



Leasing Your Farmland For Wind & Solar Energy Development

A Beginner's Guide for Farmers

Our Thanks...

New York Farm Bureau extends its sincere appreciation to the firm *McNamee, Lochner, Titus & Williams, P.C.* in Albany, NY and, particularly to Dana P. Stanton, Esq., for developing this important tool for NYFB members.

Dana P. Stanton is an associate in the firm's environmental and land use law department. Dana helps manufacturing companies achieve compliance with complex and ever-changing environmental laws and regulations. She also represents farmers and small businesses in litigation and land use matters.

Dana holds a Bachelor's of Science degree in Chemical Engineering and graduated summa cum laude from Albany Law School in 2013. Prior to attending law school, she worked as an engineer for General Electric and graduated from GE's Operations Management Leadership Program.

The information contained in this Fact Sheet is provided for informational purposes only and is not intended to create an attorney-client relationship or give legal advice. If you have any specific questions about this topic, you should contact your local attorney who will be able to advise you according to your particular situation.

Care must be taken when leasing your farmland to a solar or wind company for renewable energy generation. There are many taxation and access implications to consider and the lease agreement may be difficult to understand. The following points highlight and discuss key issues to look out for when evaluating a lease for renewable energy generation. Please consult with a knowledgeable attorney before entering into any lease with a renewable energy company.

Continued Use of the Land for Farming and Hunting

Wind installations are geared towards continued farming activities, because wind turbines are typically spaced one acre apart. Solar energy generation, in contrast, may take large amounts of land out of agricultural use. However, some companies that are used to working with farmers may allow you to conduct low-impact farming activities, such as livestock grazing or growing hand-harvested crops, in the same field as the solar installations. Such companies encourage the dual use of land and may even have an agricultural expert on staff.

Grazing

Wind turbine installations are compatible with livestock grazing and growing crops. Livestock are unaffected by the presence of wind turbines and will graze right up to the base of wind turbines. Wind turbines are sturdy enough to withstand cattle using them as rubbing posts or for shade.

Solar panels are only compatible with some smaller species. Sheep and poultry do not damage the modules and can use them for shade, shelter and roosting. Other animals are not suitable – cattle and horses can knock down solar modules, and pigs and goats will chew on the cables. Studies have shown that 95% of the grass in the field will be unaffected by the solar panels for purposes of livestock grazing. Low-intensity grazing is a cost-effective method to manage the grass.

If the solar company allows you to graze livestock in the field, be sure that the company agrees in the contract to keep all livestock gates closed when accessing the premises for construction, maintenance and demolition. Request that you are notified of the date, time and scope of construction, maintenance and demolition activities so that you can take steps to minimize any disruption of your farming activities or distress to your livestock.

If grazing land is significantly disrupted during construction or operation, and replacement feed is needed, make sure there is a provision in the lease requiring the renewable energy company to compensate you for those associated costs.

Crops

The solar company may allow you to grow certain crops between the rows of solar arrays, such as high-value, hand-harvested vegetables or flowers. In dry climates, the shading from solar panels reduces the need for irrigation, and rainwater run-off can be captured and used to water the plants. The cables need to be buried deep enough to avoid being damaged by disc harrowing and re-seeding.

Cutting hay may be possible if the solar company agrees to space the rows of solar modules far enough apart to accommodate the turning radius of your machinery. However, if you have stony soil, reasonable care must be taken to prevent the machinery from throwing rocks at the panels. A typical lease contains a provision in which you agree to pay for any damage to the company's property caused by you, and the company agrees to pay for any damage to your property caused by the company.

Hunting

Hunting and wildlife conservation are also possible. Hunting must be done in a safe manner that does not damage the renewable energy equipment. You should reserve the right in the contract to use the land for hunting. If the renewable energy equipment is installed during hunting season, and you normally get revenue from hunting license fees during that time, the lease should allow you to request reimbursement for your lost income. If hunting is allowed under the lease, the lease will typically also require you to pay for any damage caused by any hunting done by you or authorized by you.

Other Dual Uses of the Land

Bee apiaries successfully coexist with solar arrays. Habitat enhancements such as bird boxes and bat boxes and log piles can be installed.

Insurance

The renewable energy company will obtain insurance coverage for personal injury and property damage. However, the company's insurance policy will not cover you for damage caused by you or caused by activities authorized by you. Although a typical lease will not require you to take out an additional insurance policy to cover you for this possibility, it is highly recommended that you talk to your insurance provider before signing the lease to find out if you need to obtain additional insurance.

Location of the Renewable Energy Facilities

The renewable energy company will have a location in mind for the construction of the wind or solar facilities. Suitable land is relatively flat, cleared, not in a flood plain and located near existing power infrastructure or substations. Most companies look for 20 to 40 contiguous acres. You should talk to the company about where the facilities should be placed to best suit you and the continued operation of your farm, now and for any changes that can be anticipated during the term of the lease, such as movement of machinery or livestock.

Rights-of-Way and Easements

Renewable energy installations must be connected to the electrical grid, which may require the installation of power lines and other equipment. Take an active role and communicate with the company to make sure that the placement of the poles and the height of the wire will not interfere with your farming activities on the rest of your land. The company should consult with you regarding the placement of the electrical equipment and power lines. These terms should be clearly spelled out in your lease.

The renewable energy company may also need to improve existing access roads or construct new access roads. Many farmers have found that they benefit from the construction of good access roads. Discuss the construction of the roads with the company before you sign the lease. Make sure the access road is constructed so that it does not shed water onto your fields and that the finished grade does not interfere with normal drainage patterns. Also, ask about the material used to finish the surface of the access road. Make sure that the road is designed so that it serves both your needs and those of the company. The lease should explicitly allow you to use the access roads for your own purposes. The company should agree to use commercially reasonable efforts to minimize the interruption of your farming operations when constructing the access road.

Farm Buildings

The renewable energy company may require you to ask for its permission before you build any new farm structures or buildings to make sure it does not interfere with the renewable energy production. For example, they may prevent you from erecting a building structure that will shade the solar panels. However, the lease should specify that existing trees, buildings and other improvements on your farm will be allowed to remain.

Tax Implications

Wind turbines, solar panels, and other power generating apparatuses are erected or affixed upon the land, and as such, they are considered "real property". N.Y. Real Property Tax Law § 102(12)(b) and (f). Your local tax assessor will determine the contributory value of the wind turbines or solar modules to the value of your property. If the value of the converted acreage devoted to renewable energy production increases, it may affect your taxes. An increase in taxable value could increase your county, town, village, and school taxes, as well as other taxes that may be levied, such as highway, fire, ambulance, library, lighting district, drainage district, and other taxes and levies. It may also affect special district taxes for municipal water and sewer districts if the land is no longer predominantly used for agricultural purposes.

The renewable energy company should agree to pay for all personal property taxes and assessment levied against the wind turbines or solar panels, including any tax based on electricity production. Make sure that the company agrees in the lease to pay for or reimburse you for any tax increases.

Renewable Energy Tax Exemption

Land used primarily for wind or solar energy production is exempt from an increase in property taxes for a period of 15 years following the installation of the wind or solar energy equipment. N.Y. Real Property Tax Law § 487(2). After the 15-year period ends, the property taxes will increase. Additionally, if the land ceases to be used primarily for renewable energy generation, the property taxes will increase. N.Y. Real Property Tax Law § 487(7).

You, as the landowner, are responsible for applying for the exemption by submitting an application to your local tax assessor. N.Y. Real Property Tax Law § 487(6).

Most wind and solar leases are for terms of at least 20 years. Since the exemption only lasts for 15 years, your taxes will increase 15 years after the renewable energy equipment is installed. The increase in the assessment would be based on the contributory value of the renewable energy equipment in the 16th year.

The renewable energy company should agree to pay for the increase in taxes. Make sure that the lease specifies that the renewable energy company will pay for or reimburse you for any tax increases.

Opt-Out Provision

Counties, cities, towns, villages and school districts may opt out of the renewable energy tax exemption by passing a resolution, local law or ordinance. N.Y. Real Property Tax Law § 487(8). In that case, the renewable energy tax exemption would not apply. To find out if your county, town, village, and/or school district has opted out, talk to your local tax assessor, or take a look at the list maintained by the New York State Department of Taxation and Finance at <https://www.tax.ny.gov/research/property/legal/localop/487opt.htm>.

If a municipality or school district opts out after the construction of the renewable energy project has begun, the exemption will still be in place; it does not have retroactive effect. N.Y. Real Property Tax Law § 487(8)(a).

For purposes of the wind and solar exemption, the construction of a solar energy system is deemed to begin when a contract or interconnection agreement with a utility is entered into, or when a deposit is made to the utility. You or the renewable energy company must give written notice to the appropriate municipalities when such a contract or agreement is executed. N.Y. Real Property Tax Law § 487(8)(b).

Payments in Lieu of Taxes (PILOTs)

A municipality or school district that has not opted out may require you or the renewable energy company to enter into a contract for payments in lieu of taxes, called PILOTs. N.Y. Real Property Tax Law § 487(9)(a). Such contract may require annual payments in an amount not to exceed the amounts which would otherwise be payable but for the tax exemption. In effect, if a municipality leaves the exemption in place and imposes the maximum allowable PILOT obligation, you or the renewable energy company will be making payments to the municipality in the same amount as if the property were fully taxable. The main difference is those payments will have the legal status of a contract rather than property taxes.

In order to require you or the renewable energy company to enter into a contract for payments in lieu of taxes, the municipality or school district must notify you or the company of its intent to require a contract for payments in lieu of taxes within sixty days of receiving written notification of your intent to construct a wind or solar farm. N.Y. Real Property Tax Law § 487(9)(a). The payments in lieu of a tax may not continue for more than 15 years. N.Y. Real Property Tax Law § 487(9)(b).

Make sure that the lease specifies that the renewable energy company will pay for or reimburse you for any payment in lieu of a tax.

Re-classification and Conversion Fee

Land used predominantly for farming is assessed at a lower rate than land used predominately for renewable energy production. See N.Y. Agric. & Mkts. Law § 304-a. Even if the land is used for dual purposes – i.e. low-impact farming activities and renewable energy production, you may still lose your agricultural exemption on that land. Whether you will lose your agricultural assessment will be determined on a case-by-case basis by your local tax assessor. If the land is reclassified, not only will your property taxes increase, you will also have to pay a conversion fee.

A conversion fee is assessed when land that receives an agricultural assessment is later converted to a nonagricultural use. N.Y. Agric. & Mkts. Law § 306(2). A conversion of land means “an outward or affirmative act changing the use of agricultural land and shall not mean the nonuse or idling of such land.” N.Y. Agric. & Mkts. Law §301(8). Your local tax assessor will determine the amount of the conversion fee. N.Y. Agric. & Mkts. Law § 306(2)(a)(i). If only a portion of your land is converted, your tax assessor will take that into account and the conversion fee will be less. N.Y. Agric. & Mkts. Law § 306(2)(a)(ii) and (2)(c). You must notify your local tax assessors within 90 days of conversion to a nonagricultural use, or be subject to a fine of up to \$1,000. N.Y. Agric. & Mkts. Law § 306(2)(a)(iii).

Your lease should include a provision for the renewable energy company to pay for or reimburse you for any conversion fee.

Other Considerations

Construction

When constructing the renewable energy facilities, the renewable energy company should agree to remove any construction debris and restore the unused portions of your land to its previous condition. The renewable energy company should agree to take commercially reasonable steps to avoid damaging your facilities and equipment, and to make repairs if they are damaged. The company should also agree to compensate you for crop loss or destruction due to the company’s construction activities.

Dismantling the Facility

In the lease, make sure that there are provisions that specify who is responsible for dismantling the facility if the renewable energy company goes out of business, declares bankruptcy, or if the equipment ages out and is no longer commercially viable. The lease should specify that the renewable energy company will remove the wind or solar facilities at the end of the lease term. The lease should state that if the company fails to remove the energy facilities within 12 months of the end of the lease term, the facilities will be deemed abandoned. In that event, you could remove them and request reimbursement from the company. Alternatively, you can insist that the company must establish a “restoration security” payable to you to cover dismantling costs in the event that the facilities are abandoned. This would be in the form of a letter of credit, bond or corporate guarantee. With respect to solar farms, the company may not agree to restoration security, because the scrap value of the solar modules typically exceeds the cost of dismantling them and disruption to the soil is typically negligible.

The lease should contain provisions discussing what happens if the company is acquired by another company, assigns its interest in the lease, defaults on its loan or declares bankruptcy. Typically, the lease will state that if the company merges with or is acquired by another company, or assigns its interest in the lease to another company, the lease terms will remain valid and will remain the same. If the company took out a loan for the renewable energy project, defaults, and the company’s lender takes over the lease, the terms will remain the same. In the event of bankruptcy, the lease will automatically be transferred to the company’s successor. The lease should specify that if a new lease is necessary, the new lease will contain substantially all of the same terms as the original lease.

Utilities

Make sure that the lease requires the renewable energy company will pay for all water, electric, telecommunications and other utilities used by the company.

Audit Privileges

Many renewable energy companies will pay you a set annual fee. However, some companies may offer to give you royalty payments, rather than a set annual fee. If this is the case, make sure that the lease grants you the right to audit the company’s records to ensure that accurate royalties are being paid to you.

Zoning and Planning Board Approval

The renewable energy company will have to obtain zoning and planning board approval for the project. Some municipalities have provisions in their zoning code to address the siting of wind or solar projects within the community. Other municipalities have placed a moratorium on the siting and installation of such facilities until they have decided on the best method to review or regulate them.

Exclusivity

The lease will typically contain an exclusivity provision, which prohibits you from leasing your land to other companies.

Selling Your Property

A typical lease will allow you to sell or transfer the land or your interest in the lease, but only if the person or entity you sell or transfer it to agrees to assume all of your obligations under the lease. Additionally, you must provide the company with prior notification of the sale or transfer. In the event of your death, your executor or successor in interest must notify the company as promptly as possible under the circumstances.

Before signing the lease, make sure you have considered all the future uses of your land, how your business might grow or diversity, and how future generations might want to use the land when considering the type, location, and conditions of an energy lease.

Conclusion

As you can see, there is a myriad of things to consider when contemplating leasing your farmland to an energy company. This Fact Sheet has been prepared for NYFB members to use as a tool in making that decision. NYFB highly recommends its members **consult an attorney** prior to signing a lease. NYFB members can call the Legal Affairs Department at 1-800-342-4143 for a referral to an attorney. We also suggest that you speak with your local assessor and local code enforcement officer before signing a lease.

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