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U.S. Department of Agriculture Proposes Changes to AFIDA Regulations That Could Impact Renewable Energy Developers

*By Anne E. Callenbach and Alan Claus Anderson**

In this article, the authors discuss proposed changes to federal regulations that could impact renewable energy developers.

The Farm Service Agency of the U.S. Department of Agriculture (USDA) has published a notice in the Federal Register¹ that it is considering changes to its FSA-153 Form required to report foreign interests in agricultural land pursuant to the Agricultural Foreign Investment Disclosure Act (AFIDA).²

Many renewable developers are subject to AFIDA and regularly report long-term wind and solar leasehold interests to the USDA. The changes proposed by the USDA may directly impact the data required to be reported by renewable developers.

ISSUES OF INTEREST TO THE USDA

The issues the USDA appears particularly interested in include:

- Are long-term leasehold filings – particularly those in the wind turbine and solar panel industries – “different enough” from land ownership purchase or sale filings that a separate version of the FSA-153 form should be created? Should a different “logic path” of questions be developed for long-term leasehold filings?
- Many foreign wind energy companies have long-term leaseholds on U.S. agricultural land farmed by U.S. producers that trigger the AFIDA reporting requirement. Currently, the entire acreage of the parcel is captured; this is because the number of wind turbines that will be established on the land (if any) is often an unknown at the time of AFIDA reporting. In addition, the existence of the leasehold generally precludes other energy company involvement on the acreage. Does this approach overstate foreign energy company activity on U.S. agricultural land? If so, how should the acreage associated with these leaseholds be captured?

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¹ <https://www.federalregister.gov/documents/2023/12/18/2023-27683/request-for-information-on-agricultural-foreign-investment-disclosure-act-afida-fsa-153-form>.

² 7 U.S.C.A. § 3501 et seq.

- How should solar panels or photovoltaics – which are situated above the agricultural land – be treated for AFIDA reporting given that AFIDA uses an acreage basis for reporting?
- Some foreign owners are providing a very low estimate of the value of the lease (as the flat payment is low) on the FSA-153 form while others are providing the estimated value of the entire parcel. How should “interest in the value of the agricultural land” be defined for leases?
- In addition to the legal description of each leasehold parcel already required to be reported on Form FSA-153, is it an undue burden on foreign owners or their representatives to require one or more of the following:
 - (a) the longitude and latitude for each parcel;
 - (b) the property tax ID number assigned by the county; and
 - (c) the FSA tract number and the FSA farm number?

PRACTICAL IMPLICATIONS

As many renewable developers are aware, AFIDA imposes reporting requirements with respect to the acquisition or disposition of interests in agricultural property by a foreign-owned entity or an entity in which a “significant interest or substantial control” is held by a non-U.S. parent.

Sales and acquisitions in particular may be highly scrutinized by the USDA to ensure that a disposition is filed by the selling entity and an acquisition form is filed by the acquiring entity. If, for example, an entity sells a portfolio of wind or solar leases, that entity should file FSA-153 dispositions, and the purchaser should file FSA-153 acquisitions for the same property. In addition to acquisitions and dispositions, reporting of an amended FSA-153 is triggered when the land use changes, the tiers of ownership change, or the name of the foreign person changes.

Although AFIDA’s requirements have been in existence for many years, the USDA’s recent imposition of significant fines and penalties (up to 25% of the FMV of the property) to developers who fail to file (or are late to file) FSA-153 reports has engendered a new interest in AFIDA and made it more crucial to consider these reporting requirements in any diligence analysis.

Significant interest or substantial control is defined by federal regulations as an ownership interest of ten percent or more. “Foreign owners” also includes long-term leaseholders in the wind and solar industries.

AFIDA generally defines “agricultural land” as ten acres or more of land that has been used for agricultural purposes (e.g., farming, cropland, ranching,

grazing, timber production) within the last five years. These definitions apply even if the land has been planned and plotted or re-zoned for nonagricultural purposes.

Agricultural land is categorized as cropland, forestland, pastureland, other agriculture, and non-agricultural land (homesteads, farm roads).

7 C.F.R. §781.2(c) defines “any interest in real property” as all interest acquired, transferred or held in agricultural lands, except:

- (1) Security interests;
- (2) Leasehold interests of less than ten (10) years;
- (3) Contingent future interests;
- (4) Noncontingent future interests which do not become possessory upon the termination of the present possessory estate;
- (5) Surface or subsurface easements and rights of way used for a purpose unrelated to agricultural production, and;
- (6) An interest solely in mineral rights.