



Grant of Easements: Information For Landowners

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As Michigan's supply of hydrocarbon energy sources increases due to technological advances, there are more demands for energy and the utility infrastructure needed to extract the hydrocarbons. More and more, companies seek access to the property of landowners in order to be able to construct, repair and maintain that infrastructure. This paper provides a summary of some of the key issues landowners should consider when asked to provide access to their property for the placement of utility infrastructure.

TYPES OF ACCESS: A right of access can take a couple of different forms. In some instances, it may be a license, which typically is terminable at the will of the landowner and which does not run with the land (this is discussed more fully below.) Generally, however, companies are looking to obtain easements. In this paper, the **Grantor** refers to the landowner and the **Grantee** refers to the company seeking access.

COMPENSATION: The first question that the Grantor often asks is: How much should I charge? Like any other contract term, compensation can be negotiated. In some cases, it simply is a flat amount. In other cases, the fee is based on a per foot amount calculated based on the length of the easement. While each easement is unique and there is no bright-line test on what should be paid, the [Michigan Department of Natural Resources' fee schedule](#) may prove helpful when negotiating the fee amount. For example, in the Southern Lower Peninsula the consideration is \$4.50 per foot for a 30-foot easement. In the event that additional land is needed on a temporary basis, the fee for that land is typically 50% of the easement rate. Since pipelines can vary in diameter from 4" to over 36," Grantors should ask for the consideration to be more per foot for lines of larger size. In almost all cases, the fees are paid to the Grantor in a lump sum in advance.

LOCATION: One of the critical issues is defining the location of the easement area. Often times, Grantees will try and reserve the right to determine where the easement area should be. Grantors should demand that the location of the easement be mutually agreed upon by both the Grantor and Grantee. The easement agreement should include a survey and metes and bounds description showing the specific location of the easement area. Finally, the Grantee should be required to provide to the Grantor an updated survey showing the improvements once they are constructed/installed.

SCOPE OF USE: Once the easement area is identified, the parties must address what activities may be carried out in the easement area. A Grantor will expect that the Grantee's use will not interfere with the Grantor's use of the area. However, ambiguities can create disputes later on. For example, what does it mean if the Grantor grants to the Grantee the right to install "utility infrastructure" within the easement area? That would include both surface and subsurface

structures. Since most Grantors have an expectation that they will continue to have use of the surface (for example, for farming purposes), any restrictions on the right of a Grantor to use the surface within an easement area should be addressed in detail. Related to it, since certain subsurface activities (such as the placement of pipeline) can interfere with surface uses, the easement agreement should provide specifics on the subsurface uses (such as specifying a minimum depth for installed pipelines, whether it allows for replacement, or if it allows for more than one pipeline).

DURATION: Easements can be perpetual, limited to a specific purpose, or limited to a specific number of years. In all cases, they run with the land *i.e.* they burden the Grantor's land and benefit any assignees of the Grantee. The easement agreement should also provide that the easement automatically terminates once extraction is completed/abandoned.

EXCLUSIVITY: Easements may be exclusive or non-exclusive. If the easement agreement states that the Grantee's use is "**exclusive**", only the Grantee can use the easement area. For example, if the easement agreement is exclusive for a 30 foot wide right of way (and includes both the surface and subsurface), then neither the Grantor nor any other person could use the easement area. If the easement agreement states that the easement is **non-exclusive**, the Grantor retains the right to use the easement area and to grant other rights in and to the easement area (subject, of course, to the rights of the existing Grantee to use the easement area). The easement agreement should state that the easement is non-exclusive.

RESTORATION OF THE EASEMENT AREA: Once the easement is terminated, what happens to the easement area? The Grantor should require that the easement agreement specifically require the Grantee to restore the easement area. The Grantee should be obligated to restore the easement area to the condition it was in at the time of the grant, and that such restoration is to be performed within a certain period of time. This would include removing all improvements, ensuring the grade of the property has been restored, and planting vegetation. The easement agreement could also provide that the Grantor has the right to take ownership of the improvements (although the circumstances under which a Grantor would want to do so are likely very limited). If the Grantor wants restoration to be performed in accordance with specific guidelines, it should request that those guidelines be set forth in the easement agreement. For example, the Grantor may want the Grantee to use the "double-ditch" method of topsoil removal (this entails stockpiling the topsoil along one side of the trench so that it can be placed back on the surface (not at the bottom of the trench) during site restoration).

INDEMNIFICATION: What happens if the Grantor's property is damaged by the Grantee during the Grantee's use of the easement? For example, land, crops, fences, timber and livestock might be damaged during the construction, repair or removal of the approved structures, such as a pipeline. An easement agreement should obligate the Grantee to indemnify *i.e.* pay, the Grantor for any damages caused by the acts of the Grantee or any contractor, subcontractor, invitee, licensee, agent or representative of the Grantee.

DISPUTE RESOLUTION: What happens if there is a dispute between the parties? The Grantor may want to have the easement agreement include a requirement that the parties consider alternative dispute resolution (such as mediation or arbitration). ADR may be the most

economical and least burdensome way to resolve conflicts between a Grantor and a Grantee (especially since a Grantee likely has more resources to fully litigate a dispute).

OTHER INFORMATION: The flow line from an oil and gas well to the separator and tanks does not require an easement. If an oil and gas pipeline is planned for your property and contains material from wells outside your drilling unit, the user should request an easement from the landowner.

TAX CONSIDERATIONS: Although each Grantee needs to consult with its own tax counsel, except for consideration received for temporary easements (which are usually treated as income), consideration received for an easement is taxed as a capital gain and taxed at capital gain rates. Permanent structures, such as pipelines may affect or reduce the land area available for other uses, in which case no tax may be due at all. In that case, if the basis (which typically is the price paid) in the property affected by such structures exceeds the easement consideration, the basis is simply reduced by the amount of the consideration and no tax is generally owed. On the other hand, if the easement consideration exceeds the basis of the affected part of the property, the basis would be reduced to zero and the excess would be treated as gain from sale and subject to capital gains tax.”¹

REGULATORY OVERSIGHT: The Michigan Public Utility Commission (PUC) has oversight over public utility pipelines within the state. Its authority is included in the [Michigan Crude Oil and Petroleum Act 16 of 1929](#) and Public Act 9 of 1929. The Federal Energy Regulatory Commission (FERC) regulates interstate natural gas pipelines.

Both agencies utilize a review process for new pipelines that includes an environmental assessment, review of route alternatives, and interfacing with landowners and the public.

When federally regulated, interstate natural gas pipelines become operational, safety is regulated, monitored, and enforced by the U.S. Department of Transportation (DOT, www.dot.gov). Within DOT, the Pipeline and Hazardous Material and Safety Administration (PHMSA) is responsible for enforcing proper design, construction, operation, maintenance, testing, and inspection standards.

IT IS RECOMMENDED EACH LANDOWNER CONSULT HIS OR HER ATTORNEY FOR ADDITIONAL PROVISIONS OR INTERPRETATION.

¹ Pennsylvania Cooperative Extension Marcellus Education Fact Sheet Negotiating Pipeline Rights of Way in Pennsylvania, 2010

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