

Understanding and Negotiating Pipeline Easements

Shale Oil and Gas Development Fact Sheet Series

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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 may 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 the pipeline fact sheet series on OSU Extension's shale education library at shalegas.osu.edu.

What is a Pipeline Easement?

Generally, an easement is a legal interest that allows someone the right to use another's property for a certain purpose. A pipeline easement specifically gives the easement holder the right to build and maintain a pipeline on a landowner's property. It doesn't grant the easement holder actual ownership of the land, just a right to use the land for pipeline purposes. The easement "runs with the land," meaning that it remains on the property and applies to all future property owners. The easement should be in writing, signed by the landowner and recorded with the county recorder. Typically, a pipeline easement is permanent and does not have a termination date, although parties can agree to an easement that lasts for a certain period of time. Note that the term "right-of-way agreement" has the same legal meaning as the term "easement," and that many refer to the piece of land that is the subject of the easement as a "right-of-way." For this fact sheet, we will use the term "easement" rather than "right-of-way."

Pipeline Easements, and Oil and Gas Leases

An oil and gas lease might include pipeline easement rights as a provision of the lease. For this reason, landowners should examine existing oil and gas leases to determine if pipeline easement rights already exist. If so, the landowner should understand the extent of the easement rights granted in the lease. 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. Landowners who are currently

considering an oil and gas lease should consider removing any references to pipeline easements and negotiate those rights in a separate pipeline easement agreement.

Pipeline Easements and Eminent Domain

Eminent domain can play an important role in the development of pipelines and the negotiation of pipeline easements. If a landowner doesn't agree to grant a pipeline easement to a development 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.

Some argue that the statute only grants eminent domain rights for transporting gas, and does not extend the right of eminent domain for the transport of gas derivatives such as ethane. While there is not strong legal support for this argument, we can expect to see litigation on this issue in the near future.

To use eminent domain, the company must prove 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.

For an *interstate* pipeline that runs between Ohio and another state, federal law could allow a company to use eminent domain to obtain land from unwilling landowners. 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 the company and landowner have not been able to agree on compensation for the pipeline easement. See 15 United States Code §717(F).

Pipeline Easements are Negotiable

While a landowner will likely receive a "form" or "model" easement from a 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 pipeline easement 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 are there ways to reduce those impacts?
2. **Income.** How much compensation should the landowner receive for the use of the land and for the impacts 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 many of the key terms to consider in a pipeline easement. This list is a summary and does not include all of the provisions that might exist. A landowner should understand each provision and determine whether it applies to the landowner's situation and should be a point of negotiation with the development company.

Location of the Pipeline

What is the company's proposed location for 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 and soil resources 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 document should specify the exact location of the pipeline and the boundaries of the pipeline easement rather than using broad or general language such as "across the landowner's property." Problems or changes with the proposed route might occur during construction. To guarantee accuracy of the pipeline and easement locations after the pipeline is in place, the landowner can request that the company provide an "as-constructed" survey following the construction of the pipeline.

Pipeline Depth

Companies today place most pipelines underground. Although Ohio law requires that pipelines be buried at least 24 inches below the land surface, the landowner may want to negotiate a lower depth. Farmland owners should request additional depth to ensure that the pipeline will not interfere with crop production and other farming activities that might occur on the surface. The recommended depth of a pipeline on farmland is 48-60 inches below the land surface. Pipeline depth is measured from the land surface to the top of the pipe.

Width of the Easement

The pipeline easement width may range from 50 to 100 feet or more, depending on the type and size of pipeline, the nature of the landscape and construction and maintenance needs. Easement width might include land that is needed to be able to construct the pipeline or additional width for construction could be addressed in a *temporary construction easement*, explained below under "construction rights." The easement document 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 include construction needs when determining the width of the easement. In this situation, the landowner would grant construction rights as a permissible use of the pipeline easement and the width of the easement would be wide enough to accommodate construction activity.

Another approach 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 a lesser width that is designated as the pipeline easement. Temporary construction easements are often included in the same document as the 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 on the property. Be wary of language that expands the size of the easement by granting the company "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 construction parking and worker sanitary stations and rest areas, and could prohibit non-construction activities on the property such as hunting, fishing, camping or similar activities by construction workers.

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 timeline gives the landowner certainty about when construction activity will occur and can help avoid conflicts between pipeline construction and important events for the landowner, such as farm planting or harvest activities. Also address any hardships and inconveniences upon the landowner if the company fails to meet the construction timeline. For example, if the construction is far behind schedule and prevents the farmer from planting, what compensation should the farmer receive for this hardship?

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 very important for minimizing impacts on soil and water resources. A landowner can include the ODNR standards in the easement document, which will require the company to adhere to these best management practices. For further explanation, see the ODNR fact sheet, "A Landowner's Guide to Understanding Recommended Pipeline Standards and Construction Specifications" at ohiodnr.gov.

Pipeline development companies often use third-party construction companies to install the pipelines. The easement should state that all third parties are also subject to the agreed upon construction standards and should make the development company liable for noncompliance by the construction company. Also, the landowner may request that the development company provide identification information for all third parties who will perform work on the land.

Crossing Ditches or Surface Water

Will pipeline construction require crossings of a ditch or surface water on the landowner's property? The easement can include a provision that requires the company to construct temporary crossings to prevent erosion and other interferences with the waterway, streambed and riparian areas.

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 development company and seek compensation for the value of the timber. An additional consideration is restoration of the woodland area after construction; the landowner may negotiate for the company to reestablish trees and restore woodland habitat that was 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 other accessories. 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 assess fair market value for harm to structures and improvements. Instead of compensation, the company could be responsible for replacing or repairing structures and improvements.

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 usually 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 and if so, where and to what extent they may exist. If the landowner does not want these structures and facilities on the property, be sure that the easement language prohibits them. Alternatively, a landowner could limit placement of appurtenances to certain locations or require that the structure or facilities be hidden or visually pleasing. If the landowner does allow for these facilities, the landowner should request additional compensation.

Substances Permitted in the Pipeline

The easement should clarify what substances the pipeline may transport. Generally, the landowner would be wise to 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 landowner might expect that the easement is for the construction of a single pipeline, but the easement language might allow more than one pipeline or “as many lines as regulations allow.” If the landowner agrees to more than one line, payment should reflect the additional value of the easement that multiple lines create for the development company. If the landowner is not willing to allow more than one pipeline, the easement language should prohibit multiple lines. Perhaps the landowner is willing to consider additional pipelines on the easement in the future; language could state that subsequent pipelines are possible if approved by the landowner and with additional compensation.

Pipeline Pressure

What is the pressure of the pipeline proposed by the development company? The easement should state the maximum pressure allowed in the pipeline. It is advisable to consider a higher payment to the landowner for higher pressure lines because of potentially higher safety risks, especially when the pipeline is located close to human activity.

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

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 or helicopter. Landowners should consider addressing how and where the company may access the property for inspections and consider requiring the company to provide notice of inspection, including the inspection time and nature of the activity. A farmland owner may want to prohibit inspections at specific times of the year, such as during harvesting or planting seasons. A routine inspection schedule could benefit the landowner, if the company is willing to agree to one.

A final consideration for the landowner is to address property damages and disruptions due to inspection, maintenance, repair and replacement. Soil compaction and erosion, loss of timber, water supply or property access and interference with livestock production are a few examples of potential disruptions that pose hardships on the landowner. Negotiate procedures that detail replacement, repairs or compensation for these disruptions.

Signage and Markers

Ohio Administrative Code section 1501:9-10-03 states that companies must identify the route of the pipeline on the surface in “a manner which is customary to the industry.” Under federal regulations, 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 and markers so that the landowner can safely conduct agricultural, recreational or other types of activities without interfering with the pipeline.

Landowner’s Rights of Use

It is advisable for the landowner to retain broad rights to use the easement area. The landowner should try to forecast all potential uses of the property in the future and specify that the uses do not violate the easement. Such rights can include rights to farm in, on and around the easement; graze livestock; conduct recreational uses; grant other easements or place temporary structures, accessories, driveways, roads, walks, parking areas and landscaping on the easement. Stating these retained landowner rights of use within the pipeline easement will safeguard the landowner’s ordinary use of the property and minimize inconveniences and misunderstandings in the future.

Termination or Abandonment of Easement

Both parties should agree to conditions that will legally terminate or end the easement. Easements typically last forever (“in perpetuity”) as long as the company uses the easement for its stated purposes. However, the landowner may seek to 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 state that termination of the company’s rights takes place if “no construction occurs within X years after entering into the easement agreement or there is no actual use of the pipeline for X years.” Where there is a termination of the easement, the landowner may also want to require the company to remove the pipeline and other structures and restore the land surface after removal, so should be sure to include these obligations in the easement.

Disputes and Problems

How will the parties deal with disputes or problems that arise? The parties can agree upon methods for resolving disputes and include them in the easement. For example, a common dispute provision might prohibit a landowner from going to court over a dispute unless the landowner has first provided written notice of a problem to the company and given the company a specific period of time to address the problem. Another common provision is to require that the parties settle a dispute by arbitration or mediation rather than going to court. The landowner should carefully review these provisions with the landowner's attorney and ensure that the process for resolving disputes is fair and understood by the landowner.

Assignment Rights

The easement should state whether the pipeline development company may transfer its rights under the easement to another company. If the parties agree to allow an assignment, it is common for the easement to state that the company must provide written notice of an assignment to the landowner within a certain period of time, along with contact information about the new company and a statement that the easement will be binding on the assigned party.

Amendments to the Easement

What if the parties want to change or amend the easement in the future? The easement should outline whether amendments are permissible and what each party must do in order to formalize an amendment. It is common to include a provision stating that any amendments to the easement must be in writing and signed by each party or their successors.

Warranting Title

Another common clause often found in easements states that the landowner "warrants" clear title to the property and promises to compensate the company if a title problem occurs. A landowner's attorney would likely demand to remove this provision, as it is always possible that an unexpected and unknown discrepancy could arise in a landowner's title to the property.

Payment Provisions

Compensation is the final consideration a landowner should make, after gaining a clear understanding of how the pipeline may affect the landowner and the landowner's property. This is an important part of the negotiation process and requires the landowner to carefully assess property impacts, other damages and property values. There are several elements that should make up the final offer of payment, which includes:

1. ***Payment for the permanent pipeline easement.*** The easement agreement should offer a payment for the actual land required for placing 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 and reverts 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.
4. **Costs to the landowner.** The landowner can also request compensation for additional costs incurred because of the pipeline, such as payments for an attorney, property appraisals, property surveys and recording fees.

Taxation on Pipeline 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 gain. Because of these distinctions, it is important for the landowner to obtain a statement from the company that itemizes and explains the 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 and other advisors when considering and negotiating a pipeline easement.

Reference

Penn State Extension (April, 2010). *Natural Gas Pipeline Right-of-Ways: Understanding Landowner Rights and Options*. State College, PA: Pennsylvania State University.

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