



(Rev 1/2011)

# Department of Agriculture, Trade and Consumer Protection

## Permanent Agricultural Conservation Easements (PACE)

### Conflicting Property Interests In Proposed PACE Easement Areas

The Department of Agriculture, Trade and Consumer Protection (DATCP) administers a program, under s. 93.73, Stats., to purchase permanent agricultural conservation easements from willing landowners (the PACE program). DATCP administers the PACE program in cooperation with local governments and qualified nonprofit conservation organizations (cooperating entities).

PACE easements are permanent easements that are designed to protect significant tracts of working agricultural land from non-agricultural development. A PACE easement does not mandate a specific land use, but instead prohibits development that would make the land unavailable or unsuitable for agricultural use. The landowner retains ownership and control of the land, subject to the development restrictions imposed by the easement. The recorded easement runs with the land and is binding on subsequent owners of the affected land.

Cooperating entities may apply to DATCP for funding to help purchase proposed easements. DATCP reviews easement proposals and may give preliminary approval to an application. Before an easement purchase can proceed, the cooperating entity must provide DATCP with additional documentation. Among other things, the cooperating entity must do all of the following:

- Provide documentation showing the current condition and uses of the affected parcel, including current buildings and structures (baseline documentation).
- Obtain a complete title search (unrestricted in time) on the affected parcel. The title search verifies land ownership, identifies persons who may have a current ownership interest in the affected land, and identifies possible ownership conflicts or clouds on title. A title search may also reveal 3<sup>rd</sup>-party property interests including liens, mortgages, easements, leases, reservations of mineral extraction rights, utility rights-of-way and transportation corridors. Some of these 3<sup>rd</sup> party interests may impair the proposed PACE easement, or authorize land uses that may conflict with the proposed easement.
- Document to DATCP's satisfaction that any materially conflicting property interests identified in the title search will be resolved or subordinated to the proposed easement.

If DATCP finds that the documentation is satisfactory, DATCP may enter into a contract with the cooperating entity. The contract authorizes the cooperating entity to purchase the easement on behalf of DATCP and the cooperating entity (subject to terms specified in the contract), and commits DATCP to reimbursing the cooperating entity for its agreed share of the purchase cost.

After the parties agree on the easement terms and price, the landowner signs a legal document that creates the easement and designates DATCP and the cooperating entity as easement holders.

The cooperating entity and DATCP also sign the easement document, accepting the easement. The cooperating entity records the easement with the county Register of Deeds.

The recorded easement takes priority over subsequently recorded property interests in the same land, but does *not* take priority over prior-recorded interests (*unless* those interests are extinguished or subordinated to the easement). DATCP and the cooperating entity co-hold the easement, and either DATCP or the cooperating entity may enforce the easement.

### **Land Use Restrictions**

A PACE easement applies to a parcel of land described in the easement document. An easement may apply to all or part of a farm. A PACE easement normally prohibits land uses, other than the following allowed uses, on the affected parcel (the easement document may also impose limits on these allowed uses):

- “Agricultural uses” as defined in s. 91.01(2), Stats.
- “Accessory uses” as defined in s. 91.01(1), Stats.
- Current or planned uses that are consistent with the purpose of the PACE easement, and are specifically described and authorized in the easement document.
- Uses, subsequently authorized in writing by the easement holders (DATCP and its cooperating entity), which are consistent with the purpose of the PACE easement.

### **Complete Title Search**

The title search on the affected parcel must be a *complete title search that is unrestricted in time* (the search must go “back to patent”). Title companies can provide this service, although they often prefer to do more limited searches (going back only 30 years or so).

Because a PACE easement is a permanent easement purchased with public dollars, it is important to identify *all* clouds on title that could affect the validity and effectiveness of the easement (not just those that have arisen in the last 30 years). A complete title search going back to patent (not just a 30-year title search) is imperative, and can be obtained at reasonable cost.

DATCP does not require title *insurance*, but does ask the title company to identify landowners and exceptions (conflicting property interests) as it would normally do for a title insurance commitment. DATCP will normally reimburse most of the title search costs incurred by a cooperating entity. DATCP will not reimburse the landowner for the costs of a title search.

### **All Landowners Must Sign**

All current owners identified by a title search must sign the document creating the PACE easement. If ownership is not clear, additional steps may be needed to clarify ownership.

Persons holding life estates, material leasehold interests, or other possessory interests in the affected land may also need to sign the easement document, if those interests could materially affect the validity and effectiveness of the PACE easement.

### **Third Party Interests**

If a baseline documentation or title search shows that a 3<sup>rd</sup> party holds a potentially-conflicting interest in the same parcel (for example, a prior-recorded lien, mortgage or easement), the conflict can sometimes be resolved by having that 3<sup>rd</sup> party join the landowner in signing the PACE easement document (thereby subordinating that person's interest to the PACE easement). For example, if a mortgage holder joins the landowner in signing the PACE easement document, a subsequent mortgage foreclosure will not extinguish the easement.

However, some 3<sup>rd</sup> party interests may call for different treatment. Some interests may have no material impact on the PACE easement (so that subordination is unnecessary), while others may pose a significant land use conflict that can only be resolved by excluding the affected land from the PACE easement (subordination is not an effective option).

### ***Addressing Conflicting Property Interests***

This guidance describes some conflicting property interests that may be identified in a baseline documentation or title search, and spells out general guidelines for addressing those interests. DATCP and its cooperating entity will consider these general guidelines, but are not necessarily bound to these decision criteria. They may, in their sole discretion, reject a proposed PACE easement or exclude lands from the proposed easement for any reason (without having to state or justify that reason).

### **Communication Facilities**

#### ***Description:***

In some cases, a title search may show that a 3<sup>rd</sup> party holds an existing easement (or lease) to construct and operate commercial communication facilities in a proposed PACE easement area. Commercial facilities may include telephone transmission lines, cell phone towers, TV towers, radio towers, commercial satellite communication facilities, etc.

Telephone lines normally run along roads, and seldom have a material impact on agricultural land use. But cell phone towers and other communications facilities can have a significant impact, depending on the nature, size and location of those facilities.

Normal farm communication facilities, such as home telephone and cable connections, household TV satellite dishes, etc., are agricultural “accessory uses” that ordinarily pose no conflict with a PACE easement.

***Guidelines:***

An existing roadside telephone line does not materially impair a PACE easement. There is no need to exclude the existing telephone corridor from the PACE easement, or have the telephone company sign the easement document.

Other communications facilities such as cell phone towers will be evaluated on a case-by-case basis. The evaluation will consider the nature, size and location of the facilities, and their potential impact on surrounding agricultural uses.

DATCP or its cooperating entity may exclude a communications corridor or facility site from coverage under a PACE easement (or reject the PACE easement proposal altogether) if current or future facilities authorized in that corridor or at that site may conflict with the purposes of a PACE easement.

## **Electrical Generating Facilities**

***Description:***

In some cases, a baseline documentation or title search may show that a 3<sup>rd</sup> party holds an existing easement (or lease) to construct and operate a commercial wind energy system, solar energy system, bio-generator, or other electrical generating facility in a proposed PACE easement area.

A “wind energy system” may include one or more wind turbines, with related access roads and buried electrical transmission cables. Other electrical generating facilities may include similar primary and secondary features.

There are many different potential kinds of electrical generating facilities, ranging from small “windmills,” solar panels and bio-generators (used mainly to power farm operations) to large-scale commercial facilities (producing electricity mainly for the commercial “grid”).

A small farmer-owned generating facility, used mainly to generate electricity for the farm on which it is located, may be entirely compatible with the purposes of a PACE easement. But a large-scale commercial facility may take significant acreage out of agricultural production, and may adversely affect surrounding agricultural uses.

***Guidelines:***

A small farmer-owned generating facility, used mainly to generate electricity for the farm on which it is located, may be allowed under a PACE easement. Large-scale facilities, designed mainly to produce electricity for the commercial “grid,” will be evaluated on a case-by-case basis. The evaluation will consider the nature, size and location of each facility, and its potential impact on surrounding agricultural uses.

DATCP or its cooperating entity may exclude an electrical generating site from coverage under a PACE easement (or reject the PACE easement proposal altogether) if current or future facilities authorized at that site may conflict with the purposes of the PACE easement.

In its case-by-case analysis, DATCP may consider the following questions, among others:

- Will the facility be used mainly to power the farm on which it is located, or to generate electricity for the commercial “grid?”
- Is the facility consistent with the purposes of the PACE easement?
- Will the facility promote or impair preservation of agricultural land?
- How much land will the facility convert from agricultural or open space use? Is that amount significant in relation to the overall size of the PACE parcel?
- Does the facility impair or limit current or future agricultural use of surrounding land (within or outside of the PACE easement parcel)?
- Is the facility reasonably designed to minimize conversion of agricultural land?
- Will construction of the facility cause significant damage to agricultural land? What steps can be taken to minimize or repair that damage? Are the parties legally committed to taking those steps?
- Does the facility conform to other legal requirements, including applicable state and local siting or zoning standards?
- Are there reasonable alternatives?

## **High Voltage Transmission Lines and Substations**

### ***Description:***

In some cases, a baseline documentation or title search may show that a 3<sup>rd</sup> party holds an existing easement (or lease) to construct and operate a high voltage transmission line or substation in a proposed PACE easement area.

High voltage transmission lines run in straight lines regardless of waterways, roads or parcel boundaries. They often run directly across agricultural lands. Construction may convert or disrupt agricultural lands. High voltage facilities (and the maintenance of facility corridors) may also affect surrounding agricultural land use. There is a strong likelihood that high voltage transmission lines and substations will conflict with the purposes of a PACE easement.

***Guidelines:***

DATCP and its cooperating entity will normally exclude high voltage transmission corridors and substation sites from coverage under a PACE easement. However, a high voltage transmission corridor may be included in a parcel covered by a PACE easement if all of the following apply:

- Inclusion will have critical agricultural land preservation benefits.
- Construction, repair and maintenance within the transmission corridor will not have a serious adverse effect on agricultural land use within or around the corridor.
- The transmission company waives any objection to the PACE easement.

This policy does not apply to local, farm or residential distribution wires, or to poles or underground conduits used to carry those wires. Such facilities may qualify as agricultural “accessory uses” and will, in any case, tend to be compatible with the purposes of a PACE easement. The distribution company does not have to sign the PACE easement document.

## **Oil and Gas Pipeline Corridors**

***Description:***

In some cases, a baseline documentation or title search may show that a 3<sup>rd</sup> party holds an existing easement (or lease) to construct and operate a major oil or gas pipeline through a proposed PACE easement area. Pipeline corridors run in straight lines, across water features and property boundaries. A typical easement authorizes the pipeline company to enter the corridor at any time to install, enlarge, repair or maintain a pipeline. Some pipeline easements prohibit the landowner from granting conflicting easements.

Pipeline work often involves major disruption of the pipeline corridor. Soil is removed and compacted, and vegetation and wildlife habitat are destroyed. State and federal utility regulators normally require pipeline companies to restore affected land after the pipeline work is completed, but full restoration may be impossible.

***Guidelines:***

DATCP and its cooperating entity will normally exclude a major existing oil or gas pipeline corridor from coverage under a PACE easement (or reject the affected PACE easement proposal

altogether). However, an existing pipeline corridor may be included in a parcel covered by a PACE easement if all of the following apply:

- Inclusion will have critical agricultural land preservation benefits.
- Construction, repair and maintenance of the pipeline will not have a serious adverse effect on agricultural land use within or around the corridor.
- The pipeline company waives any objection to the PACE easement.

This policy does not apply to small consumer distribution lines and related easements. Consumer distribution lines and related easements typically run along roads and then directly to homes and farm buildings. Consumer distribution lines and related easements may be included in a PACE easement area, because work on these lines is not likely to cause major disruption to land or vegetation. The pipeline company does not have to sign the PACE easement.

## **Roads and Vehicle Access Easements**

### ***Description:***

In some cases, a baseline documentation or title search may show that a road, transportation corridor, or vehicle access easement runs through a proposed PACE easement area. Public roads and common carrier transportation corridors (such as railroad lines) must be excluded from PACE easement areas. However, some private roads and vehicle access easements (such as farm driveways, livestock lanes, and crop removal easements) may be consistent with the purposes of PACE.

### ***Guidelines:***

Public roads and common carrier transportation corridors (such as railroad lines) must be excluded from PACE easement areas. Private roads and vehicle access easements will be evaluated on a case by case basis: they may be included within a PACE easement area if they are consistent with the purposes of the PACE easement, and excluded if they are not.

## **Mineral Extraction Rights**

### ***Description:***

A person may hold mineral extraction rights in land, even though another person owns the land surface. A holder of valid pre-existing mineral extraction rights may mine or excavate the land to extract metallic or non-metallic minerals, notwithstanding a PACE easement applied to the land surface. Mineral extraction may include operations such as mines, gravel pits and rock quarries. Most mineral rights were granted many years ago, and they might never be used. But there is always a possibility of use, and actual mineral extraction in a PACE easement area would likely be incompatible with the purposes of the PACE easement.

According to s. 706.057, Stats., mineral rights “lapse” if the holder of those rights has not “used” the rights in the preceding 20 years. A mineral rights holder “uses” those rights by doing any of the following:

- Extracting minerals pursuant to those rights.
- Conveying the mineral rights to another person, and recording the conveyance with the Register of Deeds.
- Paying property taxes on the mineral rights.
- Filing, with the Register of Deeds, a “statement of claim” preserving the mineral rights.

A complete title search will normally reveal whether, and when, mineral rights have been “used” (except that it may not show when minerals have actually been *mined*). A holder of “lapsed” mineral rights may at any time *recover* those “lapsed” rights by filing a statement of claim with the Register of Deeds. But if the *surface landowner* files a *prior* claim to the “lapsed” rights with the Register of Deeds, the mineral rights go to the surface landowner instead. Claim forms are available from the Register of Deeds.

### ***Guidelines:***

A title search will normally disclose whether any person, other than the surface landowner, holds mineral rights in a proposed PACE easement area. If such mineral rights exist, and if they have been “used” (see above) within the past 20 years, the land subject to the mineral rights must be excluded from the PACE easement area *unless* the mineral rights holder subordinates those rights by signing the PACE easement agreement.

If existing mineral rights have “lapsed” because they have not been “used” (see above) within the past 20 years, the surface landowner may record a claim with the Register of Deeds to acquire the mineral rights (claim forms are available from the Register of Deeds). The surface landowner must file the claim before the holder of the “lapsed” mineral rights reclaims those rights by “using” them (see above).

If the surface landowner files a timely claim to acquire “lapsed” mineral rights, the surface landowner may then enter into a PACE easement covering the affected land (the prior holder of the mineral rights need not sign the agreement).

## **Drainage Districts**

### ***Description:***

In some cases, a baseline documentation or title search may show that a proposed PACE easement includes land located in a drainage district. Drainage districts are special purpose districts, like sewer districts, formed to drain land.

There are about 185 drainage districts, mainly in central and eastern Wisconsin. A county drainage board operates all of the drainage districts within a county, pursuant to ch. 88, Stats., and ch. ATCP 48, Wis. Adm. Code. The county drainage board has broad powers within the district corridor, which normally extends for 20 feet on each side of a drainage ditch.

A PACE easement will not ordinarily conflict with the purposes of a drainage district, or with the activities of a drainage board. But if there is a conflict, the drainage board's responsibilities take precedence over a PACE easement. The county drainage board may not waive its responsibilities.

The county drainage board may dredge ditches and deposit dredge materials on land in the district corridor. The board may also cut trees, drive vehicles, mow and apply pesticides within the district corridor. These activities will not ordinarily conflict with the purposes of a PACE easement.

Drainage districts are formed by circuit court order. Most districts are quite old. Even where drainage corridors exist, title searches on individual land parcels seldom identify the corridors (although they sometimes show drainage district *assessments*). DATCP has official maps of most, but not all, drainage districts. Waterways that run in a "straight line" may indicate a drainage district, although some ditches are merely private drains that are not part of a legally organized drainage district.

***Guidelines:***

If it appears that a proposed PACE easement may intersect a drainage district, DATCP will check its drainage district records to determine whether any portion of the easement falls within a drainage district corridor. DATCP will notify the county drainage board of its findings. If the drainage board objects to the inclusion of drainage district lands under a PACE easement, DATCP may exclude those lands from the easement.

A PACE easement does not affect a drainage board's authority to deposit dredge materials, cut trees, drive vehicles, mow and apply pesticides on lands in the drainage district corridor. The drainage board should not sign the PACE easement agreement, because it *cannot* subordinate its authority to a PACE easement.

## **Managed Forest Lands**

***Description:***

In some cases, a baseline documentation or title search may show that lands proposed for coverage under a PACE easement are subject to a Managed Forest Land (MFL) contract. An MFL contract, executed between the landowner and the Department of Natural Resources (DNR), runs with the land for a period of 25 or 50 years and is renewable. DNR records the contract with the Register of Deeds. The landowner must comply with a forest management plan

(stewardship plan) that promotes the growth and harvesting of marketable timber. The plan may provide for selective cutting or clear cutting at times specified in the plan. Under the contract, the landowner may defer property taxes until timber is harvested.

The MFL program is designed to promote the growth and harvesting of marketable timber. The purposes of the MFL program are consistent with those of the PACE program, so there will not ordinarily be any conflict between an MFL contract and a PACE easement. A pre-existing MFL contract takes precedence over a PACE easement. DNR will not ordinarily subordinate an existing MFL contract to a PACE easement, and there is ordinarily no need to do so.

***Guidelines:***

Lands covered by an MFL contract may be included under a PACE easement. There will ordinarily be no conflict between the MFL contract and the PACE easement. However, DNR may be willing to modify some details of the MFL contract to make it consistent with details of the PACE easement agreement, should that be necessary.

## **DNR Fish Management Areas**

***Description:***

In some cases, a baseline documentation or title search may show that DNR holds a fish management easement in riparian portions of a parcel proposed for coverage under a PACE easement. A landowner grants a fish management easement in return for a payment from DNR. DNR records the easement with the Register of Deeds. A fish management easement may allow DNR access to install fish management structures in a stream. It may also provide for public fishing pedestrian access along the stream bank.

A fish management easement typically applies to a narrow strip of land along the stream bank. The purposes of the easement do not conflict with the purposes of a PACE easement. A pre-existing fish management easement takes priority over a PACE easement. DNR will not ordinarily subordinate an existing fish management easement to a new PACE easement, nor is there any reason to do so.

***Guidelines:***

Lands covered by a fish management easement may be included under a PACE easement. There will ordinarily be no conflict between the fish management easement and the PACE easement.

## **Water, Sewage and Septic Easements**

***Description:***

In some cases, a baseline documentation or title search may show that a 3<sup>rd</sup> party holds an existing water, sewer or septic system easement on proposed PACE easement land. The easement may allow the holder to construct, repair and maintain a water, sewer or septic system within the proposed PACE easement area for the benefit of one or more landowners located outside that area. Construction and repair may involve significant disruption to soils, depending on the nature, size and location of the system.

Some of these systems may serve neighboring farm buildings or farm residences, and may be considered agricultural “accessory” uses that are consistent with the purposes of the proposed PACE easement (even though the farm buildings or residences served by the systems are located outside the PACE easement area). But in other cases, the easements may serve non-farm buildings or developments, and may be inconsistent with the purposes of the proposed PACE easement.

***Guidelines:***

DATCP and its cooperating entity will review existing water, sewer and septic system easements on a case-by-case basis. Areas affected by existing water, sewer or septic system easements may be included in a PACE easement area if those easements are consistent with the purposes of the PACE easement, or will have no material impact on the PACE easement. Areas may be excluded if the easements are inconsistent with the purposes of the PACE easement, or may have a material adverse impact on the PACE easement.