

**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,

RUGER 1.

**RULING OF THE CHIEF
ADMINISTRATIVE LAW
JUDGE ON ISSUES AND
PARTY STATUS**

DEC Order No.
DMN 09-32

December 22, 2011

Appearances of Counsel:

- Steven C. Russo, Deputy Commissioner and General Counsel (Jennifer L. Maglienti of counsel), for staff of the Department of Environmental Conservation
- The West Firm, PLLC (Thomas S. West and Gregory A. Mountain of counsel), for Anschutz Exploration Corp.
- Hinman, Howard & Kattell, LLP (Robert H. Wedlake of counsel), for Northeast Energy Development, LLC
- The Denton Law Office, PLLC (Christopher Denton of counsel), for Shappee NG Holding, LLC
- Lipman, Biltekoff & Joy, LLP (Michael P. Joy of counsel), for Western Land Services, Inc., Austin Exploration LLC, Southwestern Oil Co., and Epsilon Energy USA Inc.

In this natural gas well compulsory integration proceeding conducted pursuant to Environmental Conservation Law (ECL) § 23-0901(3), staff of the Department of Environmental Conservation (Department) proposes to issue a compulsory integration order integrating mineral interests within the spacing unit for the Ruger 1 natural gas well located in the Town of Horseheads, Chemung County. The Ruger 1 well is located in the Black River natural gas formation.

An issues conference was convened in this proceeding pursuant to section 624.4(b) of title 6 of the Official

Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR). In this issues ruling, I resolve several legal issues raised by the parties and otherwise conclude that objectors to the draft integration order have failed to raise any issues requiring any further adjudication. Accordingly, the draft integration order may be issued by the Commissioner without any further hearings.

I. PROCEEDINGS

A. Compulsory Integration Hearing

On January 26, 2009, Department staff issued a well permit as defined by ECL 23-0501(1)(b)(3) to Anschutz Exploration Corp. to drill the Ruger 1 well (API No. 31-015-26304-00-00). Upon issuance of the well permit, a spacing unit was established for the Black River natural gas formation (see ECL 23-0503[2]).

Because uncontrolled mineral interest owners remained in the spacing unit, the Department conducted a staff-level integration hearing pursuant to ECL 23-0901(3)(c) on June 3, 2009. At the integration hearing, uncontrolled owner Northeast Energy Development, LLC, proffered five compulsory integration election forms electing integrated participating owner (ECL 23-0901[3][a][2] [IPO]) status for five separate tax parcels within the unit (see Compulsory Integration [CI] Hearing Exhibit DMN 7). Northeast raised several issues concerning the proposed integration order, argued that the issues were substantive and significant, and urged referral of the issues for adjudicatory proceedings.

At the conclusion of the integration hearing, Department staff referred the matter to the Department's Office of Hearings and Mediation Services (OHMS) for adjudicatory proceedings pursuant to 6 NYCRR part 624 (see CI Hearing Transcript [6-3-09], at 59). At that time, Northeast indicated that it had checks for the well operator representing its proportionate share of well costs for the five tax parcels and was willing to tender them. However, Northeast noted its understanding that because the matter was being referred for adjudicatory proceedings, it did not have to give Anschutz the checks at that time (see id. at 58). Department staff indicated

that Northeast's understanding was correct (see id. at 58-59). Anschutz did not object.

After the matter was referred to OHMS for adjudicatory hearings, Northeast tendered its share of well costs with respect to tax map parcel no. 60.00-1-4.0 to Anschutz (see Letter from Robert H. Wedlake, to The West Firm, PLLC [6-18-10], Anschutz Notice of Appearance [7-6-10], Issues Conference Exhibit [IC Exh] 4, Exh A). Based upon this tender of well costs, Northeast requested information from Anschutz regarding gathering line issues (see id.).

B. Part 624 Proceedings

Upon referral of the matter to OHMS, the undersigned Chief Administrative Law Judge (ALJ) was assigned as presiding ALJ. A June 14, 2010, notice of a public legislative hearing and deadline for the filing of notices of appearance and petitions for party status in this proceeding was published in the June 16, 2010, edition of the Department's electronic Environmental Notice Bulletin.¹ In addition, Anschutz published the notice on June 25, 2010, in the Elmira Star-Gazette.

The notice established July 6, 2010, as the deadline for the filing of notices of appearance or petitions for party status. Four timely notices of appearance were filed, one from Department staff (dated 7-1-10, IC Exh 3), one from well operator Anschutz (dated 7-6-10, IC Exh 4), one from uncontrolled owner Northeast (dated 7-6-10, IC Exh 5), and one from uncontrolled owner Shappee NG Holdings, LLC (dated 7-6-10,

¹ With respect to review under the State Environmental Quality Review Act (ECL article 8 [SEQRA]), as indicated in the notice, Department staff published a Final Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program in July 1992 (GEIS). On September 1, 1992, Department staff issued a SEQRA 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 this proceeding is being carried out in conformance with the conditions and thresholds established for compulsory integration hearings in the GEIS and the findings statement. Accordingly, no further action is required under SEQRA (see 6 NYCRR 617.10[d][1]).

IC Exh 7).² A joint notice of appearance was filed by Western Land Services Inc., Austin Exploration, LLC, Southwestern Oil Co., and Epsilon Energy USA Inc. (dated 7-6-10, IC Exh 6) (collectively WLS).³ No other notices of appearance or petitions for party status were filed.

As provided in the notice, a legislative hearing was convened in this proceeding on July 14, 2010, in Horseheads, New York. No persons provided oral or written comments on the proposed order. Accordingly, the legislative hearing was concluded.

The issues conference was convened as noticed immediately following the legislative hearing and concluded the same day. Department staff appeared by Jennifer L. Maglianti, Esq., Associate Attorney; and Jack Dahl, Director, Division of Mineral Resources, Bureau of Oil and Gas Regulation. Well operator Anschutz appeared by Gregory Mountain, Esq., The West Firm, PLLC. Uncontrolled owners were represented by Robert Wedlake, Esq., Hinman, Howard & Kattell, LLP, for Northeast; Christopher Denton, Esq., The Denton Law Office, PLLC, for Shappee; and Michael P. Joy, Esq., Lipman, Biltekoff and Joy, LLP, for WLS.

The parties agreed to a post issues conference briefing schedule, which I confirmed in a memorandum dated August 9, 2010. In the memorandum, I directed the parties to focus the discussion to whether a proposed issue may be decided as a matter of law or whether factual issues existed that required a hearing. I also directed the parties to submit evidence in admissible form to support their asserted fact issues.

In accordance with the scheduling memorandum, Anschutz and Northeast each submitted opening briefs (see Anschutz Opening Issues Conference Brief [9-23-10]; Northeast Issues Conference Brief [9-22-10]; Northeast Issues Conference Supporting Affidavit of Vincent C. Stalis [9-22-10]). Also as

² Shappee NG Holdings, LLC, is an uncontrolled owner in the unit that elected integration as a non-participating owner (NPO) (see ECL 23-0901[3][a][1]; CI Hearing Exh DMN 8).

³ Western Land Service originally elected IPO status (see CI Hearing Exh DMN 7). Pursuant to an agreement with Anschutz, however, Western Land Services, Austin, Southwestern, and Epsilon are to be integrated as NPOs (see CI Hearing Trans, at 43-47; Issues Conference Transcript [IC Trans], at 8-10).

directed, Department staff submitted a letter discussing the source of Paragraph VII of the draft integration order, an issue which had previously been discussed at the issues conference (see Letter from Jennifer Maglienti, Esq., Associate Attorney [dated 9-22-10], with attachment).

The parties filed the following reply briefs and supporting materials: Department staff's reply brief (10-25-10); Anschutz's reply brief and affidavit of James Oursland (10-25-10); and Northeast's response brief (10-25-10).

II. DISCUSSION

A. Standards for Adjudication

Under title 9 of ECL article 23, an objector to a proposed compulsory integration order has the burden of raising a substantive and significant issue for adjudication (see ECL 23-0901[3][d]). Under the Department's Permit Hearing Procedures, which are applicable to compulsory integration orders, the purpose of an issues conference, among other things, is to determine whether disputed issues of fact meet the standards for adjudication under 6 NYCRR 624.4(c) (substantive and significant test) (see 6 NYCRR 624.4[b][2][iii]). Another purpose is to determine whether legal issues exist that do not depend upon the resolution of facts in substantial dispute and, if so, to hear argument on the merits of those issues (see 6 NYCRR 624.4[b][2][iv]). Another purpose is to decide any pending motions (see 6 NYCRR 624.4[b][2][v]).

B. Anschutz's Objection -- Timing of an IPO's Tender of Well Costs

In its notice of appearance, at the issues conference, and in its issues conference brief, Anschutz requests that Northeast be integrated as a royalty interest for each unpaid parcel, unless Northeast deposits its proportionate share of disputed well costs associated with those parcels into an escrow account by a date to be established in this ruling pending issuance of a final integration order in this proceeding. Anschutz further requests a declaration that because the Ruger 1 well has already been drilled, interest accruing in the escrow

account should be for the benefit of Anschutz. For the reasons that follow, Anschutz's request is granted.

1. Positions of the Parties

Citing three separate provisions of ECL article 23, Anschutz argues that an uncontrolled owner electing to participate in a natural gas well as an IPO must tender its proportionate share of well costs by the conclusion of the integration hearing notwithstanding a referral of the draft integration order to OHMS for adjudicatory proceedings under Part 624 (see ECL 23-0901[3][c]; ECL 23-0901[3][c][1][i]; ECL 23-0901[3][c][2]). Anschutz contends that integration hearings and adjudicatory hearings are separate and distinct proceedings (compare ECL 23-0901[3][b] with ECL 23-0901[3][d]), that integration hearings are not continued through the adjudicatory process, and that IPOs cannot wait until adjudicatory proceedings on a draft integration order are concluded to tender their share of well costs.

Accordingly, Anschutz requests that the Department modify its practice and require a party electing IPO status to tender its share of disputed well costs by the close of the staff level integration hearing even when the matter is referred to OHMS for adjudicatory proceedings. Anschutz requests that disputed well costs be held in an interest bearing escrow account, with interest to be allocated to the well operator in the event the costs are later determined to be legitimate. With respect to undisputed well costs, Anschutz requests a determination that those costs must be paid at the integration hearing and be immediately available to the operator for well development.

Northeast opposes the request. Northeast argues that the compulsory integration process is not concluded until a final integration order is issued by the Department. Northeast asserts that when an integration order is referred to OHMS for adjudicatory hearings, the integration process is not concluded until adjudicatory proceedings are concluded and an integration order is issued by the Commissioner.⁴ Northeast asserts that

⁴ Pursuant to Department Program Policy DMN-1: Public Hearing Processes for Oil and Gas Well Spacing and Compulsory Integration, Feb. 22, 2006 (DEC Policy DMN-1), when a draft compulsory integration order is referred to OHMS for adjudicatory proceedings, the final integration order will be signed by

under the statute, it is not required to tender its proportionate share of well costs until just prior to the conclusion of all administrative proceedings on an integration order, that is, just prior to the issuance of a final integration order by the Commissioner when a matter is referred for adjudicatory proceedings.

Northeast asserts that its view is consistent not only with the statutory language, but with the Department's practice in prior cases. Northeast also asserts that its position is consistent with the Department's guidance, which provides that a party electing to participate as an IPO must pay the well operator the estimated costs attributable to its proportionate interest in the unit "prior to the conclusion of the [integration] hearing, unless, as discussed below, there is a dispute about well costs which cannot be resolved at the hearing" (DEC Program Policy DMN-1: Public Hearing Processes for Oil and Gas Well Spacing and Compulsory Integration, Feb. 22, 2006 [DEC Policy DMN-1], ¶ V.B, at 8 [emphasis added]).

In the alternative, Northeast agrees that if IPOs must pay well costs at the integration hearing, notwithstanding a referral to OHMS for adjudicatory proceedings, the IPOs' well costs should be placed in escrow with an independent third party until a final integration order is issued. Northeast asserts that escrow is necessary to protect uncontrolled owners' correlative rights pending conclusion of any adjudicatory proceedings, including protecting uncontrolled owners from a well operator's bankruptcy, insolvency, or other financial harm.

Shappee supports Northeast's opposition to the request, arguing that well costs are not due until a final order of integration is issued. WLS, on the other hand, supports Anschutz's assertion that disputed well costs should be placed in an escrow account pending resolution of adjudicatory hearings on well costs.

Department staff agrees with Anschutz that well costs must be tendered to the well operator at the staff-level integration hearing. Staff asserts that in prior integration proceedings, well operators and objecting uncontrolled owners

the Commissioner (see id. ¶ V.B, at 9). When no substantive and significant issues are raised at the integration hearing, and the matter is not referred for adjudication, the Director of the Division of Mineral Resources or a designee will sign the order (see id.).

have agreed to escrow disputed amounts pending the outcome of an adjudicatory hearing and notes that Anschutz proposes the same arrangement in this case. Staff argues that the Department may not make this arrangement mandatory on future operators, but agrees that it is a reasonable measure that enables a well to proceed through adjudication without being complicated by questions concerning the validity of an uncontrolled owner's election.

Department staff disagrees with Anschutz with respect to whether undisputed well costs should be made immediately available to the well operator after tender by an IPO. Staff asserts that until the final integration order is issued, the rights and obligations of the well operator and uncontrolled owners remain unresolved, and neither the well operator nor the uncontrolled owners may fully receive the benefits that would derive from a final order. Accordingly, staff argues, the well operator is not entitled to use the funds tendered by a party electing IPO status at the integration hearing until the integration process is concluded.

2. Analysis and Ruling

The issue raised by Anschutz presents a legal question that is not dependent upon the resolution of any facts in material dispute. Accordingly, the issue may be resolved at the issues conference stage of this adjudicatory proceeding (see 6 NYCRR 624.4[b][2][iv]; 6 NYCRR 624.4[b][5][iii]).

I have addressed this issue in a recent ruling concerning another well (see Matter of Pimpinella 1-B, Ruling of the Chief Administrative Law Judge on Issues and Party Status, December 20, 2011). For the reasons stated in Pimpinella 1-B, a party electing to participate as an IPO must tender well costs to the well operator by the date of the staff-level integration hearing conducted pursuant to section 23-0901(3)(b), whether the matter is continued through a referral for adjudicatory proceedings pursuant to section 23-0901(3)(d) or not (see id. at 9-11). This conclusion is consistent with the plain language of section 23-0901(3)(c)(2), which requires a party electing IPO status to pay the amount specified in the notice of the integration hearing by the date of that hearing or be integrated as a royalty owner (see id.).

As stated in Pimpinella 1-B, the requirement that a party electing IPO status to pay its proportionate share of well costs by the date of the integration hearing is also consistent with the legislative intent and policies of the 2005 amendments to article 23 (see id. at 10). As has previously been recognized in ALJ rulings and Commissioner decisions (see, e.g., Matter of Beach W 1, Interim Decision of the Commissioner, Aug. 26, 2011, at 17), one of the purposes of the 2005 amendments was to move uncontrolled owners' decision making concerning participation in a well to as early a stage in the development of a well as possible, preferably before the well is drilled, and to streamline the process for integrating those interests (see Senate Sponsor Mem in Support, 2005 McKinney's Sessions Laws of NY, at 2254). Because one of the potential outcomes of the integration hearing is the issuance of an integration order in the event no substantive and significant objections are raised (see ECL 23-0901[3][e]), requiring parties electing IPO status to tender well costs at the integration hearing assures that the integration process can be completed at that time and without any further delay.

Requiring the tender of well costs at the integration hearing even when the matter is referred for adjudication also serves the legislative goals of early decision making and the efficiency of the administrative integration process. Requiring parties seeking IPO status to tender well costs at the integration hearing assures that those parties have the necessary standing in any ensuing adjudicatory proceedings to litigate the terms of integration relevant to an IPO, promotes certainty regarding the parties' elections, and avoids mischief in the adjudicatory process. Otherwise, a party claiming to elect IPO status could adjudicate the terms of a draft integration order, and then decline to tender its proportionate share of well costs at the conclusion of the hearing if it is dissatisfied with the outcome, resulting in unnecessary inefficiency, expense, and delay.

I also agree with Department staff that until a final order of integration is issued, the interests of well operators and uncontrolled owners are not finally resolved (see Pimpinella 1-B, at 10-11). Although parties electing IPO status are required to tender their share of well costs at the integration hearing, those owners are not actually liable for those costs and expenses except pursuant to a final integration order (see ECL 23-0901[3][c][1][ii][A]). Thus, the well operator is not

entitled to use the funds tendered at the integration hearing until all adjudicatory proceedings are concluded and a final order of integration is issued.

Instead, the operator is required to hold payments tendered at the integration hearing in an interest bearing account until a final order of integration is issued. This requirement is consistent with the 2005 amendments to ECL article 23 (see ECL 23-0901[3][c][1][ii][A]; see also ECL 23-0901[3][c][1][ii][B] [requiring a well operator to hold funds paid by an owner for plugging and abandonment costs in an interest bearing account until the funds are required and used for that purpose]), Department policy (see DEC Policy DMN-1, ¶ V.B., at 8; see also DEC Policy DMN-1, Responsiveness Summary, at 3, 12), and provisions of the draft integration order (see Draft Order No. DMN 09-32, IC Exh 2, ¶ VI.A). Accrued interest shall be applied to the participating owner's share until actual costs are incurred by the well operator. If the well operator incurs actual well costs prior to issuance of a final integration order, interest accrued after costs are incurred by the well operator will belong to the well operator.

In Pimpinella 1-B, I also addressed whether the Department has the authority to require a well operator to escrow funds tendered at the integration hearing with an independent third party pending the completion of adjudicatory proceedings (see Pimpinella 1-B, at 11-13). I concluded that the Department has that authority based upon the Department's obligation under ECL 23-0301 to protect correlative rights, the structure of ECL article 23, and administrative precedent (see, e.g., Matter of Glodes Corners Road Field, Interim Decision of the Commissioner, Feb. 25, 2000, at 2-4 [citing the practice of protecting correlative rights by requiring the escrow of funds in integration orders dated as early as 1968]).⁵

⁵ Under the common law rule of capture, a mineral rights owner does not have ownership of subsurface oil or gas until it is captured, but does have the right to drill, explore, develop, and produce those minerals (see Matter of Western Land Servs., Declaratory Ruling DEC 23-14, at 10 [referenced in DMN-1, at 10 n 1]). This qualified right of ownership is referred to as "correlative rights" (see id.). The protection of correlative rights refers to affording mineral owners the opportunity to receive or be compensated for the oil or gas attributable to the owner's acreage when it is produced, regardless of how, when, or by whom it is produced, and without being required to drill unnecessary wells or to incur other unnecessary expense to recover or receive oil or gas or its equivalent (see id. at 11-12; see also 6 NYCRR 550.3[ao]).

I also concluded that with respect to disputes between well operators and IPOs, the Department should exercise its authority only on a showing of necessity (see id. at 13).

In this proceeding, well operator Anschutz does not object to holding well costs in an escrow account, at least until it incurs costs for the drilling of the well. Northeast agrees that if its well costs must be tendered now, they should be escrowed with an independent third party and only disbursed when work is done, even if that occurs before the final integration order is issued (see Northeast's Issues Conference Response Brief [10-25-10], at 3-4). Anschutz and Northeast are free to agree to this arrangement. However, absent an agreement, as concluded above, Anschutz is only required to hold Northeast's share of well costs in an interest bearing account. As in Pimpinella 1-B, Northeast has failed in this case to make a sufficient showing of necessity to warrant requiring Anschutz to hold the funds in escrow (see Pimpinella 1-B, at 13). Moreover, absent an agreement, Anschutz may not expend funds held in an interest bearing account until a final order of integration is issued.

Accordingly, Anschutz's request that Northeast be required to promptly pay its share of well costs for the Ruger 1 unit is granted. Northeast will be given until Monday, January 23, 2012, to tender its well costs to Anschutz or have any unpaid parcel integrated as a royalty interest only. Absent agreement of the parties, Anschutz will hold any funds tendered by Northeast in an interest bearing account until a final order of integration is issued in this proceeding.

C. Northeast's Objections

At the integration hearing, Northeast raised five objections to the draft integration order (see CI Hearing Exh NED 1). In its notice of appearance and notice of issues filed in response to the June 2010 notice of hearing, Northeast's objections grew to 23 separate objections, including two objections with multiple sub-issues.

Two of the issues that Northeast raised at the integration hearing were not raised in its notice of appearance (see NED 1, Issues Nos. 3 [alleged incorrect acreage on ownership tabulation] and 5[e] [proposed addition to ¶ V.B of

the order]). In addition, many of the objections raised in its notice of appearance were withdrawn at the issues conference or in Northeast's issues conference brief.⁶ Accordingly, this ruling addresses only those issues that were not withdrawn or otherwise abandoned by Northeast.

1. Applicable Standards

As noted above, as a party objecting to the integration order, Northeast has the burden of establishing that the issues it proposes are substantive and significant (see ECL 23-0901[3][d]). In adjudicatory proceedings under Part 624 on a draft integration order, an issue is significant if it has the potential to result in the denial or modification of the proposed order, or the imposition of significant conditions in addition to those proposed in the draft order (see 6 NYCRR 624.4[c][3]; see generally Matter of Dzybon 1, Interim Decision of the Commissioner, March 18, 2011, at 12-13).⁷ An issue is substantive if it raises sufficient doubt about whether the draft order meets statutory or regulatory criteria applicable to the order, including the policy objectives of ECL 23-0301, so that a reasonable person would inquire further (see 6 NYCRR 624.4[c][2]; see generally Dzybon 1, at 12).

In each of its objections, Northeast proposes changes to the draft integration order. The draft order contains the terms of integration required by statute (compare Draft Order No. DMN 09-32, ¶ V.A-I with ECL 23-0901[3][c][1][ii][A]-[I]). The Department is authorized to include other terms in the integration order if it determines "such terms are reasonably required to further the policy objectives of section 23-0301" (ECL 23-0901[3][c][1][ii][J]). The policy objectives include preventing waste in the development, production, and use of

⁶ Northeast not only did not raise the acreage issue in its notice of appearance, it expressly withdrew the issue at the issues conference (see Issues Conference Transcript [IC Trans], at 360).

⁷ Because the interim decision in Dzybon 1 was issued after the notice of hearing was published in this proceeding, it does not technically apply to this case (see Interim Decision, at 15). Nevertheless, the procedures I established in this case are consistent with the standards enunciated in Dzybon, including the requirement that the objector to the draft order raise substantive and significant issues, and support those issues with legal argument and factual proof.

natural gas; providing for a greater ultimate recovery of gas; and fully protecting "the correlative rights of all owners and rights of all persons including landowners and the general public" (ECL 23-0301).

Northeast premises many of its proposed revisions on its assertion that the changes are necessary to protect its correlative rights. As a conservation agency, the Department has a limited role in protecting correlative rights. As noted above in footnote 5, the Department's regulations provide that correlative rights are protected when mineral owners are afforded "a reasonable opportunity" to receive or be compensated for the oil or gas attributable to the owner's acreage when it is produced, regardless of how, when, or by whom it is produced, and without being required to drill unnecessary wells or to incur other unnecessary expense to recover or receive its share of production (see 6 NYCRR 550.3[ao]; see also Declaratory Ruling DEC 23-14, at 11-12). So long as a mineral owner is afforded a reasonable opportunity to share in production, the Department does not regulate every aspect of the economic relationship among mineral rights owners in a unit, or provide a remedy for every possible contingency that might arise in the development and operation of a well. Mineral owners are encouraged to enter into voluntary agreements, such as private operating agreements, to resolve issues not otherwise covered by ECL article 23.

2. Pre-integration Subsequent Operations, Gathering Line Installation, and Gas Production (Northeast Issues Nos. 1 and 9)

Northeast asserts that if the well operator conducts subsequent operations or constructs gathering lines prior to the issuance of a final integration order, an IPO may not be charged for costs associated with those operations.⁸ Northeast also

⁸ Subsequent operations refer to work on a well, after the initial drilling of the well, that is designed to improve the productivity of a well. The operations include any reworking, sidetracking, deepening, re-completing, or plugging back of the well, or the drilling of lateral or infill wells (see ECL 23-0901[3][c][1][ii][H]). Gathering line and other surface facilities refer to surface equipment connecting the well head to the first point of interconnection with other facilities that commingle production from a group of wells (see ECL 23-0901[3][c][1][ii][E]). The surface facilities include pipe, compression, processing, treating, dehydrating or separating equipment, fixtures, related buildings, and other equipment (see id.).

proposes its own set of requirements relative to pre-integration gas production. For the reasons that follow, Northeast fails to raise any substantive and significant issues.

a) Positions of the Parties

In issue no. 1 raised in its notice of appearance and notice of issues, Northeast asserts that the final integration order should provide that if drilling occurs prior to issuance of the order, any costs associated with subsequent operations on the well or the construction of gathering lines and other surface facilities may not be charged to uncontrolled owners electing IPO or NPO status. Northeast contends that until a final integration order is issued, IPOs and NPOs are not integrated and, therefore, not liable for the costs associated with subsequent operations or gathering line installation. Northeast asserts that if a well operator conducts those operations before the final integration order is issued, it does so at its sole cost.

In issue no. 9, Northeast proposes several draft order provisions governing wells placed into production prior to issuance of an integration order. These provisions include requirements for pre-integration production volume and revenue statements, recoupment of an IPO's well costs from production revenue, and interest on revenue that exceeds the IPO's expenses, among other things.

With respect to pre-integration subsequent operations and gathering line installation, Anschutz argues that the statutory terms of integration provided in ECL 23-0901(3)(c)(1)(ii) and incorporated into the draft integration order are self-executing and may be used prior to issuance of the final integration order. Anschutz asserts that nothing in ECL article 23 prevents a well operator from drilling a well, constructing gathering facilities, placing a well into production, or conducting subsequent operations prior to issuance of the final order. Anschutz proposes to use the procedures and timeframes established at ECL 23-0901(3)(c)(1)(ii)(E) and (H) to obtain the elections of IPOs and NPOs, and escrow their share of costs of surface facilities or subsequent operations for the benefit of the operator, pending issuance of the final order.

With respect to gas production from a well drilled prior to integration, Anschutz argues that Northeast's proposals are inconsistent with and defeated by ECL article 23 (citing ECL 23-0901[3][a][1], [2], [4], [5]; [3][c]).

With respect to pre-integration subsequent operations and gathering line installation, Department staff states that just as a well operator may recoup the costs of the initial well in a unit, the well operator may recoup the proportionate share of costs for subsequent operations and gathering line installation from IPOs and NPOs electing to participate on those operations. However, staff reiterates that the statutory terms of integration are not self-executing and require a final integration order to be effective. Accordingly, when a well operator chooses to conduct subsequent operations or construct gathering facilities prior to the issuance of a final integration order, the timeframes for elections and the payment of costs for those operations provided for in the draft order are not in effect.

With respect to pre-integration production, staff agrees that Northeast's proposals are not authorized by statute, and argues that Northeast has failed to provide a sufficient justification for departing from the legislative scheme.

b) Analysis and Ruling

The facts relevant to these issues are not in material dispute. Anschutz has not yet proposed subsequent operations on the Ruger 1 well. Therefore, to the extent Northeast seeks to address an IPO's liability for the costs of subsequent operations, the issue is not ripe and Northeast has failed to raise any adjudicable issue as to those costs.

However, Anschutz has constructed gathering facilities for the well. Moreover, the Ruger 1 well is already in production. Thus, Northeast's liability for its proportionate share of costs for those gathering lines constructed is ripe and may be decided as a matter of law at this stage of the adjudicatory proceeding (see 6 NYCRR 624.4[b][2][iv]; 6 NYCRR 624.4[b][5][iii]). Similarly, the appropriate procedures governing pre-integration production are also ripe.

Subclause (E) of ECL 23-0901(3)(c)(1)(ii), and the provision of the draft order based upon that subclause (see DMN 09-32, ¶ V.E), address the liability of IPOs for the costs of gathering facilities. Under subclause (E), an IPO has 30 days after a well operator submits a written authority for expenditure (AFE) of the estimated costs associated with the construction of gathering facilities to elect to participate and pay its proportionate share of costs, or be deemed to have elected not to participate. The consequence of non-participation is the imposition of the proportionate share of construction costs plus an additional 100-percent of those costs as a risk penalty for not participating.

By its express language, subclause (E) is a term to be included in the final integration order. As with subclause (A) discussed above, which governs the liability of IPOs for costs associated with the initial well in the unit, subclause (E) does not become effective until the final order of integration is issued. However, once the final integration order is issued, an IPO who is provided with an AFE for gathering facilities will have to make its election and pay its share of costs within the applicable timeframes or be deemed to have elected not to participate.

The process envisioned by the Legislature assumed that, in most cases, the completion of the integration process, including the issuance of a final integration order, would occur before the initial well is drilled in a unit. When this process is followed, issuance of an integration order would ordinarily precede the construction of any gathering facilities. There is no dispute that an IPO is obligated to pay its share of costs associated with gathering line installation undertaken after the order is issued if it wishes to participate in those facilities.

The circumstance that gathering lines might be constructed prior to the completion of the integration process and the issuance of the final integration order does not relieve an IPO of its responsibility for paying its share of costs if it wishes to participate in those operations. As has previously been recognized, except under certain circumstances, article 23 does not prevent a well operator from drilling the initial well prior to completion of the integration process (see Matter of Beach W 1, Interim Decision of the Commissioner, Aug. 26, 2011, at 17-18). If the operator does so, however, it does not

prejudice or modify the uncontrolled owner's right to elect its participation status in the initial well (see id.).

The same rationale applied in Beach W 1 applies here. Nothing in article 23 prevents a well operator from undertaking the construction of gathering facilities prior to the completion of the integration process. If it chooses to do so, however, it may not prejudice or modify the uncontrolled owner's right to elect to participate in those operations. Thus, if an IPO wishes to participate in those operations, it will have to pay its share of costs, whether or not the operations were undertaken prior to or after the final integration order is issued.

Contrary to Anschutz's assertions, however, the well operator may not use the time frames under subclause (E) to limit an IPO's election prior to the issuance of the final integration order. The IPO's right of election, including the associated time frames for making that election and paying costs, does not become effective until the order is issued. Thus, an AFE provided to an uncontrolled owner prior to the issuance of the order does not start the clock running on the IPO's election until the order is issued.

As Department staff notes, the parties are free to reach voluntary agreements modifying any of the above procedures pending conclusion of the integration process. Absent agreement, however, an IPO's right to elect participation in surface facilities does not become effective until the final integration order is issued.

With respect to pre-integration well production, the statutory terms of integration incorporated into the draft order entitle IPOs, and NPOs out of the risk-penalty phase, to their proportionate share of production, and provide how that production is to be received (see ECL 23-0901[3][c][1][ii][A], [F], [G]; DMN 09-32 ¶¶ V.A, V.F, V.G). In addition, staff has added paragraph VI.B to the draft order, requiring the well operator to provide IPOs and NPOs with an itemized statement of actual well costs incurred within 90 days after a well commences production, is permanently plugged and abandoned, or is temporarily abandoned pursuant to 6 NYCRR 555.3(a).⁹

⁹ Draft order ¶ VI.B was added to the draft order template used by the Department in response to comments on DEC Policy DMN-1 (see Responsiveness Summary, at 3).

As with surface facilities, the provisions governing well production do not become effective until the integration order is issued. Once the order is issued, an IPO is entitled to its proportionate share of production, irrespective whether that production occurred prior to or after integration. The only caveat is that with respect to a well placed into production prior to integration, the statement of actual well costs would not be due until 90 days after the integration order is issued.

With respect to the remaining provisions governing pre-integration production proposed by Northeast, they are either inconsistent with express statutory terms or are not authorized by the statute, and Northeast has failed to raise an issue concerning whether they are reasonably necessary to protect correlative rights. Accordingly, Northeast has failed to raise a substantive and significant issue.

In sum, an IPO that wishes to participate in surface facilities constructed before the final integration order is issued must pay its proportionate share of costs. Thus, Northeast's request that the order provide that those costs are not chargeable to IPOs is denied.

Anschutz's request for a determination that subclause (E) is self-executing is also denied. Absent the agreement of the parties, the time frames applicable to an IPO's election to participate in surface facilities does not become effective until the final integration order is issued.

Finally, the draft order's provisions governing well production are applicable to pre-integration production, and become effective upon issuance of the integration order.

3. Access to Shallow Formation Testing Data
(Northeast Issues Nos. 3, 5[a], 5[d])

Northeast proposes that the final integration order include a provision allowing IPOs and NPOs access to the raw data from testing conducted by the well operator on natural gas formations shallower than the target formation for the well. Northeast fails to raise a substantive and significant issue.

a) Positions of the Parties

In this case, the target formation of the well is the Black River formation. Northeast asserts that as an IPO and, thus, an investor in the well, it is entitled to share in any testing that Anschutz conducts in gas formations shallower than the Black River formation. Northeast argues that but for the well, in which Northeast is a part-investor, Anschutz could not conduct shallow formation testing without drilling an additional well.

Shappee joins in Northeast's proposal.

Department staff opposes Northeast's proposal. Staff asserts that integration in a well is formation specific, in this case, specific to the Black River natural gas formation. Accordingly, the provision of the statute that provides that all operations of a well are deemed for all purposes to be the conduct of operations upon each separately owned tract in the spacing by the several owners refers only to operations in the target formation (see ECL 23-0901[3][f]). Thus, if shallow formation testing was not required to develop the Black River formation and Northeast was not charged for the shallow formation testing as a well cost (see ECL 23-0901[3][a][5]), it is not entitled to data from shallow formation testing conducted by the well operator. Department staff notes that in this case, Northeast does not factually dispute that Anschutz has not sought to charge Northeast for any shallow formation testing as a well cost for the Ruger 1 well.

Anschutz agrees with Department staff's position.

b) Analysis and Ruling

No material factual dispute exists with respect to this issue and, accordingly, the issue may be decided as a matter of law.

Northeast's requested provision is rejected. As Department staff notes, well permits, spacing units, and orders integrating uncontrolled mineral interests in those units are formation specific (see ECL 23-0501[1][b][1], [2]; ECL 23-0901[3][b]). Thus, the pooling language of subdivision (f) deeming all operations in a "spacing unit covered by an order of

integration" to be conducted on each separately owned tract in the unit is formation specific as well.

If a well operator conducts shallow formation testing to develop the target formation and charges the costs of that testing to the uncontrolled owners as a well cost, that testing would be considered an operation in the spacing unit under subdivision (f) (see ECL 23-0901[3][a][5], [c]). Accordingly, an IPO would be entitled to share in the raw data resulting from testing conducted to develop the target formation, even if that testing occurred in formations shallower than the target formation (see Beach W 1, at 24-25).

An IPO, however, is not entitled to data from testing outside the target formation that is not required to develop the target formation. An IPO's entitlement to well data from the target formation is premised upon its need to monitor and enforce its rights in the formation (see id.). Unless and until a spacing unit is created in the shallow formation and the mineral owner's interests in that unit are integrated, the owner does not have the requisite interest in the shallow formation to entitle it to well data.

The circumstance that the existence of the well, which the IPO has paid for in part, facilitates the well operator's ability to conduct shallow formation testing unassociated with development of the target formation does not change the analysis. As the operator of the well in the spacing unit, the well operator has unique rights and responsibilities with respect to the well (see, e.g., ECL 23-0901[3][c][1][ii][E], [H], [I]). The ability to use the well to test a shallow formation prior to seeking a well permit to plug back is one of the benefits afforded a well operator.

In this case, Anschutz has not sought to charge Northeast for shallow formation testing in the development of the Ruger 1 well's target formation. Accordingly, on these facts, Northeast is not entitled to an order directing Anschutz to provide it with well data from any testing of formations shallower than the Black River formation.

4. Proposed Modifications to Draft Integration Order
(Northeast Issues Nos. 5[g], 5[i], 7, 8, 10, and 11)

In several of its objections, Northeast proposes modifications or additions to various terms of integration included in the proposed order. These modifications include provisions addressing the price to be paid for gas marketed by the well operator on behalf of the IPO, the costs a well operator may charge for on-going operations, auditing procedures and requirements governing production and revenue statements, whether a well operator's legal expenses may be included in well costs, and escrow. Northeast argues that the modifications it proposes are reasonably necessary to protect its correlative rights. It justifies several of the modifications based upon potential problems it foresees, its experience with other well operators in other wells, or the alleged experiences of other owners. Northeast fails to raise any substantive and significant issues.

Analysis and Ruling: The modifications that Northeast proposes are addressed by the statutory integration terms incorporated into the draft order, or terms added by the Department in response to comments on the Department's Policy DMN-1. For example, with respect to the price of gas paid to an IPO for gas marketed on its behalf by the well operator, the draft order, incorporating the statutory standard, provides that the well operator "shall pay the owner based on the price received by the well operator for production in the general area less (1) the owner's proportionate share of all costs incurred by the well operator for transporting, treating, processing, or otherwise making the production marketable, and (2) a marketing fee not to exceed five percent of the sales price of the production" (DMN 09-32 ¶ V.G; see also ECL 23-0901[3][c][1][ii][G]).

With respect to costs of on-going operations, the draft order, again incorporating statutory standards, authorizes the well operator to operate and maintain the well and makes IPOs liable for their proportionate share of operating costs (see DMN 09-32 ¶¶ V.A, V.I; see also ECL 23-0901[3][c][1][ii][A], [I]). In response to comments on the Department's Policy DMN-1, staff added paragraph VII to the draft order template adopting the industry standard as to how the operational costs would be established, that is, a customary fixed rate based on actual costs and without a mark up.

Department staff agrees with Northeast that IPOs have the right to audit well operations and has provided for it in the draft order. As noted above, paragraph VI.B requires the well operator to provide IPOs with an itemized statement, "no less detailed than the Authorization for Expenditure that was provided prior to the integration hearing," of actual well costs incurred within 90 days of certain events. Paragraph I requires the well operator to provide full and free access at all reasonable times to the records of well operations, among other things. Thus, the draft order addresses the IPOs' right to audit well operations.

With respect to whether an operator's legal expenses may be charged as a well cost or operational expense, ECL 23-0901(3)(a)(5) defines well costs as including, among other things, the costs of permitting. As noted above, the draft order specifies costs that may be charged for on-going operations. I agree with Department staff that, in an appropriate case, the definition of well costs may encompass some legal costs associated with the well permitting and integration process.

Finally, as to the escrow of funds held by the well operator, as noted above, consistent with ECL article 23 and Department policy, the draft order requires that funds held by the operator be deposited in an interest bearing account until needed (see DMN 09-32 ¶¶ V.B, VI.A). The draft order does not require that funds be held in a third-party escrow account.

Accordingly, the draft order addresses each of the issues raised by Northeast. Northeast fails to provide sufficient justification for modifying the standards provided for in the draft order. Moreover, Northeast raises no present controversy concerning any of these issues. Northeast makes no allegation that Anschutz is presently charging costs not allowed under the statute or draft order, or providing insufficient documentation of well costs or operating expenses. With respect to the price paid for gas, Northeast alleges only a potential dispute between other owners in the unit and Anschutz, not a live dispute between Northeast and Anschutz. With respect to escrow, Northeast provides insufficient justification for the exercise of the Department's discretion to require escrow of funds held by Anschutz (see Pimpinella 1-B, at 11-14).

At most, Northeast raises hypothetical concerns that do not warrant further adjudication at this time. The current proceeding is not an appropriate forum to address academic issues (see Matter of AKZO Nobel Salt, Inc., Interim Decision of the Commissioner, Jan. 31, 1996, at 12). Instead, issues regarding the appropriate interpretation and implementation of the integration order should be decided in the context of an enforcement or modification proceeding, and based upon a live factual controversy between Northeast and Anschutz, not decided in the abstract.

5. Gathering Line Issues (Northeast Issues Nos. 13, 14, 15, 20, and 23)

In its issues 13 through 15, and issues 20 and 23, Northeast raises multiple questions concerning its rights and liabilities related to the gathering line system for the Ruger 1 well. Northeast fails, however, to raise any basis for modifying the draft order terms governing gathering facilities, or otherwise raise a substantive and significant issue.

a) Positions of the Parties

The questions Northeast seeks to raise include how and at what rate an IPO may take its share of gas in kind;¹⁰ whether it is potentially liable to third parties for gas transported in the gathering lines; its relationship to the main gas transmission pipeline, in this case, the pipeline operated by Millennium Pipeline Company (MPC); the proper allocation of costs and revenues associated with the gathering line; and its entitlement to information concerning the line. Northeast asserts that its questions should be addressed in the compulsory integration order to protect its correlative rights.

In response, Anschutz contends that each of the questions raised by Northeast are addressed by the statutory language or terms of integration, involve post-integration matters that are not properly part of the compulsory integration process, or involve matters that are wholly beyond the

¹⁰ Receiving gas "in-kind" means receipt of gas itself either at the well head or gathering line instead of monetary compensation (see Declaratory Ruling DEC 23-14, at 7 n 11).

Department's jurisdiction. In support of its argument that some issues are outside the Department's jurisdiction, Anschutz cites language from DEC Policy DMN-1, which states that post-integration disputes between the operator and integrated owners that do not constitute violations of the order, "such as disputes regarding gathering line costs or costs of subsequent operations, and payments therefore are not properly resolved by or before the Department" (DEC Policy DMN-1, ¶ V.C, at 10).

Department staff takes the position that Northeast's questions concerning its ability to take gas in kind are addressed by a term of the draft integration order that incorporates the statutory standard. Department staff also takes the position that the Department's jurisdiction ends at the first point of interconnection -- that is, at the first point that the gathering line for the Ruger 1 well intersects with a line that commingles production from a group of wells that includes the Ruger 1 well. Department staff asserts that issues raised by Northeast concerning pipelines beyond that point are outside the Department's jurisdiction.

With respect to the Department's authority to resolve post-integration disputes, staff asserts that the Department retains jurisdiction over some, but not all, of those disputes. Staff notes that the scope of the Department's post-integration jurisdiction presents open questions under New York law. Staff nonetheless argues that courts in other jurisdictions that have addressed the issue have recognized a division of jurisdiction between the courts and state conservation departments. The general rule is that conservation departments retain jurisdiction to interpret, clarify, amend, and supplement their orders and to resolve any challenges to the public issue of conservation of oil and gas (citing, e.g., *Brumark Corp. v Samson Resources Corp.*, 57 F3d 941, 946 [10th Cir 1995]). Courts, on the other hand, have jurisdiction to resolve the private rights of parties that are usually created by private operating agreements under a compulsory integration order, and the legal effect of those orders on title to land (see id.). Thus, Department staff asserts that matters such as Northeast's entitlement to MPC's operational reports and so on concern the legal effect of a compulsory integration order and are, therefore, beyond the Department's jurisdiction.

Finally, with respect to an IPO's entitlement to documentation and information concerning a gathering pipeline,

staff reiterates that, absent an agreement among the parties, an IPO's right to participate in a gathering line does not become effective until the integration order is finalized. Moreover, staff asserts that any potential dispute about costs of the gathering pipeline is not ripe at this time and, thus, is not adjudicable.

b) Analysis and Ruling

Northeast asserts that the Ruger 1 well is connected to the transmission pipeline operated by MPC (the Millenium pipeline) through a series of gathering pipelines (see Northeast Notice of Appearance and Notice of Issues, at 9). Northeast alleges that gas from the Ruger well runs through 1,273 feet of 4-inch gathering line to an A-5 gathering line, where it is joined with another gathering line connected to another well, the Center at Horseheads well. The A-5 line then runs 57 feet to the Millenium pipeline. No party disputes these factual assertions.

Based upon statutory standards, the draft order details Northeast's interests in the gathering pipelines. As noted above, the draft order allows an IPO to elect to participate in the gathering line from the well head to the first point of interconnection with other lines that commingle production from multiple wells, or pay a 100-percent risk penalty for the costs of the line (see DMN 09-32, ¶ V.E; see also ECL 23-0901[3][c][1][ii][E]). The order further provides that if an IPO chooses to take its share of gas in-kind, it shall be responsible for its transportation and marketing arrangements downstream of the first point of interconnection (see DMN 09-32, ¶ V.F; see also ECL 23-0901[3][c][1][ii][F]). If an IPO does not elect to take its share of production in-kind, the well operator is authorized to transport and market the IPO's share of gas (see DMN 09-32, ¶ V.G; see also ECL 23-0901[3][c][1][ii][G]).

Northeast's hypothetical questions fail to raise any adjudicable fact issues or legal bases for modifying the draft order's terms. I agree with staff that the Department's jurisdiction over pipeline issues ends at the first point of interconnection. Any pipeline issues beyond that point are outside the Department's jurisdiction and, therefore, are not adjudicable (see Matter of Sithe/Independence Power Partners,

L.P., Commissioner Interim Decision, Nov. 9, 1992, at 1 [issues outside or beyond the Department's jurisdiction are not adjudicable]). Thus, any issues concerning the Millenium pipeline are not substantive and significant.

With respect to the remaining segments of the Ruger 1 gathering line, Northeast raises no present controversy requiring further adjudication. Northeast makes no allegation that Anschutz has presented it with an AFE or otherwise sought to overcharge it for costs associated with any gathering line up to the first point of interconnection. Northeast also fails to establish where the first point of interconnection is located or allege that Anschutz is inappropriately seeking recoupment of costs beyond that point.

Without a live controversy concerning the gathering lines, issues concerning the Department's jurisdiction over pipelines are not ripe for review. Jurisdictional issues, including whether a particular segment of the Ruger 1 line is subject to the Department's jurisdiction and whether a particular pipeline dispute is subject to resolution by the Department after issuance of an integration order, should be decided in the context of a live controversy, and not in the abstract in this proceeding. Accordingly, Northeast fails to raise adjudicable issues concerning the terms of the draft order that govern the gathering facilities.

6. Incorporating the AFE into the Order (Northeast Issue No. 6)

Finally, Northeast asserts that all AFEs should be incorporated in the final integration order and attached as an exhibit to the order. In the alternative, Northeast asserts that all AFEs should be made a part of the administrative record. Northeast asserts that not having the AFE in the administrative record "hinders the orderly administrative review of objections to well costs" (Northeast Issue Conference Brief, at 4).

Analysis and Ruling: Northeast fails to raise a substantive and significant issue. As explained by Department staff, the well operator is required to provide an AFE for well costs to all uncontrolled owners within the spacing unit prior to the integration hearing (see ECL 23-0901[3][c]). Generally,

the AFE is an estimate and is subject to reconciliation post-integration when actual well costs are known (see DMN 09-32, ¶ VI.B). Accordingly, the AFE is not an enforceable document and should not be made a condition of or otherwise incorporated into the integration order.

With respect to entering the AFE into the administrative record, Northeast did not move to admit any AFE into the record either at the compulsory integration hearing or at the issues conference. Moreover, Northeast has not raised a dispute concerning well costs to which an AFE would be a relevant document. No basis exists for requiring an AFE to be made a part of the administrative record absent a dispute about well costs.

III. SUMMARY OF RULINGS

The objectors to the draft order have failed to raise any substantive and significant issues warranting any further adjudication in this proceeding. Accordingly, any further hearing is canceled (see 6 NYCRR 624.4[c][5]). A conference will be convened to finalize the integration order for the Commissioner's signature.

The legal issues determined in this ruling pursuant to 6 NYCRR 624.4(b)(5)(iii) are summarized below.

(1) Anschutz's request that Northeast be required to promptly pay its share of well costs for the Ruger 1 unit is granted. Northeast has until close of business, Monday, January 23, 2012, to tender its well costs to Anschutz or have any unpaid parcel integrated as a royalty interest only. Absent agreement of the parties, Anschutz will hold any funds tendered by Northeast in an interest bearing account until a final order of integration is issued in this proceeding (see Section II.B, above).

(2) The parties are free to reach voluntary agreements concerning pre-integration gathering facility construction and gas production. Absent voluntary agreements, the terms of integration governing gathering facilities and well production, including the relevant time frames for elections, become effective upon issuance of the final integration order and govern activities conducted prior to integration. Northeast

fails to raise any substantive or significant issues warranting any modification of the draft order's terms. In addition, Northeast's objections to the draft order provisions governing subsequent operations are not ripe and, thus, not adjudicable (see Section II.C.2, above).

(3) Northeast fails to raise any substantive and significant issue justifying modification of the draft order concerning the issues of shallow formation testing, the price to be paid for gas marketed by the well operator on behalf of the IPO, the costs a well operator may charge for on-going operations, auditing procedures and requirements governing production and revenue statements, whether a well operator's legal expenses may be included in well costs, escrow, and an IPO's rights and liabilities association with gathering facilities. Nor does Northeast raise adjudicable fact issues or present controversies relevant to these issues (see Sections II.C.3 through 5, above).

(4) Northeast fails to raise any substantive and significant issues justifying attaching any AFE as an exhibit to or otherwise incorporating the AFE into the draft order. Nor does Northeast raise a live controversy that warrants including the AFE into the administrative record (see Section II.C.6, above).

(5) Any remaining issues raised by Northeast are either nonadjudicable, or were waived or withdrawn.

IV. APPEALS

Parties to an issues conference 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, in the exercise of discretion, the appeals schedule is as follows. Appeals, if any, are due by

close of business Monday, January 23, 2012. Replies are due by close of business Tuesday, February 14, 2012.

Send the original and three copies of all submissions to Commissioner Joseph J. Martens, 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. The Commissioner will forward two copies of the submissions he receives to the presiding Chief ALJ. 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 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.

Further proceedings are stayed pending the filing of and decision on any appeals.

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

Dated: December 22, 2011
Albany, New York

TO: Attached Service List