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

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

**WICKHAM 1-380.**

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**RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE**

DEC Order No. DMN 10-13

October 29, 2010

Appearances of Counsel:

-- Alison H. Crocker, Deputy Commissioner and General Counsel (Jennifer Maglienti of counsel), for staff of the Department of Environmental Conservation

-- Dennis Holbrook, Counsel, Norse Energy Corporation, USA, for well operator Norse Energy Corporation, USA

-- Strick Law Firm, PLLC (Robert Strick of counsel), for non-participating owner Plymouth Resources

In this natural gas well compulsory integration proceeding conducted pursuant to Environmental Conservation Law (ECL) § 23-0901(3), non-participating owner Plymouth Resources and well operator Norse Energy Corporation, USA, object to paying the costs of the adjudicatory hearing being conducted pursuant to ECL 23-0901(3)(d).

The procedures followed for the adjudicatory hearing are the Department's Permit Hearing Procedures located at part 624 (Part 624) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR). Under Part 624, an "applicant" is responsible for paying the costs of the hearing (see 6 NYCRR 624.11). This ruling addresses whether section 624.11 may be applied to the parties to a proceeding under ECL 23-0901(3)(d).

## PROCEEDINGS

This proceeding concerns a natural gas well known as Wickham 1-380 (API No. 31-017-23941-00-01) located in the Town

of Plymouth, Chenango County, and operated by Norse Energy. Staff of the Department of Environmental Conservation originally issued a permit to drill the well on January 17, 2007. The target formation for the well was the Oneida formation and, accordingly, the spacing unit for the well was approximately 140 acres. A compulsory integration hearing was held on March 13, 2007, which resulted in a final order of integration (Order No. DMN 07-14) integrating interests in the Oneida formation.

Although it is disputed by Plymouth Resources, Norse Energy claims to have completed the well uphole in the Vernon formation based upon its determination that the Oneida formation was not productive. The Department issued a permit to plug back on January 22, 2010, establishing an approximately 40-acre spacing unit in the Vernon formation. The Department takes the position that because Norse Energy abandoned the portion of the well bore that targeted the Oneida formation, DMN 07-14 was extinguished, thereby extinguishing the spacing unit for the Oneida formation (see ECL 23-0503[7]).

Because mineral interests in the 40-acre spacing unit associated with the Vernon formation were not completely controlled by Norse Energy, Department staff noticed a compulsory integration hearing pursuant to ECL 23-0901(3)(b). On April 7, 2010, the compulsory integration hearing was held at the Department's Central Office before Compulsory Integration Hearing Officer Donald J. Drazan.

At the compulsory integration hearing, Plymouth Resources, an uncontrolled owner in the Wickham 1-380 unit that elected integration as a non-participating owner (see ECL 23-0901[3][a][1]), raised several objections to the proposed compulsory integration order. Plymouth Resources claimed that Norse Energy actually completed the well in the Oneida formation and produced natural gas from that formation. Plymouth Resources further asserted that Norse Energy had failed to establish that it was producing gas only from the Vernon formation. Plymouth Resources claimed that it was entitled to royalties for the production from the Oneida formation, which it had not received. Plymouth Resources also objected to the issuance of an order integrating interests in the Vernon formation until it was established that Norse Energy was only producing gas from the Vernon formation.

Based upon Plymouth Resources' objections, Compulsory Integration Hearing Officer Drazan referred the matter to the Department's Office of Hearings and Mediation Services for adjudicatory proceedings pursuant to Part 624. The matter was assigned to the undersigned Chief Administrative Law Judge ("ALJ") James T. McClymonds, as presiding ALJ.

During the preparation of the hearing notice, in an email dated June 11, 2010, Plymouth Resources:

(1) requested that the legislative hearing and issues conference originally proposed for July 13 and 14, 2010, be continued and set for hearing at a later date;

(2) objected to the assessment of any costs associated with any hearing it was unable to attend; and

(3) requested to participate in discovery and, therefore, demanded copies of all materials that Norse Energy or the Department intended to introduce as evidence, as well as the names of any and all witnesses who will appear on behalf of those parties.

In a June 14, 2010, telephone conference with the parties, Plymouth Resources subsequently objected to paying any costs associated with the hearing. Norse Energy also objected to paying any hearing costs. During the telephone conference, I granted Plymouth Resources' request that the legislative hearing and issues conference be continued, adjourned the proceedings without date, reserved on the discovery request, and put the issue of hearing costs down for oral argument.

Oral argument on the issue of hearing costs was conducted on June 29, 2010, and electronically recorded (see 6 NYCRR 624.8[b][1][xiv]). The parties waived briefing on the issue, resting instead on their oral presentations.

Decision on the hearing costs issue was adjourned while the parties engaged in mediation before ALJ Richard R. Wissler. Mediation concluded on August 3, 2010, without a settlement.

DISCUSSION

I. Positions of the Parties

The Department applies Part 624 permit hearing procedures to the adjudicatory hearings required by ECL 23-0901(3)(d) (see 6 NYCRR 624.1[a][6]; DEC Program Policy DMN-1: Public Hearing Processes for Oil and Gas Well Spacing and Compulsory Integration, Feb. 22, 2006 [DMN-1], at 1, 9). Citing the procedural ruling in Matter of Dzybon 1 (Ruling of the Chief ALJ on Procedural Issues, June 6, 2007, appeal pending), Department staff notes that in addition to the well operator, all uncontrolled owners in a spacing unit are treated as "applicants" in Part 624 proceedings on compulsory integration orders (see id. at 7-8; Matter of Beach W 1, Ruling of the ALJ on Issues and Party Status, Oct. 20, 2008, at 6-7, appeal pending). Pursuant to 6 NYCRR 624.11, applicants are responsible for paying hearing costs, including the cost of physical accommodations for the hearing, publication of any required notices, and necessary stenographic transcriptions (see also 6 NYCRR 624.12[a] [stenographic transcript]). Accordingly, Department staff asserts that hearing costs may be imposed upon any uncontrolled owner that advances issues for adjudication.

Where two or more mineral interest owners, including the well operator and uncontrolled owners, advance issues for adjudication, staff argues that hearing costs should be shared equally. Finally, staff contends that hearing costs, as a cost of permitting, may be considered a well cost (see ECL 23-0901[3][a][5]), which in turn, may be assessed and recouped through the authorization for expenditure (AFE) process provided for in ECL 23-0901 (see ECL 23-0901[c][1][ii][E]).

Norse Energy agrees that hearing costs should be borne by the proponent of an issue for adjudication. Norse Energy disagrees, however, that hearing costs are well costs subject to inclusion in the AFE. Instead, Norse Energy argues that hearing costs should be an immediate burden on the proponent of an issue or, in the alternative, shared equally among the parties.

Plymouth Resources argues that absent statutory authorization, hearing costs may not be imposed upon the parties to a Part 624 adjudication in a proceeding under ECL 23-0901.

Moreover, in Plymouth Resources' view, this proceeding constitutes a post-deprivation due process hearing required by law to address the alleged deprivation of its property interest, that is, its interest in royalties due for the alleged production of gas from the Oneida formation. Plymouth Resources asserts that a person being deprived of a constitutionally protected property right should not be asked to pay for due process. In the alternative, Plymouth Resources asserts that if hearing costs are to be imposed upon the parties to a compulsory integration proceeding, they should be assessed based upon the parties' pro rata interest in the spacing unit.

When asked whether the Department may impose hearing costs on a party absent statutory authority, Department staff noted that nothing in ECL article 23 expressly authorizes the imposition of hearing costs. However, staff claims that the ability to impose hearing costs falls within the Department's discretion to impose terms and conditions in integration orders that are "just and reasonable" (see ECL 23-0910[3]).

## II. Analysis

The general rule in New York is that an agency may not impose administrative hearing costs upon the applicant for a permit, license or other agency approval absent express statutory authority (see Matter of Spears v Berle, 63 AD2d 372, 381 [3d Dept 1978], revd on other grounds 48 NY2d 254 [1979], citing Jewish Reconstructionist Synagogue of North Shore v Incorporated Vil. of Roslyn Harbor, 40 NY2d 158, 165 [1976]). Where no express statutory authorization exists, an agency's authority to impose costs may be implied, but only for expenditures necessary to carry out an express statutory mandate, and not for the mere convenience of the agency (see id.). If neither express nor implied authority exists, an agency may not apply a regulation imposing hearing costs on an applicant (see id.).

In the absence of express statutory authority to impose hearing costs on an applicant, the courts have held that cost of the hearing room and the preparation of a hearing transcript may not be imposed upon an applicant (see Spears, 63 AD2d at 381; Jewish Reconstructionist Synagogue, 40 NY2d at 165). These costs do not represent necessary expenditures, but rather conveniences to the agency (see id.).

With respect to transcription costs, absent express statutory authorization, the agency must bear the cost of the original stenographic record, the original transcript, and the agency's copies (see Spears, 63 AD2d at 381). Only where the applicant requests its own copy of the transcript may the agency charge the applicant the cost of preparing and furnishing the copy to the applicant (see SAPA § 302[2]).

With respect to hearing notices, however, the Court of Appeals has concluded that where a statute requires public notice, the costs of publication may be imposed upon an applicant (see Jewish Reconstructionist Synagogue, 40 NY2d at 165). Where public notice is required by statute, the cost of publication is viewed as necessary to carry out the statutory mandate and, thus, the agency has the implied authority to impose publication costs on the applicant (see id.).

In compulsory integration proceedings, ECL 23-0901 requires the Department to conduct adjudicatory proceedings when substantive and significant issues are raised at the compulsory integration hearing (see ECL 23-0901[3][d]). As noted by staff, however, nothing in ECL 23-0901, or in ECL article 23 generally, expressly addresses whether the costs of the adjudicatory proceeding may be imposed upon the parties.

This is in contrast to proceedings under the Uniform Procedures Act (UPA) (see ECL article 70). Under the UPA, the Department may require an applicant for a permit or other approval governed by the UPA to pay the cost of renting a hearing room and preparing a transcript associated with a public hearing (see ECL 70-0119[3]). Indeed, section 70-0119(3) provides the statutory authorization for 6 NYCRR 624.11, at least for adjudicatory proceedings on UPA permits. However, compulsory integration orders are not governed by the UPA (see ECL 70-0107[3]) and, accordingly, ECL 70-0119(3) does not provide the necessary statutory authority for imposing hearing costs upon the parties in an adjudicatory proceeding under ECL 23-0901.

Moreover, the Department's general power to issue compulsory integration orders "upon terms and conditions that are just and reasonable" (ECL 23-0901[3]) is too broad to constitute express statutory authorization for the imposition of hearing costs on the parties to compulsory integration hearings.

Under the ECL, where the Legislature has authorized the imposition of hearing costs, it has done so explicitly (see ECL 15-0903[3][d] [costs of transcript of hearing on article 15 permits "shall be paid by the applicant"]; ECL 70-0119[3]).

The statutory definition of "well costs" also fails to provide sufficiently express authority for imposing hearing costs upon the parties to a compulsory integration order. Assuming without deciding that hearing costs could be included as a cost of "permitting" (see ECL 23-0901[3][a][5]), the Department would still need underlying express statutory authority to impose hearing costs on the parties before those costs could be imposed through the AFE. The definition of well costs does not itself provide that authority.

In the absence of express statutory authority to impose hearing costs on the parties to an adjudicatory proceeding on a compulsory integration order, the only basis for imposing hearing costs would be if those expenditures are deemed necessary to carry out a statutory mandate. As noted above, however, a hearing room and transcript are deemed conveniences to the agency, and their costs may not be imposed upon an applicant as a necessary expenditure (see Spears, 63 AD2d at 381; Jewish Reconstructionist Synagogue, 40 NY2d at 165). Thus, no basis exists for imposing the costs of the hearing room and the preparation of a hearing transcript upon the parties to a compulsory integration proceeding. Only where a party requests its own copy of the transcript may the Department charge the cost of preparing and furnishing the copy (see SAPA § 302[2]; Spears, 63 AD2d at 381).

With respect to the hearing notice, however, the costs of publication are expenditures necessary to carry out a statutory mandate. ECL article 23 provides that no order under the article may be issued without a public hearing upon at least ten days notice (see ECL 23-0305[2]). Article 23 further provides that notice shall be given "by any one or more of the following methods: (a) personal service, (b) publication in one or more issues of a newspaper of general circulation in the county where the land affected or some part thereof is situated, or (c) by registered or certified mail" (ECL 23-0305[4]). Thus, because ECL article 23 mandates public notice for hearings conducted on compulsory integration orders, the costs of publication may be imposed upon a party to the proceeding as an expenditure necessary to carry out the express statutory notice

mandate (see Jewish Reconstructionist Synagogue, 40 NY2d at 165).

I further conclude that the appropriate party against whom publication costs may be assessed is the proponent of the issues that resulted in the referral of the compulsory integration proceeding to adjudication. Placing the burden of publication costs upon the party raising the challenge to the terms and conditions of the proposed compulsory integration order is consistent not only with the case law cited above, but also with SAPA, which imposes the burden of proof upon the party who initiates the adjudicatory proceeding (see SAPA § 306[1]). Accordingly, in this proceeding, the costs of publication of the hearing notice may be assessed against Plymouth Resources as the sole party raising challenges to the Department's proposed integration order for the Wickham 1-380 well.*

Plymouth Resources asserts that as a party seeking to vindicate claimed property rights, hearing costs may not be imposed upon it without violating due process. In Jewish Reconstructionist Synagogue, however, the Court expressly noted that the right of an applicant was involved in the administrative proceeding (see 40 NY2d at 162). Nonetheless, the Court affirmed the imposition of the cost of notice publication upon the applicant (see id. at 165). Thus, so long as the publication costs are necessary to carry out a statutory mandate, which they are in this proceeding, and reasonable (see id.), no basis exists for concluding that the imposition of the cost of notice publication upon Plymouth Resources offends due process.

## III. Conclusion

In sum, Plymouth Resources' objection to paying the cost of publishing any required notices as provided for in 6 NYCRR 624.11(a) is overruled. Plymouth Resources' objection to paying other hearing costs is otherwise sustained. The Department will be responsible for bearing the costs of physical

* In this ruling, I do not reach any conclusions concerning how publication costs are to be assessed in adjudicatory hearings on compulsory integration orders when multiple parties raise challenges to the Department's proposed order.

accommodations, if proceedings are not held in Department facilities, and any necessary stenographic transcriptions.

With respect to stenographic transcripts, due process does not necessarily require that administrative adjudicatory proceedings be stenographically recorded (see Matter of Przydatek v New York State Office of Children and Family Servs., 13 AD3d 1102, 1103 [4th Dept 2004]; see also SAPA § 302[2]). So long as a recording of the proceeding is made, the hearing need not, as a general matter, be recorded by a stenographer.

However, the courts have held that where an agency's regulations require a stenographic transcript, one must be prepared (see Matter of Weekes v O'Connell, 304 NY 259, 293-294 [1952]). Here, Part 624 expressly provides that "[a]ll proceedings at a hearing must be stenographically reported" (6 NYCRR 624.12[a]; see also 6 NYCRR 624.4[a][1] [stenographic transcript of the legislative hearing required]). Thus, a stenographic transcript must be made of those portions of the proceeding the regulations require to be stenographically recorded (cf. 6 NYCRR 624.8[b][1][xiv] [oral argument need only be "recorded"]). Nonetheless, although the Department bears the burden of paying for the original and its own copies of any required stenographic transcripts, the parties may be charged the reasonable cost of the copies they request (see SAPA § 302[2]).

## RULING

Plymouth Resources' objection to paying hearing costs is overruled in part, and otherwise sustained. Pursuant to 6 NYCRR 624.11, Plymouth Resources is required to pay the cost of publishing any required notices.

Norse Energy's objection to paying hearing costs is sustained.

I reserve decision on Plymouth Resources' discovery demand pending further proceedings.

A conference call with the parties will be convened in the near future to schedule a legislative hearing, issues conference and adjudicatory proceeding.

/s/

James T. McClymonds
Chief Administrative Law Judge

Dated: October 29, 2010
Albany, New York

TO: Attached Service List