

B. TOPICAL RESPONSES

TOPICAL RESPONSE #1: Public Taking Without Compensation

Several commentators on the draft GEIS voiced the opinion that:

- (1) the Department's regulations and permit conditions can effectively prohibit a mineral rights owner from recovering oil and/or gas reserves; and
- (2) the involved parties should be compensated by the State for the unrecovered reserves.

The Department recognizes that governmental land use regulations may, under extreme circumstances, amount to a "taking" of the affected property; however, the mere existence of governmental regulation or the requirement to obtain a permit does not in itself "take" the property.

Definition and Determination of "Taking"

To determine whether a mineral rights owner can be awarded just compensation for a taking of mineral property, the legitimate public interest served by environmental land use restrictions must be balanced against the equally legitimate property rights of the mineral rights owner. The New York Court of Appeals has interpreted this balance to mean that a taking has occurred only if the property is rendered unsuitable for any reasonable income-producing or private use for which it is adapted, and thus its economic value, or all but a bare residue of its value, is destroyed.

To establish that a "taking" has occurred, the minerals owner must do the following:

- (1) present evidence of the monetary value of the property under the current and proposed permitted use,
- (2) show that the permit has been applied for and denied,
- (3) demonstrate that the effect of the denial is to prevent economically viable use of the land, and
- (4) show that the mineral rights were obtained prior to the regulations that limit the property use.

The courts will entertain the taking issue only if the minerals owner presents "dollars and cents" evidence that the property has lost all but a bare residue of its value and that all avenues of administrative remedy have been exhausted. The minerals owner must also demonstrate to the court that the prohibited use would not have a negative or conflict-creating effect on the protected land.

Conclusion

When Department regulations or permit conditions prevent an oil or gas well from being drilled in the most desirable location with regard to geology or spacing, it is still unlikely that the minerals owner will successfully marshal the proof necessary to show a taking has occurred. Directional drilling, or other more sophisticated but expensive techniques, can be employed from offsite to recover oil and gas from beneath the property in question. Regulations and/or permit conditions restricting well location would rarely eliminate all drilling possibilities. Even if a permit to drill a well was denied, and the operator could not recover the minerals from the property, the owner would have to demonstrate that the land was rendered unsuitable for any purpose.

TOPICAL RESPONSE #2: Visual Resources and Assessment Requirement

The axiom, "beauty is in the eye of the beholder" is a widely accepted principle. Oil and gas industry commentators argue that:

- (1) consideration of visual impacts is not germane and should be removed from the GEIS;
- (2) determination of the value of visual resources and the severity of impacts on these resources is subjective;
- (3) imposition of regulations to protect visual standards is arbitrary; and
- (4) the visual impacts of oil and gas operations are negligible and temporary.

Visual Resources Protection Legislation

The protection of visual resources is mandated by New York State law. Therefore, a discussion of visual resources and the requirement for assessment of these resources is an appropriate subject for the GEIS and cannot be deleted.

Under ECL 1-0101(3)(a), it is official State policy to assure "surroundings which are healthful and aesthetically pleasing." The State Legislature further emphasized this mandate when it passed ECL Article 49, entitled "Protection of Natural and Man-Made Beauty." Other laws, including the Wild, Scenic and Recreational Rivers Act (ECL Article 15, Title 27) and the Historic Preservation Act (Parks, Recreation and Historic Preservation Law, Article 14), also require the Department to enforce protection of aesthetic and visual resources of statewide significance. Procedures outlined in the State Environmental Quality Review Act (ECL Article 8) (SEQRA) provide the primary means by which aesthetic resources are evaluated.

Objective Assessment of Visual Resources

It is accepted that the value of visual resources cannot be determined by a precise formula and that subjective standards are applied when different people evaluate the same visual effect. The background setting of a proposed activity also greatly affects perception. Those people who would not notice a small drilling rig and clearing on a wooded hillside may object to placing a rig in the town park.

To facilitate an objective determination of whether a proposed action may have significant impacts, a Visual Environmental Assessment Form Addendum has been developed by the Department for use in the SEQR review process. A copy of the Visual EAF Addendum is attached for information. This optional form focuses on four criteria for measuring the visual significance of a project:

- (1) description of the existing visual/scenic environment,
- (2) identification of the degree to which the proposed action will be visible,

- (3) determination of who will see the project and in what context (e.g. worker, tourist, local resident), and
- (4) identification of the degree of visual compatibility or incompatibility with the existing environment or the "projected" environment.

To avoid arbitrary imposition of these criteria, the Department evaluates all actions within its jurisdiction, including oil and gas operations, using the same form and objective criteria. Resources of statewide and regional significance are the focus of protection. With respect to identification and evaluation of aesthetic resources of local significance, the Department is guided by public comment. Most actions, particularly oil and gas drilling operations, are not likely to trigger SEQR thresholds or the comprehensive environmental review which might require use of the Visual EAF Addendum.

Visual Resources of Statewide Significance

As stated in the draft GEIS, the most important visual resources in New York State are National Parks, State Forest Preserves, National or State Wild, Scenic and Recreational Rivers, State Game Refuges, National Wildlife Refuges, National Natural Landmarks, National or State Historic Sites, and State Parks.

There are two National Wildlife Refuges, nine National Wildlife Landmarks and roughly 25 State Parks within the State's oil and gas producing region. Most of the 400 plus National or State Historic Sites in this region are in highly populated urban areas that are unlikely to experience oil and gas activity for cost reasons.

When it is determined that a proposed activity might have a negative visual impact on a historic site, a National Wildlife Refuge, or National Landmark or State Park; the permit might be denied, or appropriate mitigating conditions might be added to the permit. Such conditions include limited drilling hours and camouflage or landscaping of the drillsite.

Drilling in or adjacent to State Parklands is one of the few circumstances where oil and gas operations might trigger SEQR thresholds requiring a supplemental environmental assessment and/or permit conditions to mitigate visual impacts. Some members of the oil and gas industry strenuously objected to this, based on the grounds that these lands should not be treated differently than the lands of any other surface owner. However, State Parklands are different. They have heightened statutory significance and are usually of some special scenic, historic or environmental value to be held in trust and administered for the benefit of all citizens.

Summary

The Department has developed uniform, objective procedures for analyzing visual impacts. The imposition of mitigating permit conditions to protect visual resources would be the exception, rather than the rule. The GEIS finds that visual impacts resulting from oil, gas and solution mining drilling and completion activities are primarily minor and short term. The visual impacts from these activities vary with topography, vegetation, and distance to viewer.

When the producing life of a well is over and the well has been plugged, abandoned, and final site reclamation is completed, there are usually no permanent or very minor visual impacts. Depending on the previous land use, there may be moderate long-term changes (defined as greater than two years) in landscape contours and vegetation caused by clearing and construction of the well site and access road.

617.21
Appendix B
State Environmental Quality Review
Visual EAF Addendum

This form may be used to provide additional information relating to Question 11 of Part 2 of the Full EAF.

(To be completed by Lead Agency)

Visibility	Distance Between Project and Resource (in Miles)				
	0-1/4	1/4-1/2	1/2-3	3-5	5+
1. Would the project be visible from:					
• A parcel of land which is dedicated to and available to the public for the use, enjoyment and appreciation of natural or man-made scenic qualities?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
• An overlook or parcel of land dedicated to public observation, enjoyment and appreciation of natural or man-made scenic qualities?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
• A site or structure listed on the National or State Registers of Historic Places?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
• State Parks?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
• The State Forest Preserve?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
• National Wildlife Refuges and state game refuges?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
• National Natural Landmarks and other outstanding natural features?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
• National Park Service lands?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
• Rivers designated as National or State Wild, Scenic or Recreational?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
• Any transportation corridor of high exposure, such as part of the Interstate System, or Amtrak?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
• A governmentally established or designated interstate or inter-county foot trail, or one formally proposed for establishment or designation?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
• A site, area, lake, reservoir or highway designated as scenic?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
• Municipal park, or designated open space?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
• County road?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
• State?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
• Local road?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

2. Is the visibility of the project seasonal? (i.e., screened by summer foliage, but visible during other seasons)

Yes No

3. Are any of the resources checked in question 1 used by the public during the time of year during which the project will be visible?

Yes No

DESCRIPTION OF EXISTING VISUAL ENVIRONMENT

4. From each item checked in question 1, check those which generally describe the surrounding environment.

	Within	
	*1/4 mile	*1 mile
Essentially undeveloped	<input type="checkbox"/>	<input type="checkbox"/>
Forested	<input type="checkbox"/>	<input type="checkbox"/>
Agricultural	<input type="checkbox"/>	<input type="checkbox"/>
Suburban residential	<input type="checkbox"/>	<input type="checkbox"/>
Industrial	<input type="checkbox"/>	<input type="checkbox"/>
Commercial	<input type="checkbox"/>	<input type="checkbox"/>
Urban	<input type="checkbox"/>	<input type="checkbox"/>
River, Lake, Pond	<input type="checkbox"/>	<input type="checkbox"/>
Cliffs, Overlooks	<input type="checkbox"/>	<input type="checkbox"/>
Designated Open Space	<input type="checkbox"/>	<input type="checkbox"/>
Flat	<input type="checkbox"/>	<input type="checkbox"/>
Hilly	<input type="checkbox"/>	<input type="checkbox"/>
Mountainous	<input type="checkbox"/>	<input type="checkbox"/>
Other	<input type="checkbox"/>	<input type="checkbox"/>

NOTE: add attachments as needed

5. Are there visually similar projects within:

- *1/2 mile Yes No
- *1 miles Yes No
- *2 miles Yes No
- *3 miles Yes No

* Distance from project site are provided for assistance. Substitute other distances as appropriate.

EXPOSURE

6. The annual number of viewers likely to observe the proposed project is _____.

NOTE: When user data is unavailable or unknown, use best estimate.

CONTEXT

7. The situation or activity in which the viewers are engaged while viewing the proposed action is

Activity	FREQUENCY			
	Daily	Weekly	Holidays/ Weekends	Seasonally
Travel to and from work	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Involved in recreational activities	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Routine travel by residents	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
At a residence	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
At worksite	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Other _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

TOPICAL RESPONSE #3: Environmental Assessment Form and Site-Specific Permit Conditions

Environmental Assessment Form

The Environmental Assessment Form (EAF) discussed in the GEIS is a modified version of the (Long Form) Environmental Assessment Form that the Department uses in all its programs. In 1985, the Division of Mineral Resources tailored the questions on the form to specifically reflect the activities of the oil, gas, and solution mining industries and their potential environmental impacts. Before implementation, the form was reviewed and approved by the SEQR Committee and New York State Oil, Gas, and Solution Mining Advisory Board. Operators have been required to submit a completed EAF with each well drilling application.

The EAF was the subject of many comments. The commentators maintained that:

1. the form was too long, cumbersome, and contained many questions the average oil and gas operator could not reasonably be expected to answer;
2. the GEIS should address all the impacts resulting from standard oil, gas and solution mining drilling operations; and
3. the EAF requirement should be eliminated after adoption of the final GEIS.

The requirement for a site specific environmental assessment cannot be completely eliminated. Without a complete EAF, including site-specific information, the Department cannot determine whether the proposed activity is consistent with the Findings Statement that will be issued after the final GEIS. Depending on the nature of the activity and its impact, the Department will require the level of environmental review under SEQR that is determined in the Findings Statement.

Future Requirements

After consideration of the comments received and extensive review and analysis of the EAF, DEC agreed that the form could be shortened and still provide adequate information to assess those environmental impacts that are site-specific to a chosen drilling location. The EAF has been revised accordingly.

The revised EAF received SEQR Committee approval in January 1990. In addition to being much shorter, the new EAF is also easier to fill out. Check off columns provided for several questions make them quicker to answer, and the layout of the form has been improved. Although the new EAF is shorter, it still requires a description of the physical setting of the well site, pits, and access road. Operators must answer questions regarding the current land use of the project site (residential, agricultural, woodland, etc.) and its physical characteristics and proximity to natural resources. The revised EAF requires the operator to provide information on the physical dimensions of the access road and well site and the plans for handling access road construction, erosion control, drilling operations, waste disposal, and site restoration. The environmental impacts of these activities can vary significantly depending on site-specific factors.

The draft GEIS implies that the Environmental Assessment Form would cease to be required after the necessary provisions of the EAF are incorporated into the drilling permit application. However, the Department has determined that the revised, shortened and simplified EAF should still remain as an attachment to the drilling permit application form.

Site-Specific Permit Conditions

Regulations generally address the routine aspects of the regulated activity. Site-specific permit conditions designed to mitigate potential impacts are still necessary because of the wide variation in natural features, the type of regulated activity, and the procedures the permittee elects to follow. For example, a permit condition imposing erosion control measures might be required for an access road or well site with steep slopes and highly erodible soils which drain to a river and/or other particularly sensitive natural resources. Site-specific permit conditions addressing noise impacts might be appropriate where drilling is proposed in highly populated or urban areas. Permit conditions restricting the location of the temporary on-site waste storage pit may be needed for a site adjacent to a wetland, but may not be necessary if the operator intends to discharge all waste fluids to a tank. Additional examples of site-specific permit conditions are described throughout Chapters 8 to 15 and summarized in Chapter 17.

Summary

In order to ensure adequate protection of natural resources, the site-specific conditions of any proposed activity must be evaluated. Information from the EAF is reviewed in part to identify site-specific considerations that might warrant imposing mitigation measures necessary to declare the project impacts non-significant. Even the most comprehensive, up-to-date rules and regulations could not mitigate the varied potential impacts that might occur at any given site. Thus, special permit conditions may be provided to require the necessary mitigation. The revised and shortened EAF specific to wells drilled under Article 23 jurisdiction is included for information.



NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION
DIVISION OF MINERAL RESOURCES

ENVIRONMENTAL ASSESSMENT FORM
Attachment to Drilling Permit Application

WELL NAME AND NUMBER

NAME OF APPLICANT

BUSINESS TELEPHONE NUMBER

()

ADDRESS OF APPLICANT

CITY/P.O.

STATE

ZIP CODE

DESCRIPTION OF PROJECT (Briefly describe type of project or action)

PROJECT SITE IS THE WELL SITE AND SURROUNDING AREA WHICH WILL BE DISTURBED DURING CONSTRUCTION OF SITE, ACCESS ROAD, and PIT AND ACTIVITIES DURING DRILLING AND COMPLETION AT WELLHEAD.
(PLEASE COMPLETE EACH QUESTION—Indicate N.A., if not applicable)

LAND USE AND PROJECT SITE

1. Project Dimensions. Total Area of Project Site _____ sq. ft.

Approximate square footage for items below:

During Construction (sq. ft.)

After Construction (sq. ft.)

a. Access Road (length x width) _____

b. Well Site (length x width) _____

2. Characterize Project Site Vegetation and Estimate Percentage of Each Type Before Construction:

_____ % Agricultural (cropland, hayland, pasture, vineyard, etc.)

_____ % Forested

_____ % Wetlands

_____ % Meadow or Brushland (non agricultural)

_____ % Non vegetated (rock, soil, fill)

3. Present Land Use(s) Within 1/4 Mile of Project (Check all that apply)

Rural

Suburban

Forest

Urban

Agricultural

Commercial

Park/Recreation

Industrial

Other _____

4. How close is the nearest residence, building, or outdoor facility of any type routinely occupied by people at least part of the day? _____ ft.

Describe _____

ENVIRONMENTAL RESOURCES ON/NEAR PROJECT SITE

5. The presence of certain environmental resources on or near the project site may require additional permits, approvals or mitigation measures—
Is any part of the well site or access road located:

a. Over a primary or principal aquifer?

Yes

No

Not Known

b. Within 2,640 feet of a public water supply well?

Yes

No

Not Known

c. Within 150 feet of a surface municipal water supply?

Yes

No

Not Known

d. Within 150 feet of a lake, stream, or other public surface water body?

Yes

No

Not Known

e. Within an Agricultural District?

Yes

No

Not Known

f. Within a land parcel having a Soil and Water Conservation Plan?

Yes

No

Not Known

g. In a 100 year flood plan?

Yes

No

Not Known

h. In a regulated wetland or its 100 foot buffer zone?

Yes

No

Not Known

i. In a coastal zone management area?

Yes

No

Not Known

j. In a Critical Environmental Area?

Yes

No

Not Known

k. Does the project site contain any species of animal life that are listed as threatened or endangered?

Yes

No

Not Known

If yes, identify the species and source of information _____

l. Will the proposed project significantly impact visual resources of statewide significance?

Yes

No

Not Known

If yes, identify the visual resource and source of information _____

CULTURAL RESOURCES

6. Are there any known archeological and/or historical resources which will be affected by drilling operations? Yes No Not Known
7. Has the land within the project area been previously disturbed or altered (excavated, landscaped, filled, utilities installed)? Yes No Not Known
- If answer to Number 6 or 7 is yes, briefly describe _____

EROSION AND RECLAMATION PLANS

8. Indicate percentage of project site within: 0-10% slope _____ % 10-15% slope _____ % greater than 15% slope _____ %
9. Are erosion control measures needed during construction of the access road and well site? Yes No Not Known
- If yes, describe and/or sketch on attached photocopy of plat _____
10. Will the topsoil which is disturbed be stockpiled for reclamation use? Yes No
11. Does the reclamation plan include revegetation? Yes No
- If yes, what plant materials will be used? _____
12. Does the reclamation plan include restoration or installation of surface or subsurface drainage features to prevent erosion or conform to a Soil and Water Conservation Plan? Yes No
- If yes, describe _____

ACCESS ROAD SITING AND CONSTRUCTION

13. Are you going to use existing or common corridors when building the access road? Yes No
- Locate access road on attached photocopy of plat.

DRILLING

14. Anticipated length of drilling operations? _____ days.

WASTE STORAGE AND DISPOSAL

15. How will drilling fluids and stimulation fluids:
- a. Be contained? _____
- b. Be disposed of? _____
16. Will production brine be stored on site? Yes No
- If yes:
How will it be stored? _____
How will it be disposed of? _____
17. Will the drill cuttings and pit liner be disposed of on site? Yes No
- If yes, expected burial depth? _____ feet

ADDITIONAL PERMITS

18. Are any additional State, Local or Federal permits or approvals required for this project? Yes No

	Date Application Submitted	Date Application Received
Stream Disturbance Permit (DEC)	_____	_____
Wetlands Permit (DEC or Local)	_____	_____
Floodplain Permit (DEC or Local)	_____	_____
Other _____	_____	_____
_____	_____	_____
_____	_____	_____

PREPARER'S SIGNATURE

DATE

NAME/TITLE (Please print)

REPRESENTING

**Suggested Sources of Information for Division of Mineral Resources
Environmental Assessment Form**

3. LAND USE

Sources: Local Planning Office
Town Supervisor's Office
Town Clerk's Office

5a. PRIMARY OR PRINCIPAL AQUIFER

Sources: Local unit of government
NYS Department of Health
NYSDEC, Division of Water—Regional Office
Availability of Water from Aquifers in New York State—United States Geological Survey
Availability of Water from Unconsolidated Deposits in Upstate New York—United States Geological Survey

5b. PUBLIC WATER SUPPLY

Sources: Local unit of government
NYS Department of Health
NYS Atlas of Community Water Systems Sources, NYS Department of Health, 1982
Atlas of Eleven Selected Aquifers in New York State, United States Geological Survey, 1982

5c. AGRICULTURAL DISTRICT INFORMATION

Sources: Cooperative Extension
DEC, Division of Lands and Forests
NYS Department of Agriculture and Markets
DEC, Division of Regulatory Affairs—Regional Office
DEC, Division of Mineral Resources—Regional Office

5f. SOIL AND WATER CONSERVATION PLAN

Sources: Landowner
County Soil and Water Conservation District Office

5g. 100 YEAR FLOOD PLAIN

Sources: DEC Division of Water
DEC, Division of Regulatory Affairs—Regional Office
DEC Region 9, Division of Mineral Resources has flood plain maps by municipality

5h. WETLANDS

Sources: DEC, Division of Fish and Wildlife—Regional Office
DEC Region 9, Division of Mineral Resources has wetlands maps by municipality

5i. COASTAL ZONE MANAGEMENT AREAS

Sources: Local unit of government
NYS Department of State, Coastal Management Program
DEC, Division of Water (maps)
DEC, Division of Regulatory Affairs—Regional Office

5k. THREATENED OR ENDANGERED SPECIES

Sources: DEC Significant Habitat Unit—Delmar
DEC, Division of Regulatory Affairs—Regional Office

6. ARCHEOLOGICAL OR HISTORIC RESOURCES

Sources: NYS Office of Parks, Recreation and Historic Preservation circles and squares map
DEC, Division of Construction Management—Cultural Resources Section
DEC, Division of Regulatory Affairs—Regional Office

18. ADDITIONAL PERMITS NEEDED

Sources: DEC, Division of Regulatory Affairs—Regional Office
DEC, Division of Mineral Resources—Regional Office
NYS Office of Business Permits

TOPICAL RESPONSE #4: Access Roads as Part of Project

In order to conduct oil, gas, solution salt mining, or underground gas storage drilling operations, the operator must construct access roads to move drilling rigs, pipe, vehicles, and other equipment to and from the well site. These roads, which are a critical, indispensable part of these activities, also constitute a major disturbance feature of these operations. Indeed, construction of an access road can actually disturb a greater surface area than the individual drill site. Moreover, some of the adverse environmental impacts can continue after construction for as long as the road is used.

Several comments were received from the oil and gas industry objecting to the inclusion of access road construction in the project review. Oil and gas operators argued that access roads should not be reviewed as part of the permit application or regulated by the Department for the following reasons:

- (1) access roads are not regulated in other industries such as logging and agriculture; and
- (2) access road construction is a contractual matter between the landowner and the operator.

First, access roads are an essential part of the drilling operation and are routinely included in the project review for other actions requiring Department permits, such as the construction of shopping centers, sewage treatment plants, gravel mines and landfills. SEQR requires a review of the entire project; therefore, review of the access road cannot be excluded. Second, the existence of a third party contract between the operator and landowner does not preclude government regulation of any activity that can have negative impacts on important environmental resources.

There are several valid environmental concerns associated with the construction of access roads. These include:

- potential soil erosion, compaction, and sedimentation
- possible loss of productive agricultural lands
- possible loss of fish and wildlife habitat

As part of the Department's well drilling permit application, an operator must submit an Environmental Assessment Form (EAF). Several questions in the EAF must be completed to help evaluate the potential impacts of an access road at a given site. There are questions about the physical dimensions and size of the project site and access road, the possibility of utilizing an existing or common corridor for the access road, and whether erosion control measures are needed.

The answers to the above questions, along with other general information on the nature of the drill site, are necessary to evaluate the potential environmental impacts of the project.

Mitigation measures that might be included as permit conditions include:

- (1) alternate siting of the road to minimize potential impacts,
- (2) provision of drainage control to minimize potential erosion problems,
- (3) use of a common access road when there is more than one well, and
- (4) restrictions on the location of stream crossings.

Regulations mandating specific erosion control measures on every access road would be costly and unnecessary. Not all access roads have steep slopes or natural resources present that are particularly sensitive to erosion and sedimentation problems, nor will a single erosion control technique be suitable for all circumstances. Therefore, mitigation of potential impacts resulting from access road construction is best handled through site-specific permit conditions rather than regulations.

Summary

Proper access road siting, construction and maintenance is treated as a valid environmental concern by the agriculture, construction, logging, and other industries. Likewise, access roads form an integral part of oil and gas well drilling operations, and under SEQR, they cannot be excluded from the Department's review and permitting process.

TOPICAL RESPONSE #5: Reasons for Including the Proposed Regulations in the GEIS

Industry commentators have objected to the inclusion of proposed regulations in the GEIS, claiming that:

- (1) the GEIS is not the appropriate forum for new proposed regulations;
- (2) many of the proposed regulations are already in effect as part of the current regulatory program;
- (3) normal procedures for promulgating requirements are being circumvented; and
- (4) the proposed regulations will become effective upon adoption of the final GEIS.

Proposed regulations were included in the draft GEIS, not to circumvent State Administrative Procedure Act (SAPA) requirements, but for the following reasons:

- (1) to provide the basis for public discussion prior to the formal publication of proposed new and revised regulations; and
- (2) to provide in one document a comprehensive listing of current standard permit conditions, policies, and guidelines that must be formalized into regulations.

SEQR Requirements

Under SEQR Regulations Part 617.14(f)(3) & (7) of 6NYCRR, an Environmental Impact Statement must enumerate the environmental impacts of a proposed action and describe mitigation measures. Under Part 617.15(b), a GEIS must "set forth specific conditions or criteria under which future actions will be undertaken or approved." Therefore, a GEIS on an entire regulatory program which determines that portions of a current program are inadequate must include a discussion of proposed mitigation measures. The proposed new and revised regulations listed in the GEIS incorporate such proposed mitigation measures.

Public Discussion

Public input is stimulated by inclusion of the proposed regulations in the GEIS. Commentators have expressed support for some regulatory proposals and have submitted reasonable alternatives to others. Alternate proposals that effectively meet the resource management and environmental protection goals of the original recommendations will be considered during the rulemaking process. Discussion of the recommendations prior to their formal submission as proposed regulations and amendments helps ensure that they are carefully reviewed before proposed regulations are formally drafted.

Listing of Standard Permit Conditions, Policies, and Guidelines

Because the regulations governing oil, gas, and solution mining operations have not been updated to reflect the major legislative revisions of 1981 and 1984, permit conditions have been imposed so that many standard operations will have non-significant environmental impacts under

current law. A prime example is the casing and cementing guidelines, implemented April 1, 1986, which have not yet been promulgated as regulations. Any assessment of the current regulatory program must consider these permit conditions and guidelines. They are listed in the GEIS as proposed regulations because it is Department policy to formalize existing standard permit conditions into regulations where possible.

Comprehensive listing in one document of permit conditions, policies, and guidelines that are being proposed as regulations helps fulfill the industry's need for a documented, consistent regulatory program, and also provides complete information to the general public.

Summary

Proposed regulations were included in the GEIS to provide a framework for public discussion of recommended changes to the oil, gas, and solution mining regulatory program, and to provide in one document a comprehensive listing of current permit conditions, policies, and guidelines that are likely to be formalized into regulations. Although all proposed regulatory changes are subject to the State Administrative Procedure Act review and public hearing requirements, including them in the GEIS facilitates the rulemaking process. It encourages public discussion and enables the Department to evaluate feasible alternative means of achieving its mandated objectives of resource management and environmental protection.

TOPICAL RESPONSE #6: Surface/Mineral Owner Lease Conflicts

There are opposing viewpoints on the subject of surface versus mineral owner rights. These contrasting views are summarized from the public comments as follows:

- (1) Many industry commentators contend that mineral resource development activities are governed by contractual agreement between the landowner and the well operator and that the Department should not, under any circumstance, attach conditions to permits requiring:
 - a) adoption of erosion and siltation control measures,
 - b) stockpiling of topsoil for use during site reclamation,
 - c) timetable for site reclamation, and
 - d) the movement of wells and/or access roads to the edges of fields where they will interfere less with farming operations.
- (2) Local governments and agricultural organizations, on the other hand, believe that the Department's concept of lease terms and agreements is "faulty". They assert that the Department does not adequately protect the current landowner, regardless of whether or not the current landowner signed the original lease agreement that remains in effect.

Legislative Mandates

The Department is mandated by law to protect the environment, correlative rights, and public safety during resource development activities by the oil, gas, underground gas storage and solution mining industries in New York State. Although most of the potential conflicts between the landowner and the well operator should be handled during the leasing process, the Department's regulatory program does play an important role in minimizing problems and protecting the environment for both the original and secondary landowners of a leasehold. The Department can and will attach permit conditions under certain circumstances to protect environmentally sensitive resources (e.g. surface and groundwaters, floodplains, agricultural districts, wetlands) and the public.

However, the Department cannot intervene into third party contracts where there are no environmental or public resource management concerns. Anyone acquiring property is ultimately responsible for being aware of all encumbrances upon that property.

It should be noted that there are rules and regulations which regulate the activities of oil and gas operators whether they occur on public or private lands. The lease is only one aspect of the overall control of land use. Laws, rules and regulations that require the adoption of erosion and siltation control measures, drilling pit and drilling site reclamation, or that prevent non-point source discharges into streams, and the damage of prime agricultural lands, all supplement provisions contained in an oil and gas lease.

There are also numerous public outreach programs sponsored by the Department, other state agencies, the Farm Bureau and Cooperative Extension that are designed to provide information on oil and gas leasing to rural landowners.

One of the purposes of the GEIS is to provide public information. Greater public awareness and understanding of the oil, gas, underground gas storage and solution mining industries and mineral lease considerations should help reduce the potential for conflict between landowners and operators engaging in new lease agreements.

TOPICAL RESPONSE #7: Soil as a Public Natural Resource

Some supportive comments were received from the oil and gas industry on the proposed regulatory requirement for topsoil stockpiling in agricultural areas and later distribution during site reclamation. They claimed that this is a standard industry practice. Other industry commentators objected to this proposed requirement, claiming that:

- (1) statements made in the GEIS imply that soil is a commonly held natural resource, similar to air and water;
- (2) the concept of soil as a natural resource is used in the GEIS to justify the regulation of private property; and
- (3) earth disturbance regulations are only appropriate under certain circumstances where they are necessary to protect a commonly held resource, such as surface waters, from excessive siltation.

The draft GEIS does state that soil is an important natural resource. Soil has long been recognized as an important natural resource under both State and Federal laws. While the majority of government programs specifically address the importance of soil to agriculture, other values of soil are also recognized under New York State's Fish and Wildlife Law (ECL 11-0303) and the Federal Soil and Water Conservation Act of 1977. Quite simply, soil, like water, is a basic natural resource. Without it plants cannot grow and without plants wildlife cannot exist.

Whether or not soil is a public natural resource which can be regulated in the same manner as air and water is not the primary issue. Soil disturbance is an inevitable part of oil and gas drilling operations. SEQR requires an agency to consider the entire proposed action during the review of potential environmental impacts. As a component of mineral resource development, disturbance of soil and the potential impacts must be considered in the environmental review before a permit can be issued.

Soil Disturbance as Part of Project

During normal oil and gas drilling operations, soil may be affected in several ways. These include soil removal for the building of access roads and the preparation of drill sites, and soil compaction from vehicles or other heavy equipment. There is also the potential for soil contamination from spills of oil, brine, and other drilling site materials. All of these can affect the ability of the soil to sustain plant life, and can trigger such problems as loss of fish and wildlife habitat, loss of agricultural lands, or soil erosion and sedimentation.

As part of the permit application process, an oil and gas operator wishing to drill a well must submit an Environmental Assessment Form to the Department and answer certain questions to help evaluate the potential impacts of soil disturbances. These questions concern the predominant land use at the site. The operator must state whether topsoil will be stockpiled for reclamation use, and whether any portion of the site is within an Agricultural District established pursuant to Article 25AA of the Agriculture and Markets Law.

The answers to the above questions, along with other general information on the nature of the drill site, are used to evaluate the potential impact of soil disturbance at the site.

Agricultural Lands Protection

The Constitution of New York State directs the Legislature to provide for the protection of agricultural lands. Article 25AA, Section 300 of the Agricultural and Markets Law states:

"It is the declared policy of the State to conserve and protect and to encourage the development and improvement of its agricultural lands for the production of food and other agricultural products. It is also the declared policy of the State to conserve and protect agricultural lands as valued natural and ecological resources which provide needed open spaces for clean air sheds, as well as for aesthetic purposes..."

Thus, proper restoration of the natural soil profile is a special concern in agricultural areas. Topsoil is essential for soil fertility and plant growth. It takes hundreds of years to form an inch of topsoil. Its loss, through commingling with other material, misplacement or erosion, can have severe long term impacts on the ability of the disturbed acreage to support crops and other vegetation.

Summary

The Department is not seeking to regulate the use of property absent the occurrence of a regulated activity. Rather, an application for a permit to drill a well triggers an environmental review of the proposed action. Since SEQR requires an agency to consider the whole action, disturbance of the soils and potential impacts must be considered in the review. Furthermore, protection of agricultural lands is mandated by law. Therefore, the Department has recommended that topsoil stockpiling and redistribution during site reclamation be required in all agricultural areas. Additional measures, such as paraplowing where compaction has occurred, are recommended as permit conditions only where warranted by site-specific conditions.