

Pipeline, Electric, Telecommunication and Private Line Easements

An energy, utility or service right-of-way easement is any recorded or unrecorded right-of-way agreement between an individual landowner and a service provider. It permits the service provider the siting and use of facilities that are part of a distribution or transmission system on, over, under or across the land of a property owner. These systems could be public interstate, local distribution utility or non-public service provider lines. Easements accommodating infrastructure and establishing the right-of-way across property could be for the exclusive benefit of the service provider or for use in connection with another project, regardless of whether the service provider owns/operates the project or not.

An easement contract conveys the right of access to use real property of another without possessing it. All other provisions concerning the project detailed in the agreement (points of ingress/egress, protection of soil and water resources, subsurface drainage, conservation practices, crop damage, setbacks, conflict resolution, financial compensation, etc.) are still highly negotiable. Ownership of land remains with the landowner.

Pipelines, electric lines or telecommunication lines detailed in the easement could be new installations or upgrades to previously existing infrastructure. Some service providers describe an agreement as temporary access for personnel, equipment and materials to perform new construction or upgrading previously installed facilities. It needs to be understood that while the activity will be completed within a period of time, most easements are considered perpetual. Many easement agreements grant the service provider key right-of-way access and possibly future development rights permanently. Regardless of what is said, the language of the easement will control if disputes arise in the future. It is always best practice to engage private legal counsel to review any easement agreement.

Getting Started

Basic questions that need to be addressed during initial conversations between the landowner and service provider's representative includes:

- **Who is the agent?** An agent/representative of the company is often assigned or subcontracted to communicate with landowners to review agreement provisions. What direct authority does this person have? Does a landowner have the right to address concerns directly to the company involved? While many companies have hired land and field agents to engage in these activities, landowners have the right to engage their own legal counsel to interpret/negotiate easement provisions, as well as discuss their concerns directly with the company.
- **What type of project is coming to the area?** What is the width of the right-of-way or easement being considered? Does the work span or connect to multi-state networks, making it an interstate project? Does it connect to or support local utility distribution assets, making it a utility-scale project, or is it for private use serving specific customers of a service company?
- **What is the project "transporting" or "delivering?"** If it is a pipeline, what gaseous or liquid material is involved? What is the distance, pressure and diameter of the pipe being constructed? Is the line part of an oil and gas drilling project? If it is an electric line, what is the charge being handled in kilovolts, distance, pole height or tower size, and interconnection points being serviced? Is it a telecommunications or local land-line phone service owned/operated by the utility? Is it a private line or project? Regardless of infrastructure involved, who are the ultimate customers being served?
- **Who has governance and power siting jurisdiction?** Most interstate projects come under jurisdiction of the Federal Energy Regulatory Commission. Public utility distribution siting comes under the jurisdiction of the Ohio Power Siting Board. Oil and gas gathering lines are governed by the Ohio Department of Natural Resources Division of Oil & Gas Resource Management. Land-line phone services are under jurisdiction of the Public Utilities Commission of Ohio. Private lines could come under local government zoning provisions, local courts or have little jurisdictional monitoring. Moreover, other state and federal agencies have jurisdiction over general construction projects. For instance, could rainwater runoff trigger the need for US EPA National Pollutant Discharge Elimination System permitting?

- **Adjudicatory process applies?** Power siting case work involving many federal and state regulatory agencies adheres to a legal, administrative process where rule of law is used to review evidence and apply legal reasoning to determine the rights and obligations between parties involved. Many of the government agencies listed above use administrative law judges and/or attorney examiners to rule on preliminary motions, conduct pre-hearing conferences, issue subpoenas, conduct hearings (which may include written and/or oral testimony and cross-examination), review briefs and prepare and issue decisions. Such permitting case work is assigned an official agency Docket Number and ensures that many, if not all, documents can be referenced as a matter of public record.
- **Is eminent domain applicable for this project?** Eminent domain provides for a right of access, for certain types of transmission and utility distribution infrastructure. Landowners should request specific written information and guidelines showing how and when eminent domain provisions apply to the specific project. All other key provisions on how an individual landowner's assets are protected, compensation for damages, ingress/egress provisions and on-going complaint resolution procedures are always up for individual negotiation in any type of easement agreement. If a project has the right to use eminent domain and an agreement cannot be reached, a court action is likely to determine the right of eminent domain, necessity and, if applicable, appropriate compensation.

Special Easement Considerations Need to be Addressed

Contrary to popular belief, a “blanket” or “group” easement encompassing all landowners impacted by a specific right-of-way does not exist. Easement agreements must be established between each impacted landowner and the service provider. Many landowners have the opportunity, and responsibility, to negotiate key easement provisions addressing unique needs and requirements on their property.

Many easement agreements focus solely on a settlement offer, providing a one-time, lump-sum payment to obtain permanent right-of-way access rights across property. Landowners have the right, and responsibility, to negotiate key provisions to assess additional compensation payments to address impacts of facility maintenance and other land access activities on a perpetual basis.

Construction activities generate potential soil and water impacts that can last for years or even decades. Landowners need to think how repair and remediation needs to be accomplished on the property to ensure land conditions can return to their original condition. Many should consult professional conservation consultants and land improvement/conservation contractors to create remediation strategies. These strategies can be considered for incorporation into the easement agreement. Costs for these services, along with legal fees to craft final language, can also be considered for negotiation as part of the settlement offer.

Basic considerations include:

- **Identify the property involved:** Easements can have “blanket” language that allows for access or use of all property with very little or no limitations. Similarly, nonspecific language that allows for a right of way or use “somewhere” on the property may not provide certainty for the landowner. Language identifying where the right of way is located by survey markers or GPS references can provide the best information for the landowner or any future landowners. Maps can be attached to the easement to show right-of-way location and special features of the land that should be protected. Access road width and size of the construction site or service lane can also be specified.
- **Identify additional agreements on the property:** Are there any other long-term leases or easements, and/or oil and gas agreements attached to the property? Are there any USDA Conservation Reserve Program (CRP) or Conservation Reserve Enhancement Program (CREP) easement obligations?
- **Width and depth provisions:** If the infrastructure is to be buried, federal or state regulations could set minimum standards; a landowner can also consider whether deeper depths might be preferable for their land use. The depth of tile lines and other underground infrastructure should also be considered, and what accommodations might be needed for that infrastructure. Historically the term, “below plow depth” has been used, however, specific measurements can provide more clarity. Case in point – agriculture professionals generally recommend a basic 36-48 inch space below the fertile “A” horizon of topsoil and a minimum of 18 inches between a service or pipeline and subsurface farm infrastructure. The same professionals recommend installation of anti-compaction pads to surface infrastructure construction sites and all access lanes, too.

- **Additional infrastructure:** Does the easement allow for the placement of just the project or facility at hand, or does it allow for other infrastructure to be installed now or at a later date? Does it allow for subleasing to other entities with similar land use needs? Does the easement speak to any other infrastructure, such as compressor stations, substations, metering equipment, or other support infrastructure?
- **Landowner Right-of-Way use:** While many easements and government regulations limit or prohibit certain surface activities and agricultural practices on right-of-ways, landowners still need to understand their rights to use easement areas for accepted agricultural use (crop production, pasture, etc.). Driveways, parking areas, access lanes, limited fencing, land forming and landscaping could be negotiated. Consider long-term potential uses and how they might be referenced or permitted in the agreement.
- **Crop disturbance or loss:** Will construction disturb or destroy growing crops - including timber? How will the value of those crops be determined for compensation? If there is crop loss or damage in the future due to maintenance or repair activities, will the landowner be compensated? How will that compensation be determined?
- **Service provider accommodations:** Some issues and concerns need to be addressed in context of a perpetual basis. Address how, when and what advance notification requirements service company personnel will use to access the property for inspection and routine maintenance. Identify planting, harvesting and animal husbandry situations when it is not recommended for a company to enter an area. Payment/compensation for damages to property, crops and impacted livestock, as well as trees, fences, buildings, tile lines and drainage ditches, springs, water wells for homestead and other use should be detailed in the agreement. Moreover, all subsurface infrastructure should be marked at all right-of-way and fencerow/access lane/road intersections using Ohio Utility Protection Service protocols.

Other Issues to Monitor – Keep a Notebook

Design and permitting for service infrastructure projects can take months, even years. Regulatory decisions and technical plan adjustments often impact right-of-ways several times during the process. Landowners need to keep track of key developments. It is recommended that landowners create personal records or notebooks to keep track of developments impacting their property.

Collect all correspondence, and information, dates and times land agents and/or preliminary environmental evaluation survey crews want access to the property. In many cases, state and federal laws permit preliminary environmental survey crews limited line of sight survey access across potentially impacted land holdings. Landowners should inquire if they or their representatives could accompany survey crews going across their property.

Many land and survey agents are required to keep detailed field notes of their activities; landowners can, too. Other notebook materials could include:

- **Meetings, hearings and document filings:** Landowners need to make plans to attend any developer or government agency-sponsored scoping meetings, open house meetings and public hearings. Moreover, if project development is governed by a state or federal agency, obtain the project's case docket number and visit the agency's website and docket information system. Some docketing systems will allow for a landowner to establish a subscription to be notified of, and have public access to, additional permit filings, public comments and case proceedings.

While attending a local information meeting, make personal contacts and establish relationships with project and regulatory agency personnel. Obtain information on repair/remediation procedures and policies, environmental impact statements (EIS), ag mitigation statements (AIS), regulatory agency Opinion & Order and other information.

- **Visit websites:** Project developers often provide a website with downloadable information on the specific project. Government agencies provide detailed information on rules, regulations, hearings schedules, public comment submission and details on ag mitigation procedures.
- **Land condition inventory:** Walk across the right-of-way and adjoining property to photograph and/or document surface conditions. Gather pre-construction data on subsurface soil conditions, hydrology, crop production figures, access road conditions, culverts, subsurface and surface drainage infrastructure. List consultants, contractors, surveyors and others who can provide special assessments for the property.

- **Research information needed for negotiations:**

Landowners need to determine potential construction impacts, repair, and remediation requirements for their property. Landowners can consider employing a consultant, a professional land improvement contractor, or ask their local SWCD for assistance. Identify soil types, topography, water bodies, potential effects of compaction and erosion and other issues relating to their land holdings. This information can be incorporated into a mitigation plan or work order to be incorporated into your unique easement agreement.

- **Monitor construction and repair:** Landowners can clarify what access they will have to the property throughout construction and after installation of infrastructure is finished. They can work with the service provider's general contractor to ensure they know and follow all on-site

safety procedures, as well as take photographs, too. If the governing agency requires inspection and compliance reports, landowners can continue to monitor their websites for case filings as many reports are public records. Landowners should continually inspect the site before, during and after construction, repair and remediation are completed.

Properly crafted easements and regulatory compliance last forever – landowners need to continue their land condition inventory, identify concerns and document it in their notebook. They need to document, photograph and note communications with company representatives, follow provisions as detailed in easement agreements, use the respective government agency's conflict resolution process for action and consult legal counsel for further assistance.

