

Those in favor of horizontal drilling for natural gas into the Marcellus Shale formation have reason to be optimistic that the prohibition on high volume hydro-fracturing (the “Moratorium”) that has been in place since 2008 will eventually be lifted. Governor Andrew Cuomo has made public statements signaling that he supports environmentally responsible drilling, both on the campaign trail and since his election.

The leasing of mineral rights by oil and gas companies in New York was discussed in detail by Attorney Robert Wedlake in HH&K’s March 2009 Newsletter. Certainly, leasing activity will increase significantly when the moratorium is lifted, and many landowners will look to join coalitions to attempt to negotiate leases with oil and gas companies. Even with Marcellus Shale horizontal drilling presently on hold, several issues related to oil and gas leases can affect Southern Tier residents right now.

Here are some common misconceptions relating to oil and gas leases in our area:

“My property is subject to an oil and gas lease, but the term ends next year, so I will be free to negotiate a new lease at that time.”

Oil and Gas Leases do not always terminate automatically. Many people mistakenly believe that their lease terminates at the end of the “Primary Term” stated in their lease. Although your lease may state a termination date at the end of the “Primary Term,” the gas company may attempt to extend the term of the lease based on various clauses contained in the lease. Your lease most likely will allow the gas company to extend the lease if gas is currently produced or stored on your property, if the gas company is in the process of testing your property for gas potential, or for other reasons if certain other gas related activities are in progress. A lease with a Primary Term of 5 years could be extended for 30 years, or so long as gas is produced from the premises. Further, some gas companies have been asserting a right to extend leases arguing that the moratorium allows an extension under the legal principle of “force majeure.”

“I am certain that I own my mineral rights and that my property is not subject to an Oil and Gas Lease because when I purchased the property my attorney did not mention it.”

In our area, attorneys typically review a property's Abstract of Title back at least 40 years. An "Abstract of Title" or "Title" is a compilation of any documents relating to a particular property, including deeds, mortgages, liens and other recorded documents. In contrast to the customary attorney review for the purposes of a purchase or refinance, a gas company will likely review the title to a property back at least 100 years, and sometimes further. It is possible for a landowner to have no knowledge that, because of a past mineral rights severance, they do not own their mineral rights or that there is an oil and gas lease on their property until a title search is performed on their property by a gas company. Once a gas company signs a lease it will have a title search performed, and if there are any mineral rights problems or leases on the property the gas company might withdraw the current lease, regardless of whether there are current production activities on the property. If you are concerned about your oil and gas rights, you may want to have a full title search performed on your property to ensure that the property is not already subject to an oil and gas lease and that you are the owner of your mineral rights.

"Once my lease is expired, the gas company will send a Termination of Lease."

It is common for a lease to expire without a gas company sending a release to the landowner. As a result, your property may be subject to an old oil and gas lease that is terminated, but the lease will still appear as an encumbrance on your property according to the County Clerk. To be certain that an oil and gas lease is terminated, a Termination of Lease should be filed in the Clerk's office. This concept is similar to a mortgage that is paid, but not discharged as of record in the Clerk's office. A mortgage continues to act as a lien against the property until a Discharge of Mortgage is filed in the Clerk's Office, regardless of whether or not it was paid. If your land is subject to an oil and gas lease, and you believe the lease has expired, you may want to request a release of the lease from the gas company. There is also a statutory procedure available to landowners who are seeking a Termination of Lease and we at HH&K have assisted many landowners with the statutory procedure.

"I am opposed to drilling in this area, therefore I will not join an Oil and Gas Coalition."

Coalitions are comprised of people with various opinions regarding oil and gas drilling. Although most coalition members are in favor of gas drilling, a coalition may appeal to people who

consider themselves to be “Pro-Gas,” “Anti-Gas,” or to people who are merely seeking information. Coalitions are formed to protect landowners and offer bargaining power when negotiating with oil and gas companies. One person who does not want to sign an oil and gas lease will not be able to prevent a gas company from drilling in a certain area. If a gas company has signed leases covering 60% of the acreage in a specific area called a "spacing unit," it may receive permission from the DEC to include all of the property in the unit through “compulsory integration,” which would give the company the right to remove gas from under premises where there is no lease, although the company would not obtain any surface rights to the unleased premises. The compulsory integration process is discussed in more detail in HH&K’s June 2010 newsletter. A negotiated lease may offer additional environmental protections and monetary benefit that are not provided by the compulsory integration process. A person may also consider joining an oil and gas coalition to obtain the most current information on the status of oil and gas leasing in their area.

While the DEC’s environmental review process continues and must be completed before Marcellus horizontal drilling permits can be issued, there are steps that landowners can take now to prepare themselves for the gas drilling that appears likely to eventually occur in this area.

The articles referenced above can be found at the “Publications” section of the HH&K website: www.hhk.com. For more information on the status of horizontal fracturing and drilling into the Marcellus Shale, please see the “Marcellus Shale Update,” written by Attorney John Jones in conjunction with his presentation to the New York State Bar Association’s Annual Meeting of the Real Property Law Section.