental  
Conservation Law ("ECL") § 23-0901(3)  
Known as,

**GILLIS 1.**

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In the Matter of the Integration of  
Interests within an Individual Spacing  
Unit Pursuant to Environmental  
Conservation Law ("ECL") § 23-0901(3)  
Known as,

**LITTLE 1.**

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**INTERIM DECISION  
OF THE COMMISSIONER**

DEC Order No.  
DMN 06-37

DEC Order No.  
DMN 06-33

DEC Order No.  
DMN 06-34

DEC Order No.  
DMN 06-13

## INTERIM DECISION OF THE COMMISSIONER

### INTRODUCTION

This interim decision addresses an appeal from a June 6, 2007, ruling of the Chief Administrative Law Judge (ALJ) concerning the applicability of the Permit Hearing Procedures of the New York State Department of Environmental Conservation (Department or DEC), set forth in Part 624 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), to compulsory integration proceedings conducted pursuant to title 9 of article 23 of the New York Environmental Conservation Law (ECL).

#### Compulsory Integration - General Background

The New York Legislature established a process in ECL article 23, title 9, which promotes the efficient siting and production of oil and gas wells in the State. This efficiency is promoted through appropriate spacing of wells - too many wells within close proximity could deplete the resource too quickly. As a result of amendments to the law enacted in 2005, when an applicant seeks a permit to drill an oil or gas well in the State of New York, it designates an area of land of sufficient size around the proposed well to promote this efficiency. This area of land is called the "spacing unit." The application for a well drilling permit identifies all landowners within the spacing unit.

Typically, the permit applicant enters into leases with landowners in the spacing unit. Other landowners in the spacing unit who do not enter into leases are referred to as "uncontrolled owners." These uncontrolled owners cannot veto the permit application or opt out of the spacing unit, but must instead elect one of three options for how their mineral interests will be integrated with other mineral interests in the spacing unit. These "integration options"<sup>1</sup> entail different

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<sup>1</sup> The three integration options are as follows:

- (1) integrated participating owner (IPO) - pays all costs associated with the exploration as they are incurred and acquires a full working interest in its proportionate share of the spacing unit;
- (2) integrated non-participating owner (NPO) - reimburses the well operator out of production proceeds for its

levels of risks and rewards for the uncontrolled owners. If uncontrolled owners do not elect any of the three options, by operation of law, they will be integrated into the spacing unit as "integrated royalty owners" who only receive a royalty for their share of a well's production.

The process for establishing the status of uncontrolled owners within a spacing unit then proceeds to a compulsory integration hearing, over which staff presides and which may culminate in a final compulsory integration order. A final compulsory integration order would not be issued if the matter was held over or if the well operator or uncontrolled owners raised any issues as to the draft order. In the latter circumstance, the matter may then be referred to the Department's Office of Hearings and Mediation Services (OHMS) for further proceedings before an Administrative Law Judge (ALJ) under 6 NYCRR Part 624.

#### Summary of the Chief ALJ's Procedural Ruling

The four captioned matters were referred to OHMS for adjudication of various issues raised in the respective compulsory integration hearings. The matters were assigned to Chief ALJ James T. McClymonds, who ruled on five procedural issues. Specifically, the Chief ALJ ruled that when a matter is referred to OHMS after a compulsory integration hearing for adjudication of a substantive and significant issue,

- (1) a legislative hearing shall be conducted, pursuant to 6 NYCRR 624.4(a);
- (2) an issues conference shall be held, pursuant to 6 NYCRR 624.4(b);

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proportionate share of all costs incurred for the development of a successful oil or gas well within the spacing unit, pays an additional risk penalty to the well operator equal to two hundred percent of costs, and shares in the production of the well according to its proportionate interest; or

- (3) integrated royalty owner - receives a set royalty for its share of production, free of any charges, taxes, liabilities, or other obligations that might be incurred by the well operator or other non-royalty owners within the spacing unit.

(ECL 23-0901[3][c][1][i]; 23-0901[3][a][1], [2], [3].)

- (3) all owners within the subject spacing unit are mandatory parties to any subsequent adjudicatory proceedings, pursuant to 6 NYCRR 624.5(a);
- (4) an automatic right to file an interim appeal from an ALJ ruling is allowed, pursuant to 6 NYCRR 624.5(e)(1)(v); and
- (5) the Part 624 hearings should be held in a venue in close proximity to the wells, pursuant to 6 NYCRR 624.3(b)(2).

The Chief ALJ reserved decision on two other issues:  
(1) who bears the costs of the Part 624 proceedings, and  
(2) whether adjudication extends or reopens the statutory election period for uncontrolled owners, pursuant to ECL 23-0901(3)(c).

#### Appeal from the Chief ALJ's Ruling

Fortuna Energy, Inc., (Fortuna), which is the well operator in each of the proceedings, moved for leave to file an expedited appeal from various parts of the Chief ALJ's procedural ruling.<sup>2</sup> Chesapeake Appalachia, L.L.C. (Chesapeake), which is a well operator in other proceedings, submitted an amicus filing in support of Fortuna's motion. Department staff submitted a letter in which it stated that it did not object to the granting of leave to appeal the Chief ALJ's ruling. Western Land Services, Inc. (WLS), which is an uncontrolled owner in these and other proceedings, opposed Fortuna's motion.

The Commissioner granted Fortuna's motion, allowed Chesapeake to participate in the appeal as an amicus, and set a briefing schedule. Fortuna subsequently filed its memorandum of law in support of its appeal from the Chief ALJ's procedural ruling. Department staff filed a reply to Fortuna's appeal, which was comprised of a memorandum of law and the affidavit of Kathleen Sanford, who is the Department's Permits Section Chief in the Bureau of Oil and Gas Regulation, Division of Mineral Resources. WLS filed its reply to Fortuna's appeal, which consisted of a letter and a resubmission of the affirmation of attorney Michael P. Joy (initially submitted in opposition to

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<sup>2</sup> The well operators have drilled the wells in each of the captioned proceedings.

the motion for leave to appeal). Chesapeake, as amicus, submitted a memorandum of law in support of Fortuna's appeal.

Fortuna claims that the Chief ALJ's ruling creates an inefficient hearings process and will cause delays in determining the status of uncontrolled owners. Specifically, Fortuna raised four issues in its appeal:

- (1) a Part 624 legislative hearing is duplicative and therefore unnecessary because the compulsory integration hearing under ECL 23-0901 serves the same purpose;
- (2) the Chief ALJ wrongly determined that uncontrolled owners are mandatory parties in a Part 624 adjudication following a compulsory integration proceeding;
- (3) a Part 624 adjudication does not extend or reopen the ECL 23-0901 election period for uncontrolled owners; and
- (4) Part 624 hearings that follow compulsory integration hearings should take place in Albany.

Department staff and Chesapeake agree with Fortuna on all of the issues that Fortuna raised. WLS disagrees with Fortuna on all issues and further claims that the issue of whether a Part 624 adjudication extends or reopens the ECL 23-0901 election period for uncontrolled owners is not presented in this appeal because the Chief ALJ did not decide that issue.

#### Summary of this Interim Decision on Issues Raised in this Appeal

As to the first issue raised by Fortuna, I agree with the Chief ALJ that a legislative hearing conducted pursuant to 6 NYCRR 624.4(a) is required in any matter referred to OHMS for adjudication after a compulsory integration hearing.

As to the second issue raised by Fortuna, I do not accept the Chief ALJ's ruling that uncontrolled owners within a spacing unit are mandatory parties in any subsequent Part 624 proceedings. I instead determine that uncontrolled owners within a spacing unit have automatic standing to be potential parties in any subsequent Part 624 proceedings. Before being accorded party status, however, those uncontrolled owners need to demonstrate in a subsequent Part 624 proceeding that any

issues they raise within compulsory integration are both substantive and significant.

As to the third issue raised by Fortuna, because the Chief ALJ reserved decision on whether a Part 624 adjudication could extend or reopen the ECL 23-0901 election period, that issue is not before me on this appeal, and I decline to reach it now.

Finally, as to the fourth issue raised by Fortuna, I agree with the Chief ALJ that Part 624 hearings should take place in a location in close proximity to the wells. Each of these issues is addressed in more detail below.

### **Issue No. 1: The Requirement of a Legislative Hearing**

The Chief ALJ solicited comments from the parties as to the applicability of Part 624 to integration hearings mandated under ECL 23-0901. Upon his review of the comments, the Chief ALJ noted the unanimous recommendation of the parties to dispense with the legislative hearing aspect of any subsequent Part 624 hearing. In the parties' view, the legislative hearing aspect of any subsequent Part 624 hearing is satisfied by the integration hearing conducted prior to referral of the matter to OHMS. The Chief ALJ disagreed with this view and concluded that in any subsequent Part 624 proceeding, a legislative hearing is required. All parties except WLS reiterated their positions in this appeal. WLS changed its position and now asserts that a legislative hearing under Part 624 is required once a compulsory integration matter is referred for further proceedings under Part 624.

I concur with the Chief ALJ's conclusion that a legislative hearing pursuant to Part 624 is required once a matter is referred for a hearing following a compulsory integration hearing. However, my determination is based in part on a different analysis.

ECL 23-0901(3)(d) provides that "substantive and significant" issues related to the compulsory integration hearing process shall be adjudicated. The Department's procedures for adjudication of issues raised in permit proceedings are set forth in Part 624.<sup>3</sup> Matters that are

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<sup>3</sup> Part 624 procedures, which are denominated "permit hearing procedures," apply to adjudication of substantive and significant issues referred from a compulsory integration hearing. While compulsory integration hearings are not permit hearings, *per se*, they arise from an application for a well drilling permit. Moreover,

referred for adjudication under Part 624 are handled in a three-part process: legislative hearing, issues conference, and adjudicatory hearing (6 NYCRR 624.4). Thus, a legislative hearing is part of the overall hearing process under Part 624.

The legislative hearing is open to the general public, and any person may provide oral or written comments. These comments are unsworn, but they become part of the record, and the ALJ may refer to them to inquire further on any issues once the matter moves into the issues conference, which usually follows immediately after the legislative hearing. I see no reason to exclude the public from the opportunity to provide comments. Indeed, providing the public with this opportunity promotes transparency in government and comports with the statutory requirement for public hearings pursuant to ECL article 23 (see ECL 23-0305[2]).<sup>4</sup>

Nor will a legislative hearing delay the proceedings. The majority of legislative hearings proceed with dispatch. Moreover, the ALJ will inform the parties who participated in the compulsory integration hearing that the comments that they offered there shall be incorporated into the record of the Part 624 legislative hearing, further promoting efficiency.

The Chief ALJ stated that a key difference between the integration hearing and the Part 624 legislative hearing is that "[t]he integration hearing is presided over by a member of Department staff, namely a designee of the Director of the Division of Mineral Resources" while "[a] Part 624 legislative hearing, in contrast, is conducted by an administrative law judge ("ALJ") employed in OHMS" (Ruling on Procedural Issues, June 6, 2007, at 4). The Chief ALJ further noted that

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Department program guidance provides that adjudication of issues arising from a compulsory integration hearing would be conducted pursuant to 6 NYCRR Part 624 (see Department Program Policy DMN-1, issued February 22, 2006, entitled "Public Hearing Processes for Oil and Gas Well Spacing and Compulsory Integration [DMN-1]," at 4). However, while Part 624 provides a framework for these proceedings, not all of its provisions fit neatly with the compulsory integration process. At times, the Part 624 procedures will need to be adjusted so that the statutory mandates contained in title 9 of ECL article 23 are met.

<sup>4</sup> Also, as addressed further below, the venue for the legislative hearing further enables public participation - the compulsory integration hearing is held in Albany, while the Part 624 legislative hearing is held in a location that is closer to the spacing unit (see 6 NYCRR 624.3[b][2]).

"The ALJs are required, by law and regulation, to conduct hearings in a fair and impartial manner, and exercise judgment independently of Department staff (see State Administrative Procedure Act ["SAPA"] § 303; 6 NYCRR 624.2[b]; 6 NYCRR 624.8[b][2][i]). In addition, a Departmental ALJ is subject, among other things, to the rule against ex parte communications (see SAPA § 307[2]; 6 NYCRR 624.10). The process before the ALJ, including the Part 624 legislative hearing, has the procedural safeguards and formalities of a trial, including the right to present and cross-examine witnesses, and a decision limited to a formal evidentiary record. Even though the integration hearing may be conducted impartially, the integration hearing officer does not serve the same institutional role as the ALJ, nor is that officer under similar legal constraints designed to protect the trial-like administrative adjudicatory process." (Id. at 4-5.)

To the extent that any language in the ruling might be read as suggesting that participants in a public hearing conducted by Department staff are not afforded every due process safeguard appropriate to the respective proceeding, I wish to dispel that notion.

Additionally, a Part 624 legislative hearing is not a trial. It does not include the right to present and cross-examine witnesses, nor is it in itself an adjudicatory proceeding. As provided in 6 NYCRR 624.2(t), the legislative hearing in a Part 624 proceeding is "the portion of the hearing process during which unsworn statements are received from the public and the parties." Thus, any suggestion that the legislative hearing enjoys the same due process safeguards as the evidentiary aspect of a Part 624 adjudicatory hearing would be incorrect.

In comparing the compulsory integration hearing with the Part 624 legislative hearing, the Chief ALJ notes that public comment on a proposed integration order is not taken at an integration hearing. In his analysis, however, he states that "one purpose of the Part 624 legislative hearing is to receive unsworn statements by the parties and the public concerning a proposed Departmental action (see 6 NYCRR 624.4[a][1])." (Ruling, at 5.) He further states that "[m]oreover, even mineral rights owners not otherwise willing or able to participate in the adjudicatory phase of a Part 624 proceeding

may wish to offer comments on the draft integration order for the ALJ's consideration." (Id.)

As noted, the purpose of the Part 624 legislative hearing is to receive unsworn statements by the parties and the public concerning a proposed Departmental action (6 NYCRR 624.2[t]). Section 624.4(a) does not expand that purpose, but merely indicates how those comments may be submitted and summarized, and how they may be subsequently used by the ALJ at the issues conference.

An ALJ's consideration of those public comments in a proceeding is limited. Section 624.4(a)(4) provides that statements made at the legislative hearing "may be used by the ALJ as a basis to inquire further of the parties and potential parties at the issues conference."<sup>5</sup> This inquiry may lead to the clarification and refinement of an issue for adjudication.

In conclusion, a compulsory integration hearing that Department staff conducts is not the equivalent of a Part 624 legislative hearing. Accordingly, when a matter is referred to OHMS after a compulsory integration hearing for adjudication of a substantive and significant issue, a legislative hearing pursuant to 6 NYCRR 624.4 is required, notwithstanding the record established by the compulsory integration hearing from which the matter is referred. To further expedite a legislative hearing, the record from the compulsory integration hearing will be incorporated into the record of a legislative hearing conducted pursuant to Part 624.

## **Issue No. 2: Party Status in the Adjudication**

The second ruling from which Fortuna appeals concerns party status for uncontrolled owners within a spacing unit. The Chief ALJ ruled that Part 624 proceedings arising from compulsory integration are multi-applicant proceedings and that uncontrolled owners are mandatory parties in those proceedings (Ruling, at 7). I do not accept this conclusion and instead determine that uncontrolled owners within a spacing unit have automatic standing to participate in any Part 624 proceeding

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<sup>5</sup> Statements made at the legislative hearing "are not to be used to frame issues, but to alert the ALJ to matters about which the ALJ may wish to inquire further during the issues conference, if they are not independently addressed at that time by the parties or the potential parties." (Part 624 Public Comment Responsiveness Document of 1994, at 14.)

that follows a compulsory integration hearing. However, this recognition of automatic standing for uncontrolled owners does not dispense with the statutory requirement that they demonstrate that any issues they raise are both substantive and significant.<sup>6</sup> In other words, their standing alone in the Part 624 process does not automatically advance issues for adjudication.

Stating that compulsory integration proceedings are multi-applicant proceedings is an attempt, I believe, to fit the compulsory integration process into the standard procedures of Part 624. Here, however, the fit can be awkward and ultimately unnecessary in determining party status for uncontrolled owners. Based on a strict reading of 6 NYCRR 624.5(a), the mandatory parties to Part 624 proceedings in permit matters are only the applicant and Department staff. Section 624.2(d) defines "applicant" as "the person who has applied for one or more permits from the department." Section 624.2(x) defines "permit" as "any permit, certificate, license or other form of department approval, other than an enforcement order, issued in connection with any regulatory program administered by the department."

The closest analogy here is the application for a well drilling permit (see ECL 23-0501). In that application, the well operator who seeks to drill would be the "applicant." ECL 23-0501(1)(b)(2) defines "well operator" as "the applicant for a permit to drill, deepen, plug back or convert a well subject to this title and titles 7 and 9 of this article, or the actual operator of the well if the well is not operated by the original applicant." Under this construct, an uncontrolled owner is not an applicant.

But compulsory integration proceedings are not permit application proceedings - they are adjunct to an application for a permit to drill a well - and the nomenclature for parties in Part 624 proceedings does not fit perfectly. However, well operators and uncontrolled owners have significant mineral

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<sup>6</sup> The Legislature used the terms "substantive and significant" when it amended ECL 23-0901(3) for objections raised at a compulsory integration hearing (see ECL 23-0901[3][d]). As discussed, infra, at 12-13, in Part 624, "substantive and significant" represents the threshold standard that a potential party must meet in order to advance an issue to adjudication (see 624.4[c][1][iii]; 624.4[c][2]; 624.4[c][3]). If a matter is referred by staff for an adjudicatory hearing, the ALJ rules on which issues go forward to adjudication, based on the substantive and significant standard.

interests that are directly affected by compulsory integration, and their interests should be recognized in subsequent proceedings under Part 624. In other words, although well operators and uncontrolled owners are not applicants because compulsory integration proceedings are not permit application proceedings, they nonetheless have significant mineral interests that are directly affected. Thus, they should have automatic standing to participate in any Part 624 proceedings following a compulsory integration hearing.

Therefore, while I do not adopt the rationale in the Chief ALJ's ruling that compulsory integration proceedings are multi-applicant proceedings, I determine that well operators and uncontrolled owners have automatic standing to participate in Part 624 proceedings that follow compulsory integration hearings. This recognition of automatic standing is based on the mineral interests that well operators and uncontrolled owners possess and are directly affected by compulsory integration. The well operators and uncontrolled owners would then have to demonstrate that any issues they wish to pursue in a Part 624 proceeding are substantive and significant, as ECL 23-0901(3)(d) requires.

#### Procedures for Identifying and Advancing Issues for Adjudication

The procedures for identifying and advancing issues for adjudication in compulsory integration proceedings - from the compulsory integration hearing, a referral of issues for adjudication to OHMS, and any subsequent Part 624 proceedings - are set forth below. At the compulsory integration hearing, objectors need only raise their substantive and significant issue or issues by oral presentation on the record, articulating the reasons supporting each issue. This support may also be in written form, as in the case of disputed well costs, but need not always be so.

Should an objector have a dispute with the Department over a proposed term of the integration order, or with information provided to it prior to the integration hearing by the operator, Department staff may refer the matter to OHMS.<sup>7</sup> Conversely, if

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<sup>7</sup> To date, the record upon referral to OHMS by Department staff has been limited, consisting of the various forms and other information mandated by ECL article 23. For future matters, and no later than the legislative hearing, Department staff shall provide its determination and any supporting information on the various issues raised by the participants in the compulsory integration hearing.

staff does not refer a matter for adjudication, the matter ends with the issuance of a final integration order (ECL 23-0901[3][e]). After referral to OHMS, the objector may then advance the matter to administrative adjudication by demonstrating to the ALJ that its dispute is substantive and significant.

To this end, upon referral to OHMS, the presiding ALJ will require submission of a petition (referred to by the Chief ALJ as a Notice of Appearance<sup>8</sup>) (Ruling, at 8), copied to staff and the other parties, setting forth the objector's reasons why the issue or issues it has raised are substantive and significant and making offers of proof on factual issues the objector wishes to adjudicate. At the Part 624 issues conference, the ALJ will hear the offers of proof and rule on whether the issue or issues raised are substantive and significant. Subject to appeal to the Commissioner, only those issues determined by the ALJ to be substantive and significant and not otherwise resolved will advance to adjudication (see 6 NYCRR 624.4[b][2]).

Although the Legislature did not define substantive and significant in ECL article 23, those terms are defined in Part 624, and with some minor adjustment, will apply here. For example, the definition of "substantive" (6 NYCRR 624.4[c][2]) can be applied to compulsory integration issues in the following manner:

"An issue is substantive if there is sufficient doubt about whether the draft compulsory integration order meets statutory or regulatory criteria applicable to the order, including the policies established by ECL 23-0301, such that a reasonable person would require further inquiry. In determining whether such a demonstration has been made, the ALJ must consider the proposed issue in light of the record of the compulsory integration hearing and related documents, the draft order, the content of any petitions filed for party status, the record of the issues conference and any subsequent written arguments authorized by the ALJ."

Additionally, the definition of "significant" (6 NYCRR 624.4[c][3]) can be applied as follows:

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<sup>8</sup> The term "petition" is part of the nomenclature in Part 624 (see 6 NYCRR 624.5[b]), while a "Notice of Appearance" is not.

"An issue is significant if it has the potential to result in the denial of the draft integration order, a major modification to the proposed order or the imposition of significant conditions in addition to those proposed in the draft order."

Once a matter is referred to OHMS and noticed pursuant to 6 NYCRR 624.3, any other member of the public could seek to intervene in the proceeding upon the filing of a petition that satisfies the requirements of 6 NYCRR 624.5(b). Then the ALJ would determine whether those petitioners have party status and have raised a substantive and significant issue. In addition, if an uncontrolled owner did not participate in the compulsory integration proceeding and seeks to raise issues once the matter has been referred by staff for adjudication, that uncontrolled owner would have to satisfy the standards for filing a late petition (see 6 NYCRR 624.5[c]).<sup>9</sup>

In a typical Part 624 proceeding, the applicant has the burden of proof on all issues that proceed to adjudication (see, e.g., 6 NYCRR 624.9[b]) ("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"). As discussed above, compulsory integration proceedings are not permit application hearings; rather, they are unique proceedings created by the Legislature. Thus, the traditional Part 624 burden of proof construct needs to be adjusted for these proceedings.

Section 306(1) of the State Administrative Procedure Act (SAPA) provides a closer approach: "[e]xcept as otherwise provided by statute, the burden of proof shall be on the party who initiated the proceeding." Here, the parties who raise substantive and significant issues "initiate" the subsequent Part 624 proceeding that arises out of compulsory integration. Thus, the parties who raise issues that proceed to adjudication in a Part 624 proceeding should have the burden on those issues. Therefore, I determine that for each issue that proceeds to adjudication in a Part 624 proceeding following a compulsory integration hearing, the party who raised that issue has the

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<sup>9</sup> While in other matters, an ALJ would be required to determine a petitioner's environmental interest, that showing may be dispensed with for the well operator and other uncontrolled mineral owners in the spacing unit. As concluded above, these parties have standing to participate in Part 624 proceedings on a proposed compulsory integration order. Petitioners who are not mineral owners in the spacing unit, however, would still have to demonstrate a relevant interest under ECL article 23 to be granted party status.

burden of proof on it. See also, DMN-1, at 9 (“[t]he objecting owner will bear the burden of proof assigned to an applicant in other Department permit proceedings”).

I recognize, too, that the well operator and uncontrolled owners may participate in a Part 624 hearing that follows a compulsory integration hearing, not to raise substantive and significant issues, but to defend the mineral interests that staff has identified in the draft compulsory integration order or to make a meaningful contribution to the record on an issue raised by another party (see 6 NYCRR 624.5[d][1][ii]). In those instances, these parties should submit a letter or a notice of appearance to OHMS at least one week before the legislative hearing stating who they are, their address, their counsel or other representative (if they have any), and what issues they wish to contribute to or defend.

In conclusion, in a compulsory integration proceeding commenced under ECL article 23, the well operator and uncontrolled owners have automatic standing to participate in the issues conference of a Part 624 proceeding that follows a compulsory integration hearing and must also demonstrate that their issues meet the substantive and significant threshold to advance those issues to the adjudicatory portion of the Part 624 proceeding. Finally, once an issue proceeds to adjudication under Part 624, the party raising that issue has the burden of proof on it.

**Issue No. 3: The Effect of a Part 624 Proceeding on the ECL 23-0903 Election Process for Uncontrolled Owners**

In his ruling, the Chief ALJ reserved decision on whether “[Part 624] adjudicatory proceedings might have some effect on the statutory election period.” (Ruling, at 9.) Fortuna appeals this issue and asserts that the Part 624 adjudicatory proceedings have no effect on the statutory election period set forth in ECL 23-0901(c)(2). Because the Chief ALJ did not rule on this issue, it is not ripe for me to decide on this appeal, and I decline to reach it.

**Issue No. 4: The Location of the Part 624 Hearing**

I deny Fortuna’s appeal on the issue of where Part 624 hearings are held. Pursuant to Department program policy, Department staff conducts compulsory integration hearings at the Department’s central office in Albany (see DMN-1, at 2). In contrast, a Part 624 proceeding that follows a compulsory integration hearing would be required by regulation to be held

in close proximity to the well (see 6 NYCRR 624.3[b][2]). I see no reason to depart from the practice set forth in Part 624. Convening a Part 624 proceeding close to the well promotes public participation. In most if not all of these matters, Albany is far from the well locale, and this distance can hamper and diminish public participation.

Section 624.3(b)(2) provides that the location of the hearing "must be in the town, village or city in which the project is located, as reasonably near the project site as practicable, depending upon the availability of suitable facilities." (Id.) However, the regulation further provides that "another location may be selected based on the convenience of the parties and witnesses at the discretion of the ALJ." (Id.) Therefore, a Part 624 hearing is to be held near the well site, unless another location is selected pursuant to 624.3(b)(2).

#### **Conclusion and Application of this Interim Decision**

While Part 624 provides a framework for these proceedings, not all of its provisions apply or fit neatly with the compulsory integration process. As this interim decision demonstrates, Part 624 will be adjusted to ensure that the policies of ECL article 23 are met.

This interim decision applies to pending matters referred for adjudication, but for which no notice of hearing has been published, and to all matters subsequently referred to OHMS.

For the New York State Department  
of Environmental Conservation

/s/

By:

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Joseph J. Martens  
Commissioner

Dated: March 18, 2011  
Albany, New York

TO: Service List (attached)