Current legislation for a state-level moratorium on shale-gas drilling takes the risk of extending the term of leases that gas companies hold in the Southern Tier and enables them to wait for the gas price to rise and for export infrastructure to be constructed.

The Southern Tier is the part of New York most likely to be subject to drilling using high-volume hydrofracking (HVHF), whether on the basis of the completion of the SGEIS, the promulgation of new regulations or the initiation of an “experiment al” drilling program.

The primary term for most leases in the Southern Tier has already expired, or will soon expire. The gas companies operating in the Southern Tier obtained most of their leases in 2006–2007. While the language of these leases differed from company to company, most leases had a primary term of five years and established several circumstances under which the lease term would be extended beyond five years from the date of execution:

1. The commencement of drilling activity before the end of the primary term
2. The production of gas before the end of the primary term
3. By tendering a per-acre payment (sometimes not stipulated) before the end of the primary term, that term can be extended a further five years, and by the same means extended a further five years after that
4. An application for a drilling permit is pending with the DEC
5. A force majeure (an act of god) preventing the company from drilling

The first three ways (above) in which the gas companies can extend their leases all cost real money. In the current economic climate, and especially given the low price of gas, the companies would prefer the last two options, whose cost to them is trivial. The fee for a permit application that will hold open the leases in a one-square-mile drilling unit established by the application is around $4,000. Declaring a force majeure that applies to an entire leasehold is even cheaper. Both of these cheap options are being used by drillers.

Some drillers can extend their leases by submitting applications for permits. Despite the executive action launched by Governor Paterson and continued by Governor Cuomo, the current moratorium on the permitting of HVHF wells does not prevent some drillers from extending their leases by submitting applications for permit s. In fact, the longer the permit moratorium is in place, the longer those applications are pending, the easier it is for drillers to “sit on” their leases and wait out current low prices and lack of export infrastructure.

The state agrees that its own SGEIS process constitutes a force majeure. The cheapest way to extend the term of the cheap leases bought during the “land rush” period is to declare a force majeure. Chesapeake Energy, for instance, has told its lessors that “During the time that your Lease is extended on the grounds of force majeure arising out of the SGEIS process . . . [our] interest in your Lease shall not terminate until December 31, 2013 . . . in accordance with the AOD (Assurance of Discontinuance).” The AOD was an agreement by Attorney General Schneiderman to end his investigation of Chesapeake’s assertion of force majeure against its lessors. Thus, Chesapeake’s leases were, for the most part, extended to the end of 2013,
regardless of when they were signed. There was no agreement as to whether Chesapeake’s force majeure claims, based on the state regulatory process, were valid or invalid.

The state does not enforce the Aukema decision on other drillers.

Subsequent to the AOD between the AG and Chesapeake, a federal court decision in the Aukema case declared that the existing moratorium, during which the SEQRA–mandated SGEIS process was playing out, could not be used as a force majeure to extend leases because the drillers could always use vertical drilling, or drill in other formations, to make use of their leases. However, the AG’s office considers the ruling to apply narrowly to the parties in that case, and is not taking any action against force majeure extensions of other leases.

Because the current moratorium legislation would, for the first time, extend the governor’s moratorium to cover vertical drilling, it gives the drillers an opportunity to “re-try” their force majeure claims.

A new, legislated moratorium may extend leases in the Southern Tier.

People had hoped that Aukema had extinguished force majeure claims, but the AG’s narrow reading of Aukema (applying only to the parties named in the suit) has undermined that hope. The value of Aukema as precedent would be further undermined by the current moratorium legislation because it suspends vertical drilling in shales: extending this moratorium may well give rise to new force majeure claims. A new lawsuit defending against those claims may land in a court more receptive to force majeure claims than the one that produced the Aukema decision.

Drillers claimed in Aukema that only HVHF is profitable for shale drilling. In fact, of the 36 applications for drilling shales made in the last 30 months, only two applications for vertical drilling remain in the queue. Thus the language suspending the issuance of permits for vertical drilling offers little protection, even in the short term, but can give rise to new force majeure claims whose disposition is entirely uncertain.

A statewide ban on hydraulic fracturing, or its criminalization, has none of the risks posed by the current moratorium legislation.

The banning/criminalizing of fracking extinguishes the ability of the frackers to carry out their plans, regardless of the language of leases, the position taken by the Attorney General, or the sentiments of any judge.

Conclusion

New York State, despite the reputation of its ongoing moratorium-by-executive-action, has been very friendly to the efforts by gas companies to cheaply retain their leasehold, despite economic conditions that might cause them to be abandoned.

- The state has accepted applications to drill that extend leases.
- The state has not challenged the assertion of force majeure by gas companies.
- A moratorium will likely serve to extend again the leasehold that the gas industry needs to wait out the current condition of low prices and a lack of export facilities.
- Only a statewide ban on / criminalization of fracking will definitively end the fracking of New York.