

## Wind Energy Easement and Lease Agreements

*The following outline raises issues related to various provisions that can be found in wind energy easement agreements. Its purpose is to give you a general idea of what types of provisions might be contained in proposed easement agreements or easement option agreements that wind energy developers may present to you in an effort to obtain wind energy easements over all or a portion of your land. It is not a comprehensive discussion of the topic and is meant only to be a guide.*

A WIND ENERGY EASEMENT OR LEASE AGREEMENT, like any easement or lease agreement, is a legally binding agreement that needs to be carefully reviewed and understood before executing it. A wind energy agreement will have a long-term effect on you and your land. It will affect not only you but also future generations. It is important that you not agree to or execute any agreement or option agreement until you have discussed it with your attorney and he or she has had an opportunity to review it. It is strongly advised that upon receiving a wind energy agreement or option agreement that you take it to your attorney along with the attached outline for his or her review. When approached by a wind energy developer with a wind energy agreement or when just considering the prospects of such an agreement, the following are the some of the questions that you should ask yourself and/or the developer:

1. How much of my land will be tied up and for how long?
2. What land use rights am I giving up? What activities can I continue?
3. How much will I be paid and how will I receive payments?
4. Are the proposed payments adequate now and will they be adequate in the future?
5. Does the proposed method of payment or the Agreement itself present any adverse tax consequences to me?
6. Are there firm plans to develop my land, or is the developer just trying to tie it up?
7. If payments are to be based on revenues generated by the wind turbines, how much information is the developer willing to disclose concerning how the owner's revenue will be determined?
8. What rights is the developer able to later sell or transfer without my consent, and how might such transfer or sale affect me? Will the new developer have the same obligations to me and capacity to meet them?
9. Does the developer have adequate liability insurance? Can I be held liable for anything connected with the wind energy installations?
10. What are the developer's termination rights? Can the developer simply terminate the easement at any time, and if so how does that affect future payments?
11. What are my termination rights and how are they exercised?
12. If the Agreement is terminated either voluntarily or involuntarily, what happens to the wind energy structures and related facilities located on my land? Is the developer required to remove everything, including underground cables and foundations, and if so how soon and at whose cost?

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### HOW TO USE THIS DOCUMENT

The outline below includes several parts: *I. General Purpose of Wind Energy Lease/Easements, II. Specific Types of Agreements in Use, III. Use of Option, Easement and Lease Agreements in Connection with Wind Energy Projects, and IV. Wind Energy Lease/Easement Provisions.* Part IV is by far the longest section, enumerating and explaining the many possible provisions that could or should be included in a lease or easement.

All of the information in this document is relevant to most wind energy easement/lease agreements. Some provisions are highlighted where specific recommendations are made, where landowners should be cautious, or to point to a source of additional information.



RECOMMENDATION



CAUTION



FOR MORE INFORMATION

## Wind Energy Easement and Lease Agreements

### I. GENERAL PURPOSE OF WIND ENERGY LEASE/EASEMENTS

- A. Allow testing to be done for purposes of determining the feasibility of wind energy conversion on property.
- B. Allow construction, operation and maintenance of wind energy conversion facilities.
- C. Allow transmission of the electricity generated by the wind energy conversion.

### II. SPECIFIC TYPES OF AGREEMENTS IN USE

- A. **Easement.** An easement is an interest in land in the possession of another that entitles the holder of the interest to a limited use or enjoyment of the land.

#### *General Characteristics of an Easement:*

1. Easements are either exclusive or nonexclusive. Under an exclusive easement the easement rights are exclusive to the holder. If easement is nonexclusive others could have the right to use the land concurrently.
2. Grantor of easement relinquishes very few rights even if the easement is exclusive.
3. The rights granted can be permanent or for a set period of time. Easements for a short period of time are sometimes referred to as temporary easements.
4. Payment for an easement can be either in lump sum or through periodic payments. Amount paid for easement may depend on whether easement is exclusive or nonexclusive.

- B. **Lease.** A lease is a conveyance of land for a term that is less than the term of the owner's interest.

#### *General Characteristics of a Lease:*

1. A lease creates a landlord/tenant relationship.
2. Tenant usually has exclusive use of the property covered by the lease.
3. If landlord wants to retain rights to use land, such rights must be specifically stated.
4. A lease is always for a set period of time.
5. Lease payments are usually periodic.

- C. **Option.** An option provides for the exclusive right to lease or obtain easement rights at some time in the future.

#### *General Characteristics of an Option:*

1. The right must be exercised within a specified period of time. Time period can vary from months to years. In some cases state statutes may govern the maximum duration of an option agreement.
2. The option usually provides for some form of payment for the rights being preserved.

### III. USE OF OPTION, EASEMENT AND LEASE AGREEMENTS IN CONNECTION WITH WIND ENERGY PROJECTS

#### A. *Option Agreements:*

1. Can be used for the purpose of allowing wind energy developer an opportunity to determine whether the land is suitable for the harvesting of the wind energy.
2. In some cases, an option may be used to tie up the land by speculators or a developer who is either seeking to raise capital or not sure whether wind resources justify development of the property and want to preserve the right to do so in the future.
3. Should contain details as to what lease/easement rights can be exercised, the legal description of the property covered and all terms and conditions of the lease/easement rights. In many cases, a copy of the complete lease/easement agreement that is to be executed by the parties if the option is exercised is attached to the option agreement.
4. Should contain the price to be paid for the option, the length of the option and the procedure for exercising the option.
5. May contain lease/easement rights sufficient to allow the wind energy developer access to and use of the land for purposes of conducting the necessary studies in connection with determining the suitability of the land for wind energy development.

#### B. *Easement Agreements:*

1. Can be used in conjunction with an option agreement or lease agreement to provide all rights necessary for wind energy developer to determine the suitability of the land for wind energy development and thereafter to construct, operate and maintain the wind energy facility and equipment.
2. When used in conjunction with a lease, there may be one or more separate easement agreements. For example, there may be a separate easement agreement for each of the following purposes:
  - (a) *Construction, Access and Transmission Easement.*
    - (i) Right to construct, maintain, repair, replace and remove all or any part or element of the wind turbines.
    - (ii) Right to travel over, across and along the easement property by means of existing roads or roads to be created by developer so as to have access to the turbines and other facilities.
    - (iii) Right to construct, maintain, repair, replace and remove all or any part or element of the facility built to transmit the electricity or control wind facilities (i.e. electrical transmission and telecommunications lines).
  - (b) *Wind Nonobstruction Easement.*
    - (i) The right to capture and use the free and unobstructed flow of wind currents over and across Landowner's property.
    - (ii) Usually prohibits Landowner from any activity on property that interferes with or obstructs wind speed or direction.
  - (c) *Overhang or Encroachment Easement.*
    - (i) The right to have rotors of wind turbines located on adjacent property overhang onto Landowner's property or vice versa.
    - (ii) In some cases developer's obligation to lease land may be contingent on developer obtaining such an easement from neighboring property.
  - (d) *Noise Easement.*
    - (i) The right to generate and maintain audible noise levels in excess of specified decibel levels.
    - (ii) May cover a certain radius centered from each wind turbine.

- 3. Important considerations with respect to all easements no matter what their purpose:
  - (a) That it is limited to only the land or air space that is necessary to serve its purpose.
  - (b) That the land covered is clearly described.
  - (c) Whether the easement is exclusive to Developer or may be used by others (for example others may have a right to use a road easement).
  - (d) If Landowner is going to be limited as to the activities that can take place on the easement property such limitations should be clearly set forth.
  - (e) The length of the easement should be clear (i.e. is it temporary, permanent, or if issued in connection with a lease, does it terminate at the expiration of the lease term).
  - (f) The price or consideration for the easement and whether it is a one time fee or a periodic fee.
  - (g) If in connection with the easement Landowner's land is to be disturbed, it should be clear as to whether the land is to be put back into its original condition either upon the termination of the easement or at some earlier time.
- 4. If the easement agreement (or some cases a memorandum describing) is to be recorded, it is important that the agreement clearly set forth how the easement is to be removed upon its termination. For example and as a minimum, the easement should provide that upon its termination the easement holder shall record a document evidencing the termination of the easement.

#### C. *Lease Agreements.*

- 1. Usually will give the tenant (wind energy developer) the exclusive right to use a portion of the landlord's land for wind energy purposes for a set period of time.
- 2. Usually will require landlord to also provide some or all of the easements referenced above.
- 3. Usually will contain an automatic renewal provision or provisions. Landowner should be cautious with respect to automatic renewal provisions and should consider their length and the compensation being paid or to be paid for each renewal period. Landowner may want to consider negotiating a specified option for renewal requiring notice and possibly price adjustment.
- 4. May contain a "condition subsequent" provision which allows the tenant the right to terminate the lease if certain conditions are not met. For example, the tenant may terminate the lease if land not suited for development after testing, or if neighboring property owner will not provide necessary encroachment or access easement.
- 5. Will contain many terms and conditions regarding the tenant's and landlord's respective rights and obligations with respect to the leased property (which rights and obligations are more fully discussed below).

#### IV. **WIND ENERGY LEASE / EASEMENT PROVISIONS.**

The following discussion pertains to provisions that are normally found in either (a) a lease agreement with a wind energy developer, or in (b) an easement agreement when the easement agreement is the sole document between Landowner and Developer covering all aspects of the wind energy project.

For the remainder of this document, the term Agreement means lease/easement agreement. the term Developer means the holder of the easement or the tenant under the lease agreement. and the term Landowner means the party granting the easement or the lease.


##### A. *Legal description of the land subject to the Agreement.*

- 1. Legal description should be limited to only that portion of the land that is reasonably needed for the proper exercise of the lease/easement rights granted.
- 2. Developer seeking the lease/easement may want to tie up as much land as it can even though only a small portion of it will be used.

- ✓ 3. Avoid grant of a lease/easement over large blocks of land when only a portion is going to be used unless payment for the lease/easement rights are based on the total number of acres and Landowner is comfortable tying up the land.
- 4. Typically Developer seeking the lease/easement will want to make use of the property as follows:
  - (a) Construct on certain portions of the land wind turbines that will generate electricity and the related physical structures including those necessary for interconnecting to the electricity network, such as transformers, power lines and switchgears.
  - (b) Have access from public roads to and from the land where the wind turbines and other physical structures are located.

#### B. **Term of Agreement.**

- 1. Usually the Agreement will be for a number of years – commonly 20 and often 40 years – and will terminate prior to the intended expiration date only by voluntary termination on the part of Developer or involuntary termination as a result of a default on the part of Developer.

 See *Wind Energy Easements and Leases: Best Practices and Policy Recommendations*

- ! 2. In some cases Landowners have granted perpetual easements. Landowners should be cautious about granting perpetual easements especially when an easement for a specified period of time will be sufficient. A lease will always be for a set period of time and thus cannot be perpetual.
- ! 3. Landowner should be cautious in agreeing to automatic renewal periods in the Agreement since conditions might change over the initial term covered in the Agreement that warrant active review and possibly modifications to the Agreement.
- ✓ 4. Landowner should check with tax advisor as to any possible adverse tax consequences that may result from granting a perpetual easement as opposed to an easement for a specified number of years. For example, a perpetual easement may constitute a sale of land for income tax purposes.


#### C. **Payment for Lease/Easement Rights.**

 See *Wind Energy Easements and Leases: Compensation Packages*


- 1. This is usually the most difficult part of negotiating an Agreement.
- ✓ 2. Matters to consider:
  - (a) If Agreement calls for different phases, then it may be appropriate to have different compensation for each phase.
    - (i) Preliminary phase when Developer is determining whether to build wind facilities on the land, or where on the land to build them or how many to build.
    - (ii) Construction phase.
    - (iii) Operational phase.
  - (b) The length of time the land may be tied up without any construction of a wind energy facility.
  - (c) May be appropriate to consider smaller payment amounts if portions of the lease/easement property can be continuously and simultaneously used by Landowner in connection with farming or other agricultural uses.
  - (d) May also be appropriate to consider larger payments if landowners current activities (such as agriculture or hunting) will be significantly curtailed by the Agreement.
  - (e) If the Agreement does not require that a minimum number of wind turbines be built, consideration should be given to minimum payments regardless of how many are built. If payment is to be based on amount of electricity generated by a turbine or turbines, Landowner should make sure that the minimum size of each turbine is addressed.
  - ! (f) Be careful of payments that are based on a percentage of gross operating proceeds even if gross operating proceeds are defined as “all gross receipts from the sale of electricity generated by the wind turbines located on the land.” If properly drafted, these arrangements can be advantageous to Landowner.

- (i) Should have access to power agreement between Holder and power company so as to be able to determine what Holder is being paid for the power generated by the wind turbines. Holder not likely to agree to provide access to power agreement but Landowner should still try to negotiate for such access.
  - (ii) Should have access to power production information on an ongoing basis to audit royalty payments. A generally worded audit right might not be sufficient. What documents may Landowner inspect? Where does inspection take place? Require an out-of-state or international developer to produce necessary documents in Landowner's home state or locality.
  - (iii) Power agreement may provide for larger payments by power company to Developer in early years and smaller payments in later years. If such is the case, a payment provision in a Agreement that provides for Landowner to receive a larger percent of gross revenue in later years can be misleading.
  - (iv) Landowner needs to understand that a significant portion of the revenue derived from a wind turbine can be realized through tax credits or the sale of "green" or other environmental credits and that those economic benefits are likely not to be viewed in a power agreement. Thus, a percentage of the power sales is not necessarily a percentage of the economic benefit derived by Developer.
-  (g) In general, avoid lump-sum payments for long term lease/easement rights. An exception to this may be in the case of payment for an easement that is of limited duration or purpose such as a temporary construction easement or an encroachment easement.
- (h) When the method of payment is to begin when construction commences, make sure the Agreement describes what constitutes the "commencement of construction."
- (i) Provision should be made for the complete reimbursement of Landowner if Landowner incurs penalties or is subject to reimbursement obligations as a result of the land being taken out of a conservation reserve program. Prior to executing an Agreement, Landowner should review any existing conservation program contracts to determine if there will be any adverse consequences as a result of the proposed lease/easement.
- (j) Landowner should consult with tax advisor to make sure the method of payment does not have any adverse tax consequences on Landowner presently or in the future.
- (k) Landowner needs to factor in possible increases in insurance premiums especially if Agreement requires that Landowner name Developer as an "additional insured" in Landowner's liability insurance policy.
- (l) Landowner may wish to provide for additional payments if Developer allows telecommunication companies to place antennas on the wind turbine towers.



#### **D. Typical Rights that Developer will Want.**

1. Right to conduct certain activities on the land prior to constructing any wind energy facilities. These activities may include the following:
  - (a) Erection of meteorological towers.
  - (b) Taking soil samples
  - (c) Release of weather balloons.
  - (d) Environmental, noise and/or wildlife studies.
2. Right to construct and install wind energy facilities and in connection with such activity construct and install the following:
  - (a) Foundations, concrete pads and footings.
  - (b) Wind turbine units.
  -  (c) Guy wires, support fixtures, anchors and fences. (Caution should be exercised in allowing guy wires. They may have more of an impact on birds than the tower or turbine blades. Also, they may interfere with normal farming activities or the aesthetic appearance of the property more than the tower.)

- (d) Buildings needed for maintenance of wind turbine units and maintenance and storage of related equipment.
- (e) Electrical transformers and energy storage facilities.
- (f) Electric transformers, electric distribution and transmission towers and lines either above ground or underground.
- (g) Substations or switching facilities for the purpose of connecting to transmission system.
- (h) Private roads providing access from public roads to the wind energy facilities.


 3. Most Agreements will have a catch-all provision which will give the Holder the right to engage in all other activities reasonably determined to be necessary or useful to accomplish the general purpose of the lease/easement. Landowner should be aware of such a provision and consider its impact on rights reserved by Landowner.

**E. *Typical Rights Reserved by Landowner.***

- 1. Landowner may want to have a “catch-all” provision stating that any rights with respect to the use of the land not given explicitly to Developer are retained by Landowner.
- 2. In lieu of a “catch-all” provision specific rights such as the following can be reserved:
  - (a) Right to use land for grazing.
  - (b) Right to harvest crops.
  - (c) Right to conduct farming or agricultural activities on the land or other activities involving the land such as logging, mineral, oil, gas or other resource extraction.
  - (d) Right to construct improvements on parts of the land if necessary and incident to farming or other agricultural activities.
  - (e) Right to hunt on land. Note this activity can be of great concern to Developer because of the potential for possible damage to Holder’s equipment from the discharge of firearms.
- 3. All of the above rights are usually subject to such activities not interfering with or creating a risk of damage to or injury to the wind energy facility.
-  4. Landowner should take great care in reserving any rights that are unique to Landowner’s agricultural or other operations on the land.
-  5. When specifically listing the rights being reserved, Landowner may also want to include a “catch-all” provision such as the one discussed in paragraph E.1. above so as to avoid limiting the rights reserved to just those listed.


Any of the above rights reserved by Landowner, whether through a “catch-all” provision or as result of being specifically listed, should be exercisable by Landowner without the consent of Developer; or if consent is required, then the Agreement should provide that such consent should not be unreasonably withheld.

**F. *Minimum Duties and Obligations of Developer.***

-  1. Keep the land free from liens such as mechanics’ liens.
  - (a) Should require the immediate removal by Developer of any such liens.
  - (b) May allow Developer the option of contesting the validity of the lien.
    - (i) This right to contest should be at no cost to Landowner.
    - (ii) As a minimum, Developer should indemnify Landowner against any costs, expenses or damages Landowner incurs as a result of such lien.
    - (iii) Landowner may want to require Developer to post a bond or escrow in an amount sufficient to cover the cost of removing the lien in the event Developer is unsuccessful in its efforts in contesting the lien.
    - (iv) Landowner may be required to cooperate with Developer if such cooperation is needed in order to remove lien. Such cooperation should be at no cost to Landowner.

2. Comply with all federal, state and local law and regulations.
3. Obtain and comply with all permits.
  - (a) Landowner may be required to cooperate with Developer in seeking permits.
  - (b) Obtaining permits or cooperating with Developer in obtaining permits should be at no cost to Landowner.
4. Ensure proper usage, storage, disposal and release of hazardous substances on the land.
  - (a) Developer may be allowed to use hazardous substances in its normal business operations provided such use is not harmful to Landowner and is in full compliance with all applicable laws.
  - (b) Developer should indemnify Landowner with respect to any claims made against Landowner resulting from Developer's handling of such hazardous substances.

**G. *Minimum Duties and Obligations of Landowner.***

1. To allow Developer the quiet use and enjoyment of the land without interference so long as Developer is not in default under the terms of the Agreement.
2. Landowner is not to engage in any activity that would impede or decrease the output or efficiency of the wind energy.
3. Landowner is not to interfere with the wind speed or direction.
4. Landowner is to ensure proper usage, storage, disposal and release of hazardous substances on the land.
  - (a) Landowner should be allowed to use hazardous substances in its normal business operations provided such use is not harmful to Developer and is in full compliance with all applicable laws.
  - (b) Landowner should indemnify Developer with respect to any claims made against the Developer resulting from Landowner's handling of such hazardous substances.
5. Landowner to cooperate with Developer in obtaining any necessary subordination agreements or approvals from existing lien holders.
  - (a) Existing mortgages on land may require approval of the lease/easement grant by the holder of the mortgage(s).
  - (b) This should be done at no cost to Landowner.
  -  (c) Landowner should be careful of provisions that allow Developer to payoff any existing prior lien and deduct the payoff amount from amounts owed Landowner under the Agreement. An earlier payoff could have adverse tax consequences to Landowner.
6. Landowner to assist and fully cooperate with Developer in obtaining land use permits, building permits, environmental impact reviews or any other approvals required for the construction or financing of the wind energy facility. Such assistance and cooperation should be at no cost whatsoever to Landowner.


**H. *Taxes and Utilities.***

1. Developer should be required to pay any increase in real estate taxes as a result of the installation of the wind facility.
2. Developer should not be required to pay increase if due to improvements made by Landowner or result from an increase in the underlying value of the land.
3. Developer should be required to pay any personal property taxes levied against any wind facility.
4. Developer should be required to pay all water, electric, telecommunications and other utility service used by the wind facility.

**I. *Developer's Assignment Rights.***

1. Developer normally wants complete right to assign all or any portion of their lease/easement rights to another without the need for consent or approval of Landowner.
2. Such a right of assignment can include the following:
  - (a) Right to finance wind power facilities by having a mortgage placed on Developer's interest.



- (b) Right to grant subleases or subeasements.
  - (c) Right to sell or otherwise transfer the lease/easement to another party.
  - (d) Right to grant to a utility company the right to construct, operate and maintain electric transmission, interconnection and switching facilities on the land. Landowner should exercise caution in allowing such a broad grant.
3. These assignment provisions usually allow the original Developer to be released from any further obligations or duties under the lease/easement if the party receiving the assignment agrees to assume all responsibilities of Developer.
  4. Landowner should consider requiring original Developer to continue to be liable for the performance of all duties and obligations under the lease/easement after any assignment. From the Developer's standpoint, this may not be negotiable.
  5. Landowner might also consider requiring that Developer obtain prior written consent to any assignment. Such a provision could contain any *one* of the following with respect to Landowner's giving or refusing to give such consent:
    - (a) Landowner's consent can be granted in Landowner's sole discretion. Developer is unlikely to agree to this.
    - (b) Landowner's consent cannot be unreasonably withheld.
    - (c) Landowner's consent cannot be unreasonably withheld if all of the following conditions are met:
      - (i) Proposed assignee has a net worth at least equal to current Developer.
      - (ii) Proposed assignee is creditworthy considering the obligations to be assumed under the Agreement.
      - (iii) Proposed assignee has experience and expertise in the business of wind energy comparable to current Developer.
      - (iv) Current Developer is not in default under any of the terms and conditions of the Agreement.
  6.  Developer should be required to give written notice to Landowner of any assignment including the name, address and phone number of the party receiving the assignment.

**J. Indemnification Provisions.**

1. Usually will be mutual.
2. Usually provide for indemnification for damages arising out of:
  - (a) Any operations or activity of the indemnifying party on the land.
  - (b) Any negligent or intentional act or omission on the part of the indemnifying party.
  - (c) Any breach of the Agreement.
  - (d) In some provisions, indemnification by Landowner may include actions of tenants, guests or licensees.
  - (e) Landowner may want to have indemnification provision include indemnification by Developer for damages sustained by Landowner as a result of any claim made by a neighboring Landowner arising out of the location of the turbine (i.e. a claim that the location of the turbine diminishes the wind rights of the adjacent property owner).
  - (f) Most indemnification provisions include paying the reasonable attorneys' fees of the party being indemnified.

 **K. Insurance Provisions.**

1. Agreement should require that Developer maintain appropriate liability insurance covering all of its activities on Landowner's land and should name Landowner as additional insured.
  - (a) The policy should contain sufficient liability limits to protect Landowner.
  - (b) The policy should also provide that it cannot be cancelled without at least 30 days written notice to Landowner.

(c) Landowner may want to require that such insurance contain a “contractual liability endorsement” to insure Developer’s indemnification obligations.

2. Developer should be required to provide Landowner with yearly certificates of insurance.
3. Some Agreements require that Landowner also have appropriate liability insurance naming Developer as an additional insured. Before agreeing to such a provision Landowner should consult with his or her insurance agent to determine whether naming Developer as additional insured will cause an increase in Landowner’s insurance premiums. Landowner should also factor in yearly premium increases over term of Agreement.
4. Should require that Developer pay any increase in Landowner’s insurance premiums due to either wind energy activity on land or due to Landowner naming Developer as additional insured.
5. Landowner should be careful about agreeing to language in Agreement that allows Developer to “self insure.” If Developer is to self insure there needs to be assurance that the Developer has the financial capability to self insure and that any such self insurance program will provide the same protection as comprehensive liability coverage.

**L. *Specific Rights that may be Given to Developer’s Lender.***

1. Lender is not liable for any of Developer’s obligations under the Agreement until such time as the lender’s mortgage is foreclosed.
2. Neither Landowner nor Developer can modify the Agreement without the lender’s approval.
3. Lender has the right at any time to cure any default of Developer.
4. Landowner is required to give lender notice of any default by Developer. In some cases lenders are given additional time to cure default which begins to run when the Developer’s time to cure has expired.
5. If Landowner is entitled to terminate the lease/easement as a result of a default on the part of Developer, Landowner must give notice to the lender and lender must be given an opportunity to cure the default.
6. If lender needs to foreclose its mortgage in order to cure the default, lender must be given reasonable period of time to foreclose. With such a provision, Landowner should consider a provision that requires that any monetary default be cured by lender pending such foreclosure.
7. Upon foreclosure and the agreement by the lender to assume all of the obligations under the Agreement, Landowner must recognize the lender as the new Developer.
8. Landowner may be required from time to time to execute on behalf of Developer and in favor of Developer’s lender certificates indicating whether any defaults currently exist under the Agreement (estoppel certificates). Landowner may want to limit the number of times such documents need to be provided to Developer’s lender or to be able to charge a fee for such certificate.
9. The Agreement may contain a provision that requires Landowner to cooperate and negotiate in good faith any amendments to the Agreement that may be reasonably necessary for any lender to effectuate or preserve its lien. This type of a provision is too open-ended and should be avoided by Landowner.
10. Occasionally leases have contained provisions which would appear to restrict Landowner’s right to encumber his/her own property. Make sure no such restrictions exist.

**M. *Condemnation Provisions.***

1. The Agreement should provide for what happens to the lease/easement in the event the lease/easement property is taken by condemnation.
2. Some Agreements provide that the parties either amend the Agreement to relocate the wind facilities or at Developer’s option terminate the Agreement. Landowner should also have the right to terminate the Agreement.
3. Landowner should be entitled to receive all condemnation payments except Developer may want amounts awarded to compensate for:
  - (a) The removal or relocation of the wind facility.

- (b) Loss or damage to any wind facility which Developer cannot remove or is required not to remove.
- (c) Loss of use or value of the lease/easement.

4. Developer will want the right to participate in any settlement discussions involving Landowner and the condemning authority.

**N. Default and Termination.**

1. Events that normally constitute default on the part of Developer and allow for the termination of the Agreement:

(a) Failure to make payments to Landowner after written notice of such overdue payment.

(i) Some Agreements provide up to thirty days written notice to Developer before Landowner can terminate lease/easement.


(ii) Landowner should consider a shorter period of time for written notice such as ten days.


(b) A failure to perform any other material term of the Agreement that continues for thirty days after written notice to Developer.

(i) Not unusual to have a provision that allows Developer additional time to cure the default if under the circumstances it will reasonably take more than thirty days to cure the default.

(ii) Any additional time granted in Agreement should be limited, for example, not to exceed 180 days and require that Developer diligently pursue curing the default.

(c) Developer files for protection or liquidation under bankruptcy laws.


 2. Some Agreements provide that if Developer has assigned portions of the lease/easement to others, such other “Assignees” have the right to cure their pro rata portion of the default. Such a provision is not advisable unless it results in the entire default being cured. Also, some Agreements give the Assignees additional time to cure the default, which does not begin to run until after the Developer’s time to cure has expired.

 3. Some Agreements give Developer the right to voluntarily terminate the Agreement by simply giving Landowner written notice of such termination.

(a) With this type of a provision, Landowner should be allowed, as a minimum, to keep all payments made to date.

(b) Landowner may also want to require that a termination fee is due upon such termination or that a portion of the lost future payments be paid.


(c) Landowner should be careful of any termination provision that allows Developer the right to retain a portion of the lease/easement.

 4. Every Agreement should provide that upon termination, Developer is required to execute a recordable document evidencing the termination of the lease/easement.

(a) Obtaining a recordable document in an involuntary termination situation may be difficult.

(b) Consequently, Landowner should consider a provision which would allow Landowner to terminate the lease/easement by simply filing an affidavit with the county recorder or registrar of titles attesting to the default, the notice given to Developer of said default and the failure of Developer to cure the default within the cure period.

(c) Another option would be to allow for Landowner to recover costs and expenses, including attorneys’ fees, if Landowner is forced to go to court to obtain a release or a termination of the lease/easement.

 5. The Agreement should require that upon termination, Developer must remove all wind facilities from the land.


(a) Developer should be required to remove the wind facilities within a specific number of days such as 90 or 180 days.

- (b) The Agreement should specify exactly what constitutes removal considering there may be materials under ground such as footings or cables. Some agreements specify that everything above ground and to a certain depth below ground must be removed.
- (c) Landowner should consider a penalty provision if Developer does not remove the wind facilities in a timely fashion.

 O. **Miscellaneous Provisions.**

1. The manner in which notices are to be given to each party should be specified.
2. The Agreement may only be amended by a written document executed by all parties.
3. Agreement is to be interpreted under the laws of the state in which the property is located.
4. Any waiver of a term or condition of the Agreement must be in writing and executed by all parties in order to be binding.
5. Agreement should have a provision that provides that attorneys' fees are recoverable by a party who is forced to bring an action to enforce the terms of the Agreement. Landowner should not agree to any provision that only allows Developer the right to collect attorneys' fees.
6. Agreement should include a provision which suspends performance of an obligation when the party who is to perform such obligation is unable to do so due to unforeseen events such as strikes, floods, civil disturbance, terrorist attacks, etc. Landowner should be careful when reviewing what matters are to be considered unforeseen events.



7. Landowner should be careful about agreeing to the following types of provisions:
  - (a) Confidentiality provisions which prohibit Landowner from disclosing information pertaining to the terms and conditions of the lease/easement.
    -  *See Wind Energy Easements and Leases: Best Practices and Policy Recommendations.*
  - (b) Provisions that require both parties to execute such additional documents and take such action as may be reasonably necessary to carry out the intent and purpose of the lease/easement.
  - (c) If in any provision that requires Developer to obtain Landowner's consent, if Landowner wants complete discretion in granting or denying such consent then any language in the provision stating that such consent cannot be unreasonably withheld should be avoided. An example of such language to be avoided or accepted only with a complete understanding of its consequences is "Lessee will obtain prior written consent of Landowner, which consent shall not be unreasonably withheld, conditioned or delayed." It should be noted that in certain areas, such as the right to assign the lease/easement, the Developer probably will not agree to the Landowner having complete discretion in granting consent.
  - (d) Provisions that require the parties to convert Developer's interest to whatever will qualify for tax credits, benefit or incentive for alternative energy expenditures.
  - (e) Provisions that require mandatory or binding arbitration. Arbitration may not be appropriate in certain circumstances, depending on the issues involved and the rules and procedures of the particular arbitration process being mandated. If a dispute arises between the parties, the parties can always decide at such time to resolve their dispute through arbitration.
  - (f) With respect to items 7(b) and 7(d), if Landowner is going to agree to such provisions, Landowner should consider requiring that Developer pay the Landowner's reasonable attorney's fees if the Landowner wants to have proposed amendment reviewed by an attorney.

## *Wind Energy Easement and Lease Agreements Overview*

*This outline is just that – points to think about in considering a wind energy agreement. Please remember that there is no substitute for the actual reading of the lease in its entirety.*

GENERALLY SPEAKING, LANDOWNER SHOULD EXPECT a lease/easement to be quite detailed, fair and balanced in its terms. The goal is to have less left to chance or ambiguity. Landowner should make an affirmative effort to determine the industry reputation, size and financial net worth of the Developer. Considerations in the above outline are applicable to wind energy agreements generally. Nevertheless, Landowner should have legal counsel in the state in which the real estate is located to review the lease/easement to make sure it is consistent with that state's laws and customary practices.

Landowner will want to take steps to determine whether the payment offered – and method of payment – is fair. Given the wide range of compensation packages we have seen and the on-going variability of the prices paid for wind generated electricity, verifiable percentage lease/easements (with appropriately worded audit rights), backed by minimum royalty payment provisions may be the best approach. There seems to be no present clearinghouse for information assessing market value for royalty payments found in wind lease/easements, thus we are not in a position to advise in any formal sense. However, a companion piece to this outline, ***Wind Energy Easements and Leases: Compensation Packages*** explores compensation packages in general, including some specific examples of lease/easement terms that have been used and the general factors that influence lease terms. Also, wind energy professionals tend to keep abreast of current pricing, and it is best to speak with individuals familiar both with the industry and the area before making a commitment.

Finally, remember that the definition sections contained in a lease/easement are part of the official document. Make sure the definitions conform to their use throughout the document. Make sure the definitions are understandable and that terms defined do not compromise Landowner's rights, providing a hidden limitation or term not understood or discernable from the body of the lease/easement.