Pipelines: Legal and Regulatory Issues

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Pipeline Easements: Initial Questions

• Do I want this pipeline easement on my property?
  • What are the impacts of the pipeline on my property?
  • What income will I receive?

• Have I already granted pipeline easements in my oil and gas lease?

• If I don’t want it, is eminent domain a legitimate possibility?

• Should I negotiate easement together with other landowners?
  • “Landowner group” negotiation approach?
  • Challenge as compared to leases:
    • Differences in properties, land uses.

• Should I involve an attorney?
  • Different roles for an attorney
    • Review the easement
    • Actively negotiate the easement
    • Represent in eminent domain proceeding
Pipelines and Eminent Domain

Can private companies use eminent domain to obtain pipeline easements?

Two avenues:
1. State authority
   - Ohio Revised Code 1723
2. Federal authority
   - Ohio’s eminent domain power does not extend to an oil and gas development company for gathering its own gas.
   - This is not a company that is organized for the purpose of transporting gas.
Pipeline Easements and Eminent Domain

- The pipeline company must follow Ohio’s eminent domain process and procedures.
  - Gives landowner:
    - Notice to use eminent domain
    - Appraisal of property
    - Written good faith offer of purchase
  - Must show that the pipeline is necessary.
  - Ohio Revised Code Chapter 69

- Federal law allows use of eminent domain for *interstate* pipelines that run between states.
  - If the company has obtained a *Certificate of Public Convenience and Necessity* from the Federal Energy Regulatory Commission.
  - And if the company can’t reach an agreement with landowner.

**Easement Location**

- Minimize impacts on property, farm, sensitive areas, etc.
  - May need to specifically exclude areas.
- Can it parallel property boundaries or other easements?
**Easement Location**

- Ascertain location clearly.
  - Avoid a "blanket" easement.
  - Use legal descriptions and illustrations.
  - Request a post-construction survey for exact location.

**Pipeline Depth**

- Clarify the required depth of the pipeline when laid beneath the land surface.
  - Typical: 36 inches
  - For agriculture, consider 36-48 inches to avoid conflicts with surface use.

**Pipeline Size**

- Clarify size of the pipeline, or establish a maximum size.
  - Another factor to consider for payment.

**Easement Width**

- Typical width:
  - 100 feet (50 feet on either side of line) often includes construction area
  - Shrinks down to about 50 feet after construction?

**Construction Rights**

- Two approaches to construction:
  - Included in the pipeline easement
  - As a temporary construction easement
    - Exists during pipeline construction process
    - Terminates after construction is complete
  - Important to establish clear boundaries and scope for each approach

**Construction Timetable**

- Establish a specific time period for the construction and installation of the pipeline.
  - Include timetable for temporary construction easement.
  - Include remedies for failing to meet timeline.
  - Include restrictions on workers during construction period.
Construction Standards

- Incorporate ODNR standards.
- And/or establish how company will restore easement area.
  - After construction and after any future surface disturbance.
  - Specify top soil removal and replacement methods (double ditching; original topsoil).
  - Require soil enrichment—manure, compost.
  - Require reseeding—may need future years until established.

Crossings at Waterways

- Will pipeline cross a ditch or waterway?
  - Consider impacts.
  - Require company to construct temporary crossings.

Timber Impacts

- Will there be impacts on woodlands or timber stands?
- Tree removal issues:
  - By whom?
  - Best management practices
  - Rights to or payment for timber
  - Restoration

Property Improvements

- Impacts on drainage, fencing, gates, outbuildings, storage tanks, etc.?
- Livestock containment
- Questions to consider:
  - What will be impacted?
  - How to address the impact?
  - Where to move improvements?
  - How much compensation?

Other Structures or Facilities

- Restrict surface facilities or structures on the easement?
  - Compressor/pump stations?
- Alternatively, could limit surface facilities to certain locations.
- If allow, consider this in payment determination.

Substances in the Pipeline

- Limit to natural gas and constituents.
- Generally prohibit other substances.
  - List specifically excluded substances like sewage, oil, wastewater.
Number of Pipelines

- Limit the easement to a single pipeline.
- How to address the possibility of an additional line in the future:
  - Additional easement or approval.
  - Additional payment.

Pressure in the Pipeline

- Establish maximum pressure for the line.
- Consider higher payment for higher pressure line.
  - Due to higher risks.

Indemnification

- Require company to indemnify landowner and hold harmless against any future lawsuits that may arise.
  - “Of or arising from the easement.”
  - Due to the pipeline, equipment or any facilities, etc.

Inspection and Maintenance

- Address how company will access the easement in the future.
- Require a notice to landowner.
  - Specify the activity that will occur and when.
- Establish a routine maintenance and inspection schedule?
- Identify times when company can’t access, i.e., harvest, planting.

Inspection and Maintenance

- Define the scope of access.
- Define types of maintenance that may occur.
- Address potential damages for disruptions to landowner.
  - Inspection, maintenance, repair, replacement.
  - Loss of … water supply, access, soil, etc.

Signage and Markers

- May require that landowner must agree to locations for required signage that the company must post.
- How will company mark the easement boundaries?
Landowner’s Rights of Use

• Retain broad rights to use the easement area.
  – May farm in, on and around the easement.
  – May graze animals.
  – Permit temporary structures or accessories.
• What about driveways, landscaping, parking?
• Consider all potential future uses and needs . . .

Termination of Easement

• Define what constitutes termination of the easement.
• Require notice of termination to landowner.
• Determine company’s obligations upon termination.
• Clarify landowner’s rights upon termination.

Abandonment of Easement

• Define what constitutes an abandonment of the easement by the company.
  – No construction occurs within X years of entering into easement.
  – No actual use of pipeline after X years.
• Address company’s obligations:
  – For structures, facilities.
  – Remediation after removal.

Disputes and Problems

• Fair procedure for notifying company of a problem or for handling disputes.
  – Where to direct problems.
  – Time period for addressing or remedying the problem.
  – Dispute resolution?
  – Legal remedies if fail to address problem.

Assignment Rights

• Address procedures for assignment of rights to other companies.
  – Notice to landowner required.
  – Compliance with easement terms required.

Amendments to Easement

• No verbal amendments.
• Establish that written agreement is required to amend the easement terms.
Warranting Title

- Do not agree to warrant or “promise” clear title to the property.
  - Or to compensate company if a title issue arises.

Payment for the Easement

Payment components:
- Pipeline easement
- Temporary construction easement
- Damages to landowner
- Costs to landowner

Payment for the Easement

- Payment is based on length of pipeline run across the property.
  - Price per linear foot or linear “rod”
    - A rod is 16.5 feet.
- How does width or total acreage factor into the payment?
  - Doesn’t, unless landowner raises it.
  - Increase payment for higher width of easement?

Payment Considerations

- Fair market value of the land
- Current rates in the area
- Amount of temporary construction use
- Loss of marketable timber
- Loss of crops
- Loss of development potential
- Soil compaction
- Interference with agricultural systems
- ... and many other factors
- ... fully examine your individual situation

Payment Considerations

- Tax obligations
  - Permanent pipeline easement (over 30 years): capital gains income
  - Property damages: capital gains income
  - Temporary construction easement: ordinary income
- Itemized list from company can be helpful.

Enforcing the Easement

- An easement is not self-executing!
- An easement is a “contract” between landowner and company.
- Landowner must actively assess compliance, resolve conflicts and protect interests.