



FACT SHEET

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“Shale Oil and Gas Development” Fact Sheet Series

Negotiating Pipeline Easements

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Introduction

Pipelines play an important role in the development of Ohio’s shale resources. As shale development in Ohio continues to expand, so does the need for pipelines that transport shale gas resources. Many landowners will be approached by companies who want to construct a pipeline across their properties. Landowners facing this situation will benefit from understanding and negotiating the pipeline easement, also referred to as the pipeline “right-of-way.” This fact sheet explains pipeline easements and reviews issues and terms for landowners to consider when negotiating an easement. For additional information on pipelines, pipeline regulation and pipeline construction see our pipeline fact sheet series on OSU Extension’s shale education library at <http://shalegas.osu.edu>.

What is a Pipeline Easement?

A pipeline easement is a written agreement that gives a company the right to establish a pipeline on a landowner’s property. The term “pipeline right-of-way” is often used interchangeably with the term “pipeline easement,” although some also use the term “right-of-way” to refer to the actual strip of land that is involved in the easement. For this fact sheet, we will use the term “easement” rather than “right-of-way.”

A pipeline easement doesn’t grant the pipeline development company actual ownership of the land; it grants only a right to use the land for the purposes stated in the easement. The easement “runs with the land,” meaning that it remains on the property and applies to all future property owners. Typically, a pipeline easement is permanent and does not have a termination date, although the parties might agree otherwise.

Pipeline Easements and Existing Oil and Gas Leases

Oil and gas producers often include pipeline easement rights within an oil and gas lease. For this reason, landowners should examine any existing oil and gas leases on their property to determine if pipeline easement rights already exist. If so, the landowner should understand the

extent of the easement rights. For example, the lease may grant the oil and gas company the right to establish gathering lines anywhere on the lease property. Or an oil and gas lease might prohibit the landowner from granting a pipeline easement to another company. Landowners who have existing oil and gas leases should carefully review the leases and consult an attorney for clarification of any language that refers to pipelines.

Pipeline Easements and Eminent Domain

If a landowner doesn't agree to enter into a pipeline easement with a company, the company may try to acquire the easement through the power of eminent domain. Ohio has a specific law in Ohio Revised Code 1723.01 that allows a private company that is organized "for transporting natural or artificial gas, petroleum, coal or its derivatives ... through tubing, pipes, or conduits" to do two things:

1. To enter upon any private land to examine or survey for pipelines, and
2. To use eminent domain to take private land, or any right or interest in private land, as is necessary for the pipelines.

To use eminent domain, the company must prove that that the company and landowner were not able to reach an agreement about granting a pipeline easement and that the taking of the pipeline easement is necessary. The company must follow the procedures for eminent domain laid out in Ohio Revised Code Chapter 163.

Federal law might allow a company to use eminent domain for an *interstate* pipeline that runs through Ohio. The federal law states that a company may acquire property rights for a gas pipeline if the company has obtained a certificate of public convenience and necessity from the Federal Energy Regulatory Commission and if the company and landowner have not been able to agree on compensation for the pipeline easement. See 15 USC §717(F).

Negotiating Pipeline Easements

While a landowner will likely receive a "form" easement from a pipeline development company, the landowner should consider this form easement as a starting point for negotiating easement terms rather than as a final offer from the company. It is acceptable to respond to the company's easement offer with additional provisions that address the landowner's needs. The assistance of a knowledgeable attorney throughout this easement negotiation process can be invaluable and well worth the investment.

Before the negotiation process begins, take into account three key areas of concern:

1. *Impact on property.* What effects could there be on the property due to the construction, maintenance and long term presence of the pipeline, and what are ways to reduce those impacts?
2. *Income.* How much compensation should the landowner receive for the easement and for damages that will or might result from the pipeline?
3. *Eminent domain.* Does the company possess the potential power of eminent domain, and is the company willing to pursue eminent domain?

Pipeline Easement Terms

The following explains the key terms in a pipeline easement. This list is a summary, and does not include all of the provisions that might exist in a pipeline easement. A landowner

should understand each provision, determine how it affects the landowner's situation, identify additional concerns, and work with an attorney to develop a final list that fully addresses the landowner's individual situation.

Location of the Pipeline

One of the most important issues to landowners is the company's proposed location of the pipeline. A landowner should carefully review the proposed location and consider its impacts upon the property. Are there areas of the property that the landowner does not want to disturb, such as important habitat, timber or soil resource areas or residential use areas? If so, the landowner should try to negotiate the location to avoid these areas. Because an easement usually prevents a landowner from building new structures over the easement area, the landowner should also try to determine where buildings or structures may be desired in the future and ensure that the easement will not cross those areas. Additionally, the landowner might consider asking the company to locate the pipeline parallel to property boundaries or other existing easements to reduce land use conflicts and ensure efficient land use.

Once the company and landowner agree to the pipeline location, the easement should specify the exact location of the pipeline and the boundaries of the easement rather than using broad or general language such as "across the landowner's property." To guarantee accuracy of pipeline and easement locations, the landowner can also request that the company provide an "as-constructed" survey to document the actual pipeline and easement location following the construction of the pipeline.

Pipeline Depth

Today, companies place most pipelines underground. Although Ohio law requires that pipelines be buried at least 24 inches below the surface, the landowner can negotiate a lower depth. Farmland owners should request additional depth to ensure that the pipeline will not interfere with crop production and other activities that might occur with farming; the recommended depth on farmland is 48 inches below the land surface. Pipeline depth is measured from the land surface to the top of the pipe.

Width of the Easement

The easement width may range from 50 to 100 feet or more, depending on the type of pipeline, the nature of the landscape and construction and maintenance needs. Easement width might include land needed to construct the pipeline, or additional width for construction could be addressed in a temporary construction easement, explained below under "construction rights." The easement should state the width in specific terms, rather than in general terms such as "a width as is necessary to support a pipeline."

Construction Rights

There are two approaches to addressing construction needs for the pipeline. A company might address construction in the pipeline easement by including construction activity as one of the purposes of the easement. In this situation, the landowner would grant construction rights as a permissible use of the easement and the width of the easement must be wide enough to accommodate construction activity.

Another approach companies utilize is to negotiate a *temporary construction easement* in addition to the pipeline easement. The temporary construction easement allows the company access to additional land along the pipeline easement in order to install the pipeline. When

construction is complete, the temporary construction easement terminates and the company's rights of use "shrink down" to the lesser width designated as the permanent pipeline easement.

For either approach, it is important for the landowner to understand the boundaries for construction activity and the potential impacts construction might create. Be wary of language that expands the easement by setting the width as "a width as is necessary to construct the pipeline," or that gives the company broad rights to access and use non-easement property for construction and construction-related purposes. The preferred language for the landowner regarding construction rights is to state the precise boundaries where construction will occur.

The landowner should also place restrictions on construction-related activities such as use of the property by construction workers. These restrictions could address issues such as parking, sanitary stations and worker rest areas, and could prohibit non-construction activities such as hunting, fishing, camping or similar activities.

Construction Timeline

A valuable provision for the landowner to request is a timeline that outlines the time period for construction and installation of the pipeline. The timetable gives the landowner certainty as to when activity will occur, and can help avoid conflicts between pipeline construction and important events for the landowner, such as farm planting or harvest seasons. A favorable timetable would include remedies for the landowner if the company causes hardships and inconvenience by failing to meet the construction timeline.

Construction Standards

The Division of Soil and Water Conservation in the Ohio Department of Natural Resources (ODNR) has developed a comprehensive set of standards for pipeline construction that address issues such as soil compaction, erosion and drainage. Adherence to these standards is particularly important for minimizing impacts on soil and water resources. A landowner can incorporate the ODNR standards in the easement, which will require the company to adhere to these best management practices. The complete standards are available online at:

http://www.dnr.state.oh.us/portals/12/CE/Pipeline/Ohio_Pipeline_Const_Standards.pdf

For further explanation, see our Fact Sheet on "ODNR Pipeline Construction Standards."

Pipeline development companies often use third party construction companies to install pipelines. The easement should state that all third parties are also subject to agreed upon construction standards and should allocate responsibility for third party compliance to the pipeline development company. A landowner may also request that the development company provide identification information for all third parties performing work on the land.

Crossing Waterways

Will pipeline construction require crossings of a ditch or waterway? If so, the easement should include provisions requiring the company to construct temporary crossings that prevent erosion and other interferences with the waterway, streambed and riparian area.

Impacts on Woodlands and Timber

Pipeline construction projects often interfere with existing woodlands or timber stands. A landowner who does not want this type of interference should try to negotiate the pipeline location to avoid impacts on woodlands. If the pipeline will interfere with trees, the easement should address tree removal issues such as who will remove the trees, best management practices for tree removal, and who has rights to the timber. The landowner may want to use or sell the

timber or may prefer to grant timber rights to the pipeline development company and seek compensation for the value of the timber. An additional consideration concerns restoration of the woodland area after construction; the landowner may negotiate for the company to reestablish trees and restore woodland habitat impacted by construction activities.

Drainage, Fencing, Gates and Other Improvements

The landowner may also need for the pipeline development company to replace or install improvements such as subsurface drainage, fencing, gates, storage tanks, outbuildings and wind turbines. Address which improvements must be moved, how and where they will be moved and compensation for harm to the improvements. If there are livestock on the property, require procedures that contain the livestock during and after pipeline construction. A private third-party appraisal may be desirable to provide the landowner fair market value for harm to structures and improvement. In lieu of compensation, the company could be responsible for replacing or repairing structures and improvements. For more information regarding drainage tile and other repairs refer to the following OSU Extension factsheet: *A Landowner's Guide to Understanding Recommended Pipeline Standards and Construction Specifications*

Construction of Associated Structures or Facilities

There are a number of structures and facilities associated with the construction and operation of pipelines, such as compressor stations, pump stations, meter stations and meter pits. Legally, these structures are referred to in the easement as “appurtenances.” A landowner should examine the proposed easement to determine if the easement allows the development company to place appurtenances on the pipeline easement. If the landowner does not want these structures and facilities on the property, the easement should prohibit them. Alternatively, a landowner could limit placement of appurtenances to certain locations on the easement. If the landowner does allow for these facilities, the landowner should request additional compensation.

Substances in the Pipeline

The easement should clarify what substances the pipeline may transport. The landowner should limit pipeline use to natural gas and its constituents and prohibit use of the pipeline for other substances such as wastewater, sewage and oil.

Number of Pipelines

The easement should allow the construction of a single pipeline. If the landowner is willing to consider additional pipelines in the future, the easement may include language requiring that subsequent pipeline construction activity be approved by the landowner and that the company provides payment for the additional pipeline.

Pipeline Pressure

What is the pressure of the pipeline proposed by the development company? The easement should state the maximum pressured allowed in the pipeline. It is advisable to consider a higher payment to the landowner for higher pressure lines, due to the associated and increased risks.

Indemnification

A landowner should seek a provision that protects the landowner from liability for all acts of the company related to the pipeline. Because companies often subcontract to third parties to construct the pipelines, liability protection should include acts committed by third parties. The

company should agree to defend the landowner and hold the landowner harmless from any liabilities arising from the pipeline or from any pipeline-related activities.

Access to Pipelines for Inspection and Maintenance

The law requires companies to perform routine inspections of their pipelines to make sure they comply with safety regulations. The methods of inspection a company will use can vary—from gas sampling and leak detection by personnel on the ground to aerial patrols by plane. Landowners should address how and where the company may access the property for inspections, and require that the company provide notice of inspection to the landowner in advance of the inspection, including the time and nature of the activity. A landowner may want to prohibit inspections at specific times such as during harvesting or planting. Also, a landowner may wish to establish a routine maintenance and inspection schedule with the pipeline company. A final consideration for the landowner is to address disruptions due to inspection, maintenance, repair, and replacement, which can potentially result in soil compaction and erosion or a loss of timber, water supply and access to the property. The landowner should negotiate procedures detailing replacement or compensation for these disruptions.

Signage and Markers

A law under the Ohio Administrative Code (section 1501:9-10-03) states that companies are required to identify the route of the pipeline on the surface in a manner which is customary to the industry. Under federal regulation, markers are to be placed so that the location of the pipeline is accurately known. It may be in the landowner's best interest to require additional pipeline signage in designated areas to safely conduct agricultural, recreational, or other types of activities. In addition to signage and markers a landowner may want the company to provide notice of other warnings, such as whether the gas being transported under the easement is scented or unscented.

Landowner's Rights of Use

It is advisable for the landowner to retain broad rights to use the easement area. Such rights can include rights to farm in, on, and around the easement, graze animals, conduct recreational uses, grant other easements and to place temporary structures, accessories, driveways, roads, walks, parking areas and landscaping on the easement. Including these landowner rights within the pipeline easement will safeguard the landowner's ordinary use of the property and minimize inconveniences.

Termination or Abandonment of Easement

Both parties should agree to conditions that will terminate or end the easement. Easements typically last in perpetuity, as long as the company uses the easement for its stated purposes. However, the easement may clarify that there will be an automatic termination or abandonment of the easement if the company ceases to use the pipeline as intended or fails to utilize it for a certain period of time. For example, the easement could provide that abandonment of the company's rights takes place when "no construction occurs within X years of entering into the easement or there is no actual use of the pipeline after X years." The landowner may also want to require the company to remove the pipeline and other structures upon termination or abandonment of the easement.

The landowner should also require notice of termination when a company voluntarily terminates the pipeline easement, and include provisions outlining the company's obligations and the landowner's rights upon termination.

Disputes and Problems

How will the parties deal with disputes or problems that arise? The easement often contains methods for resolving disputes, but these methods might be written in favor of the pipeline company. The provisions usually include a procedure requiring the landowner to give written notice of problems to the company, a time period for the company to address the problem and required arbitration of the dispute rather than court litigation. The landowner should carefully review these provisions with the landowner's attorney and suggest terms that ensure fairness to the landowner.

Assignment Rights

The pipeline development company may want to transfer its rights under the easement to another company. In that situation, the easement should require written notice of the assignment and contact information about the new company. The easement should also emphasize that the new company must conform and comply with the terms of the easement.

Amendments to the Easement

Verbal amendments of the easement should not be permitted. The landowner should insist that written agreement is necessary in order to amend or augment the easement, and should follow the procedure for the written amendment if the company agrees to any changes to the pipeline easement.

Warranting Title

It is possible that discrepancies may arise in a landowner's title to a property so a landowner should never agree to warrant or "promise" a clear title to the property. Accordingly, a landowner should never agree to compensate a company if a title issue arises.

Payment Provisions

Compensation is the final consideration a landowner should make, after understanding impacts of the pipeline on the landowner's property. This is an important part of the negotiation process and requires the landowner to carefully assess impacts, values and offers to other landowners. There are several parts to the payment equation, which includes:

1. *Payment for the permanent pipeline easement.* The easement agreement should offer a payment for the actual land required for placing and the pipeline on the property. This amount is usually offered as a set dollar amount *per linear foot* of pipeline that will be laid on the property. Sometimes the payment amount will be stated as "per rod," which is 16.5 linear feet. Many factors contribute to the amount the company offers, including the size and type of the pipeline, the importance of the location to the pipeline route, current rates in the area and current land values. Individual impacts and factors should also affect the payment. Landowners may benefit from talking with other landowners in the area to ascertain baseline values offered to others, but be aware that individual circumstances can lead to different values. In addition to the per-foot or per-rod payment, a company might also offer a signing bonus, which gives the landowner another fixed dollar amount for signing the easement.

2. *Temporary construction easement.* A company may seek a temporary construction easement that gives the company rights to use a larger area during the initial pipeline construction but reverts back to a smaller area once the pipeline is completed (see further explanation above under “construction rights.” The company should make an additional payment for this temporary easement, based on factors similar to those used to calculate the pipeline easement.
3. *Damages to the landowner.* Compensation to the landowner should also include any damages the landowner will incur as a result of the construction, maintenance and long-term presence of the easement on the property. We discuss many of these potential damages above, such as interference with land use, impacts on crop production or subsurface drainage and loss of timber. Damages should also include inconvenience impacts from the construction process.

Taxation on Easement Payments

Landowners should be aware that income received for the easement creates tax payment obligations. For federal taxation purposes, income for an easement that lasts thirty years or more is considered a capital gain and must be reported as such. Income received for a “temporary” easement, one that lasts less than thirty years (such as a construction easement) is considered ordinary income for tax reporting purposes. Payment for damages to the landowner’s property is considered capital gains. Because of these distinctions, it is important for the landowner to obtain a statement from the company that itemizes and explains payments made to the landowner.

The Importance of Professional Assistance

This fact sheet should not be used to replace the services of an attorney or other professional. We strongly encourage landowners to consult with an experienced attorney when considering and negotiating a pipeline easement.

References

Natural Gas Pipeline Right-of-Ways: Understanding Landowner Rights and Options; Penn State Extension (Apr., 2010) <http://extension.psu.edu/naturalgas/news/2010/04/pipelineinfo>.

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