

# What Every Landowner Should Know About Easements and Eminent Domain

## *Some things to think about before you grant an easement<sup>1</sup>*

The Bluegrass Pipeline Partners, LLC has proposed to construct a 24-inch pipeline through several Kentucky counties in order to transport natural gas liquids (a mixture of hydrocarbons including pentane, butane, isobutane, ethane, and benzene) from the Marcellus and Utica shale plays in West Virginia, Pennsylvania, and Ohio, to the gulf coast.

As part of that project, the company, which is a joint venture of Williams Co. and Boardwalk, will need to acquire easements.

An easement is a grant of a right by the owner of a property to another, usually for compensation, to use a defined part or all of the property for specified purposes. The easement grants a right to use a defined area of your property, but may have effects outside of the easement boundaries that you should consider **before** you grant an easement.

Do not rush into a decision to grant an easement, and do not allow yourself to be pressured into signing an easement contract before you are ready and before all of your questions have been answered in writing. Once the easement is granted, it is unlikely that you will be able to change or add terms or conditions.

Here are some considerations that you will want to address through the negotiation process.

### **Do the Bluegrass Pipeline Partners, LLC have the power of eminent domain (condemnation)?**

While no Kentucky court has yet ruled on this, the consensus of the Attorney General, Energy and Environment Cabinet, a number of County and Commonwealth Attorneys, and the Kentucky Resources Council is that they **do not**. You are encouraged to talk with an attorney in the event that a company representative states that the alternative to signing an easement is that eminent domain will be used, and not to sign an easement based on a fear that your property will be taken by condemnation if you do not.

### **Consult an attorney and other advisors before signing anything.**

- The easement that you will be asked to sign was written for the benefit of the company seeking the right to access and use your property. Consult an attorney to help negotiate easement terms that protect your interests.
- Granting an easement may have income tax consequences, for which you should seek advice from your accountant or tax professional.

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<sup>1</sup> This handout was prepared by Tom FitzGerald, Director, Kentucky Resources Council, [www.kyrc.org](http://www.kyrc.org) and Terry Geoghegan, Commonwealth Attorney for Hart, Larue, and Nelson Counties, [tlg@bardstowncable.net](mailto:tlg@bardstowncable.net). It is not intended to provide legal advice, but is intended to highlight some issues that you should discuss with an attorney, your accountant, insurance agent, mortgage holder, and realtor, since granting an easement could affect your tax liability, insurance policy, mortgage, and property values and marketability.

- Granting an easement may affect your insurance policy availability and rates, for which you should consult your homeowner insurance agent.
- Granting an easement may affect your existing mortgage or the ability to refinance your mortgage, so the bank or other institution holding your mortgage should be consulted.
- Granting an easement may affect your property values, the ability to develop your property, and the marketability of your property. Check with your realtor about the impact that granting an easement for a hazardous material pipeline such as the proposed natural gas liquids pipeline, may have on the value or use of your property.

## **Compensation**

You are not required to accept a one-time payment for the easement that is based on the easement length, but instead can ask for an annual payment based on a percentage of the throughput of the line or other manner of compensation. The Williams Company representative indicated that they are looking for a long-term “partnership with the land owner,” and sharing the value derived from the transportation and sale of the NGLs is appropriate in such a relationship.

Payment details may be specified, for example, for the easement, damages to crops, timber or other products located within or outside of the easement, impact to land value, division between the landowners and the surface tenant, duration, survey fees, legal review fees, recording fees, and taxes on payment.

## **Easement Scope and Details**

Who will pay the taxes on the land covered by the easement, and if it is the easement holder, what assurance is there (such as an escrow account) that the taxes will be timely paid.

What is the duration of easement –it does not have to be perpetual, but can be limited to a set period of time or can be written to terminate when the pipeline ceases to be used.

What is the minimum depth of cover. Minimum federal standards require 3-feet to top of pipe, 2-feet if in bedrock, but a greater depth can be negotiated. The agreement can specify that the depth of cover shall be maintained at all times, to address possible settlement or subsidence.

How many and what size of pipelines will be allowed, and what can be transported in the pipeline, the maximum size and maximum pressure can all be specified and limited. If you do not limit the number and size of pipelines, new pipelines could be added without your permission.

What above-ground facilities, such as test leads, markers, rectifiers, casing vents, valves and valve actuators, meter stations and pig launcher/receivers, will be allowed.

What rights of access across the property to the easement will be allowed, if any. The right of access to the easement can be limited, so that the company will not be able to cross your property to gain access to the easement but will be limited to using the easement itself for any monitoring, maintenance, testing and repair.

The location and dimensions of the temporary and permanent easement.

Whether consent of the landowner is needed before the easement can be transferred, sold, or assigned to another entity by the easement holder.

Any limitations on the use that can be made of the easement by the landowner.

The option for the landowner of demanding specific performance of company obligations in circuit court or to use alternative dispute resolution for resolving disputes between the landowner and pipeline company.

A corporate guarantee by Williams Co. and Boardwalk to stand behind all obligations of Bluegrass Pipeline Partners, LLC if the latter becomes incapable of or fails to timely perform any duties or discharge any obligations required under the Agreement.  
Incorporation of all requirements into the easement document.

### **Construction-related provisions**

The point of contact during construction, who can be called day or night if there is a problem.

What days and hours will construction activity be allowed.

A construction plan, including location of temporary roads, if any, disposition of brush or trees removed from right of way; the segregation, stockpiling, and restoration of topsoil and subsoil, revegetation and other, restoration requirements, the timetable for construction, location of temporary crossings across open trenches or ditches, backfilling and compaction of trenches, and stone removal and disposition, etc.

A blasting plan if blasting will occur, including a blasting schedule and a pre-blast survey of all buildings, wells, springs, and other structures to be done to document pre-blasting conditions, followed by a post-blasting survey and an agreement to compensate for any changes occurring between those periods.

A construction bond to cover all construction-related responsibilities under the agreement, including payment for damages to crops, structures, buildings, and water supplies (including water quality testing and well yield).

A water supply replacement obligation in the event that the excavation, construction, blasting, or operation (leakage, etc.) causes loss, diminution, or contamination of water supply.

The surveying and staking of the easement prior to construction.

Compensation for any damage to trees, crops, plants, fences, etc. during construction.

Restoration plan, including timeframe for restoration, types of grasses and other vegetation to be planted.

As-built survey of easement, with metes and bounds description.

Evidence of maintenance of casualty and liability insurance and worker's compensation insurance for personal or property damage during construction.

### **Operation, Maintenance, Abandonment**

Access to the easement by the easement holder (i.e. if fenced, who can gain access, and does access require prior notification to the landowner). Where fencing or gates exist, what locks will be used and who will have access to the locks.

The name and information on the landowner's contact with the easement holder, including emergency contact information.

Frequency and manner of inspection and maintenance schedule.

Who bears responsibility for maintenance of right-of-way, and how it will be maintained (i.e. mowing, use of herbicides or not, etc.)

When the pipeline and related structures are deemed "abandoned," and will the pipeline and other related structures be removed, and will the easement be revegetated and then revert to the landowner?

Mandatory termination of the easement for non-use over a defined period of time, and for failure of the company to comply with the terms of the easement.

Liability for property damage and personal injuries during operation, and abandonment.

An indemnity agreement providing that the easement holder will save and hold harmless the other party against any legal causes of action, including environmental, levied as a result of activities both on and off the land by the easement holder or agents. The indemnity could also include an obligation to pay legal fees incurred in defense of a suit, and an obligation to defend the landowner from any third-party claims associated with the operation of the pipeline or any leaks, releases, or other accidents.

Responsibility for costs of remedying any contamination from leaks or releases from the pipeline.

Repair and compensation for any damage to property or use of property from operation of pipeline, including leaks, releases or accidents.

Maintenance of non-cancellable insurance policy to insure against all risks, including property damage, personal injury, and from leaks and spills.

The obligation to repair and compensate for damages incurred during maintenance or repair of pipeline.

Stipulated penalties for any breach of easement terms and conditions by the company.