STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

BEACH W 1.

RULING OF THE ADMINISTRATIVE LAW JUDGE ON ISSUES AND PARTY STATUS

DEC Order No. DMN 07-12

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

DZYBON 1.

DEC Order No. DMN 06-37

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

EOLIN 1.

DEC Order No. DMN 06-33

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

GILLIS 1.

DEC Order No. DMN 06-34

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

LITTLE 1.

DEC Order No. DMN 06-13

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

LUCAS 1.

DEC Order No. DMN 07-11

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

MESSING 1-B.

DEC Order No. DMN 07-07

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

PIETILLA 1.

DEC Order No. DMN 07-05

Appearances of Counsel:

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

-- The West Law Firm, PLLC (Thomas S. West of counsel), and Nixon Peabody, LLP (Ruth Leistensnider of counsel), for Fortuna Energy Inc.

-- Lipman & Biltekoff, LLP (Michael P. Joy of counsel), for Western Land Services, Inc.

-- The Denton Law Office PPLC (Christopher Denton of counsel), for M & D Land and Cattle Company, LLC, et al.

-- William Casey McManemin, representative for proposed amicus party Dorchester Minerals, L.P.

RULING OF THE ADMINISTRATIVE LAW JUDGE ON ISSUES AND PARTY STATUS

Background

Staff of the Department of Environmental Conservation's Division of Mineral Resources ("Department") propose to issue compulsory integration orders pursuant to Environmental Conservation Law ("ECL") § 23-0901, integrating mineral interests within the spacing units for each of eight natural gas wells. Those wells are the Beach W1 well located in Spencer, Tioga County; the Dzybon 1 and Eolin 1 wells, both located in Corning, Steuben County; the Gillis 1 well located in Caton, Steuben County; the Little 1 well, located in Veteran, Chemung County; the Lucas 1 well, located in Van Etten, Chemung County; the Messing 1-B well, located in Southport, Chemung County; and the Pietilla 1 well, located in Van Etten, Chemung County. All eight wells will tap into the Trenton-Black River natural gas formation.

Separate compulsory integration hearings, conducted by Department staff pursuant to ECL 23-0901(3)(b), were held on each of the eight wells. Pursuant to ECL 23-0901(3)(d), based upon objections raised at those hearings, Department staff referred the matters except for Little 1 to the Department's Office of Hearings and Mediation Services ("OHMS") for administrative adjudicatory hearings pursuant to 6 NYCRR part 624 ("Part 624"). Little 1 was referred to OHMS upon remand from Supreme Court, Albany County, in a pending CPLR article 78 proceeding. All eight matters were assigned to Chief Administrative Law Judge ("ALJ") James T. McClymonds, as the presiding ALJ. Because common issues were presented, the eight proceedings are being conducted on a joint record.

These administrative adjudicatory proceedings are the first to be conducted under the 2005 amendments to ECL article 23 (see L 2005, ch 386). The parties to the Dzybon 1, Eolin 1, Gillis 1 and Little 1 matters were afforded the opportunity to comment on the application of Part 624 to administrative adjudicatory proceedings under the new law, and a procedural ruling was issued (see Matter of Dzybon 1, Chief ALJ Ruling on Procedural Issues, June 6, 2007 ["Procedural Ruling"]). Appeals from the procedural ruling are presently pending before the Commissioner. In the interim, the parties to the remaining four matters, which were referred for adjudicatory hearings after the issuance of the procedural ruling, agreed that the procedural ruling would apply to them as well, subject to the Commissioner's determination on appeal.

Notice, Notices of Appearance, and Petitions for Party Status

A joint notice of public legislative hearing, issues conference and adjudicatory hearing for the eight proceedings was published in the Department's Environmental Notice Bulletin on June 19, 2007 (see Issues Conference Exhibit ["IC Exh"] 9A). Notice was also published in the Elmira Star-Gazette and The Leader, both on June 25, 2007 (see IC Exhs 9B and 9C).

Pursuant to the procedural ruling and 6 NYCRR 624.4(a), a joint legislative hearing was scheduled to commence on July 18, 2007 at 1:00 PM at the Hilton Garden Inn, Horseheads, New York. A joint issues conference pursuant to 6 NYCRR 624.4(b) was scheduled to commence at the same location at the conclusion of the legislative hearing, and continue on July 19, 2007 as needed. An adjudicatory hearing was scheduled to commence at the conclusion of the issues conference and continue on July 19, 2007 as needed.

Pursuant to the procedural ruling, the well operator and all uncontrolled mineral rights owners in each spacing unit, were accorded automatic full party status for the adjudicatory proceedings. Uncontrolled owners are mineral interest owners in a spacing unit who have not entered into a voluntary lease or participation agreement with the well operator, including potential integrated participating owners ("IPOs"), integrated non-participating owners ("NPOs"), and royalty owners (see ECL 23-0901[3][a]). The notice established July 11, 2007 as the deadline for the filing of notices of appearance by those automatic full parties wishing to participate in the adjudicatory hearing. The notice also established July 11, 2007 as the deadline for the filing of petitions for party status pursuant to 6 NYCRR 624.5(b).

Timely notices of appearance were filed by Fortuna Energy Inc. -- the well operator in each of the eight units -- Western Land Services, Inc. ("WLS"), and by Mr. Christopher Denton, Esq., on behalf of 17 individual uncontrolled owners. A petition for amicus party status was filed by Dorchester Minerals L.P. Department staff is a mandatory party to these proceedings pursuant to 6 NYCRR 624.5(a) (see Procedural Ruling, at 7).

State Environmental Quality Review Act ("SEQRA") Status

As stated in the notice, Department staff published a Final Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program in July 1992. On September 1, 1992, Department staff issued a SEQRA (ECL article 8) findings

statement concluding that the conduct of compulsory integration hearings pursuant to ECL article 23 would have no significant impact on the environment. Department staff, on behalf of the Department as lead agency, determined that these proceedings are being carried out in conformance with the conditions and thresholds established for compulsory integration hearings in the GEIS and in the findings statement. Accordingly, no further action is required under SEQRA (see 6 NYCRR 617.10[d][1]).

Legislative Hearing

The joint legislative hearing convened as scheduled at 1:00 PM on July 18, 2007. About 26 people attended the legislative hearing. In addition to Department staff, who offered a brief statement describing the compulsory integration process and staff's position on the issues raised by the parties in these proceedings, five individuals spoke at the legislative hearing.

Two of the speakers at the legislative hearing also submitted written materials, which are incorporated into the legislative hearing transcript (see Legislative Hearing Trans [7-18-07], at 33-41 [written submissions by Bryan S. Snyder]; id. at 50-51 [written submissions by Ashur Terwilliger]). Written submissions by other legislative hearing attendees are also incorporated into the transcript. No other written submissions were received.

The speakers raised several concerns about the integration process for the eight wells involved here, as well as other wells not the subject of these hearings. Their concerns and comments included that the time for landowners to respond to a notice of unitization is too short; that seismic and other geological data used to determine unit boundaries should be made available to landowners; and that royalties be released while disputes over the terms of integration are adjudicated. Speakers also raised concerns about alleged discrepancies between the production volume statements provided by well operators to mineral interest owners and statements provided to the Department. Speakers also made statements in support of requiring well operators to provide well data to other participating owners. Speakers asserted that landowners are not being treated fairly in the integration process; raised criticism of the process for establishing spacing units; and pointed out that well operators usually decline requests to name participating owners as additional insureds on their drilling insurance policies and that such insurance is not otherwise available to participating owners.

The legislative hearing was concluded at 1:36 PM, with the conclusion of the public statements.

Issues Conference and Briefing

The joint issues conference convened at 1:53 PM on July 18, 2007, after the conclusion of the legislative hearing, and continued on July 19, 2007. Department staff was represented by Jennifer Hairie, Esq., Kathleen Sanford, Jack Dahl and Thomas Noll. The remaining parties appeared by counsel, as designated above, except amicus petitioner Dorchester Minerals, which did not appear at the issues conference.

During discussions on the Messing 1-B unit, Fortuna objected to WLS's participation on the ground that because WLS had no interests in the unit, it lacked standing to offer argument. WLS orally requested that it be granted amicus party status in the Messing 1-B proceeding. Over Fortuna's objection, I granted WLS's late filed oral petition for amicus party status, and proceedings continued (see Issues Conference Transcript ["IC Trans"], at 267-270).

Towards the close of the issues conference, the parties stipulated on the record that Fortuna was authorized to begin production in the Dzybon, Gillis, Lucas, and Pietilla units and make payments to all owners of all amounts not in dispute, subject to the parties' right to audit the payments and raise objections to the amounts actually paid (see IC Trans, at 389-417). The parties also stipulated that Fortuna was authorized to begin production and make payments in the Beach W1 unit, except for payments to Ms. Flora McDowell, whose election required confirmation (see id. at 396-398). The parties agreed that payments to Ms. McDowell would begin 45 days after her elections were confirmed (see id.).

No such agreement was reached with respect to the Eolin, Little and Messing units. The parties did agree, however, to continue discussions regarding the Eolin unit (see id. at 409-410).

After the conclusion of the issues conference, the following briefing schedule was established: opening briefs from the parties were due August 23, 2007; replies due September 18, 2007. Upon the consent of the parties, the deadline for submitting briefs was subsequently extended one day to August 24, 2007.

Timely opening briefs and reply briefs were submitted

by Department staff, Fortuna, WLS and Mr. Denton. No written submissions were received from Dorchester Minerals.

Post-Issues Conference Submissions

Beach W1 Unit -- Clarification of Elections

During the issues conference on July 19, 2007, Department staff indicated that it might require affidavits from Ms. Flora McDowell and her counsel to aid in interpreting the compulsory integration election forms submitted by those uncontrolled owners in the Beach W1 unit. By email transmission dated September 28, 2007, Department staff informed the presiding ALJ and the parties that after considering a letter from Ms. McDowell to Fortuna, dated May 17, 2007, with attachments (see IC Exh 1C), staff understood the intentions of each of the involved parties, and did not require any further clarification from the uncontrolled owners in the Beach W1 unit. Accordingly, Ms. McDowell's election was confirmed by Department staff, without objection from the parties, on September 28, 2007.

Messing 1-B Unit -- Stipulation Regarding Well Costs

In his notice of appearance and during the issues conference, Mr. Denton raised an issue concerning well costs assessed for the Messing 1-B well. Counsel for Fortuna subsequently filed a letter dated November 28, 2007, with attachments, with the ALJ. The letter transmitted a stipulation executed by counsel for Department staff, counsel for Fortuna, and Mr. Denton, on behalf of Keeblers Two Ponds, LLC, Peacefield Enterprises, LLC, Mace's Gas Development, LLC, Leo C. Keebler, S. William and Susan H. Tanner, and Donald L. and Sharon Haskins.

The stipulation indicated that the parties had entered into a settlement agreement that resolved all issues concerning the amount of well costs that may be assessed against the non-participating owners in the Messing 1-B unit, and that the parties withdrew their request raised at the issues conference in the above referenced proceeding for adjudication of that issue. The stipulation also indicated that once the stipulation was accepted as part of the record in this adjudicatory proceeding, the well would commence production and Fortuna would pay all monies not in dispute as if the proposed order in this proceeding was in effect, subject to adjudication of the outstanding issue pertaining to access to well data and site access.

By memorandum dated November 30, 2007, I gave notice that Fortuna's November 28, 2007 letter and attached stipulation

were accepted into the record of the adjudicatory proceeding on the Messing 1-B unit. The letter and stipulation were received as Issues Conference Exhibit 17.

DISCUSSION

Standards for Adjudication

The purpose of an issues conference is, among other things, to hear, identify, narrow and potentially resolve the issues raised by the issues conference participants and determine party status for any subsequent adjudicatory proceedings (see 6 NYCRR 624.4[b][2]). With respect to party status, I have concluded that, in addition to Department staff, the well operator and all uncontrolled owners in a spacing unit are mandatory parties under Part 624 for purposes of administrative adjudicatory proceedings on proposed integration orders under Article 23 (see 6 NYCRR 624.5[a]; Procedural Ruling, at 7-8). This conclusion is premised upon the circumstance that the legal rights, duties and privileges of the well operators, integrated participating owners ("IPOs"), integrated non-participating owners ("NPOs"), and uncontrolled royalty owners named in the proposed integration order are directly determined in Departmental adjudicatory proceedings pursuant to Part 624 and the ensuing final compulsory integration order (see Procedural Ruling, at 7-8, 9; see also State Administrative Procedure Act ["SAPA"] § 102[3]). It is also premised upon the recognition that under the new Article 23, a compulsory integration proceeding is akin to a Departmental permitting proceeding with multiple applicants, namely the mineral interest owners in the spacing unit named in the proposed integration order, whose rights and duties are being determined in that order, which is the equivalent of a Departmental permit or license.

As to the issue raised by the issues conference participants, those mandatory parties seeking to affirmatively raise issues for adjudication must satisfy the standards for adjudication applicable to applicants (see Procedural Ruling, at 9). Thus, a well operator or other uncontrolled mineral interest owner must establish at the issues conference that an issue sought to be adjudicated (1) relates to a dispute between Department staff and the well operator or other uncontrolled mineral interest owner over a substantial term or condition of the draft integration order, or (2) relates to a matter cited by Department staff as a basis to deny the integration order or a proposed term thereof and is contested by the well operator or other uncontrolled mineral interest owner (see 6 NYCRR 624.4[c][1][i], [ii]). A well operator or other uncontrolled

mineral interest owner, however, who does not affirmatively raise a challenge to the Department's proposed order is otherwise entitled to participate in the adjudicatory proceedings to defend the Departmental action and its own rights, just as an applicant is entitled to participate in adjudicatory proceedings on a permit under the Uniform Procedures Act (see ECL article 70 ["UPA"]; 6 NYCRR part 621).

I have also concluded that third parties who are not mineral interest owners in a spacing unit, but who seek to participate in adjudicatory proceedings on a compulsory integration order, hold the status of "intervenors" under Part 624 (see 6 NYCRR 624.5[b]; Procedural Ruling, at 8). As such, third parties seeking to participate in adjudicatory proceedings on a proposed integration order would have to file a sufficient petition for party status, and satisfy the standards for party status, including the standards for issue adjudication, applicable to intervenors (see 6 NYCRR 624.5[b]; 6 NYCRR 624.4[c][1][iii], [2]-[4]).

During the issues conference and on appeal to the Commissioner from the procedural ruling, Fortuna criticizes my ruling granting mandatory party status to all uncontrolled mineral interest owners in a spacing unit. Fortuna would afford mandatory party status to only the well operator and those uncontrolled mineral interest owners who raise issues that Department staff deemed substantive and significant at the pre-adjudicatory integration hearing (see ECL 23-0901[3][b], [d]). All others would be required to file late-filed petitions for party status at the Part 624 issues conference. To do otherwise, asserts Fortuna, will result in the "automatic" adjudication of issues "regardless of merit" and the "evisceration" of the substantive and significant standard.

Fortuna's criticism is overstated. The circumstance that a mandatory party is "automatically" a party to a Part 624 administrative adjudicatory proceeding does not necessary mean that all issues raised by such a mandatory party are "automatically" adjudicated. As noted above, issues affirmatively raised by mandatory parties must satisfy the standards applicable to applicants established in section 624.4(c)(1)(i) and (ii). Thus, irrelevant issues -- issues not involving a substantial term or condition of the proposed integration order or issues not related to a denial by Department staff -- would not be adjudicated. Moreover, principles such as waiver and preservation may also bar the adjudication of issues raised by mandatory parties, although how those principles will be applied in the context of the current Article 23 has yet to be

settled. Thus, issues raised by mandatory parties are not automatically adjudicated regardless of merit under Part 624.

On the other hand, the adjudication of issues that are relevant to a substantial term of the proposed integration order and the subject of a significant dispute between Department staff and the named parties to the integration order is consistent with the statutory directive to adjudicate substantive and significant issues (see ECL 23-0901[3][d]). In other words, by raising a significant dispute with Department staff concerning a substantial term of the integration order, a named party to the proposed integration order satisfies the statutory substantive and significant test (see id.).

Moreover, to the extent Fortuna proposes to require uncontrolled mineral interest owners whose issues were rejected by Department staff at the integration hearing to meet the standards applicable to intervenors under Part 624, it is not clear how such standards would be applied. The standards applicable to intervenors require a proposed intervenor to raise an issue concerning an applicant's ability to meet permitting standards (see 6 NYCRR 624.4[c][2]). Under Fortuna's view, the only "applicant" in a Part 624 proceeding on a proposed compulsory integration order is the well operator. However, the terms of the well drilling permit are not at issue in a compulsory integration hearing. Moreover, if the issue sought to be raised by the uncontrolled mineral interest owner concerns the terms of that owner's integration, and not the terms of the well operator's integration, by definition, such owner could never satisfy the Part 624 standards for adjudication even though the owner's mineral rights are being determined in the integration order.[1]

Fortuna also contends that the fact that a Departmental action might "affect" a landowner's rights does not warrant granting mineral interest owners "applicant" status. Fortuna argues that every environmental statute or regulation affects

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[1] At the issues conference, no party explained how the standards applicable to intervenors would be applied to uncontrolled mineral interest owners, nor did any party argue a different outcome if the standards applicable to intervenors, as opposed to the standards applicable to applicants, were applied. To the contrary, Fortuna opined that no dispute existed concerning whether the contested issues raised by all parties at the issues conference met the statutory substantive and significant standard (see IC Trans [7-19-07], at 417-418).

landowners' rights in some way, but that this has not resulted in the Department treating such effected landowners as "applicants" in the permitting process. This contention is not accurate. Those landowners who seek a Departmental permit and, thus, whose rights and duties are being determined in a Departmental approval, are treated as "applicants" in the permitting process, in part, to protect their due process rights as a property owner (see Matter of 628 Land Assocs., Interim Decision of the Commissioner, Sept. 12, 1994, at 2).

Fortuna is correct that other landowners, such as the neighbors to a permit applicant, who might be incidentally impacted by the permit applicant's project are not automatically granted "applicant" status in the permitting process. However, although such landowners might be incidentally impacted by the Departmental approval, such landowners' rights, duties and obligations are not the subject of, nor directly determined by, the Departmental permit. Nor are such landowners named parties in the Departmental permit. Here, a proposed compulsory integration order does not merely incidentally impact the uncontrolled mineral interest owner's rights in the way a permit effects a neighboring property owner. Rather, as noted above, the compulsory integration order directly determines the rights, duties and privileges of the uncontrolled mineral interest owners in the spacing unit and named in the order, including those who raised issues rejected by staff at the integration hearing (see SAPA § 102[3]). Thus, such mineral interest owners are in essence "applicants" under Part 624.

Fortuna also relies upon agency decisions under the former Article 23 for the proposition that uncontrolled mineral interest owners other than the well operator are intervenors under Part 624. However, current Article 23 makes clear that compulsory integration proceedings under the new law are, in essence, multiple applicant proceedings. Moreover, current Article 23 provides for an integration hearing, which is similar to the staff-level, pre-adjudicatory hearing review of an applicant's permit application and objections provided for under Part 621 for UPA permits. These changes to former Article 23 warrant revisiting how Part 624 should be applied under the new statutory framework.

Finally, on its appeal from the procedural ruling, Department staff seeks clarification concerning whether the procedural ruling applies to the staff-level integration hearing held pursuant to ECL 23-0901(3)(b). The procedural ruling concerns only the post-referral application of Part 624 to adjudicatory proceedings on proposed compulsory integration

orders. The standards applicable during the pre-referral integration hearing were not before me on the procedural ruling, nor did I take any view of the standards to be applied at such a hearing. Under the Department's Program Policy DMN-1: Public Hearing Process for Oil and Gas Well Spacing and Compulsory Integration (Feb. 22, 2006 ["DMN-1"]), the determination whether a substantive and significant issue has been raised at a staff-level integration hearing and, thus, whether to refer the matter for adjudicatory proceedings under Part 624, rests in the sound discretion of Department staff and is made pursuant to the standards staff deems appropriate.

Issues Presented for Adjudication

A. Application of Laws of 2005, Chapter 386 to Pre-Amendment Permits to Drill/Risk Penalty (Eolin 1 and Little 1 Wells)

The proceedings in Eolin 1 and Little 1 involve what Department staff refer to as "transition" wells. Transition wells are natural gas wells for which a permit to drill was issued before August 2, 2005, the effective date of the 2005 amendments to ECL article 23 (see L 2005, ch 386 [hereinafter, the "new law"]), but for which the compulsory integration of mineral interests was completed after August 2, 2005. In Eolin 1, the permit to drill was issued on March 12, 2004; in Little 1, the permit to drill was issued on June 22, 2005. Fortuna is the present operator of the two wells.

Department staff has taken the position in these and prior proceedings on transition wells that the new law applies to the compulsory integration of interests for transition wells such as Eolin 1 and Little 1, that is, wells for which the permit to drill was issued before August 2, 2005, but for which spacing units were not established until after August 2, 2005. Accordingly, Department staff convened compulsory integration hearings pursuant to ECL 23-0901(3)(b) for the Eolin 1 and Little 1 wells. The integration hearing for the Little 1 well was held June 1, 2006, and for the Eolin 1 well on August 31, 2006.

At the respective integration hearings, WLS sought to participate in the units as an IPO (see ECL 23-0901[3][a][2]). However, WLS objected to the imposition of a risk penalty of 200 percent of well costs and a risk penalty of 100 percent of surface facilities costs in the computation of the amount to be paid Fortuna to participate as an IPO in the two units. To avoid being integrated as a royalty owner (see ECL 23-0901[3][a][3]), WLS filed three election forms at each hearing: an "under

protest" form electing IPO status subject to the objected-to risk penalty; a "corrected" form electing IPO status without the risk penalty; and a "protective" form electing status as an NPO (see ECL 23-0901[3][a][1]; see also IC Exh 3, WLS Exh 1 [Eolin 1]; IC Exh 5A, WLS Exh 1 [Little 1]).

At each of the hearings, Department staff accepted WLS's "protective" election as an NPO on the ground that because the subject wells were in production, the risk to participate in the units had been removed. Thus, staff concluded it was "just and reasonable" to impose a risk penalty upon uncontrolled owners, including those seeking to participate as an IPO (see Integration Hearing Trans [6-1-06], at 121-125 [Little 1]; Integration Hearing Trans [10-3-06], at 45-52 [Eolin 1]).

Subsequently, in Little 1, Department staff concluded no substantive and significant issues were presented at the integration hearing and, thus, no adjudicatory hearing was required (see ECL 23-0901[3][e]). Accordingly, staff issued Integration Order No. DMN 06-13, dated August 17, 2006 (see IC Exh 5D). WLS was integrated as an NPO (see id., Exh D).

In Eolin 1, Department staff concluded that other issues raised at the integration hearing were substantive and significant. Accordingly, staff referred the matter to OHMS for administrative adjudicatory proceedings pursuant to Part 624 (see ECL 23-0901[3][d]).

WLS filed a CPLR article 78 proceeding in Supreme Court, Albany County, challenging the Little 1 integration order. In light of a remand for further administrative adjudication in an article 78 proceeding challenging the unrelated Drumm 1 integration order (see Matter of Western Land Services, Inc. v Department of Envtl. Conservation, Sup Ct, Albany County, Dec. 29, 2005, Teresi, J., Index No. 6647-06),[2] the parties to the

[2] Drumm 1 also concerned a transition well in the same procedural posture as Eolin 1 and Little 1. At the integration hearing on the Drumm 1 well, WLS objected to the imposition of a risk penalty to parties seeking participation as an IPO. In a ruling dated September 26, 2006, I concluded that the new law applied to the Drumm 1 transition well (see Matter of Drumm 1, ALJ Ruling, Sept. 26, 2006, at 3-6). I also concluded that under the new law, no administrative adjudicatory proceedings were available to challenge an integration order issued by Department staff after an integration hearing, absent a referral from Department staff to OHMS pursuant to ECL 23-0901(3)(d), which, as

Little 1 article 78 proceeding stipulated to discontinue that proceeding and for a remand to the Department for further administrative adjudication (see So-Ordered Stipulation of Discontinuance and Order of Remand, Matter of Western Land Services, Inc. v Department of Envtl. Conservation, Sup Ct, Albany County, Jan. 18, 2007, Donohue, J., Index No. 8739-06 [IC Exh 5C]). The proceeding was subsequently referred to OHMS, and I was assigned as Presiding ALJ.

1. Fortuna's Objection -- Application of Current Article 23 to Transition Wells

Fortuna objects to the application of the new law for the compulsory integration of interests in both the Eolin 1 and Little 1 units. As it has asserted in other proceedings, including Drumm 1, Fortuna contends that former Article 23 applies to compulsory integration of interests in transition wells and that Department staff properly exercised its discretion under the "just and reasonable" standard to impose a 200-percent risk penalty upon IPOs (see ECL former 23-0901[3]). Fortuna asserts that only those provisions of the new law governing the establishment of spacing orders are applicable to transition wells (see ECL 23-0503[5]). Under Fortuna's view, once a spacing order is issued for wells permitted prior to the effective date of the new law, the provisions of the former law govern the integration of interests in those spacing units. In addition, Fortuna contends that application of the new law to wells permitted prior to the new law's effective date deprives well operators of vested rights.

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in Little 1, had not occurred in Drumm 1.

Fortuna filed an appeal and, in the alternative, moved for leave to appeal with the Commissioner challenging my ruling that the new law applied to the Drumm 1 transition well. Contemporaneously, WLS filed the CPLR article 78 proceeding that resulted in Justice Teresi's remand for further administrative adjudication.

After the remand from Supreme Court, Department staff referred the Drumm 1 matter to OHMS for adjudicatory proceedings. In light of staff's referral, the Commissioner dismissed the appeal, denied the motion for leave to appeal, and remanded the matter to me for further proceedings (see Matter of Drumm 1, Commissioner Ruling on Motion for Expedited Appeal, Nov. 30, 2007). Although the Drumm 1 matter is presently before me, it is not the subject of this issues ruling.

WLS opposes Fortuna's objection, and argues that the new law applies to transition wells.[3] WLS contends that Fortuna's reading of the statutes effectively eliminates the "or" in the applicability provisions of new Article 23 (see L 2005, ch 386, § 10 ["This act shall take effective immediately and shall apply to any oil or gas well permit or spacing order issued on or after such effective date except as otherwise specifically provided in this act." (emphasis added)]). Moreover, citing the second interim decision in Matter of Terry Hill South Field (Second Interim Decision of the Assistant Commissioner, June 7, 2007, at 13-15), WLS contends that Fortuna is seeking application of the former law while improperly urging application of the 200-percent risk penalty from the new law.

Department staff generally agrees with WLS's arguments concerning application of the new law to transition wells. In addition, Department staff points out that in Little 1, Fortuna executed a stipulation agreeing to application of the new law during proceedings on the well, thereby rendering the issue academic (see IC Exh 5A, WLS Exh 5).

Fortuna's objection raises a threshold legal issue the resolution of which does not depend upon facts that are in material dispute (see 6 NYCRR 624.4[b][2][iv]). Moreover, at least in Little 1, the stipulation executed by Fortuna renders the objection moot. In the stipulation, Fortuna agreed to the application of the terms of the new law without reservation of the right to challenge the new law's application (see Stipulation, IC Exh 5A, WLS Exh 5).[4]

In any event, on the merits, for the reasons stated in the ruling in Drumm 1 and incorporated by reference herein, I

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[3] Mr. Denton joins WLS's argument. Moreover, with respect to Little 1, Mr. Denton appears as a respondent on the issues raised by WLS. As Mr. Denton conceded during the issues conference, his clients did not raise objections to the integration order at the integration hearing or on CPLR article 78 review. Thus, Mr. Denton waived the right to affirmatively raise issues concerning the Little 1 unit. However, as a mineral interest owner in the unit, and consistent with his clients' status as mandatory parties, he may be heard as a respondent during these proceedings (see Procedural Ruling, at 7-8).

[4] The stipulation, if any, executed in Eolin 1 was not included in the issues conference record. Thus, it is not clear whether Fortuna similarly waived the objection in Eolin 1.

adhere to my prior determination that the new law applies to transition wells (see Ruling of the Chief Administrative Law Judge, Sept. 26, 2006, at 3-6). As noted in Drumm 1, this conclusion is supported by the plain text of the current Article 23, as well as the legislative goals of the new law, namely, to provide certainty and efficiency in the process of integrating interests in oil and gas wells.

Fortuna contends that because the integration provisions of ECL 23-0901 do not contain a provision similar to ECL 23-0503(3) governing well permits issued before the effective date of the new law, the integration provisions of the new law are not intended to apply to such well permits. Citing ECL 23-0901(3)(b), Fortuna contends that under the new law, integration of mineral interests is linked to, and is contemporaneous with, the issuance of well permits and, thus, it is "impossible" to apply the new law to well permits issued under the old law. Fortuna's argument is not convincing.

ECL 23-0901(3)(b) provides:

> "If 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."

The well permitting process recognizes that the integration of interests may be required for a well (see, e.g., ECL 23-0501[3]). However, a fair reading of section 23-0901(3)(b) indicates that the compulsory integration of interests is linked not with the issuance of the well permit, but with the establishment of the spacing unit, whether as a matter of law (by conforming to Statewide spacing requirements) (see ECL 23-0503[2]; ECL 23-0501[1][b][1]), or by spacing order (see ECL 23-0503[3]; see also Drumm 1, ALJ Ruling, at 4). It is upon the establishment of the spacing unit that the determination can be made whether the well operator controls all owners within the unit. Thus, pursuant to ECL 23-0901(3)(b), the compulsory integration of interests under the new law necessarily follows the establishment of a spacing unit under the new law, not the issuance of the well permit.

Nothing in the new law requires that the integration of interests occur at the same time that the well permit is issued (see ECL 23-0501; ECL 23-0503). To the contrary, under ECL 23-0901(3)(b), the integration hearing necessarily occurs at some time after the well permit is issued.

For well permits issued after the effective date of current Article 23, the statute contemplates that a spacing unit will be proposed contemporaneously with the application for the well permit (see ECL 23-0501[2]). As Fortuna correctly notes, this constitute a significant change from the practice under the former Article 23, pursuant to which the Department took a field-wide approach to the establishment of spacing units. However, as Fortuna concedes, for wells permitted prior to the effective date of the new law, the new law expressly provides for establishment of a spacing unit under the new law at a time following the issuance of the well permit. Because the new law expressly applies for the establishment of spacing units for transition wells, and because the integration of interests under the new law follows the establishment of spacing units under the new law, it is not "impossible" to integrate interests in the Little 1 and Eolin 1 wells under the new law, as Fortuna asserts.

As I have previously concluded, application of current Article 23 to wells permitted, but not integrated, prior to the new law's effective date does not constitute an impermissible retroactive application of a new statute in derogation of vested rights (see Matter of Fred Andrews 1-A, Summary Report of the Chief Administrative Law Judge, May 22, 2007, at 8-9, decision of the Commissioner pending). The new law applies prospectively with respect to the establishment of spacing units and the compulsory integration of interests therein for wells permitted prior to the new law (see id.).

Even assuming for the sake of argument that the new law is being retroactively applied, the vested economic right Fortuna claims under the old law is the alleged "right" to have uncontrolled owners integrated as 1/8th royalty interests, rather than as either integrated participating or non-participating working interest owners, that is IPOs and NPOs respectively under the new law.[5] Under former Article 23, however, the Department

[5] As was noted by the Assistant Commissioner in Terry Hill South Field, the 1/8 royalty interest the Department applied to uncontrolled owners who did not wish to participate in the operation of a well is different from the 1/8th royalty interest provided for in ECL former 23-0901(3) (see Second Interim Decision, at 14 n 5). The latter is a royalty paid to an unleased working interest owner (an NPO under the new law) during the risk penalty recovery period (see id.). The royalty interest Fortuna refers to here represents the conversion, pursuant to the Department's "just and reasonable" power, of a working interest in gas production from a well, into a monetary royalty in lieu

integrated uncontrolled owners as royalty interests, free and clear of any liabilities and obligations arising from the operation of a well, pursuant to its broad discretionary power to integrate uncontrolled owners "upon terms and conditions that are just and reasonable" (ECL former 23-0901[3]; see Matter of Terry Hill South Field, Second Interim Decision of the Asst. Commissioner, June 7, 2007, at 14 n 5; Matter of Western Land Servs., Inc., DEC Declaratory Ruling No. 23-14, Jan. 29, 2004, at 16, 17). Because the Department's integration of mineral rights owners as royalty interests was an exercise of discretion under the former law, Fortuna cannot claim a vested property right in the Department's exercise of that discretion (see Matter of Daxor Corp. v State of New York Dept. of Health, 90 NY2d 89, 98-99 [1997], cert denied 523 US 1074 [1998]; Huntington Yacht Club v Incorporated Vil. of Huntington, 1 AD3d 480, 481 [2 Dept 2003]; Matter of Dworkin v New York State Dept. of Envtl. Conservation, 229 AD2d 42, 47 [3d Dept], appeal dismissed 89 NY2d 1085 [1997]).

Finally, even assuming the old law applies to transition wells, WLS is correct that at most, Fortuna would be entitled to the 100-percent risk penalty provided for under the old law, not the 200-percent risk penalty urged here (see Terry Hill South Field, Second Interim Decision, at 13-15).

2. WLS's Objection -- Application of Risk Penalty to IPOs

WLS objects to the Department's determination to integrate it as an NPO subject to a risk penalty in the Eolin 1 and Little 1 units. WLS argues that under the new law, the Department lacks statutory authority to impose a risk penalty upon a mineral interest owner who has elected to participate as an IPO and has otherwise satisfied the criteria required for participation as an IPO -- that is, has tendered certified funds representing its proportionate share of the well costs. Citing the ruling in Drumm 1, WLS contends that the fact that knowledge about a transition well's productivity might be known at the time of integration does not warrant imposition of a risk penalty. Moreover, WLS argues that based upon the information available at the integration hearing on Little 1, the productivity of the Little 1 well was unknown. Thus, WLS argues that the Department's failure to allow WLS to elect participation as an IPO without a risk penalty was arbitrary and capricious.

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thereof free and clear of any liability associated with well operation (see id.).

Department staff argues that its determination to charge WLS a risk penalty was based upon the circumstance that the Little 1 well was in production at the time of the integration hearing, and relies upon the authority under ECL 23-0901(3)(c)(1)(ii)(J) to impose terms in an integration order that are "reasonably required to further the policy objectives" of Article 23. Department staff asserts that the record requires development of the facts and circumstances present when the elections were made in Little 1 to determine whether it is just and reasonable to impose a risk penalty upon WLS.

Fortuna, citing Western Land Servs., argues that the overarching requirement of Article 23 is the "just and reasonable" standard (see 26 AD3d, at 20). Fortuna contends that it is just and reasonable, under either the old or new law, to impose a risk penalty when a well is in production to avoid "free riders," that is, to prevent parties from electing to participate at cost when the risk associated with well development has been removed.

The issue whether the Department has the authority to impose a risk penalty against a mineral rights owner electing participation as an IPO is an adjudicable issue. The issue relates to a dispute between Department staff and an "applicant" -- in this case a mineral rights owner whose rights are being directly determined by the integration order -- over a substantial term or condition of a "draft permit" -- in this case, the proposed integration order (see 6 NYCRR 624.4[c][1][i]; Procedural Ruling, at 7-8, 9). Moreover, I agree with Department staff that disputed issues of fact are presented that require a hearing before the issue can be resolved (see 6 NYCRR 624.4[b][2][iii]). One the one hand, WLS asserts that information concerning the productivity of the Little 1 well was not available at the time of the integration hearing. In particular, WLS references the cost and revenue statement for the Little 1 well that was provided to the participants at the integration hearing (see WLS Brief, Exh C; see also Integration Hearing Transcript [6-1-06], IC Exh 5A, at 95-98). That statement shows that no revenues were received from the Little 1 well as of March 31, 2006.

On the other hand, Fortuna argued at the integration hearing that facts existed supporting the conclusion that the productivity of the Little 1 well was open and notorious at the time WLS made its election, and gave an indication of some of those factual circumstances (see Integration Hearing Transcript [6-1-06], at 84-85, 107-111). Thus, triable fact issues exist concerning whether the productivity of the Little 1 well was

known or reasonably could have been known by WLS at the time of the integration hearing. The need for a factual hearing concerning the degree of risk involved at the integration hearing is further supported by Supreme Court's remand in Little 1 for the development of such a record.

The questions whether the Department has the authority under the current Article 23 to impose a risk penalty upon an IPO pursuant to its "just and reasonable" power and, if so, whether it is "just and reasonable" to impose a risk penalty based upon the circumstance that risk has been removed from the election process, are significant open questions that should not be decided without a developed factual record. The former question implicates the scope of the Department's powers under the new law. In particular, the issue concerns whether the statute's general provisions granting the Department discretionary "just and reasonable" power (see ECL 23-0901[3]; ECL 23-0901[3][c][1][ii][J]) may be used to vary the specific provisions governing an IPO's rights and interests (see ECL 23-0901[3][a][2]). This question may be rendered academic if the facts demonstrate that the productivity of the well in issue was not known, or could not reasonably have been known, at the time of the integration hearing. Resolution of the latter question depends on facts that are in material dispute.

Even if the old law applies, the factual dispute should be resolved before answering these two question under the old law. Finally, although the parties did not offer significant argument concerning the Eolin 1 well, I conclude the factual circumstances concerning that well's production at the time of the integration hearing should also be adjudicated.

B. Access to Well Data and Well Site Access (Multiple Units)

An issue relevant to all units except the Little 1 unit[6] is whether IPOs and NPOs (hereinafter "working interest owners") are entitled to access to well data and the well site upon payment of well costs (that is, upon payment of their proportionate share of well costs in the case of IPOs, or after the well operator's recoupment of 100 percent of well costs from production in the case of NPOs), and without any Department-

[6] Although the well data and site access issues are not presented on the remand in Little 1, depending on how the issues are resolved, the Department may initiate proceedings to modify the integration order in Little 1.

imposed terms of confidentiality. Department staff proposes to include in the integration order terms providing working interest owners, at the owners' sole risk and cost, full and free access at all reasonable times to all operations on the spacing unit and to the records of operations conducted thereon or production therefrom (see, e.g., Lucas 1, Draft Integration Order, IC Exh 6A, ¶ I). In addition, the owners' right to data is not conditioned upon the existence of separate confidentiality agreements with the operator or any other terms of confidentiality (see, e.g., id., ¶ I.C).

1. Positions of the Parties

Department staff takes the position that upon payment of 100 percent of their proportionate share of well costs, working interest owners become joint operators of the well and, therefore, are automatically entitled to the raw well data derived from well operations. Staff notes that the well costs working interest owners are required to pay to participate in a well expressly include the costs of well testing and logging (see ECL 23-0901[3][a][5]). Staff contends that because working interest owners are required to pay for well data, they are entitled to receive the raw data as a "benefit" of the well (see ECL 23-0901[3][c][1][ii][A] ["benefits clause"]).[7]

Staff also relies on ECL 23-0901(3)(f), which provides that the operation of a well upon any portion of a spacing unit is deemed for all purposes to be the conduct of such operations upon each separately owned tract in the spacing unit by the owner or several others.[8] Staff argues that because well operations

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[7] The ECL 23-0901(3)(c)(1)(ii)(A) benefits clause provides:

"The owner shall be liable for its proportionate share of all costs and expenses, including taxes, and claims of third parties related to the well, operations thereon and in conjunction therewith, and shall be entitled to its proportionate share of all benefits therefrom" (emphasis added).

[8] ECL 23-0901(3)(f) provides:

"All operations including, but not limited to, the commencement, drilling, or operation of a well or the existence of a shut-in well upon any portion of a spacing unit covered by an order of integration shall be deemed for all purposes the conduct of operations

are deemed to be conducted by each owner in a spacing unit, and because data collection is a well operation, each owner is deemed to conduct data collection and, thus, is entitled to share such data. In essence, staff urges, the working interest owners are deemed by statute to operate the well along side the well operator.

Department staff asserts that its interpretation of Article 23 is consistent with industry practice and the approach taken in other gas producing states (citing, e.g., Centurion Oil, Inc. v Stephens Prod. Co., 857 P2d 821, 826 [Okla Ct App 1993] [noting record evidence that it is industry custom for an operator to supply well logs to other participants in the well]). In addition, staff urges that well data is necessary to allow working interest owners to audit the well operator and to make various decisions under Article 23, including decisions concerning surface facilities, subsequent operations, and whether to buy out of any risk penalty. Therefore, in staff's view, raw well data should be made available to working interest owners as a matter of policy and equity.

With respect to confidentiality, Department staff takes the position that the imposition of confidentiality terms is not necessary to meet the policy objectives of Article 23. Finally, Department staff asserts that for the same reasons working interest owners are entitled to well data, they are entitled to reasonable well site access without Department-imposed confidentiality requirements.

Fortuna objects to the requirement that working interest owners be given "unfettered" access to well data without Department-imposed confidentiality terms. First, Fortuna contends that working interest owners do not possess a property or statutory right to well data. Fortuna argues that no express provisions of Article 23 provide working interest owners with a right to well data. Fortuna further argues that if the Legislature had intended to provide such a right, it could have so provided in ECL 23-0313, which governs the confidentiality of

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upon each separately owned tract in the spacing unit by the owner or several owners thereof. That portion of production allocated to each tract included in a spacing unit covered by an order of integration shall, when produced, be deemed for all purposes to have been produced from such tract by a well drilled thereon."

well data when provided to the Department.[9] Moreover, Fortuna contends, ECL 23-0313 establishes that well data is confidential and that the general provisions of Article 23 cannot override the specific confidentiality requirements of ECL 23-0313.

With respect to the statutory provisions relied upon by staff, Fortuna asserts that section 23-0901(3)(f) and the benefits clause refer only to production from a well, not well data. Fortuna argues that industry practice and the practice in other states is to not address well data access in compulsory integration orders and, to the extent working interest owners are provided access, such access is provided only pursuant to private confidentiality agreements between the well operator and the working interest owner. Fortuna contends that if the Department requires disclosure of well data without imposing terms of confidentiality, takings concerns will be raised.

Fortuna states that the Department may have the power to require the sharing of well data pursuant to the Department's power to impose terms of integration upon terms that are "just and reasonable" (see ECL 23-0901[3][c][1][ii][J]). However, Fortuna contends that the Department may only require data sharing through a State Administrative Procedure Act ("SAPA") article 2 rulemaking, and that such a requirement must be conditioned upon just and reasonable confidentiality terms. In addition, Fortuna argues that NPOs may only be provided access to data after the risk penalty is paid (i.e., 200 percent of costs), not after the payment of 100 percent of costs, as staff proposes.

With respect to site access, Fortuna argues that working interest owners possess no property or statutory right to site access and, to the extent the Department requires site access pursuant to its just and reasonable power, such site access must also be conditioned on just and reasonable terms including confidentiality, notice, non-interference, safety, and liability protection.

In reply, Department staff contends that it does not require that working interest owners be provided unfettered access to raw well data. Rather, staff asserts that working interest owners should be given that level of access that is

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[9] ECL 23-0313 provides that well logs provided to the Department shall be confidential until six months after commencement of actual drilling operations (see ECL 23-0313[1][d]). The six-month period is subject to additional extensions upon the request of the person furnishing the data.

customary in the field. Moreover, staff agrees that site access should be conditioned on the terms Fortuna asserts, except confidentiality.

WLS and Mr. Denton agree with and make many of the same arguments as Department staff. They assert that the right to access well data is a property right derived from their common law right of capture. They argue that although Article 23 divests them of their common law right to drill and explore for natural gas on their properties, it preserves the remainder of their rights to the benefits from the well drilled in the unit as if such well were drilled on each individually owned parcel. Among the rights they claim is the right to the well data for which they have paid.

WLS also alleges that the practice in the industry and in other states is to require well operators to share well data with working interest owners without imposing confidentiality terms. Mr. Denton further argues that if his clients are charged 100 percent of well costs without being provided access to the data from the well, their due process and equal protection rights will be violated.

With respect to confidentiality, WLS contends that it is not seeking public disclosure of well data, and that working interest owners are as interested as well operators in maintaining the confidentiality of well data. However, WLS argues that confidentiality agreements should be negotiated, not imposed by the Department. Specifically, WLS argues it would not be just and reasonable to impose terms of confidentiality upon working interest owners when, allegedly, well operators like Fortuna often publicly disclose well data to their investors.

2. Discussion

The objection raised by Fortuna concerns a dispute between Department staff and Fortuna, a mineral interest holder in the subject units, over a substantial term of the proposed Departmental approval, the draft integration order (see 6 NYCRR 624.4[c][1][i]; Procedural Ruling, at 9). Adjudicable issues raised include whether working interest owners are entitled under Article 23 to well data and well site access; if not, whether it is just and reasonable for the Department to require the well operator to share well data and provide well access in the exercise of its discretion under the just and reasonable terms clause (see ECL 23-0901[3][c][1][ii][J]); and, in either case, whether the Department should exercise its discretion and impose just and reasonable terms of confidentiality upon the parties.

With respect to the first issue, I conclude that Article 23 is ambiguous concerning whether working interest owners are entitled to well data and well site access. As noted by all parties, the cost of well testing and logging is expressly included in the statute as a well cost (see ECL 23-0901[3][a][1]). However, the statutory provisions relied upon by Department staff, WLS and Mr. Denton do not expressly include access to well data and the well site among the rights held by working interest owners. Rather, the benefits clause and section 23-0901(3)(f) use general terms such as "all benefits" and "all operations" that are not separately defined. Moreover, other provisions of Article 23 that delineate the rights and obligations of working interest owners also fail to expressly provide for well data and site access (see, e.g., ECL 23-0901[3][c][1][ii][C], [F]).

Conversely, the statute does not unambiguously provide the well operator with sole control over well data and site access either. Although the statute expressly delineates a variety of rights and obligations for the well operator, none of those provisions expressly address well data and site access (see, e.g., ECL 23-0901[3][c][1][ii][B], [D], [H], [I]).

Moreover, contrary to Fortuna's argument, ECL 23-0313 does not clearly resolve the question in its favor. Although the bill jacket for ECL 23-0313 does contain references to the well operator, the express language of ECL 23-0313 refers to "persons," not just well operators, furnishing records to the Department. Fortuna's arguments concerning section 23-0313 presume that such persons under the section are well operators. However, whether well operators are the sole owner of well data, or whether well operators are joint owners with other working interest owners, is the threshold question that must be decided. Moreover, although section 23-0313 supports the proposition that the Department must treat well data as confidential when such data is provided to the Department, section 23-0313's express terms regulate the Department's disclosure of well data to the public. Section 23-0313 does not impose limitations on the persons furnishing the data to the Department.

With respect to the arguments WLS and Mr. Denton raise under the common law right of capture doctrine, the parties do not cite any authority expressly addressing whether the right to well data and site access are among the correlative rights retained by working interest owners when their common law right to drill and explore is otherwise limited by statute. Thus, whether working interest owners are entitled to well data and site access is not clearly resolved by the common law.

Given the ambiguity in Article 23 concerning the ownership of well data and control over site access, it is appropriate to consider industry practice and the practice in other gas producing states as an aid to interpreting the legislative intent of Article 23 (see McKinney's Cons Laws of NY, Book 1, Statutes § 127). The parties, however, offer conflicting interpretations of industry practice in this regard, and support their assertions with conflicting expert opinion (compare, e.g., Expert Report of Bruce M. Kramer, Fortuna Post-Issues Conference Brief, Exh A, with Affidavit of Jeffrey Cook, WLS Post-Issues Conference Reply Mem of Law, Exh B). Thus, a hearing is required to develop the record on industry practice and the practice in other states before the conflicting opinions and interpretations can be resolved. This is particularly so, given that these cases present the first opportunity to interpret the new Article 23 on the issue of well data and site access. In determining whether the New York Legislature intended Article 23 to adhere to or diverge from industry practice, it is important to establish what that practice is. It is also important to determine how other states have interpreted statutory provisions similar to the benefits clause and section 23-0901(3)(f) in Article 23 and, assuming without deciding that other states require the sharing of well data, whether such states do so as a matter of law or in the exercise of discretion.

Even assuming without deciding that the Legislature did not intend to include well data and site access as a benefit to working interest owners under the express terms of Article 23, industry practice and the practice in other states is also relevant to whether the Department should exercise its discretion in requiring data sharing and site access pursuant to its authority to impose just and reasonable terms of integration (see ECL 23-0901[3][c][1][ii][J]).[10]

Industry practice is also relevant to whether the Department should exercise its just and reasonable terms authority to impose terms of confidentiality upon well operators and working interest owners.[11] Other fact issues joined by the

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[10] These issues are also relevant to the Department's exercise of its just and reasonable authority under the former law, in the event it is determined that the old law applies to the subject transition wells.

[11] The six-month confidentiality period under ECL 23-0313 has apparently passed for some of the subject well data and, thus, the confidentiality issue is moot in some of the present

parties relevant to this question and requiring record development are the extent to which the confidentiality of well data is maintain by its owners or released to the public, and the terms of confidentiality regularly used in the industry. In this regard, the parties reference various model joint operating agreements, but none have been offered for the record.[12]

Given the pending factual inquiry concerning the authority for the data sharing requirement Department staff proposes to include in the integration orders, Fortuna's assertion that the Department may only impose the data sharing requirement pursuant to a SAPA rulemaking is not ripe. If it is concluded that the Legislature intended that working interest owners should receive well data as a benefit under the statute, the proposed term would be statutorily based and, thus, no administrative rulemaking would be needed. Accordingly, I reserve decision on Fortuna's argument until is it determined whether the data sharing requirement is based upon the Department's exercise of its authority to impose just and reasonable integration terms, and is not otherwise required by statute.

Similarly, I reserve decision on the as-applied constitutional challenges raised by Fortuna and Mr. Denton. A determination whether those challenges are preserved for review and otherwise meritorious must await decision on whether or not terms of confidentiality should be imposed upon the parties.

C. Miscellaneous Issues

Clarification and Confirmation of Elections (Beach W 1 Well)

In a letter dated April 23, 2007, Department staff requested that the presiding ALJ confirm the elections of four mineral rights owners in the Beach W 1 unit and ensure that

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proceedings. Nevertheless, to the extent required, I apply the mootness exception. The questions concerning well data and site access raised by the parties are novel and important issues that are likely to recur yet typically evade review (see Matter of Hearst Corp. v Cline, 50 NY2d 707, 714-715 [1980]).

[12] These issues are also relevant to whether confidentiality terms should be imposed under the former law, again, assuming without decide that it is determined that the former law applies to the subject transition wells.

payments of well costs due to the well operator have been made (see IC Exh 1B). Those four owners are Mr. Thomas Banfield, Ms. Ruth Hinz-Foster, Mr. Charles Bostwick and Ms. Flora McDowell. The elections from these four owners were made after the integration hearing and, thus, require confirmation.

In addition, staff requested that Ms. McDowell's election be clarified. As noted above, by email dated September 28, 2007, Department staff indicated that clarification of Ms. McDowell's election was no longer required. Accordingly, a hearing will be convened to confirm the subject elections.

Title Disputes/Timing of Service of Notice Upon Recently Discovered Owners (Beach W 1 Unit)

In his notices of appearance in the Beach W 1 proceeding, Mr. Denton raised an issue concerning title disputes and the timing of the compulsory integration hearing notice provided to newly discovered owners. At the issues conference, Mr. Denton confirmed that no title disputes existed in the Beach W 1 unit, and that the timing of notice issue had been resolved by the parties (see IC Trans, at 179-188). Fortuna stated its agreement with Department staff that owners identified less than 30 days prior to a compulsory integration hearing must be provided with notice of hearing and the compulsory integration election option prior to any attempt to lease their mineral interests (see id. at 186-187; see also Fortuna's Issue Statement, IC Exh 10A, at 9). Accordingly, the issue will not be subject to adjudication.

Motion To Dismiss Frank Title Issue (Dzybon 1 Unit)

After the proceeding concerning the Dzybon 1 unit was referred to OHMS for adjudicatory proceedings, Fortuna filed a motion dated April 19, 2007 seeking dismissal of issues Mr. Denton raised on behalf of his client, Mr. James Frank, concerning Mr. Frank's title to mineral rights in the Dzybon 1 unit. Mr. Denton filed a letter opposing the motion, and reply and sur-reply filings were submitted by Fortuna and Mr. Denton, respectively.

In its motion and at the issues conference, Fortuna argued that the Frank title issue presents a pure title dispute that is not subject to adjudication in Departmental adjudicatory proceedings (citing, e.g., DEC Program Policy DMN-1). In the alternative, Fortuna contends that under principles of res judicata and collateral estoppel, Mr. Frank's claim of ownership of mineral rights in the Dzybon 1 unit are precluded by the

recent decision and order entered in Frank v Fortuna Energy Inc. (Sup Ct, Steuben County, April 6, 2007, Latham, J., Index No. 95518). In Frank, the court concluded that the reservation of mineral rights by prior owners of Mr. Frank's parcel -- the Uhls -- was effective. Accordingly, the court dismissed Mr. Frank's complaint filed pursuant to Real Property Actions and Proceedings Law ("RPAPL") article 15 (Action to Compel the Determination of a Claim to Real Property).

In response to Fortuna's motion, Mr. Frank agrees with Fortuna that the title issue should not be adjudicated. Mr. Frank notes, however, that an appeal from Supreme Court's order in Frank is pending. Accordingly, Mr. Frank requests that Fortuna's motion be denied, and that Mr. Frank and his LLC be allowed to remain a party to the Dzybon 1 compulsory integration proceeding until termination of all appellate proceedings.

In its reply, Fortuna indicates that notwithstanding its request that the Frank title issue be dismissed, it has no objection to Mr. Frank remaining a party to the Dzybon 1 compulsory integration proceeding pending exhaustion of appeals in the Frank matter. Fortuna notes that Mr. Frank has raised other issues referred for adjudication and continues to be a party until those issues are resolved.

In his surreply, Mr. Frank argues that Supreme Court's order in Frank is not final until all appeals are exhausted, and requests that all proceeds attributable to the property claimed by Mr. Frank be escrowed pending the outcome of all appeals.

At the issues conference, Department staff indicated that in the event of a reversal of the order in Frank, Mr. Frank as well as other owners affected by such a reversal would be given the opportunity to file an election and participate in compulsory integration proceeding at the administrative level. Whether further adjudicatory proceedings would be necessary would depend upon whether adjudicable issues are raised in such compulsory integration proceedings.

Based upon the agreement of the parties, and settled collateral estoppel principles, I conclude that no adjudicable issues are presented concerning Mr. Frank's claim of ownership of mineral rights in the Dzybon 1 unit. The parties have elected to pursue an RPAPL article 15 action in State court, in which Mr. Frank had a full and fair opportunity to litigate his claim of title. That action resulted in a final determination on the merits rejecting Mr. Frank's claim. Thus, Mr. Frank is collaterally estopped from raising his mineral rights claim in

this administrative adjudicatory proceeding (see Ryan v New York Telephone Co., 62 NY2d 494, 500-501 [1984]).

Moreover, notwithstanding Mr. Frank's contention, the pendency of an appeal from Supreme Court's order in Frank does not undermine the issue preclusive effect of that order (see, e.g., Matter of Capoccia, 272 AD2d 838, 847 [3d Dept], lv dismissed 95 NY2d 887 [2000]; Matter of Beard v Town of Newburgh, 259 AD2d 613, 614 [2d Dept], lv dismissed 93 NY2d 958 [1999]; see also Parkhurst v Berdell, 110 NY 386 [1888]). Thus, unless and until Supreme Court's order is reversed on appeal, its determination on the mineral rights issue remains binding in this proceeding.

Accordingly, Fortuna's motion to dismiss the Frank title issue is granted. Moreover, because Mr. Frank has no mineral interests in the Dzybon 1 unit, no basis exists for granting his request to escrow funds, and I recommend that the Commissioner decline to grant such a request. There being no objection to Mr. Frank's continued participation in the adjudicatory proceeding, however, his request to continue to participate is granted.

In rejecting the Frank title issue as an issue in this case, I do not rule on Fortuna's argument that title issues are not adjudicable in Departmental adjudicatory proceedings. The Department arguably lacks jurisdiction to entertain RPAPL article 15 complaints, as such. On the other hand, the ECL, including ECL article 23, regulates and imposes obligations upon property owners. Thus, the Department arguably has jurisdiction to determine whether a person is an "owner" for purposes of its permitting and enforcement authority, and may use administrative adjudicatory proceedings to resolve disputes regarding ownership. Given my determination above, however, it is not necessary to decide the scope of the Department's jurisdiction to resolve title disputes, and I decline to do so.

Adequacy of Service upon the Uhl Heirs (Dzybon 1 Well)

In its hearing referral, Department staff indicated that an issue might be raised challenging the adequacy of the service of notice concerning compulsory integration proceedings upon all uncontrolled owners in the Dzybon 1 unit, and whether the recently located Uhl heirs were timely served with the required compulsory integration package. At the issues conference, however, Department staff stated that, based upon an affidavit from Alan P. Uhl indicating that compulsory integration packages were received by the Uhl heirs, the issue was resolved

to its satisfaction, and no other party raised an objection (see Trans, at 211-212; see also IC Exh 10C; IC Exh 14B). Thus, no issue is presented for adjudication.

Length and Costs of Gathering Lines (Gillis 1 Well)

In its hearing referral for the Gillis 1 well, Department staff indicated that A.V.S.D. Land Services, LLP, raised an issue at the integration hearing concerning the validity of the length and cost of the gathering pipeline attributable to the Gillis well. In its July 10, 2007 notice of appearance, however, A.V.S.D. stated that it withdrew its objection to the length of the subject pipeline, but reserved the right to challenge the actual costs of the pipeline after an audit. A.V.S.D.'s withdrawal of the issue in this proceeding was confirmed in a June 25, 2007 letter from Mr. Denton to Fortuna (see IC Exh 12B), and on the record of the issues conference (see IC Trans, at 137-138). Thus, the issue concerning the length and costs of the gathering line for the Gillis 1 well is resolved.

Surface Facilities (Little 1 Well)

In its notice of appearance for the Little 1 well, WLS sought clarification of the pipeline revenues generating by the surface facilities associated with the well. At the issues conference, WLS indicated that this issue had been resolved (see IC Trans, at 173-174). Thus, the issue will not be subject to any further adjudication.

Validity of MacCaskill Election (Lucas 1 Well)

At the integration hearing conducted on February 13, 2007, Fortuna objected to the election offered by Douglas C. MacCaskill on behalf of Mary Ellen Thomas to be a non-participating owner in the Lucas 1 unit. Prior to Department staff's referral of the Lucas 1 matter to OHMS, Fortuna filed a notice of appeal and notice of motion for leave to appeal with the Commissioner raising its objection regarding the MacCaskill election. The notice of appeal and motion for leave to appeal were referred by the Commissioner to the present presiding ALJ for resolution. Subsequently, Department staff referred the Lucas matter for adjudicatory proceedings.

By letter dated July 17, 2007, Fortuna withdrew its appeal and motion for leave to appeal, subject to a reservation of rights (see IC Exh 10D). At the issues conference, Fortuna confirmed the withdrawal of its objection to the MacCaskill election, and its withdrawal of the notice of appeal and motion

for leave to appeal (see IC Trans, at 174-175). Accordingly, the validity of the MacCaskill election will not be adjudicated.

Wellbore Costs Chargeable for the Messing 1-B Well

It was undisputed at the issues conference that three well drilling episodes were required before natural gas was successfully produced from the Messing 1-B well. The first episode -- the Messing 1 well -- produced a dry well. The second episode -- the Messing 1-A well, a sidetrack from the Messing 1 wellbore -- was also dry. The third episode -- the Messing 1-B well, also a sidetrack from the Messing 1 wellbore -- established a productive well.

At the integration hearing, Mr. Denton on behalf of several NPOs, challenged Fortuna's proposal to charge the costs associated with all three drilling episode in the authorization for expenditures ("AFE"). Department staff took the position that only those costs associated with a portion of the Messing 1 wellbore and all of the Messing 1-B sidetrack could be charged in the AFE.

In its notice of appearance and at the issues conference, Fortuna challenged Department staff's determination concerning the costs chargeable for the Messing 1-B well. As noted above in the procedural history, Fortuna subsequently filed a November 28, 2007, stipulation executed by Fortuna, Department staff, and Mr. Denton, on behalf of three limited liability companies, stating that the parties had reached a settlement concerning the costs chargeable to the NPOs for the Messing 1-B well and therefore withdrew their request for adjudication of the issue (see Stipulation, IC Exh 17, at 4). Accordingly, based upon the parties' stipulation, the issue concerning the costs chargeable for the Messing 1-B well will not be subject to any further adjudication (see 6 NYCRR 624.13[d]).

Hearing Costs

In the June 6, 2007 procedural ruling, I reserved decision on which parties would bear the costs of the hearing, pending oral argument on the issue. At the issues conference, during oral argument, Fortuna agreed to pay the hearing costs in these proceeding and not pass those costs on to the other parties in the subject units (see IC Trans, at 351-352). Accordingly, the issue concerning hearing costs is removed from these proceedings.

D. Summary -- Issues for Adjudication

A hearing will be convened:

(1) to develop the factual record concerning whether the productivity of the Little 1 and Eolin 1 wells was known or reasonably could have been known by WLS at the time of the respective integration hearings on those two wells;

(2) to develop the factual record concerning natural gas industry practice and the practices in other states concerning the sharing of well data and well site access among well operators and working interest owners;

(3) to develop the factual record concerning the confidentiality of well data and the terms of confidentiality customarily used in the industry; and

(4) to confirm elections in the Beach W1 unit.

Amicus Party Status

1. WLS Petition (Messing 1-B Well)

As noted above, WLS made an oral application to participate as an amicus party in proceedings concerning the Messing 1-B well. That application was granted on the record (see IC Trans, at 267-270).

2. Dorchester Minerals Petition

Dorchester Minerals, L.P., filed a timely petition to appear as an amicus party in the proceedings concerning all eight above referenced gas wells. However, Dorchester Minerals did not appear at the legislative hearing or issues conference, and has not made any further written submissions. Accordingly, Dorchester has failed to establish that it has any expertise, special knowledge, or unique perspective that will make a material contribution to the record on the issues raised (see 6 NYCRR 624.5[d][2][iii]). Thus, Dorchester Minerals' petition to participate as an amicus party is denied.

Appeals

Parties to an issues conferences are entitled to appeal as of right to the Commissioner on an expedited basis a ruling to include or exclude any issue for adjudication, a ruling on the merits of any legal issue made as part of an issues ruling, or a ruling affecting party status (see 6 NYCRR 624.8[d][2]). Under Part 624, the parties would have ten days from the date this

ruling is mailed to file their appeals (see 6 NYCRR 624.6[e][1], [b][2][i]). The ALJ has the discretion, however, to modify regulatory time frames to avoid prejudice to the parties (see 6 NYCRR 624.6[g]).

Accordingly, to avoid prejudice to the parties, the appeals schedule is as follows. Appeals, if any, are due by close of business Monday, April 7, 2008. Replies are due by close of business Monday, April 21, 2008.

Send the original and one copy of all submissions to Commissioner Alexander B. Grannis, c/o Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services, New York State Department of Environmental Conservation, 625 Broadway, 14th Floor, Albany, New York 12233-1010, and one copy of all submissions to all others on the active parties service list at the same time and in the same manner as transmittal is made to the Commissioner. Send a total of two copies of all submissions to James T. McClymonds, Chief Administrative Law Judge, Office of Hearings and Mediation Services, 625 Broadway, 1st Floor, Albany, New York 12233-1550. Submissions by electronic mail or telefacsimile are authorized, so long as a conforming hard copy is sent by regular mail and postmarked by the deadline.

Appeals and any responses thereto should address the ALJ's rulings directly, rather than merely restate a party's contentions and should include appropriate citations to the record and any exhibits introduced therein.

Further Proceedings

Pursuant to 6 NYCRR 624.8(d)(7), there will be no adjournment of the hearing during the pendency of any appeal from an issues ruling, except by permission of the ALJ. In addition, the failure to file an appeal from an issues ruling will not preclude appealing the ruling to the Commissioner after the hearing (see 6 NYCRR 624.8[d][6]).

Accordingly, I will convene a conference call with the parties identified in this ruling to arrange the scheduling of the evidentiary hearings identified above.

/s/
James T. McClymonds
Chief Administrative Law Judge

Dated: March 14, 2008
Albany, New York

Attachments

To: Louis A. Alexander, Assistant Commissioner
Attached Active Parties List (via email and regular mail)
Attached Service Lists (via regular mail)

Matter of Beach W 1, et al.
DEC Order No. DMN 07-12, et al.
Issue Conference July 18-19, 2007

ISSUES CONFERENCE EXHIBIT LIST
Updated 3/14/08

Issues Conference Exhibit No.	Description	ID	Rec'd
1A	Matter of Beach W 1, Draft Order, with attachments; Compulsory Integration Hearing Transcript, Feb. 13, 2007	✓	✓
1B	Letter from Jennifer Hairie, Esq. to Chief ALJ McClymonds, dated April 23, 2007, with attachments, RE: Confirmation of Elections in Beach	✓	✓
1C	Letter from Ms. Flora McDowell to Fortuna Energy, Inc., dated May 17, 2007, with attachments, RE: Clarification of Elections in Beach	✓	✓
2A	Matter of Dzybon 1, Draft Order, with attachments; Compulsory Integration Hearing Transcript, Sept. 26, 2006	✓	✓

Issues Conference Exhibit No.	Description	ID	Rec'd
2B	Letter from Thomas West, Esq., to Chief ALJ McClymonds, dated April 19, 2007, with attachments, RE: Fortuna's Motion to Dismiss Frank Title Issue in Dzybon	✓	✓
2C	Letter from Christopher Denton, Esq. to Chief ALJ McClymonds, dated April 25, 2007, RE: Party Status of James Frank in Dzybon	✓	✓
2D	Letter from Thomas West, Esq. to Chief ALJ McClymonds, dated May 16, 2007, RE: Frank Title Issue in Dzybon	✓	✓
2E	Letter from Christopher Denton, Esq. to Chief ALJ McClymonds, dated May 21, 2007, RE: Frank Title Issue in Dzybon	✓	✓
3	Matter of Eolin 1, Draft Order, with attachments; Compulsory Integration Hearing Transcript, Oct. 3, 2006	✓	✓

Issues Conference Exhibit No.	Description	ID	Rec'd
4	Matter of Gillis 1, Draft Order, with attachments; Compulsory Integration Hearing Transcript, Oct. 3, 2006	✓	✓
5A	Matter of Little 1, Draft Order, with attachments; Compulsory Integration Hearing Transcript, June 1, 2006	✓	✓
5B	Letter from Jennifer Hairie, Esq. to Chief ALJ McClymonds, dated Feb. 22, 2007, Referring Little 1 to Hearings	✓	✓
5C	Matter of Western Land Servs. v Department of Envtl. Conservation, Sup Ct, Albany Count (Donohue, J.), Index No. 8739-06, Stipulation of Discontinuance and Order of Remand of Little	✓	✓
5D	Matter of Little 1, Order No. DMN 06-13, dated Aug. 17, 2006, with attachments	✓	✓
5E	Letter from Michael Joy, Esq. to Chief ALJ McClymonds, dated March 2, 2007, RE: Bifurcation of Risk Penalty Issue in Little	✓	✓

Issues Conference Exhibit No.	Description	ID	Rec'd
6A	Matter of Lucas 1, Draft Order, with attachments; Compulsory Integration Hearing Transcript, Feb. 13, 2007	✓	✓
6B	Fortuna's Notice of Appeal, Motion for Leave to Appeal, and Attorney Affirmation, dated Feb. 20, 2007, in Lucas	✓	✓
7	Matter of Messing 1-B, Draft Order, with attachments; Compulsory Integration Hearing Transcript, Jan. 23, 2007	✓	✓
8	Matter of Pietilla 1, Draft Order, with attachments; Compulsory Integration Hearing Transcript, Jan. 9, 2007	✓	✓
9A	Notice of Public Legislative Hearing, Issues Conference, and Adjudicatory Hearing, dated June 19, 2007, published in the *Environmental News Bulletin*, June 20, 2007	✓	✓
9B	Affidavit of notice publication in the June 25, 2007 Elmira *Star-Gazette*	✓	✓
9C	Affidavit of notice publication in the June 25, 2007 Corning *The Leader*	✓	✓
9D	Notice of Hearing Distribution List, including interested party distribution list	✓	✓

Issues Conference Exhibit No.	Description	ID	Rec'd
10A	Fortuna's Issues Statement, dated July 10, 2007	✓	✓
10B	Letter from Ms. Vicki Schlierer to Chief ALJ McClymonds, dated July 17, 2007, with enclosures, RE: transmittal of Kessy and Erlandson resumes	✓	✓
10C	Copy of Letter from Thomas West, Esq. to Jennifer Hairie, Esq., dated Jan. 19, 2007 RE: Dzybon -- Uhl Deed	✓	✓
10D	Letter from John McManus, Esq. to Hon. Louis Alexander, Asst. Commissioner, dated July 17, 2007 RE: Withdrawal of Appeal and Motion for Leave to Appeal in Lucas	✓	✓
11	Western Land Services Inc., Notice of Appearance, dated July 10, 2007	✓	✓
12A	Letter from Christopher Denton, Esq. to Chief ALJ McClymonds, dated July 10, 2007, with attachments, RE: Transmittal of 17 Notices of Appearance, on Behalf of M & D Land & Cattle Company, LLC (Beach W 1), et al.	✓	✓
12B	Letter from Christopher Denton, Esq. to Thomas West, Esq., dated June 25, 2007 RE: Gillis Pipeline Issue	✓	✓
13	Dorchester Minerals, L.P., Petition for Amicus Status, dated July 11, 2007	✓	✓

Issues Conference Exhibit No.	Description	ID	Rec'd
14A	Affidavit of Ms. Janice Hart, dated July 17, 2007, with Exhibits, RE: Uhl heirs	✓	✓
14B	Affidavit of Mr. Alan P. Uhl, dated July 14, 2007, with Exhibit	✓	✓
15	Fortuna Energy Inc., Map of Statewide Spacing Unit, Messing 1B, Target Formation: Black River, dated Oct. 25, 2006	✓	✓
16	Department Staff, Messing 1-B, List of Significant Dates	✓	✓
17	Letter from Thomas S. West, Esq., to Chief ALJ McClymonds, dated Nov. 28, 2007, with Stipulation attached	✓	✓