

Wind Energy Easements and Leases: Best Practices and Policy Recommendations

OUR RECOMMENDATIONS:

1) Public Disclosure of Energy Production from Wind Turbines

2) Public Filing of Lease Documents and Public Disclosure of Terms

3) Limiting Land Agreement and Option Time Periods

4) Non-severability of Wind Rights from the Land

5) Decommissioning and Site Clean Up

6) Insurance and Indemnity Practices

7) Guidelines for Setbacks

THE WIND EASEMENT WORKGROUP HAS DEVELOPED A LIST of recommended best practices and public policies for wind developers, states, and local governments seeking to facilitate orderly and sustainable wind energy development. These policies and practices are designed to protect landowners, enhance economic development opportunities in wind energy, and broaden access to wind energy market information, without place undue regulation and constraints on the wind industry. These recommendations focus on landowner issues related to land leases and easements and wind energy development in general. More detailed recommendations for wind energy easement and lease contracts are included in the Wind Energy Easement and Lease Guidelines. This document includes issues that could be translated into public policy or best practices guidelines. Our recommendations are based on wind energy laws in South Dakota, experiences in other industries, and collective experiences with wind energy/landowner issues among the Workgroup participants.

1) PUBLIC DISCLOSURE OF ENERGY PRODUCTION FROM WIND TURBINES

Recommendation: Energy production data should be reported to a central state agency by wind turbine owners. This information should be available to the public.

Explanation: Public disclosure of energy production information from wind turbines would serve three main purposes: 1) facilitate transparency for production based payments; 2) provide information for other landowners considering signing an agreement with a production based compensation package; 3) increase public knowledge about the wind resource and potential of wind energy and 4) provide general information to the state on the economic contribution of wind power.

Compensation packages for landowners based on percentages of revenue have significant advantages for both the landowner and the wind project developer. Chief among these benefits is that this type of agreement creates an incentive for all parties involved to work to keep the wind turbines running as efficiently as possible. That is, everybody benefits when the project is more successful. In this kind of agreement landowners must have access to sound energy production information to ensure that they are receiving fair compensation. In this scenario, however, the burden of verifying production numbers should not be on the landowner. Public reporting of energy production would provide landowners a ready method for obtaining this information.

Landowners who are still considering whether to sign a land agreement would also benefit significantly from having this information available publicly. They would have the ability to independently compare production estimates provided to them by developers with actual production information. Wind energy development is well served by landowners having the ability to make informed choices.

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Public disclosure of wind energy production information also increases the knowledge base in general about the performance and potential of wind energy. Real turbine production information is by far the best indicator of the success of wind projects, but it is rarely publicly available. Today, only a handful of small public utility and school wind turbine projects actively share turbine production information.

Reporting of production information also provides quality information to the state on the economic contribution of wind power to the local and regional economy. Perhaps the best precedent is in how agricultural commodities are reported and catalogued. For example, in Minnesota, the Agricultural Statistics Division conducts agricultural surveys of farmers and agribusinesses to provide accurate, timely, and relevant Minnesota statistics of crop acreage, yield, production, and stocks among a host of other information. These data are used to inform agricultural policies and programs as well as provide farmers and farm-related businesses with a basis for production and marketing decisions.

2) PUBLIC FILING OF LEASE DOCUMENTS AND PUBLIC DISCLOSURE OF TERMS

Recommendation: Full terms of lease and easement documents should be publicly filed and be made available publicly.

Secondary Recommendation: Do not require full disclosure of lease terms, but require that all contracts have a “no gag” clause. That is, neither party to the agreement should be prevented from disclosing the terms.

Explanation: This practice would serve several useful purposes: it reduces competition among neighbors, encourages developers to give fair or equal deals to everybody, and lowers the possibility of a lone holdout among landowners or islanded land in the middle of a wind farm.

Confidentiality clauses are an excessive burden on landowners and are a significant liability risk. Many documents currently in use have been problematic in their limitations on discussions among family members and have had minimal effectiveness for limiting discussions among neighbors.

Developers vary in their emphasis on confidentiality, indicating that there is not a consensus in the wind industry that it is necessary to do business. Public filing and disclosure of terms would open up a secretive aspect of the wind industry and provide both a fair playing field for developers to compete for windy land and an opportunity for owners of windy land to educate themselves.

Note that similar provisions are already included in South Dakota statute (§ 43-13-17 to 43-13-19; Source: SL1996, ch 260, § 4).

3) LIMITING LAND AGREEMENT AND OPTION TIME PERIODS

Recommendation:

- 1) Limit option periods to 5 years. Land should not be tied up longer than 5 years if no wind development takes place.
- 2) Limit easement periods to 30 years. Wind easements should not automatically renew for longer than 30 years. Wind turbine owners should renegotiate with landowners if they wish to operate a project longer than 30 years.

Explanation: There is precedent for these time limits in South Dakota, where options are limited to 5 years and easements are limited to 50 years. For options, 5 years is a sufficient amount of time for wind project development. This timeframe is sensitive to uncertainties and subsequent delays in federal policies supporting wind that lengthen development periods. If turbines are not built after 5 years, it is reasonable that the land should be made available again for the landowner to develop himself, market to other wind developers, or use for another purpose. Limiting option periods also protects wind developers from being tied to land long after they have decided not to develop it.

The projected lifespan of nearly all wind projects is 30 years or less. Easement contracts should not tie up land longer than the projected lifespan of the wind project. Repowering should lead to new negotiations with the landowner.

Note that similar provisions are included in South Dakota statute (§ 43-13-17 to 43-13-19; Source: SL 1996, ch 260, § 4).

4) NON-SEVERABILITY OF WIND RIGHTS FROM SURFACE RIGHTS

Recommendation: Wind rights should not be severed from the land.

Explanation: The intent of this policy recommendation is to ensure that the economic benefits of wind energy development stay connected to the land, and thus the local community as much as possible. The impact of this policy would be that wind rights cannot be sold or leased in perpetuity separately from the land.

Note that a similar provision is included in South Dakota statute (§ 43-13-17 to 43-13-19; Source: SL 1996, ch 260, § 4).

5) DECOMMISSIONING AND SITE CLEAN UP FUND

Recommendation: Wind project owners should be required to maintain a fund with adequate resources to cover the costs of decommissioning and site clean up.

Explanation: Many wind agreements are vague and include minimal incentives to ensure that the project owners follow through with site clean up after decommissioning. Provisions in many contracts leave too much chance that landowners will be left with the responsibility of removing equipment.

6) INSURANCE AND INDEMNITY PRACTICES

Recommendation: Wind developers must maintain liability insurance at a minimum level specified in the land agreement. The developer must indemnify the landowner against liabilities for injuries or claims caused by the developer's exercise of rights granted in the lease or easement.

Explanation: Landowners should not be held liable for issues related to the wind project.

7) GUIDELINES FOR SETBACKS

Recommendation: Turbines should be sited no less than five times their rotor diameter from property lines, unless written permission is given by the neighbor. An easement or lease on the neighbor's land would be considered written permission.

Explanation: This recommendation is designed to protect wind rights of all landowners and minimize the impact of

wind turbines on neighbors. Wind turbines produce wake effects 8-11 rotor diameters downwind. Requiring a setback of 5 rotor diameters from property lines provides a buffer that will protect the wind rights of all landowners in the vicinity of a wind project. We believe clear standards for property line setbacks are critical to preventing disputes over wind rights now and in the future. Without standards, conflicts among neighbors and among wind developers can arise. A prolonged or heated conflict over wind rights could delay or limit wind project development opportunities for a community.

This recommendation is based on the Minnesota Environmental Quality Board's wind access buffer rule that requires turbines to be placed 5 rotor diameters or more away from a project site's perimeter as a condition for granting permits on wind projects greater than 5 MW.

Alternative Recommendation: Establish a **Resource Based Compensation Model** for wind energy development where compensation is provided based on both real estate and wind resource usage.

Explanation: Wind energy development engages two primary natural resources: land and the wind blowing across it. Current models for compensating landowner hosts of wind projects are based on the use of the land for the placement of turbines, associated equipment and access roads. The wind resource consumed by a wind turbine extends approximately 8-11 rotor diameters downwind and approximately half as far laterally. A resource based compensation model for wind energy development would compensate all landowners in this "wind pool" or "wind print" in addition to the landowner providing real estate for the turbine. The need for mandated setbacks could be eliminated if all landowners providing wind resource are compensated. This model has the advantages of encouraging more collaboration within a community, preventing taking of anybody's wind resource without compensation, and providing the developer with maximum flexibility in siting turbines in the best wind locations. Disadvantages of this model include the possibility of complicating the land agreement process by the need for developers to negotiate with more landowners.

A fuller explanation of the Resource Based Compensation Model for Wind Energy Development will be available on the Windustry website later in the fall of 2005.