



Regional Center for Renewable Energy and Energy Efficiency
المركز الإقليمي للطاقة المتجددة وكفاءة الطاقة

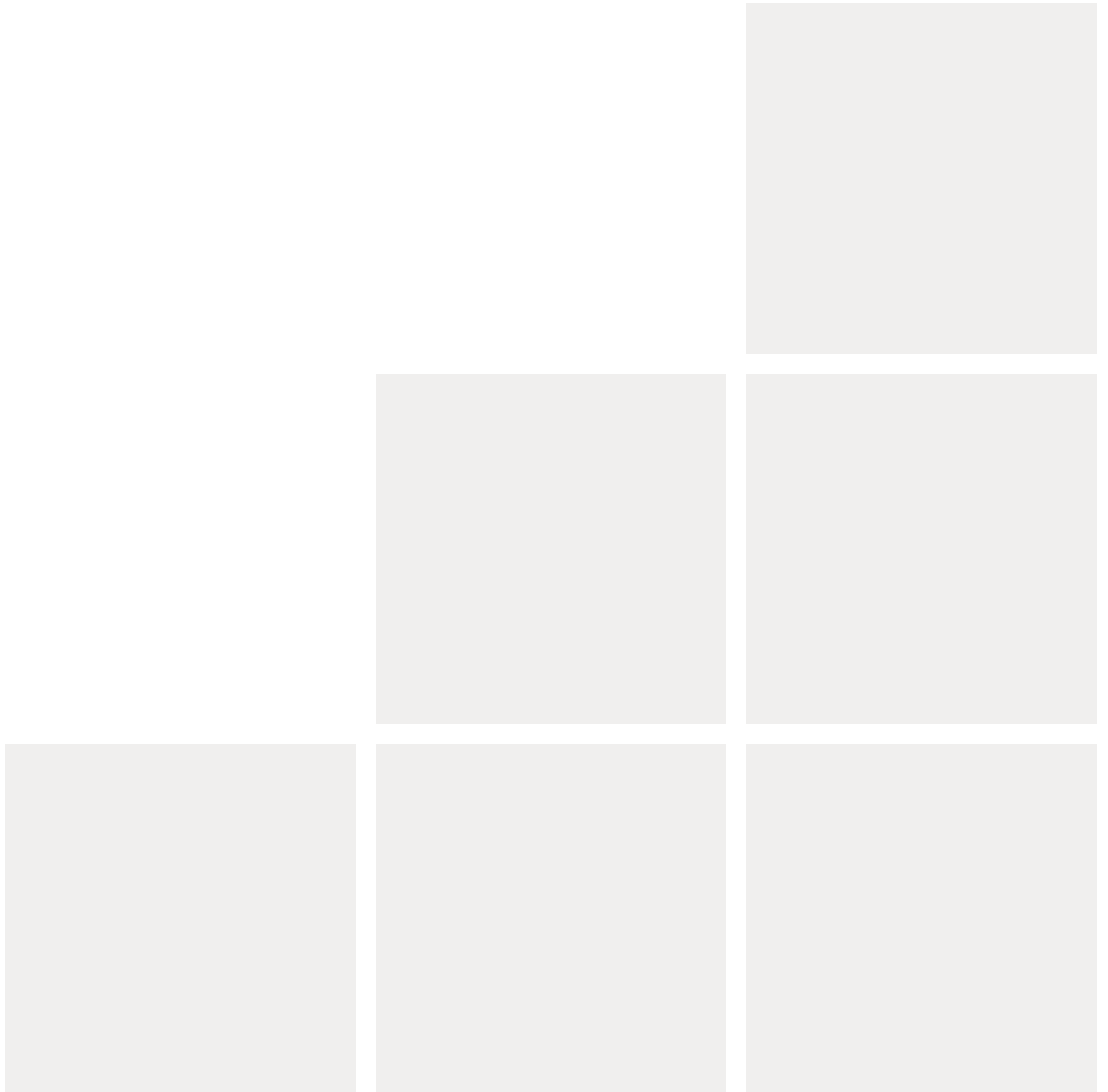


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Preamble

This Land Use Agreement (LUA) for Renewable Energy projects development is presented as a generic model. Member states are urged to embed their particular considerations, their own legal context, local laws and tax obligations into the present model to ensure that their objectives will be achieved and their legal interests will be protected before entering into any binding LUA.

I. Introduction, Context and Guide's Objectives

Land Use Agreements (LUAs) of public owned lands to be used for Renewable Energy (RE) projects are legally binding agreements that needs to be carefully drafted, discussed, reviewed and understood before executing it. Any public land RE-LUA will have a long-term effect on the Public Authority (PA) owning or possessing the Land Use Right (LUR) and also on the land itself. Consequently, PA need involve both technical and legal competent experts from inside and/or outside the Authority in the preparation of these documents.

It is essential to understand that the LUA is an indispensable part of any RE project development process. Owners may be told the agreements they are being asked to sign are standard contracts for RE projects and the terms of these contracts are fixed and are the same everywhere for everyone. Even though this is partially true, until an agreement is signed, any and all of the agreement provisions are negotiable.

It should also be noted that in many cases, the people who originally negotiate a LUA will not be involved later in the operating period of the project, so it is important that any understanding between the parties be properly addressed in the written agreements to prevent future misunderstandings. It is crucial to underline that, no matter what conversations the parties might have about terms and arrangements, the only thing that matters is what the document says. Therefore, if you don't like something about an agreement, negotiate a change before signing. Once signed, all parties involved have given written approval of the provisions of that agreement and are legally bound to fulfill their part.

In the same time, It would be useful to indicate the following issues as well:

- To the User, the LUA is a key ingredient in the project's cost structure and ultimate financial success.
- To the Owner, the agreement impacts everything that happens on its site and adjoining lands for many years to come and establishes how much this owner will be paid for the use of his land.
- In the real practice, if RE projects development are to be realized through "Competitive Bedding" procedure, the Request for Proposals (RFPs) generally includes a LUA model mainly proposed from the Owner's prospective. However, in the other schemes when market forces and investment environment encourage RE developers to approach Owners, developers generally come with LUA models developed from developers' prospective.

As a general process, RE developers typically obtain access to the land in a two-step process: **an option phase** (as it will be discussed later) and a **long-term lease phase**. In the option phase, the developer will enter into an Option Agreement with the Owner to gain access to the land for resource assessment and testing and to secure the rights to the land if the project goes forward. If testing reveals a good RE resource and other factors

indicate the project is feasible, the developer would normally exercise the option and passes to second phase for the negotiation of the long-term lease or LUA for the installation and operation of the project; if not, the option will expire. It is also possible for a single agreement to cover both the short-term option phase and the long-term operational land use phase.

A well-executed LUA is an important part of the project development process. Before allowing RE equipment to be purchased and installed, project investors, financing organizations and power purchasers will want to be sure that the LUA provides clear, unimpeded rights to the use of the land over the expected life of the project.

The scope of the present User's Guide focuses on the long-term land use phase for the installation and operation of an RE energy project through the development of a proposed LUA model to be used within the RCREEE member states. Many of the topics that have been discussed in the developed LUA model are common to any lease. However, the User's Guide intended to provide additional explanation of some particular clauses that can have different alternatives commonly used in the industry or even proposed by the author. The Guide also provides some other lights and discussions that would signify additional information and guidance for the readers. However, the treatment of the addressed topics here is not a comprehensive discussion covering these topics and is meant only to give some choices throughout this User's Guide.

II. Essential Considerations to Avoid Speculations in RE LUAs

Although land speculations are outside our main concerns in this User's Guide as we are only dealing with the long-term LUAs during the installation and operation of the RE project, it is vital to mention that solid background and careful insightful decision making have to be considered while drafting, reviewing and signing the Option Agreements (pointed out in the following Item III) to avoid land speculation and profiteering.

It should be noticed that a signed LUA has an intrinsic value. It is worth something and the User can sell the LUA to another party during the evaluation phase if not prohibited from doing so in the agreement itself. This would lead to speculative and perhaps fraudulent investment in the field of RE projects development. Thousands of square kilometers of public land in the United States allocated for RE projects development have been used for speculative purposes. A badly addressed Option Agreement would allow the User to "flip" the LUA to another party, without any real intention on the initial company's part to actually build a RE development in the first place. The Option Agreements provisions have to be tailored to avoid such speculations.

When Option Agreements would allow it, it's quite common to find a User has sold the lease to another party during the site evaluation phase and before any investments in real assets of the RE project. In this case, the Owner will have to deal with a new company, a new set of people for the next two decades (at least) without having any previous common understanding. This kind of risk points out the vital need to reduce speculation in land for RE projects development during the site testing and evaluation Option Agreement phase. The goal is to ensure that the User has been selected according to a well detailed and structured criteria and to assure that the selected User is carrying out the required tests, resource assessment and studies and entering into the required agreements in a timely manner. As part of the final approval authorization for a lease, a development timeline will be stipulated to avoid any potential speculation and encourage timely development of a project.

The RCREEE member states should try to stay ahead of any potential land speculation and profiteering through the design of a well structured Option Agreement either as a separate contract or as a first phase of a long term LUA as it will be briefly outlined in part III of this guide.

III. Specific Types of RE Land Agreements

A. Option Agreements for Site Evaluation

Once potential sites for RE projects are identified, the User will enter into an Option Agreement with the Owners to gain access to the land for testing and to secure the rights to the land if the project goes forward. The User normally needs to obtain at least one to two years worth of hourly data at a specific location to evaluate the RE resource.

An option essentially removes property from the market while a User determines whether to proceed with the project. The option period typically lasts two to five years to allow sufficient time to procure testing equipment and test the resource. The term may be extendable. Before the term is over, the User can either exercise the option to lease the land, request an extension, or let the option expire. This way, both the Owner and User are protected during that option period if it is decided that the RE project development will not be carried out. If the project does not go forward, the expiration of the option means the User is not tied to unwanted property and payments, and the Owner can put the land to other use.

During the option period, the User often pays modest fees to Owners for the right to place the RE resource measurement equipment on the site, and sometimes pays fees to compensate for construction-related disruptions. The option agreement should contain details as to what lease/easement rights can be exercised, the legal description of the property covered and all terms and conditions of the lease/easement rights. In many cases, a copy of the complete lease/easement agreement that is to be executed by the parties if the option is exercised is also attached.

In some cases, an option may be used to tie up the land by speculators or a User who is either seeking to raise capital or not sure whether RE resources justify development of the property and want to preserve the right to do so in the future.

B. Right of First Refusal

The right of first refusal entitles the RE developer the right to match any other offer from a third party to lease the land from the Owner. Compensation for the right of first refusal may be factored into the option to lease. Alternatively, developers may propose a separate agreement for the right of first refusal, which itself has intrinsic value for which the Owner should be compensated. A Owner sells the developer a right of first refusal over the land. This type of agreement does not set the price or other terms of an anticipated future lease.

If a developer with a right of first refusal agrees to match the offer received by the Owner for the land, then the right of first refusal is exercised and the developer gets to lease the property. However, if the holder of a right of first refusal elects not to match the offer, the third party making the offer can acquire the property from the Owner.

C. Easement

In addition to the agreements signed with Owner to evaluate the potential of a specific site for the installation of an RE project; developers normally need to sign other types of complementary agreements that would ease their enjoyment of their right to use the leased property. An easement conveys limited rights to use other portion(s) of the same Owner's property rights of use or other Owners' properties right of use, either on the land or in the air. The easement agreements are normally signed to accompany other LUAs and last only for a specified period of time which normally cope with original agreements.

General Characteristics of an Easement:

- Easements are either exclusive or nonexclusive. Under an exclusive easement the easement rights are exclusive to the holder. If easement is nonexclusive others could have the right to use the land concurrently.
- Grantor of easement relinquishes very few rights even if the easement is exclusive.
- The rights granted can be permanent or for a set period of time. Easements for a short period of time are sometimes referred to as temporary easements.
- Payment for an easement can be either in lump sum or through periodic payments. Amount paid for easement may depend on whether easement is exclusive or nonexclusive.

The most common type of easement is the right to travel over another person's land, also known as a right-of-way. Other common examples of easements include the right to construct and maintain a roadway across the property, the right to construct a pipeline under the land, and the right to build and maintain a power transmission line over the land.

In addition and more specifically for RE developments, easements are commonly used in to ensure RE access through restrict vegetation, structures, or other obstacles that would impair or obstruct the required RE flow.

D. Long Term Lease or Land Use Agreement for Installation and Operation

A long term lease or a Land Use Agreement (LUA) is a legal binding contract or agreement between Owner and RE developer (User) which transfers the right to possess and use specific property, for a specific purpose and a specific period of time and under certain conditions.

LUAs are complex documents that may run with the land for 20 to up to 50 years (in some cases). Consequently, they should be carefully considered and the RE project developer should also be carefully selected. The developer should be able to meet certain

project milestones. One such milestone could be a Renewable Energy Power Purchase Agreement (REPPA) or a contract for the sale of the RE-generated electricity.

Owners should be cautioned that LUAs are legally binding contracts between the Owner and a User and as such Owners cannot sign multiple LUAs with multiple Users for the same piece of property. From another side, if landlord wants to retain specific rights to use the land in other purposes, such rights must be specifically stated in the signed LUA.

LUAs are typically, broken down into two periods: Option or evaluation period as detailed in Paragraph A above (for 2 to 5 years) and Installation and operations “perpetual” period (for at least 20 years). A well-executed LUA is an important part of the project development process. Before allowing RE improvements to be purchased and installed, investors will want to be sure the LUA provides clear, unimpeded rights to access and use of the land over the long term.

LUAs usually will give RE developer the exclusive right to use a portion of the Owner’s land for a set period of time and also will require Owner to also provide some or all of the easements referenced above in Paragraph C.

LUAs contain sometimes an automatic renewal provision or provisions. Owners should be cautious with respect to automatic renewal provisions and should consider their length and the compensation being paid or to be paid for each renewal period. Owners may want to consider negotiating a specified option for renewal requiring notice and possibly price adjustment.

In general, LUAs contain all terms and conditions regarding the land user’s (RE project User) and the Owner’s respective rights and obligations with respect to the leased property.

Many of the topics that have been discussed in the provided LUA model are common to any lease. However, we provide additional explanation of some particular clauses that can have different alternatives commonly used in the industry or even proposed by the author. We also provide some other lights and discussions that would represent additional information and guidance for the readers. However, the treatment of the addressed topics here is not a comprehensive discussion covering these topics and is meant only to give some choices throughout this User’s Guide.

IV. More Lights on Some Articles Stated in the Provided LUA Model

A. Article 5: Fee Payment to Owner

It should be clear that the method for determining the amount of compensation fees for the land use varies from an Agreement to the other. There is no ideal or standard compensation template. That is why, for Owners, determining compensation is the most difficult and confusing negotiation aspect when developing of RE LUA.

➤ Matters to consider:

- If Agreement calls for different phases, then it may be appropriate to have different compensation for each phase.
 - I. Preliminary phase when User is determining whether to build RE facilities on the land, or where on the land to build them or how many to build.
 - II. Construction phase.
 - III. Operational phase.
- The length of time the land may be tied up without any construction of a RE facility.
- May be appropriate to consider smaller payment amounts if portions of the lease/easement property can be continuously and simultaneously used by Owner in connection with farming or other agricultural uses.
- May also be appropriate to consider larger payments if Owners current activities (such as agriculture or mining) will be significantly curtailed by the Agreement.
- If the Agreement does not require that a minimum installed capacity of RE facilities to be built, consideration should be given to minimum payments regardless of how many are built. If payment is to be based on amount of electricity generated by the RE facilities, Owner should make sure that the minimum size of installed capacity is addressed.
- Be careful of payments that are based on a percentage of gross operating proceeds even if gross operating proceeds are defined as “all gross receipts from the sale of electricity generated by the RE facilities located on the

land.” If properly drafted, these arrangements can be advantageous to Owner.

➤ **The amount that a User offers to compensate the Owner will be dependent upon a number of factors, including:**

- Annual Energy Output from the property
- Power Purchase Agreement
- Value of property to project
- Proximity to interconnection

➤ **Concerning the revenues from environmental attributes:**

- It should be noted that as incentives of environmental attributes are not will defined in the RCREEE member States, gross revenues generated from the properties related to these attributes are not considered yet and have not been included in our model.

➤ **Typical Payment Structures and Rates**

• **Royalties:**

The most common structure is the royalty payment. In royalties arrangements, the User pays the Owner a percentage of the revenue received from the electricity produced by the RE facilities. This percentage is negotiated between the Owner and the User. Royalties ensure an ongoing economic relationship between the User and the Owner and guarantee benefits for the Owner. Royalties fluctuate with production, which varies with the seasonal and yearly RE resource, and can also fluctuate if the price at which the electricity is sold by the RE power project is variable.

Revenue can be measured by gross receipts or metered production multiplied by the price of power paid to the project. One well-accepted option is for the User and RE power project operator to provide a summary of gross receipts along with each payment (quarterly, annually, or other payment period agreed to in the contract), with Users allowing owners access to the data upon request. The Owner, however, does not have a say in the price of the electricity that is sold.

Little information are publicly available on the royalties, however RE developers in Ontario Canada typically offer minimum rent payments from \$1,250 to \$5,000 per turbine and royalties from 1.75% to 3% of gross revenues generated from the property. In the United States royalty rate reaches 6% and even higher rates in Europe (Feed-in Tariffs).

- ***Royalty and Guaranteed Minimum Payment Combination:***

Often, lease payments based on a percentage of gross revenue are supplemented by a guaranteed minimum payment. Minimum payments essentially serve as a floor price and guarantee that Owners receive some revenue, even if the RE facilities experience more than typical maintenance outages or if RE resources are lower than expected in any given year, producing less energy and generating less revenue than expected.

- ***Flat- or Fixed-Fee:***

In a flat- or fixed-fee arrangement, the User and Owner(s) agree on a fixed fee, per modular facility or per unit of land or per MW of installed capacity, to be paid by the User on a monthly or yearly basis, reflecting the total amount of land made available by the Owner(s) for meteorological towers, RE facilities siting and spacing requirements, access roads, and control and maintenance buildings. This type of payment arrangement ensures transparency and clarity of understanding, and provides both the Owner and project developer with certainty regarding future income or payment streams.

- ***One-Time, Lump-Sum Payment:***

This type of contract is the least common arrangement, but may be satisfactory to both parties if the Owner is in need of immediate cash and is willing to forego the prospect of a steady income stream, and the User has the ability to release a large amount of cash up front. This arrangement generally is not optimal since it removes the ongoing economic agreement between the Owner and User and because of potential problems if ownership of the land is transferred without economic benefits flowing to the new Owner.

- ***Or, any combination of the above mentioned options.***

- ***Additional Royalty Payment Considerations:***

The discussion above assumes that royalties are paid on a per turbine production basis, which does not have to be the case. Royalties can be paid based on the average turbine production across the project (overall project generation divided by the number of turbines in the project), which is easier for the User to determine and account for, and is more advantageous to the Owner because it reduces risk and it is easier to verify. The advantage of this arrangement versus payment on output of a specific turbine is that the pooling arrangement takes into account the production of the entire project and reduces the effects of variability of individual turbine production or the possibility that one turbine could suffer from operations problems.

The principal advantages and disadvantages of the abovementioned land use payment structures are presented in Table 1. It can be summarized as follows:

- The most frequent payment structures were royalties and flat or fixed fee.

- In general, most of the larger projects (>25 MW) employed the royalty type of contract arrangement. All of the royalty structure leases reviewed based payments on gross revenue, not on net income or profit. Gross revenue is defined as the amount of energy (kWh) delivered times the power purchase price (price per kWh). The gross revenue is equivalent to the amount the project developer is paid by the local utility (or other power purchaser) for delivering electricity. Because gross revenue is determined before any other project expenses are considered, it is fairly easy to verify and document through the official transactions and payment records between the buyer and operator of the project.
- Most of the cases that used a flat-fee structure were for smaller RE projects (usually small demonstration or test projects). When a flat fee is used, it is usually because of its simplicity and the fact that the overall amounts are fairly small.
- Although literature review revealed that payments can also be based on a fixed amount per MW per year, the reviewed agreements did not yield any contracts of this type. However, some examples of larger RE projects (25-50 MW, and >50 MW) use a fixed or flat payment per turbine, which suggests that a fixed payment (per turbine or acre or MW installed) is also a reasonable approach for larger projects.

Table 1: Advantages and disadvantages of different payment structures

Arrangement	Advantages	Disadvantages
Royalties	General: <ul style="list-style-type: none"> • Take into account varying productivity • Give Owner incentive to work with User to correctly place the generating units • Give Owners and Users incentives to ensure continuous operation of generating units • Easy to Calculate if based on gross revenue 	Owner: <ul style="list-style-type: none"> • Difficult to verify electricity output from each modular unit • Individual monitors on units do not reflect the energy sold because they do not account for energy losses in the electrical system • Users generally do not like to share power productivity data
Royalty/Minimum Guarantee Combination	Same as above, with additional benefits from an up-front fee or a minimum guarantee	Same as above

<p>Flat or Fixed Fee (per turbine or per km2 or per MW installed)</p>	<p>Owner:</p> <ul style="list-style-type: none"> • Provides steady, predictable income stream • Protected in years of low power generation and/or revenue <p>User:</p> <ul style="list-style-type: none"> • Does well in high production/revenue years <p>General:</p> <ul style="list-style-type: none"> • Can be used to compensate a Owner for use of land for an access road crossing the property, even if generating units is not installed on the land • Clarity and transparency: Easy to verify 	<p>Owner:</p> <ul style="list-style-type: none"> • Fluctuating level of income associated with royalty payments <p>User:</p> <ul style="list-style-type: none"> • Expenses are harder to bear in years of low power generation and/or revenue <p>General:</p> <ul style="list-style-type: none"> • Payments do not mirror actual revenue generated • Eliminates the economic incentive for the Owner to cooperate with the User to ensure maximum power generation
<p>Lump Sum</p>	<p>Owner:</p> <p>Source of immediate cash</p> <p>User: Does not have to provide payments in subsequent years</p>	<p>Owner:</p> <ul style="list-style-type: none"> • Does not provide steady income • stream <p>User:</p> <ul style="list-style-type: none"> • Must provide lump sum up front <p>Both: Bad “fit” to have financial transaction complete but physical use ongoing over many years</p>

It should be noted that in addition to land on which the RE facilities are physically located, land typically is needed for other project facilities such as anemometers (RE measuring stations), wiring, and the electrical substation, and Owners must be compensated for those uses as well. Sometimes separate leases are created for the other project facilities, and sometimes they are included in the same leases used for the RE facilities.

For more details on this topic you can refer to the following documents that can be accessed on the web on the following links:

<http://windeis.anl.gov/documents/fpeis/maintext/Vol2/appendices/Vol2AppA.pdf>

http://www.conservewy.com/docs/ENR%20Wind%20Resource%20Guide_final_0604_c_omp.pdf

http://saline.unl.edu/c/document_library/get_file?folderId=294039&name=DLFE-18538.pdf

B. Article 8: Removal and Site Restoration

While reading this article the user has to consider the following concern:

- Eventually the RE project will come to an end. LUAs should clearly identify who will be responsible for removing the RE facilities at the end of their useful lives or if they become inoperative. The LUA should describe who determines when the RE facilities will be removed and who will pay for their removal.
- As part of project decommissioning, the LUA should state who will be responsible for ensuring that the site is restored and to what state. Provisions in the lease should be clear as to the removal, storage, and replacement of topsoil disturbed during construction. The Owner may also insist that the RE developer control noxious weeds in an agreed upon manner.
- The LUA should provide assurance to the Owner that the RE project developer will ensure that there are sufficient funds to eventually remove the RE facilities and restore the site to its pre-project use. Typically, the User will either post a bond to do so or will provide some assurance in the LUA that the funds required will be available at the end of the lease period.
- Decommissioning may require removal of the RE facilities' foundations to below grade level, preferably below plough depth. Similarly, decommissioning should require the proper disposal of oil filled components such as transformers and may or may not require the removal of all buried infrastructure such as buried electrical cable. One has to note that all LUAs and contracts should only end when all installations and accessories are removed from property.
- In most cases, the following issues are considered:
 - The project substation generally becomes the property of the utility purchasing the power and, therefore, is not removed by the User.
 - Underground electrical wiring remains in place because removing it after the project's life will create more disturbance than leaving it in place.
 - Access roads are left in place.

As an example of decommissioning plan and cost, we recommend the user to refer to the decommissioning plan of the STONY CREEK WIND FARM, WYOMING COUNTY,

NEW YORK in the United States of America related to the Stony Creek Wind Farm project which is proposed to be constructed in the Town of Orangeville in Wyoming County, New York. The project includes the construction and operation of up to 59 wind turbines, the installation and operation of associated collection lines, access roads, substation, and related facilities (the “Project”). This document summarizes the decommissioning tasks and costs and can be found on the following link:
http://www.inveneryllc.com/stonycreek/pdf/1/03_DEIS/DEIS_Appendices/I_5_Decommissioning_Plan.pdf

C. Article 9: Default and Termination

This section grants either party the right to terminate the LUA. Termination may be limited to “material” defaults or to monetary defaults. The following issues are important to consider:

- Termination clause based on User defaults will require multiple steps (e.g. notice and cure period to both the User and the lender(s)). It defines non-performance, and defines the events of non-performance that constitute default, opportunities to remedy in the case of default (i.e., payment, cure period), and any settlement of amounts due at termination.
- Each party is protected financially and is given the opportunity to remedy any breach so that the project can continue operating and the Owner can continue to receive revenue. Given all the agreements in place between the various parties, it is usually in everyone’s best interest to keep the project operating. Also, since most utility-scale RE power projects have multiple lease agreements, having just one Owner terminate an agreement could create significant hardship for the project to continue operating (i.e., meeting energy delivery contractual obligations, accessing project property that requires crossing the terminated leased property, etc.).
- We state here more events than what is mentioned in the “Model Agreement” that normally constitute default on the part of User and allow for the termination of the Agreement:
 - (a) Failure to make payments to Owner after written notice of such overdue payment.
 - (i) Some Agreements provide up to thirty days written notice to User before Owner can terminate the Agreement.
 - (ii) Owner should consider a shorter period of time for written notice such as ten days.
 - (b) A failure to perform any other material term of the Agreement that continues for thirty days after written notice to User.

- (i) Not unusual to have a provision that allows User additional time to cure the default if under the circumstances it will reasonably take more than thirty days to cure the default.
 - (ii) Any additional time granted in Agreement should be limited, for example, not to exceed 180 days and require that User diligently pursue curing the default.
- (c) User files for protection or liquidation under bankruptcy laws.
- Some Agreements provide that if User has assigned portions of the lease/easement to others, such other “Assignees” have the right to cure their pro rata portion of the default. Such a provision is not advisable unless it results in the entire default being cured. Also, some Agreements give the Assignees additional time to cure the default, which does not begin to run until after the User’s time to cure has expired.
- Some Agreements give User the right to voluntarily terminate the Agreement by simply giving Owner written notice of such termination.
 - (a) With this type of a provision, Owner should be allowed, as a minimum, to keep all payments made to date.
 - (b) Owner may also want to require that a termination fee is due upon such termination or that a portion of the lost future payments be paid.
 - (c) Owner should be careful of any termination provision that allows User the right to retain a portion of the Agreement.
- Every Agreement should provide that upon termination, User is required to execute a recordable document evidencing the termination of the lease/easement.
 - (a) Obtaining a recordable document in an involuntary termination situation may be difficult.
 - (b) Consequently, Owner should consider a provision which would allow Owner to terminate the Agreement by simply filing an affidavit with the county recorder or registrar of titles attesting to the default, the notice given to User of said default and the failure of User to cure the default within the cure period.
 - (c) Another option would be to allow for Owner to recover costs and expenses, including attorneys’ fees, if Owner is forced to go to court to obtain a release or a termination of the Agreement.
- The Agreement should require that upon termination, User must remove all RE facilities from the land.
 - (a) User should be required to remove the RE facilities within a specific number of days such as 90 or 180 days.
 - (b) The Agreement should specify exactly what constitutes removal considering there may be materials underground such as footings or

- cables. Some agreements specify that everything above ground and to a certain depth below ground must be removed.
- (c) Owner should consider a penalty provision if User does not remove the RE facilities in a timely fashion.

D. Generic Considerations While Developing Other Provisions of the LUA

The following discussion pertains to provisions that are normally found in either (a) a lease or easement agreement with a RE project developer:

➤ **Typical Rights that User will want:**

- (a) Right to conduct certain activities on the land prior to constructing any RE facilities. These activities may include the following:
- (i) Erection of meteorological towers.
 - (ii) Taking soil samples
 - (iii) Release of weather balloons.
 - (iv) Environmental, noise and/or wildlife studies.
- (b) Right to construct and install RE facilities and in connection with such activity construct and install the following:
- (i) Foundations, concrete pads and footings.
 - (ii) RE units.
 - (iii) Guy wires, support fixtures, anchors and fences. (Caution should be exercised in allowing guy wires. They may have more of an impact on birds than the tower or turbine blades. Also, they may interfere with normal farming activities or the aesthetic appearance of the property more than the tower.)
 - (iv) Buildings needed for maintenance of wind turbine units and maintenance and storage of related equipment.
 - (v) Electrical transformers and energy storage facilities.
 - (vi) Electric transformers, electric distribution and transmission towers and lines either above ground or underground.
 - (vii) Substations or switching facilities for the purpose of connecting to transmission system.
 - (viii) Private roads providing access from public roads to the wind energy facilities.

- Most Agreements will have a catch-all provision which will give the Holder the right to engage in all other activities reasonably determined to be necessary or useful to accomplish the general purpose of the Agreement. Owner should be aware of such a provision and consider its impact on rights reserved by Owner.

➤ **Typical Rights Reserved by Owner:**

- (a) Owner may want to have a “catch-all” provision stating that any rights with respect to the use of the land not given explicitly to User are retained by Owner.

- (b) In lieu of a “catch-all” provision specific rights such as the following can be reserved:
 - (i) Right to use land for grazing.
 - (ii) Right to harvest crops.
 - (iii) Right to conduct farming or agricultural activities on the land or other activities involving the land such as logging, mineral, oil, gas or other resource extraction.
 - (iv) Right to construct improvements on parts of the land if necessary and incident to farming or other agricultural activities.
 - (v) Right to hunt on land. Note this activity can be of great concern to User because of the potential for possible damage to Holder’s equipment from the discharge of firearms.

- All of the above rights are usually subject to the following state of affairs:
 - (a) Such activities will not be interfering with or creating a risk of damage to or injury to the RE facility.
 - (b) Owner should take great care in reserving any rights that are unique to Owner’s agricultural or other operations on the land.
 - (c) When specifically listing the rights being reserved, Owner may also want to include a “catch-all” provision to avoid limiting the rights reserved to just those listed.
 - (d) Any of the above rights reserved by Owner, whether through a “catch-all” provision or as result of being specifically listed, should be exercisable by Owner without the consent of User; or if consent is required, then the Agreement should provide that such consent should not be unreasonably withheld.

- ***Minimum Duties and Obligations of User:***
 - (a) Keep the land free from liens such as mechanics’ liens.
 - Should require the immediate removal by User of any such liens.
 - May allow User the option of contesting the validity of the lien.
 - (b) This right to contest should be at no cost to Owner.
 - As a minimum, User should indemnify Owner against any costs, expenses or damages Owner incurs as a result of such lien.
 - Owner may want to require User to post a bond or escrow in an amount sufficient to cover the cost of removing the lien in the event User is unsuccessful in its efforts in contesting the lien.
 - Owner may be required to cooperate with User if such cooperation is needed in order to remove lien. Such cooperation should be at no cost to Owner.
 - (c) Comply with all statewide and local law and regulations.
 - (d) Obtain and comply with all permits.
 - Owner may be required to cooperate with User in seeking permits.

- Obtaining permits or cooperating with User in obtaining permits should be at no cost to Owner.
- (e) Ensure proper usage, storage, disposal and release of hazardous substances on the land.
 - User may be allowed to use hazardous substances in its normal business operations provided such use is not harmful to Owner and is in full compliance with all applicable laws.
 - User should indemnify Owner with respect to any claims made against Owner resulting from User's handling of such hazardous substances.
- **Minimum Duties and Obligations of Owner.**
 - (a) To allow User the quiet use and enjoyment of the land without interference so long as User is not in default under the terms of the Agreement.
 - (b) Owner is not to engage in any activity that would impede or decrease the output or efficiency of the RE energy.
 - (c) Owner is not to interfere with the RE resources values or directions.
 - (d) Owner is to ensure proper usage, storage, disposal and release of hazardous substances on the land.
 - Owner should be allowed to use hazardous substances in its normal business operations provided such use is not harmful to User and is in full compliance with all applicable laws.
 - Owner should indemnify User with respect to any claims made against the User resulting from Owner's handling of such hazardous substances.
- Owner to cooperate with User in obtaining any necessary subordination agreements or approvals from existing lien holders.
 - (a) Existing mortgages on land may require approval of the lease/easement grant by the holder of the mortgage(s).
 - (b) This should be done at no cost to Owner.
 - (c) Owner should be careful of provisions that allow User to payoff any existing prior lien and deduct the payoff amount from amounts owed Owner under the Agreement. An earlier payoff could have adverse tax consequences to Owner.
- Owner to assist and fully cooperate with User in obtaining land use permits, building permits, environmental impact reviews or any other approvals required for the construction or financing of the wind energy facility. Such assistance and cooperation should be at no cost whatsoever to Owner.

E. Miscellaneous Issues.

Owner should be careful about agreeing to the following types of provisions:

- Confidentiality provisions which prohibit Owner from disclosing information pertaining to the terms and conditions of the LUA.
- Provisions that require both parties to execute any additional documents and take such action as may be reasonably necessary to carry out the intent and purpose of the lease/easement.
- If in any provision that requires User to obtain Owner's consent, if Owner wants complete discretion in granting or denying such consent then any language in the provision stating that such consent cannot be unreasonably withheld should be avoided. The User probably will not agree to the Owner having complete discretion in granting consent.
- Provisions that require the parties to convert User's interest to whatever will qualify for tax credits, benefit or incentive for alternative energy expenditures.
- Provisions that require mandatory or binding arbitration. Arbitration may not be appropriate in certain circumstances, depending on the issues involved and the rules and procedures of the particular arbitration process being mandated. If a dispute arises between the parties, the parties can always decide at such time to resolve their dispute through arbitration. Local and international arbitration rules have to be taken into considerations.

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