



IOGA COMMENTS ON
APPENDIX 4 - MINERAL OWNERSHIP AND
LEASING SUMMARY

(Prepared for IOGA by John H. Meyer, Esq.)

COMMENTS RELATING TO APPENDIX 4
OF THE DRAFT GEIS PREPARED BY DEC

IA4-1 The introductory paragraph states that an oil and gas lease creates the potential for impacts where none existed before. This is nonsense. The mineral owner has every right to explore for oil and gas before he signs these rights over to a lessee. This is nothing more than a transfer of certain rights. The rights existed both before, during and after the execution of an oil and gas lease. In Section A, Mineral Ownership, the author states that fee simple title gives all rights in and to, among other things, the air space. This is rather a silly idea to express in a statement of this sort as it is both untrue and irrelevant. The Author also states that the fee simple may be acquired by a Warranty Deed; in fact, the fee simple may be acquired by any type of deed, if the grantors interest being conveyed, is in fact a fee simple. This would include Quit Claim Deeds, Bargain and Sale Deeds, Executor's and Administrator's Deeds, Sheriff's Deeds, Trustee's Deeds, Tax Deeds or any of a number of other varieties. It might also be noted that the owners rights are limited by zoning laws, and various other types of land use regulations including restrictive covenants. There is also reference to an "act of severance" but it is not made clear that this is effected by the same means that any other voluntary transfer of real property is made, i.e., by deed, will, etc. Also, I am unaware of any titles originating from government patents in any oil and gas areas of New York State.

IA4-4 The author points out that purchase of a fee simple estate for the purpose of oil and gas development is rare, and that "the use of mineral deeds sees little contemporary use." This raises the question of why the author bothers to review these in any depth at all.

- IA4-1 The number of private landowners with the knowledge, resources and willingness to risk a dry hole, who are also ready on their own, to develop and market any hydrocarbon resources underlying their land is relatively small. The oil and gas lease almost invariably transfers the development rights from those who are unable or unwilling to assume development risks to those who are.
- IA4-2 Air space is relevant insofar as it is generally included in the definition of "fee simple." While air rights are not owned to infinity, the surface owner has the right to as much as he needs in connection with the use of his land.
- IA4-3 Deletion of the word "warranty", so as to not exclude these other types of deeds, would be technically correct. The purpose of this Appendix was to provide some background material and a very broad overview of oil and gas leases for people unfamiliar with them in order to illustrate the general scope and responsibilities covered by such agreements. This was clearly stated in the first paragraph of the Appendix. It was never intended to be a definitive text on the subject of leasing.
- IA4-4 The fact that they are rare does not render their use invalid.

IA4-5

The author's understanding of the nature of an oil and gas lease appears to be deficient. While it is true to state that a deed is a grant of a separate estate, separate from what? The oil and gas lease is also a grant of a

IA4-6

separate leasehold estate. Under the common law, estates can be for a term of years or for an indefinite period. While it is also true to state that an oil and gas lease may have an implied covenant to develop, the doctrine of implied covenants has been pretty well eroded by the inclusion in the lease of specific

IA4-7

clauses to preclude a Court substituting an implied covenant in law for the apparent lack of intention on the part of the parties to the lease. The doctrine of implied covenants is a late 19th and early 20th century development, the application of which is precluded by modern drafting practices. However,

IA4-8

the main difference between a deed and a lease is that the lessor retains a reversionary interest and more importantly a royalty interest. The author again refers to the potential for negative environmental impact due to the lessee's implied easement to use the surface. This easement is usually an

IA4-9

express easement rather than implied and it should be pointed out that the lessee is not the beneficiary of any rights created by the lessor, but only of rights transferred by the lessor. There is no net increase in rights to the property. The doctrine of dominant and servient estates is one that is being eroded by modern Court decisions and by State and Federal environmental laws and regulations.

IA4-10

The author's reference to "standard provisions found in a contemporary lease" raises the question of what are "standard provisions"? Since there are hundreds of lease forms currently in use, it would be useful to know which forms were examined by the author.

The author's analysis of the oil and gas lease focuses on the rights of

IA4-5

The subject of discussion was a mineral deed as compared to an oil and gas lease. The "separate estate" referred to was the severance of the mineral interest from the surface. This was discussed in part A.2. of page 2 of the Appendix.

IA4-6

Correction noted. This point is discussed in part B.2.c. pages 5 and 6 of the Appendix. The fifth sentence in part A.3. on page 3 should read as follows: "A lease contains provisions to maintain it in force; a deed does not."

IA4-7

Royalty interest is discussed in part B.4. found on pages 8 and 9 of the Appendix.

IA4-8

While the right to use the surface of the leasehold is usually an express point in the lease, occasionally it is not. As the commentator states in his next paragraph: "there are hundreds of lease forms currently in use . . ." In the absence of an express surface use easement, the following maxim still applies: "Whoever grants a thing is deemed also to grant that without which the grant itself would be of no effect."

IA4-9

The term "standard provisions" was used to denote clauses which occur so frequently in the vast majority of contemporary oil and gas leases that they could be considered standard inclusions. The list of provisions is by no means all inclusive and was never intended to be. Once again, the purpose of this Appendix was to provide a broad overview to those not familiar with oil and gas leases.

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the lessee, and apparently ignores the lessee's obligation to the lessor, which is primarily to pay monies. This is a not inconsiderable obligation, and is self-evidently the most important consideration and probably the sole inducement to the lessor to execute the lease in the first place. The author's approach seems to be skewed by a lack of understanding of the primary goal of the lessee, which is to produce oil and/or gas. From the author's point of view, it appears that the lessee's primary goal is to hold leases. This is but a means to the end, which is to produce oil and gas for a profit. Thus, this is the true purpose of the "secondary term". The goal of the lessee is to recover his investment in the well and to profit from additional production. The author's statement that "lessors do not generally resist drilling delay rental clauses" and the paragraph which follows leaves until the end the obvious reason, i.e., the lessors will be paid money for the delay rental period.

IA4-11

The author's attitude towards lessees is displayed in the analysis of what is referred to as "defensive clauses". These are referred to as "lengthy and complicated" although they are no more lengthy or complicated than any other clause in the lease. In addition, the reference to "to protect what lessees regard as their legitimate interest" seems to imply that other parties might regard these as illegitimate interests, or that lessees have no legitimate interests. The five clauses which are modifications of the termination clause break down into simple common sense. They all allow the extension of the primary term for various causes where it is demonstrated that the lessee is making an investment and operating in good faith.

IA4-12

The author also uses the term "condemnation" to apparently mean the accumulation of geological evidence that the lease will be most likely be unproductive, rather than the legal term meaning the taking by a governmental

IA4-10

Because this Appendix was prepared as a source of general information about oil and gas leases, it does not include some of the detailed information described in the comment. Note also that another goal of obtaining leases is to profit from trading, selling, or otherwise disposing of them.

IA4-11

The fact that defensive clauses are so commonly used by the industry in their oil and gas leases demonstrate that a need for them exists, and discussion of them in this Appendix is appropriate. The text makes no judgment regarding other parties perception of the legitimacy of defensive clauses.

body for public purpose. These clauses all recognize the value of the lessee's economic investment in the property as an alternative to the payment of delay rentals or royalties.

IA4-13

The reference to pooling and unitization provisions fails to mention the impact of spacing regulations and the economic waste resulting from drilling wells in too great a proximity to each other. Pooling and unitization are primarily oil and gas conservation measures. The author again discusses implied covenants, which are discussed hereinabove, and fails to mention that most Courts have adopted some form of the prudent operator rule which requires the lessee to operate in good faith. This rule was adopted in New York by the Appellate Division in the case of Doran & Associates, Inc. v. Envirogas, Inc., 492 N.Y.S.2d 504 (N.Y. App. Div. 1985); again, implied covenants have been rendered moot by most carefully drafted oil and gas leases.

IA4-14

In the author's conclusions, mention is made of the lessee's responsibility for surface damage and proximity of wells to structures on the property. Nearly every lease form in use today contains such clauses, and the DEC regulations further govern the location of wells relating to structures, streams, roadways, etc.

IA4-15

It is true to state that an oil and gas lease is a complex instrument, a binding legal document, and certainly legal counsel can be of assistance in the analysis. Whether or not it is true to state that consultation with legal counsel will help landowners to avoid or mitigate potential negative impacts to their property while simultaneously allowing them to enjoy the economic benefits will depend in large part upon the expertise of the attorney in oil and gas matters.

IA4-12 Correction noted. Replace "consequences of condemnation" with "termination".

IA4-13 No implied covenants were discussed in connection with the pooling and unitization clause. This clause, along with the five other defensive clauses described in the text were listed due to their presence in most leases.

IA4-14 Comment noted.

IA4-15 Correction noted. The phrase "... landowners should consult with legal counsel ..." should be changed to "landowners may wish to consult with legal counsel with expertise in oil and gas lease matters."

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COMMENTS AS SUBMITTED BY THE NEW YORK STATE OIL PRODUCERS ASSOCIATION TO N.Y.S. DEPARTMENT OF ENVIRONMENTAL CONSERVATION REGARDING THE PROPOSED FINAL DRAFT OF THE GENERIC ENVIRONMENTAL IMPACT STATEMENT (GEIS).

Presented at Wellsville, New York, June 16, 1988,
by Thomas E. Hungerford, President.

The Association contends, and has long believed, that a GEIS (or site specific environmental impact statement) are not necessary for the protection of the environment and certainly not for the environmental impacts recited in the GEIS. The environmental impacts resulting from routine oil and gas operations are minimal and surely anyone who observes the lush vegetation and excellent water supplies in W.N.Y. sees evidence of an undamaged area. This is true even in intensely drilled old oil areas which have been producing over 100 years. For instance, the water supply for the Village of Bolivar, N.Y. comes from drilled wells centered in the most densely drilled portion of the Richburg field, yet the water is of superb quality with no evidence of oil and gas.

OPA-1 | The Department recites some instances of environmental damage and we agree that some unsuitable practices occurred in the early development of the industry. However, as we have asked before, can the Department cite cases of any extensive damage, especially subsequent to the regulations imposed as a result of the changes to the Conservation Law in 1963? It appears that the DEC could meet their responsibilities under SEQR without the GEIS, and many of the conditions quoted in this draft were selected and phrased to justify the Department's position. Comments made by some of our members in 1986, on the GEIS, reflect some of the comments we made here today. Since we feel that these '86 comments are very applicable now, they are attached hereto in their entirety.

OPA-1

The Department has on record numerous examples of damage resulting from oil and gas operations. Anyone wishing to explore this topic is invited to visit our Central Office to review our records, tapes, and films which document violations that resulted in environmental damage. See response to I-419.

SEQR requires government agencies to analyze the environmental, social, and economic impacts of their actions. The GEIS is the most thorough means of accomplishing this mandate.

OPA-2

We also question the cost effectiveness of the GEIS and note that the taxpayers of this State have supported a costly endeavor to regulate an industry that is declining at an alarming rate. Oil production in '85, '86 and '87 has been 1,071,000, 853,000 and 709,000 bbls. respectively, and without a price increase, under this decline rate, the oil industry will effectively cease to exist in N.Y. State in 5 years (1993). This is a sad commentary on an industry that has had such a magnificent history and contributed so much to the economy of this State. It is noted here that Penna., and Ohio, with much larger oil and gas operations, have not adopted a GEIS.

However, this Association is aware that requests and arguments that the GEIS be abandoned should have been presented in the early comments on its development, and we are realistic enough to believe that this is unlikely now. In view of this some general comments on the contents are submitted as follows:

OPA-3

1. All proposed future regulations should be removed. This is not the vehicle to promote additional regulations and if desired they should be proposed individually, through normal procedures.

OPA-4

2. All cementing and completion, plugging and abandonment and well permitting and spacing requirements should be replaced by those existing subsequent to the environmental legislation of 1963. We cannot see any evidence of increased environmental protection by the later regulations.

OPA-5

3. Many of the suggestions and proposals in the GEIS such as scenic vistas, access roads, aesthetic compatability standards and lease terms are outside the DEC's responsibility and an interference in 3rd party contracts.

In addition, we have prepared some specific comments, identified by page in the draft, which will not be read in here, but are also attached for submission with the written comments. We thank the Department for the opportunity to comment and note that, although our suggestions are not always accepted, we are always encouraged to present our input on this and other items of concern.

OPA-2

New York's old oilfields have been producing for over 100 years. The economic life of most wells is less than 50 years. A decline in production results from natural reservoir depletion, regardless of the existence of regulations and the GEIS. It is true that if no new major discoveries are made economic production in the old fields will eventually cease, even without regulations or the GEIS. Not every state has adopted a State Environmental Quality Review Act (SEQRA) requiring agencies to analyze the environmental, social and economic impacts of their regulatory actions. However, New York State has adopted SEQRA, and the GEIS is a legal requirement. One of the primary purposes of the GEIS is to avoid the requirement of separate costly environmental impact statements on individual wells or projects.

OPA-3

See Topical Response Number 5 on Reasons for Including Proposed Regulations in the GEIS.

OPA-4

Industry experts and regulatory personnel found the regulatory program that was based on the 1963 legislation inadequate with respect to environmental protection and long-term resource management. The major weakness in the 1963 legislation was the almost complete exemption of the old oilfield areas from regulation. For example, casing and cementing technology has advanced dramatically over the past 30 years.

OPA-5

The discussions in the GEIS of scenic vistas and aesthetic compatibility standards are included because SEQR requires that these topics be addressed in any Environmental Impact Statement. In addition, no regulatory proposals concerning these topics were made. If these topics were not addressed in the GEIS or if there were no GEIS, operators might have to address these topics in separate Environmental Impact Statements for each and every well. Access roads are considered "part of the action" to drill a well, and oil and gas operators, contrary to their claims, are not the only industry required to address the impacts of access roads. The GEIS was written, in part, for public information. Providing the public with information on lease terms is not interference in third party contracts.

June 16, 1988

SPECIFIC COMMENTS ON THE GEIS AS PROVIDED BY THE
NEW YORK STATE OIL PRODUCERS ASSOCIATION

	<u>PAGE</u>		
OPA-6	4-1	B. Add: Natural oil and gas seeps have also polluted some fresh water drinking sources and not all fresh water damage is industry related.	OPA-6 The commentator's observation is true, but we do not and cannot regulate natural phenomena.
OPA-7	4-2	Last Para. Add: However, under present economic and regulatory operating conditions, the <u>economically</u> recoverable oil reserves will be depleted in a very short time.	OPA-7 The suggested addition is not appropriate for inclusion in Chapter 4, on history. This point is covered instead in Chapter 18, on economics.
OPA-8	4-7	1st para. Was the Peet Hollow well contaminated by the waterflood or was the drilling practice of the time, with cable tools, responsible? We believe the latter.	OPA-8 Herrick (1949) attributed the pollution to waterflooding, but undoubtedly the drilling and completion practices of the time were also contributory.
OPA-9	6-18	Add: The protection of visual resources must be consistent with encouragement of industry operations. Also this is subjective and defined standards will never be established.	OPA-9 See Topical Response Number 2 on Visual Resources and Assessment Requirement.
OPA-10	8-2	Item 1. Outside old field areas a blanket 40 acre spacing for wells is unreasonable. A spacing schedule should be established based on depth of target and/or producing horizon and reservoir pressure. e.g. Oriskany production will support 120-160 acre spacing and is economically unsound at lessor spacings.	OPA-10 The DEC encourages operators to submit information to support changes in spacing which will increase ultimate recovery.
OPA-11	9-2	Para. 2. Cable tool rigs <u>are not</u> confined to shallow wells and many Oriskany gas wells have been drilled by them, at depths to 7000 ft. Add: They are especially suitable where evaluation of several formations is desired, while drilling. Particularly low pressure formations.	OPA-11 We recognize that cable tools are an appropriate or acceptable technology for well drilling in some areas of New York State, but it is our understanding that 7,000-foot wells can no longer be economically drilled with cable tool rigs.
OPA-12	9-15	Item 4. This requirement for surface casing in wells drilled into known reservoirs which do not exceed 200 psi formation pressure.	OPA-12 This test pressure is far below the lowest API casing strength rating. There must be some assurance of minimal casing integrity.
OPA-13	11-3	1st para. Has the Department verified <u>many</u> old abandoned wells as improperly plugged? Add: However, many old abandoned wells in the water-flood areas must have had adequate plugs as demonstrated by their integrity during flooding operations.	OPA-13 The DEC has documented evidence of improperly plugged wells. Most of these wells came to our attention when abandoned wells leaked in response to nearby stimulation or waterflooding activity.

PAGE

OPA-14 | 11-7 Item 2a. Temporary abandonment or shut in periods shall be longer than one year. (evidence the continued economic conditions in the field, presently). Penna. is now considering allowance of a 5 year temporary abandonment.

OPA-15 | 11-11 Item F. Some reference should be made to the EPA plugging requirements and the fact that one agency or the other will eventually control injection well plugging. Not both as presently required.
(This is in addition to Chapter 15 discussion)

OPA-16 | 12-5 Item C1. Should read "A production potential of 1000-2000 barrels per acre...."
per acre foot is an error

OPA-17 | 12-9 2nd para. Enhanced recovery is now projected to recover much less than 8,059,000 bbls. of oil, under present conditions.
3,000,000 bbls. without additional development

OPA-18 | 12-17 "Production" para. Add: Some waterflood operations have flowed or are presently flowing the producing wells. No pumping units are used.
Possible for future floods also (if any).

OPA-19 | 12-30 Add: Mining is a possible secondary or tertiary recovery technique particularly in shallow formations with very high oil reserves in place, such as 18,000 bbls. per acre.

OPA-20 | 12-31 Item 4. Replace with: Ignition was never attained due to continued failures of the igniter.

OPA-14 Reasonable alternative proposals will be considered during the rulemaking process.

OPA-15 Reference is made to the plugging requirements for injection wells under USEPA jurisdiction. See page 11-23 and Figure 11.6 on page 11-26d. It is not a fact that one agency or another will eventually be the sole regulatory agency, but we continue to work toward a like set of standards.

OPA-16 As stated by the commentator, a production potential of 1,000-2,000 barrels per acre expected waterflood yield is correct for New York State oilfields, but this section of Chapter 12 is on waterflooding in general. New York has thinner sands, lower porosities and lower recovery factors than other areas of the nation. A production potential of greater than 1,000 barrels per acre-foot would be the minimum expected yield to initiate an economic waterflood in other areas of the United States. The minimum production yield needed to initiate an economic waterflood project changes with current and predicted oil prices.

OPA-17 Correction noted. Division staff has recently recalculated remaining recoverable waterflood reserves to be approximately 3,576,000 barrels.

OPA-18 The suggested addition is appropriate.

OPA-19 Oil mining recovery techniques are most appropriate for thick, heavy tar sands which do not occur in New York State.

OPA-20 VanTyne and Foster (1980) reported that ignition was sustained for 37 days.