

“Force Majeure” or Simply Force?

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Within the past two weeks a number of landowners in this area received letters notifying them that because the DEC has “banned” drilling in the Marcellus shale, the companies will extend their leases without additional compensation.

According to Nick Schoonover, Tioga County Landowners Group, at least eight landowners had called him, concerned about a “Notice of Force Majeure and Extension of Lease Terms” they’d received from Chesapeake Energy. The letters, dated May 29, were sent via overnight mail.

Within a week a dozen more had called regarding similar letters from Fortuna Energy. Fortuna offered landowners 30 days to extend their leases for an additional three years, with an increase in the royalty. Landowners choosing to not extend their leases would be sent a “Notice of Force Majeure”.

What is Force Majeure?

Force Majeure literally means “greater force”. When included in a contract, a “Force Majeure” clause excuses a party from fulfilling its contractual obligations due to unforeseen events beyond its control. Such events include natural disasters such as floods, hurricanes, and other “acts of God” as well as terrorist attacks, civil unrest and acts of war.

While most natural gas leases contain a generic Force Majeure clause, Chesapeake’s are quite detailed. The following language, copied from some of the Chesapeake leases filed at the Broome County Clerk’s office, protects the gas company when their work is “prevented or delayed by such laws, rules, regulations or orders, or by inability to obtain necessary permits, equipment, services, material, water, electricity, fuel, access or easements, or by fire, flood, adverse weather conditions, war, sabotage, rebellion, insurrection, riot, strike or labor disputes, or by inability to obtain a satisfactory market for production or failure of purchasers or carriers to take or transport such production, or by any other cause not reasonably within Lessee’s control...”

Gas Companies Say They Can’t Drill

According to spokesmen from both Chesapeake and Fortuna, the current regulatory climate in New York prohibits them from drilling for natural gas.

“There’s a moratorium on drilling in the Marcellus,” said Henry J. Hood, Senior Vice President and Land and Legal Counsel for Chesapeake Energy. “Or at least any drilling that would use lots of water,” he explained. Hood claims that even though Chesapeake has cooperated with DEC throughout the permitting process they are denied permits to drill horizontal wells in the Marcellus.

Fortuna too claims that they are being stymied by state regulations. In their letter to landowners they explain that the company is facing serious obstacles beyond their

control. The obstacle, they write, is the “current ban on the issuance of Marcellus Shale drilling permits”, a ban which prohibits them from using the drilling and completion techniques they believe necessary for developing the Marcellus play.

“Three things need to be in play for exploitation of the gas resources,” Fortuna Energy spokesman Mark Scheuerman told *Broader View Weekly* last week. “The permitting process needs to be reliable, timely and efficient; the commercial price of gas needs to make drilling worthwhile; and the overall regulatory environment needs to be interested in development of Marcellus.” He feels that at this time none of these needs are met.

DEC says Yes They Can

According to DEC spokesman Yancey Roy, natural gas companies are not prohibited from drilling in the Marcellus. Gas companies are not prohibited from drilling horizontally in the Marcellus, nor are they prohibited from using hydraulic fracturing (hydro-fracking).

“Right now, if a company wants to drill a horizontal well in the Marcellus, they have the option of waiting for DEC to complete the SGEIS (for high volume hydro-fracking and horizontal drilling) or they may file their applications and go forward with a site specific Environmental Impact review,” Roy explained.

Roy noted that there are 15 active vertical Marcellus wells in New York, ten of them permitted between 2006 and 2008. As of last week, however, the DEC had not approved any horizontal wells in the Marcellus. Roy noted that gas companies have submitted 33 applications to be processed pending completion of the SGEIS.

Even if companies aren’t “prohibited” from drilling, they claim that conducting a site specific Environmental Impact Statement (EIS) for each well will take too long. “In Pennsylvania it takes 28 days for Fortuna to get a permit for a horizontal Marcellus well,” Scheuerman said.

Hood claims that DEC officials have rejected Chesapeake’s and even told the company to hold off on permit requests until the SGEIS is completed. However, a letter from DEC clearly states that the company’s applications were incomplete.

It’s Not Force Majeure if You can Drill

If a company has a lease that allows it to drill for gas, and there are a number of gas-bearing strata beneath the ground, can they declare “force majeure” because it is difficult to drill in one specific deposit? The landowners in Tioga County don’t think so.

“The existing leases [Fortuna and Chesapeake] grant access to all formations in the property,” Nick Schoonover pointed out. He ticked off the names of gas-bearing formations on his fingers: Herkimer, Marcellus, Utica, Onandoga, Oriskany, Trenton/Black River, Theresa, Potsdam..... “It’s what they refer to in the gas business as a ‘stacked play’,” Schoonover said.

Because of the opportunities to extract gas from a number of formations, the relatively quick turnaround time for vertical Marcellus permits, and the opportunity for companies to proceed with an EIS for horizontal wells, Schoonover believes there is no basis for invoking the Force Majeure clause in gas leases.

“If landowners receive Force Majeure letters, they should contact me,” Schoonover said. You may reach him at 607-687-2800 or by e-mail at tiogagaslease@aol.com.