

# Utility Scale Solar - What You Should Know

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In March of 2020, Gov. Cuomo announced in his State of the State address an ambitious goal of 70% of the state's electricity needs would be generated via renewable means by 2030. Under this Green New Deal the mandate increases to 100% by 2040. As a result coal-fired plants will be idled while more wind and solar projects will be initiated. For you, as a holder of large tracts of open land, that may mean that you will be visited by landmen seeking to lease all or a portion of that land to use for constructing a solar array. Understand, this is not a couple dozen panels up on the barn roof generating a few kilowatts, but acres of panels on the ground generating several megawatts of electricity. This is not necessarily a bad thing as it reduces carbon emissions and may provide a secondary income stream for you, especially if it is placed on marginal land or land not currently in productive use. That said, in order for this to be a benefit and not a detriment you need to go into it with your head up and your eyes open.

## **Therefore, Basic Information**

Understand that this is an industry in its infancy, and lease documents are not battle tested so don't sign any landman's forms as is. There is potential for many unrealistic provisions and expectations, and almost everything is fair game for negotiation with few, if any, "deal breakers". You will need professional legal counsel. You may be able to educate yourself on understanding the broad strokes of a commercial lease, but here the devil is in the details and is why you need an attorney.

This transaction is a commercial lease, but it's a lease on steroids and may be 50 – 70 pages long. It is at a higher level of sophistication than any ag tenant lease, utility easement, or right of way (ROW). There will be permanent structures built that do not become fixtures owned by you the landlord. Part and parcel of the lease is a solar easement on the surrounding acreage which means you can't do anything that might interrupt the flow of sunlight. So that means no tower silos, large grain bins, tree plantings, etc. upstream of

the incoming sunlight. Unlike the gas lease there are no royalties or subsurface rights.

The tenant (solar company) has some unique needs to understand. The structures have greater requirements for access, maintenance, and transmission than other utility operations. The income stream from the structures is used as collateral to obtain financing, and the tenant's ability to continue operations on your land cannot be interfered with by anyone holding a superior interest in the land (i.e. -mortgage). You may need to subordinate superior liens. All lease documents will be recorded with your deed.

Go into this with the understanding that this is a long-term (>40 years) business relationship. The structures mentioned above may be sold multiple times. The tenant has the ability to assign (transfer) the lease without your approval, and this is non-negotiable. Given this, there is likely to be several tenant changes over the life of the lease. (Likewise, there could be landowner changes, too.) The presence of a solar array may also affect the marketability of your property which could impact your heirs.

The property tax liability should be a shared responsibility with the tenant paying for the increase in the assessment. You will need to make sure the tenant maintains liability insurance and names you as a co-insured. This is for your protection. They should also furnish you with a Certificate of Insurance (COI) each year, as well as indemnify you for any costs, losses, liabilities, etc. that arise from their activities. This must be all encompassing.

At some point in time the agreement and the array will reach its end of life. The structures age, are superseded by a new technology, you or your heirs do not wish to renew, whatever. The decommissioning, or removal and restoration, of the site is important and must be negotiated and established in detail upfront even though it may not occur for decades. You may not even be dealing with the same people



Photo by Tim Terry

that originally signed the lease. A Decommissioning or Performance Bond is one way of making sure there is funding available to get the job done to the satisfaction of the specifications originally negotiated. The exact nature of the bond is hard to determine, but this is where it makes sense to consult an attorney.

### **The Agreement**

The agreement comes in two parts: the Option Agreement and the Lease agreement, but even before that you may be presented with a Preliminary Letter of Intent. This one page document is basically a non-disclosure agreement or confidentiality clause so that future terms, especially the financial compensation, are not disclosed to others. Sometimes these letters omit that disclosure is allowed to attorneys, accountants, financial advisors, family etc. -- so make sure that is in there.

The Option Agreement (10-12 pages) locks in the land for a due diligence period of 1-5 years while the solar company decides if they want to develop the site. You will receive some payments during the period to secure their development rights, access to the site, and your confidentiality. This gives them time to do a more thorough feasibility study including a title search, legal survey, distance to grid connection, and neighboring land availability. They are trying to determine the viability of development – financial and otherwise. No ground will be broken at this time,

except for some soil borings, and they will bear all the costs. You may still farm the land during this period, but no development. In other words, no new home site, heifer barn, satellite manure storage, etc. on the optioned property

The Lease Agreement – a.k.a. Ground Lease (50-70 pages) – shows up when the solar company decides to develop the site. You will be sent a copy of the agreement to sign within a specified period. You have no chance to renegotiate at this time so don't sign the option agreement without also negotiating the entire lease agreement.

### **Negotiating**

Some of us are good at animal husbandry, others are good at crop production, and still others excel at ag engineering. It's a rarity, however, that any have successfully negotiated a commercial agreement as intricate as a solar lease. This is why you need to secure professional legal help. Start with your own attorney. If they're not comfortable with it ask them who'd they least like to go up against in court. Look for someone experienced with real estate contracts, land acquisition, or better yet, oil and gas leases.

Even though your attorney may do all the talking there are some things you need to know or at least consider:



*Sustainability Management Specialist Sarah Zemanick (SUST) leads a tour at the 2014 opening of the Cornell Solar Farm on Snyder Road. Credit: Jason Koski (UREL)*

**1. Understand your bargaining position** - They have to have the land, and until you sign an agreement you have all the leverage. Unfortunately, you have little or none after signing so get it up front. It's best to think about this in the long term – not just the immediate benefit.

The lease will often be presented with a sense of urgency, perhaps even as a crisis. This is nothing more than a marketing technique. Landmen / leasing agents want to make the sale. The first offer is not their best offer. (Negotiation 101 – Never begin a negotiation from a point you can't immediately abandon.) Ask yourself, "Is this the only offer I will get?" "If one developer is interested will there be others?" "Can I walk away?" "Which terms are flexible, which are not?" Offers may range from X to 10X and is likely due to the number of middle men the lease may have to go through. Proximity to existing infrastructure – high voltage power lines, substations, facilities to be built – may also be a factor. Cost to construct a substation is considerable, so if you're located less than two miles from one your site may garner a premium.

You may be thinking, "Why don't I just develop this myself?" According to the Pennsylvania Dept. of Environmental Protection a solar array requires an

average investment of \$1.13M per megawatt for utility scale solar. Think about that for a minute.

There is a deadline and offers due get retracted, so be deliberate but don't dawdle.

**2. Determine what you want and/or what you want to prevent.** Do this before seeing your attorney as it will help them help you. Think: What will this look like when it's operational and over the next 40 years? What's important to me? Think through the finances. What will and won't you allow? Do you want to protect natural structures – pond, lakes, creeks, etc.? Are there places you don't want solar panels and /or ROW's? Do you want to grow or do something under or between the rows of panels? Every property is unique. Describe specifically what you want to go into the option.

Many leases don't specifically state 40 - 50 years, instead they are written for 10 or 20 years plus a series of 5 year options.

Option period payments tend to be small because it's a period of highest risk for the developer. Can you get more money? Try bargaining for more money or less time to develop – real money is when it's operational. Critical in any long term leasing agreement is to build

in an escalator – dollars have to keep pace with inflation. What initially looked like the gravy train could, over time, only buy you a cup of coffee. Use the government inflation statistics as the escalator. This is typical of commercial rental agreements so you shouldn't get any push-back from the developer.

**3. Don't assume you can do things that are not written in the lease agreement.** Include in the initial negotiation or via addendum. The guy who sits down on the back deck and tells you all the nice money you're going to make and what a wonderful person you are and how this is going to be a great thing -- once you sign the lease you may never see him again. Instead, you'll be dealing with someone who has the company's best interest in mind. It doesn't matter if it wasn't written down. It is a bitter pill to swallow, but realize that while you still own the land you won't be able to use the land. The chain link fence and barbed wire sends the message that no one, not even the landowner, is welcome in there. Grazing cattle, growing crops, setbacks, even placement of panels and control units need to be delineated up front. You will need to specify continued access to the back 40, pastures, water sources, or the secret fishing hole.

**4. Understand the duration of the lease.** Basic math here: Option + Construction + Operations + Renewals = Duration of the Lease. The option period may be as long as 4-5 years with very little money coming in. There is usually little or no breakdown of the various categories in the lease except maybe renewals. Options periods range from 30 – 60 months, and it may be in your best interest to push for lower – the sooner they start paying you the real money the better. A Memorandum of Lease document will be recorded on your deed in courthouse.

**5. The option agreement is their option not your option.** They can pull out at any time so don't spend the lease money before you have it. However, don't think you're going to get out of it if you change your mind. Depending on how it's written, by signing the option agreement you are also signing the lease agreement – this is where your attorney earns his/her keep. You may not have your land developed after you sign a lease. You can't get out of it or amend it after you sign. They may option all of your land, but only use a portion of it. You may be able to push this with

the solar company, i.e. – they have to use a minimum percentage or release the remaining acreage.

**6. Know how to modify your lease.** Step 1 – find an attorney (see #1) Legal contracts require legal help. Answer the long term questions upfront. Get what you want in writing before signing the lease as changes are not possible afterward. Shorten the option period and/or increase the option money. You may unknowingly be agreeing to a Warranty of Title thereby indemnifying the solar company. As landowner you are guaranteeing that you have perfect, blemish free ownership of the property, but that is not usually the case as there may be other leases, originated generations ago, that are still in effect today, such as utility ROW's, conservation easements, FSA/NRCS administered programs, subsurface rights (oil, gas), etc. There may be some long hidden environmental hazards that come to light during installation. If you indemnify the solar company you are essentially giving them a blank check. Curtail this as much as possible. Lease offers usually have some flexibility.

**7. Be clear on when, where, and how you will be paid.** After you've done your due diligence and have settled on an offer be clear that you are not giving them anything for free. Even water used for cleaning and maintaining the panels. Get paid for any access they will be restricting. Getting paid for ALL acres used including access and ROW's not just the solar field itself. Be sure that they will maintain any ROW's – keeping brush and noxious weeds trimmed. You'll want the payment terms to be clear and concise. There are many different arrangements on the options. Sometimes payment is upfront, sometimes there is a modest upfront plus annual payments. You need to specify defined dates, i.e. - "Need to have a check for this amount on this date or solar company is in default." Define what happens if payment(s) are missed – are you free and clear from the lease, how will back payments be recouped?

**8. Things that are written count, things that are spoken don't.** Once you sign the option you may never see the landman that originated the lease option again. You will likely be dealing with an entirely different person and/or entity, or even their attorneys. Avoid falling for "that doesn't need to be in there", or "Everybody knows that's ok" statements. Get all the



*Photovoltaic solar panels at the Solar Farm on Snyder Road. Credit: Jason Koski (UREL)*

promises in writing. If it's important to you it has to be in the agreement. Even down to minute details – such as herbicide use especially on an organic operation. These leases are so new there is no track record and procedures have not been standardized. Define who, when, and how the site will be maintained. What happens if a water line or drain tile is cut during construction – who pays? How will it be repaired? There may be shared farm lanes, but who will maintain them? Get it in writing!

**9. Things your neighbors may not like.** Fences limit hunting. Arrays may detract from their views. Local zoning may exercise some limitations. You may have already leased out part of that land for another ag enterprise, this should be recorded on the lease. What will happen to these things following construction? For instance, will the array interfere with maple sap harvesting? Will part of the sugarbush be removed to accommodate the array? Will there be light intrusions from security lights? How will the grounds around the facility be maintained vis-à-vis weeds, grass, litter caught in the security fence, etc? What visual screening will be provided around the site?

**10. Not all info on the internet is good info.** Some is very good, some is conspiratorial, most is somewhere in between.

## **Parting Thoughts**

Site plans may/ may not be required. These are usually not a condition of the option but may be required for the lease.

Decommissioning and land recovery – bargain for the maximum amount of clean-up and removal, and remedies if they don't. This is often addressed by a performance bond secured at, or prior to, signing of the agreement.

Determine the remedies and disposition of the lease if the solar company is liquidated. You don't want or need the responsibility of remediating the site. Sure, much of the galvanized steel structure may look pretty appealing, but the panels may be considered hazardous waste requiring special disposal and a hefty tipping fee. Plus it needs to be properly disconnected from the grid.

This may affect Land Trust easements and or any "clean and green" status. Often if 50% or more of the power generated is used internally it is not a problem, however, this is not likely for an industrial sized project. Any roll back taxes should fall to developer.

As stated earlier, securing legal services is a must not an option. Figure on 10 – 12 billable hours, or more, depending on how complex the lease may be. ■