

RATIONALE FOR AMENDING GAS EDI SECTION 11

General Objectives:

1. The drafting group discussed concern over the existing s. 11 of Gas EDI that emerged from the Alberta Court of Appeal decision in *Atcor v Continental Energy Marketing Ltd.* (1996), 38 Alta. L.R. (3d) 229, wherein Kerans J.A. criticized the operative force majeure clause as being so broadly written as to create “an escape clause” (at p. 236). In that same case, he advocated that “one reasonably expects to see in the contract that the event is tied to meaningful consequences. A good contract would expressly deal with several possible results and different levels of obligation to mitigate” (at p. 237). This draft attempts to address the comments by the Alberta Court of Appeal.
2. This draft attempts to organize the entire section according to a logical flow of information.
 - a. 11.1 now only contains the base concept of Force Majeure.
 - b. 11.2 now is the only subsection that defines what is a Force Majeure event.
 - c. 11.3 clarifies what will not be considered a Force Majeure event.
 - d. 11.4 details the obligations of the parties to mitigate once Force Majeure has been invoked, including limits on those obligations.
 - e. 11.5 deals with conduct of the parties in dealing with an event of Force Majeure.
 - f. 11.6 deals with partial performance during an event of Force Majeure.

Subsection 11.1

1. “such failure was caused by Force Majeure” replaced by “performance was prevented by Force Majeure” because of the comments by Kerans J.A., at p. 237, distinguishing between a failure to perform versus an inability to perform that gives rise to a valid invocation of force majeure.
2. NAESB includes introduction to definition of “Force Majeure” in subsection 11.1 (“any cause not reasonably within the control of the party claiming suspension”), and that language incorporated in this draft but placed in 11.2 where the term is defined, generally.

Subsection 11.2

1. This draft attempts to keep the definition of what *is* a Force Majeure in one place.
2. Added “terrorist acts” as a specific example of “acts of others” in sub-subsection 11.2(iv).
3. Deleted reference to hurricanes in sub-subsection 11.2(i) as an example of a physical event that results in evacuation of an area.

Subsection 11.3

1. This subsection was drafted using language that seemed to be common in special provisions, mostly derived from NAESB language.
2. This draft specifically adds the failure of specific wells as not constituting an event of Force Majeure unless there is a Force Majeure event affecting an entire area. Note for small producers, this should not preclude calling an event of Force Majeure if only one well owned in an area where there is widespread Force Majeure.

Subsection 11.4

1. This subsection now deals with the specific mitigation duties and obligations of the parties in an event of Force Majeure
2. Most of the revisions to this subsection made to clarify limitations on the obligation to mitigate.

Subsection 11.6

By consensus of the Force Majeure Subcommittee, this subsection added to include the *pro rata* concept and was supported by the Special Provisions. Used plain language of “percentage” rather than “*pro rata*” based on Encana’s past experience that US counterparties not familiar with the *pro rata* concept.