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,

STAGE 1.

RULING ON MOTION FOR SUMMARY DISMISSAL

DEC Order No. DMN 08-10

Appearances of Counsel:

-- The West Law Firm, PLLC (Thomas S. West of counsel), for movant-operator Chesapeake Appalachia, LLC

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

-- Lipman & Biltekoff, LLP (Michael P. Joy of counsel), for Southwestern Oil Company and Buck Mountain Associates Inc.

-- Mark C. Scheuerman, General Counsel, for Fortuna Energy Inc., amicus curiae

RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON MOTION FOR SUMMARY DISMISSAL

Chesapeake Appalachia, LLC, the operator of the Stage 1 well (API No. 31-015-26058-00-00) moves for summary dismissal of an issue proposed for adjudication by uncontrolled mineral interest owners Southwestern Oil Company and Buck Mountain Associates Inc. at a compulsory integration hearing held pursuant to Environmental Conservation Law ("ECL") § 23-0901(3) on February 6, 2008. In the alternative, Chesapeake moves for an interim order authorizing it to issue notices pursuant to ECL 23-0901(3)(c)(1)(ii)(E) and (H) until a final order of integration is issued for the Stage 1 unit.

For the reasons that follow, Chesapeake's motion is denied.

Procedural Background

In November 2007, Chesapeake submitted to the Department a well permit application to drill the Stage 1 well in the Town of Baldwin, Chemung County. Because Chesapeake proposed to use Statewide spacing for the Stage 1 unit, no separate spacing order was required. Accordingly, Department staff issued the permit to drill on December 13, 2007, and thereby established the spacing unit for the well as a matter of law.

Because Chesapeake did not control 100 percent of the mineral interests in the Stage 1 unit, a compulsory integration hearing pursuant to ECL 23-0901(3)(b) was convened on February 6, 2008. Participants at the compulsory integration hearing included Department staff, and Chesapeake. In addition, Southwestern Oil Company and Buck Mountain Associates attended the integration hearing, seeking integration as participating owners in the unit (collectively, the "IPOs") (see ECL 23-0901[3][a][2]). The remaining uncontrolled owner for the unit, East Resources, Inc., did not appear at the integration hearing, but filed an election also seeking integration as an IPO.

At the integration hearing, two objections were raised. First, Chesapeake objected to language in the draft order of integration for the unit mandating that the well operator provide each integrated participating owner and non-participating owner, at the integrated owner's 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, subject to certain conditions (see Draft Order No. DMN 08-10, ¶ I). This issue, known as the access to well site operations and to well data issue, has been raised in several integration hearings and administrative adjudicatory proceedings (see, e.g., Matter of Beach W 1, Ruling of the Administrative Law Judge on Issues and Party Status, March 14, 2008, at 18-25, appeals pending before the Commissioner).

Second, the IPOs argued that, pursuant to ECL 23-0501(2)(b), when a well operator is issued a permit to drill by the Department for a unit in which all of the mineral interests are not controlled, the operator may not commence drilling operations until the compulsory integration process under ECL article 23, title 9, is completed. The issue concerning the well operator's authority to commence drilling prior to the completion of the compulsory integration process has also been referred for adjudication in the Winter 1-A well proceeding.

At the conclusion of the compulsory integration

hearing, the integration hearing officer concluded that substantive and significant issues existed requiring referral of the Stage 1 matter to the Department's Office of Hearings and Mediation Services ("OHMS") for adjudicatory proceedings pursuant to 6 NYCRR part 624 ("Part 624"). The formal hearing referral was submitted to OHMS on May 8, 2008, upon the integration hearing officer's receipt of the integration hearing transcript.

On February 20, 2008, after the conclusion of the integration hearing, but before the formal referral of the matter to OHMS, Chesapeake filed the present motion with the Commissioner. By memorandum dated March 4, 2008, the parties were informed that the Commissioner had referred the motion to Chief Administrative Law Judge ("ALJ") James T. McClymonds for initial review and disposition. Timely responses to Chesapeake's motion were filed by Department staff and the IPOs. The ALJ subsequently authorized the submission of replies and sur-replies. Chesapeake filed a timely reply, and Department staff and the IPOs, respectively, each filed a timely sur-reply. Fortuna Energy Inc. filed a brief amicus curiae supporting Chesapeake's position.

Discussion

In its motion, Chesapeake seeks summary dismissal of the issue proposed by the IPOs at the compulsory integration hearing that ECL 23-0501(2)(b) prohibits Chesapeake and all other well operators from commencing drilling activities on a unit pursuant to a well permit issued prior to the issuance of a final compulsory integration order pursuant to ECL 23-0901(3). Chesapeake argues that its motion raises a purely legal issue that, if resolved in its favor, would obviate the need for further administrative proceedings, and permit the Department to issue a final order of integration. Chesapeake further asserts that the matter requires urgent attention because it calls into question the authority of well operators to commence drilling prior to the issuance of a final compulsory integration order for the unit.

In the alternative, in the event its request for summary dismissal is denied, Chesapeake seeks interim relief pending further adjudicatory proceedings. Chesapeake seeks a determination that the provisions of ECL 23-0901(3) are self-executing in the absence of a final order of integration. Such a determination would allow Chesapeake to provide notices to uncontrolled owners, consistent with their elections to participate as either IPOs or non-participating owners (see ECL 23-0901[3][a][1] ["NPOs"]), relative to the tie-in of surface

equipment as provided for in ECL 23-0901(3)(c)(1)(ii)(E), or subsequent operations as provided for in ECL 23-0901(3)(c)(1)(ii)(H). Chesapeake asserts this interim relief is necessary to provide guidance to the well operator concerning the treatment of uncontrolled owners for wells that are drilled prior to the completion of the compulsory integration process.

Department staff opposes Chesapeake's motion for summary dismissal and its request, in the alternative, for interim relief. Although staff agrees with Chesapeake's interpretation of the well operator's authority to drill prior to the completion of the integration process, staff contends the motion for summary dismissal is premature. Department staff contends that the issue should not be decided prior to the convening of a legislative hearing and issues conference pursuant to Part 624. Acordingly, staff urges that Chesapeake's motion for summary dismissal should be denied without prejudice.

With respect to the request for interim relief, Department staff argues the relief requested should be denied. Department staff contends that the language of ECL 23-0901(3) itself expressly provides that its terms are not self-executing, that Chesapeake has not demonstrated a real need for interim relief or legitimate prejudice if the relief is not granted, and that Chesapeake raised their own objections at the compulsory integration hearing that in part necessitated the referral for hearings and, thus, is partially responsible for any delay that might result.

The IPOs also oppose Chesapeake's motion, arguing the merits of the authority to drill issue. The IPOs also object to Chesapeake's assertion that they raised the authority to drill issue in an allegedly improper attempt to leverage a joint operating agreement with Chesapeake.

I conclude that both issues raised by Chesapeake -- (1) the well operator's authority to drill pending the compulsory integration process, and (2) whether the provisions of ECL 23-0901(3) are self-executing prior to the issuance of a final integration order -- should be decided based upon a record developed at an issues conference convened after notice is published and a legislative hearing is held on the Stage 1 unit. Without prejudging the point, both issues appear to involve important open questions of statutory interpretation concerning a significant new law and the procedures evolving thereunder. Such questions should be examined in a orderly fashion, after those parties whose interests will be determined in the proposed integration order have been afforded notice and the opportunity

to participate in the proceeding, whether as full or amicus parties, and after such parties have had the full opportunity to present their positions on the issues.

Specifically, East Resources was not provided notice of Chesapeake's present motion. As an uncontrolled owner in the unit, East Resources would be entitled, if it so chooses, to seek to participate in at least the issues conference stage of these proceedings (see Matter of Dzybon 1, Chief ALJ Ruling on Procedural Issues, June 6, 2007, appeals pending before the Commissioner). It is not presently known whether East Resources wishes to be heard on either of the issues raised by Chesapeake and, if so, what its position is.

If, as Chesapeake contends, the issues are purely legal in nature, such issues can be decided at the issues conference stage and on interim appeal to the Commissioner, and without any further adjudication. On the other hand, it would be imprudent to proceed to decide the issues without first determining, after all interested parties have had notice and the opportunity to be heard, that the issues are not dependent upon the resolution of facts in substantial dispute (see 6 NYCRR 624.4[b][2][iv]).

Chesapeake has failed to establish circumstances warranting a departure from Part 624's regular procedures in this case. Moreover, with respect to the interim relief sought by Chesapeake, a determination that the provisions of ECL 23-0901(3) are self-executing would do more than merely maintain the status quo pending litigation. To the contrary, such a determination would affirmatively establish the rights and obligations of uncontrolled owners prior to the completion of the adjudicatory process and the issuance of a final integration order. Such affirmative relief is not in the nature of preliminary relief and should not be granted before the question is fully developed through at least the issue conference stage of a Part 624 proceeding.

Ruling

Accordingly, Chesapeake's motion is denied in its entirety without prejudice. Chesapeake is granted leave to re-raise the issues presented in its motion at a duly convened issues conference.

A conference call will be held with the parties to schedule the legislative hearing and issues conference, and prepare the hearing notice.

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James T. McClymonds
Chief Administrative Law Judge

Dated: May 30, 2008
Albany, New York

TO: Attached Service List (via electronic transmission and first class mail to counsel and East Resource only)