

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

In the Matter of the Application for an
Adjudicatory Hearing Pursuant to
Environmental Conservation Law ("ECL")
§ 23-0305

**RULING OF THE CHIEF
ADMINISTRATIVE LAW
JUDGE**

- by -

ADVOCATES FOR CHERRY VALLEY,

Petitioner.

DEC Case No.
OHMS-66175

June 13, 2011

Appearances of Counsel:

-- Peter Henner, for petitioner Advocates for Cherry
Valley

By letter application dated May 4, 2011, petitioner
Advocates for Cherry Valley (petitioner) requests a hearing
pursuant to Environmental Conservation Law (ECL) § 23-0305(6) to
adjudicate issues concerning review pursuant to the State
Environmental Quality Review Act (SEQRA) (ECL article 8) of an
application to conduct hydraulic fracturing of a natural gas
well known as the Sheckells 1 well. In the alternative,
petitioner requested a declaratory ruling from the General
Counsel of the Department of Environmental Conservation
(Department) pursuant to State Administrative Procedure Act
(SAPA) § 204 and part 619 of title 6 of the Official Compilation
of Codes, Rules and Regulations of the State of New York (6
NYCRR).

By letter dated May 18, 2011, Deputy Commissioner and
General Counsel Steven C. Russo declined to issue a declaratory
ruling on the ground that the issues raised involved decisions
by Department staff in the course of issuing permits pursuant to
ECL article 23 (see 6 NYCRR 619.3[b]). For the reasons that
follow, petitioner's request for an adjudicatory hearing
pursuant to ECL 23-0305(6) is denied.

I. Facts and Procedural Background

Petitioner's request for an adjudicatory hearing concerns a natural gas well known as the Sheckells 1 well (API No. 31-077-23760-00-00) located in the Town of Cherry Valley, Otsego County. The original permit to drill the Sheckells 1 well was issued to well operator Covalent Energy Corporation on June 1, 2007 (see Document [Doc.] 7). The target natural gas formation for the Sheckells 1 well was the Utica shale (see Doc. 4). The application for the permit indicated that air would be used as the drilling fluid (see id.). No mention was made of hydraulic fracturing, or hydrofracturing, operations in the original application materials. In issuing the permit, Department staff concluded that the well permit was a standard permit, the issuance of which conformed with the standards, criteria, and thresholds contained in the July 1992 Final Generic Impact Statement on the Oil, Gas and Solution Mining Regulatory Program (Final GEIS) and its September 1, 1992 Findings Statement (see Doc. 6). Accordingly, no additional SEQRA determination was required (see id.; see also 6 NYCRR 617.10[d][1]).

Because the proposed spacing unit for the well conformed to State-wide spacing (see ECL 23-0501[1][b][1]), no spacing order and no spacing hearing were required or conducted on the original permit (see ECL 23-0503[2]; see also DEC Program Policy DMN-1: Public Hearing Process for Oil and Gas Well Spacing and Compulsory Integration, Feb. 22, 2006 [DMN-1], at 1-2). In addition, because all mineral interests in the spacing unit for the well were controlled by Covalent, no compulsory integration order and no compulsory integration hearing were required or conducted (see ECL 23-0901[3][b]).

Drilling of the well was completed in August 2007. In April 2010, the Sheckells 1 well was transferred to Gastem USA, Inc. (Gastem). In July and September 2010, Gastem filed materials in support of its application to the Department for approval to perform hydrofracturing operations on the Sheckells 1 well in the Utica shale (see Docs. 38, 40 and 41). Department staff approved the application by letter dated September 17, 2010 (Doc. 42). During communications with the Department concerning the application, Department staff indicated that the proposed 80,000-gallon hydrofracturing job would be consistent with the GEIS, provided certain issues were addressed, including

water source approvals and waste disposal (see Doc. 32; see also Draft Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program [Jan. 1988], Volume I, at 9-25 to 9-29, 9-31 to 9-46 [reproduced as Doc. 3]).

In October 2010, Gastem submitted to the Department a revised proposal for hydrofracturing the Sheckells 1 well (see Doc. 44). In response, Department staff notified Gastem that development activities at the Sheckells 1 well were not authorized, that unless further revised, the October 2010 revised proposal would be the basis for further Departmental review, and that additional information was required prior to that review (see Doc. 45).

In May 2011, petitioner filed its request for an administrative adjudicatory hearing or, in the alternative, a declaratory ruling,¹ from the Department. In its request, petitioner seeks to raise various issues concerning the adequacy of the SEQRA review conducted in connection with the September 2010 approval issued by the Department authorizing hydrofracturing of the Utica shale in the Sheckells 1 well.

II. Discussion

Petitioner states that it is a not-for-profit corporation established in 2002, the purpose of which is "to maintain and enhance the value and beauty of the valleys and hills we live in by promoting responsible land use and resource development" (Request for Hearing [5-4-11], at 1). Nothing in petitioner's submissions indicate that it holds any mineral interests in the Sheckells 1 well.

The threshold issue on the petition is whether an administrative adjudicatory hearing is required to review the Department's September 2010 approval of Gastem's application to hydrofracture the Sheckells 1 well (see id. at 3). Petitioner notes that the September 2010 determination was not part of an enforcement proceeding under ECL article 71, and that approvals arising under ECL article 23 are not governed by the Uniform Procedures Act (ECL article 70) or its implementing regulations at 6 NYCRR part 621. Nevertheless,

¹ As noted above, petitioner's request for a declaratory ruling was addressed by the Department's General Counsel in his May 18, 2011, letter.

petitioner argues that a hearing on its application is mandated by ECL 23-0305(6).

Under New York administrative law, an administrative adjudicatory proceeding is required for an agency action, other than a rulemaking, in which the legal rights, duties or privileges of named parties are determined, where the action is required by law to be only on a record and after an opportunity for a hearing (see SAPA § 102[3]; see also Matter of Asman v Ambach, 64 NY2d 989, 990 [1985] [hearing required where recent amendments to statute provided that licensee may present evidence or sworn testimony, that a stenographic record of the hearing must be made, and the review committee's decision must be limited to the record]; cf. Matter of Mary M. v Clark, 100 AD2d 41, 43 [3d Dept 1984] [no statute or regulation required proceeding on record]; Matter of Vector East Realty Corp. v Abrams, 89 AD2d 453, 456 [1st Dept 1982], appeal withdrawn 58 NY2d 973 [1983] [eligibility determination did not require a hearing under SAPA where statute contained no requirement of a record or a hearing]). In the licensing context, statutes providing an opportunity for hearing include statutes providing an opportunity to be heard (see SAPA § 401[1]). A "license" includes any agency permit, certificate, approval, registration, charter, or similar form of permission required by law (see SAPA § 102[4]). "Licensing" includes any agency activity respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, recall, cancellation or amendment of a license (see SAPA § 102[5]).

When an adjudicatory hearing is required by law, procedures consistent with the provisions of SAPA article 3 are required (see SAPA §§ 102[3], 401[1]). Under the Department's procedures, where an adjudicatory hearing is required in the permitting context, the provisions of 6 NYCRR part 624 apply. In the administrative enforcement context, the provisions of 6 NYCRR part 622 apply.

ECL 23-0305(6) provides:

"The department may act upon its own motion or upon the application of any interested party. On the filing of an application concerning any matter within the jurisdiction of the department, pursuant to this article, the department shall promptly fix a date for a hearing thereon, and shall cause notice of the hearing to be given. The hearing shall

be held without undue delay after the filing of the petition."

However, the broad language of ECL 23-0305(6) is limited by other provisions of section 23-0305. ECL 23-0305(1) provides:

"[t]he provisions of this section shall apply only to rules, regulations, orders and hearings made or conducted in the administration of [ECL article 23]."

ECL 23-0305(2) further provides:

"[n]o rule, regulation, order or amendment thereof, except in an emergency, shall be made by the department without a public hearing upon at least ten days' notice, exclusive of the date of service."

Thus, the section 23-0305(6) requirement to conduct a hearing on the application of any interested party expressly applies only to rules, regulations, and orders of the Department authorized and issued under ECL article 23.

In this case, the challenged approval is not designated as an order of the Department under article 23. This is in contrast to other agency approvals, such as spacing orders and compulsory integration orders, that are specifically identified as "orders" under article 23 (see, e.g., ECL 23-0503[3][b]; ECL 23-0901[3]). Nor is the approval here a rule or regulation adopted pursuant to article 23. Thus, section 23-0305 does not mandate a hearing for the September 2010 approval.

Moreover, even assuming the approval challenged here is an agency "order," nothing in article 23 requires that the hearing be adjudicatory in nature. Again, this is in contrast to other approvals specifically denominated as "orders," such as spacing orders or integration orders, where an "adjudicatory hearing" is required under certain circumstances (see, e.g., ECL 23-0503[3][d]; ECL 23-0901[3][d]). Thus, section 23-0305 does not expressly mandate an adjudicatory hearing on petitioner's application.

Petitioner does not otherwise identify any provision of ECL article 23, the ECL generally, or any other source of law mandating an adjudicatory hearing on its application. The provisions of article 23 governing well permits contain no

requirement for an adjudicatory hearing to address objections raised by a party such as petitioner that possesses no mineral interests in the subject well (see ECL 23-0501; ECL 23-0503). Nor does petitioner identify any provision of SEQRA (ECL article 8) that would require a hearing on its objections. Petitioner concedes that the September 2010 approval is neither governed by the UPA nor issued in an enforcement proceeding. Thus, the ECL provisions for public adjudicatory hearings in the UPA or enforcement contexts do not apply (see ECL 70-0119; ECL 71-1307[1]).

Finally, an administrative hearing prior to agency action may also be required by due process, even when a statute or regulation does not otherwise expressly require a hearing (see Matter of Mary M., 100 AD2d at 43; Matter of Vector East Realty Corp., 89 AD2d at 456-457). Where the exercise of a statutory power adversely affects property rights, the requirement of notice and hearing may be implied, even where the statute is silent (see Hecht v Monaghan, 307 NY 461, 468 [1954]). Here, however, as a party without mineral interests in the subject well, petitioner has not identified any interest for which due process would require an adjudicatory hearing. Accordingly, petitioner's request for an adjudicatory hearing should be denied.

III. Conclusion and Ruling

Petitioner's request for an adjudicatory hearing to address its objections concerning the SEQRA review undertaken in connection with the Department's September 2010 approval of hydrofracturing operations for the Sheckells 1 well is denied. Question number 1 raised in petitioner's May 4, 2011, request is answered in the negative (see Hearing Request [5-4-11], at 3). Given the determination above, I decline to address the remaining questions raised in the request on the ground of lack of jurisdiction.

_____/s/_____
James T. McClymonds
Chief Administrative Law Judge

Dated: June 13, 2011
Albany, New York