

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

In the Matter

- of -

the Application for a Spacing and Compulsory  
Integration Order Pursuant to Environmental  
Conservation Law ("ECL") Article 23 within an  
Individual Spacing Unit Known

- as -

**FRED ANDREWS 1-A.**

DEC File No. DMN 01-2

INTERIM DECISION AND ORDER OF THE COMMISSIONER

January 7, 2009

INTERIM DECISION AND ORDER OF THE COMMISSIONER

PROCEDURAL BACKGROUND

Staff of the Department of Environmental Conservation ("Department"), Division of Mineral Resources ("DMN"), issued an order dated September 8, 2006, establishing a natural gas well spacing unit for the Fred Andrews 1-A well (API No. 31-015-23182-01) and integrating interests within that unit (see Order of the Director, Sept. 8, 2006). Western Land Services, Inc. ("WLS"), Harold A. Cutler, Jr. and Sharon M. Cutler (the "Cutlers"), and Gerald M. and Carolyn S. Welliver (the "Wellivers") (collectively, "appellants"), respectively, filed separate notices of appeal and appeals with the Commissioner and the Department's Office of Hearings and Mediation Services ("OHMS") challenging the order. The Commissioner assigned the matter to Chief Administrative Law Judge ("Chief ALJ") James T. McClymonds for appropriate disposition.

Upon the submission of written briefs and responses by the parties, the Chief ALJ prepared a Summary Report and Recommended Decision, dated May 22, 2007 ("Summary Report"). Subsequently, I directed the parties to file comments to the Summary Report. Timely comments and responses thereto were received from all parties.

In his report, the Chief ALJ recommended that I "deem appellants' appeal to be an application for a ruling re-opening the 2002 Commissioner's orders" establishing the Quackenbush Hill Field, "grant the application, and modify the 2002 orders to the extent of vacating those portions of the orders that adopted those portions of the 2001 stipulation that established procedures for the compulsory integration of interests in spacing units created after August 2005 and to substitute the compulsory integration procedures established by the 2005 amendments." (Summary Report, at 11.) Moreover, the Chief ALJ recommended that I "vacate the September 8, 2006 integration order and remand the matter to Department staff for an integration hearing pursuant to the 2005 amendments to article 23 of the Environmental Conservation Law ("ECL)." (Summary Report, at 2.)

For the reasons that follow, the Chief ALJ's recommended decision is modified in part, and as so modified, is adopted as my decision in this matter. Accordingly, the Director's order dated September 8, 2006 is vacated, and the matter remanded to the Chief ALJ for further proceedings consistent with this interim decision and order.

## DISCUSSION

### Statutory Background

The procedures set forth in ECL article 23, title 5, govern well permits and well spacing in oil and natural gas pools and fields. The procedures set forth in ECL article 23, titles 7 and 9, respectively, govern the voluntary and involuntary integration of ownership interests within such spacing units and fields. These titles were substantially revised and amended by chapter 386 of the Laws of 2005, which became effective August 2, 2005.

#### 1. Practice Under The Prior Law

Prior to the enactment of the new changes, except for certain oil fields or pools developed before January 1, 1981, and certain natural gas fields or pools developed before January 1, 1995, the Department was required to establish spacing units in any oil or gas field proposed for development. (See, generally, ECL 23-0501, as added by L 1972, ch 664, as amended by L 1981, ch 846 and L 1984, ch 891.) This was accomplished on a field-wide basis through the promulgation of an order establishing spacing units within the field and procedures for the development of future units. (See, e.g., Matter of Quackenbush Hill Field, Decision and Order of the Commissioner, Dec. 30, 2002.) The orders were issued by the Department after an administrative adjudicatory hearing conducted pursuant to 6 NYCRR part 624 ("Part 624").

In advance of the hearing, the field and its constituent spacing units would be proposed by a well operator and conditionally approved by Department staff as part of the application for a spacing order set forth at 6 NYCRR part 553. Generally, the well operator would have one or more permits to drill in the field, and would have one or more producing wells. (See Matter of Western Land Servs., Inc., Declaratory Ruling DEC No. 23-13, Jan. 29, 2004, at 2.) During the Part 624 hearing, challenges to the boundaries of the proposed field and any spacing units within it could be raised. Such challenges were to be based upon appropriate scientific information and data. If the challenge raised factual issues that were both substantive and significant, as determined by an ALJ and confirmed by the Commissioner, those issues were advanced to adjudication.

Except for certain minimum boundary setbacks and minimum distances between well locations, neither former ECL 23-0501 nor its implementing regulations indicated the acreage to be

allotted to a spacing unit. Former ECL 23-0501(3) provided only that "spacing units shall be of approximately uniform size and shape." (See also 6 NYCRR 553.1 [establishing set back requirements].)

In addition to establishing gas well spacing units, ECL 23-0501(9) of the old law required that spacing orders also provide for the integration of any ownership interests within individual spacing units not controlled by the well operator. This was accomplished either through voluntary integration pursuant to then existing ECL 23-0701, or through compulsory integration pursuant to then existing ECL 23-0901(2) and (3). Moreover, pursuant to former ECL 23-0501(9), the spacing order was to "specify the procedure to be followed for compulsory integration of interests within spacing units" and this procedure was to "be consistent with" ECL 23-0901(2) and (3). Such compulsory integration procedures were proposed by Department staff for inclusion in the spacing order and, as required by former ECL 23-0901(2), were an additional matter to be considered and scrutinized during the Part 624 hearing process and before inclusion in any ultimate spacing order issued by the Commissioner.

Under ECL 23-0501(6) of the old law, an order establishing spacing units could be modified to include additional lands if the pool of oil or gas under development was determined to underlie such lands. Moreover, under ECL 23-0501(7) of the old law, the Department could modify an order establishing units "to change their size, or to permit the drilling of additional wells on a reasonably uniform pattern." Finally, with respect to the integration of interests, former ECL 23-0901(3) required that any order issued by the Department "be upon terms and conditions that are just and reasonable." In view of these statutorily mandated requirements, Department staff routinely and appropriately proposed terms to be included in spacing orders providing permit application procedures for future units or extension wells.

In practice, the foregoing matters were all the subject of a stipulation entered into between the Department and the operator of existing wells within the proposed field. This stipulation, which had the effect of a draft permit (see Matter of Terry Hill South Field, Second Interim Decision of the Assistant Commissioner, June 7, 2007, at 16; First Interim Decision of the Commissioner, Dec. 21, 2004, at 9), would be included in the Department's request for a public adjudicatory hearing pursuant to Part 624, seeking a Commissioner's order establishing field wide spacing rules and the integration of

interests within spacing units. Should the Commissioner grant the relief sought, the stipulation and its terms would be incorporated into the Commissioner's order. Typically, the stipulation was divided into sections addressing various issues, including, (1) the proposed field and its constituent spacing units, (2) matters relating to existing wells in the field, (3) matters relating to wells to be drilled pending the issuance of a Commissioner's order, (4) well permit application procedures for future unit wells and extension wells, (5) well testing and reporting procedures, (6) restrictions on the public disclosure of information provided to the Department by an operator, and (7) compulsory integration procedures. (See, e.g., Stipulation, Nov. 1, 2001, incorporated by reference into Matter of Quackenbush Hill Field, Decision and Order of the Commissioner, Dec. 30, 2002.)

## 2. Changes Effected Under The New Law

As noted above, titles 5, 7 and 9 of ECL article 23 were substantially amended in chapter 386 of the Laws of 2005, effective August 2, 2005. Pursuant to amended section ECL 23-0501, new Statewide spacing rules were put into effect for certain gas wells mandating the acreage to be allotted to a spacing unit. This acreage varies depending upon the location and depth of the particular gas formation into which the well is proposed to be drilled. Pursuant to new section ECL 23-0503(2), the spacing unit for a new well is established at the time the well permit is issued. Thus, the new law changed the establishment of gas well spacing units from a field-wide basis to a unit-by-unit basis.

Under the new law, the applicant for a well drilling permit must propose a spacing unit for the well in its application (see ECL 23-0501[2]). If the proposed spacing unit satisfies the Statewide spacing requirements of ECL 23-0501, the unit is established as a matter of law without a hearing, and no spacing order is needed (see ECL 23-0503[2]). Owners and lessees within the unit may not challenge the boundaries of the unit, so long as it comports with Statewide spacing requirements of the new law. This clearly differs from the old law which required a spacing unit to be established by a spacing order issued after a hearing held pursuant to Part 624.

This change in the law created an anomalous situation for wells referred to as "transition wells." These are wells permitted prior to the effective date of the new law, but for which a spacing order had not yet been issued. The new law addresses this anomaly in ECL 23-0503(5). In such a situation,

the new law directs that the Department "issue a notice of intent to issue a spacing order" and that the well operator "cause such notice to be published in a form and manner" prescribed by the Department. If the proposed spacing unit comports with the Statewide spacing requirements of ECL 23-0501, and if no comments raising substantive and significant issues with respect to the proposed unit's boundaries are received within thirty days after publication of the notice, then no hearing on such boundary issues is required. In such a case, the Department may issue a spacing order establishing the boundaries of the spacing unit.

### 3. Integration of Uncontrolled Mineral Interests

Under both the old law and the new law, if the well operator did not or does not control all land parcels in a spacing unit through ownership, lease or voluntary agreement pursuant to ECL article 23, title 7, the interests of such uncontrolled owners and lessees were or must be established by a compulsory integration proceeding conducted pursuant to ECL article 23, title 9. Under section ECL 23-0901(3) of the old law, after a Part 624 hearing, the Department would issue an order integrating the interests of all uncontrolled owners and lessees. This order was to be "upon terms and conditions that [were] just and reasonable" as determined by the Department, and would, when applicable, contain provisions regarding the integration of interests in future unit and extension wells.

By contrast, under the new ECL 23-0901, as amended, an uncontrolled owner in a spacing unit has the explicit right to elect the status at which it will participate in the development of the unit. Pursuant to ECL 23-0901(3)(a)(1) through (3), respectively, they may elect to be an "integrated non-participating owner," an "integrated participating owner," or an "integrated royalty owner." This election is as of right and precedes an integration hearing provided for in the new law. The substantive terms of the order of integration are now articulated in the law at ECL 23-0901(3)(c)(1)(ii). Effectively, the election process allows the uncontrolled owner to determine the manner in which it will be impacted by the order of integration.

The new law also provides for a pre-adjudicatory hearing integration hearing (see ECL 23-0901[3][b]). Under the new law, an adjudicatory hearing under Part 624 is held only if substantive and significant issues are raised at the integration hearing (see ECL 23-0901[3][d]). If substantive and significant issues are not raised at the integration hearing, a final compulsory integration order is issued without further hearing (see ECL 23-0901[3][e]).

Significantly, the terms of an integration order statutorily required under the new law do not include any provisions addressing the integration of interests in any future extension wells in a natural gas field. The reason for this is clear. Under the new law, natural gas fields are developed on a unit-by-unit, not field-wide, basis. As noted, each uncontrolled interest in a spacing unit must elect the status at which it wishes to participate in the development of the unit after the unit is established. An uncontrolled interest may elect to be an "integrated non-participating owner," an "integrated participating owner," or an "integrated royalty owner," pursuant, respectively, to ECL 23-0901(3)(a)(1), (2) and (3). Since the uncontrolled interests in any, as yet, undetermined spacing unit for any well, whether a well in an existing field or otherwise, are unknown, their elective status under the new law is equally unknown. Accordingly, it is impossible to provide any terms in an integration order under the new law which would or could integrate those undefined interests in any future unit.

#### The September 8, 2006 Director's Order

The Fred Andrews 1-A well was permitted on April 29, 2005, with drilling commencing on April 30, 2005. The well, which is located within the Trenton/Black River formation and accesses a target formation at a depth exceeding 8,000 feet, was permitted as an extension well in the Quackenbush Hill Field. The Quackenbush Hill Field was established by Commissioner's orders issued January 23, 2002 and December 30, 2002. The Commissioner's orders incorporated by reference a November 1, 2001 stipulation entered into by Department staff and Pennsylvania General Energy Corp., predecessor in interest to Fortuna Energy Inc. ("Fortuna").

Subsequent to the drilling of the Fred Andrews 1-A well, Fortuna proposed the establishment of a spacing unit for the well comprised of 631.4 acres. Although the spacing unit was proposed to be established after the effective date of the 2005 amendments to Article 23, Department staff concluded that the procedures for the establishment of the Fred Andrews 1-A spacing unit and the integration of interests therein were governed not by the new law, but the procedures outlined in the Quackenbush Hill Field stipulation incorporated by reference into the 2002 Commissioner's orders (see Stipulation ¶ IV). On this appeal, appellants challenge Department staff's determination to apply the stipulation, and the September 8, 2006 Director's order that resulted.

## Procedural Issues

The Chief ALJ recommended that I deem appellants' "appeals" to be applications for a ruling re-opening the 2002 Commissioner's orders establishing the Quackenbush Hill Field. (See Summary Report, at 2, 9.) This recommendation was due, in part, to the circumstance that the appeals were filed directly with the Commissioner and OHMS after issuance of staff's September 8, 2006 order, and not in the context of an on-going Part 624 proceeding (see id. at 9-11).

Fortuna argues that no party requested that their appeal be deemed a motion to reopen the 2002 orders, and that no basis exists for reopening those orders.<sup>1</sup> Department staff also argues that no party requested that the 2002 orders be reopened. Appellants, on the other hand, agree with the Chief ALJ's recommendations regarding the availability of administrative remedies to raise their challenge to the September 2006 Director's order.

The gravamen of appellants' challenge is that the Department erred in applying the 2001 stipulation and the 2002 orders to integrate interests in the Fred Andrews 1-A unit. In addition, appellants expressly requested that the September 8, 2006 Director's order be vacated. In essence, appellants' challenge constitutes a request that the Commissioner revisit the 2002 orders and 2001 stipulation and determine whether they still apply in the face of the 2005 amendments. As the Chief ALJ made clear in the analysis provided in his summary report, which I adopt, the Department has inherent authority to revisit and reconsider its prior orders (see Matter of Stagecoach Field, Commissioner's Ruling on Petition for Modification or Vacatur, March 12, 2004; Matter of Mohawk Valley Organics, LLC, Commissioner's Ruling on Motion to Suspend and Reopen Hearing Record, Sept. 8, 2003). The grounds for reconsidering prior

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<sup>1</sup> Fortuna also claims that it was given no opportunity to comment upon whether grounds existed to reopen the orders. The Chief ALJ, however, informed the parties that he was considering whether administrative remedies were available to appellants, and provided the parties with ample opportunity to comment. Moreover, the ALJ's summary report, including his recommendation regarding reconsideration, was issued to the parties, and the parties were provided with the opportunity to file both comments and replies responding to the ALJ's recommendations. Thus, Fortuna has had full opportunity to address whether the 2002 orders may be reconsidered by the Commissioner.

orders include not only those grounds provided for in CPLR 5015, but also "for sufficient reason and in the interests of substantial justice" (Woodson v Mendon Leasing Corp., 100 NY2d 62, 68 [2003]). Moreover, the Commissioner's authority to revisit not only the 2002 Commissioner orders, but also the September 8, 2006 Director's order derives from the Commissioner's duty to administer Article 23 and act upon applications by interested persons on matters within the Department's jurisdiction under Article 23 (see ECL 23-0305[6]).

The Commissioner's authority to revisit and reconsider prior orders, however, should only be exercised cautiously. Extraordinary circumstance exist in this case, though, warranting the exercise of that authority in the interests of substantial justice. As noted by the Chief ALJ, this matter concerns the appropriate procedures to be followed in light of significant changes in the underlying statute governing an important aspect of the Department's jurisdiction, specifically, the integration of mineral interests in Departmental orders. Accordingly, in the unique circumstances of this case, appellants' appeals are considered on the merits.

#### Applicability of the New Law to the Fred Andrews 1-A Well

The 2006 Director's order was promulgated by Department staff upon an application made by Fortuna in accordance with the procedures set forth in the 2001 stipulation, particularly, Section IV thereof. While Department staff's determination to apply the 2001 stipulation in this regard was not unreasonable, the procedures followed to promulgate the Director's order were, in my view, at variance with the 2005 amendments to ECL article 23. Indeed, Department staff recognizes this variance, but asserts that the procedures established in settled orders of the Department pertaining to the Quackenbush Hill Field, in which the Andrews unit is located, should be followed in this matter.

I agree with the Chief ALJ that the 2005 amendments apply to all transition wells, whether those wells are extension wells in previously discovered natural gas fields or wells in new fields, and adopt the ALJ's rationale accordingly. (See Summary Report, at 5-9; see also Matter of Drumm 1, Ruling of the Chief ALJ, Sept. 26, 2006, at 3-6.)<sup>2</sup> As noted above, the aforementioned amendments to ECL article 23 became effective on

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<sup>2</sup> I do not, however, adopt any dicta in the summary report or in Drumm concerning the establishment by law of spacing units for transition wells.

August 2, 2005. The enactment explicitly states that the amendments "apply to any oil or gas well permit or spacing order issued on or after" that date. (L 2005, ch 386, § 10.) In addition, the inclusion in the 2005 amendments of provisions governing the establishment of spacing units for transition wells clearly indicates that the new law was to apply in circumstances, such as in this case, where a well permit had been issued prior to the effective date of the amendments, but a spacing unit had not yet been established under the old law. (See ECL 23-0503[5].) As noted by the ALJ, no distinction is made between extension wells or discovery wells. (See Summary Report, at 6-7.) I agree with the ALJ that to recognize such a distinction would be at odds with the legislative purposes of the new law and deprive mineral rights owners of the procedural safeguards and benefits the new law provides. (See id. at 7-8.)

In this case, although the Fred Andrews 1-A well permit had been issued prior to August 5, 2005, the spacing order for the unit had not. Thus, by the express terms of section 10 of chapter 386, and ECL 23-0503(5), the new law applied to the establishment of the Fred Andrews 1-A spacing unit. To the extent that the terms of the 2001 stipulation provide procedures inconsistent with the new law, the stipulation and the 2002 orders incorporating it were superseded by the new law.

Fortuna argues that because the new provisions of title 9 of Article 23, which govern the integration of uncontrolled mineral interests in spacing units, do not contain a transition provision similar to ECL 23-0503(5), the Legislature did not intend that the new law's provisions for integration orders be applied to permits issued under the old law. Fortuna asserts that the formation of a spacing unit is a prerequisite for an integration hearing under the new law. Fortuna also notes that under the new law, spacing units are established at the time well permits are issued. Fortuna contends that for a transition well that is permitted and drilled prior to the establishment of the spacing unit, the "condition precedent" for the operation of the new law's provisions for compulsory integration "cannot be satisfied either physically or temporally" (Fortuna Comments, at 8). Fortuna's argument is overstated.

Current ECL 23-0901(3)(b) provides that "[i]f upon issuance of a well permit by the department, the well operator does not control all owners within the spacing unit, either through lease or voluntary agreement, the department shall schedule an integration hearing." Contrary to Fortuna's assertions, it is not "impossible" to satisfy this provision in the transition well context. As Fortuna readily admits, ECL 23-

0503(5) cures the lack of a spacing unit for well permits issued prior to the effective date of the 2005 amendments.<sup>3</sup>

Fortuna is also correct that at the time the permit was issued, it could not be determined whether the operator controlled all interests in the unit because the unit did not exist. However, that is also cured with the establishment of the unit pursuant to ECL 23-0503(5). Once a spacing unit for a transition well is established pursuant ECL 23-0503(5), it can be determined whether the well operator controls all owners within the unit and, thus, whether an integration hearing is required. The circumstance that the establishment of a spacing unit in the transition well context is not perfectly contemporaneous with the issuance of the well permit does not mean that the conditions in ECL 23-0901(3)(b) cannot be met. To the contrary, the structure of ECL 23-0503(5), in concert with ECL 23-0901(3)(b), evidence the Legislature's intent that the new law apply to the integration of interests in spacing units established for transition wells.

That the Legislature intended uncontrolled owners in the transition well situation of ECL 23-0503(5) to be integrated

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<sup>3</sup> Before the ALJ, Fortuna argued that a spacing order is not required for the Fred Andrews 1-A unit because the proposed unit conforms to Statewide spacing under the new law and, therefore, no spacing order is required under ECL 23-0503(2) (providing for establishment by law of a spacing unit for a well permitted under the new law when the unit proposed in the well permit application conforms with Statewide spacing). This argument ignores the plain language of ECL 23-0503(5), which expressly indicates the procedure to use when the spacing unit proposed for a transition well comports with Statewide spacing under the new law. In that circumstance, "the Department may issue [a spacing] order without hearing if the proposed spacing unit complies with the requirements of [Statewide spacing] and no substantive and significant objections to the boundaries of the proposed spacing unit are received" (ECL 23-0503[5]). Because uncontrolled mineral interests remained in the Fred Andrews 1-A unit integrated, and because a spacing order had still not been issued under the old law, a spacing order was required for the unit (see Stipulation ¶ IV.F.5). The circumstance that the unit proposed for the Fred Andrew 1-A conforms to Statewide spacing under the new law merely means that the spacing order may be issued without hearing if no substantive and significant objections are raised to the proposed unit boundaries. It does not mean that no spacing order is required.

pursuant to the new law, including their entitlement to exercise the right of election under the new law, is seen by the analogy provided in ECL 23-0503(6). This section addresses the expansion of a spacing unit established prior to the new law. As ECL 23-0503(6) makes clear, when a spacing unit is expanded to include new owners, those new owners have the right to elect the status at which they will participate in the development of the expanded spacing unit. If the right of election is thus allowed for theretofore unknown and uncontrolled owners when a pre-existing spacing unit is expanded, it logically follows that when a new spacing unit is defined for a transition well under ECL 23-0503(5), those theretofore unknown and uncontrolled owners should also be given the same right of election. The election process mandated by ECL 23-0901 was not followed in the promulgation of the Director's order of September 8, 2006.

Fortuna also argues that applying the new law to integrate interests in transition wells constitutes a retroactive application of the new law in derogation of Fortuna's vested rights. I agree with, and adopt, the Chief ALJ's conclusion that application of the new law to transition wells does not constitute a retroactive application of a new statute. (See Summary Report, at 8-9.) Using the new law to establish the spacing order for, and to integrate uncontrolled interests in, the Fred Andrews 1-A well constitutes a prospective application of the new law to a new spacing unit. Applying the new law to the Fred Andrews 1-A unit will have no impact on any other spacing unit in the Quackenbush Hill Field, or any other natural gas well field or units, and will have no impact on the mineral interests integrated in those previously established units.

The vested right Fortuna claims would be impaired is the "economic framework for further development of the Quackenbush Hill Field." (Fortuna Comments, at 8-9.) It is not clear whether an "economic framework for further development" is a property interest that is vested in Fortuna. Under the 2001 stipulation, Fortuna did not have the exclusive right to develop extension wells in the field. Rather, the stipulation provided minimum requirements that Fortuna would have to meet to obtain a drilling permit. (See 2001 Stipulation, ¶ IV.) If Fortuna could not meet those requirements, a permit to drill might be granted to another well operator that could meet the requirements.

Moreover, Fortuna appears to assume that integrating uncontrolled owners in a unit as anything other than royalty interests is a new right for uncontrolled owners under the new law. However, integration as a working interest (as an "integrated participating owner" or a "nonparticipating owner"

under the new law) was available to uncontrolled owners even under the old law. (See Matter of Western Land Servs., Inc. v Department of Env'tl. Conservation, 26 AD2d 15, 19-20 [3d Dept 2005], lv denied 6 NY3d 713 [2006]; Terry Hill South Field, Second Interim Decision, at 10-12; see also Matter of Western Land Services, Declaratory Ruling DEC No. 23-14, Jan. 29, 2004.) The new law merely reformed and regularized the process and procedures for the exercise of that right by uncontrolled owners. The circumstance that some uncontrolled owners did not exercise the right to be integrated as working interests in fields developed under the old law did not vest in Fortuna a right to have uncontrolled owners integrated as royalty interests only, or to otherwise prevent third-parties from electing to be integrated as working interests, whether under either the old or the new law. Thus, even assuming application of the new law to the Fred Andrews 1-A unit constitutes a retroactive application of the 2005 amendment, Fortuna identifies no vested rights that would be impaired.

Moreover, the circumstance that the 2002 orders incorporated by reference procedures outlined in the 2001 stipulation does not provide Fortuna with a vested right in those procedures. This is particularly so given that the procedures for developing future wells in the field were not litigated in either the administrative adjudicatory hearing or the court proceedings on the Quackenbush Hill Field. In addition, as noted above, Fortuna did not have the exclusive right to develop the field and, thus, cannot claim exclusive rights to the procedures in the 2001 stipulation as against non-parties to the prior proceedings that had no opportunity to challenge those procedures.

Finally, Fortuna argues that because appellants or their predecessors in interest failed to raise objections to the terms of integration in the 90 days provided for in the March 2006 notices to uncontrolled mineral owners, their present appeals are untimely. However, in promulgating the 2006 Director's order, Department staff did not follow the notice provisions of the 2005 amendments and the notice that was provided was insufficient to constitute notice under the new law. The new law requires newspaper publication of both the notice of intent to issue a spacing order for a transition well, and the notice of an integration hearing. (See ECL 23-0503[5]; ECL 23-0901[3][c]; see also ECL 23-0305[4][a] [publication notice under Article 23 is publication in a newspapers of general circulation in the county where the land affected or some portion thereof is situated].) Even assuming the notice provided, which was a letter on Fortuna's letterhead (see, e.g., Letter from Fortuna to

Beeman, dated March 13, 2006, Exhibit B to Letter of Lipman & Biltekoff, LLP, dated November 8, 2006, commenting on the Summary Report), constituted notice of the Department's intent to issue a spacing order and notice of an integration hearing, it was not published in a newspaper of general circulation.

In addition, Fortuna's letter did not explicitly provide notice of the right to object to boundaries of the proposed spacing unit, as allowed for under section 23-0503(5). Furthermore, the new law requires that together with actual notice of the integration hearing, uncontrolled owners are to receive an election form granting them the right to elect their integration status, an estimation of the costs for their participation, and a draft integration order. (See ECL 23-0901[3][c][1].) None of these were provided with Fortuna's letter notification. Thus, the notice provided was insufficient under the new law, and the failure of appellants or their predecessors in interest to respond to Fortuna's letter is insufficient to bar their present challenge to the Director's order.

In sum, because Department staff used procedures inconsistent with the new law to promulgate the 2006 Director's order, that order is deemed void ab initio. As the previous discussion indicates, the order of September 8, 2006, was issued after the effective date of the new law, August 2, 2005. In addition, the notice provided to uncontrolled owners and the procedures followed precluded such uncontrolled owners' right to challenge the boundaries of the proposed Fred Andrews 1-A spacing unit, guaranteed by new section ECL 23-0503(5). Finally, uncontrolled owners were not afforded the right of election nor were their interests properly integrated as required by new section ECL 23-0901. Accordingly, the order of September 8, 2006, is, for all purposes, void ab initio.

#### Department Staff's Requests

Department staff request certain modification of the Chief ALJ's recommended decision if I affirm. First, Department staff requests that I not annul that portion of the Director's order that established the Fred Andrews 1-A spacing unit because no objections were raised concerning the unit. As the discussion above indicates, however, the March 2006 notice and the manner of its issuance did not comply with the new law. Because a notice of intent to issue a spacing order was not published, and the March 2006 Fortuna letter did not expressly provide for the right to raise objections to the unit, it cannot be known whether parties beyond the uncontrolled owners in the unit that are

entitled to receive publication notice have objections. Thus, the September 8, 2006 order is vacated in its entirety.

Second, Department staff requests that relief on this appeal be granted only to objecting owners. Again, because the notice provided was insufficient under the new law, it cannot be known how parties might exercise their rights if they had been provided with proper notice. Accordingly, any uncontrolled owners in the Fred Andrews 1-A unit must be given the opportunity to exercise their rights after proper notice under the new law.

Third, staff argues that it is not necessary to reopen or otherwise modify the 2002 Commissioner's orders, as recommended by the Chief ALJ. I agree that it is not necessary to explicitly modify the 2002 Commissioner's orders in light of this decision. It is enough to note that the new law applies to all transition wells, and anything in the 2002 Commissioner's orders, or the 2001 stipulation incorporated by reference in those orders, that is inconsistent with the new law is not to be followed.

Fourth, staff requests that I determine how to address royalties already paid under the Director's order. This issue was not litigated by the parties and, thus, should not be decided for the first time at this stage. Any issue concerning royalties already paid under the Director's order should be addressed on remand to the Chief ALJ.

Finally, Department staff requests that I direct that any party that fails to meet deadlines on remand be integrated as a royalty interest on default. Integration as a royalty interest is the default integration status under the new law, and should be applied in the event parties fail to meet appropriate deadlines. (See ECL 23-0901[3][c][2].)

#### ORDER

NOW, THEREFORE, upon due consideration of the foregoing, it is hereby ORDERED that:

- I. The recommended decision of the Chief ALJ is modified in part and, as so modified, affirmed.
- II. The Director's order of September 8, 2006, is vacated and deemed void ab initio.
- III. The matter is remanded to the Chief ALJ for further proceedings consistent with this interim decision and

order.

- IV. The provisions of ECL article 23, as amended 2005, apply to the establishment of the Fred Andrews 1-A unit and the integration of mineral interests therein. To the extent that the 2002 Commissioner's orders establishing the Quackenbush Hill Field, and the 2001 stipulation incorporated by reference therein, provide procedures inconsistent with the 2005 amendments, they are not to be followed.

NEW YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION

By: \_\_\_\_\_/s/\_\_\_\_\_  
Alexander B. Grannis  
Commissioner

Dated: Albany, New York  
January 7, 2009

TO: Attached Service List