

SHORT EAF, RESPONSE TO PUBLIC COMMENT

January 25, 2012

INTRODUCTION

Comments are either directly quoted or paraphrased from original documents. To the greatest extent possible comments and responses have been organized along the organization of the environmental assessment form. References to questions are based on numbering of the EAFs noticed in the State Register on November 24, 2010 and posted on the Department of Environmental Conservation's website at <http://www.dec.ny.gov/permits/6061.html>. Responses to comments on the Regulatory Impact Statement and Regulatory Flexibility Analysis and Job Impact Statement are set out in the responses to comments on the Full EAF.

GENERAL COMMENTS AND RESPONSES

1. Comment

The form should include general questions about: Coastal resources, Mining, Air Emissions, Noise, Odor or Bright Lights, Demand for Community Services and Groundwater.

Response

The Short EAF is a state-wide form, and is intended to capture the most typical environmental issues associated with the common kinds of actions that are classified as Unlisted. As such, it would be difficult to capture all issues without making the form much longer than it is. EAFs are usually completed with an application for approval of the underlying action (e.g., application for preliminary site plan approval) which often contains additional information that may be used to supplement the EAF or vice versa.

2. Comment

The DEC received many requests asking for internet links to the Workbook or spatial data such as wetlands maps.

Response

The DEC's will be developing a companion workbook to the Short EAF. The workbook will contain information to guide project sponsors and agency reviewers in the preparation of a Short EAF. It will contain background information on topics and built-in links to spatial data. The workbook should make it easier and more likely that project sponsors will have access to information that will allow them to provide an accurately completed Part 1. It will also make it easier for the reviewing agencies to confirm responses that they believe may be in error.

3. Comment

DEC received several comments asking for inclusion of questions related to the State Smart Growth Infrastructure Act, Chapter 433 of the Laws of 2010, codified at Article 6 of the Environmental Conservation Law. Typical of such comments was the following comment: "In response to the recent enactment of the State Smart Growth Public Infrastructure Policy Act, we recommend that SEQR documents be carefully reviewed to take into consideration the requirements of this Act...." Specifically, one commentator urged that the Department add

sections to Part 1 of the Short EAF to address the smart growth criteria set forth in the State Smart Growth Public Infrastructure Act that do not appear to be contained in Part 1 of the form.

Response

Specific reference to the State Smart Growth Public Infrastructure Policy Act would not be appropriate since the new law only applies to State Infrastructure agencies as defined in the law (ECL §6-0103[2]). For the most part, DEC is trying to keep the state-wide model EAFs statewide and non-agency specific as possible. State Infrastructure agencies may integrate their reviews under the State Smart Growth Infrastructure Act into their implementation of SEQR. Further, at least one agency has developed its own guidance on smart growth. See <http://www.nysefc.org/CleanWaterStateRevolvingFund/SmartGrowth.aspx>. However, since the State Smart Growth Public Infrastructure Policy Act affects many New York agencies, DEC will discuss the in the workbook – most likely keyed to questions that bear on smart growth.

PART 1 SPECIFIC COMMENTS AND RESPONSES

INSTRUCTIONS

4. Comment

Short EAF, Part 1, Instructions – Commentator suggests adding another check box (in addition to Y and N) after each question so that there is a visual cue to the reviewing body that this question will need to be revisited once additional information is available.

Response

Part 1 is completed by the project sponsor. If the reviewing agency requires additional information on any topic that information should be requested by the reviewing agency prior to the completion of parts 2 and 3.

5. Comment

Short EAF Part 1, add a N/A, not applicable column to the questions that would not be relevant to all applications.

Response

A N/A column has been added to one question. The other questions in Part I can be adequately answered by either yes or no.

GENERAL COMMENTS AND RESPONSES

6. Comment

Short EAF, Part 1 - It does not appear that the questions cover all the criteria for determining significance in 617.7 (c) (1), (2) and (3) and lead agency will not be able to make a reasoned elaboration.

Response

DEC recognizes that Part 1 does not track all of the criteria found in 617.c. The items selected are those most likely to be relevant for Unlisted actions that will use the Short EAF. See response to comment “1”.

SPECIFIC COMMENTS AND RESPONSES

7. Comment

Short EAF Part 1, Question 1 - Agency/permit approval question should be expanded and in tabular format.

Response

DEC likes the table format in the Full EAF. However, unlisted actions generally have fewer permits or approvals. In many cases involving Unlisted actions, there are no other involved agencies. In the interest of conserving space DEC has retained the existing format for this question.

8. Comment

Short EAF, Part 1, Question 3 – Define “near” more specifically.

Response

Several comments have asked about terms such as “near”, “adjacent”, “adjoining” etc. In some circumstances, questions using the terms have been revised, when deemed appropriate. Clarification of terms such as these, used throughout both the short and full EAFs, will be in the work book. Also, some of these terms have fairly well established common meanings.

9. Comment

Short EAF Part 1, Question 5 - “The Short EAF at Question 5 asks if the site is located ‘in’ a CEA. This is insufficient to alert the decision maker to potential impacts. Question 5 (on the short form) should mirror Question E (3)(d) on the long form as ask if the site is “in or substantially contiguous” to a CEA. In addition, I would also substitute the work ‘proximate’ for the word ‘contiguous’ which, although modified by the word ‘substantially,’ generates confusion and implies the site must actually abut or border a CEA

Response

The question now reads “[i]s the site of the proposed action located in, or does it adjoin, a state listed Critical Environmental Area (CEA)?” The question was written to make it a relatively straightforward matter for the applicant to answer.

10. Comment

Short EAF Part 1, Question 5 - Should make reference to a “designated” Critical Environmental Area.” Many local board members are not aware that CEAs are a legal designation.

Response

Comment accepted. The form makes reference to State listed CEAs and a website link will be provided in the workbook so the list can be readily accessed.

11. Comment

Short EAF, Part 1, Question 5 – Add “If yes, identify CEA, provide location and reason for designation”.

Response

Question has been revised to request identification of the CEA. The reason for the designation should be known to the reviewing agency since almost all CEAs have been established by local governments.

12. Comment

Short EAF, Part 1, Question 5 - Should also ask about Important Bird Areas, the NYS Open Space Conservation Plan, and other such designations, similar to the full EAF.

Response

These suggested additions were not deemed to be critical to the review of the type of Unlisted actions that will use the Short EAF. The topics will be included in the work book as other resource planning documents that may aid in the review of an action.

13. Comment

Short EAF Part 1, Question 6 is confusing and should be rewritten. As currently worded, it seems to possibly refer to a legislative act such as adoption of a zoning law or amendment, but could be interpreted (I believe erroneously) to warrant an affirmative response if an action is subject to site plan review, for example, by virtue of ‘adoption of a plan’.”

Response

The question has been re-written in response to this and other comments and moved to the beginning of Part 1.

14. Comment

Short EAF, Part 1, Question 7 – Suggest re-word to “Does proposed action require a zoning change”?

Response

Question removed and asks if action is permitted under zoning regulations.

15. Comment

Short EAF, Part 1, Question 8 - Suggest delete “prior permits / approvals, applications,” insert “previously”.

Response

Question has been deleted in response to comments. The intention here was to encourage both lead agencies and applicants to gather all the relevant information on a parcel of land that has previously been prepared. For example, an environmental impact statement prepared for an adjoining parcel of land or even one in the same vicinity of the action may have relevant area information that does not need to be completely reproduced. The concept of using the information from previous environmental reviews that may have been conducted for the same site will be discussed in the workbook.

16. Comment

Short EAF, Part 1, Question 9 - It is too vague to ask whether the proposed action will result in a substantial increase in traffic above present levels. To clarify the term, the EAF could reference guidance in the CEQR 2010 technical manual, such as Table 16-1, Minimum Development

Densities Potentially Requiring Transportation Analysis. Alternately, the form could ask more specific questions, such as if traffic levels at impacted intersections are already above capacity; if the action would involve traffic improvements that might avoid any significant adverse impacts; if traffic-reducing measures have been incorporated into the project design already.

Response

The traffic question has been re-written based on public comment.

17. Comment

Short EAF, Part 1, Question 9.a - Suggest define “substantial”.

Response

Substantial will be explained in work book through the use of a table that identifies the scale of development that would result in the generation of 100 peak trip per hour. If the proposed development is under the threshold it would be deemed not substantial for the purposes of answering this question. Conversely, if the development exceeds the threshold it will be deemed to constitute a substantial increase.

18. Comment

Short EAF, Part 1, Question 10 - “Asking if the ‘the proposed action maximize[s] use of energy efficient design’ is too vague. How does an agency determine whether use of energy efficient design is “maximized”? DEC should define this phrase, or otherwise provide a means by which this ambiguity can be clarified. The EAF should also reference the ‘Building Design and Operation Measures,’ listed on page 12 of the DEC's Guide for Assessing Energy Use and Greenhouse Gas Emissions in an Environmental Impact Statement, to clarify what steps can be employed to improve energy efficiency, and should indicate in a companion document the degree of energy conservation that can be achieved using each energy conservation measure. DEC should also inquire into whether the project would be eligible for LEED or Energy Star certification.

Response

The question has been re-written to ask whether the proposed action meets or exceeds the state energy code requirements and if the proposed action will exceed requirements, the question asks the applicant to describe design features and technologies. As rewritten, the question gives the project applicant an opportunity to describe in a general way how extra steps will be taken to avoid or reduce potential significance of energy and greenhouse gas related impacts as well as to encourage such actions. DEC expects to provide further guidance in the workbook.

19. Comment

Short EAF, Part 1, Question 10 – Consider changing to “incorporate energy-efficient design”. It may be difficult to demonstrate that any project actually “maximizes” the use of energy efficient design.

Response

Question has been revised as set out in the response to comment “18”.

20. Comment

Short EAF Part 1, Question 12 - Applicant is asked if the proposed action is consistent with the predominant character of the existing built or natural landscape. The typical applicant is unlikely to have the expertise to make such an assessment without the help of a professional.

Response

DEC does not agree with the statement. This question can be easily answered by placing the proposed project in the existing setting. Is it consistent with what is already there or does it introduce a new use or a new element into the landscape. The workbook will also provide some examples to help preparers answer this question.

21. Comment

Short EAF, Part 1, Question 13 – Provide direction on how to determine if a community meets EPA’s criteria with hyperlink to SEQR handbook or appropriate information resource.

Response

Question has been removed based on comments received.

22. Comment

Short EAF, Part 1, Question 14 – Several comments asked for clarification and definition of the term “substantially contiguous to”. Stated that meaning and usage is different in SEQR from terms like “adjacent to” which it is often confused with.

Response

Question has been revised in response to comments to eliminate the term. We removed the term “substantially contiguous to” and now ask only if site “contains” a structure listed on either the State or National Registers of Historic Places.

23. Comment

Short EAF, Part 1, Question 14 - Should also include sites eligible for listing on the State of National Registers.

Response

The language is intended to mirror the language in 617.4(b) (9) which says “... listed on the National Register of Historic Places, or that has been proposed by the New York State Board on Historic Preservation for a recommendation to the State Historic Preservation Officer for nomination for inclusion in the National Register, or that is listed on the State Register of Historic Places...”.

24. Comment

“Part 1, Question 15.a – “Should require identification/naming of the wetlands or waterbodies and, similarly; question 15.b should require naming of which agency or agencies regulate the identified wetlands or waterbodies.”

Response

Questions 15 and 16 have been revised in response to comments. Only if the proposed project will alter a wetland or waterbody will the project sponsor be required to identify the wetland.

25. Comment

Short EAF, Part 1, Question 15 - Should also ask how far away the nearest such water bodies are.

Response

A subpart “c” has been added that asks if the proposed action will physically alter, or encroach into, any existing wetland or water body (with request for identification and extent of alteration).

26. Comment

Short EAF, Part 1, Question 15 - Should include an “if yes” section.

Response

Agree. Change made.

27. Comment

Short EAF, Part 1, Question 15.a – The use of “adjacent area” is confusing because the person completing the form may think that it refers only to the adjacent area of a mapped wetland, even though the context implies otherwise. Suggests change to “nearby”.

Response

The term “adjacent area” has been eliminated from this question.

28. Comment

Short EAF, Part 1, Question 15.a – Change to “wetland or wetland adjacent area”.

Response

Wetland adjacent area has been removed from this question and DEC expects to discuss the importance of the adjacent area for state regulated wetlands in the work book.

29. Comment

Short EAF, Part 1, Question 15.a – Should explain that the question is limited to DEC mapped wetlands, to be consistent with Q.15.b.

Response

Question has been revised, Q. 15.a is not meant to be linked specifically DEC wetlands.

30. Comment

Short EAF, Part 1, Question 15.a - Suggest changing to “adjoining” or “area bordering the site”.

Response

Question has been revised in response to comments.

31. Comment

Short EAF Part 1 Question 16 - Add a new question to follow existing question 16, “Will the proposed action be located over or within the drainage basin of a known aquifer?”

Response

Proposed question was not added but impact to groundwater has been added to question 10 in Part 2.

32. Comment

Part 1, Question 17 - “Rather than seeking merely an affirmative or negative response, question #17 should require identification of the threatened, endangered or listed species.”

Response

DEC expects that the workbook will contain a note that an affirmative answer to this question should result in additional inquiry to identify the species and to assess the likelihood that the proposed project would have a significant adverse affect on the species or its habitat.

33. Comment

Short EAF Part 1, Question 18 & 19 - Applicant is asked if the proposed action will create a stormwater discharge or lead to the impoundment of water. These questions will require an applicant to hire a professional to give a more accurate analysis.

Response

DEC does not agree with the statement. Question 19 regarding the construction of an impoundment should be very simple for a project sponsor to answer. Either their project will include such a feature or it will not. This level of detail should be readily available to the project sponsor. Regarding stormwater, the question has been revised in response to comments so that it can be answered by the project sponsor based on the available plans.

34. Comment

Short EAF Part 1, Question 18 - Add a question to follow existing question 18, "Please indicate if the plans minimize impervious surfaces, decrease soil erosion, use porous materials or collect and reuse stormwater".

Response

DEC expects that these concepts, which are recognized ways to reduce stormwater runoff, will be included in the workbooks for both the Short and Full EAF. No new question added.

35. Comment

Short EAF, Part 1, Question 20 - Suggest delete "now, or at any time".

Response

Question has been broken into two components. Suggestion taken and terms removed.

36. Comment

Short EAF, Part 1, Signature – The required certification should be stronger. Too many consultants and other people lie on EAFs and EISs. Signatories should be required to affirm the accuracy of the document, to the best of their knowledge, under penalty of perjury.

Response

The instructions clearly state the form is to be completed by the applicant or project sponsor and that it becomes part of the application for approval or funding, which will be subject to public review and may be subject to further verification. The lead agency has an obligation to do their best to understand and accept the information provided, and to verify it if there are questions. The lead agency technically accepts ownership of the EAF. DEC does not believe that the verification needs to be more formalized since the emphasis should be on fact gathering to the best of the preparer's knowledge at the time the EAF is completed.

SHORT EAF, PART 2

GENERAL COMMENTS

37. Comment

Short EAF, Part 2, Instructions, Line 1 – Change “should be completed by the lead agency” to “shall be completed...”. “Should” is only directory, shall is mandatory. Too many applicants fill out Part 2 of the EAFs and too many agencies accept that. Better yet, the instructions should specifically say that the applicant shall not fill this out. Also, the use of “should” implies that Part 2 is optional.

Response

DEC is aware that some project sponsors either complete Parts 2 & 3 on their own initiative or at the request of the reviewing agency. No matter who completes these parts, the instructions clearly state that the lead agency is responsible for the preparation of Parts 2 & 3. So, this means that no matter who answers the questions it is the lead agency that by signing and issuing the completed Short EAF has accepted the accuracy of the information and made a determination of significance.

38. Comment

Short EAF, Part 2 – Consider reorganizing Part 1 questions so that Part 1 and Part 2 questions correspond numerically. Alternatively, consider incorporating the Lead Agency’s review check box into another column next to the questions in Part 1 to make the Lead Agency’s review process more efficient.

Response

Part 2 was revised in response to comments to loosely follow the organization of Part 1.

39. Comment

Short EAF, Part 2, Instructions, Line 1 – Suggests delete “lead”. In a non-coordinated review of an unlisted action, there is not really a “lead agency”.

Response

DEC agrees that the term is confusing where there is only one involved agency. The definition of “lead agency” under 617.2(u) does not discriminate between whether an action involves one or more than one involved agency. The lead agency is the involved agency principally responsible for undertaking, funding or approving and action... Therefore, no change has been made except that DEC will attempt to do a better job of explaining the use of the term.

40. Comment

Short EAF, Part 2, Instructions, Line 1 – Suggests change to “... submitted by the project sponsor or otherwise available to the reviewer.” The current wording requires that, no matter what other information is available, the agency may only consider data provided by the applicant, and may only consider data that support the action. This is clearly contrary to both the letter and spirit of SEQ. This is the single most important thing that could be done to improve SEQ.

Response

The instruction have been revised to point out that the Part 2 should be completed using the information contained in Part 1 and other materials submitted by the project sponsor or that is otherwise available to the reviewer.

41. Comment

Short EAF, Part 2 – Suggests adding a question based on the wording of 6 NYCRR 617.6(a)(3), about whether or not a full EAF or other additional information is needed before making a determination of significance. Too many agencies feel forced by the process to make a decision before they have enough information to do so.

Response

The instructions say “otherwise available to the reviewer”. The work book will explain that if a reviewing agency does not have enough information, they can request supplemental information if it is deemed necessary to support its determination of significance.

42. Comment

Short EAF, Part 2, Instructions – Suggests the second and third sentences should be split up into a few different questions, rather than these key issues being buried in the boilerplate. Otherwise, they will get ignored.

Response

Two questions have been moved to Part 3 where it is more important and has less chance of being ignored.

43. Comment

Short EAF, Part 2, last line - Suggest replacing “concept” with “question”, insert question mark at end of sentence.

Response

Change from “concept” to “question” was not accepted. Difference in the words was not deemed critical to the understanding of the direction. Question mark was added.

44. Comment

The majority of the questions in Part 2 contain the word "substantial", this allows for a significant amount of interpretation and subjectivity by the Lead Agency. The challenge with all the subjective language in SEQR is that communities struggle to find volunteer decision-making board members with the skill or fortitude to make judgments on "substantial or significant" issues.

Response

Part 2 (and 3) of the Short EAF has been modified to mirror the new Part 2 of the Full EAF, which is a variation on the existing structure and seems to have broad popularity. The new Part 2 allows lead agencies to dismiss no impacts or small impacts from further discussion. This allows agencies to follow a three step process, which is to first make a judgment as to whether the impact will not occur or will be small, or will the impact be moderate to large. If the lead agency determines that the impact will not occur or will be small then no further analysis is required. If

the lead agency determines that the impact is moderate to large, it would then further assess the impact in Part 3 to determine whether the impact is significant. This thought process allows for finer grain judgments than simply asking if the impact may be substantial. In either case, the lead agency is still called on to make judgments requiring the exercise of reason but such judgments are inherent to the process.

45. Comment

Short EAF Part 2 - Add a reference to the Department of Health's Type I list of actions which makes realty subdivisions a Type I action.

Response

Such a reference would be more appropriate to the workbook rather than the form and Part 1, question 2 where the applicant is required to list other involved agencies.

46. Comment

Short EAF, Part 2 - Add a question: Will the proposed action involve creating new individual water supplies or impact existing nearby individual water supplies?

Response

The corresponding question in Part 1 (question 10) has been revised to ask about the applicants plan for providing potable water for the proposed development. Part 2, Question 7 has been revised to direct the lead agency to assess impact on existing public or private water supplies and to characterize the potential impact as "no, or small" or "moderate to large."

47. Comment

Short EAF, Part 2 - Add a question: Will the proposed action involve installing new onsite wastewater treatment systems or impact existing nearby individual onsite wastewater treatment systems?

Response

The corresponding question in Part 1 (question 10) has been revised to ask about the applicants plan for providing wastewater treatment for the proposed development. Part 2, Question 7 has been revised to direct the lead agency to assess impact on existing public or private wastewater treatment and to characterize the potential impact as "no, or small" or "moderate to large."

SPECIFIC COMMENTS AND RESPONSES

48. Comment

Short EAF, Part 2, Question 2 – Spelling correction – superseded.

Response

Question eliminated for other reasons.

49. Comment

Short EAF, Part 2, Question 6 - Suggest changing "adverse change" to "increase."

Response

Question has been revised in response to comments and additional clarification will be included in the work book.

50. Comment

Short EAF, Part 2, Question 7 “Asking if ‘the proposed action may result in a substantial adverse change in the use of Energy’ is too vague. The term ‘substantial’ in the context of quantifying an increase in the use of energy should be defined. How much must energy use increase for them to be described as "substantial?" Furthermore, asking if the proposed action ‘fails to incorporate energy conservation or renewable energy opportunities’ provides little guidance regarding how effective different energy conservation or renewable energy opportunities are at reducing GHG emissions. The EAF should also reference the "Building Design and Operation Measures," listed on page 12 of the DEC's Guide for Assessing Energy Use and Greenhouse Gas Emissions in an Environmental Impact Statement, to clarify what steps can be employed to improve energy efficiency, or otherwise provide a means by which this ambiguity can be clarified. Furthermore, DEC should indicate in a companion document the degree of energy conservation that can be achieved using each energy conservation measure. DEC should also inquire into whether the project would be eligible for LEED or Energy Star certification.

Response

Question has been revised in response to comments.

51. Comment

Short EAF, Part 2, Question 9 – Clarify meaning of “environmental burden.” Provide hyperlink to required information.

Response

Question has been deleted in response to comments.

PART 3 COMMENTS AND RESPONSES

52. Comment

Short EAF, Part 3, Instruction, Line 1 – Suggests change “should be completed by the lead agency” to “shall be completed by ...” Should is only directory, not mandatory.

Response

DEC is aware that some project sponsors either complete parts 2 and 3 on their own initiative or at the request of the reviewing agency. No matter who completes these parts, the instructions clearly state that the lead agency is responsible for the preparation of parts 2 and 3. This means that no matter who answers the questions it is the lead agency who will be ultimately responsible for the proper completion of those section.

53. Comment

Short EAF, Part 3, Instruction, Line 1 – Suggests deleting “lead.” In a non-coordinated review of an unlisted action, there is not really a “lead agency”.

Response

The definition of “lead agency” under 617.2(u) does not discriminate between whether an action involves one or more than one involved agency. The lead agency is the involved agency principally responsible for undertaking, funding or approving and action... No change has been made. See response to comment “39”.

54. Comment

Short EAF Part 3 - As currently written, presumes a Negative Declaration and its final phrase should be amended to read 'should explain whether the Lead Agency determined that the impact will not be 'significant' rather than 'how the Lead Agency determined that the impact will not be significant.'

"...[I]n the Short EAF, the 'Determination of Significance' box is lacking the 'Conditioned Negative Declaration' choice which a Lead Agency could make for an Unlisted action."

Response

Section has been re-written so there is no presumption of negative declaration. The Short EAF cannot be use for conditioned negative declarations.