

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

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In the Matter of the Application for a Field-Wide Variance from the Statewide Spacing Provisions of Section 553.1 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") for the Drilling of Oil Wells, and for the Establishment of a Limiting Gas-Oil Ratio Pursuant to Section 556.1

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

DEC Order No.  
DMN 08-V-04

- for the -

**WHITESVILLE FIELD,**

Allegany and Steuben Counties, New York.

**EAST RESOURCES, INC.,**

Applicant.

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Appearances of Counsel:

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

-- The West Law Firm (Thomas S. West and Yvonne E. Hennessey of counsel), for applicant East Resources, Inc.

-- Roger Downs, Sierra Club Atlantic Chapter, for party-status petitioner Sierra Club Atlantic Chapter

-- Ross Scott Law Firm (W. Ross Scott of counsel), for party-status petitioners Preserve Our Water and Environmental Resources and Terrence M., Pamela J., Daniel L., and Susan H. Dempsey

-- Terrence M. Dempsey, pro se and on behalf of party-status petitioners Pamela J., Daniel L., and Susan H. Dempsey

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

Applicant East Resources, Inc., proposes to produce oil and associated natural gas from the Fulmer Valley sandstone in an oil field known as the Whitesville Field. East Resources has requested that the Department of Environmental Conservation ("Department") establish a limiting gas to oil ratio for the Field pursuant to section 556.1(g) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"). This ruling addresses the issues to be adjudicated and the party status of petitioners seeking to participate in adjudicatory proceedings pursuant to 6 NYCRR part 624 ("Part 624") on East Resources' application.

PROCEEDINGS

The area of the Whitesville Field that East Resources proposes to develop is approximately 20,000 acres in size, including approximately 440 acres in the southeast corner of the Town of Willing, Allegany County; 7,880 acres in the southern portion of the Town of Independence, Allegany County; and 11,720 acres in the southwest portion of the Town of West Union, Steuben County. East Resources originally proposed to develop oil wells on leasehold acreage within 501 spacing units in the Field, using a grid pattern of 40-acre spacing units. The wells would be located a minimum of 100 feet from a unit boundary and 350 feet between wells.

East Resources proposes to establish a maximum gas to oil ratio ("GOR") of 165,000 cubic feet of gas for each barrel of oil produced (cf/bbl) from the Fulmer Valley sands in the Whitesville Field. Because the Department had not previously established a GOR for the Field, the regulatory GOR of 2,000 cf/bbl would apply to any oil well developed in the Field (see 6 NYCRR 556.1[e]). Accordingly, East Resources applied to the Department pursuant to 6 NYCRR 556.1(g) for the establishment of its proposed GOR for the Whitesville Field.

At the time of East Resources' application, the State-wide spacing regulations for wells not subject to a spacing order required that a well be located no less than 660 feet from the boundary line of the lease or unit, and no closer than 1,320 feet from any other oil or gas well in the same pool (see 6

NYCRR 553.1[a]). Accordingly, East Resources also applied pursuant to 6 NYCRR 553.4 for a field-wide variance from the section 553.1 State-wide well spacing requirements.

East Resources did not seek any specific well permits in its application. Instead, East Resources sought the GOR and spacing variances for use in future applications to drill wells in the Whitesville Field.

#### State Environmental Quality Review Act ("SEQRA") Review

In July 1992, the Department published a Final Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program ("GEIS"). On September 1, 1992, the Department issued a SEQRA (Environmental Conservation Law ["ECL"] article 8) findings statement. Together, the GEIS and SEQRA findings statement describe well drilling and well spacing, and establish the basis for environmental review and approval of Departmental actions under the Oil, Gas and Solution Mining Law (ECL article 23).

Department staff, on behalf of the Department as lead agency, determined that proceedings on East Resources' application were being carried out in conformance with the conditions and thresholds established in the GEIS and the findings statement. Accordingly, Department staff concluded that no further action was required under SEQRA (see 6 NYCRR 617.10[d][1]).

#### Part 624 Proceedings

Section 556.1(g) authorizes the Department, after notice and a public hearing, to change the limiting GOR upon an application by any interested owner or operator. Section 553.4 authorizes the Department, after a public hearing, to grant an applicant's variance request if the Department determines that the well spacing variance will protect correlative rights and prevent waste of the resource.

Accordingly, Department staff referred East Resources' application to the Department's Office of Hearings and Mediation Services for administrative adjudicatory proceedings pursuant to Part 624. The matter was assigned to Chief Administrative Law Judge ("ALJ") James T. McClymonds as presiding ALJ.

1. Notice

A legislative hearing and issues conference were scheduled to begin at 1:00 P.M. on Tuesday, July 15, 2008, in the gymnasium of the Whitesville Central School, Whitesville, New York. In addition, the deadline for the submission of written comments on East Resources' application and petitions for party status was set for close of business on Tuesday, July 8, 2008.

A June 9, 2008, notice of application, public legislative hearing and issues conference giving notice of the above hearing dates and deadlines was published in the Department's electronic Environmental Notice Bulletin ("ENB") on June 11 and 18, 2008. In addition, the notice was published in the Addison Post the weeks of June 14 and 21, 2008, and in the Wellsville Daily Reporter on June 17 through 20, June 24 through 27, and July 1 through 3, 2008.

In addition to the ENB and newspaper publication, on June 13, 2008, OHMS sent a copy of the notice to various interested parties, including to a list of property owners in the Whitesville Field provided by East Resources.

2. Petitions for Party Status/Written Comments

Three timely petitions for party status were filed. The Sierra Club Atlantic Chapter filed a petition for full party status dated July 8, 2008. Preserve Our Water and Environmental Resources ("POWER") also filed a petition for full party status dated July 8, 2008. A joint petition for full party status was filed by Terrance M. and Pamela Dempsey, and Daniel L. and Susan H. Dempsey (the "Dempsey petitioners") on July 11, 2008. I had previously granted the Dempsey petitioners an extension of time to file their petition.

East Resources filed a July 8, 2008, notice of appearance. Attached to the notice, East Resources filed a Whitesville Field Well GOR Report (July 7, 2008).

I also received 15 written comments prior to the legislative hearing. Fourteen writers expressed support for East Resources' application. One writer expressed concerns about East Resources' proposed well spacing.

### 3. Legislative Hearing

The public legislative hearing was convened as scheduled on July 15, 2008. Over 120 individuals attended the hearing. After brief presentations by Department staff and East Resources, 20 speakers offered oral comments.

A majority of the speakers spoke in favor of East Resources' application. They viewed the development of the Whitesville Field as an economic boon for the area. Some speakers spoke specifically on the spacing and GOR issues, including William G. Dibble, Allegany County District III Legislator, who urged the Department to modify or eliminate oil and gas well spacing, and eliminate the GOR for wells drilled into Upper Devonian oil producing formations above the Tully Sandstone formation.

About a third of the speakers raised environmental concerns, including the potential impacts oil and gas development has on surface and groundwater pollution, use of water resources, and disposal of wastes. A couple of speakers were undecided, recognizing both the economic benefits for the area and the potential environmental harm that might arise from oil and gas drilling.

The legislative hearing concluded at 2:56 P.M.

After the legislative hearing, on July 30, 2008, Mr. Dibble forwarded to the ALJ copies of Allegany County Resolution Nos. 136-08 and 25-08, supporting the development of oil and gas in the Southern Tier of New York. On November 12, 2008, Mr. Dibble forwarded a copy of the Allegany County Board of Legislators' Resolution No. 185-08 (adopted Oct. 27, 2008), urging the State to modify well spacing requirements and eliminate the GOR for wells drilled into Upper Devonian formations above the Tully Unit. After affording the parties the opportunity to comment, I included Mr. Dibble's submissions in the record of the legislative hearing.

### 4. Issues Conference

The issues conference convened after the conclusion of the legislative hearing, and continued on Wednesday, July 16, 2008. At the issues conference, W. Ross Scott appeared on behalf of both POWER and the Dempsey petitioners. The issues conference concluded at 10:39 A.M.

## 5. Post-Issues Conference Proceedings

After the issues conference, chapter 376 of the Laws of 2008 was signed into law on July 23, 2008. Chapter 376, among other things, established State-wide oil and gas well spacing requirements for oil and gas pools not previously subject to statutory State-wide spacing (see ECL 23-0501[1][b][1], as amended by L 2008, ch 376). As a result of the new legislation, by letter dated August 28, 2008, East Resources withdrew its request for a spacing variance. The withdrawal left East Resources' GOR variance request as the only pending application in this proceeding.

The parties to the issues conference were granted until September 19, 2008, to file post-issues conference briefs. Post-issues conference briefs dated September 19, 2008, were filed by East Resources, the Sierra Club, and the Dempsey petitioners. Department staff filed a letter dated September 19, 2008, in lieu of a formal brief. By email dated September 20, 2008, POWER notified the parties that it was withdrawing its petition for party status.

Thereafter, the remaining parties requested, and I granted, leave to file reply briefs. The Dempsey petitioners filed a reply brief dated October 24, 2008. Department staff, East Resources, and the Sierra Club each filed letters dated October 24, 2008, in lieu of formal briefs.

On November 4, 2009, Department staff filed a letter providing a status report concerning East Resources' GOR variance request, and proposing a technical conference among the parties and mediated by an ALJ in an attempt to resolve outstanding issues. On November 16, 2009, the Sierra Club filed a response to Department staff's letter. East Resources filed a response on November 19, 2009, consenting to the mediation, among other things.

By email dated December 2, 2009, I assigned ALJ Richard R. Wissler to conduct the mediation. By email dated December 4, 2009, the Dempsey petitioners indicated their interest in participating in the mediation. To date, the Sierra Club has not expressed an interest in participating.

## DISCUSSION

### Standards for Adjudication

Under Part 624, the purpose of the issues conference is to narrow or resolve disputed issues of fact without resort to taking testimony, to determine whether the remaining disputed issues of fact require adjudication, to hear argument and resolve legal issues whose resolution is not dependent on facts that are in substantial dispute, and to determine the party status of third-party petitioners, among other things (see 6 NYCRR 624.4[b][2], [5]).

Pursuant to Part 624, the applicant and Department staff are automatically full parties to the proceeding (see 6 NYCRR 624.5[a]). The standard for adjudication of disputes between an applicant and staff is whether the dispute concerns a substantial term or condition of a draft permit, or whether it relates to a matter cited by Department staff as a basis to deny a permit (see 6 NYCRR 624.4[c][1][i], [ii]).

With respect to third-party petitioners seeking full party status, the petitioner must (1) file a petition that complies with 6 NYCRR 624.5(b)(1) and (2); (2) demonstrate an adequate environmental interest; and (3) either raise a substantive and significant issue on its own, or demonstrate that it can make a meaningful contribution to the record regarding a substantive and significant issue raised by another party (see 6 NYCRR 624.5[b][1] and [2], [d][1]). An issue raised by a party-status petition is substantive if it is sufficient to raise a reasonable doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project (see 6 NYCRR 624.4[c][2]). An issue is significant if it has the potential to result in denial of a permit, a major modification to the proposed project, or the imposition of significant permit conditions in addition to those proposed in any draft permit (see 6 NYCRR 624.4[c][3]).

With respect to SEQRA issues proposed for adjudication, where, as here, Department staff has determined not to require the preparation of an environmental impact statement ("EIS"), that determination will not be disturbed unless the ALJ concludes that the determination was irrational or otherwise affected by an error of law (see 6 NYCRR 624.4[c][6][i][a]).

## Gas-To-Oil Ratio Variance

### 1. Background

In late 2006 and early 2007, East Resources began discussions with Department staff concerning its proposal to develop for oil production the formation it identified as the Fulmer Valley sands in the Whitesville Field (see, e.g., Hall Letter [1-3-07], Issue Conference Exhibit ["IC Exh"] 2, Exh A). Under cover of a letter dated March 6, 2008, East Resources submitted documents to Department staff in support of its proposal to change the GOR from the regulatory GOR of 2,000 cf/bbl to its proposed GOR of 165,000 cf/bbl (see Hall Letter [3-6-08], IC Exh 2, Exh E). East Resources asserted that because of the extremely low permeability of the Fulmer Valley reservoir, higher drawdown pressures are required to mobilize the oil (see id.). A step rate test conducted on the Cryder Creek No. 9 test well revealed that a GOR of 165,000 cf/bbl was required to produce one barrel of oil per day (see id.). East Resources further asserted that the Cryder Creek No. 9 test well was incapable of producing oil at 2,000 cf/bbl, and that the entire field would be uneconomic at that GOR (see id.). The Whitesville Field Well GOR Report submitted before the issues conference provided further elaboration in support of East Resources' proposed GOR (see IC Exh 4, Attachment).

At the issues conference, Department staff indicated that it had not made a determination whether the proposed GOR may be approved, although if it had to decide at that time, it would deny the proposed GOR and request more information. Staff explained that its statutory obligations are to prevent waste of the resource and protect the correlative rights of mineral rights owners. Staff was concerned that at a GOR of 165,000 cf/bbl, the Field would function as a gas field and potentially leave recoverable amounts of oil in place. Because a hearing is required in any event to establish a GOR, staff proposed to use the discovery process and formal litigation to develop the technical information necessary to make the determination.

Department staff also explained that what East Resources refers to as the Fulmer Valley sands may actually be three separate formations: the Penny sands, the Fulmer Valley sands, and the Nunda or Sea Level sands. Staff questioned whether East Resources separately tested each of these three formations and, if so, established whether each formation is separately capable of producing oil and gas. If so, staff indicated that separate GORs and well construction requirements

might be required, and that the separate formations should not be commingled within a single GOR.

In addition, Department staff suggested that if the Field or any of the three formations are actually being developed, or are capable of being developed, as a natural gas field, different well spacing requirements would apply and potentially different mineral interests would be impacted.

In response, East Resources indicated that it had no interest in wasting the resource, and that it would work with Department staff to develop a testing protocol that would answer staff's questions. Accordingly, it was agreed that after consultation with Department staff, East Resources would submit a proposed testing protocol to staff for approval. Once approved, East Resources would then conduct the test and provide the results to the parties to this proceeding. After the results were made available, it was agreed that the parties would reconvene to discuss whether any further adjudicatory proceedings are required.

After the issues conference, East Resources and Department staff conferred on the test protocol. On September 16, 2008, East Resources submitted its Whiteville Field GOR Test Procedure, which staff approved by letter dated October 6, 2008. East Resources conducted the test in November 2008, and transmitted the results by email dated November 26, 2008 (see IC Exh 11, attachment).

By letter dated November 4, 2009, Department staff explained its view of the test results (see IC Exh 11). Department staff asserted that the test established that only the shallowest formation, the Penny sands, produced both gas and oil at the measured rate of 1,062 cf/bbl, which is below the regulatory GOR of 2,000 cf/bbl. Staff further noted that the Fulmer Valley sands and the deepest formation, the Sea Level or Nunda sands, produced only gas during the test. Accordingly, staff concluded that the three formations should be separately developed as either gas or oil reservoirs, and that the oil producing reservoir should be subject to a GOR that results in the greatest quantity of recovered oil. Staff insists that gas from all three formations should not be comingled. Moreover, staff concluded that the Sea Level sands could only be developed separately as a gas only reservoir if East Resources could demonstrate that the wells would be constructed in a way to prevent gas or oil from the other two formations from contributing to production.

Staff further explained that other options for developing the Whitesville Field were discussed with East Resources, but they failed to reach agreement concerning how the reservoirs should be classified and what permit conditions should be imposed to address the GOR issue. Staff also noted that East Resources has subsequently submitted 16 well permit applications for gas wells in the Whitesville Field. Although the well permit applications identify the Nunda sands as the target formation, East Resources proposes an open hole well completion that Department staff's believes will result in the comingling of the Penny, Fulmer Valley, and Sea Level sands it previously rejected. Accordingly, staff asserts that the GOR issue for the Whitesville Field remains alive. In addition, staff asserts that issues concerning well construction and the impact of hydrofracturing on the shallower sands also remain pending. Accordingly, staff recommends that this proceeding continue, and proposes that the parties engage in mediation to potentially resolve the technical issues without hearing.

East Resources concurs in staff's recommendation to attempt mediation of the technical issues in an effort to render the GOR issue academic (see IC Exh 13). East Resources also agrees with staff that if the three formations are properly isolated, no GOR issue will remain. East Resources asserts that it has proposed an appropriate well drilling and completion methodology that will satisfy regulatory requirements.

## 2. Discussion and Ruling

Pursuant to section 556.1(e) of 6 NYCRR, in the event the Department has not established a specific GOR limit for a particular oil pool, as is the case here, the regulatory GOR limit is 2,000 cf/bbl. Pursuant to section 556.1(g), an interested owner or operator may apply for a variance from the regulatory 2,000 cf/bbl GOR limit. A specific GOR may be established for an oil pool only after appropriate notice and public hearing (see 6 NYCRR 556.1[g]).

When establishing a specific GOR limit for an oil pool, the Department applies the standards derived from the policy objectives of the Oil, Gas and Solution Mining Law (ECL article 23). Accordingly, a GOR for a specific oil pool must prevent waste of the resource, maximize the ultimate recovery of oil and gas to be had, and protect the correlative rights of all owners and the rights of all persons, including landowners and the general public (see ECL 23-0301). Preventing waste would

include avoiding the unnecessary dissipation of reservoir energy such that recoverable quantities of oil or gas are left in the ground (see ECL 23-0101[20][b], [c] [definition of "waste"])). Protecting correlative rights means affording mineral rights owners the reasonable opportunity to recover or receive the oil or gas beneath their tracts, or the equivalent thereof, without being required to drill unnecessary wells or to incur other unnecessary expenses to recover or receive such oil or gas or its equivalent (see 6 NYCRR 550.3[ao]).

The dispute between Department staff and East Resources concerning the appropriate GOR for the oil bearing formations proposed for development in the Whitesville Field and associated oil well construction requirements constitutes a dispute over a substantial term or condition, and is potentially a basis for the denial, of the variance sought by East Resources. Moreover, Department staff asserts, and East Resources has not disputed, that the GOR issue remains a live controversy not only due to the pending GOR variance application, but also because of the 16 pending gas well permit applications. Thus, the issues concerning the appropriate GOR for the Whitesville Field and the appropriate conditions for the development of the oil formations are adjudicable (see 6 NYCRR 624.4[c][1][i], [ii]).

Accordingly, adjudicatory proceedings on the GOR variance application are continued. However, to allow Department staff, East Resources, and any party status petitioners that wish to participate, the opportunity to resolve the disputed issues without formal adjudication, further adjudication proceedings will be adjourned pending the outcome of a technical conference convened for this purpose. ALJ Richard R. Wissler has been assigned as a mediator to convene and facilitate the technical conference among the parties, and to report back when that technical conference is completed.

## Party Status Petitions

### 1. Petitioners' Positions

In its petition for party status, the Sierra Club raised issues concerning the environmental impacts that East Resources' proposed well spacing might lead to in the Field. In addition, the Sierra Club asserted its belief that once East Resources exhausted the Fulmer Valley sands, it intends to extract natural gas from the deeper Marcellus Shale formation.

Accordingly, the Sierra Club argued that future drilling in the Marcellus Shale should be considered in this proceeding. The Sierra Club challenged the sufficiency of the 1992 GEIS on a variety of topics, including the impacts associated with hydraulic fracturing, or "fracing," of gas formations, the impacts upon global climate change resulting from natural gas development in New York, and the potential impacts upon the New York City watershed arising from Marcellus Shale development in that area. The Sierra Club urged that the proceedings on East Resources' variance applications be adjourned until a supplemental GEIS is prepared to address these concerns, among others.

In their petition for party status, the Dempsey petitioners similarly raised concerns about the impacts upon air and water quality associated with East Resources' well spacing proposal, and argued that the GEIS does not adequately address the impacts associated with the proposed denser spacing.

In its post-issues conference briefs filed after the adoption of Laws of 2008, chapter 376, and East Resources' subsequent withdrawal of its spacing variance request, the Sierra Club reaffirmed its request for full party status. The Sierra Club reiterates its argument that the Department should revisit the 1992 GEIS before approving East Resources' requested GOR variance. In addition to the SEQRA issues previously raised, the Sierra Club also asserted that East Resources should not be allowed to avoid the more restrictive requirements associated with natural gas wells by means of a modified GOR for its proposed oil wells. Accordingly, the Sierra Club supported Department staff's plan to conduct further testing to establish a reasonable GOR for the Field.

In its response to Department staff's November 4, 2009, letter, the Sierra Club asserts that no well in the Whitesville Field should be allowed to produce from more than one zone, that wells targeting the Sea Level or Fulmer Valley sands should be subject to gas well spacing, and that wells targeting the Penny sands should be deemed oil wells subject to the regulatory 2,000 cf/bbl GOR. The Sierra Club urges that any variance from these conditions requires the preparation of an environmental impact statement. Moreover, the Sierra Club continues to challenge the validity of the 1992 GEIS as a basis for staff's determination not to require the preparation of an EIS on East Resources' variance request.

In their post-issues conference briefs, the Dempsey petitioners also sought to participate in hearings on East Resources' proposed GOR. Based upon their property ownership within the proposed Field, the Dempsey petitioners assert that if any oil or gas is left stranded beneath their property they would suffer an injury in fact. The Dempsey petitioners claim the right to participate in determining a GOR limit that will assure that no oil or gas will remain unrecovered as a result of any GOR limits established in this proceeding. The Dempsey also assert that as conditions for granting a GOR variance, the Department should require East Resources to identify and cap any abandoned wells located within the Whitesville Field. The Dempseys do not, however, specifically identify any such uncapped wells in the Field. Finally, the Dempseys request that the Department require citizen group monitoring of well operations.

## 2. Discussion and Ruling -- SEQRA Issues

As noted above, in adjudicatory proceedings under Part 624, review of Department staff's determination not to require the preparation of an environmental impact statement is limited to whether the determination was irrational or otherwise affected by an error of law (see 6 NYCRR 624.4[c][6]). If not, the determination will not be disturbed and SEQRA issues will not be otherwise adjudicated (see id.).

As Department staff explained at the issues conference and in its post-issues conference briefs, staff's determination not to require preparation of an EIS was based upon the 1992 GEIS and SEQRA Findings Statement. The SEQRA regulations (6 NYCRR part 617) authorize use of a GEIS to assess the environmental impacts of a number of separate actions which, if considered together, may have significant impacts; a sequence of actions by an single agency; separate actions having generic or common impacts; or an entire program or plan having wide application or restricting the range of future alternative policies or projects, including an agency's comprehensive resource management plan (see 6 NYCRR 617.10[a][4]; see also Matter of Eadie v Town Bd. of Town of N. Greenbush, 7 NY3d 306, 319 [2006]). The GEIS and its findings are required to set forth specific conditions or criteria under which future actions will be undertaken or approved, including requirements for any subsequent SEQRA compliance (see 6 NYCRR 617.10[c]). The specific conditions or criteria may include thresholds for supplemental EISs to reflect project-specific significant

impacts, such as site specific impacts, that were not adequately addressed or analyzed in the GEIS (see id.).

When a final GEIS has been prepared, no further SEQRA compliance is required if a subsequent proposed action will be carried out in conformance with the conditions and threshold established in the GEIS or its findings statement (se 6 NYCRR 617.10[d][1]). Further SEQRA action, including the preparation of a supplemental EIS, may be required, however, if the subsequent proposed action was not addressed or not addressed adequately in the GEIS (see 6 NYCRR 617.10[d][2]-[4]).

The Department's Division of Mineral Resources used the GEIS process to establish the procedures for environmental review and approval of Departmental actions governed by the Oil, Gas, and Solution Mining Law (ECL article 23), including the Department's program for regulating the drilling and operation of oil and gas wells (see Final Generic Environmental Impact State on the Oil, Gas and Solution Mining Regulatory Program, at FGEIS 1 [July 1992]). This process resulted in the 1992 GEIS and the 1992 SEQRA Findings Statement.

Under the procedure established by the 1992 GEIS and Findings Statement, the site specific environmental impacts of a natural gas or oil well are generally reviewed at the time the well permit application is filed with the Department (see 1992 Findings Statement, Finding ¶¶ 4, 7; GEIS, at FGEIS 12-FGEIS 18). At that time, either the shortened program-specific environmental assessment form ("EAF") (see GEIS, at FGEIS 32) or, depending on the circumstances, the long-form EAF contained in the SEQRA regulations (see 6 NYCRR 617.20 Appdx A) must be filed (see 1992 Findings Statement, SEQRA Review Procedures). The EAF is used by the Department to determine whether further SEQRA review is required, and whether project specific permit conditions should be imposed to mitigate the significant environmental impacts that are identified (see id.).

This proceeding, however, does not involve any specific well permit applications. With the withdrawal of its spacing variance request, all that this proceeding involves is East Resources' GOR variance request. Thus, the only Departmental action at this time is to hold a hearing on East Resources variance request.

Under the 1992 GEIS and Finding Statement, the holding of a variance hearing alone, and without a well permit application pending, is identified as "not significant" under

SEQRA (1992 Findings Statement, SEQR Determination [n]; GEIS, at FGEIS 18). Department staff relied upon the GEIS's determination of non-significance for variance hearings to conclude the SEQRA review of East Resources variance application without requiring the preparation of a supplemental EIS.

Proposed intervenors fail to demonstrate that Department staff's determination to not require the preparation of an EIS on East Resources' variance request is irrational or otherwise affected by an error of law (see 6 NYCRR 624.4[c][6][i][a]; see also 6 NYCRR 624.4[c][4] [where a proposed intervenor proposes an issue for adjudication, burden of persuasion is upon the intervenor at the issues conference]). As staff explained at the issues conference, the granting of a variance at this time would not in and of itself authorize East Resources to drill any oil or gas well (see IC Trans [7-15-08], at 95). Rather, it is when East Resources files a specific application for a well permit using any approved GOR variance that the potential environmental impact associated with a specific well can and will be examined. Because staff's reliance on the GEIS's determination of non-significance for the GOR variance request is rational, its determination not to require further SEQRA review at this time will not be disturbed.

Moreover, Sierra Club's issues concerning the adequacy of the 1992 GEIS with respect to development of the Marcellus Shale are not ripe in this proceeding. Nothing in East Resources' application materials or the issues conference record indicates that East Resources intends to develop the Marcellus Shale. East Resources does not seek a GOR variance for the Marcellus Shale formation. East Resources seeks only a GOR variance for the Fulmer Valley and associated sands. Thus, the adequacy of the GEIS with respect to Marcellus Shale development is not relevant to this proceeding.

Nevertheless, it should be noted that the Department has separately undertaken a review of the 1992 GEIS to address, among other things, potential development of the Marcellus Shale and associated environmental impacts. At the time this ruling is being drafted, a draft supplemental GEIS for horizontal drilling and high-volume hydraulic fracturing to develop the Marcellus Shale has been released for public comment (see Notice of Draft SGEIS, Department of Environmental Conservation Environmental Notice Bulletin, Oct. 7, 2009, ENB-Statewide Notices, [http://www.dec.ny.gov/enb/20091007\\_not0.html](http://www.dec.ny.gov/enb/20091007_not0.html)). To the extent the Sierra Club wishes to press its issues concerning the

1992 GEIS's adequacy, the appropriate forum is the supplemental GEIS review process, not this adjudicatory proceeding.

With respect to the Dempseys' issue concerning potential environmental impacts of drilling and producing natural gas wells when uncapped wells are located in the vicinity of the drilling operation, Department staff contends that no regulatory authority requires the non-owners of abandoned wells to plug them prior to hydrofracing (see, e.g., ECL 71-1305). Department staff agrees that plugging abandoned wells prior to hydrofracing in the area is a prudent practice, and notes that East Resources has a practice of voluntarily doing so. However, staff does not believe it is appropriate or necessary to address enforcement issues through special permit conditions. As to citizen-group monitoring of well operations, staff asserts that it lacks the authority to empower a citizen group to act as an agent of the State or to authorize such a group to in effect trespass on private land. East Resources agrees that no regulation requires it to cap abandoned wells in the Field or authorizes use of citizen monitoring groups and that, in any event, these issues are only reviewable as part of future well permit applications.

Assuming without deciding that the Department may impose abandoned well capping or citizen group monitoring requirements as SEQRA conditions to a well permit, the Dempseys' issues are not ripe in this GOR variance proceeding as well. As concluded above, site specific environmental impacts, which would include impacts associated with hydrofracing in areas with abandoned wells or the use of citizen groups to monitor well operations, are reviewed when specific well permit applications are filed with the Department. Here, the Department's determination not to require further SEQRA review of site specific conditions when no specific sites are proposed for drilling, and no specific abandoned wells are identified, is rational and will not be disturbed. Thus, whether capping of abandoned wells prior to hydrofracing or citizen group monitoring may be required pursuant to SEQRA are issues not subject to adjudication in this proceeding.

### 3. Discussion and Ruling -- Non-SEQRA Issues

To the extent proposed intervenors seek to participate in adjudicatory proceedings on non-SEQRA issues concerning the GOR variance application, they have failed to meet the Part 624 standards for party status. On the issue of the appropriate GOR for the Fulmer Valley and associated sands, proposed intervenors

do not affirmatively seek to raise their own issues for adjudication. Rather, they seek to participate on an adjudicable issue raised by other parties, namely Department staff and East Resources. In this context, to be granted full-party status, proposed intervenors must demonstrate that they can make a meaningful contribution to the record on the issue (see 6 NYCRR 624.5[d][1][ii]).

In past proceedings, the party status petitioners at issue have demonstrated that they could make a meaningful contribution by offering expert testimony on an issue (see Matter of William E. Dailey, Inc., ALJ Rulings on Issues and Party Status, April 5, 1995, at 26-28, affd in relevant part by Interim Decision of the Commissioner, June 20, 1995), by offering a unique historical perspective on an issue (see Matter of Town of Poughkeepsie, ALJ Rulings on Party Status and Issues, Aug. 21, 1996, at 6, adopted by Decision of the Commissioner, Oct. 16, 1996), by offering significant argument on an important legal question (see Matter of Onondaga County Resource Recovery Agency, Interim Decision of the Commissioner, Dec. 30, 1994, at 7 [proposed intervenor raised an issue concerning the interpretation of a Departmental regulation]), or by otherwise making a significant contribution to the resolution of an issue (see Matter of Thalle Indus., Inc., ALJ Rulings on Party Status and Issues, Dec. 10, 2003, at 41-42, affd by Decision of the Deputy Commissioner, Nov. 3, 2004). On the other hand, where the issues identified for adjudication are narrow, and all relevant information will be adduced from Department staff and the applicant, proposed intervenors have been denied full party status (see Matter of Conover Transfer Sta. and Recycling Corp., ALJ Rulings on Party Status and Issues, July 7, 1992, at 14-15).

In this case, the Sierra Club has failed to demonstrate that it can make a meaningful contribution to the record on the GOR issue. Sierra Club makes no offer of expert testimony, or offers any analysis of the applicable legal standards for GOR variances that differs in any material way from Department staff's argument. Sierra Club simply agrees with Department staff that further testing should be required and that to the extent that any of the three formations are, in fact, natural gas fields, they should not be developed as oil fields. The issue of the appropriate GOR for the subject sands is a narrow, technical one, and all relevant information relevant to the issue will be developed by Department staff and East Resources. The Sierra Club has failed to demonstrate that granting it full party status on the issue will make a meaningful contribution to record development (see id.).

Similarly, the Dempseys have also failed to demonstrate that they can make a meaningful contribution on the GOR issue. Like the Sierra Club, they simply agree that the Department should not allow East Resources to develop any natural gas fields as oil fields, and fail to offer any significant additional arguments, insights or technical expertise relevant to the issues concerning GOR variances. Thus, they have also failed to demonstrate their entitlement to full party status.

In addition, to the extent the Dempsey petitioners seek affirmatively to raise their issues concerning uncapped wells and citizen group monitoring of well operations as GOR variance issues, as opposed to SEQRA issues, they have failed to carry their burden of raising a substantive and significant issue for adjudication on the GOR variance (see 6 NYCRR 624.4[c][1][iii] [issues affirmatively raised by proposed intervenors must be both substantive and significant]). The Dempseys have failed to make an adequate offer of proof demonstrating the relevance of their issues to GOR variance standards, namely the prevention of waste, the maximization of oil or gas recovery, or the protection of correlative and other rights. Moreover, as noted above, the determination of the appropriate GOR does not in and of itself authorize the drilling of any wells. Because the Dempseys' issues concern well drilling and operation, they are not ripe on this GOR variance application. Because the Dempsey petitioners have failed to demonstrate how their issues might result in the denial of the GOR variance or result in significant modification to such a variance if granted, and they have failed to raise sufficient doubt about East Resources' ability to meet GOR variance standards to require further inquiry, they have failed to raise a substantive and significant issue warranting adjudication (see 6 NYCRR 624.4[c][2], [3]).

In its reply brief, Department staff indicated that although it opposed adjudication of the abandoned well and citizen group monitoring, it does not oppose the Dempsey petitioners' participation in the adjudicatory phase of this proceeding, either as a full party or amicus party. Staff asserts that because the Dempsey petitioners are mineral owners in the Whitesville Field, their correlative rights may be affected by the GOR variance and, accordingly, they might be allowed to participate on this issue. The Dempsey petitioners' status as mineral owners in the Field satisfies the additional requirement for a party-status petitioner that they identify

their environmental or other relevant interest in the proceeding (see 6 NYCRR 624.5[b][1][ii], [iii]). However, their mineral interest ownership status alone does not satisfy the requirement that they raise a substantive and significant issue (see 6 NYCRR 624.5[d][1][ii]). Nor does their mineral interest ownership interest without more demonstrate that they can make a meaningful contribution to the record regarding a substantive and significant issue raise by another party, whether as a full party or amicus (see 6 NYCRR 624.5[d][1][ii], [2][iii]). Thus, the Dempsey petitioners' mineral interest ownership alone does not warrant granting them party status.<sup>1</sup>

East Resources objects to the Sierra Club's environmental interest in this proceeding. Citing Society of Plastics Indus., Inc. v County of Suffolk (77 NY2d 761 [1991]), East Resources argues that the Sierra Club has failed to identify members in the Whitesville Field and, thus, has also failed to establish organizational standing. Because I conclude that the Sierra Club has failed to raise an adjudicable issue of its own, or demonstrate that it will make a meaningful

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<sup>1</sup> This GOR variance proceeding is distinct from compulsory integration proceedings, in which I have concluded that mineral interest owners are automatic parties to the proceeding and have analyzed the issues they proposed for adjudication under the standards applicable to applicants, not party-status petitioners (see Matter of Drumm 1, et al., ALJ Ruling on Issues and Party Status, and Orders of Disposition, Nov. 4, 2009, at 9-10; Matter of Beach W1, et al., ALJ Ruling on Issues and Party Status, March 14, 2008, at 6-10, appeal pending; Matter of Dzybon 1, et al., ALJ Ruling on Procedural Issues, June 6, 2007, at 6-8, appeal pending). The rationale for doing so is premised upon the circumstance that adjudicatory hearings on compulsory integration orders determine the rights and interests of mineral interest in a gas or oil well spacing unit, and the resulting order expressly names the affected mineral owners, determines their rights, and imposes terms and conditions upon those rights (see Beach W1, at 8-9; Dzybon 1, at 7-8). Here, in contrast, the Dempsey petitioners' mineral interests are not being adjudicated in these proceedings, and their mineral interests will not be expressly determined or conditioned by any variance granted to East Resources. Indeed, East Resources' GOR variance, even if granted, might not even be applied to a well in which the Dempsey petitioners own a mineral interest. Thus, the rationale for treating mineral interest owners as automatic parties articulated in Dzybon 1, Beach W1, and Drumm 1 is inapposite in this proceeding.

contribution on an issue raised by another party, whether the Sierra Club has a sufficient environmental interest is rendered academic.

East Resources also objects to the timeliness of both the Sierra Club's and the Dempsey petitioners' GOR variance issues. Citing the provisions of Part 624 concerning late-filed petitions for party status (see 6 NYCRR 624.5[c]), East Resources argues that the attempt by the Sierra Club and the Dempsey petitioners to raise issues concerning the GOR variance after the issues conference and East Resources' subsequent withdrawal of its spacing variance application should be deemed untimely. Both East Resources and the Dempsey petitioners filed timely petitions, however, and the GOR variance issues were raised by Department staff and East Resources prior to and during the issues conference. Because I have concluded that neither the Sierra Club nor the Dempsey petitioners have raised adjudicable issues of their own or have demonstrated that they will make a meaningful contribution on issues raised by others, the issue whether the party status petitioners' attempt to raise issues concerning the GOR variance in their post-issues conference briefs is untimely is also rendered academic.

#### CONCLUSIONS AND SUMMARY OF RULINGS

1. The dispute between Department staff and East Resources concerning the appropriate GOR for the oil bearing formations proposed for development in the Whitesville Field and associated oil well construction requirements constitutes a dispute over a substantial term or condition, and is potentially a basis for the denial, of the GOR variance sought by East Resources. Thus, the issues concerning the appropriate GOR for the Whitesville Field and the appropriate conditions for the development of the oil-bearing formations are adjudicable (see 6 NYCRR 624.4[c][1][i], [ii]).

2. Department staff and East Resources are automatically full parties to any further adjudicatory proceedings on the GOR variance application (see 6 NYCRR 624.5[a]).

3. Party-status petitioners Sierra Club and the Dempseys have failed to raise an adjudicable issue of their own, or demonstrate that they can make a meaningful contribution to the record regarding an adjudicable issue raised by another party (see 6 NYCRR 624.5[d][1][ii]). Accordingly, the petitions for

full party status filed by the Sierra Club and the Dempsey petitioners, respectively, are denied.

4. Based upon POWERS's withdrawal of its petition for party status, the POWERS petition is dismissed.

#### 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, Wednesday, January 6, 2010. Replies are due by close of business, Wednesday, January 20, 2010.

Send the original and three copies 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. 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 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

Adjudicatory proceedings on the issues identified in this ruling are adjourned pending the mediation before ALJ Wissler. ALJ Wissler will report to me on the status of the mediation no later than Friday, January 29, 2010.

Until the petitioners' party status is finally determined, they have the right to participate in further proceedings (see 6 NYCRR 624.5[e][3]). Accordingly, the Dempsey petitioners are entitled to participate in the mediation until such time as my ruling on their party status is either affirmed on appeal to the Commissioner or not timely appealed.

/s/

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James T. McClymonds  
Chief Administrative Law Judge

Dated: December 11, 2009  
Albany, New York

Attachments

TO: Attached Active Parties Service List